TERMINATION BASED ON
IRRECONCILABLE DIFFERENCES UPHELD

The decision of Employment Relations Authority in Terris v Parliamentary Services deals with the somewhat uncommon occurrence of a dismissal for irreconcilable differences. It arguably reinforces the benefit of having an irreconcilable differences clause in certain employment agreements.

Facts

After his election as a list MP in 2008, Paul Quinn was given responsibility for representing the National Party as its designated MP for the Hutt Valley. As Mr Quinn was based in Wellington city he thought it prudent to hire someone with knowledge of the Hutt Valley. John Terris had helped Mr Quinn prior to the election and as a former Mayor and MP for Lower Hutt, had many contacts in the Hutt Valley. Mr Terris was offered employment through Parliamentary Services as Mr Quinn’s out of Parliament support staff member. This created what is known as a “triangular” employment relationship, because Mr Terris worked directly for Mr Quinn, yet was actually employed by Parliamentary Services. The employment agreement contained a clause that permitted Parliamentary Services to terminate the employment of Mr Terris if the General Manager of Parliamentary Services considered that an irreconcilable breakdown had occurred in the employment relationship.

Mr Terris made it clear upon taking this role that he wished to continue with his community and political activities. However, Mr Quinn wanted him to tone them down, and in many areas he did so. Mr Quinn remained especially concerned about Mr Terris’ involvement in the Hutt Mana Charitable Trust (‘the Trust’) and the complaint Mr Terris had made to the Crown Law Office about the other trustees.

Parliamentary Services wrote to Mr Terris in December 2009 stating in relation to the Trust that “there exists a potential for confusion that your actions may be linked to Paul Quinn...
MP and therefore generate a perceived conflict of interest and potential embarrassment for the member”. Parliamentary Services requested that Mr Terris not make any media statements in relation to the Crown Law complaint. Mr Terris agreed but then stated he would still issue a press statement recording his criticisms of the Trust.

Mr Terris then made comments about the Trust (although not in relation to the Crown Law investigation). Some of these comments were published in the Hutt News.

The Hutt News then published a report on the annual meeting of the Trust in February 2010, quoting Mr Terris as saying that he had been the subject of threats of violence and legal retribution and that “There have been attempts to gag me via pressure on my employer [Mr Terris now assists National List MP Paul Quinn].”

This upset Mr Quinn as he felt he had been dragged into the problems of the Trust and that he was being associated with attempts to “gag” Mr Terris.

Several meetings were then held between Parliamentary Services, Mr Quinn, and Mr Terris. Mr Quinn stated that there were ongoing potential conflicts of interest, and alleged that Mr Terris had continuously demonstrated a lack of awareness and that the relationship had broken down. Mr Terris believed that the relationship was salvageable. On 31 May 2010 Mr Thorn, General Manager of Parliamentary Services, wrote to Mr Terris and advised him that there was an irreconcilable breakdown in the relationship as both parties could no longer work together and so the relationship was being terminated in accordance with the irreconcilable differences clause of the employment agreement.

Decision
The Employment Relations Authority found that Mr Terris had been justifiably dismissed. Mr Terris was working in a highly political environment, where he had to take into account the needs of his employer (Parliamentary Services), and those of its client (Mr Quinn) and both had to be satisfied with his performance. Mr Terris should have been aware that his own political activities would impact negatively on Mr Quinn.

The Authority found that the employment relationship broke down due to Mr Terris’ political activities and statements. While Mr Terris may not have believed this to be the case, Mr Quinn did and the Authority stated that a relationship is irreconcilable if one party considers it so. The Authority found that Mr Terris’ actions at the Trust’s meeting were clearly designed to embarrass Parliamentary Services and/or Mr Quinn and destroyed any prospect of the relationship being repaired. Mr Terris’ employment was therefore justifiably terminated.

Comment – Did the “irreconcilable differences” clause make a difference?
The above demonstrates that in limited circumstances an employer will be able to rely on incompatibility or irreconcilable differences to dismiss an employee. The Authority in this case emphasised that it will only be in rare cases where dismissal is justified for reasons of incompatibility. That observation is not new. The more interesting question is whether the presence of the “irreconcilable differences” clause had any effect on the outcome in this case. The Authority in its determination noted that Parliamentary Services in its letter to Mr Terris invoked the clause and relied on it. The Authority also noted the limited options of Parliamentary Services given the triangular nature of the relationship. It observed that Mr Terris was aware in those circumstances of the clause and its applicability in the circumstances that prevailed. This all suggests there is real value in including irreconcilable differences clauses in appropriate cases such as triangular employment relationships or when there is a very close relationship required e.g. between a Board and a CEO.

