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LEGAL FORUM

The legal position regarding disciplinary proceedings when criminal proceedings are pending

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Introduction

This paper was prompted by the findings of the Employment Court in the recent cases of *Russell v Wanganui Collegiate*, unreported, Goddard C.J., 17 November 1998, WC 72/98 and 22 April 1999, WC 19/99 and *Sotheran and Brown & Anor v Ansett New Zealand Limited* unreported, Palmer J., 1 April 1999, CC 7/99.

This issue raised by these two cases was *is an employer prohibited from conducting an investigation and then dismissing an employee where there is the potential for criminal proceedings or criminal proceedings are pending in relation to the same issue?* In other words do *Russell* and *Sotheran* change the established legal position. Set out below is a brief overview of the established law prior to these decisions. I have then set out the basis of the decisions in *Russell, Sotheran and A v B*, and finish with some conclusions and issues for discussion.

The established law

It is well established law that an employer must carry out his or her investigation in respect of an employee's conduct and that the employer is entitled to reach a decision to dismiss separate from any police or other investigation and irrespective of whether or not criminal charges have been laid or are likely to be laid. It is well established that the standard of proof on the employer is different to that of the criminal jurisdiction and the employer can and may reach a different conclusion to that which a criminal court might find. It is also well established that if an employee refuses to answer questions from the employer in the course of the investigation the employer is still able to proceed with the inquiry and reach a decision. Set out below is a brief discussion of some of the cases from which these principles are derived.

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There are a raft of cases where despite the matter being referred to the Police and charges being laid, the employer has carried out their own inquiry and dismissed. See for example *Herbert v Waitaki International Ltd* [1987] NZILR 415; *Hati v Auckland Farmers Freezing Co-op Ltd* [1988] NZILR 662 and *Ropiha v Weddel Crown Westfield Ltd and Auckland and Tomoana Freezing Works etc IUOW* [1989] 1 NZILR 668. In none of these cases was the issue raised that the respondent could not proceed because of the criminal investigation or proceedings. It is clear, however, that the employer has to carry out an independent inquiry. What these earlier cases began to establish and discuss was that it is not for the Tribunal or Court to determine the guilt or innocence of the person involved in the alleged "crime", that the justice of the dismissal must be judged at the time of the action taken and the standard of proof. See *New Zealand Bank Officer IUOW v ANZ Banking Group Ltd* [1981] ACJ 225, *Northern etc Butchers IUOW v Peach and Vienna Foods Ltd* [1982] ACJ 379. Later cases, notably *Honda NZ Ltd v NZ (with exceptions) Shipwrights etc Union* [1990] 3 NZILR 23 have clearly confirmed and clarified particular tests to be applied.

It is interesting to note that in the *Rohipa* case the union had a policy of taking no action until the outcome of police prosecution was known so it refused to supply names of witnesses that would have cleared the applicant. However, the Court held that the employer knew of the policy but this did not prevent it from interviewing its own employees and *"any constraints that may have been created by the union arose from the employer's own act of informing the police very early in the day, before it could have been said to have properly completed its own factual investigations"*. This is the only case earlier than *Russell* that I identified, where facts involving a suspension of an employer's investigation before the criminal proceedings was raised. But in this case no stay of the investigation was sought.

Other cases which it is important to note as background are set out below.

In *Slattery v NZ Co-op Dairy Co Ltd.*, [1991] 2 ERNZ 898 Travis J., the principle was established that where an adequate opportunity for an explanation was given, but no explanation was forthcoming until the trial, such explanation, however credible, could not be called in aid by the grievant in attempting to undermine the employer's justification. The justification for the dismissal must be examined from the standpoint of the employer at the date of the dismissal. In this case the applicant only provided an explanation at that District Court trial. The applicant had a representative at the meeting. Both the applicant and the representative declined to answer particular questions. No reason is given for this in the judgment but clearly it was not because of any prejudice to the applicant's right to silence. That is, the applicant did not seek to halt the investigation because of the criminal investigation; merely refused to answer questions during the investigation.

An employer is not entitled to substitute the opinion of a Police investigator or some other third party for its own enquiries and assessment. *New Zealand Clerical Workers v Anderson and Son Ltd* 1979 ACJ 333 Horn C.J. In this case the employer did not investigate the matter at all but relied on the view of a Police Officer that there was enough evidence to charge the worker with theft. See also; *Hati v Auckland Farmers Freezing Co-*

op Ltd and Auckland and Tomoana Freezing Works etc IUOW [1988] NZILR 662; *Davis v Golden Bay Cement Co Ltd* [1993] 2 ERNZ 742 and *Lavery v Wellington Area Health Board* [1993] 2 ERNZ 31.

