Employment Court of New Zealand

Angus v Ports of Auckland Limited [2011] NZEmpC 160; [2011] NZEmpC 160 (2 December 2011)

Last Updated: 28 May 2012

IN THE EMPLOYMENT COURT AUCKLAND

[2011] NZEmpC 160

ARC 69/11

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

BETWEEN ANDREW ANGUS Plaintiff

AND PORTS OF AUCKLAND LIMITED Defendant

ARC 72/11

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

BETWEEN GRAHAM MCKEAN Plaintiff

AND PORTS OF AUCKLAND LIMITED Defendant

Hearing: 7 November 2011 (Heard at Auckland)

Court: Chief Judge GL Colgan

Judge AD Ford

Judge C Inglis

Appearances: Simon Mitchell, counsel for plaintiff

Richard McIlraith and Kylie Dunn, counsel for defendant

Peter Cranney, counsel for New Zealand Council of Trade Unions as intervener

Tim Cleary, counsel for Business New Zealand Inc as intervener

Judgment: 2 December 2011

INTERLOCUTORY JUDGMENT NO 2 OF THE FULL COURT

ANDREW ANGUS V PORTS OF AUCKLAND LIMITED NZEmpC AK [2011] NZEmpC 160 [25 November 2011]

[1] This judgment attempts to provide the trial Judges who will hear the substantive proceedings, other Judges, members of

the Employment Relations Authority, practitioners, and others involved in employment relations, with guidance about the interpretation and application of two new important sections of the Employment Relations Act 2000 (the Act). Those new sections change the previous law about the test of justification for dismissal or disadvantage in employment (s 103A) and the test for reinstatement (s 125).

[2] By far the most work of the employment institutions (the Court, the Employment Relations Authority and the Mediation Service) deals with personal grievances and dismissal personal grievances in particular. In almost all cases that hinges on issues of justification dealt with in s 103A. The changes to this section affect a substantial number of cases and also, indirectly, the circumstances of large numbers of employers, employees, and unions across the country and across all employment relationships from low paid casual and part time employees to chief executives of large corporations and of government departments. The changes to s

103A will have widespread effects but what is important now is the nature of those changes.

[3] The cases of Andrew Angus and Graham McKean involve the same employer, Ports of Auckland Ltd (POAL), although very different facts. It is convenient to deal with these preliminary issues in each case together. The assembling of a full Court to deal with these questions as preliminary issues allows for the conclusions of the majority of the Judges of the Employment Court to be expressed at a relatively early stage of the new laws‟ operation. That contrasts with the position following amendments to the Act in 2004 when what is now the previous s 103A was enacted. It was relatively late in the life of that section before a

full Court was able to interpret the law in *Air New Zealand Ltd v V*.1

[4] Both of these proceedings were removed by the Employment Relations

Authority to the Court for this purpose. Each plaintiff sought interim reinstatement

1 [2009] ERNZ 185.

and individual judges have determined those applications2 and set the substantive grievances down for hearing in February 2012.

[5] This judgment will, therefore, deal only with the legal principles applying to justification for dismissal and to reinstatement in employment but not on the particular facts of either case which will be determined in due course by single judges.

Statutory interpretation

[6] As did the full Court in its judgment in *V*3 interpreting former s 103A, we start with s 5 of the Interpretation Act 1999 which provides:

5 Ascertaining meaning of legislation

(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

(2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.

(3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[7] In respect of both sections at issue in this case, we have also considered their immediate predecessors and the leading authorities on their interpretation and application. Both new ss 103A and 125 amend the previous statutory position as interpreted by the courts. In addition to the foregoing sources, we will refer to other relevant provisions of the principal Act to interpret the new sections.

[8] As in *V*, we have had regard to the specific objects of the Act set out in s 3 which relate to both ss 103A and 125, and those in s 101 which relate to Part 9 of the Act containing both new sections.

[9] In *V* we referred to what was then (and remains) the latest authoritative statement about the law of statutory interpretation, the judgment of the Supreme

2 *Angus v Ports of Auckland Limited* [2011] NZEmpC 125 and *McKean v Ports of Auckland Limited*

[2011] NZEmpC 128.

