

Update Personal Grievances

Service 80 — March 2020

Commentary

Chapter 3: Unjustifiable dismissal

- Under the Employment Relations (Triangular Employment) Amendment Act 2019, the defined terms relating to personal grievances will in time apply — with all necessary modifications — as if references to the employer were references to a controlling third party in a triangular employment relationship and references to the employee’s employment included work the employee has performed under the control or direction of a controlling third party (see [3.1A]; corresponding references are included in chapters 7, 8, 9 and 10);
- A decision to summarily dismiss was held not to be outside the permissible range of responses “although closer to the edges of what a fair and reasonable employer could have done in all the circumstances” (*Elisara v Allianz New Zealand Ltd* [2019] NZEmpC 123) (see [3.37.2]);
- The Court has held that s 67A does not require any particular form of words in a trial provision, so that the inclusion of “to the effect that” in s 67A “means a provision in an employment agreement complies with the section if the provision has the same general meaning and leads to the same result as specified in the section”: thus, a clause stating that a trial period was “in accordance with s 67A of the Employment Relations Act 2000” was held to reasonably convey that the trial period started at the beginning of the employment (*Watts and Hughes Construction Ltd v De Buyzer* [2019] NZEmpC 116) (see [3.54.2]);
- The Court of Appeal has held that s 67B(1) applied to the termination of the appellant in circumstances where that termination was advised to him within the trial period, but the employer paid the employee in lieu of work for the notice period, in a manner permitted by his employment agreement. (*Ioan v Scott Technology NZ Ltd* [2019] NZCA 386) (see [3.58.1]);
- A trust board which had commenced an inquiry into possibly unauthorized substantial payments being made by the Trust was held to be entitled to raise its concerns about financial management with an employee responsible for that task, so that its actions were held not to be a breach of its duties as employer and could not then be seen as repudiatory behaviour amounting to a constructive dismissal (*Bradley v Ngāti Apa Ki Te Rā Tō Charitable Trust* [2019] NZEmpC 167) (see [3.27.3]);
- The Court of Appeal has upheld a ruling by the Employment Court that “notice of termination” in s 67B includes a situation where the employer gives the requisite period of notice but does not require the employee to work out the

notice, instead making a payment for the period of the notice (*Ioan v Scott Technology NZ Ltd* [2019] NZCA 386) (see [3.58.1]);

- Where an individual employment agreement contained a clause stating that the contractual period of notice would not apply if the employer decided “to terminate based on the 90-day trial”, the Employment Court held that the trial provision did not meet the notice requirements of s 67B and was accordingly invalid (*Allied Investments Ltd v Cradock* [2019] NZEmpC 159) (see [3.58.1]);
- Proceedings were struck out where notice given under a trial period provision was held to comply with the employment agreement (*Jobbitt v 4 Seasons Indoor Outdoor Living (2014) Ltd* [2019] NZEmpC 198) (see [3.58.1]).

Chapter 4: Procedural fairness

- Where an employee faced with a disciplinary investigation had not obtained relevant information despite being best placed to obtain it and having had time to do so, the Court held that the failure of the employer to make its own inquiries was not a defect in its process and was not unfair to the employee (*Emmanuel v Waikato District Health Board* [2019] NZEmpC 81) (see [4.15.9]);
- Summary dismissal by letter was held to be unjustifiable where it closely followed the raising of serious allegations against the plaintiff without giving him the opportunity of fully responding (*Fernandez v Rappongi Excursions Ltd* [2019] NZEmpC 99) (see [4.16.4.1]);
- Where senior executives of an employer had exchanged correspondence which indicated that they had made their minds up on the outcome of a disciplinary investigation, the Court’s finding that the decisionmaker was unencumbered by these views, and came to his own decision on the issue, removed the case from the ambit of predetermination (*Elisara v Allianz New Zealand Ltd* [2019] NZEmpC 123) (see [4.18.1]);
- The Employment Court has reiterated that drug-testing policies, and their application, must be interpreted and applied strictly, given that they impinge significantly upon individual rights and freedoms (*A v N Ltd* [2019] NZEmpC 129) (see [4.11]);
- Breach of procedural fairness arose where an employer suspected an employee of misconduct but withheld the statement of a fellow employee on which it had partially relied (*A v N Ltd* [2019] NZEmpC 129) (see [4.16]);
- Dismissal by text message after the employer had made no attempt to investigate his concerns or to raise them with the employee, was held to be unjustifiable (*Thorne v Rolton* [2019] NZEmpC 171) (see [4.17]);
- A decision-making process was held not to have been approached with a sufficiently open mind where a person who had not been assigned the decision-making role, and who bore some ill-feeling towards the employee, was “significantly entwined” in the process (*Maddigan v Director-General of Conservation* [2019] NZEmpC 190) (see [4.18.1.3]);
- An employer investigating alleged misconduct arising from an email sent to a third party under the employee’s name proceeded unfairly when it told the employee that he would have to provide “proof” that his email account had been spoofed or hacked rather than asking for information that would allow it to understand what had happened (*Johnson v Chief of the New Zealand Defence Force* [2019] NZEmpC 192) (see [4.19]).

