Update

# Personal Grievances

## Service 87 — February 2022

### Current developments

- The Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment bill has been drawn for first reading. It proposes an extension of time for sexual harassment grievances to be raised from 3 months to 12 months;

### Commentary

**Chapter 3: Unjustifiable dismissal**

- An employee who decided it was intolerable to work for an employer when he regarded his wife as having been unfairly treated, knowing that the employer wished him to continue in work, was held to have voluntarily ended his employment and not as having been constructively dismissed (*Zara's Turkish Ltd (in liq) v Kocatürk* [2021] NZEmpC 117) (see [3.27.1]);
- Judge Beck has suggested that only in situations where significant negative consequences would have been apparent to a fair and reasonable employer at the time of the decision, would there be an argument that subsequent events should form a part of the assessment of justification under s 103A (*Caddy v Vice-Chancellor, University of Auckland* [2021] NZEmpC 129) (see [3.31]);
- The COVID-19 Response (Vaccinations) Legislation Act 2021 provides the framework for an assessment tool, intended to be set out in regulations by mid-December 2021, to assist employers in conducting individual assessments to determine whether vaccination and/or medical examination or testing is warranted for any particular type of work, also providing for dismissal on notice for employees covered by such determinations who remain unvaccinated (see [3.32A]);
- Under the Protected Disclosures (Protection of Whistleblowers) Bill, as reported back, amendment to s 103 of the ER Act is again proposed, so as to make retaliatory action, or the threat of retaliation, one ground for raising a personal grievance (see [3.46]);
- In 2021, a survey found that 23 per cent of collective agreements, covering just six per cent of employees, included a clause of three months or less; three per cent of collective agreements, also covering six per cent of employees, provided for three to 12 months; and around one per cent provided for a probationary period of unspecified length (see [3.48]);

**Chapter 4: Procedural fairness**

- Under clause 3 of a new Schedule 3A to the Employment Relations Act 2000, once the employer has given an employee reasonable written notice specifying the date by which the employee must be vaccinated in order to carry out her or his work, if the employee is unable to comply with a duty imposed by any COVID-19 order, or the employee is not vaccinated by the date the employer has specified in its own determination, the employer can terminate the employee's agreement by giving the employee notice (see [4.5]);
- Judge Corkill has addressed a number of issues relating to the appointment and reception of external investigators in a case involving termination for incompatibility (*Smithson v Wellington College Board of Trustees* [2021] NZEmpC 114) (see [4.15.1A]);
- An employer that knows that it could take time for an employee to clearly understand what was being communicated to him in the circumstances could "be expected to take particular care in explaining and discussing all the elements of the concerns it held" (*QDA v EKD* [2021] NZEmpC 139) (see [4.15.2]);
- Where an employee had been dismissed for misconduct and subsequently argued that the employer should have ensured that she had adequate representation other than her union, the Court rejected the argument (*Waitoa v The Chief Executive of the Ministry of Social Development* [2021] NZEmpC 113) (see [4.17.7]);
- Whilst prior notification of the purpose of a meeting aimed at advising an employee around performance issues would have been preferable, it was not unfair to raise performance issues at the meeting since the employee was well aware of the employer's concerns (*Mike's Transport Warehouse Ltd v Vermuelen* [2021] NZEmpC 197) (see [4.19]);
- Where an employer argued that it was incumbent on an employee to raise a vacancy in feedback on a proposed restructuring, Judge Beck held that such an expectation would reverse the onus placed on employers under s 4(1A)(c) and that an employer "cannot rely on the silence of an employee to absolve their own failure to adhere to a positive statutory duty" (*Gafiatullina v Propellerhead Ltd* [2021] NZEmpC 146) (see [4.43.2]);
- The most recent survey of provision for notice of redundancy 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 (see [4.41.3]);
- Multiple breaches of good faith were held to be arguable where an administrator, who had been given notice of dismissal for redundancy, requested details of the rates for contractors who were planned to replace her, whether the employer would contract her to do the work on an out-sourced basis, and — if so — the proposed terms of trade and a specification of the services to be provided but the employer rejected them completely and implemented the decision to dismiss without further discussion (*McDonnell v The Board of Trustees of Te Manawa O Tūhoe Trust* [2021] NZEmpC 214) (see [4.47.1]);
- Where the totality of the information supplied prior to a redundancy dismissal enabled an employee to understand the reasons for financial losses relied on by the employer, and to formulate a response, sufficient access to relevant information was held to have been provided notwithstanding an absence of detailed financial forecasts (*Allison v Ceres New Zealand LLC* [2021] NZEmpC 177) (see [4.47.3]);
- A new section in chapter 4 deals with procedural fairness issues in the context of the COVID-19 Response Framework (see [4.54] and following);

 

