Elias in Wonderland

R v Pora [2001] 2 NZLR 37

Introduction

The Court of Appeal judgment, *R v Pora* ("*Pora*"),[1] has potentially far reaching implications for the way in which statutes are interpreted New Zealand. It is the latest in a series of cases incrementally endowing the New Zealand Bill of Rights Act 1990 ("the Bill of Rights") with increasingly stronger powers. This commentary examines the judgment written by Elias CJ and joined by Tipping J.[2] The judgment suggests that old common law canons of construction should give way to a new, rights-centred approach to statutory interpretation, sourced in section 6 of the Bill of Rights. This rights-centred approach requires that judges give a particular enactment a meaning consistent with the rights and freedoms protected in the Bill of Rights. As applied by the minority, this seems to mean that the words Parliament has used should take a back seat and that the purpose of the enactment, as divined by the courts take precedence. This inversion of the hierarchy between text and purpose ultimately changes the conditions on which the courts will give effect to Parliament's words, reconfiguring the rule of law.

Background and Facts

The appellant was accused of murdering Susan Burdett in her home on 23 March 1992. At the time of the offence, the sentence for murder was life imprisonment. On 1 September 1993, the Court was given the power by the Criminal Justice Amendment Act 1993 ("the 1993 Amendment") to impose a minimum term of imprisonment of more than 10 years where the circumstances of the offence were "exceptional".[3] The 1993 Amendment also provided, at section 56, that a minimum period of imprisonment not be imposed if it could not have been imposed at the time the offence was committed. Moreover, section 4(2) of the Criminal Justice Act 1985 ("the Act") provides that:

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1 [2001] 2 NZLR 37.
2 Ibid paras 1-58.
3 Criminal Justice Amendment Act 1993, s 2.

> [N]otwithstanding any other enactment or rule of law to the contrary, no court shall have power, on the conviction of any offence, to impose any sentence or make any order in the nature of a penalty that it could not have imposed on or made against the offender at the time of the commission of the offence.

When the appellant was first convicted of Susan Burdett's murder in 1994, he was not subject to the minimum period of imprisonment prescribed by the 1993 Amendment because section 4(2) of the Act and section 56 of the 1993 Amendment precluded its imposition.
In October 1999, the appellant's conviction was set aside and a new trial was ordered, at which he was also convicted of murder. However, by this time the legislation relating to sentencing had changed. The Criminal Justice Amendment Act (No 2) 1999 ("the 1999 Amendment"), which had been enacted in the intervening period, lowered the threshold for imposing minimum non-parole periods.[4] While the 1993 Amendment allowed such periods only to be imposed in "exceptional circumstances", the 1999 Amendment requires only that such circumstances be "sufficiently serious" for the period to be imposed.[5]

Section 2 of the 1999 Amendment also altered the conditions for imposing a minimum sentence where the murder involved a "Home Invasion".[6] The 1999 Amendment altered section 80(2A) of the Act to require that anyone convicted of such an offence be imprisoned for 13 years without parole, not only increasing the minimum period but also removing the discretion of a sentencing judge as to whether or not a minimum period should apply.

On general principles, as well as by specific statutory provision at section 4(2) of the Act and section 56 of the 1993 Amendment, the new penalties and the new offence of Home Invasion would only have prospective effect. However, section 2(4) of the 1999 Amendment unsettles this position. Section 2(4) provides that the amendments to section 80 of the Act made by the 1999 Amendment apply "in respect of the making of any order" under section 80 "even if the offence concerned was committed before" the commencement of the section. In other words, section 2(4) purports to apply the new sentencing rules retrospectively. What is more, it purports to punish offenders for a crime that did not technically exist at the time the offence was committed.

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4 Ibid Short Title.

5 Criminal Justice Amendment Act (No 2) 1999, s 2(1).

6 "Home Invasion" is defined with reference to the Crimes Act 1961, which was amended by the Crime (Home Invasion) Amendment Act 1999, to create the offence of Home Invasion.

The Court of Appeal in *R v Poumako*[7] addressed the question of the true construction of section 2(4) of the 1999 Amendment, but preferred to express no final opinion. Instead, the Court held that the appellant's behaviour met the higher threshold of "exceptional circumstances" and so a minimum period of 13 years imprisonment properly applied, regardless of which law was applicable. *Pora* placed the dilemma in starker terms. In order for the new conditions in section 80 of the principal Act to have effect in that case, they would have to apply to offences committed before the power to impose a minimum non-parole period existed.

In *Pora*, the Court of Appeal divided three ways on the correct interpretation of the statute. Elias CJ and Tipping J, with Thomas J concurring in a separate judgment, held that section 4(2) of the Act operated to entirely negate the effect of section 2(4) of the 1999 Amendment. Section 80 of the Act, therefore, had no retrospective effect at all. Gault, Keith and Tipping JJ held that section 2(4) of the 1999 Amendment meant that section 80 of the Act, as amended, must have some retrospective effect. However, section 56 of the 1993 Amendment limited that retrospective effect to offences committed after the initial power to impose a minimum sentence came into effect. They also strongly condemned the reasoning employed by Elias CJ and Thomas and Tipping JJ. Richardson P, in a two-paragraph judgment, concurred with Gault, Keith and McGrath JJ, but preferred not to express a final opinion on the reasoning of the Chief Justice. My principal concern here is with the reasoning Elias CJ.

The Minority Judgement of Elias CJ Joined by Tipping J

Elias CJ and Tipping J follow a three-stage methodology by which they purport to apply the Act to the facts of the case. Their starting point is "the text and purpose of the statute being considered", followed by a consideration of "the wider legislative context" and finally, of "principles of construction adopted by judges in their decisions".[8] As with the general tenor of the judgment, the methodology is ostensibly deferential to Parliament's authority.

The first stage of the analysis is an adoption of the purposive approach mandated by section 5(1) of the Interpretation Act 1999. That section reads: "The meaning of an enactment must be ascertained from its text and in light of its purpose". The idea behind section 5 is to let Parliament's intent guide the application of the statute as far as the text

7 [2000] NZLR 708.
8 Supra note 1, para 5.

will allow it, thereby avoiding absurdity and restraining judicial legislation. In looking to the wider legislative context as a secondary consideration, the Court displays a concern for giving effect to Parliament's designs on all legislation, rather than just the case in hand. The only intimation of a judicial presence comes at the third stage of the inquiry, where "judge-made principles" come into play. The judgment, however, emphasises that these principles are "subordinate to legislative direction".[9]

Text and Purpose

The judgment adopts an oppositional framework in deciding how section 4(2) of the Act and section 2(4) of the 1999 Amendment are to be interpreted. Because the two sections are unable to be reconciled upon their face value meanings, "the question is not one of clarity but rather which section is meant by Parliament to prevail"?[10] The Court's task is to discern which of the two enactments is "the leading provision". That provision is then regarded as being the law, rendering the other a nullity.

