



Client Services:

- General advice in relation to all employee-related issues
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Just a small theft . . .

A recent determination of the Employment Court, **Dumolo v. Lake District Health Board** [2014] NZEmpC 40, may raise questions as to an employer's ability to justifiably dismiss an employee for unauthorised possession, in circumstances where the value of the item taken by an employee was of "minimal" value.

This matter came before the Employment Court as a result of a challenge of an Employment Relations Authority determination which had found that the employee had been justifiably dismissed.

The facts before the Court were as follows:

1. The employee was employed as an Information Systems Support Level 2 Technician by the Lakes District Health Board (LDHB) at Rotorua Hospital from 21 September 2009 until his summary dismissal on 14 May 2010.
2. In his role the employee had access at all hours to the majority of the LDHB's site, including the hospital areas and consequently a high level of trust was placed in the employee.
3. The employee had been issued with a formal warning concerning failure to follow established protocols around a backup tape.
4. The employer had also had cause to have a discussion with the employee concerning his "behavioural interaction with other staff members".
5. The employee was an exponent and instructor in the martial arts of taekwondo and ran a private business in training martial arts. The employee had run a course in self-defence for LDHB employees which he had been paid for, and he had hoped to run further courses however at the time of dismissal no agreement had been reached between the parties for this to occur.
6. In May 2010, the employer became aware of another backup failure and initiated a formal meeting to discuss its view that Mr Dumolo was responsible for this.
7. Prior to this meeting taking place the employer became aware that the employee "without authorisation, had removed LDHB property in the form of a blank writable DVD disc from his work premises."
8. A meeting was therefore convened to discuss both issues concerning the backup failure and the alleged unauthorised possession of a DVD disc.
9. After considering the employee's explanation in relation to the backup tape failure, the employer accepted that there "may have been technical problems leading to that issue and Mr Dumolo was given the benefit of the doubt and his explanation accepted." However LDHB did not accept Mr Dumolo's explanation for the taking of the DVD, and concluded that Mr Dumolo's conduct amounted to serious misconduct and ultimately reached a decision to dismiss Mr Dumolo.
10. The Court noted that LDHB's Management and Administration Manual categorised "Theft or Conversion" and "Unauthorised possession of LDHB property" as serious misconduct.
11. The employee did not at any time dispute taking the DVD however argued that his conduct did not amount to serious misconduct and maintained that, irrespective of whether his conduct was held to constitute serious misconduct or misconduct, dismissal was not the appropriate outcome. Mr Dumolo stated his belief "that an item of this value should be equated with stationery items such as pens and writing paper. He inferred that the employer was unreasonable in elevating the matter in the way it did."
12. The LDHB while acknowledging that the value of the DVD was minimal being "a dollar or thereabouts", the matter was "one of principle". Further evidence was given on behalf of the LDHB that "while the item had an extremely low value, if the practice of taking such items became widespread it could develop into a significant cost to the LDHB."

Disclaimer:

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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13. The Court also noted that “the employer has clearly taken into account in dismissing Mr Dumolo, not only the fact that he stole a DVD but also his employment background. He had received a warning for a backup failure and other supervisors of him had received complaints about his behaviour from other staff members. Mr Wheatley significantly stated in his evidence that he might not have dismissed an employee with long and valued work history in a similar situation.”

The Court determined that the disciplinary process “appears to have been conducted in an appropriate manner” however in relation to the substantive reasons for the dismissal stated:

“The factor, which causes difficulty, is that while Mr Dumolo's conduct probably would be categorised as serious misconduct and unauthorised taking of an employer's property would invariably be categorised as such, in this case it is at the lower end of seriousness. The decision therefore to be made is not necessarily how the conduct is to be categorised but whether LDHB's response to it in all of the circumstances was not the action which a fair and reasonable employer would take.”

The Court considered the employee's assertion that if he carried out further courses for the LDHB then he would utilise the DVD for this purpose however the employee conceded that until there was an agreement as to the future courses the DVD was to be used for his own private business. In this regard the Court noted:

“[33] . . . there is one part of the evidence, which causes concern at the dismissal being upheld. This relates to the evidence of Mr Nieuwoudt. Mr Dumolo conceded that the disc he took was used to download a film to be used for his martial arts students. Some of these were fellow employees with whom he had conducted a martial arts course at the request of the employer and for which the costs and his fee were paid by the employer. Mr Nieuwoudt had indicated to Mr Dumolo that he was hopeful that further courses paid for by the employer might be conducted by Mr Dumolo. The matter was apparently one of funding. It is true that Mr Dumolo knew that no such further courses were in immediate prospect but nevertheless Mr Nieuwoudt had held out that there might be a prospect of such courses in the future. While tenuous, there was nevertheless some link between the taking of the DVD and what might be considered a benefit for the employer. As I understand it Mr Dumolo's evidence is that if further courses were agreed to, the film that he downloaded would be used during such courses. He did concede, however, that for the moment the DVD was to be used for his own private business.

[34] It might be said that this does not, in any event, excuse Mr Dumolo's conduct. On the other hand it is a factor, which a fair and reasonable employer would have taken into account in assessing all the

circumstances and therefore affect its response such that disciplinary action short of dismissal would have been more appropriate.

[35] . . . During the course of the disciplinary process none of the managers, including Mr Wheatley, made enquiry of Mr Nieuwoudt. That should have been undertaken as part of a genuine consideration of Mr Dumolo's explanation. . . .”

The Employment Court concluded that the dismissal of the employee was unjustified.

The Employment Court, in considering the remedies to be awarded to Mr Dumolo, took into account Mr Dumolo's contribution to his dismissal:

“[38] As I have indicated, Mr Dumolo's conduct in taking the DVD would be categorised as serious misconduct. However, in all of the circumstances I do not consider a dismissal was the appropriate response from the employer. Even so, the employer, in such circumstances, would be entitled to take a reasonably stern approach. Mr Dumolo has very much been the author of his own misfortune in this matter. It is clear that he took a casual attitude to removing property without authorisation. There may perhaps be circumstances where there is a line of demarcation with stationery items. Quite often businesses have their logo printed on pens and other stationery items for advertising purposes and there is an inference they expect them to be used outside the workplace. In such a case they might not take the approach which LDHB has in this case to such items. However, Mr Dumolo was given a number of DVDs which were clearly to be used in his role as an Information Systems Support Technician with his employer and he has committed a considerable error of judgement in deciding to take the DVD. This is so even if he believed he might use the downloaded film at a later date if funding was approved for him to carry out the self defence courses on behalf of the LDHB. In all the circumstances his contributory behaviour, particularly the somewhat offhand and casual attitude he displayed during the disciplinary process, substantially contributed towards the situation that gave rise to his dismissal.”

The Employment Court awarded Mr Dumolo three months lost wages and a \$3,000.00 compensatory payment.

In conclusion however it must be noted that this case was determined on the previous test of justification provided for in s.103A of the Act which provided that the test was whether the actions of the employer and how it acted were what a fair and reasonable employer “**would**” have done in all of the circumstances at the time that the dismissal occurred. Potentially a different decision may have resulted if the Court was applying the current “**could**” test of justification.