



## The Third Party Effect

### Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
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A recent Employment Relations Authority determination (**Hill v. Workforce Development Limited**) involved a “triangular arrangement” between an employer, the employee and a third party where the employee was engaged to work at the third party’s facility/premises. This is a relatively common situation and consequently the outcome of this determination, particularly the obligations upon an employer, when issues arise between the employee and the third party, is of interest.

Ms Hill, the employee, was employed by Workforce Development Limited (WFD) to teach literacy and numeracy and was required to work at one of the Department of Corrections’ Prison facilities in Whanganui.

Access to prisons is determined solely by Corrections who reserve the right to withdraw access where “it determined it appropriate to do so for safety, security or other concerns about a person given such access”.

In light of the relationship between the employee and Corrections, the individual employment agreement provided:

*“This Employment Agreement is contingent on you being accepted by the Department of Corrections along with you successfully completing the Department of Corrections’ induction and orientation process.*

*It is further agreed that at any time, should the Department of Corrections consider you to be in breach of any of their rules or policies, and as a consequence deem this breach by you to be serious, they may withdraw your access to one or all of their sites.*

*In this instance, and should the Department of Corrections’ decision become final, and there are no other positions for you to fulfil, Workforce Development Limited may terminate this employment agreement through the notice provisions.”*

During an overseas trip Ms Hill sent a postcard of the British Houses of Parliament, to one of her students at the Prison, to assist that person in the learning process. The postcard was discovered and intercepted by officials at the Department of Corrections. For security reasons Ms Hill was subsequently suspended from the facility and an interim decision made to withdraw access to the site, based on the following:

*“I have serious concerns about the safety of this tutor and believe that she may be compromised. My concerns are as follows:*

- *We have a nothing in, nothing out policy. This includes letters and the tutors are well versed in this.*
- *Lynda first wrote to [name withheld] when he was at Wanganui Prison, he has since transferred to Hawke’s Bay Prison and she has actively followed him [via correspondence only as far as I can ascertain]. This is clearly demonstrated by her sending the card directly to HB Prison.*
- *There is no way to know who else Lynda is corresponding with in the Prisons, the content or nature of information being passed, the volume of communications that has been passed between Lynda and [name withheld] and the method. Is she passing messages through her classes to prisoners?*
- *Lynda states in her postcard that if [name withheld] wants to correspond back to her, he may do so through ‘programmes’. This puts my staff at risk by implying that this is acceptable when it could lead to our staff losing their job. It definitely compromises their safety.*
- *From what I understand, Lynda has worked at the Prison for quite a length of time — she was delivering programmes for another provider prior to her employment with Workforce. She is not new to our environment and should be aware of the dangerous situation she has put herself and our staff in. If she is not, then I am even more concerned for her safety.”*

Upon receipt of this advice WFD wrote to Ms Hill advising her:

- (i) she had the opportunity to meet with Corrections, along with her employer to hear from them and to make submissions; and
- (ii) in the event Corrections interim decision became permanent her employment may be terminated, subject to redeployment opportunities; and
- (iii) advising of a preliminary decision to suspend Ms Hill from her employment with WFD.

## 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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After meeting with Ms Hill and a representative of her employer, the Department of Corrections made a final decision to permanently deny Ms Hill access to the Whanganui Prison.

Ms Hill's employer subsequently wrote to her issuing four weeks' notice of the termination of her employment with Workforce Development Limited however providing:

*"This means that should an alternative not be identified between now and Friday 16th December 2011, then your employment will terminate on that date.*

*I will leave it to you to contact me once you feel well enough to discuss this further with me, or you may feel more comfortable to make any submissions or suggestions in writing.*

*In any case, please feel free to contact me as soon as you are able."*

In assessing the respective obligations of the parties in the triangular relationship the Employment Relations Authority noted that:

*"[26] Corrections is not a party to the employment relationship problem in the Authority, and therefore its actions cannot be the subject of the Authority's investigation, except as background to the events that occurred."*

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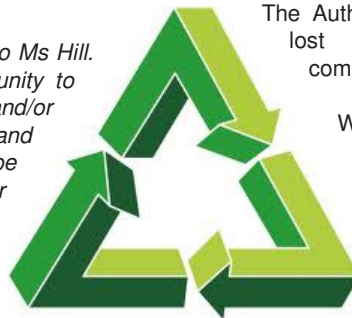
*"[29] WFD's omission once the decision had been made by an unseen decisionmaker (the prison manager) could have been to appeal it and asking for the opportunity to mitigate the outcome. Ms Greenhalgh accepted she did not do this. Indeed a fair and reasonable employer could be expected to have done more given Corrections did provide an opportunity for this:*

*"In the meantime I would appreciate if you are able to follow this up with your facilitator and look forward to an outcome or response on this matter.*

*Can this be presented in writing addressed to the Prison Manager — Wanganui Prison at your earliest convenience please."*

*(Letter dated 29 September 2011 from Hati Kaiwai Prison Manager).*

*[30] Instead Ms Greenhalgh left it to Ms Hill. Ms Hill was not given the opportunity to have a professional legal and/or employment advisor. A fair and reasonable employer could be expected to have made it very clear that such advice would be advisable particularly given: (1) that there was a triangular employment arrangement, (2) that WFD could not be involved directly in the decision making and (3) that the situation could possibly impact on Ms Hill's employment. Indeed Ms Hill was not a party to the WFD and Corrections agreement. Whilst WFD did suggest Ms Hill could have a support person, and Ms Hill was assisted by her partner, there was no advice for her to get professional legal/employment advice. "*



The Authority therefore determined that the employer's actions in proceeding to give Ms Hill notice to terminate her employment before Ms Hill had been given the opportunity to discuss and mitigate her position with Corrections was "pre-emptive" and consequently the dismissal was unjustified.

The Authority determined:

*"Even although the terms of the WFD and Corrections contract do not provide terms as such, WFD as a fair and reasonable employer of Ms Hill could have been expected to approach Corrections again after the decision. This is especially so because:*

- *Ms Hill was not a party to the WFD Corrections contract.*
- *WFD has requirements to act as a fair and reasonable employer under the terms of the individual employment agreement.*
- *WFD provided no response and reply to the prison manager when the opportunity was signalled on 29 September. This should have been done when the outcome was announced.*
- *WFD had no contact at all with the prison manager whom made the decision. It was not enough to rely on the meeting of 20 October and what everyone thought the outcome of that was and wait on a decision, especially when WFD was not given Mr Mason's report and had nothing else in writing."*

However the Authority also noted (with the exception of WFD's omission as outlined above) that:

*"[34] Otherwise WFD's action was in the range of responses available to the employer when redeployment was not a possibility and it was entitled to rely on the terms of the employment agreement. The employer correctly provided notice. The time of the notice was also used for exploring any re-deployment. I hold that this was not fatal to the ultimate dismissal."*

The Authority awarded Ms Hill three months lost remuneration and an \$8,000 compensatory award.

While the determination is subject to a challenge to the Employment Court it would be prudent for employers in a "triangular arrangement" to be mindful of their obligations to employees who may effectively be denied access to their place of work. In particular that obligation will extend to taking all fair and reasonable steps to influence the decision-maker if the impact of that decision may consequently result in the employer having no alternative but to terminate their employment relationship with the employee concerned.