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Simon Joins the Partnership

We are pleased to welcome Simon Martin to the partnership in the Employment Team.

Originally from Ashburton, Simon joined Quigg Partners in 2007 after graduating from the University of Otago. He was admitted to the bar in 2008, and has been with us since then, save for a couple of years living and working in New York City with his wife, Alex.

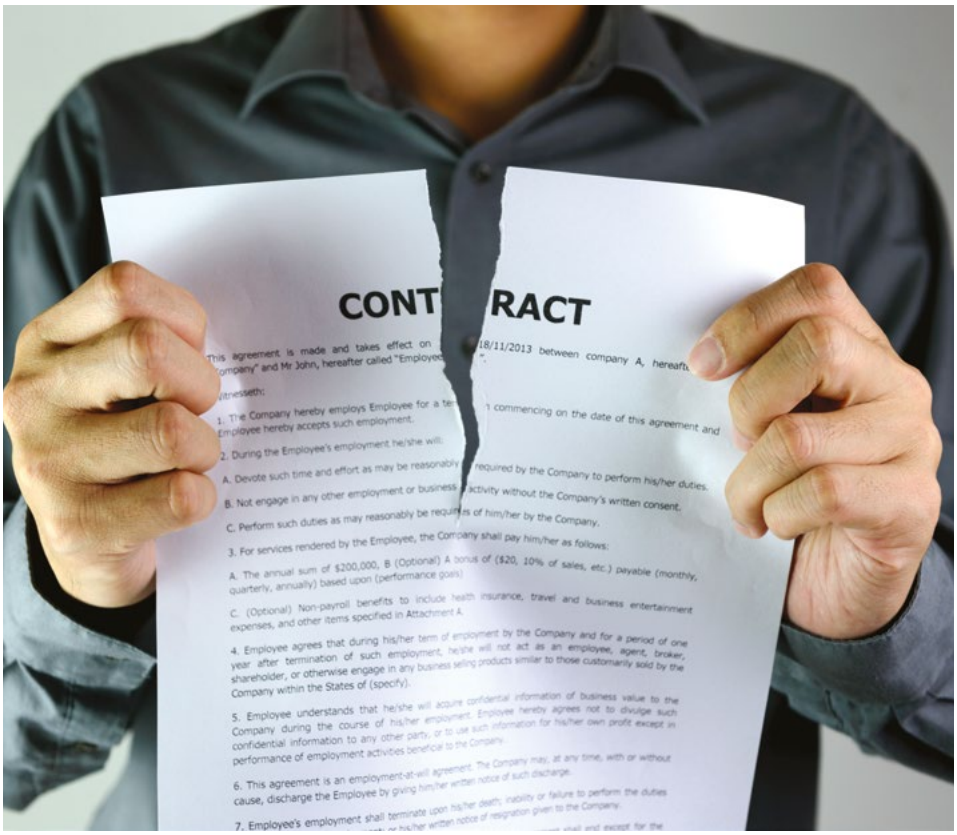
He now has over 10 years of extensive experience in all aspects of employment law and is a trusted and valued member of the team. Quigg Partners is excited about the change which reflects the continued growth of the firm coming into its 20th year.

Final and Binding...or is it?

The Employment Relations Authority has held a settlement agreement was not valid as the parties had relied on incorrect information

Mr Bagley was employed by Deloitte as an Associate Director in the Oracle Practice. In June 2018 it became clear that Oracle's profitability was short of budget. The decision was made to consider restructuring the Oracle business. A meeting took place between Mr Bagley and Mr Glover, a Partner. It quickly became apparent to Mr Bagley that the parties were discussing a *"likely restructure which would result in my position begin disestablished."*

Following the meeting, Mr Bagley was advised by HR that he would not be entitled to compensation if his position was made redundant. On 30 June 2018, Mr Bagley signed a settlement agreement ending his employment. The agreement did not include redundancy compensation but a significant tax free payment under section 123(1)(c)(i) was made together with notice and commission. Before signing the Record of Settlement, Mr Bagley had taken



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Quick Reference

the opportunity to obtain legal advice, had reviewed his employment agreement, and had reviewed Deloitte's intranet to see if there were any redundancy policies. He had not been able to find any redundancy policies and relied on the advice of HR that he was not entitled to redundancy compensation.

