

Employment Update

Good Faith After Termination – Waiariki case raises contempt issues

The Employment Relations Authority at Auckland has recently released a decision in the case of *Manoharan & Anor v The Chief Executive of Waiariki Institute of Technology*. The main issue in the case was whether the dismissal of two employees for serious misconduct was unjustified based on a procedural error.

The more unusual feature of the case is that, following the filing of the claim for unjustified dismissal, the employer sent an email to its remaining employees instructing them not to provide the dismissed pair with any support (with regard to their claim). The Claimants applied to the Authority for remedies for contempt and the Authority advised the Chief Executive of the employer (Dr Borren) to withdraw the instruction or he would be ordered to do so. It took Dr Borren over 2 weeks to send the email retraction to his employees.

The “contempt” application is in fact a claim under two heads - 134A of the Employment Relations Act 2000 (delaying or obstructing an Authority investigation) and breach of the duty of good faith implied into every employment agreement. The duty continues even *after* the termination of the employment relationship.

Obstructing the Investigation

The Authority found that sending the initial email instruction, and taking more than 2 weeks to retract it, was a breach of s134A. The standard is that there was potential for the instruction to obstruct the investigation, whether it actually did or not.

Further, the Authority found that the duty of good faith continues beyond termination, at least until the Authority’s investigation is complete. This duty is implied as a part of every employment relationship by section 4 of the Act. By sending the email, Dr Borren was found to have attempted to “disable any opposition to him in response...to the personal grievance” and that this was a breach of the duty of good faith.

The Authority’s approach reflects their view that an investigation is to be a fact gathering exercise to be greatly assisted by parties having access to witnesses and evidence. Having made the above findings the Authority did not make an award but referred the parties to a further mediation to decide on quantum. They did reference an analogous case where the penalty awarded was \$20,000.

Avoiding the Same Mistakes

This entire chain of events stemmed from a procedural error in what could have been a situation of straightforward dismissal for serious misconduct. This is far from novel and serves as yet another reminder to employers that, regardless of the actions of an employee, the correct procedure must be followed in any disciplinary action for misconduct.

If a claim is made against an employer in the Authority, the employer must carefully manage its response to any requests for information and how it deals with any potential witnesses (including current employees). The duty not to obstruct the investigation coupled with the ongoing duty of good faith may require specific steps be taken or systems put in place to avoid an employer finding itself deemed obstructive.

If you are an employer or employee currently involved in a disciplinary situation for misconduct in employment, we can provide you with assistance to ensure that the correct procedures are followed.

Jackson Russell Employment Specialists –

**Glenn Finnigan, Partner
Simon Davies-Colley, Solicitor**

For specific advice

If you have any questions or would like assistance with these or any other legal matter then please let your usual Jackson Russell contact, or Darryl King, Partner (Business Law); Glenn Finnigan, Partner (Employment); Mark Sullivan, Partner (Dispute Resolution and Insurance)

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