

Department of Labour  
TE TARI MAHI



# **EMPLOYMENT CASES SUMMARY**

**October 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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Significant Judgments/Decisions

This section includes full **headnotes** for those considered to be significant, including important landmark cases, cases with significant points of law, and those attracting high public interest.

Brief Summaries

This section provides brief headnote summaries of all other cases for the specified period.

## FULL-TEXT OF DETERMINATIONS

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# Significant Judgments/Decisions added to the Employment Law Database 1 September 2008 - 30 September 2008

## *Commissioner of Police v Hawkins*

CA 711/07

Heard: 21 Apr 2008, Wellington

**Judgment Date:** 12 Jun 2008

**Court/Authority:** Glazebrook, O'Regan, Ellen France JJ

**Appearances:** JC Holden, AL Martin ; CP Brosnahan

COURT OF APPEAL – Practice and procedure – Application for leave to appeal  
Employment Court decision – Appellant sought leave to appeal on five grounds

–  
Whether Employment Court wrong to find appellant consented to personal  
grievance  
– Whether Employment Court wrong to treat a voluntary disengagement on  
medical  
grounds as a resignation – Whether Employment Court wrong to find that a  
multiplicity of allegations against different members of the police could create  
a breach of duty to meet constructive dismissal test – Whether Employment  
Court wrong to apply principle of presumption of innocence in employment  
context – Whether Employment Court erred in law in making number of  
findings when no basis in evidence – HELD – Leave to appeal granted on three  
questions – Does s114(1) of the Employment Relations Act 2000 require the  
employer to have turned its mind to the 90 day period and agree (expressly or  
impliedly) to proceed – If so, does consent have to be pleaded by the  
employee – Can voluntary disengagement under s28D of the Police Act 1958  
be reversed by way of a personal grievance – Leave otherwise declined –  
Police sergeant

This was a partially successful application for leave to appeal a decision of the  
Employment Court which found that the respondent had been constructively dismissed.

The plaintiff was employed as a sergeant at the Taumarunui police station. In 2001, he  
voluntarily disengaged from the police under s28D of the Police Act 1958. The plaintiff  
then raised a personal grievance of constructive dismissal alleging that the bullying  
behaviour of his Detective Sergeant caused his ill-health and that police management had  
failed to take action on his complaints. At the time he disengaged the plaintiff was facing  
assault charges. However, he was discharged at trial due to clear conflicts in evidence.

The Employment Court found that the personal grievance was raised out of time but  
that the appellant had consented to it by engaging with the respondent to settle the  
grievance. The Employment Court held that voluntary disengagement did not preclude a  
claim for constructive dismissal. The Employment Court concluded that the respondent  
was constructively and unjustifiably dismissed as a result of the ongoing betrayal of the  
respondent's trust and confidence in the police administration through its failure to  
address the systemic dysfunction in the Taumarunui police station. The Employment Court  
held that the actions of the Area Controller actively and wrongly encouraged the  
resignation in a manner that was foreseeable. The Employment Court observed that it was

incumbent on the appellant to ensure that the presumption of innocence applied to police officers as it would to all citizens. (See: [2007] ERNZ 762).

The appellant sought leave to appeal on the grounds that the Employment Court: (i) was wrong to find that the appellant consented to the personal grievance being brought out of time; (ii) was wrong to treat a voluntary disengagement on medical grounds as a resignation; (iii) was wrong to find that a multiplicity of allegations against different members of the police could create a breach of duty to meet the test for constructive dismissal; (iv) was wrong to apply the principle of the presumption of innocence; and finally (v) erred in law in making a number of its findings when there was no basis in the evidence.

The appellant submitted that (i) the proper construction of "consent" in relation to raising a personal grievance out of time in s114(1) Employment Relations Act 2000 ("ERA") meant that the employer had turned its mind to the 90 day issue or could be implied to have done so and agreed to proceed nevertheless. Acquiescence could suffice but this would require evidence of the employer having turned its mind to the 90 day rule but not acted on its rights; (ii) the respondent did not resign but initiated a statutory process which permitted the respondent to leave the police pursuant to s28D of the Police Act and that the Employment Court was in error by finding that a constructive dismissal claim can override the statutory termination; (iii) the Employment Court truncated the test for constructive dismissal by failing to inquire as to whether there was any repudiatory conduct by the appellant and that ultimately there was no repudiatory conduct; (iv) it was wrong in law for the Employment Court to have regard to the presumption of innocence; and (v) a number of the findings of the Employment Court lacked an evidentiary basis to support them.

The respondent submitted that (i) there was no material difference between resignation and voluntary disengagement as they were both ways of terminating employment; (ii) a correct reading of the Employment Court's approach revealed that the constructive dismissal test was correctly applied; (iii) the Employment Court's comment on the presumption of innocence was not necessary for its decision; and (iv) all of the factual findings of the Employment Court were open to the Judge on the evidence.

Held

(1) The issue of what constitutes consent had not been considered by this Court in the context of s114(1). It was an important matter with potentially very wide implications for all employers and employees. It was thus appropriate to grant leave on this issue and on the related issue of whether consent has to be pleaded. (para 13)

(2) The Court noted that if the correct test was applied, whether what the appellant did in the present case amounted to consent was a factual matter and cannot be appealed to this Court. For the avoidance of doubt, leave did not extend to this issue. (para 14)

(3) The Court was satisfied that the issue of statutory disengagement was a question of law of potential significance to all voluntary disengagements from the police. It was a question of law of sufficient general and public importance to justify the grant of leave to appeal. (para 19)

(4) The Court did not accept that the Employment Court truncated the test for constructive dismissal. Against the background of factual findings it was open to the Employment Court to consider that there had been a repudiatory breach of duty. In the Court's view, the Employment Court applied the correct test and found against the appellant on all three limbs. (paras 35–36)

(5) The Court accepted the appellant's submission that the presumption of innocence is not relevant in the employment context. However, as it was not necessary for the Employment Court's decision and the respondent placed no reliance on it, leave to appeal on this point was not necessary and consequently refused. (para 43)

(6) As there was evidence to support the Employment Court findings, there was no error of law. Leave to appeal on this issue was refused. (paras 46–47)

(7) Leave to appeal was granted with regard to the following questions: (a) Does 114(1) of the Employment Relations Act 2000 require the employer to have turned its mind to the 90 day period and agree (expressly or impliedly) to proceed? (b) If the answer to (a) is yes, does consent have to be pleaded by the employee? (c) Can voluntary disengagement under s28D of the Police Act 1958 be reversed by way of a personal grievance? Leave was otherwise declined. (paras 48-49)

**Result:** Application granted in part (leave to appeal) ; Costs to lie where they fall

**Statutes considered:**

Crimes Act 1961 s347  
ECA s33  
ECA s33(2)  
ERA s114  
ERA s114(1)  
ERA s114(4)(a)  
ERA s214(3)  
Police Act 1958 s28(4)  
Police Act 1985 s28C  
Police Act 1958 s28D

**Cases referred to in judgment:**

Auckland Shop Employees Union v Woolworths (NZ) Ltd [1985] 2 NZLR 372  
Creedy v Commissioner of Police [2008] NZSC 31 (SC)  
Hawkins v Commissioner of Police [2007] ERNZ 762 (EC)  
Jacobsen Creative Surfaces Ltd v Findlater [1994] 1 ERNZ 35  
Phillips v Net Tel Communications [2002] 2 ERNZ 340  
Russell v Wanganui City College [1998] 3 ERNZ 1076  
Singh v Chief Executive Officer of the Department of Labour [2005] 1 ERNZ 569  
Sotheran v Ansett New Zealand Ltd [1999] 1 ERNZ 548  
Wackrow v Fonterra Co-operative Group Ltd [2004] 1 ERNZ 350

**Pages:** 3  
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***Vice-Chancellor of Lincoln University v Stewart***

CC 5C/08

Heard: 24 Apr 2008, Christchurch

**Judgment Date:** 17 Jun 2008

**Court/Authority:** Couch J

**Appearances:** G Jones, A Shakespeare ; P Cranney

DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS AUTHORITY – Reasons – Process for challenging Authority determination ordering removal of matter to Court – Defendant successfully applied for matter to be removed to Court – Plaintiff challenged removal order – Both plaintiff and defendant said would challenge if unsuccessful in Authority – Defendant argued more appropriate for Court to deal with case because involved serious allegations and parties of significant status – Defendant argued urgency required because reinstatement sought - HELD – Both s178 and s179 Employment Relations Act 2000 gave Court jurisdiction to reconsider removal order – Unsatisfactory to have two available processes which had different criteria – Preferable that parties use s178 procedure rather than

general right of challenge – Authority wrongly removed matter – Court had residual discretion as to whether to order Authority to investigate – Authority can competently deal with serious allegations – Status of parties generally irrelevant – Inevitability of challenge argument would generally be treated with caution but unusual circumstances of present case meant challenge almost inevitable – Interests of justice best served by earliest possible resolution of dispute – Matter to remain before Court – Challenge dismissed

This judgment recorded the reasons for an unsuccessful challenge to a determination of the Employment Relations Authority which held that the Authority had wrongly removed the matter to the Employment Court but ordered that the matter should remain before the Court.

The defendant lodged proceedings in the Employment Relations Authority alleging unjustified dismissal and sought remedies, including reinstatement. The defendant applied to have the matter removed to the Employment Court. The Authority removed the matter on the grounds that an important question of law was likely to arise and due to public interest in the case.

The plaintiff challenged that determination under s179 Employment Relations Act 2000 (“ERA”). This raised the issue as to whether a party who is dissatisfied with a removal order may use the challenge process as an alternative to the process provided under s178 ERA.

The defendant submitted that it was more appropriate for the Court to deal with the matter because it involved serious allegations and both parties had significant status. The defendant further argued that because a challenge was virtually inevitable, as a matter of economy, the matter should remain before the Court. Further, urgency was required because reinstatement was in issue and two hearings should be avoided.

The plaintiff acknowledged that if the Authority ordered reinstatement, it would challenge that determination. The plaintiff pointed out that the defendant had caused the delay by applying to have the matter removed and no weight ought to be placed on the disadvantage caused by the delays that had occurred.

Held

(1) A decision by the Authority to order removal of a matter before it to the Court or to refuse to make such an order would clearly be a determination for the purposes of s179(1) ERA and apparently give rise to a right of challenge under s179 ERA. The Court found that s179(5) ERA does not preclude a challenge under s179(1) ERA to a determination of the Authority on an application for removal. (paras 9-10)

2) Viewing ss178 and 179 ERA separately, each appears to give jurisdiction for the Court to reconsider issues of removal previously determined by the Authority. As a matter of principle, it is unsatisfactory for there to be two alternative processes available in the Court to address the same issue. Such a situation is even more unsatisfactory where those two processes involve the application of different criteria. (paras 11, 13)

(3) It is clearly preferable that a party dissatisfied with the Authority’s determination of an application for removal should proceed under the particular provisions in s178(3) and s178(5) ERA rather than the general right of challenge under s179 ERA. Given the clear words of s179 ERA, however, it would be wrong to construe them as excluding a challenge to such a determination. (para 19)

(4) Some very good reason would need to be advanced for proceeding by way of challenge under s179 ERA rather than by way of application under s178(3) or s178(5) ERA. (para 20)

(5) The Court concluded that the matter was not properly removed to the Court. Having reached that decision, there remained a residual discretion under s178(5) ERA whether or not to order the Authority to investigate the matter. (paras 37-38)

6) Authority members regularly dealt with allegations of the most serious nature and did so competently. In most cases, a party's standing in the community is irrelevant to the essential issues involved in resolving an employment relationship problem. In the rare cases where it is relevant, it did not seem that the Court is any better suited to dealing with such issues than the Authority. (para 39)

(7) In most cases, the Court would treat a submission that a challenge was inevitable with considerable caution. An investigation by the Authority may give the parties insights they did not have prior to that process or lead to a compromise they did not anticipate. (para 40)

(8) The scheme of the ERA is clear. Personal grievances are to be dealt with by the Authority in the first instance in all but the very few cases in which one or more of the criteria set out in s178(2) ERA are established. In the present case, none of those criteria was established. The matter was before the Court as a result of error by the Authority. As a result, there was ample foundation for the plaintiff's submission that the matter should be returned to the Authority. In exercising its discretion, however, the Court must give effect to what it perceived to be the interests of justice in this particular case. (para 43)

(9) In all the circumstances, the Court found that the interests of justice would be best served by the earliest possible resolution of the dispute between the parties. The Court accepted that, in the unusual circumstances of the present case, it was almost inevitable that any determination the Authority might give would be challenged. It followed that a hearing in the first instance by the Court was likely to produce an earlier conclusion than a direction that the Authority investigate the matter. (para 44)

(10) The Court recorded that it reached that conclusion by a narrow margin and that the particular facts of the present case had been an important factor in its doing so. The present decision should not be taken as an indication of the conclusion which might be reached in other cases. Indeed, given that the starting point for the exercise of the discretion under s178(5) ERA is that the matter ought not to have been removed into the Court by the Authority, the discretion is more likely than not to be exercised in favour of a direction that the Authority investigate the matter. (para 45)

**Result:** Challenge dismissed ; Costs reserved

**Statutes considered:**

ERA s4  
ERA s4(1A)(a)  
ERA s103A  
ERA s123(1)(ca)  
ERA s178  
ERA s178  
ERA s178(2)(a)  
ERA s178(2)(b)  
ERA s178(2)(c)  
ERA s178(2)(d)  
ERA s178(3)  
ERA s178(5)  
ERA s178(6)  
ERA s179  
ERA s179(1)  
ERA s179(2)  
ERA s179(5)  
ERA s194A  
ERA s211

**Cases referred to in judgment:**

Clerk of the House of Representatives v Witcombe [2006] ERNZ 196  
NZ Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt  
Harvey Ltd [2002] 1 ERNZ 74  
NZ Baking Trades Union (Inc) v Foodtown Supermarkets Ltd [1992] 3 ERNZ 305  
Rawlings v Employment Relations Authority [2006] ERNZ 729  
Vice-Chancellor of Lincoln University v Stewart CC 5A/08, 2 May 2008  
Whanganui College Board of Trustees v Lewis [2000] 1 ERNZ 397

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***McCain Foods (NZ) Ltd v Service & Food Workers Union Nga Ringa Tota Inc***

WC 11/08

Heard: 28 Apr 2008, Auckland

**Judgment Date:** 23 Jun 2008

**Court/Authority:** Full Court

**Appearances:** RL Towner ; P Cranney, T Oldfield

DE NOVO CHALLENGE TO DETERMINATION OF EMPLOYMENT RELATIONS  
AUTHORITY – Dispute – Access to workplace – Union rules – Defendant’s  
member organisers employed by plaintiff’s competitor – Confidential  
information on notice boards where organisers met with plaintiff’s employees  
– Whether employees of competitor company entitled to entry as union  
member representatives onto the plaintiff’s premises pursuant to statutory  
powers – Plaintiff submitted that defendant’s national secretary lacked power  
to appoint member organisers under defendant’s rules – Plaintiff submitted  
refusing entry to competitor employees due to potential damage caused by  
access to confidential information was justified and defendant not acting  
reasonably – Defendant submitted unions have general right to organise their  
affairs and choose representatives – Defendant submitted practical steps could  
be taken to ensure confidential information not accessed – HELD – Union rules  
should be interpreted liberally to give effect to union’s objectives – Necessarily  
implicit in defendant’s rules that member organisers could be appointed and  
lack of express power to do so not fatal – Unreasonableness not determinative  
of issues – Practical steps such as reasonable notice and low-tech concealment  
of confidential information would eliminate risk of disclosure – Member  
organisers under duty of good faith not to disclose any confidential information  
– Food processing workers

This was an unsuccessful de novo challenge to a determination of the Employment Relations Authority which held that the defendant’s member organisers employed by a competitor were entitled to access to the plaintiff’s work site provided they gave reasonable notice.

