Department of Labour
TE TARI MAHI

EMPLOYMENT CASES SUMMARY

June 2008

INFORMATION AND PROMOTION GROUP – KNOWLEDGE MANAGEMENT TEAM

Employment Cases Summary

The *Employment Cases Summary* summarises judgments/decisions of the Employment Court and determinations of the Employment Relations Authority that have been added to the Department of Labour Workplace Information and Promotion Group – Knowledge Management Team database. Employment Court headnotes are provided by the Legal Research Counsel of the Ministry of Justice. Employment Authority headnotes are provided by the Legal Researchers of the Department of Labour.

Headnotes of the Court of Appeal and High Court headnotes are added only if they are about employment law matters.

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FULL-TEXT OF DETERMINATIONS

The Workplace Information and Promotion Group Knowledge Management Team is a business group of the Department of Labour. Full-text copies of Authority determinations may be obtained by contacting:

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Under the Employment Relations Act 2000

NZ Amalgamated Engineering, Printing & Manufacturing Union Inc v Witney Investments Ltd (formerly Epic Packaging Ltd)

CA 282/06
Heard: 29 Nov 2007,
Judgment Date: 21 Dec 2007
Court/Authority: Glazebrook J
Appearances: R E Harrison QC, J A Wilton ; T P Cleary, P Akbar

> COURT OF APPEAL – Appeal against Employment Court decision – Statutory interpretation – s56A Employment Relations Act 2000 ("ERA") – Collective bargaining – Whether union could initiate bargaining under s42 ERA for employer to join existing collective agreement ("CA") as subsequent party – Whether statutory bargaining process under Part 5 ERA could be used to persuade employers to join CA – Appellant submitted that CA, ss42 and 56A ERA, and legislative history of s56A ERA supported joinder – Appellant submitted that precursor agreement was itself a CA – Further, that s3(a)(iv) ERA only protects employees' freedom of choice – Respondent submitted that s42 notice only available for negotiation of new CAs – Respondent submitted s56A provided for unilateral joinder by employer and that legislative history and statutory interpretation of ss42 and 56A did not support bargaining for joinder – Respondent submitted that scheme of ERA demonstrated that bargaining process not meant to apply to subsequent joinder negotiations – HELD – Section 56A does not prohibit reaching an agreement for subsequent joinder by statutory bargaining process – Negotiations for subsequent joinder following notice under s42 are negotiations for a CA – Written document following proposed negotiation process is itself a CA – ERA protects employees' integrity of choice and freedom of association not employers – Appeal allowed – Plastics industry employees

This was a successful appeal against a decision of the Employment Court which held that the statutory bargaining process contained in Part 5 of the Employment Relations Act 2000 could not be used to persuade employers to join existing multi-employer collective agreements as subsequent parties (See: [2006] ERNZ 617).

The respondent was a manufacturer of plastic packaging. The appellant was a party to a multi-employer multi-union collective agreement ("the Plastics Agreement") composed of several unions and employers in plastics manufacturing. The Plastics Agreement made provision for additional employers to become subsequent parties to the agreement.

In April 2005, the appellant gave notice under s42 Employment Relations Act 2000 ("ERA") of its intention to bargain for a collective employment agreement with the respondent. The purpose was to obtain the respondent's agreement to become a subsequent party to the Plastics Agreement as provided for in s56A ERA. The respondent contested the notice and refused to commence bargaining with the

appellant.

The Employment Court held that the statutory bargaining process contained in Part 5 of the ERA could not be used to persuade employers to join existing collective multiemployer
agreements as subsequent parties. The Employment Court rejected the argument that an agreement to join an existing collective agreement was itself a collective agreement. The Employment Court also held that the values of integrity of choice and freedom of association in ERA applied to employers, unions, and employees.

The appellant submitted that: (i) Workplace specific "carve outs" could be made by simple agreement between the affected parties; (ii) s56A could not be used to permit an employer to unilaterally join an existing collective agreement and that s56 did not exclude the application of the statutory bargaining process to achieve subsequent joinder; (iii) any agreement to join the Plastics Agreement would itself be a collective agreement making any negotiations with regard to the joinder agreement bargaining for a collective agreement; (iv) the legislative history supported its interpretation of s56A; and (v) the ERA was designed to protect an employee's integrity of choice and freedom of association not an employer's.

The respondent submitted that: (i) a s42 notice could only be given to initiate bargaining for a new collective agreement not for an employer to become a subsequent party to an existing collective agreement; (ii) an employer could unilaterally join an existing collective agreement provided the collective agreement allowed it and there had been proper consultation with employees; (iii) statutory indications in ss 45, 49 and s 56A(6) ERA showed that the statutory bargaining process was not meant to apply to subsequent joinder; and (iv) the legislative history of s56A did not support the argument in favour of joinder.
Held

(1) Section 56A is an empowering section (hence the "may" in that section). It allows subsequent joinder to an existing collective agreement where certain conditions are met and provides the procedure for effecting that joinder. The Court accepted that, on its face, s 56A appeared to allow an employer to decide unilaterally to join an existing collective agreement, thus automatically bringing within the ambit of the collective agreement all of its employees who were members of the union under the coverage clause of the collective agreement. The Court remarked, however, that, even if allowed, unilateral action on the part of employers would be unlikely. An employer who decided to join an existing collective agreement without the concurrence of its employees and the relevant union could not expect to maintain harmonious relations with either the union or its employees. Given the commercial reality, in most cases there would be precursor negotiations and agreement between the employer and the relevant union. (paras 39–40)

(2) There is nothing in s 56A to prohibit the reaching of an agreement for subsequent joinder by way of the statutory bargaining process. The Court considered that there was force in the appellant's submission that, if that had been the intent, one might have expected s 56A to have said so. This was particularly the case in light of the very strong emphasis on good faith in collective bargaining under the ERA. (para 42)

(3) Section 42 allows a union or employer to initiate "bargaining for a collective agreement" by giving notice. The Employment Court held that this must mean bargaining for a new collective agreement and not joinder to an existing agreement. The Court did not agree. In the Court's view, what the appellant seeks to achieve in the present case is a collective agreement between the appellant and the respondent. Therefore, in ordinary parlance, the appellant wishes to bargain for a collective agreement. The preferred mechanism for achieving a collective agreement with the

respondent happened to be by way of the respondent's joinder to an existing collective agreement. That did not turn the negotiations into something other than negotiations for a collective agreement. If, as a result of the bargaining process the respondent were to join the Plastics Agreement, then there will be an applicable collective agreement between the appellant and the respondent where none existed before. In that sense, any collective agreement to be bargained for was new, at least as between the appellant and respondent. (paras 43–45)

(4) There was no existing applicable collective agreement in force between the respondent and the appellant. That meant that the time limits on the initiating of bargaining set out in s 41 did not apply. Section 41, therefore, could not prevent the respondent and the appellant using the statutory bargaining process. (para 48)

(5) The Court did not accept that there was any restriction on what could be the subject of bargaining where subsequent joinder was sought. The Court accepted the appellant's submission that a s 42 notice triggered a bargaining process that must be conducted in good faith. As the appellant submitted, collective bargaining under the ERA was not to be conducted as a "one way street", or on a "take it or leave it" basis. Each side was entitled to put forward its own claims, and the bargaining on each side must address all such claims in good faith. This meant that, contrary to the Employment Court's view, all aspects of the potential collective agreement, including coverage, the identities of the parties and the expiry date, were up for negotiation. (para 51)

(6) In the Court's view it was easy to postulate a situation where a union wished an employer to join an existing MECA as a subsequent party but the employer wanted a SECA on terms and conditions which differed from the existing MECA. It would be surprising if strike action was lawful under s 83 in support of a claim for an employer to enter into a SECA on exactly the same terms and conditions as an existing MECA but not for the joinder to that existing MECA. The terms and conditions of employment and the obligations of the employer to the relevant employees would be exactly the same. Why the ERA would provide for one permissible way (i.e. subsequent joinder) of achieving particular terms and conditions of employment to be denied the benefits (or detriments) of the statutory collective bargaining provisions (as a kind of statutory orphan) was unclear, particularly given the object of promoting collective bargaining in both ss 3 and 31 of the ERA. (paras 55 – 56).

(7) The Court considered that the written document provided for in the process agreement at the end of the proposed process could itself be a collective agreement, provided it contained the minimum terms set out in s 54 and any other terms required under any other legislation. A collective agreement, as defined in s 5 of the ERA, was simply "an arrangement that is binding on one or more unions; and one or more employers; and two or more employees". A joinder agreement, such as was sought by the union in this case, would fit this broad definition. This meant that the bargaining for that joinder agreement would itself be bargaining for a collective agreement between the respondent and the appellant. (paras 65, 67).

(8) Nowhere was it explicitly stated in the course of the legislative history that the statutory bargaining process is excluded. Equally, nowhere did it say that it was allowed. This meant that the legislative history provoked its own interpretation dispute that was the same as the point of statutory interpretation the Court was called upon to decide. The legislative history could not, in these circumstances, be of assistance in resolving that statutory interpretation issue. (paras 71-72)

(9) The Court accepted the appellant's submission that, when s 3(a) as a whole is read, it is apparent that s 3(a)(iv), where it refers to the integrity of individual choice, is referring to the integrity of choice of an individual employee and in particular that employee who seeks to remain outside collective action and collective participation in the workforce. It was not a principle that was designed to protect employer integrity of choice. The ERA

placed strong and central emphasis on promoting collective bargaining, on the position of unions as representatives of collective interests and on supporting collective relationships. Due to this focus, the Court also accepted the appellant's submission that it was erroneous to see the protection of "the integrity of individual choice" as a value inherent in the ERA which can derogate from its provisions dealing with collective bargaining. (para 74)

(10) The Court also accepted the appellant's submission that the freedom of association value in the ERA itself is designed to protect employees' freedom of association, to the extent provided for in Part 3 of the ERA. The ERA expressly dealt with freedom of association in relation to employees. It did not do so in relation to employers or unions in the context of their employment relationships generally and collective bargaining in particular. The Court agreed that any freedom of association of an employer (or indeed union) must cede to the requirements of the statutory bargaining provisions in the ERA where they apply. Any restrictions on freedom of association for employers and unions were a function of the statutory bargaining process. (paras 75–76)

Result: Appeal allowed ; No order for costs

Statutes considered:
ERA s3(a)
ERA s3(a)(iii)
ERA s3(a)(iv)
ERA s3(b)
ERA s4
ERA s4(1)(a)
ERA s4(2)
ERA s4(4)(d)
ERA s5
ERA s31
ERA s31(aa)
ERA s31(d)
ERA s32
ERA s32(1)(a)
ERA s32(1)(b)
ERA s32(1)(c)
ERA s32(1)(e)
ERA s33
ERA s33(2)
ERA s34
ERA s40(1)
ERA s41
ERA s42
ERA s42(1)
ERA s42(2)
ERA s43
ERA s45
ERA s49
ERA s50A
ERA s50H
ERA s50I
ERA s50J
ERA s50J(3)
ERA s51
ERA s51(1)
ERA s51(2)
ERA s54
ERA s54(2)
ERA s54(3)(a)
ERA s54(3)(b)

ERA s56A
ERA s56A(1)
ERA s56A(3)(c)
ERA s56A(6)
ERA s59
ERA s83
ERA s86
ERA s86(1)(a)
ERA s86(1)(b)
ERA s114
Industrial Relations Act 1987 s134
New Zealand Bill of Rights Act 1990 s6

Cases referred to in judgment:
Association of University Staff Inc v Vice-Chancellor of the University of Auckland [2005] 1 ERNZ 224
Epic Packaging Ltd v New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc [2006] ERNZ 617
New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc v Witney Investments (formerly Epic Packaging Ltd) [2006] ERNZ 1076
Service and Food Workers Union Nga Ringa Tota v Auckland District Health Board WC18/07, 1 August 2007
Toll New Zealand Consolidation Ltd v Rail & Maritime Transport Union Inc [2004] 1 ERNZ 392
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B. W. Murdoch Ltd v Horn (Labour Inspector)

AC 3/08
Heard: 26 Feb 2008, Auckland
Judgment Date: 5 Mar 2008
Court/Authority: Shaw J
Appearances: M Ryan ; C Hurren

> DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONSAUTHORITY – Holidays Act 2003 – Payment for public holidays – Casual employee – Four public holidays fell during casual employee's period of employment – Whether casual employees entitled to payment for public holidays – Whether the nature of employee's work meant that he was entitled to such payments – Plaintiff submitted that public holiday pay could be paid under s28 Holidays Act 2003 as part of hourly rate – Plaintiff submitted that employee had discretion to accept or decline work – HELD – Casual employees prima facie entitled to payment for public holidays – Question then whether public holiday would otherwise be a working day for the employee – Nature of employee's work entitled him to public holiday pay – Challenge dismissed – Store person

This was an unsuccessful de novo challenge to a determination of the Employment Relations Authority which upheld the defendant's determination that an employee was entitled to payment for public holidays.