Suspension of disciplinary proceedings

The use of the term suspension where criminal proceedings are involved has arisen in two ways. The first is in relation to the suspension of an employee while an investigation by the employer is carried out. The development of the law in relation to the suspension of employees is not central to this paper and it is not necessary to detail it. However, it is worthwhile noting one case. In the case of *Tawhiwhirangi v The Attorney General* [1993] 2 ERNZ 456, and [1994] 1 ERNZ 459 it was argued that the investigation by the employer (which had been contracted out to a third party) was so tarnished by the process, of which the unlawful suspension of the employee was a part, that the investigation should not be allowed to continue. This was not upheld by Goddard C.J. as while there were defects in the procedure these could be corrected and the whole process revisited. The suspension was held to be unlawful for other reasons.

The second area where the term suspension has been used in relation to criminal proceedings is where proceedings in the Tribunal are "suspended", that is adjourned or stayed until a criminal case is heard. Obviously in such circumstances the employer has carried out an investigation and dismissed the worker. The grievance has been filed and set down in the Tribunal. The situations that arose in *Russell* and *Sotheran* are different in that the employees sought a stay of the investigation. These matters are discussed below.

Before the Employment Contracts Act 1991 the issue was not dealt with in terms of a stay of proceedings. Some early cases were based on seeking leave to proceed when a disputes committee had not been set up. In *Mulder v Ocean Beach Freezing Company Ltd* [1984] NZTLR 487 Horn C.J. stated that in most instances it would be desirable for a disputes committee to not be set up before the District Court had heard a criminal charge. The judge stated that this was a course that had been followed by parties and the Court on a number of occasions. It was a position which was reflected in the civil courts as well. See *Wood v Director General of Social Welfare* unreported, High Court 3 December 1992 M 659/91. However most of the cases dealt with a situation where the employer had dismissed the employee but the personal grievance was heard after the criminal charges had been laid and then dismissed or discharged. There was one interesting case at this time being *Harrison v Northland Polytechnic* [1991] 2 NZLR 593 where the disciplinary process was allowed to proceed despite the risk of injustice in the criminal proceedings which were running at the same time because the process was held in private.

From 1991 to 1996 there were only four applications for stay. Of these one was successful. In 1996 the Tribunal referred as a question of law to the Court whether it is a matter for the Tribunal's discretion whether it refrains from adjudicating on a personal

grievance when criminal proceedings on the same facts are pending. This was the case of *Mann v Alpinewear (NZ) Ltd* [1996] 1 ERNZ 248. In it Travis J. settled the question that the Tribunal does have discretion to decide whether or not to refrain from setting down adjudication proceedings where criminal proceedings are pending. It was held that the Tribunal in exercising the jurisdiction should do so on the basis of its equity and good conscience jurisdiction taking into account all the relevant factors in the case and having regard to the factors or guidelines highlighted in the judgment which are appropriate to the particular case. Twelve guidelines were set and were derived from an Australian case *McMahon v Gould* (1982) 1 ACLC 98. This case was also relied on in *Sotheran*. Travis J. also noted Chambers Minutes of Palmer J. and Finnigan J. in two separate cases where they declined to proceed with a hearing until criminal proceedings were completed.

From 1996 there have been, as far as can be ascertained, five applications for stay or adjournment of the Tribunal's proceedings and of these two were upheld.

There appear to be no cases where the issue of an injunction to prevent the employer's investigation proceeding has been raised until *Russell* and *Sotheran*. However it is worth noting the following case.

In *Teviotdale v Lakeland Health Ltd* [1998] 3 ERNZ 941 CA the Court of Appeal were satisfied that Lakeland Health was not bound to defer its decision to dismiss an employee until High Court Proceedings had been determined. While both proceedings were based on the admission and finding of disgraceful conduct on the part of Dr Teviotdale the focus of the two inquiries, that is by the employer and by the Medical Council, and the assessment of penalty before the High Court were different. In this case the applicant admitted to the employer that he had deliberately misled the Disciplinary Council and this, along with failing to keep the respondent informed of the medical disciplinary proceedings, were breaches for which the employer could dismiss. There was no issue that the applicant sought to stop the disciplinary hearing with the employer, probably because the employer's disciplinary hearing followed as a consequence of the medical disciplinary proceedings. While double jeopardy to the applicant was raised, it was clear that the employer could proceed. This judgment was issued at the same time as *Russell* but, as noted, was a case of unjustified dismissal and not an application for stay or application for interim injunction.