3 At [18]-[24].

Court in *Commerce Commission v Fonterra Co-Operative Group Limited.*4 As in *V*, we again set out at para 22 of the Supreme

Court"s judgment where Tipping J wrote:

It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment ["Enactment" means "the whole or a portion of an Act or regulations": see s 29 of the Interpretation Act 1999] must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment [See generally *Auckland City Council v Glucina* [1997] NZCA 353; [1997] 2 NZLR 1 at p 4 (CA) per Blanchard J for the Court, and Burrows, Statute Law in New Zealand (3rd ed, 2003), p 146 and following].

[10] Also as we noted in *V*, the Supreme Court in *Fonterra* expressly approved the following general statement at page four of the decision of the Court of Appeal in *Auckland City Council v Glucina*5 where Blanchard J wrote:

It is only if the Court is left unclear about the legislative intent after reading the provision in question or if, notwithstanding its apparent clarity, a literal application would lead to a result seemingly in conflict with the policies of the Act, that the Court need go further.

[11] Among the relevant objects of the Act set out in s 3 are the following:

The object of this Act is—

(a) to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship—

(i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and

confidence, but also on a legislative requirement for good

faith behaviour; and

(ii) by acknowledging and addressing the inherent inequality of power in employment relationships; and

...

(vi) by reducing the need for judicial intervention;

...

[12] Section 101 sets out the object of Part 9 ("Personal grievances, disputes and

enforcement") materially as follows:

4 [2007] NZSC 36; [2007] 3 NZLR 767

5 [1997] NZCA 353; [1997] 2 NZLR 1 (CA).

The object of this Part is—

(a) to recognise that, in resolving employment relationship problems, access to both information and mediation services is more important than adherence to rigid formal procedures; and

(ab) to recognise that employment relationship problems are more likely to be resolved quickly and successfully if the problems are first raised and discussed directly between the parties to the relationship; and

(b) to continue to give special attention to personal grievances, and to

facilitate the raising of personal grievances with employers; ...

[13] Unsurprisingly the leading English authority on statutory interpretation6 notes that to "„amend" an Act is to alter its legal meaning". It is also a function of statutory enactment (including amendment) to confirm expressly the common law that applies and augments a statutory provision.7 This provides both easier accessibility to the law which would otherwise be contained in judgments, and greater certainty for those who wish to embark on a course of conduct ensuring that it is in conformity with the law.

[14] Despite the temptations, proposed to us by all counsel to a greater or lesser degree, to go directly to and begin our process of statutory interpretation at the point of the Ministerial introduction of the Bill to Parliament, we do not propose to do so. If the text of legislation is unambiguous it must be applied in the light of the Act"s purpose. That is to fulfil the fundamental statutory test for legislation interpretation set out in s 5 of the Interpretation Act. The context in which we

interpret the new legislation includes its predecessor and the courts‟ interpretations of that.

[15] So viewed, both new ss 103A (with one exception dealt with subsequently) and 125 contain no ambiguities or even uncertainties which might trigger a broader inquiry, including into extrinsic legislative materials. Therefore we do not seek the

statute‟s meaning in those sources.

6 Francis Bennion *Statutory Interpretation* (2nd ed, Butterworths, London, Dublin and Edinburgh,

1992) at 188.

7 The 2004 amendments to s 66 by adding subss (5) and (6) following the judgments of the Court of Appeal in *Norske Skog Tasman Limited v Clark* [2004] NZCA 74; [2004] 3 NZLR 323, [2004] 1 ERNZ 127 (CA) provide one such example.

[16] We deal in logical sequence, first, with the interpretation and operation of s 103A and set out both its pre and post 1 April 2011 contents. We will refer to these as “former s 103A” and “new s 103A”:

(Former) 103A Test of justification

For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

(New) 103A Test of justification

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated

the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing

or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's

concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the

allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly.

[17] We will not repeat in detail the full Court‟s reasoning in *V* which led it to its interpretation of former s 103A. Rather, we now set out the following passages from the judgment in *V* which encapsulate that meaning. At [37] the Court concluded:

The meaning of the text of s 103A is clear on its face and in the light of its common law antecedents. It sets out a test of justification where a personal grievance has been alleged. In cases of dismissal, [former s 103A] requires the Authority or the Court to objectively review all the actions of an employer up to and including the decision to dismiss. The same test applies to justification in disadvantage grievances. Those actions are to be assessed against the test of what a fair and reasonable employer would have done in all the circumstances.

[18] What did Parliament change from former s 103A as interpreted above in new s 103A? We start with a general overview

of the new section.

