DYHRBERG DRAYTON
EMPLOYMENT LAW

Update Summary

There are a number of recent employment cases which are likely to be of interest to employers. You can click on the below link to read our summary.

- In the *Callard v Wellington City Transport Limited* decision an employee with a history of poor attendance was dismissed for failure to complete a rehabilitation counselling course.

- In the decision of *Atkinson v Phoenix Commercial Cleaners Limited* the legal definition of "Meaning of employee" under the Employment Relations Act 2000 was considered along with the common law tests to determine whether a worker is an employee or contractor.

- The *Bennett v Hutt City Council* decision reinstated an employee after the employee was dismissed for failing a reasonable cause drug test conducted in breach of internal policy.

- In the decision of *Fredericks v VIP Frames & Trusses Limited* it was found that the employer had failed to provide a safe workplace but there was no causal link between the employer's conduct and the employee's resignation.

- In *Vai v Goodman Fielder New Zealand Ltd* the employee was dismissed for breaching health and safety requirements, however, interim reinstatement was ordered as the employer's investigation was found to have been flawed.

- The decision of *Alatipi v Department of Corrections* reinstated the Corrections Officer to his position following a finding the investigation into whether he had assaulted a prisoner was flawed and compensation ordered. This decision examines the investigation conducted in great detail and provides insight into how to conduct a thoroughly and procedurally correct investigation.

In addition recently the government announced the Transport and Industrial Relations Select Committee would need further time to report back on the Health and Safety Reform Bill. The deadline was pushed back to 24 July. Officially the Bill needs some "tweaking" before it is passed. However, it appears that specific lobby groups are pressing for the Bill not to affect them dramatically.

Failure to complete Alcohol Counselling Course

In the decision of *Andrew Callard v Wellington City Transport Limited* [2014] NZERA Wellington 126 Mr Callard was employed by the Wellington City Transport Limited (**WCTL**) as a bus operator before his dismissal on notice for failing to attend and complete an alcohol counselling course.

Facts

When attempting to address Mr Callard's poor attendance at work, the smell of alcohol was detected on him. Mr Callard consented to a drug and alcohol screening test based on reasonable cause in accordance with WCTL's Alcohol and Drug Free Policy. The first test was negative, but the subsequent test was non-negative, leading to Mr Callard's suspension. Mr Callard was issued a final written warning and he agreed his continued employment would be conditional on completion of a rehabilitation alcohol counselling course. Mr Callard sporadically attended the course. As a result the course provider advised WCTL it would discharge him and close his file. He had attended 4 out of 7 scheduled appointments. Following a disciplinary process, WCTL advised Mr Callard it did not have any trust and confidence in him given his failure to attend the counselling course as had been agreed.

Held

When considering whether the decision to dismiss was that which a fair and reasonable employer could have concluded in the circumstances, the Authority noted Mr Callard's failure to attend a rehabilitation counselling course alone, would unlikely be sufficient. However, Mr Callard's conduct must be considered alongside the circumstances, including the nature of WCTL's transport business and the agreed terms of employment (in that the parties had agreed that attendance would be conditional on continued employment).

The Authority noted WCTL's efforts to balance Mr Callard's rostering alongside his counselling course. The Authority held that it was fair and reasonable for WCTL following a fair investigation to conclude it no longer had trust and confidence in Mr Callard. Accordingly its decision to dismiss was upheld.

At a Glance

This case confirms if an employer follows a fair and reasonable process and comes to a fair and reasonable decision given the circumstances, its decision to dismiss would likely be upheld. The key reason the employer succeeded in this case was that the employee had agreed that his ongoing employment would be conditional on attendance.

To Contract or Not

In the decision of *Marion Atkinson v Phoenix Commercial Cleaners Limited* [20015] NZEmpC 19 the Court considered whether Ms Atkinson, a cleaner with Phoenix Commercial Cleaners Limited (**Phoenix**), was an employee under the Employment Relations Act 2000 (**Act**). To bring a claim of unjustifiable dismissal, Ms Atkinson first had to establish she was an employee under section 6 of the Act. This required the Court to consider, broadly and realistically rather than narrowly and artificially or legalistically, the real nature of the relationship.

