

DOCTORS, DISMISSALS AND CONSPIRACIES:

The Year's Best Cases

Rob Towner

BELL GULLY

Introduction

1. This paper reviews important and interesting case law over the last 12 months, focussing on the following issues:
 - (a) Bargaining issues;
 - (b) Strikes and lockouts;
 - (c) Union access;
 - (d) Dismissals;
 - (e) Trade secrets and restraints of trade;
 - (f) Mediation; and
 - (g) Holidays Act issues.

A list of pending and recently enacted legislation relevant to employment is also attached to this paper for your interest.

Bargaining Issues: MECAs, MUCAs and SECAs

2. A number of important issues related to collective bargaining arose in cases during 2007. These include the extent of obligations to settle a collective agreement under section 33 and initiating bargaining with a subsequent party.
 - (i) ***the extent of obligations under section 33***
3. In *Service and Food Workers Union v Auckland District Health Board* (Employment Court, WC 18/07, 1 August 2007), the Employment Court considered the issue of whether the obligation to conclude a collective agreement in section 33 of the Employment Relations Act (**ERA**) required the 20 defendant employers to conclude a single, multi-employer collective agreement (**MECA**) with the plaintiff union.

4. The plaintiff's members included employees of 16 individual district health boards throughout the country, and of four companies that contract to the health boards to provide food, cleaning and associated hospital services. These 20 employers were the defendants to the claim. By the date of the hearing, negotiations for a collective agreement had been in progress for over 16 months, with a major sticking point being the defendants' resistance to a MECA with the plaintiff. The central issue was therefore whether the ERA requires parties to collective bargaining to settle a MECA if stipulated for by the union.
5. While each of the defendants accepted that they should have collective agreements with the union to cover their own employees, they wanted these to be in the form of single-employer collective agreements (**SECA**). Later in bargaining, the health boards indicated their willingness to be parties to a MECA, but said this should not include the contracting companies, so the issue remained for decision by the Court. The union argued that in refusing to sign a MECA, the defendants were acting contrary to law – in particular, section 33 and Schedule 1B (the Code of good faith for the public health sector) of the ERA.
6. The Employment Court concluded that section 33 (which was amended in 2004) goes no further than to make it one aspect of the duty of good faith in section 4 that a union and an employer bargaining for a collective agreement should conclude such an agreement unless there is a genuine reason, based on reasonable grounds, not to. However, while the requirement to conclude a collective agreement may include a MECA, it may equally include a SECA or one of the other varieties of collective agreements (such as a multi-union collective agreement or **MUCA**) that the ERA allows. The section does not go so far as to require the parties to conclude a MECA, even if this has been stipulated for by the union, or if, as applied in this particular case, the public health sector code requires the employer parties to support bargaining for a MECA:

“At the end of bargaining, all that is required is a collective agreement that may include the types of collective agreement to which the employer parties have already committed themselves in this case.”

(ii) *initiating bargaining with a subsequent party*

7. In *New Zealand Amalgamated Engineering, Printing and Manufacturing Union v Witney Investments Ltd (formerly Epic Packaging Ltd)* (Court of Appeal, CA 282/06, 21 December 2007), the Court of Appeal addressed the question of whether the statutory bargaining process in Part 5 of the ERA can be used to persuade employers to join an existing MECA as subsequent parties. Previously, the Employment Relations Authority held that it could; and (as discussed in last year's conference) the Employment Court held that it could not. The union appealed that Court decision in the Court of Appeal.
8. Some of Witney's employees were members of the EPMU. The union sought to join the employer as a subsequent party to an existing multi-employer, multi-union collective agreement (**MECA/MUCA** or **MEMUCA**) in the plastics industry. The union issued Witney with a bargaining notice under section 42 of the ERA, with the purpose of bargaining being to obtain Witney's agreement to become a subsequent party to the plastics agreement; Witney resisted this notice.
9. The employer's position was that a section 42 bargaining notice cannot be given with a view to bargaining for an employer to become a subsequent party to a collective agreement. Rather, it argued that the process is only available for the negotiation of new collective agreements (whatever the form – MECA, MUCA, SECA etc.). The union argued however that there is nothing in the ERA provisions dealing with statutory bargaining to exclude the application of the statutory bargaining process to achieve subsequent joinder to a collective agreement.
10. The Court of Appeal overturned the Employment Court's decision that the bargaining notice issued under section 42 was invalid. Instead, it concluded that section 56A allows subsequent joinder to existing collective agreements where negotiations have resulted in an agreement by an employer or union to join an existing collective agreement. Consequently, the bargaining process in Part 5 may indeed be used to persuade employers to join existing MECAs as subsequent parties.

