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THE ADVOCATE

a regular newsletter for clients of mcphail gibson & zwart
ISSUE 241
April 2015

Investigations and Conclusions

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 judgment of the Employment Court ***Edwards v. The Board of Trustees of Bay of Islands College*** [2015] NZEmpC 6 (dated 3 February 2015) dealt with the dismissal of a school Principal for alleged serious misconduct. The Employment Court overturned the original Employment Relations Authority decision in favour of the school and held that the dismissal was unjustifiable. In doing so, the Court commented on a number of issues surrounding disciplinary investigations, and on how the outcome of an investigation should be expressed.

Quality of Investigation

The Court referred specifically to the higher expectations it has of a well-resourced employer when conducting and deciding on disciplinary issues:

"[10] . . . s 103A(3)(a) of the Act 2000 (the Act) requires the Authority or the Court to consider "the resources available to the employer" in determining whether an employer has sufficiently investigated allegations against an employee. That means, in practice, that the Authority or the Court will expect the quantity and the quality of the employer's investigation and decision-making to be determined, in part, by the resources reasonably available to the employer to do so. ***That will mean that a large employer with in-house or otherwise available human resources and legal advice may be held to a higher standard than an employer who is the owner/operator of a small business which cannot afford such resources.****"*

[emphasis added]

Serious Allegations Require Higher Standard of Proof

The Court also restated a long-held principle that serious allegations require convincing proof:

"[11] There is another factor affecting dismissals for particularly serious misconduct. As long ago as in New Zealand (with exceptions) Shipwrights etc Union v Honda New Zealand Ltd, the Labour Court established (and the Court of Appeal confirmed) that the more serious an allegation against an employee said to justify dismissal, the higher the expected standard of proof of that allegation must be. That is a principle which has been followed consistently over decades including under the current personal grievance regime.

[12] As the Labour Court put it in the Honda case:

> *" … however,* ***where a serious charge is the basis of the justification for the dismissal, then the evidence in support of it must be as convincing in its nature as the charge is grave.*** *This does not involve proof beyond reasonable doubt, nor does it involve some kind of half-way house between proof on a balance of probabilities and proof beyond reasonable doubt. It involves only an awareness on the part of the grievance committee of the gravity of the allegation and the need, therefore, if the balance is to be tilted in favour of the party alleging the act of serious misconduct, that the proof of that act must be convincing in the way we have described. That is because the more serious the misconduct alleged, the more inherently unlikely it is to have occurred and the more likely the presence of an explanation at least equally consistent with the absence of misconduct."*
>
> [emphasis added]

Outcome of Investigation – How This Should be Expressed

The Court was critical of the manner in which the employer expressed its conclusions on the investigation and the outcome:

"[306] This case illustrates a phenomenon that the Employment Court is seeing increasingly in dismissal cases. Having conducted an investigation, an employer then sets out, in a comprehensive letter, the employer's findings arising from that investigation, and the employer's conclusion that the appropriate sanction or outcome is or will be dismissal. The employer, nevertheless, invites the employee to a further meeting, in effect to allow the employee an opportunity to dissuade the employer from the course of action it has indicated it is going to, is likely to, or may well take. On its face, such a "last chance" opportunity may be seen to be fair to the employee, especially where that has been preceded by a comprehensive and inclusive inquiry process with warnings of potential consequences.

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 **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

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[307] However, the natural reaction of many employees in such circumstances, particularly after a lengthy, complex, and difficult investigation by the employer, will be to shrug his or her proverbial shoulders and say: "What's the point? The employer's mind's already been made up and, especially following an investigation in which I have participated, there is really nothing more I can say that will change the employer's mind. The die is already cast." This is a natural human reaction despite the apparent implication from such an approach that there is yet time to change the employer's intention.

[308] Another difficulty arises where there may be matters referred to in the employer's pre-conclusory advice, as I have set out above, which the employee wishes to have the employer take into account and which may or may not have been raised previously. Even if, as in this case, that information is given to the employer before the final meeting, there is a natural view on the part of the employee that it is going to be very difficult, if not impossible, to persuade the employer to retreat from the decision to dismiss that has already been indicated.

[309] In legal terms, this approach to investigations, conclusions, and dismissals, runs the risk of breaching s 103A of the Act and, in particular, the minimum requirement under subs (3)(d) that an employer, in these circumstances, must genuinely consider the employee's explanation (if any) in relation to the allegations against the employee before dismissing the employee. That phrase ("before dismissing the employee") means before deciding to dismiss the employee. It is a long and well-established expectation of employers in these circumstances that they should remain open-minded and objective at all stages during the investigations and inquiries that they carry out into alleged misconduct before reaching decisions about whether that occurred, the nature of the misconduct, and the consequences of it."

The Court held that the employer had gone too far by expressing conclusions as to **both** the nature of the misconduct and the appropriate penalty i.e. dismissal. It concluded:

"[312] ***It is good employment practice for an employer to indicate the potential or possible consequences of its investigation into serious misconduct and even, at that stage, findings about what occurred and whether that constitutes misconduct or serious misconduct. However, to then express, as clearly as the employer did in this case, what the consequences of that will be, at the same time as allowing for a further meeting between the parties, and the implicit opportunity to dissuade the employer from that outcome, risks a finding of pre-determination by the employer and, potentially, the dismissal being held to be unjustified."***

[emphasis added]

This aspect of the case emphasises the need for a two stage process when reaching a decision to dismiss or discipline. Firstly a decision on the nature of the conduct – is it misconduct, serious misconduct or neither. The employee is asked for his/her views before this decision is made. In the second stage, the employee is then appraised of the employer's decision on the nature of the conduct and asked to comment on what possible outcomes there might be, such as counselling, a warning or dismissal. Having heard the employee, a final decision can be made.

Footnote: *Regarding overall quality of investigations, there have been a number of Court decisions in recent times that appear to require an extremely high standard of investigation that would seem almost out of reach for an employer, even a well-resourced one. In a recent case* ***A Ltd v. H*** *(26 March 2015) an employer whose investigation was found wanting by the Court sought leave from the Court of Appeal to have the following question determined:*

"Was the approach of the Employment Court in determining whether A Ltd had sufficiently investigated the allegations against H for the purposes of s 103A of the Employment Relations Act 2000 correct in law?"

The Court of Appeal granted leave to appeal, stating:

"We consider it reasonably arguable the Employment Court imposed a standard of inquiry which was too stringent and which bordered on the equivalent of a judicial investigation."

We will keep you posted on what may well be an important development in the case law surrounding investigation and dismissals.

REMINDER:

Employment Law Changes from 1 April 2015:

Minimum Wage Rates to Increase –

The adult minimum wage is to rise to $14.75 an hour (currently $14.25). The Starting Out and training minimum wages will increase from $11.40 an hour to $11.80 an hour. The new minimum wage rates will come into effect on 1 April 2015.

Changes to Paid Parental Leave –

Changes to Paid Parental Leave come into effect on 1 April 2015 which extend the maximum amount payable from 14 to 16 weeks. The changes apply to an employee or self-employed person if:

- the expected date of delivery of their child is on or after 1 April 2015, but the child is born before that date; or
- the child is born on or after 1 April 2015; or
- in the case of adoption, if the date on which the carer assumes care of the child is on or after 1 April 2015.