

NEWSLETTER - AUGUST 2009

Winners of the New Zealand Employment
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Awards

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DISPUTES TRIBUNAL CHANGES

Maximum claim levels for the Disputes Tribunal have been increased following the passing of the Disputes Tribunals Amendment Act 2009. The maximum claim level has increased from \$7,500.00 to \$15,000.00, or, with the consent of both parties, from \$12,000.00 to \$20,000.00.

BILL FOR COMPULSORY REDUNDANCY COMPENSATION INTRODUCED

The Employment Relations (Statutory Minimum Redundancy Entitlements) Amendment Bill was introduced into Parliament on 5 August 2009 by the Labour Party.

This Bill seeks to amend the Employment Relations Act 2000 by inserting into Part 6A minimum statutory entitlements for employees in the event of dismissal for redundancy.

The Bill is yet to have its first reading, and given Labour's minority, it is unlikely to gain much traction. However, employers may wish to consider the effect of any mandatory redundancy compensation on employees, particularly when hiring new employees.

ARGUMENT OVER \$7.00 COSTS EMPLOYER THOUSANDS

An argument over a \$7.00 shortfall in a till has cost a café \$6,000.00 in hurt and humiliation compensation.

In *Hancox v Victoria Street Café and Restaurant Limited* (Christchurch, Employment Relations Authority, July 2009) the employee argued that she was unjustifiably dismissed following an altercation with a director of the respondent, over a discrepancy in the till balance.

THE FACTS

On 29 May 2008 a director, Mr M, spoke to the employee about the till being down by \$7.00 the previous day. Mr M explained that if a till was down in the future the shortfall would come out of everyone's wages. The employee later realised she had processed a refund the previous afternoon and left a note of this on the docket placed in the back of the till.

The employee approached Mr M and attempted to explain how the error had occurred and how it had been documented. The employee said she became frustrated at Mr M's resistance to accept her explanation and the suggestion that wages would be docked in the future if this situation occurred again.

The employee then spoke to Mrs M voicing her concern and alleging that Mr M was calling her a liar. It was at this point that Mr M lost his temper and started raising his voice at the employee. The employee told Mr M that she did not have to listen to him yelling at her and that she was going home. The employee says she was upset and crying and was trying to defuse the situation by retiring from the building.

On 30 May 2008, the following day, the employee reported at work to begin her shift.

At a meeting later that day, Mrs M asked the employee why she had come to work. The employee explained that she was rostered to work and thus had come to work. Mrs M then brought out a range of issues which had been giving her concern over a few months, none of which had been discussed with the employee previously.

The employee asked Mrs M if she was firing her. Mrs M replied, "I think you should resign." The employee told Mrs M she would need to discuss the matter with her fiancé.

THE DETERMINATION

The Employment Relations Authority held:

- 1 The employee did not resign;
- 2 The employee was dismissed unjustifiably by reason of the respondent's failure to undertake any enquiry into the incident on 29 May 2008 which might have established, on the balance of probabilities, the applicant left the premises to defuse the altercation; and
- 3 The employee, while participating in the altercation with Mr M, was simply attempting to put her explanation to him. In such circumstances, the applicant did not contribute to the situation which gave rise to her dismissal.

REMEDIES

The employee was awarded:

- 1 13 weeks loss of wages.
- 2 \$6,000.00 for hurt and humiliation.

AIR NEW ZEALAND v V – THE TEST OF JUSTIFICATION

The Employment Court has released a full Court decision, *Air New Zealand v V* (June 2009, Auckland, Employment Court) on the interpretation of the test of justification in section 103A of the Employment Relations Act 2000 (**Act**).

EMPLOYMENT LAW BRIEFS

THE FACTS

The employee was employed by Air New Zealand as a Warehouse Agent in its International Cargo Division. This is a safety sensitive area where the operation of heavy machinery poses safety risks. The employee had worked for Air New Zealand for many years and had an unblemished employment record.

In December 2005, Air New Zealand introduced an alcohol and other drugs programme, the terms of which were contained in a comprehensive policy. The policy required all employees to maintain a zero blood alcohol level and to maintain drug free at all times while at work. The policy also strongly encouraged employees to declare their possible alcohol or other drug abuse, a process called "self referral".

On 28 September 2006, the employee was informed by his manager that he was required to take a random drugs test. He agreed but told his manager that he would have a problem with the test, implying he would fail it. In terms of the policy, this did not amount to self referral. The test produced a positive result for cannabis which was 20 times the threshold level for the test.

As a result of the positive drugs test, the employee was stood down from work on full pay and Air New Zealand undertook a comprehensive investigation into his conduct.

The employee explained that he had regularly smoked cannabis. At times, he did so every evening, including evenings before beginning work on a morning shift at 4.00 am. He said that this helped him deal with domestic problems including the chronic illness of his mother for whom he cared. He also said that he considered cannabis harmless and believed that his use of it was not jeopardising his own safety or that of his colleagues.

The employee had read the policy. He understood that it had been introduced to ensure the safety of staff and passengers of Air New Zealand. He was fully aware of the requirement for all employees to maintain a zero blood alcohol level and to remain drug free at all times while at work. He was also aware of the provisions concerning random drug testing.

At the final meeting the manager stressed the potential danger of the employee attending work over a long period with cannabis in his system and that the employee did not accept this risk. The manager explained that he had considered the mitigating circumstances and the alternatives but had concluded that the employee's employment would be terminated, effective immediately.

THE ISSUE – SECTION 103A OF THE ACT

One of the arguments that Air New Zealand raised on appeal was that, having found that the employee had engaged in serious misconduct, the Employment Relations Authority was wrong to embark on a

consideration of Air New Zealand's decision to dismiss the employee. As a consequence, Air New Zealand said that it was not open to the Authority to reach the conclusion that the dismissal was unjustifiable.

The Court confirmed that an employer is not to be judged against the standard that the Authority or the Court would have applied, had they been in the employer's position. Rather, the standard is what the fair and reasonable employer would have decided, and how it would have acted in the circumstances of the actual employer. Importantly, this inquiry is not limited to deciding whether or not serious misconduct occurred – it extends to considering all elements of the process and the employer's decision about the appropriate outcome.

CONCLUSION

This case highlights that there are three stages before dismissing an employee:

- 1 Determining the process which should be followed before reaching a decision.
- 2 Deciding whether there is sufficient reason to dismiss.
- 3 Determining whether there are any other options open to the employer.

This case also serves as a reminder for employers to advise employees of the possible outcomes to an investigation and giving an employee an opportunity to respond to these. This may also include a preliminary decision and the reasons behind it.

EMPLOYMENT RELATIONS TEAM

If you have any queries in respect of the above, or any other employment law issues, please contact a member of Lane Neave's

Employment Relations Team: Glenn Jones, Andrew Shaw, David Caldwell, Amy Shakespeare and Fiona McMillan.