Update
Personal Grievances

Service 84 — February 2021

Commentary

Chapter 2: The grievance process

- Once signed by a mediator under s 149, the terms of settlement are enforceable under the ER Act by way of compliance order or a penalty may be imposed by the Authority on any party who breaches any agreed term. Such remedies may also be imposed on a party's representative if they breach the record of settlement, even though notwithstanding that the representative was not a party to the employment relationship or the record of settlement: (*CultureSafe NZ Limited v Turuki Healthcare Services Charitable Trust* [2020] NZEmpC 166) (see [2.11]);
- The Employment Court has found that the Authority has jurisdiction to issue compliance orders and impose penalties against non-parties to the employment relationship. *CultureSafe NZ Ltd v Turuki Healthcare Services Charitable Trust* concerns a challenge brought an employment consultancy company and two advocates who provided services for the company, against a determination of the Authority issuing compliance and suppression orders and a penalty against them (see [2.15]);
- After considering the principles set out in *Poverty Bay Electric Power Board and GFW Agri-Products Ltd*, along with the particular circumstances of this case (including DJK's confusion), the Court reached the view that DJK's employment was not terminated on 16 January 2019, the date she received formal notice of termination, but rather, the date on which her notice period came to an end (*Ceres New Zealand LLC v DJK* [2020] NZEmpC 153) (see [2.27]);
- The Employment Court has most recently confirmed that an employee's representative "must comply with procedural rules and directions of the Authority, if issued within jurisdiction, and whether or not those rules or directions refer to a party only or to a representative" (*Bay of Plenty District Health Board v CultureSafe New Zealand Ltd* [2020] NZEmpC 149) (see [2.41]).

Chapter 3: Unjustifiable dismissal

- The test for assessing whether an employee has been dismissed is objective, which logically leaves room for a finding that dismissal occurred even if the employee did not subjectively believe it to be so; or for a finding that a dismissal occurred even if the employer did not subjectively believe it to be so; and (by extension) where neither the employee nor the employer subjectively believed dismissal had occurred (*Concrete Structures (NZ) Ltd v Ward* [2020] NZEmpC 219) (see [3.2]);

- Where an employee was in dispute with her employer and left work, stating that she would return only when her alleged grievances were dealt with, and the employer continued to try to reach the employee to discuss her position, the Court held that the employer was entitled to treat her eventually as having abandoned her employment (*Mackenzie v Huntington's Disease Association (Auckland) Inc* [2020] NZEmpC 177) (see [3.8.1]);
- A dispute between employer and employee was held not to be "a genuine one where each party adhered to their position on reasonable grounds", but rather a series of continuing breaches of duty by the employer which ultimately led to a loss of trust and confidence, and to result in constructive dismissal (*O'Boyle v McCue* [2020] NZEmpC 175) (see [3.25A.2]);
- Resignation was held to be unforeseeable where an employer had provided a comprehensive statement of issues and concerns around performance over a lengthy period and displayed a clear willingness to help the employee improve his performance (*Greetham v Lawter (NZ) Ltd* [2020] NZEmpC 174) (see [3.25A.3]);
- The s 103A justification test is imported into some pay equity claims, through s 15 of the Equal Pay Act 1972 (see [3.39B]);
- In 2020, a survey found that collective agreements providing for probationary periods were more common in the private sector and, of private sector employers with collective agreements, 15 per cent had a probationary period of three months or less; one per cent had three to six months; and a further one per cent had more than six months (see [3.48]);
- The Court of Appeal declined an application for leave to appeal. Where a plaintiff, whose employment agreement contained a valid trial period, was given one week's notice of termination "effective today" and the Employment Court had held that the words "effective today" meant that the plaintiff was not required to continue working for the period of notice and would receive payment in lieu of actual work (*Appleyard v Corelogic NZ Ltd* [2020] NZCA 572) (see [3.58.1]).

Chapter 4: Procedural fairness

- The Authority or the Court may now have regard to codes of employment practice as evidence of compliance with statutory provisions and rely on any such code in making a determination as to what is required to comply (Employment Relations Act 2000, s 100C, substituted by s 28 of the Equal Pay Amendment Act 2020) (see [4.7.2]);
- Where an employee's compromised mental health was known to the employer, which did not act on the employee's several requests during a meeting that the employer should speak to his representative, the employer's inaction was described as being inexplicable and inexcusable (*Concrete Structures (NZ) Ltd v Ward* [2020] NZEmpC 219) (see [4.38]);
- The most recent survey of redundancy provision in collective agreements indicates that, while four weeks remains the most common provision, average periods of notice for some sectors range up to eight weeks and that the most recent survey of collective agreements indicates that 72 per cent of employees entitled to redundancy compensation received at least six weeks' wages for their first year of service with 62 per cent being entitled to at least two weeks' wages for each subsequent year (see respectively (see [4.41.3] and [4.52])).

Chapter 7: Unjustifiable disadvantageous action

- Issuing an unjustifiable warning during a dispute around leave entitlement, which

escalated pressure and stress already being experienced by the employee, was held to amount to unjustifiable disadvantage (*O'Boyle v McCue* [2020] NZEmpC 175) (see [7.6.2]);

- An employer's failure to observe standards of protection in health and safety legislation gave rise to a finding of unjustifiable disadvantage (*Davis v Idea Services Ltd* [2020] NZEmpC 225) (see [7.9]);
- Unjustifiable disadvantage was established where an employer, which had dismissed the employee under a valid trial period, had failed to consult the employee on organisational changes within his responsibilities and to follow a dispute resolution process in the employment agreement (*Evans v JNJ Management Ltd* [2020] NZEmpC 181) (see [7.9]).

Chapter 11: Remedies

- Where a decline in health following dismissal prevented a plaintiff from working, this was held not to preclude an award of wages in the period immediately following termination of employment and an order was made for reimbursement of the full three month period prescribed in s 128(2) (*Baker v Hauraki Rail Trail Ltd* [2020] NZEmpC 148) (see [11.13A.2]);
- The severe impact of a dismissal on an employee who was known to be experiencing problems with his mental health was also held to undermine his capacity to actively pursue employment or undertake anything other than casual work for a period (*Concrete Structures (NZ) Ltd v Ward* [2020] NZEmpC 219) (see [11.13B.3]);
- Applying the banding approach to claims for compensation, $30,000 was awarded where the employee had been significantly negatively affected so that his already compromised mental health deteriorated further (*Concrete Structures (NZ) Ltd v Ward* [2020] NZEmpC 219) (see [11.17.6]).