At this stage, the minority relies on three main indicia of weight, both found within the principal Act. The first is the wording of section 4(2) which commands that it is to apply "notwithstanding" any enactment to the contrary. On its own terms, the primacy of section 4(2) is subject to only two exceptions, both of which are named within the section. This is taken to imply that any exceptions to section 4(2) should be mentioned within the section. In contrast, section 2(4) of the 1999 Amendment is not expressed to apply "notwithstanding" anything.[11]

The second indicator of weight stems from the scheme of the Act as: "The prominence given to this provision indicates its importance".[12] Section 4 is the first provision found in Part I of the principal Act under the heading "Sentencing Generally". This makes it one of the "leading provisions in the scheme of the act".[13] It follows that all other provisions, including section 2(4) of the 1999 Amendment, are to be interpreted as subject to it.

The third reason advanced for the primacy of section 4 of the Act initiates a theme carried on into the second stage of the investigation. In looking at the legislative history of the provision, the Court notes that it

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9 Ibid.
10 Ibid.
11 Ibid para 25.
12 Ibid para 18.
13 Ibid.

was first enacted in compliance with Article 15(1) of the International Covenant of Civil and Political Rights ("ICCPR"). On an enquiry as to the correct construction of the statute as a whole, this would be of little significance. The law applicable in New Zealand is the law enacted by Parliament. International instruments can have effect only in cases where there is some ambiguity or where Parliament is silent.[14] Here, there is not so much an ambiguity as there are two clear statements that are at loggerheads. Parliament is not silent. It has spoken twice. The problem is that it has said different things each time. Because the focus is not so much on the correct relationship between two statements, but on which of them is the stronger, the endorsement by the ICCPR of one statement over the other bolsters the argument for that section.

The Wider Legislative Context

Elias CJ looks to two other statutes for assistance in determining which of section 4(2) of the Act and section 2(4) of the 1999 Amendment is the leading provision. These are the Interpretation Act 1999 at section 7 and the Bill of Rights at sections 25(g) and 26. Both statutes make pronouncements to the effect that legislation is not to have retrospective effect.

The Court looks to them not so much to provide a new strand of reasoning as to why section 4(2) of the Act should prevail, but to add another two voices to the chorus led by the ICCPR, urging that it do so. Each essentially fulfils the same function as section 4(2) of the Act, but with less force. Each is expressed to be subject to limitation by express pronouncement of Parliament.[15] If section 4(2) of the Act did not exist, section 2(4) of the 1999 Amendment would ultimately take effect regardless of either statute. They serve much the same purpose in Elias CJ's reasoning as the ICCPR does: they add weight. In doing so, they import all of the policy reasons underlying each act as factors suggesting that for section 4(2) of the Act to prevail is a good thing. Arguably, on the interpretive strategy pursued by Elias CJ, this is quite a legitimate field of consideration.

Principles of Construction

Finally, the minority turns its attention to principles of construction. The discussion of these principles is sprinkled with Latin terminology and

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14 *Ashby v Minister of Immigration* [1981] 1 NZLR 222.

15 Section 4 of the Bill of Rights and section 4(b) of the Interpretation Act 1999.

contains references to them as "mechanical",[16] "out of step with the purposive approach",[17] and "judge-made".[18] The clear subtext is that principles of construction are antiquated conceptions pulled from the ether by judges, that they are artificial and can be used indiscriminately to frustrate legislative purpose. The other side of the opposition is Parliament's will as already divined in the previous two stages of the inquiry.

Each of the three canons is dealt with separately. The first to be considered is the rule that later provisions prevail over earlier ones. The existence of this rule is questioned and it is presented as a somewhat arbitrary "rule of last resort".[19] There seems to be some (wilful?) confusion as to whether the word "later" means later in time or later in the statute. The authority the Court looks to is *Re Marr (Pauline) (A Bankrupt)*[20] in which the two provisions in question were enacted contemporaneously and the question was whether the numerically later one prevailed. Nicholls LJ held that there was no "rule of last resort" requiring that it do so.[21] *Pora,* on the other hand, concerns two provisions that were enacted at different points in time. Elias CJ acknowledges this factual difference, but holds that *Marr* applies anyway because both applications of what is taken to be the same rule rely upon: "A mechanical rather than a purposive approach to statutory interpretation".[22] Therefore, "chronological order of the inconsistent provisions cannot be determinative and is not likely to be helpful".[23]

Finally, the minority turns its attention briefly to the idea that an interpretation that preserves some scope for both enactments is to be preferred. It asserts that in this case, favouring either enactment results in the other becoming ineffective in reality. On a face value reading of section 4(2) of the Act this would appear to be untrue. Even if section 2(4) of the 1999 Amendment were given full scope, section 4(2) of the Act would still apply to the imposition of all other penalties in the statute. Perhaps it is thought the essence of section 4(2) of the Act is that it applies supremely and, therefore, allowing a retrospective provision would, while nominally preserving some scope for the section, undercut its status as the leading provision. Consequently, such an attempt to

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16 Supra note 1, para 36 and 38.
17 Ibid para 37.
18 Ibid 134-137 per Thomas J.
19 Ibid para 36-37 per Elias CJ.
20 [1990] Ch. 773 (CA).
21 Ibid 784-785.
22 Supra note 1, para 38.
23 Ibid para 40.

reconcile the two would result in "a strained interpretation of both provisions", which "evades the hard question of ascertaining the legislation means".[24] Exactly where one would look to find the meaning of the legislation, if not in the legislation itself, is not made clear.

Problems with the Judgment

1. Use of Canons of Construction

In purporting to favour Parliament's intent over judge-made law, with respect, the Chief Justice seems blind to the processes she employs. For example, she supposes that the fact that section 4(2) of the Act specifically contemplates two exceptions implies that any further exceptions to its application should also be mandated from within the section.[25] This seems essentially to be an application of the canon *expressio unis exclusio ulteria*,[26] a rule of interpretation developed by judges. Likewise, the fact that section 4 of the Act garners strength from its placement in what the learned judges term the "principle part of the Act", seems to stem from the functional construction rule, itself a common law rule of construction.[27]

A picture that shows judge-made rules of interpretation pulling a text in one way and the will of Parliament pulling it another, is false. A more accurate conception sees some principles of interpretation pulling the statute one way and some another, with different conceptions of Parliament's intention lying in either direction. The question of which principles exert greater traction must then turn not on a numbers game, but on an examination of the relevance of those principles themselves.

The principles that fall first for examination when interpreting a statute are the linguistic canons. The minority identifies three of these: *lex posterior derogat priori*,[28] *generalia specialia generalibus non derogant*,[29] and the presumption favouring constructions that allow both enactments some effect. The minority themselves employ the maxim *expressio unis exclusio ulterior* and the functional construction rule. As the minority very properly points out, such rules are valuable only insofar as they help to indicate Parliament's intention. Each stems from broader

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24 Ibid para 44.
25 Ibid para 25.
26 "The expression of one thing is the exclusion of another."
27 Supra note 1, para 18.
28 "A later statute takes away the effect of a prior one."
29 "Generalities do not derogate from particular provisions."

ideas about language and each is not so much a discrete rule, but rather a particular application of a broader linguistic convention. So, which of these maxims is most helpful?

