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Editorial

Issue 6 Editorial

Susan Hornsby-Geluk, General Editor and Partner, Dundas Street Employment Lawyers

At the recent New Zealand Law Society Employment Law Conference there was a strong focus on access to justice and alternative dispute resolution. We were challenged about how we could change the existing framework to make it accessible to the more vulnerable groups in our community, and how we could establish processes which look at supporting and maintaining employment relationships and which maintain dignity and mana.

Despite this there are situations in which dismissal is necessary and appropriate. The least that we can do as practitioners, for the benefit of both employees and employers, is to ensure that the process is effected as fairly and as well as it can be.

Botched dismissals, which end up in litigation, prolong the stress and financial implications for all parties — except perhaps the lawyers. This edition therefore focuses on some of the difficult dismissal situations, with a view to supporting lawyers to provide the best possible advice to clients.

Greg Cain and Katie Alexander from Dentons Kensington Swan have written about business interruption dismissals. This has been a front-of-mind issue for all of us this year, particularly in those very uncertain weeks of Level 4 lockdown. Now, as we turn our attention to the resultant litigation from that period, considering the various options for dismissal in a pandemic, fire, earthquake or other business interruption event again becomes critical. The thoughtful analysis from Greg and Katie provides a clear guide on the options and pitfalls.

Alastair Espie and Caitlin Sargison from Duncan Cotterill have provided an in-depth analysis of interim reinstatement cases. In addition to setting out a clear breakdown of the legal test for interim reinstatement, including the factors which have influenced determinations one way or another, their article also details some interesting trends. This becomes particularly important as we deal with the inevitable COVID-19 backlog in our employment institutions, which seems certain to increase the number of interim reinstatement cases.

Erin Burke of Practica Legal has written about incompatibility. Dismissal in such situations is necessarily rare. She considers recent case law and discusses the negative impacts of incompatibility situations in the workplace. Erin also provides some insight into a strategy that could be used in these cases to avoid an incompatibility dismissal.

Dismissal for serious misconduct is perhaps the type of dismissal that most people think about when they think about a person being "fired". It strikes at the heart of the employment relationship and is often the subject of media stories. Rebecca McLeod from Preston Russell Law writes about the test for dismissal for serious misconduct, the focus on reasonableness, and the threshold for finding that serious misconduct has occurred.

Our Q and A for this issue is with James Crichton. Jim was the Chief of the Employment Relations Authority for over 15 years, finishing up in January this year — a substantial achievement and contribution for any individual. He has provided some insight about the Authority's drift to a more legalistic framework, and the advice he gave the incoming Chief, Dr Andrew Dallas. Jim advocates for a 180-degree change in the current approach to naming parties in the Authority, a change in how costs are handled, and considers that statutory change may be needed for dependent contractors. His thoughts on some of these critical issues, after such a long career with the Employment Relations Authority, are of real value to all practitioners.

It was a pleasure to see many of you at the New Zealand Law Society Employment Law Conference here in Wellington in late October 2020. There were some very thoughtful and insightful presentations from our legal community. For those who attended, I hope that like me, the conference left you feeling revitalised and inspired.

As always, please contact me with any feedback or thoughts (susan@dundasstreet.co.nz). Here's to a more peaceful and predictable 2021. Ngā mihi o te Kirihimete me te Tau Hou.

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Articles

Dismissals in the context of a business interruption event

Greg Cain, Partner and Katie Alexander, Solicitor, Dentons Kensington Swan

Introduction

It is safe to say that 2020 did not turn out as many businesses had expected. In the employment context, the advent of COVID-19 has left some employers and employees facing a situation where they no longer can fulfil the contractual obligations of their employment relationship. Whether the event is a global pandemic, or a major natural disaster, in times of unexpected crisis the most basic components of an employment agreement become difficult. Parties are suddenly grappling with issues such as whether employees can work, and what they should be paid.

Large numbers of businesses have been put in a position where they were forced to consider making changes to ensure their continued viability, including reducing operating costs and letting staff go. Following the lockdown, the impact of COVID-19 continues to be significant, and many employers (and their advisers) want to know what factors they need to consider when deciding whether to reduce headcount.

Redundancies

Can COVID-19 be used as a reason to justify making staff redundant?

The answer (seemingly surprising to many) is that COVID-19 has not displaced the normal rules. While the restrictions imposed by the Government have been unprecedented, existing employment law obligations continue to apply, including in a redundancy context. This includes providing a sufficient rationale, and following the usual rules of procedural fairness (particularly when consulting on a restructuring proposal, carrying out any selections, and exploring redeployment). The fact that the country went into a lockdown does not in itself mean an employer can shortcut the process.

What about the Government Wage Subsidy — is an employer obliged to apply?

This section discusses whether an employer that had an adequate business case for a restructuring became murkier with the introduction of the Government Wage Subsidy (GWS). The requirements attached to the GWS, such as that employers must continue to pay their employees at least 80 per cent of their normal income, and that those who could not afford to were still required to pass on at least the value of the subsidy to their employees, complicate the position. Has an employee been unjustifiably dismissed if the employer could have applied for the subsidy but chose not to?

The decision of the Employment Relations Authority in *de Wys v Solly's Freight (1987) Ltd* suggests perhaps not.[1] In this case, two employees raised a claim for unjustifiable dismissal after they were made redundant on 2 April 2020 (very near the beginning of the Level 4 lockdown). Although Solly's originally applied for the GWS on behalf of the two employees, on the morning of 2 April 2020, Solly's advised the Ministry of Social Development to remove the two employees that it intended to make redundant from the GWS application. The two employees were advised later that day that they were being made redundant.

The Authority concluded no fair and reasonable employer could have decided that the two employees had genuinely become surplus to the company's requirements on 2 April 2020, when its communication beforehand was reassuring about their employment for at least the short term if the GWS was received, and Solly's knew or ought to have known that the GWS would soon be paid. Solly's could have alerted the employees to the fact it was considering excluding them from its application for the GWS. It did not, and that was not forced on it by external factors beyond its control. The dismissals were therefore unjustified.

Solly's was ordered to pay almost $60,000 in lost wages and compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 to the two employees.

While the case has little precedent value, it is interesting that the Authority's concern around the GWS in this case was not whether the employer should (or should not) have applied for the GWS. Rather, the Authority's criticism was directed at the fact that the employer did not consult the employees before it decided to remove them from the

1. *de Wys v Solly's Freight (1987) Ltd* [2020] NZERA 285.

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application. In other words, the Authority was more concerned with communication with the employees about the GWS application than the application itself.

Applying this reasoning, if an employer did not apply for the GWS, but sought its employees' feedback on its proposal not to, and had an otherwise robust justification for restructuring, a redundancy could still be justified. This may not sit well with the purpose of the GWS scheme, as the very reason it was introduced was so that employers could avoid redundancies where possible.

There is also an argument that an employer must apply for the subsidy as a matter of good faith, if it is an available alternative to termination, and that any failure to do so amounts to a breach of the duty of good faith and/or renders the redundancy unjustified. This argument has been made by a number of employee representatives.

In our view there is a distinction between a restructure that is implemented where an employer is reacting to longer term business challenges, or to a broader recessionary environment, even if triggered by COVID-19 — and a restructure implemented to mitigate the immediate losses incurred during the lockdown. In the case of the latter, it would be harder to justify refusing to apply for the GWS as a short-term solution. The Level 4 lockdown was only temporary; New Zealanders were told it would initially be for a period of four weeks. Even after three weeks in Level 4 lockdown, it became clear that we would be moving down the alert levels.

It is more difficult to justify redundancy to offset the effect of the lockdown, when the lockdown itself was only temporary (and its effect able to be mitigated by the GWS).

What if an employer received the GWS and then made an employee redundant?

Applying the same analysis, it might be argued an employer who accepts the GWS then makes an employee redundant anyway (after the GWS expired) is not acting in good faith, as well as undermining the purpose of the GWS scheme. That said, it could also be argued that the employer is doing the right thing by the employee by applying for the GWS, providing them with an income for a further period which they would not have otherwise had if their positions were disestablished immediately.

Whether an employer is acting fairly and reasonably will also depend on the industry. Many employers in the tourism industry, for example, were at the start of the Level 4 lockdown facing not only the prospect of their businesses being closed for the duration of the lockdown, but also the fact that the border had been closed (and would remain that way for the foreseeable future).

Compare that with, for example, an employer that can easily continue to operate during the lockdown by having their workers work from home, and whose business picked up again after the lockdown. Even where an initial downturn in business occurred, it is harder to argue that a company that can still operate (albeit remotely) has a reasonable basis for making staff redundant after the GWS expires unless there are other factors independent of the lockdown justifying this.

Where an employer faces stiff headwinds in the longer term, even if arising from COVID-19 (such as a tourism business), it will in many cases be reasonable to restructure so that redundancies take effect at the expiry of the GWS. Many such employers in practice began consulting employees during the period covered by the GWS and giving notice so that their employment came to an end as the GWS expired.

Frustration of contract

The global pandemic also had many questioning whether the doctrine of frustration of contract could be applied. Legal frustration occurs when an extraordinary and unforeseen event makes it impossible for the parties to perform the obligations created by their contract. It applies where the performance of a contract becomes impossible, or radically different from what the parties initially agreed, because of a factor outside their control, and for which they are not responsible.

The most common example is death. If an event occurs that amounts to legal frustration, the contract will terminate immediately, and the parties are excused from any further obligations to each other (except for those obligations which have already fallen due).

The common law doctrine of frustration has been confirmed in New Zealand in *Karelrybflot AO v Udovenko*.[2] The Court of Appeal in that case said that the doctrine does not apply lightly and must be kept within its very narrow limits. Indeed, frustration of contract has proven difficult to establish in the employment context.