A week later Mr Bagley was made aware of a redundancy policy dated October 2017 which entitled him to redundancy benefits. He immediately alerted Deloitte. Deloitte dismissed his concerns and referred to the settlement agreement as being full and final, and as having been signed off by a mediator, meaning it could not be reopened or renegotiated. Mr Bagley sought his entitlements in the Employment Relations Authority.

Employment Relations Authority

Deloitte accepted that it had provided incorrect advice to Mr Bagley. However, it attempted to rely on the wording of the Record of Settlement which said it was in "full and final settlement". Deloitte argued the Record of Settlement was agreed to as an alternative to a possible redundancy, and as redundancy was in contemplation when the agreement was signed any claim in connection with redundancy was settled by the Record of Settlement.

Mr Bagley said he was entitled to rely on information provided to him on behalf of Deloitte, but that the information provided was incorrect. As he had been misled when entering the Record of Settlement, it should be held invalid. He argued that it would be unfair and inequitable to allow Deloitte to benefit from its own error, to Mr Bagley's detriment.

The ERA referred to two English judgments which considered the extent to which the *"restrictive statutory scheme for challenging employment settlement agreements prevented the Court from intervening."* In both cases, the Tribunal had held that agreements reached under the statutory scheme had to be valid agreements. The ERA said the Record of Settlement between Mr Bagley and Deloitte could not be valid because Mr Bagley had relied on the mistaken representation by Deloitte.

Despite this finding the ERA declined to award a remedy to Mr Bagley. It noted that the payments made under the Record of Settlement amounted to a greater figure than what he would have been entitled to if he had been made redundant. The ERA said a further payment to Mr Bagley would not be just or equitable.

Learnings

Care should always be taken to provide employees with accurate information relating to their employment entitlements. An otherwise 'full and final' settlement may not be so when incorrect information is relied on to the employee's detriment. Policies should be reviewed regularly so that they are up to date and reflect the employer's intentions. HR staff should be encouraged to be familiar with policies, codes of conducts and manuals.

Successful constructive dismissal claim leads to large remedies

A hotel bar manager who was constructively dismissed by her employer has been awarded over $28,000 by the Employment Relations Authority

In August 2017, Dawn Langdon commenced employment at the Junction Hotel as the bar manager. In January 2018, her relationship with another employee, 'D', began to deteriorate. Ms Langdon requested a meeting to resolve the issues, but when the meeting occurred she was blamed by Mr Pink (her employer and the Hotel owner) for causing the relationship problems. Ms Langdon's relationship with D continued to deteriorate. In February, Ms Langdon requested a second meeting. Mr Pink refused to meet and Mrs Pink told her to *"start looking for another job"* which upset her. On 17 February she was invited to attend a disciplinary meeting about potential serious misconduct which could lead to instant dismissal.

At the disciplinary meeting the parties discussed a loss of customers which Mr Pink attributed to Ms Langdon, but he refused to identify the lost customers. Mr Pink said Ms Langdon blamed other people and had a *"superiority complex"*. Ms Langdon's support person was not allowed to speak during the meeting, and Mr Pink *"closed down"* the meeting when he attempted to do so. Ms Langdon asked for a decision at the close of the meeting. Later that day, Mr Pink gave Ms Langdon a letter which said, among other things, her rostered hours would be reduced and that she needed to look at her attitude which needed a *"vast improvement"*.

The letter made Ms Langdon stressed and her doctor signed her off from work as a result. Despite communicating this to Mr Pink, he replied to Ms Langdon referring to the abandonment of employment clause in her employment agreement. Ms Langdon confirmed she was not abandoning her employment. At the end of February Ms Langdon's rostered weekly hours were reduced from 42 to 25.

On 2 March Ms Langdon raised concerns that her bullying issues had not been resolved and that the reduced hours had not been discussed with her. Mr Pink replied that Ms Langdon had *"bombarded"* him with emails since commencing employment and asked Ms Langdon to compensate him $500 for the *"time wasted unnecessarily."* Ms Langdon then resigned as she felt so stressed that she had little choice to resign.

