MGZ | mcphail gibson & zwart ltd

THE ADVOCATE

a regular newsletter for clients of mcphail gibson & zwart

ISSUE 281

August 2018

Poor Performance or Misconduct?

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

"There is an important distinction between a misconduct concern on the one hand and a performance or capability concern on the other because they require different approaches."

This is a distinction that is often misunderstood when employers come to consider the actions of an employee and determine whether those actions amount to either misconduct or poor performance. A distinction that is often very difficult to determine.

A recent Employment Relations Authority decision; ***Close v. Recreational Services Ltd***, considered just such an event or series of events.

Martin Close worked for Recreational Services Ltd (RSL) on a Council contract emptying public rubbish bins and cleaning drinking fountains in reserves and parks in Christchurch.

In July 2016 he was issued a final written warning for what amounted to serious misconduct for:

a) Falsification, or being party to falsification of any company record or making a false declaration.
b) Failing to comply with organisational and job specific requirements, procedures and policies.
c) Not working within the boundaries of trust and confidence issues and in good faith with matters that could harm and/or damage the employer/employee relationship.

His vehicle was fitted with a GPS tracking system and the employer found that over a period of some seven days he had claimed to have worked over 11 hours performing duties when he had not done so. The warning stated that *"any further acts of misconduct may result in further disciplinary action up to and including dismissal".*

A few months later, following complaints from the public and the Council regarding allegations that he had failed to empty bins on his '*regime'*, Mr Close was required to attend a further disciplinary meeting. Mr Close then went on sick leave remaining absent from 3 October 2016 to 30 November 2016 claiming stress caused by the disciplinary process.

Mr Close returned to work on 30 November 2016 and the employer checked Mr Close's performance on 1 December, and on the 3rd, 4th and 7th December. It found that, over that four day period, 55 bins had not been emptied.

On 13 December 2016 Mr Close was required to attend a formal disciplinary meeting which included the initial complaints/concerns plus those from December. Essentially the claims were that the bins in each case had not been emptied and were not been signed off by Mr Close.

His work required him to follow an electronic work system loaded into his cell phone providing instructions of his daily work pattern and allowing him to sign off the same. The allegations were that in August he had failed to empty and sign off two bins on the days and in December a total of some 55 bins over four working days. The company claimed that the *"propensity of these allegation [sic] are considered by the Company to constitute serious misconduct and if they are found to have substance you need to appreciate that it may result in disciplinary action, up to and including dismissal."*

MGZ | mcphail gibson & zwart ltd

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**.

Contact Details:

Ground Floor

71 Cambridge Terrace

PO Box 892, Christchurch

Tel (03) 365 2345

Fax (03) 365 2347

www.mgz.co.nz

Neil McPhail
E: neil@mgz.co.nz
M: 0274 387 803

Raewyn Gibson
E: raewyn@mgz.co.nz
M: 0274 387 802

Peter Zwart
E: peter@mgz.co.nz
M: 0274 367 757

Dean Kilpatrick
E: dean@mgz.co.nz
M: 027 279 1353

At the disciplinary meeting Mr Close provided five general explanations for his failure:

- *"• I have been off for 2 months due to stress*
- *I told you that I did not know where the parks were*
- *The run was not organised well and I found it hard to comprehend the run*
- *I was used to doing the East run and found it hard to change*
- *I believe that the company and management are trying to push me too hard."*

He pointed out that he was stressed and that the run was too hard for him. Due to that he had to take two months of stress leave and visited the doctor.

He stated that even following his return to work he was not able to complete his run because he was too stressed.

While the employer considered the explanation, they determined that they would not accept his explanation of stress because he had not reported this to the employer and because *"after taking all of Mr Close's comments into consideration, as well as the fact that he was currently under a final written warning for similar circumstances, [they] reached the conclusion that Mr Close's actions constituted serious misconduct and that [they were] justified in summarily terminating his employment."*

It was the view that he had proven (initially) that he was able to perform job well and that they did not believe him when he said he was struggling with the job.

The Authority determined that the employer was wrong in relying on the pre-existing final written warning when it chose to dismiss him, because "*the issues of concern for which Mr Close was dismissed were of a different character to those for which the warning was given.*" and *"it was issued because Mr Close recorded on his timesheets (or had the office staff do so) hours which GPS data confirmed he did not work. The issues for which Mr Close was dismissed were largely for different reasons; namely, not carrying out assigned duties."*

To reach this conclusion the Authority recognised the distinction between misconduct and performance. In doing so they relied upon the Employment Court case ***You v. Commissioner of Inland Revenue*** which itself recognised the 1980 Court decision of ***Trotter v. Telecom*** which provided a distinct framework for the analysis of a justified dismissal for performance:

"(a) Did the employer in fact become dissatisfied with the employee's performance?
(b) Did the employer inform the employee of its dissatisfaction and require the employee to achieve a higher standard of performance?
(c) Was information given to the employee readily comprehensible, an objective critique of the employee's work and an objective statement of the standards to reach?
(d) Was the employee given a reasonable time to attain the required standards?
(e) Following the expiry of a reasonable time:
(i) Use of an objective assessment of measurable targets?
(ii) Fairly putting tentative conclusions before the employee?
(iii) Listening to the employee's explanation with an open mind?
(iv) Considering the employee's explanation and favourable aspects of the employee's service and the employer's responsibility for the situation (for example, not detecting weaknesses sooner or promoting beyond level of competence).
(v) Exhausting all remedial steps including training, counselling and exploring redeployment."

The Authority determined that Mr Close had returned to work from a period of stress leave and that his failure to visit assigned parks, sign off jobs and empty bins were failings of performance not conduct. It was held that the employer failed *"to investigate whether the sudden and stark failings, after a history of a year's satisfactory performance, were due to a sudden, out of character wilful misconduct or another cause beyond his control for which Mr Close could have been given guidance or further training or some other assistance."*

To have determined that the failure was misconduct, the employer must have *"concluded that Mr Close was lying about struggling, and that he had deliberately failed over a four day period to empty 55 bins, had deliberately missed parks he had previously attended and had deliberately sent false information via Con X."*

The situation that RSL found itself in is not uncommon. The distinction between misconduct and performance is not always easily recognised. The significance of this case lies in the Authority's willingness to separate the two issues and require the employer to treat them differently.