The defendant had members who performed similar functions at both the plaintiff’s food processing plant in Hastings and that of another local competitor. The defendant’s national secretary had appointed two delegates who were employed at the competitor plant (“the member organisers”). The defendant used member organisers to recruit at work sites with no or a low level of union membership.

In 2007, the parties’ negotiations for a collective agreement reached a stalemate. The defendant responded by making recruitment visits to the plaintiff’s Hastings plant and speaking to employees in the cafeteria before or after work or during their breaks.

The plaintiff's Hastings plant was encouraged to compete with one of the plaintiff's Australian plants and performance details were publicised on staff notice boards in the cafeteria. The plaintiff considered some of the information publicised to be commercially sensitive information. The plaintiff therefore objected to the entry and access of the member organisers.

The plaintiff submitted that union rules should be strictly interpreted and that the defendant's national secretary did not have the power under its rules to appoint the member organisers as union representatives. Therefore the appointments were of no legal effect. The plaintiff submitted that it was justified in refusing the member organisers access because of potential damage to its business from loss of valuable commercial information. Finally, the plaintiff submitted that the defendant was not acting reasonably, and therefore not in compliance with s21(2) of the Employment Relations Act 2000, in insisting that access to the company's site be granted to the member organisers.

The defendant submitted that unions have a general right to organise their own affairs including their choice of representatives. The defendant submitted further that the plaintiff could take practical steps to ensure that any confidential information on notice boards was obscured during the member representatives' visit.

Held

(1) The Court concluded that provisions of union rules conferring powers should be interpreted facilitatively and liberally to give effect to the union's lawful objectives. The emphasis is no longer upon literal and restrictive interpretations of such provisions and consequential exclusion of implied powers. (para 52)

(2) In the absence of a statutory definition, counsel for the defendant argued that the Court should adopt the definition from the 6th edition of the Concise Oxford Dictionary that a representative was a "person's or firm's agent". The Court agreed with that starting point. (para 53)

(3) The Court found it was necessarily implicit in the defendant's rules that representatives or agents could be appointed to exercise the statutory powers of entry to workplaces. The absence of an express power was not fatal to the desirability, if not necessity, in practice for the defendant to make such appointments. (para 63)

(4) The Court concluded that there were implied powers in the defendant's rules to create the position of member organiser and to authorise persons holding that position to exercise the union's statutory right of entry to workplaces. As the Authority found and the Court endorsed, so long as persons purporting to enter were authorised representatives of the defendant, the employer was not permitted to prevent their entry simply because it does not approve of them. (para 65)

(5) Whether or not the Court may think that the entry of the competitor's employees onto the plaintiff's premises purporting to represent the defendant is unreasonable could not be determinative of the issues in the present case. (para 66)

(6) The Court did not wish to discourage the plaintiff from sharing information with its workforce and accepted that some of this at least, and for a limited time, will be confidential in the sense that the plaintiff wished legitimately to ensure that competitors were not aware of it. Although, by agreeing to disclose such information to a large workforce, the plaintiff must accept the possibility of some inadvertent disclosure even by its own loyal employees, that should not be an argument for compromising confidentiality in other ways. Rather, the answer seemed to the Court to be that practical means could and should be taken by the plaintiff and the defendant to preserve current levels of confidentiality of this information. This can be done at the same time as allowing the defendant to exercise its statutory rights including, if it wished to do so, by union representatives who were employed by a competitor business. (para 74)

(7) In the detailed legal analysis of such concepts as expressed or implied authorisation, ultra vires and the reasonableness of entry by competitors' employees, it was easy to overlook essentially practical and reasonable ways of resolving this dispute. There were at least two that were obvious. First, the employer could ask to have reasonable, albeit short, notice of the defendant's intended visit so that confidential information on a notice board in a room where a meeting was going to be held could either be removed temporarily or obscured simply by another sheet of paper being pinned on top of it. That would eliminate the risk about which the plaintiff is concerned that employees of its competitor will, even inadvertently, learn of the plaintiff's strategies or other confidential information. That would seem to the Court to be both a low-tech and easily implemented solution to the plaintiff's concerns. The other answer may be for the parties to agree that the meetings that the union wishes to hold will be held elsewhere other than in the work cafeteria where such notices are exhibited. (paras 75-76)

(8) The statutory obligations of "good faith" also affect this aspect of the dispute. The Court considered that the duty extends to not disclosing the plaintiff's confidential information if that comes to the knowledge of those union representatives including if they are employed by competitors. As well, the statutory obligations of good faith that member organisers may owe their own employer do not extend to any obligation to convey to it confidential information belonging to its competitor into possession of which the union representatives may have come by virtue of that role. (paras 77-78)

(9) The Court did not agree with plaintiff counsel's proposition that employees of the competitor company will feel compelled to do what they can to advance their employer's interests at the expense of the plaintiff. The employees concerned were food processing workers employed on modest wages to perform manual work. Although not to demean them or their work, they were not fiduciaries or even managers involved in strategy. If anything, their loyalty in this task as member organisers may be to their union rather than to their own employer. (para 79)

**Result:** Challenge dismissed ; Costs reserved

**Statutes considered:**

ERA s4(2)(b)  
ERA s19  
ERA s20  
ERA s20(2)  
ERA s20(3)  
ERA s21  
ERA s21(2)  
ERA s212(b)  
ERA s21(2)(c)(ii)  
ERA s21(3)  
ERA s21(3)(b)(ii)  
ERA s22  
ERA s23  
ERA s24  
ERA s25  
ERA s25(c)  
ILO Convention 87, art 3

**Words and phrases:** Representative

**Cases referred to in judgment:**

Air Line Pilots Association IUOW v The Registrar of Unions [1989] 3 NZILR 305  
Antunovich v Dalmatinsko Kulturno Drustvo Inc (Dalmatian Cultural Society) HC,  
Auckland, CP398-SW00, 15 November 2000  
Attorney General v Great Eastern Railways Co. 5 App. Cas. 473  
Automobile Association (Wellington) Inc v Daysh [1955] NZLR 520  
British Actors' Equity Association v Goring [1977] ICR 393

British Actors' Equity Association v Goring [1978] ICR 791  
Carter Holt Harvey Ltd v National Distribution Union Inc [2002] 1 ERNZ 239  
Crédit Suisse v Allerdale Borough Council [1996] 4 All ER 129  
Finnigan v New Zealand Rugby Football Union [1985] 2 NZLR 159  
Heatons Transport (St Helens) Ltd v Transport and General Workers' Union [1975] AC 15  
NZ (with exceptions) Food Processing, Chemical IUOW v NZ Meat Processors, Packers, Preservers, Freezing Works IUOW [1986] ACF 885  
R v Aird: Ex parte Australian Workers' Union (1973) 129 CLR 654  
R v Holmes: Ex parte Public Service Association (NSW) (1978) 140 CLR 63  
Service Workers Union of Aotearoa Inc v Southern Pacific Hotel Corporation (NZ) Ltd [1993] 2 ERNZ 531  
Walker v Mount Victoria Residents Association Inc [1991] 2 NZLR 520  
Wellington Amalgamated Watersiders' Industrial Union of Workers and Others v Wall [1962] NZLR 777  
Winstanley v The National Union of Railwaymens IUOW A283/80, 17 November 1982.  
**Pages:** 4F  
[975089]

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***Roebeck & Anor v Bradford Trust Ltd***

AC 20A/08  
Heard: 2 Jun 2008, Auckland  
**Judgment Date:** 21 Jul 2008  
**Court/Authority:** Colgan CJ

PRACTICE AND PROCEDURE – Interlocutory issue – Authority investigation – Conduct of litigants – Court called for good faith report under s181 Employment Relations Act 2000 – Authority reported plaintiffs had not facilitated Authority's investigation to a significant extent – Report included findings of credibility against plaintiffs as witnesses – Authority also reported plaintiffs failed to file documents and comply with directions – Whether Court should direct that challenge be other than hearing de novo – Whether plaintiffs had participated in Authority's investigation in manner designed to resolve the issues – Whether Authority's rejection of plaintiffs' evidence as untrue or unreliable was obstruction of Authority's investigation – Defendant submitted Court should consider adverse credibility findings in determining whether to limit nature and extent of challenge – Defendant submitted challenge should be limited to questions of liability only – HELD – Findings of substantive bad faith in Authority should not curtail right to appeal – Limiting right of appeal a serious step – Court should be satisfied that case was a proper one to limit appeal right and do so only to extent necessary in interests of justice – Plaintiffs obstructed rather than facilitated Authority's investigation – Challenge limited to liability only – Plaintiffs not entitled to hearing de novo – Orders accordingly

This was an interlocutory judgment in a challenge to a determination of the Employment Relations Authority which held that the requirement to assist the Authority in its investigation did not extend to substantive elements such as the credibility of witnesses, that the plaintiffs acted obstructively in the Authority and that the plaintiffs' right of challenge would be limited to questions of liability.

The plaintiffs were former employees of the defendant. The defendant successfully brought proceedings in the Authority for breaches of the plaintiffs' employment agreements that caused loss to the defendant. The Authority awarded the defendant damages.

The plaintiffs challenged that determination and elected a full hearing of the entire matter (a hearing de novo).

Comments made in the Authority's determination prompted the Court to call for a good faith report under s181 of the Employment Relations Act 2000 ("ERA"). The determination and the subsequent report described the plaintiffs' evidence as unreliable and outlined several procedural shortcomings including the failure to lodge tender documents in order to assist the Authority to quantify the defendant's losses.

The Authority concluded the plaintiffs had not facilitated the investigation to a significant extent.

The defendant sought directions from the Court under s182(3) ERA to limit the nature and scope of the plaintiffs' challenge as a result of the findings of bad faith by the Authority.

The defendant submitted that the Authority's findings against the plaintiffs' credibility should go to whether the plaintiffs' challenge could be heard by a hearing de novo. The defendant further submitted that the plaintiffs should be limited to challenging questions of liability but not quantum.

Held

(1) The Court concluded that simply because a party may have been an unbelievable or unbeliever witness or may even have failed to disclose in that witness's intended evidence-in-chief all of the evidence expected by the Authority, such a party should not suffer a reduction in appeal rights for bad faith conduct in the Authority. (para 11)

(2) The obligations on parties in the Authority are to assist its investigative process but those obligations do not extend to every substantive element of the parties' case including credibility of its witnesses and their perceived attitudes towards the tribunal. To remove rights of appeal from the decision of a tribunal of first instance that operated other than adversarially, is a very serious step and the Court should be cautious to ensure, first, that a proper case is made out for such a deprivation of rights and, second, to curtail those rights only to the extent necessary to meet the interests of justice in the statutory problem solving scheme. (para 13)

(3) The Court accepted that in material respects and in particular in relation to quantification of losses claimed by the defendant, these plaintiffs acted obstructively rather than facilitatively in the Authority's investigation. (para 16)

(4) In these circumstances, the Court accepted the defendant's submission that the plaintiffs did not participate in the Authority's investigation in a manner that was designed to resolve the issues involved and that this should affect the nature and extent of their challenge. The Court accepted also that it was in the interests of justice to disallow the plaintiffs to challenge the Authority's assessment of the quantum of loss awarded in favour of the defendant. This left the plaintiffs with the right to challenge the Authority's findings of liability. That process would be undertaken on its merits. (para 17)

**Result:** Orders accordingly ; Costs in favour of defendant

**Statutes considered:**

ERA s181

ERA s182(3)

**Cases referred to in judgment:**

Taylor & Anor v von Tunzelman AC 8/08, 15 April 2008  
Frank Godinet counsel for plaintiffs (Paul Edward Roebeck & David John Pakieto)  
Philip Skelton counsel for defendant (Bradford Trust Limited)

**Other workers/site names:** Pakieto

**Pages:** 3  
[975205]

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***SCA Hygiene Australasia Ltd v The Pulp and Paper Industry Council of the Manufacturing and Construction Workers Union Inc & Ors***

AC 27/08  
Heard: 31 Jul 2008, Auckland  
**Judgment Date:** 28 Aug 2008  
**Court/Authority:** Shaw J  
**Appearances:** D France, G Mayes ; K Beck, K Jones

INJUNCTION – Application for permanent injunction to restrain strike – Plaintiff intended to implement restructuring plan to reduce manning levels on Paper Machine 3 (“PM3”) – Defendant initiated bargaining and put forward claim regarding manning levels on PM3 – Plaintiff announced restructuring of PM3 would proceed – Defendant advised strike action limited to PM3 intended – Under s83 Employment Relations Act 2000 (“ERA”) a strike is lawful if it relates to collective bargaining and is not unlawful under s86 ERA – Case law interpreted “relates to” under s86 ERA to mean “dominant purpose” – Whether participation in strike would relate to collective bargaining and therefore be lawful under s83 ERA – Plaintiff submitted “relates to” should be given same meaning in s83 ERA as in s86 ERA – Plaintiff submitted strike would relate to restructuring not collective bargaining – Defendant submitted dominant purpose test should only apply to s86 ERA – Defendant submitted that members had right to lawful means to support claim – HELD – Dominant purpose test introduced gloss that went beyond plain meaning of enactment and its purpose – Question is whether there is a real causal relationship between the action and the bargaining – Proposed strike was directly related to collective bargaining for PM3 manning claim – Application dismissed – Pulp and paper workers

This was an unsuccessful application for a permanent injunction to restrain the defendant’s members from participating in a strike.