Case Law

The Court referred to *Bryson v Three Foot Six Limited* [2003] 1 ERNZ 581, the only Supreme Court decision to examine the interpretation and application of section 6 of the Act, "Meaning of Employee". The Supreme Court reiterated that to determine the real nature of the relationship between the parties pursuant to section 6 '*all relevant matters*' will include the common law tests or guidelines including control, integration, and whether the contracted person had been effectively working on their own account, known as the fundamental test. These three are customary indicia would not be applied exclusively and the conclusions were not determinative of the real nature of the relationship.

The Court also referred to *Autoclenz v Belcher* [2011] UKSC 41 a decision of the Supreme Court in the United Kingdom, where the Court held it must make a realistic assessment of the reality in all the circumstances of work performed. A material difference between the current facts and those set out in *Bryson* and *Autoclenz*, was that Ms Atkinson did not have a concluded written agreement therefore there was no common intention between the parties. The Court then considered the common law tests and guidelines.

- *Control Test* - the control test requires a determination of the nature and extent of control of the work performed or with whom such control rested. Cleaning contracts were obtained and negotiated by Phoenix. Ms Atkinson was also required to adhere to Phoenix's schedule of areas to be cleaned and how to clean them. Ms Atkinson also had to wear a Phoenix branded uniform when undertaking work. Therefore the facts were more indicative of an employment relationship.

- *Fundament Test* – the fundamental test required the Court to consider whether Ms Atkinson performed the cleaning services as a person in business on her own account. Ms Atkinson had no independent trading entity nor was she GST registered. Phoenix provided all tools of trade including cleaning supplies and a motor vehicle marked with its name. Ms Atkinson had little, if any, real ability to increase her economic fortunes while engaged by Phoenix. Application of this test was indicative of employment.

- *Integration Test* - this test requires consideration of whether Ms Atkinson was integrated into Phoenix's business. Ms Atkinson wore a Phoenix uniform and drove between assignments in a Phoenix sign-written van. A neutral but interested observer would identify her as a Phoenix cleaner, therefore she was integrated into its business at the time the commercial relationship ceased.

The Court concluded this was a plain case in reality of an employment relationship between the parties. In fact it was a significantly stronger case of an employment relationship than either the Supreme Court decisions cited.

At a Glance

Care must be taken when engaging an independent contractor. Each case will be determined on its unique set of facts taking into account the reality of the situation. However, some key issues to consider:

- Is there a written contracting agreement?

- Who will provide the tools of trade including any uniform and motor vehicle? Will expenses be reimbursed or included in the contractor's invoice?

- Can the contractor work for other companies? Does a restraint of trade apply following the conclusion of the relationship?

- What association does the contractor have with the company, such as email address? Business card? Uniform? Sign-written motor vehicle?

- Is the contractor operating through a company? Are they GST registered? Will they forward invoices for payment?

Life Guard High

In the decision of *Bennett v Hutt City Council* [2015] NZERA Wellington 31 the Authority considered an application by Mr Bennett for interim reinstatement.

Facts

In December 2014 Mr Bennett was advised the Hutt City Council (**Council**) had received reports of possible drug use by some staff at Huia Pool. It commissioned an independent investigation. Mr Bennett advised the investigator that occasionally he smoked cannabis at home. Upon revelation of this information Council on reliance on its "probable cause testing policy" asked Mr Bennett to undertake a drug test noting that he performed a safety sensitive role.

Mr Bennett was suspended for a non-negative test result for cannabis, subsequently confirmed. Council considered issuing Mr Bennett with a final warning conditional on rehabilitation. However, Council ultimately terminated Mr Bennett's employment for serious misconduct.

The essential issue was whether Council had reasonable cause to ask Mr Bennett for a drug test following his admission to the independent investigator that he occasionally smoked cannabis at home. If it did not, the drug test obtained was unlawful and could not be relied upon.

Council's Drug and Alcohol Policy provided for testing if there was reasonable cause to suspect the employee was working under the influence of drugs or alcohol. In particular the policy prescribed when determining 'reasonable grounds' '*physical symptoms and/or unusual or out of character on-site observable behaviours must be considered*'. Various examples of physical symptoms or behaviours were set out in a non-exhaustive list. However, the testing of Mr Bennett occurred in circumstances where he had not exhibited any of the symptoms or behaviours prescribed by Council's policies.

