

The right remedy?

In the current economic climate, being without a job is an even less attractive proposition than it has been previously. It's not surprising then, says Bridget Smith, that applications for reinstatement—the primary remedy—appear to be on the rise.

WEARING YOUR EMPLOYEE HAT FOR A MOMENT, IMAGINE yourself in this situation: you develop a suspicion that your employer wants to get rid of you. What do you do?

If the one thing the employer wants is to get rid of an employee by removing them from the workplace, the most leverage the employee has comes from remaining in their role, together with threatening an urgent application for reinstatement if they are dismissed. The minute the employee indicates that they would be willing to go, even if it is for a price, the dynamic changes and it is no longer a question of whether the employee will go but when, and for how much.

So, as an employee, if you suspect your employer wants to get rid of you, and you don't want to go, the best advice is often to bolt yourself to your seat and make it clear that you have no intention of going anywhere. At any price.

Of course, that only works if the employer's rationale for the proposed termination of employment is baseless and would be unlawful. If the employer has a lawful reason for seeking to terminate an employee's employment, other approaches, such as discussion and negotiation, may be more constructive.

As an employer, the question is more commercial and pragmatic. How much it is worth to me for the employee to leave, and is it worth the risk—particularly given that reinstatement is the primary remedy.

If an employer does elect to terminate the employee's employment, and this is challenged by the employee, the question is: what next? In the current economic climate, being without a job is an even less attractive proposition than it has been previously. While there will still be some employees who will be able to see it as an opportunity to up-skill, retrain or try another role or even industry, for most,

employment equals financial security—which means paying the mortgage and feeding and clothing the children. It should come as little surprise then that at a time when it is likely to be harder to find new employment following dismissal, anecdotal evidence suggests that applications for reinstatement are on the rise.

We all know that reinstatement is the primary remedy under the Employment Relations Act 2000. This means that if an applicant wants to be put back into their old job as their main remedy, they should receive that—unless there is good reason not to. The limitation on the remedy is that the Act specifies that reinstatement must be 'practicable', meaning that the Authority should not reinstate an applicant where the relationship between the parties has broken down to the extent that it is not workable.

I must disclose that I have long harboured doubts about reinstatement from a practical perspective. It is easy to understand raising it from a strategic perspective—employee realises the employer wants them gone so the best thing to do is make it clear that they have no intention of leaving and, if dismissed, will seek reinstatement. When the employer wants the employee gone, the most leverage the employee has is in remaining in their role and refusing to leave.

However, the practicality of returning to the workplace after the employer has dismissed an employee—particularly where the employer has made it clear they wanted the employee out to such an extent that they were prepared to take legal risks to achieve that—makes me wonder how workable that relationship can be in the future. The answer, I suspect, lies in goodwill on both sides. But whether that can exist is quite another question.

Beyond considerations of the practicality of reinstatement as a remedy, particularly in the current climate, reinstatement has attracted

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REINSTATEMENT

The reality is that reinstatement remains the primary remedy. In the current economic climate, with new employment hard to come by and applications appearing to be on the rise, employers would be well-advised to continue to be mindful of that.

media attention following two relatively recent cases: the Court of Appeal's decision in *Commissioner of Police v Hawkins*, issued in May this year, and in *Morgan v Doug Hood Mining Limited*, a decision of the Employment Relations Authority, again in May this year.

In *Hawkins*, the Court of Appeal declined to grant leave to appeal on the following question: was it open to the Court to reinstate Mr Hawkins given that nearly seven years had passed since his departure from the police, which was found to be constructive dismissal? Accordingly, the way has been paved for the law to develop further in this area. However, it was confirmed that it was open to the Court to reinstate Mr Hawkins, even though he had previously disengaged (on medical grounds, under the Police Act). Thus, the case remains a precedent for the reinstatement of an employee, even seven years after the termination of the employment relationship.

The other case of note is the decision in *Morgan* in which Mr Morgan, who made an operational error costing his employer in

excess of \$1 million, was not only reinstated, but also awarded lost wages and compensation.

To briefly summarise the facts, Mr Morgan was working at a mine when the excavator he was operating over-balanced and rolled. This resulted in substantial damage to the excavator (the repairs apparently cost approximately \$1 million), together with a loss of revenue to the company while the excavator was out of action.