Lex posterior derogat priori, while not itself determinative of the correct interpretation, at least points to a general principle that is. An important aspect of Parliamentary sovereignty is that Parliament cannot bind its successors. Therefore, although earlier Parliaments may have intended that a particular construction be put on one enactment, later Parliaments are free to alter that construction by later enactments. As the most recent expression of Parliament's will, section 2(4) of the 1999 Amendment must be upheld. This does not mean that in every case where enactments conflict the earlier enactment becomes a nullity. It simply means that, by virtue of Parliament's sovereignty, it must be given some effect. In this case, however, the words of the 1999 Amendment are not capable of a construction that can be reconciled with any construction of section 4(2) of the Act. In as far as it applies, the later law must repeal the earlier. To suggest otherwise requires an ahistorical view of Parliament's intent that regards all of Parliament's utterances as equal, regardless of when they were made. Such a conception is unnecessarily abstract and artificial. Trying to ascribe a general underlying intent to all enactments in an area ignores the fact that political exigencies and ideological trends may mean that Parliament's intentions in a particular area may change radically over time.

The other two canons examined by the minority are not determinative. However they do support the primacy of section 2(4) of the 1999 Amendment on other grounds. The specificity of the later enactment is persuasive because it fits in with general conventions of meaning. Suppose I tell you that I am a vegetarian but at some other time mention that I eat fish. Is it more reasonable to conclude that the fact that I eat fish entirely negates the former statement, or that I am largely vegetarian except for the fact that I eat fish? For much the same reasons, a construction should be sought that allows both enactments some effect. It is the court's duty to give effect to the will of Parliament as expressed in legislation.

The functional construction rule pulls the interpretation of the statute in another direction. It relies on conventions about the functions of various parts of statutes. It is presumed that Parliament was aware of these conventions when the statute was drafted and relied upon them to help convey the meaning intended. The maxim *expressio unis exclusio ulterior* relies on a similar presumption, which is itself drawn from the way we communicate, especially in a formal context such as law. Where

precision is important, it seems reasonable to assume that lists are exhaustive unless otherwise stated.

Neither of these reasons appear to be sufficient to negate the later expression of Parliament's will in section 2(4) of the 1999 Amendment. Indeed, it could be argued that such reasons are only applicable to how the earlier Parliament responsible for section 4(2) of the Act intended that it be interpreted. The earlier enactment, as interpreted by the canons that apply to it, only has the residual role that the later enactment, as interpreted by the canons that apply to it, allows.

Methodology

The fact that the implications of the *lex posterior derogat priori* principle are played down by Elias CJ and Tipping J is an understandable result of their methodology. They purport somehow to divorce the text of an enactment from the interpretation of that text. The fact that it is impossible to do this and still extract a meaning from the text is reflected by the unacknowledged use of principles of interpretation at the first stage of the methodology employed by Elias CJ and Tipping J.

By arbitrarily rearranging the interpretive process, the Court is arguably no longer examining the text in light of its purpose, but the purpose of the text in light of the text. In order to keep within the bounds of section 5(1) of the Interpretation Act 1999, the text must be paramount in the determination of meaning. Considerations of purpose (in this case presumptions about Parliament's intent imported by other legislation and the common law) should only be taken into account after the limits put on an enactment by semantics, syntax and rules of construction have been established. In other words, to quote a judge-made rule of construction, *expressum facit cessare tacitum*: statement ends implication.

Section 6 of the Bill of Rights

Because section 4 of the Bill of Rights reserves full sovereignty to Parliament, the Bill of Rights has mostly been given effect through section 6, which urges that legislation should be given a meaning consistent with the rights and freedoms contained in the Act where possible. Although the judgment does not explicitly place much emphasis on section 6, it is still essential to the Court's reasoning. Indeed, the Court finds that section 6 "requires" that they give section 2(4) of the 1999

Amendment no effect.[30] If the judgment is to be taken seriously, then section 6 has a much greater role than previously thought and the text allows. Section 6 reads: "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."

The latitude that section 6 allows judges when they interpret statues is circumscribed by the use of the word "meaning".[31] Although we can never be sure of a speaker's exact meaning, we can at least make reasonable estimations about that meaning and, adopting an objective approach, circumscribe those estimates. Such an approach would limit the set of meanings to those that a reasonable hearer could take from the words used.[32] Could a reasonable person, upon hearing that a penalty is to apply to offences committed at any time, interpret that to mean that it only applied prospectively? The Chief Justice obviously thinks so. However, if, as I have argued, such a conclusion cannot be extracted from the text, then the power of section 6 as an aid to interpretation has increased greatly. It seems that the words used in an enactment no longer constitute an obstacle to giving it a meaning consistent with the rights and freedoms contained in the Bill of Rights. Section 6 means that the words used are secondary to Parliament's intention. The corollary of an increase in the magnetic pull of section 6 is a decrease in that of section 4.

It seems that if section 4 is to have any effect at all, it must now be explicitly invoked and the relevant provisions of the Bill of Rights specifically ousted. Although no court has yet invoked section 4 to save a provision, occasional dissenting judgments imply that a meta-language dictating the precise effect of an enactment on other enactments has never before been a requirement.[33] If evidence of an intention to abridge the right is required, then *Pora* has profound constitutional implications.

The requirement that any enactment infringing a right states that it is doing so before it will be given effect imposes, despite assurances to the contrary, a manner and form requirement.[34] Furthermore, because section 2(4) of the 1999 Amendment was ousted simply by one provision that was not expressed to be defeasible in the face of later legislation, it is arguable that an enactment intended to abridge rights protected by the Bill of Rights would now have to address each enactment with which it might possibly come into conflict. The fact that the Bill of Rights and the

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30 Supra note 1, para 50.

31 Hodge, "Statutory Interpretation and Section 6 of the New Zealand Bill of Rights: A Blank Cheque or a Return to the Prevailing Doctrine?" (2000) 9 Auckland U L Rev 1, 9.

32 Ibid 6.

33 *Quilter v Attorney General* [1998] 1 NZLR 523 per Thomas J.

34 Supra note 1, para 52.

Interpretation Act 1999 are used to lend weight to such an interpretation could be viewed as undercutting the defeasibility provisions those statutes contain, thus frustrating their true purpose.

Conclusion

What all of this ultimately means is that, if the reasoning in Elias CJ's judgment and Thomas J's concurring judgment is to be taken seriously, the rule of recognition has either changed or is different to what it was previously thought to be.[35] That is to say, the conditions upon which the courts will consider a statutory instruction to be good law have changed.