The Test for Interim Reinstatement

Section 127(4) of the Employment Relations Act 2000 (**Act**) requires the Authority when determining whether to make an order for interim reinstatement, to have regard to the object of the Act and the law relating to interim injunctions.

- Is there an arguable case for unjustifiable dismissal?
- Does Mr Bennett have an arguable case for permanent reinstatement in the event he is found to have been unjustifiably dismissed?
- Where does the balance of convenience lie?
- Where does the overall justice lie?

Case Law

The Authority referred to the decision of *Parker v Silverfern Farms Limited (No. 1)* 2009 ERNZ 301 in which the Court had said that employee drug testing regimes impinged significantly upon individual rights and freedom and, policies and their applications must meet the legal test of being lawful and reasonable and where there are such policies, they should be interpreted and applied strictly.

Held

The Authority held an arguable case had been established that Mr Bennett was dismissed unjustifiably under the Act as Council had asked for him to submit to a drug test in absence of any "reasonable cause" as required under its own policy.

When considering where the balance of convenience rested between now and the determination of the substantive personal grievance, the Authority accepted Council's safety concerns, However, it could place conditions on Mr Bennett's return. The balance of convenience favoured Mr Bennett.

The Authority held that overall justice rested with Mr Bennett. He had an arguable case to have been unjustifiably dismissed as he had been asked to take a drug test in circumstances where Council did not have reasonable cause for that request. Mr Bennett was reinstated to undertake alternative duties and undertake rehabilitation and was to be remunerated as Operations Manager (his original position).

At a Glance

This decision highlights the need to be familiar with, and follow company policy when conducting drug testing.

Nail Gun to the Chest

In the decision of *Lyndon Fredericks v VIP Frames & Trusses Limited* [2015] NZERA Christchurch 2, the Authority considered whether the employee had been unjustifiably dismissed, albeit constructively by his employer.

Facts

This case admittedly has quite unusual facts. Lyndon Fredericks was employed by VIP Frames & Trusses Limited (**VIP**) as a Truss and Frame Fabricator. In January 2014 VIP recruited a new employee. Mr Fredericks had been asked to '*keep an eye on him*'. Mr Fredericks immediately observed the new employee was inexperienced with the nail gun he had to operate and advised a work colleague and management. Later in the day the new employee mistakenly aimed the nail gun at Mr Fredericks, lodging a 90mm nail into his chest. Mr Fredericks was discharged from hospital the next day.

VIP instructed a health and safety expert to commence an investigation. The investigator concluded the incident and the extent of Mr Fredericks' injuries were an aberration caused by unusual circumstances that nullified the gun's safety function. The expert concluded there was no reporting obligation to Worksafe New Zealand.

Following the investigation, Mr Fredericks' partner advised VIP the incident had had a psychological impact on him. VIP, accordingly, sought for Mr Fredericks to establish he was fit to return to work given he worked in a safety sensitive area and used potentially harmful tools. Until it had received such confirmation, it made the decision to lock Mr Fredericks out of the workplace on health and safety grounds. Mr Fredericks never returned to the workplace despite obtaining a psychological assessment confirming he was capable of doing so.

Test for Constructive Dismissal

Mr Fredericks ultimately resigned and claimed he had been constructively dismissed. The Authority referred to the leading decision setting out the test for constructive dismissal, *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Limited* (1985) ERNZ SEL CAS 136 in which the Court held constructive dismissal includes but is not limited to the below elements.

- An employer gives an employee no choice between resigning or being dismissed.
- An employer has followed a course of conduct with a deliberate and dominate purpose of coercing an employee to resign.
- A breach of duty by the employer causes an employee to resign.

The Court noted there must also be a causal link between the employer's conduct and the tendering of the resignation.

Held

The Authority accepted Mr Fredericks' claim he had aired safety concerns and those concerns had not been acted upon, thereby VIP had failed to provide a safe workplace. As a result he suffered disadvantage in his employment. The Authority also noted there was no evidence that VIP attempted to confirm whether the newly hired employee was proficient in the use of the nail gun prior to assigning him to such work.

