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Unjustifiable Dismissal: Procedural Fairness and the Employer

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This paper discusses the procedural fairness rule with regard to unjustifiable dismissal and endeavours to determine whether this rule, which has the function of providing workers with employment security, is also fair to employers. The content of procedural fairness, the relationship between procedural and substantive fairness and the reduction of remedies because of contributory fault are examined and the conclusion is reached that the employer is constantly at a disadvantage. The subordination of substance to procedural fairness, pedantic scrutiny of the Courts, and the fact that the reduction of remedies because of contributory conduct does not adequately redress the imbalance, all combine to create a situation that is not fair to the employer.

Introduction

The trend in employment law in New Zealand has been to provide employees with increasing certainty in their employment (Johnston, 1995). One aspect of this trend is the treatment of unjustifiable dismissal which is by far the most frequent complaint in personal grievance actions (Howard, 1995). Although an employer is required to justify the dismissal of an employee both substantively and procedurally, it is now firmly established that procedural unfairness alone justifies a finding of unjustifiable dismissal (Hughes, 1996). It has been argued that the Employment Tribunal and the Employment Court do have two "mechanisms" to deal with the situation where the facts may justify a dismissal but where the employer has acted unfairly. One is to ensure that an employer is not burdened by excessive technicality in observing procedural fairness, and the other is that an award may be reduced on the grounds of contributory conduct (Anderson, et al., 1995).

This paper examines the requirement of procedural fairness as interpreted by case law, and analyses the way in which the Tribunal and the Court have dealt with contributory conduct. The purpose is to determine whether the "mechanisms" result in a fair deal for the employer or whether the subordination of substance to procedure has the effect of awarding liberal

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compensation[1] to the employee even when there has been substantive justification for a dismissal (Howard, 1995).

The employment protection debate in New Zealand

At the time when the Employment Contracts Act 1991 (ECA) was passed it was decided to leave the personal grievance provisions largely unchanged. This decision was made in spite of strong arguments from within the government and other quarters for its abolition (Anderson, et al., 1995). The New Zealand Business Roundtable (1991), and later with the New Zealand Employers' Federation (1992) have proposed that unless parties had contracted to the contrary, all contracts of employment may be terminated on fourteen days notice. They argued that by making firing unnecessarily difficult and costly, the costs of employing workers in the first place are increased, and this results in the reduction of overall employment.

The debate continues in New Zealand, for dismissal remains a contentious issue. On the one hand there is the view (Hughes, 1993) that the Courts do not go far enough in the favour of employees - that the level of compensation does not recognise the real economic consequences of dismissal. On the other hand it is argued that it is unfair that employees retain the right to leave employment "without explanation or consideration of even the most minor of the employer's interests, provided only that they give the agreed notice" (Jones, 1996), whereas an employer who terminates a working relationship has his attitude, behaviour and procedures minutely examined and criticised. In a recent publication (Baird, 1996) it is contended that the present unjustifiable dismissal doctrine adversely affects the productivity of already hired workers who know that their employers will not easily fire them because of the costs involved.

The interpretation of "unjustifiable"

Although the term "unjustifiable dismissal" was used in both the Industrial Relations Act 1973 (IRA) and the Labour Relations Act 1987 (LRA), and again in the ECA, it has not been defined. There have been no legislative guidelines as to what conduct justifies a dismissal and whether it is legitimate to consider procedural aspects of a dismissal as well as the substantive in reaching a decision (Fulton, 1996). It was therefore left to the Courts to develop a body of law.

In 1980 Chief Judge Horn of the Arbitration Court, in *Taranaki Amalgamated Society of Shop Assistants and Related Trades IUW v CC Ward Ltd* [1980] ACJ 124, expressed his reluctance to "set down rigid rules by way of precedent". This dictum was criticised (Hughes, 1991). It was felt that it was the task of the Court to establish guiding principles precisely because the statutory wording was ambiguous (Mathieson, 1981). However, in *Auckland Local*

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[1] Statistics released by the Employment Court and Tribunal for 1995 show that the majority of awards of compensation for "humilation" ranged between $2,000 and $8,000.

Authorities etc Officers IUW v Waitemata City Council [1980] ACJ 35, too, the Court said that it was "refraining (to a degree) from laying down too early too rigidly defined principles". In the absence of a clear definition in the Act and the reluctance on the part of the Court to set out guiding principles, an employer could at that stage hardly be expected to know what procedure would be considered adequate when dismissing an employee.