There is nothing inherent in the idea of a legal system that requires a particular set of conditions to be the rule of recognition.[36] However, the rule implicit in Elias CJ's judgment points to a new conception of Parliamentary sovereignty. Because the requirement of explicitness is sourced in an interpretation of section 6, on one view it is Parliament, and not the courts, that has changed the rule of recognition. Although they are ostensibly only procedural, such manner and form requirements could in theory be used to much the same effect as substantive restrictions, effectively removing some fields of legislation from Parliament's purview by stipulating that onerous conditions be met if any alterations to the existing law be recognised.[37]

The age old question about God asks if his omnipotence means that he could make a rock so large that even he could not lift it. Similar questions have been asked about Parliament's sovereignty. Is it continuing or self-embracing? Can Parliament legislate out of its own sovereignty? The legal orthodoxy suggests that the answer is no, that a particular Parliament cannot bind its successors.[38] Despite assurances to the contrary, Elias CJ's judgment necessarily disagrees. In theory then, Parliament could place itself under a rock that even it could not lift.

John Palmer

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35 I am relying here on HLA Hart's conception of a legal system. But the line of argument would apply to any conception that depicts a legal system as having two tiers, for example Kelsen's *grundnorm*.

36 Hart, *The Concept of Law* (2 ed, 1994) 150.

37 Ibid 151.

38 Joseph, "Constitutional and Administrative Law in New Zealand" (1993) 488.

Is Covert Participant Video Surveillance a "Search"?

R v Smith (Malcolm) [2000] 3 NZLR 656

Introduction

Last year, in *R v Smith* ("*Smith*"),[1] the New Zealand Court of Appeal considered the issue of whether 'covert participant video surveillance' ("CPVS") constituted an unreasonable search for the purposes of section 21 of the New Zealand Bill of Rights Act 1990 ("the Bill of Rights"). Section 21 provides: "Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise."[2] Determining what constitutes a 'search' has proven to be a difficult issue. There is an historical nexus between the law of search and seizure and the common law's emphasis on the protection of property rights. This is illustrated in *Olmstead v United States*[3] in which the majority of the United States Supreme Court held that wire-tapping of telephones did not amount to a search or seizure within the meaning of the Fourth Amendment of the Constitution of the United States of America ("the Fourth Amendment"). They held the Fourth Amendment only covered the search and seizure of material things, such as people, houses, papers or effects.

In a prophetic dissent, Brandeis J contended that the majority's interpretation was too narrow and that one day the State would have means of surveillance at its disposal that would render this property-based notion of search and seizure obsolete.[4] Time has proven Brandeis J correct. Today, law enforcement agents have far more sophisticated means to detect crime: satellite photography, infrared detection devices and electronic recording devices are but a few.

These new methods have forced the courts to confront the issue of whether electronic surveillance constitutes a search, even though it would not do so in the traditional common law sense. *Smith* presented an opportunity to answer this question, but ultimately the Court failed to do so. The Court avoided clarifying the meaning of 'search', as it had also

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1 [2000] 3 NZLR 656.

2 This section is New Zealand's equivalent to the Fourth Amendment of the United States Constitution.

3 277 US 438 (1928).

4 Ibid 474.

avoided doing in other section 21 cases,[5] and moved directly to the issue of what amounts to 'reasonableness' under section 21.

This commentary focuses on the definition and implications of 'search', as opposed to 'reasonableness'. A comparison to previous section 21 cases shows that *Smith* is a natural descendant of those cases.

Background and Facts

Smith had prior convictions for Class 'A' drug offences. In 1999, the Police suspected that Smith was involved in further offending, but Smith proved very elusive. He avoided being caught by way of police listening devices and search warrants by using hand signals and by only dealing with known drug-users. He stored only small amounts of drugs on his premises.

The Police successfully recruited an informer, Bright, who made a series of evidential drug purchases. The items were fingerprinted without success. The Police then planted a listening device on Bright and sent him in to make a purchase. This was frustrated by Smith's use of hand signals. Finally, on 14 August 1999, a small video camera was discretely placed on Bright when he went in to make the transaction with Smith. This procedure was repeated during the period of the 16th to the 19th of August 1999. On the 19th and 20th of August 1999, the Police comprehensively searched the property and found evidence of drug trafficking.

Smith was convicted on 23 drug charges. Ellis J sentenced him to 12 years imprisonment. Smith appealed against conviction on 19 of those counts and against the 12-year sentence.

Decision of the Court of Appeal

The ground of appeal that is the focus of this analysis is that Bright's video evidence was the product of an unreasonable search. Richardson P framed this issue early in his judgment:[6]

> The crucial question on the appeal against conviction is whether the deployment of a police informer and the use of a video camera strapped to his body when purchasing drugs from the appellant constituted an abuse of process or an unreasonable search and seizure in breach of section 21 of the New Zealand Bill of Rights Act 1990.

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5 See *R v Gardiner* (1997) 15 CRNZ 131 (CA); *R v Fraser* [1997] 2 NZLR 442 (CA); *R v Wong-Tung* (1995) 13 CRNZ 422 (CA); *R v Barlow* (1996) 14 CRNZ 9 (CA).

6 Supra note 1, 658.

Richardson P reiterated the principles for interpreting section 21[7] laid out by the Court in *R v Grayson and Taylor.*[8] The two principles that are pertinent to this analysis are:

> (1) a section 21 inquiry requires weighing legitimate State interest, such as law enforcement considerations, against the individual's interest in privacy and security. The assessment of the seriousness of the intrusion is determined contextually, rather than with absolute rules; and
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> (2) a search is an examination of person or property. However, Richardson P noted that *R v Grayson and Taylor* was limited in this respect as it did not involve the use of modern investigative technologies that did not involve trespass.

The learned Judge discussed three New Zealand authorities on electronic surveillance. Two of these, *R v Fraser*[9] and *R v A,*[10] illustrate the holistic approach favoured by Richardson P of examining the totality of circumstances. *R v A* and the third case discussed by Richardson P, *R v Barlow,*[11] are authority that a technique known as 'participant electronic surveillance' ("PES"), which involves covert audio recording via a microphone, is a reasonable form of search. These cases are relevant insofar as CPVS is a combination of PES and video surveillance. It involves the willing participation of one of the parties to the surveillance. The only difference is the use of a video camera rather than a microphone. Richardson P concluded that both in principle and on the authority of these cases the investigative technique used by the Police in *Smith* was reasonable. There was no difference in principle between audio and video recording. As had been established in earlier section 21 cases, reasonableness was a matter of time, place and circumstance. There was no place for hard and fast rules. His Honour also examined the Canadian authorities of *R v Duarte*[12] and *R v Wong*[13] and concluded they should not be adopted in New Zealand.

