

Not an Employee, so no PG

The employee, Mrs Gamble had been employed since 1972 as a Lab technician by Canesis Network Limited. In mid 2006, Canesis entered in to discussions with AgResearch Limited which led to an agreement that AgResearch would purchase all of the business assets of Canesis. This proposal was announced to staff in October 2006. AgResearch reviewed its operations and determined it would need 100 additional staff following the purchase. Canesis employed 116 staff, which meant 16 Canesis staff (including Mrs Gamble) were not offered employment. The sale and purchase agreement between Canesis and AgResearch was concluded in November 2006. On this day AgResearch wrote to Mrs Gamble and advised that it was not proposing to offer her employment but sought submissions from her on the future of her position. Mrs Gamble made submissions, supported by two of her supervisors however Mrs Gamble's position was confirmed as redundant by Canesis and she was not offered employment by AgResearch. She was asked to work out a short period of notice with payment in lieu of a further 3 months notice and offered 44 weeks' salary as redundancy compensation. In February and March of the following year AgResearch advertised positions for research technicians. Although Mrs Gamble did not apply for these positions she considered them to be similar to her former Canesis position. In March 2007 she lodged a personal grievance against AgResearch alleging she had been unjustifiably dismissed. The preliminary issue the Authority considered was whether the employee had standing to bring a grievance against AgResearch. It determined that as Mrs Gamble had never been an employee of AgResearch she could not pursue her personal grievance.

Mrs Gamble then sought a hearing in the Employment Court on the issue of standing and in addition the imposition of a penalty pursuant to s.134 of the Employment Relations Act 2000. In determining the issue of standing, regard was had initially to s.6 of the Employment Relations Act, which defines the meaning of employee as:

- means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and
- (b) includes—
 - (i) a homemaker; or
 - (ii) a person intending to work; but
- (c) excludes a volunteer who—
 - (i) does not expect to be rewarded for work to be performed as a volunteer; and
 - (ii) receives no reward for work performed as a volunteer.

The advocate for Mrs Gamble argued she should have standing based on a number of propositions, including:

- That the reference to “a person intending to work” works both ways in that a person who has offered and accepted work intends to work but also that a person intending to work should be deemed to have been offered and accepted employment. The Judge rejected this argument stating that: “A *unilateral subjective intention cannot create an employment relationship.*”
- That the heading of Part 6A of the Employment Relations Act: “**Continuity of employment if employees’ work affected by restructuring**” imported a broad concept of continuity of employment in all cases where undertakings had been transferred. This was rejected on the basis that Mrs Gamble did not fall within the specific category in Part 6A dealing with “*protected*” employees, but rather fell within the category of “*other employees*” set out at subpart 3. The relevant sections in subpart 3 do not created any automatic right for “*other employees*” to transfer automatically to the purchaser of their existing employers business.
- That transferring assets from one entity to another necessarily involved the transfer of associated liabilities (including employees). This was rejected on the basis that it is common commercial practice to sell the assets of a business entirely distinct from it liabilities.

Judge Couch concluded that the employee did not have standing to pursue a personal grievance against AgResearch and on this basis also did not have standing to bring a claim for a penalty against AgResearch for allegedly breaching her employment agreement.

Welcome back to work !

We wish you all the best for 2010 and look forward to providing you with assistance throughout the year.



Time Limits can be S t r e t c h e d ...



In *Pani v Transportation Auckland Corporation Limited t/a Stagecoach Auckland*, Louis Pani, filed a challenge to a determination of the Employment Relations Authority (in which his unjustifiable dismissal personal grievance had been dismissed) 5 days outside of the 28 day time limit for filing. He had been dismissed summarily from his position as a coach builder on 23 January 2009, for being a party to the theft of Christmas Hampers belonging to his employer, which were intended to be gifted to staff.

The Employment Relations Authority dismissed his personal grievance in its determination of 10 September 2009 and awarded \$2,500 costs against Mr Pani.

Mr Pani instructed his union to challenge the determination on 1 October. The last day for filing a challenge was 8 October. The union's solicitor gave evidence of having arranged for the necessary documents to be filed and the filing fee paid electronically on 8 October.

The payment could not be processed on this date and was held back with the documentation until the following day, by which time it was late.

The documentation was then sent back to the solicitor by the Registrar due to being filed out of time. An application was then filed for leave to extend time. In determining whether the extension should be granted, the Chief Judge had regards to:

- The extent of the delay;
- The reasons for the delay;
- Any prejudice to the respondent in allowing the challenge to be filed out of time;
- The prospects of success if the challenge for the employee proceeded;
- Whether it was in the interests of justice for litigation to be prolonged.

It was concluded that the delay was relatively short, and the employee was not at fault for the delay.

The Chief Judge further commented that the reasons relied upon by the company as evidencing prejudice to the employer did not actually relate to the delay in filing the challenge and were not of such significance to warrant dismissing the application.

The Chief Judge reviewed the determination of the Authority and concluded that applying the section 103A test, "*it could probably be said*" that a fair and reasonable employer would have dismissed the employee, however concerns were expressed regarding the arguably erroneous approach of the Authority to a number of issues. In particular the employee had criticised the employer for not making enquiries of other employees working in the same area at the same time as the alleged theft. The employer had opted not to follow this up because it considered these employees would not have seen any of the events alleged. The Chief Judge also concluded it was arguable the Authority had applied a low threshold of proof of a very serious allegation of misconduct. The Chief Judge determined it was in the interests of justice that the applicant should have his time for filing his challenge extended.

Introducing Amanda Munting-Kilworth

As advised last month Sarah Bradshaw is now on parental leave until June 2010. Amanda Munting-Kilworth will join the team on 18 January 2010.

Amanda qualified as lawyer in 1994. Between 1994 and 2001 Amanda practised as a solicitor both in Christchurch and in London before taking time off to raise her three children.

Initially Amanda practiced law in Christchurch for Wolfe Cadenhead Stone (who subsequently merged with Lane Neave) gaining invaluable experience and being exposed to a wide variety of law, including employment law. Amanda then went on to practice law in London gaining additional experience as in-house legal counsel.

We look forward to welcoming Amanda to the team and introducing her to clients.

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail**, **Raewyn Gibson**, **Peter Zwart** or **Sarah Bradshaw**.

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