Guidance as to the meaning of "unjustifiable" was at last laid down in the Court of Appeal decision in *Auckland City Council v Hennessy* [1982] ACJ 699. Somers J held:

> . . . the word unjustified should have its ordinary accepted meaning. Its integral feature is the word unjust - that is to say not in accordance with justice or fairness. A course of action is unjustifiable when that which is done cannot be shown to be in accordance with justice or fairness.

Since this decision, a body of case law has developed on this subject. The Court in New Zealand now sees the standard of fairness as being its own opinion based on a range of factors. It did not adopt the United Kingdom's test of whether the employer acted as a reasonable employer and instead, the Court has placed a strong emphasis on a combination of natural justice and "good industrial relations practice" (Anderson, 1988).

What is procedural fairness?

The overriding function of the procedural fairness rule is to promote employment security (Adzoxornu, 1991). The minimum requirements of procedural fairness (amounting to the principles of natural justice) were set out in *NZ Food Processing Union v Unilever NZ Ltd* [1990] 1 NZILR 35 as being: (a) notice to the employee of the specific allegation of misconduct to which the employer must answer; (b) an opportunity for the employee to refute the allegation or mitigate his or her conduct; and (c) an unbiased consideration of the employee's explanation.

Four elements (Horn, et al., 1991) can actually be identified in the concept of procedural fairness, and these consist of the three requirements of natural justice mentioned in *NZ Food Processing etc IUOW v Unilever NZ Ltd*, plus the requirement of warnings:

(1) *Warnings*. The employer must warn the employee of the misconduct (unless it is serious misconduct warranting summary dismissal) and implicit therein must be a request for an improvement in conduct and performance. The requirements that have to be met with regard to warnings have become extensive. Examples of some of the many rules developed by the Courts are the following: warnings must not only be given, but they must be adequate (*O'Connor v Wellington CC* [1990] 2 NZILR 128); a prior warning cannot be relied on if it has "expired" (*NZ Woollen Mills IUOW v Christchurch Carpet Yarns Ltd* [1989] 2 NZILR 14); an adequate period has to be allowed for the employee to improve in response to a warning about unsatisfactory work (*Trotter v Telecom Corporation of New Zealand Ltd* [1993] ERNZ 659); different warnings must be given to the same employee for different types of misconduct (*Robertson v Honda NZ* [1991] 3 ERNZ 451).

(2) *Investigation.* There should generally be an enquiry process leading to the decision to dismiss or to take other adverse action against the employee. The leading case in this area is the Court of Appeal decision in *Airline Stewards and Hostesses of New Zealand IUOW v Air New Zealand Ltd* [1990] 3 NZLR 549. Bisson J held:

> Put briefly, an employer in the conduct and management of its business is not called upon to sit in judgment of an employee and require proof beyond reasonable doubt of alleged misconduct. When an incident occurs which raises the question of misconduct by an employee, the employer is required to act fairly in considering the interests of the employer's business and of the employee's employment in that business.

(3) *Reasons for the dismissal.* The employer should communicate the reasons for the dismissal to the employee before the dismissal is effected. This requirement is especially suited to cases where the dismissal is based on incompetency. In *Donaldson and Youngman (t/a Law Courts Hotel) v Dickson* [1994] 1 ERNZ 920 an employee was not previously informed that her performance was inadequate, and the Court held that it was unfair of the employer to present her with a list of complaints at the same time as dismissal.

(4) *Opportunity to be heard.* The worker must be provided with a real opportunity to be heard and to offer an explanation to the alleged misconduct, before dismissal is effected. In general an employer will be required to tell the worker in clear terms that dismissal is a possibility and also tell him or her that any explanation will be taken into account.

Apart from the requirement of procedural fairness, the Court may also take other factors into consideration as a matter of "fairness" in some situations. Examples of these are: past record (*Wellington Local Bodies Officers Union v Wellington Regional Hydatids Control Authority* [1977] ICJ 141); disparity of treatment (*Northern Clerical Union v Fruitpac UEB Carton* [1989] 2 NZILR 664) and alternatives to dismissals (*Northern Distribution Union v Lightning Transport Ltd* [1991] 2 ERNZ 779).

