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The worse for drink . . .

George Rerekura v A W Fraser Limited (NZERA 2011, Christchurch, 205160434)

In an interesting decision, the Employment Relations Authority has found that a labourer who got drunk instead of coming into work and then lied about why he was absent was justifiably dismissed over the incident, despite having worked for the company for two decades with no previous disciplinary action having been taken against him.

Mr Rerekura had been an employee of A W Fraser Ltd (AWF), a scrap metal recycler, and its predecessors for over 20 years. He was scheduled to work the night shift on Friday 19 December 2008, however there was a private Christmas function organised for that night by some of Mr Rerekura's colleagues. Mr Rerekura attended the 19 December function, became *"the worse for drink*" and did not attend the workplace that evening, and did not contact his work to notify them of his intention not to attend or provide an explanation for his non-attendance.

On the basis of Mr Rerekura's absence without notification, AWF marked him as sick, as that was the company's default position in the absence of notification. When Mr Rerekura next attended work on Monday 22 December 2008, he had a conversation with Mr Dixon, AWF's Production Manager, about the absence on 19 December 2008. Mr Dixon, who was carrying out some preliminary inquiries into this matter, asked whether he was sick, Mr Rerekura alleged that he was. Mr Dixon then asked Mr Rerekura if he wanted to reconsider his answer because Mr Dixon had heard that he was not sick at all; Mr Rerekura then changed his story and told the truth saying "*I was out on the piss*".

Mr Dixon told Mr Rerekura that there would need to be a formal disciplinary meeting to discuss the matter. At the end of the disciplinary process, Mr Rerekura was dismissed from his employment. A personal grievance was promptly raised by Mr Rerekura's union, arguing that while Mr Rerekura accepted that he had been absent from work because he had been drinking at the function, had failed to notify his employer that he was going to be absent, knew that that his shift was short-staffed due to another employed being on annual leave and had initially said he was sick, they further stated that they believed his employer had "*blown the whole thing way out of proportion*".

The Authority was of the view that the only issue for determination in the case was whether AWF's decision to dismiss Mr Rerekura was the decision a fair and reasonable employer would make. It stated:

"...it seems to the Authority that the message is clear enough that the employer was complaining about an employee who, without notification or lawful excuse, failed to attend at the workplace when he knew or ought to have known that his services would be particularly in demand because of the absence of one other person on annual leave, who failed to turn up at all, failed to provide any explanation or notification, and then was caught in a lie when asked for an explanation. Indeed, it might be said that had AWF not been aware of the factual position when it sought Mr Rerekura's comments on the reasons for his absence, he might have been able to successfully mislead his employer. Certainly, it seems on the evidence before the Authority that Mr Rerekura's intention was in fact to mislead his employer about the reason for his absence."

The Authority concluded:

The fact that Mr Rerekura thought it appropriate to go out "*on the piss*" on a night when he should have been working must go to the root of the trust and confidence that ought to be maintained between parties to an employment relationship.

The Authority also considered that Mr Rerekura's failure to appreciate the significance of what he had done and his enthusiasm for minimising his wrongdoing counted against him as well. In dismissing the claim, the Authority was satisfied on the balance of probabilities that a good and fair employer, after conducting a proper investigation, would have terminated Mr Rerekura's employment.

New Obligations as a Result of the 1 April 2011 Legislative Changes

The new section 64 of the Employment Relations Act, due to take effect on 1 July 2011 places an obligation on employers who enter into an individual employment agreement, or a variation to and individual employment agreement, to make retain copies of:

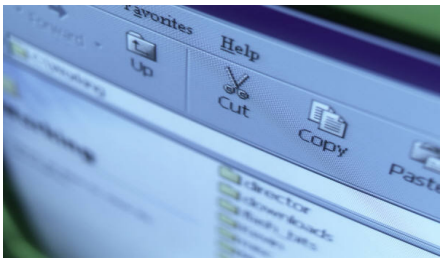
- the employee's individual employment agreement or the current terms and conditions of employment that make up the employee's individual terms and conditions of employment (as the case may be); and
- an intended agreement even if the employee has not signed the intended agreement.

For new employees it is therefore imperative that you obtain a signed individual employment agreement, **before** the employee commences employment because once they have commenced employment it may be difficult to obtain the employee's signature.

It appears that the legislation will have retrospective effect and so you will therefore need to make an assessment of your personnel files to determine whether you have a signed individual employment agreement and if not at least take some steps to have an employee/s sign an individual employment agreement.

This part of the legislation does not come into effect until 1 July 2011 and so you therefore you have some time to get your processes in order and to research your files and at least attempt to comply with this requirement.

Please do not hesitate to contact us if we can provide any assistance in this regard.



Minimum Wage Increase

As of 1 April 2011 the adult minimum wage rates (before tax) that apply for employees aged 16 or over are:

- $13.00 per hour, which is
- $104.00 for an 8-hour day or
- $520.00 for a 40-hour week.

The rates that apply to new entrants, and employees on the training minimum wage (before tax), are:

- $10.40 per hour, which is
- $83.20 for an 8-hour day or
- $416.00 for a 40-hour week

Court of Appeal Upholds Previous Ruling on Sleepovers and Minimum Wage Issue

You will recall the long-running saga involving Idea Services Ltd which we discussed in the February and July 2010 editions of *The Advocate*. The Court of Appeal has released its decision (*Idea Services Ltd v Phillip Dickson* [2011] NZCA 14) and upheld the Employment Court's majority decision that Mr Dickson was working during the entire period of his sleepover and that his employer was required to pay him at least the minimum wage for each hour that he worked.

The Court of Appeal also endorsed the three factors that the Employment Court used to determine whether the time that someone was engaged in a sleepover constituted work and these factors may now be applied to other situations that come before the Authority or Courts to determine if what an employee is doing constitutes "*work*" for the purposes of the Minimum Wage Act.

The Court also rejected Idea's submission that "*rate*" in section 6 of the Minimum Wage Act and paragraph 4 of the Order (which states what the current minimum wage is) meant "*average rate of pay over a pay period*". Instead, it preferred the Employment Court's approach that "*rate*" meant "*per unit of time*" and that for every hour worked Mr Dickson was entitled to at least the minimum wage.

The Court was, however, at pains to point out that its findings related to this specific case and agreed with Mr Dickson's counsel that "*any issues in relation to other types of workers should be addressed by the courts when and if they arise*". However it is important to note, this is not the end of the story as the IHC has recently sought leave to appeal to the Supreme Court.

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