In *A Worker v A Farmer*,[3] the employee was a farm worker who worked and lived on the employer's property. The worker was accused of touching the son of the employer inappropriately. The Police investigated on two occasions and never pressed charges. The employer ordered him off the farm with his remaining wages. The employee brought a personal grievance for unjustifiable dismissal.

The employer argued that there was frustration of contract. The Employment Relations Authority held that the allegations were a "supervening" event and there was frustration of contract.

In a de novo challenge the Employment Court also found frustration of contract on the basis it was a supervening event that could not have been foreseen. The Court said that it must have been beyond contemplation at the time the worker was employed that such allegations would be made, because otherwise he would not have been employed. The Court also accepted the evidence of the wife and

2. *Karelrybflot AO v Udovenko* [2000] 2 NZLR 24 (CA).
3. *A Worker v A Farmer* [2010] NZCA 547, (2011) 9 NZELC 93,694.

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farmer (the employers) that the worker's continued presence on the farm would be intolerable.

The decision was appealed to the Court of Appeal, which allowed the appeal. The Court considered that the doctrine could not apply unless the employment agreement did not make sufficient provision for what had occurred. The Court noted, and appeared to accept, the submission that the statutory requirements, including dealing in good faith and providing the employee with an opportunity to comment on information relevant to a proposed termination, are imported into the agreement. The Court stated that the Employment Court Judge did not consider the effect of the statutory requirements on the ability of the agreement to respond to the situation.

The Court said that it was possible to envisage a range of situations where some form of serious wrongdoing was alleged which would leave one or both of the parties in distress and/or create a rift between the parties. The unusual facts of the case did not mean that what occurred was beyond the scope of the agreement. The situation was not such that the farmer could not afford the worker the benefit of the statutory processes for dismissal. Matters came to an end before that happened, and it was therefore premature to conclude that further performance of the agreement was not possible.

The Court said it simply did not know whether or not the parties' relationship was irrevocably damaged because the process was not followed, and it was conceivable that some resolution may have been possible. It was therefore not correct for the Judge to conclude that the contract was frustrated, and he ought to have considered whether it was justifiable on an objective basis in terms of s 103A.

The fact that frustration was not available in this case does not bode well for employers invoking frustration in the COVID-19 context. While the pandemic was (for the majority) an unforeseen event, the statutory duties applied by the Court of Appeal have only narrow exceptions, none of which appear to apply here.

In a redundancy situation, the employer at the very least would need to inform and consult an employee before forming a conclusion that the employment agreement had been frustrated. It seems obvious that the courts would be very reluctant to endorse an employer's process if it did not do at least that. Otherwise, applying the Court of Appeal's reasoning, the employer cannot properly have formed a view that the agreement had been frustrated.

The approach is similar when contemplating whether the doctrine could be invoked in circumstances where a natural disaster causes the destruction of a workplace — for example in the aftermath of the Christchurch earthquakes. Some commentators have suggested that the destruction of the workplace premises due to an earthquake would not be sufficient to engage the doctrine, as it is a foreseeable event, and therefore could be provided for in an employment agreement (we expand on this further below regarding force majeure clauses).

Force majeure

As alluded to above, what happens in the event of a foreseeable event (outside of the parties' control) can be provided for in employment agreements, through a force majeure clause. In the employment context, it could be said that the difference between force majeure clauses and common law frustration is that force majeure clauses are used when parties identify potential business interruption events and provide for these in the employment agreement. Frustration occurs when the agreement does not provide for such events.

Force majeure clauses might excuse parties from performing their obligations in the event of a specified occurrence outside of their control. Common examples of occurrences which are specified in a force majeure clause include natural disasters or "acts of God", fire, war, and/or pandemics.

In an employment context, a force majeure clause may specify that such occurrences will mean the employment agreement is terminated. Such clauses are sometimes framed more narrowly, for example to provide for suspension of the obligations to work and to pay, rather than to dismiss.

In the context of COVID-19, a force majeure clause may be of limited usefulness. For example, if an employer in the tourism industry is looking to terminate a permanent employee due to the impacts of COVID-19 on its business, it is unlikely that it could simply point to a force majeure clause in the employment agreement to terminate the employment. Rather, a fair and reasonable employer would carry out a restructuring process on the basis that it has no ongoing need for the role, and would inform and consult the employee (as required by s 4(1A)(c)). It is difficult to see what a force majeure clause really adds in this context.

That said, for employers who have staff employed on a temporary basis, a force majeure clause might be useful. Take for example, an outdoor swimming pool with a number of life-guarding staff on a rotating roster. If a lockdown were to occur as we head into summer, these staff would be unable to work, and even once the lockdown was over the levels of staff required would likely be reduced. In this case, having a force majeure clause in the employment agreements may be more apt, as the employer could then reasonably rely on the clause to suspend the workers, potentially without pay. However, it would need to consult the workers on any proposal to terminate in order to comply with s 4(1A)(c), regardless of the existence of a force majeure clause.

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Will the real (interim) reinstatement please stand up?


Alastair Espie, Senior Associate and Caitlin Sargison, Solicitor, Duncan Cotterill

The Employment Relations Act 2000 provides two forms of reinstatement — permanent and interim — which may be sought by a dismissed employee who seeks to be returned to their former role. While obtaining permanent reinstatement will be the goal for such an individual, the reality is that interim reinstatement will usually be the only form that ever really matters.

Interim reinstatement, as its name suggests, is a temporary remedy, and its attraction to litigants is the speed in which it may be obtained. The pursuit of an order for permanent reinstatement can easily take three to nine months and often longer. In contrast, applications for interim reinstatement can be determined by the Employment Relations Authority within a matter of weeks of an employee being dismissed. Notably, such applications are decided on the basis of untested affidavits which means that Authority members will not have the complete picture in front of them when they make and issue their interim reinstatement determinations. As a result, these determinations are intended only to be a stop-gap measure until a case can be heard in full, and the substantive merits, including whether permanent reinstatement should be granted, are conclusively determined.

Despite their ostensibly temporary nature, a review of interim reinstatement determinations going back over the last six years shows that in most cases they will often be, or have the effect of, a final decision. Of the 47 interim reinstatement determinations issued by the Authority since January 2015, just four (9 per cent) were followed by a substantive determination from the Authority in which a claim for permanent reinstatement was still a live issue.[1] Although four interim determinations were challenged to the Employment Court, none of these were followed by a substantive decision on reinstatement (and just one was successfully overturned).

That means that in 91 per cent of cases which yielded an interim reinstatement determination, the Authority was not called upon to determine whether permanent reinstatement should be granted.[2] Even allowing for the possibility that some of the more recent interim determinations remain "live" and in the pipeline awaiting their substantive hearing, it can be reasonably assumed that most have been brought to an end — either through agreed resolution or abandonment.

What this illustrates is the significance of interim reinstatement not just as a potential remedy but as an outcome. Moreover, it casts into sharp focus the importance of understanding the way in which the Authority approaches its decision-making role at the interim stage.

In that context, this article looks at some of the key trends from the last six years of interim reinstatement determinations, specifically the frequency with which the Authority is being asked to determine these types of cases, the way in which they are being determined, and the types of claims that are having success.

How often are interim reinstatement applications being heard?

While applications for interim reinstatement are not necessarily uncommon, applications that make it all the way to a determination may be a novelty for many employment practitioners.

To illustrate, the interim reinstatement determinations issued in each complete year between 2015 and 2019 were 11 (2015), four (2016), six (2017), five (2018), and eight (2019).[3] While the number of applications filed with the Authority in each of these years is not known, it undoubtedly is significantly higher.

In many instances the low number of determinations reflects that most applications for interim reinstatement will settle before the Authority issues a determination. Notably, mediation is still, in effect, a mandatory requirement. If it has not already been attempted by the parties, the Authority will build mediation into the timetable despite the urgent nature of the proceedings.

However, interim reinstatement cases are also at times averted by the Authority offering parties prompt dates for a

1. In one further case that went to a substantive hearing, *Gemmell v Quality Roading & Services (Wairoa) Ltd* [2015] NZERA Wellington 102, the employee only pursued financial relief for his personal grievances and did not seek permanent reinstatement.
2. Although in a number of cases, the Authority's interim determination was challenged in the Employment Court while several cases were the subject of joint applications for stays or consent determinations.
3. These numbers do not include applications for employees to be reinstated from suspension.

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substantive hearing — sometimes within six to eight weeks of an application being filed. While this is not quite the same expediated timeframe that can be managed for an interim hearing, the attraction of an early substantive hearing is that it avoids the need for parties to effectively go through two hearings (an interim and substantive), and significantly brings forward the point at which some Authority-imposed form of finality may be obtained.

Unfortunately, in the age of COVID-19, the Authority has to work through an unprecedented surge in employment relationship problems and claims, and accommodating early substantive hearings appears to have become much more difficult. The impact of this appears to be reflected in a noticeable increase in the number of interim reinstatement decisions issued by the Authority in 2020.

With one month left in the year, the number of interim reinstatement determinations is already at 12. Even if this is still a relatively small number of decisions overall, it is 33 per cent higher than 2019 and double the number issued in each of the three years prior (2016–2019). Only 2015, with 11 determinations issued, comes close.

How is the Authority deciding interim reinstatement cases?

Turning to the nuts and bolts of how the Authority resolves applications for interim reinstatement, it is required to apply the law of interim injunctions[4] with this, taking the form of a well-settled legal test. While not intended as a definitive legal statement, the questions the Authority is called upon to answer in each case can be broadly summarised as:[5]

- whether there is a serious question to be tried that:
  - the applicant was unjustifiably dismissed; and
  - permanent reinstatement is practicable and reasonable;
- where the balance of convenience lies; and
- where the overall justice of the case lies.