The debate over the utility of irreconcilable differences clauses will no doubt continue. In this case the Authority noted that the enforceability of such clauses is a “significant legal issue”, but declined to determine that question. Nevertheless, the case does suggest that such clauses may have practical if not necessarily legal benefits for employers. Such clauses used to be present in the State Services Commission model employment agreement for Chief Executives, but were removed some years ago. Some might think it is time for its re-introduction.

RESTRACTURING - FAILURE TO CONSULT PROVES COSTLY

The decision of the Employment Relations Authority in the case of Humphries v Blue Star Taxis (Christchurch) Society Limited has some interesting things to say on the process which should be undertaken when disestablishing a position.
Facts
Maree Humphries was employed by Blue Star Taxis (‘the Company’) in Christchurch as the Sales and Marketing Manager in November 2007. The employment relationship was relatively fraught from the start and Ms Humphries encountered hostility from certain taxi drivers and members of the Board. This hostility included Board members making loud and disparaging comments about her during their Board meetings which she could hear as her office was next door to the Board Room.

In early May 2011 the General Manager of the Company, Mr Wilkinson, asked Ms Humphries to attend a meeting at which he told her that she had to look for a new job. Mr Wilkinson’s evidence on this conversation was that he had simply asked Ms Humphries “is this really where you want to be?” A few days later one of the drivers who soon after became a Board member told Ms Humphries that the Board wanted to get rid of her and that the Board had been telling the drivers that she had already gone. A few days after this, Ms Humphries attended a meeting at which Mr Wilkinson showed her a letter he had written to the Board which stated that Mr Wilkinson had concerns about the Board’s plan to replace Ms Humphries with “a younger woman in a short skirt who only worked three days a week” and that they should not proceed. Mr Wilkinson then told Ms Humphries that her job was safe.

In late May, Ms Humphries discovered by accident a copy of the draft minutes from the April 2011 Board meeting at which it was moved that Ms Humphries’ role be disestablished. This caused Ms Humphries considerable distress and concern about her future. She was further confused when on 8 June 2011 she received a pay rise.

On 7 July 2011 Ms Humphries received a letter confirming that her position was to be disestablished. Ms Humphries was given no opportunity to comment upon the disestablishment of her position prior to this decision being made.

Findings
Despite the various disparaging remarks which had been made about Ms Humphries by Board members, the Authority found that the decision to disestablish her position was made for genuine reasons. It was forecast in July 2011 that the Company was likely to make a loss in the region of $92,000 for the 2011/2012 financial year. The Board had concluded that there was an urgent need to reduce costs and that the only place to make significant change was to disestablish the Sales and Marketing Manager role.

The Authority was satisfied that there was a genuine need to make urgent savings and the most effective method of doing so was to disestablish Ms Humphries’ role.

However the Authority found that the Company’s failure to consult with Ms Humphries, despite having the knowledge that it needed to, constituted an unjustified disadvantage. The Authority found that this disadvantage led to considerable distress and hurt including causing a reasonably significant impact upon Ms Humphries’ health.

The Authority found that Ms Humphries suffered a further unjustified disadvantage as a result of considerable distress which had been caused from early May 2011 onwards when Ms Humphries began to hear rumours about her dismissal. These rumours had been caused directly by Board members leaking information to drivers about the Board’s decision to dismiss Ms Humphries. The constant worry which this caused to Ms Humphries and the mixed messages which she received had a significant impact upon her health.

Ms Humphries was awarded $10,000 for each count of unjustifiable disadvantage, being $20,000 in total.

Comment
This case follows a line of authority from the decision of Simpson Farms Ltd v Aberhart which stated that where a decision to disestablish a position is substantively justified but the procedure is flawed the grievance will be one of unjustified disadvantage rather than unjustified dismissal. The Authority Member in this case commented that “contrary to the belief of some employers, a full and fair consultation in relation to a proposed redundancy need not take an inordinately long time and the respondent could have fulfilled its obligations towards Ms Humphries... within a reasonable period of time without causing itself significant prejudice.”
This indicates that the Authority will take a dim view of any redundancy which is not preceded by consultation and should remind employers that despite any commercial imperative for change, consultation almost invariably needs to be undertaken first.

**SUSPENSIONS AND POLICE INVESTIGATION: AN UNEASY RELATIONSHIP**

The case of *Munro v NS Security Limited* (formerly known as *Hibiscus Coast Security Limited*) recently dealt with the difficult problem of an employee who is subject to a police investigation and what an employer should do when such an investigation may continue for a significant period of time.

