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Employment Court discusses new test for dismissal justification

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A decision of the Employment Court in July 2012 has shed light on the implications of the 2011 changes to the test for unjustified dismissal.

Section 103A of the Employment Relations Act 2000 was amended from 1 April 2011. The test for whether a dismissal or other disciplinary decision by an employer is justified is now decided by reference to whether the actions of the employer were what a reasonable employer *"could"* have done in all of the circumstances. Formerly, the test was what a reasonable employer *"would"* have done.

In *de Bruin v Canterbury District Health Board* [2012] NZEmpC 110, the Employment Court considered the case of Mr de Bruin, an experienced mental health nurse who, in the course of managing a difficult patient, responded to an attack on him by slapping the patient's face.

Mr de Bruin was summarily dismissed for this action, and this decision was later upheld by the Employment Relations Authority.

In a reversal of the Authority's decision, the Court found that Mr de Bruin had been unjustifiably dismissed and reinstated him to his former position. As it was found that he had contributed to the situation, however, he received no further remedies (despite having lost $44,000 in wages since his dismissal).

The basis for the decision being reversed on appeal related primarily to the investigation undertaken by the employer. The Court found that there were a number of deficiencies in this investigation, including:

- An incorrect finding by the employer that the slap was deliberate, in the face of evidence suggesting that it was an automatic reaction.
- The failure to put to witnesses the conflicting evidence as to whether Mr de Bruin had also placed his knee on the patient's chest.
- Mr de Bruin being told that a particular manager, rather than a presiding panel, was the decision maker in his case.
- The panel did not properly investigate how hard the slap was, which it needed to have done in order to conclude that what Mr de Bruin did was serious misconduct. The Court noted that not every touch to the face would constitute serious misconduct.
- Mr de Bruin's long service as a nurse (40 years) was seen by his employer as an aggravating factor, in that he should have been able to restrain

himself. The Court held instead that his long service, with no prior incidents of this nature, ought to have been considered in his favour.

- There were a number of circumstances in Mr de Bruin's personal life which contributed to his unusual behaviour and these ought to have been properly considered.

Overall, the Court was reassured that Mr de Bruin could and would continue safely to practice. This view was supported by an interim decision of the Nursing Council which had said that Mr de Bruin could continue to practice whilst his case was determined. Mr de Bruin's attitude was also significant, in that he admitted what had occurred, took personal responsibility regarding the incident and was committed to improving his practice. The Court considered, as required by section 103A, whether the procedural deficiencies were minor but ultimately reached the conclusion that unfairness had occurred and Mr de Bruin was unjustifiably dismissed.

While this decision may seem surprising, it reinforces the emphasis in the legislation on the completion of a proper and thorough investigation (taking into account the employer's resources). It also demonstrates that reinstatement can be a particular risk for employers in professional or specialist lines of work, where a dismissal decision can affect the employee's future ability to work in their chosen profession by, for instance, affecting their ability to hold a practising certificate. It also is indicative that the change to section 103A, intended by the government to make dismissal decisions easier for employers, has not, as yet, had that effect as the overall principles of reasonableness and fairness remain firmly in place.

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