Increased litigation

A former Chief of the Employment Tribunal (Gardiner, 1993: 343) said: ". . . we are saturated with personal grievances, 95 percent of which are alleged unjustifiable dismissal cases". The Employment Tribunal may well be less "saturated" if employees who have been dismissed with substantive justification were not able to obtain compensation because of procedural defects.

Recently the observation was made that the amount of litigation and involvement of lawyers in the resolution of this type of industrial dispute has increased, and that lawyers are the only group who are benefitting. Johnston (1995) suggests that litigation in this area could be reduced and that employers would be encouraged to take on additional staff if the maximum compensation recoverable for unjustifiable dismissal were the greater of three months' remuneration or the balance of the remuneration for the period of a fixed term contract (i.e. no compensation for humiliation, loss of dignity, injury to feelings or loss of any benefit).

Pedantic scrutiny

It must be conceded that a worker who faces the loss of a job, and possibly his reputation, is entitled to the benefit of the rules of natural justice, i.e. a fair procedure. However, there should also be some consideration for the employer who has a business to run and has to do this efficiently and profitably. It is not fair to expect standards of procedure that are so high that an employer is not able to dismiss an employee justifiably, even where there is substantive justification.

In *NZ Food Processing Union v Unilever NZ Ltd* Chief Judge Goddard said:

> Failure to observe any one of these requirements will generally render the disciplinary action unjustified. This is not to say that the employer's conduct of the disciplinary process is to be put under a microscope and subjected to pedantic scrutiny, nor that unreasonably stringent procedural requirements are to be imposed.

This statement has been quoted with approval in a number of subsequent cases (*Finsec v AMP Society* [1992] 1 ERNZ 280, *Sparkes v Parkway College Board of Trustees* [1991] 2 ERNZ 851). Case law, however, shows that the Court does at times subject the employer's conduct to "pedantic scrutiny". The view has been expressed that the Employment Tribunal and Court often take it upon themselves to decide whether they would have dismissed and what procedure they would have followed to do so. It has been suggested that because procedure is a lawyers' topic over which they become unreasonably pedantic, 75 percent of the cases are decided on procedural fault or "what I would have done if I was them".

In *Taurima t/a Looking Good Fashion Jewelry v Moore* Unreported, 19 March 1993, Christchurch, CEC 13/93 a warning was held to be inadequate by Judge Palmer on the grounds that the employee, a shop manager, did not receive a copy of a letter which she was given to read at the time the warning was made.

In *Johannink Ltd v Northern Distribution Union* [1990] 1 NZILR 974 a store manageress was given oral and written warnings over a period of 16 months. In addition the employer provided "extraordinary support". The eventual dismissal was held to be procedurally unfair simply because the employer had not decided to dismiss earlier.

In *Burgess v Multiwall Packaging Ltd* [1990] 1 NZILR 970 a factory worker was dismissed because of increasing absenteeism. The written warning to the effect that future absence without good reason and advice to the employer "could" result in dismissal was held to be an inadequate warning and the word "could" should have read "would"!

In *NZ Nurses Union v United Life Care* [1989] 3 NZILR 552 the majority view of the Court was that the employer had acted unfairly in dismissing the employees because it did not actually have sufficient evidence at the time of the dismissal. There was strong dissent, however, by one member of the Court who felt that the majority view imposed on employers a duty to meet the exacting standards of the Court and that an employer could hardly be expected to conduct a concentrated four day hearing before making its decision.

In *NZ Woollen Mills Union v Feltex Carpets* [1988] 1 NZILR 848 the dismissal of a worker for chronic absenteeism was held to be unfair because he had been absent (he refused to attend) from a meeting which was held with the union representative in accordance with the procedure set out in his contract. The worker was awarded $2,500 compensation for "humilation". In this case the employer was (unfairly) penalised - the employee had deliberately prevented him from following the required "fair" procedure.

In *Eagle Airways Ltd v Lang* Unreported, 9 March 1995, Christchurch, CEC 6/95 Judge Palmer expressed his concern that in some cases the Tribunal may have misapplied this test and instead substituted its own view for that of the employer.

