

FULL COURT RECONSIDERS S.103A 'JUSTIFICATION' TEST

In a judgment delivered on 3 June 2009 all the Judges of the Employment Court (then four) considered the interpretation and application of section 103A of the Employment Relations Act 2000, being the test of *'justification'* in personal grievance cases. The case judgment is *Air New Zealand v V*.

Employment Relations Authority

The ERA had found V was guilty of serious misconduct when testing positive for cannabis. It found however that Air New Zealand's refusal to provide V with a rehabilitation programme rendered his summary dismissal unjustifiable.

Issues for Employment Court

Issue One: (Question of Law):

Having found V had engaged in serious misconduct was it open to the ERA to have considered Air New Zealand's decision to dismiss? Was it open to the ERA to conclude Air New Zealand's decision was unjustifiable?

Issue Two: (Question of Fact) - (If found wrong on Issue One):

If it was open to the ERA to consider Air New Zealand's decision to summarily dismiss V after having found him guilty of serious misconduct, was it wrong on the facts to find Air New Zealand's decision to dismiss was unjustified.

Facts

- V was employed by Air New Zealand in its cargo handling area
- V's job was in a safety sensitive area
- Air New Zealand had a zero tolerance drug and alcohol policy for safety sensitive areas
- Safety sensitive areas were open to random drug testing
- V tested positive for cannabis as a result of a random drug test
- Air New Zealand's drug and alcohol policy included a rehabilitation option for those failing a test

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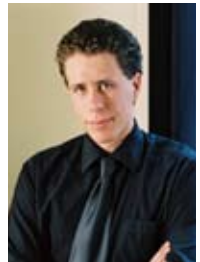
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- Air New Zealand declined to offer V rehabilitation and summarily dismissed him

Issue One Test of Justification

The Court noted:

- The test of justification is on an objective basis and in all the relevant circumstances at the relevant time
- The Court's considerations include the:
 - Conduct of the worker
 - Conduct of the employer
 - History of employment
 - Nature of the industry and its customs and practices
 - Terms and conditions of employment
 - Terms of any other relevant documents
 - Circumstances of dismissal
 - Good industrial practice
- The obligation to justify a decision to dismiss was on the employer
- The standard is that of a fair and reasonable employer
- The Court can review the employer's inquiry and decision as to whether misconduct has occurred and its seriousness
- The Court can also inquire into the employer's ultimate decision in light of its previous finding
- The Court's inquiry is directed at considerations of moral justice which involves the Court considering whether what was done by the employer was just to both the employee and the employer in all the circumstances.

Issue Two – Application of Test to the Facts

In considering this issue the Court took into account further facts that included:

Further Facts

- V had worked for Air New Zealand for many years
- V had an unblemished employment record
- Air New Zealand's policy included "self-referral" that could lead to rehabilitation support through the Medical Review Officer
- An employee who declares drug use immediately before or after testing is not "self-referring"
- V read and was aware of Air New Zealand's policy
- V was a regular recreational cannabis user
- A random drug test on V was arranged and V then declared his drug use to his Manager
- V tested positive; being 20 times over the threshold level
- V's Manager undertook a disciplinary process with V obtaining his responses
- V's Manager told him why he was considering summary dismissal that included:
 - Awareness of Air New Zealand's policy
 - Awareness of zero tolerance
 - Level of risk to V and workmates
 - Decision to use cannabis over lengthy period after introduction policy
 - Decision not to use self-referral system
- Air New Zealand considered rehabilitation as an option but rejected it

Court Decision

The Employment Court didn't agree with the reasoning of the ERA in rejecting Air New Zealand's decision not to offer rehabilitation. V had been given an opportunity to comment on Air New Zealand's view that he needed to abstain from drugs and alcohol. In quoting an earlier Court of Appeal decision, the Court held that to require Air New Zealand to seek V's comments on V's Manager's conclusion that rehabilitation was not an appropriate option would be to "extend the right to be heard and to answer allegations too

far" and that such an approach "could lead to an interminable process". V's Manager had put to V his conclusions for rejecting rehabilitation as an option. The Manager's action was in accordance with Air New Zealand's policy. The process used to summarily dismiss satisfied both elements of the section 103A test i.e.

