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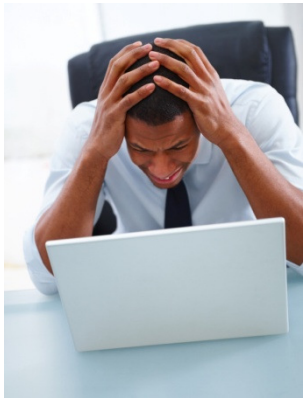
A Hopeless Case



In a classic example of an employer having to throw in the towel on an employee (whose performance was so terrible that even the Employment Relations Authority was in a state of disbelief at the lengths the company had gone to help him) an accident-prone bus driver who crashed ten times in less than 18 months has lost his challenge to get his driving job back.

Transportation Auckland Corporation Ltd dismissed Alan Slater as a result of performance issues after he had a string of accidents including hitting a bollard, a wheelie bin, a bus-stop sign, several other vehicles (including two parked buses) and driving the wrong way through a bus wash during his relatively brief career as a bus driver in Auckland. He received three warnings for various incidents and was given a final warning for turning up late to work, before finally being dismissed after a further accident occurred.

After he was dismissed in April 2010, Mr Slater took a case for unjustified dismissal to the Employment Relations Authority arguing that his final accident was not properly investigated by the company.

Mr Slater's driving record makes for poor reading and shows that the company did everything it could to help him but with no success. Mr Slater began working for the bus company in May 2008. After a matter of weeks his managers were expressing concern about his driving, in particular his positioning of the bus and concentration when driving. Just over a month later, he was observed "*having trouble staying in lane*" and in mid-October he had his first fender-bender when he struck a wheelie bin.

In January 2009, he was in trouble for not stopping for passengers and hit a van's tailgate and a bus-stop sign in one week during February. After several more incidents, Mr Slater attended a defensive driving course in May, but in the same month he collided with another vehicle. Between June and October 2009, he had another four accidents, with three of them involving stationary objects. The straw that broke the camel's back came in March 2010 when he hit a concrete bollard.

The Authority determined that the dismissal was justified because Mr Slater's driving was "*so poor that the company did not have confidence in him to drive safely*". The Authority bluntly concluded:

If the Company can be faulted, it can only be that they were overly tolerant. It may be that a more direct and formal disciplinary process undertaken earlier in Mr Slater's term of employment may have encouraged him to be more careful and more attentive. However Mr Slater cannot have been oblivious to the fact that his performance was not of sufficient standard and that there would reach a point where the Company had no option but to terminate his employment. The Company, in this instance, were extremely tolerant of Mr Slater's deficiencies but of course also have an obligation to the public to ensure that its drivers operate its buses in a safe manner.

REMINDER – SIGNED EMPLOYMENT AGREEMENTS

As a result of the recent amendments to the Employment Relations Act employers are required to have a signed copy of each employee's individual employment agreement or, where the employee has yet to sign, a copy of the intended agreement from **1 July 2011**. *[Refer The Advocate – December 2010 and April 2011]*

These agreements must be available to the employee on request and the new requirement also applies to existing agreements.

There are penalties for non-compliance, however prior to bringing an action the Department of Labour must give an employer seven working days to address the issue. So, if you have unsigned employment agreements sort the issue out immediately and get them signed!

For more information about this or assistance with the preparation of employment agreements please phone MGZ to discuss.

Employment Court Decision A Threat to Flexible Labour?

Major concerns have been raised after an Employment Court ruling which gives employees facing redundancy a broader range of access to confidential information and which gives a wide interpretation as to what is considered '*relevant information'* which must be given to employee's facing redundancy.

In the latest edition to *The Vice-Chancellor of Massey University v Wrigley and Kelly* saga, the Employment Court has held that an employer conducting a restructuring process should have provided two unsuccessful candidates with information concerning other candidates, including information in the minds of selection panel members, when it was requested by Wrigley and Kelly.

