Update
Personal Grievances

Service 82 — August 2020

Commentary

Unjustifiable dismissal: Chapter 3

- An abandonment clause requiring absence for three consecutive days before coming into effect was held not to have been satisfied where an employee was rostered to return to work on 9 September and had contacted the employer on 11 September seeking to return (*123 Casino Ltd v Zuo* [2020] NZEmpC 88) (see [3.8.1]);
- Silence is not sufficient for purposes of making cancellation, or an intention to cancel, clear to another party under s 41 of the Contract and Commercial Law Act 2017 (*123 Casino Ltd v Zuo* [2020] NZEmpC 88) (see [3.8.3]);
- Where a chef's employment agreement described the relationship as being "casual", clauses dealing with holidays, sick leave, termination of employment and redundancy were held to be more consistent with "ongoing" employment (*123 Casino Ltd v Zuo* [2020] NZEmpC 88) (see [3.22.1]);
- There was no constructive dismissal where an employee resigned before an investigation into her absence from work was completed, and before any disciplinary process had commenced, the Court holding that she "must have appreciated that her decision would pre-empt any further investigation" (*Waste Management NZ Ltd v Jones* [2020] NZEmpC 73) (see [3.25A.5]);

Procedural fairness: Chapter 4

- The Court of Appeal has rejected arguments that an employer is required to apply the civil standard of proof in its consideration of whether serious misconduct has occurred and must then apply the standard of proof flexibly, so that the more serious the allegation, the more compelling the evidence required (*Cowan v IDEA Services Ltd* [2020] NZCA 239) (see [4.13A]);
- The duty to provide information under s 4(1A) was held to be triggered where it was apparent from an investigation that disciplinary action might follow, so that potentially the employer might have made a decision adversely affecting the employee's continuation in employment, but the Court emphasised the requirement to provide "relevant" information alone under subs (1A) (*Waste Management NZ Ltd v Jones* [2020] NZEmpC 73) (see [4.15.9]);

Grounds for dismissal: Chapter 5

- In a case where the employer raised the possibility that the employee had been affected by mental health concerns during her employment, unbeknownst to the

employer, and requested disclosure of the employee's relevant medical records, the Court held that any public interest in disclosure for purposes of proceedings was far outweighed by the public interest in maintaining the confidentiality of the doctor/ patient relationship (*O'Boyle v McCue* [2020] NZEmpC 51) (see [5.23.2]);

Remedies: Chapter 11

- An award in the lowest band under Archibald ($7,000) was made for the "negative impact" of dismissal where an employee had walked out when her employer failed to pay her for a purported "work trial" that preceded the signing of an employment agreement (*123 Casino Ltd v Zuo* [2020] NZEmpC 88) (see [11.17.6]);
- Application for leave to appeal was dismissed where the appellant challenged a decision in which the Employment Court had applied the broad brush "contingencies" approach when finding that an employee's employment was unlikely to have lasted more than three months beyond the actual date of termination (*Zhang v Telco Asset Management Ltd* [2020] NZCA 223) (see [11.17.6]);
- An employee who left work abruptly when the employer failed to pay her wages owed was held to have contributed to her dismissal to the extent of 20 per cent (*123 Casino Ltd v Zuo* [2020] NZEmpC 88) (see [11.48.7]).