Test for constructive dismissal

The Employment Relations Authority held that Ms Langdon had been constructively dismissed. It conducted a two step test to reach this decision.

First the Authority asked whether Ms Langdon's resignation was caused by a breach of duty on the part of Mr Pink. The Authority held Mr Pink had behaved in a manner that was either calculated or likely to destroy or seriously damage the employment relationship in breach of his good faith obligations. The reasons for this finding were that:

- Mr Pink had not properly investigated Ms Langdon's relationship issues with D and had predetermined that she was the one responsible for the issues;
- the $500 compensation request was not in good faith, discouraged her from raising concerns, and did not comply with the relationship problem resolution clause in Ms Langdon's employment agreement;
- Mr Pink invited D to the disciplinary meeting and then referred to Ms Langdon's previous employment in a critical manner in front of him; and
- Mr Pink failed to consult with Ms Langdon about her reduced hours and correspondingly increasing D's rostered hours.

Secondly, the Authority asked whether Mr Pink's breaches were serious in nature and whether it was reasonably foreseeable that Ms Langdon would not be prepared to continue to work for Mr Pink. The Authority held 'yes' to both of those questions and said that Ms Langdon's personal grievance for constructive dismissal had been made out. The Authority held that the dismissal was not fair or reasonable.

Ms Langdon was awarded $18,000 for compensation for the humiliation and loss of dignity she had suffered. She was awarded $8,232 for lost wages and received a further $2,374.60 made up of interest, employer KiwiSaver contributions, holiday pay and an alternative holiday not taken.

Learnings

Employers should take complaints or concerns about working relationship issues seriously and should never penalise or discourage employees from raising such concerns. Where the relationship issues are serious or sensitive employers might be wise to use a third party investigator which will maintain employer impartiality, especially when required to decide on the investigation's findings.

To avoid claims of constructive dismissal employers should act in accordance with their good faith obligations which require parties to be active and constructive in establishing and maintaining a productive and communicative relationship. Any decision made by an employer must be justifiable, and where the decision might have an adverse effect on the employee's employment they must be given relevant information and an opportunity to comment before the decision is made.

Employment Court "Parks" Employer's Decision - Parking Officer gets reinstatement

An employee who was unjustifiably suspended twice and then unjustifiably dismissed has been awarded reinstatement to his previous position

