

Update Personal Grievances

Service 81 — July 2020

Commentary

The grievance process: Chapter 2

- Commentary on ‘Costs in the Authority’ has been updated regarding general principles and financial hardship (see [2.39]);
- Commentary on ‘The Employment Court’ has been updated regarding adjournment (*Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 35) (see [2.50]);
- Commentary on ‘The Employment Court’ has been updated regarding Calderbank offers (*Elisara v Allianz New Zealand Ltd* [2020] NZEmpC 13) (see [2.56]);

Unjustifiable dismissal: Chapter 3

- The Employment Relations (Triangular Employment) Amendment Act 2019, which provides a framework for a worker in a triangular employment arrangement to raise a grievance with her or his employer, including the ability to join the “controlling third party” to the proceedings, comes into effect on 27 June 2020 (see [3.1A]);
- Where a redundancy process was held to have been flawed in a way that could not be described as minor, the Chief Judge observed that it was best described as giving rise to an unjustified dismissal as opposed to an unjustified disadvantage (*Innovative Landscapes (2015) Ltd v Popkin* [2020] NZEmpC 40) (see [3.2]);

Grounds for dismissal: Chapter 5

- Dismissal was held to be justified when the failure of a traffic controller to comply with health and safety standards allowed traffic to proceed into a controlled area of roading (*Hong v Chevron Traffic Services Ltd* [2020] NZEmpC 44) (see [5.9.6]);

Substantive fairness: Chapter 6

- A relevant consideration is the employee’s future reliability and trustworthiness in considering past records and the relevance of employment history (*Emmanuel v Waikato District Health Board* [2019] NZEmpC 81) (see [6.6]);

Unjustifiable disadvantageous action and non-compliance: Chapter 7

- The use of a “templated” disciplinary letter, in the context of a continuing dispute around the employer’s right to require the employee to attend training, was held

to have caused unjustifiable stress and distress which would have been avoided had the issue been framed as a dispute as to the nature and extent of employment arrangements (*Gibson-Smith v Ministry of Business, Innovation and Employment* [2020] NZEmpC 62) (see [7.7.2]);

- Unjustifiable disadvantage was established where a corrections officer was seriously assaulted by a high security prisoner, where the risk of assault was foreseeable, the department had not met its staffing ratios in the unit where the plaintiff had been working at the time, and the department had failed to take steps which might have mitigated the emotional damage (*JCE v The Chief Executive of the Department of Corrections* [2019] NZEmpC 46) (see [7.10]);

Discrimination: Chapter 8

- The Employment Court does not have jurisdiction to hear claims purporting to be brought under the Human Rights Act (*Kocatürk v Zara's Turkish Ltd* [2020] NZEmpC 32) (see [8.34]);

Remedies: Chapter 11

- Six months' reimbursement plus interest was upheld by the Court of Appeal as falling within the Judge's discretion where the employee was a very senior employee managing the employer's New Zealand restaurant operations for nearly 30 years (*Rappongi Excursions Ltd v Fernandez* [2020] NZCA 37) (see [11.11.2]);
- A claim for reimbursement must be supported by evidence of loss of income (*Talbot Agriculture Ltd v Wate* [2020] NZEmpC 28) (see [11.11.4]);
- Where a defendant had breached its contractual duty of care towards the plaintiff, as well as unjustifiably disadvantaging him, the Employment Court held that contractual damages and compensation for the personal grievance should have been separately assessed and an overall judgment then made (*JCE v The Chief Executive of the Department of Corrections* [2020] NZEmpC 46) (see [11.16A.4]);
- A flawed redundancy process, resulting in stress, uncertainty and a feeling of powerlessness, led to a compensation award of \$15,000 (*Innovative Landscapes (2015) Ltd v Popkin* [2020] NZEmpC 40) (see [11.17.6]);
- The Employment Court has rejected a submission that, generally, successful claims for unjustified disadvantage could be expected to attract lower levels of compensation compared to other personal grievances, observing that each case must be decided on its merits and awarding compensation of \$30,000 (*JCE v The Chief Executive of the Department of Corrections* [2019] NZEmpC 46) (see [11.32.5]);
- An employer's financial capacity is not a consideration that is relevant to the exercise of the Court's discretion in setting compensation for non-pecuniary loss under s 123(1)(c)(i) (*Innovative Landscapes (2015) Ltd v Popkin* [2020] NZEmpC 40) (see [11.34]);
- The Court of Appeal has held that the Employment Court correctly allowed a claim for reimbursement of the employee's legal costs in successfully defending a fraud prosecution arising from a complaint made by the employer, rejecting a submission that s 123(1)(c)(ii) is purely prospective (*Rappongi Excursions Ltd v Fernandez* [2020] NZCA 37) (see [11.35.6]);
- Judge Smith held that the value of payments made to the plaintiff under the Accident Compensation Act 2001 should be deducted when calculating lost remuneration, because the defendant had paid all of the plaintiff's wage-related

accident compensation entitlements in its capacity as an accredited employer (*JCE v The Chief Executive of the Department of Corrections* [2020] NZEmpC 46) (see [11.54A]).

