BUDDLE FINDLAY
BARRISTERS & SOLICITORS, NEW ZEALAND
AUCKLAND • WELLINGTON • CHRISTCHURCH

Clarendon Tower
78 Worcester Street
PO Box 322, DX 16805
CHRISTCHURCH
Telephone 0-3-379 1747
Fax 0-3-379 5659

T C Weston
CCC717480

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CONFIDENTIAL

The City Manager
Christchurch City Council
PO Box 237
CHRISTCHURCH

Attention: Mr Mike Richardson

Dear Sir

Civic Childcare Centre - Employment Court

1. You have asked for a short report for distribution to Councillors in confidence. As I understand it, it is intended that this report be circulated together with the decision of the Employment Court dated 16 March 1995.

2. The decision is described as an interim judgment. This terminology is very curious. It is not an interim judgment strictly speaking because it finally determines the remedies that were sought by the Applicants. In that sense, it is a substantive judgment. Pursuant to Section 135 of the Employment Contracts Act the Council has a right of appeal on a point of law. Such appeal is made by giving notice of appeal within 28 days after the date of issue of the decision and in this case, that must be from 16 March 1995.

3. Nevertheless, the Judge has taken the unusual step of giving what he calls "skeletal reasons" for his decision and has said that he will issue a much fuller judgment in due course. While it is known for Judges to issue judgment and then deliver their reasons for judgment later, it is extremely unusual for a Judge to give judgment together with interim reasons, and then provide a more detailed account of those reasons at a later date. In fact, there have to be real doubts that the Court has jurisdiction to do this but I have not had an opportunity of giving it any consideration. For all that, and if the matter is appealed, I imagine that the Court of Appeal would find that this was a curious method of delivering judgment.

4. At the very least, this method of delivering judgment means that the Council is forced to decide on the issue of appealing (or not) in something of a vacuum. Normally, of course, the 28 day period would run from the date of delivery of judgment together with the reasons for

that judgment and the party concerned can carefully look at that judgment and make an informed decision. Here, we may not have that luxury and it may be necessary to file a Notice of Motion on Appeal simply to preserve the position while we wait for the reasons to be given. Obviously, and if the Council does decide to appeal, this will have to be kept under review over the next few weeks.

5. Because the judgment is expressed to be interim it is difficult to provide you with any definitive advice in relation to its contents. While my following remarks must be provisional, I comment as follows:

   (a) The interim judgment effectively makes no reference to the suspension of the licence by the Ministry of Education. As a result of that suspension the creche was going to close in any event and there is no way, in all the circumstances, that it was likely ever to reopen again.

   (b) The Court of Appeal has stated that in redundancy situations the Employment Court's only role is to examine whether or not redundancy is genuine. For reasons that are not particularly clear, the Court has concluded that this was not a redundancy but in doing so it appears to have breached the test set out in the Court of Appeal decision in Hale. However, until we receive the final reasons for judgment I cannot be certain that this is the approach taken by the Judge.

   (c) For all that, the Judge seems to have assumed that the suspension of the licence amounted to the making of "allegations" and that the Council dismissed the employees on the basis of those allegations. That is completely contrary to the evidence but at this stage the Judge has not dealt with it in his interim decision.

   (d) The amount of compensation awarded to the First and Second Applicants is extraordinary and well in excess of any previous authority. In the Devlin case the Court of Appeal reduced the amount of compensation that the Employment Court had awarded in that case. There, the Employment Court had awarded a much lesser amount than has occurred here and the Court of Appeal said that in so doing it had erred in law. Once again, we do not have a full set of reasons but it would appear that such an argument is open here.

   (e) The Court has dismissed our argument about the indemnity provision, describing it as "ingenious". What the interim judgment does not mention was that this argument was based on an English House of Lords decision which has been adopted in New Zealand by the High Court. On that basis, it is difficult to see how it can be characterised as "ingenious".

6. The result is extremely disappointing and is, I believe, quite against the weight of the evidence. That, of itself, can amount to an error of law in some circumstances. For all that, the Judge will be aware that he is susceptible to challenge on matters of law only and he will be endeavouring to make findings of fact that will bind the Council on appeal. For that reason, if no other, and if the Council does decide to appeal, it is important that there are no public comments upon the interim judgment that may allow the Judge to "patch up" any gaps that he has left.

7. As a matter of law, I believe that the interim judgment reveals sufficient flaws in its reasoning as to amount to errors of law. Consequently, and as things stand at the moment, I believe that the Council has proper grounds upon which to appeal should it decide to do so. I

recommend that if it decides to appeal then we hold off filing the appeal as late as possible within the 28 day period so that we can give consideration to the more detailed reasons that I hope will be forthcoming within that time frame.

Yours faithfully
BUDDLE FINDLAY

T C WESTON
Partner