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Suspension and Summary Dismissal in Absence of Express Provisions

In some disciplinary matters the option of suspension may be necessary in light of the seriousness of the misconduct or the allegations against the employee. Suspension may be necessary to protect business property, other employees or even the employee under the spotlight. Can you suspend an employee without a contractual provision enabling you to do so? And does the absence of an express clause providing for summary dismissal prevent an employer from dismissing an employee without notice?

Employers are in a stronger position to be able to suspend where there is an express contractual provision providing for suspension. It is important that before suspending the employee is given an opportunity to comment on the proposed suspension before a final decision is made to suspend.

Where a contractual provision is not in the employment agreement circumstances may justify suspension, particularly if there are safety concerns. In ***Williams v The Warehouse Ltd*** (unreported AA498/05 Auckland, 23 December 2005) there was no contractual provision for suspension, however the Employment Relations Authority found the Warehouse's actions were justified in order to protect the welfare of other staff, as there was a legitimate fear that Williams *"might take reprisal against staff who complained about her behaviour".*

Kereopa v Go Bus Transport Limited [2009] 7 NZELR 4 is another example where there was no contractual provision for suspension. Ms Kereopa commenced employment as a bus driver in 2006. Go Bus received an oral complaint from a person who was unable to read or write alleging that Ms Kereopa had been smoking marijuana while on duty. The complaint was considered to be a serious allegation affecting the safety of the public, the bus passengers and the driver herself, as well as the reputation of Go Bus. A letter was drafted advising Ms Kereopa of the allegations and suspending her on full pay pending an investigation.

The Employment Relations rejected Ms Kereopa's claim of unjustified dismissal, but found that she had been unjustifiably disadvantaged by the manner in which Go Bus had suspended her.

Ms Kereopa challenged the finding of a justified dismissal in the Employment Court, and the employer cross-challenged the finding of unjustified disadvantage arising from the suspension.

Counsel for Ms Kereopa argued that the collective agreement *"did not have a summary dismissal clause in it and provided no express or implied authority to the defendant to dismiss an employee for serious misconduct"* and that in the absence of an express clause providing for summary dismissal, dismissal could only take place in accordance with the graduated system of warnings in accordance with the terms of clause 20 of the Collective Agreement.

For Go Bus, it was argued that the absence of a clause addressing summary dismissal was not evidence of any intention to exclude a right to terminate employment summarily. Judge Travis supported this position and stated *"It would be a most unusual collective agreement which expressly excluded the right to dismiss for serious misconduct which had destroyed the essential trust and confidence implied into every employment agreement".* Further, he went on to state that where a decision is made to terminate summarily, there will be no need to issue a warning and as such the warning procedure set out in the collective agreement would not apply.

In considering the process by which Ms Kereopa was suspended reference was made to ***Singh v Sherilee Holdings Ltd,*** AC 53/05, 22nd September 2005 where it was stated:

"In the absence of an express contractual provision authorising suspension, it will only be in unusual cases that it is justifiable...to justify a suspension, an employer must have good reason to believe that the employee's continued presence in the workplace will or may give rise to some other significant issue".

Judge Travis agreed with the employer that safety issues about a bus driver allegedly driving a bus after smoking cannabis would have justified suspension without delay.

The Court then considered the process of the investigation and found that despite minor procedural flaws the investigation was reasonable.

In summary, in instances where the individual or collective employment agreement does not contain an express provision allowing summary dismissal or suspension, this will not necessarily prevent an employer from dismissing or suspending an employee where serious misconduct exists, and in particular where safety is of concern.

The Remedy of Reinstatement and its Implications on Third Parties

Horton v Fonterra Cooperative Group Ltd [2010] NZEMPC 72 is a factually complex case which has raised important issues in relation to the remedy of reinstatement and how it affects third parties. This was a successful challenge to a determination of the Employment Relations Authority which found that Mr Horton was justifiably dismissed for serious misconduct.

By way of background Mr Horton was a long serving employee having commenced employment with Fonterra in 1994. Mr Horton was interested in some roofing iron on one of his employer's sites which he thought he could use for building a fence on his own property.

Mr Horton asked permission to take some of this iron and it was decided that he could take some of the iron which had no value. It transpired that Mr Horton in fact had fencing iron delivered to his property for his use, which the company had not actually consented to. After a period of weeks the employer undertook an investigation to find out where the iron had gone. Despite the discrepancy in accounts on how the wrong iron had been delivered to Mr Horton's property, he was dismissed for serious misconduct. Mr Horton then raised a personal grievance.

The Employment Relations Authority found that the dismissal was justified, and Mr Horton challenged that decision in the Employment Court. The Court found that Mr Horton had been unjustifiably dismissed and that the company had made errors of fact in the course of its investigation.

Reinstatement was the remedy sought by Mr Horton and this was opposed by the company on the basis that a full year had passed since Mr Horton's dismissal and that they had in this time employed a replacement employee.

It was argued that as they were fully staffed it was wholly impracticable to consider reinstatement as they would have to let another employee go.

The company argued that it could not have been the purpose of the Act to create a situation where another employee's livelihood was put in jeopardy.

The Court did not accept this reasoning and stated that reinstatement was a primary remedy under the Employment Relations Act and that it was the company's action in employing someone else when reinstatement was being sought by Mr Horton that had caused the possibility an innocent employee would have to be dismissed, and that this would not suffice as a genuine reason for why reinstatement was impracticable as was required by the Act.

The Court went on to say that *"to routinely award compensation instead of reinstatement would be to create a system of licensing unjustified dismissals".*

The Court held that Mr Horton was to be reinstated within 14 days and further awarded $7,500.00 in compensation for hurt and humiliation.

This case illustrates that an employer must proceed carefully if it dismisses an employee who then seeks reinstatement. Engagement of a replacement employee on a '*permanent basis'* is a risky proposition. The appropriate course of action is to engage a temporary replacement in these circumstances.

Note that the primary remedy of reinstatement may be amended under the proposed changes to the ERA.

Holidays Act Amendment Bill:

The Holidays Amendment Bill 2010 was introduced to Parliament on 16 August 2010 and had its first reading on 24 August 2010. The stated purpose of the Bill is to amend the Holidays Act 2003 to enable:

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- *by agreement, one week of an employee's minimum entitlement to annual holidays to be commuted for a cash payment to the employee;*
- *amending the calculation and application of payment for public holidays, alternative holidays, sick leave, and bereavement leave;*
- *allowing employers and employees to agree to transfer the observance of public holidays to another working day;*
- *allowing employers to direct when an alternative holiday is taken, should the employer and employee not reach an agreement;*
- *providing an additional test (the "but for" test) to the factors for determining a day that would otherwise be a working day under Section 12 of the Act;*
- *allowing employers to request proof of sickness or injury within the first three consecutive calendar days of an employee taking sick leave without first having reasonable grounds to suspect that the sick leave is not genuine;*
- *clarifying employees' entitlements during a closedown period on days that would otherwise be working days for the employee;*
- *increasing the maximum penalties for non-compliance with the Act to $10,000 for individuals and $20,000 for companies and other bodies corporate;*
- *including a definition of discretionary payments in the principal Act;*
- *clarifying the meaning of allowances in the principal Act."*

Submissions on the Bill are due by 17 September 2010.

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