[19] Former s 103A has now been split into two subsections. New s 103A(1) is, in essence, no different from the opening words of former s 103A. New s 103A(2) differs from the second part of former s 103A by the substitution of the word "could" for the previous "would".

[20] Next, new s 103A adds a number of considerations that the Authority or the Court must consider when determining the subs (2) test. Subsection (4) makes clear that not only are the subs (3) considerations not the only ones that must be examined and applied by the Authority and the Court, but that the Institutions also are free to take into account other factors thought to be appropriate.

[21] Finally, subs (5) prohibits the Authority or the Court from determining that a dismissal or a disadvantage in employment is unjustified solely because of procedural defects if such were minor and did not result in the employee being treated unfairly.

[22] The change from "would" in former s 103A to "could" in new s 103A is not dramatic but, contrary to the submission put to us by Mr Mitchell, it is neither ineffectual nor even insignificant. The Authority and the Court must continue to make an assessment of the conduct of a fair and reasonable employer in the circumstances of the parties and judge the employer‟s response to the situation that gave rise to the grievance against that standard. What new s 103A ("could")

contemplates is that the Authority or the Court is no longer to determine justification (what the employer did and how the employer did it) by a single standard of what a notional fair and reasonable employer in the circumstances would have done.

[23] The legislation contemplates that there may be more than one fair and reasonable response or other outcome that might justifiably be applied by a fair and reasonable employer in these circumstances. If the employer‟s decision to dismiss or to disadvantage the employee is one of those responses or outcomes, the dismissal or disadvantage must be found to be justified. So, to use the present tense of "would" and "could", it is no longer what a fair and reasonable employer will do in all the circumstances but what can be done.

[24] There are substantial and significant parts of former s 103A that are unaltered. The legislation does not preclude the Authority or the Court from examining and, if warranted, finding unjustified, the employer‟s decision as to consequence once sufficiently serious misconduct is established, as was argued unsuccessfully for the employer in *V*. That has never been the position and is not so under the most recent amendments. The Authority and the Court will have to continue to assess, objectively and carefully, both the conduct of the employee and the employer, and then the employer‟s response to those conducts.

[25] It has never been the law that the Authority and the Court decide justification by assessing what they would have done in the circumstances. That has not changed. On a case by case basis, the Authority and the Court will need to assess objectively whether what the employer did, and how the employer did it, were what a fair and reasonable employer in those circumstances could have done.

[26] Nor, too, does the new statutory provision alter the approach to what is sometimes referred to as procedural fairness exemplified in a number of decisions of the Court. The legislation (in subss (3), (4) and (5)), although expressing this for the first time, continues the emphasis on substantial fairness and reasonableness as opposed to minute and pedantic scrutiny to identify any failing, however minor, and to determine that this will not be fatal to justification. A failure to meet any of the s

103A(3) tests is likely to result in a dismissal or disadvantage being found to be

unjustified. So, to take an extreme and, these days, unlikely example, an employer which dismisses an employee for misconduct on the say so only of another employee, and thus in breach of subs (3), is very likely to be found to have dismissed unjustifiably. By the same token, however, simply because an employer satisfies each of the subs (3) tests, it will not necessarily follow that a dismissal or disadvantage is justified. That is because the legislation contemplates that the subs (3) tests are minimum standards but that there may be (and often will be) other factors which have to be take into consideration having regard to the particular circumstances of the case.

[27] The new legislation has not affected longstanding considerations such as parity/disparity of treatment of other employees in similar circumstances, the need for employers to comply with relevant contractual provisions and with their own unilaterally determined codes of conduct, and the need to consider an employee‟s overall employment history. In appropriate cases, these (and others not mentioned) are still matters that will require consideration. If the Court or the Authority is satisfied that the application of these and other longstanding principles means that a fair and reasonable employer in the circumstances of the parties could not have dismissed or disadvantaged the employee as the employer did, then such dismissals or disadvantages will be unjustified.

[28] Under the 2004 s 103A test, the Court or the Authority was not to hear evidence or submissions from other employers or other persons saying what they would have done in the circumstances in an attempt to persuade the Court that a fair and

reasonable employer would have done what the employer did.8 Not only will the Authority and the Court not now be helped by such evidence and submissions but, under new s 103A, that too will continue to be inadmissible.