**Facts**

Mr Munro was employed as a Security Guard for NS Security Limited (‘the Company’). In October 2008 while at his supervisor’s house after his night shift, Mr Munro moved some magazines from his company car to his own private vehicle. Mr Munro’s supervisor, Mr Dowden, approached him and asked where he had got the magazines from. Mr Munro told him that it was none of his business. Mr Dowden then took Mr Munro’s car keys and reiterated his question and stated that Mr Munro would be suspended without pay until he answered the question. A scuffle then broke out in which Mr Munro punched Mr Dowden.

Mr Munro the next day received a letter from the General Manager of the Company confirming his suspension without pay. The letter stated that Mr Munro may have committed serious misconduct and that he would be notified of a meeting to discuss potential outcomes following the investigation. Mr Munro was given no opportunity to comment upon the suspension prior to it being imposed.

The Police subsequently laid criminal charges and Mr Munro was bailed on the condition that he not associate with Mr Dowden. Mr Munro was acquitted following a trial by jury in November 2009.

In February 2010 Mr Munro, through his lawyer, wrote to the Company advising them that he considered he had been constructively dismissed and that he should have been on full pay during the period of his suspension.

**Decision**

The Employment Court found that the suspension was unjustified and that Mr Munro suffered an unjustifiable disadvantage because of it. Mr Munro was suspended without pay, despite his employment agreement not providing for suspension at all. The Court stated that the general rule is that there is no legal right to suspend an employee in the absence of a statutory or express contractual right to do so, but that a suspension may nevertheless be justifiable if the employee’s continued presence in the workplace may give rise to some other significant issue. The Court found that there was no evidence that Mr Munro’s presence in the workplace would have given rise to a significant issue.

The Employment Court also found that the procedure by which the suspension was imposed was flawed. This was due to the fact Mr Munro was not given any opportunity to comment on the suspension before being suspended.

The Employment Court also found that the Company should have carried out an investigation or at least taken further steps following the outcome of the criminal proceedings against Mr Munro. However, this was not a sufficiently serious breach of the terms of the employment agreement to warrant Mr Munro considering the employment relationship terminated and claiming constructive dismissal. In making this finding, the Court took into account the fact that Mr Munro took no action to query the situation as regards his suspension with his employer or raise his concerns about it until 18 months after the fact.

**Remedies**

Mr Munro was awarded three months’ pay for the wages he lost during the period of the suspension. The Court declined to award Mr Munro compensation for the
full period he was suspended without pay as there was limited evidence of Munro looking for other work: he had “effectively sat on his hands” for the period of the suspension. This award was reduced by 20% due to Mr Munro contributing to the situation by refusing to answer Mr Dowden’s questions and punching Mr Dowden.

Mr Munro was also awarded $2,000 for hurt and humiliation as a result of the unjustified suspension.

Comment
This case shows the difficulty that employers can encounter when employees are involved in criminal investigations linked to employment-related conduct. Such investigations (as in this case) often take a significant period of time before they are concluded. Consideration should be given to including a provision in employment agreements which provides for the suspension of an employee without pay specifically in the event of a lengthy criminal investigation or natural disaster. Employers should also take steps to remain in contact with the employee during the criminal investigation to enable them to take appropriate steps (such as disciplinary action) either during the investigation or once it is concluded.

SACKED BUS DRIVER GETS $15,000

The Employment Relations Authority in the case of Kolo’ofai v Invercargill Passenger Transport Limited has awarded a bus driver who was dismissed for theft close to $15,000 for unjustified dismissal. The driver had been dismissed from a previous job for theft and had recently been convicted of eight counts of fraud.

Facts
Ms Kolo’ofai was employed as a casual driver by Invercargill Passenger Transport Limited (‘the Company’) in June 2011. On 26 August 2011 the Company received an email from a customer alleging Ms Kolo’ofai had not put the money given to her by a customer into the cash box. The complainant was also not sure if a ticket had been given to the customer.

The email prompted Mr Bass (Ms Kolo’ofai’s manager) to invite Ms Kolo’ofai to a disciplinary meeting to discuss an allegation that she had stolen money. Ms Kolo’ofai was provided with a copy of the written complaint with the name of the complainant blanked out.

The disciplinary meeting took place on 27 August 2011. At the meeting Ms Kolo’ofai claimed that she had put the coins in a spare compartment of the cash box and had sorted them at the end of the trip. There was no discrepancy in the takings for that day, although as Mr Bass stated at the Authority meeting, if Ms Kolo’ofai had been “selling canaries” (reusing tickets in order to keep the takings) then the till would not show a discrepancy.