1. The "what" (what would a fair and reasonable employer do in all the circumstances)
2. The "how" (the process to be followed)

EMPLOYER SUCCEEDS IN OBTAINING "EXTENSIVE AND INTRUSIVE" SEARCH ORDER

The recent Employment Court decision of *Te Runanga o Ngati Whatua v Brence* will assist employers who suspect an employee or former employee of taking sensitive information that belongs to the employer. Until recently, an employer could only obtain a search order from the High Court if they wanted to search for documents or electronic storage devices that they suspected contained information that rightfully belonged to them. The decision in *Te Runanga* restores the Employment Court's power to grant such orders.

The Facts

Mr Brence was employed by the Runanga from 16 July 2008 to 27 February 2009 before he was dismissed summarily for alleged serious misconduct. Prior to his dismissal, Mr Brence held a senior managerial role in Te Ha O Te Oranga Ngati Whatua. His position involved being aware of, and having access to, key sensitive and confidential information about the Runanga's business. During a disagreement in late December 2008, Mr Brence threatened to disclose information about the Runanga's business to others. Mr Brence also suggested earlier in his



employment that the business should make use of documentary information that he had retained from his old employer.

Mr Brence was dismissed on 27 February 2009 and was asked to return all property owned by the Runanga and was told specifically not to delete any information held on the cell phone or laptop computer that he was to return. Evidence suggested that between 26 January and 2 March 2009, approximately 118 files were removed from the laptop computer and transferred to a USB device. The names of these files indicated that they were property of the Runanga.

There was further evidence that at this time Mr Brence deleted some 2000 files and folders, contrary to his contractual obligations and his employers request not to delete information. The Runanga never received a USB device and

the laptop computer and cell phone had little information left on them, including no emails.

The Decision

The Runanga applied for a search order in the Employment Court to obtain the information that Mr Brence had taken. The order was granted on the basis that there was sufficient evidence that Mr Brence held or once held information that belonged to the Runanga and “*the potential or actual loss or damage to the Runanga will be serious if a search order is not made.*” The Court thought that this was a case in which a search order without notice to Mr Brence was appropriate in order to preserve and secure the evidence. The Court commented that the orders granted in this case to search for the information held by Mr Brence “*are both extensive and intrusive.*”

TOO BIG FOR THE JOB

A recent decision of the Employment Relations Authority in Auckland has held that an employee’s dismissal for being unfit for work was unjustified. In *Douglas v Godfrey Haulage Ltd* Mr Douglas was examined and drug tested as part of a pre-employment medical check-up. The nurse who undertook the examination on Mr Douglas subsequently telephoned Godfrey Haulage and urged them to proceed with caution with regard to Mr Douglas. The nurse’s concerns regarded his obesity, a leg ulcer and a knee injury. The nurse then emailed to Godfrey a “*Pre-employment*

Medical Report” which stated:

“Work Fit: (Recommended for position). To be a good employee he really needs to lose weight. His right knee causes him a lot of pain which requires twice daily pain medication”.

The Authority found that despite the concerns raised in Mr Douglas’s pre-employment medical examination, there was no recorded discussion at his employment interview of his health. At that interview, Mr Douglas was informed of what the job involved and confirmed that based on that

information, he believed that he could perform the job. Mr Douglas was later telephoned by a representative of Godfrey and told that the job was his. Mr Douglas accepted the offer of employment and was later given an induction package including his terms and conditions of employment. He was then to commence a week of training. Two weeks into his employment, Mr Douglas was called whilst in the smoko room by a Mr Dines. Mr Douglas told Mr Dines that he was enjoying the job and that all was going well. However, Mr Dines then told Mr Douglas *“I’ve got a problem, I think you should finish up”*. Mr Douglas stated that he had done nothing wrong and asked why he was being told to finish up. In response to this, Mr Dine stated that he should look into joining a gym and hiring a personal trainer to assist in losing weight. The Authority also found that Mr Dines asked whether Mr Douglas was a member of Southern Cross Insurance as he believed they would subsidise a stomach stapling operation costing \$15,000. Upon further protests from Mr Douglas that he

had done nothing wrong, Mr Dines accepted that he had done nothing wrong but stated that he was simply too big for the job. Despite Mr Douglas’s protests that he had a mortgage to service and that he had passed his training with *“flying colours”*, Mr Dines was adamant that Mr Douglas was to finish immediately. Godfrey argued before the Authority that Mr Douglas had been on a one week trial period and subsequent to that period had been unsuccessful in maintaining his employment. The Authority rejected this and noted the express provision in Mr Douglas’s employment agreement for a three month probationary period. Further, it accepted that Mr Dines’ comments to Mr Douglas whilst he was in the smoko room, whilst no doubt founded out of genuine concern for Mr Douglas, were ones that were found by Mr Douglas as offensive, distressing and humiliating. As a result of the dismissal Mr Douglas was awarded \$10,500 reimbursement for lost wages and \$4,000 compensation for hurt, and humiliation, loss of dignity and injury to feelings.