[29] That is not to say that the Authority and the Court, in appropriate cases, may not be assisted by evidence of industry practice about particular conducts or behaviours, evidence of the health and safety risks of acts or omissions, or the like.

Such material has always been available to the Authority and the Court in

8 *X v Auckland District Health Board* (2006) 7 NZELC 98,104.

appropriate cases and especially where the employment is in a very specialised and/or technically complex field in which the Authority and the Court may be unsuited to making, unaided, nuanced decisions beyond their expertise. Past examples of such cases have included *Graham v Airways Corporation*9 (safe performance of air traffic controllers‟ duties) and *Fuiava v Air New Zealand Ltd*10 (carriage of dangerous goods on commercial passenger aircraft). There are and will

be other examples where the Court and the Authority have been, and will be, assisted by evidence to determine what a fair and reasonable employer could have done in the circumstances. Ultimately, however, the Authority or Court must decide this issue on a case by case basis and objectively.

[30] We now examine, interpret and give guidance on the application of each of the constituent parts of new s 103A.

Section 103A(1)

[31] Although this subsection replicates effectively the relevant part of the predecessor s 103A and therefore, we infer, no change was intended by Parliament to what it covers, it is noteworthy in one respect. That is its continued use of the phrase “on an objective basis”. Section 103A, and subs (1) in particular, govern how the Authority and the Court are to determine questions of justification in personal grievances. It does not tell employers how they are to dismiss employees or to effect disadvantage in their employment lawfully. So the requirement to determine justification “on an objective basis” is a requirement of the Authority or the Court. This means that the Authority and the Court are not to determine justification by deciding how they would have acted or done what they would have done if they had been the employer. To do so would be to act subjectively. Acting objectively connotes independently, impartially, and without self-interest, all attributes that are

expected of courts and tribunals.

9 [2005] NZEmpC 70; [2005] ERNZ 587.

Section 103A(2)

[32] Despite Mr Mitchell‟s valiant submission that there is really no difference in practice between the use of the words “would” and “could” in subs (2), we conclude that Parliament did intend to alter the test of justification of dismissals or disadvantages in employment from that which applied under former s 103A.

[33] As Mr McIlraith submitted, in grammatical terms, both “would” and “could” are modal auxiliary verbs. When contained in the phrases “would have done” and “could have done” in the former and new s 103As respectively, “would” is the past tense of “will” and “could” is the past tense of “can”. They indicate different degrees of likelihood or probability of outcome or result. As such, they have different meanings. “Could have done” connotes several available possibilities, whereas “would have done” indicates a single outcome. To use the topical examples provided by Mr McIlraith in argument illustrates the difference:

(a) If the French had tried a bit harder, they *would* have won the Rugby

World Cup.

(b) If the French had tried a bit harder, they *could* have won the Rugby

World Cup.

[34] We should not, of course, be taken to indicate any view about the truth of either of these statements but, as theoretical examples of the two phrases, they are illuminating.

[35] Whereas, under former s 103A, the Court and the Authority were required to determine a single outcome (what a fair and reasonable employer in all the circumstances would have done and how such an employer would have done it), the new test allows for more than one possible justifiable outcome and more than one possible justifiable methodology. That is not to say that there will always be more than one possible consequence justifying dismissal or making a dismissal unjustified. Extreme examples illustrate this although they should not be taken to be markers, either generally or in these particular cases of course. At one extreme, an employer will be justified in dismissing an employee who deliberately destroys the employer‟s business premises by arson. There will not be other possible outcomes. At the other

end of the spectrum, there can only be one outcome in the case of an employee who is dismissed for no reason other than the natural colour of his or her hair. Such a dismissal can only be unjustified.

[36] The most important change to former s 103A is that by use of the word "could" in substitution for the former "would", Parliament has indicated that there may be more than one justified sanction available to an employer in any given situation in employment which might result in the employee‟s dismissal or in disadvantage to the employee in his or her employment.

[37] The effect of new s 103A is that so long as what happened (and how it happened) is one of those outcomes that a fair and reasonable employer in all the circumstances could have decided upon, then the Authority and the Court will find that justified.

[38] Although we have not found it appropriate or necessary to undertake either an historical or inter-jurisdictional analysis of new s 103A, there are statements in leading judgments in New Zealand and in the United Kingdom which confirm the consistency and appropriateness of this interpretation.