Chapter 5: Grounds for dismissal

- Lying to an employer that absence from work was due to a cancelled flight, when the employee (who had previously been warned about timeliness) had never

booked a flight, was found to be a misleading statement amounting to serious misconduct justifying dismissal (*Emmanuel v Waikato District Health Board* [2019] NZEmpC 81) (see [5.10.5]);

- Where an employer abandoned the attempt to impose its own drug testing policy without consultation and invited a drug-testing operator into the workplace without notice, an unjustifiable dismissal was held to occur when the employee refused to take a drug test and the employer remained unsatisfied with her answers to questions put to her subsequently (*A v N Ltd* [2019] NZEmpC 129) (see [5.6.3]);
- The Court has re-emphasized the need for an employer with intellectually disabled service users to care for vulnerable persons in a particular non-aversive way (*Cowan v IDEA Services Ltd* [2019] NZEmpC 172) (see [5.8.4]);
- No redundancy occurred where a manager's proposed role in a restructuring was for work in the same location, reporting to the same manager, holding the same status in the company, requiring the same skills and experience, and involving similar tasks (*Johnston v The Fletcher Construction Company Ltd* [2019] NZEmpC 178) (see [5.27.1]).

Chapter 7: Unjustifiable disadvantageous action

- Where an employee was unsuccessful in being selected for training for a better-paid position, his claim for unjustifiable disadvantage failed when the Court held that the Company's treatment of the employee did not breach relevant clauses in the collective agreement, including a clause undertaking to provide non-discriminatory assessment (*Lyttelton Port Company Ltd v Pender* [2019] NZEmpC 86) (see [7.8.3]);
- In a case where the process for an employee's return to work after a settlement of a grievance continued to involve the active participation of a manager with whom she had had an antagonistic relationship, the Court observed that a fair and reasonable employer could be expected to recognize that the manager should withdraw from the process (*CBA v ONM* [2019] NZEmpC 144) (see [7.5.3]);
- "Disadvantage" was established where the employer's behaviour made it clear to an employee, who had not been disciplined after an investigation, that he was nevertheless not trusted (*Johnson v Chief of the New Zealand Defence Force* [2019] NZEmpC 192) (see [7.10]).

Chapter 8: Discrimination

- "Intra-ground" disability discrimination was held not arise where two employees, each of whom suffered a psychiatric/ psychological disability of a similar type or level, were alleged to have been treated differently (*CBA v ONM* [2019] NZEmpC 144) (see [8.15]).

Chapter 11: Remedies

- In a case where dismissal for serious misconduct was held to have been justifiable, the Court indicated that reinstatement would have been ruled out in any event (*Emmanuel v Waikato District Health Board* [2019] NZEmpC 81) (see [11.4A.10]);
- The Court upheld an order for interim reinstatement where there was a strong case relating to predetermination, the need to provide a fair selection process, requests for further information and consideration of alternative employment options (*Genesys Telecommunications Laboratories Ltd v Scott* [2019] NZEmpC 113) (see [11.9]);

- Reinstatement was refused where the employee had arrived at the point where he was “deeply distrusting of management and has a level of preoccupation with broader perceived injustices . . . which would seriously undermine attempts to reintegrate him into the workplace (*Maddigan v Director-General of Conservation* [2019] NZEmpC 190) (see [11.4A.9]);
- A “broad brush assessment of contingencies” was applied where the exploration of alternative employment options would have been complicated by the employee’s “strong views” and “redundancy may only have been a question of time” (*Zhang v Telco Asset Management Ltd* [2019] NZEmpC 151) (see [11.13.2]);
- Recent Band 2 compensation awards have been assessed at \$15,000, \$20,000 and \$22,500 (*Johnson v The Chief of the New Zealand Defence Force* [2019] NZEmpC 192, *Allied Investments Ltd v Cradock* [2019] NZEmpC 159 and *Zhang v Telco Asset Management Ltd* [2019] NZEmpC 151 respectively) (see [11.17.6]);
- Judge Corkill awarded \$30,000 compensation for unjustifiable disadvantage where a defendant had significantly delayed reinstating the plaintiff pursuant to a settlement agreement, and had continued to involve a manager whom she did not trust in the process, leading to a state of serious depression (*CBA v ONM* [2019] NZEmpC 144 (see [11.32.5]));
- Where an employee had obtained expert IT and legal advice following a letter from the employer assuming that he had sent an unauthorised email containing confidential information, an allegation effectively applying a reverse onus, compensation was awarded for part of the costs involved (*Johnson v Chief of the New Zealand Defence Force* [2019] NZEmpC 192 (see [11.35.6]));
- Overstated allegations impugning a manager for purported professional impropriety were held to be blameworthy for purposes of contribution (*Zhang v Telco Asset Management Ltd* [2019] NZEmpC 151) (see [11.48.3]).