On 15 March 2007, the plaintiff, owner of the Kawerau Mill, announced a restructuring proposal which included the reduction of manning numbers on Paper Machine 3 (“PM3”). Without agreement being reached after extensive consultations with the defendant, the plaintiff announced on 27 November 2007 that it would reduce manning levels on PM3 on 25 February 2008.

On 11 December, the defendant gave notice of initiation of bargaining for a new collective agreement. On 7 February 2008, the defendant tabled its collective agreement bargaining claims which included a claim regarding the manning levels on PM3. At a meeting held on the same day, the secretary of the defendant said that if the plaintiff continued to implement the restructure there would be consequences.

Meetings, consultation and negotiation continued but on 12 June 2008 the plaintiff announced to the PM3 employees that it would proceed with the implementation of the PM3 restructure on 30 June 2008. The defendant therefore advised the plaintiff that the PM3 would be stopped due to strike action if the restructure were implemented. The present proceedings were subsequently commenced.

The issue before the Court was whether participation in the proposed strike related to bargaining for a collective agreement and was therefore lawful under s83 Employment Relations Act 2000 ("ERA"). Section 83 provides that a strike is lawful if it relates to collective bargaining and is not prohibited under s86 ERA. The plaintiff did not allege that the strike would be unlawful under s86 ERA.

In *NZ Labourers etc IUOW v Fletcher Challenge Limited* (cited below) the words "relates to" in what was then equivalent of s86 ERA – which defined unlawful as opposed to lawful strikes and lockouts as in the case of s83 – were interpreted to mean that the "dominant purpose" of the strike or lockout had to relate to the prohibited grounds listed in that section.

The plaintiff submitted that "relates to" in s83 should be given the same meaning in s86. The plaintiff further submitted the strike did not relate to collective bargaining for the purposes of s83 but rather related to the restructuring.

The defendant submitted that the dominant purpose test should only apply to s86 and that to apply it to s83 would unnaturally extend the wording of the Act. The defendant further submitted that its members had the right to take whatever lawful action it saw as necessary to support its claim in collective bargaining.

Held

(1) The Court was of the view that the dominant purpose test had added a gloss to the meaning of the words of sections 83 and 86 which had gone beyond the plain meaning of the text of those sections and did not serve the purpose of the enactment. (para 37)

(2) To establish whether the industrial action related to collective bargaining, the question is whether there is a real causal relationship between the action and the bargaining. Rather than applying an abstract test which did not appear in the sections, essentially the decision is a matter of fact about what is the motivation for the action. (para 39)

(3) There should be no distinction between the meaning of "relates to" in ss83 and 86. The use of the same words in each section is a strong indication that they should be interpreted the same and this is consistent with the purposes of the sections. (para 40)

(4) The Court concluded that for participation in a strike to be lawful under s83, the Court has to find as a matter of fact that it relates to collective bargaining in the sense the collective bargaining must be the cause of the strike or be specifically related to the strike action. (para 41)

(5) The Court found that the proposed strike action which was to be limited to the PM3 manning issue was in response to the plaintiff's decision to implement the restructuring on 25 February in spite of the claim which was yet to be bargained for. (para 48)

(6) The Court was satisfied that, although the defendant plainly disagreed with the decision to restructure, the proposed strike was directly related to the collective bargaining for the PM3 manning claim. The defendant wished to delay the implementation of the restructuring while it furthered the claim on the table. (para 52)

**Result:** Application dismissed (permanent injunction) ; Costs reserved

**Statutes considered:**

ERA s80(a)  
ERA s80(b)  
ERA s83  
ERA s83(b)  
ERA s84  
ERA s86  
Interpretation Act 1999, s5(1)  
Trade Practices Act 1974

**Words and phrases:** Relates to

**Cases referred to in judgment:**

Air New Zealand Limited v Flight Attendants and Related Services (NZ) Association Inc [2002] 2 ERNZ 770  
Hancock & Co Limited v Wellington Hotel etc IUOW [1987] NZILR 613  
New Zealand Public Service Association Inc v Designpower NZ Limited [1992] 1 ERNZ 669  
Norske Skog Tasman Limited v Pulp and Paper Industry Council of Manufacturing and Construction Workers Union AC 42/04, 31 July 2004  
NZ Labourers etc IUOW v Fletcher Challenge Limited (1989) ERNZ Sel Cas 424  
Southern Local Government Union v Christchurch City Council [2007] ERNZ 739

**Other workers/site names:** Wheatley, Neal

**Pages:** 3  
[975327]

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***Te Ao v Chief Executive of the Department of Labour***

AC 31/08  
Heard: 11 Aug 2008, Hamilton  
**Judgment Date:** 3 Sep 2008  
**Court/Authority:** Colgan CJ  
**Appearances:** M Chambers, S Scott ; A Gane

REFERRAL OF QUESTIONS OF LAW – Mediation – Confidentiality – Statutory interpretation – Public policy – Plaintiff was employment mediator employed by defendant – Plaintiff dismissed following complaints by parties to mediation regarding plaintiff’s behaviour during mediation – Plaintiff filed personal grievance – Whether s148(2) Employment Relations Act 2000 (“ERA”) precluded plaintiff from giving evidence to Authority – Whether public policy provided ground for noncompliance with clear words of s148(2) – Plaintiff submitted s148(2) precluded him from giving evidence as words of s148(2) were unambiguous – Plaintiff submitted not appropriate case for public policy exception – Defendant submitted s148(2) did not preclude plaintiff’s evidence – HELD – Purposive as opposed to literal interpretation of s148(2) appropriate – Alleged comments of plaintiff not for purposes of mediation therefore not subject to s148(2) prohibition – Alternatively, circumstances constituted grounds for public policy waiver of statutory confidentiality – Questions answered – Employment mediator

This judgment answered questions of law referred by the Employment Relations Authority in the course of its investigation of the plaintiff’s personal grievance.

The plaintiff was employed by the defendant to provide employment mediation services under s144 of the Employment Relations Act 2000 (“ERA”). In April and May 2007, the

plaintiff provided mediation services to a supervisor and supervisee in an existing employment relationship. Both parties subsequently complained about the plaintiff's conduct during the mediation. The complaints referred, inter alia, to comments that the plaintiff made regarding one party's sexual orientation.

Following his dismissal, the plaintiff filed a personal grievance for unjustified dismissal and sought orders for interim and permanent reinstatement.

Section 148(2) ERA provides that no person who provided mediation services may give evidence in any proceedings about the provision of the services or anything, related to the provision of the services, that came to his or her knowledge in the course of the provision of the services. In *Just Hotel Ltd v Jesudhass* (cited below) the Court of Appeal held that s148(1), which also deals with confidentiality in mediation, afforded no exceptions to confidentiality save for the grounds of public policy.

The Authority referred three questions of law to the Employment Court: (a) assuming the plaintiff was a person who provides mediation services under s148(2), was his filing in the Authority of a personal grievance alleging unjustified dismissal, together with the associated application for an order for interim reinstatement, 'proceedings' for the purposes of s148(2); (b) if so, would the plaintiff's giving of evidence addressing the conduct complained of amount to evidence about the provision of the services or anything related to the provision of the services that came to his knowledge in the course of the provision of the services; and (c) if the answer to either or both of (a) and (b) above was 'yes', given that the plaintiff's employer dismissed him because of that conduct and the plaintiff said the dismissal was unjustified, could the plaintiff give evidence about the conduct in the course of proceedings addressing the resulting personal grievance and if so under what conditions.

Despite the effect it might have on his personal grievance, the plaintiff submitted that s148(2) precluded him from giving evidence in the Authority either in support of his claim or in opposition to such evidence as might be called for by the defendant to justify the dismissal. The plaintiff submitted that the words of s148(2) were unambiguous and that this was not an appropriate case to allow public policy considerations to override clear statutory language.

The defendant submitted that the legislation did not preclude the plaintiff from giving relevant evidence to the Authority about the events in mediation that led to the dismissal.

Held

(1) The Court did not consider that any special meaning attaches to the word "proceedings" in s148(2). It is intended to encompass a case before the Employment Relations Authority (or the Employment Court or the Court of Appeal or the Supreme Court on appeal from the Employment Court) howsoever that case may have been commenced and irrespective of the different descriptions given to cases such as "matters", "actions", or otherwise. (para 31)

(2) The Court concluded that a personal grievance challenging justification for dismissal is a proceeding under the Employment Relations Act 2000 for the purposes of s148(2) irrespective of whether interim reinstatement and/or permanent reinstatement were claimed as remedies. (para 35)

(3) Any evidence that the plaintiff might wish to give to the Authority in its investigation of his personal grievance will be about the provision of the mediation services to the parties to the mediation on the relevant dates concerned. (para 40)

(4) A purposive interpretation of s148(2) will produce a different result than a purely literal interpretation of what might be said to be unambiguous words and phrases. Applied literally, these would preclude a mediator from ever giving evidence in any proceedings about anything that may have happened in the course of a mediation. One only had to

consider an extreme example to appreciate why a purposive, as opposed to literal, interpretation was appropriate and indeed necessary. (para 57)

(5) What the mediator was alleged to have said would not have been for the purpose of the mediation, to resolve the parties' employment relations problems, and therefore not subject to the s148(2) prohibition. (para 60)

(6) The Court concluded that a purposive interpretation of s148(2) will not preclude the plaintiff from giving evidence in his personal grievance proceedings about what he said and did in the mediation that led to his dismissal. However, if the Court was wrong and a strict literal interpretation of the section must be given, then it was necessary to decide whether the circumstances of this case constituted a "public policy" ground for non-compliance with the statute. (para 62)

(7) Neither the Court of Appeal's judgment in *Just Hotel Ltd v Jesudhass* (cited below) nor *Milner v Police* (cited below) called in aid of the "public policy" principle in *Just Hotel*, identified the legal basis for this practice or described the circumstances in which it could be used. The Court's researches failed to disclose, in legal texts, reference to a principle of law that enabled the courts on occasions to override a clear statutory provision prohibiting the giving of certain evidence in proceedings properly before the Court. Such a bold approach to the rule of law was inherently counterintuitive. On the other hand, the Court of Appeal pronounced upon it, in relation to the mediation confidentiality provisions in the ERA and this Court was bound to follow and adhere to the law as so stated. (paras 63–64)

(8) The Court concluded that the relevant circumstances of the case constitute grounds for a "public policy" waiver of statutory confidentiality as indicated in *Just Hotel*. Most of the grounds for so concluding have also been grounds used by the Court to support a purposive interpretation of the legislation as opposed to a strict literal interpretation. (para 67)

(9) Apart from the scope of the evidence that the plaintiff was entitled to give, the Court did not consider that any condition should attach to that and none was proposed by the plaintiff, the defendant or the Authority. (para 73)

**Result:** Questions answered ; Costs reserved

**Statutes considered:**

ERA s144  
ERA s148(1)  
ERA s148(2)  
ERA s148(2)(a)  
ERA s148(2)(b)  
ERA s161  
ERA s161(1)(e)  
ERA s161(1)(f)  
ERA s161(1)(g)  
ERA s161(1)(h)  
ERA s161(1)(i)  
ERA s161(1)(j)  
ERA s161(1)(k)  
ERA s161(1)(l)  
ERA s161(1)(m)  
ERA s161(1)(q)  
ERA s161(1)(r)  
ERA s187  
ERA s187(1)(a)  
ERA s187(1)(b)  
ERA s187(1)(e)  
ERA s187(1)(h)  
ERA s193

ERA s194(1)  
ERA s213  
Judicature Amendment Act 1972, Part 1  
Interpretation Act 1999 s5  
Interpretation Act 1999 s5(1)  
Interpretation Act 1999 s5(2)  
New Zealand Bill of Rights Act 1990, s6  
New Zealand Bill of Rights Act 1990, s27  
State Sector Act 1988 s59

**Cases referred to in judgment:**

Just Hotel Ltd v Jesudhass [2007] ERNZ 817  
Milner v Police (1987) 4 NZFLR 424  
Ye & Ors v Minister of Immigration [2008] NZCA 291

**Pages:** 4  
[975337]

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## Arrears - Employment Relations Act 2000

### ***Booth & Anor v Medic One Services Ambulance Trust & Anor***

4 Oct 2007, D King, AA 307/07, (9 pages)

ARREARS OF WAGES – Identity of employer – Applicants alleged owed arrears by first respondent - Respondents alleged applicants employed by second respondent and no money owed – No appearance for respondents and they failed to comply with direction to mediation – Applicants employed before second respondent incorporated – Claimed employment changed after its incorporation – Correspondence indicated confusion on part of all parties regarding identity of employer – Email relied on by applicants made no reference to change or assignment of employment – No payment of outstanding entitlements at purported change of employer and no discussion of terms and conditions - Nothing signified applicants relinquished employment with second respondent and accepted new employment with first respondent – No request for them to do so, and no offer or acceptance - Mutuality of intent could not be said to exist – Applicants employed by second respondent, a limited liability company now in liquidation - Unable to recover from it any arrears that may be owed

