

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2010] NZEMPC 17
WRC 52/09**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN SECRETARY FOR JUSTICE
Plaintiff

AND CATHERINE ANNE DODD
Defendant

Hearing: 5 March 2010 (by telephone conference call)

Appearances: Alastair Sherriff and Brigette Shone, Counsel for Plaintiff
Susan Hughes QC, Counsel for Defendant

Judgment: 5 March 2010

INTERLOCUTORY JUDGMENT NO 2 OF CHIEF JUDGE GL COLGAN

[1] The plaintiff challenges the admissibility of the intended evidence of four of the defendant's five witnesses at next week's challenge by hearing de novo to the Employment Relations Authority's determination finding Catherine Dodd to have been unjustifiably dismissed and reinstating her in employment.

[2] Mr Sherriff submits that the case will centre on the application of s 103A of the Employment Relations Act 2000 tests in considering justification for summary dismissal.

[3] The impugned evidence is of (now) two District Court Judges, a senior legal practitioner, and a retired area commander of police. Very broadly summarised, all witnesses will depose to their admiration for the performance by the defendant of her

roles as Taranaki courts' manager, registrar of the High and District Courts at New Plymouth, and sheriff. They will say that they view the misconduct to which Ms Dodd admitted and along with other considerations for which she was dismissed was out of character. As appropriate, given their current status, the witnesses will express their confidence in the practicability of Ms Dodd's reinstatement. In the case of Judge AC Roberts, his evidence is intended to go a little further and address a factual matter raised by the evidence of the plaintiff's witnesses which Judge Roberts says he believes involved him.

[4] It is correct, as Mr Sherriff submits, that the Court will not permit witnesses to second guess the justification for the dismissal by giving their opinions as to how they consider a fair and reasonable employer would have acted in all the circumstances. An attempt to do so in the early days of s 103A, by calling a number of senior managers of similar employers to speculate how they would have dealt with misconduct, was unsuccessful: see *X (subsequently White) v Auckland District Health Board*.¹

[5] Having read the affidavits of the defendant's intended witnesses, I do not consider that any of their evidence is designed to allow such inadmissible considerations to influence the Court. The affidavits are carefully and professionally crafted to avoid that consequence and successfully so. Even if it might be said, although I do not think it could be, that some passages stray across the line, the Court is well able to separate the relevant from the irrelevant and rely only on the former.

[6] The defendant's case in justification for dismissal is that if there were other persons whose accounts or views may have been relevant to the employer's investigation of Ms Dodd's conduct, it was incumbent on her to have brought these to the employer's attention. Mr Sherriff will say that in the absence of the defendant doing so, she should not now be permitted to adduce such evidence as she would have been able to have before the dismissal but failed to do.

¹ AC 52A/05, 31 October 2005.

[7] For her part, the defendant's case will be that she asked the plaintiff's representatives investigating her alleged misconduct to make broader inquiries, including of the persons whose evidence is now challenged, but that the employer's representatives failed or refused to do so. Ms Dodd's case will be that the evidence to be called from these witnesses will be what they would have told the employer's inquiry if they had been contacted. Her case is that if this information had been available to the decision-maker, Mr Hampton, as she submits it ought to have been, the plaintiff could not, as a fair and reasonable employer, have dismissed her justifiably.

[8] The challenged evidence is relevant to these arguments that will be live issues at the trial.

[9] The case is, nevertheless, not only about the justification for Ms Dodd's dismissal. If she is again successful and the Court finds that her dismissal was unjustified, she again seeks the remedy of reinstatement. I think it is fair to say that this is opposed implacably by the plaintiff. Whether an employee is reinstated in employment depends upon a broad range of relevant considerations going to practicability. Past events related to the dismissal are not the only relevant considerations. The history of the employment in general, events that have occurred since the dismissal and, to the extent that it can be predicted, probable future events, are all relevant considerations. Three of the four intended witnesses for the defendant are persons with whom she will interact if reinstated and their evidence is relevant to the Court's consideration of practicability. The evidence of the retired police area commander is also relevant in this exercise because relevant past interactions may be a good indicator of future conduct.

[10] For these reasons, I have no hesitation in concluding that the intended evidence for the defendant of Valerie Knox, Patrick Mooney, and Judges Louis Bidois, and Allan Roberts is relevant and admissible at next week's trial.

[11] I reserve costs on this hearing.

GL Colgan
Chief Judge

Judgment signed at 3.45 pm on Friday 5 March 2010