It is surely not unreasonable to ask how there can be fairness to the employer when the procedural requirements are contained in an ever-increasing and complicated body of law which is not easily accessible to and digestible by the average employer, whose conduct is often subjected to the pedantic scrutiny of the Courts.

No substance without procedure

In *Nelson Air Ltd v NZALPA* [1994] 2 ERNZ 665 the Court of Appeal stated that:

> . . . it is often convenient to distinguish between procedural and substantive unfairness. But there is no sharp dichotomy. In the end the overall question is whether the employee has been treated fairly in all the circumstances.

In a recent case, *Drummond v Coca Cola Bottlers NZ* [1995] 2 ERNZ 229, the Court emphasised that an employer will not be able to demonstrate substantive fairness of a dismissal if a proper procedure is not followed. The Chief Judge said:

> It is now well settled that it is incorrect to look at dismissals separately from the point of view of substantive justification and procedural fairness, especially in that order . . . The true enquiry is one that looks at the dismissal overall but it would be no exaggeration to say that the enquiry into procedure should come first.

This case was followed by *Tupu v Romanos Pizzas* [1995] 2 ERNZ 266 in which the Employment Court held that it was not for the Employment Tribunal to decide what the worker had done by way of misconduct until dealing with remedies. The Court stressed that it is the employer and its handling of the dismissal that is on trial, not the employee!

More recently the same approach was seen in *Phipps v The New Zealand Fishing Industry Board* [1996] 1 ERNZ 195 where the dismissal was for redundancy due to reorganisation. The Employment Court held that the Tribunal was wrong in taking a two-step approach and particularly looking at the substantive before the procedural justification. Unless the employer justified the redundancy by showing that it acted in a fair and reasonable manner when making the decision, the employer could not argue that the dismissal was justified substantively, and the fact that the redundancy was genuine was irrelevant!

The *Drummond, Tupu* and *Phipps* decisions lead to the conclusion that it is not appropriate for an employer defending an unjustified dismissal claim to lead evidence of the employee's misconduct, incompetence or redundancy. An employer must first show that a fair procedure was followed. If not, the dismissal is unjustifiable.

This reasoning may be theoretically sound, but the results are not always fair, seeing that there have been many cases where the breach of procedural fairness made no difference to the decision on the substantive merits as they appeared at the hearing.

Should the procedural requirement be removed?

The procedural fairness requirement was not universally accepted. When the Employment Contracts Bill was tabled by the National Government at the end of 1990, it included cl.17(3) which provided

> . . . the failure by an employer to observe, follow, or adhere to any procedural requirements (whether imposed by law or by contract or otherwise) in making a decision to dismiss an employee shall not of itself render that dismissal unjustifiable, if, but for that failure, the dismissal would otherwise have been substantively justifiable.

In his speech introducing the Bill the Minister of Labour stated that the Bill would enable only dismissals that are unjustified in substance to be ruled unjustifiable. The Law Commission recommended that a change of terminology from unjustifiable dismissal to "without good reason" would permit concentration on substantive rather than procedural aspects of dismissal. The inclusion of the clause was favoured by the NZ Employers' Federation. It is therefore obvious that considerable unease existed at the time concerning the emphasis on procedural fairness.

However, because of vigorous opposition the clause was struck out from the Bill. It was also criticised as being "badly drafted" and clearly "unworkable" as it was feared that employers would deny natural justice to employees.

It has been estimated that if cl.17(3) had been included in the final version of the ECA the number of cases found to be unjustified dismissals would probably have dropped from three-quarters to under one-half. It has been argued that cl.17(3) would have resulted in the exclusion of a significant criterion for assessing the adequacy of employer behaviour. The assessment of substantive justification would have become more rigorous and former matters of procedural fairness would have become matters of substantive justification because of the difficulty of separating substantive from procedural justification. However, it can also be argued that in many cases there is no such difficulty.

The position in the United Kingdom

The Courts in the UK, where the "no difference" rule was used for several years under the Employment Protection (Consolidation) Act 1978 (UK), did not find the task of separating

procedural fairness from substantive justification impossible. This rule subordinated procedural to substantive issues in the finding of fairness, and a failure to exercise procedural fairness was therefore only relevant if following the correct procedure would have made a difference to the employer's final decision. In 1987 this approach was overruled in *Polkey v A E Dayton Services Ltd* [1988] 1 AC 344 which set out a test which is still not as onerous as the one applied by the New Zealand Courts. Lord Mackay said:

> If the employer could reasonably have concluded in the light of the circumstances known to him at the time of dismissal that consultation or warning would be utterly useless he might well act reasonably even if he did not observe the provisions of the Code. Failure to observe the requirement of the Code relating to consultation or warning will not necessarily render a dismissal unfair.