Strikes and Lockouts

11. A number of issues regarding strikes and lockouts have arisen out of collective bargaining over the past year. In particular, there were decisions on the restriction on replacement labour during strikes and lockouts and the definition of lockout have been considered in the courts.
 - (i) ***scope of section 97 restriction on replacement labour***
12. Both *Finau v Southward Engineering Co Ltd* (2007) 8 NZELC 98,952 and *New Zealand Amalgamated Engineering, Printing and Manufacturing Union v Air Nelson Ltd* (Employment Court, CC 22/07, 8 November 2007) provide analysis of aspects of section 97 of the ERA, which sets out limitations on an employer's ability to cover the performance of duties of striking or locked out workers.
13. Under section 97(2), an employer may "employ or engage" another person to perform the work of a lawfully striking or locked out employee in only one of two situations: firstly, if that person is already employed by the employer at the time the strike or lockout commences, is not employed principally for the purpose of performing work of a striking or locked-out employee, and agrees to perform the work; or another person may be employer or engaged if there are reasonable grounds for believing that it is necessary for the work to be performed on health and safety grounds.
14. In *Finau*, the full Court considered issues relating to strike-breaking under section 97 and the consequent suspensions that the employer imposed under section 87. Some union members had taken strike action during bargaining for a collective agreement. Two machinists refused to operate their machines and as a result were then suspended as parties to the strike. Two other employees were then instructed to operate the machine. Their employment agreements included provisions permitting the employer to transfer them to other jobs that they were qualified to perform, and they had been trained to use this particular machine. They refused to do so, as they did not want to perform the work of striking employees, and they were then suspended under section 87 purportedly because they were now also parties to the strike.

15. The first question was whether the particular employees were being asked to do the work of striking employees or work that was their own. This turned on the Court's interpretation of "the work of a striking or locked out employee" in section 97. The employer argued that if the work to which the employees had been redeployed could be described as their own "type of work", rather than "the work of a striking employee" under section 97, then that section would not apply. The union advocated a "particular task" approach, with the phrase thus meaning the particular task that, but for the strike, would have been done by a worker who is on strike.
16. The Court preferred the type of work approach advocated by the employer. This interpretation enables employers to direct non-striking workers to do tasks within the range of work they normally perform, but still requires the agreement of those employees if they are being asked to do work they do not normally perform. The Court held that an employee exercising their lawful right to refuse to perform the work of a striking employee does not fall within the definition of "strike" in section 81, and thus may not lawfully be suspended under section 87.
17. In *Air Nelson*, the issue was whether the restrictions on replacement labour in section 97 extended to an arrangement whereby a corporate employer had agreed to undertake the work of the striking union members employed by Air Nelson. The EPMU strike affected Air Nelson's ability to process food stuff freight on behalf of Air New Zealand, covered in commercial agreements between the two companies (Air Nelson being a wholly owned subsidiary of Air New Zealand). Given this agreement, an Air Nelson manager e-mailed Air New Zealand, asking that the company make the "necessary arrangements" to ensure that cargo continued to be freighted from Nelson. In response, a number of Air New Zealand managers came from other centres to help load cargo onto aircraft from Nelson during the strike.
18. The Employment Court concluded that Air New Zealand was not "engaged" (in terms of section 97) to perform the work of the striking employees in question (freight loading). The e-mail message established that Air Nelson would be unable to discharge its obligation under the contract with Air New Zealand to process and load freight during the strike, triggering a contractual provision in the freight agreement which included the right for Air New Zealand to carry out the work itself. So, rather than deploying its staff to

Nelson pursuant to any new “engagement”, Air New Zealand was exercising its rights under the existing agreement with Air Nelson to carry out the work.

19. A further issue in the *Air Nelson* case, relating to contract engineers who undertook line maintenance work during the strike, was decided consistently with *Finau*, with the Court finding that this was “within the range of work which they routinely performed”. The work could thus properly be regarded as the contract engineers’ own work, rather than that of the striking employees.