**Result:** Application dismissed ; No order for costs

### ***Finau v Xtreme Construction Ltd***

15 Aug 2007, R Arthur, AA 250/07, (4 pages)

ARREARS OF WAGES – No appearance for respondent – Applicant submitted not paid correct amount for hours worked – Claimed respondent initially agreed to pay arrears, but later suggested paying wages due at lower hourly rate – Applicant's evidence accepted – Arrears due and owing - Applicant also sought compensation for effects of not getting paid – As claim not a personal grievance, Authority unable to award compensation – However, entitled to interest on outstanding sum – COSTS – Length of investigation meeting not specified – Applicant entitled to costs charged by lawyer initially engaged to recover wages – Construction worker

**Result:** Application granted ; Arrears of wages (\$1,940) ; Interest (10.73%) ; Costs in favour of applicant (\$100) ; Disbursements (\$70)(Filing fee)

### ***Green v Nouveau Holdings Ltd***

2 Oct 2007, R A Monaghan, AA 302/07, (6 pages)

ARREARS OF WAGES AND HOLIDAY PAY – No appearance by respondent – Unlawful deduction from wages as no written authority – Authority calculated arrears of wages and holiday pay due and owing, reduced by amount applicant admitted owed respondent – Claim for overtime declined as parties had agreed to recognise overtime with time off in lieu – Applicant had not taken accumulated lieu time before resigned but, without more, not entitled to payment – Applicant's other claims for reimbursement and equipment rental disallowed as no evidence or no agreement - PENALTY – Breach of employment agreement – Breach of Employment Relations Act 2000 - Applicant disputed employment agreement presented by respondent, claimed no agreement finalised – Information insufficient to support penalty for failure to supply written agreement – Apparently unreliable wage payments capable of amounting to breaches of employment agreement – Matter addressed in a global way as notional single failure to pay wages – Salesperson

**Result:** Application granted ; Arrears of wages (\$3,415.03)(nett) ; Arrears of holiday pay (\$844.80)(gross) ; Penalty (\$500)(Payable to Crown) ; Disbursements in favour of applicant (\$70)(Filing fee)

### ***Havenleigh Global Services Ltd v Toeikrathok and Ors***

24 Sep 2008, J Crichton, CA 7A/08, (6 pages)

RECOVERY OF MONIES - Investigation re-opened – No appearance by respondents - Applicant claimed Authority failed to investigate and determine

one issue raised in statement of problem – Labour Inspector directed applicant to pay holiday pay to two of respondents (“PT” and “WN”) – Authority found holiday pay already paid in hourly rate – Applicant sought to recover payments directed by Labour Inspector – Authority found had recourse to make order for repayment under s94A Judicature Act 1908 (“JA”) by reason of s162 Employment Relations Act 2000 (“ERA”) – Found Labour Inspector made mistake of fact or law by applying s28(1) Holidays Act 2003 (“HA”) and failing to take account of s28(2) and s28(3) HA - Found provisions of JA and ERA satisfied because employment agreement existed, was related to enactment or rule of law relating to contracts, and was mistaken application of HA – Overpayment of holiday pay to be repaid  
**Result:** Application granted ;

***Karunanayake v AAA Parts & Auto Services Ltd***

*29 Oct 2007, M Ulrich, AA 337/07, (6 pages)*

ARREARS OF WAGES AND HOLIDAY PAY – Applicant sought payment at agreed rate for all hours worked during employment and holiday pay – Respondent claimed applicant received full entitlement – No appearance by respondent - Original investigation meeting adjourned part heard because translator required and because respondent’s director would not desist from using unacceptable language – Respondent had not complied with Authority Minute to provide wage, time and holiday records - Further minute requested Labour Inspectorate to uplift documents but attempts to do so unsuccessful – Labour Inspectorate subsequently calculated gross earnings and holiday pay at minimum wage rate using time records – Authority Minute declined respondent’s request to respond to evidence after investigation meeting – Disagreement over correct hourly rate – Written employment agreement stated hourly rate – No evidence of agreement to vary rate – Applicant’s evidence of hours worked accepted - Entitled to be paid for hours worked at hourly rate for which he agreed to work – Arrears due and owing – Mechanic

**Result:** Application granted ; Arrears of wages (\$12,062) ; Arrears of holiday pay (\$1,248.75) ; Interest (9%) ; Disbursements in favour of applicant (\$70)(Filing fee)

***Mighty River Power Ltd v Paio***

*14 Sep 2007, R Arthur, AA 285/07, (6 pages)*

RECOVERY OF MONIES – Applicant sought recovery of money mistakenly paid to respondent as wages – Respondent offered and accepted position but never started work – Person intending to work - No appearance for respondent – Applicant’s evidence accepted – Applicant contacted respondent once discovered mistake and she agreed to repay money – However, applicant had not received money or heard from her again – Matter did not fall within Wages Protection Act 1983 as no ongoing employment or wages from which to make deductions – Fell within jurisdiction of s161(r) Employment Relations Act 2000 – Respondent did not do any work for applicant and not entitled to wages – Applicant entitled to order requiring respondent to repay money – Respondent warned of consequences if failed to comply with order

**Result:** Application granted ; Orders accordingly ; Disbursements in favour of applicant (\$70)(Filing fee)

***Siataga v McKellar Property Services Wellington Ltd***

*6 Aug 2007, H Doyle, CA 91/07, (10 pages)*

UNJUSTIFIED DISMISSAL – No appearance for respondent – Matter determined with agreement of respondent’s liquidator – Identity of employer raised – Labour Inspectors and Inland Revenue Department of view employer correctly identified – Authority found limited evidence showed applicant employed by respondent - Respondent argued applicant’s resignation was accepted but would occur later – Applicant had told respondent if changes to work not made, would resign – Respondent did not reply to applicant’s satisfaction, so applicant gave notice of

resignation period – Respondent replied wanted applicant to stay on until client's contracts complete – Applicant considered resignation put to one side and stayed on – Employment continued past end of client's contracts – Authority found applicant's resignation not accepted by respondent – Found agreement applicant would continue working until later time – Found although was discussion about employment continuing until end of one client's contracts, applicant continued working beyond that date – Found respondent's reliance on earlier resignation which had not been accepted breached duty of good faith – Found was discussion about applicant reducing Area Manager hours, but change not implemented in proper process and no evidence to support genuine redundancy – Found fair and reasonable employer would have discussed reduction of hours with applicant and gone through proper process – Dismissal unjustified – Remedies – Applicant unable to work for over a year – Applicant's employment may not have continued for further full year as respondent lost number of contracts – Awarded six months lost wages - No contributory conduct – Found dismissal had devastating effect on applicant – Applicant unable to leave house for several months due to depression – Applicant's household suffered significant financial difficulties – Respondent's callous dismissal disregarded applicant's hard work, loyalty and dedication – High compensation award appropriate - ARREARS OF WAGES – Applicant claimed unpaid wages and holiday pay – Authority found Labour Inspectors correctly calculated holiday pay owing – Authority found applicant underpaid - Interest on arrears awarded – COSTS – Applicant legally aided – Applicant entitled to costs for short meeting, plus filing fee - Commercial Cleaning Area Manager

**Result:** Application granted ; Reimbursement of lost wages (\$17,100) ; Arrears of wages (\$269.20)(Interest 10%) ; Arrears of holiday pay (\$1,993.53)(Interest 10%) ; Compensation for humiliation etc (\$15,000) ; Disbursements in favour of applicant (\$70)(filing fee) ; Costs in favour of applicant (\$1,500)

## Arrears - Holiday Pay - Employment Relations Act 2000

### ***Green v Nouveau Holdings Ltd***

2 Oct 2007, R A Monaghan, AA 302/07, (6 pages)

ARREARS OF WAGES AND HOLIDAY PAY – No appearance by respondent – Unlawful deduction from wages as no written authority – Authority calculated arrears of wages and holiday pay due and owing, reduced by amount applicant admitted owed respondent – Claim for overtime declined as parties had agreed to recognise overtime with time off in lieu – Applicant had not taken accumulated lieu time before resigned but, without more, not entitled to payment – Applicant's other claims for reimbursement and equipment rental disallowed as no evidence or no agreement - PENALTY – Breach of employment agreement – Breach of Employment Relations Act 2000 - Applicant disputed employment agreement presented by respondent, claimed no agreement finalised – Information insufficient to support penalty for failure to supply written agreement – Apparently unreliable wage payments capable of amounting to breaches of employment agreement – Matter addressed in a global way as notional single failure to pay wages – Salesperson

**Result:** Application granted ; Arrears of wages (\$3,415.03)(nett) ; Arrears of holiday pay (\$844.80)(gross) ; Penalty (\$500)(Payable to Crown) ; Disbursements in favour of applicant (\$70)(Filing fee)

### ***Karunanayake v AAA Parts & Auto Services Ltd***

29 Oct 2007, M Ulrich, AA 337/07, (6 pages)

ARREARS OF WAGES AND HOLIDAY PAY – Applicant sought payment at agreed rate for all hours worked during employment and holiday pay – Respondent claimed applicant received full entitlement – No appearance by respondent - Original investigation meeting adjourned part heard because translator required and because respondent's director would not desist from using unacceptable language – Respondent had not complied with Authority Minute to provide wage, time and holiday records - Further minute requested Labour Inspectorate to uplift documents but attempts to do so unsuccessful – Labour Inspectorate subsequently calculated gross earnings and holiday pay at minimum wage rate using time records – Authority Minute declined respondent's request to respond to evidence after investigation meeting – Disagreement over correct hourly rate – Written employment agreement stated hourly rate – No evidence of agreement to vary rate – Applicant's evidence of hours worked accepted - Entitled to be paid for hours worked at hourly rate for which he agreed to work – Arrears due and owing – Mechanic

**Result:** Application granted ; Arrears of wages (\$12,062) ; Arrears of holiday pay (\$1,248.75) ; Interest (9%) ; Disbursements in favour of applicant (\$70)(Filing fee)

### ***Taylor v Mastfix Maintenance Ltd***

19 Oct 2007, D Asher, WA 140/07, (6 pages)

UNJUSTIFIED DISMISSAL – Poor performance - No appearance by respondent – Applicant alleged dismissed when told work had run out - Respondent claimed applicant casual employee and dismissed for performance reasons – Authority concluded permanent employee – Respondent submitted documents showing warnings allegedly given to applicant – Applicant denied receiving any warnings - Credibility finding in favour of applicant strengthened by respondent's failure to appear and provide evidence as previously agreed – Dismissal without warning or consultation, a significant breach of s4(1A) Employment Relations Act – Dismissal unjustified - Remedies – Applicant claimed unable to pay mortgage – Acknowledged did not own house he lived in, but submitted relative relied on him to make mortgage payments - ARREARS OF HOLIDAY PAY – Applicant owed for annual leave and public holidays – COSTS – Length of investigation meeting not specified - Applicant sought exemplary costs of \$5,000 on grounds of respondent's conduct, in particular manufacture of evidence regarding warnings

- Claimed respondent's absence from investigation meeting was tacit admission of grievance – Appropriate costs \$3,000 – Labourer

**Result:** Application granted ; Reimbursement of lost wages (\$1,506)(3 weeks) ; Compensation for humiliation etc (\$10,000) ; Arrears of holiday pay (\$1,004)(Public holidays) ; (\$1,100)(Annual leave) ; Costs in favour of applicant (\$3,000) ; Disbursements (\$100)

## Compliance Order - Employment Relations Act 2000

### ***Wade v Hume Pack N Cool Ltd***

*16 Oct 2007, V Campbell, AA 322/07, (6 pages)*

COMPLIANCE ORDER – Applicant sought compliance with agreement he claimed respondent entered into to resolve wage claim – Respondent claimed no agreement reached – Authority concluded applicant withdrew original wage claim and agreed to continue negotiations – Subsequent payment made to applicant – On balance of probabilities, payment intended to be full and final settlement of wage claim – Applicant alleged at investigation meeting payment should have been made without deduction for tax – Authority satisfied respondent treated payment appropriately

**Result:** Application dismissed ; Costs reserved

## Costs - Employment Relations Act 2000

### ***Atkinson v Suttons Moss Ltd***

28 Aug 2008, P Cheyne, CA 69B/08, (2 pages)

COSTS - Successful personal grievance and arrears claim - Length of investigation not specified - Respondent argued applicant should not be awarded costs as only partially successful - Also argued should be awarded costs for successful defence - Neither party legally represented but both had instructed counsel prior to investigation meeting - Authority found applicant successful party - Applicant therefore entitled to contribution to costs

**Result:** Costs in favour of applicant (\$750); Disbursements (\$70) (Filing Fee)

### ***Devi v Manhaas Industries (2000) Ltd & Ors***

20 Aug 2008, P R Stapp, WA 77A/08, (3 pages)

COSTS - Unsuccessful Arrears claim and Practice and procedure claim - One day investigation meeting - Costs to follow event - Applicant could not rely upon making claim of costs when wholly unsuccessful in claims - Respondent could not reasonably expect to receive full indemnity costs as nothing exceptional about matter - Approach to costs should be on all inclusive basis - Respondents entitled to reasonable combined contribution to costs of \$2,000

**Result:** Costs in favour of respondents (\$2,000)

### ***Dolan v Filta Vacuum Products Ltd***

1 Sep 2008, R A Monaghan, AA 214A/08, (4 pages)

COSTS - Successful personal grievance - Three day investigation meeting - Applicant sought contribution to costs of \$13,000 - Argued difficulties arranging mediation and difficulties within mediation regarding unavailability of calculations - Claimed offer by respondent to settle was unrealistic, aggravated situation and length of investigation excessive - Respondent submitted both parties should bear own costs - Overall both parties successful in parts of respective claims but also had serious flaws in unsuccessful parts - Authority took into account without prejudice offer of settlement finding it unrealistic and substantially different from result in determination - Tariff based approach not suitable for matter with degree of factual complexity and significant preparation time involved - Respondent to make 66 percent contribution to applicant's costs

**Result:** Costs in favour of applicant (\$11,633)

### ***Finau v Xtreme Construction Ltd***

15 Aug 2007, R Arthur, AA 250/07, (4 pages)

ARREARS OF WAGES – No appearance for respondent – Applicant submitted not paid correct amount for hours worked – Claimed respondent initially agreed to pay arrears, but later suggested paying wages due at lower hourly rate – Applicant's evidence accepted – Arrears due and owing - Applicant also sought compensation for effects of not getting paid – As claim not a personal grievance, Authority unable to award compensation – However, entitled to interest on outstanding sum – COSTS – Length of investigation meeting not specified – Applicant entitled to costs charged by lawyer initially engaged to recover wages – Construction worker

