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THE ADVOCATE

a regular newsletter for clients of mcphail gibson & zwart ltd

ISSUE 296

November 2019

Client Services:

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- Resolving Personal Grievances and Workplace Disputes
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Exemplary Processes

In a recent commentary on procedural fairness I intriguingly noted reference to a case described as being "*In many ways . . . a textbook example of how a disciplinary investigation should be carried out*."

In circumstances where procedural fairness requirements seem to be putting higher and harder burdens on employers, the 2015 decision deserved another look. The case, ***Goel v. DG for Primary Industries*** [December 2015] considers the circumstances of Mr Goel, employed as a Ministerial Co-ordinator in the Ministerial and Official Correspondence Team at MPI. He was engaged primarily to co-ordinate responses to incoming Ministerial and official correspondence, including as a key function, the formatting and proofreading of MPI responses to Official Information Act requests. He had worked for MPI and one of its predecessors (Ministry of Fisheries) from December 2011. He was dismissed in March 2013. For reasons not relevant to the outcome, the matter was heard at first instance by the Employment Court in November 2015.

As background, Mr Goel's performance reviews indicated that while he was making progress, he was still not performing the full requirements of the job and suggesting that he still had some issues with interpersonal skills. In March 2012 he received a written warning following a '*particularly disruptive*' incident in a team meeting.

In December 2015 MPI received an OIA request for information that Scott Gallagher (Deputy Director-General, Resource Management and Programmes) declined. On 13 December Mr Goel was asked to complete the proofreading and formatting of Scott Gallagher's letter.

Scott Gallagher was particular about how his letter should be signed off, preferring '*Scott Gallagher, Deputy-General*' to the standard template for official MPI correspondence which was '*Scott Gallagher, Director-General, Resource Management and Programmes*'.

Mr Goel returned the completed document to Ms Gordon (Scott Gallagher's Executive Assistant) who returned the document to Mr Goel for correction because he had used the official signature block. Ms Gordon explained the required change. Mr Goel returned the file soon after to Ms Gordon without the requested change. Ms Gordon returned it to Mr Goel who refused to change it making statements along the lines of Mr Gallagher is '*not above the process*', '*is not God*'. He became loud, making her feel uncomfortable. Mr Goel's manager, Jeff Stewart then got involved. He and Mr Goel argued about the issue until he finally instructed Mr Goel to make the change, explaining that it was a fair and lawful instruction, leaving him to complete the task. Mr Goel subsequently returned the letter to Ms Gordon and Mr Stewart. He had again refused to make the change and was again given a clear direction by Mr Stewart to make the change. When Mr Goel again failed to do this Mr Stewart asked another employee to make the change and asked Mr Goel to leave the building for the day.

Mr Stewart then obtained advice from the HR Department and a decision was made to investigate the incident the following week as an allegation of serious misconduct and to suspend Mr Goel on pay pending the investigation. A letter suspending Mr Goel was emailed to him that night despite a contractual obligation to provide employees with '*a reasonable opportunity to make submissions about suspension before it [was] imposed*'. Mr Goel who subsequently represented himself, did not challenge this.

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 **Raewyn Gibson**, **Peter Zwart** or **Dean Kilpatrick.**

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The letter also included the allegations which were:

- *"• Your behaviour at work disrupted the workplace and caused unnecessary distress to others, not for the first time; and*
- *You repeatedly failed to follow lawful and reasonable instruction in the performance of your duties."*

Mr Goel was advised that these allegations could constitute serious misconduct resulting in dismissal and also of his right to be represented.

Mr Bolger, (Deputy Director-General of Mr Goel's division) appointed an MPI Manager, Ms Guisanne to investigate the matter. Mr Bolger was to be the decision-maker.

Ms Guisanne investigated and provided a draft report to Mr Goel on 19 December 2015. He rejected the report because it didn't address his concerns (unstated) about the process and Mr Bolger decided to '*redo the investigation'* appointing Mr Firman, an HR Advisor to do so.

Mr Firman was never given a copy of the Guisanne Report, nor did he have any knowledge of the facts of the incident. It was Mr Firman's investigation that the Employment Court Judge, Forde J described as '*a textbook example of how a disciplinary investigation should be carried out*', and later '*exemplary in every respect and [one which] cannot be faulted*'.

After receiving terms of reference and finding out what was alleged, Mr Firman followed the procedure:

1. He worked out what was required to be determined and who needed to be spoken to.
2. He constructed a series of open-ended questions that would not bias the investigation and got these critiqued by his manager.
3. He contacted and met with Mr Goel and in addition to asking the questions he went over the process and asked who else he should talk to. Mr Goel was advised of his right to be represented, and to get EAP support. They met in a neutral area. Mr Firman followed the same process with all interviewees.
4. He kept, '*hopefully verbatim notes'* and subsequently typed them up and returned to each person to verify.
5. He drafted a report and sent that and all statements to Mr Goel inviting him to make comments on the draft report before it was sent to the decision-maker. Mr Goel did this by way of tracked changed.

6. Mr Firman then completed the report and forwarded it to Mr Bolger including the tracked changes.
7. The Report made findings of fact and determined which were misconduct and which were serious misconduct. He ultimately concluded that Mr Goel had committed two acts of serious misconduct and four of misconduct. He did not make any recommendations on penalty.
8. Mr Bolger sent a copy of the final report to Mr Goel with a letter setting out a preliminary decision to terminate Mr Goel's employment. He was invited to a meeting to '*make submissions and to try and persuade him [Mr Bolger] to adopt another course of action'.*
9. Mr Goel met with Mr Bolger and at the end of that meeting Mr Goel was dismissed on notice.

The Court in its decision accepted that the decision to dismiss '*was one that fell within the band of reasonable responses available' to a fair and reasonable employer.* Accepting that *'there may be more than one possible justifiable outcome and more than one possible justifiable method adopted by employers to get to that outcome'.*

In the absence of a plausible explanation proffered by Mr Goel, his blatant refusal to comply with the lawful, and reasonable instruction of Mr Stewart; the dismissal was found to be substantively justified and, with an investigation procedure described as without fault, the dismissal was found to be justified.

It is uncommon for a decision of the Court to be so fulsome in its praise of an investigation process. While MPI is a large organisation with significant resources, there are still lessons that can be learnt for all employers. Fundamental to this process was the independent (albeit internal) investigation and the cautious manner in which Mr Firman followed his own processes. Organisations without the resources of MPI will still be obliged to follow such processes and may need to seek external advice.