

CHIEF EXECUTIVE REINSTATED

The Employment Relations Authority in Auckland has recently ordered the interim reinstatement of David Edmunds to his former role as CEO of United Group New Zealand Ltd ('UGL'). The engineering and service delivery company, which operates 26 New Zealand facilities and employs over 1000 staff, had dismissed Mr Edmunds as its CEO on 24 June.

Mr Edmunds accordingly has his job back pending a substantive hearing before the Authority. Mr Edmunds had been CEO of UGL since 2003.

The Dismissal—Reasons

UGL dismissed Mr Edmunds on the basis of unsatisfactory results and performance which did not reach expected standards. Mr Edmunds claimed that his performance had never been formally challenged and that his dismissal came as a great shock. However, affidavits filed by UGL averred that the 'writing had been on the wall' for Mr Edmunds for some time. UGL claimed that for a year and a half concerns were being raised as to the CEO's budget forecasting

The Dismissal—Process

It was undisputed before the Authority that Mr Edmunds had been called to a meeting on 24 June, the purpose of which he had no notice. At this meeting Mr Edmunds was advised that he was summarily dismissed with effect from Friday 27 June.

The Tests for Interim Reinstatement

It was conceded by UGL that Mr Edmunds had an arguable case that he hadn't been treated fairly by UGL. This was on the basis that the alleged performance issues had not been drawn to his attention in a fair manner. It was said he had not been given a reasonable opportunity to address UGL's concerns. When interim reinstatement is sought, a Court or the Authority must consider whether the claimant has an arguable case. In this situation, as this was conceded by UGL the Authority turned its attention to what the appropriate remedy was at this interim stage.

The Authority also considered whether an alternative remedy to his interim reinstatement would be adequate. Mr Edmunds said he wanted his

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job back. He claimed that the damage to his reputation as an experienced senior executive, and the public perception that he was a ‘non-performing CEO’ could not be compensated monetarily.

UGL said if Mr Edmunds was reinstated on an interim basis but then lost his case UGL would not be able to quantify the amount of damages the company would sustain. UGL claimed its business would be disrupted and Mr Edmunds would be difficult to manage. The Authority found in favour of Mr Edmunds. Despite a full hearing of the matter being scheduled to take place shortly, it held Mr Edmunds’ reputation may suffer as a result of him not being reinstated and noted that the Employment Relations Act provided reinstatement as the primary remedy.

The terms of that reinstatement were that Mr Edmunds was to be placed on “gardening leave” pending the outcome of the substantive hearing. He will not be required to perform his work duties and UGL is not required to allow him to perform those duties, from the date of the termination of Mr Edmund’s employment until the Authority's determination on the substantive issue.

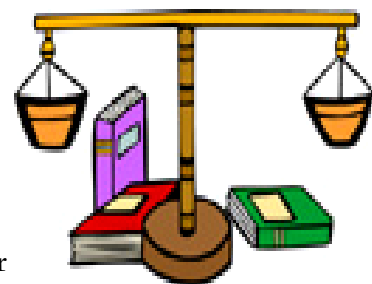
Lessons

1. Given that the case was publicly reported in the National Business Review, did the CEO in this case actually protect his reputation in obtaining interim reinstatement? He may have *“won the battle but lost the war”*.
2. The case is a timely reminder of the differences between New Zealand employment law and that of other comparable countries. No matter what level a person is employed at within a New Zealand company, the personal grievance provisions of the Employment Relations Act will apply.
3. In dealing with CEO performance issues expert assistance is required.

LEGISLATION UPDATE

KiwiSaver – Compulsory Employer Contributions

The Employment Relations (Breaks, Infant Feeding, and Other Matters) Amendment Act 2008 was recently passed into law, confirming new rules surrounding infant feeding and meal and rest breaks that we covered in our previous newsletter. However,



the most important change heralded by this legislation was added by way of a Supplementary Order Paper on 2 September.

The Supplementary Order Paper inserted into the then Employment Relations (Breaks and Infant Feeding) Amendment Bill provisions concerning KiwiSaver. These provisions create a further ground for personal grievance under section 103(1) of the Employment Relations Act where an employee's employment is "*adversely affected*" by virtue of them being a member of KiwiSaver. An employee's employment is adversely affected if their "*salary or wages are less than the salary or wages of other comparable employees employed by the employer*" by reason of the employer taking into account the compulsory contributions the employer is required to make to the employee's KiwiSaver account.

