IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA433/2017
[2018] NZCA 304

	BETWEEN	DANIEL SEAN RAMKISSOON Appellant
	AND	COMMISSIONER OF POLICE Respondent

Hearing:	2 May 2018 (further material received 4 May 2018)
Court:	French, Brown and Gilbert JJ
Counsel:	C W Stewart and C M Pallant-Drake for Appellant K F Radich and C M Curran-Tietjens for Respondent
Judgment:	10 August 2018 at 10 am

JUDGMENT OF THE COURT

A **We answer the two questions of law submitted for determination by this Court:**

(1) **Did the Employment Court err in dismissing the unjustified dismissal claim by failing to take into account as a relevant consideration, and treating as merely background, the Ōpōtiki non-appointment events?**

No.

(2) **Did the Employment Court err in its determination that the test in ss 103A and 125 of the Employment Relations Act 2000 as amended by the Employment Relations Amendment Act 2010 applied to the appellant's unjustified dismissal grievance?**

No.

B **The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.**

C **The appellant must pay the respondent costs for a standard application on a band A basis and usual disbursements.**

REASONS OF THE COURT

(Given by French J)

[1] Mr Ramkissoon was a police officer. During his employment, he submitted two unjustified disadvantage personal grievances. The first concerned his non-appointment to a vacancy at the Ōpōtiki police station. The second grievance related to the way he was treated by his employer when he became ill following the non-appointment. This second grievance was described in the statement of claim as the rehabilitation management grievance. Subsequently, Mr Ramkissoon medically disengaged from the police force and raised a third personal grievance. He alleged he had been constructively dismissed and brought a claim of unjustified dismissal.

[2] The three personal grievances were heard in the Employment Court by Chief Judge Colgan. The Judge upheld the first personal grievance which he termed the "Opotiki non-appointment grievance" and awarded Mr Ramkissoon monetary compensation.[1] However, the Judge rejected the rehabilitation management grievance and further found that the termination of Mr Ramkissoon's employment amounted to a resignation, not a constructive dismissal.[2]

[3] Dissatisfied with that outcome, Mr Ramkissoon sought and obtained leave to appeal to this Court on two questions of law under s 214 of the Employment Relations Act 2000.[3]

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1 *Ramkissoon v Commissioner of Police* [2017] NZEmpC 85, (2017) 15 NZELR 203 [EmpC decision] at [312] and [345].
2 At [325]–[326].
3 *Ramkissoon v Commissioner of Police* [2017] NZCA 558.

[4] The two questions this Court approved for determination were:

(i) Did the Employment Court err in dismissing the unjustified dismissal claim by failing to take into account as a relevant consideration, and treating as merely background, the Ōpōtiki non-appointment events?

(ii) Did the Employment Court err in its determination that the test in ss 103A and 125 of the Employment Relations Act 2000 as amended by the Employment Relations Amendment Act 2010 applied to the appellant's unjustified dismissal grievance?

Background

[5] In 2006, Mr Ramkissoon was stationed at the Whakatāne police station. He gave evidence at a trial of four other officers charged over an incident Mr Ramkissoon had witnessed. The four officers were acquitted. The prosecution and the acquittal divided the Whakatāne station. Mr Ramkissoon felt under pressure from senior officers, some of whom appeared to blame him for the failure of the prosecution. In evidence before the Employment Court, Mr Ramkissoon described the Whakatāne incident as a turning point in his employment relationship which up until that point had been positive.

[6] In February 2009, Mr Ramkissoon applied for a vacancy at the Ōpōtiki station. The vacancy was for a station sergeant position. Mr Ramkissoon held the rank of constable but was given to understand that would not be an impediment. An appointment panel recommended him for appointment and a formal offer was sent which he signed. He was subsequently informed by human resources that the offer had been a mistake and that he did not hold the necessary qualifications for the position. Following an employment review process, the offer was cancelled and the position re-advertised. Mr Ramkissoon was accused by senior management of making misrepresentations and misleading the panel, accusations which the Employment Court found were unjustified.[4]

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[4] At [59] and [287].

[7] In evidence, Mr Ramkissoon said the false allegations impugning his integrity were "crippling" and "unbearable". He became unwell due to stress and had to take sick leave, commencing in late June 2009. In July 2009 he was referred to a psychologist. Then followed a series of agreed rehabilitation plans to address his health issues and manage his return to work.

