

Conduct Outside of Workplace Resulting in Dismissal

The Employment Relations Authority determination in *Guy Hallwright v. Forsyth Barr Ltd* [2013] NZERA Auckland 79, which has been the subject of media attention, confirms that conduct which occurs outside of the workplace may give rise to a justified dismissal.

The conduct in question resulted in Mr Hallwright being convicted of a criminal charge. The Employment Relations Authority described the conduct as follows:

“Mr Hallwright and the injured motorist, Song-jin Kim, were at the intersection of Symonds St and Khyber Pass Rd in Auckland when Mr Kim’s perception of Mr Hallwright’s driving caused him to express dissatisfaction in a readily observable way. Mr Hallwright responded in kind. Both drivers turned into Mt Eden Rd, and both stopped at the side of the road. Mr Hallwright left his car and went to ask Mr Kim “what is your problem”, before thinking better of escalating the matter and retreating to his own car. Mr Kim followed, banged on the bonnet of Mr Hallwright’s car, then moved around to the driver’s side. As he did so Mr Hallwright was attempting to manoeuvre back into the line of traffic. Although Mr Hallwright did not intend to harm Mr Kim, unfortunately Mr Kim was caught under the wheel of the car. The car drove over him causing the serious injury.”

The Authority noted that this conduct was not carried out in the course of Mr Hallwright’s employment, and further that his actions at the time were such that neither the nature of his employment or the identity of the employer were evident. However media interest was aroused due to the nature of the incident and because Mr Hallwright was employed as a senior investment analyst at Forsyth Barr Limited.

Mr Hallwright was dismissed for serious misconduct on the basis that his actions:

- amounted to conduct bringing his employer into disrepute; and
- breached an obligation in the parties’ employment agreement not to engage in activity that was likely to compromise his ability to carry out his duties.

In reaching the decision that Mr Hallwright’s dismissal was justified the Employment Relations Authority referred to the publicity which Mr Hallwright’s criminal case attracted which resulted in his conviction for causing “grievous bodily harm with reckless disregard”. The media coverage described Mr Hallwright as being an employee of Forsyth Barr and included television footage of Mr Hallwright standing in front of Forsyth Barr’s offices.

The company argued that the criminal conviction had brought Forsyth Barr into disrepute on the basis of the following:

- *“it was an integral component of Mr Hallwright’s job that he be available to make public statements and provide commentary to the media, and the media were interested in his comments only because he was employed by FBL;*

- *the integrity and probity of senior employees in the investment industry is of enormous importance, with public confidence being critical to success in the marketplace;*
- *feedback from staff and clients indicated that many of those who had become aware of Mr Hallwright’s actions were disturbed by them; and*
- *while it may not be possible to quantify any loss of business or damage to the FBL brand, FBL’s reputation had been damaged and Mr Hallwright’s name and that of FBL had been inextricably linked. “*



In asserting that his dismissal was unjustified Mr Hallwright maintained:

“[44] Broadly speaking, Mr Hallwright says the incident was not work-related, his conduct in it has been dealt with in the appropriate forum, and it is not for his employer to further penalise him by terminating his employment. With more specific reference to the two grounds FBL identified as affecting the employment relationship and amounting to serious misconduct, Mr Hallwright says there was no evidence FBL’s reputation was damaged by his actions and he denies that his ability to carry out his duties was affected. Perceived difficulties for FBL were the result of inaccurate and unbalanced media coverage — a matter outside the parties’ control. “

The Authority referred to the leading case in this area – *Smith v. Christchurch Press Company Limited* and noted:

“[45] The applicable law is set out in the leading case of Smith v Christchurch Press Company Limited. The relevant questions in relation to dismissals for conduct outside the workplace are whether there is a link between an employee’s conduct and the employee’s employment, and whether the conduct had an adverse effect on the employment. When there is such a link, an employer may consider dismissal for serious misconduct. A link can be identified with reference to whether:

- *the employer’s business may be damaged;*
- *the conduct is compatible with the proper discharge of the employee’s duties;*
- *there is an impact on other employees; or*
- *there are other factors undermining the necessary trust and confidence between the parties.”*

The Authority determined that Mr Hallwright’s actions amounted to conduct bringing his employer into disrepute and that this conduct constituted a breach of Mr Hallwright’s obligation not to engage in activity likely to compromise the ability to carry out his duties and determined:

“The conduct of which he was guilty discredited him personally and tainted his position overall. Accordingly the conclusion that it compromised his ability to carry out his duties was one a fair and reasonable employer could have reached.”