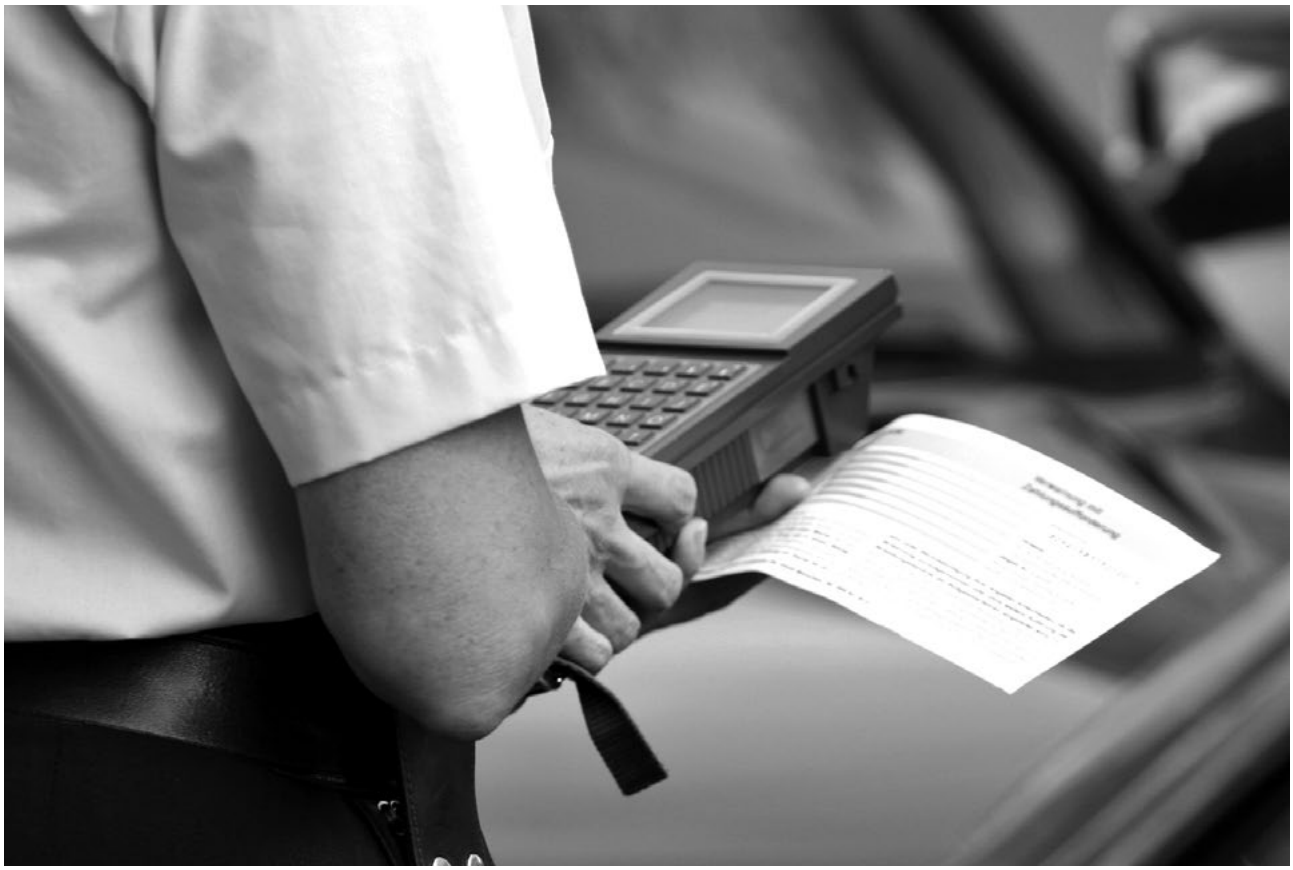
Mr Hong was employed as a parking officer by Auckland Transport. Mr Hong met most of the performance measures for his role but had some issues with how he related to members of the public. No warnings were given and no performance management was ever commenced.

On 24 and 25 January 2017 Mr Hong and his manager, Mr Bidgood, attended a training workshop. Mr Hong challenged the facilitator in an allegedly *"abrupt and hostile manner"* that he was entitled to tell members of the public to stop swearing at him.

The day after the workshop Mr Bidgood says he invited Mr Hong to take some paid time off to reflect on the workshop and his conduct. Mr Hong says he was given no option but to leave work. The Employment Court found this was an unjustified suspension. Mr Hong was required to take time off no matter what he said. However, the parties accepted this unjustified suspension did not cause material impact or disadvantage to Mr Hong.

Mr Hong returned to work on 31 January 2017. That day a member of the public became abusive towards Mr Hong who urgently requested Police assistance. Following this, Mr Bidgood says he became worried about Mr Hong working unsupervised in light of Mr Hong's conduct at the workshop.

On 3 February 2017 a letter headed "PROPOSED SUSPENSION" was given to Mr Hong. The letter said AT had grave concerns about Mr Hong's refusal to follow lawful and reasonable instructions and invited Mr Hong to a meeting on 9 February 2017. The letter said that Mr Hong was not permitted to attend the workplace in any capacity until the 9 February meeting. The Employment Court found this was an unjustified suspension as well; the letter was prepared prior to the meeting, and Mr Hong was given no opportunity to comment on the suspension before the decision was finalised.



At the 9 February meeting Mr Bidgood clarified that the lawful and reasonable instructions it alleged Mr Hong had refused to follow were that Mr Hong should not respond to or challenge members of the public in an argumentative manner. Mr Hong said he had followed the correct procedure on 31 January, agreed to change the phrase he used when members of the public swore at him, and agreed to follow every reasonable instruction from AT. Despite this AT confirmed the suspension in a letter given to Mr Hong later that day. The Court found this suspension was justified; Mr Hong had the opportunity to make comments which were considered before the third suspension was confirmed.