[8] On 13 July 2009, Mr Ramkissoon commenced alternative duties. He first worked on day shift with a burglary/property squad and then with the CIB general squad.[5] He enjoyed the work and his health improved. However, according to his evidence, the progress he made was undermined by the area commander attempting from late October 2010 onwards to force him back to frontline duties (shift work). Mr Ramkissoon said this eventually caused him to relapse into "the darkness of depression" in December 2010. He went back on extended sick leave on 30 December 2010 and was then, he claimed, subjected to a series of unreasonable actions in the guise of rehabilitation which became "grossly overwhelming and destructive to [his] hopes of recovering".

[9] On 14 February 2011, Mr Ramkissoon's lawyer wrote to the area commander submitting a second personal grievance relating to the management of his rehabilitation programme. The letter alleged among other things that the order to return to frontline duties was unfair, that management had breached the police rehabilitation policy and that its conduct towards Mr Ramkissoon had been heavy handed and intimidating.

[10] Mr Ramkissoon did not resume work until March 2011 when he was made to undertake what he considered demeaning work in a noisy typists' office. In evidence he said he was unable to cope mentally and psychologically. He went back on sick leave on 15 April 2011 with a review date of 6 May 2011. Meantime, his lawyers wrote again to the area commander adding events since 14 February 2011 to the personal grievance.

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5 CIB stands for Criminal Investigation Branch.

[11] The full particulars of the rehabilitation management grievance, as later articulated in the statement of claim, were that the Commissioner (through his managerial and supervisory personnel) had disadvantaged Mr Ramkissoon by:

(a) wrongly asserting he was not genuinely ill;

(b) continually subjecting him to undue pressure to return him to frontline (shift work) duties;

(c) contacting him at home while on sick leave further pressuring him to give dates for return to work and give further details as to sickness;

(d) referring to unfounded false assertions that he was using industrial blackmail and the 'sick leave card';

(e) allowing a manager to have an active role in Mr Ramkissoon's rehabilitation management and grievance when the manager in question had a conflict of interest, namely being the subject of the earlier grievance (Ōpōtiki non-appointment);

(f) instigating and pursuing an unrelated investigation while Mr Ramkissoon was on sick leave;

(g) failing to recognise and respect, as a good and reasonable employer should, that while the stress creating situation prevailed, rehabilitation is unlikely to be effective; and

(h) unjustifiably using a medical certificate to require Mr Ramkissoon to return to frontline duties when he was not in a fit condition to do so, knowing he was not fit for such duties.

[12] Mr Ramkissoon did not ever return to work. His paid sick leave entitlements ran out and in June 2011 he applied to voluntarily disengage from the police force due to medical incapacity under s 76 of the Policing Act 2008. The application was

approved on 24 August 2011 and on 30 August 2011 he submitted a personal grievance of constructive dismissal.

The Employment Court decision

[13] As already mentioned, Judge Colgan upheld the Ōpōtiki non-appointment personal grievance. He found the Police had breached its own employment review process, its statutory duty of good faith and the requirements of natural justice.[6]

[14] As regards the second personal grievance, the Judge found that Mr Ramkissoon's diagnosed illness was recognised by his employer and that significant assistance to both manage and overcome this was provided, substantially in accordance with the relevant policies.[7] He further found that the agreed and legitimate goal of the rehabilitation programme was to enable Mr Ramkissoon to participate effectively in frontline police duties.[8]

[15] The Judge concluded, standing back from the minutiae of the multitude of events, that the police conduct was what a fair and reasonable employer would have done; both in terms of what was done and how it was done. It followed, the Judge said, that the second claimed personal grievance must be dismissed.[9]

[16] The Judge then went on to say that because the constructive dismissal claim relied "very substantially" on the same matters that were the subject of the rehabilitation management grievance, it followed that the constructive dismissal claim must also fail.[10] The outcome of one essentially dictated the other.

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6 At [296]–[303].
7 At [316].
8 At [319].
9 At [324].
10 At [325].

Did the Employment Court err in dismissing the unjustified dismissal claim by failing to take into account as a relevant consideration, and treating as merely background, the Ōpōtiki non-appointment events?