In contrast to the approach followed in the UK, the approach developed by the Courts in New Zealand places so much emphasis on procedural fairness that an employee whose dismissal would otherwise have been justified, may be able to collect compensation simply because of minor procedural defects.

The NZ Business Roundtable and NZ Employers Federation recommend that the definition of personal grievance be amended by adding provisions to s.27 of the ECA, based on the English legislation, that would limit the relevance of procedural fairness.

Contributory conduct and the reduction of remedies

Seeing that the reduction of remedies because of contributory fault is the only relief available to an employer who has been held to have dismissed an employee in a manner which is procedurally unfair, although with substantive justification, the question is: is the imbalance adequately redressed?

The statutory provisions

Because of the decision to omit cl.17(3) of the Employment Contracts Bill, which would have removed the procedural fairness requirement, s.40(2) was inserted into the ECA. The failure to change the position with regard to procedural fairness led to a corresponding emphasis upon remedies in such cases (the policy apparently being that any "employee fault" has to be dealt with by remedies, not by restricting the grievance procedure). However, this new provision was not expected to make a difference to the practice of the Tribunal and the Court as the Court had already, under the 1987 Act (the LRA), taken the complainant's conduct into account in determining compensation and reimbursement (Hughes, 1993).

There are two provisions in the ECA that are relevant to contributory conduct and the reduction of remedies. The first is s.40(2) which provides that:

> the Tribunal or Court shall . . . consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and shall, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

This provision does not apply to any personal grievance, but only to an unjustifiable dismissal (Hughes, 1993). The reduction, however, applies to any of the remedies enumerated in s.40(1)(a) - (c), namely reimbursement of wages, reinstatement, compensation for humiliation, loss of dignity or loss of any benefit.

The second provision is s.41(3) which is similar to section 40(2). It provides that where the Tribunal or Court has determined that an employee has a personal grievance and has lost remuneration as a result of the personal grievance:

> where . . . The Tribunal or the Court is satisfied that the situation that gave rise to the personal grievance resulted in part from fault on the part of the employee in whose favour the order is to be made, -
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> the Tribunal or the Court shall reduce, to such extent as it thinks just and equitable, the sum that would otherwise be ordered to be paid to the employee by way of reimbursement.

This provision applies only to the reimbursement of lost remuneration, but is not restricted to unjustifiable dismissals, as it applies to any personal grievance. Section 41(3) is equivalent to s.229(3) of the Labour Relations Act 1987.

The "three steps" set out in Paykel Ltd v Ahlfeld

In *Paykel Ltd v Ahlfeld* [1993] 1 ERNZ 334 the employer sought to have the remedies awarded reduced because of the employee's contributory conduct. Travis J first considered s.40(2) and pointed out that there are three steps that must be followed in making a decision as to whether remedies must be reduced:

(1) There must be a finding of unjustifiable dismissal.

(2) There must be a causal link between the conduct and the situation giving rise to the dismissal. Misconduct that is discovered subsequent to the dismissal cannot be taken into account.

(3) The third step requires that the Tribunal "shall" reduce the remedies that would otherwise have been awarded "if the actions so require". At this stage the culpability or blameworthiness of the employee becomes relevant. Depending on the degree of culpability, the reduction may vary from no reduction to the award of no remedies at all. Travis J held that procedural fairness, although not relevant to the second step of finding a causal link, is relevant to this third step.

Travis J followed the approach of the English Court of Appeal in *Nelson v British Broadcasting Corporation (No 2)* [1980] ICR 110 in which it was held that an award of compensation could only be reduced if the conduct was culpable or blameworthy.

Travis J then turned to s.41(3) of the ECA. Travis J held that under this provision the final two steps required under s.40(2) are effectively compressed into one. There must be a causal link and the conduct must be blameworthy. It is important to note that Travis J implied that there is no substantial difference between ss.40(2) and 41(3) of the ECA.