On 22 February 2017 a further meeting occurred where Mr Hong asked what he could do to show his willingness to change AT's perception of him. AT said that it was concerned about Mr Hong saying it was his right to tell people to stop swearing at him as it was against the law rather than following AT's instructions to not respond.

On 24 February 2017 AT dismissed Mr Hong. The principal reasons for the dismissal were concerns about Mr Hong's safety and compatibility with the job. Mr Hong raised a personal grievance almost immediately. Although AT succeeded in the Authority while defending Mr Hong's claim, it accepted in the Employment Court proceedings that the dismissal was unjustifiable as Mr Bidgood had multiple roles in the decision to dismiss Mr Hong and AT failed to address its concerns at an earlier stage.

Reinstatement

AT opposed reinstatement on the basis that it was neither practicable nor reasonable and relied on its loss of trust and confidence in Mr Hong. The Court said relying on this would be a *"difficult position to maintain"* where AT had accepted the dismissal was unjustified. The Court held that it was not sustainable for AT to say it had lost trust and confidence in Mr Hong considering that:

- AT could not sufficiently explain what it meant when it referred to the "regularity of [Mr Hong's] outbursts" in the suspension letter;
- Concerns regarding how Mr Hong related to the public were not safety related and had never been escalated by Mr Hong's supervisors;
- Mr Hong acted appropriately during the 31 January incident but this did not seem to have been considered by AT. AT appeared to hold this incident against Mr Hong even though it knew members of the public often become abusive towards parking officers;
- Mr Hong had not knowingly disregarded AT's policies;
- Mr Hong had repeatedly said he would adopt AT's suggested phrasing when dealing with members of the public who swore at him; and
- Mr Hong had demonstrated a willingness to comply with AT's instructions in the past.

The Court further noted that Mr Hong would now have a clearer understanding of AT's expectations of him, he would have a new supervisor, his colleagues were supportive of him and there was no evidence that Mr Hong put himself, colleagues or members of the public at risk. The Court also said in reference to Mr Hong's view that he should be able to tell members of the public to not swear at him, that employees are entitled to hold views that differ from those of their employers.

Remedies

The Court ordered that Mr Hong be reinstated to his prior position. It awarded lost wages and benefits from the time of dismissal to when Mr Hong found alternative employment (approximately 6 month) plus interest. Mr Hong was also awarded $28,500 as compensation for humiliation, loss of dignity and injury to feelings caused by the second unjustifiable suspension and the unjustified dismissal.

Learnings

Employers should try to avoid a 'straw that broke the camel's back' situation; performance concerns should be raised at an early stage rather than rushing to document or collate concerns when dismissal is considered necessary. Concerns should be documented in writing, and warnings given where appropriate. This will lay the foundation for dismissal if necessary at a later stage. If the concerns weren't sufficient to justify dismissal, they also won't likely be sufficient to prevent reinstatement.

Employers should note that suspensions are regarded as a serious disciplinary step and should not be used as a default precursory step where issues arise. The decision of whether or not to suspend an employee should be treated just as seriously as any other form of disciplinary action.

New guide issued for public sector severance payments

The Controller and Auditor-General has recently released a new guide for the public sector on severance payments.

The guide recognises that severance payments can be reasonable and appropriate when employment relationships end following employment difficulties. However, it also recognises that severance payments are ultimately made from public money and misspending can attract public and political scrutiny as well as scrutiny from the IRD and the Auditor-General.

