BUDDLE FINDLAY DECEMBER 2011

Legal update on Employment Law.

COULD/WOULD? NEW LAW, BUT BUSINESS AS USUAL

In the recent *Ports of Auckland* decision, the Full Court of the Employment Court issued some guidance on the new rules for determining whether a dismissal or other action is justified, and whether a former employee should be reinstated. While the legal framework has shifted, for most employers in most situations, the shift changes little in practice.

BACKGROUND

On 1 April 2011, the test for justification in section 103A of the Employment Relations Act changed from what a reasonable employer *would* have done in all the circumstances to what it *could* have done. A list of mandatory considerations - i.e. core procedural requirements - were also added, as well as a provision confirming that minor procedural defects will not undermine the lawfulness of an employer's actions if they did not result in unfairness.

Changes were also made to the reinstatement provisions. It is no longer the 'primary remedy' and may be granted where it is both practicable and reasonable. Previously reinstatement had to be granted unless it was impracticable.

PORTS OF AUCKLAND DECISION

In two Ports of Auckland cases (heard together) the Employment Court had its first opportunity to consider the meaning and effect of the law changes. Both cases involve claims by stevedores dismissed for serious misconduct involving alleged racism. One employee was dismissed for writing an offensive column in a widely distributed Union magazine, and the other for putting a note making fun of employees from Tuvalu under the door of a Ports of Auckland administrative employee.

The outcomes of these cases have yet to be determined, as the Court was focused at this stage on clarifying the new law.

WHAT DOES THE DECISION SAY?

The decision returns to the language of there being a 'range of lawful responses' for employers faced with misconduct. While that may be so, in practice employers are judged for the decision that they actually made.

The Court noted that the phrase *"in all the circumstances"* is very wide and includes circumstances relevant to the employee, the employer and more broadly, such as industry standards. The importance placed on health and safety in a particular sector is a good example of this.

The four new mandatory considerations added to section 103A were intended to reflect well established fair-process requirements, but were seen as *“problematic”* by the Court due to internal inconsistencies. For instance, one of the considerations the Authority and Court must consider is whether the employer *"sufficiently investigated the allegations against the employee"*. However, in a redundancy or incapacity situation, there are no 'allegations'. The four mandatory considerations also use the terms *"allegations"* and *"concerns"* at different times, without any apparent reason for the distinction. Faced with these issues, the Court said (in essence) that common-sense and the established rules should prevail.

The Court also said that the four mandatory considerations are minimum requirements and have equal weight, but that it had a broad discretion to consider other relevant factors. This means that other well-established fair-process requirements (e.g. the obligation to provide relevant information) still apply. Overall, and despite the issue identified by the Court, employers should continue to follow the well-established guidelines from the case law, which section 103A was intended to reflect.

REINSTATEMENT

The test for reinstatement has changed, and in our view this change has greater practical impact than the section 103A changes. The introduction of the requirement that reinstatement be “reasonable”, lowers the threshold for employers opposed to reinstatement. The Court also said that the new test requires a "broad enquiry into the equities of the parties' cases", and that it will take into account the effects of reinstatement not just on the employee and the employer, but on other employees and third parties, such as patients in institutions.

The fact that reinstatement is no longer the primary remedy is also significant, though the Court commented on its ongoing importance, and on the need for both the employee and employer to present evidence relevant to their views about reinstatement. Assertions about trust and confidence, by themselves, will not be enough.

A FINAL WORD

When considering at an earlier stage whether to award interim reinstatement in the Ports of Auckland cases, Judge Inglis said that "the amendments reflect a parliamentary intention to make it easier for employers to justify dismissals and to make it more difficult for employees to be reinstated if they have been unjustifiably dismissed".

We respectfully agree with Her Honour. Day-to-day, however, employers cannot take too much from this, or from the Full Court's decision. Fundamentally the questions for an employer are still, having regard to all the circumstances, 'do I have sufficient reason to dismiss?' and 'have I acted fairly?'. Faced with those questions, the distinction between 'could' and 'would' is a very fine one that is unlikely to have a practical bearing on most employers' decision-making. The same can be said of Authority members and Judges, who ultimately decide whether a particular action was fair and reasonable. If not, it is not a decision that a fair and reasonable employer could or would make.

From everyone at Buddle Findlay, we wish you and your families a very happy and relaxing Christmas, and would like to thank you for your support throughout the year.

Back to top>>

PETER CHEMIS
Partner
DDI: 04 498 7339
peter.chemis@buddlefindlay.com

HAMISH KYNASTON
Partner
DDI: 04 462 0439
hamish.kynaston@buddlefindlay.com

KERRY SMITH
Partner
DDI: 03 371 3501
kerry.smith@buddlefindlay.com

SHERRIDAN COOK
Partner
DDI: 09 357 1858
sherridan.cook@buddlefindlay.com

ALASTAIR SHERRIFF
Consultant
DDI: 04 498 7327
alastair.sherriff@buddlefindlay.com

SUSAN ROWE
Senior Associate
DDI: 03 371 3517
susan.rowe@buddlefindlay.com

ANDREA PAZIN
Senior Associate
DDI: 04 498 7303
andrea.pazin@buddlefindlay.com

IRIS REUVECAMP
Senior Associate
DDI: 04 498 7337
iris.reuvecamp@buddlefindlay.com

JOSS OPIE
Senior Solicitor
DDI: 04 498 7334
joss.opie@buddlefindlay.com

GEMMA MAYES
Senior Solicitor
DDI: 09 357 9388
gemma.mayes@buddlefindlay.com

JACKIE BEHRNES
Senior Solicitor
DDI: 03 371 3530
jackie.behrnes@buddlefindlay.com

BUDDLEFINDLAY

Buddle Findlay produces a range of topical legal updates. If you would like to subscribe to other legal updates, please CLICK HERE.
If you have any questions on issues covered please contact the sender.
This article is provided for general information purposes only and not as legal advice.
CLICK HERE to unsubscribe if you no longer wish to receive employment email legal updates from Buddle Findlay.