

# Update Personal Grievances

## Service 95 — November 2023

### Commentary

#### Chapter 2: The Grievance process

- Judge Perkins held that when issuing directions under s 182, the interests of justice must be balanced. The general approach of the Court is to have considerable hesitation in rejecting the Authority’s view that the plaintiff failed to facilitate the investigation. However, in some cases restricting the nature of the challenge and the extent of the evidence entitled to be led would nevertheless lead to an unacceptable miscarriage of justice (*GEA Process Engineering Ltd v Schicker* [2018] NZEmpC 117) (see [2.45]).

#### Chapter 3: Unjustifiable dismissal

- The Employment Court has recognised the reality that there is an inherent imbalance of power between employer and employee and that this is a relevant matter of context in assessing whether there was a mutual termination (*Birthing Centre Ltd v Matsas* [2023] NZEmpC 162) (see [3.4]);
- A nurse who had been dismissed after posting anti-Muslim and anti-vaccination messages on Facebook unsuccessfully argued that the dismissal breached the NZ Human Rights Act 1990 in curtailing her right to free speech (*Turner v Te Whatu Ora – Health New Zealand*) (see [3.42]);
- The National Party, which will lead the next Government after the October general election, has indicated that it will extend trial periods to all employers (see [3.51.4]).

#### Chapter 4: Procedural fairness

- The Chief Judge has noted the “significant resources available to the company (management, financial, human resources, and legal)” as being “relevant to an assessment of the ‘reasonable action’ mix” (*Pact Group v Robinson* [2023] NZEmpC 173) (see [4.14]);
- A disciplinary meeting held via Zoom after an employee had requested an in-person meeting was held to have been unfair, among other things because it ignored the employer’s policy commitment to tikanga (*Pact Group v Robinson* [2023] NZEmpC 173) (see [4.17.5A]);
- Unfairness resulted where an employee was alleged to have committed intentional acts which constituted serious misconduct, but the investigator failed to fairly consider psychiatric and other evidence provided by the employee and the decision maker dismissed that evidence based solely on CCTV footage,

failing also to obtain follow-up psychiatric evidence (*AJY v Chief Executive of the Department of Corrections* [2023] NZEmpC 168) (see [4.17.8]).

### Chapter 5: Grounds for dismissal

- Non-reflexive assault and verbal abuse by an experienced care worker on a person with an intellectual disability, in breach of her employment agreement and the employer's policies and code of conduct, was held to be serious misconduct (*Robertson v IDEA Services Ltd* [2023] NZEmpC 145) (see [5.8.4]);
- An employer which relied on suspected fraudulent filling in of time sheets was held not to have been justified on the evidence in "advancing immediately down the disciplinary route" when there was an alternative explanation available which it had not explored (*Pact Group v Robinson* [2023] NZEmpC 173) (see [5.10.8]);
- A palliative care nurse was held to have been justifiably dismissed for serious misconduct after posting comments on Facebook which were anti-vaccination and anti-Muslim, in breach of the employer's Code of Conduct (*Turner v Te Whatu Ora – Health New Zealand* 2023 NZEmpC 158) (see [5.14.5]).

### Chapter 6: Aspects of substantive fairness

- In *AJY v Chief Executive of the Department of Corrections*, the Court found that the decision-maker's failure to fairly consider psychiatric evidence provided by AJY was a breach of procedural fairness. The Court found that irrespective of the fact the employee had admitted wrongdoing, the decision maker ought to have made further inquiries about the employee's mental health, or to obtain follow-up psychiatric evidence after being put on notice that the employee had relevant mental health considerations. (*AJY v Chief Executive of the Department of Corrections* [2023] EmpC 168) (see [6.8]);
- The Court held that an employer's denial of an employee's request to attend a disciplinary meeting in person (rather than via Zoom) was a breach of its obligations to act fairly and reasonably. This was particularly so given the employer had incorporated tikanga values into its company policies and the employee had made it clear that the lack of opportunity for face-to-face communication engaged cultural concerns as it left her feeling stripped of her mana and culturally disadvantaged (*GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101) (see [6.8]).

### Chapter 7: Unjustifiable action

- A palliative care nurse was held to have been justifiably suspended after posting comments on Facebook which were anti-vaccination and anti-Muslim, in breach of the employer's Code of Conduct and that of the Nursing Council of New Zealand (*Turner v Te Whatu Ora – Health New Zealand*) (see [7.7A]).

### Chapter 8: Discrimination

- A palliative care nurse who had been dismissed after posting anti-Muslim and anti-vaccination comments on social media failed in a submission that the dismissal was in breach of the prohibition of discrimination based on religion and political opinion respectively (*Turner v Te Whatu Ora – Health New Zealand* [2023] NZEmpC 158) (see [8.13] and [8.17]).

### Chapter 11: Remedies

- Reinstatement was not ordered where an employee had continuing antagonism towards other employees and demonstrated a lack of insight into the issues

triggering a disciplinary process (*AJY v Chief Executive of the Department of Corrections* [2023] NZEmpC 168) (see [11.4A]);

- Nine months' remuneration was awarded where an employee had not been employed for over three years after being unjustifiably dismissed, but the Court found that dismissal would otherwise have been a possibility in light of their behaviour, or other options terminating employment could have been explored (*AJY v Chief Executive of the Department of Corrections* [2023] NZEmpC 168) (see [11.11.2]);
- Loss of remuneration under s 128 included money owing in lieu of proper notice where the agreement provided for a benefit which became payable if the employees were not required to work out a notice period, the obligation to pay crystallising on the date employment ceased (*Birthing Centre Ltd v Matsas* [2023] NZEmpC 162) (see [11.12]);
- An award of \$31,000, falling within the middle range of revised band 2, resulted from a dismissal which substantially impacted the employee in terms of "deep shame, hurt and embarrassment" (*Pact Group v Robinson* [2023] NZEmpC 173) (see [11.17.7]).

