

## Justification and Reinstatement Tests Explained

The Employment Court has released a decision explaining recent changes to the unjustified dismissal regime in the Employment Relations Act 2000. The decision heard two cases at the same time, both involving employees of Ports of Auckland. While the substantive cases for Mr McKean and Mr Angus will not be heard until 2012, this decision sets out how the new tests for justification for dismissal and reinstatement are to be applied.

### Justification

The key change to section 103A is that an employer's actions must be what a fair and reasonable employer *could* have done in the circumstances (instead of "*would* have done" which was the wording in the Act prior to the amendment). The Court found that this change was significant and contemplates that, depending on the situation, a reasonable employer might take one of several different actions when considering what to do where misconduct has occurred. In other words, a dismissal or some other action by an employer need only be within a range of steps a reasonable employer might take.

As well as finding that the changes were significant, the Court drew attention to those areas of the law which were not changed. Features relating to dismissal which remain the same include:

- The requirement for procedural fairness;
- The fact that minor defects in process will not hinder an otherwise justifiable action; and
- The statutory considerations which an employer must take into account when deciding how to act.

The Court emphasised that different actions may be appropriate (or not) in different industries. So the phrase "in all the circumstances" includes taking into account the practices and nuances of particular industries.

The justification test itself has been presented in a helpful three stage format:

1. The Authority/Court must first determine the facts as to what the employer actually did leading up to the dismissal/disadvantage of the employee, and how the employer did it.
2. Secondly, relying on all relevant materials and its expertise, the Authority/Court must determine what a fair and reasonable employer *could* have done, and how it could have done it, in all the circumstances at the relevant time.
3. Finally, the Authority/Court must determine objectively whether the actions of the particular employer were what the fair and reasonable employer could have done *bearing in mind that there may be more than one justifiable process and/or outcome.*

## **Reinstatement**

The Court also examined the new section 125 test for reinstatement as a remedy for a personal grievance. The new test does away with the requirement of reinstatement as the primary remedy, allocating it “no more or less prominence than the other statutory remedies”.

In deciding whether reinstatement should be ordered, the Authority/Court must consider not only whether it would be practical but also the reasonableness of such an order. As before, it must take into account the effects of such an order on the individual employer and employee. Now, however, consideration must also be given to the impact on other affected employees of the same employer and possibly other individuals. The Court gives the example of health care patients who would be affected by reinstatement of an employee.

## **Practical Application**

Over all, these changes are good news for employers as the tests are no longer as rigid. The new justification test aims to avoid punishing employers where dismissal is one of several reasonable actions. Having said this, the Court affirmed several existing requirements for employers including getting the procedure right. The clear message is that, while the test may be more relaxed, an employer still cannot get away with firing people without good cause and/or following the correct process.

If you are currently having issues with an employer/employee relationship, or simply want some advice on how these recent changes could affect your situation, we are available to provide cost-effective assistance tailored to your needs.

**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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