

Multiple Cause Dismissals

In a recent Advocate (November 2012) we looked at the case of *Drader v. CE Ministry of Social Development*. You will recall that the decision related to a MSD employee dismissed for two separate reasons; an altercation at a hotel with a client and a subsequent incident where Ms Drader used Ministry information to contact and threaten the client. The Court found that the first ground was procedurally unjustified. They found however that the second ground (contact of the client) justified the dismissal in its own right.

The case confirms a series of decisions establishing that where independent grounds for justifying summary dismissal exist, the failure to prove other grounds relied on for dismissal does not necessary render a dismissal unjustified: *Zendel Consumer Products Ltd v. Henderson* [1992] 2 ERNZ 377.

The *Zendel* decision involved a situation where the employee was dismissed on four differing grounds and while it upheld an earlier unjustified dismissal decision, it accepted the principle that the dismissal may, if justified, be found valid on only one of the number of reasons. This principle was reflected more recently in a 2010 Employment Relations Authority decision, *Dohl v. Beare Haven Investments Ltd*. In that case the employee, Mr Dohl, raised a series of complaints regarding other employees and conduct that he deemed to be racist behaviour against him. In one incident he was injured by a piece of wood falling on his head in circumstances that he at first claimed to be a racially motivated incident. As a consequence of the incident he refused to attend a doctor, left the workplace and abused his colleagues. He subsequently accepted this was an accident, apologised and resigned. The employer did not accept the resignation and he was ultimately dismissed for three reasons:

- (a) Refusing to seek medical treatment;
- (b) Leaving your place of employment without permission or notifying your supervisor of your intention to do so.
- (c) Causing an incompatible situation between your fellow employees within the produce department by using bad language and calling them dogs."

While the Authority found that the first two reasons did not justify his dismissal, they found that in respect of the third reason it was open to the employer to "summarily dismiss Mr Dohl for this behaviour, whatever provocation he felt he was subjected to. I note that there was no evidence other than Mr Dohl's of this being a response to any abuse by any [of the employer's] staff towards Mr Dohl on this occasion."

These decisions are interesting in upholding the principle that a dismissal will not be unjustified if some of the reasons advanced for dismissal were unjustified.

Resignations

As an interesting aside in the *Dohl* case, when Mr Dohl sought to resign during the investigation, the employer chose not to allow him to do so. The Employment Relations Authority had this to say:

"[The employer] was right not to simply accept Mr Dohl's resignation in the heat of the moment, as Mr Dohl may well have changed his mind and then, as indicated in [the employer's] evidence, a claim for constructive dismissal may have resulted. There was, however, nothing to stop Mr Dohl from resigning simply because [the employer] purported to refuse to accept his resignation. If he really wanted to resign, he simply could have done so on the spot. It was his election not to do so and [the employer] can not be held responsible for that. Overall, I consider that while it was wrong of [the employer] to simply state that it would not accept Mr Dohl's resignation, it was also appropriate for it to indicate to Mr Dohl that it did not want to accept his resignation in the heat of the moment, or while he was not in the best frame of mind. Given that no actual prejudice arose to Mr Dohl as his dismissal was justifiable, and the matter really lay in Mr Dohl's own hands in that he could have resigned anyway, I conclude that there is no personal grievance around these actions of Mr Dohl and [the employer]."

While not of itself profound this consideration of resignations re-emphasises that while resignations should not always be accepted, an employer cannot refuse to accept a resignation. A resignation is for an employee to give, and while an employer may not support a resignation and it may seek to persuade the employee not to resign, it cannot at law refuse to accept a resignation.



Help us Save Trees

Our revamped website now has past issues of "The Advocate" from 2010 onwards available for direct download.

If you would prefer to download "The Advocate" directly from our website each month, or alternatively receive "The Advocate" via email, rather than this paper version, please let us know via email carey@mgz.co.nz



Non Attendance by One Party

In addition to the *Drader* decision, the November 2012 Advocate also considered a case; *Singh v. Tandoori Knights Ltd* where the employee lost the claim for unjustified dismissal irrespective of the fact that the employer did not attend the hearing.

On a twist of this same theme, in *Kumar v. Usha Food Ltd*, the employee claimed to have been unjustifiably dismissed and underpaid statutory holiday pay. While Mr Kumar failed to attend the hearing, the employer did. The Authority considered the claims in the employee's Statement of Problem. Given the failure to attend, the dismissal was not upheld.



The Authority however also investigated the wage claims and during an investigation of the timesheets, the employer accepted that some \$188.00 was owing for statutory holiday pay. While the sum is not significant the consequences of such a finding might be. Costs were reserved as part of the decision. Given that the case was in part a win for both sides, the Authority may well determine that no costs are payable.

Procedural Issues Reconsidered

A very recent Employment Court decision considers, among other things, a number of procedural issues relating to a dismissal. In *Here v. McAlpine Hussman Ltd*; December 2012, the Court found that Mr Here was justifiably dismissed for having threatened a supervisor. While the substantive issue itself was not significantly challenged, the employee claimed that the dismissal was unjustified for a number of procedural reasons, including:

- (a) The company should have suggested that Mr Here obtain legal representation. Mr Here had been advised of his right to be supported and brought the union representative with him to the disciplinary meeting. The Court found that *"I do not accept that there is an additional obligation on an employer to advise an employee that s/he would be wise to bring a legal representative to a disciplinary meeting. At the end of the day it is the employee's right to decide on the extent and nature of any representation, not the employer's. If that choice turns out to be a poor one then I do not consider that to be a result that can be visited on the employing party."*
- (b) Advice as to the actual decision-maker. The company was represented by two managers at the disciplinary meeting. Mr Here claimed that the dismissal was unjustified because he was not told who the actual decision-maker was. The Court determined that this did not amount to a procedural failing.
- (c) Not giving the option of input into the ultimate decision. Mr Here claimed that he was disadvantaged because, following the investigation into the facts, the employer did not ask him "whether there was any reason why he should not be (dismissed)". He claimed this was a significant procedural flaw. On the facts of the case the Court determined that Mr Here was incorrect in his allegation and that in fact he was given such an opportunity. Significantly however the Court dealt with this in a manner which might confirm Mr Here's view; i.e if he had not been given such an opportunity, the dismissal may have been procedurally unfair.

The Court's consideration of these procedural issues provides more insight into the ongoing issue of what will, or will not, be considered as grounds for a procedurally unfair dismissal.

We encourage employers talk to us about procedures before, not after dismissal.

TRAINING: Employment Relations Practice Course

Our next Employment Relations Practice Course has been set down for **Tuesday 9 and Wednesday 10 April 2013.**

Places on this course are strictly limited. Details in regard to the course will be can be found on your website - www.mgz.co.nz/training. If you wish to book a place for this course please contact us.

In-House Training

Over recent times we have conducted a number of in-house tailored training sessions for companies, particularly the two day Employment Relations Practice Seminar, which can also be split into individual sessions to meet a company's particular needs. If you would like to discuss your training needs for 2013 please contact us.



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.

McPhail Gibson & Zwart - Ground Floor, 71 Cambridge Terrace, PO Box 13-780, Christchurch Tel (03) 365 2345 Fax (03) 365 2347 www.mgz.co.nz

Neil McPhail - Email neil@mgz.co.nz Mobile 0274 387 803

Raewyn Gibson - Email raewyn@mgz.co.nz Mobile 0274 387 802

Peter Zwart - Email peter@mgz.co.nz Mobile 0274 367 757