Although this test is in no way new or novel, it allows plenty of scope for trends to develop and evolve in terms of how the Authority approaches each component of this test, and the factors which prove significant in swinging results in favour of employees or employers.

Serious question to be tried

In recognition of the fact that interim reinstatement cases are determined on the basis of untested affidavit evidence, the threshold for an employee to establish that there is a serious question to be tried (also referred to in many determinations as demonstrating an "arguable case") is not a high one.

The Employment Court has said of the test that it requires an applicant to establish "that the claim is not vexatious or frivolous".[6] In non-judicial circles, the bar has at times been described (perhaps cynically) as being so low that one only needs to avoid tripping in order to clear it.[7]

Whichever definition is preferred, the low threshold is evidenced by the fact that the Authority accepted that there was a serious question to be tried that the applicant had been unjustifiably dismissed in all 47 interim reinstatement determinations issued since 2015.

Employees encountered slightly more difficulty in establishing a serious question that they should be reinstated on a permanent basis. While the number that failed to do so was still limited to three,[8] the Authority proved much more willing to describe an employee's argument under this heading as "weak".

While specific to the facts of each case, examples of issues that have led the Authority to doubt or dismiss an employee's prospects of obtaining permanent reinstatement include:

- the possibility of the employee ending his working life prior to a substantive hearing;[9]
- accusations of forgery made by an employee against his colleagues;[10]
- medical evidence which indicated that the employee's employment would increase the risk of future health issues;[11]
- the fact that a disestablished role was the only New Zealand-based position;[12] and
- significant health and safety concerns which arose from an incident that the Authority considered could only have occurred due to gross negligence or a deliberate or wilful act.[13]

Perhaps unsurprisingly, arguments that the employer's trust and confidence in an employee has been seriously damaged and that this presents a barrier to permanent reinstatement have been a recurring theme in many interim reinstatement cases. While the Authority has at times placed weight on an

4. Employment Relations Act 2000, s 127(4).
5. See *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [7]-[9].
6. At [9].
7. As far as the writers are aware, this observation has not been made or cited in any Authority determination, or of any other judicial body.
8. See *Foote v DEC Plastics Ltd* [2020] NZERA 356; *JOH v DZL* [2020] NZERA 298; *Smith v Fletcher Concrete and Infrastructure Ltd* [2020] NZERA 190.
9. See *Martin v Accident Compensation Corporation* [2017] NZERA Wellington 4.
10. *JOH v DZL*, above n 8.
11. *X v The New Zealand Fire Service Commission also known as Fire and Emergency New Zealand* [2017] NZERA Wellington 97 at [15].
12. *Murphy v Atlantic Australasia Pty Ltd* [2019] NZERA 645.
13. *Foote v DEC Plastics Ltd*, above n 8.

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employer's views about trust and confidence,[14] it has also in a number of cases treated them with scepticism given the untested nature of the evidence before it. An example of this is *Tuilaepa v The Chief Executive of the Ministry of Social Development* in which the Authority noted the possibility that a full investigation may ultimately find that the employer does not have a reasonably sound basis for its claims that trust and confidence had been damaged.[15]

Balance of convenience

The balance of convenience is the most important battleground in an application for interim reinstatement. Put simply, the party that the balance of convenience favoured has been successful in all of the interim reinstatement determinations issued since the start of 2015, with just one novel exception.[16]

In brief, the balance of convenience assessment requires the Authority to enquire into the possible detriment each party may experience if interim reinstatement is granted or declined. This test naturally lends itself to an expansive array of considerations being taken into account, including for example the adequacy of alternative remedies available to each party, as well as the impact on third parties (although some Authority members will treat these particular considerations as separate assessments under their own discrete heading). As a result, this is the area in interim reinstatement cases where there appears to be the greatest scope for the approaches and views of different Authority members to diverge.

While by no means exhaustive, factors that have been proven significant at the balance of convenience stage in recent years include the following:

- *Implications for third parties*: Examples of where this has held sway include when reinstatement would lead to the hours of other employees being reduced, other positions needing to be disestablished to make way for an applicant's return,[17] and potential risks to vulnerable patients if they are returned to a dismissed employee's care.[18] More recently, in *JGD v MBC Ltd*, the Authority had particular regard to the potential for an employee's reinstatement to trigger the loss of a significant client and the disestablishment of 25 roles.[19]
- *Absence of prior disciplinary issues*: Particularly in cases where health and safety considerations were the basis for a dismissal, the Authority has treated an extended track record of no prior incidents or issues (for example, nine, 16 and 18 years)[20] as tilting the balance of convenience towards an employee.
- *Workplace environment*: The Authority has, in cases, accepted that the prospect of dysfunctional relationships[21] or disruption and division[22] constitutes significant detriment to the employer. On the other side of the coin, an employee's demonstrated enthusiasm for building a constructive relationship with his employer, including offering to attend mediation and providing evidence of continuing positive relationship with his colleagues, assisted him with the balance of convenience.[23]
- *Disestablished roles*: Where there was simply no role for the employee to return to,[24] including where the employee's projects have come to an end,[25] or reinstatement would displace another permanent employee's role,[26] the balance of convenience has weighed against reinstatement. However, the Authority has also been prepared to take a steely approach in dismissing "no role available" arguments in cases where there was a lack of evidence about detriment that would result from an employee's reinstatement.[27]
- *Immigration status*: Where an employee's immigration status is a material issue, it has proven significant for both employees and employers. On one side, the risk that an employee's dismissal could result in them being deported prior to a substantive hearing was regarded as a consequence that could not be compensated and which weighed heavily in favour of

14. See, for example, *Stewart v Ravensdown Aerowork Ltd* [2019] NZERA 495 at [13].
15. *Tuilaepa v The Chief Executive of the Ministry of Social Development* [2015] NZERA Auckland 401 at [44].
16. *IAE v Wairarapa District Health Board* [2020] NZERA 294 in which four employees were dismissed for incompatibility. The employees in that case were only reinstated to payroll in recognition of the fact that the balance of convenience favoured the employer.
17. *Gibbs v Vice Chancellor of Lincoln University* [2015] NZERA Christchurch 7 at [78]; and *VAL v MBU Trust Board* [2018] NZERA Christchurch 192.
18. See *DKR v Waikato District Health Board* [2019] NZERA 623; and *Bolton v Wellington Free Ambulance Service (Inc)* [2019] NZERA 51.
19. *JGD v MBC Ltd* [2020] NZERA 393.
20. *Takai v AFFCO New Zealand Ltd* [2016] NZERA Auckland 50; *Tuilaepa v The Chief Executive of the Ministry of Social Development*, above n 15; and *Vai v Goodman Fielder New Zealand Ltd* [2015] NZERA Wellington 49 respectively.
21. *Kang v One Pure International Group Ltd* [2020] NZERA 211.
22. *Gemmell v Quality Roading & Services (Wairoa) Ltd* [2015] NZERA Wellington 43.
23. *C v D* [2015] NZERA Auckland 99 at [70].
24. *Kang v One Pure International Group Ltd*, above n 21; *Murphy v Atlantic Australasia Pty Ltd*, above n 12.
25. *JOH v DZL*, above n 8.
26. *O'Sullivan v Southland YMCA Education Ltd* [2015] NZERA Christchurch 88 at [55].
27. See, for example, *Uppal v Gate Gourmet New Zealand Ltd* [2019] NZERA 464; and *Chaplin v Amuri Health Care Ltd* [2020] NZERA 74.

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reinstatement.[28] On the other, the limited term of an applicant's work visa meant permanent reinstatement could be for no more than a few months, and ultimately tilted the balance of convenience away from an employee.[29]

- *Time to substantive hearing*: The time between an interim and substantive hearing is a frequently cited and persuasive factor in interim reinstatement determinations. Although there is not necessarily a consensus amongst Authority members as to what constitutes a substantial delay, those at the briefer end of the spectrum (eg, one to three months) generally seem to favour employers on the basis that the disruption of interim reinstatement may outweigh the impact on the employee significantly. Conversely, delays that could see employees out of the workplace for at least four months will more commonly weigh in favour of reinstatement.
- *Ability to meet undertakings*: A requirement for any interim reinstatement application is an undertaking from an employee that they will abide by any orders of the Authority to repay damages suffered by their employer should the employee be granted reinstatement.[30] The Authority has shown that it is prepared to scrutinise the likelihood of an employee being able to meet their undertaking if required, and has in cases treated a lack of evidence which proves this as a factor that leans against reinstatement.[31] However, one notable exception is *Scott v Genesys Telecommunications Laboratories Ltd* where the Authority took a very different view and was not persuaded that present proof of an employee's ability to meet the undertaking was required.[32]

Notably, the most commonly advanced arguments by employees were based around the financial and reputational impacts that would result if they were not reinstated on an interim basis. In the majority of cases where they have appeared, such arguments have not proven decisive. However, employee arguments that appear to have had more success (at least proportionally) have been those based around an employee's right to work and maintain skills[33] as well as the other "intangible benefits of working".[34] In this vein, similar factors that have helped carry the day for employees include where loss of employment could potentially force an employee to make a career change or move overseas,[35] result in the expiry of their qualifications,[36] or impede an employee's ability to be considered for redeployment into an open role.[37]

Overall justice

The final step in the Authority's assessment of an interim reinstatement application involves giving consideration to the overall justice of the case. Typically, the Authority will approach this test as something of a formality, with the outcome of this enquiry mirroring its earlier conclusion on the balance of convenience. However, a small number of determinations will feature a much more comprehensive analysis of the overall justice.