Mr Bass concluded that Ms Kolo’ofai had committed theft. He relied on (amongst other things) Ms Kolo’ofai’s failure to say something that could have ‘got her off’, and the fact that she had been unable to prove that the complainant had been telling lies. Ms Kolo’ofai’s employment was terminated immediately. Ms Kolo’ofai was at the time on a final written warning for failing to drive a route she was rostered to drive.

Determination
The Employment Relations Authority found that Ms Kolo’ofai had been unjustifiably dismissed. The Authority made this finding for two main reasons.

The Authority found that the Company had not carried out a sufficiently thorough investigation. Ms Kolo’ofai or her representative should have been given the opportunity to question the complainant. The Authority found that the Company should have taken more time to seek more information from the complainant rather than the somewhat inconclusive information which was contained in the email. The Authority stated that “it is a fundamental tenet of fairness that the accused (Ms Kolo’ofai) should be able to ask questions of the accuser”. The Authority then went on to state that even if the Company had wanted to protect the identity of the complainant, it could have allowed Ms Kolo’ofai’s representative to question them. The failure to arrange for such questioning was a fundamental one which the Authority found rendered the dismissal unjustifiable.

The Authority also found that the Company did not have sufficient evidence to reasonably conclude that Ms Kolo’ofai had stolen the money. Mr Bass stated that his conclusion was partially based on the fact that Ms
Kolo’ofai had not been able to prove that the informant was telling lies. The Authority held that this was not a conclusion that a fair and reasonable employer could have reached in circumstances where the complainant had not actually seen Ms Kolo’ofai taking money. This is despite the fact that in Ms Kolo’ofai’s previous employment (where Mr Bass had also been her manager) she had been dismissed for “selling canaries”.

Remedies
Ms Kolo’ofai was awarded lost wages in the sum of $6,949.28 and $7,500 for hurt and humiliation as a result of the dismissal. This sum was not reduced despite the fact that it emerged at the investigation meeting that Ms Kolo’ofai had been found guilty of eight counts of benefit fraud in 2010 and that this had never been disclosed to the Company.

Comment
The Authority’s findings in the face of the facts presented may to some seem to be harsh on the employer. The Authority however had the benefit of hearing from and questioning the witnesses as part of its investigation. That and the fact that the allegations were grave thus requiring a commensurate level of proof may well explain the determination.

SEVERANCE PAYMENTS:
A GUIDE FOR THE PUBLIC SECTOR

The Controller and Auditor-General (‘Auditor-General’) has recently released a good practice guide on severance payments for public sector employees. The guide acknowledges that an agreed severance arrangement can be a cost-effective and low-risk option, especially where the risk of successful legal action by the employee is assessed as high or the effects on the public entity are becoming significant.

The guide emphasises the importance of having sought and received legal advice (in writing) and that this will be helpful or even essential if the employer later needs to explain the basis for the severance payment. Mediation is encouraged in the interests of early clarification of the dispute and the cost-effective resolution of the problem for both parties.

The guide states that any employer making severance payments needs to keep a clear paper trail recording the background, risk assessment and advice obtained, basis and reason for the severance payment and terms, and evidence of the required authorisation.

The Auditor-General also emphasises that severance payments will need to be approved at the correct level of delegated authority. The authorisation required will depend on the amount of the severance payment, in keeping with the rules applying to the particular public entity. These payments must be reasonable in the circumstances and justifiable as a proper use of public money.

As regards the settlement terms, the Auditor-General states that tax-free payments under section 123(1)(c)(i) of the Employment Relations Act 2000 should not be regarded as an automatic part of any settlement and it is not appropriate to make a payment of this type unless there is proven distress or humiliation.

The Auditor-General has also warned against the use of clauses in records of settlement which promise confidentiality. The Auditor-General states that public entities are subject to a myriad of reporting requirements and so the terms of settlement should be confidential “except as required by law”.

IS ASKING FOR AN APPLICANT’S FACEBOOK PASSWORD LEGAL?

The Privacy Commissioner Marie Shroff has commented upon the practice of requesting applicants’ Facebook passwords in the wake of international news stories on the prevalence of this practice.

Since this practice has come to light in the United States everyone from Senators to Facebook itself has weighed in on the issue. Facebook stated that it is a violation of Facebook’s terms of use to request this information and that it would take action to protect the privacy and security of its users.
Marie Shroff has told a Parliamentary Select Committee that she would like to investigate anecdotal evidence of this trend but did not have enough resources to do so. Her initial view of asking applicants for their Facebook login information was that “it’s undesirable to use that kind of pressure in any application situation”.

