



ISSUE

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a regular newsletter for clients of
mcphail gibson & zwart ltd

Final Warning Not So Final After All

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

A recent Employment Relations Authority decision, *Andrews v Chief Executive of the Inland Revenue Department*, serves as a reminder that engaging in a robust process is key if an employer wants to discipline an employee.

Background

Ms Andrews worked as a Customer Services Officer (“CSO”) for 11 of her 14 years at the Inland Revenue Department (“IRD”). In October 2020 she was instructed to check some work by another CSO, though she was not given specific instructions about the task she was supposed to undertake. Ms Andrews viewed the information for the client that the work related to, as well as the tax information for the client’s partner (referred to as Taxpayer A). Taxpayer A was “a prominent New Zealand member of an identified profession”. While carrying out the task, Ms Andrews viewed Taxpayer A’s income for the 2016-2021 tax years, and their 2017 income tax return.

The following day, Ms Andrews discussed Taxpayer A’s income with other employees. Ms Andrews commented that being the “nosey person” she was, she checked Taxpayer A’s income. Concerns about these comments were brought to Ms Andrews’ Manager’s attention. IRD then wrote to Ms Andrews and invited her to a disciplinary meeting, alleging that her actions and comments might amount to serious misconduct.

IRD’s Investigation Process

IRD was concerned that Ms Andrews may have accessed sensitive revenue information about Taxpayer A without an apparent business reason, without proper authority and outside of her normal duties. Further, IRD was concerned that she had disclosed sensitive information about Taxpayer A at a meeting the following day, and with another employee outside of that meeting.

Specifically, IRD was concerned that Ms Andrews had told other employees that she had come across a “very famous” type of taxpayer’s account, and that being the “nosey person” she was, she checked Taxpayer A’s income, told them Taxpayer A’s name and monthly earnings and may have disclosed Taxpayer A’s income details to staff outside of her current team.

As part of IRD’s investigation, it reviewed the steps Ms Andrews undertook for the task and interviewed her team leader. Of particular importance was the team leader’s opinion that Ms Andrews’ comment about being nosey showed that she did not have a business reason to view Taxpayer A’s income tax information for years prior to 2021. However, IRD did not provide the information contained in the interview with her team leader, including her team leader’s opinion on Ms Andrews’ comment about being “nosey”, to Ms Andrews.

IRD told Ms Andrews that if the allegations were substantiated then she may have breached her employment agreement, IRD’s Code of Conduct, sections 6 and 18 of the Tax Administration Act 1994 (relating to the integrity of the tax system and the confidentiality of sensitive revenue information) and the State Sector integrity standards.

Ms Andrews explained that she checked both the client’s and Taxpayer A’s records to satisfy herself that neither of them had outstanding tasks to be addressed. She also explained that her actions with respect to Taxpayer A matched her usual work pattern.

Her use of the word “nosey” at the meeting referred to the standard inquisitive approach she took to her work, and she had not intended any implication that her access was improper.

Disclaimer:

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 **Dean Kilpatrick, Jane Taylor, Deborah Hendry or Jane Jarman.**

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Ms Andrews' Manager accepted that Ms Andrews had a valid business reason to view Taxpayer A's income for 2021 and possibly for 2020, but not for 2016-2019. He considered that she had viewed Taxpayer A's income for those additional years out of curiosity. He also considered that she had viewed Taxpayer A's 2017 income tax return without a valid business reason, without proper authority and outside of her normal duties. The allegations that Ms Andrews had shared Taxpayer A's identity and/or salary with other employees were not substantiated.

Ms Andrews was given a final written warning, based on her Manager's view that her actions amounted to serious misconduct. This warning would be in effect for 12 months.

Personal Grievance

Ms Andrews raised a personal grievance for unjustified disadvantage and took the matter to the Employment Relations Authority ("**Authority**").

The Authority scrutinised IRD's process and discussed the steps required for compliance with section 4(1A)(c) of the Act – an employer's duty of good faith in relation to disciplinary or performance proceedings. The Act provides that *"An employer who is proposing to make a decision that will, or is likely to, have an adverse affect on the continuation"* of an employee's employment must:

1. Provide that employee with access to all relevant information; and
2. Provide that employee with an opportunity to comment on that information before the decision is made.

The Authority held that details of the interview with Ms Andrews' team leader and her team leader's opinion on Ms Andrews' comment about being "nosey" was relevant information, and IRD failed to provide this. Further, the Authority noted that the parameters of the task, the extent of checking what it reasonably allowed for, and Ms Andrews' typical approach to similar tasks were matters that IRD was obliged to fully investigate as part of its disciplinary process. IRD did not do so.

The Authority held that IRD did not genuinely consider Ms Andrews' response prior to making its decision because:

1. IRD did not provide Ms Andrews with all relevant information; and
2. IRD did not sufficiently investigate whether Ms Andrews' action with respect to Taxpayer A were different from her actions in similar circumstances.

The Authority therefore held that the final written warning was unjustified.

Remedies

Ms Andrews sought an apology from IRD, however the Authority noted that the statutory remedies do not permit such an order.

The Authority considered whether the remedy of reinstatement could be awarded in cases involving an unjustified disadvantage, particularly those involving warnings. The Authority noted that there were many such cases where reinstatement had been awarded and ordered that Ms Andrews be reinstated to the position she was in before the warning and that her personal file be redacted accordingly. The Authority noted that reinstatement here had the effect of removing the "*finding*" of serious misconduct and that Ms Andrews should be regarded as having never received the warning.

Ms Andrews also claimed compensation for humiliation, loss of dignity and injury to her feelings. The Authority considered the harm was within the midrange and awarded \$20,000 compensation. This is an unusually high award from an unjustified disadvantage resulting from the issuing of a final written warning, and a reminder to employers that procedural defects in disciplinary proceedings (even those not resulting in a dismissal) can be costly.



On Monday 12 September 2022, the Government announced that it was retiring the Covid-19 Protection Framework as of 11.59pm that night. Masks are now only required in healthcare and aged care facilities, though it is open to businesses to have their own policies.

Government vaccine mandates will end on 26 September 2022, as will the vaccine requirements for incoming travellers and air crews. If you have a vaccination policy, it is important to undertake a new health and safety risk assessment to ascertain whether this policy continues to be justified in the circumstances.

NOTE: If you have dismissed an employee for being unvaccinated, you do not have an obligation to offer them their old job, or any other vacant job (unless you choose to do so).

If you have any questions or would like some assistance in this area please give us a call.

QUEEN ELIZABETH II
MEMORIAL DAY



We also note that 26 September 2022 will be a one-off public holiday to mark the passing of Queen Elizabeth II. This should be treated as any other public holiday, however if you have questions about your obligations, please contact us to discuss further.