(ii) definition of “lockout” in section 82

20. In *Service and Food Workers Union v Spotless Services (NZ) Ltd* (2007) 8 NZELC 98,968, the SFWU had served several strike notices on Spotless Services (the employer). The employer sent numerous lockout notices to the union, some in response to the strike notices and some in anticipation of receiving strike notices. The employer operated in the health sector and wanted to ensure that a minimum number of employees were available to provide services to district health boards during the strike action. In its lockout notices, the employer stated that the lockout was done with a view to compelling employees to agree that a minimum number of employees would be available to work their normal duties at various sites. The notices stated that the employer would withdraw the lockout notice on receipt of a written undertaking to this effect from the union.
21. The union applied to the Employment Court for an injunction ordering the employer to refrain from demanding that as part of any lockout that employees make themselves available for work. The union argued that such a demand was unlawful, and did not fall within the definition of a lockout in section 82. The employer supported its actions by relying on section 82(1)(b)(ii), which provides that a lockout is an act of an employer in discontinuing the employment of any employees done with a view to compelling employees to comply with demands made by the employer.
22. The Employment Court held that these lockouts were not lockouts permitted under the Act and granted the relief that the union sought. In his judgment, Chief Judge Colgan emphasised that the purpose behind the bargaining provisions in the ERA is to correct

the inherent inequality of power in employment relationships. The Chief Judge felt that to permit an employer to dictate the terms of its employees' strike action would exacerbate rather than rectify this inequality.

23. In *Southern Local Government Officers Union v Christchurch City Council* (Employment Court, CC 26/07, 29 November 2007), the full Court considered whether the actions of the defendant city council, in purporting to lock out eight of its dog control officers during negotiations for a new collective agreement, were unlawful. One aspect of the lockout was the suspension of the officers' standby duties with a corresponding suspension of their standby allowances. The issue was whether a reduction in work corresponding to a reduction in pay can constitute a lockout under the ERA definition.
24. The Court concluded that as employees lose remuneration while on strike, employers should also lose productivity when locking out. Provided that the reduction in work is properly linked to the reduction in pay (and is not an unlawful unilateral variation of the agreement), remuneration may be abated rateably for the work from which the employees are locked out. If these conditions are satisfied, then a reduction in work corresponding to a reduction in pay can constitute a lockout.

Union Access

25. Under section 20(1) of the ERA, a representative of a union is entitled, in accordance with sections 20 and 21, to enter a workplace for purposes related to: the employment of its members; or related to the union's business; or both. Under section 20(4), a discussion in a workplace between an employee and an entitled union representative must not exceed a reasonable duration and is not considered a "union meeting" for the purposes of section 26.
26. In *Terry Young Ltd v New Zealand Engineering, Printing and Manufacturing Union* (2007) 8 NZELC 98,962, the Employment Court considered the question of whether, when a union exercises the right of access to a workplace under section 20, the law limits discussions by the union official to employees individually. The plaintiff employer argued that union access must be confined to meetings with individual employees because subsection (4) refers to "an employee" (in the singular), and because by providing in

section 26 for union meetings with the employees collectively, Parliament should be taken to have intended that section 20 access to workplaces is to be confined to meetings with the individual employees only.

27. However, the Employment Court rejected this interpretation, and agreed with the Employment Relations Authority that discussions with employees undertaken by union officials entering workplaces under section 20 are not confined to discussions with single employees individually, but include discussions with employees collectively. The Court noted that “one of the principal thrusts of the Employment Relations Act 2000 is for collectivism”, and that union access to workplaces under section 20 is generally expressed to be for purposes that are collective rather than individual.
28. The Court’s interpretation of section 26 also differed significantly from that advocated for the employer, with the Court holding that Parliament simply intended to reinstate a statutory right to union meetings through section 26 (as this right had been abolished by the Employment Contracts Act 1991), rather than intended to narrow the scope of union access provisions.

Dismissals

(i) section 103A

29. Significant developments in the law regarding dismissals continued in 2007, and particularly prominent was the Employment Court’s interpretation of section 103A in *X v Auckland District Health Board* [2007] 1 ERNZ 66. The central issue in this case was that raised by section 103A - whether a fair and reasonable employer would have dismissed the plaintiff in the circumstances which existed at the time of the dismissal. The Court’s decision reflects the high procedural expectations that it has of employers, and demonstrates that it will examine all aspects of an employer’s dismissal procedure for fairness.
30. The plaintiff, a doctor employed by the defendant since 1977, was dismissed in April 2005 following an investigation into emails containing attachments with inappropriate and lewd content and photographs which the doctor had received and forwarded in 2004.