Turning to *Russell v Wanganui City College*, there are two judgments: one dated 17 November 1998 and the second dated 22 April 1999. The reason for this is that in the first hearing Goddard C.J. held that the question of whether the injunction should continue was to reviewed on 15 February 1999.

In the first case the applicant sought an interim injunction and a judicial review. It sought to restrain the defendant from proceeding with the disciplinary inquiry and an order restraining members of the Board of Trustees from participating in any decision making committee of the board on the grounds that their participation would involve a situation of apparent predetermination and bias. It was acknowledged that the case was unusual

because there was no dismissal and no decision to dismiss. It was clear that the matters central to the employer's disciplinary inquiry were also the subject of the complaint to the Police.

Goddard C.J. held that it was not proper for the board to proceed with the disciplinary inquiry but that such restraint should be of a relatively temporary nature and reviewable by the Court. The reasons for granting the injunction were as follows:

- The applicant had established an arguable case for maintaining the status quo until his rights could be determined. What was being granted was interim not final relief;

- The right in question is the applicant's right to have the process stayed until he is charged or prosecuted;

- The basis of the right is the right to a fair trial and the right to see the process of criminal justice not interfered with to his detriment. His right to silence is enshrined in the Bill of Rights and the rule of law.

Goddard C.J. went on to make the following observations:

- The employer is entitled to conduct an investigation, in fact it is bound to do so;

- It is a grave matter for the Court to interfere with this entitlement;

- The burden is on the employee to show it is just and convenient that the employer's ordinary rights are interfered with or modified;

  The employee is not entitled as of right to have the process stayed;

- The Court's task is one of balancing justice between the parties;

- Each case must be judged on its own merits;

- Two factors to take account of are the right to silence and the undesirability of exposing a person to double jeopardy;

- There must be a real and not merely a theoretical danger of injustice in the criminal proceedings having regard to factors such as:
  - the publicity of the civil proceedings;
  - the proximity of the criminal proceedings;
  - the possibility of a miscarriage of justice by disclosure of the defence or interference with a witness;
  - the burden of preparing for two proceedings;
  - the effect on the employer;

- can the proceeding be allowed to proceed to a certain stage before being stayed.

At the second hearing in February the police inquiries were still incomplete and were not a priority. In fact there was a possibility that they had not even begun. There had also been changes in the staffing at the school and a new head was keen to put the college back on an even keel. However the order was reaffirmed. The reasons for this (in summary) were as follows:

- The same issues were central to both proceedings - a person cannot be forced to give evidence;
- While it is possible that in this case there might never be a prosecution the Court cannot draw inferences about the future on which it has no reliable information. It is simplistic to say that, merely because there is no prosecution as yet, the applicable rules (for example, right to silence) can be disregarded;
- The applicant would clearly be prejudiced if required to participate;
- This must be balanced against the employer's rights. The Court considered the law and then looked at whether or not conditions could be imposed which accommodate the employer's concerns. Relevant factors in this consideration were the close connection in law and fact between the employer and the State; the closeness of the subject matters in both hearings; the risk of disclosure and the extent to which it was possible realistically to control the material and prevent its use.

The situation could not be controlled and consideration of these factors led to the conclusion that there is a real risk of criminal prosecution, that the disciplinary inquiry would be prejudicial to the applicant's right to a fair trial and that the injunction was to remain in place. Leave was reserved for the parties to reapply in the event of a change in circumstances.

The *Sotheran* case was also one where the two plaintiffs, (one of whom was the union), sought an interim injunction restraining the defendant from carrying out a disciplinary inquiry. A number of orders were sought which it is not necessary to detail. The injunction stopping the disciplinary inquiry was granted. In this case Palmer J. reiterated the grounds on which he had to decide whether or not the injunction should be granted and then applied the guidelines as set out in *McMahon v Gould* and reaffirmed by *Mann v Alpinewear (NZ) Ltd.* John Haigh QC for the defendant ran a strong argument, relying on House of Lords cases, that all the employer had to do was provide an opportunity for the employee to be heard and that if the employee says nothing in contemplation of criminal proceedings then the employer is entitled to dismiss. John Haigh QC then clearly referred to the New Zealand authorities in support of this position including *Russell* which he noted was on appeal. Palmer J. stated that *Russell* is the correct and just approach and

that in terms of the employer's decision to go ahead with the dismissal or not, if the employer has any doubts as to the justification of the dismissal then it would be fair to wait until the criminal proceedings are dealt with.

