

Update Personal Grievances

Service 83 — December 2020

Commentary

Unjustifiable dismissal: Chapter 3

- Where an employee was employed on a casual basis on assignment, during which he was required to wear the company’s work shirts, an instruction to return the shirts part-way through an assignment following disagreement with another employee was held clearly to imply that he would not be needing them because he would not be completing the relevant assignment and he was therefore dismissed (*Surplus Brokers Ltd v Armstrong* [2020] NZEmpC 131) (see [3.6]);
- Chief Judge Inglis observed that an inference of abandonment was one “that an employer should draw carefully and only after making inquiries of the employee to ensure that abandonment was their intention” (*Surplus Brokers Ltd v Armstrong* [2020] NZEmpC 131) (see [3.8.1]);
- A fixed-term agreement entered into pending a restructuring was held not to be genuine, from an objective standpoint, when it had the effect of overriding the protections of a redundancy regime which would otherwise have applied. This was held to be so notwithstanding that the company was sincere in concluding that it may need to effect a restructuring and in its belief that this constituted a reasonable ground for fixed-terms (*Kwik Kiwi Cars Ltd v Crossley* [2020] NZEmpC 142) (see [3.17.2]);
- An employee working on a casual basis may nevertheless be unjustifiably dismissed if the employment is terminated during a period when mutual obligations of employment existed between the parties (*Surplus Brokers Ltd v Armstrong* [2020] NZEmpC 131) (see [3.22.1]);
- Section 73 of the Public Service Act 2020 restates the “good employer” provisions of s 56 of the now-repealed State Sector Act 1988, with some changes, and s 75 requires chief executives and boards to promote diversity and inclusiveness (see [3.41]);
- Where a plaintiff, whose employment agreement contained a valid trial period, was given one week’s notice of termination “effective today”, those words were held to convey that he was not required to continue working for the period of notice and would receive payment in lieu of being required to work out that period, so that s 67B was observed (*Appleyard v Corelogic NZ Ltd* [2020] NZEmpC 107) (see [3.58.1]).

Procedural fairness: Chapter 4

- Where a plaintiff argued that procedural unfairness had resulted from the failure to outline reasons for redundancy as being restructured reporting lines, rather

than financial considerations, the Court found that both probably had a part in the decision to dismiss but that in the overall context of the plaintiff's senior management position any procedural defect was minor (*Kiteley v Carbine Aginvest Corporation Ltd* [2020] NZEmpC 106) (see [4.8]).

Grounds for dismissal: Chapter 5

- Application for leave to appeal was declined where a traffic controller had been held to have been justifiably summarily dismissed for failing to comply with health and safety standards in allowing traffic to proceed into a controlled area of roading (*Hong v Chevron Traffic Services Ltd* [2020] NZCA 339) (see [5.9.6]);
- A *Code of Conduct* and supporting guidance issued under s 57 of the repealed State Sector Act 1988 remains in place under the Public Service Act 2020 (see [5.9.8]);
- Decisions as to redundancy which ultimately prove to have been unwise in terms of their commercial consequences may still be found to be genuine business decisions when considered objectively (*Kiteley v Carbine Aginvest Corporation Ltd* [2020] NZEmpC 106) (see [5.26.6]).

Unjustifiable disadvantageous action: Chapter 7

- Where the plaintiff had originally lodged a statement of claim with the Authority claiming unjustifiable disadvantage, unjustifiable dismissal, and also for arrears of wages for unlawful deductions, but all claims except for that of unlawful deduction were then withdrawn, Judge Beck held that the issues of unjustified disadvantage, pleaded on a de novo challenge to the Authority's determination, could not be included as part of "the matter" under s 179 of the ER Act (*Sinton v Coatsville Motors 2013 Ltd* [2020] NZEmpC 137) (see [7.2.6]).

Discrimination: Chapter 8

- A new s 2B of the Equal Pay Act 1972 Act states that if an employee considers that they have an unlawful discrimination, an equal pay, or a pay equity claim, they have a choice as to whether to bring the claim under the 1972 Act, the HR Act, or the ER Act, but that they cannot take more than one of these actions (see [8.34]).

Remedies: Chapter 11

- Judge Holden has observed in terms of reinstatement that practicality and reasonableness are two separate considerations, so that practicality means "capable of being carried out in action" with potential for a successful re-imposition of the employment relationship, but reasonableness requires the Court to consider the respective effects of an order, not only on the individual employer and employee in the case, but also on other affected employees of the same employer and, in some cases, potentially affected third parties (*Smith v Fletcher Concrete & Infrastructure Ltd* [2020] NZEmpC 125) (see [11.4.1]);
- An award of \$20,000 compensation for injury to feelings was made where the employer had terminated the employment in misplaced reliance on an invalid fixed-term agreement, leaving the employee "devastated" and "lacking confidence" (*Kwik Kiwi Cars Ltd v Crossley* [2020] NZEmpC 142) (see [11.17.6]).