- Judge Corkill has held that it is arguable that in circumstances such as the COVID-19 context, where a "no jab, no job" outcome is under consideration, there is an active obligation on the employer to constructively consider and consult on alternatives where there is an objectively justifiable reason not to be vaccinated (*WXN v Auckland International Airport Ltd* [2021] NZEmpC 205) (see [4.55.1]);
- An assessment tool enabling an employer to require workers to be vaccinated in certain contexts has been released under the COVID-19 Public Health Response (Vaccination Assessment Tool) Regulations 2021 (LI2021/418) (see [4.55.2.3]);

**Chapter 5: Grounds for dismissal**

- A submission that serious misconduct had occurred was described as "wholly misconceived" where a trial period employee had been given insufficient orientation and time to demonstrate her skill level before being summarily dismissed under a contractual provision limited to serious misconduct (*Best Health Foods Ltd v Berea* [2021] NZEmpC 155) (see [5.4.4]);
- An employee in a youth justice facility was held to have been justifiably dismissed after refusing to leave a "sit-in" in a manager's office, leading to her arrest for trespass and removal by the Police (*Waitoa v The Chief Executive of the Ministry of Social Development* [2021] NZEmpC 113) (see [5.6.1]);
- Even where an employer operates a health and safety policy with particular components highlighted, any particular incident must be seen in context *(QDA v EKD* [2021] NZEmpC 139) (see [5.9.6]);
- The Employment Court has reiterated that a justifiable dismissal on the grounds of incompatibility will only be available in very rare circumstances (*Christieson v Fonterra Co-operative Group Ltd* [2021] NZEmpC 142) (see [5.12]);
- The *Thwaites* focus on positions rather than people when assessing the justification for redundancy was applied where a university employer was held to have genuine and reasonable grounds for taking the professoriate out of scope of restructuring proposals, leaving the proposals to impact only on other academic positions (*Caddy v Vice-Chancellor, University of Auckland* [2021] NZEmpC 129) (see [5.25.1]);
- The COVID-19 pandemic has given rise to a number of specific issues around the personal grievance jurisdiction (see [5.32]);

**Chapter 7: Unjustifiable disadvantageous action**

- The Supreme Court has held, by a majority, that the circumstances that had triggered a tort action in negligence for psychiatric harm arising from bullying lay within the exclusive jurisdiction of the specialist institutions as a personal grievance (*FMV v TZB* [2021] NZSC 102) (see [7.11A]);

**Chapter 8: Discrimination**

- Where a defendant argued that its abrupt termination of the plaintiff's employment was triggered by her anger and upset response when told she was redundant, and her stated intention to raise a personal grievance, Judge Beck held that an employee should not be criticised for reacting emotionally and "[the] fact that she was raising a grievance cannot be a basis for the company taking adverse action against her" (*Gafiatullina v Propellerhead Ltd* [2021] NZEmpC 146) (see [8.27]);

**Chapter 9: Sexual and racial harassment**

- In the human rights jurisdiction, the fact that the victim either voices robust objection on the one hand, or elects to tolerate harassment, however unwelcome

or offensive on the other, does not make any difference to the issue of detriment (*Thompson v Van Wijk* [2021] NZHRRT 39) (see [9.11]);
- In a decision involving sexual harassment of an extreme nature, the Human Rights Review Tribunal assessed damages at $100,000 (*Thompson v Van Wijk* [2021] NZHRRT 39) (see [9.25]);

**Chapter 11: Remedies**
- Chief Judge Inglis has observed that the 2018 amendment restoring the primacy of reinstatement arguably reflected a Parliamentary intention to raise the bar that employers would have to negotiate in order to prove that reinstatement was neither reasonable nor practicable (*Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* [2021] NZEmpC 59) (see [11.3.2]);
- Judge Beck has emphasised that, in terms of reinstatement, practicability and reasonableness are two separate considerations and that the criterion of "reasonableness" may require consideration of the effect on third parties (*Christieson v Fonterra Co-operative Group Ltd* [2021] NZEmpC 142) (see [11.4]);
- Compensation of $20,000 was awarded where a genuine redundancy was accompanied by a flawed consultation process and an unnecessarily hasty exit at the employer's behest (*Gafiatullina v Propellerhead Ltd* [2021] NZEmpC 146) (see [11.17.6]);
- An award of $13,000 compensation was made for the "considerable anguish and upset" at losing a job after moving to New Zealand and being immersed in an unfamiliar culture, where work provided an income and social contact with others in her community (*Zara's Turkish Ltd (in liq) v Kocatürk* [2021] NZEmpC 117) (see [11.22.10]);
- A majority judgment in the Supreme Court has suggested that, if an employer accuses an employee of dishonesty (impliedly wrongly) and notifies others of the accusation, there "has been an unjustified dismissal" and the employee's remedy lies in compensation under s 123(1)(c) rather than an action for defamation in the High Court (*FMV v TZB* [2021] NZSC 102) (see [11.33]).

 