Employers who employ employees on 'total remuneration' packages that allow for the employer's compulsory contributions within that remuneration will be most affected by these amendments. The amendments apply both to employment agreements entered into after 2 September 2008 and any variations to agreements after that date. Increasing an employee's total remuneration will constitute a variation to their employment agreement and thus any increase must allow for compulsory employer contributions to be in addition to that increase.

The provisions relevant to KiwiSaver came into force on 10 September meaning these changes become immediately relevant to employers. Should you have any queries or concerns regarding the amendments and their application to your employees, Quigg Partners would be happy to assist.

KiwiSaver – Trans-Tasman Transfers

A deal is currently being brokered between the Governments of New Zealand and Australia to allow for the transfer of private retirement savings between the countries. Currently, personal savings accumulated in Australia under its retirement savings scheme cannot be transferred to New Zealand. The reason for this has historically been the lack of an equivalent scheme on this side of the ditch.



The enactment of KiwiSaver has meant that this barrier no longer exists. The proposed changes are part of the Single Economic Market (SEM) initiative which was launched to promote trade and greater freedom of movement of people across the Tasman. Both countries aim to finalise the deal by the end of October.

Casual Employees

Trevor Mallard has recently announced Government plans to bolster rights for casual employees. In response to research carried about by the Department of Labour in 2007 which showed a general lack of knowledge in this area, proposed amendments to the Employment Relations Act would al-

low employees and employers to determine whether the employee shall be classified as an ‘employee’ or a ‘casual employee’. Also, a Code of Employment Practice for Casual and Non-Standard Employment would be created to enable better understanding of rights and obligations in this area.

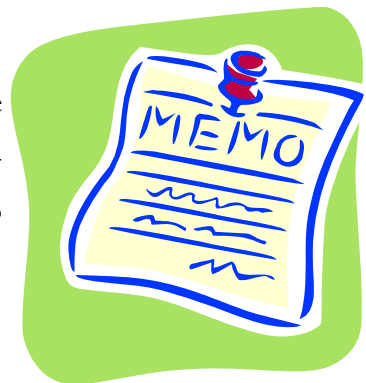
The proposed amendments will set out guidelines for determining the status of employees, including: how regular the employment is; the level of autonomy the employee has; and whether the employee is genuinely free to accept or reject offers of employment.

Young Workers

Labour MP Darien Fenton has proposed a member’s bill which would seek to regulate working conditions for children aged 15 and under. The Employment Relations (Protection of Young Workers) Amendment Bill would require all children aged 15 and under to be employed under employment agreements and prohibit them being engaged as independent contractors. The prohibition on young workers being contractors is to prevent them from having to organise their own tax and ACC affairs.

NATIONAL OUTLINE POLICY

The recently released National Party ‘Employment and Workplace Relations Policy’ would signal some changes to the current employment law landscape in New Zealand should they be voted into power come November 8th.



90-Day Trial Period for New Employees

The most talked-about limb of National’s policy is its proposed 90-day trial period for new employees. Under this policy, businesses with 19 or less employees may enter into agreement with new employees whereby during the trial period, either party may terminate the employment relationship for performance-related reasons without recourse to personal grievance rights.

During the trial period, good faith provisions as well as rights to sick leave, holidays and health and safety would still apply. Mediation would still be available in disputes. National has also stated that the policy will include provisions preventing employers simply hiring and firing the same employee every 90 days.

In their online policy document, National states that it believes employment law should “*expand job opportunities for those having difficulty getting work – like young, inexperienced people or new immigrants*”. It is this

principle that is said to be the driving force behind the proposed changes – by encouraging employers to ‘take a chance’ on these workers without fear of personal grievance claims being raised.

It is perhaps likely that the types of employees noted above would be most affected by the policy, as highly skilled individuals in establishing working relationships are unlikely to agree to probationary arrangements in taking on a new employment opportunity.

Annual Leave ‘Cash-in’ / Holidays Act Review

National has also proposed a change to the current rules concerning annual holidays. The proposed change would give employees the option to request cash in lieu of their fourth week of annual leave. This request could only come from employees and could not be raised in negotiations for an employment agreement.

A review of the Holidays Act is also mooted in National’s policy, with a working party being appointed to review the somewhat historically troublesome piece of legislation. The review would focus on the issue of relevant daily pay.

Unions and Collective Bargaining

If elected, National has indicated it would continue to allow union access to workplaces with the employer’s consent and maintain the “*social partnership*” between Business New Zealand and the Council of Trade Unions. However, National does propose to introduce a right for employees to bargain collectively with employers without having to belong to a union. A ‘workplace agreement’ could be negotiated by elected employee representatives with the employer to cover participating employees.