His Honour then considered the circumstances in this case. First, Smith had willingly conducted the transaction with the informer, Bright. Second, in the Court's view, it was hopeless to argue that Smith's privacy interest could trump the public interest because Smith clearly suspected

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7 This analysis begins at para 39 of his judgment.
8 [1997] 1 NZLR 399 (CA)
9 [1997] 2 NZLR 442 (CA)
10 [1994] 1 NZLR 429 (CA).
11 (1996) 14 CRNZ 9.
12 [1990] 1 SCR 30.
13 [1990] 3 SCR 36.

he was under surveillance. Curiously, the fact Smith had taken steps to protect his privacy meant his expectation of privacy was reduced rather than increased. Third, the only purpose of the video was to obtain an accurate record of what took place and reduce the risk of unfairly undermining Bright's credibility as a witness.[14]

Analysis

The Court did not determine whether CPVS was a search. It side-stepped the issue, stating: "In this case, too, it is convenient to turn immediately to the question of whether what was done was unreasonable."[15] Thus, the Court avoided having to address the difficult question of whether CPVS, or indeed any form of electronic surveillance, amounts to a search within the meaning of section 21. However, this approach is not logical. A section 21 inquiry by definition entails a two-step process. First, a court must decide whether the activity in question (in this case, CPVS) constitutes a search.[16] This determines whether the activity is governed by section 21. If the first step is passed, the second step requires the court to decide whether the activity is reasonable or unreasonable. If the search is unreasonable, then the evidence of that search will be excluded.[17] Going straight to the second question makes no sense unless the first question is answered in the affirmative. Holding the use of CPVS, or indeed any form of electronic surveillance, to have been reasonable in the particular circumstances is irrelevant if that activity did not first constitute a search pursuant to section 21.

An investigation of the Court of Appeal's previous section 21 cases involving video surveillance and PES lead inexorably to the outcome in *Smith.* Thus, it is unsurprising the Court found that the Police's conduct was reasonable and that the Court did not take the opportunity to clarify whether section 21 applied to electronic surveillance and other techniques that do not involve trespass.

A Shift from the Common Law

In the seminal case of *R v Jeffries*,[18] Richardson J (as he then was) moved away from the common law property-based notion of search and

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14 Supra note 1, 667.

15 Ibid 666.

16 Most cases involve 'search', rather than 'seizure', although the methodology is the same.

17 Evidence obtained in breach of the Bill of Rights is subject to the prima facie rule of exclusion: *R v Butcher* [1992] 2 NZLR 257 (CA).

18 [1994] 1 NZLR 290 (CA).

endorsed a privacy-based notion of search. He stated: "A search of premises or the person is an invasion of property rights, a restraint on individual liberty, an intrusion on privacy and an affront to dignity."[19] This interpretation of section 21 re-orients its meaning to protect people, as opposed to places, from unwarranted state intrusion. This seachange could have been particularly significant for cases involving new technologies that allow law enforcement to gather private information without committing physical trespass at common law. However, in electronic surveillance cases, there has been a gradual retreat from the privacy-based concept of a search.

1. Video Cases

Two cases that unsettle the privacy-based rationale underlying section 21 and signal a return to a property-based notion of search are *R v Fraser*[20] and *R v Gardiner*.[21] This is explicit in *R v Fraser,* in which Gault J commented that:[22]

> As in this Court, the touchstone in other jurisdictions has been the protection of reasonable expectations of privacy. But there is no consistent approach to whether that is a test for what constitutes search or whether it is applied, once it is established there is a search, to test its reasonableness.

In both cases, surveillance took place via a video camera located outside the property. In *R v Fraser* the camera was trained on the backyard and in *R v Gardiner* (more intrusively) the camera was trained on the windows of the house. The defendants in both cases challenged the evidence and, in both cases, the conduct was held to be reasonable. The Court failed, however, to consider whether the video surveillance amounted to a search.

2. PES Cases

The Court did directly consider the issue of what constituted a search in *R v A*[23] and *R v Barlow*.[24] PES was used in both cases to covertly

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19 Ibid 302. The United States case, *Katz v United States* 389 US 347 (1967), changed the concept of 'search' from a property-based to a privacy-based notion. See, particularly, the concurrence of Justice Harlan: ibid 360. A similar conception was adopted in Canada in *Hunter v Southam Inc* [1984] 2 SCR 145.

20 Supra note 9.

21 (1997) 15 CRNZ 131 (CA).

22 Supra note 9, 449.

23 Supra note 10.

24 Supra note 11.

record the defendants making incriminating statements. In *R v A,* the Court held that PES amounted to a search. Clearly, it would not have constituted a search under a property-based notion of 'search'. However, the search was considered to be a reasonable one in the circumstances.

In *R v Barlow,* the Court held that PES was not inherently unreasonable; its only purpose was to obtain a full and correct record as to what had been said. On the question of whether PES was a search, only Richardson J (as he then was) maintained that PES was a search, albeit a reasonable one. In contrast, Hardie Boys J expressed doubt as to whether PES was a search: "I remain to be convinced, however, that participant recording is properly to be regarded as either a search or a seizure."[25] Gault J considered that PES was merely a superior form of note-taking. His Honour also thought that participation in a conversation could not be a search.[26] McKay J went to the extent of doubting the privacy-based notion of a search altogether. He opined that a search implied some type of physical intrusion.[27]

3. A Quiet Retreat?

The combined effect of these cases has been to cast uncertainty on the scope of section 21. Cases such as *R v Barlow* and *R v Fraser* in particular, suggest a return to an archaic property-based notion of search, rather than the privacy-based notion adopted in *R v Jeffries*. In light of this, the result in *Smith* is not unexpected. Both video surveillance and PES have been held to be reasonable; and CPVS held to be reasonable in *Smith*. The previous cases shy away from determining the issue of what amounts to a search and the same occurs in *Smith*.

4. A Valid Analogy?

Richardson P stated that the approach to be taken in *Smith* was the same as the approach taken in the PES cases.[28] He considered that there was no difference in principle between audio and video surveillance. The approach was the same. This yielded the result that the Police conduct was not unreasonable under section 21. Unfortunately, his Honour does not go into further detail. Richardson P may have considered CPVS a search and determined the case on the reasonableness ground by analogy to *R v A*.

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25 Ibid 41.
26 Ibid 48.
27 Ibid 56-57.
28 Supra note 1, 667.

Alternatively, it is possible that Richardson P was leaning towards the view that CPVS is not a search at all, by analogy to the doubts about PES and electronic surveillance expressed in *R v Barlow* and *R v Fraser*. If PES is just a better form of note-taking that can bolster the informer's testimony as to what he or she heard, then the same argument can be made for covert video surveillance. The video camera does not see anything that the informer does not see and to which the informer cannot testify.

I agree with Richardson P's analogy of CPVS to PES. CPVS relays visual imagery while PES relays audio signals. But, there is no material difference between the two techniques for the purposes of a privacy-based search and seizure analysis. Both techniques intrude upon privacy to some degree. Both techniques rely upon the consent and participation of the party carrying the recording equipment. Neither technique is implicated by a traditional property-based notion of search.

Overseas Cases

1. United States

In the United States, PES does not constitute a search for the purposes of the Fourth Amendment.[29] Earlier cases had already established that the law would not protect a wrongdoer whose trusted accomplice turned out to be a State informer.[30] Therefore, it was logical for the law to deny protection when that same informer was recording or transmitting the content of conversations. The rationale is that the speaker assumes the risk that an informer or accomplice may subsequently divulge the contents of a conversation to another. Since there is no difference between an informer subsequently revealing a conversation and an informer recording the same conversation, the speaker also assumes the risk of PES.