In relation to the allegation that VIP had breached its privacy obligations owed to Mr Fredericks the Authority noted that while there was some inappropriate communications, there was no evidence of disadvantage. While VIP had not reported the incident to WorkSafe, that did not constitute a breach of any duty owed to Mr Frederick. VIP's decision to lock Mr Fredericks out of the workplace did not cause him any disadvantage as it was obliged to provide a safe work environment for both Mr Fredericks and his colleagues. Mr Fredericks was ultimately awarded $6,000 as compensation and lost wages due to the unjust disadvantage suffered by virtue of the failure to provide a safe workplace.

At a Glance

Under the current Health and Safety in Employment Act 1992 (**HSE Act**) employers shall take all practicable steps to ensure the safety of employees at work. It is arguable VIP had not done so, as not only did it hire an inexperienced new employee and appoint that person to a safety sensitive position, it did not act upon Mr Fredericks concerns. It is not clear from the report commissioned, how the gun's safety function became nullified. An employer is obliged to cater for the negligent and inexperienced employee when ensuring health and safety.

While VIP did not report the matter to WorkSafe, and the lack of reporting did not cause any disadvantage, it is possible that VIP had a reporting obligation under the HSE Act had further medical information been provided to the Authority. Under the HSE Act employers are required to report incidents of accidents and serious harm. Serious harm is defined in schedule 1 of the HSE Act.

Update on the Christchurch worker shot with a nail gun to the chest

Further to our note on the Christchurch case of a worker who was shot in the chest by a colleague, VIP Frames & Trusses Ltd were recently successfully prosecuted by WorkSafe New Zealand. VIP was ordered to pay $9,000 in reparation to Mr Fredericks, and was fined $46,962 for breaching the Health and Safety in Employment Act 1992. In relation to a separate incident, VIP was fined $10,837 for failing to notify WorkSafe.

WorkSafe's investigation revealed that VIP failed to ensure the standard operating procedure for nail guns was adequate, failed to prohibit cross-nailing, and failed to ensure the production line allowed operators enough time to check no one was in the line of fire before firing a nail gun. It had failed to take all practicable steps to keep employees safe at work. Trainees should have also been properly supervised and assessed, and their hazard register should have identified all known nail gun hazards. The incident also caused Mr Fredericks, the injured employee significant emotional and physical harm, and he was verbally abused and ostracised by former work mates.

At a glance

The overarching duty on employers is to take all practicable steps to ensure the safety of employees while at work. In practical terms this includes training employees appropriately and checking their skills so the work may be performed safely. Employers should also respond promptly to safety concerns raised. Lastly, employers should be aware of their obligations to report serious harm and accidents to WorkSafe. If in doubt, employers can call WorkSafe on their "Serious harm and Accidents" reporting line, or "General Enquiries". How Not to Conduct an Investigation

In the decision of *Willie Alatipi v The Chief Executive of the Department of Corrections* [2015] NZEmpC 7, the Court reinstated Mr Alatipi to his position of Corrections Officer and awarded him lost wages and compensation. The Court held the Department of Corrections (**Corrections**) prior to dismissing Mr Alatipi, did not have sufficient and reliable evidential basis for having concluded, Mr Alatipi had assaulted a prisoner. The facts in this matter are quite complex but are worth delving into in order to understand the deficiencies in the investigation Corrections had conducted.

Dismissed for not following health and safety obligations

In the decision of *Filipo Vai v Goodman Fielder New Zealand Ltd* [2015] NZERA Wellington 49, Mr Vai was dismissed on health and safety grounds. Goodman Fielder New Zealand Ltd (**Goodman Fielder**) decided Mr Vai had breached its health and safety requirements by extending his hand into an operating extruder to clear a blockage, therefore it no longer was confident he could be trusted to comply with safety practises in the future. Mr Vai claimed his dismissal was unjustified and sought reinstatement, including on an interim basis.