**Result:** Application granted ; Arrears of wages (\$1,940) ; Interest (10.73%) ; Costs in favour of applicant (\$100) ; Disbursements (\$70)(Filing fee)

### ***Kirk v William Gordon Craig on Behalf of The Trustees of the Estate of W Bruce Craig and William Craig***

5 Sep 2008, G J Wood, WA 101A/08, (3 pages)

COSTS - Unsuccessful Arrears of Wages claim - Successful Recovery of Monies counterclaim - Length of investigation meeting not specified - Respondent sought full costs of \$7,741 - Argued applicant did not provide records until day

of hearing, and schedules to prove underpayment, inconsistent with each other - Also persisted with claim despite being told was overpaid - Respondent provided two pieces of written evidence from applicant showing vexatious nature of applicant's claims - Applicant declined to comment on submissions - Respondent successful bringing claim against applicant and defending claim - Applicant did not provide work diary which claims based on, therefore extending length of investigation meeting, making a higher award appropriate - Respondent entitled to reasonable contribution of \$3,000 to costs

**Result:** Costs in favour of respondent (\$3,000)

***Shakes & Anor v Norske Skog Tasman Ltd***

*25 Aug 2008, V Campbell, AA 243A/08, (3 pages)*

COSTS - Unsuccessful Practice and Procedure claim - Length of investigation meeting not specified - Respondent incurred costs of \$15,180 - Authority deemed costs high as matter decided on the papers and not complex case - Respondent offered applicants refund \$1,000 they had paid in costs for original application - Applicants sought contribution to costs and referred to earlier Calderbank offers made - Costs not punitive in nature - Authority considered both parties submissions and concluded respondent entitled to contribution to costs

**Result:** Costs in favour of respondent (\$3,000)

***Siataga v McKellar Property Services Wellington Ltd***

*6 Aug 2007, H Doyle, CA 91/07, (10 pages)*

UNJUSTIFIED DISMISSAL – No appearance for respondent – Matter determined with agreement of respondent's liquidator – Identity of employer raised – Labour Inspectors and Inland Revenue Department of view employer correctly identified – Authority found limited evidence showed applicant employed by respondent – Respondent argued applicant's resignation was accepted but would occur later – Applicant had told respondent if changes to work not made, would resign – Respondent did not reply to applicant's satisfaction, so applicant gave notice of resignation period – Respondent replied wanted applicant to stay on until client's contracts complete – Applicant considered resignation put to one side and stayed on – Employment continued past end of client's contracts – Authority found applicant's resignation not accepted by respondent – Found agreement applicant would continue working until later time – Found although was discussion about employment continuing until end of one client's contracts, applicant continued working beyond that date – Found respondent's reliance on earlier resignation which had not been accepted breached duty of good faith – Found was discussion about applicant reducing Area Manager hours, but change not implemented in proper process and no evidence to support genuine redundancy – Found fair and reasonable employer would have discussed reduction of hours with applicant and gone through proper process – Dismissal unjustified – Remedies – Applicant unable to work for over a year – Applicant's employment may not have continued for further full year as respondent lost number of contracts – Awarded six months lost wages - No contributory conduct – Found dismissal had devastating effect on applicant – Applicant unable to leave house for several months due to depression – Applicant's household suffered significant financial difficulties – Respondent's callous dismissal disregarded applicant's hard work, loyalty and dedication – High compensation award appropriate - ARREARS OF WAGES – Applicant claimed unpaid wages and holiday pay – Authority found Labour Inspectors correctly calculated holiday pay owing – Authority found applicant underpaid - Interest on arrears awarded – COSTS – Applicant legally aided – Applicant entitled to costs for short meeting, plus filing fee - Commercial Cleaning Area Manager

**Result:** Application granted ; Reimbursement of lost wages (\$17,100) ; Arrears of wages (\$269.20)(Interest 10%) ; Arrears of holiday pay (\$1,993.53)(Interest 10%) ; Compensation for humiliation etc (\$15,000) ; Disbursements in favour of applicant (\$70)(filing fee) ; Costs in favour of applicant (\$1,500)

***Smith v Danaflex Packaging Corporation Ltd***

*2 Sep 2008, D Asher, WA 79A/08, (5 pages)*

COSTS - Unsuccessful Personal Grievance and Dispute - Half day investigation meeting - Respondent argued put to unnecessary cost as result of having to file substantive statement as applicant's original statement of problem lacked specificity - Submitted Authority should take into account conduct which unnecessarily increased costs - Respondent made Calderbank offer of \$2,000, which applicant rejected - Respondent's total Authority-related costs were \$9,729 and sought \$6,000 as contribution to reasonably incurred costs - Applicant argued no realistic prospect of meeting any costs claim without substantial hardship - Calderbank offer made did not reflect costs incurred by applicant - Submitted costs should lie where they fall - Respondent successful party in respect of dispute and personal grievance therefore costs normally follow event, however applicant's current financial and employment difficulties taken into account - Authority deemed it reasonable to suspend order for costs of \$1,500 contribution to respondent's costs until applicant resumed employment and cleared any significant personal debt

**Result:** Costs in favour of respondent (\$1,500 - Suspended order)

***Taylor v Mastfix Maintenance Ltd***

*19 Oct 2007, D Asher, WA 140/07, (6 pages)*

UNJUSTIFIED DISMISSAL – Poor performance - No appearance by respondent – Applicant alleged dismissed when told work had run out - Respondent claimed applicant casual employee and dismissed for performance reasons – Authority concluded permanent employee – Respondent submitted documents showing warnings allegedly given to applicant – Applicant denied receiving any warnings - Credibility finding in favour of applicant strengthened by respondent's failure to appear and provide evidence as previously agreed – Dismissal without warning or consultation, a significant breach of s4(1A) Employment Relations Act – Dismissal unjustified - Remedies – Applicant claimed unable to pay mortgage – Acknowledged did not own house he lived in, but submitted relative relied on him to make mortgage payments - ARREARS OF HOLIDAY PAY – Applicant owed for annual leave and public holidays – COSTS – Length of investigation meeting not specified - Applicant sought exemplary costs of \$5,000 on grounds of respondent's conduct, in particular manufacture of evidence regarding warnings - Claimed respondent's absence from investigation meeting was tacit admission of grievance – Appropriate costs \$3,000 – Labourer

**Result:** Application granted ; Reimbursement of lost wages (\$1,506)(3 weeks) ; Compensation for humiliation etc (\$10,000) ; Arrears of holiday pay (\$1,004)(Public holidays) ; (\$1,100)(Annual leave) ; Costs in favour of applicant (\$3,000) ; Disbursements (\$100)

## Dispute - Employment Relations Act 2000

### ***F Fabbian Lighting (NZ) Ltd v La Cava & Anor***

5 Oct 2007, L Robinson, AA 312/07, (8 pages)

PRELIMINARY QUESTION – DISPUTE - Parties disagreed about date first respondent's employment ended – Answer informed temporal limits of contentious restrictive covenants - Substantive employment relationship question to be addressed later – Respondent resigned giving four week's notice – Applicant alleged respondent took annual leave during closedown and remain employee – Respondent claimed parties agreed employment would end at start of closedown – Also disagreement over date respondent resigned – Authority accepted veracity of letter produced that gave notice of termination at end of closedown – Respondent's last day at work was start of Christmas closedown - Final pay included holiday pay until end of closedown – Whether parties agreed to vary termination date in letter – Parties agreed respondent would "finish up" before Christmas – Ambiguity about whether last day of employment as well as last day of work – Applicant maintained respondent required to take last two weeks of notice as annual leave in accordance with closedown provisions – Closedown provisions not correctly applied – Respondent not entitled to leave, took anticipated leave – Ordinarily not proper for employer to unilaterally require notice to be taken as annual leave – However, Authority inclined to accept parties acted genuinely in accordance with closedown provisions and applicant not attempting to reduce final pay – Parties did not expressly agree respondent's employment would terminate before closedown – No variation to initial date given when respondent resigned, merely agreement not required to work final two weeks – Applicant conducted itself consistent with initial agreement – Completion of leave form by respondent inconsistent with current position – Respondent's employment terminated after close down - Commercial Lighting Consultant

**Result:** Question answered in favour of applicant ; Orders accordingly ; Costs reserved

### ***Harding v Spectrum Care Trust Board***

1 Sep 2008, A Dumbleton, AA 314/08, (19 pages)

DISPUTE - Question whether part of applicant's employment known as "sleepover" amounted to "work" within meaning of s6 Minimum Wage Act 1983 ("MWA") - If so, applicant to be paid minimum wage for time, even if current pay rate complied with collective employment agreement - Payment for sleepovers by allowance, with extra allowance for dealing with disturbances - Applicant sought finding that pay incorrect and order requiring respondent pay minimum legal entitlement for past and future "sleepovers" - Respondent was charitable trust providing services for people with disabilities - "Sleepover" was eight hour overnight period between two shifts where applicant stayed at one of respondent's houses with clients - No dispute applicant "worker" under MWA so work subject to s6 MWA - Respondent argued fundamental indicator of work was physical and/or intellectual activity present to some degree - Authority of view applicant productive even when asleep during "sleepover" - Applicant's presence in house equally as valuable as labour involving physical and/or mental activity - Presence maintained physical and emotional well-being of clients and security of respondent's property - Presence constituted valuable consideration for reward under employment agreement - Applicant's freedom restricted during "sleepover", so not truly at rest or even in on-call situation - Authority found as question of mixed fact and law that what occurred when applicant rostered to "sleepover" did amount to work under MWA - Each "sleepover" occurring during pay cycle to be taken into account in assessing whether applicant paid at least at rate entitled to under MWA - Authority accepted respondent's calculations which showed applicant's rate of pay not less than rate required by MWA - Respondent in compliance with s6 MWA - Therefore no underpayment and no arrears owing - Community Support Worker

**Result:** Questions answered ; Costs reserved

***Public Service Association v Bay of Plenty District Health Board & Ors***

*3 Oct 2007, V Campbell, AA 305/07, (13 pages)*

DISPUTE – Parties disagreed over application of multi employer collective agreement (“MECA”) - Clauses concerned salary scales and pay progression for various roles at respondents – Dispute arose because nationally agreed terms of settlement (“NTS”), signed off by all DHBs and applicant, subsequently altered when regional MECA put together – Changes significantly affected meaning of NTS and not ratified or rejected by applicant’s members – Purpose of NTS to provide some common terms, including salary scale, across all DHBs irrespective of other conditions in MECA – Question whether MECA had effect as collective agreement due to failure to properly ratify it – Ratification meetings held before negotiations complete – Only terms and conditions ratified were those in NTS – MECA in writing and signed by all parties, although applicant should not have done so as not ratified – However, Authority prohibited from cancelling or varying collective agreement – When parties signed off on NTS intended terms would be incorporated into MECA without change – Authority deferred to terms of ratified settlement and determined appropriate pay scales for disputed classes of employees and application of progression clauses

**Result:** Questions answered ; Costs reserved

***Webb v NZ Tramways and Public Passenger Transport Employees Union (Auckland Branch)***

*9 Aug 2007, D King, AA 240/07, (4 pages)*

DISPUTE – Applicant alleged respondent disregarded union rules – Four unions, including respondent, engaged in negotiating multi union collective agreement – Respondent wanted to carry out postal ratification ballot – Applicant preferred stopwork meeting and claimed postal ballot could only be conducted if approved by National Council – Rules did not prohibit postal ballot - Authority accepted respondent’s Management Committee given power by rules to require postal ballot – Union had not had functioning National Council for many years - Rules did not provide for its involvement in negotiating employment agreements and made no sense for it to determine ratification method – Authority could not direct method of ratification – Question answered in favour of respondent

**Result:** Question answered in favour of respondent ; Costs reserved

## Injunction - Employment Relations Act 2000

### **A v B**

*15 Oct 2007, P Cheyne, CA 120/07, (7 pages)*

IN JUNCTION – Applicant sought injunction to prevent respondent continuing employment investigation – Charged with possession of drugs – Granted name suppression by District Court – Order prohibiting publication of identifying details made by Authority - Respondent told of arrest by police - Suspended applicant and began investigation - Respondent aware applicant may also have breached code of conduct constraints on relationships between employees and those in employer's control - While respondent assured confidentiality of employment investigation, likely statements would come to attention of or be discoverable by police - Significant overlap between employment investigation and criminal charges - Real danger of injustice arising in criminal proceedings if required to answer questions - Respondent said would not draw any adverse inference if applicant said nothing - However, did not resolve the problem - Applicant not told of entitlement to advice, support and representation until after exchange with managers that respondent sought rely on - Made it more important applicant had proper opportunity to explain or deny exchanges – Damages inadequate alternative remedy for any injustice that did arise – Applicant suggested risked criminal charges arising from relationship allegations or that may have to say something relevant to existing criminal charges to properly answer concerns - However, Authority found relationship allegations essentially unconnected to existing charges - Appeared order could be made leaving it open for respondent to question applicant about those allegations - Suspension able to continue and applicant gave undertaking as to damages – Applicant favoured by balance of convenience and overall justice - Pending further order of the Authority, respondent restrained from continuing employment investigation into allegations directly related to criminal charges currently pending against applicant - Order to be reviewed promptly following next District Court appearance

**Result:** Application granted ; Orders accordingly ; Costs reserved.

## Jurisdiction - Employment Relations Act 2000

### ***Bartley v Grasshoppers Lawnmowing Services Ltd***

3 Oct 2007, R A Monaghan, AA 303/07, (9 pages)

JURISDICTION - UNJUSTIFIED DISMISSAL – Whether person intending to work – Applicant alleged offered and accepted employment – Respondent denied making offer and considered exchange about terms and conditions a general discussion about position – Alleged later attempted to contact applicant, and when he did not respond, it appointed someone else – Applicant did not accept respondent mailed documents and submitted it simply changed its mind and failed to advise him – Respondent sought employee in response to new contract with client – At date of alleged offer contract not finalised – Unlikely respondent would make express offer at that time – Not made clear to applicant that job description being provided to other candidates – Situation exacerbated by parties differing use of “would” e.g. applicant indicated “would accept” salary, which respondent took as indication of interest in position, not acceptance of offer – Authority of view miscommunication led to problem, rather than change of mind on respondent’s part – No offer and acceptance – No employment relationship created - Gardener