In March 2005 Mr Honkoop ("the employee") applied for a temporary position with the plaintiff. It was agreed that the employee would be given 40 hours of work per week and be paid $20 per hour on top of the 6% holiday pay guaranteed under s28 of

the Holidays Act 2003. There was no discussion regarding payment for public holidays. The employment agreement stated that the employment relationship was casual with no fixed hours except as agreed between the parties and that the employment would end on completion of the project for which the employee was hired. There was nothing in the employment agreement regarding payment for public holidays.

Throughout his employment, the employee worked 40 hours per week with some variation in the number of days worked per week. The amount of work was not assessed and allocated to the employee on a weekly basis.

Four public holidays fell during the employee's employment with the plaintiff. During these holidays the plaintiff's business was closed and the permanent employees received payment for those public holidays.

The employee claimed payment for the public holidays on his timesheets but payment was never made. The employee contacted the defendant once his contract had ended. The defendant determined that the employee was entitled to public holiday pay. When the plaintiff advised the defendant it would not comply, the defendant applied to the Authority for orders that payment for the public holidays be made.

The Authority agreed with the defendant holding that the real nature of the relationship was one consistent with s 66 of the Employment Relations Act 2000 because it was agreed that the employment would end on a specified date or on the occurrence of a specified event.

The plaintiff submitted in reliance on s28 of the Holidays Act 2003 that the employee's holiday pay could be and had been paid to him as part of his negotiated hourly rate. The plaintiff contended that as s5 of the Holidays Act 2003 defines holiday as an annual holiday or a public holiday that the statutory intention was that payment for public holidays may be paid in regular instalments in the same way as payment for annual holidays under s 28. The plaintiff also submitted that the employee's work was agreed to on a week to week basis and that he could have accepted or rejected those offers as he wished.

Held

(1) As a matter of principle there is no basis for the plaintiff's proposition that, solely by reason of their status, casual employees are not entitled to payment for public holidays. (para 35)

(2) The Court did not accept the plaintiff's submission that public holiday pay could be paid in regular instalments in the same way as annual pay under s28. It was clear from the scheme of the Holidays Act that this regular method of payment was limited to payments of annual holiday pay. Section 28 was contained in Part 2 subpart (1) of the Holidays which was subtitled "Annual Holidays". All references to entitlements to and payments for public holidays were in subpart (3). Payment for public holidays was therefore discreet and unrelated to payments for annual holidays. This was reinforced by s46 which stated that public holidays were in addition to annual holidays. (paras 39–40)

(3) The Holidays Act does not differentiate between entitlements to public holidays on the basis of the type of employment. Any employee is prima facie entitled to public holidays and payment for them whether the employee is required to work on those days or not. The Court did not accept the plaintiff's submission that, because the employee was not asked to work on the public holidays in question, he had no entitlement to payment. Section 49 expressly deals with this situation. (paras 41–42)

(4) The Court concluded in principle there is no basis for treating casual and permanent employees differently when assessing their entitlement for payment for public holidays if they do not work on such holidays. The question to be asked for all employees was whether, pursuant to s49, the public holiday would otherwise be a working day for the employee. This was a question of fact. Where the situation was not clear, as was more likely in the case of short term or casual employees, the factors in s12(3) of the Holidays Act were to be taken into account. (para 44).

(5) While the Court reached the same conclusion as the Authority about the employee's entitlement to payment for public holidays, the Court held that the correct approach is to analyse the relationship according to the factors set out in s12(3) of the Holidays Act which are expressed to be for the purpose of the parties reaching agreement on the matter or for the Labour Inspector to take into account in reaching a determination on entitlements to holiday pay. If these were applied, it was not necessary to categorise the "real nature of the relationship" for the purpose of establishing rights to payments of public holidays. (para 47)

(6) The Court concluded that the employee was entitled to payment for each of the public holidays which fell during the term of his employment. (para 62)

Result: Challenge granted ; Reimbursement of holiday pay of $826.80 ; Costs to lie where they fall

Statutes considered:
ERA s6
ERA s66
Holidays Act 2003 s5
Holidays Act 2003 s6(1)
Holidays Act 2003 s6(3)
Holidays Act 2003 s7(a)
Holidays Act 2003 s12
Holidays Act 2003 s12(3)
Holidays Act 2003 s12(3)(iii)
Holidays Act 2003 s27
Holidays Act 2003 s28
Holidays Act 2003 s40
Holidays Act 2003 s43
Holidays Act 2003 s46
Holidays Act 2003 s48
Holidays Act 2003 s49
Holidays Act 2003 s50
Holidays Act 2003 s52(3)
Holidays Act 2003 s56

Cases referred to in judgment:
New Zealand Fire Service Commission v New Zealand Professional Firefighters Union [2006] 1 ERNZ 1109; [2007] 2 NZLR 356 (CA)
Progressive Meats Limited v Meat and Related Trades Workers Union of Aotearoa Inc WC 1/08, 7 February 2008
TNT v Cunningham [1993] 3 NZLR 681 (CA)
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Spotless Services (NZ) Ltd and Ors v Service and Food Workers Union Nga Ringa Tota Inc and Ors

CA 704/07
Heard: 17 Mar 2008, Wellington
Judgment Date: 17 Mar 2008
Court/Authority: William Young P, Ellen France, Baragwanath JJ
Appearances: CH Toogood QC, KJ Burson ; P Cranney, T Oldfield

> COURT OF APPEAL – Practice and procedure – Application for leave to appeal against two Employment Court decisions – HELD – Leave to appeal granted on question whether Employment Court erred in law in concluding that: (a) lockout was unlawful and not within s82 Employment Relations Act 2000; (b) subsequent lockout notices invalidated lockout; and (c) wage arrears claims should be calculated on basis that if not locked out, employees would have been on strike – Application granted – Hospital workers

This was a successful application for leave to appeal against two Employment Court decisions.

The applicant issued lockout notices which demanded that a minimum number of employees be available during strike action planned by members of the respondent.

The Employment Court held that a demand made in a lockout notice must be lawful. The purported lockout was not valid under s82 Employment Relations Act 2000 ("ERA") because the demand made was inconsistent with an employee's right to strike. (See: AC 43D/07, 23 July 2007) ("the first judgment")

In a separate judgment, the Employment Court addressed the wage claims made by the employees who had purportedly been locked out. It held that if the affected employees had not been subject to a purported lockout they probably would have undertaken strike action and been on strike for eleven-twelfths of the relevant period. Therefore, the employees were only entitled to wage arrears for the periods when they would not have been on strike. The Employment Court also held that inconsistent advice given to affected employees by the applicant during the notice period of the lockout provided an additional ground for the unlawfulness of the lockout. (See: AC 50A/07, 26 November 2007) ("the second judgment")

The applicant sought leave to appeal the first judgment. Both the applicant and the respondent sought leave to appeal the second judgment.

Held
(1) The Court thought it right to grant leave to appeal on the question whether the following conclusions of the Chief Judge were erroneous in law: (a) that the lockout was unlawful and not within s 82 ERA; (b) that the subsequent notices to employees issued by the applicant in any event invalidated the lockout; and (c) that the employees' financial relief should be calculated on the basis that were it not for the lock-out notices they would have been on strike pursuant to strike notices given by the union. (para 5)

Result: Application granted (leave to appeal) ; Costs reserved

Statutes considered:
ERA s82

Cases referred to in judgment:
Service and Food Workers Union Nga Ringa Tota Inc v Spotless Services (NZ) Ltd
AC 43D/07, 23 July 2007
Service and Food Workers Union Nga Ringa Tota Inc v Spotless Services (NZ) Ltd

AC 50A/07, 26 November 2007
Spotless Services (NZ) Ltd v Service and Food Workers Union Nga Ringa Tota Inc
[2007] NZCA 514

Other workers/site names: Service and Food Workers Union Nga Ringa Tota Inc, Aburn, Spotless Services (NZ) Ltd (CA 710/07, CA 434/07)

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New Zealand Amalgamated Engineering Printing and Manufacturing Union v Air Nelson Ltd

CA 657/07
Heard: 17 Mar 2008, Wellington
Judgment Date: 19 Mar 2008
Court/Authority: William Young P, Ellen France, Baragwanath JJ
Appearances: JA Wilton ; CH Toogood QC

> COURT OF APPEAL – Practice and procedure – Application for leave to appeal against Employment Court decision – Statutory interpretation – s97(4) Employment Relations Act 2000 ("ERA") – Meaning of "work of a striking or locked out employee" – In determining meaning, Employment Court applied interpretation given to same words in s97(3) ERA that it adopted in Finau v Southward Engineering Co Ltd (cited below) – Leave to appeal already granted in Finau – HELD – Similar interpretation issues that will arise in Finau likely to arise in present proceedings – Appropriate to hear two appeals in conjunction – Application granted

This was a successful application for leave to appeal against an Employment Court decision.

In June 2007, some of the respondent's employees, who were members of the appellant union, undertook strike action. During the strike, employees of Air New Zealand Ltd and contractors engaged by the respondent performed work which might otherwise have been the work of the striking employees.

The issue was whether these actions complied with s97(4) Employment Relations Act 2000 ("ERA"). The Employment Court held that it was lawful. (See: CC 22/07, 8 November 2007)

In determining the meaning of the words "the work of a striking or locked out employee" in s97(4) ERA the Employment Court applied the interpretation given to those words in s97(3) ERA that it had adopted in Finau v Southward Engineering Co Ltd (cited below). The Court had granted leave to appeal the decision in Finau.