Where the overall justice is considered in depth, the key considerations will often overlap with factors considered in weighing the balance of convenience, or alternatively be at the more novel and case-specific end of the spectrum.[38] However, a factor that seems to have found a recurring and influential role in assessing the overall justice is the existence of contrition on the part of the employee (usually in cases where the conduct in issue has been admitted). As an example, in *Johnstone v Aslan Farms Ltd (Auckland)*, the Authority placed particular weight on an employee's willingness to accept areas of his performance where he could change, as well as his commitment to working hard and proving himself.[39] Similarly, in *Austing v Wellington Free Ambulance Service Trust*, a commitment from two employees dismissed for bullying to adapt and improve their behaviour was a determining factor in finding that the overall justice favoured reinstatement.[40]

In one instance, the overall justice has also been an avenue through which the Authority has recognised that all parties have had a measure of success in an interim reinstatement case. In *IAE v Wairarapa District Health Board*,[41] four employees who had been dismissed for incompatibility established a case that appeared to be strongly arguable,

28. *Joshi v Southgate Legend Ltd* [2018] NZERA Auckland 314 at [36] and [40].
29. *Vermuelen v Mikes Transport Warehouse Ltd* [2020] NZERA 145 at [51].
30. Employment Relations Act 2000, s 127(2).
31. *Vermuelen v Mikes Transport Warehouse Ltd*, above n 29.
32. *Scott v Genesys Telecommunications Laboratories Ltd* [2019] NZERA 470.
33. *Bennett v Hutt City Council* [2015] NZERA Wellington 31.
34. *Mealing v DB Breweries Ltd* [2016] NZERA Christchurch 39 at [73].
35. *Gibbs v Vice Chancellor of Lincoln University*, above n 17.
36. *Austing v Wellington Free Ambulance Service Trust* [2015] NZERA Wellington 79 at [74].
37. *Tupe v Board of Trustees of Te Manawa O Tuhoe Trust* [2020] NZERA 132.
38. See, for example, *Joshi v Southgate Legend Ltd*, above n 28, at [46]–[47] in which the Authority placed weight at the overall justice stage on the employer requesting that a dismissed employee assist with its business records and offering to provide the employee with assistance in securing a visa.
39. *Johnstone v Aslan Farms Ltd (Auckland)* [2018] NZERA Auckland 406 at [63].
40. *Austing v Wellington Free Ambulance Service Trust*, above n 36, at [82].
41. *IAE v Wairarapa District Health Board*, above n 16.

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while the employer was successful in establishing that the balance of convenience was against reinstatement. The Authority effectively used the overall justice assessment to break the tie by ordering reinstatement to payroll as something of a compromise position.

Which way are the cases falling?

Turning to perhaps the most important trend — which applications for interim reinstatement have been succeeding over the last six years? The answers are set out in the table below, and while there are many observations that can be made about these numbers, there are three key trends that we wish to briefly note.

Type of dismissal	Number of claims	Number of successful claims	Number partially successful (eg, reinstatement to payroll)	Number of unsuccessful
dismissal for serious misconduct (non-health and safety)	21	5	1	15
dismissal for serious misconduct (health and safety)	9	5	0	4
dismissal for redundancy	10	6	0	4
dismissal for performance issues	1	0	0	1
dismissal for incompatibility	1	0	1	0
constructive dismissal	2	0	0	2
others	3	3	0	0
Total	47	19	2	26

First, the numbers show that over the last six years, applications for interim reinstatement have more often than not been declined, with employers prevailing in 56 per cent of determinations issued. Further, if cases where the employee is only reinstated to payroll are excluded, the success rate for employees sits at just 40 per cent.

Second, the period reviewed includes 12 December 2018 which was the date that reinstatement became (again) the primary remedy for a personal grievance.[42] Since then, the number of interim reinstatement determinations across 2019 and 2020 has increased to an average of 10 a year (with one month left in 2020). However, despite the seemingly greater willingness or need for employees to pursue interim reinstatement, the success rate for employees since the legislative change took effect has in fact gone down to a mere 35 per cent (or 40 per cent if reinstatement to payroll is included).

Finally, it is notable that employees who were dismissed by way of redundancy have had the highest rate of success in pursuing applications for interim reinstatement (60 per cent). Given the current climate which is dominated by COVID-19 and with high numbers of redundancies, this would seem a particularly significant trend, and one that many prospective litigants should take note of.

What's next?

As COVID-19 appears to be going nowhere fast, and despite the relatively low success rates for employees over the last two years, it seems likely that the recent increase in interim reinstatement determinations may well continue — particularly given the significant backlog of cases the Authority is working through. In turn, it will be interesting to see what impact increasing wait times have on the disposition of interim reinstatement cases, and how the trends looked at in this article continue to develop. Given the value of a job is arguably more important than it ever has been, these are trends worth watching.

42. Employment Relations Act 2000, s 125.

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Dismissals for incompatibility

Erin Burke, Employment Lawyer and Director, Practica Legal

Introduction

Incompatibility amongst employees is arguably one of the most exhausting, long-running employment problems any employer (and their lawyer) will have the misfortune to deal with. It is also one of the most difficult dismissals to defend.

This article discusses the recent case of *Neil v New Zealand Nurses Organisation*[1] which successfully defended the dismissal of two employees for incompatibility. It also discusses whether the law in this area sets the threshold too high for employers to justifiably dismiss, until well past the point of significant damage to the workplace and the health and wellbeing of other employees. It concludes with a suggestion on avoiding dismissals for incompatibility.

Background facts

Angela Neil and Tina West were employed by the New Zealand Nurses Organisation (NZNO). Ms Neil was an organiser for 12 years, initially in the Hamilton office, but relocated to the Tauranga office in 2012. Ms West was an administrator who worked in the Hamilton office from 2004 and then transferred to the Tauranga office in 2016.

Relationships became strained between Ms Neil and Ms West on one side, and three other employees on the other. Matters came to a head in April 2018 following two incidents, which resulted in complaints and counter-complaints amongst the five employees. An inquiry commenced into the complaints in May 2018 with a report on matters being completed in June 2018.

The report, drafted by NZNO's Assistant Industrial Services Manager, Glenda Alexander, referred to "a culture of complaints and [counter-complaints] and the absence of appropriate communication" between the five staff members.[2] The report concluded with the "options" being that "People behave as adults, resolve the conflicts and work together professionally and harmoniously or they find somewhere else to work".[3]

In an attempt to resolve the conflicts, a facilitation was held in July 2018. During the facilitation, the parties discussed behaviours and expectations but the facilitator, somewhat prophetically, observed that she doubted "agreements made by the team are able to be sustained".[4]

Ms Neil absented herself from the workplace from July 2018, initially on special leave awaiting the outcome of the facilitation, but following that, on sick leave until her entitlements were exhausted. She would never return to the workplace.

In August 2018 Ms Neil and Ms West engaged an advocate, Allan Halse, and it would appear on Mr Halse's advice, Ms West also absented herself from the workplace from mid-September 2018 onwards, but was not granted special leave.

On 8 October 2018 Mr Halse formally raised personal grievances of unjustified disadvantage on behalf of Ms West and Ms Neil. Those grievances were said to result from workplace bullying and failures by NZNO to provide a safe work environment and to respond to grievances "raised throughout the duration of employment".[5] Mediation was attended in early December 2018, but matters were not resolved.

Shortly after mediation, Mr Halse sent NZNO a psychologist's report for each employee, although the reports appeared to have been prepared in September. They set out that both employees were suffering from anxiety and stress due to the workplace situation. This was followed by two letters from Mr Halse on 12 December 2018, entitled "Formal Bullying Complaint" which recapped the issues set out in the earlier notifications of personal grievances, up to the April incidents, was critical of how the complaints and the July facilitation had been handled and asked that the employees' concerns be investigated by an independent investigator.

NZNO responded with two letters dated 20 December 2018, each with the same effect, stating:[6]

1. *Neil v New Zealand Nurses Organisation* [2020] NZERA 219.
2. At [10].
3. At [11].
4. At [5].
5. At [6].
6. At [15].

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> Further, it is of concern to us that you continue to be so significantly affected by this particular event that occurred some eight months ago, and do not appear able to move on. I note in this regard that the incident in question was at the lower end of the spectrum in terms of seriousness and did not, in my view, amount to bullying.

The letters further stated that NZNO felt they had done everything they could to resolve the conflicts, and asked each employee to advise by 14 January 2019 what steps they thought NZNO could reasonably undertake that would make the workplace safe for them. The letters concluded that if no further solutions were identified to facilitate their return to work in the near future, then options would need to be considered which might involve termination for medical incapacity or incompatibility.

Mr Halse responded the following day saying his clients would return to work on 14 January 2019 with full medical clearance, providing NZNO gave assurances that his clients would not be subjected to inappropriate behaviours, retaliation, physical or verbal intimidation, mobbing or unreasonable expectations. He also sought assurances NZNO would "provide a safe workplace with no workplace bullying going forward"[7]. Both employees were said to be looking forward to returning to work "in a safe and transparent environment".

NZNO responded by email on 24 December 2018 stating it had taken steps to provide a safe workplace but could not control how Ms West and Ms Neil each perceived that environment and the actions of their workmates. It said the information now provided by the two women, and their views on the working environment, meant NZNO was not satisfied that letting them return to that same environment would be safe or healthy for them and that their relationships with their colleagues would need to be addressed before they could return.

No more was heard from Ms Neil, Ms West or Mr Halse until the latter filed an application to the Authority on 14 January 2019 seeking:[8]

> ... orders that NZNO pay them for "the time taken off work due to the unsafe working conditions until such time that the workplace is deemed safe to return to". The applications said Ms West and Ms Neil were "effectively locked out" of work with no pay because NZNO had refused to investigate their bullying complaints, had refused to pay them special leave for their absences and had refused to agree to their request to return to work on 14 January. They also sought orders for NZNO to pay penalties for breach of good faith and to pay them compensation for distress.