**Result:** Application dismissed ; Costs reserved

### ***Feo & Ors v Technology Ucan Trust Ltd***

11 Oct 2007, R A Monaghan, AA 316/07, (11 pages)

JURISDICTION – Whether employees or independent contractors – Respondent disputed status of second, third, fourth and fifth applicants - Applicants responded to broadly-worded advertisements offering opportunity to earn specified sum of money per week, with no experience necessary – Signed standard ‘independent agent agreement’ indicative of contracting relationship – Written agreement more than an attempt to label arrangement and given weight as genuine reflection of parties’ intentions - Respondent exercised relatively high degree of control but this appeared to flow from applicants’ lack of experience and did not outweigh freedoms that were also conferred – Integration test not helpful – Most applicants did not appear to approach work as if in business on own account, however not because of limits in agreements – No employment relationship – Respondent directed to mediation in respect of grievance raised by first applicant - Sales

**Result:** Application dismissed ; Orders accordingly ; Costs reserved

### ***Hoffman v AJ & MR Smythe***

16 Sep 2008, J Scott, AA 324/08, (8 pages)

JURISDICTION – Applicant claimed unjustifiably dismissed – Respondent argued final binding and enforceable settlement of employment relationship problem reached through mediation with Department of Labour Mediator – Authority found must be live issue between parties for Authority to have jurisdiction – Authority found applicant present for bulk of negotiations – Found settlement reached to resolve employment relationship problems – Found settlement recorded in writing and signed by authorised representatives – Authority not satisfied was miscommunication between applicant and representative – Found regardless, would not invalidate agreement as representative had express authority to represent applicant – Parties planned on having mediator sign agreement to ensure was binding and enforceable – However, mediator did not sign agreement so settlement not enforceable under s151 Employment Relations Act 2000 (“ERA”) – No question that specific performance provision unenforceable – Found settlement arrived at could be described as variation of employment agreement – Pursuant to s161(1)(r) ERA, Authority found employment relationship problem lodged by applicant was resolved in settlement agreement, so no live dispute between parties - Senior farm worker

**Result:** Application dismissed ; No order for costs

***Hughes and Anor v Upper Hutt Cosmopolitan Club Inc.***

*17 Sep 2008, G J Wood, WA 120/08, (11 pages)*

JURISDICTION – First issue whether Part 6A Employment Relations Act 2000 (“ERA”) protections extend beyond vulnerable employees to owner/operators – Second issue whether applicants were employees, or whether employment relationship was sham and/or applicants in business on own account – Respondent had catering contract with Hughes Catering Limited (“HCL”), of which applicants were sole shareholders and directors – Applicants also employees of HCL – Respondent terminated contract with HCL – Applicants claimed Part 6A ERA applied, providing continuity of employment to employees providing food catering services affected by restructuring where their work becomes responsibility of new employer – Respondent argued that must be “vulnerable employees” to qualify under Schedule 1A ERA – Authority found Parliament intended process to cover certain categories of work, not categories of employees – Authority found majority of applicants’ duties constituted food catering services - Also found not excluded from coverage by Schedule just because other duties included company related work – Respondent argued did not consider applicants to be employees of HCL - Authority found relationship between HCL and applicants not that of employer and employee – Arrangement entered into between applicants and their company not a sham – However applicants in business on own account, and not employees – Applicants not employees for purposes of Part 6A ERA – No jurisdiction

**Result:** Application dismissed ; Costs reserved

***Jurgens v Martin Engineering (PN) Ltd***

*19 Oct 2007, D Asher, WA 141/07, (7 pages)*

JURISDICTION – Whether employee - Whether applicant unconditionally offered employment - Applicant claimed person intending to work – Respondent denied employment relationship existed – Applicant interviewed for vacancy – Claimed offered and accepted employment – Respondent contended any offer subject to satisfactory reference check – Applicant required to fill in job seekers form and given draft employment agreement containing start date – While initially interested in employing applicant, as consequence of discussion with referees respondent decided not to offer him employment – Credibility finding in favour of respondent – Any employment offer conditional on referee check – Applicant remained job applicant, not employee – No jurisdiction

**Result:** Application dismissed ; Costs reserved

***Teaukura v Richmond Construction Ltd***

*24 Sep 2007, D King, AA 296/07, (5 pages)*

JURISDICTION – Whether employee or independent contractor – No written employment agreement – Head of respondent not directly involved in applicant’s engagement and claimed unaware of arrangement’s details - Applicant alleged told would be paid same as co-worker who recruited him – No discussion about employment status - Respondent claimed all staff contractors – Applicant fully integrated into respondent’s business and told when and how to work – Not in business in on own account – Applicant employee - UNJUSTIFIED DISMISSAL – Applicant unwell and obtained medical certificate – On date of expected return advised respondent still unwell - Employment terminated – Respondent alleged applicant hungover, not unwell, based on information from co-worker who attended work drunk – Respondent acted on information given by intoxicated worker without giving applicant opportunity to respond – Dismissal unjustified – Remedies – Respondent later told co-worker applicant could return to work – Applicant accepted received message but did not return as wanted to hear it from respondent – Failure to mitigate loss – Entitled to lost wages only for week before offered re-employment - Hammer hand

**Result:** Application granted ; Reimbursement of lost wages (\$539)(1 week) ; Compensation for humiliation etc (\$2,000) ; Costs reserved ; Disbursements in favour of applicant (\$70)(Filing fee)

## Penalty - Employment Relations Act 2000

### ***Green v Nouveau Holdings Ltd***

*2 Oct 2007, R A Monaghan, AA 302/07, (6 pages)*

ARREARS OF WAGES AND HOLIDAY PAY – No appearance by respondent – Unlawful deduction from wages as no written authority – Authority calculated arrears of wages and holiday pay due and owing, reduced by amount applicant admitted owed respondent – Claim for overtime declined as parties had agreed to recognise overtime with time off in lieu – Applicant had not taken accumulated lieu time before resigned but, without more, not entitled to payment – Applicant's other claims for reimbursement and equipment rental disallowed as no evidence or no agreement - PENALTY – Breach of employment agreement – Breach of Employment Relations Act 2000 - Applicant disputed employment agreement presented by respondent, claimed no agreement finalised – Information insufficient to support penalty for failure to supply written agreement – Apparently unreliable wage payments capable of amounting to breaches of employment agreement – Matter addressed in a global way as notional single failure to pay wages – Salesperson

**Result:** Application granted ; Arrears of wages (\$3,415.03)(nett) ; Arrears of holiday pay (\$844.80)(gross) ; Penalty (\$500)(Payable to Crown) ; Disbursements in favour of applicant (\$70)(Filing fee)

# Personal Grievance - Dismissal - Employment Relations Act 2000

## ***Bartley v Grasshoppers Lawnmowing Services Ltd***

*3 Oct 2007, R A Monaghan, AA 303/07, (9 pages)*

JURISDICTION - UNJUSTIFIED DISMISSAL – Whether person intending to work – Applicant alleged offered and accepted employment – Respondent denied making offer and considered exchange about terms and conditions a general discussion about position – Alleged later attempted to contact applicant, and when he did not respond, it appointed someone else – Applicant did not accept respondent mailed documents and submitted it simply changed its mind and failed to advise him – Respondent sought employee in response to new contract with client – At date of alleged offer contract not finalised – Unlikely respondent would make express offer at that time – Not made clear to applicant that job description being provided to other candidates – Situation exacerbated by parties differing use of “would” e.g. applicant indicated “would accept” salary, which respondent took as indication of interest in position, not acceptance of offer – Authority of view miscommunication led to problem, rather than change of mind on respondent’s part – No offer and acceptance – No employment relationship created - Gardener

**Result:** Application dismissed ; Costs reserved

## ***Francis v Avalon Businesses Ltd***

*30 Oct 2007, J Scott, AA 340/07, (11 pages)*

UNJUSTIFIED DISMISSAL – Whether dismissed or abandoned employment - Significant dispute of facts – Applicant alleged employed only as manager – Authority found applicant intended to deceive it when denied working as masseuse – Credibility finding in favour of respondent – Applicant initially worked as masseuse and paid in cash – Later she convinced respondent to hire her as manager to raise takings and shift business focus to prostitution – Earnings did not increase and parties agreed applicant would work part time for lower salary – When respondent later made contact to discuss very low takings, applicant became aggressive and threatened respondent – Following day applicant, other employees, and clients did not show up – Probable applicant removed contact details and texted employees and clients that business closed – No arrears owing – Applicant abandoned employment and took steps to destroy business - No dismissal – Madame

**Result:** Application dismissed ; Costs in favour of respondent (\$1,500) ; Disbursements (\$582)

## ***May v Majac Trust***

*28 Oct 2007, J Crichton, CA 126/07, (7 pages)*

UNJUSTIFIED DISMISSAL – Whether dismissed or resigned - Applicant alleged respondent visited his farm accommodation and summarily dismissed him – Respondent claimed applicant resigned during earlier conversation – Claimed applicant asked for Farm Manager to be excluded from property applicant worked on and quit when request refused – Applicant contended made no such request and did not resign - On balance of probabilities, Authority concluded applicant became angry or agitated about not getting own way and quit as a consequence – Whether, having received resignation in those circumstances, respondent did enough to allow parties to reconsider positions – Respondent visited farm to deal with consequences of earlier resignation – Evidence suggested applicant aware had “overstepped the mark a little” in earlier conversation and visit inevitable consequence of earlier behaviour – Authority satisfied applicant accepted he ought to leave – Applicant resigned – No dismissal – Farm worker

**Result:** Application dismissed ; Costs reserved

**McGillivray v Godfreys Bakery**

29 Oct 2007, J Crichton, CA 125/07, (9 pages)

UNJUSTIFIED DISADVANTAGE – Business sold and applicant alleged lost seniority to new owner, who pestered him with phone calls - Also complained about new method of payment but issue never raised with respondent – Respondent alleged applicant's behaviour and performance decreased markedly and attempts to engage him unsuccessful as he refused to change - Applicant denied problems with performance or talking about it with respondent – Claimed work deliberately taken away from him and given to others – Applicant raised personal grievance and parties attended mediation – Claimed as result of confrontational nature of mediation he felt worse and resigned – Respondent's evidence preferred – No unjustified action in relation to applicant's pay, hours or ability to take bereavement leave - No unjustified disadvantage - UNJUSTIFIED DISMISSAL – Constructive dismissal – Interim determination struck out part of statement of problem that appeared to provide sole basis for constructive dismissal claim – Claim now advanced on different basis – Altercation between applicant and owner, who readily admitted she was in wrong – Appeared applicant so unnerved by exchange that when later mediation also unnerving he felt had to resign – No reasonable basis for constructive dismissal – No disadvantage found so same facts could not provide grounds for constructive dismissal - Not inappropriate for employer to seek to address performance deficits in sheltered environment of mediation conducted by Mediation Service - Must be competent for employer to raise matters with employee in that protective environment and to not be subject to threat of finding of constructive dismissal exclusively for that reason – No constructive dismissal – Baker  
**Result:** Application dismissed ; Costs reserved

**Meredith v Gengy's Investments Ltd**

25 Sep 2007, A Dumbleton, AA 298/07, (7 pages)

UNJUSTIFIED DISMISSAL – No written agreement – Applicant promoted to manager on three month trial period – Unclear whether employment permanent or fixed term – Respondent intended fixed term to assess suitability for management position – Not a genuine reason for fixed term – Respondent also claimed received complaints about applicant's performance – Did not provide clear standards or deadlines - Three month trial not fair and applicant's conduct did not give respondent sufficient grounds to summarily dismiss him – Dismissal unjustified – Restaurant manager

**Result:** Application granted ; Reimbursement of lost wages (\$5,333)(2 months) ; Compensation for humiliation etc (\$3,000) ; No order for costs

**Neil v Lammas**

1 Oct 2008, J Scott, AA 354/08, (6 pages)

UNJUSTIFIED DISMISSAL – No appearance by respondents – Vague oral employment agreement included provision for applicant's accommodation – Applicant claimed after two weeks employment, asked respondent for help when encountered problem herding cows – Respondent swore at and criticised applicant, and told applicant to leave farm – Applicant went inside shed - Respondent yelled at applicant through shed window and told applicant to leave accommodation within two days – Two days later applicant attempted to reconcile relationship – Respondent again swore at applicant – Authority found words and actions of respondent constituted dismissal – Found respondent did not discharge burden of justifying dismissal – Applicant unjustifiably dismissed – Applicant out of work for four weeks – Applicant entitled to lost remuneration, compensation and loss of benefit of accommodation - Farm manager

**Result:** Application granted ; Reimbursement of lost wages (\$3,846.15) ; Loss of benefit (accommodation)(\$480) ; Compensation for humiliation etc (\$3,000) ; Costs reserved

***Siataga v McKellar Property Services Wellington Ltd***

*6 Aug 2007, H Doyle, CA 91/07, (10 pages)*

UNJUSTIFIED DISMISSAL – No appearance for respondent – Matter determined with agreement of respondent’s liquidator – Identity of employer raised – Labour Inspectors and Inland Revenue Department of view employer correctly identified – Authority found limited evidence showed applicant employed by respondent – Respondent argued applicant’s resignation was accepted but would occur later – Applicant had told respondent if changes to work not made, would resign – Respondent did not reply to applicant’s satisfaction, so applicant gave notice of resignation period – Respondent replied wanted applicant to stay on until client’s contracts complete – Applicant considered resignation put to one side and stayed on – Employment continued past end of client’s contracts – Authority found applicant’s resignation not accepted by respondent – Found agreement applicant would continue working until later time – Found although was discussion about employment continuing until end of one client’s contracts, applicant continued working beyond that date – Found respondent’s reliance on earlier resignation which had not been accepted breached duty of good faith – Found was discussion about applicant reducing Area Manager hours, but change not implemented in proper process and no evidence to support genuine redundancy – Found fair and reasonable employer would have discussed reduction of hours with applicant and gone through proper process – Dismissal unjustified – Remedies – Applicant unable to work for over a year – Applicant’s employment may not have continued for further full year as respondent lost number of contracts – Awarded six months lost wages - No contributory conduct – Found dismissal had devastating effect on applicant – Applicant unable to leave house for several months due to depression – Applicant’s household suffered significant financial difficulties – Respondent’s callous dismissal disregarded applicant’s hard work, loyalty and dedication – High compensation award appropriate - ARREARS OF WAGES – Applicant claimed unpaid wages and holiday pay – Authority found Labour Inspectors correctly calculated holiday pay owing – Authority found applicant underpaid - Interest on arrears awarded – COSTS – Applicant legally aided – Applicant entitled to costs for short meeting, plus filing fee - Commercial Cleaning Area Manager

