

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 79
5396063

BETWEEN GUY HALLWRIGHT
 Applicant

AND FORSYTH BARR LTD
 Respondent

Member of Authority: R A Monaghan

Representatives: K Beck and C Morrison, counsel for applicant
 P Churchman, counsel for respondent

Investigation meeting: 18 and 19 December 2012

Determination: 5 March 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Guy Hallwright was convicted of a criminal charge after actions of his while driving caused serious injury to another motorist.

[2] Mr Hallwright and the injured motorist, Song-jin Kim, were at the intersection of Symonds St and Khyber Pass Rd in Auckland when Mr Kim's perception of Mr Hallwright's driving caused him to express dissatisfaction in a readily observable way. Mr Hallwright responded in kind.

[3] Both drivers turned into Mt Eden Rd, and both stopped at the side of the road. Mr Hallwright left his car and went to ask Mr Kim 'what is your problem', before thinking better of escalating the matter and retreating to his own car. Mr Kim followed, banged on the bonnet of Mr Hallwright's car, then moved around to the driver's side. As he did so Mr Hallwright was attempting to manoeuvre back into the line of traffic. Although Mr Hallwright did not intend to harm Mr Kim, unfortunately Mr Kim was caught under the wheel of the car. The car drove over him causing the serious injury.

[4] Mr Hallwright's teenaged daughter was in the car. Mr Hallwright was taking her to an appointment near where the incident occurred. He called the Police, dropped his daughter at her appointment, and returned to the scene.¹

[5] These actions were not carried out in the course of Mr Hallwright's employment, and nothing in them was capable of identifying the nature of his employment or the identity of his employer. However the information was eventually publicised in the course of the significant media attention which followed the incident.

[6] Media interest was aroused among other things because Mr Hallwright was employed as a senior investment analyst at Forsyth Barr Limited (FBL).

[7] FBL is a high-profile company and is in the business of providing investment services including share broking, investment advice, portfolio management, research and investment banking. Its clients include institutional and private investors and retail customers.

[8] Mr Hallwright's duties as a senior investment analyst were concerned with the financial and strategic analysis of particular listed companies in particular industries. They included building detailed financial models; financial forecasting; estimating the fair value of the companies' shares; and making recommendations as to whether the shares should be bought or sold. In doing so Mr Hallwright would maintain close contact with the companies concerned and others associated with them. His role also included writing market overviews and outlooks, providing reports to institutional investors, and marketing in the form of meetings and contact with the institutions. He also provided commentary to the business media on related matters.

[9] After the criminal trial and sentencing FBL dismissed Mr Hallwright for serious misconduct in that, in the circumstances, his actions:

- amounted to conduct bringing his employer into disrepute; and
- breached an obligation in the parties' employment agreement not to engage in activity that was likely to compromise his ability to carry out his duties.

¹ This summary of the facts is taken from the notes of Judge R E Neave on sentencing, in *R v Hallwright* DC AK CRI-2010-004-017554, 30 August 2012

[10] Mr Hallwright says the dismissal was unjustified and has raised a personal grievance.

The test of justification for the dismissal

[11] The justification for Mr Hallwright's dismissal is determined under the statutory test in s 103A of the Employment Relations Act 2000. The test requires the Authority to decide the question of justification objectively.

[12] The Authority may not substitute its opinion for that of the employer,² but in applying the test it must consider whether:

- FBL acted fairly in concluding Mr Hallwright was guilty of serious misconduct and in particular whether, before deciding to dismiss him, it,
 - sufficiently investigated the allegations against him,
 - raised its concerns with him,
 - gave him a reasonable opportunity to respond to the concerns, and
 - genuinely considered any explanation regarding the allegations; and
- FBL had reasonable grounds for concluding that,
 - the misconduct in question occurred, and
 - it amounted to serious misconduct; and
- there are any other relevant factors.

[13] The Authority must also consider whether the above matters mean that, in deciding to dismiss Mr Hallwright, FBL did what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

Did FBL act fairly in concluding Mr Hallwright was guilty of serious misconduct

1. The procedure followed in deciding to dismiss

[14] The incident occurred on 8 September 2010. It attracted publicity but when Mr Hallwright was charged on 20 September 2010 he obtained an order for interim name suppression. He pleaded not guilty, and did not report the matter to FBL at the

² *Angus v Ports of Auckland* [2011] EmpC 160

time. When the suppression order was lifted on 1 December 2010 Mr Hallwright's name and that of his employer were publicised. Extensive media coverage followed.

[15] Hints on an internet blog site, followed by confirmation from Mr Hallwright, meant FBL's managing director, Neil Paviour-Smith, became aware in late November 2010 that Mr Hallwright was the person involved in the incident. Mr Hallwright protested his innocence to Mr Paviour-Smith, and indicated the charges against him would be defended strongly.

[16] Mr Paviour-Smith chose to be supportive and to regard Mr Hallwright as innocent until proved guilty. I do not consider this response detracts from the potentially serious implications for Mr Hallwright's continued employment, or that it meant Mr Paviour-Smith did not take the incident seriously. Arguably Mr Paviour-Smith should have drawn those implications to Mr Hallwright's attention at the time, and warned Mr Hallwright that he could be dismissed in the event of a conviction. However if FBL had such an obligation, the breach does not otherwise affect anything in the positions of either party and I consider it minor.

