

Court Reinstates Abusive Employee

A recent Employment Court decision, although unremarkable on the facts, provides us with some food for thought in both procedural and substantive matters. While the case came to be considered under the old 'would' not 'could' test, the lessons will still be largely significant for employers and employees alike.

The case was **Allen v. C3 Limited**. C3 was a stevedoring company at Mt Maunganui, and Mr Allen, a forklift driver.

Mr Allen was dismissed because in a meeting with his manger (Mr Payne) over a claim for overtime, he told him to "get fucked", made what was described as 'an obscene gesture' and departed the meeting despite an instruction not to do so from Mr Payne.

Mr Allen was called to a disciplinary meeting to address allegations of misconduct as defined in the company Code of Conduct:

"The use of abusive and/or obscene language and gestures and . . . the refusal to carry out a reasonable instruction from a manager or supervisor."

At the meeting were Mr Payne, 'in a note taking capacity' and the HR Manager, Mr Pritchard, who 'conducted the meeting'. Mr Allen admitted insubordination and the use of obscene language. When the employer queried whether or not an apology would be provided, Mr Allen said "If I need to apologise then I will I suppose". Mr Allen was dismissed on one week's notice.

The Employment Relations Authority decision which had concluded that the dismissal was justified was challenged to the Employment Court. The employee challenged on two significant grounds, firstly the dismissal was procedurally unfair because of bias and secondly that it was substantively unjustified.

As stated above, the issue came to be considered by the Court under the old rules for determining whether a dismissal is justified, however given the outcome of the decision, it is unlikely that the move from a 'would' to a 'could' test would have significantly changed the outcome.

BIAS

The employee claimed that Mr Payne should not have been involved in the process, stating that, procedurally the dismissal was predetermined in circumstances where the person who the employee had offended was also the person who made the decision to dismiss. The Court referred to an earlier decision, **Walker v. Boehringer Ingelheim** where the Court had observed that ". . . it is unwise for a person directly involved in the events to be allowed to make a decision where this can be avoided."



While the employer claimed in this case that Mr Pritchard was the decision-maker and Mr Payne the mere note taker, the Court did not accept this. On the evidence the Court found that Mr Payne had been involved in the initial decision to hold a disciplinary meeting. Tellingly the record of the meeting included notes regarding comments made by Mr Payne to Mr Pritchard during an adjournment; to the effect that he (Mr Payne) would have difficulty working with Mr Allen in the future. These comments were not put to Mr Allen. The Court actually went so far as to determine as a matter of fact that they believed Mr Payne had made the decision not Mr Pritchard.

The Court went on to say:

*"I am left with no doubt that even if that was not so, Mr Payne's strongly held and articulated views would have been influential in Mr Pritchard's consideration. In **Walker v Waiheke High School Board of Governors Blanchard J** observed that:*

"The mere presence of an accuser at a meeting in which a critical decision is taken may give rise to a breach of natural justice. It may influence the decision even if the accuser says nothing."

And later:

"Mr Payne's roles as complainant, witness, and decision-maker were incompatible. An objective observer would not conclude that he had brought an unbiased mind to the decision to dismiss. The multi-dimensional role he assumed was not how a fair and reasonable employer would have acted, and fell short of the standard in s 103A."

This decision again emphasises the complexity of bringing investigations into line with the requirements of natural justice. The Court did seem to acknowledge that such a concept has the potential to cause problems with smaller employers:

"There is no immutable rule that the person complained about cannot act as decision-maker, and there will be circumstances in which it is not practical to do otherwise. However, C3 is a large organisation, and it is clear that someone other than Mr Payne could have undertaken the process. It is also clear that someone other than Mr Payne should have done so, given that Mr Allen directed his obscene gesture and verbiage at Mr Payne . . ."

SUBSTANTIVE JUSTIFICATION

While of less significance than the procedural issues, in part because the matter was heard under the old 'would' rules, the Court's decision on the substantive issues is still of interest. The Court found that the use of language and the obscene gesture *"fell within the category of misconduct and . . . may well have amounted to serious misconduct too."*

From the evidence the Court found that the lack of voluntary apology was regarded by the employer as the *'final straw'* with the suggestion that he may not have been dismissed had a voluntary apology been forthcoming. The difficulty with this from the Court's point of view was twofold. Firstly, Mr Allen was not told that an apology was required to avoid dismissal. Secondly, the Court found the employer's view regarding an apology to be inconsistent with the company's statement that dismissal was *"necessary to send a strong message to staff that insubordination was not tolerated within the company"* and its earlier evidence that an apology would not have been made public.

The dismissal was found to have been unjustified on both substantive and procedural grounds.

REINSTATEMENT

Mr Allen claimed reinstatement and that too came to be reviewed under the old tests where it was to be regarded as the primary remedy and to be ordered unless reinstatement was not practicable.

The company's main submission on practicability was that it would force Messrs Allen and Payne to work together. The irony of this was not lost on the Court where it pointed out that this merely highlighted why it was inappropriate for Mr Payne to be involved in the decision-making. On Mr Allen's behalf it was argued that reinstatement was practicable and manageable. As evidence of this Mr Allen referred to the fact that he had not been suspended and that he had been able to work with Mr Payne during the period of the investigation. The Court accepted this and reinstated Mr Allen.

In conclusion, all cases will be considered on their own facts. While one of the significant issues for this case is the fact that it was considered under the old test, it still provides food for thought:

1. Employers need to give some thought as to the decision-maker in any disciplinary investigation. Where it is practicable, the decision-maker should be separated from the factual matrix and should not be the complainant.
2. The larger the employer, the more likely it is that a failure to separate complainant and decision-maker will result in an unjustified decision.
3. Any issue that ultimately comes to be considered as a reason for justification of dismissal (the apology) must be put to the employee as part of the investigation.
4. Suspension, or a failure to do so, may come to be considered where reinstatement is claimed.

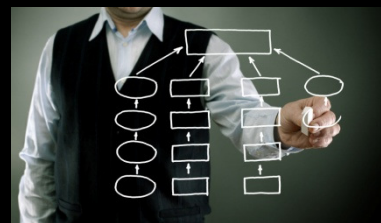
As advocates we are more and more frequently being called on to assist in the investigative/decision-making process. At the very least we would strongly suggest you seek advice before initiating a disciplinary process in what is becoming an increasingly vexatious area.

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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