Higher standards for justifying dismissal, 27 May 2015

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Industrial and employment relations practitioners are debating whether recent decisions of the Employment Court have raised the standard of proof and investigation standards that an employer is required to meet before reaching a decision to dismiss an employee.

What should be considered the current standard of proof following these recent judgments, and what practical advice is available on how disciplinary investigations should be carried out in light of these new decisions?

The standard of proof

In justifying any dismissal, s 103A of the Employment Relations Act 2000 (ERA) requires an employer to establish that the process followed in reaching that decision was what a fair and reasonable employer could have done in all of the circumstances. It has long been the case that an employer does not need to be satisfied beyond reasonable doubt (ie to the criminal standard of proof) that the conduct in question occurred in order to justify a dismissal. All that is required is that the employer follows a fair and reasonable process and that when viewed objectively the decision to dismiss was one of the disciplinary outcomes that could have been taken by the employer in the circumstances of the particular disciplinary matter.

That principle has been applied in various judgments, including the Court of Appeal's decision in *Airline Stewards & Hostesses of New Zealand IUOW v Air New Zealand* [1990] 3 NZLR 549 . It held:

> Put briefly an employer in the conduct and management of its business, is not called upon to sit in judgment on an employee and require proof beyond reasonable doubt of alleged misconduct. When an incident occurs which raises the question of misconduct by an employee, the employer is required to act fairly in considering the interests of the employer's business and the employee's employment in that business.

In *Warehouse* v *Cooper* [2000] 2 ERNZ 351, Chief Judge Colgan held:

> It is fundamental employment law that an employer considering allegations of serious misconduct by an employee is not required to conduct a criminal or civil trial or to employ a judicial process … in all cases where employers investigate allegations of misconduct by employees, they may be said to be judges in their own cause. That is the nature of the employment relationship. The decision-maker is not an independent and disinterested third party for whom such rules of natural justice might be appropriate.

Has the Employment Court imposed a more stringent standard of proof?

Later this year or in early 2016, the Court of Appeal will consider whether the Employment Court has raised the standard of investigation required to be reached by an employer before it dismisses an employee. In *A Ltd* v *H* [2015] NZCA 99, the Court of Appeal granted leave to appeal against a decision of the Employment Court and said:

> It is reasonably arguable the Employment Court imposed a standard of inquiry which was too stringent and which bordered on the equivalent of a judicial investigation.

The Court of Appeal granted leave to appeal the question:

> Was the approach of the Employment Court in determining whether A Limited had sufficiently investigated the allegations against H for the purposes of s 103A of the Employment Relations Act 2000 correct in law?

Until the Court of Appeal addresses the issue, the question at the forefront of most employment and industrial relations practitioners is how can employers meet the high standard imposed by the Employment Court in light of recent judgments. Three cases in which the Employment Court held the employer fell below the required standard are noted below and advice is given on what employers must do to meet the standard required at present.

Howard v Carter Holt Harvey

In *Howard* v *Carter Holt Harvey* [2014] NZEmpC 157, an employee was dismissed for assaulting a fellow employee. Mr Howard was a long-term employee of Carter Holt Harvey (CHH) in Christchurch. During a shift, Mr Howard punched another employee (Mr Lal) in the face because he believed that Mr Lal had "pinged" an elastic band at him on purpose.

Upon learning of the incident a few days later, CHH commenced an investigation and conducted interviews with multiple witnesses.

The Court held that the CHH's process was deficient, because:

- No enquiries were made on the day of the incident.
- The initial phase of the inquiry focused only on whether Mr Howard had punched Mr Lal and not the logistics of the incident, ie whether the punch could have been 'reflexive' as argued by Mr Howard.
- Interviews were not recorded in full which led to evidence being omitted.

The Court held that the possibility that Mr Howard had been hit multiple times with elastic bands was not a possibility adequately investigated by CHH.

Harris v The Warehouse Ltd

Ms Harris was employed as a security officer by The Warehouse Ltd (The Warehouse). The role involved significant customer interaction and required an ability to adequately manage any conflict with customers which might arise.

A customer entered the Warehouse store carrying a small dog in contravention of The Warehouse policy. Ms Harris asked the customer to remove the dog from the store. The customer refused and Ms Harris repeated the request. The customer complained that Ms Harris was rude, used offensive language and yelled at the customer across the store in front of other customers and staff members.

The store manager commenced a disciplinary investigation during which time Ms Harris was suspended on full pay. A dispute arose over what happened when Ms Harris repeated her request. Several employees and customers were interviewed, and CCTV footage of the incident was taken into consideration. There were conflicting accounts from the different witnesses about whether Ms Harris had behaved inappropriately and, if so, to what extent. This included whether or not particular words were used by Ms Harris. There had been no previous complaints made against Ms Harris.

Further disciplinary meetings were held where Ms Harris was asked for her explanation. While she primarily denied making any rude or racist comments to the customer, she later admitted that she had called the customer "arrogant" and offered to provide a written apology. After taking an adjournment to consider Ms Harris' explanations, the store manager prepared a written preliminary statement outlining why he believed her version of events was inconsistent with the CCTV footage and other witness accounts. Ms Harris was dismissed summarily following an opportunity to comment on the preliminary outcome.