Two letters were sent to Ms Neil and Ms West on 29 January 2019, which stated amongst other things, that the relationship between themselves and their colleagues and NZNO, as their employer, had become irreconcilable. It further noted that a number of disparaging posts about NZNO had been made by Mr Halse on his company's Facebook page, a page widely read by nurses, which was "further suggestive of a breakdown in the employment relationship".[9]

The letters also said that Ms Neil and Ms West's views regarding their colleagues appeared to be so entrenched that other options such as mediation would be unlikely to succeed. NZNO asked to meet with Ms Neil and Ms West to discuss these matters, and that a possible outcome may be termination of the employment relationships for incompatibility. Mr Halse would not agree to the meeting, and further requests for a meeting were similarly rejected.

On 11 February 2019, further letters were sent stating that NZNO had reached the preliminary view that Ms Neil and Ms West's employment would terminate due to incompatibility. The employees refused to make further comment or meet to discuss the proposal. The termination of their employment was confirmed on 20 February 2019.

Legal principles of dismissal for incompatibility

It has long been held that a dismissal for incompatibility can be justified, however, it is noted that the threshold is high so instances would be comparatively rare. The onus is on the employer to establish three broad grounds:[10]

1. The employer must establish the existence of irreconcilable incompatibility.
2. The incompatibility must be wholly or substantially attributable to the employee.
3. The employer must carry out the dismissal in a fair manner.

The first major issue for the Authority to determine was whether the way Ms Neil and Ms West's complaints had been dealt with, up until 20 December 2018 when NZNO refused to commence an independent investigation, was fair, reasonable and sufficient.

The Authority held that as part of "all of the circumstances" specified in s 103A of the Employment Relations Act 2000, the prior conduct in relation to professional relationships between Ms Neil, Ms West and their colleagues needed to be considered. The "turbulent history" of Ms Neil between 2009 and 2017 included numerous complaints, warnings and training in relation to her communications with other staff. It also included an investigation in 2015 where Ms Neil and Ms West were complainants along with five others, in relation to their, then, Lead

7. At [17].
8. At [19].
9. At [21].
10. *Walker v Procare Health Ltd* [2012] NZEmpC 90 at [77] and *Mabry v West Auckland Living Skills Homes Trust Board* (2002) 6 NZELC 96,573 (EmpC).

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Organiser. The findings of that investigation led the investigator to identify the following as "symptoms" of "a leadership crisis":[11]

- An engrained sense of entitlement amongst staff ... leading to a sense of impregnability by organisers and an attitude that they are not accountable to the organisation.
- Ongoing bad behaviour by staff that has become endemic and habitual. Examples include:

  ...

  - Staff refusing to be reasonable about vehicle use ...
  - Levels of sick leave that exceed reasonable and justifiable levels. It is hard to accept that all such leave is genuine ... and with some staff reveals a shocking sense of entitlement.

Whilst less prominent in her conduct towards others, Ms West had also been the subject of a number of complaints in relation to her interactions and communication style.

The Authority concluded that the actions taken by NZNO in relation to Ms Neil and Ms West's complaints over the incidents in April 2018, including the investigation and facilitation meeting, were fair and reasonable. Likewise, the declining of their requests for special leave.

In relation to whether the dismissals were justified, the Authority held that NZNO had met the onus of showing its employment relationship with Ms West and Ms Neil was so broken that it had become incompatible. In reaching this conclusion it took a holistic view of the evidence from the events between 20 December 2018 and 20 February 2019.

The Authority noted the following three points which indicated that incompatibility had been established:

> [142] Firstly, NZNO had reasonably concluded that the views Ms Neil and Ms West held regarding instances in which they said they were bullied by the other employees were disproportionate and held with such ongoing intensity there was no realistic prospect they could return to working productively in the office.
>
> ...
>
> [144] Secondly, NZNO had not reached its conclusion on incompatibility lightly or quickly.
>
> ...
>
> [147] Thirdly, and more particularly, NZNO again tried and failed in the period from late December 2018 to February 2019 to engage with Ms West and Ms Neil about the basis on which they could safely return to work ... It was part of a situation where NZNO reasonably concluded that a productive ongoing employment relationship, with its organisation generally and those colleagues specifically, could not be restored. Rather it was so broken down, it had become incompatible with its needs and interests as their employer.

When deciding the second limb of the test, as to whether the incompatibility was wholly or mainly attributable to the dismissed employees, the Authority held that the question does not come down to who was most responsible but rather that:

> [150] ... the focus of this question concerns whether the position Ms West and Ms Neil took had become so entrenched and intractable that there was no realistic prospect they could any longer satisfactorily perform their roles, thereby being incompatible with the requirements of the employment relationship. The answer is yes and it was that position which made the breakdown substantially attributable to Ms West and Ms Neil. They sought to return to work but refused to engage with their NZNO managers about how that might be achieved. Having declared Mr Mathews was a sociopath, as Ms West did, and deriding their other colleagues as his "sycophants", as their advocate did on their behalf, there was no reasonable chance they could return to the Tauranga office and reliably work with the other three.

It was further noted that the conduct of the advocate in this case, through his negative postings about NZNO on social media and his refusal to meet to discuss his clients' return to work, reinforced the position that the situation was wholly or mainly attributable to the employees. In closing submissions, Ms Neil and Ms West argued that they should not be held responsible for the actions of their advocate. Whilst the Authority held that the advocate's actions alone would not have been sufficient to justify dismissal, Ms Neil and Ms West had formally authorised him to act, NZNO was required to listen to his views and was entitled to attribute his views as being those of his clients.

The attribution of an advocate's conduct and statements to being the views of their client was further reiterated in another incompatibility case two months after *Neil*. Although that case was unsuccessfully defended, the offensive comments made by the advocate in *Nolan v Civil Aviation Authority*[12] resulted in a 10 per cent reduction in remedies.

The Authority also concluded that NZNO's process had been fair and reasonable, and the dismissals were held to be justifiable.

Onus too high to justify dismissals for incompatibility

As can be seen in the cases of *Neil and Walker v Procare Health Ltd*[13] the length of time it takes between events

11. At [77].
12. *Nolan v Civil Aviation Authority* [2020] NZERA 345.
13. Above n 5.

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arising and a dismissal for incompatibility, can be between one to two years. During this period, productivity can be significantly decreased due to absenteeism and the ongoing situation can have a serious impact on the mental health of other employees, which is not just restricted to those directly involved.

It is likely a person dismissed for incompatibility will also potentially be litigious in nature, and every action of the employer will then be scrutinised, retrospectively, in the Authority or Employment Court.

In the case of a small employer, the effects of an incompatible employee in a small team are likely to be amplified and it would be difficult to imagine a small employer being able to withstand this situation for one to two years. So, are there any other options when dealing with this situation?

The author has had a number of cases almost identical to *Neil* and considers that rather than trying to meet the high threshold of a dismissal for incompatibility, another option may be more realistic.

In one such case, the workplace had been in turmoil for some two years prior to instruction. When instructed, it was to investigate yet more complaints and counter-complaints, with dysfunctional relationships very similar to those described by the investigator in *Neil* in 2015. None of the complaints were upheld, and each complainant was sent a detailed letter with numerous attachments explaining why their complaint(s) had not been upheld. It also informed each complainant that the disruption these complaints were having on the organisation were unsustainable and could not continue.

The outcome letters further informed each complainant that the Board was planning to focus on workplace culture over the next 12 to 24 months, and as part of that, there would be major upgrades to current policies, including the Complaints Policy. A significantly amended Complaints Policy was duly sent out to employees for consultation. One of the main amendments was the addition of the following section:

> **Misuse of the Complaints System:**
>
> The complaints system is for the purposes of resolving legitimate complaints. Where a complaint is held to be vexatious or where it is held that it has been laid with the intention of undermining another staff member's well-being and/or continued employment, this will be treated as serious misconduct, which could result in disciplinary action up to and including summary dismissal.
>
> *It is important for all staff to realise that just because a complaint has not been upheld, that will not automatically make it a misuse of the complaints system.*
>
> Complaints that are subsequently held to be a misuse of the complaints system will involve one or more of the following features:
>
> - The facts of the complaint are found to be wholly untrue or greatly exaggerated;
> - A complainant has made multiple complaints against another employee, with the same outcome of the complaint being unjustified each time;
> - A complainant(s) is found to have collaborated with others to file multiple complaints about the same staff member(s) in an attempt to lend legitimacy to complaints by volume;
> - A complainant is found to have pressured or coerced others (employees, clients or members of the public) to make a complaint; and/or
> - Any other action that after careful consideration, leads to the conclusion that the complaint was vexatious or laid with the intention of undermining the well-being and/or continued employment of another employee(s).

Following consultation (where there was virtually no disagreement), each employee was sent a copy of the final policy and asked to acknowledge their receipt and understanding of it. Eight months on, that workplace has calmed down considerably. The entire workplace had known of the upheaval in a certain section, and the introduction of the new clause in the Complaints Policy appeared to remove some of the feelings of entitlement that had led to the ongoing dysfunction. Simultaneously, the Complaints Policy now offered the employer the option of dismissing for serious misconduct, rather than incompatibility, should similar matters arise in future.

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The test for dismissal in a disciplinary context

Rebecca McLeod, Partner, Preston Russell Law, Invercargill and Winton

The codification of the test of justification under s 103A of the Employment Relations Act 2000 has greatly assisted practitioners since its inception when advising both employer and employee clients.