Held

The Authority concluded there was an arguable case given the numerous disagreements as to facts. It was not clear whether Mr Vai actually extended his arm into the extruder's hopper, and whether the approach he had taken to clear the blockage had been previously approved in training. There were also questions about whether the equipment was the subject of a risk assessment and therefore whether anyone knew if Mr Vai's action was hazardous. The Authority dismissed Goodman Fielder's assertion that they could no longer trust Mr Vai to act in a safe manner and any return would undermine its efforts to ingrain a safety culture by rewarding unsafe conduct. The Authority noted this was Mr Vai's first infraction in 18 years, and he did not show a propensity for unsafe conduct and had given an undertaking to act as instructed if returned.

The Authority made some ancillary comments about Goodman Fielder's zero tolerance policies. The Authority said the devil was in the detail and that such policies were admirable, however, having such a policy did not absolve the employer from a critical assessment of all the relevant circumstances in the individual case.

The Authority reinstated Mr Vai to his position of Operator on an interim basis pending the outcome of the substantive matter. While so engaged Mr Vai is to adhere to any lawful and reasonable instructions.

At a Glance

While health and safety infractions by employees deserve a stern response, all of the facts need to be taken into account when coming to a fair and reasonable decision, such as the employee's employment record, whether the safety practice was standard or somehow acceptable, and risk assessment of the equipment. If you act in haste, you might pay to regret it.

How Not to Conduct an Investigation

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Facts

Mr Alatipi was employed as a Corrections Officer at Rimutaka Prison between January 2001 and the date of his dismissal in November 2011.

There was conflicting evidence around whether the prisoner had been assaulted by Mr Alitipi or not. The prisoner alleged Mr Alitipi had assaulted him following a verbal altercation. Mr Alatipi alleged there had been a dispute between the two as the prisoner wanted to be removed to another unit and sought to call his lawyer. However, Mr Alitipi had been instructed by the Principal Corrections Officer that only 2 phone calls were allowed to be made over the weekend and they could only be made by a new prisoner. Mr Alitipi confirmed he had given the prisoner a "talking to" as a result. The prisoner was already a remand prisoner and therefore did not qualify to make a weekend phone call.

Mr Alatipi challenged Corrections' decision to dismiss him alleging unjustifiable dismissal and argued the injuries sustained by the prisoner were either self-inflicted or caused by another prisoner. He also claimed the disciplinary process followed by Corrections was unfair and seriously flawed throughout.

The prisoner later advised the Acting Senior Corrections Officer, Mr Francis of the alleged assault and requested someone higher up attend his cell. At Mr Francis' instruction, Mr Alitipi attended the prisoner's cell. Mr Francis did not tell Mr Alatipi the prisoner claimed to have been assaulted by an officer. Mr Alatipi in his evidence advised when he approached the cell he assured the prisoner that on Monday he would try to talk to the Principal Corrections Officer to see if the prisoner would be allowed to speak with his lawyer. He specifically said that he did not notice any injuries on the prisoner and the prisoner did not seem to be overly upset.

Subsequently during the medical round which is conducted regularly during the day, the prisoner advised the attending Corrections Officer, Franciscus de Grott and a nurse, of the alleged assault. Another Corrections Officer, Mr McHena escorted the nurse and Mr de Grott throughout the medical round. Mr McHena in his statement to the Police said he did not notice anything wrong with the prisoner. The nurse present in her statement to the investigator confirmed she did not see the prisoner's face, so could not confirm the allegation. Mr de Grott confirmed this evidence. However, in a written report made a couple of days later Mr de Grott said the prisoner was visibly upset, and appeared to have injuries on his face. Mr de Grott later escorted the prisoner to the Health Unit, and in doing so did not follow usual procedure which was to consult with the Acting Senior Corrections Officer.

Ms Hawthorn, Operations Manager Rehabilitation and Employment for the Lower North Region at Corrections upon learning of the alleged assault, opened a formal investigation and appointed Mary Wilson the Investigator's/ Projects Manager for the Southern Region, and also of Corrections, to carry out an investigation into the incident on her behalf. Ms Wilson was to report back by 12 August 2011. On 13 April 2011, Ms Hawthorn advised Mr Alatipi of the allegation, namely, '*You assaulted a prisoner on Saturday, 2 July 2011 at Rimutaka Prison*'. He was also advised of the investigation and was placed on special leave. On 19 July 2011, Mr Alatipi was suspended on full pay.

