Update
Personal Grievances

Service 91 — November 2022

Commentary

Chapter 3: Unjustifiable dismissal

- In a case of disputed dismissal, the Court observed of the objective approach that, in such cases, "[the] lens must be trained on the employee's understanding of the events which it is alleged the employer has initiated" (*Kang v Saena Co Ltd* [2022] NZEmpC 151) (see [3.2]);
- Where a recently employed worker was shocked by a confrontation with the business owner, who told her to leave the workplace, and then said she would "quit" or "leave", Judge Corkill held that — in the context of what had occurred — she was "quitting" the situation and not the employment (*Kang v Saena Co Ltd* [2022] NZEmpC 151) (see [3.9]).

Chapter 4: Procedural fairness

- The most recent survey of provision in collective agreements indicates that, while four-weeks' notice of redundancy remains the most common provision, average periods of notice for some sectors range up to eight weeks (see [4.41.3]);
- Survey evidence indicates that provision in collective agreements for employer support in redundancy is increasingly common, with 54 per cent of employees allowed time off for interviews and close to half allowing access to employer-provided counselling and advisory services (see [4.49]);
- A redundancy decision announced on the day a national lockdown commenced was held to have been "unduly rushed" (*Drivesure Ltd v McQuillan* [2022] NZEmpC 176) (see [4.47.1]);
- With the dismantling of the COVID-19 Protection Framework, the last government vaccination mandates — for health and disability workers — ended on 26 September 2022 and face covering requirements remained after that date only for people at certain health premises (see [4.57.1]).

Chapter 5: Grounds for dismissal

- The required elements of misrepresentation under the Contract and Commercial Law Act 2017 were discussed at length in a decision which emphasised the focus on what a reasonable person would have understood by the words and/or conduct in question (*Butt v Attorney-General* [2022] NZEmpC 183) (see [5.10A]);
- When considering justification in incompatibility cases, the issue might now be framed in terms of whether the incompatibility was irreconcilable (*Ashby v NIWA Vessel Management Ltd* [2022] NZEmpC 174) (see [5.12]).

Chapter 11: Remedies

- An award of 12 months' lost remuneration was made, after taking into account contingencies of life, where the plaintiff had worked for the defendant for many years before being dismissed for alleged incompatibility (*Ashby v NIWA Vessel Management Ltd* [2022] NZEmpC 174) (see [11.11.2]);
- Distress compensation of $20,000 was awarded under the *Archibald* banding approach where a newly employed worker had been dismissed in the course of a heated outburst by the business operator (*Kang v Saena Co Ltd* [2022] NZEmpC 151) (see [11.17.6]);
- An award of $35,000 for distress ("towards the top of the middle band") was made where the process followed by the employer, and the dismissal of a long-serving employee itself, were very significant contributors to the plaintiff's distress (*Ashby v NIWA Vessel Management Ltd* [2022] NZEmpC 174) (see [11.17.6]);
- In the circumstances of the case, the Employment Court was held to have jurisdiction to hear a proceeding in which the claimant had made claims under the Accident Compensation Act 2001 but review and appeal rights under that Act had not been exhausted (*The Board of Trustees of Melville High School v Cronin-Lampe* [2022] NZCA 407) (see [11.31.4]);
- An award of $8,000 compensation for a procedurally unfair redundancy, following a rushed process, was described as "relatively modest" (*Drivesure Ltd v McQuillan* [2022] NZEmpC 176) (see [11.32.5]);
- Employees were held not to have contributed to a grievance when they asked for a proposed meeting to discuss redundancy to be deferred, so that — among other things — they could obtain legal advice (*Drivesure Ltd v McQuillan* [2022] NZEmpC 176) (see [11.48.7]).