Arguments on appeal

[17] The key ground of appeal arises out of the following passage in Judge Colgan's judgment:[11]

> [325] To establish a constructive dismissal, the plaintiff relies very substantially upon his treatment by the Commissioner as employer over the period of almost 26 months from early July 2009 until he disengaged from the Police on 22 August 2011. The plaintiff must establish that the reality of the ending of his employment was not, in effect, a resignation (disengagement) but was at the initiative of the employer because of a breach or breaches which, taken together, allowed the plaintiff to treat these as so repudiatory that they amounted to a dismissal. If that is established, it will also be necessary to determine that such a constructive dismissal was unjustifiable although, inevitably, these two theoretically separate questions overlap significantly. *The Opotiki non-appointment events do not come into this consideration. They are background to it but the defendant's breaches in this regard have constituted a separate grievance.*

[18] Ms Stewart on behalf of Mr Ramkissoon submitted that the two final sentences of this paragraph demonstrated a significant error in reasoning. She referred us to authority which says a constructive dismissal can comprise the cumulative effect of a series of events and that, when considering a claim of constructive dismissal, the court must consider all the circumstances.[12] In her submission, although the Ōpōtiki non-appointment events had taken place two years prior to the disengagement, they remained a highly relevant and important circumstance which the Judge was required to consider and which should have been taken into account. By excluding them, he had wrongly limited the scope of his inquiry.

[19] Ms Stewart pointed out that the hearing in the Employment Court concluded in late November 2013 but that the decision was not delivered until 7 July 2017, over three and a half years later. That delay, she suggested, could well explain the error because due to the passage of time the Judge may have confused the Ōpōtiki non-appointment events with the Whakatāne incident. The latter had been the subject

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11 Emphasis added.

12 *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Industrial Union of Workers (Inc)* [1994] 2 NZLR 415 (CA) at 419.

of a pre-trial ruling to the effect that it was only background material and not part of any cause of action.[13]

[20] That the Judge may have been confused was, Ms Stewart argued, supported by another paragraph in the judgment which she said directly contradicted the paragraph quoted above. In this other paragraph, the Judge appeared to consider the Ōpōtiki events were relevant to the constructive dismissal claim, saying:

> [302] In addition to the Opotiki non-appointment being a disadvantage personal grievance on its own, these events, when they became known to the plaintiff, were the catalyst of ongoing and increasing complaint and disillusionment by him. These caused and contributed materially to his incapacity and his need for rehabilitation (and thereby to his rehabilitation grievance). They contributed ultimately to his resignation or disengagement which is the subject of his unjustified constructive dismissal grievance.

[21] Whatever the reason for the error, Ms Stewart argued it was a critical one. She referred us to passages in the evidence as well as a number of exhibits which in her submission showed "unequivocally" that the Ōpōtiki non-appointment events remained current and of concern right up to the point of Mr Ramkissoon's disengagement. Had the Ōpōtiki non-appointment been taken into account, the outcome of the unjustified dismissal claim was likely, she contended, to have been different.

Analysis

[22] The delay of three and a half years to deliver the judgment is unacceptable and we can understand why Mr Ramkissoon may have difficulty accepting findings made such a long time after the case was heard. However, following a careful review of the pleadings, all of the evidence and not just selected passages, as well as the parties' submissions in the Employment Court, we are satisfied the Judge has not erred. The record shows the case was never presented on the basis now being suggested.

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[13] *Ramkissoon v Commissioner of New Zealand Police* [2013] NZEmpC 147 [pre-trial ruling] at [37].

The statement of claim

[23] The constructive dismissal claim was relevantly pleaded in the following terms:

> 25 The actions of the Defendant by his employees, more particularly set out in paragraph 22 above harmed the Plaintiff to the extent that he was required to medically disengage from his employment with the Police and provided the necessary Medical Certificates to establish the grounds for medical disengagement.
>
> …
>
> 28 Particulars of the allegation of constructive dismissal are set out in paragraph 22 of this Amended Statement of Claim. As a consequence of those actions the Plaintiff's health deteriorated to such an extent that he could no longer perform the tasks of a police officer and accordingly medically disengaged.
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> 29 The actions of the Defendant referred to in paragraphs 22 and 28 hereof and referred to in the letter of 30 August 2011 constitute constructive dismissal in that they subjected the Plaintiff to extreme psychological, emotional and economic hardship as a result of the Defendant's conduct whereupon he was forced to leave the Police.