ERA DENIES POSTIES

The Employment Relations Authority recently rejected a claim by the Postal Workers’ Union that postal worker’s public holiday pay should be calculated on the basis of the normal daily wage as well as any overtime worked. The Union argued that it was not possible to determine, using the terminology of the Holidays Act, *“relevant daily pay”*



for the purposes of calculating public holiday pay without taking into account overtime. Evidence was put before the Authority that a standard amount of overtime worked by postal workers averages seven minutes per day or 2.4% of total hours worked.

The Authority did not agree. It believed there were clearly identifiable payments of wages and allowances that were made to posties on a daily basis. The Authority noted that any overtime payments were uncertain and not sufficiently

predictable upon which to base a calculation of relevant daily pay for the purposes of public holiday pay. The Authority summed up the matter before them succinctly by saying that NZ Post was paying postal workers what they “*would have*” received had they worked on the day in question, not what they could or might have received. Not surprisingly, one of the issues to be considered by the recently formed Holidays Act Review Panel is the definition of ‘relevant daily pay’.

NEW RESTRICTIONS ON GIVING IMMIGRATION ADVICE

The Immigration Advisors Licensing Act 2007 came into force back in May 2007. However certain important sections of this Act have only now come into force two years after the date on which the Act received royal assent. The sections of the Act that have most recently come into force relate to the ability of persons to provide immigration advice, with section 6 of the Act providing a general prohibition on the provision of immigration advice unless an individual is licensed under the Act to provide such advice or is exempt under the Act from the requirement to be licensed.

The Act defines immigration advice quite broadly as “*using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration*

matter relating to New Zealand, whether directly or indirectly and whether or not for gain or reward”.

Thus, individuals who may have formerly provided immigration advice in an informal context now need to be aware of the need to be licensed to provide any such advice, whether or not it is given for a fee or other type of reward.

Those exempt from the requirement to hold a license include members of Parliament, foreign diplomats, lawyers, volunteers for community law centres and those working as volunteers for the Citizens Advice Bureau. For employers who regularly employ individuals from overseas, it is important that they have an understanding of the new legislation and are aware of the limitation it imposes.

PARENTAL LEAVE PAYMENTS BOOSTED!

On 1 July 2009 parental leave payments for families with newborns increased. The Minister the Hon. Kate Wilkinson announced that the maximum parental leave payment would increase from \$407.35 to \$429.74 per week. Self employed parents' minimum payment would also increase from \$120 to \$125 per week.

The driving force behind the boost is the increasing number of New Zealand parents that receive parental leave and the increase in average

weekly earnings.

The Minister announced that well over 23,000 families receive parental leave

assistance each year. Parental leave is calculated on the parents' average weekly earnings and they are entitled to these payments for a period of up to 14 weeks.



MCCAIN FORCED TO ATTEND FACILITATION

The recent decision in *McCain Foods (NZ) Limited v Service & Food Workers Union Nga Ringa Toa Incorporated* centred upon whether collective bargaining between the parties should be facilitated statutorily by the Employment Relations Authority. This was the first case to interpret and apply the bargaining facilitation provisions introduced into the Employment Relations Act in 2004.

The Facts

McCain operates three vegetable processing plants in Timaru, Fielding and Hastings. Although the three plants are operated independently the union was a

party to a series of collective agreements with McCain covering members in Timaru and Fielding.

There had never been negotiations for a collective agreement covering members at the Hastings plant. Bargaining for such an agreement began in June 2006. During collective bargaining McCain implemented wage reviews for non-union members only and as a result union member-



ship decreased from approximately 50 members to 30 within a period of two months. After a series of negotiations, some involving mediators, the union was frustrated and believed the parties had reached

a stalemate. Twenty-three months had passed since bargaining was initiated and while there had been some progress the most difficult issue surrounding remuneration could not be agreed upon.