Held

(1) The Court had granted leave to appeal against the decision in Finau on the question of the approach to be taken to the interpretation of s 97(3) ERA. On that basis, the respondent did not oppose leave in the present case. The Court was satisfied that leave to appeal should also be granted in the present case because similar issues of interpretation arose and the Court would benefit from considering those issues in the context of s 97 ERA as a whole. (paras 3-4)

(2) Leave to appeal was granted on the question of whether the construction of s

97(4) ERA applied by the Employment Court was erroneous in law. Both parties agreed that this appeal should be heard in conjunction with the appeal in Finau and the Court made an order accordingly. (para 5)

Result: Application granted (leave to appeal); Orders accordingly ; Costs reserved

Statutes considered:
ERA s97
ERA s97(3)
ERA s97(4)
ERA s214

Cases referred to in judgment:
Finau and Ors v Southward Engineering Co Ltd WC 17/07, 25 July 2007
Finau and Ors v Atlas Specialty Metals Ltd (Formerly Southward Engineering Company Ltd [2007] NZCA 575
Pages: 2
[974598]

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Waikato District Health Board and Ors v The New Zealand Public Service Association Inc and Ors

AC 6/08
Heard: 12 Mar 2008, Auckland
Judgment Date: 20 Mar 2008
Court/Authority: Colgan CJ, Travis, Shaw JJ
Appearances: D Alderslade, P White ; T Kennedy, F Fitzsimons

> POINT OF LAW CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Collective bargaining – Ratification – National Terms of Settlement ratified after wage negotiations – Subsequent changes to multi-employer collective agreement ("MECA") never ratified before signing – Employment Relations Authority ("the Authority") held that s163 Employment Relations Act 2000 ("ERA") precluded it from declining to give effect to MECA – Issue of status and effect of collective agreement if in writing and signed by employer and union but not ratified – Whether s163 Employment Relations Act 2000 ("ERA") precluded Authority from declining to give effect to signed but not ratified collective agreement – Defendant submitted that employers could not interfere with ratification issues – Defendant submitted that plaintiffs were seeking compliance with union rules which were not theirs to enforce – HELD – Employers may have justifiable rights over issues of ratification – Plaintiff was seeking compliance with ERA not union rules – Unions may not sign collective agreements without ratification – Section 163 ERA did not preclude Authority from declaring that collective agreement was of no effect –Public health workers

This was a point of law challenge to a determination of the Employment Relations Authority which held that s163 of the Employment Relations Act 2000 precluded it from declining to give effect to a signed but not ratified multi-employer collective agreement.

Core national wage negotiations for all members of the defendant in all district health boards began during collective bargaining between the four plaintiff district health boards ("the Midland DHBs") for a multi-employer collective agreement ("MECA").

Collective bargaining was suspended pending the outcome of the wage negotiations. Although the wage negotiations did not amount to collective bargaining as defined by the Employment Relations Act 2000 ("ERA"), the parties, nevertheless, entered into a process agreement governing the wage negotiations, which required any settlement to be ratified according to the defendant's rules and according to advice on ratification procedures given for regional MECA negotiations.

The wage negotiations concluded in September 2005. The Terms of Settlement ("NTS") was signed and negotiations for the MECA continued. As was required, the defendant took the NTS to its members and achieved ratification. The union members voted for "the concept" of a regional MECA made up of details negotiated in the NTS, together with any further or varied provisions that might be settled during the MECA negotiations. The defendant advised the plaintiff of the ratification and that it would subsequently seek endorsement of the whole document.

According to the Authority, following the ratification of the NTS, meetings and negotiations concerning the content and wording of the MECA continued between the parties and certain changes were made. These changes were never taken back by the defendant to affected union members for ratification, however, a concluded MECA was signed by the parties.

Sections 51 and 54 ERA provide respectively that all collective agreements must be ratified before being signed and a collective agreement is of no effect unless it has been signed by each union and employer that is a party to the agreement. Section 163 precludes the Authority from making orders that purport to cancel or vary an agreement or any term thereof.

The Authority found that the document met the test under s54 ERA of being in writing and signed by the union and employer parties, despite acknowledging that that defendant should not have signed the MECA because it had not been ratified, However, the Authority determined that s163 ERA precluded it from declining to give effect to the signed but not ratified MECA.

The defendant submitted that employers may not interfere with matters of ratification because s51 gave the union and its members complete freedom over the ratification procedure. The defendant further submitted that the plaintiffs were seeking compliance with union rules which were not theirs to enforce. Finally, the defendant submitted that the terms of settlement could be ratified as they could under the Employment Contracts Act 1991.

Held

(1) While the "how" of ratification is not a matter for decision by the employer party or parties to bargaining, the "what" and "when" of ratification are matters governed by the statute and therefore on which the employer(s) may have justiciable rights. (para 24)

(2) What the employers were seeking to do in the present case was to ensure compliance with the legislation, not with union rules that were a contract between the incorporated society (union) and its members. So the Court did not agree that the plaintiffs should be refused the relief they seek on grounds amounting to, or at least analogous to, a lack of standing. (para 28)

(3) The Court concluded that the requirement for signature by the parties and the union in particular cannot be read in isolation of the equally plain requirement in s51 that a union must not sign a collective agreement until it has been ratified. Compliance with s51(1) was a necessary prerequisite to the separate prerequisite of signing in s54. If a collective agreement has not been ratified, it cannot be signed and therefore is of no effect. (paras 30–31)

(4) The Court did not agree with counsel's submission that "terms of settlement" may be ratified as was the position under the 1991 legislation. There was now no reference to the phrase "terms of settlement" and Parliament had deliberately substituted for it, in an equivalent provision, with reference to "the collective agreement". The 2000 Act has now expressly set a different and arguably higher standard for ratification. What must be ratified is "the collective agreement" which must include the various statutory minima required to constitute such an agreement. (paras 34–35)

(5) If the Court were to find that the collective agreement would not ever have been in effect because of the failure to ratify, this would not be a cancellation of that agreement. Rather, it would be a declaration of its status from which other legal consequences may flow. It would not be the cancellation (or variation) of a previously effective collective agreement. By operation of ss51 and 54, if one of the statutory prerequisites to give it effect (ratification) has not been satisfied, the Midland Allied Health collective agreement settled between the defendant and the plaintiffs may never have been effective in law. The Authority was erroneous in its conclusion of law as to the effect of s163. It was not precluded from declaring that the collective agreement was of no effect. (paras 39–40)

Result: Challenge granted ; Costs reserved

Statutes considered:
ECA 1991 s16
ERA s4A
ERA s31
ERA s31(d)
ERA s32(1)
ERA s32(1)(a)
ERA s42
ERA s45(6)
ERA s47(5)
ERA s51
ERA s51(1)
ERA s52
ERA s54
ERA s54(1)
ERA s163
ERA s192
ERA Part 5

Words and phrases: Ratification

Cases referred to in judgment:
National Union of Public Employees v New Zealand Customs Service [2004] 1 ERNZ 347
NZ Tramways & Public Passenger Transport Authorities Employees IUOW (Wellington Branch) v Cityline (NZ) Ltd t/a Cityline Hutt Valley and Wellington City Transport Ltd t/a Stagecoach WC 23/07, 19 September 2007
New Zealand Medical Laboratory Workers Union Inc v Waikato Medical Laboratory Ltd [1998] 1 ERNZ 162
Service & Food Workers Union Nga Ringa Tota Inc v Heinz Watties Ltd WA 67/06, 24 April 2006
Taylor Preston Ltd v Metuariki [2003] 1 ERNZ 420

Other workers/site names: Tairawhiti District Health Board, Bay of Plenty District Health Board, Northland District Health Board, Waikato District

Health Board

Pages: 4
[974597]

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Taylor & Anor v Von Tunzelman

AC 8/08
Auckland
Judgment Date: 15 Apr 2008
Court/Authority: Colgan CJ

> PRACTICE AND PROCEDURE – Nature and extent of challenge – Plaintiffs filed de novo challenge to determination of Employment Relations Authority – Court sought good faith report under s181 Employment Relations Act 2000 – Authority made several criticisms of the plaintiffs' conduct concluding that the plaintiffs had not facilitated the investigation to a "significant extent" and had not acted in good faith towards defendant – HELD – Focus on consequence of obstruction rather than intention of obstruction – Plaintiffs obstructed investigation – Right to elect de novo hearing removed – First plaintiff disallowed from challenging quantum of sales commission awarded to the defendant – Orders accordingly

This interlocutory judgment determined the nature and extent of the first plaintiff's challenge following consideration of a good faith report under s181 Employment Relations Act 2000.

The defendant lodged a personal grievance with the Employment Relations Authority. The Authority found that the defendant was an employee employed by the first plaintiff personally and that he had been unjustifiably dismissed. The Authority also found that the first plaintiff owed the defendant sales commissions, being the lesser amount of 10 percent of his gross sales or $40,000 ("the first determination"). The Authority directed the plaintiffs to supply the information regarding total gross sales within 14 days of the determination. The plaintiffs failed to do so, and in absence of the information, the Authority directed that the first plaintiff pay the defendant $40,000 ("the second determination").

The plaintiffs filed a de novo challenge to the first determination. The second plaintiff subsequently went into voluntary liquidation, and its challenge was not pursued.

Upon reading the determination, the Court called for a report under s181 of the Employment Relations Act 2000 ("ERA").

The Authority criticised the plaintiffs' conduct in its report. The Authority stated that the first plaintiff had failed to supply requested information, had failed to participate in the investigation process on a number of occasions, and was frequently late or absent. The Authority concluded that the plaintiffs had not facilitated the investigation "to a significant extent" and had not acted in good faith towards the defendant. The defendant also submitted that the first plaintiff had acted in bad faith.

Held

(1) The Court is required to look at the Authority's investigation. Criticism of submissions made by the defendant's counsel in this Court was not the subject of the Authority's s181 report that will dictate the nature of the challenge available. Nor were the defences that the first plaintiff put forward to the Authority, even although it decided against these on

their merits. These are stances the parties take in litigation and have to be decided by the Authority. If such defences are unmeritorious, then this can be reflected in a subsequent order for costs. But having one's assertion, for example, that the claimant was not an employee rejected, does not fall within the statutory prohibition against obstructing the Authority's investigation, or acting in bad faith towards the other party, or not participating in the Authority's investigation in a manner that was designed to resolve the issues involved. Every day in courts and tribunals (including the Employment Relations Authority), defences are found wanting, and witnesses' accounts of events rejected, without these also becoming examples of bad faith in the conduct of the case. (para 11)

(2) Contrary to the assessment of the Authority, the Court did not interpret the notion of "obstructing" as importing elements of intention if, by that, the Authority Member concluded that for the first plaintiff to have obstructed rather than facilitated the investigation, the first plaintiff must have intended to cause obstruction. The Court found that the test is less rigorous. Whilst the failures must have been deliberate in the sense of being more than the consequence of simply inadvertence or reasonably explicable behaviour, it is the consequence of obstruction that is to be focused on rather than an intention to obstruct. If there is deliberate (as opposed to inadvertent) conduct on the part of a litigant that is, in the result, obstructive of the Authority rather than facilitative, the statutory test will be met. (paras 13-14)

(3) The Court concluded that all of the first plaintiff's enumerated failures were obstructive of the Authority's process rather than facilitative. They delayed its investigation and made that more difficult because the Authority had less information on which to base its investigation and conclusions. The first plaintiff had not provided a reasonable explanation for his failures as enumerated. They were obstructive rather than facilitative of the Authority's investigation and determination. In common parlance the first plaintiff did not act towards the Authority and the defendant in good faith. (paras 16-17)

(4) The finding that the first plaintiff did not facilitate the Authority's investigation and therefore that he did not participate in it in a manner that was designed to resolve the issues involved, removed from him the right to elect to challenge the Authority's determination by hearing de novo. (para 19)

(5) The first plaintiff had a right of challenge and it was only the nature and extent of that which could address his conduct in the Authority: that right of challenge could not be abrogated. (para 21)

(6) In the Authority's assessment (and the Court agreed) the first plaintiff's failure to provide evidence relating to commissions as expressly directed by the Authority was the most serious. Although not to minimise the obstruction caused to the Authority and the defendant by the first plaintiff's earlier failures to comply with procedural requirements and to participate in the Authority's first investigation meeting, these were less reprehensible. The Court concluded that the most just outcome in all the circumstances would be to curtail the extent of the challenge by disallowing the first plaintiff the opportunity to challenge the Authority's assessment of the quantum of commissions owed to the defendant. (paras 23-24)

Result: Orders accordingly ; Costs reserved

Statutes considered:
Employment Court Regulations
ERA s181
ERA s182(3)

Other workers/site names: Worldwide Publishers Ltd (in Liquidation)
Pages: 2
[974696]

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Creedy v Commissioner of Police

SC 57/2007
Heard: 10 Mar 2008, Wellington
Judgment Date: 23 Apr 2008
Court/Authority: Elias CJ, Blanchard, Tipping, McGrath, Wilson JJ
Appearances: JA Hope, SA McKenna, MO Hope ; DB Collins QC, C Inglis, C Curran-Tietjens

> SUPREME COURT – Appeal from Court of Appeal decision – Practice and procedure – Personal grievance – Leave to raise personal grievance out of time – Jurisdiction – Statutory interpretation – Sections 114(4) and 115 Employment Relations Act 2000 ("ERA") – Meaning of "exceptional circumstances" – Court of Appeal allowed respondent's appeal against Employment Court decision granting leave to raise personal grievances out of time – Court of Appeal concluded exceptional circumstances required more than just meritorious reasons and that inquiry under s12 Police Act 1958 ("s12 inquiry") not open to review by Employment Court – Whether Court of Appeal wrong to conclude that delay by appellant in raising personal grievance concerning unjustifiable dismissal not due to exceptional circumstances under s114 ERA – Whether Employment Court had jurisdiction to review actions of Police Disciplinary Tribunal – Appellant submitted all aspects of s12 inquiry open to review by Employment Court – Appellant submitted exceptional circumstances existed under s114 ERA – Respondent submitted Tribunal quasijudicial and not an employer – Respondent submitted circumstances not exceptional – HELD – Police disciplinary procedure amenable to personal grievance – Circumstances not exceptional – Personal grievance time-barred – Appeal dismissed
> in part – Sworn police officer (Sergeant)

This was a partially successful appeal from a Court of Appeal decision which held that that the delay by the appellant in raising the personal grievance concerning his unjustifiable dismissal was not due to exceptional circumstances and that an inquiry under s12 of the Police Act 1958 was not open to review by the Employment Court in personal grievance proceedings.

