

Update Personal Grievances

Service 93 — May 2023

Commentary

Chapter 3: Unjustifiable dismissal

- Section 142ZA of the ER Act, which provides when “conduct engaged in on behalf of a body corporate” is to be treated for the purposes of the ER Act as having been engaged in also by the body corporate, applies to the grievance jurisdiction (*Saena Company Ltd v Kang* [2023] NZCA 50) (see [3.7]);
- Cover for work-related “mental injury” under s 21B of the Accident Compensation Act 2001 was held to exist where the appellant had been subjected to two distressing incidents arising in the context of a proposed restructuring, which she had equated to constructive dismissal (*Phillips v Accident Compensation Corporation* [2022] NZACC 100) (see [3.31A]);
- Chief Judge Inglis has stated that steps a notional fair and reasonable employer could have taken under s 103A may usefully be conceived of as a target where the bullseye of the target is “employer best practice” and the outer circles of the target comprise “acceptable action” (*Wilson-Grange Investments v Guerra* [2023] NZEmpC 39) (see [3.36A]).

Chapter 4: Procedural fairness

- A modest fine was imposed for “low culpability” breach of a compliance order relating to redundancy notification where the defendant had identified positions surplus to requirements by naming individuals, positions they held at the time, and the schools and faculties in which they were appointed, contrary to the Authority’s approach when making a compliance order (*New Zealand Tertiary Education Union Te Hautū Kahurangi O Aotearoa Inc v Vice-Chancellor of the Auckland University of Technology* [2023] NZEmpC 2) (see [4.43]);
- Judge Beck held that the restrictive approach of the Court of Appeal to redeployment following redundancy in *New Zealand Fasteners Stainless Ltd v Thwaites* [2000] 2 NZLR 565 has been superseded in the light of subsequent statutory developments: when considering whether to dismiss an employee after their position has been made redundant, an employer “must consider” whether to redeploy the employee (*New Zealand Steel Ltd v Haddad* [2023] NZEmpC 57) (see [ERA4.11A.6]);
- An employer acted unfairly when it reached a conclusion based on the transcripts of interviews which invited broad and general answers lacking specific information, but which were then turned into support for a specific allegation (*Henry v South Waikato Achievement Trust* [2023] NZEmpC 20) (see [4.15.2]);

- Predetermination was held to vitiate a purported “consultation” on the disestablishment of an employee’s position as a Process Computing Manager when, by the time of the purported consultation, the decision had already been made (*New Zealand Steel Ltd v Haddad* [2023] NZEmpC 57) (see [4.47.1]).

Chapter 5: Grounds for dismissal

- Where delay in reporting an alleged assault was treated by the employer as breaching its complaints procedure, past inconsistencies on the employer’s part in adhering to the procedure were seen to allow the possibility that the employee’s comprehension of the procedure was understandable (*Henry v South Waikato Achievement Trust* [2023] NZEmpC 20) (see [5.9.3]).

Chapter 7: Unjustifiable disadvantage

- Where an employee’s unjustifiable disadvantage grievance was based in part on a shortfall in pay and an initial letter had referenced an alleged breach of the Wages Protection Act and breach of contract, Chief Judge Inglis held that the key point was whether the employee had done enough to alert the employer to a grievance that the employee wished to be addressed and that the letter did this (*Wilson-Grange Investments v Guerra* [2023] NZEmpC 39) (see [7.2.6]);
- Where an employee was suspended after the employer outlined six “concerns” in a letter, without being told why these might have given rise to the need to suspend her from the workplace, or how a further undisclosed concern was relevant, suspension was held to have been unjustified (*Henry v South Waikato Achievement Trust* [2023] NZEmpC 20) (see [7.7A]).

Chapter 9: Sexual and racial harassment

- The High Court has reiterated that where a complaint of sexual harassment has been made alleging intentional sexual conduct or language, and there is a power imbalance favouring the perpetrator over the complainant, it is reasonable to draw a rebuttable inference that the sexual conduct or language was unwelcome, whether the complainant objected at the time of the alleged harassment or not (*Craig v Stringer* [2023] NZHC 666) (see [9.11]).

Chapter 11: Remedies

- A reinstated position was described as being no less advantageous where the same salary was provided and — although not managing staff unlike the employee’s original role — the employee had to manage key relationships and had a high level of responsibility (*New Zealand Steel Ltd v Haddad* [2023] NZEmpC 57) (see [11.5]);
- Reinstatement was held not to be practicable or reasonable where the employee had accused other employees, with whom she would have had to work, of a significant professional and personal lapse (*Henry v South Waikato Achievement Trust* [2023] NZEmpC 20) (see [11.4A.7]);
- Where an employee had received a contractual redundancy payment after he was unjustifiably dismissed for redundancy, following a significantly flawed process, but had then been reinstated, the Court held that the reversal of the redundancy by reinstatement meant that the redundancy compensation had to be repaid (*New Zealand Steel Ltd v Haddad* [2023] NZEmpC 57) (see [11.12.7]);
- A grievant was held to have taken reasonable steps in mitigation when she obtained casual employment as a stop-gap measure before finding full-time employment (*Henry v South Waikato Achievement Trust* [2023] NZEmpC 20) (see [11.13]);

- Compensation of \$35,000 was awarded where an employee was “deeply impacted” by suspension and dismissal (*Henry v South Waikato Achievement Trust* [2023] NZEmpC 20) (see [11.17.6]);
- Special damages were awarded for what the grievant had spent on retaining a lawyer to act for her from shortly after a suspension until dismissal, costs which were “not subsumed into the costs of litigation” (*Henry v South Waikato Achievement Trust* [2023] NZEmpC 20) (see [11.35.6]);
- Where a grievant had been told by the Accident Compensation Corporation that he was not required to repay accident compensation payments made following his dismissal, the Court held that where the loss from unjustifiable dismissal had been mitigated or reduced by other earnings, it was not open to the Court to award more than the actual loss (*New Zealand Steel Ltd v Haddad* [2023] NZEmpC 57) (see [11.54A]).