[24] As can be seen, the actions relied upon are said to be set out in [22] of the statement of claim. Paragraph 22 lists the matters we have already detailed above in our discussion of the rehabilitation management grievance. Paragraph 22 says nothing about the Ōpōtiki non-appointment events.[14]

[25] Ms Stewart attempted to overcome this difficulty by relying on the reference to "the letter of 30 August 2011" in paragraph 29 of the statement of claim. The letter of 30 August 2011 was a letter from Mr Ramkissoon's lawyer raising the constructive dismissal claim. It read:

> As you are probably aware, Sean Ramkissoon has now medically disengaged from the Police.
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> As will have been apparent from the grievances raised, psychological and mental health has been detrimentally affected by the actions of the police, both in respect of the initial grievance relating to the Opotiki Sergeant's position and subsequently with the harassment from [the area commander].

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[14] The only reference was not to the events themselves but the fact a manager who was involved in the Ōpōtiki incident had been allowed to play a role in the rehabilitation management.

> The consequence of this has been that his health has deteriorated to such an extent that he can no longer perform the tasks of a police officer.
>
> It is considered it is the actions of the Commissioner, through his staff that have created the position and effectively Sean Ramkissoon has been constructively dismissed.
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> This will now be added to the grievances that are awaiting hearing.
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> …

[26] Ms Stewart argued that by virtue of [29], the grounds of the constructive dismissal claim are to be found in both [22] and the letter of 30 August 2011. That in turn, according to her submission, means that because the letter mentions the Ōpōtiki non-appointment and its consequences, the Ōpōtiki non-appointment events were pleaded as part of the constructive dismissal claim.

[27] We disagree. In our view, having regard to the structure of the pleading, [29] is not reasonably capable of that interpretation. The "and" before the reference to the letter is not conjunctive. It is simply descriptive. That is to say, correctly interpreted it is simply narrating that the actions listed in [22] have also been referred to in the letter.

[28] We note too that neither the statement of claim nor the letter alleged that the failure to resolve the Ōpōtiki non-appointment personal grievance in a timely manner was part of the constructive dismissal claim, this being another contention advanced on appeal.

[29] We are mindful of the further point made by Ms Stewart that in the Employment Court there is a degree of informality and that an overly technical approach should not be taken to pleadings. Ultimately what matters, Ms Stewart argued, was that the other side be fully and fairly informed of the case against them. We agree but in our view the statement of claim did not achieve that, if the intention was as is now being claimed.

[30] We are reinforced in our interpretation of the pleadings by reference to other aspects of the record, notably the submissions made in the Employment Court and, most importantly of all, the evidence.

The evidence

[31] The evidence clearly established that the primary catalyst or trigger for Mr Ramkissoon becoming ill and having to take time off work in 2009 was the Ōpōtiki non-appointment events.[15] However, the evidence also established that although the Ōpōtiki events caused him to become ill through stress, his health stabilised to the point where in 2010 he was expressing an interest in other positions and was able to undertake fulltime duties in the CIB. Mr Ramkissoon stressed in his evidence that the work he was doing in the CIB was not light duties. He said he was up to full capacity working up to 16 hours a day and doing full duties, just in an alternate role.

[32] Significantly, he was so happy in his work in the CIB that in an email he suggested he stay there and that his rehabilitation be considered complete. The problem from his perspective was that senior managers refused to accept that being in an alternate role as opposed to returning to his old role was part of the rehabilitation policy.

[33] The thrust of Mr Ramkissoon's evidence was that all would have been well had senior managers in particular the area commander not pressured him to return to frontline duties and engaged in the conduct summarised in [22] of the statement of claim, virtually all of which occurred between October 2009 and August 2011. To put it another way, on his own case what drove him out was not the Ōpōtiki events but the way he was treated in his rehabilitation.

[34] The evidence therefore accurately reflected the way the claim was pleaded.

Submissions in the Employment Court

[35] There do not appear to have been any opening submissions made by the lawyer (not Ms Stewart) representing Mr Ramkissoon in the Employment Court. For present purposes, the closing submissions are noteworthy for their lack of structure regarding the legal basis of the constructive dismissal claim. That explains why, as noted in his decision, Judge Colgan had to seek further clarification. The response he received is

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[15] We say "primary" because there was evidence the Whakatāne incident was also a stressor.

recorded in the decision but is expressed in such general terms as to be of little assistance.[16]

[36] The closing submissions on behalf of the Commissioner do however make it clear what he understood to be the basis of the constructive dismissal claim. The statement is made "[a]s previously discussed, the second disadvantage grievance and the dismissal grievance are both said to have arrived out of the rehabilitation process…" If this was a fundamental misunderstanding or mischaracterisation of the constructive dismissal claim, one would have expected Mr Ramkissoon's lawyer to have refuted it immediately. A similar description of the constructive dismissal claim had been made by Judge Colgan in the pre-trial ruling.[17]

Conclusion on question one

[37] The limited rights of appeal to this Court mean Mr Ramkissoon is unable to challenge the factual findings made by Judge Colgan regarding the rehabilitation management grievance.[18] In our assessment, the arguments raised on appeal are a valiant but thinly disguised attempt to overcome that difficulty by recasting the case and giving the Ōpōtiki non-appointment events an elevated importance they simply did not have at trial in relation to the constructive dismissal claim.