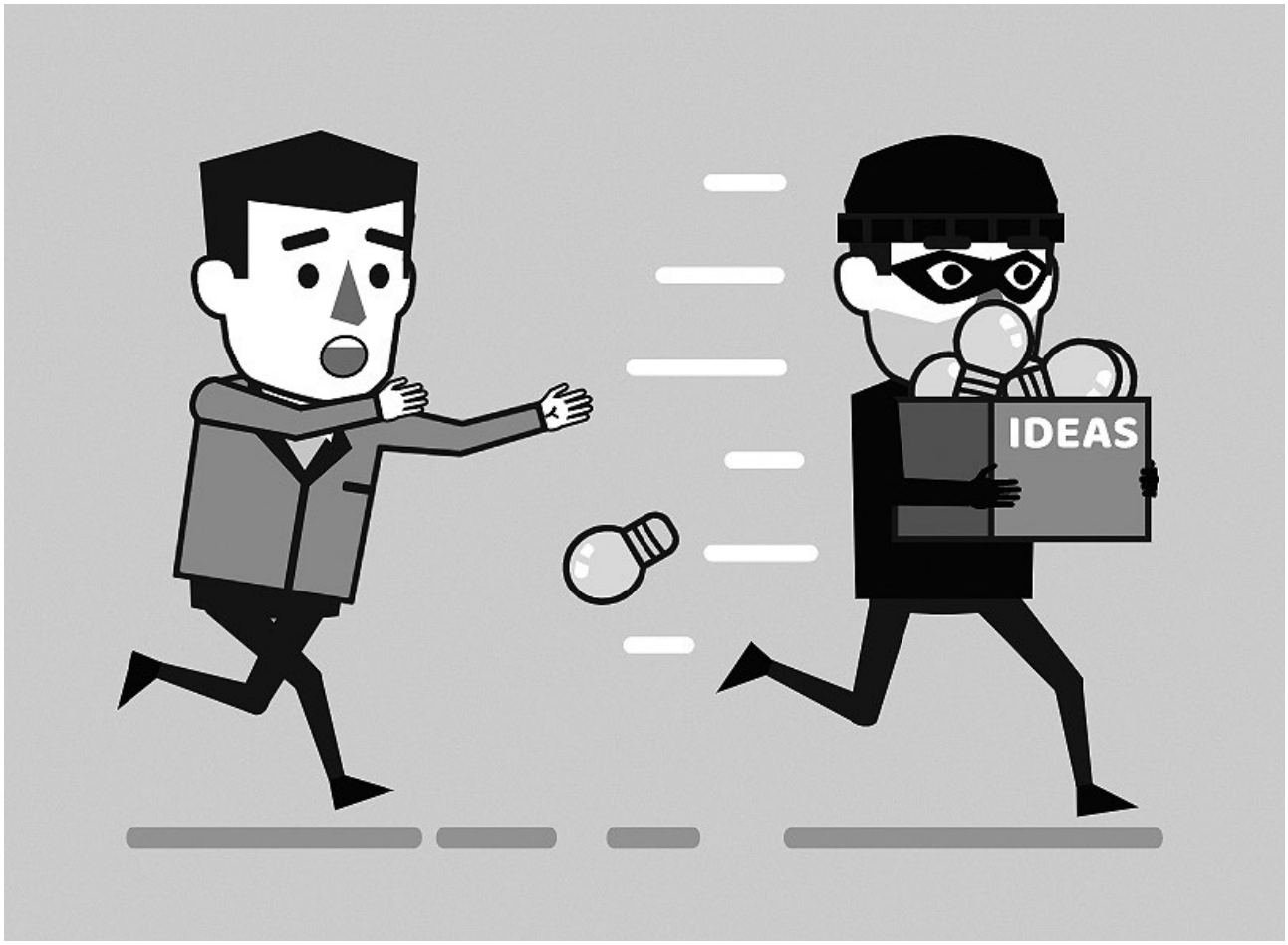
The guide cautions against making severance payments wherever an exiting employee asks for such a payment. This is because the reasonableness of making severance payments needs to be assessed on a case by case basis. The guide provides a list of common situations that might reasonably lead to the parties considering an exit agreement including severance

payments, and a list of factors that will help to determine the amount of severance (if any) to be paid, including:

- The nature of the dispute, including how it arose and who is at fault;
- The employee's seniority, length of service, and contractual entitlements;
- The strength of both parties' claims;
- The risks and legal costs involved in defending legal proceedings, including the risk/value of establishing a precedent through public resolution;
- The effect on the employee, including mental health considerations, and the moral obligations of the employer; and
- How much each party has at stake and how motivated each party is to resolve the dispute.

