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The Punch – Retaliatory or Instinctive?

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- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
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In Issue 209 of The Advocate, we looked at the case of a psychiatric nurse who was dismissed for slapping a patient and was reinstated by the Employment Court (***De Bruin v. Canterbury District Health Board***). In that case the Court closely examined the investigation carried out by the employer and held that investigation to be unsatisfactory. Issues considered relevant by the Court and which it considered were not adequately investigated included whether the slap was deliberate or reflexive, and how hard the slap was.

A recent case ***Howard v. Carter Holt Harvey Packaging Limited*** similarly closely scrutinised the employer's investigation. A common factor in these decisions was that both were large employers, which affected the test applicable in relation to investigating the misconduct in accordance with the requirements of the Employment Relations Act:

> *"(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 .. ."*
> [S.103A(3)(a)]

Both of those cases show that the Court, in line with the legislative requirements, expect more of a well-resourced employer when it comes to an investigation surrounding misconduct.

In the ***Howard*** case, the employee, Dan Howard, was dismissed for punching a co-worker, Mr Lal. The two employees worked opposite each other on a production line, packing kiwifruit. Mr Lal had to place rubber bands over the end of pieces bundled by Mr Howard. On 17 July 2012 after a rubber band hit Mr Howard in the eye, he stepped forward and took a swing with a closed fist, which hit Mr Lal's head. Mr Howard later said that Mr Lal had been riling him over the previous hour or so, touching his hand five times until told to stop. Mr Howard was then hit in the chest by rubber bands four or five times before a band connected with his eye and the punch ensued.

The punch was not reported to management until 25 July 2012, by which time Mr Lal had left the company at the conclusion of his temporary employment. An investigation commenced on 26 July 2012 and a formal meeting with Mr Howard and his union representative occurred on 1 August 2012. Mr Howard resigned at this meeting, but he then took legal advice and his lawyer wrote to CHH which agreed to reinstate him and conclude the disciplinary process.

Further investigations took place, including telephone discussions with various witnesses including Mr Lal. A further disciplinary meeting was held on 16 August 2012, at which Mr Howard was dismissed.

In reviewing the company's actions, the Court considered the difference between culpable and non-culpable conduct, referring to two previous decisions including ***De Bruin*** and the Court's observations in that case:

". . . a deliberate action must be regarded as a much more serious matter than a reflexive one."

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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The Court then went on to find that the process adopted by CHH in investigating the punch *". . . became disjointed, and was in the end unsatisfactory".* Among the unsatisfactory factors were:

(a) No enquiries being made on the day of the incident, leading to possibly affected recollections.

(b) Initial inquiries focused on whether there was a punch, not where the participants were in relative terms nor how hard the punch was. Not all information conveyed was recorded.

(c) The resignation and reinstatement interrupted the flow of the investigation.

(d) Talking to key witnesses (Mr Lal) by phone was not satisfactory.

(e) Re-interviewing of other witnesses did not focus on detail of the incident.

(f) The second disciplinary meeting also had procedural flaws.

One key matter was that CHH did not obtain a clear understanding of the location of the participants. CHH was of the view that Mr Howard had to take several steps before he hit Mr Lal, however it transpired in evidence that the two were only 75 cm apart at the time of the incident. This was relevant to whether the punch was deliberate or reflexive. There was also *". . . limited attention paid to the question of the nature of any punch."*

The Court was also critical of CHH's failure to ascertain from Mr Lal whether he had provoked Mr Howard (as Mr Howard had asserted) by deliberately flicking rubber bands at him or *"chipping away at him*". Evidence of a history of antagonism between the two was apparently ignored in favour of Mr Lal's claim that there was a good relationship.

The Court further held that CHH had wrongly concluded from its record of the investigation that Mr Howard threw the punch because he felt Mr Lal had deserved it, whereas Mr Howard had not made a statement of this nature.

Finally, the Court criticised CHH for taking no account of the injury to Mr Howard's eye as a contributing factor to the incident.

Having considered all of these factors, the Court held as follows:

"[72] An assessment must be made as to the established procedural defects when considered cumulatively. Was the decision to dismiss one that a fair and reasonable employer could have undertaken in spite of these defects in process?"

"[73] An objective assessment of the multiple procedural defects results in a conclusion that the investigation was flawed so as to deny Mr Howard a fair opportunity of establishing that this was not a case where dismissal was an appropriate outcome, notwithstanding the concession that serious misconduct had occurred. The defects meant that CHH could not properly consider Mr Howard's explanation in relation to the allegations it was considering. Accordingly the challenge must succeed."

Contrary to ***De Bruin***, however, the Judge did not consider reinstatement of Mr Howard to be either reasonable or practicable. The Court considered the throwing of the punch amounted to a breach of the company's policies, and that Mr Howard must accept "*substantial responsibility*" for his actions. The Court was also concerned about his attitude:

"[82] The next issue concerns Mr Howard's attitude. In evidence he stated that what had occurred was a "technical assault", implying that it was an assault in name only, and was excusable. That description downplays the throwing of the punch — even if instinctive. It demonstrates an absence of insight. I also accept the submission made for CHH that although Mr Howard now says he regrets what occurred, many of his statements of regret were qualified."

Other factors the Court took into account were its concerns that Mr Howard may still need professional assistance for anger; it was also concerned about his attitude towards management and considered that there would be difficulties with trust and confidence.

Ultimately, the Court awarded Mr Howard reimbursement for 3 months lost wages and $10,000 compensation, reduced by 70% for his contributory conduct. Given the lack of reinstatement, which was the main remedy he sought, and the substantial reduction in his monetary remedies, Mr Howard's victory has the potential to be seen as a pyrrhic one.

The lesson for employers, especially large well-resourced ones, is that the Court has high expectations of a carefully conducted investigation into any misconduct by an employee.