One other point to note in this case is that the first plaintiff was the two pilots. The Police had declared publicly that it was going to charge one and not the other. Palmer J. held that as the material that would be the subject of inquiry was so closely related to both pilots that allowing the employer to proceed against one would still unfairly prejudice the other.

Turning finally to the case of *A v B*, a judgment of Travis J., issued in May of 1999. This was an appeal against a decision of the Tribunal which declined the appellant's (i.e. the employer's) application to adjourn the personal grievance until criminal charges against the appellant's managing director were dealt with. The respondent B did not appear. Points to note about this case are that new material that had not been disclosed at the Tribunal or to the respondent's representative, and that were intended only for use at the criminal trial, was brought before the Employment Court and the respondent was not alleging that there had been any criminal offence in relation to her. She was arguing there was no nexus between the criminal trial and her grievance. The appellant's application to have the matter adjourned was granted. The reasons for this are set out below.

Travis J. referred back to *Mann* which he had also determined. He stated that the guidelines in *Mann* were not a checklist but merely guidelines and this meant that the determination of the matter is not dependent on how many factors are weighed on each side of the equation. One factor may well exceed all others and that is sufficient. The right to silence and the right to a fair trial are the paramount considerations in this case and outweigh all others. The allegations against the managing director are central to the respondent's case. Travis J. went on to say that in *Mann* the employee had expressly waived the right to avoid questions on the ground of self incrimination and possible prejudice of his criminal trial. This would normally support a stay, however, the practice of allowing the criminal charge to be dealt with first should be followed notwithstanding any assurances by the employee's counsel.

Conclusions and issues arising

1. One of the things that stands out, having looked into this issue, is that the time delay between personal grievance proceedings and criminal proceedings has lengthened considerably. The increase in the delay in having a personal grievance determined has probably heightened moral or economic considerations for both parties. These issues are only exacerbated where a third party such as Air Accident Investigator, Coroner, professional disciplinary body etc may also be involved. The fact that the right to silence is now enshrined in the Bill of Rights, which can't be read down, may also have given more prominence to the issues involved.

2. The principle that the criminal proceedings should be determined before any civil litigation is well established. The new development is that by *Russell* and *Sotheran* the right of the employer to carry out their own investigation may be curtailed if criminal proceedings are even likely and there is prejudice to the employee if the investigation continues.

3. The law still requires an employer to carry out an investigation and determine to dismiss an employee irrespective of whether or not criminal charges are pending. Employees are not in every case going to seek an injunction to prevent the employer proceeding. When no protest is raised there is nothing to prevent the employer continuing with an investigation.

4. If the employee participates in the process but refuses to answer questions, he or she can still be dismissed. Here the employer must be careful that it does not use the fact that the employee did not answer to imply guilt. The employer must to able to show it reached a reasonable conclusion based on all the facts available at the time.

5. An employee or employer can apply to have Tribunal proceedings stayed until the criminal proceedings are determined and it appears that the stay is more likely to be granted simply because of the person's right to silence and right to a fair trial, given these are paramount considerations, as a result of the *A v B* case. However *Russell* does affirm that the right to a stay is not automatic.

6. For an employee to obtain a stay of the employer's investigation he or she can only do so by way of proceedings in the Employment Court. The Employment Court must determine the case on the basis of whether or not the person making the application has an arguable case and where the balance of convenience lies. The Court will consider the same factors as outlined in *Mann v Alpinewear.*

7. Employers may opt to hold their own investigation before reporting a matter to the Police. This would appear to be the safest approach. However this may be affected by third party investigations.

8. It is worth noting from the *Sotheran* case that an employee who is not the subject of the disciplinary inquiry but is involved in the case may also be able to stop an investigation if it is also likely he or she will be involved in the criminal proceedings. This would also mean that the employer could not go on a "fishing expedition" by interviewing everyone but the actual person involved so as to come to a conclusion to dismiss.

9. In the *Harrison* case the investigation was allowed to proceed because it was held in private. However in *Russell,* while this point was explored the Court held it was not possible for restraints to be placed on the process. This raises the question whether an employee does give information in the context of it being confidential

and only for the use of the employer, is that information able to still be used in a criminal case. My understanding would be that there would be nothing to prevent the Police from gaining a Court Order to have the information released if it was material to a criminal investigation or proceeding.

10. When an employment investigation is stopped by injunction there may be issues arising as to the impact delays have on remedies and costs in the Tribunal and Court.