The guide explains that the Auditor-General's role is not to examine the particular circumstances of the employment relationship, the reasons for the severance payment or whether the severance payment was appropriate. However, where the severance payment appears excessive, or not in keeping with public sector norms, the Auditor-General is more likely to scrutinise matters more closely. The guide goes into some detail about the legal requirement on public sector organisations to disclose severance payments. Disclosure requirements vary depending on the type of organisation, the employment agreement and the terms of the settlement agreement.

Public sector employers should familiarise themselves with the framework of severance payments so that these payments can be made with confidence where appropriate. Legal advice should be sought early in the dispute or disciplinary process. The guide can be accessed online through the Controller and Auditor-General website.



Sticky fingered architect sentenced in District Court

An architect who stole intellectual property belonging to his ex-employer has been sentenced to three months community detention and 220 hours of community work

Between May 2015 and March 2017 Michael Davies was employed by Context Architects Limited. Mr Davies resigned in February 2017. Before his departure the parties agreed on what files Mr Davies would retain. However, Context Architects discovered that shortly before his departure, Mr Davies had downloaded a large number of other files onto a personal drive. The files were confidential and commercially sensitive.

Mr Davies was charged with stealing trade secrets for a pecuniary advantage. In Court Mr Davies said he did not intend to obtain a pecuniary advantage from the information taken and he had done nothing with the information. There was no evidence put before the Court of any financial effect on Context Architects. Mr Davies was remorseful and had completed 70 hours of voluntary community work for the Salvation Army.

However, Judge Paul found the offending was pre-mediated, a significant breach of trust and could have led to financial loss. The owner of Context Architects was significantly affected by Mr Davies' actions which felt like a "betrayal" to her. Mr Davies was sentenced to three months community detention and 220 hours of community work.

Learnings

The sentence imposed by the District Court should provide employers with comfort that theft of intellectual property and trade secrets is taken seriously by our courts. But such theft needs to be discoverable by the Employer and preferably before an employee has had time to benefit from their crime. Employers should consider the measures they have in place to protect intellectual property. In this case, Context Architects' IT support company identified that information had been downloaded by Mr Davies and alerted Context Architects.

Overseas snippets

Too much job satisfaction?

A Canadian arbitrator has upheld the termination of an employee who admitted to masturbating at work

In January 2016 complaints were made to the Employer's HR department that someone was masturbating in the workplace bathrooms. The Employee was identified as the culprit. A meeting was held where the Employee was informed that his colleagues had complained about someone *"breathing heavily, making erratic movements and moaning"* in the bathroom. The Employee claimed masturbation was never specifically mentioned at this meeting but at arbitration the Arbitrator had no doubt that the Employee was aware of what was really being discussed. The Arbitrator found that after that meeting the Employee knew that the Employer considered masturbating in workplace bathrooms to be inappropriate and that the Employee should stop doing it.

The Employee stopped masturbating at work for a short time but recommenced in a fashion described by a colleague as *"more frequent and brazen"*. An investigation was conducted in April 2018. On 23 April 2018 another meeting was held where the Employee admitted to watching pornography and masturbating in the workplace bathrooms. He agreed he had previously been advised by the Employer that the behaviour was inappropriate and needed to stop.

The Arbitrator found that the Employee continued conduct that he knew was causing distress to his colleagues, that was considered inappropriate and that his Employer wanted him to stop. The Arbitrator put some emphasis on the fact that the Employee was effectively on notice of this after the January 2016 meeting. The Arbitrator found that the Employee's conduct constituted harassment as defined by the Employer's Code of Conduct. The Arbitrator found that termination of the Employee's employment on 27 April 2019 was warranted.

Learnings

The January 2016 meeting, even though it was not a disciplinary meeting, helped the Employer establish that the Employee knew his conduct was inappropriate. This supported the Employer's decision to terminate the Employee in 2018. This shows the value of raising conduct and performance issues with employees early, even if in an informal manner. Employers should document when issues have been raised with employees so they can point to putting the employee on notice of a need to improve.

