THIS WEEK'S ARTICLES

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EMPLOYMENT LAW

Employment law's hottest topics under the lens

By Margaret Robins, Principal, Workplace Law, and member of ADLS' Employment Law Committee

The ADLS Employment Law Committee recently held its annual Burning Issues Forum.

Catherine Stewart, Convenor of the Committee, opened the Forum by traversing key issues in employment law over the past year. These included the increasing trend for large penalties to be awarded by the Employment Relations Authority and Employment Court for serious breaches of minimum standards, the development of case law regarding the application of scale costs (such as an uplift of 15% for GST on an award of reasonable costs), and a number of decisions from the Employment Court and Supreme Court over the prior 12 months which encapsulate important and developing principles in employment law. Ms Stewart also referred to likely employment law changes under the Labour-led government – burning the brightest of all burning issues – and outlined what proposed changes the government has signalled will occur.

Remedies

Russell McVeagh partner Kylie Dunn focussed on the ten awards of compensation made by the Employment Court over the past 12 months. The mean award in this admittedly small sample, including dismissal and disadvantage grievances, and taking into account reduction for contribution by the employee, was $12,000. Ms Dunn compared the $12,000 figure with an analysis carried out last year covering the years 2013 to 2016. She concluded that there had not been much movement in compensation awards from 2013 to 2017. Ms Dunn referred to the Employment Court judgment of *Stormont v Peddle Thorpe Aitken Limited*, in which the Court analyses the three distinct concepts listed in section 123(1)(c)(i) of the *Employment Relations Act 2000* – humiliation, loss of dignity, and injury to feelings. She encouraged those present to be mindful of the breadth of harm that section 123(1)(c)(i) is meant to encompass.

The Court in *Stormont* also held that:

- the imposition of a penalty is not relevant to the amount of compensation awarded;
- relying on its "gut feel" does not discharge

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ADLS' inaugural North Shore Legal Dinner held at the The Wharf in Auckland's Northcote point was a great success, with North Shore practitioners enjoying some early Christmas spirit. Pictured here are Dion Morley, Dana Holbrook, Julie Bremner and his Honour Judge Maude. For more photos from the evening, please turn to pages 4 and 5.

Happy Holidays from *LawNews*

ADLS and *LawNews* wish all our members and readers a very Merry Christmas and a happy festive season. May your holidays be peaceful and filled with the joys of family, friends and fun. Thank you to all who have written for *LawNews* or otherwise supported us throughout 2017, and we look forward to working with you again in the New Year. We note that *LawNews* will recommence publication in the first week of February 2018 - submissions welcome.

EMPLOYMENT LAW

Employment law's hottest topics under the lens

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the employer's obligation to provide adequate information during redundancy consultation; and

- the fact no redeployment is available does not excuse the employer from consulting about redeployment.

In relation to penalties, Ms Dunn referred to three Employment Court cases in the last year where penalties have been awarded for breaches of the implied duty of good faith and, in one case, breach of a settlement agreement by an employer. In the breach of settlement agreement case (*Lumsden v Sky City Management Limited*), the Court considered the section 133A factors relevant to assessing the quantum of penalties. The Forum was also advised of an Employment Court judgment issued only a few days earlier (*Waikato DHB v Archibald*), in which the Chief Judge found it helpful (in that particular case) to assess compensation for humiliation, loss of dignity and injury to feelings against three bands, describing the $20,000 compensation awarded in that case as "moderate" and in the middle of the middle band. Ms Dunn pointed to the *Stormont* and *Lumsden* judgments as providing good guidance about payment of penalties to the wronged party versus payment to the Crown.

From left to right: Forum presenter his Honour Judge Smith, ADLS Employment Law Committee Convenor and Forum Chair Catherine Stewart, presenter Kylie Dunn and presenter Philip Skelton QC

Availability provisions and disclosure obligations

His Honour Judge Smith spoke first about the "availability provisions" that came into effect on 1 April 2016 (including section 67D). These provisions were a response to zero hour contracts, that is, contracts containing no guaranteed hours but requiring employees to be available should work be offered. His Honour discussed the first and only Employment Court judgment to consider whether section 67D had been engaged or infringed, *Fraser v McDonalds Restaurants NZ Ltd*.

The evidence in this case was that the employees nominated the maximum hours they would be available to work. From that nomination, the employees were guaranteed 80% security of hours, up to 32 hours per week. Hours were adjusted each quarter based on what was worked in the previous quarter. This formula, provided in the employment agreement, meant hours could reduce over time. The employees argued that, under this formula, they had to work more than their nominated hours in order to avoid the effects of this automatic reduction. The Court was not prepared to make a declaration that the employment contained an availability provision. What made the difference in this case, was the evidence that McDonalds did not actually reduce the plaintiff employees' hours. The facts of the *McDonalds* case, as determined by the Court, meant that while the judgment dealt with section 67C and 67D, it did not need to address all the nuances those sections create. The primary take-home message is that flexibility in arranging roster relationships is achievable with careful drafting.

His Honour also spoke to the recent Supreme Court case *ASG v Harlene Hayne, Vice-Chancellor of the University of Otago*. The issue in this case was the obiter remark in the Court of Appeal decision, left unaltered by the subsequent Supreme Court decision, that the employee owed a duty of good faith to report to his employer the fact that he was facing charges. This employee had, in the District Court, been discharged without conviction precisely because of the potential impact on his ongoing employment. His Honour raised the scope of an employee's duty to disclose, and when that duty manifests itself. It is clear that some nexus to employment is needed before an employee is required to disclose, but how far does the duty to inform on yourself go? The answer appears to be: It depends on the nexus between the facts of the charge and the nature of the employment. There was an obvious nexus in the *ASG* case, but what about cases on the cusp?