In 2011 this test, at least from an employer's perspective, was enhanced by the change from "would" to "could."

Section 103A(2) now confirms that when considering whether a dismissal was justified, one must assess whether the employer's actions were what a fair and reasonable employer could have done in all of the circumstances at the time the dismissal occurred.

This has allowed for a range of responses from an employer, when viewed objectively by the Employment Relations Authority or the Employment Court. In addition, it is not for the Court (or the Authority) to replace that employer's decision that was subjectively made by the employer. Rather, the Court is an objective outside observer, ensuring the employer has adhered to all the limbs of that test.

However, a recent decision of the Court of Appeal in *Cowan v Idea Services Ltd,*[1] when declining leave to appeal a decision of the Employment Court, confirmed that reasonableness is the only standard that the Court must use when assessing an employer's actions.

Reasonableness

In essence, the test for dismissal in a disciplinary context is reasonableness when viewed against the test of justification under s 103A of the Act.

Reasonableness allows flexibility for the Authority or Court when examining an employer's actions leading up to and in consideration of the decision to dismiss.

On appeal, the Court of Appeal affirmed the Employment Court's earlier ruling,[2] and significantly, expressly affirmed the legal principles that Judge Corkill had set out as he reviewed other leading cases on the test under s 103A(2) of the Act:[3]

(a) The task of the Court is to examine objectively the employer's decision making process and determine whether what the employer did and how it was done were what a fair and reasonable employer could have done.

(b) It is not for the Court to substitute its decision for what a fair and reasonable employer could have done in the circumstances.

(c) There may be a range of responses open to a fair and reasonable employer.

(d) The requirement is for an assessment of substantive fairness and reasonableness not a minute and pedantic scrutiny to identify failings.

(e) Regarding the standard of proof, a distinction must be drawn between the inquiry the Court makes and the inquiry of the employer.
The ascertainment of facts on which an employer forms a belief that an employee has engaged in serious misconduct is not the same as proving to a court that the dismissal was justified. The first does not involve a standard of proof. The second does.

(f) In ascertaining the facts, the employer may be presented with conflicting accounts. He or she, acting reasonably, will be entitled to accept some in preference to others. That does not call for the application of any standard of proof.

(g) But when required to prove that dismissal was justified the employer will need to show that both the course taken to ascertain the facts and the determination that those facts warranted dismissal were reasonable. That must be shown on the balance of probabilities flexibly applied according to the gravity of the matter (the dismissal) in the circumstances.

When formulating this very helpful summary on the test of justification and how it will be applied, Judge Corkill had relied on other leading decisions, including *Angus v Ports of Auckland (No 2)*.[4]

The Employment Court, in the interlocutory decision in *Angus*, discussed at length the legal principles which applied to the test of justification. The Court undertook a thorough

1. *Cowan v Idea Services Ltd* [2020] NZCA 239.
2. At [40]
3. At [18].
4. *Angus v Ports of Auckland (No 2)* [2011] NZEmpC 160 at [36]-[44].

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interpretation of the legislation, including the change from the former test of justification to the new test under s 103A of the Act as it is now:[5]

> The legislation (in subss (3), (4) and (5)), although expressing this for the first time, continues the emphasis on substantial fairness and reasonableness as opposed to minute and pedantic scrutiny to identify any failing, however minor, and to determine that this will not be fatal to justification.

The Court went further to set out how the new test would be applied in practice:[6]

> [57] The Authority or the Court must first determine, as matters of fact, what the employer did leading to the employer's dismissal or disadvantaging of the employee, and how the employer did it. This may include findings about what occurred which brought about the employer's acts or omissions that led to the dismissal or disadvantage, if the facts about material events are disputed.
>
> [58] Next, relying upon evidence, relevant legal provisions, relevant documents or instruments and upon their specialist knowledge of employment relations, the Authority and the Court must determine what a fair and reasonable employer could have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances will include those of the employer, of the employee, of the nature of the employer's enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections (3), (4) and (5) must be applied to this exercise.
>
> [59] Finally, in determining justification under new s 103A, the Authority or the Court must determine whether what the employer did and how the employer did it, were what that notional fair and reasonable employer in the circumstances could have done, bearing in mind that there may be more than one justifiable process and/or outcome. The Court or the Authority must do so objectively, that is ensuring that they do not substitute their own decisions for those of the fair and reasonable employer in all the circumstances.

Upon reflection of this analysis of s 103A, in the nearly 10 years between decisions, the test of justification for a dismissal and the application of the standard of reasonableness have remained firmly staunch to the original legal principles that were set out in *Angus*, and have now been affirmed by the Court of Appeal in *Cowan*.

The threshold for a finding of serious misconduct

The threshold for a finding of serious misconduct has been relatively well settled for some time, with case law that predates the legislative changes discussing this threshold and the standard of reasonableness.

In 2001, the Court of Appeal in *W & H Newspapers Ltd v Oram* set out that:[7]

> The burden on the employer is not that of proving to the court the employee's serious misconduct, but of showing that a full and fair investigation disclosed conduct capable of being regarded as serious misconduct.

In addition, while this decision also predated the statutory change from "would" to "could" in 2011, the courts were already applying the standard of reasonableness and what employers "could" have done for some time.[8]

In 2005, the Court of Appeal in *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)* discussed what could constitute serious misconduct on the part of the employee. It also explored what assessment the Court would have to make in order to determine whether a dismissal for serious misconduct was justified:[9]

> In our view, the correct approach is to stand back and consider the factual findings made by the Authority and evaluate whether a fair and reasonable employer would characterise that conduct as deeply impairing, or destructive of, the basic confidence or trust essential to the employment relationship, thus justifying dismissal ... What must be evaluated is the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach.

In 2009, the Employment Court in *Air New Zealand v V* determined that the Court must not only assess the employer's enquiry into the alleged serious misconduct and the disciplinary process, but should also assess whether summary dismissal was a justifiable outcome, in accordance with s 103A of the Act.[10]

The proposition was put to the Court of Appeal in the *Cowan* appeal that a higher burden of proof was required for an employer to successfully argue that serious misconduct had occurred.

In addressing that, the Court considered the Supreme Court's decision in *Z v Dental Complaints Assessment*

5. At [26].
6. At [57]-[59].
7. *W & H Newspapers Ltd v Oram* [2001] 3 NZLR 29 (CA) at [32].
8. At [31].
9. *Chief Executive of the Department of Inland Revenue v Buchanan (No 2)* [2005] 1 ERNZ 767 (CA) at [36].
10. *Air New Zealand v V* [2009] NZEmpC AC 15/09 at [36].

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Committee[11] which had discussed and subsequently determined that the balance of probabilities was the only civil standard and was to be flexibly applied "according to the seriousness of matters to be proved and the consequences of proving them."[12]

The Court here of course followed the Supreme Court decision, which was clear that there could not be a higher burden of proof required from an Employer, before a finding of serious misconduct could be made.[13]

Justice French went further to say that:[14]

> ... flexibility in terms of the notion of requiring stronger evidence in relation to serious allegations should not be regarded as a legal proposition. Rather it simply reflected the reality of what Judges do.

This is significant. The Court of Appeal, reflecting on the Supreme Court's position confirmed that there is no legal standard of proof required by an Employer. The standard of reasonableness already exists and, on review of the case law, has for a significant period of time.[15]

This poses difficulties for practitioners. On the one hand it assists us to advise knowing that the test is just that — reasonableness when set against the test under s 103A of the Act. However, with this confirmation of "reasonableness" being the only consideration, there will always be a push-pull effect with decision-making. Although we are guided by statute and case law, more often than not we are operating in a grey area drawing on the facts of our client's particular cases to fit into a certain ratio.

Our clients often want definitive answers and for our advice to be unquestionably correct, however, the Court is clear that it will always retain the ability to be flexible. The key consideration will always be reasonableness, with no higher threshold required for a finding of serious misconduct. It will entirely depend on the facts of the case.

Is the law working well or should it change?

Reasonableness is the only way that the law can work in this context. Every employer and employee that finds themselves in a disciplinary process will be different. Each industry is different and each employee within that business is different.

Some employees will have been through a disciplinary process before and some will not. The flexibility and notion of what is reasonable means that the human dimension of the employment relationship will have to come into play as there cannot be a "one-size fits all" approach.

Similarly, employers will have a vast range of wider considerations to make during a disciplinary process. How will this affect their business? Will they be short staffed if the process ends in a dismissal? How long will this take? That said, generally speaking employers take the decision to dismiss summarily, very seriously. Not only because of the risks of a grievance, but also in light of the effects of that dismissal on the employee.

Reasonableness and the test of justification allows the courts to take a very wide view of what the employer did leading up to the dismissal, the employee's actions, the considerations of the employer before the decision to dismiss was made, and the dismissal itself, at that time, in that business.

The courts are very clear that there will be no departure from a seemingly well-established standard of reasonableness, regardless of what we practitioners may try and persuade them to do from time to time.

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11. *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1.
12. At [112].
13. *Cowan*, above n 1, at [37].
14. Above.
15. At [39].

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Q and A

James Crichton

You were a member of the Employment Relations Authority (ERA) from 2004 until you stepped down last year. During that time, how have you seen the ERA adapt and evolve?

There have been a number of significant changes over the life of the Authority. When I started as a Member, the vast majority of hearings were dealt with in less than a day and multi day hearings were very rare. Now, the converse is the case. When I became a Member, there were a great many more self-represented parties than there are now. Increasingly, investigation meetings have become more like a miniature Court hearing rather than a quite different investigative process run on different principles. It is easy to blame the Authority for this, but unfairly I think. Parties have increasingly sought to use the Authority to test fire arguments they might want to use in the Court and to over-engineer Authority files rather than play to the Authority's strengths which can potentially provide quick and cost-effective decisions.