The doctor deleted these emails. However, delete does not always mean delete, and unbeknownst to the doctor these emails and images were discovered by administrative staff with access to his computer. Complaints were then made to the employer.

31. Although the Court described the doctor's conduct as "adolescent", "logically inexplicable" and "frankly stupid", the mistakes which the ADHB made in the course of its investigations proved fatal to its case – and resulted in the decision to reinstate Dr X. Understanding the deficiencies in this investigation and dismissal may assist other employers to address potential weaknesses in their own disciplinary procedures, and avoid the possibility of an adverse finding by the authority or court.
32. Key reasons for the Court's decision that the dismissal was not what a fair and reasonable employer would have done in the circumstances related to the ADHB's breaches of good faith and contract, and the absence of a substantive justification for the dismissal. The employer was said to have breached good faith in a number of instances: in misleading the doctor about the need for representation at the first disciplinary meeting; failing to provide the doctor with the information he sought; and the lack of active engagement with the doctor during the disciplinary process. Chief Judge Colgan explained:

“An employer investigating serious allegations against an employee cannot simply act as a proverbial sponge, a non-communicative observer and critic...”
33. Colgan was disapproving of the way in which the employer's distaste for the doctor and his images seemed to have provided the justification for those with critical views to treat him in the way that they did during this process. The decision presents a clear message that regardless of its employee's actions, an employer's failure to reach the procedural standards expected at any point may render a decision to dismiss unjustifiable.
34. The ADHB did receive some vindication later in 2007, however, when the Supreme Court allowed the doctor's interim stay order, preventing publication of his name, to lapse in August: *White (Formerly Known as "X") v Auckland District Health Board* (Supreme Court, SC 37/2007, 8 August 2007).

35. Following the *X v ADHB* decision, the Court indicated in *Chief Executive of Unitec Institute of Technology v Henderson* (2007) 8 NZELC 98,793 that section 103A requires a balancing test between procedure and substance and stated that in some instances “procedural infelicities” might not now be determinative. This suggests that in some special situations, the Court may be a little softer in its procedural expectations.
36. In *Henderson*, the employer had not disclosed outcomes of interviews or provided copies of the notes taken. However, given that the employee had admitted the essential acts of harassment, and other information gleaned from the investigation did not affect these, the procedural failing was held not to invalidate the decision to dismiss. In so deciding, the Court highlighted that section 103A had not “altered the long-established case law that fairness and reasonableness must be assessed broadly and not by the application of inflexible principles by minute and pedantic scrutiny.”
37. Therefore, it is clear that under section 103A, an employer undertaking a disciplinary investigation must be a fair and reasonable employer at each stage of the process and in every decision reached, and must undertake to do so in good faith. While in certain circumstances the Court will not subject an employer’s dismissal process to such close scrutiny (as in *Henderson* for example), employer’s should always bear in mind that every aspect of the process could be challenged after the fact. At the end of the day, the key issue is overall fairness.

(ii) Serious misconduct investigations – fighting in the workplace

38. Some interesting cases have arisen this past year in relation to investigations into physical altercations situations between co-workers, which have resulted in the dismissal of the employees involved. These decisions further underline the need for thoroughness in investigations into serious misconduct, and illustrate the potentially large financial consequences for employers who are anything less than rigorous in their investigations.
39. In *Housham v Juken New Zealand Ltd* [2007] 1 ERNZ 183, the plaintiff employee was involved in a physical altercation with another employee which was not witnessed by anyone else. The two employees’ accounts of the fight differed. Immediately after the altercation, before receiving any medical treatment, the employer requested that the

plaintiff provide a written statement and be interviewed. The plaintiff was later informed that the matter was being taken seriously, and he should make sure he had representation during the investigation. Two further meetings were held, in which the company summarised its account of events (some aspects of which Mr Housham disagreed). The plaintiff was then informed that he was dismissed for breaching the company's policy against engaging in physical acts of violence. The plaintiff raised a personal grievance, claiming that he had been unjustifiably dismissed.