More Work Trials

In contrast to the Employment Relations Authority determination reported in our last issue (Issue 216) concerning the use of pre-employment trials, a recent decision of the Authority – **Amberleigh Howe-Thornley v. The Salad Bowl Limited** [2013] NZERA Chch 25, has determined that Ms Howe-Thornley was not engaged on a pre-employment trial as the company had alleged, but was an employee and consequently was unjustifiably dismissed.

In this case the company contended that it never employed Ms Howe-Thornley and maintained that she was present on its premises in order to complete an unpaid three hour trial to determine her suitability for the role. Ms Howe-Thornley alleged that the initial interview which she attended ended with a job offer and that there was no mention of a trial period. While Ms Howe-Thornley acknowledged that she was not provided with a draft individual employment agreement and nor were wages discussed she understood that her hours of work were to be between 11.00 am and 2.00 pm, Monday to Friday and that she may be required for additional work on Saturday's.

Ms Westphal who interviewed Ms Howe-Thornley for the position gave evidence that she made it clear to Ms Howe-Thornley that she would be required to undergo a three hour trial to ascertain her suitability for the job. Another employee gave evidence that Ms Westphal had introduced Ms Howe-Thornley to her on the basis that she would be doing a 'trial period'.

Ms Howe-Thornley's three hour trial period was cut short because of the illness of another staff member on the day of her trial period. However that evening Ms Howe-Thornley received a text from Ms Westphal "... please come in again tomorrow at 11 ...". Ms Howe-Thornley worked approximately two hours that day. At the end of that day Ms Westphal found the till was \$52.36 short which was more than it had ever been out before. Ms Westphal concluded Ms Howe-Thornley had taken the money and sent her a text "... do not need to come into Salad Bowl tomorrow. We'll be in touch ...". Ms Howe-Thornley thought little of the text because she understood she was to be engaged to work on the cart which was not due to start until 27 August 2012.

When Ms Howe-Thornley did not hear anything further from Ms Westphal she text her which resulted in the following exchange of texts:

"Howe-Thornley to Westphal at 8.35am

Hi randi! What's the go today?

Westphal to Howe-Thornley at 9.56am

Nothing. Please return t-shirt and feel free to get another job.

Howe-Thornley to Westphal at 10am

Sorry i don't understand?

Westphal to Howe-Thornley at 10.05am

There is no job.

Howe-Thornley to Westphal at 10.07am

Ok. Do i get paid for the Monday and Tuesday of last week?

Westphal to Howe-Thornley at 10.08am

Money missing from till is reason you don't have a job!

Howe-Thornley to Westphal at 10.10am

Sorry i have absolutely no idea what you are talking about!!

Westphal to Howe-Thornley at 10.08am

Goodbye. "

In reaching the decision that Ms Howe-Thornley was employed as opposed to being engaged on a pre-employment work trial the Employment Relations Authority referred to the following:

"[19] The evidence is Ms Howe-Thornley was preparing produce for sale. On the second day she was also serving clients. She was, I conclude, working.

[20] Ms Westphal also asserts she pays prospective employees performing a work trial. Ms Howe-Thornley is the first and only exception though that was not initially intended. Ms Westphal originally intended paying Ms Howe-Thornley for her work on the two days but subsequently changed her mind when she found money missing.

[21] In other words it was intended there be an exchange of labour for remuneration. The fundamental characteristics of an employment agreement are present. For these reasons I conclude Ms Howe-Thornley was employed."

Consequently the Employment Relations Authority determined that Ms Howe-Thornley had been unjustifiably dismissed and awarded her \$1215.00 lost wages, a \$5,000.00 compensatory sum and \$67.50 as unpaid wages. This case highlights again the importance of ensuring that a pre-employment trial does not 'morph' into an employment relationship.



The Holidays (Full Recognition of Waitangi Day and ANZAC Day) Amendment Bill has now been introduced which provides for the Mondayising of Waitangi and ANZAC Day when these days fall during the weekend. We will keep you up to date with the progress of this Private Member's Bill.

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact Neil McPhail, Raewyn Gibson, or Peter Zwart.

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