Federal freedoms fettered

The Australian High Court has recently upheld the decision to dismiss a public servant after she criticised the government's immigration policy in anonymous tweets

Ms Banerji was employed by the Department of Immigration and Border Protection. Under the twitter pseudonym 'LaLegale' she criticised the Federal Government and its immigration policies. She was dismissed in 2013 for breaching the Australian Public Service Code of Conduct which said public servants were to take reasonable steps to avoid conflicts of interest and were to uphold the public sector's integrity and good reputation.

The High Court unanimously upheld her dismissal although the Court was clearly not completely at ease with this decision. The Court noted that every person who posts on social media anonymously should assume that their identity could be revealed and so there was an obvious risk that anonymous tweets from public servants could damage the public sector's reputation. Two Justices noted the burden of the public sector gag was *"substantial"* and *"deep and broad"*; but ultimately the need for the public service to be apolitical meant the gag was *"reasonably necessary and adequately balanced"*.

Public servants give up some of their freedom of speech, or freedom of *expression*, in return for their public sector employment. Ms Banerji's lawyer described this as surrendering the right to participate in the political process. Public sector employers face a delicate balance between maintaining the public's confidence in the public sector's neutrality and gagging employee's political opinions to such an extent that their freedoms of expression are fettered.

Gender Discrimination Win

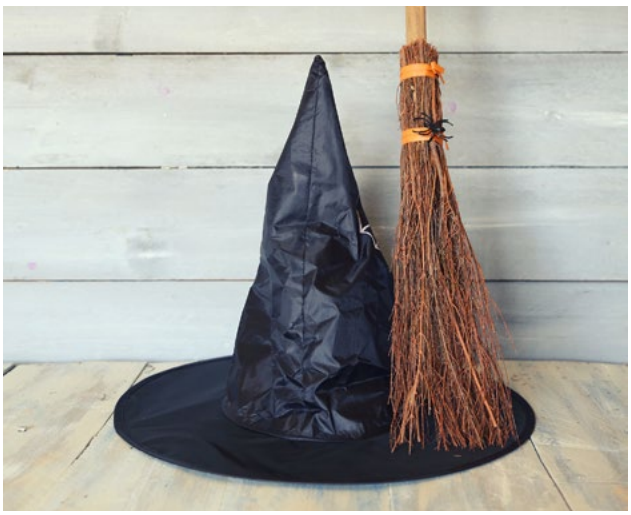
Ms Stacey Macken brought a gender discrimination claim in the UK Employment Tribunal against the London office of BNP Paribas (a French international banking group).

Ms Macken began her employment with the bank in January 2013. Her annual salary was £120,000. A male employee was hired shortly afterwards in the same job title and with the same responsibilities but with an annual salary of £160,000. The bank claimed Ms Macken was employed as a junior and the male employee was her senior. However, the Tribunal ruled the bank had not adequately explained why the male employee received a salary so much higher than Ms Macken's salary. Both had received the same grade in their employment reviews. Ms Macken also received significantly lower bonuses than the male employee. The Tribunal found Ms Macken had been treated unfairly because she was a woman.

An example of this gender discrimination occurred in October 2013 when Ms Macken arrived at work to find a Halloween style witches hat on her desk.

The Tribunal wrote that: *"Leaving a witches' hat on a female employee's desk, in a predominantly male working environment, was an inherently sexist act that potentially reflects on the nature of working environment for the Claimant and the approach that was taken to women."*

There were a number of other incidents which were demeaning and belittling for Ms Macken.



Ms Macken had tried to raise complaints about the discrimination she had experienced. These complaints were ignored and shut down.

The Tribunal ruled in her favour relating to claims of unequal pay, sex discrimination and victimisation. Ms Macken's claim was for £4,000,000. The size of the award she will receive has not been determined yet.

A key factor in this decision was the male employee referred to above. The Tribunal found that he and Ms Macken were doing the same job and so she was not being paid equally. The bank was unable to show that the difference in pay did not involve treating Ms Macken differently because of her sex.