The application of either s.40(2) or s.42(3) raises issues of causation, blameworthiness and proportionality.

Causation

In *Paykel Ltd v Ahlfeld* Travis J emphatically stated that there can be no reduction in the remedies if the employer discovers, after the dismissal, that the employee had been guilty of serious misconduct that was previously unknown. The reason for this was given as the lack of a causal link between the employee's conduct and the situation which gave rise to the dismissal.

In *Macadam v Port Nelson Ltd (No 2)* [1993] 1 ERNZ 300 Chief Judge Goddard, too, stressed that if there is no causal connection to the situation giving rise to the grievance, then misconduct, no matter how serious, is irrelevant.

In *Carlton and United Breweries (NZ) Pty v Bourke* [1993] 2 ERNZ 1, however, a different approach was taken with regard to causation. In this case the contributory conduct consisted of misconduct by the employee which was not discovered until after the dismissal. Although the ECA itself only provides for a reduction for contributory conduct where there is a causative link between the conduct and the dismissal (ss.40(2) and 41(3)), Palmer J stated:

> . . . to adopt Mr Bumble's aphorism "the law [would indeed be] an ass" if, in an employment setting, the Tribunal - and now this court upon appeal - was to ignore as irrelevant deliberate and serious misconduct by an employee . . . because such misconduct was not known to the employer at the time it dismissed the particular employee for unrelated misconduct . . ..

Palmer J then pointed out that the Employment Court is a Court of Equity and is expressly empowered by s.104(3)[2] of the ECA to exercise its specialist adjudication jurisdiction "as in equity and good conscience it thinks fit". The Court substantially reduced the sum awarded as compensation for distress, humiliation and injury to feelings.

In the UK the test with regard to causation is not as onerous. In *Polkey v A E Dayton Services Ltd* the House of Lords stated that where facts subsequently discovered or proved before an Industrial Tribunal show that dismissal was in fact merited, compensation would

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[2] The Employment Tribunal is similarly empowered by section 79(2).

be reduced to nil to ensure that an employee who could have been fairly dismissed does not get compensation. This approach, echoed by the *Carlton* decision, is preferable to the strict approach in the *Paykel* decision, because the results are fairer[3].

Blameworthiness

In *Paykel Ltd v Ahlfeld* it was held that it is the degree of culpability which will determine the variation of reduction from no reduction to the award of no remedies at all. Travis J held that procedural fairness may be relevant to culpability.

In *Donaldson and Youngman v Dickson* Goddard CJ commented that the applicant could not be found guilty of blameworthy conduct if she was working at her job in ignorance of any dissatisfaction with her work. This strict approach may be fair in a case where an employee is unaware of any dissatisfaction which the employer may have. This cannot be said of all cases as there will be circumstances where employees must know, even without warning, that their services are not satisfactory.

In *Wholesale Plant Nursery Ltd v Johnston* Unreported, 5 April 1995, Christchurch, CEC 13/95 the Employment Court criticised the "inappropriately rigid approach" to s.40(2) in *Paykel Ltd v Ahlfeld.* In this case the Employment Tribunal reduced an award by 50 percent because of the employee's contributory conduct (her sarcastic manner of dealing with customers and staff, and her unwilling nature) even though the employer had not warned her of any dissatisfaction with her work. This approach is to be commended.

In *Robertson v Port Nelson Ltd* [1994] 1 ERNZ 976 the Appeal Court held that the actions of an employee, whose dismissal was unjustifiable on procedural grounds, were held not to be blameworthy. The Court held that the mental condition he suffered from at the time had deprived him of any liability in this respect. As a result there was no reduction of the remedies.

A different approach was taken in *Wilson v Sleepyhead Manufacturing Co Ltd* Unreported, 12 October 1992, Auckland, AT 211/92. In this case the unjustifiable dismissal concerned an epileptic worker who had suffered two seizures at work. The Court held that although the employee was clearly not at fault in having a seizure, the "windfall" of $7,039 (being three months' ordinary remuneration by virtue of s.41(3)) would be somewhat punitive on the employer. The Court therefore reduced this amount to $5,000 by exercising "equity and good conscience". Although the reduction in the *Sleepyhead* case was not a considerable one, the decision shows that the Court recognised the fact that an absence of fault on the part of the employee should not necessarily be a bar to the reduction of remedies.

