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## Document (1)

1. [Service 85 — August 2021](#)

**Client/Matter:** -None-

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Personal Grievances (NZ)

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**Personal**

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**Service 85 — August 2021**

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**Commentary**

## **Chapter 3: Unjustifiable dismissal**

- The Court has reiterated that the test for assessing whether an employee has been dismissed is objective (*Saipe v Bethell* [\[2021\] NZEmpC 33](#) <sup>CB</sup>) (see [\[3.2\]](#));
- Where an agreement contained an abandonment clause, the employee believed that he had been dismissed, and the employer had ignored a request for mediation when concluding there was an abandonment, Judge Corkill held that this “was a far cry from an abandonment situation” (*Concrete Structures (NZ) Ltd v Rottier* [\[2021\] NZEmpC 95](#) <sup>CB</sup>) (see [\[3.8.1\]](#));
- A claim of constructive dismissal was dismissed where breaches of an employment agreement were the primary reason for the employee’s resignation but the causal chain was held to have been broken by the employee’s decision not to resign at various times over several months when the employer had failed to pay her monies due and had not responded to her communications on the issue (*ANZ Sky Tours Ltd v Wei* [\[2021\] NZEmpC 76](#) <sup>CB</sup>) (see [\[3.25.2\]](#));
- Failure to have the employee sign an emailed agreement before he started employment was described as fatal to the employer’s reliance on the trial provision contained in that agreement (*Senate Investment Trust v Cooper* [\[2021\] NZEmpC 45](#) <sup>CB</sup>) (see [\[3.54\]](#)).

## **Chapter 4: Procedural fairness**

- Where an agreement required an “interview” to determine whether a drug test was required, Judge Corkill observed that the use of that term “suggests a constructive process of question and answer” (*Concrete Structures (NZ) Ltd v Rottier* [\[2021\] NZEmpC 95](#) <sup>CB</sup>) (see [\[4.16\]](#));
- A significant breach was established where two employees were not given a copy of the selection matrix for redundancy before it was used and then not notified of their scores confirming selection for redundancy, or given the opportunity to discuss the scores (*Smartlift Systems Ltd v Armstrong* [\[2021\] NZEmpC 66](#) <sup>CB</sup>) (see [\[4.51.5\]](#)).

## **Chapter 5: Substantive grounds for dismissal**

- Unjustifiable dismissal resulted when an employee was sent away for a drug test (which he refused) as a “knee jerk” response to a heated argument, when the justification for a test had not been adequately investigated (*Concrete Structures (NZ) Ltd v Rottier* [\[2021\] NZEmpC 95](#) <sup>CB</sup>) (see [\[5.4.1\]](#));
- The Court has emphasised that the obligations of a person conducting a business or undertaking under the [Health and Safety at Work Act 2015](#) do not override or take precedence over the obligation to act fairly

which falls on employers under the ER Act (*Concrete Structures (NZ) Ltd v Rottier* [2021] NZEmpC 95 <sup>CB</sup>) (see [5.9.6]).

### Chapter 7: Unjustifiable disadvantageous action

- The Court of Appeal has declined an application for leave to appeal from a decision that an employee had been disadvantaged by the employer's failure to provide a safe working environment for a care worker (*Idea Services Ltd v Davis* [2021] NZCA 111 <sup>CB</sup>) (see [7.9]);
- Unjustifiable disadvantage was established where the employer failed to pay the employee money owed to her and unilaterally varied the employment agreement over the period of her employment (*ANZ Sky Tours Ltd v Wei* [2021] NZEmpC 76 <sup>CB</sup>) (see [7.9]).

### Chapter 8: Discrimination

- An order for compensation was made, but the quantum reserved, where a home carer for her seriously disabled son was held to be an employee and to have received lesser treatment compared with other carers who did not have a familial connection to the disabled person they were caring for (*Fleming v Attorney-General* [2021] NZEmpC 77 <sup>CB</sup>) (see [8.15]);
- The distinction between family status and marital status as a ground of discrimination lies in the importance of the relationship with a particular person to family status, not of the relationship itself (*McKeogh v Attorney-General* [2020] NZHRRT 39) (see [8.19]).

### Chapter 11: Remedies

- A Band 1 award of \$7,000 compensation for injury to feelings was made following a flawed redundancy process after which the impact on the plaintiff was described as being "reasonably low-level and not long lasting" (*Butler v Ohope Chartered Club Inc* [2021] NZEmpC 80 <sup>CB</sup>) (see [11.17.6]);
- Where an employee had a pre-existing history of depression, medical evidence that his condition had been exacerbated by the triggering incident of dismissal was given significant weight in assessing compensation for distress (*Concrete Structures (NZ) Ltd v Rottier* [2021] NZEmpC 95 <sup>CB</sup>) (see [11.20]);
- Where an employer had not disclosed the selection matrix for redundancy prior to implementing it, or provided two employees with their scores prior to dismissal, the distress caused by learning of the low scores after termination was taken into account when fixing compensation (*Smartlift Systems Ltd v Armstrong* [2021] NZEmpC 66 <sup>CB</sup>) (see [11.22.9.1]);
- Where the Authority's finding of constructive dismissal, and compensation award of \$20,000, was not upheld but — on the same facts — the employer was held to have unjustifiably disadvantaged the employee, an award of \$12,000 was substituted (*ANZ Sky Tours Ltd v Wei* [2021] NZEmpC 76 <sup>CB</sup>) (see [11.32.5]).