The Employment Court held that a fair and reasonable employer in the circumstances of the case could not have dismissed Ms Harris. This finding was made on a number of grounds, including:

- The Warehouse gave too little weight to the substance of the explanations provided by witnesses during the disciplinary meetings and by other witnesses and relied too heavily on its own interpretation of the CCTV footage.
- There were inconsistencies between different witness accounts, and those accounts and the accounts of the customer complainants had not been properly tested during the disciplinary investigation.
- The Warehouse provided a fulsome apology to the customer that attributed fault on the part of Ms Harris and The Warehouse at the outset which in some way tainted the overall decision to dismiss as it suggested predetermination of the investigation.
- The tone and content of parts of the customers' complaints about Ms Harris were not treated with the degree of critical assessment that should have been provided in light of all of the circumstances of the matter including the words of the complaint itself.
- The Warehouse had declined to interview an employee who was close by until later in the investigation, because it believed (following an examination of the CCTV footage) that the employee had been engaged with a customer at the time. The Court noted that the store manager had later interviewed this witness but did not give her evidence any weight and took no records of that interview. The Court noted the employee had said that, if Ms Harris had shouted at the customer, she would have heard based on previous incidents of this nature, and the employee's evidence was not relayed to Ms Harris during the investigation process. The Court said it was relevant information and could have provided Ms Harris with a persuasive submission to provide as feedback during the investigation.
- The employer did not act in a fair and reasonable manner when the store manager and his team destroyed all notes of interviews conducted.
- When The Warehouse undertook the investigation it did not properly test differing witness accounts of the incident.

H v A Ltd

The case of *H* v *A Ltd* [2014] NZEmpC 189 concerned a pilot who was dismissed from his employment with A Ltd following a disciplinary investigation into serious misconduct.

Mr H and Ms C gave conflicting accounts of what had occurred. According to Ms C, Mr H entered her bedroom, sat on the bed and touched her leg inappropriately. Mr H denied misconduct, stating that when he had entered her bedroom and sat on her bed, he had not touched her leg inappropriately.

The fleet manager conducted an investigation into the incident. Ms C had provided a written statement, and Mr H also prepared and submitted a summary of events. At the first meeting, Mr H was asked a series of questions and answers were given. The other flight attendants and manager on the trip were also interviewed.

Mr H was provided with a copy of Ms C's complaint and notes of the interviews conducted with the other crew members. Mr H was informed that if the allegations were found to be true, this would constitute sexual harassment under the harassment policy and amount to a breach of the code of conduct.

Further meetings were conducted where Mr H was asked to provide his response to the witness statements, and comment on the assertions made by Ms C. Mr H's representative raised a concern that the crews' accounts were problematic as they had clearly discussed the matters among themselves, which would colour their hindsight.

The fleet manager conducted further interviews with Ms C and Mr B (the Captain), copies of the interviews were then provided to Mr H and he was asked to respond. Mr H was questioned on the inconsistencies between his account of events and the crew members' accounts.

Following this meeting, the fleet manager prepared a findings document which he presented to Mr H and his representative. This document outlined in detail the steps taken in the investigation and the different evidence considered. The document concluded that the fleet manager had considered all the evidence and reached the conclusion that Ms C's account was more likely to be accurate. He provided reasons for this conclusion including the fact that it was "inexplicable" that Mr H would enter a flight attendant's room and sit on the bed next to her. He concluded that Mr H's actions amounted to serious misconduct and he was considering terminating Mr H's employment. The fleet manager said that he had considered alternatives but believed it was appropriate to terminate Mr H's employment effective immediately.

The Employment Relations Authority found that the decision to dismiss was substantively and procedurally justified. Mr H appealed to the Employment Court.

The Court considered that a key issue was whether the allegations were considered in an "even handed" manner, and said that s 103A of the ERA requires a consideration of all the circumstances. This included a consideration of whether the evidence obtained was sufficient in respect of such a serious allegation.

In finding that the dismissal was unjustified, the Court held:

- A Ltd had not followed a consistent procedure when interviewing the witnesses. For example, Mr H was the only person interviewed whose interviews were recorded verbatim and who was questioned in considerable detail.
- The fleet manager had not fully examined the possibility that Ms C had been influenced by the opinions of the other flight attendants.
- The fleet manager failed to give sufficient weight to his finding that he did not accept Ms C's recollection of events leading up to the incident when he made his decision. A Ltd had an obligation to vigorously test all the evidence and failed to do so because only Mr H was subjected to repeated and detailed questioning. A Ltd failed to genuinely consider all possible alternatives to dismissal.

The Court held that these procedural defects amounted to "significant breaches of natural justice" and A Ltd had not conducted a fair and reasonable investigation, or adequately considered Mr H's explanations.

As noted, A Ltd has been given leave to appeal by the Court of Appeal on an important question of law, being the high standard required of employers in conducting investigations.

Comment

Whether or not employers are being held to an increasing higher standard of justification will remain a matter of discussion among employment and industrial law practitioners until such time as the Court of Appeal hears and determines the *H v A Ltd* appeal.

In the meantime, to meet the high standards imposed by the Employment Court in the cases noted above, employers should:

- ensure that an investigation into misconduct is commenced at the first available opportunity
- when any explanation is put forward by an employee, investigate and test the veracity of the explanation (eg in the *Howard* case, the employer should have visited the area in which the incident occurred so as to consider the distance between Mr Howard and Mr Lal to fully assess whether the punch could have been "reflexive" or "retaliatory")
- in absence of complete audio transcripts, carefully take notes that accurately record the details of any incident, any explanations put forward and all investigative steps that have been taken by an employer
- be consistent with their note taking and keep an accurate record of all evidence that is taken during an investigation
- make complete transcripts of meetings (it is unwise for employers to later compile typed notes that are "based on" handwritten notes that were taken at the time)
- ensure that any employee signs any notes taken at meetings as an accurate record of what took place

• preserve any notes taken during any investigation
• ensure that a consistent line of questioning is applied to all witnesses
• remember the process an employer follows will be subjected to objective scrutiny, including whether or not findings are open to an employer based on the evidence it uses in an investigation
• test inconsistencies between witness accounts with the witnesses themselves before preferring the evidence given by one witness over another, and
• give information that supports an employee's case to the employee to comment on during an investigation.