40. Chief Judge Colgan identified several aspects of the employer's investigation into the incident that were flawed, including interviewing the plaintiff before he was medically treated, and making calculations based on a reconstruction of events that was not put to the plaintiff for his comment. The Chief Judge also noted that while an employer is entitled to have a "zero tolerance" policy to physical violence in a safety sensitive workplace, this does not absolve the employer from being required to make a critical assessment of all of the relevant circumstances.
41. Furthermore, the Court noted that as regards substantive justification, the employer's actions were also not fair and reasonable, as there was little evidence (in terms of the injuries sustained) to support the other employee's allegation that of the plaintiff had punched him in the head. Also, even if the employer's erroneous conclusion about the events leading up to the altercation was accepted, the plaintiff's response of applying force to the other employee's head was reasonable and legitimate in the circumstances then prevailing. This is because even in the presence of a "zero tolerance" policy, an employee is entitled to take reasonable steps to avoid actual or imminent assault.
42. The plaintiff no longer sought reinstatement, but he was awarded 9 months' lost wages, \$20,000 as compensation for hurt and humiliation, compensation regarding the loss of his superannuation entitlement and costs. The Court clearly took seriously the evidence presented which showed the impact of this unjustified dismissal on Mr Housham's standing in the community and his ability to obtain alternative employment.
43. In *Murphy v Steel & Tube New Zealand Ltd* (Employment Court, CC 18/07, 16 October 2007), the Employment Court ruled against the employer, reinstating Mr Murphy 22 months after he was first dismissed following a physical altercation at work. Murphy and

a co-worker were involved in two incidents which ultimately led to a physical fight, with the co-worker (who was also dismissed) suffering cuts to his face and lip. Murphy challenged his dismissal and claimed a personal grievance of unfair dismissal.

44. In making its decision, the Court closely examined the investigation process used, including the conclusions reached by the decision-maker. The Court noted that there was a conflict between witness accounts of the incident and Mr Murphy's version, and was not satisfied that the company properly clarified these discrepancies. It was also concerned that the employer took past behaviours into account in making its decisions, which Mr Murphy was never given an opportunity to respond to.
45. It is therefore not surprising that the Court concluded that the investigation was inadequate and had unfair elements, and thus Mr Murphy's dismissal was unjustifiable. Mr Murphy's contribution to his dismissal was assessed at just 20%, and he was awarded lost remuneration and compensation of \$4,000, in addition to an order of reinstatement. The case once again emphasises the need for meticulous practice by employers when dealing with misconduct allegations, even those related to serious physical fighting between employees, and shows that failure to do so can have serious consequences.

Trade Secrets and Restraints of Trade

(i) consideration for restraints of trade

46. The first significant case of 2007 regarding restraints of trade was *Fuel Espresso v Hsieh* [2007] 1 ERNZ 60, a case which dealt with the issue of consideration for restraints of trade contained in original employment agreements. In this case, the respondent had been employed by the applicant company as a barista in one of its small espresso outlets throughout Wellington City. As part of his agreement with the company, the respondent was prohibited from working in a competing espresso bar or café within a 100 metre radius of one of the plaintiff's outlets, or setting up a competing business within a five kilometre radius, for a period of three months throughout New Zealand.

47. The respondent resigned his employment and two weeks later, started work as a barista with a competitor about 70 metres from the applicant's premises – well inside the area covered by his restraint of trade. The applicant believed that some of its customers had gone over to the respondent's new employer to buy their coffee. The applicant alleged that the respondent had breached the restraint of trade in his employment agreement, and sought an order that the respondent cease working for the competitor until the expiry date of the restraint.
48. The Employment Court had held that the restraint of trade was unenforceable, as there was no evidence that proper consideration had been paid for the restraint of trade, over and above the consideration for the underlying employment agreement. However, the Court of Appeal granted the applicant its injunction. It held that where the Court is dealing with an initial agreement of the parties, the law only requires that there be consideration, but will not inquire into the adequacy of that consideration, nor does it require an extra "premium" for a restraint of trade clause. The Court stated that, "Agreements are made to be kept."

(ii) *jurisdictional issues*

49. Significant cases in 2007 also helped to clarify which Court has jurisdiction where an employee has breached a restraint or confidentiality provision, and the previous employer wishes to bring a claim against both its ex-employee and the subsequent employer.
50. In *Credit Consultants Debt Services NZ Ltd v Wilson*, the plaintiff company provided credit and debt management services throughout New Zealand and Australia. The first defendant (Wilson) had been the plaintiff's general manager for five years. His job involved forming, maintaining, and developing relationships with the plaintiff's actual and potential clients. He had access to a range of confidential information, including client details, pricing structures, target clients, and market share by industry and geography. His employment agreement contained a clause restraining him for six months from being involved in the same or substantially the same business within New Zealand, a confidentiality clause, and a non-solicitation covenant.