[38] Our answer to question one is therefore "no".

[39] In coming to this conclusion, we have not overlooked Ms Stewart's argument about the allegedly contradictory paragraph in the Judge's decision quoted above. However, in our view, the paragraph is not necessarily inconsistent with an approach which relegated the Ōpōtiki non-appointment events to background material. In the impugned paragraph the Judge was not addressing the issue of causation in the constructive dismissal context. Rather the point he was making was the uncontested one that it was the Ōpōtiki non-appointment events that caused Mr Ramkissoon to become unwell, triggering the need for a rehabilitation programme.

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16 EmpC decision, above n 1, at [234].
17 Pre-trial ruling, above n 13, at [6].
18 Employment Relations Act 2000, s 214.

[40] In our view the judgment read as a whole is consistent with the pleaded basis of the constructive dismissal claim. We note for example that at the very beginning of the judgment, the Judge summarises the three personal grievances and says of the third "[t]he absence of justification for his constructive dismissal is substantially the same conduct claimed in respect of his second (rehabilitation) grievance."[19]

[41] We would add that even if we are wrong and the Ōpōtiki non-appointment events should have been viewed as more than background, it would not have made any difference to the outcome having regard to all the circumstances. Those circumstances include the fact Mr Ramkissoon had signed a rehabilitation plan which initially had him returning to frontline duties in four to six weeks, was working to full capacity, was seeking other jobs and stating there was no need for the rehabilitation to continue. Those being some of the key circumstances it could not, on any view of it, have been reasonably foreseeable there was a substantial risk the Ōpōtiki events would of themselves or even in combination with other events result in his medical disengagement.[20] We note too uncontested evidence that it was not until 2011 that management became aware he was suffering from any depression or other clinical mental disorder. As regards the ongoing failure to resolve the Ōpōtiki grievance, there was evidence Mr Ramkissoon had himself contributed significantly to the delay.

[42] Our answer to the first question means that technically the second question becomes moot. However, in deference to the arguments we heard, we will address it.

Did the Employment Court err in its determination that the test in ss 103A and 125 of the Employment Relations Act 2000 as amended by the Employment Relations Amendment Act 2010 applied to the appellant's unjustified dismissal grievance?

Background

[43] On 1 April 2011, amendments to the Employment Relations Act changing the statutory test for justification in dismissal and disadvantage grievance claims came into force.[21]

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19 At [4].
20 See *Auckland Electric Power Board*, above n 12, at 419.
21 Employment Relations Amendment Act 2010, s 2(2).

[44] Prior to 1 April 2011, the test under s 103A was:

> … the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether … how the employer acted [was] what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[45] Under the 1 April 2011 amendment to s 103A, the key change for present purposes was to change the word "would" in the phrase "what a fair and reasonable employer would have done" to "could". It is common ground that this change was intended to lower the threshold for justification.

[46] At the same time this amendment came into force, the provision relating to reinstatement was also amended. Prior to 1 April 2011, s 125(2) provided that reinstatement was the "primary remedy" and that it "must" be granted "wherever practicable". The amendment removed the reference to reinstatement being the primary remedy. It also replaced "must" with "may" stating that the Authority may provide for reinstatement "if it is practicable and reasonable to do so". It is common ground that the effect of this amendment was to reduce the availability of reinstatement.