In December 2000, the appellant police sergeant was charged with 39 disciplinary offences and was subsequently suspended from duty in January 2001. In April 2001, Mr Barrowclough (B), the appellant's counsel and close friend, wrote to the Police to advise them of a personal grievance over an employment "disadvantage" to the appellant through the application of the Police disciplinary process. No further details were provided. The appellant alleged that B had assured him that the April 2001 letter was sufficient to protect his right to bring a personal grievance based on dismissal, if necessary.

The Police Disciplinary Tribunal conducted an inquiry under s12 of the Police Act 1958 ("the s12 inquiry") finding, in August 2001, 31 of the 39 charges proven against the appellant. Before any sanction was imposed, the appellant applied for and was granted early retirement in December 2001.

In January 2003, the appellant alleged, for the first time, by filing a statement of problem with the Employment Relations Authority, that he had been constructively dismissed. Due to the delay, the appellant required leave to pursue his grievance out of time which the respondent successfully opposed.

The appellant challenged that determination. The Employment Court held that

"exceptional circumstances" under s115(b) of the Employment Relations Act 2000 ("ERA") were established and that the actions of the Tribunal were subject to review as part of the personal grievance (See: [2006] 1 ERNZ 517). The Court of Appeal overturned the Employment Court's findings as to the timing of the personal grievance and the jurisdiction to review the Tribunal's actions (See: [2007] ERNZ 505).

The Supreme Court granted leave to appeal on the questions of: (a) whether the Court of Appeal was wrong to conclude that the appellant's delay in raising the personal grievance was not due to "exceptional circumstances" and (b) whether the Employment Court had jurisdiction to review the Tribunal's actions. In relation to jurisdiction, the appellant argued that all aspects of the s12 inquiry could be the subject of a personal grievance and were amenable to an appeal to the Employment Court as it was conducted administratively and was the responsibility of the respondent. The respondent submitted that the s12 inquiry was not amenable to review under the ERA. The s12 inquiry was quasi-judicial in nature and the respondent was not responsible for its conduct. Further, that a personal grievance could only be brought against an employer, which the Tribunal was not. In relation to the issue of raising a personal grievance out of time, the appellant submitted that the circumstances were exceptional for the purposes of s115(b) ERA because of the unusually close relationship between the appellant and B and the misunderstanding that had occurred between them. The respondent submitted s115(b) did not apply on the facts.

Held

(1) The inference was inescapable that Police Officers facing allegations of misconduct were intended to have the protection of, first, a s12 inquiry, and secondly, resort to the personal grievance procedure. (para 16)

(2) In the case of a Police Officer, the s12 inquiry is an aspect, and an important one, of a dismissal. If the conduct of an inquiry could not be challenged by way of personal grievance, it could not be challenged at all (except possibly, by judicial review). Parliament was most unlikely to have intended such an outcome. (para 22)

(3) The Court concluded that all aspects of the internal Police disciplinary procedure, other than where s87(2)(a) or (b) Police Act 1958 is engaged, are amenable to a personal grievance. It followed that, if the appellant's personal grievance was brought within time, the Employment Court would have jurisdiction to review the laying of the charges against the appellant, the conduct of the Police in prosecuting those charges, and the Tribunal's conduct and report. (para 23)

(4) Although the contents of s115 were clearly not intended to be a comprehensive schedule of what will constitute "exceptional circumstances", they assist in determining when such circumstances exist and when they do not. More particularly, Parliament has specified in s115(b) that reliance on an agent will result in "exceptional circumstances" if the requirements of that paragraph were met. It would tend to negate the purpose of that paragraph if other situations where an employee had mistakenly relied on an agent to ensure that a grievance was notified in time were readily treated as establishing "exceptional circumstances". (para 28)

(5) The appellant had an agent, B. Section 115(b) was therefore relevant. On any view of the facts, they did not come within either limb of that paragraph. The appellant did not make any arrangements with B to raise a grievance on his behalf grounded on his departure from the Police, and B could not therefore be said to have failed unreasonably to ensure that it was. There was no evidence that the appellant ever told B that he wanted to challenge his departure, or even that B was still acting for him 90 days after it. Nor can the unusually close relationship between the appellant and B be said to have been material. Most clients rely on their legal advisers to protect their interests, even if they were one of many clients. There was therefore no basis in law on which the time for bringing the appellant's grievance could be extended. (para 29)

(6) In their judgments, both the Courts below discussed the interpretation of the phrase "exceptional circumstances", and the Court heard extensive argument on this point. Where none of the s115 categories will apply, either directly or by parity of reasoning, this question will remain of practical significance. In Wilkins & Fields (cited below), the Court of Appeal treated "exceptional circumstances" as those which are "unusual, outside the common run, perhaps something more than special and less than extraordinary". This formulation appears to combine two different meanings, the first that of being unusual (the "exception to the rule") and a second and more stringent interpretation of somewhere between special and extraordinary. For a number of reasons, the Court preferred the first meaning. (paras 30–31)

(7) The requirements of s114 were not satisfied. The appellant was therefore time-barred from bringing a personal grievance against the respondent alleging that he was constructively and unjustifiably dismissed. (para 34)

Result: Appeal dismissed in part ; No order for costs

Statutes considered:
Employment Contracts Act 1991
ERA s113
ERA s114
ERA s114(4)
ERA s114(4)(a)
ERA s115
ERA s115(b)
Human Rights Act 1993
Labour Relations Act 1987 Seventh Schedule
Police Amendment Act 1989
Police Act 1958 s5
Police Act 1958 s5(5)
Police Act 1958 s5A
Police Act 1958 s12
Police Act 1958 s64
Police Act 1958 s87
Police Act 1958 s87(2)(a)
Police Act 1958 s87(2)(b)
Police Act 1958 Fifth Schedule
Police Regulations 1959
Police Regulations 1992 r20
Police Regulations 1992 r24

Words and phrases: Exceptional circumstances

Cases referred to in judgment:
Commissioner of Police v Creedy [2007] ERNZ 505 (CA)
Creedy v Commissioner of Police [2006] 1 ERNZ 517
R v Kelly [1999] 2 All ER 13 (CA)
Wilkins & Field Ltd v Fortune [1998] 2 ERNZ 70 (CA)
Pages: 4
[974708]

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Challenges to the Employment Court - Employment Relations Act 2000

B. W. Murdoch Ltd v Horn (Labour Inspector)
5 Mar 2008, Shaw J, AC 3/08, (3 pages)

DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONSAUTHORITY – Holidays Act 2003 – Payment for public holidays – Casual employee – Four public holidays fell during casual employee's period of employment – Whether casual employees entitled to payment for public holidays – Whether the nature of employee's work meant that he was entitled to such payments – Plaintiff submitted that public holiday pay could be paid under s28 Holidays Act 2003 as part of hourly rate – Plaintiff submitted that employee had discretion to accept or decline work – HELD – Casual employees prima facie entitled to payment for public holidays – Question then whether public holiday would otherwise be a working day for the employee – Nature of employee's work entitled him to public holiday pay – Challenge dismissed – Store person

Result: Challenge granted ; Reimbursement of holiday pay of $826.80 ; Costs to lie where they fall

Arrears - Employment Relations Act 2000

Drayton Transport Ltd v Stocker
22 Aug 2007, J Crichton, CA 103/07, (5 pages)

RECOVERY OF MONIES – Applicant claimed respondent breached employment agreement ("EA") causing it financial loss – Applicant claimed warned respondent not to overload company vehicles – Respondent claimed no warning given – Applicant's evidence preferred – Police issued respondent infringement notice for driving company vehicle in overloaded condition – Applicant paid fine but sought recovery of fines and costs associated with notice from respondent – Respondent resistant to mediation and Authority concluded referral pointless – BREACH OF CONTRACT – No documentary evidence to support conclusion about EA – Alleged did not knowingly overload vehicle – Applicant claimed vehicle grossly overloaded – Claimed police required vehicle to be immediately discharged of load as carrying twice normal capacity – Authority found inconceivable applicant did not know vehicle grossly overloaded – Applicant also informed by owner of cargo that respondent regularly overloading vehicle – Applicant's evidence preferred that loading weights computerised and any responsible driver would check weights before load completed – Subsequent inquiry disclosed vehicle damaged by overloading – More than likely respondent knowingly overloaded vehicle in breach of term or implied term of EA – Authority satisfied applicant suffered loss for costs and penalties associated with infringement notice – Found respondent told applicant that breached EA because didn't think would get caught – Respondent ordered to reimburse fines and costs for breaching EA - Application granted

Result: Application granted ; Monies owed ($4,940.00) (Breach of contract)

Gao v The Produce Company Ltd
22 May 2008, D King, AA 185/08, (2 pages)

ARREARS OF WAGES AND HOLIDAY PAY - Applicant worked for one day before resigning - Declined to work out notice period when asked - Applicant paid for half a day - Applicant sought remainder of wages - Respondent claimed no obligation to pay as applicant failed to work out notice period - Applicant not given employment agreement with provision permitting deductions if notice not worked - No written consent to deduction - Deduction unlawful - Respondent to pay $64.80 for unpaid portion of wages and holiday pay

Result: Application granted ; Arrears of wages and holiday pay ($64.80) ; Disbursements in favour of applicant ($70)(Filing fee)

Arrears - Holiday Pay - Employment Relations Act 2000

Gao v The Produce Company Ltd
22 May 2008, D King, AA 185/08, (2 pages)

ARREARS OF WAGES AND HOLIDAY PAY - Applicant worked for one day before resigning - Declined to work out notice period when asked - Applicant paid for half a day - Applicant sought remainder of wages - Respondent claimed no obligation to pay as applicant failed to work out notice period - Applicant not given employment agreement with provision permitting deductions if notice not worked - No written consent to deduction - Deduction unlawful - Respondent to pay $64.80 for unpaid portion of wages and holiday pay

Result: Application granted ; Arrears of wages and holiday pay ($64.80) ; Disbursements in favour of applicant ($70)(Filing fee)

Service & Food Workers Union Nga Ringa Tota Inc v Air New Zealand Ltd
9 May 2008, A Dumbleton, AA 172/08, (4 pages)

