**IN THE COURT OF APPEAL OF NEW ZEALAND** **CA 302/96**



**BETWEEN** **I H WEDDING & SONS LIMITED**

**Appellant**

**AND** **JAMES W HENRY**

**Respondent**

**Coram:** Richardson P
Thomas J
Blanchard J

**Hearing:** 20 April 1998

**Counsel:** D M O'Neill for Appellant
S R Mitchell for Respondent

**Judgment:** 20 April 1998

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JUDGMENT OF THE COURT DELIVERED BY RICHARDSON P

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This appeal brought pursuant to s135 of the Employment Contracts Act 1991 is against the decision of the Employment Court of 4 December 1996 dismissing the appeal against the decision of the Employment Tribunal of 12 February 1996.

The claim in the Employment Tribunal was for recovery of wages. Mr Henry, the respondent on this appeal, had worked for the appellant, I H Wedding & Sons Ltd, for a number of years. For economic reasons the employer sought to change the terms and rates of payment of its workers. It presented a new document which Mr Henry refused to sign when asked in July 1991 and again in 1992. The company

paid Mr Henry on the basis set out in the new document which provided a higher hourly rate but without overtime rates or meal money. When his employment ended Mr Henry sued for arrears of wages. His case was that in the absence of a new contract or agreed variation he remained employed under the terms and conditions of the award continuing on an individual contract of employment in those terms following its expiry. The company's case was that he had agreed to the variation. On her assessment of the evidence the Employment Tribunal concluded that Mr Henry had not agreed to the new contract.

On appeal, the Employment Court reached the same conclusion. In essence, the conclusion was that Mr Henry did not expressly agree to the variation of the contract and his conduct did not amount to acceptance of a variation. In that regard s48(1) of the Employment Contracts Act provides for recovery of arrears where payments of wages have been made at a rate lower than that legally payable under the employment contract and notwithstanding the acceptance by the employee of any payment at a lower rate or any express or implied agreement to the contrary. In short, s48 precludes the employer from pleading acceptance of the payment at the lower rate as an estoppel or as constituting conduct varying the contract.

The appeal to this court under s135 is not a general appeal. Subsection (1) provides:

> Where any party to any proceedings under this Act is dissatisfied with any decision of the Court (other than a decision on the construction of any individual employment contract or collective employment contract) as being erroneous in point of law, that party may appeal to the Court of Appeal against the decision; and section 66 of the Judicature Act 1908 shall apply to any such appeal.

Appeal lies only where the appellant is dissatisfied with the decision of the court "as being erroneous in point of law" and further, the decision on the construction of the

employment contact is not appealable. In this case we cannot discern a clear point of law properly arguable in this court. What in essence is involved is the application of standard principles to the facts as found by the Employment Tribunal and upheld by the Employment Court. This was borne out in the submission on behalf of the appellant. The first general submission is that the Employment Court made an error of law in holding that the conduct of the respondent did not amount to agreement to the variation of the employment contract imposed unilaterally by the appellant. The second general submission is that the Employment Court failed to give sufficient weight to the conduct of the respondent in considering whether or not he had consented to the variation of the contractual terms. Underlying both of those submissions are the questions of fact which were decided adversely to the appellant by the Employment Tribunal and then on appeal by the Employment Court. The third general submission is that if the court holds that the respondent assented to the variation or in some way accepted the variation to the terms of the contract, then new contractual terms had been struck. That is submitted as being the answer to the application of s48(1). But, again, the problem with that submission is that the Employment Tribunal, and then the Employment Court, held as a matter of fact that the respondent had not assented to the variation and accepted new contractual terms proposed by the employer.

For those reasons we are satisfied that the case does not raise a question of law properly arguable in this court and the appeal must accordingly be dismissed.

The respondent is entitled to costs which are fixed at $3,000 together with any reasonable disbursements fixed if necessary by the Registrar including travel of counsel.

**Solicitors:**
O'Neill Allen & Clark, Hamilton, for appellant
Yolland Gubb & Co, Auckland, for respondent