Employment Relations Authority

The Employment Relations Authority (“ERA”) described the situation as being an impasse and concluded “*there was no foreseeable likelihood of progress in the bargaining.*” Although the negotiations were unduly protracted the parties had attempted to bargain numerous times, often with the assistance of a mediator, however they still could not agree on the issues. The ERA decided that the union had satisfied the statutory grounds for facilitated bargaining and directed that the negotiations for collective bargaining between the parties be facilitated in the ERA.

Employment Court

This case involved interpreting the new legislative provisions requiring that collective bargaining result in a collective agreement, unless there was a genuine reason based on reasonable grounds not to. Section 50C of the Act sets out the grounds in which collective bargaining may be referred to the Authority for facilitation. Section 50C(1)(b) states that if bargaining has been *unduly protracted* and

extensive efforts (including mediation) have failed to resolve the difficulties that precludes the parties from entering a collective agreement, then the Authority may facilitate. The Court said that it is clear from the legislation that Parliament intended referrals for facilitation if the parties have *serious difficulties* in concluding a collective agreement.

The Court held that a collective bargaining period of thirty-four months was unduly protracted when considering that the maximum term for any collective agreement is thirty-six months. The Court also held that participation by a mediator went towards constituting ‘extensive efforts’ under s50C(1)(b)(ii). The union established the grounds that extensive efforts had failed to resolve the difficulties facing the parties and that the bargaining period was unduly protracted. The Court stated that the law requires something more than just a commitment to bargaining, it requires a collective agreement as a result of the bargaining. The Court held that the Authority may, and should, accept a reference for facilitation of the bargaining in respect of the issues not yet settled. McCain’s challenge to the determination of the Authority failed and was dismissed.

“SWINE FLU” – WILL HEALTHY EMPLOYEES BE PAID?

There is currently debate over whether healthy employees who are sent home by their employers as a precautionary measure will be paid for this period and if so, on what basis? The issue has yet to be tested and any test will depend on the surrounding factual circumstances.

Does an employer have to pay employees in the event the workplace is closed?

Generally, wages/salary are payable if the employee is ‘ready and willing’ to perform work. However, how long an operation can sustain wage/salary payments if that operation is closed for an extended period is likely to become an issue. Businesses should develop plans with employees to give organisations an ability to respond in a flexible manner in the event that the workplace is closed for an extended period of time. Such plans may provide for employees to perform duties at home or by some other flexible means.

How does an employer pay employees who are sick or quarantined?

The first ‘port of call’ in this instance will usually be to utilise an employee’s paid sick leave entitlement. An employee’s paid sick leave entitlement is usually finite and therefore employers may allow employees to take anticipated paid sick leave. The parties are free to negotiate the use of annual or some other period of paid/unpaid leave.

Can an employer stop healthy employees coming to work?

Employers have an obligation to take ‘all practical steps’ to provide a safe workplace. An employer may

require an employee to stay at home if that employee’s presence at work risks their health and safety or that of their work colleagues. Employees in this situation should be informed of the reasons behind this course of action. The alternative is that an employer may require an employee to take a period of annual leave upon 14 days notice.

What if an employee refuses to come in to work?

An employee can refuse to perform work under the Health and Safety in Employment Act 1992. The grounds for refusal include: that the work is likely to cause serious harm; that they attempted to resolve the matter with their employer as soon as practicable after first refusing to work; the matter must not have been resolved; and the employee must believe on reasonable grounds that the work is likely to cause serious harm.

In the event that an employee refuses to come to work based on the above grounds, employers should attempt to eliminate, isolate or minimise the risk of the work causing serious harm. However, an employer can still require an employee who refuses to attend work on the above grounds to attend to any other work within the scope of the employee’s employment agreement or, if possible, work from home.

Employees returning from overseas?

If an employee has recently been overseas, especially in countries or regions that were initially identified



as areas in which an individual was more likely to contract swine flu, a ‘commonsense’ approach may be to closely monitor their health.

The rapid spread of influenza indicates that a

prudent approach would be to be mindful of the health of all employees, irrespective of whether they have recently been overseas. Employees should be encouraged to adhere to good hygiene practices.

OVERSEAS SNIPPETS

Australia: Golden Handshakes Not So Golden

The Federal Government is poised to pass law placing strict limits on ‘golden hand-shake’ payments to directors and executives. The Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009, if passed, will clarify the types of payments that will contribute to termination benefits and place caps on termination payments for key executives. All new contracts for key executives will contain caps, which may discourage talented executives from accepting positions in Australian companies. Shareholders must approve a termination payment if its value is more than one year’s average base salary and this approval must be voted on at a General Meeting. Shareholder approval may be avoided if a ‘golden handshake’ payment is agreed to at the beginning of employment.

