

EMPLOYMENT

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AUTHORITY APPLIES “COULD”
JUSTIFICATION TEST TO DISMISSAL

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This month, the Employment Relations Authority considered for the first time justification for a dismissal under the new test in section 103A of the Employment Relations Act 2000 (*Sigglekow v Waikato District Health Board*).

With effect from 1 April this year, the justification test for an employer’s actions, including dismissal, changed to “whether the employer’s actions and how it acted were what a fair and reasonable employer could (rather than would) have done in all the circumstances at the time”. This amendment was aimed at acknowledging a range of possible reasonable responses in any situation. The Authority’s determination examines the new test and its application in detail.

The Authority found that the dismissal was unjustified on procedural and substantive grounds, providing an extensive list of flaws and deficiencies. The decision illustrates the high expectations (required by law) of a large employer, with specialist HR resources, to get the process right.

This was a case where the Authority found much wrong with the employer’s actions and how it acted. The full impact of the new “range of reasonable responses” test is likely to emerge in more borderline cases.

Guidance for employers

Key guidance points for employers in light of this decision include:

- An employer with sufficient resources (including HR and legal support) and

time to conduct an investigation properly will be expected to do just that. This means taking care to be thorough and fair throughout the investigation process. All leads of enquiry should be exhausted.

- A full investigation may need to extend beyond the specific events complained of. For example, any previous incidents of a similar nature which have not been disciplined should be investigated.
- It could be problematic for an employer to assert that an employee’s actions posed a risk to the workplace (thus justifying summary dismissal) in circumstances where the employee’s suspension was not considered at the appropriate time. The issue of why an employee was not suspended should be considered (and justifiable) before a decision to dismiss is taken.
- Check that an incident or issue is properly categorised as misconduct rather than performance or even medical incapacity.
- Each and every concern regarding an employee’s actions and/or explanation must be put to the employee (if it is to be relied upon) and an opportunity provided for the employee to respond. In the above case, the employer failed to raise concerns about possible consequential regulatory breaches and about beliefs the employee held which were incompatible with his role.

- Follow up on an employee's explanation to ascertain its validity, rather than discounting it at face value.
- Failure to provide an employee with all relevant information in a disciplinary context is likely to be a breach of good faith.
- Comply with organisational standards set out in policy and contractual documentation, in particular performance management and disciplinary requirements.

The new justification test

The new section 103A test for justification applies to dismissals (or other action) effected on or after 1 April 2011.

As previously, the new section 103A test encompasses in a disciplinary context an employer's investigation, its decision about whether misconduct or serious misconduct occurred, and the ultimate outcome or sanction.

In applying the test to a dismissal, the Authority or Court must consider:

- the resources available to the employer;
- whether the employer raised its concerns with the employee;
- whether the employer gave the employee a reasonable opportunity to respond; and
- whether the employer genuinely considered the employee's explanation.

In addition, the Authority or Court can consider any other factor it considers appropriate. However, a dismissal cannot be unjustified solely because of minor procedural defects, which did not cause any unfair treatment.

Nurse found sleeping on the job

Mr Sigglekow worked as a registered psychiatric nurse at a rehabilitation ward for mental health patients. Waikato District Health Board (WDHB) dismissed him for serious misconduct for leaving a rostered shift early without authorisation (leaving a female psychiatric assistant in sole charge of 5 male patients), and sleeping on duty. The incidents followed shortly after Mr Sigglekow had returned to work after a lengthy period of absence due to a serious heart attack.

Mr Sigglekow said he had left the shift early because he felt unwell and was concerned about having another heart episode. He denied sleeping at work, but admitted "resting". He considered this was acceptable, although WDHB did not share that view.

Relevant factors

In applying the new test, the Authority considered that:

- "all of the circumstances at the time" included the employer's actions and reactions; the circumstances in which the misconduct arose; the employer's business circumstances; and the employee's personal circumstances.
- "other appropriate" factors included good faith requirements; contractual obligations; whether the employer's expectations were made clear to the employee; the parties' respective conduct; the employment history; nature of the industry; industrial practice; any statutory or public interest obligations on the employer; relevant policies; workplace size; whether significant conclusions were communicated to the employee; disparity of treatment; and any mitigating factors.

The Authority clarified that relevant information discovered after a dismissal, (such as new conduct warranting dismissal), would not affect justification, but could be relevant to remedies.

Dismissal unjustified

The Authority found that WDHB, with in-house HR expertise and legal advice, failed to carry out an investigation that was full or fair. It did not comply with internal policies, it failed to raise key concerns with Mr Sigglekow and it failed to genuinely consider his explanation.

Further, WDHB was in breach of its statutory good faith obligations by failing to provide information relevant to its concerns, it had not made its expectations clear to Mr Sigglekow, it did not properly consider his personal circumstances (relating to his health), and had not acted consistently regarding similar incidents in the past.

The Authority declined to award reinstatement because it was not practicable. Mr Sigglekow had failed to produce any medical evidence to support his claim that he was fit to return to work. In addition, previously he had not been open with his employer regarding the extent of his health problems, and bringing him back to work with appropriate support would be unduly onerous for WDHB.

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