

## A Brawl, a Breach and a Threat!

A recent Employment Court determination, **Jane Drader v. Chief Executive of the Ministry of Social Development** [2012] NZEmpC 179 held that despite the finding that the dismissal of Mrs Drader involved a number of procedural deficiencies, it was nevertheless a justified dismissal.

Mrs Drader was Service Centre Manager, in Kerikeri and had dealt with a client ("Client A"), while on reception on 3 and 4 February 2012.

On the evening of 4 February 2012, while enjoying drinks out at a bar with her husband and friends, Mrs Drader asked a male for a light for her cigarette. The male, coincidentally was Client A's 'man' and this led to an incident between Mrs Drader and Client A during which Client A struck Mrs Drader with a bottle, cutting her above the right eye and during which Client A alleged she was hit by Mrs Drader.

On Monday 7 February 2012 Mrs Drader returned to work and accessed Client A's confidential client records and took from these records Client A's unlisted residential telephone number. Mrs Drader then proceeded to ring Client A and on Mrs Drader's account of what occurred she told Client A "you've let the dogs out now, you'd better watch out" and then hung up.

Client A then made a complaint alleging, amongst other matters, that:

- a) Mrs Drader had in fact initiated the fight with her on the evening of Friday 4 February 2012.
- b) Mrs Drader had accessed client A's confidential client details from Work and Income's records and her confidential phone number.
- c) Mrs Drader then had used these private and confidential details to telephone client A on 7 February 2011 and to threaten her.

MSD conducted a disciplinary process in respect to the issues arising from the client's complaint and ultimately reached a decision to summarily dismiss Mrs Drader on the following basis:

*'This dismissal results from a client complaint which, in brief, concerned a fight in a public place with a client; your accessing that client's confidential record without authorisation; and you phoning that client and making threats.*

...

*For the record I note that you did not disclose the unauthorised accessing and allegedly threatening phone call when you first met with your manager (Mr MacPherson) and such admission was only made by you once the specific details of the client complaint became known to you.*

*As Regional Commissioner I have carefully considered all the relevant material provided; including your service record and explanations, and have determined that your actions are so serious as to have permanently damaged the Ministry's trust and confidence in you. On that basis the Ministry has concluded that we have no option other than to terminate your employment. ... "*

The Court held that "there are some considerable difficulties for the defendant in the procedures that were adopted and that these had substantive consequences" including the following:

1. The decision-maker, the Regional Commissioner, relied upon a copy of a report prepared by Mrs Drader's manager, a copy of which was not provided to Mrs Drader. This was a document which the Regional Commissioner relied heavily upon in reaching the decision to dismiss. Among other things, the report included Mrs Drader's Manager's conclusion that, despite there being no clear direct evidence, Mr Drader had had to hold his wife down on the evening of 4 February 2012, to prevent her returning to the bar where the altercation had taken place. The Court held that Mrs Drader should have had the opportunity to consider and respond to the report.
2. The Regional Commissioner had met with Client A during the course of the process however Mrs Drader was not told of the substance of that interview. The Regional Commissioner's "observations of client A's injuries and client A's account of how she received them, influenced Ms Rata [the Regional Commissioner] and her findings that both the plaintiff and client A were injured in what she concluded was a fight, as opposed to an unprovoked serious assault with a bottle upon the plaintiff by client A. Further, client A, in a very compelling way, had told Ms Rata of the serious consequences she suffered as a result of the telephone call from the plaintiff. These were not spelt out to the plaintiff at any stage, and yet Ms Rata was able to conclude that the plaintiff showed no remorse for the serious consequences her actions had caused client A."
3. Client A had indicated that she was prepared to meet with Mrs Drader and the Court noted that such a meeting "may have at least sorted out the difficulties between client A and the plaintiff, even if it left serious issues regarding the plaintiff's unauthorised access of the defendant's computer system and her telephone call to client A. . . . An important opportunity to mitigate some of the consequences to client A of the plaintiff's telephone call was therefore missed."
4. The Regional Commissioner said that "she regarded the plaintiff's actions of fighting in a public place and swearing, affected the reputation of the defendant and the plaintiff's own reputation." However the accounts given by Mrs Drader and Client A of what occurred that Friday evening were inconsistent. The Court noted that the Regional Commissioner "appeared to reject the account she received from both the plaintiff and Mr Drader, that client A was guilty of an unprovoked assault with a bottle." Further, the Regional Commissioner had rejected the offer of affidavits to support Mrs Drader's account or indeed any statements in support of "Client A's" contentions. The Court held:



*"If Ms Rata was going to reach a conclusion regarding the incident, then she was obliged to hear the plaintiff's full explanation, and supporting affidavits, which were offered to her."*

Taking into account these matters the Court held:

*"For these reasons, I find the defendant's conclusion that the plaintiff was guilty of serious misconduct in relation to the incident on the Friday night, was not one which a fair and reasonable employer would have reached in all the circumstances of the case."*

However the Court then assessed the employer's findings, based on Mrs Drader's admissions, that she had been "guilty of unauthorised access to the defendant's confidential records, obtained an unlisted phone number, went into a private interview room and made a telephone call which the plaintiff conceded, on at least two occasions, amounted to a threat."

The Court referred to the evidence in the Court proceedings by Mrs Drader's husband and friends to the effect that Mrs Drader was traumatised by the blow from the Friday evening or even concussed and that this had impacted upon her behaviour when she returned to the workplace the following Monday.

However the Court noted that this was not an explanation provided during the course of the disciplinary process and that the evidence before the Court "was too late, inconsistent and unsupported by medical evidence. . . .". "Trauma or concussion properly presented would have explained the inexplicable, because in all other respects the plaintiff had presented as a quietly confident manager whose actions on the Monday were entirely out of character."

The Court concluded:

*"[89] Because of the matters that I have found, the situation becomes more finely balanced than at first glance. It may well have been open to the Court to conclude that because of the failures in relation to the finding of serious misconduct by the plaintiff of fighting in a public place and aspects of the plaintiffs alleged lack of remorse for the consequences of her actions on the Monday, that the decision to summarily dismiss her was not one that a fair and reasonable employer would have reached."*

*[90] The difficulty with that conclusion is that the admitted misconduct on the Monday, which I find was serious and in breach of the zero tolerance policy properly imposed by the defendant on its employees would have amounted to contributory conduct in terms of s 124 of the Act, and resulted in a finding that disqualified the plaintiff from any remedies. In particular, it would have disqualified her from the remedy, that she primarily sought, of reinstatement."*

*"[92] I conclude that the better course in this case is to find that the dismissal is justified, in spite of process and substantive failures in relation to one of the grounds of serious misconduct, because the defendant discharged the burden of showing that a fair and reasonable employer would have dismissed the plaintiff for serious and wilful breaches of the Code of Conduct. The challenge therefore fails and must be dismissed."*

This case emphasises the importance of conducting a full and fair enquiry into serious allegations of this nature and to ensure that any documentation and/or information relied upon in reaching a decision to dismiss are put to the employee for their feedback during the course of the disciplinary process. However the decision can be commended for not allowing the procedural deficiencies to take priority over the very serious conduct which Mrs Drader had acknowledged had occurred.

## Employee loses case even though employer fails to show . . .

A failure by a respondent to appear in a hearing usually proves fatal, however in what is a relatively exceptional determination by the Authority, a claim for unjustified dismissal and arrears of wages was rejected by the Employment Relations Authority in circumstances where the employer failed to front up to the Authority hearing.

It is however important to note that the employer had filed a Statement in Reply which included evidence on behalf of the employer and the Authority spoke by telephone to one of the witnesses (Mr Froozanfar) who was able to support the employer's contention that the employee was dismissed because he had a drinking problem and was regularly the worse for drink and that it was his drinking problem that caused the termination of the employment.

The Authority noted:

*"[9] When the Authority spoke with Mr Singh at the investigation meeting, and put to him the allegations made by Tandoori Knights in the statement in reply, Mr Singh denied having a drinking problem, denied being drunk in the workplace, and denied being abusive of other patrons. His evidence however was unconvincing and the Authority was not persuaded that Mr Singh's recollection of the events could be relied upon."*

*[10] Given Mr Froozanfar's very clear evidence supporting the fundamental elements of the factual matrix referred to in the statement in reply, the Authority is satisfied it can rely on those facts and for the avoidance of doubt, indicates now that it prefers the record of events from the statement in reply rather than the oral evidence offered by Mr Singh. The tipping point obviously is the evidence provided by Mr Froozanfar who was effectively the proximate cause of Mr Singh being dismissed from his employment."* **[Singh v. Tandoori Knights Ltd]**



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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