[39] In *Iceland Frozen Foods Ltd v Jones*11 the UK Employment Appeal Tribunal, as long ago as 1982, made the following remarks, which have not subsequently been departed from in that jurisdiction, although the statutory tests are of course different from those in New Zealand:

The question in each case is whether the Industrial Tribunal considers the employer‟s conduct to fall within the band of reasonable responses...

[40] In *Rolls-Royce v Walpole*12 the Employment Appeal Tribunal said at para 16:

As this Appeal Tribunal pointed out in the judgment in *Watling's* case, in a given set of circumstances it is possible for two perfectly reasonable employers to take different courses of action in relation to an employee. Frequently there is a range of responses to the conduct or capacity of an employee on the part of an employer, from and including summary dismissal downwards to a mere

11 [1982] UKEAT 62_82_2907; [1982] IRLR 439.

12 [1980] IRLR 343.

informal warning, which can be said to have been reasonable. It is precisely because this range of possible reasonable responses does exist in many cases that it has been laid down that it is neither for us on an appeal, nor for an Industrial Tribunal on the original hearing, to substitute our or its respective views for those of the particular employer concerned. It is in those cases where the employer does not satisfy the Industrial Tribunal that his response has been within that range of reasonable responses, that the Industrial Tribunal is enjoined by the statute to find that the dismissal of the relevant employee has been unfair.

[41] In *W&H Newspapers Ltd v Oram*13 the Court of Appeal at [31] held:

The Court has to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to express this in terms of "could" rather than "would", used in the formulation expressed in the second *BP Oil* case ([1992] 3 ERNZ 483 (CA) at p 487).

[42] There is a further element of subs (2) that we need to address because of Mr Mitchell‟s submissions about it. That is the scope of the phrase "in all the circumstances". Although conceding that this must include circumstances relevant to the employee‟s employment with the employer, Mr Mitchell resisted a more expansive interpretation which would include taking account of the nature of the employer‟s enterprise. The broader interpretation will mean, in practice, that it is not simply a notional generic "fair and reasonable employer" that is referred to in subs (2) but a fair and reasonable employer engaged in the business or enterprise of the particular employer.

[43] Mr Mitchell‟s concern was that in many cases such an interpretation might cause the Authority or the Court to abdicate its role to determine justification on an objective basis.

[44] We do not accept that submission. Section 103A applies to all employment situations but many of which are very specialised, engaging highly skilled staff, and having attributes neither shared with many others nor necessary in most employment situations. It may require more detailed and expert evidence that is necessary to establish, objectively, whether an employer has lost trust and confidence in a

particular employee‟s performance of a specialised role with which the Court is not at all familiar. Nevertheless, this will be necessary to fulfil the statutory requirement that "all the circumstances", at the time that the dismissal or action occurred, are considered in determining whether the employer‟s actions, and how the employer acted, were what a fair and reasonable employer could have done.

[45] So to summarise, the phrase “in all the circumstances” includes the particular

nature of the employing enterprise, determined if necessary by evidence.

Section 103A(3) and (4)

[46] As already outlined, Parliament has, for the first time, provided a number of mandatory considerations that must be taken into account by the Authority or the Court in determining whether the subs (2) test is established in any case. All counsel were agreed both that these considerations contain some apparent internal inconsistencies and that, applied literally, they may not be appropriate to a determination of justification for dismissals or disadvantages in employment on grounds such as redundancy, medical incapacity, and for other reasons than what are generally referred to as “misconduct” in employment.

[47] The four considerations which, together constitute stages of an inquiry that may lead to a dismissal or disadvantage in employment in chronological sequence, may be seen as the legislative successors to the simpler and more general guidelines provided by the Court as long ago as in the *New Zealand (with exceptions) Food*

*Processing IUOW v Unilever New Zealand Ltd*14 case:

... Where there is no agreed procedure the law implies into the employment relationship a requirement to follow a procedure which is, in the circumstances, fair and reasonable. Again, a good and conscientious employer will follow such a procedure. What that procedure should be in any particular case is a question of fact and degree depending on the circumstance of the case, the kind and length of the employment, its history and the nature of the allegation of misconduct relied on including the gravity of the consequences which may flow from it, if established.

