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LAWNEWS THIS ISSUE:

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+ Employment law

SCORCHING 2015 "BURNING ISSUES" FORUM

By Simon Lapthorne on behalf of ADLSI's Employment Law Committee

Now an unmissable annual event, this year's "Burning Issues" forum (the 15th annual event in the series) attracted a record turnout of around 140 lawyers, with a panel of top presenters considering the latest topics in employment law.

ADLSI Employment Law Committee Convenor Catherine Stewart began the forum by providing a general overview of recent case law and legislative developments.

This included the Court of Appeal decision in the case of *Grace Team Accounting v Brake* [2014] NZCA 541, which held that the Employment Court (Court) and the Employment Relations Authority (Authority) can enquire into the substantive merits of an employer's decision to make redundancies.

Ms Stewart highlighted another Court of Appeal decision in the case of *JP Morgan Chase Bank v Lewis* [2015] NZCA 255, regarding breach of a settlement agreement.

Section 149 of the *Employment Relations Act 2000* (ERA) provides for a mediator from the Mediation Service to sign terms of settlement. The terms are then final and binding on the parties and may not be cancelled under the *Contractual Remedies Act 1979*. Moreover, the terms cannot be brought before the Authority or the Court except for enforcement purposes.

The Court of Appeal held that breaches of settlement agreements which are not section 149 records of settlement do not fall within the jurisdiction of the Authority (or the Court), which means that practitioners will need to carefully consider the appropriate forum. For example, a settlement agreement may be more appropriate if a client is concerned about protecting confidentiality, or intellectual property, so that damages for breach of the agreement can be pursued through the civil courts.

In terms of simmering legislative changes, Ms Stewart reminded the audience that the *Health and Safety at Work Act 2015* is due to come into force on 4 April 2016. This imposes wide ranging duties on persons conducting a business or undertaking (PCBU) to ensure health and safety at work. In addition, it imposes specific duties on "officers" of a PCBU, which includes directors, partners and chief executives.

Another key piece of legislation due to come into force next year is the Employment Standards Legislation Bill, which targets zero hours contracts and broadens eligibility for parental leave. The Bill includes measures prohibiting employers from making unreasonable deductions from employees' wages and provides penalties for breaches of minimum entitlements, compensation and banning orders prohibiting people from being employers.

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This table got into the festive spirit at this year's South Auckland Bench and Bar dinner! Pictured here are: (front row, from left to right) Maggie Winterstein, Lila Tu'i, Helen Young, Sam Wimsett, Jean Hindman and Rebecca Keenan; (back row, from left to right) Sharyn Larkin, Ella Burton, Denise Wallwork and Julia Spelman. For more photos from the evening, please turn to page 4.

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Disciplinary investigations and reinstatements

Presenter Phillipa Muir summarised a number of recent cases which suggest that a very high standard of investigation is now required by an employer in order to justify dismissal for serious misconduct.

The case of *H v A Limited* [2014] NZEmpC 92 concerned the dismissal of a pilot (Mr H), following an allegation of sexual harassment by a 19 year-old flight attendant (Ms C), during a stop-over. The dismissal was found by the Employment Court to be unjustified and Mr H was reinstated.

The Court found that the employer's investigation had been defective as interviews with people other than Mr H were not recorded, or transcribed, and the investigator did not consider whether Ms C's account was influenced by the reaction of her colleagues. In addition, inconsistencies between Ms C and Mr H's account were not raised.

While A Limited strongly opposed reinstatement, the Court held that an employer could not rely on a lack of trust and confidence to oppose reinstatement if the investigation resulting in that loss of trust was flawed.

The case has been appealed to the Court of Appeal on the basis that the standard of enquiry imposed upon the employer was too stringent and bordered on a judicial investigation. The appeal is due to be heard in May next year.

Ms Muir also considered the case of *Harris v The Warehouse* [2014] NZEmpC 188, which concerned the dismissal of a security officer, Ms Harris, by The Warehouse for allegedly using offensive language to a customer, intimidating the customer and threatening to call police and issue a trespass notice when the customer was already in the foyer.

The Employment Court found that the allegation of offensive language came from a co-worker but the customer's detailed report of the incident did not refer to it.

The Warehouse discounted the evidence of a co-worker who said that she would have heard if Ms Harris had shouted at a customer and witnesses did not check and sign the accuracy of their notes. In addition, The Warehouse relied on CCTV footage, but there was no audio.

The Court held that the dismissal was unjustified and Ms Harris was also reinstated.

Presenters His Honour Chief Employment Court Judge Graeme Colgan, Peter Cranney, Peter Churchman QC, Phillipa Muir and Catherine Stewart.

The Court suggested to The Warehouse that it should have specialist support for store management when dealing with complaints where a difficult investigation may well lead to dismissal.

Remedies for hurt and humiliation and choice of forum

Peter Churchman QC considered a number of recent Authority decisions and compared awards of compensation for hurt and humiliation in those cases with awards made in the Human Rights Review Tribunal (Tribunal).

