MGZ mcphail gibson & zwart ltd

THE ADVOCATE

EMPLOYMENT LAW · EMPLOYMENT AGREEMENTS · DISPUTE / GRIEVANCE RESOLUTION · TRAINING

Issue 208 | July 2012

Applying the *"Could"* instead of the *"Would"*

Effective from 1 April 2011, the fundamental test for justifying dismissals was changed in a subtle but important way. In considering whether a dismissal was justifiable, the test became what a fair and reasonable employer "*could*" have done in all of the circumstances as opposed to what the employer "*would*" have done. (There is quite a history to the "*could/would*" saga but that is not the subject of this Advocate. "*The Advocate*" Issue 119 deals with the last time the test was amended).

Additionally, some new guidelines were provided to the Authority or Court when applying the new test:

"(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly."

In one of the first decisions referring to the new test, ***Angus v. Ports of Auckland*** [2011] NZELC 93,999, the Court noted:

"[5] Nevertheless, even at this stage, the Court must take account of the new state of the law. Parliament has changed the previous position and, in very general terms, has both sought to make it easier for employers to justify dismissals and to make it more difficult for employees to be reinstated if they have been unjustifiably dismissed . . ."

A recent Employment Relations Authority case, ***Connolly v. Brinkman*** ([2012] NZERA Auckland 45), demonstrated that indeed it should, as a result of the amendment, become easier for employers to justify dismissals, particularly in a small enterprise. The facts of the case were as follows:

1. Ms Connolly (the employee) claimed she was unjustifiably dismissed from her employment in a small shop. After several years of untroubled full time employment, matters deteriorated and Ms Connolly wrote a letter of complaint to her employer (the Brinkmans) on 19 June 2011, relating to some time she had to take off work due to a sinus complaint. She claimed that she had to do unpleasant work (including chopping onions) and that this caused her sinus complaint.

2. The Brinkmans responded with a letter of warning, which they said they had already drafted but not delivered to her by the time they received her complaint. The warning was dated 20 June 2011. The warning letter raised concerns about Ms Connolly's performance and stated:

   "You will have to start changing your attitude towards all of us. … Try working together more because I won't help you if you won't help me. Show some more initiative. Don't ignore customers while doing a task. They shouldn't have to wait. … Thanks to them you have a job. Also more respect for me and Josh [Mr Brinkman]. We are not your colleagues but your bosses. "

3. A further warning letter was issued on 8 July 2011 headed, "*Second and Last Written Warning*". This warning complained about Ms Connolly being "*hostile and aggressive*" and being "*out of order*". It also stated:

"We have come to a point that working with you is stressful for all of us. I feel personally attacked and very uncomfortable around you. I cannot talk to you without being yelled at. This has to stop immediately or your employment is going to be cancelled. You have two weeks to prove yourself that you can listen to us. Change your attitude towards me and be able to help and share tasks. Stop blaming others for the mistakes you make. Admitting you are wrong isn't going to hurt you. "

The letter offered a meeting with Ms Connolly:

"We are willing to have a meeting with you only if you can promise there will be no yelling. We [do] not have to put up with that any longer. "

4. Ms Connolly responded with a letter dated 15 July 2011, complaining that the warnings were too general to be acted upon, and that because there had been no meetings to discuss the matters, the warnings were unfair.

5. Then, on 30 July 2011, Ms Connolly was issued with a letter headed "*general termination*", dismissing her for '*serious misconduct'*, comprising serious or repeated failure to follow reasonable instructions, and dishonesty, grounds which were set out in Ms Connolly's individual employment agreement. Ms Connolly immediately challenged her dismissal.

Despite there having been no formal meetings preceding the warning or dismissal, the Employment Relations Authority upheld the dismissal. After referring to the new test and the ***Angus v. Ports of Auckland*** case, the Authority was satisfied that the outcome of this case was *". . . one of a range of possible outcomes which a fair and reasonable employer could have arrived at . . .".*

Regarding the actual dismissal itself, the Authority said:

"[28] The Authority is particularly drawn to that conclusion by the application of subsection (3) of s 103A. That subsection requires the Authority to consider four elements. The first is whether there has been a proper investigation, the second is whether the concerns have been raised with the employee, the third is whether the employee has been given a reasonable opportunity to respond, and the fourth is whether the employer has considered the explanation on a proper basis. While this is no means a perfect example of the application of a measured and reflective process for managing performance deficits, it is fair to say that this employer, using the resources common to a small business, sufficiently inquired into the allegations (which in effect were allegations they themselves had observed). Then, the Authority is satisfied that the problems that the employer identified were adequately conveyed to Ms Connolly in the first warning letter. The Brinkmans were effectively put on notice as to Ms Connolly's response in her correspondence with them. The only hesitation the Authority has is in respect of the fourth question, whether the Brinkmans "genuinely considered the employee's explanation" before taking action."

Regarding the lack of formal meetings, the Authority held:

"[32] Further and finally, the Authority is satisfied that, in the present case, the failure of the parties to meet with each other to try to resolve matters face-to-face was a function of the sudden and perhaps unexpected deterioration in their personal relationship which made such a meeting, in a productive sense, impossible. It is plain on the evidence that there were meetings (albeit informally arranged and in the workplace) but none of those meetings achieved any positive outcome because of the rapid deterioration in the interpersonal relationship between the parties. That fact is evidenced by the deteriorating tone of the correspondence between the parties which the Authority has already referred to. In the Authority's opinion, the only criticism of substance that could be levied at the procedure adopted by the employer in the present case, is the failure to convene a productive meeting and if that failing is seen as a major deficit in terms of the process adopted by this employer, then the Authority, in evaluating the matter, places weight on subsection (5) of s 103A by concluding that, in the present circumstances of this case, the defect was a minor one and did not result in unfairness to Ms Connolly. A particular reason for the Authority to reach the conclusions it does about subsection (5) and its application to the present case is Ms Connolly's obvious ability to articulate her point of view in writing. Had Ms Connolly chosen to engage with the employer in a more sympathetic and constructive fashion, she might well have got better results from her contact. But in the result, Ms Connolly must take some responsibility for the way in which she engaged with her employer and in the absence of any evidence that Ms Connolly was unable to look out for her own interests, the Authority thinks it appropriate to conclude that a procedural deficit of the sort referred to cannot be held to undermine the whole process."

It then said:

"[33] In the result, this small employer identified concerns with this employee around the employee doing what she was told, raised those issues time and again in interpersonal exchanges which, on the evidence of both parties, became increasingly intemperate, then reduced this to writing in two warning letters and then, having received fundamentally unhelpful responses from Ms Connolly, decided to dismiss because Ms Connolly was effectively making the employers miserable in their own business. For the reasons advanced, the Authority concludes that this was a justified dismissal."

This case should not be taken as licence for small employer to ignore normal procedural requirements; however it does suggest that the Employment Relations Authority have become more flexible in its attitude towards what would otherwise have (but for the changes to the test of justification), been deemed serious procedural errors.

McPhail Gibson & Zwart - 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