The minimum requirements can be said to be:

(1) notice to the worker of the specific allegation of misconduct to which the worker must answer and of the likely consequences if the allegation is established;

(2) an opportunity, which must be a real as opposed to a nominal one, for the worker to attempt to refute the allegation or to explain or mitigate

his or her conduct; and

(3) an unbiased consideration of the worker's explanation in the sense that that consideration must be free from pre-determination and

uninfluenced by irrelevant considerations.

Failure to observe anyone of these requirements will generally render the disciplinary action unjustified. That 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. Slight or immaterial deviations from the ideal are not to be visited with consequences for the employer wholly out of proportion to the gravity, viewed in real terms, of the departure from procedural perfection. What is looked at is substantial fairness and substantial reasonableness according to the standards of a fair-minded but not overindulgent person.

[48] This was partially clarified and augmented in 2004 by s 4 of the Act which specifies that one of the obligations of good faith between employers and employees is, under s 4(1A)(c), as follows:

... requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—

(i) access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) an opportunity to comment on the information to their employer

before the decision is made.

[49] The references in subs (3)(a) and (d) to the investigation of, and explanation for, “allegations against the employee” both appear to confine these mandatory considerations to cases where there are allegations against an employee, but also do not sit easily with the references in subs (3)(b) and (c) to the employer‟s “concerns”. How “allegations” morph into “concerns”, but later in a sequential process, resume being “allegations”, is enigmatic and counsel were not able to suggest what Parliament may have meant by these changes in wording.

[50] Although we have not found it necessary to consider extrinsic materials otherwise than in the interpretation of these sections, the ambiguities in and apparent inconsistencies between the four considerations set out in subs (3) warrant

examination of appropriate legislative background material. Unfortunately this has

not assisted us to define Parliament‟s intention.

[51] The position is problematic because there are a number of circumstances which lead to disadvantages in employment which do not originate from allegations of misconduct and because of the mandatory nature of subs (3): "... the Authority or the court must consider ...". We have already given examples of dismissals for redundancy and for reasons of medical incapacity and there are other similar „no fault‟ situations which arise not infrequently.

[52] In the circumstances, we can really only conclude that the Authority and the Court should try to give a sensible interpretation to subs (3).15 Parliament must have intended that the four considerations set out in subs (3) were meant to have equal application to both allegations against an employee and to other concerns an employer had about an employee so that the different express references to "allegations" and "concerns" in the subsection should be read consistently as

allegations against the employee or other concerns of the employer about the employee.

[53] The foregoing interpretation and application of subs (3) is consistent with established practice of the Court, the Authority and generally in employment over a long period. So, for example, in a case of medical incapacity, it is well established that an employer must investigate, as well as it is reasonably able to do, the circumstances of an employee absent from work long-term and without apparent certainty of return. Included in this investigation must be the employer‟s concerns about that situation. Next, such concerns, and the issues generally, must be raised with the employee before any decision is taken to dismiss or disadvantage the employee. Then, it is well established that in such circumstances the employer must give the employee a reasonable opportunity to respond to these matters. Finally, the employer‟s consideration of them before dismissing or disadvantaging an employee

must be undertaken genuinely.

15 *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530.

[54] We do not consider that Parliament intended to change that approach and, especially, by its enactment of subs (3).

[55] Finally in this regard, subs (4) confirms that the factors that the Court must consider under subs (3) (as interpreted above) are not the only factors and provides a broad discretion for the Authority or the Court to consider other relevant factors. One example is the need to ensure broad parity of sanction in the absence of a reasonable explanation for disparity. Employees in like circumstances should be treated alike unless there are good reasons for different treatment. That is one of the number of factors allowed for by subs (4) that will continue to arise on a case by case basis.

Section 103A(5)

[56] This is also a mandatory provision and is self-explanatory. Its terms confirm the approach to such issues that the Employment Court has followed for a number of years and which the Authority is bound to apply also.16 We consider this provision has been enacted more to affirm expressly the state of judge-made law than to change a previous legislative position (indeed there is none). The two elements of subs (5) must exist cumulatively for the subsection to have effect.

Application of s 103A in practice

[57] The Authority or the Court must first determine, as matters of fact, what the employer did leading to the employer‟s dismissal or disadvantaging of the employee, and how the employer did it. This may include findings about what occurred which brought about the employer‟s acts or omissions that led to the dismissal or disadvantage, if the facts about material events are disputed.