BARGAINING - Facilitation – Application for reference to facilitation – Outcome of earlier investigation meeting directed parties to mediation – Authority suspended investigation of reference until parties attempted to reach agreement using mediation – Meeting resumed after parties failed to reach agreement in mediation – Applicant accepted Authority must be satisfied bargaining unduly protracted and extensive efforts failed to resolve difficulties precluding parties entering into agreement – Accepted applicant having serious difficulty concluding collective – 12 months since bargaining initiated and no advance towards settlement in last 4 months – Authority satisfied extensive efforts made by parties failed to resolve bargaining – Key issue whether bargaining unduly protracted – Mere passage of 12 months not reason for finding bargaining unduly protracted – Bargaining protracted due to parties seeking to reflect settlement of collective covering other workers performing same or similar work to members of applicant, by NZEPMU – Authority had regard to occasions when bargaining took place in determining whether bargaining unduly or excessively protracted – Respondent submitted about 20 days on which parties have bargained in last 12 months – Authority found bargaining not "excessively" prolonged, however, clear that bargaining had stalled and would benefit from some outside influence to restart it – Test is clear as to requirements before reference under s 50B ERA can be accepted by Authority – Application declined

Result: Application dismissed

Breach of Contract - Employment Relations Act 2000

Drayton Transport Ltd v Stocker
22 Aug 2007, J Crichton, CA 103/07, (5 pages)

RECOVERY OF MONIES – Applicant claimed respondent breached employment agreement ("EA") causing it financial loss – Applicant claimed warned respondent not to overload company vehicles – Respondent claimed no warning given – Applicant's evidence preferred – Police issued respondent infringement notice for driving company vehicle in overloaded condition – Applicant paid fine but sought recovery of fines and costs associated with notice from respondent – Respondent resistant to mediation and Authority concluded referral pointless – BREACH OF CONTRACT – No documentary evidence to support conclusion about EA – Alleged did not knowingly overload vehicle – Applicant claimed vehicle grossly overloaded – Claimed police required vehicle to be immediately discharged of load as carrying twice normal capacity – Authority found inconceivable applicant did not know vehicle grossly overloaded – Applicant also informed by owner of cargo that respondent regularly overloading vehicle – Applicant's evidence preferred that loading weights computerised and any responsible driver would check weights before load completed – Subsequent inquiry disclosed vehicle damaged by overloading – More than likely respondent knowingly overloaded vehicle in breach of term or implied term of EA – Authority satisfied applicant suffered loss for costs and penalties associated with infringement notice – Found respondent told applicant that breached EA because didn't think would get caught – Respondent ordered to reimburse fines and costs for breaching EA - Application granted

Result: Application granted ; Monies owed ($4,940.00) (Breach of contract)

Costs - Employment Relations Act 2000

Barrett v Horion 2 Ltd
19 May 2008, D King, AA 181/08, (2 pages)

COSTS - Unsuccessful personal grievance - One day investigation meeting - Respondent incurred costs of $29,424 and sought $19,616 as contribution to costs - Submitted appropriate case to award substantial contribution - Spent significant sum defending itself against number of claims necessitating research and preparation of extensive evidence - Authority took into account applicant's financial position and was not persuaded should be departure from notional daily rate - Respondent entitled to contribution to costs of $2,500 plus disbursements, subject to respondent providing details and receipts to Authority

Result: Costs in favour of respondent ($2,500)

Maritime Union of New Zealand & Ors v TLNZ Ltd & Anor
10 Apr 2008, Colgan CJ, AC 7/08, (3 pages)

COSTS – Proceedings removed from Employment Relations Authority – Plaintiffs unsuccessfully challenged lawfulness of defendant's proposed drug and alcohol policies – Defendants sought $142,931.25, being two-thirds of actual costs of $216,562.50 – 7 hearing days plus half-day site visit – Defendants provided no detail of how costs incurred – Plaintiffs submitted lack of detail meant costs should be determined under High Court Rules – Plaintiffs contended essentially a dispute case and all parties likely to benefit from judgment – Further, that a high costs award would discourage unions from engaging in litigation to challenge employer-imposed policies – HELD – Present case in nature of generalised dispute – Substantive judgment benefited all parties and others in the same field – Different principles apply in determining costs – Real disincentive to litigation if large costs awards against unsuccessful party – Costs considered under High Court Rules – Costs of $35,000 plus $5,000 disbursements in favour of defendants – Stevedores

Result: Costs in favour of defendants ($35,000 excluding GST plus $5,000 including GST for disbursements)

Morrison v Cova Ltd
26 May 2008, V Campbell, AA 27A/08, (2 pages)

COSTS - Partially successful personal grievance - Length of investigation meeting not specified - Respondent submitted should be awarded costs as applicant did not win case advanced in statement of problem - Although applicant's dismissal justified, suspension caused unjustified disadvantage - Both parties partially successful therefore not equitable for costs to be awarded to either party

Result: Costs to lie where they fall

Williams v The Warehouse Ltd
19 May 2008, D King, AA 15A/08, (2 pages)

COSTS - Unsuccessful personal grievance - Length of investigation meeting not specified - Respondent incurred legal fees in excess of $10,000 and sought contribution of $2,000 - Applicant to pay respondent's costs

Result: Costs in favour of respondent ($2,000)

Xian v The Herb Patch Ltd

21 May 2008, D King, AA 184/08, (2 pages)

COSTS - Unsuccessful personal grievance - Two day investigation meeting - Respondent sought contribution to total costs of $7,868 - Hearing prolonged by applicant's reluctance to answer questions - Applicant submitted unfair to pay respondent's costs as respondent had chosen to hire a lawyer, therefore should bear the costs of doing so - Respondent had to expend time and money to defend unmeritorious claim - Due to applicant's conduct, which lengthened hearing time , Authority deemed it fair to depart from notional daily rate

Result: Costs in favour of respondent ($3,500)

Dispute - Employment Relations Act 2000

General Distributors Ltd v National Distribution Union
14 Aug 2007, A Dumbleton, AA 248/07, (9 pages)

DISPUTE – Interpretation of collective employment agreement ("CEA") – Supermarket closure due to expired lease – Respondent claimed employees redundant as result of closure – Applicant intended to relocate employees to alternative locations – CEA provided that in case of redundancy company must endeavour to relocate within it, or provide compensation – Redundancy provisions come into operation when redundancy situation as defined in CEA - Interpretation of CEA definition of redundancy - CEA defined redundancy as company having labour surplus to requirements because of closing down of part of company's operation due to re-organisation requiring permanent reduction in employees at worksite – Applicant claimed circumstances not redundancy because closure of single worksite did not cause labour surplus on company-wide scale – Applicant alleged this was consistent with intent of parties as expressed in CEA because transfer of positions avoided loss of employment, disruption and inconvenience to workers – Respondent alleged redundancy provision to be interpreted on scale of specific worksite, not company-wide needs of employer, referring to McCain Foods (NZ) Ltd v Service & Food Workers Union Inc [2004] 2 ERNZ 252 - Authority found McCain provision materially same as present – Closure of single worksite resulted in redundancy under CEA definition – Employers may not use relocation to avoid responsibilities under redundancy provisions of agreement - Applicant's preferred interpretation circumvented CEA redundancy provision, as it was relocation under different guise – Parties' intentions ascertained from meaning of words of CEA – CEA redundancy where employer closed supermarket and transferred employees to other stores operated by it – Therefore not mandatory for employees to seek relocation etc in lieu of CEA's provision for redundancy compensation – Remedies - Declaration respondent's interpretation of redundancy correct

Result: Application dismissed ; Declaration in favour of respondent ; Costs reserved

Dotse Staff Association Inc v Chief of Defence Force
13 May 2008, R A Monaghan, AA 175/08, (8 pages)

PRACTICE AND PROCEDURE – GOOD FAITH – In earlier statement of problem, applicant alleged breaches of good faith in relation to bargaining – Authority directed parties to mediation – Memorandum of agreement concluded in mediation and resulted in earlier statement of problem being withdrawn – In letter to Authority withdrawing earlier statement of problem, applicant claimed was placed under duress during mediation, in that respondent threatened to "negate" terms of settlement and so had no option but to accept respondent's interpretation of terms and withdraw claims – In present statement of problem applicant sought Authority investigation of earlier breaches of good faith because of concerns regarding mediation – Respondent claimed statement of problem raised matters that were resolved in mediation, therefore could not be raised again – On face of memorandum matters resolved in mediation – Authority did not accept argument that because good faith not discussed in mediation that could be raised again to render parts of memorandum unenforceable – Seemed applicant claiming some or all terms of memorandum entered into under duress – Authority considered scope of s148 Employment Relations Act ("ERA") – Authority outlined position of Court of Appeal in Just Hotel Limited v Jesudhass [2007] NZCA 582 – Court found "all communications 'for the purposes of mediation' attracted statutory confidentiality, except where public policy dictated otherwise" – Authority found allegations went to heart of discussions concerning settlement, therefore difficult to say communications not "for the purposes of mediation" – Any evidence relevant to allegations not admissible – Applicants also claimed evidence admissible under s148(5) ERA as mediation undertaken with intent of resolving disagreement regarding new terms and conditions of employment – Argument under s148(5) ERA dismissed – Mediation concerned interpretation and application of new terms already agreed not with negotiation of new terms and conditions – Applicant did not address Authority on law of duress but simply asserted respondent's actions amounted to duress – Elements of duress outlined in Pharmacy Care Systems Limited v Attorney General (CA 198/03) – Authority declined to take allegations of duress further in absence of admissible evidence or legal argument regarding presence of duress – Matters already resolved in mediation in terms of memorandum of understanding could not be relitigated

Result: Orders accordingly

The New Zealand Chief and Deputy Chief Fire Officers' Society and Ors v The New Zealand Fire Service Commission
24 May 2008, G J Wood, WA 70A/08, (3 pages)

INTERIM INJUNCTION - Applications for interim injunctions restraining appointments to two positions in Fire Service declined - Immediately filed application for short term interim injunction to permit them to urgently file a challenge to determination - Sought orders that appointments not proceed until specified date - Gave undertaking to file challenge by specified date - New Zealand Professional Firefighters' Union gave undertaking to pay money into Employment Court to be held to cover any loss suffered by appointees - Respondent gave undertaking that neither appointee would take call as Assistant Fire Region Commanders until specified date - Authority accepted had jurisdiction to grant unsuccessful applicants to an interim injunction, pending challenge of the dismissal of their claims, an interim injunction to prevent challenge being rendered nugatory - Given short duration of interim injunction respondent not as injuriously affected as would have been under original application - Costs could be met by applicant's undertakings - Interim injunction granted - Condition of granting interim injunction that would expire on order of Employment Court or specified date if challenge not filed - Respondent released from undertaking

Result: Application granted ; Orders accordingly ; Costs reserved

The New Zealand Chief and Deputy Chief Fire Officers' Society and Ors v The New Zealand Fire Service Commission and Anor
26 May 2008, G J Wood, WA 70/08, (11 pages)