The University had recently undergone a restructure and the applicants' (two lecturers) existing positions were made redundant and they were unsuccessful candidates for new positions arising out of the restructuring. As a result, their employment with the University came to an end. In making appointments to the two new positions, the University relied on two selection panels. Prior to conducting interviews the selection panels met to discuss the selection process. At these meeting panel members were given:

(a) A memorandum from the senior human resources advisor about the selection process;
(b) A list of the candidates and interview times;
(c) A copy of the relevant job description;
(d) A copy of the CVs and cover letters received from each candidate;
(e) An interview sheet to complete for each candidate; and
(f) An individual assessment sheet for each candidate.

Questions were allocated to each of the panel members. The interviews were scheduled for an hour and for the most part were completed in around that time. Each member of the selection panel scored the candidates responses to each question on a rating of 0 to 5 as set out on the interview sheet. Panel members could and did record comments about the candidate and their responses on the interview sheet.

Mr Wrigley and Mr Kelly contended that the University was in breach of its good faith obligations under section 4(1A)(c) by dismissing them without providing "*access to information relevant to the continuation of the employees' employment, about the decision and an opportunity to comment on the information to their employer before the decision is made".*

While the applicants were given the selection criteria, had knowledge of:

- the composition of the selection panels
- who the other candidates were
- feedback received from the selection panel; and
- copies of individual assessment sheets setting out the selection panel's scoring of the applicants.

However, they were not provided with;

a. The interview sheets completed by the selection panel in respect of all the candidates.
b. A candidate comparison/summary of ratings sheet prepared by the selection panel's convenor;
c Panel recommendations to the University containing information about the successful candidates;
d. Notes created for the meetings with the unsuccessful candidates and notes taken during those meetings; and
e. The "significant amount of information in the minds of the selection panel members and the decision maker that has not been committed to writing *(including)* selection panel members' views of the candidates' relative strengths and weaknesses … *(their)* assessment of the performance of each candidate during the interview and the impact this had on their views of the candidates' strengths and weaknesses.

Wrigley and Kelly argued that they should have been given these documents and information so that they could properly make informed submissions responding to the fact that they had not been chosen to the new positions. The University's primary argument was that s 4 (1A) (c) did not apply to all information and practical parameters had to be placed on what needs to be provided, subject to ensuring employees were sufficiently informed so as to be able to provide a meaningful response. It maintained that it had fully discharged its statutory good faith obligations, and that there was good reason to maintain confidentiality of the disputed information to protect the privacy of the other individuals involved.

The Court agreed with the University's argument that the applicants were not entitled to all information, but only to relevant information and that what constitutes relevant information will depend on the facts of each case. However the Court was satisfied that what that meant in this instance was that the applicants were, to a limited extent, entitled to more information, and an opportunity to comment on it, if only to ensure there are no issues of perverse or irrational scores or addition errors. The Court stated that this was because a comparison of the applicants with other candidates was fundamental to the termination of the applicants' employment and a scrutiny of those comparisons is consistent with their statutory entitlement to relevant information.

The Court accepted that the information was confidential since it contained personal information regarding other employees and had been compiled by selection panel members in confidence. However, in the Court's view there was no good reason to maintain the confidentiality of the information. Therefore, the information should have been provided to Wrigley and Kelly before the University made its final decision to dismiss them. However, the court did place a number of conditions on the order to prevent confidential information from being disclosed to people other than the parties concerned.

The decision is significant for employers because it means that in the case of any proposal which could result in a dismissal, including for redundancy or inadequate performance or misconduct, employees may be entitled to access a broader range of information than previously thought if they ask for it, including confidential information in certain circumstances. It has also raised fears privacy will be undermined in that job candidates may become less inclined to give full honest answers as the information they provide may no longer be held in confidence or that some might not apply for certain jobs at all worrying that their application might be exposed.

Only time will tell if these fears have any substance.

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