**Result:** Application granted ; Reimbursement of lost wages (\$17,100) ; Arrears of wages (\$269.20)(Interest 10%) ; Arrears of holiday pay (\$1,993.53)(Interest 10%) ; Compensation for humiliation etc (\$15,000) ; Disbursements in favour of applicant (\$70)(filing fee) ; Costs in favour of applicant (\$1,500)

***Teaukura v Richmond Construction Ltd***

*24 Sep 2007, D King, AA 296/07, (5 pages)*

JURISDICITON – Whether employee or independent contractor – No written employment agreement – Head of respondent not directly involved in applicant’s engagement and claimed unaware of arrangement’s details - Applicant alleged told would be paid same as co-worker who recruited him – No discussion about employment status - Respondent claimed all staff contractors – Applicant fully integrated into respondent’s business and told when and how to work – Not in business in on own account – Applicant employee - UNJUSTIFIED DISMISSAL – Applicant unwell and obtained medical certificate – On date of expected return advised respondent still unwell - Employment terminated – Respondent alleged applicant hungover, not unwell, based on information from co-worker who attended work drunk –Respondent acted on information given by intoxicated worker without giving applicant opportunity to respond – Dismissal unjustified – Remedies –Respondent later told co-worker applicant could return to work – Applicant accepted received message but did not return as wanted to hear it from respondent –Failure to mitigate loss – Entitled to lost wages only for week before offered re-employment - Hammer hand

**Result:** Application granted ; Reimbursement of lost wages (\$539)(1 week) ; Compensation for humiliation etc (\$2,000) ; Costs reserved ; Disbursements in favour of applicant (\$70)(Filing fee)

## Personal Grievance - Dismissal - Misconduct - Employment Relations Act 2000

### ***Beckett v Whakatu Wool Scour Ltd***

*21 Aug 2007, D Asher, WA 115/07, (8 pages)*

UNJUSTIFIED DISMISSAL – Serious misconduct – Applicant under verbal warning for lateness – Two disciplinary meetings held – Second disciplinary meeting culminated in dismissal – Dismissal letter stated reasons being three days absence, notification of absence on those days, sick leave record, impact on business and staff morale and poor performance – Respondent argued applicant lied, intentionally disrupted operations, and did not acknowledge or agree to change high absence rate and poor communication – Issue whether fair and reasonable employer would have dismissed applicant for reasons set out in dismissal letter – Authority found applicant on sufficient notice of employer's concerns about timekeeping, sick leave, work performance and impact of those on staff morale – However, found respondent did not properly satisfy itself that applicant's performance below standard, in order to justify summary dismissal for serious misconduct – Found lateness only one or two minutes – Found one day of absenteeism was suspension, not sick leave – Applicant fulfilled contractual requirements to notify in advance of absence where ill – No requirement applicant must undertake overtime as directed – Found applicant's comments that thought would be dismissed and had prospects for new job not misconduct and irrelevant to substantive issues – No evidence applicant's absence intended to disrupt respondent – Respondent obliged to follow own House Rules by issuing final warning regarding improving attitude and work performance – Dismissal unjustified – Remedies – Applicant found alternative employment eight weeks later – Authority found applicant self-imposed limits on employment options – Applicant entitled to one month's lost wages – Found little evidence of hurt and humiliation – \$5,000 compensation appropriate – Applicant's behaviour regarding timekeeping problems and performance close to contributory conduct – However, having regard to modest remedies awarded, respondent's obligations to follow own disciplinary process and finding that applicant should only have received final warning, no contributory conduct appropriate

**Result:** Application granted ; Reimbursement of lost wages (4 weeks) ;  
Compensation for humiliation etc (\$5,000) ; Costs reserved

### ***Hall v Finlay & Associates Ltd t/a Bobby's***

*3 Oct 2007, L Robinson, AA 306/07, (8 pages)*

UNJUSTIFIED DISMISSAL – Misconduct - No appearance by respondent – Applicant worked to supplement benefit – Worked 14 hours per week and paid \$80 gross per week, the upper limit before domestic purposes benefit would abate – Applicant noticed shortfall in float and recorded deficit – Respondent subsequently visited her at home and claimed video footage showed she took missing money – Applicant alleged dismissed at this time – Viewed surveillance footage and denied it showed her taking money, but claimed respondent said as money still missing she was still dismissed – Applicant raised personal grievance and sought further information from respondent – During subsequent exchange respondent denied applicant dismissed – Claimed only suspended while matter investigated, although conclusion was now dismissal – Applicant dismissed when visited by respondent – What followed was attempt by respondent to revise history - Complete absence of fair process – Dismissal so unfair respondent not entitled to honestly believe applicant stole money – Dismissal unjustified – Bar manager

**Result:** Application granted ; Reimbursement of lost wages (\$800)(10 weeks) ;  
Compensation for humiliation etc (\$8,000) ; Disbursements in favour of applicant (\$70)(Filing fee)

**MacDonald v Brake & Transmission New Zealand Ltd**

17 Oct 2007, M Ulrich, AA 326/07, (10 pages)

UNJUSTIFIED DISMISSAL – Misconduct – Applicant dismissed for misuse of company vehicle – Respondent received number of complaints about applicant's use of vehicle from public, customers and police – Dismissed after disciplinary process when further customer alleged applicant "tailgated" him – Applicant claimed drove carefully and lawfully and complaints baseless – Respondent relied on earlier final warning issued to applicant – Respondent's concerns clearly notified to applicant and Authority satisfied warning justified and fairly relied on during disciplinary investigation – Applicant advised of new complaint and that disciplinary process would take place – Respondent declined request for mediation as still investigating complaint – Not unreasonable given early stage of investigation – Applicant's allegations of ulterior motivation rejected - Dismissal justified - Sales

**Result:** Application dismissed ; Costs reserved

**Martin v Cook & Galloway Engineers Ltd**

5 Oct 2007, V Campbell, AA 309/07, (9 pages)

UNJUSTIFIED DISMISSAL – Misconduct - Applicant involved in confrontation with co-worker – Both men dismissed - Respondent aware of deteriorating relationship between applicant and co-worker but did not respond to numerous complaints laid by both men during employment – Investigated altercation and concluded co-worker acted in threatening manner, but applicant did not diffuse situation, instead exacerbated it by threatening co-worker with sparks from grinder - Co-worker subsequently convicted of assault with intent – As result of injury applicant on leave and received ACC – Called to what he believed was investigation into co-worker's actions, had no idea could face dismissal as result of explanation – Respondent conceded did not meet all procedural fairness requirements - While applicant breached health and safety obligations by showering co-worker in sparks, fair and reasonable employer would have taken into account co-worker's actions in moving into area where grinder being used, especially as armed with steel bar – Those actions, plus earlier threats and unmerited accusations tipped balance of blame in favour of co-worker – Respondent had obligation to take all practicable steps to ensure co-worker did nothing to cause harm or injury to applicant at work - Failed to provide safe work environment – Dismissal unjustified – Remedies – Contributory conduct 10 percent

**Result:** Application granted ; Reimbursement of lost wages (\$4,403.22 reduced to \$3,962.90) ; Compensation for humiliation etc (\$3,000 reduced to \$2,700) ; Costs reserved

**Metua v Independent Liquor (NZ) Ltd**

31 Oct 2007, A Dumbleton, AA 345/07, (6 pages)

UNJUSTIFIED DISMISSAL – Serious misconduct – Applicant verbally abused and physically assaulted by co-worker – Reported incident and allowed to go home – As he left, intentionally damaged co-worker's car – Although respondent aware of damage did not raise it with applicant when investigated assault, and he did not volunteer information – Co-worker dismissed and respondent began investigating damage to car – Applicant admitted damage and arranged to pay for repairs – Respondent concluded actions serious misconduct and dismissed him – Reasonable for respondent to conclude applicant had no reasonable excuse – Applicant no longer in harms way when retaliated and no reason to suppose complaint not taken seriously, or would not be investigated properly – Respondent entitled, and had responsibility, to keep premises safe and secure from damage caused from within - Also had interest in discouraging reasonably large work force from committing acts of revenge or retaliation in workplace - Dismissal justified

**Result:** Application dismissed ; Costs reserved

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

### ***Taylor v Mastfix Maintenance Ltd***

*19 Oct 2007, D Asher, WA 140/07, (6 pages)*

UNJUSTIFIED DISMISSAL – Poor performance - No appearance by respondent – Applicant alleged dismissed when told work had run out - Respondent claimed applicant casual employee and dismissed for performance reasons – Authority concluded permanent employee – Respondent submitted documents showing warnings allegedly given to applicant – Applicant denied receiving any warnings - Credibility finding in favour of applicant strengthened by respondent's failure to appear and provide evidence as previously agreed – Dismissal without warning or consultation, a significant breach of s4(1A) Employment Relations Act – Dismissal unjustified - Remedies – Applicant claimed unable to pay mortgage – Acknowledged did not own house he lived in, but submitted relative relied on him to make mortgage payments - ARREARS OF HOLIDAY PAY – Applicant owed for annual leave and public holidays – COSTS – Length of investigation meeting not specified - Applicant sought exemplary costs of \$5,000 on grounds of respondent's conduct, in particular manufacture of evidence regarding warnings - Claimed respondent's absence from investigation meeting was tacit admission of grievance – Appropriate costs \$3,000 – Labourer

**Result:** Application granted ; Reimbursement of lost wages (\$1,506)(3 weeks) ; Compensation for humiliation etc (\$10,000) ; Arrears of holiday pay (\$1,004)(Public holidays) ; (\$1,100)(Annual leave) ; Costs in favour of applicant (\$3,000) ; Disbursements (\$100)

## Personal Grievance - Dismissal - Redundancy - Employment Relations Act 2000

### ***Barnett v Brooklyn Holdings Ltd & Ors***

*15 Oct 2007, P R Stapp, WA 138/07, (10 pages)*

UNJUSTIFIED DIMSISAL – Redundancy - Identity of employer – Applicant initially employed by first respondent, which was owned by third respondent – Alleged subsequently informed third respondent intended to rearrange business and change nature of employment relationships – Applicant claimed also told job secure and given employment agreement for second respondent, which he signed and returned – Respondent submitted did not receive signed copy and document only draft proposal, not offer – Applicant later called to meeting and told terminated – Claimed only explanation offered to him related to performance – Respondent contended applicant aware less finishing work required and agreed to leave in exchange for two weeks pay – Authority accepted while first respondent continued to do construction work for a time after dismissal, less finishing work and applicant would not have returned to tools – Respondent claimed attempts at redundancy process cut short when applicant decided to leave – Agreement signed by applicant not determinative of offer as not signed by employer and unclear how applicant obtained it – Authority satisfied performance not significant issue considering restructuring evidence – Applicant left when role changed, work due to slow down and declined to go back on tools – No dismissal – Finishing manager

**Result:** Application dismissed ; Costs reserved

### ***Byford v Newdick & Anor***

*3 Oct 2007, V Campbell, AA 304/07, (7 pages)*

UNJUSTIFIED DISMISSAL – Redundancy - Respondent received WINZ subsidy for applicant – Respondent reviewed farm structure as struggling with cash flow – Informed applicant of proposal and arranged meeting – Around same time applicant suffered workplace injury – On balance of probabilities Authority satisfied applicant given appropriate duties while injured – At meeting discussed injury and possibility of redundancy – Alternative position had lower wage and unattractive to applicant – Applicant continued at work until had altercation with respondent - Given medical certificate due to stress – Next day respondent visited applicant at farm house and informed him position disestablished – Applicant to work out two weeks notice - Following day applicant threatened respondent, who contacted police and obtained trespass notice against applicant – Applicant called to disciplinary meeting – Told incident being treated as serious misconduct and dismissal possible – Applicant advised unable to attend work or meeting for remainder of notice period – Respondent wrote to applicant advising relationship irrevocable broken and respondents feared for lives – Gave applicant notice under Residential Tenancy Act 1986 to vacate premises – Also provided list of duties for final week as requested by applicant – Genuine redundancy – Applicant provided with opportunity for input into decision – Dismissal justified – Assistant farm manager

**Result:** Application dismissed ; No order for costs

### ***Redward v Adams Transport Ltd***

*8 Oct 2007, D Asher, WA 135/07, (8 pages)*

UNJUSTIFIED DISMISSAL – Redundancy – Applicant alleged enough suitable work to keep him employed – Respondent claimed originally intended applicant to work as driver but later discovered he was “paint and panel” man called to drive as last resort – Submitted did not have sufficient paint and panel work to justify employment, also claimed insufficient driving work – No consultation before dismissal – Respondent alleged also had performance concerns but never put to applicant – Submitted did not think applicant retrainable due to age – Conceded procedural deficiencies in redundancy process – Alleged acted genuinely and asked Authority to have regard to size and absence of HR division