Dispute Resolution

National would retain the Mediation Service but take steps to ensure it is “*properly resourced with properly qualified mediators*”. Also of note, it is proposed that the Employment Relations Authority would have a greater adversarial focus, including the right to be heard and the right to cross-examine before an impartial referee, while injunctions and important questions of law would be allowed to be heard in the Employment Court in the first instance.

Parties to proceedings in the Employment Court would be able to appeal to the Court of Appeal as of right under National policy. Currently, Employment Court decisions may only be appealed to the Court of Appeal on questions of law.

Summary

While National’s proposed 90-day trial period may attract further debate, the party’s policy signals a departure from some of the more radical amendments we have seen in prior changes of govern-

ment, especially in both the Employment Contracts Act and the Labour Relations Act. The policy appears to indicate that like the present Government in its current term, a National-led Government will focus on “fine tuning”, adopting the view that “if it aint broke, why fix it?”.

NO CONTEMPT IN EMPLOYMENT RELATIONS AUTHORITY

Full Court of the Employment Court

A recent decision of the Employment Court has held that the Employment Relations Authority does not have the power to punish for contempt. In *Ryan Security & Consulting (Otago) Limited v Bolton*, a full Court was asked whether the Authority can punish for contempt where a party is in breach of its orders and, if not, where such sanctions may be sought.



Removal to Court

The applicant in this instance sought a declaration from the Authority that Mr. Bolton was in contempt and an order that he pay costs of litigation to date and a significant fine with a portion of this fine being payable to the applicant. Due to the potentially important question of law at stake, the Employment Relations Authority removed the application to the Court.

Power to Punish for Contempt?

In addressing the question before it, the Employment Court addressed prior cases surrounding the ability of Courts to punish for contempt. Previous decisions of the Arbitration Court and the Labour Court had ruled that there was an implied jurisdiction to do whatever is necessary to make the applicable Court’s jurisdiction effective. However, the Full Court found that processes for the enforcement of orders made by the Authority were already contained in the Employment Relations Act. Section 137 confers on the Authority a power to order compliance with its orders and if a compliance order is not obeyed, section 138(6) provides that any person affected by the failure to comply may apply to the Court for exercise of its powers under section 140(6), which include fines and imprisonment.

Compliance Order

In finding that the Employment Relations Act already conferred express powers of enforcement on the Authority, the Court found that it was unnecessary to imply any powers of enforcement by way of contempt. The Court noted that it had sympathy for the applicant’s practical concerns about the considerable delay in time and the expensive nature of the current process for compliance under the Act, but preferred to focus on the fact that these compliance mechanisms were what Parliament had enacted and that the implication of powers to punish by contempt was a step which ought not to be taken likely. Thus, it found that the Authority had no power to punish for contempt and directed the applicant to seek compliance with the orders made by the Authority through the process provided for in the Act.

CAUTION:

UK NOTE ON ‘STALE WARNINGS’

A recent decision of the Court of Appeal of England and Wales has highlighted the contentious nature of expired or ‘stale’ warnings. In *Airbus UK Limited v Webb*, the Court allowed an appeal against the decision of the Employment Appeal Tribunal that held an employee who was summarily dismissed for gross misconduct was unfairly dismissed.

The Facts

The employee was found watching television during work time. 13 months earlier, the employee had been accused of gross misconduct for similar behaviour and had initially been summarily dismissed. However, upon internal review, his dismissal was lessened to a final written warning. The company disciplinary policy stated that this warning would cease to be ‘live’ after a period of 12 months. The warning expired at the end of August 2005. The second incident occurred 3 weeks later.

The Law

Both the Employment Tribunal and the Employment Appeal Tribunal treated a Scottish Court of Session decision as authority for the proposition that an expired final warning should be “disregarded for all purposes and in all circumstances” (*Diosynth Ltd v Thomson*). Interestingly, in applying the English test of fairness in dismissal, both of the tribunals held that the decision to dismiss the employee was indeed a reasonable decision taking into account all relevant factors (similar to New Zealand’s test for justification under section 103A of the ERA).