His Honour also considered whether the employee's duty to disclose conflicted with the defendant's right to silence in criminal cases. It appears, after *ASG*, that suppression orders to avoid the follow-on consequences (to employment) of being charged or convicted, may be pointless because "publication" does not include bare disclosure to those who, objectively assessed, have a genuine interest in knowing – in that case, the employer.

Pay equity

Philip Skelton QC addressed the issue of pay equity, acknowledging that the Bill currently before Parliament, to implement the principles of the Joint Working Group on Pay Equity, would not proceed under the new government.

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ADLS UPDATE

Reflections on 2017, from ADLS President

Joanna Pidgeon

In the busy lead up to Christmas, it is good to take the time to pause and reflect on the year that has been and the upcoming new year.

2017 has been another successful year for ADLS. Highlights include:

- our continuing growth, including our national membership base;
- ADLS' rebrand earlier in the year, which incorporated both tradition and heritage but also reflected our contemporary and national focus;
- the extension of our collegiality outreach with more local and regional events;
- younger lawyers (through our Newly Suited Committee and other groups) having the opportunity to increase their engagement in the profession;
- the continuation of our support and connection with students, assisting with work opportunities, mentoring, and connection with our Committees (in conjunction with the Equal Justice Project).
- our wide-ranging and widely supported CPD programme, incorporating conferences, seminars, webinars, workshops and On Demand viewing.

The addition of the Digital Signing Service to our WebForms platform is an exciting step, enabling thousands of legal professionals across the country to sign documents, verify identity, and witness documents digitally with robust security procedures. Importantly, it is not just the leading ADLS forms within WebForms that can be digitally signed – non-ADLS documents can also be uploaded to the platform for digital signing. This is another example of ADLS leading the way in using technology innovatively to assist lawyers in their day-to-day legal practice.

Next year will be a big year as practitioners come to grips with AML/CFT requirements, and ADLS is committed to providing practical advice to assist with implementation, including our Toolkit Series of AML/CFT seminars.

We are also looking forward to using technology innovatively at our AGM, to enable members outside of the Auckland CBD to participate in our AGM and vote remotely.

The volunteer work of our members and Committees has led to a huge amount of work, including submitting on legislation, writing *LawNews* articles and contributing to CPD, among other things. I would like to thank Tim Jones for his long and outstanding service as he steps down as Convenor of the Documents & Precedents Committee, and welcome new Convenor Jacqueline Parker.

I would also like to thank the ADLS Council for their contribution – Vice-President Marie Dyhrberg QC, Mary Anne Shanahan, Stephanie Nicolson, Tony Bouchier, Vikki Brannagan, as well as our new Council members, Bernard Smith, Tony Herring and Craig Fisher. Their input has been invaluable. ADLS' CEO, Sue Keppel, along with all the ADLS staff, make a tireless contribution, with energy and innovation, to keep the Society going from strength to strength.

I wish you and your families the compliments of the season, and hope that there is time for rest, recreation and family before we head back to work in the new year.

Joanna Pidgeon, ADLS President

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Mr Skelton QC said the Employment Relations Authority has been holding onto more than 100 pay equity claims, waiting for the legislation to be passed. He observed that the *Equal Pay Act 1972* continues to apply and (as interpreted in *TerraNova*) its provisions apply not just to equal pay but to pay equity. He questioned whether there was any need for the *Equal Pay Act* to be replaced – the *Terra Nova* case indicates it is working well. Mr Skelton QC urged the Authority to determine the backlog of pay equity claims without further delay and observed that those determinations will present an opportunity for the Employment Court to set guidelines to assist resolution of such claims. Employment lawyers will need to upskill on how to deal with what will be complex class action litigation in this area. As he noted, we are used to dealing with disputes of rights, but these are disputes of interests.

The ADLS Employment Law Committee thanks Simpson Grierson for, once again, providing an excellent venue for learning and conviviality.

UPDATE FROM ADLS' EMPLOYMENT LAW COMMITTEE

Employment Court – Costs Guidelines

In response to a request by Chief Judge Inglis asking for feedback from the ADLS Employment Law Committee on the pilot Costs Guidelines, the Committee has written to the Chief Judge with suggestions as to how the Costs Guidelines might be modified.

The Committee considers that, two years on, the Costs Guidelines are largely working well and are achieving the intention of providing general predictability for costs awards, thereby assisting the parties to calculate and settle costs themselves by reference to the schedules. However, Committee Convenor, Catherine Stewart, notes that the Committee would still prefer to see the current Costs Guidelines modified prior to being confirmed on a more permanent basis, to include costs provided for:

- preparation for a mediation hearing or Judicial Settlement Conference (JSC) following commencement of Employment Court proceedings; and
- appearance at a mediation hearing or JSC following commencement of Employment Court proceedings.

Members of the Committee have noted that there is generally no cost for the mediator (unless a private mediator is arranged), or the Employment Court Judge for a JSC. The only costs that the parties bear are their legal costs. While the Committee is concerned that costs consequences of attending mediation or a JSC should not act as a disincentive to parties to engage in these processes, on balance, there would likely be greater incentive for the parties to settle if they know that costs consequences could arise if they do not. The Committee is also mindful of the overall cost of proceedings to litigants and considers that costs awards for mediations or judicial settlement conferences might go some way in assisting a successful party to recover costs.

A copy of the Committee's letter is available to view on the ADLS Employment Law Committee's page on the ADLS website – https://www.adls.org.nz/for-the-profession/committees/list-of-committees/employment-law/. Any additional comments can be sent to the Committee Secretary at committee.secretary@adls.org.nz.