INTERIM INJUNCTION - Reasons for determination of Authority on interim injunctions - Following a resignation Fire Service created two new roles - Mr Irvine ("I") and Mr Luff ("L") applied for the positions but were unsuccessful - Two other people were appointed to the roles ("the appointees") - New Zealand Chief and Deputy Chief Fire Officers' Society ("Society") raised concerns about appointments - Society considered appointees not competent - Sought cancellation of appointments and re-advertisement - L and I applied for informal and formal review of appointments as allowed for under Fire Service Act 1975 - L's application for review declined as had not provided appropriate information - I's application accepted but review committee recommended appointment be upheld - Society applied for interim injunction restraining respondent from taking further steps to employ appointees until further order of Authority - Claimed respondent breached collective employment agreement - New Zealand Professional Firefighters' Union ("Union") and L and I applied for interim injunction - Raised same concerns as Society and also alleged bias on part of selection panel, incorrectly prepared job description, and irrational system of assessment - Also claimed Chief Executive predetermined decision, review committee inappropriately constituted, L's application for review improperly rejected, and I's review application not fairly considered - Society incorporated issues raised by Union into claim - Proceedings consolidated - Respondents argued appointments properly made and matter one of judicial review outside Authority jurisdiction - Improper appointment if applicants' could establish case of bias - Just because concerns could be raised by judicial review did not mean Authority had no jurisdiction - Serious question to be tried - Damages not appropriate remedy for either party - Case about preserving and maintaining parties' rights and obligations - Applicants claimed if injunction not awarded would be subject to unacceptable health and safety risk - If injunction granted respondent would be required to breach employment agreements and suffer reduction in management resources - While Authority loath to intervene in appointment process would do so if appointments not validly made - Applicants

less injuriously affected by refusal to grant interim injunction than respondents - Union's delays should not count against granting of injunction as sought same remedies as Society, and Society did not delay - Significant adjustments appointees made to lives factor against granting injunction - No account taken of allegations against all parties that did not come to Authority with "clean hands" - Likely to be caused by misunderstanding rather than poor conduct - Commission aware of applicants' concerns when appointments made - Status quo for purposes of applications was prior to employment becoming unconditional - Balance of convenience favoured respondents - Authority will be able to do justice to applicants even if appointees start work - Nothing in overall justice of case to lead to different conclusion – Applications dismissed
Result: Applications dismissed ; Costs reserved

Bolton v The Rathbone Clinic Ltd
7 Sep 2007, Y S Oldfield, AA 275/07, (7 pages)

JURISDICTION – Whether employee or independent contractor – Applicant engaged as locum osteopath by respondent – Applicant divided time between respondent and another osteopathy clinic – Parties discussed entering permanent written agreement – Authority found applicant not shown draft agreement – Applicant not given same induction as other employees – Applicant gave 5 weeks notice of intention to leave to develop own practice in competition with respondent – Applicant told to leave immediately – Applicant sought declaration was employee, compensation, lost wages, and other remedies – Respondent alleged applicant self-employed contractor - Authority only heard jurisdiction issue - No written agreement – Respondent engaged other osteopaths as contractors – Nationwide industry practice for osteopaths to be self-employed – Applicant received professional supervision from respondent's director – Applicant built up client base but patients still those of clinic – Respondent did not deduct tax from applicant's earnings – Applicant registered for tax through other clinic - Applicant paid own professional registration, indemnity insurance and first aid certificate – Applicant provided own diagnostic equipment – Respondent provided rooms, fittings and administrative support – Applicant used respondent's locum number for ACC purposes – Applicant not paid holiday or sick pay - Control and integration tests not decisive – Respondent paid applicant percentage of fees he generated – Losses shared between applicant and respondent in case of client default – Applicant in business for himself in limited way because received commission and could establish own client base – Applicant self-employed sub-contractor - No jurisdiction - Osteopath

Result: Application dismissed ; No order for costs

Matich v Fairfax New Zealand Ltd
1 Aug 2007, L Robinson, AA 228/07, (5 pages)

JURISDICTION - Whether employee or independent contractor - Applicant claimed unjustifiably dismissed - Applicant previously had contract for services with former owners of publication - When respondent took over publication entered into independent contracting agreement - Before agreement signed respondent indicated preferred to have employment relationship - Applicant considered it but declined - Applicant claimed never worked from home, had use of company car, and given directions by respondent - Denied free to sell advertising to other publications - Authority found applicant sold advertising on commission basis - Applicant had no set hours, no direction on job performance, and was free to work from home - Respondent did not provide any tools of the trade or equipment - Parties intended that applicant be independent contractor - Not degree of control that typically characterised employment - Applicant not integral part of respondent's business - Applicant bore business risk as if sold no advertising would not get paid - Applicant operated from basis of own business operation and in business on own account - Applicant independent contractor - No jurisdiction - Sales representative

Result: Application dismissed ; Costs reserved

Sage v N.Z. Underwater Assn Inc
29 Feb 2008, J Wilson, AA 68/08, (8 pages)

JURISDICTION – Whether employee or independent contractor – Applicant claimed compensation for unjustified constructive dismissal, unpaid annual holiday pay and other outstanding monies – Respondent alleged applicant independent contractor – Parties agreed to determine employment status as

preliminary issue - Individual Employment Agreement ("IEA") contained some terms consistent with employment agreement and some consistent with contract for services – Applicant submitted invoices to respondent through Dive Tours New Zealand Ltd ("DTL") – Applicant sole shareholder and director of DTL – Paid own GST – Argued IEA and nature of position supported claim applicant was employee - Claimed respondent's president acknowledged him as employee – Claimed respondent controlled hours of work and he could not personally make profit or loss - Conflicting evidence on whether respondent supplied some equipment to applicant to carry out duties – Respondent argued payment of GST not determinative of employment status – Also claimed IEA evinced parties' intentions were that applicant contractor - Respondent claimed applicant worked part time flexible hours – Monthly amount paid to applicant varied - Respondent's financial statements separated applicant's invoices from other wages - Authority found IEA contradictory therefore hard to place weight on it - Hours not controlled by respondent – Applicant not integral part of respondent's business – On balance Authority found in business on his own account – Applicant sole shareholder and director of limited liability company – Services sold to respondent through applicant's company – Independent contractor not employee
Result: Application dismissed ; Costs reserved

Parental Leave - Employment Relations Act 2000

Van Walen v Department of Labour
12 May 2008, R Arthur, AA 174/08, (9 pages)

PARENTAL LEAVE - Application for review under s71ZB Parental Leave and Employment Protection Act 1987 ("PLEPA") - Application for paid parental leave ("PPL") approved - Applicant made redundant three weeks before due to go on PPL when employer put into voluntary liquidation - Applicant contacted IRD about redundancy and matter referred to Department of Labour ("DoL") - DoL advised no longer eligible to receive PPL as employment terminated before PPL started and therefore no longer had position from which to take PPL - Individual employment agreement entitled applicant to one month's notice in event of redundancy - Liquidators' acknowledged applicant had unsecured claim for four weeks notice - Issues were when applicant's employment ended and whether ineligible for PPL when employment ended - Applicant submitted although in liquidation employer still obliged to give her notice of termination - Submitted therefore still eligible for PPL - PPL should then continue as provided for under s71L(2)(a) PLEPA - Section 71L(2)(a) stated PPL still payable although employee's employment terminated by redundancy before 14 weeks after date of commencement or employee returned to work or resigned - Respondent submitted applicant ceased to be eligible employee under PLEPA as not employed by time PPL started - Submitted applicant also not covered by s71L PLEPA - PLEPA provided for maternity leave to begin earlier than "expected date of delivery" as used in s7 - Appeared applicant's circumstances no longer met requirements of s7 PLEPA - However, Authority stated s7 PLEPA to be read in context of Act as a whole, and consistently with intention of Act - Under s12 PLEPA applicant and employer agreed applicant's maternity leave would start earlier - References in s7 to whether employee "will have been in the employment of..." must be read as anticipatory or prospective at time application for PPL made and actually taken - Not intended to apply retrospectively once leave commenced earlier under provisions of ss11 to 14 - Dismissal clearly redundancy - Employer's decision to go into liquidation did not extinguish applicant's contractual right to notice or pay in lieu - Date of termination taken from expiry of agreed period of notice or period for which pay in lieu given in determining 90 day period in which to raise personal grievance - Authority saw no reason why principle could not apply to timeframes in statutory provision for parental leave - Cases dealing with obligations on employees not to work for competitor during notice period also supported view - Applicant entitled to benefit of contractual notice period - Applicant's employment extended for further month after date of termination so overlapped with date due to start PPL - Applicant protected by s71L(2)(a) PLEPA so PPL to continue through to originally scheduled expiry - DoL's decision to be reversed - Applicant entitled to PPL for period previously advised by IRD - Customer Services Representative
Result: Application granted ; Orders accordingly ; No order for costs

Personal Grievance - Dismissal - Employment Relations Act 2000

Armon v Bridgestone New Zealand Ltd
30 Jul 2007, P Montgomery, CA 87/07, (8 pages)

UNJUSTIFIED DISMISSAL – Applicant lodged ACC claim for work related injury of carpel tunnel syndrome – Respondent contracted third party ("CRM") to independently manage employee work related injury claims – Applicant's claim accepted and underwent surgery – Upon return to work applicant agreed to placement on Average Earnings ("AE") scheme allowing him to produce lower volume of tyres – Respondent argued applicant placed on scheme to assist recovery after surgery – Applicant received second consultation and diagnosed with ulnar neuritis – New ACC claim lodged and certificate issued stating applicant unavailable to resume normal duties for 90 days – Applicant placed on light duties unrelated to tyre building, however, worked full hours – CRM initially accepted claim, however later revoked decision – Applicant sought review of CRM decision with ACC – Met with respondents manager to discuss applicant's inability to perform duties – Company attendance records showed applicant regularly absent from work – Respondent decided applicant's ongoing and prolonged physical incapacity meant payment would only be made for hours actually worked – Also decided applicant would be transferred to service pool and if unable to work full shift in future, employment would be terminated – Applicant told there would be ongoing consultation and monitoring of condition – Applicant's employment terminated two months later due to uncertain length of incapacity – Applicant claimed disadvantaged by respondent and CRM not maintaining regular contact and consultation – Also claimed dismissal unjustified and discriminatory due to selection on grounds of disability – Respondent took cautious approach and placed applicant on AE scheme when applicant had initially sought full duties – Clear from email traffic that respondent diligently adhered to consultation procedure agreed to between parties – Individual rehabilitation plan stated applicant responsible for ensuring abstained from any activity that re-aggravated injury – Applicant claimed respondent failed to await outcome of ACC review before decision to dismiss made – Authority found respondent not hasty in making decision to dismiss – Respondent allowed to balance business interests with ongoing employment of applicant – Respondent not bound to await outcome of various processes – Authority found viewing matter overall no grounds to find breach of duty or discriminatory behaviour by respondent – No unjustified disadvantage – No unjustified dismissal – Tyre builder

Result: Application dismissed ; Costs reserved

Braganza v Brand Developers Ltd
6 Dec 2007, L Robinson, AA 386/07, (7 pages)

UNJUSTIFIED DISMISSAL - Summary dismissal - Respondent alleged applicant dismissed for dishonestly inputting data and for poor attitude - Applicant dismissed by telephone by call centre manager at managing director's instruction - Allegation of dishonesty not credible - Absence of investigation by respondent into dishonesty allegation - Process unfair and unjustifiable - Claims of poor attitude insufficient to warrant summary dismissal - Dismissal unjustified - Remedies - No contributory conduct - Applicant claimed 36 weeks lost wages - Insufficient steps taken to mitigate losses in searching for work - Awarded 12 weeks lost wages - Compensation awarded for shaken confidence, humiliation and loss of dignity - Reinstatement not initially sought but raised at investigation meeting - Reinstatement ordered as not impractical - PENALTY - Respondent initially failed to attend mediation, but attended subsequently - Penalty declined - Part-time employee - Call centre customer care representative

Result: Application granted ; Reinstatement ordered ; Reimbursement of lost wages ($2,220)(12 weeks) ; Compensation for humiliation etc ($3,000) ; Costs reserved

Heriot v Asteron Life Ltd
21 Aug 2007, D Asher, WA 114/07, (10 pages)