51. Mr Wilson was made redundant in December 2006. In March 2007, an employee of the plaintiff noticed an advertisement in the local newspaper announcing Mr Wilson's appointment as the corporate sales manager of EC Credit Control, a competitor of the plaintiff. An action against Mr Wilson and his new employer was commenced immediately in the Authority, seeking injunctive relief, compliance orders, penalties and damages. The action was then removed to the Employment Court (which heard the case in three separate hearings).
52. In the first hearing, the Court decided that it had no jurisdiction to award injunctive relief against the second defendant, the subsequent employer: [2007] 1 ERNZ 26. An interim injunction was, however, issued against Mr Wilson, preventing him from soliciting clients or employees of the plaintiff and using or passing to others confidential information belonging to the plaintiff.
53. At the second hearing, the full Court concluded that the only remedy that it had jurisdiction to award against the subsequent employer was a penalty under section 134 of the ERA, for aiding and abetting Mr Wilson's breaches of the employment agreement: [2007] 1 ERNZ 205. The bulk of the judgment was devoted to the issue of whether the employment institutions have the power to grant injunctive relief. The Court found that they do have this power, conferred in section 162 of the ERA - a different conclusion to that reached in *Axiom Rolle PRP Valuation Services Ltd v Kapadia* (2006) 3 NZELR 390.
54. At the third, substantive hearing, the Court held that the restraint of trade, confidentiality and non-solicitation clauses in Mr Wilson's employment agreement were reasonable and therefore enforceable, and had been breached by him: [2007] 1 ERNZ 252. The remedies awarded against Mr Wilson were injunctions restraining him from working for the second defendant for the full six months of his restraint; a compliance order requiring him to comply with the relevant subsisting clauses of his employment agreement with the plaintiff; and total penalties of \$6,000 for the three breached clauses in his employment agreement, payable to the plaintiff.
55. The Court then considered whether to award a penalty against the second defendant for aiding and abetting Mr Wilson's breaches of his employment agreement. It was required to establish that there was an act of aiding and abetting and that this act was wilful. The

facts made it clear that the subsequent employer knew of the relevant clauses of the employment agreement, and further, had been reckless as to their effect when it employed Mr Wilson. Therefore, Court ordered total penalties of \$5,000 against the second defendant for the two breaches of the employment agreement that it had abetted, payable to the plaintiff.

56. *Credit Consultants* clarifies that injunctive relief can be granted by both the Employment Relations Authority and Employment Court. However, apart from aiding and abetting a breach of an employment agreement, there is no other basis on which to cite an entity that is not party to an employment agreement (such as a subsequent employer) as a defendant in the employment jurisdiction. The proper forum for relief against such a party is the civil jurisdiction of the ordinary courts.
57. Following on from the Employment Court's discussion in the *Credit Consultants* cases, the High Court considered jurisdictional issues in a claim of breach of fiduciary duty, misuse of confidential information, and conspiracy in *Transnet v Dulhunty Power* (2008) 8 NZELC 98,843. In this case, the plaintiff was a competitor of the first two defendants (related companies) that were engaged in the supply of equipment to the electricity transmission industry. The third and fourth defendants were the chief executive officers of these companies; the fifth was an employee of the plaintiff and was now employed by the first defendant.
58. The plaintiff claimed that during a closed tender process for a supply contract, the defendants obtained a copy of its tender before submitting their own (lower) tender and winning the contract for supply. In terms of jurisdiction, the High Court concluded that it had jurisdiction against the fifth defendant in tort and equity, rather than the employment institutions, largely because the employment institutions had no jurisdiction over any of the other defendants. The plaintiff obtained injunctions: restraining the defendants from further benefits from this successful tender; directing the plaintiffs to take the first defendant's place as the supplier; and directing the defendants to rid themselves of any of the plaintiff's confidential information in their possession.
59. This case and the *Credit Consultants* cases have helped to clarify the circumstances in which proceedings must be lodged in the employment institutions, which is an issue that

has received much attention over the past few years. Parties to a cause of action who have not had an employment relationship will need to rely on (or be sued in) the ordinary courts; parties who do have an employment relationship at issue must go to the employment institutions. *Transnet* shows that where there is a mix of defendants, some of whom have an employment relationship and some who do not, then the ordinary courts will be required to determine these matters if that is the only way that remedies can be awarded.

