

Personal Grievance Backfires – Employer Awarded Damages

In a recent case heard by the Employment Relations Authority, **Goodman v. Rooney Earthmoving Limited**, an employee hoping to obtain \$8,000.00 from his employer for unjustified dismissal was instead ordered to pay his employer more than \$9,000.00 in damages.

Goodman, the employee, was a truck driver. On 10 June 2011, he was driving his truck (fully laden with lime) and was intending to make a right turn on SH.83 into Gibson Road. Approaching Gibson Road he had to pass a tractor pulling a trailer, which was proceeding in the same direction as he was. Goodman crossed onto the wrong side of the road, then a car appeared over the brow of the hill, coming towards him, and with no opportunity to return to the left hand side of the road, he made the right turn into Gibson Road faster than he intended and his truck skidded into a tree. Goodman was uninjured but the truck sustained \$10,707.95 (inc GST) in damage.

Following the accident, Goodman was required to undertake a drug test and tested positive for cannabinoids, at the level of 289 nanograms per millilitre of urine (as against a cut off level of 50 nanograms).

For reasons associated with a change in managerial personnel, a disciplinary meeting was not convened until 18 July 2011. Mr Goodman was unrepresented at the meeting (although the company had invited him to bring a representative) but recorded the meeting on his cellphone. On the basis of what it considered an admission by Mr Goodman that he regularly ate cannabis to assist with keeping a hereditary glaucoma condition at bay, the company dismissed him.

Mr Goodman challenged the dismissal in the Employment Relations Authority, and sought \$8,000.00 in compensation for unjustified dismissal. Despite numerous objections raised by Mr Goodman's advocate (including the delay between the incident and the disciplinary meeting; a lack of support person; issues around the test results; alleged pre-determination) the Employment Relations Authority determined the dismissal to be justified.

The Authority considered the company's counter-claim for reimbursement of the costs of repairing the truck. The Authority said:

"In order to be able to claim damages from Mr Goodman the respondent must show there has been a breach of a contractual duty from which the damage flowed. Although there was no signed agreement between the parties, there was obviously a contractual arrangement governing the relationship. This contractual arrangement comprised express terms, terms incorporated by statute and terms implied by various mechanisms.

There is a pertinent contractual term that has been recognised for many years as being implied into all employment relationships; namely that the employee will exercise reasonable care in the discharge of his duties. That negligence by the employee resulting in damage to the employer can be recovered by the employer. Lister v Romford Ice and Cold Storage Co Ltd [1957] AC 555 HL. (It should be mentioned that the Court of Appeal in Katz v Mana Coach Services [2011] NZCA 610 (2 December 2011) recently questioned, obiter, whether an employer could recover damages from an employee where the employee has been negligent in the performance of his duties, but until a higher court has determined otherwise, Lister remains good law)."

The Authority then went on to consider the cause of the accident and held:

"I am also cognisant of the fact that Mr Goodman attempted to overtake a tractor on a stretch of wet road with a fully laden trailer, which would have weighed in the region of 40 tonnes, when he knew he had to turn right in less than 700 metres. Mr Goodman conceded he knew the road well, and so cannot reasonably claim that the turning came up unexpectedly. Although he partly blames the accident on the fact that a car came over the brow of the hill, causing him to have to turn suddenly as he was on the wrong side of the road, that indicates to me that the manoeuvre was undertaken when he could not see far enough ahead in any event to overtake safely. I do not need to conclude whether Mr Goodman had been under the influence of cannabis at the time of the accident as the manoeuvre was inherently hazardous and was not one that a competent and experienced employee should have undertaken.

All in all, I am satisfied that Mr Goodman was significantly at fault in causing the accident, which in turn caused damage to the truck belonging to the respondent. That in turn caused it financial loss, as the cost of the replacement parts needed for repair was less than the respondent's insurance excess of \$10,000.

I am satisfied that Mr Goodman was negligent, in breach of his implied duty towards his employer. I am also satisfied that Mr Goodman is directly responsible for the losses caused by that negligence, and that the losses are not too remote from Mr Goodman's negligent actions.



The respondent claims that it is owed the sum of \$10,707.05, being the cost to the respondent of buying parts to repair the truck. A detailed invoice was presented to the Authority detailing the parts that needed to be purchased and Mr Goodman confirmed that the parts detailed on the invoice appeared to be appropriate for the damage that he was aware had been caused to the truck. Mr Goodman's advocate suggested on the second day of the investigation meeting that some of the items on the invoice were questionable, but I believe there is no cogent reason to doubt that all the items were properly required to repair the damage to the truck. I therefore accept the invoice as accurately representing the loss incurred by the respondent.

However, the figure claimed by the respondent includes GST, which the respondent is able to set off in its tax returns against GST it receives on its sales and income. I do not believe that it is appropriate to require Mr Goodman to pay to the respondent the GST inclusive sum. The GST exclusive sum is \$9,310.48 and this is the sum that I order Mr Goodman to pay to the respondent."

Claims by employers against employees are relatively rare. This case serves as a useful reminder to any employer whose employee has caused significant damage in the course of employment, that remedies exist for damages to be recouped. McPhail Gibson & Zwart Ltd can assist employers in such circumstances.

Employment Relations Practice Course - 3 & 4 July 2012

This 2 day course examines employment issues from engagement to termination and relevant employment legislation. Topics covered include:

- Pre Employment
- Discipline and Termination
- Holidays Act
- Negotiations and Good Faith
- Policies
- Exit Interviews
- Long Term Absences (Medical/Accident)
- Performance Management
- Parental Leave
- Redundancy and Restructuring
- Legislative Updates

The February staging of this course was booked out so if you are interested in attending get your registration in to us today !

Details in regard to the above course are included with this issue of "The Advocate". If you would like another copy sent to you give us a call on 03 365 2345, email carey@mgz.co.nz or check out our website www.mgz.co.nz

Parental Leave and Employment Protection (Rate of Parental Leave Payment) Regulations 2012 (SR 2012/104)

These regulations, which come into force on 1/07/2012, adjust the amount specified in section 71M(1)(a) and (1A)(a) of the Parental Leave and Employment Protection Act 1987 (the Act). Under section 71M(1) of the Act, the rate of parental leave payment payable to an employee is the lesser of —

- \$458.82 per week (as from 1 July 2011); and
- the greater of —
 - 100% of the employee's ordinary weekly pay before the commencement of the parental leave; and
 - 100% of the employee's average weekly earnings.

Under section 71M(1A) of the Act, the rate of parental leave payment payable to a self-employed person is the lesser of —

- \$458.82 per week (as from 1 July 2011); and
- the greater of —
 - 100% of the self-employed person's average weekly earnings; and
 - the minimum amount set under section 71OA of the Act.

The amount of \$458.82 per week must be adjusted by 1/07/2012 by any percentage movement upwards in average ordinary time weekly earnings. These regulations adjust the amount to \$475.16. These regulations also set, for the purposes of section 71M(1A)(b)(ii) of the Act, the minimum amount payable to a self-employed person. The amount is set at \$135.00 per week. The amounts apply to parental leave payments payable on and after 1/07/2012.

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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.

McPhail Gibson & Zwart - PO Box 13-780, Christchurch Tel (03) 365 2345 Fax (03) 365 2347 www.mgz.co.nz

Neil McPhail - Email neil@mgz.co.nz Mobile 0274 387 803

Raewyn Gibson - Email raewyn@mgz.co.nz Mobile 0274 387 802

Peter Zwart - Email peter@mgz.co.nz Mobile 0274 367 757