UNJUSTIFIED DISMISSAL – Incompatibility – Increasingly negative relationship between applicant and manager - Applicant claimed victim of workplace bullying, negligence, bias, favouritism, misleading and deceitful behaviour and lack of due care – Claimed employer failed to inquire into alleged threats to applicant's employment by manager – Also claimed unfairly warned by respondent about emails sent to manager and co-workers – Also claimed bullied through demeaning unnecessary retraining - Respondent held series of meetings with applicant and manager – Applicant had one day secondment but insisted on return to former position – Applicant disregarded instruction to avoid discussing issues with co-workers – Applicant and manager took leave to avoid each other - Further meeting held where applicant felt respondent took manager's side – Applicant sought return to workplace – Formal meeting held where applicant agreed to 6 month written warning on record, referral to mediator, temporary secondment and Employee Assistance Programme ("EAP") – Applicant had union and legal representatives – Applicant took sick leave immediately after – Applicant repudiated agreement, sought review of terms and claimed not mentally fit at time – Following suspension, applicant dismissed on grounds that behaviour seriously undermined relationship of trust and confidence - Authority found respondent entitled to take appropriate action where serious incompatibility between applicant and manager – Respondent took proper steps when incompatibility apparent - Investigation, offer of use of EAP services, paid applicant special leave, attempted mediation, and offered temporary relocation and return to position after "cooling down" – Evidence of genuine effort by respondent – No evidence of respondent unfairly siding with manager – Fair and reasonable to require applicant to take up temporary secondment – Applicant uncooperative in insisting on only returning to previous position – Applicant bound by agreement with respondent – In the alternative, respondent entitled to refuse to review agreement reached – Applicant justifiably dismissed – In the alternative, contributory conduct would negate financial compensation - Call centre team leader

Result: Application dismissed ; costs reserved

Johnson v The Travel Practice Ltd
7 May 2008, J Crichton, CA 59/08, (8 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - Applicant recently returned to workforce after 16 year absence - Never worked in travel industry before - Dispute about hourly rate, with applicant believing been offered one rate but employment agreement providing for lower rate - Applicant experienced difficulty in employment almost immediately - Upset by Managing Director's ("MD") behaviour and language and absence of training for role - Management meeting where decided would put applicant under supervision of senior staff member and Administration Manager ("AD") would discuss change in role with applicant - Same day AD met with applicant but meeting turned into discussion about whether applicant should leave, and AD never discussed proposed change in role - Meeting resulted in applicant agreeing to leave after working out notice period - Following conversation with staff member applicant formed view staff member knew she was to lose her job - Applicant indicated wished to leave immediately - Staff member denied giving applicant that impression - Authority satisfied both applicant and MD used bad language - Applicant's allegations MD bad tempered and mercurial probably accurate representation - However, MD's behaviour not so bad as to cause breach of applicant's employment rights - Authority found more rather than less likely AD initiated discussion about

applicant leaving - Even if that view wrong by focusing on applicant's unhappiness and failing to discuss proposed role change potential for constructive dismissal created - Had applicant known of proposed change likely would have accepted it and continued employment - Breach of duty to applicant - Even if applicant had actually resigned, resignation in context of failure to provide her with all information - Dismissal unjustified - Applicant constructively dismissed - Applicant provided no evidence for claim owed higher wage - Wages calculated at hourly rate in agreement - Applicant entitled to reimbursement of lost wages of $3,875.08 - Award of compensation appropriate - Applicant awarded $4,000 compensation - Junior Processor

Result: Application granted ; Reimbursement of lost wages ($3,875.08) ; Compensation for humiliation etc ($4,000) ; Disbursements in favour of applicant ($70)(Filing fee) ; Costs reserved

Panovski v Marine Trimmers & All Awnings Ltd

26 Jul 2007, R A Monaghan, AA 219/07, (7 pages)

UNJUSTIFIED DISMISSAL – Poor performance – Respondent received written complaint from customer about applicant's work – At performance review respondent raised client complaint and general problem of time taken to complete jobs – Applicant incorrectly alleged false calculation of holiday pay which led to bad feelings in workplace – Applicant arrived late to work one day without authority or contact, causing a job to be delayed – Respondent received second customer complaint about applicant's work – Customer sought repayment of deposit and withdrew future custom – Applicant took week unauthorised leave without notifying respondent – Respondent surprised by applicant's return on following week as thought resigned – Respondent questioned absence and raised second client complaint – Respondent claimed applicant then resigned – Applicant claimed was dismissed – Applicant's evidence preferred – Respondent later sent dismissal letter to applicant, stating poor performance – Authority found not made clear to applicant in first performance meeting that employment in jeopardy – Nor any indication of what improvement required and how it would be measured – Applicant not given time to respond to second client complaint prior to dismissal – Dismissal meeting undermined by respondent's belief that employment relationship already over – Respondent obliged to reconsider decision in light of explanation of absence – Dismissal unjustified – Remedies – Reimbursement 3 months lost wages – Fifty percent contributory conduct – Applicant's explanations for poor performance inadequate – Damages for humiliation etc awarded - Canvas fabricator and marine trimmer

Result: Application granted ; Lost remuneration ($8,550 reduced to $4,225) (3 months) ; Compensation for humiliation etc $1,000

Pilbrow v Alexander & Co Ltd

13 Sep 2007, D King, AA 284/07, (8 pages)

UNJUSTIFIED DISMISSAL – Alleged applicant agreed to terminate employment as term of negotiated settlement – Applicant appeared to assert settlement entered into unfairly due to undue influence or duress – Respondent handled confidential material during course of work – Respondent claimed applicant had difficulty maintaining good relationships with co-workers due to negative attitude – During performance review applicant critical of respondent's performance – Applicant resented respondent's proposal to restructure – Respondent discovered high volume of personal emails on applicant's computer – Emails contained derogatory comments about respondent and indicated applicant looking for other employment – Respondent met with applicant and indicated had lost trust and suggested suspension until computer fully examined – Parties had without prejudice discussion where possibility of resignation raised – Applicant given document which amounted to settlement agreement – Respondent claimed applicant signed agreement and confirmed intention to sign agreement –

Applicant claimed felt embarrassed when shown emails and denied having read email policy – Claimed told result of actions would be immediate suspension followed by investigation where dismissal probable – Applicant sought time to seek legal advice – Applicant allowed time to obtain legal advice but suspension effective immediately – Applicant claimed no option but to sign – Claimed unsure whether still employee once suspended and intimidated by threat of probable dismissal – Test for undue influence very high – Factors cited in Adams v Alliance Textiles [1992] 1 ERNZ 982 important – Respondent must prove applicant provided informed consent to settlement – Applicant not young inexperienced person whose will easily overborne – Applicant unhappy working for respondent and had been actively seeking other employment – Not unreasonable for respondent to suggest suspension – Authority satisfied applicant not denied opportunity to obtain legal advice – Applicant's claim that did not understand position once suspended disingenuous – Even if Authority had found applicant unlawfully coerced into signing agreement, applicant's contribution would have resulted in reduction of remedies to amount in agreement – Application dismissed - Personal assistant

Romero v The Change Group Australia Pty Ltd
28 May 2008, M Urlich, AA 193/08, (6 pages)

UNJUSTIFIED DISMISSAL - Constructive dismissal - Dismissal - Applicant claimed resignation amounted to unjustified constructive dismissal - Claimed following resignation was re-employed by respondent then unjustifiably dismissed later same day - Respondent claimed applicant resigned, and while discussions about re-employment entered into no conclusion reached - Applicant had worked at business for eight years prior to sale to respondent - Offered and accepted employment with respondent on existing terms and conditions - After three day's employment applicant raised concerns about training, hours of work and personal safety - After meeting with respondent applicant believed hours would be varied, would be rostered to any branch and would lose entitlement to public holidays - Claimed changes were forcing resignation - Respondent argued told applicant no immediate changes would be made to hours but could be in future - Also did not believe any real safety concerns - Authority satisfied applicant's resignation came before any changes to terms of employment made - Proposed changes allowed under agreement - No evidence respondent breached any duty that could give rise to serious risk of resignation - Resignation not unjustified constructive dismissal - Authority found respondent could not offer employment on terms requested by applicant and so no offer made - No dispute applicant not employee prior to meeting following resignation - Applicant not person intending to work for purposes of s5 Employment Relations Act 2000 - No unjustified dismissal - Foreign Exchange Sales Consultant
Result: Application dismissed ; Costs reserved

Skinner v Lime Recruitment Ltd
28 May 2008, L Robinson, AA 196/08, (4 pages)

UNJUSTIFIED DISMISSAL - Applicant claimed unjustifiably dismissed - No appearance for respondent - Applicant in first month of employment - Worked two days per week with full time employment to begin at end of first month - Applicant left work to collect ill child from childcare - Advised one of respondent's directors and sought approval to work following day - Applicant told later same day not to attend work and not needed anymore - Applicant did not return to work - Authority found applicant's sending away constituted a dismissal - No evidence to prove justification for dismissal - Respondent's actions not those of fair and reasonable employer - Dismissal unjustified - Remedies - Applicant without income for eight weeks following dismissal - Satisfied took steps to find work - Reimbursement of eight weeks wages awarded - Applicant experienced financial difficulties - Suffered stress and embarrassment - Having regard to applicant's evidence, length of service and nature of personal grievance award of

$3,000 appropriate - Receptionist and Recruitment Administrator
Result: Application granted ; Reimbursement of lost wages ($5,760)(8 weeks) ; Compensation for humiliation etc ($3,000) ; No order for costs

Personal Grievance - Dismissal - Misconduct - Employment Relations Act 2000

Stott v Redvale Canine Centre Ltd

7 Feb 2008, L Robinson, AA 34/08, (7 pages)

UNJUSTIFIED DISMISSAL - Serious misconduct - Summary dismissal - Applicant falsely reported dog scheduled for vet check as euthanased - Respondent alleged informed of allegation by another employee ("W") - Respondent called disciplinary meeting with applicant to discuss allegation of theft of dog - Also alleged theft of dog food - Applicant initially denied then admitted allegations and asked for forgiveness - Respondent considered previous record of misconduct and warnings - Applicant dismissed after meeting - Respondent's evidence preferred - Respondent justified in concluding applicant failed to follow procedures and deliberately falsified records - However, respondent had insufficient evidence of applicant misappropriating company property to justify summary dismissal - Respondent's notes taken at interview with W did not disclose evidence of theft - Allegation of loss of trust and confidence must be objectively sustainable - Authority found surrounding performance issues peripheral - Summary dismissal unjustified - Applicant's arguments founded on residential tenancy agreement not founded on employment relationship therefore not within Authority's exclusive jurisdiction - Remedies - Applicant's actions wholly causative of situation - 100 percent contributory conduct - No remedies appropriate - Kennel Manager

Result: Application granted ; Costs reserved

Personal Grievance - Dismissal - Poor Performance - Employment Relations Act 2000

Yang v Liu
13 May 2008, Y S Oldfield, AA 176/08, (9 pages)

UNJUSTIFIED DISMISSAL - No written employment agreement - Applicant summarily dismissed after approximately five weeks of employment - Respondent claimed applicant on three month probationary period - Requirements of s67 Employment Relations Act 2000 not met - Employment period could not be treated as probationary - Respondent claimed applicant misrepresented abilities and was incapable of performing duties - Respondent's expectations unrealistic when knew of applicant's qualifications and abilities when employed him - Authority found applicant did not misrepresent himself - Respondent claimed gave applicant two warnings - Authority satisfied applicant informed respondent unhappy with his work but warnings did not meet requirements of procedural fairness - Applicant dismissed without notice or pay in lieu - Respondent provided little explanation and gave applicant no chance to respond - Requirements of procedural fairness not met - Dismissal unjustified - REMEDIES - Respondent unilaterally varied applicant's salary without consent - Respondent to pay applicant arrears of wages - As no written employment agreement notice period to be inferred - Salary paid weekly, notice period of one week reasonable - Respondent to pay one weeks pay in lieu of notice - Applicant claimed lost remuneration - Little evidence provided that attempted to mitigate loss - Allowed opportunity to submit further evidence - Respondent questioned authenticity of evidence - Authority concluded further investigation meeting to establish validity would put parties to unnecessary additional expense - Authority not satisfied applicant sufficiently mitigated loss - However, Authority accepted would have taken applicant some time to find work - Lost remuneration set at eight weeks - Respondent to pay $4,400 lost remuneration - Termination of employment caused great deal of stress - However, employed for very brief period - Taking both factors into consideration award of $4,000 compensation appropriate - PENALTY - Applicant sought penalty for failure to supply written employment agreement - Other orders made against respondent - Penalty not warranted in circumstances - Legal assistant

