



Criminal Conduct Outside the Workplace

A recent decision from the Employment Relations Authority has dealt with a relatively topical issue surrounding an employee's conduct outside of the workplace. This is particularly so given the recent media speculation concerning the potential for the individual who threw the 'item' at Steven Joyce, to be dismissed for conduct which occurred outside of the workplace.

The Authority determination concerned Ms Wikaira, who was employed by the Department of Corrections as a Corrections Officer. The Department of Corrections had a Code of Conduct which described examples of behaviours that conflicted with the principles identified in the Code and which the Department considered were not acceptable, including admitting to a criminal offence and engaging in actions that bring the Department into disrepute.

Ms Wikaira was dismissed for three breaches of its Code which the Department maintained constituted serious misconduct, in particular that Ms Wikaira had:

- "a) Engaged in "unlawful action" because she was charged with the criminal offence of wilful damage on 13 February 2015 to which she plead guilty on 22 April 2015;
- (b) Failed to disclose the criminal charge which was laid against her on 13 February 2015 until 11 March 2015, by which time she had already appeared in the Kaikohe District Court twice;
- (c) Potentially brought the Department into dispute by appearing in the District Court on four occasions and by having a warrant issued for her arrest due to her non-appearance in Court on 12 May 2015."

The criminal charges related to a domestic incident between Ms Wikaira and her stepfather, who had laid a police complaint alleging that Ms Wikaira had hit and broken his car windscreen. The police subsequently charged Ms Wikaira with the criminal offence of 'wilful damage'.



In relation to the alleged breaches:

- a) Ms Wikaira denied that she had engaged in an 'unlawful action' because she only pleaded guilty to the charge of wilful damage on her lawyer's advice and further that because she was discharged without conviction this further supported her claim that her actions were not unlawful and consequently she did not breach the Code. The Department did not accept that Ms Wikaira's interpretation of the Code and referred to the specific provision in the Code which includes "admitting" to a criminal offence, which Ms Wikaira did by pleading guilty.
- b) In relation to the failure to disclose the criminal charges in a timely manner, Ms Wikaira admitted that she did not disclose the criminal charges to the Department until her second District Court appearance on 11 April, however Ms Wikaira maintained that she did not realise she had been charged with a criminal offence until 11 April 2015.

The Department did not accept that explanation. It relied upon the fact that before Ms Wikaira disclosed the criminal charge she had attended the police station, had been charged with a criminal offence, had been summoned in writing to appear in the Kaikohe District Court and had also signed the police issued summons to acknowledge she knew she was required to attend Court or a warrant could be issued for her arrest. She had also appeared the District Court twice and on each occasion had been bailed, she had signed a Bail Notice which acknowledged she was aware that a summons could be issued if she did not appear in Court.

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The **Employment Standards Bill** has passed its third reading in Parliament and will come into force on 1 April 2016. We will provide you with an outline of the changes in the next Advocate and will be holding briefing sessions on the changes.

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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- c) In relation to the claim of disrepute relating to her court attendance and having a warrant issued for arrest due to her non-appearance in Court on 12 May 2015, there was evidence before the Department that the arrest warrant was issued due to miscommunication between Ms Wikaira's criminal lawyer and the District Court staff.

The Department concluded that despite the apparent explanation for the warrant for arrest, Ms Wikaira's conduct still brought the Department into disrepute.

In reaching the view that Ms Wikaira's dismissal was justified the Authority noted the following:

"[66] This involves an objective assessment. The Authority is not permitted to substitute its own subjective view. A harsh dismissal may still nevertheless be fair and reasonable and therefore a justifiable dismissal. . . .

[68] The Department's objectives include reducing reoffending and maintaining public safety. To ensure those objectives are met the Department sets clear expectations for its employees in its Code.

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[71] The Code expects a very high standard of professional and personal behaviour and requires the Department's employees to (among other things) comply with the law at all times and role model high standards of integrity, presenting themselves in a way that enhances the credibility and supports the Department's success."

In relation to the first allegation that Ms Wikaira was engaged in "unlawful action" because she was charged with and pleaded guilty to a criminal offence of willful damage the Authority determined:

"[73] It is clear that the first disciplinary allegation was a breach of the Code because Ms Wikaira did engage in conduct which resulted in her being charged with a criminal matter (wilful damage) which she pleaded guilty to. A criminal charge is an unlawful action.

[74] I do not accept Ms Wikaira's position that she did not engage in any unlawful action because her guilty plea was entered upon advice of her criminal lawyer, Mr Blakely. Ms Wikaira says she did not do anything wrong because she engaged in the conduct which gave rise to the wilful damage charge in self-defence. That position was open to her to run before the District Court but after taking legal advice she decided to plead guilty.

[75] I am satisfied that a fair and reasonable employer could have concluded that an employee who pleads guilty to a criminal charge is accepting that their actions were unlawful."

In relation to the second allegation that Ms Wikaira failed to disclose the criminal charges in a timely manner, the Authority held:

"[78] At the Police station on 13 February Ms Wikaira had signed an acknowledgment of receipt of the criminal charge and summons. The summons was very clear that she had to attend at the Kaikohe District Court on 25 February, which she did. Ms Wikaira also says that she consulted a lawyer prior to her first appearance in the District Court and she was legally represented at both her Court appearances.

[79] These actions were inconsistent with Ms Wikaira's explanation that she did not know she had been charged with a criminal offence. Why attend Court and instruct a criminal lawyer if she was not aware she had been charged with a criminal offence?

[80] At the Court appearance on 25 February Ms Wikaira was bailed. She was issued with a Notice of Bail which identified the criminal charge number and specified the criminal charge of wilful damage. This should have put Ms Wikaira on notice that she was involved in a criminal matter, even if her lawyer had not already informed her of that.

. . .

[84] I also consider that given the nature of Ms Wikaira's role as a Corrections Officer and the particular nature and environment of the Department, the failure to disclose a criminal charge at the earliest opportunity is conduct which is capable of being viewed as serious misconduct. It goes to the heart of trust and confidence for someone in her position."

Finally in relation to the claims that Ms Waikaira's conduct had brought the Department into disrepute, the Authority concluded:

"[86] I again consider that Ms Wikaira's role and the nature of the employment environment that the Department operates in means it was open to the Department to fairly and reasonably have concluded that multiple District Court appearances by a Corrections Officer and the issuing of an arrest warrant against an employee are inconsistent with the Department's stated objectives and do potentially bring the Department into disrepute.

[87] The Kaikohe District Court is a small local Court so it is likely that Ms Wikaira was known to those working in the Court system and/or those who attended Court, including the media, on the days of her appearances."

As we have outlined in previous issues of The Advocate, conduct outside of the workplace, may, depending upon the connection between this and the role occupied by the employee, constitute justified grounds to discipline and/or dismiss an employee.

Minimum Wage Rates to Increase

The Government has announced the adult minimum wage will go up by 50 cents to \$15.25 an hour on 1 April 2016.

The current adult minimum wage rate is \$14.75 an hour.

The starting-out and training hourly minimum wages rates will increase from \$11.80 to \$12.20 per hour, remaining at 80 per cent of the adult minimum wage.