Australia: \$466,000 Awarded for Sexual Discrimination

The Federal Court in *Poniatowska v Hickinbotham* has ordered an employer to pay a former employee AUS\$466,000 for unlawful sexual harassment and sexual discrimination during her employment. The applicant was employed by Employment Services Australia (‘ESA’) as a building consultant but her employment was later terminated for poor performance. After her termination, the applicant sought damages for unlawful discrimination under the Sex Discrimination Act 1984.

The Court found that ESA had not engaged in sexual harassment itself, but that a number of its employees had by sending explicit text messages and picture messages to the applicant and telephoning her numerous times requesting a sexual relationship. However, it was found that ESA had failed to take any action when the applicant complained of this behaviour and it had failed to discipline the employees’ involved due to a lack of internal protocol. The Court held that the reasons for the applicant’s termination were artificial and that she was terminated because she had alleged sexual harassment.

ESA were held vicariously liable for the behaviour of its employees by failing to take reasonable steps to prevent the unlawful conduct and for failing to investigate the complaints seriously. The Court found that as a result of the discrimination the applicant had suffered considerable hurt and humiliation. ESA were ordered to pay the applicant AUS\$466,000 (including interest) for general damages, loss of past and future earning capacity and medical expenses.

Britain: “Superbug” Kills £175,000 Severance Payment

Former Chief Executive of Maidstone and Tunbridge Wells NHS Trust, Rose Gibb, was recently denied the £175,000 severance payment that she was promised in return for her timely resignation. The payment attracted public outcry after it was discovered that hospitals managed by the Trust had

appalling hygiene standards, which contributed to one of worst superbug outbreaks in Britain. Over one thousand people were infected with the bug and 90 people were left dead. The High Court ruled that the payment was “*irrationally generous*” and that the Trust had no authority to offer such a large severance package. Justice Treacy emphasised that the Court regards payments “*over and above statutory and contractual liabilities as exceptional.*” Ms Gibb is applying to the Court for leave to appeal the decision that the agreement was legally void.

Britain: Pay Cuts for more than Half of UK Workers

More than half of UK employees have had their pay cut, hours reduced or benefits slashed as a result of the recession. This is the reported finding from a survey by a campaign group called ‘Keep Britain Working’.

United States: Employer who ‘key-logged’ Employee headed for Court

The U.S District Court for the Northern District of California has allowed a claim alleging that an employer breached the Electronic Communications Privacy Act (ECPA) by using ‘key-logging’ to discover an employee’s private password and then using it to access the employee’s personal email account. ‘Key-logging’ is the recording of the order of keys struck on a person’s keyboard and is often done without the person’s knowledge. While the ECPA does not prohibit access to ‘stored’ information, this case dealt with the ‘interception’ of electronic information. The Court allowed the claim to proceed

on the basis that the allegations were sufficient to support a claim that the communications had been monitored. The important question that has yet to be answered is whether ‘key-logging’ records key strokes in transit. If so, employers’ will potentially be liable for intentional interception of electronic communications. The answer to this question may have implications for employers who monitor or investigate their employees.

United States: CEO’s still have their own Severance Plans

Efforts are being made across America to have Companies adopt a uniform approach to severance plans for all employees, including the CEO. A recent study has shown that 51% of Companies still have a separate severance plan for the top executive.

United States: Top 10 hardest jobs to fill:

1. Engineers
2. Nurses
3. Skilled/Manual Trades
4. Teachers
5. Sales Representatives
6. Technicians
7. Drivers
8. IT Staff
9. Labourers
10. Machinists/Machine Operators



RIGHT-SIZING TOOLBOX SESSION

With the current global economic downturn putting the squeeze on many businesses, it is important that managers and staff are up to date with the law around restructuring and redundancy. Quigg Partners are offering Employment Law Toolbox sessions in 2009 which can assist businesses, both small and large, to accommodate the credit crunch through 'right-sizing' their operations. These can be held in your workplace or in our private seminar rooms. Toolbox sessions can be tailored to suit your needs and may also cover:

- Effective Disciplinary Procedure - managing difficult employees
- Bill of Rights, Privacy, OIA, Codes of Conduct and Conflict of Interest issues
- CEO/Board Relationships - special considerations

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