The Decision

The Court refused to accept that *Diosynth* was authority for the proposition that “misconduct, in respect of which a final warning was given, but has expired, can never be taken into account” by an employer considering dismissal or a tribunal considering the justification of a dismissal. It distinguished that case on the basis that the expired warning in that instance was the “principal reason” for the dismissal, while in Mr Webb’s case “the subsequent misconduct on its own was shown by Airbus to have been the reason, or principal reason, for dismissal.” The Court stated that Airbus was entitled to treat the previous misconduct, for which the expired warning was given, as relevant to its response to Mr Webb’s later misconduct, i.e. whether dismissal “was within the range of reasonable responses”.

Implications

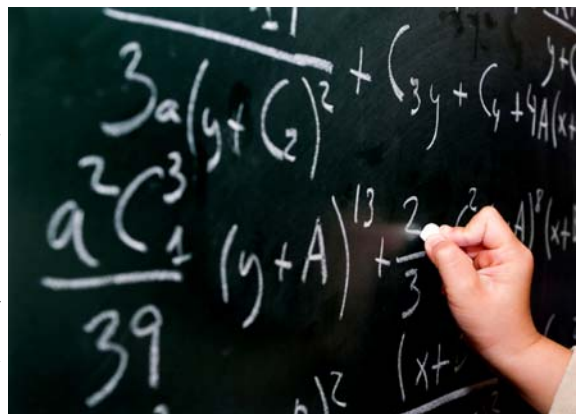
This case may give further support to the New Zealand Employment Court's comments in *NZ Baking Trades Employees IUOW v Findlay's Gold Krust Bakeries Ltd* which suggested that in some circumstances, the question of whether an employer or Court may rely on a 'lapsed' warning to justify a dismissal is one that "cannot be viewed so rigidly either from the point of view of the employer or the worker". In any event, employers should be mindful of the 'principal reason' for the employee's dismissal and be aware that where this is the existence of an expired warning, Courts are unlikely to look on this favourably.

Retention of Stale Warnings

If 'stale' or 'expired' warnings can be used as secondary justification for a dismissal then clearly they need to be retained. Some representatives of employees seek to have expired warnings removed from the employee's file held by the employer. Employers may understandably be resistant to such a request. If such warnings are retained the employer must be very careful how such a warning may be used or relied on in the future.

NATURAL JUSTICE AND SCHOOL SUSPENSIONS

The Court of Appeal has recently decided a case concerning the extent to which natural justice applies in a situation where a Principal or teacher undertakes an investigation of a student's misconduct which may result in the suspension of the student. In *Bovaird v J Suing by his Litigation Guardian*, the Court considered an appeal of a decision in the High Court which held that where a Principal or teacher commenced an investigation into claims of misconduct by a student, natural justice required that the student's parents be consulted before the school decided to suspend the student.



The Facts

In this instance, J was a sixteen year old student who had been previously suspended for gross misconduct after he was found to be in possession of paraphernalia for smoking marijuana

while at school. He was eventually reinstated from the suspension although his reinstatement was conditional on J complying with the school rules, accepting random drug testing and completing a drug rehabilitation course.

Only 2-3 days after being reinstated, J was part of a group of students who misbehaved on a 3-day field trip to Mount Tongariro. At all stages of the ensuing disciplinary process, J refuted the allegations being made against him. However, he later admitted the allegations after being questioned by the Principal for over 45 minutes.

A meeting of the school Board was convened after which the Board decided that although the other students involved in the misconduct had been conditionally reinstated, it did not believe that imposing the same conditions on J would be *“an appropriate or productive outcome”*. The Board then decided to expel J.

No reasons were provided for J’s expulsion and when sought by J’s mother, the Principal provided her with a copy of the minute of the Board meeting. This minute was a standard template and gave no other details apart from: *“no belief that he will meet conditions of reinstatement—expel”*.

The Law

The Education Act 1989 Act states that a purpose of the legislation is to *“ensure that individual cases are dealt with in accordance with the principles of natural justice”*. Also, it has been recognised that underlying the purpose of both the Act and the Education (Stand Down, Suspension, Exclusion and Expulsion) Rules 1999 is the need for any suspension or stand down process to be tailored to the particular circumstances of the situation rather than being driven by hard and fast rules.

There is an absence of any provision either in the Act or the Rules that requires a parent to be involved with the suspension process before a student has been suspended. However, there is express provision for parents to be involved in the process after the fact. It was this provision for parental involvement post-suspension that the High Court believed was an *“oddity”*. It found that the failure of the Principal to contact J’s mother before his decision to suspend her son was a breach of natural justice.