You were the Chief of the ERA between 2015 and 2019. What were the biggest challenges you faced in this role?

The biggest challenges of the role of Chief were around ensuring quality, cost-effective and speedy outcomes to parties' disputes. I fancy all Chiefs would say much the same thing and would then go on to say they thought they were only partly successful! Members all have a different way of working, a different way of investigating matters and thus a different speed with which they produce decisions and that somehow needs to be married to a fair system of file allocation.

Dr Andrew Dallas was appointed as the new Chief of the ERA following your departure. Did you give him any particular words of advice?

I did give Andrew some advice when I left the role of Chief; essentially, I told him he needed to find his own voice as Chief, that he should avoid trying to copy or replicate what others had done but to determine his own priorities and interests in the role. Andrew was kind enough to say he thought that was good advice.

The ERA was established as a quasi-judicial tribunal to improve access to justice and provide employees with a more informal, less rigid procedure to have their claims heard. What barriers do you believe still exist for employees accessing justice?

I think the barriers that resulted in the creation of the Authority still exist. And as the Authority drifts toward a more legalistic framework, the barriers continue to hinder employees from bringing claims against poor employers. But it is also true that those same hindrances apply to small employers as well; the ability to take a day off work to give evidence may not impose a great burden on an HR manager from a big corporate but will be a significant burden on the operator of the corner dairy.

Unions and migrant advocates have been lobbying to stop the publication of the names of parties to employment disputes, claiming it is having a chilling effect on employees bringing claims against bad employers. What is your view on this?

I agree with the view that names of parties in Authority matters should not be automatically published. Indeed, I have long thought that the default setting for Authority hearings ought to be that names are only published on application by a party; that is, that the default practice be reversed. As Chief, I received correspondence regularly from individual employees who had been entirely successful against a poor employer and yet, by dint of having their name published, had never worked again. That cannot be fair and just. A change now would mirror the practice in the Tenancy Tribunal and would be similar to the practice in the Family Court.

What other reforms do you think are necessary in the employment relations sphere?

Costs in the jurisdiction is another area where reform needs to be considered. We, as a country, are out of step with other common law countries. In the Authority, the successful party can look to the unsuccessful party for a contribution to costs. In the rest of the common law world, parties typically bear their own costs. I support a change in New Zealand. I think parties can best plan their foray into litigation by knowing what the costs of the exercise are; being liable

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for some of the costs of the other party, if one should lose, is imponderable which is difficult to plan for.

There has been a lot of discussion around the distinction between employees and contractors, particularly following the decision in *Leota v Parcel Express*. The government has released a discussion document on the issue, pointing to potential reforms in this area. Do you think the law as it stands strikes the right balance when it comes to protecting employees and promoting contractor independence?

I incline to the view that a change in statute law is warranted; the essence of the proposed change is to deal with the circumstances of the dependent contractor, the operator who is effectively bound into the principal and has no freedom of action her or himself. Such a status is arguably worse than that of an employee because it lacks all the protections of employment law and also lacks any of the benefits of self-employment.

Prior to joining the ERA, you held a number of roles working in the ports industry, chief executive of a local authority and you also had significant involvement in the health sector. What prompted you to join the ERA?

I sought to join the Authority because I believed in its founding ethos and thought I could make a contribution. I enjoyed the work and the people, parties, as well as colleagues and staff, so I stayed. I probably have a short attention span because there is no sense in which my career to date has been devoted to one kind of work. What is true though is that there is a common theme running through all my career choices and that is a commitment to employment law and practice in all its manifestations, from a first appearance in the jurisdiction before an old personal grievance committee in 1978.

You have since joined Three60 Consult as an employment law specialist. How have you found the transition back to advising and representing clients?

I have thoroughly enjoyed working with Three60 Consult since I left the Authority. I'm mostly doing mediations and independent employment investigations with a limited amount of appearance work. Changing one's mindset from a willingness to see both sides of the question to a single-minded pursuit of one's client's interests is not straightforward!

Outside of your advocacy and advisory work, what do you like to do in your downtime?

Pre-COVID, I would have said my downtime was spent travelling. Now, I probably just think about travelling! But I also take photographs. I own a home in Queensland which I would like to spend some time in but so far this year, I haven't been there since February.

Tell us something about you most people don't know.

Most people would not know that my principal academic interest is religion in all its manifestations. I have no faith of my own but that does not discourage me from studying faiths and faith communities.

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Case Comments

New Zealand Resident Doctors Association v Auckland District Health Board

[2020] NZEmpC 166

Employment Relations Act 2000, s 62 — interpretation of "new employee" and "work the employee will be performing"

Summary of facts

The New Zealand Resident Doctors Association (RDA) is a union representing junior doctors throughout New Zealand. RDA represents doctors who are Resident Medical Officers (RMO) and was historically the only union representing RMOs. RMOs cover graduates through to registrars. A graduate is a house officer for at least two years and then will apply for a position as a registrar. Registrars specialise by applying to one of 12 medical or surgical colleges through which training occurs. There can be a number of specialisations within a college.

The defendants in this case for the purpose of the first question[1] were the Auckland region district health boards — Auckland, Waitemata and Counties Manukau. For the second question,[2] all 20 District Health Boards (DHBs) in New Zealand were defendants.

In the Auckland region, RMOs rotate through placements quarterly and registrars rotate every six months. This can include changing their employer to any of the Auckland region DHBs. Following university, RMOs apply for a placement to an agent of all 20 DHBs. Once they receive a placement, the Northern Regional Alliance (NRA) takes over the administration of their employment and rotations. NRA offers the RMOs employment on behalf of all the Auckland region DHBs. The offer includes a description of the RMOs' training, known as a "run". There are hundreds of run descriptions across the New Zealand DHBs.

Bargaining for a new multi-employer collective agreement between RDA and the DHBs was initiated in December 2017, with the current Multi-Employer Collective Agreement (MECA) due to expire in February 2018. Negotiations became protracted, and through the effect of s 53 of the Employment Relations Act 2000, the expired MECA continued in force until February 2019. At this stage, all RDA members employed on that MECA became employed on individual employment agreements based on the expired RDA MECA.

During bargaining RDA wanted a roster system they described as "safer hours". Some disciplines in the RMOs did not want this roster as it made it harder to get sufficient experience in particular specialities. As a result, Speciality Trainees of New Zealand Inc (STONZ) was formed. That new union settled a MECA which took effect in December 2018.

First question

On 6 May 2019, the Act was amended to reintroduce s 62, a rule requiring any "new employee" who was not a member of a union with a collective they could join to be employed on the terms and conditions set out in any applicable collective agreement for the first 30 days of their employment.

From December 2018, any newly employed RMO would need to be employed on the terms of the STONZ MECA, the only collective in force. The question for a full bench of the Employment Court was whether the RMOs became "new employees" every time they rotated into the employment of another Auckland region DHB.

RDA argued that they were not new employees for the purpose of s 62. The union said that while it accepted that each DHB was a separate legal entity and the RMOs were not in a joint employment relationship with the Auckland region DHBs, that the situation was a rare case where a more nuanced or granular application of the law was required. RDA submitted that in looking at all the characteristics of the DHB system, there was a continuous subsisting employment relationship with all the Auckland region DHBs and therefore the employees were not "new employees" for the purpose of s 62.

The Employment Court specifically recognised the freedom of contract issue inherent in the position of the RDA, but noted that tension arose due to s 62 and was therefore Parliament's intention. The Court also noted that there was no ambiguity on the text of the section, and that any ambiguity arose because of the systems put in place by the DHBs. The Court held that an RMO transferring DHBs as part of their rotation was a new employee for the purpose of s 62 and must be employed on the terms and conditions of the STONZ collective.

Second question

RDA then challenged all DHBs in their interpretation of s 62(4). That subparagraph applies when there is more than one collective that the new employee could be covered by and requires that the employee be covered by the collective that binds the greatest number of the employer's employees in relation to the work the employee will be performing.

RDA settled its collective in August 2019. From that date, there were two collectives an RMO could be employed under for their first 30 days of employment. RDA had around 2,500 members and STONZ 1,400.

RDA submitted that new employees should be employed on the terms of the collective of which the most RMOs were employed under. STONZ and the DHBs considered that a

1. "Are RMOs 'new employees' for the purposes of s 62(3) of the Act when, as part of their training, they move from one DHB in the Auckland region to another DHB in that region?": Decision, at [1].
2. "What is the work an RMO 'will be performing' for a DHB for the purposes of s 62(4) of the Act?": at [1].

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more specific assessment of the work performed was needed, and registrars should be categorised by the type of work they perform. RDA also submitted the collective's coverage clauses were the best way to categorise the workers.

SToNZ submitted that there were at least five ways to categorise the work performed by an RMO, ranging from all RMOs being a single cateogry, down to dividing RMOs by run descriptions. Both the DHBs and SToNZ submitted that the third category should apply — dividing registrars and trainees by their college or intended college, and treating house officers as one uniform category.

The Court agreed with the DHBs and SToNZ on this categorisation. It held that this was the most practical and appropriate way of determining the work to be done.

Comment

While the most rational approach appears to have been reached in this case, there is limited assistance given for other employers who may face a similar issue. Ultimately, it was a combination of practical efficacy and an attempt to best reflect Parliament's intentions that resulted in this outcome. That is not particularly helpful guidance for employers faced with a similar assessment.