Some commentators in New Zealand have suggested that a request for an applicant’s Facebook login information would fall foul of the prohibition in the Human Rights Act 1993 against making any inquiry about an applicant which could indicate an intention to unlawfully discriminate.

OVERSEAS SNIPPETS

US: $5 Million for Racial Harassment
A Kansas City woman who converted to Islam in 2006 was awarded $5 million in punitive damages along with $120,000 in lost wages and other actual damages by a jury in Jackson County. This is the largest ever award for workplace discrimination in Missouri.

Ms Bashir said that her work environment at AT&T became hostile as soon as she converted to Islam. Her co-workers began to refer to her hijab as “that thing on her head” and she suffered from constant harassment and belittlement. The abuse came to a head when in 2008 her boss snatched her hijab off her head and exposed her hair.

After the harassment started Ms Bashir contacted a company help line but no change occurred. She was eventually fired after the not returning to work for 9 months after going on stress leave following the incident in which her hijab was removed.

Germany: Gliding On
Most people are happy with a simple goodbye and good luck email upon their retirement. However, a surveyor from the state of North Rhine-Westphalia decided to take a different approach. The unnamed 64 year old sent an email to 500 of his colleagues stating that he had coasted through the last 14 years of his work without lifting a finger. He stated “Since 1998, I was present but not really there. So I'm going to be well prepared for retirement- Adieu”.

The man informed his colleagues that during the course of his employment he earned €600,000. The man's email has caused outrage with mayor of Minden Volker Fleige saying that “The man had not once complained about not having enough to do during his 38 years of employment”.

The story has also caused embarrassment as it has been Germany driving cuts in the so-called “bloated” public services of Spain, Greece and Portugal.

Australia: Schools Need Power to Expel Teachers
The Australian Productivity Commission has recommended that School Principals be given the power to sack unsatisfactory teachers. The report released on 4 May 2012 states that a lack of performance management in government schools means that very few teachers are ever disciplined or dismissed.
The report argues that current industrial awards and industrial agreements do not provide the ability at school level to vary workplace arrangements or to manage poor performance. The report also recommends that schools are able to offer higher salaries for hard to fill roles. The report states that “current teacher awards and agreements mean pay is largely the same across the system and does not encourage people to work in hard to staff areas”.

UK: Bankers Win Bonus Battle
The English High Court has ruled that bankers are entitled to bonuses which were verbally promised to them but not paid after the financial crisis hit. In August 2008 the Chief Executive of Dresdner Bank stated via a video conference that there was a €400 million bonus pool set aside which bankers would be paid from. However, no written individual guarantees were made to bankers until December 2008 when a letter was sent to staff which allowed for a discretionary reduction in bonus payments.

The High Court ruled that this announcement amounted to a legally binding agreement as the bonus pool was clearly created to stabilise the workforce. The Court struggled to see what the intention of the announcement would be if it was not to have legal effect. Commerzbank (now the owner of Dresdner Bank) plans to appeal the decision which could have a widespread effect on employers who fail to deliver on their employees’ bonus expectations, even if these expectations were created through verbal or informal discussions.

Australia: Workers Comp for Sex Romp
The Australian Federal Court has ruled that workers compensation is available to an employee who was injured while having sex in a hotel room during a work trip. The woman (whose name was suppressed) was required to travel to a country town by her employer. While there she arranged to meet up with a male friend who lived in the town, the two then went back to her hotel room where she was then injured after a light fell of the wall and hit her on the head while they were “rolling around”.

The Court ruled that the injuries were suffered in the course of the woman’s employment. The Court stated that if an employee is injured during an interval during a period of work (like a lunch break) then the injury will be considered as being suffered during the course of employment. The Judge said “an employee who is at a particular place at which he or she is induced or encouraged to be by his or her employer during an interval or interlude in an overall period or episode of work will ordinarily be in the course of employment”.

The Judge ruled that the time spent in the hotel room was an interval of employment as the employee was induced to be at that particular place (the hotel room) by her employer. The Court stated “if the applicant had been injured while playing a game of cards in her motel room she would be entitled to compensation and the fact that the woman was engaged in sexual activity rather than some other lawful recreational activity while in her hotel room does not lead to any different result.”

Although not discussed in the case the possibility was left open that the employee may not have been entitled to compensation if the employer had a policy in place setting out the permitted activities that may be undertaken in hotel rooms on overnight stays!