Result: Application granted ; Payment in lieu of notice ($550) ; Arrears of wages ($210) ; Reimbursement of lost wages ($4,400) ; Compensation for humiliation etc ($4,000) ; Application dismissed (Penalty) ; Costs reserved

Personal Grievance - Dismissal - Redundancy - Employment Relations Act 2000

Andrews v Men at Work Building Solutions Ltd
10 Sep 2007, R Arthur, AA 279/07, (9 pages)

UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - Redundancy - Applicant claimed redundancy not genuine, not properly consulted, and not offered part-time replacement position - Undisputed that new technology greatly reduced applicant's administrative work - Company directors consulted applicant and sought suggestions about restructuring - Applicant offered none - Authority found applicant declined offer of alternative part-time position - Applicant given one month's paid notice, one month's additional pay and offered outplacement counselling and reference - Overlap in some tasks with new position - Authority found replacement part-time position not sufficiently similar so as to cast doubt on genuineness of redundancy - Applicant's position surplus to respondent's requirements - Respondent entitled to make redundancy as matter of business judgement - Redundancy genuine - Conflicting evidence over whether second meeting with applicant about restructuring held - Respondent's inability to show evidence of second meeting meant unable to show applicant had time to consider and comment before final decision made - Obligation of consultation and justification for redundancy lies with employer, not worker - Consultation obligation not met - Arrangements for paid notice and termination of employment not clearly communicated to applicant - Lack of clear communication resulted in applicant turning up for work and then being asked to leave - Applicant embarrassed and upset - Remedies - No reimbursement of lost wages as redundancy genuine - Compensation for hurt and humiliation limited to failure to fully consult applicant and clearly advise about termination arrangements - Office Administrator

Result: Application granted ; Compensation for humiliation etc ($1,500) ; Costs reserved

Personal Grievance - Unjustified Disadvantage - Employment Relations Act 2000

Andrews v Men at Work Building Solutions Ltd
10 Sep 2007, R Arthur, AA 279/07, (9 pages)

UNJUSTIFIED DISMISSAL - UNJUSTIFIED DISADVANTAGE - Redundancy - Applicant claimed redundancy not genuine, not properly consulted, and not offered part-time replacement position - Undisputed that new technology greatly reduced applicant's administrative work - Company directors consulted applicant and sought suggestions about restructuring - Applicant offered none - Authority found applicant declined offer of alternative part-time position - Applicant given one month's paid notice, one month's additional pay and offered outplacement counselling and reference - Overlap in some tasks with new position - Authority found replacement part-time position not sufficiently similar so as to cast doubt on genuineness of redundancy - Applicant's position surplus to respondent's requirements - Respondent entitled to make redundancy as matter of business judgement - Redundancy genuine - Conflicting evidence over whether second meeting with applicant about restructuring held - Respondent's inability to show evidence of second meeting meant unable to show applicant had time to consider and comment before final decision made - Obligation of consultation and justification for redundancy lies with employer, not worker - Consultation obligation not met - Arrangements for paid notice and termination of employment not clearly communicated to applicant - Lack of clear communication resulted in applicant turning up for work and then being asked to leave - Applicant embarrassed and upset - Remedies - No reimbursement of lost wages as redundancy genuine - Compensation for hurt and humiliation limited to failure to fully consult applicant and clearly advise about termination arrangements - Office Administrator

Result: Application granted ; Compensation for humiliation etc ($1,500) ; Costs reserved

Armon v Bridgestone New Zealand Ltd
30 Jul 2007, P Montgomery, CA 87/07, (8 pages)

UNJUSTIFIED DISMISSAL – Applicant lodged ACC claim for work related injury of carpel tunnel syndrome – Respondent contracted third party ("CRM") to independently manage employee work related injury claims – Applicant's claim accepted and underwent surgery – Upon return to work applicant agreed to placement on Average Earnings ("AE") scheme allowing him to produce lower volume of tyres – Respondent argued applicant placed on scheme to assist recovery after surgery – Applicant received second consultation and diagnosed with ulnar neuritis – New ACC claim lodged and certificate issued stating applicant unavailable to resume normal duties for 90 days – Applicant placed on light duties unrelated to tyre building, however, worked full hours – CRM initially accepted claim, however later revoked decision – Applicant sought review of CRM decision with ACC – Met with respondents manager to discuss applicant's inability to perform duties – Company attendance records showed applicant regularly absent from work – Respondent decided applicant's ongoing and prolonged physical incapacity meant payment would only be made for hours actually worked – Also decided applicant would be transferred to service pool and if unable to work full shift in future, employment would be terminated – Applicant told there would be ongoing consultation and monitoring of condition – Applicant's employment terminated two months later due to uncertain length of incapacity – Applicant claimed disadvantaged by respondent and CRM not maintaining regular contact and consultation – Also claimed dismissal unjustified and discriminatory due to selection on grounds of disability – Respondent took cautious approach and placed applicant on AE scheme when applicant had

initially sought full duties – Clear from email traffic that respondent diligently adhered to consultation procedure agreed to between parties – Individual rehabilitation plan stated applicant responsible for ensuring abstained from any activity that re-aggravated injury – Applicant claimed respondent failed to await outcome of ACC review before decision to dismiss made – Authority found respondent not hasty in making decision to dismiss – Respondent allowed to balance business interests with ongoing employment of applicant – Respondent not bound to await outcome of various processes – Authority found viewing matter overall no grounds to find breach of duty or discriminatory behaviour by respondent – No unjustified disadvantage – No unjustified dismissal – Tyre builder

Result: Application dismissed ; Costs reserved

Flynn v General Distributors Ltd

6 May 2008, A Dumbleton, AA 167/08, (7 pages)

UNJUSTIFIED DISADVANTAGE - Applicant sought compensation for, and removal of, warning from employment file - Applicant chose new locker in more secure location, because old locker broken into - Respondent did not challenge the relocation - Respondent required locker for employees with greater need - Employer repeatedly requested that applicant relocate locker - Without proper reason, applicant refused to attend two disciplinary meetings to discuss failure to comply with employer's instructions - Employer reasonably and lawfully removed possessions from locker and returned them to applicant - Removal by employer not breach of work rules - Requests to relocate locker not harassment or intimidation - Final warning placed on applicant's file for failing to comply with instruction - Warning since expired - Applicant's rejection of opportunity to discuss matter, contrary to good faith obligation owed to employer - Customary aspect to use of lockers - Provision of locker benefit, not entitlement - Reasonable and lawful instruction - Employer entitled to ensure compliance - Warning justified - Application dismissed - 2IC

Result: Application dismissed ; Costs in favour of respondent ($500)

Dotse Staff Association Inc v Chief of Defence Force
13 May 2008, R A Monaghan, AA 175/08, (8 pages)

PRACTICE AND PROCEDURE – GOOD FAITH – In earlier statement of problem, applicant alleged breaches of good faith in relation to bargaining – Authority directed parties to mediation – Memorandum of agreement concluded in mediation and resulted in earlier statement of problem being withdrawn – In letter to Authority withdrawing earlier statement of problem, applicant claimed was placed under duress during mediation, in that respondent threatened to "negate" terms of settlement and so had no option but to accept respondent's interpretation of terms and withdraw claims – In present statement of problem applicant sought Authority investigation of earlier breaches of good faith because of concerns regarding mediation – Respondent claimed statement of problem raised matters that were resolved in mediation, therefore could not be raised again – On face of memorandum matters resolved in mediation – Authority did not accept argument that because good faith not discussed in mediation that could be raised again to render parts of memorandum unenforceable – Seemed applicant claiming some or all terms of memorandum entered into under duress – Authority considered scope of s148 Employment Relations Act ("ERA") – Authority outlined position of Court of Appeal in Just Hotel Limited v Jesudhass [2007] NZCA 582 – Court found "all communications 'for the purposes of mediation' attracted statutory confidentiality, except where public policy dictated otherwise" – Authority found allegations went to heart of discussions concerning settlement, therefore difficult to say communications not "for the purposes of mediation" – Any evidence relevant to allegations not admissible – Applicants also claimed evidence admissible under s148(5) ERA as mediation undertaken with intent of resolving disagreement regarding new terms and conditions of employment – Argument under s148(5) ERA dismissed – Mediation concerned interpretation and application of new terms already agreed not with negotiation of new terms and conditions – Applicant did not address Authority on law of duress but simply asserted respondent's actions amounted to duress – Elements of duress outlined in Pharmacy Care Systems Limited v Attorney General (CA 198/03) – Authority declined to take allegations of duress further in absence of admissible evidence or legal argument regarding presence of duress – Matters already resolved in mediation in terms of memorandum of understanding could not be relitigated

Result: Orders accordingly

Ryan Security and Consulting Otago Ltd v Bolton and Ors
12 May 2008, P Cheyne, CA 64/08, (2 pages)

APPLICATION FOR REMOVAL TO EMPLOYMENT COURT - In earlier determination Authority issued interim injunction against first respondent - Applicant sought declaration first respondent in contempt of Authority for failure to comply with interim injunction - Sought imposition of fine and order for costs - Situation did not come within express words of s196 Employment Relations Act 2000 ("ERA") - Case law unclear as to Authority's power - Followed that central issue in matter was question of law about Authority's power to punish for contempt not within express words of s196 ERA - Important question of law which should be heard by Employment Court - Other outstanding issues should also be removed to Court and dealt with at same time - Counsel for parties agreed with removal - Matter to be removed to Employment Court

Result: Application granted ; Orders accordingly ; No order for costs

Practice & Procedure - Consent Orders - Employment Relations Act 2000

Cave v Keltern Stud Ltd
29 May 2008, G J Wood, WA 78/08, (1 pages)
CONSENT ORDER - Parties reached agreement on terms of settlement at investigation meeting - Terms of settlement to be orders of Authority - Order prohibiting publication of terms of settlement
Result: Consent order granted ; Orders accordingly ; No order for costs

Hanlon & Anor v Programmed Maintenance Services Ltd
27 May 2008, G J Wood, WA 74/08, (1 pages)
CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement to be orders of Authority - Order prohibiting publication of terms of settlement
Result: Consent order granted ; Orders accordingly ; No order for costs

Hunter and Anor v Mana Coach Services Ltd
27 May 2008, D Asher, WA 73/08, (2 pages)
CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement to be orders of Authority
Result: Consent order granted ; Orders accordingly ; No order for costs

Lange v Fonterra Cooperative Group Ltd
27 May 2008, R A Monaghan, AA 192/08, (2 pages)
CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement to be orders of Authority - Order prohibiting publication of terms of settlement
Result: Consent order granted ; Orders accordingly ; No order for costs

Machon v Vice Chancellor Massey University
29 May 2008, D Asher, WA 75/08, (2 pages)
CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement to be orders of Authority - Order prohibiting publication of terms of settlement
Result: Consent order granted ; Orders accordingly ; No order for costs

McLeod v The Silky Oak Chocolate Company Ltd
21 May 2008, D Asher, WA 68/08, (2 pages)
CONSENT ORDER - Parties reached agreement on terms of settlement - Terms of settlement to be orders of Authority - Order prohibiting publication of terms of settlement
Result: Consent order granted ; Orders accordingly ; No order for costs

Department of Labour

TE TARI MAHI