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[3] It has also been argued that the *Carlton* decision may open the door for a critical analysis of an employee's performance over the entire period of this employment in an effort to discredit his character and reduce an award of compensation.

Proportionality

Proportionality involves determining the level of fault on the part of the employee in order to determine the reduction of remedies.

In *Macadam v Port Nelson (No 2)* Goddard CJ said, by way of an example, that an award of one third of wages lost reflects a finding that the employee has been twice as culpable as the employer in causing the personal grievance, but he stressed that the matter of apportionment was actually nothing other than "the application of common sense".

In *Paykel v Morton* [1994] 1 ERNZ 875 Colgan J commented that a reduction of 25 percent made pursuant to s.40(2) was a "significant" reduction, and in *Donaldson and Youngman v Dickson* Goddard CJ said that it should be very "rare" for the Tribunal to find that an employee's contribution has been in the order of 50 percent or even greater. He added that in most cases where an employee has contributed to the grievance to the order of 75 percent, the difference between 75 percent and 100 percent (which would mean no award at all) was imperceptible to the naked eye, even to a trained and experienced one.

These value judgements as to what is a "significant" reduction and which reductions should be "rare" are not of much help, and although one would expect similar culpability to receive a similar reduction, case law does not reflect a consistent approach.

The following examples illustrate the fact that the Employment Tribunal and Court have not been consistent in their decisions:

* In *Finsec v AMP Society* the Employment Court refused to grant any remedy at all to the employee in view of his degree of fault. The contributory conduct consisted of the employee's failure to properly account for funds which were the property of the employer or its clients.

* In *Northern Distribution Union v BP Oil New Zealand Ltd* [1991] 2 ERNZ 531 the Labour Court (exercising transitional jurisdiction under s.186 of the ECA) found that an employee's act of placing a cheque of $3,100 intended to benefit a staff social club in his own bank account was "not an act of serious dishonesty". Although the Court found contributory conduct on the part of the employee, no reduction was ordered.

This decision was reversed by the Court of Appeal which described the Labour Court's view as "rather remarkable" and "entirely unjustified". The dismissal was held to be procedurally fair and justifiable. The orders made in the Labour Court were consequently set aside.

* In *Quest Rapuara (The Career Development and Transition Education Service) v Rahui* Unreported, 11 October 1994, Christchurch, CEC 41/94 the Employment Court reduced the remedies for an unjustifiable dismissal by 75 percent because of contributory conduct consisting of an assault on a fellow worker.

* In *Wilson v PC Direct Ltd* Unreported, 14 March 1994, Auckland, AT 64/94 the reimbursement ordered in the case of an unjustified dismissal was reduced by only 10 percent for contributory conduct. An employee was dismissed because his employer discovered that he had been aware that his co-worker and flatmate had been stealing property from the employer and had lied about his knowledge of this.

Is the imbalance redressed?

The Courts have not been consistent in their interpretation of ss.40(2) and 41(3) of the ECA, and have also, in a few cases, reduced remedies in circumstances where the requirements of causation and blameworthiness were lacking, by relying on ss.79(2) or 104(3) of the ECA which allow the Court "to make such decisions or orders . . . as in equity and good conscience it thinks fit". This shows that the statutory requirements are too strict. With regard to proportionality there has also not been a consistent approach. The Court has therefore failed to establish a coherent body of law in this area and Anderson et al. (1995) admit: "The relevant principles on fault are perhaps still not fully formulated". It must be conceded that the reduction of remedies offers little relief to the employer and does not adequately redress the imbalance.

Conclusion

The term "unjustifiable dismissal" has not been defined by either the IRA, LRA or ECA, and it has therefore been the Courts that have given meaning to the term in an ever-increasing volume of case law. Recent case law, especially, shows that the Court does not look at substantive justification and procedural fairness overall, but considers the procedure first and holds that if there is any defect in this procedure, the employer cannot argue that the dismissal was justified substantively.

The "mechanisms" which the Court has to deal with the situation where a dismissal is procedurally unfair but substantively justified are inadequate to produce results that are fair to the employer. Case law shows that the employer's conduct is often subjected to pedantic scrutiny and that the reduction of remedies on the grounds of contributory conduct does not redress the imbalance. It is perhaps time for the Courts to pay more attention to fairness to the employer.

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