

Update on Recent Employment Law Developments

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Agenda

- Justification for dismissal
 - test of justification
 - serious misconduct
 - unjustified actions
- Collective bargaining
 - communications during bargaining
 - passing on
 - replacement labour in industrial action
 - union access

Justification for dismissal



Test of justification (1)

- Statutory test – s103A Employment Relations Act
- Whether a dismissal (or action) is justifiable:
 - determined on an objective basis
 - the employer's actions
 - what a fair and reasonable employer would have done, in all the circumstances
 - at the time the dismissal or action occurred
- A reasonable employer, not a disinterested bystander

Test of justification (2)

- *Fuiava* (EC)

- employee's wife packed two aerosol cans into package for air carriage and employee declared he had packed items and there were no aerosols
- employee dismissed for serious misconduct
- relevant facts as to whether dismissal justified:
 - conduct of worker and employer
 - history of the employment
 - nature of the industry, its customs and its practices
 - good industrial practice
 - terms of the employment agreement
 - circumstances of the dismissal
- dismissal justified

Serious misconduct

- *Wood* (ERA)
 - employee forwarded an email depicting obese body images and woman's head on body of male
 - employee dismissed for serious misconduct
 - ERA held dismissal did not meet s103A test
 - employer was not consistent in applying its email policy
 - fair and reasonable employer would not have considered the email offensive

Unjustified actions (1)

- *Chin* (EC)

- employee was accused of conspiring with her husband, who had failed business dealings with employer and client
- employee told to sign employment agreement or there would not be a position for her
- employee and her husband visited at home by employer about business transactions – police had to remove employer
- Court held clear breaches of duty, constructive dismissal

Unjustified actions (2)

- *Subway* (settled)

- employee dismissed for sharing a drink with a friend during a break
- employer contacted police, employee arrested, held in custody for 2 hours, and was charged with theft of two cups of diet coke
- case settled but note unintended consequences of employer's actions – employer may be liable for police action if decision to treat employee that way is unjustified

Collective bargaining



Communications during bargaining

- Court of Appeal has clarified that an employer can communicate with employees during bargaining, but the employer:
 - must not directly bargain with individuals where they have an authorised representative
 - must not undermine or do anything that is likely to undermine the bargaining or the authority of the other party in bargaining
- Importance of bargaining process arrangements / protocols

Passing on (1)

- Breach of good faith to pass on terms in a collective agreement or terms agreed in bargaining, if:
 - employer intends to undermine the collective agreement and actions have that effect
 - employer intends to undermine the bargaining or actions have that effect

Passing on (2)

- *NDU v GDL* (Employment Court)
 - same pay rate irrespective of union membership
 - collective agreement offered 60c per hour increase
 - individuals offered 5 or 5.2% increase
- Court held increases offered were not “substantially the same” as the collective agreement
- No intention of undermining the collective agreement
- No effect of undermining the collective agreement

Replacement labour (1)

- ERA prevents employers engaging others to perform work of striking or locked out employees except:
 - already employed by the employer
 - not employed principally for that purpose
 - agree to perform the work
 - health and safety grounds
- Covers employing and engaging contractors

Replacement labour (2)

- *NDU & EPMU v GDL & The Supply Chain*
(supermarket distributions)
 - union members went on strike, then locked out
 - public notice that “other methods” of supplying goods to supermarkets had been implemented
 - Linfox – entirely separate trucking company – was picking and packing goods and distributing them
 - Court held that suppliers not the employer had made alternative arrangements
 - no arguable case, so no injunction granted

Union access (1)

- Statutory right of union access provided in s20 ERA for discussion between an employee and a representative of a union
- ERA Amendment Act (No 2) 2004 inserted new subsection (4) (and also a subsection (5)):
 - access must not exceed a reasonable duration
 - access not to be treated as a union meeting for the purpose of section 26

Union access (2)

- *Terry Young Limited v NZEPMU*
 - issue was whether union access under s20 is limited to discussions with employees on individual basis
 - Court held unions entering workplaces may hold discussions with employees individually or collectively, as ERA promotes collectivism, stated purposes of access collective
 - references to employees in the singular not determinative, instead provides the “minimum qualifying standards” for access
 - addition of subsections (4) and (5) was not intended to confine the scope of meetings

Questions



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