Applying the Supreme Court's reasoning to *Smith* must yield the conclusion that CPVS does not amount to a search. The informer or undercover operative sees what the video camera sees. That person can testify as to what the video camera recorded. Therefore, just as PES is a

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[29] *United States v White* 401 US 745 (1971). *White* has been rejected in several states under the respective state constitutions. See, for example, Alaska: *State v Glass* 583 P 2d 872 (1978); Pennsylvania: *Commonwealth v Schaeffer* 536 A 2d 354 (1987); *Commonwealth v Thorpe* 424 NE 2d 250 (1981).

[30] *Hoffa v United States*, 385 US 293 (1966).

superior form of note-taking, CPVS is a superior form of eyewitness testimony.

2. *Canada*

By contrast, the Supreme Court of Canada has ruled that PES,[31] as well as ordinary video surveillance,[32] constitutes a search under section 8 of the Canadian Charter of Rights and Freedoms ("the Charter"), the Canadian equivalent of section 21. The primary determinant of whether an activity amounts to a search is whether that surveillance technique can be tolerated by a free and democratic society as a reasonable intrusion on privacy. If video surveillance and PES cannot satisfy this test, then it is unlikely CPVS can. Therefore, following the reasoning of *R v Duarte* and *R v Wong*, the Canadians would consider CPVS to be a search for the purposes of section 8 of the Charter.

Significantly, the Supreme Court of Canada views the 'assumption of risk' argument differently. In *R v Duarte*, La Forest J considered that if Canada were to follow the United States line of authority, then privacy would be meaningless.[33] It would essentially mean that people assume the risk that the State may be recording their conversations with others at any time. There was a qualitative difference between the risk of someone repeating one's words and the risk of them being recorded.[34] A witness' memory can fade and their credibility may be challenged. An electronic recording is permanent and irrefutable.

La Forest J also makes a further distinction between PES and an ordinary conversation.[35] People choose in whom they wish to confide. Sometimes, the people who are confided in reveal the contents of those conversations. The United States view is that the speaker must bear the burden of having made the wrong choice. This is also the case where the confidant records a conversation. La Forest J accepts that by speaking to a confidant, one has knowingly accepted the risk the confidant may repeat the conversation. However, the speaker does not assume the risk of being secretly recorded by the confidant because the speaker cannot assume a risk to which she is in fact oblivious.

Further, La Forest J considers that it would be illogical if third-party audio surveillance ("bugging") amounted to a search[36] and PES did not.

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31 *R v Duarte*, supra note 12.
32 *R v Wong*, supra note 13.
33 Supra note 12, 44.
34 Ibid 47.
35 Ibid 49.
36 Ibid 47. See, generally, *Katz v United States*, supra note 19.

The classification of an activity as a search should not turn on the consent of the confidant. For the speaker subject to the surveillance, PES is no less intrusive than third-party audio surveillance. Nor should the location of the microphone, whether it be on an informer's body or hidden somewhere in the room, be the crucial factor determining whether an activity is a search. The suggestion is that PES and third-party audio surveillance should both be treated the same way.

The divergence in the United States and Canadian approaches is usefully summarised in *R v A*:[37]

> In short, the Fourth Amendment to the United States Constitution applies only where the target of police surveillance had an actual expectation of privacy which society is prepared to regard as reasonable and in that context the Court adopts an assumed risk analysis. The Canadian concern is whether the particular police investigation technique can be tolerated by a free and democratic society as a reasonable intrusion on a citizen's privacy.

New Zealand: At the Crossroads?

In *Smith*, the Court of Appeal had the opportunity to clarify an uncertain part of search and seizure law. It could have adopted the United States view and held CPVS was not a search. This would have been possible on the authority of *R v Barlow*, in which several of the Judges expressed doubt as to whether PES amounts to a search.

Richardson P may in fact have been leaning towards the United States position when he stated that Smith was a willing participant in the transactions with Bright.[38] It was simply unfortunate for Smith that Bright happened to be working for the Police. Further, the video evidence was merely a superior form of evidence to which Bright could testify. However, the United States approach is not fleshed out. Nor is its logical conclusion - that CPVS is not a search - ever explicitly adopted.

Alternatively, the Court could have adopted the Canadian view and ruled the Police conduct in *Smith* constituted a search. This would have been possible on the authority of *R v A* and the President's judgment in *R v Barlow*. I suggest this is the better solution. CPVS only falls within the scope of section 21 if it is considered to be a search. If this technique is not considered to amount to a search, there is no independent restraint upon the use of this surveillance method by agents of the State. The Police would be free to use CPVS in any way and in any circumstances

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37 Supra note 10, 436 per Richardson J.

38 Supra note 1, 667.

they see fit. This is disturbing because it means that citizens would always be at risk of the State recording their words and actions when interacting with other citizens. Privacy - one of the core values section 21 is meant to protect - would mean very little. I respectfully concur with La Forest J's observation in *R v Duarte* that:[39]

> A society which exposed us, at the whim of the state, to the risk of having a permanent electronic recording made of our words every time we opened our mouths might be superbly equipped to fight crime, but would be one in which privacy no longer had any meaning.

This does not mean that law enforcement should not be able to use these advanced surveillance methods in certain situations. For a cunning target such as Smith, this may be the only way of gathering evidence. But, this goes to the second step of the section 21 analysis, namely, 'reasonableness'. This second step only arises if and when the first step of the analysis is passed: the particular conduct must first amount to a 'search'.

In Canada, after *R v Duarte* and *R v Wong*, the legislature enacted warrant procedures for video surveillance and PES. Such a warrant is now a necessary, though not sufficient, condition for reasonableness under section 8 of the Charter. It is not suggested that New Zealand should necessarily adopt such a strong warrant preference rule. However, it is suggested the Crimes Act 1961 should be amended to include warrant procedures for various forms of electronic surveillance, such as PES and CPVS. There may be circumstances where it is impractical to insist upon a warrant, though this seems unlikely. If the Police have time to equip an informer with surveillance gear, there should be sufficient time to obtain a warrant. However, in exigent circumstances, whether the surveillance was reasonable will be determined ex post facto in section 21 cases. Both of these avenues presuppose that electronic surveillance already qualifies as a search in terms of section 21.

Conclusion

A section 21 analysis involves a two-question inquiry in which the answer to the first question determines whether or not the second question can or should be asked. The first question, which must be answered in the affirmative, is whether the conduct complained of amounts to a 'search'.

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[39] Supra note 12, 44.

If the conduct does amount to a search, the second question to be answered is whether the search was 'reasonable'.

With respect to PES and, by analogy, CPVS, the United States Supreme Court answers the first question in the negative. PES and CPVS do not constitute a 'search' and, therefore, do not trigger Constitutional rights. The Supreme Court of Canada, however, answers the first question in the affirmative. PES and CPVS do amount to a 'search' and, therefore, trigger Charter rights. Whether the search is 'reasonable' depends on whether the surveillance techniques, such as PES, were undertaken without a search warrant.