[47] The relevance of the amendments to this case is of course that the key events at issue spanned a period that straddled the amendments coming into force. Judge Colgan held that in the absence of any express transitional provision under the amending legislation, the determining factor should be when the events constituting the grievance occurred.[22]

[48] In relation to the Ōpōtiki grievance, the Judge said that clearly arose before 1 April 2011 and was thus governed by the "would" test for justification.[23] The rehabilitation management grievance was, he considered, less straightforward because it spanned about two years of attempted rehabilitation which ended with Mr Ramkissoon's disengagement in August 2011. However, the Judge was satisfied that the vast majority of the relevant events upon which the grievance was founded

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22 EmpC decision, above n 1, at [10] and [14].
23 At [13].

occurred before 1 April 2011. Accordingly, that too was governed by the pre-1 April test of justification.[24]

[49] As regards the constructive dismissal claim, the Judge considered it significant that the first notification of Mr Ramkissoon's intention to disengage was given after 1 April 2011 and that his employment did not end until August 2011. In those circumstances, the Judge considered it was the current "could" test that applied to the question of justification if Mr Ramkissoon was dismissed constructively.[25] It followed that his application to be reinstated[26] was also governed by the 1 April 2011 amendment to s 125.[27]

Arguments on appeal

[50] On appeal, Ms Stewart argued that all three grievances should have been determined by the older more employee-friendly provisions. She contended the Judge's ruling in relation to the constructive dismissal claim was inconsistent with his approach to the other two grievances. In her submission, the ruling was inconsistent with another Employment Court decision *Allen v C3 Ltd*,[28] as well as being contrary to the presumption against retrospectivity and the provisions of the Interpretation Act 1999.

Analysis

[51] The amending Act does not contain any relevant transitional provisions. We have undertaken a review of the background legislative materials but these contain nothing of assistance. The issue thus falls to be determined by general principles.

[52] Section 17(1)(b) of the Interpretation Act states that the repeal of an enactment does not affect an existing right. Section 18 deals with the effect of repeal on enforcement of existing rights. It provides that an existing right is to be enforced under the repealed legislation.

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24 At [14]–[15].
25 At [16].
26 The Judge considering that reinstatement was only potentially available in relation to the constructive dismissal claim: at [17].
27 At [17].
28 *Allen v C3 Ltd* [2012] NZEmpC 124, (2012) 9 NZELR 499.

[53] The issue thus turns on whether Mr Ramkissoon had an existing right before 1 April 2011. Termination of employment is an essential element of the cause of action of constructive dismissal. In our view, until that happened he did not have an existing right in terms of the law of dismissal and therefore we consider Judge Colgan was correct.

[54] We do not accept there is any necessary inconsistency between this conclusion and the Judge's ruling in relation to the rehabilitation management grievance even although the same conduct by the employer was common to both. The different conclusion is justified by the fact that Mr Ramkissoon had no right to bring a dismissal claim until his employment was terminated, whereas all the elements necessary for his rehabilitation management grievance had occurred before 1 April 2011. The latter is of course evidenced by the fact that he had raised the rehabilitation grievance in February 2011.

[55] We also do not accept that Judge Colgan's decision is inconsistent with *Allen*. In *Allen* the grievant had been dismissed before 1 April 2011 and although the case was heard after that date Judge Inglis held (correctly in our view) that the claim must be determined by the legislation in force at the time of termination. Significantly, in *Allen*, the Court stated:[29]

> Claims for reinstatement under the old section are necessarily limited by the date of the disadvantageous action or dismissal. All such actions occurring after 1 April 2011 will be considered under the new section.

[56] We agree and would add that in cases where the disadvantageous action grievance relies on actions that occurred both before and after 1 April 2011, the just and principled approach is to determine the issue by reference to the time at which the majority of the key actions occurred. That of course is precisely what Judge Colgan did in this case.

[57] It follows we also answer the second question of law in the negative.

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[29] At [84].

Outcome

[58] We answer the two questions of law submitted for determination by this Court:

(1) Did the Employment Court err in dismissing the unjustified dismissal claim by failing to take into account as a relevant consideration, and treating as merely background, the Ōpōtiki non-appointment events?

No.

(2) Did the Employment Court err in its determination that the test in ss 103A and 125 of the Employment Relations Act 2000 as amended by the Employment Relations Amendment Act 2010 applied to the appellant's unjustified dismissal grievance?

No.

[59] As regards costs on the appeal, counsel were agreed these should follow the event. The appellant must therefore pay the respondent costs for a standard appeal on a band A basis and usual disbursements. The appellant is also liable to pay costs on the application for leave to appeal, these being reserved at the time leave was granted. We therefore make an order that the appellant must pay the respondent costs for a standard application on a band A basis and usual disbursements.

[60] Counsel told us that by consent costs in the Employment Court have not yet been fixed but are awaiting the outcome of this appeal. We do not therefore address them.

Solicitors:
New Zealand Police, Wellington for Respondent