Prior to completing her report, Ms Wilson sought to hear from Mr Alitipi. However, on advice, Mr Alitipi sought for their meeting to be postponed until the outcome of the Police investigation was known. Mr Alatipi's representative advised he was merely exercising his right a to fair process.

On 30 August 2011 Mr Alatipi was provided with a copy of the report. There was nothing to indicate the report was in anything but final form. On 8 September the Police advised they would not lay any criminal charges as there was insufficient evidence. Mr Alatipi subsequently met with Ms Wilson on 20 September. Ms Wilson then had a further interview with the prisoner. Ms Wilson issued a revised employment investigation report concluding based on evidence provided, on the balance of probabilities, the allegation was substantiated.

A disciplinary meeting was held on 9 November 2011, Mr Alitipi made the following points:

- He had not been provided with a copy of all interview notes and other information the investigator was relying upon.
- The investigator had predetermined the outcome of the investigation as she had not interviewed all relevant witnesses.
- The investigator had incorrectly interpreted some of the evidence given by witnesses.
- The investigator had not considered the possibility that the photographs of the prisoner did not show injuries consistent with the alleged assault and had simply relied on what the prisoner had told her.
- The investigator had raised with Mr Alatipi a number of past protocol issues which were not part of the complaint made against him.
- The Police investigation had concluded there was insufficient evidence to support a charge of assault.

The Law

The statutory test of justification for dismissal provides that whether a dismissal is justified must be determined on an objective basis, having regard to whether the employer's actions and how the employer acted, is what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

The Court referred to the *Honda New Zealand Ltd v New Zealand Boilermakers' etc Union* [1999] 1 NZLR 392 decision where the Court of Appeal stated that where a serious charge is the basis of the justification for the dismissal, then the evidence in support of it must be as convincing in its nature as the charge is grave.

In addition, the Court said that the statements given to Police and the investigator contained a number of inconsistencies which had not been adequately probed during the employment investigation. There were also inconsistencies around with whom the prisoner had spoken with following the incident and why those persons were not interviewed. In addition, the prospect that the prisoner's injuries could have

been self-inflicted did not appear to have been a matter considered or investigated by the investigator or the decision-maker.

The Court noted the employer understandably would wish to complete its disciplinary investigation without delay, but it had an obligation to act fairly and in good faith. Given the delays already in the investigation, it would not have been unreasonable to postpone the investigation until the Police had released their findings. This was a practice not inconsistent with Corrections' past decisions. It would have also been consistent with Mr Alatipi's rights under the Code of Conduct to access all relevant information and material.

Held

- In all circumstances no fair and reasonable employer could have acted as Corrections did when rejecting Mr Alatipi's request for a postponement of the investigation.

- The first employment investigation report was issued before the investigator had spoken with Mr Alitipi and it appeared to have been issued in final form. In it the investigator found the allegations to have been substantiated.

- Ms Hawthorne as the decision-maker had an obligation under Corrections' Code of Conduct to make her own independent judgement as to whether there was sufficient reasons for the dismissal. Ms Hawthorne made only limited inquiries. The Court concluded it did not appear that Ms Hawthorne was interested in going out of her way to check out the obvious shortcomings in the investigator's report or make any independent judgement as to whether there were sufficient reasons for dismissal.

- The investigator's and Ms Hawthorne's failure not to interview other potentially relevant witnesses, was in the Court's view, inexplicable. Given the seriousness of the misconduct, namely a criminal act by a long-serving prison officer, the investigator and/or the decision-maker should have followed the matter up.

- The investigator appeared to passively accept the prisoner's statement.

- In the Court's view, as a long serving employee, Mr Alatipi deserved better treatment. Mr Alatipi was reinstated to his position of Corrections Officer, and awarded lost wages for the amount of three months, and compensation for the amount $20,000.

At a Glance

This decision highlights in many ways all the pitfalls of an internal investigation. When conducting such an investigation it is important to be clear on the terms of reference, and to afford both the complainant and the alleged perpetrator natural justice. That means giving them copies of the case against them including witness statements and notes taken. The investigator and ultimate decision making should be aware of their obligations under any terms of reference, policy and statutory requirements. Inconsistencies should be queried and appropriately investigated. Be fair, be consistent, analyse and test the respective evidence.

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