[58] Next, relying upon evidence, relevant legal provisions, relevant documents or instruments and upon their specialist knowledge of employment relations, the

Authority and the Court must determine what a fair and reasonable employer could

16 *Clarke v AFFCO NZ Ltd* [2011] NZEmpC 17; *Mercer v Maori Television Service* [2010] NZEmpC

133[2010] NZEmpC 133; , (2010) 8 NZELR 122; *Willis v Fonterra Cooperative Group Ltd* [2010] NZEmpC 80, (2010) 7

NZELR 630; *Chief Executive of Unitec Institute of Technology v Henderson* (2007) 4 NZELR 418.

have done, and how a fair and reasonable employer could have done it, in all the relevant circumstances at the time at which the dismissal or disadvantage occurred. These relevant circumstances will include those of the employer, of the employee, of the nature of the employer‟s enterprise or the work, and any other circumstances that may be relevant to the determination of what a fair and reasonable employer could have done and how a fair and reasonable employer could have done it. Subsections (3), (4) and (5) must be applied to this exercise.

[59] Finally, in determining justification under new s 103A, the Authority or the Court must determine whether what the employer did and how the employer did it, were what that notional fair and reasonable employer in the circumstances could have done, bearing in mind that there may be more than one justifiable process and/or outcome. The Court or the Authority must do so objectively, that is ensuring that they do not substitute their own decisions for those of the fair and reasonable employer in all the circumstances.

Section 125

[60] New s 125 both changes the previous law about reinstatement and affirms expressly the longstanding application of predecessor provisions by the courts.

[61] Reinstatement is now no longer the primary remedy for unjustified disadvantage in, or unjustified dismissal from, employment. The remedy of reinstatement is available but now has no more or less prominence than the other statutory remedies for these personal grievances. That is not to say that in a particular case, reinstatement may not still be the most significant remedy claimed because it is of particular importance to the grievant. As in the past, the Authority and the Court will need to examine, on a case by case basis, whether an order for reinstatement should be made if it is sought.

[62] Not only must the Authority and the Court be satisfied that the remedy of reinstatement is practicable in any particular case, but they must also now be satisfied that it is reasonable to make such an order. Parliament has clearly intended

that there be factors which are additional to those of practicability as the

Employment Court and the Court of Appeal have interpreted that notion.

[63] It is only necessary to refer to the most recent case in which the Court of Appeal examined practicability of reinstatement, *Lewis v Howick College Board of Trustees*.17 The Court of Appeal upheld the reinstatement test applied by this Court at first instance, which reiterated the Court of Appeal"s judgment in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School*18 (*NZEI*) which had, in turn, affirmed the test applied by the Labour Court in first instance in that case. The Employment Court in *NZEI* said:

Whether ... it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.

[64] In *Lewis* the Court of Appeal added:

[6] ... The test for practicability requires an evaluative assessment by the decisionmaker and the factors to be considered have been clearly identified by this Court in the *NZEI* case. We see no basis on the wording of s 125 of the Employment Relations Act to import into the test a distinction between procedural and substantive grounds for unjustified dismissal. We consider that a unitary approach to the issue of reinstatement is preferable.

[7] There is no dispute between the parties that the onus of proof of lack of practicability rests with the employer. ...

[65] Even although practicability so defined by the Court of Appeal very arguably includes elements of reasonableness, Parliament has now legislated for these factors in addition to practicability. In these circumstances, we consider that Mr McIlraith was correct when he submitted that the requirement for reasonableness invokes a broad inquiry into the equities of the parties" cases so far as the prospective

consideration of reinstatement is concerned.

17 [2010] NZCA 320.

18 [1994] NZCA 509; [1994] 2 ERNZ 414 (CA).

[66] In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.

[67] Reinstatement in employment may be a very valuable remedy for an employee, especially in tight economic and labour market times. The Authority and the Court will need to continue to consider carefully whether it will be both practicable and reasonable to reinstate what has often been a previously dysfunctional employment relationship where there are genuinely

held, even if erroneous, beliefs of loss of trust and confidence.

[68] As in other aspects of employment law, it is not a matter of laying down rules about onuses and burdens of proof but, rather, on a case by case basis, of the Court or the Authority weighing the evidence and assessing therefrom the practicability and reasonableness of making an order for reinstatement. The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some cases, others, for example affected health care patients in institutions.

GL Colgan
for the full Court

Judgment signed at 3 pm on 2 December 2011