In New Zealand, a definitive determination of whether electronic surveillance constitutes a section 21 search remains elusive. In the author's view, the Court of Appeal appears to favour the United States approach. This is hinted at by the prior case law. *R v Barlow* casts considerable doubt on whether PES is a search at all. *R v Fraser* does the same in respect of ordinary video surveillance. In declining to decide whether CPVS amounts to a section 21 search, *Smith* continues this trend of equivocation. In particular, Richardson P's comments that Smith willingly conducted the transactions with Bright and that the video evidence only served to bolster Bright's testimony, are further indications that the Court favours the United States approach to electronic surveillance cases.

However, *Smith* only hints at this approach. It does not explicitly adopt it. Instead, the Court skips the question of whether CPVS is a search and decides the case based on the second question: 'reasonableness'. With respect, this does not provide legal clarity. This back-to-front analysis renders *Smith* of limited precedent value for both lawyers and law enforcement. It only tells us that CPVS may or may not be reasonable depending on the circumstances of the case. What it does not tell us is whether CPVS, in the abstract, or electronic surveillance in general, constitutes a section 21 'search' and, hence, is subject to the 'reasonableness' requirement of section 21. This is the crucial issue that continues to await resolution.

John Ip

Serious Misconduct and Summary Dismissal: A Reporter Fights for his Job.

W & H Newspapers Ltd v Oram (3 May 2001) unreported, Court of Appeal, CA 140/00, Gault, Blanchard & McGrath JJ.

Introduction

In this unanimous judgment delivered by Gault J, the Court of Appeal affirmed the principles espoused in *Click Clack International v James*[1] and *Northern Distribution Union v BP Oil New Zealand Ltd.*[2] These principles are:

1. An employer may summarily dismiss an employee for a single act of carelessness if that act is sufficiently serious so as to deeply impair the implied duty of trust and confidence between the parties;[3] and
2. A court cannot substitute its judgment for that of the employer where dismissal is within the range of responses reasonably available to an employer where an act of misconduct has occurred.[4]

In giving its decision, the Court has apparently "[struck] fear into the hearts of workers".[5] The Court overturned the Employment Court decision, that had upheld the decision of the Employment Tribunal. The case is notable for two reasons. Firstly, in affirming *Click Clack* and *Northern Distribution*, the Court has shown that even in this supposed new era of industrial relations,[6] an employer still has the right to summarily dismiss an employee for a single act of serious carelessness. Secondly, the decision confirms the importance of natural justice arguments in employment matters concerning summary dismissal.[7]

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1 [1994] 1 ERNZ 15. In the judgment, Gault J referred to the case of *Click Clack International v Jarvis*. It is presumed he meant *James*.

2 [1992] 3 ERNZ 483 (CA).

3 *Click Clack International v James* [1994] 1 ERNZ 15.

4 *Northern Distribution Union v BP Oil New Zealand Ltd* [1992] 3 ERNZ 483 (CA).

5 Andrew Little, National Secretary of the Engineering, Printing and Manufacturing Union, cited in "Reporter's dismissal justified says court", *The New Zealand Herald*, Auckland, New Zealand, 4 May 2001, A5.

6 Referring to the enactment of the Employment Relations Act 2000. The case was heard under the Employment Contracts Act 1991 because the misconduct occurred in July 1999.

7 See eg *Drummond v Coca-Cola Bottlers NZ* [1995] 2 ERNZ 229.

The Facts

Oram, the respondent, was a senior journalist employed by the country's largest newspaper, the New Zealand Herald ("the Herald").[8] He had been with the newspaper for 15 years. On 21 July 1999, he was reporting on a hearing at the Auckland District Court that concerned a liquor licence application. The Police regarded the applicant for the liquor licence to be the leader of one of the most dangerous organised crime syndicates in the country. Not surprisingly, the Police opposed his application. The surrounding circumstances were of interest to the editors of the Herald and their intention was to give the story some extensive coverage in the weekend edition.

Oram organised for a Herald photographer to take a photograph of the applicant as he left a café near the courthouse. Oram had given the photographer a brief description of the subject and "directed him to a group of three people emerging from a café".[9] Oram then made his first mistake. He did not watch the photograph being taken. Although the photographer did capture on film the person described to him by Oram, the person he photographed was not the applicant but a social worker who was attending the hearing in a different capacity.

The decision was made by the Herald to make the article the lead story for the following weekend edition. Oram then made his second mistake. He neglected to check the photograph before it was published, despite reminding himself twice to do so.[10] The newspaper went to print and the photograph of the social worker was shown on the front page with the caption "Gang Chief". The story went further, describing him as David Smith, a career criminal and leader of criminals. The article also made extensive references to Smith's lengthy criminal record.

A complaint was promptly made and Oram was asked for an explanation. At this stage, he accepted full responsibility and exonerated the photographer. However, at the disciplinary meeting with his immediate supervisors, acting on advice from his counsel, Oram contended that the Herald should take some of the blame because of the "Herald system of dealing with photographs".[11] It will be seen that this may have been Oram's third mistake. The Herald presented a summary of their views to Oram two days after the meeting and requested a reply.

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8 Oram's actual employer was Wilson and Horton Newspapers Ltd, the owner of the Herald and the appellant in this case.

9 *W & H Newspapers Ltd v Oram* (3 May 2001) unreported, Court of Appeal, CA 140/00, para 3.

10 Ibid para 6.

11 Supra note 9, para 7.

Oram did reply through his solicitor, but it was to no avail. He was dismissed a few days later. The whole episode took less than three weeks.

The Employment Tribunal Decision

The Employment Tribunal ("the Tribunal") concluded that Oram's dismissal was unjustifiable. In doing so, the adjudicators found that Oram's behaviour amounted to serious misconduct and that the Herald had followed the correct procedure. However, when referring to the law, the Tribunal misapplied that law and the ensuing tests.[12] It determined that the Herald had not given Oram the opportunity to respond directly to their concern that they were unable to have trust and confidence in him following his "change of attitude".[13] The letter the Herald sent containing a summary of their views did not mention this concern. Oram had initially been "contrite and accepting of blame",[14] but this had shifted to a position that appeared "cavalier and unaccepting of responsibility for the error".[15] The implication is that Oram should have continued to be remorseful. Had he not attempted to place some liability on the Herald, he may have retained the requisite trust and confidence of his employer and not been dismissed. This much, however, is speculation. In any event, the Tribunal seemed to place heavy emphasis on Oram's exemplary work record and on the fact that the Herald had not discussed with him, prior to his dismissal, the effect of his change of attitude on the Herald as his employer. These two points were sufficient to persuade the Tribunal in their overall decision that the dismissal was unjustified. Oram was reinstated.

This reasoning seems to reject the fundamental principle of employment law as explained previously. The Tribunal cannot substitute its judgment for that of the employer where dismissal is within the range of responses reasonably available to an employer where an act of misconduct has occurred.[16] Indeed, the Tribunal found that serious misconduct had occurred and, prima facie, it would appear as if dismissal was a response available to the Herald.