Mediation

60. The confidentiality of communications made during mediation was recently considered by the Court of Appeal in *Just Hotel Ltd v Jesudhass* (Court of Appeal, CA 249/06, 14 December 2007). This appeal turned on the construction of section 148(1) of the ERA, which provides that any communication made “for the purpose of mediation” must be kept confidential.
61. Mr Jesudhass and Just Hotels Ltd entered into mediation over an unjustified disadvantage personal grievance brought by the employee. Mr Jesudhass claimed that during this mediation, his employer indicated to him that he would not be permitted to return to work and that he would be dismissed immediately after the end of the mediation. Just Hotels denied this, and said that Mr Jesudhass was dismissed by fax two days after the mediation. The issue was the extent to which the communications between the parties in mediation over an employment dispute could later be relied on in the determination of a personal grievance.
62. Allowing the appeal, the Court held that there was no ambiguity in the words of section 148(1), and all communications “for the purposes of the mediation” attract statutory confidentiality, except possibly where public policy dictates otherwise. This means that documents prepared for use in the mediation, or statements made orally at the mediation are protected; only documents which come into existence independently of the mediation are excluded. This decision reinforces the desirability of encouraging the parties to a mediation to speak freely and frankly, safe in the knowledge that their words cannot be used against them in subsequent litigation if the dispute is not resolved at mediation.

Holidays Act Issues

63. The Supreme Court issued its decision on the *New Zealand Airline Pilots' Association Industrial Union of Workers Inc v Air New Zealand Ltd* (Supreme Court, SC 91/2006, 14 November 2007), an appeal against the Court of Appeal decision discussed in this seminar last year. The majority held that where the parties agree under s 44(2) of the Holidays Act that an employee will observe a specified public holiday on an exchange day, the employees' entitlement transfers to the exchange day. The power in section 44(2) is not a power to agree that a public holiday could cease to be a public holiday, and an agreement under this provision does not have the effect of allowing employees and employers to redefine the clear definition of "public holiday" within the Act. The effect of Air New Zealand's argument that those pilots who work on a substituted public holiday lose their entitlement to time and a half would undermine the concept of public holiday within the Act. Therefore, Air New Zealand's appeal was dismissed.

Legislation

64. A schedule of recent employment legislation is attached.

I want to thank Liz Caughley for her assistance in the preparation of this paper.

Pending/Recently Enacted Employment Legislation

Set out below is an alphabetic list of legislative developments affecting employment over the past year.

Bill	Stage	Intent and effect
Employment Relations Amendment Act 2007	3 rd reading, 27 Feb 2007	Increased age of retirement for Employment Court judges from 68 to 70.
Employment Relations (Flexible Working Arrangements) Amendment Act 2007	Enters into force 1 Jul 2008.	Inserts a new Part 6AA in the Employment Relations Act, which aims to provide certain employees with a statutory right to request a variation in their hours of work, days of work, or place of work, on the basis that they have the care of any person. It also places corresponding duties on employers who receive such a request. A review of the operation and effects of the legislation will take place after two years from its commencement.
Taxation (KiwiSaver) Act 2007	Enters into force 19 Dec 2007.	<p>The position remains that from 1 April 2008, it is compulsory for employers to contribute 1% of an enrolled employee's gross salary or wages to KiwiSaver. This will rise 1% each year to a total of 4% of the employee's total salary or wages from 1 April 2011.</p> <p>The new s 101B of the KiwiSaver Act means that any employment agreement provisions that were entered before the date of enactment of this amendment (i.e. 19/12/07) that effectively bind employees to fund KiwiSaver compulsory employer contributions will have no effect. So, employer contributions are to be paid in addition to the employee's gross salary or wages. After the date of enactment, employer contributions may be offset in part against pay movements, subject to mutual agreement between the employers and employees concerned as part of good faith bargaining.</p> <p>Payments for ACC compensation and parental leave payments under the PLEPA are considered part of "gross salary or</p>

		<p>wages”.</p> <p>Where an employee has more than one job, she or he may choose any or all of their respective employers to make deductions of contributions from their respective salary or wages.</p>
<p>Minimum Wage (New Entrants) Amendment Act 2007</p>	<p>Enters into force 1 April 2008.</p>	<p>Amends the Minimum Wage Act 1983 to provide expressly for a minimum rate of wages for new entrants, being workers who are 16 or 17 years of age and meet certain criteria. The rate prescribed by the Governor-General for these workers must not be less than 80 percent of the rate prescribed for adult workers.</p>