



DO NOT PASS GO, DO NOT COLLECT \$200

ISSUE  
302

May 2020

a regular newsletter for clients of  
mcphail gibson & zwart ltd

## Do Not Pass Go, Do Not Collect \$200.00 ...

### 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
- Employment Relations Strategies
- Training
- Monthly newsletter

In one of the more unusual cases we have seen, the Employment Court reach a decision in April this year that a stop-go worker who let cars through at the wrong times was justifiably dismissed.

Yoon Cheol Hong worked for Chevron Traffic Services Limited from September 2017, until he was dismissed in June 2018.

On 25 May 2018, Mr Hong was working on site at one of the ends of a three-way traffic control system. It was alleged by his co-workers that he failed to communicate by the radio on four separate occasions and allowed traffic to enter the restricted area while traffic was also coming from the other ends. Somewhat damningly, the Court recorded that the superintendent on site had:

*"... witnessed Mr Hong on at least three occasions directing traffic against the flow of traffic coming from the opposite direction. He stated in evidence that Mr Hong was clearly not listening on his radio-telephone, and his conduct on that day was dangerous and inexplicable."*

At the direction of the site superintendent, Mr Hong was moved to another part of the site. However, after similar incidents occurred, Mr Hong was removed from site. A complaint was made by the head contractor to Chevron. Incident reports were also lodged by Chevron's supervisor on site.

As a result, Chevron investigation the complaint and incident reports. In the Courts words, after "Mr Clarke [the managing Director] and the Commercial Manager, Jordan Masters had carefully interviewed the employees and the traffic superintendent" Mr Clarke met with Mr Hong on two occasions "to discuss the issues raised and to then consider all matters."

The Court noted that Mr Hong was advised that he was entitled to have a support person present at the meetings. It also noted that Mr Hong "is legally qualified and had been admitted as a barrister and solicitor but does not have a practising certificate. He now describes himself as an employment advocate".

Two meetings were held with Mr Hong on 1 and 7 June 2018. It appears Mr Hong attended each meeting alone. Mr Clarke and another company manager attended each meeting. At each meeting, Mr Clarke and the other manager present confirmed "Mr Hong refused to properly and reasonably engage at the meetings".

At the 1 June 2018 meeting, Mr Hong denied any wrongdoing and claimed it was a "frame up". The Court summarised Mr Clarke's evidence:

*"... Mr Hong was aggressive towards him, spoke to him in an insulting way and raised allegations of racial bias. He stated that, at the first meeting, Mr Hong taunted him to try and get him to suspend him. He warned Mr Clarke of consequences if he was dismissed. Mr Clarke stated that, at one point, Mr Hong told him that he was not to speak while he saw Mr Hong's lips were moving. He stated that Mr Hong also spoke disparagingly about his fellow employees and alleged racial bias on their part. While Mr Hong totally denied that the incidents had taken place, he made a statement to the effect that, if such incidents occurred, they could not be regarded as serious misconduct justifying dismissal, as they were a regular occurrence. Mr Clarke's evidence as to Mr Hong's behaviour at the meetings is corroborated by the evidence of Mr Masters and Mr Toki."*

## 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 **Peter Zwart, Dean Kilpatrick or Jane Taylor.**

## Contact Details:

Level 2  
71 Cambridge Terrace  
PO Box 892, Christchurch  
Tel (03) 365 2345  
Fax (03) 365 2347  
[www.mgz.co.nz](http://www.mgz.co.nz)

**Peter Zwart**  
E: [peter@mgz.co.nz](mailto:peter@mgz.co.nz)  
M: 0274 367 757

**Dean Kilpatrick**  
E: [dean@mgz.co.nz](mailto:dean@mgz.co.nz)  
M: 027 279 1353

**Jane Taylor**  
E: [jane@mgz.co.nz](mailto:jane@mgz.co.nz)  
M: 021 1539 147

A second meeting was held on 7 June 2018. In the Courts words:

*“Mr Clarke indicated that he had considered Mr Hong’s reaction to the allegations carefully. Mr Hong was given another opportunity to respond but, again, simply denied the allegations, stating that he had nothing further to add. He kept asking Mr Clarke in a taunting way to dismiss him. Mr Clarke found the process of dismissing Mr Hong distressing. After hearing Mr Hong’s response, he took an appropriate adjournment to gather his thoughts and consider the entire matter. When he returned to the meeting, he advised Mr Hong that he was being dismissed.”*

The reasons for dismissal were recorded in a detailed letter dated 8 June 2018. In short, Mr Hong was summarily dismissed for serious misconduct.

Mr Hong claimed he was unjustifiably dismissed and pursued his claim to the Employment Relations Authority. The Authority disagreed with Mr Hong and determined that he had not been unjustifiably dismissed.

Dissatisfied with the Authority’s determination, Mr Hong challenged the decision to the Employment Court. The Court recorded Mr Hong’s claims in its judgment:

- a. That the plaintiff has a personal grievance for unjustified dismissal;
- b. That Chevron was in breach of duty of good faith for the purpose of s.4 of the Act;
- c. Penalty in the sum of \$20,000.00 for breach of duty of good faith under s.4A of the Act;
- d. Penalty in the sum of \$20,000.00 for breach of s.65(2)(b)(i) of the Act under s.135(1)(b) of the Act;
- e. Compensation in the sum of \$80,000.00 for humiliation, loss of dignity, and injury to feelings pursuant to s.123(1)(c)(i) of the Act caused by unjustified dismissal;
- f. Reimbursement for lost earnings and other money for 6 months from the date of dismissal under ss.123(1)(b) and 128 of the Act;
- g. Interest at the rate of 6% per annum calculated from the date of dismissal to the date of judgment;
- h. Costs;
- i. Setting aside costs determination of the Authority; and
- j. Any other and further order(s) Court deems just and fit.”

According to the judgment, acting on his own account, Mr Hong cross-examined witnesses intensively, which did give rise to some inconsistencies. Mr Hong used these inconsistencies to advance the claims that the incidents did not occur and therefore provided he was framed. The Court dismissed this approach, stating:

*“However, the issue is whether Mr Clarke reacted in a fair and reasonable way having regard to what faced him. In carrying out his investigation, Mr Clarke would not have been required to embark on the type of exhaustive scrutiny which Mr Hong subjected the witnesses to.*

...

*Mr Clarke carried out a careful, reasonable investigation, and then Mr Hong was given the opportunity of responding to the allegations which had been made. Mr Hong chose to simply deny the allegations and, in addition to not properly engaging in the process, behaved in an offensive way towards Mr Clarke.”*

The Court went on to state:

*“The way Mr Hong acted at the meetings was contrary to good faith obligations to properly engage with Mr Clarke and be responsive and communicative.”*

The conclusion of the Court was that Mr Hong was justifiably dismissed, reflecting the determination of the Authority.

For completeness, the Court then went on to examine the breach of good faith claim. Putting aside the claim had not been advanced in the Authority, and therefore claimed out of time, the court noted:

*“In any event, I am not prepared to accept Mr Hong’s assertions that the employer in this case acted in breach of good faith. In fact, as I have held, quite the contrary is the case, and it is Mr Hong who breached such duties.”*

On reading the facts, the outcome appears somewhat inevitable. It does however illustrate that process and substance still go hand in hand. Chevron in this case undertook a robust process, investigating the issues, presenting them to Mr Hong to respond, and considering his responses before making a final decision.