Cassandra Kenworthy, Barrister, Barristers.Comm Chambers

Bay of Plenty District Health Board v CultureSafe New Zealand Ltd

[2020] NZEmpC 149

Ms Shaw raised a personal grievance against her employer, Bay of Plenty District Health Board (DHB). Proceedings were filed in the Authority and a hearing set down. Allan Halse, the sole shareholder and director of CultureSafe New Zealand Ltd, began representing Ms Shaw. CultureSafe is an organisation that represents clients with alleged bullying and workplace harassment claims. It operates an active Facebook page and provides advocacy services.

Following the alleged breach of four directions by Mr Halse, Ms Shaw and CultureSafe (the defendants), the matter was removed to the Employment Court on the issue of whether the Authority had jurisdiction to make those directions and award penalties for their breach.

Summary of facts

The Authority issued four directions. The first followed the DHB alleging that Mr Halse contacted the DHB's Chief Operating Officer via LinkedIn. The DHB said that the communication contained veiled threats that Mr Halse would go to the media if they did not engage directly with him with a view to settling Ms Shaw's matter. The Authority directed that while the DHB was represented by Counsel, Mr Halse was not to contact the DHB and warned that any conduct which undermined the Authority's investigation would be viewed "very seriously".

Mr Halse then allegedly contacted the DHB's CEO. The Authority requested a teleconference, which was cancelled after the Authority advised the parties that it had received an email from Mr Halse stating CultureSafe had been threatened by the DHB's lawyers. Mr Halse said the lawyers were aiding and abetting the commission of a criminal offence. Mr Halse advised in the email that he would attend the teleconference with witnesses and would audiotape it. The Authority considered that the email contained threats that amounted to conduct which might be considered obstructing and delaying the Authority's investigation and could result in a penalty pursuant to s 134A of the Employment Relations Act 2000. Authority again directed that Mr Halse not make any public comment regarding the DHB and its staff on his Facebook page while the Authority's investigation was ongoing. He again was warned that he may be subject to a penalty.

The third direction resulted in further alleged communications from the defendants to the Chair of the DHB and the CultureSafe Facebook page. A transcript of an article regarding Ms Shaw's allegations of bullying had been published and both Ms Shaw and Mr Halse were interviewed on Radio New Zealand. At the end of its investigation meeting, the Authority issued a third direction to the effect that no public comments were to be made by the parties pending its determination.

A further post was made on the CultureSafe Facebook page and the DHB filed an application for a penalty or costs uplift as a result. Another post followed stating that the DHB would be prosecuted for failing to provide a safe working environment. The DHB referred this post to the Authority. Mr Halse then emailed the Authority stating that he would not be taking the post down and that if the DHB's lawyers did not withdraw the previous memorandum, he would post that on the page as well.

The DHB filed an ex parte application for penalties, contempt orders and takedown orders against the defendants. It alleged that each were in breach of the directions of the Authority. It was submitted that the harm and undue hardship caused to the DHB and its employees caused by the posts outweighed the need for the application to proceed on notice.

The Authority required the DHB to serve a formal application for penalties and contempt orders on the parties. It granted the takedown orders without notice.

Analysis

The DHB filed a statement of problem seeking the same orders as in the ex parte application. The defendants denied liability. The matter was removed to the Court.

The DHB submitted that the Authority has a broad jurisdiction, and acted within that jurisdiction when making the four directions. As they had allegedly not been complied with by the defendants, the Court had jurisdiction to consider a penalty under s 134A of the Act, or under s 196 which relates to contempt of the Authority. While the relief sought was originally sought from the Authority, the Court had jurisdiction to make the orders.

The defendants submitted that the Authority only had the powers bestowed on it by its statute, and that it could not constrain the right of free speech under the New Zealand Bill of Rights Act 1990 (NZBORA). It was submitted

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that the Authority had specific but limited powers under ss 134A and 196, and these were designed to allow the Authority to control its process in particular respects at investigation meetings, but not otherwise.

The Court held that the Authority had jurisdiction to make orders that bind a representative of a party. It noted the 2019 Practice Note from the Chief of the Authority,[1] which emphasised the obligation of all representatives to comply with timetables and orders, and stated that they may be subject to a personal penalty if the representative obstructed or delayed an investigation.

The Court held that the first three directions of the Authority were valid, with the allegations being sufficiently serious to justify the direction being made. The Court accepted that the NZBORA's freedom of expression was circumscribed by the order but that it was a justified limitation, as the direction supported another right — the right to a fair hearing.

The fourth direction should not have been made without the opportunity of the defendants to respond to the allegations. The Court held that the request for orders should have proceeded on notice. Had the orders been made on notice, the Court held the Authority had jurisdiction to make the takedown orders.

Commentary

The decision of the Court aligns with fair process principles. The Authority needs the power to control what happens in relation to its investigation meetings, even if the conduct is not during an investigation meeting. This prevents unfairness that could affect a party's ability to represent themselves arising outside of the investigation meeting. This is particularly important in a jurisdiction where non-lawyer representatives act and are not subject to the supervisory jurisdiction of the New Zealand Law Society.

Cassandra Kenworthy, Barrister, Barristers.Comm

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1. James Crichton *Practice Note 3 — Conduct of Representatives in the Employment Relations Authority* (Employment Relations Authority, April 2019).

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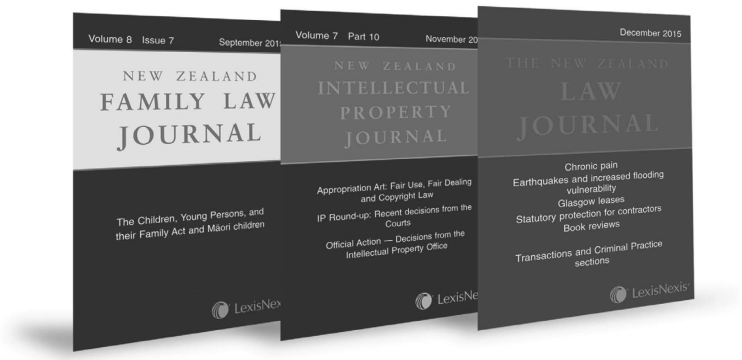

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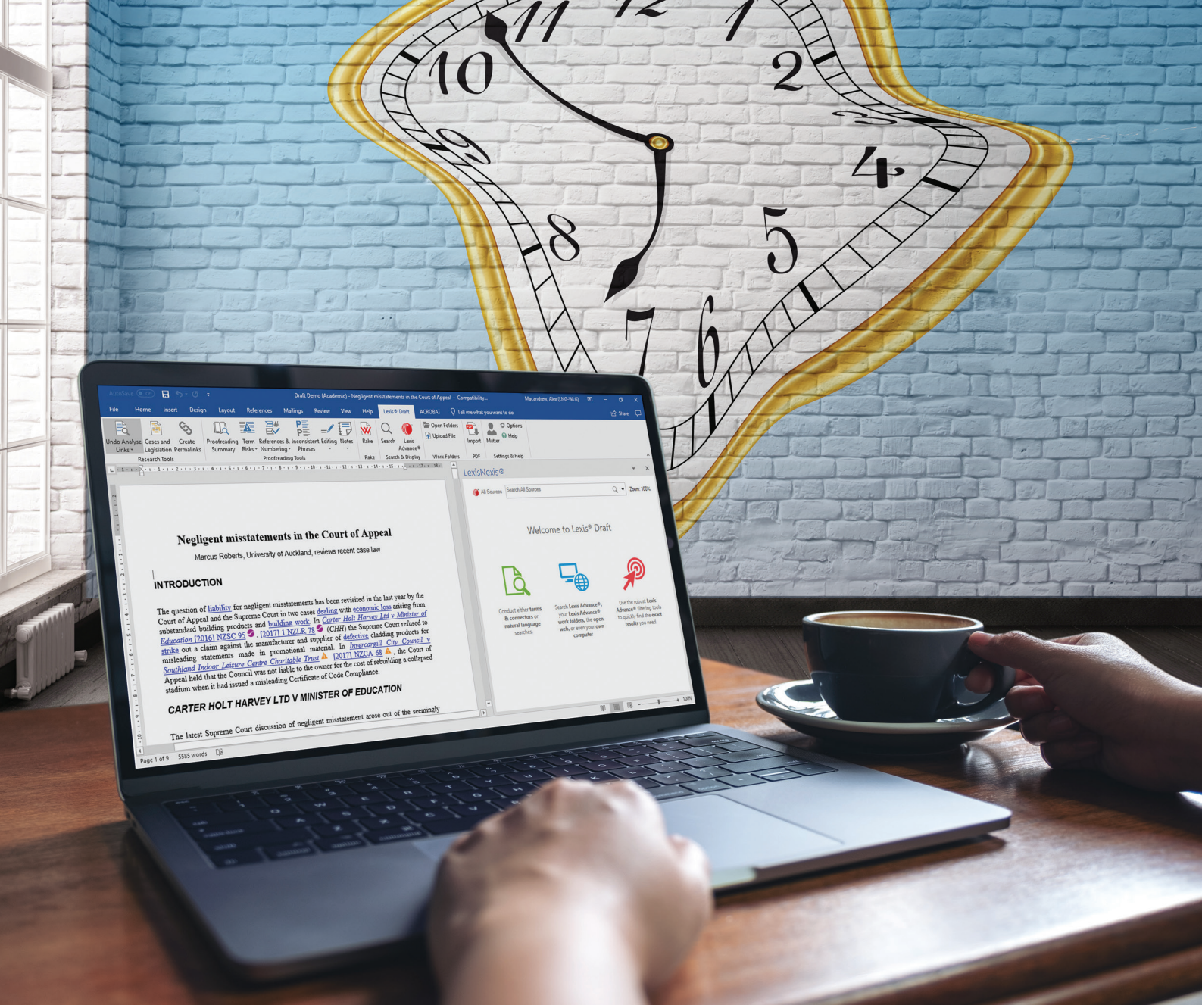

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