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12 See *Airline Stewards and Hostesses of NZ Industrial Union of Workers v Air New Zealand Ltd* [1990] 3 NZLR 549 (CA).

13 Supra note 9, para 15. The Herald seemed to place importance on this change of attitude by Oram.

14 Ibid.

15 Ibid, per evidence of Gavin Ellis, Editor-in-Chief of the Herald

16 Supra note 4.

The Employment Court Decision

The appeal to the Employment Court was dismissed. In Judge Palmer's opinion, the Tribunal "correctly dealt with the material issues and made findings that were open to it on the facts as presented".[17] The Employment Court appeared to give limited consideration to the actual appeal argued, namely, that the Tribunal substituted its decision for that of the employer. The Herald appealed to the Court of Appeal.

The Court of Appeal Decision

The primary point on appeal was that the Tribunal and the Employment Court, in dismissing the appeal, had substituted their own views for that of the employer.[18] Gault J intimated that the Herald had immediate difficulty in its appeal because the correct approach was identified and had appeared to be followed in the decisions below. Counsel for the Herald conceded that the correct approach was indeed identified, but it was argued that the facts of the case were not applied properly to the law. In his argument, counsel referred to the English decision of *Iceland Frozen Foods Ltd v Jones*.[19] In that case, Browne-Wilkinson J (as he then was) held that the correct approach in these matters should be that the Tribunal "must consider the reasonableness of the employer's conduct, not simply whether they ... consider the dismissal to be fair".[20] Counsel for the appellant went on to submit that the Tribunal had substituted its weighing of the relevant factors for that of the employer. Counsel for the respondent replied that the findings made in the lower courts were open on the facts as presented.

The Court then set down the relevant law. Serious misconduct by an employee can justify summary dismissal if it impairs the implied duty of trust and confidence in an employment relationship. Once the employee has established a prima facie case that there was a dismissal and that the dismissal was unjustified, the onus then moves to the employer to justify it. "The court has to be satisfied that the decision to dismiss was one that a reasonable and fair employer could have taken."[21] The burden on the employer is not that of proving serious misconduct, "but of showing that a full and fair investigation disclosed conduct capable of being regarded as

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17 Supra note 9, para 19.
18 Supra note 9, para 22.
19 [1982] IRLR 439.
20 Ibid 442.
21 Supra note 9, para 31.

serious misconduct".[22] His Honour then went on to say that after such an investigation, the employer can justify a dismissal by showing that at the time of the dismissal it believed that serious misconduct had occurred.[23] Finally, the misconduct must deeply impair the implied duty of trust and confidence essential to the relationship between the two parties, and correct procedure must be followed.[24]

In their judgment, the Court referred to the three principal reasons given by the Tribunal and adopted by the Employment Court in their decisions. These were: procedural failure—the Herald did not give Oram the chance to respond to their concerns about his change of attitude; systemic failure by the Herald—this reason refers to the contributory negligence argument proffered by Oram; incorrect weighing of the relevant factors such as Oram's initial acceptance of responsibility; his expression of regret and contrition; his early and immediate attempts to assist the Herald to minimise the damage; the effect of the dismissal on him; and his length of experience and blameless employment record with the Herald.

With regard to the first reason, the Court could find no denial of natural justice[25] in the Herald's failure to convey their concerns to Oram regarding his change of attitude. As the Court correctly points out, to do so "could lead to an interminable process".[26] Again, this raises the interesting point of what may have occurred had Oram maintained his regret and accepted full responsibility, instead of trying to place blame on his employer.

Concerning the second reason, the Court noted that the rulings in the lower courts relating to the apportionment of blame to the Herald had no basis in law. It was at this point where the Tribunal and Employment Court had substituted their views for that of the employer. It simply was not for them to decide what the Herald's system for checking photographs should have been. This seems correct.

The Court also rejected the third reason adopted by the lower courts. It was not open to the courts to balance the relevant factors in mitigation. Rather, they were obliged to assess whether a fair and reasonable

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22 Supra note 9, para 32. Gault J cited *Airline Stewards*, supra note 12, 552-553.

23 An interesting corollary of this is that an employer may be able to summarily dismiss an employee even if it is established that serious misconduct had not occurred, provided the employer believed on reasonable grounds that it had.

24 See, for example, supra note 4; See, generally, Hodge, "The Exaltation of Procedure" (1996), seminar presented to NZLS Employment Law Conference.

25 See, generally, *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA).

26 Supra note 9, para 39.

employer could have weighed them in the same way as the Herald.[27] The Tribunal and Employment Court were also wrong to conclude that the single careless act of Oram should not have led to his dismissal. This was not for the courts to decide. The courts were only to place themselves in the position of a fair and reasonable employer in the same situation as the appellant and discern from the evidence whether the action taken was justified.[28]

Thus, the Court affirmed the finding in *Click Clack*.[29] The concerns of the National Secretary of the Engineering, Printing and Manufacturing Union,[30] seem to be somewhat overstated. *Click Clack* has been the law since 1994 and this decision does nothing to strengthen or weaken the position of either employer or employee. It merely confirms the present law in this area.

What is more significant is the affirmation that employers must use the correct procedure if they wish to summarily dismiss an employee following a single serious act of negligence. Failure to do this will ensure that the employee has the comfort and backing of authority in seeking redress. The Herald did follow the correct procedure, as the Tribunal found, and was entitled to dismiss Oram, as they saw fit to do. Not to have done so would have seemed to condone the behaviour. The Herald will also need to be consistent in its actions should a similar mistake occur in the future. In the situation where an employee has been summarily dismissed, the onus remains on the employer to show that the relationship has been deeply impaired. In the future employers might recognise that relationships that are impaired may in fact be able to be repaired.[31] This case in no way endorses the view that that employers should not attempt to repair damaged relationships. The employment relationship in this case, however, may have been irreparable, notwithstanding Oram's exemplary work record. The error he made, in the author's opinion, deserved the action taken by the Herald.

Conclusion

In *W & H Newspapers Ltd v Oram*, the Court of Appeal has shown that in employment matters unaffected by the Employment Relations Act 2000, it is willing to uphold sound principles of law, even in this new age

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27 Supra note 4.

28 The harshness of the Herald's decision to dismiss Oram was not a factor.

29 Supra note 3.

30 Supra note 5.

31 Anderson, "Personal Grievance – Serious Misconduct: *Click Clack International v James* " [1994] ELB 26, 27.

of industrial relations. Despite the pleadings of union delegates, this case should not alarm employees. The vast majority of employees do not commit serious acts of negligence while on the job. For the ones that do, they should expect the law to assist the employer. There is still the defining issue of correct procedure to assist an employee should such a situation arise. If employees do find themselves in this precarious position, adopting a consistent position of extreme regret and contrition may mean that the relationship between the employer and the employee is viewed as one of good faith and that the impaired relationship can be repaired.

Nick Kearney