The statutory provisions concerning compensation for hurt and humiliation in the ERA and the *Privacy Act 1993* are similar. However, in the case of *Hammond v Credit Union Baywide* [2015] NZHRRT 6, the Tribunal awarded Ms Hammond $98,000 for hurt and humiliation, which is more than double the previous highest award. It is also significantly higher than the average award in the Authority.

Mr Churchman QC pointed out that in some cases lawyers will have a choice of fora and will need to carefully consider the time to bring proceedings, the cost of the forum, any jurisdictional bars and the quantum of awards available.

Mr Churchman QC concluded by asking whether it was time for the Authority to reconsider the quantum of awards available.

Collective bargaining and access to information

Peter Cranney considered the provisions of sections 50K and 50KA of the ERA in respect of ending collective bargaining and the impact of these sections in terms of strikes and lockouts.

Mr Cranney suggested that on one reading of the new statutory provisions, it is now more difficult for an employer to end bargaining and he suggested that an employer could be ordered into facilitation rather than bargaining ending.

He highlighted the very serious consequences if a party fails to observe good faith by undermining the collective bargaining and pointed out that the Authority has significant powers if the applicant party has been found to have undermined the bargaining. However, as yet there has not been any judicial consideration of the issue.

Finally, Mr Cranney considered the provisions of section 4(1A)(c) of the ERA in relation to access to information and suggested that the Authority or Court will have to decide if disclosure of information is unwarranted, which will be a balancing exercise.

Burning issues for the judiciary

His Honour Chief Judge Colgan concluded the forum by considering the issues of costs, the internet publication of judgments and unrepresented/inadequately represented litigants.

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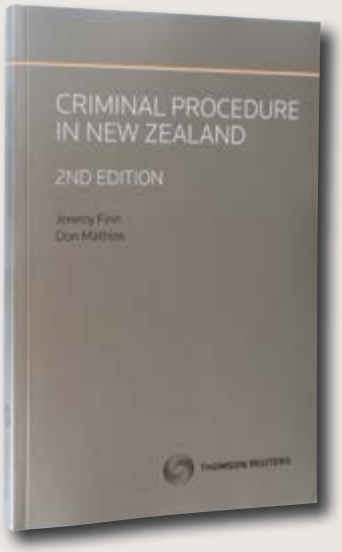
+ New book

Criminal Procedure in New Zealand, 2nd Edition



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His Honour referred to the recent case of *Fagotti v Acme & Co Limited* [2015] NZEmpC 135, in respect of Authority costs, which essentially confirmed the existing position as set out in the case of *PBO Limited v Da Cruz* [2005] ERNZ 808.

In respect of *Calderbank* offers, his Honour advised that the position is still not settled and he referred to a number of cases in which this issue has been considered.

He pointed out that one problem with *Calderbank* offers is that they frequently fail to address the issue of an apology, publicity and reputational loss, which can be a significant consideration for applicants.

In addition, he reminded practitioners that the case of *Kaipara v Carter Holt Harvey Limited* [2012] NZEmpC 92 makes it clear that a *Calderbank* offer made in the Authority should be repeated in any subsequent Court proceedings if it is to be effective in a Court costs award.

In relation to Employment Court costs, his Honour advised the Court is about to issue scale guidelines which will include the following features:

- costs will generally follow the event;
- judges will make early indications at first directions conferences of the categorisations of cases; and
- the scale will be similar to the High Court and District Court scale of costs.

Practitioners were advised to expect a practice direction to be published soon. [Note: this Practice Direction has now been issued.]

In respect of the internet publication of all judgments, all judgments since 2006 have been published, usually no earlier than three days after issue. The Judicature Modernisation Bill, when enacted, will require internet publication of all judgments by all Courts.

His Honour highlighted some of the problems with universal internet publication of judgments: it makes principally private litigation very public and once public, it is difficult to take down a judgment from the internet effectively. One practical solution to this problem may, in appropriate cases, be to apply for a non-publication order. However, the Court is not of one view on tests for non-publication and an unsuccessful application may actually promote interest in the case.

His Honour suggested that practitioners who are instructed to do so should apply for non-publication orders early and should support the application thoroughly with evidence.

A non-publication order in the Authority does not necessarily extend to the non-identification of the parties in the Court and therefore a separate application will have to be made.

Finally, in respect of unrepresented and inadequately represented litigants, his Honour made it clear that one cannot generalise about such litigants and the Court is required to hear and accommodate them.

His Honour highlighted some difficult areas with unrepresented litigants including disclosing the content of mediation, claiming extra-jurisdictional remedies and the relevance of documents and events. He also suggested that inadequately represented litigants can be more difficult to deal with, particularly if representation is by a political or interest group whose cause may be more important than the litigant's individual circumstances.

There is a growing tendency for some unrepresented litigants to complain (generally falsely) of professional misconduct by opposing counsel. His Honour emphasised the importance of recording in writing all significant dealings with a potentially querulous litigant.

+ ADLSI Council

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