The company investigated the cause of the accident and determined it was operator error—Mr Morgan's fault. It relied on that as a lawful basis for dismissing him. As noted above, Mr Morgan successfully challenged the dismissal. The Employment Relations Authority held that there were a number of significant failings in the procedure followed by the company, including that it had failed to commence a separate disciplinary investigation as a result of its investigation to determine the cause of the accident. That is, it found that operator error was the reason for the accident and

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The power of intention

People who set goals are most likely to achieve them, but Kaye Avery questions whether SMART goals are the best way to go, or whether a firmly held intention will have greater impact. She discusses career goal-setting in an unstable world situation.

that it followed that Mr Morgan should be dismissed, without a separate enquiry and opportunity to respond to the allegation of serious misconduct.

As part of its decision, the Authority examined whether a fair and reasonable employer would have determined that Mr Morgan's actions were serious enough to justify summary dismissal. It held that in assessing whether a single error could justify dismissal, a fair and reasonable employer would take into account: the conduct and related events; the consequences of the conduct; the employee's role; the employee's seniority and experience; and the nature of the employer's business.

Examining the decision in the context of reinstatement as the primary remedy, the Authority determined that Mr Morgan should be reinstated to his previous position given his excellent work record and the fact that he was an experienced operator. It weighed this ahead of the consequences of Mr Morgan's conduct for the company.

The company argued, unsuccessfully, that it could not continue to have trust and confidence in Mr Morgan to perform his role, given this serious error and the significant consequences for the company and that it was concerned that it was a driver error. However, that was not accepted. The Authority in fact held that this type of conduct should have resulted in a written warning and not dismissal.

Couple this decision with consideration of the recent conduct of the Westpac employee whose misplaced decimal point error cost the bank approximately \$3.8 million. While the employee was not dismissed for that error, it appears if she had been—and had sought to challenge that dismissal (provided there was no evidence of negligence or recklessness)—then applying the principles of this decision, Westpac may well have been ordered to reinstate her.

Interestingly, this employee has since been dismissed following a subsequent error in which she keyed in the wrong loan amount. While that error did not result in a loss for the bank, it appears to have been the straw that broke the camel's back. As yet, I do not know whether the employee has either challenged the decision or sought reinstatement, but the results could be interesting.

So what is the message to take from all of this? The reality is that reinstatement remains the primary remedy. In the current economic climate, with new employment hard to come by and applications appearing to be on the rise, employers would be well-advised to continue to be mindful of that.

These recent decisions indicate that reinstatement will be awarded by the Authority and the Employment Court, even after a significant absence from the workplace, where it is thought to be practicable. **ef**

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In this changeable and unpredictable world of work, goal-setting can be a frustrating exercise. There is significant evidence, though, that people who set goals are most likely to achieve them—that is, if the goals themselves are congruent with an individual's motivators, real engagement and self-confidence.

As a career coach, however, I am very cautious about the wisdom of some goal-setting processes, in particular the SMART process—Simple, Measurable, Achievable, Results-focused and Timely.

SMART goals tend to be extrinsically motivated, rather than being internally referenced. Accessing internal drivers and taking into consideration the possible ecological impacts of choices made is a better predictor of success. When career decisions and first steps are congruent, the likelihood of 'success' is greater.

The limitations of SMART goals include placing a measure on the success of the goal, which can be a distraction from the true value of the achievement. Creating a goal that is 'achievable' is wise and realistic; however, I often wonder what opportunities might be passed by if one is open to broader possibilities. I also wonder what learning might be missed when 'results' don't happen within the timeframe ('timely') one predetermines?

In my view, a firmly-held and well-grounded intention is more likely to open up someone's experience and the opportunities that unfold. I encourage people to think deeply about what is important to them in their lives. Having even a vague idea of purpose or a long-term vision for one's self is an excellent beginning.

Next, steps can be identified and the adjustments and contextual considerations made in a far more ecologically sound way.

Let's compare two different ways of presenting a career goal identifying the different approaches:

- To be enjoying and building competence in XYZ field—the Intention approach;
- To have established a profile in the XYZ field by December 2010 and be earning \$80K per year—the SMART approach.

The first offers an intrinsic value and quality, whereas the second is externally focused, with measurable results. To me, the first example is more likely to have sustainable results, given that the individual has enough courage and determination to work through hurdles.

By digging deeper into a more intrinsic sense of purpose, we are more likely to find ways to have more-meaningful careers and to make a contribution. Self-help books abound on this subject and we all know people who live with a very clear sense of what they are about. They seem to take hurdles as they come because there is a greater purpose they are intent on.

In *The Power of Intention*, Dr Wayne Dyer describes intention as "a strong purpose or aim, accompanied by a determination to produce a desired result."

But his whole thesis in this book is about the power of a greater intention than the egocentric one, which is limited by our limited beliefs and desires. He proposes that the more 'spiritual' orientation of intention is more likely to create a field of energy that manifests experience greater than our limited dreams.

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