The Decision

The Court of Appeal disagreed with the reasoning of the High Court, stating that burdening Principals with this additional requirement of parental consultation was unnecessary and at odds with the legislative policy in both the Act and the Rules. In making this decision, the Court fo-

cused on the fact that the school environment *“requires an individual response to each incident”*. Decisions regarding students’ wellbeing and education often have to be made in a *“time-sensitive environment with the safety, wellbeing and education of other students in mind”*. The obligation of a Principal, according to the Court of Appeal, was simply to act *“fairly”* and only rely on information that constitutes *“reasonable grounds”* for suspension under the Act.

Although it is clear that the Court of Appeal disagreed with the High Court’s reasoning in this matter, the appeal was nonetheless dismissed as the Court still found that the Principal had insufficient grounds to suspend the student. It nevertheless stands that the extent of natural justice in investigations into students’ alleged misconduct does not prescribe the involvement of parents prior to making a decision to suspend a student.

OVERSEAS SNIPPETS

SHAM REDUNDANCY RESULTS IN MAXIMUM FINE

Australian software company Sterling Commerce has lost an appeal against the imposition of a penalty by the Federal Magistrates Court. Sterling was ordered to pay a penalty of AU\$33,000 for its actions in failing to reinstate an employee returning from maternity leave, instead claiming that her position was redundant.

The employee and Sterling had originally agreed that she would return from maternity leave to work part time in April 2005 and then full time by December 2005. In her absence, the company hired a contractor to perform her tasks as marketing manager.

Justice Gordon found that in fact the employee’s *“job did exist and she should have been reinstated to it”*. She held that Sterling had taken *“a deliberate course of conduct to justify their decision to continue to employ Ms Matthews, her replacement, rather than Ms Illiff.”* The course of action the Judge refers to is Sterling’s intentional efforts (evidenced by emails between Ms Illiff’s superior and another marketing manager) to amend the current job description sufficiently to avoid legal action, *“at a time when it was clear to Sterling Commerce that Ms Illiff was likely to take issue with what was happening to her”*.

U.S. CEO CASH INCENTIVES DECLINE

A recent study of 350 of the largest and mid-size companies in the US has found a marked decrease in the level of direct compensation for CEOs. The 16% decline in cash incentives for CEOs, according to the study, reflects a weakening in corporate performance.



CEO base salaries, which comprise only 19% of total CEO remuneration in the US, rose in only 58% of organisations surveyed. Of those organisations, base salary increased by 4.2% in ‘large’ companies; 3.9% in ‘top 50’ companies; and 3% in ‘mid-size’ companies.

U.S: POST 9/11 DISMISSAL BACKFIRES ON EMPLOYER—\$1.6M

A British Muslim who was dismissed from her job just weeks after the September 11 attacks on New York City has been awarded a record payout. Halima Aziz, a lawyer employed by the Crown Prosecution Service, was suspended after she made an offhand reply to a security guard who asked her whether she was a ‘security risk’. Ms Aziz replied, “*I’m a friend of [Osama] bin Laden’s*”. The Crown Prosecution Service has been ordered to pay her £600,000 (NZ\$1.6 million).

AUSTRALIA: JUSTIFICATION: RELYING ON POST-DISMISSAL INFORMATION

A recent case in Australia has highlighted the ability of employers to use information or evidence discovered post-termination to bolster justification of a dismissal. In *Johns v Brisbane City Council*, the employee was suspended from work pending investigation into allegations of misconduct. The Council directed the employee to return any Council property and when he failed to do so, sent him a “*show cause*” letter asking him to provide reasons why his employment should not be terminated.

The Council received no response to this letter and subsequently terminated the employee’s employment. The employee was subsequently charged with theft of Council property. He commenced unfair dismissal proceedings.

The Commission accepted that the fact the employee was convicted of the theft after he pleaded guilty fatally compromised his employment contract in such a manner that the Council was justified in terminating his employment. Interestingly, the Commission did not accept the Council’s argument that the mere fact the employee was charged with an offence was a valid reason for terminating the employee’s employment.



To keep Managers and staff up to date with developments in employment law and best practice Quigg Partners are offering Employment Law Toolbox sessions in 2008. These can be held in your workplace or in our private seminar rooms. Toolbox sessions can be tailored to suit your needs and may cover:

- Effective Disciplinary Procedure - managing difficult employees
- Restructuring - avoid the credit crunch costing you even more
- Bill of Rights, Privacy, OIA, Codes of Conduct and Conflicts of Interest issues

Other topics may also be available upon request.

ENQUIRE NOW

On a no obligation basis enquire now about the option(s) that may best suit you by contacting:

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