– Dismissal substantively unjustified as respondent's claim had insufficient paint and panel work in clear conflict with employment agreement that stated applicant employed as driver – No objective evidence applicant surplus to requirements – Claims regarding applicant's performance advanced after termination not credible, although relied on negative views when decided to dismiss – Breach of obligation to raise concerns with employee – Obligation all the greater in present situation given respondent's admitted view it saw applicant as health and safety risk, including while driving – Respondent discriminated against applicant on basis of age - Profound breaches of statutory obligations – Redundancy not genuine – Dismissal unjustified - Remedies – Although already found alternative employment, applicant sought reinstatement – Not practicable as respondent's attitude left Authority with no confidence similar employment relationship problems would not reoccur – Applicant better placed to continue with new employment – Circumstances of termination posed greater problems in respect of efforts to find new employment – Given complete failure to consult and highly critical claims advanced by the Company after the termination in an unmeritorious attempt to justify termination, \$15,000 compensation appropriate - Truck driver

**Result:** Application granted ; Reimbursement of lost wages (\$12,191.10 less earnings) ; Compensation for humiliation etc (\$15,000) ; Costs reserved

## **Personal Grievance - Unjustified Disadvantage - Employment Relations Act 2000**

### ***Dalton v Awhina Wahine Inc***

*15 Oct 2007, P R Stapp, WA 139/07, (8 pages)*

UNJUSTIFIED DISADVANTAGE – Applicant alleged disadvantaged when contract not properly renewed and performance reviewed – Applicant initially employed for six months on fixed term – Employment agreement contained end date but not way agreement would end or reasons for fixed term – During employment parties discussed renewing contract on better terms – Applicant prepared and signed draft agreement and sent to respondent – Respondent considered document contained changes not agreed to – Original term ended, some changes relating to increased hours and pay implemented, but no new agreement reached – During further discussions applicant alleged respondent revoked agreement she believed had been reached – Applicant also disagreed with performance assessment - Raised personal grievance and respondent subsequently gave her notice employment would end in accordance with second fixed term – Authority not satisfied parties agreed to payment of bonus – Applicant's claim increased pay and hours revoked by respondent rejected – New terms continued during negotiations for new agreement – Difference between parties regarding changes to employment agreement more than likely due to genuine misunderstanding – Although performance review delayed, not unjustified and no apparent disadvantage to applicant – Although dispute over end of employment, applicant never raised grievance regarding dismissal and no causal nexus to apply s122 Employment Relations Act 2000 – Parties had common belief employment ended according to purported fixed term – No unjustified disadvantage - Office support

**Result:** Application dismissed ; Costs reserved

### ***Griffiths v New Zealand Post Ltd***

*30 Oct 2007, P R Stapp, WA 146/07, (9 pages)*

UNJUSTIFIED DISADVANTAGE – Discrimination - Applicant diagnosed with medical conditions brought on by wearing helmet at work – Parties discussed options in regard to contractual obligation to wear helmet – Applicant received certificate of exemption from requirement to wear cycle helmet from Land Transport Safety Authority and in 1994 respondent agreed to let him work without helmet – In 2006 respondent revisited issue and decided letting applicant cycle without helmet unacceptable risk – Other delivery options discussed and trial walking round proposed – After trial applicant not permitted to return to cycle round without helmet – Applicant sought to be reinstated to cycling round – Alleged unjustifiably disadvantaged and discrimination - Although applicant had helmet exemption it did not prevent respondent exercising discretion about health and safety under collective employment agreement – Respondent acted as fair and reasonable employer – Provided options to try and meet applicant's circumstances – Although permitted him to ride without helmet he was on notice decision subject to review – Respondent entitled to act cautiously to protect itself in regard to health and safety obligations and ACC provider status - Although process not ideal, respondent did not deliberately put applicant on walking delivery by masquerading it as trial – No evidence to support discrimination claim – No unjustified disadvantage – No grounds for compliance order - Postie

**Result:** Application dismissed ; Costs reserved

### ***McGillivray v Godfreys Bakery***

*29 Oct 2007, J Crichton, CA 125/07, (9 pages)*

UNJUSTIFIED DISADVANTAGE – Business sold and applicant alleged lost seniority to new owner, who pestered him with phone calls - Also complained about new method of payment but issue never raised with respondent – Respondent alleged applicant's behaviour and performance decreased markedly and

attempts to engage him unsuccessful as he refused to change - Applicant denied problems with performance or talking about it with respondent - Claimed work deliberately taken away from him and given to others - Applicant raised personal grievance and parties attended mediation - Claimed as result of confrontational nature of mediation he felt worse and resigned - Respondent's evidence preferred - No unjustified action in relation to applicant's pay, hours or ability to take bereavement leave - No unjustified disadvantage - UNJUSTIFIED DISMISSAL - Constructive dismissal - Interim determination struck out part of statement of problem that appeared to provide sole basis for constructive dismissal claim - Claim now advanced on different basis - Altercation between applicant and owner, who readily admitted she was in wrong - Appeared applicant so unnerved by exchange that when later mediation also unnerving he felt had to resign - No reasonable basis for constructive dismissal - No disadvantage found so same facts could not provide grounds for constructive dismissal - Not inappropriate for employer to seek to address performance deficits in sheltered environment of mediation conducted by Mediation Service - Must be competent for employer to raise matters with employee in that protective environment and to not be subject to threat of finding of constructive dismissal exclusively for that reason - No constructive dismissal - Baker  
**Result:** Application dismissed ; Costs reserved

***Oosthuysen v Humes Industries Ltd***

*2 Oct 2007, J Crichton, CA 119/07, (10 pages)*

UNJUSTIFIED DISADVANTAGE - Applicant withdrew constructive dismissal claim as resigned before matters complained of occurred - Applicant suffered work related injury after respondent accepted resignation - Obtained two medical certificates as first medical clinic referred him to second centre - First certificate stated applicant fit to return to work - Second indicated applicant required week off work - Respondent denied receiving second certificate - Third certificate, with later date, faxed to respondent by first medical centre when applicant began treatment - Respondent confused by change to date and attempted to contact applicant - Applicant alleged did not return calls as messages threatening - Applicant's claim that subject to harassment and rudeness when returned to workplace denied by respondent - Authority not persuaded respondent's attempts to contact applicant constituted harassment - On balance of probabilities, applicant's recollection of providing second certificate to respondent mistaken - Respondent's behaviour inconsistent with knowledge medical advice changed - Respondent's actions to try to establish what was going on reasonable in circumstances - Applicant continued to work out three months notice - On balance, suggestion of humiliation or harassment unbelievable - No disadvantage

**Result:** Application dismissed ; Costs reserved

## Practice & Procedure - Employment Relations Act 2000

### ***Dickson v Wesley Community Action Trust***

*15 Oct 2007, P R Stapp, WA 137/07, (12 pages)*

PRACTICE AND PROCEDURE – Employment status - Whether homemaker or agent - Respondent had agreement with CYFS to provide foster care services – Agreement stated respondent would employ staff, although could engage personnel “on contract” – Caregivers required to provide care in own homes, meet prescribed obligations, attend training and be on call 24 hours – Parties agreement stated contracting relationship – Respondent described payment as reimbursement for costs associated with care, not wages – Claimed applicant had high level of discretion on how role carried out – Existence of provider agreement meant applicant not agent - Role clearly fit into category of “homemaker” – Applicant provided exclusive commitment to role, including use of his own home – Respondent had considerable control and rights and obligations could not be assigned – Applicant integral to respondent’s business and not able to profit from work - Alternatively respondent argued contracting relationship – If Authority wrong about applicant being homemaker, would still consider him employee, not contractor – Respondent’s alternative argument applicant volunteer rejected as applicant expected to be paid – Parties could progress to next step in resolving matter - Caregiver

**Result:** Question answered in favour of applicant ; Costs reserved

### ***Dickson v Wesley Community Action Trust***

*16 Sep 2008, P R Stapp, WA 72A/08, (2 pages)*

PRACTICE AND PROCEDURE - Application for removal to Employment Court - Respondent requested removal of proceedings to Employment Court on matter of determining what constituted “work” and whether applicant paid at prescribed rate under Minimum Wage Act 1983 - Personal grievance matter would remain before Authority - Two Authority determinations issued which involved separate proceedings but were related to present case - Those determinations likely to be challenged - Found matter important and involved question of law - However, lateness of removal application and costs involved weighed against removal - Also proceedings respondent sought to have removed were continuation of employment relationship problem which had already been heard by Authority - Authority considered parties would benefit from proceeding with investigation meeting - Application for removal declined

**Result:** Application dismissed ; Costs reserved

### ***Hodgson v Parentline Charitable Trust***

*7 Sep 2007, J Scott, AA 114D/07, (5 pages)*

PRACTICE AND PROCEDURE - Application to strike out counterclaim seeking repayment of allegedly unauthorised salary increase – Strike out application filed and addressed part way through investigation meeting on substantive issues – Respondent’s submissions on application received after hearing on all matters concluded – Applicant submitted respondent’s case founded on fundamental error of reasoning drawn from documents founding claim and did not meet requisite standard of proof – Applicant did not establish counterclaim could not succeed – Submissions established two opposing views of claim

- Fact all evidence already heard confirmed Authority’s view matter should be dealt with as part of overall task of considering and arriving at findings and determinations in matter including credibility findings - Authority also had regard to broad powers to investigate a matter before it, untroubled by technicalities or the way parties have described matter, with a view to resolving employment relationship problem on the substantial merits – Application declined

**Result:** Application dismissed ; Costs reserved

***Jenkins v New Zealand Amalgamated Engineering, Printing and Manufacturing Union and Anor***

*1 Oct 2008, P Montgomery, CA 147/08, (3 pages)*

PRACTICE AND PROCEDURE - Application for removal to Employment Court - Applicant sought compliance order, arrears of wages, and penalty for breach of good faith provisions of s4(6) and s4A Employment Relations Act 2000 ("ERA") - Authority found significant legal issues likely to arise in seeking to establish nexus between breach of terms and conditions of employment and breaches of ERA good faith provisions - Another issue was application of term "not inconsistent" with terms of collective agreement - Decision from Court would assist parties materially - Some elements which constituted test case - Matter removed to Court

**Result:** Application granted ; Costs reserved

***Public Service Association v Bay of Plenty District Health Board & Ors***

*3 Oct 2007, V Campbell, AA 305/07, (13 pages)*

DISPUTE – Parties disagreed over application of multi employer collective agreement ("MECA") - Clauses concerned salary scales and pay progression for various roles at respondents – Dispute arose because nationally agreed terms of settlement ("NTS"), signed off by all DHBs and applicant, subsequently altered when regional MECA put together – Changes significantly affected meaning of NTS and not ratified or rejected by applicant's members – Purpose of NTS to provide some common terms, including salary scale, across all DHBs irrespective of other conditions in MECA – Question whether MECA had effect as collective agreement due to failure to properly ratify it – Ratification meetings held before negotiations complete – Only terms and conditions ratified were those in NTS – MECA in writing and signed by all parties, although applicant should not have done so as not ratified – However, Authority prohibited from cancelling or varying collective agreement – When parties signed off on NTS intended terms would be incorporated into MECA without change – Authority deferred to terms of ratified settlement and determined appropriate pay scales for disputed classes of employees and application of progression clauses

**Result:** Questions answered ; Costs reserved

***Straume v Armour Transport Technologies Ltd***

*26 Oct 2007, D Asher, WA 144/07, (6 pages)*

PRACTICE AND PROCEDURE – Location of investigation meeting – Respondent claimed should be held in Christchurch, location closest to its head office – Applicant contended Wellington nearest to place where events giving rise to problem occurred – Applicant responsible for providing own office and worked from Havelock North – Contended loss of job meant cost of travelling would be further disadvantage – Respondent contended employment relationship problem had two parts and both events occurred in Dunedin – Submitted its financial situation should be taken into account – Authority had discretion to decide location of investigation meeting – Person lodging application required to consider which office nearest to place where events giving rise to problem occurred – No evidence to support conclusion applicant failed to genuinely and reasonable consider requirements in regulations, or that consideration illogical or vexatious – Authority satisfied it followed, fairly and reasonably, from agreement and fact applicant largely worked from home that appropriate to investigate "events" that gave rise to this employment relationship problem in office where grievance filed, i.e. Wellington - Appropriate element of compromise in parties bearing some of costs of meeting at 'midway' point - Investigation into employment relationship problem to be convened in Wellington - Made sense for parties to undertake mediation in same location on same day, or day before, investigation and direction to that effect likely

**Result:** Orders accordingly ; Costs reserved

***Tuineau v Department of Labour***

*7 Jul 2008, D King, AA 237/08, (5 pages)*

PRACTICE AND PROCEDURE – Whether respondent impliedly consented to grievances being raised outside 90 day period – Respondent conceded gave implied consent to claims relating to loss of work vehicle and increased travelling time – Respondent argued had not consented to applicant raising claims out of time relating to OOS, stress and alleged promise of health and safety officer's position – Authority found history of matter between parties included mediation, correspondence, meetings, respondent filing Statements in Reply addressing issues, agreement to set date for substantive hearing, and filing and exchanging of witness briefs – Found at no stage did respondent protest that claims outside 90 day period - Authority found history led to conclusion that respondent aware of issues and impliedly consented to grievance being raised out of time

**Result:** Question answered ; Costs reserved

***Webb v New Zealand Tramways and Public Passenger Transport Employees Union Inc***

*15 Sep 2008, A Dumbleton, AA 322/08, (4 pages)*

PRACTICE AND PROCEDURE – Application for stay of proceedings – Determination AA 221/08 ordered respondent to conduct election of national officers of union and restore National Council ("NC") as governing body - Determination AA 221A/08 varied election timetable – Applicant sought injunction to postpone election - Authority viewed application as application for stay of proceedings of earlier determinations, or orders varying those determinations – Applicant seeking investigation into Auckland Branch ("AB") elections – Investigation meeting scheduled – Present application based on applicant's perceived links between NC and AB application – Authority found one link existed, in that Union Rule 18 provided that elected union branch officers became members of NC – Authority found this link should not lead to stay of proceedings regarding NC simply because applicant challenged AB elections – Result of AB determination would not prevent NC performing its role – Vital that re-establish NC as soon as possible – Authority rejected applicant's claim that revised timetable ordered by Authority did not allow reasonable time – Found other matters raised by applicant were about electioneering and not matters for Authority – Application to suspend NC elections declined

**Result:** Application dismissed ; No order for costs

## Practice & Procedure - Consent Orders - Employment Relations Act 2000

***A v B Ltd***

*5 Sep 2008, J Crichton, CA 88A/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

