

Update Personal Grievances

Service 92 — February 2023

Commentary

Chapter 3: Unjustifiable dismissal

- An employee's position as manager was held to be inconsistent with casual status as was the agreement which imposed continuing obligations such as a trial provision, provision for abandonment of employment and restrictions on other employment (*Caisteal An Ime Ltd v Faithfull* [2022] NZEmpC 216) (see [3.22.1]);
- Judge Corkill has reiterated that s 103A does not mandate principles of perfection but requires a balance to be struck (*FGH v RST* [2022] NZEmpC 223) (see [3.34B]);
- Where an employee posted comments on Facebook criticising some employers for not paying wage subsidies claimed on the behalf of employees (but not naming her employer) and the employer then posted a message identifying its business and concluding "nice way to resign Lou", a dismissal was held to have occurred (*Caisteal An Ime Ltd v Faithfull* [2022] NZEmpC 216) (see [3.36]);
- Section 73 of the Public Service Act 2020 does not require an enhanced standard to be applied by departments when considering health and safety issues in the context of personal grievances (*FGH v RST* [2022] NZEmpC 223) (see [3.41.2]).

Chapter 4: Procedural fairness

- Where an unjustifiable disadvantage grievance involving, among other things, the management of the plaintiff's psychological health and one issue was the foreseeability of harm when the employer commenced an investigation process, Judge Corkill held that the responsibility to provide details of relevant background medical information fell on the plaintiff (*FGH v RST* [2022] NZEmpC 223) (see [4.12]);
- Where one factor in a decision to dismiss was that the employee would not accept responsibility for his behaviour and accept that it was wrong, the Court held that not having told the employee that this was something the employer intended to take into account was a significant shortcoming and that raising it with him was required by s 103A(3)(b) (*Baillie v The Chief Executive of Oranga Tamariki – Ministry for Children* [2022] NZEmpC 233) (see [4.16.4.1]);
- Where an employer had suspended a disciplinary investigation, to consider medical management, before formalising its disciplinary concerns, the Court held that suspension of the investigation for a lengthy period was understandable in the complex circumstances of the case (*FGH v RST* [2022] NZEmpC 223) (see [4.17.2]).

Chapter 5: Grounds for dismissal

- The Court has rejected a submission that serious misconduct must involve intentional, wrongful and deliberate behaviour, observing that “it is not possible to define serious misconduct because it is always a matter of degree, but what is needed is conduct that deeply impairs or is destructive of that basic confidence and trust that is essential to the employment relationship”. (*Baillie v The Chief Executive of Oranga Tamariki – Ministry for Children* [2022] NZEmpC 233) (see [5.4.1]);
- The publishing of posts on a Facebook or other social media platform are not immune from consequences simply because they may have been put up in an employee’s own time, and/or because they express a personal opinion (*FGH v RST* [2022] NZEmpC 223) (see [5.14.5]).

Chapter 7: Unjustifiable disadvantageous action

- An employer’s failure to provide a written employment agreement was held not to give rise to a disadvantage grievance where the plaintiff had entered into a mediation process following dismissal consistent with one that might have been followed had a written agreement been operative (*Kang v Saena Company Ltd* [2022] NZEmpC 151) (see [7.5A]);
- The Court distinguished the act of suspension from compulsory sick leave pending a psychiatric assessment, where health and safety circumstances warranted this step (*FGH v RST* [2022] NZEmpC 223) (see [7.7A]);
- Disadvantage was held to arise from the inclusion of a non-compliant availability clause which provided no consideration for the plaintiff holding himself available for work, as stipulated in the agreement, since there was no valuing of his availability, and no sharing of the cost of him making himself available (*Stewart v AFFCO New Zealand Ltd* [2022] NZEmpC 200) (see [7.20.3]).

Chapter 9: Sexual and racial harassment

- As at January 2023, a Member’s Bill proposing to extend the time limit for an employee to file a personal grievance involving sexual harassment from 90 days to 12 months awaits its third reading (see [9.13A]).

Chapter 11: Remedies

- In a case in which an employee who had refused mandatory vaccination against COVID-19 under what was then the relevant Order and had then made a number of serious allegations against the employer once employment ended, the Court held that it was not seriously arguable that the plaintiff would be permanently reinstated (see [11.4A.9]) (*HLJ v VMZ* [2022] NZEmpC 201);
- Where an employee had been dismissed after questioning aspects of employers’ management of the COVID-19 wage subsidy, the Court held that the subsidy (which was set at \$400 per week) was not what the employee had lost as remuneration (her average pay over the length of employment being \$231.16 per week) (*Caisteal An Ime Ltd v Faithfull* [2022] NZEmpC 216) (see [11.12.7]);
- Judge Corkill has held that if compensation for breach of availability provisions could be assessed on a quantum meruit basis, then it would amount to a benefit which the Court could properly direct for payment under s 123(1)(c)(ii) (*Stewart v AFFCO New Zealand Ltd* [2022] NZEmpC 200) (see [11.16A.3]).