[17] In general there are risks for both parties if an employer attempts to address the implications of an employee's criminal charges, in a disciplinary context, before the charges have been tried. There may be good reasons why this can and does occur, but it is not unusual for employers to await the outcome of the trial before addressing possible disciplinary issues. At times they have been ordered to do so³. Unfortunately for all concerned here a significant and unexpected amount of time passed before the trial went ahead, and for a time the delay misled Mr Hallwright into believing his employment should be safe.

[18] Mr Hallwright was convicted of causing grievous bodily harm with reckless disregard on 29 June 2012. A second more serious charge was dismissed. Mr Paviour-Smith wanted to know whether Mr Hallwright intended to appeal against the conviction. On confirmation of this intention he would address the future of Mr Hallwright's employment. During July 2012 there was a series of meetings and exchanges between the parties in respect of both of these matters.

³ For example: *Sotheran v Ansett New Zealand Ltd* [1999] 1 ERNZ 548; *Russell v Wanganui City College* [1998] 3 ERNZ 1076, with the applicable restraint continued in *Russell v Wanganui City College* [1999] 1 ERNZ 654.

[19] Mr Hallwright did not appeal against his conviction. In addition the parties' attempts to reach an agreement on the future of Mr Hallwright's employment were unsuccessful, so Mr Paviour-Smith initiated a disciplinary process by letter dated 7 August 2012. He referred to the presence in the parties' employment agreement of:

- a definition of serious misconduct which included: '*conduct bringing the employer into disrepute*'; and
- an obligation not to '*engage in any activity that is likely to compromise [your] ability to carry out [your] duties*.'

[20] He advised of the preliminary view that Mr Hallwright's conduct fell within both of these provisions, and that Mr Hallwright's continuing employment was in jeopardy. He sought an explanation and asked for a meeting on 15 August 2012.

[21] The meeting went ahead on 15 August, and Mr Hallwright attended with his lawyers.

[22] The lawyers urged that Mr Hallwright's conduct be addressed not only with reference to the fact of the guilty verdict, but also to the extent of his culpability. Relevant considerations included in particular Mr Hallwright's daughter's presence and her upset, Mr Kim's aggression and the perceived threat that posed, and Mr Hallwright's resulting wish to extricate himself before matters escalated further. The lawyers suggested the level of culpability was low and sentencing - which was still pending - was likely to reflect this. Accordingly FBL should not proceed until after sentencing.

[23] The parties also discussed FBL's concerns about its reputation, and there was a suggestion that this too would be better addressed after sentencing. Finally the parties discussed whether Mr Hallwright's ability to do carry out his duties was affected.

[24] Mr Paviour-Smith prepared a draft decision in a letter dated 22 August 2012.

[25] On whether Mr Hallwright's conduct had brought FBL into disrepute, Mr Paviour-Smith made the following points:

- there had been extensive media coverage throughout, most of which described Mr Hallwright as an ‘investment banker’ or a ‘senior employee of Forsyth Barr;
- television footage included shots of Mr Hallwright in the FBL offices in front of the Forsyth Barr sign;
- responses to the coverage included emailed queries about how FBL could employ someone capable of acting as Mr Hallwright had;
- it was an integral component of Mr Hallwright’s job that he be available to make public statements and provide commentary to the media, and the media were interested in his comments only because he was employed by FBL;
- the integrity and probity of senior employees in the investment industry is of enormous importance, with public confidence being critical to success in the marketplace;
- feedback from staff and clients indicated that many of those who had become aware of Mr Hallwright’s actions were disturbed by them; and
- while it may not be possible to quantify any loss of business or damage to the FBL brand, FBL’s reputation had been damaged and Mr Hallwright’s name and that of FBL had been inextricably linked.

[26] Mr Paviour-Smith also believed the incident and its impact had an effect on Mr Hallwright’s ability to carry out his duties. He accepted there may not be an effect on Mr Hallwright’s technical ability to undertake financial analysis or financial transactions with institutional clients. However aspects of Mr Hallwright’s duties which were compromised concerned his media profile, the inclusion of his name on FBL publications, and his activities in making public presentations to retail clients.

[27] The letter concluded that the two allegations of misconduct were established, the relationship of trust and confidence between the parties was irreparably damaged, and the appropriate penalty was summary termination of employment. It offered Mr Hallwright an opportunity to comment on that penalty and any other aspect of the draft decision.

[28] Mr Hallwright’s solicitors responded in a letter dated 28 August 2012, expressing concern about the failure to wait until after sentencing. Otherwise they said of the allegation regarding disrepute that:

- the incident occurred outside work and beyond the naming of FBL as the employer it had no bearing on Mr Hallwright's job or how he did it, or on FBL's business;
- there was no indication that FBL had been brought into disrepute or damaged by the incident;
- the media coverage was not balanced and did not accurately reflect the evidence; and
- details of the feedback from staff and clients had not been provided.

[29] Regarding Mr Hallwright's ability to carry out his duties, the letter pointed out that Mr Hallwright had carried out his normal duties since the incident - a period of 20 months. While Mr Hallwright did not accept his media activities were a significant part of his job, he was willing to limit those.

[30] Mr Hallwright was sentenced on 30 August 2012. The sentencing attracted further extensive media attention.

[31] Mr Paviour-Smith had agreed to postpone a decision until sentencing, and subsequently agreed to await the transcript of the judge's sentencing notes. Meanwhile by further letter dated 3 September 2012 Mr Hallwright's solicitors drew attention to a number of the judge's comments at sentencing. They emphasised the judge's view of whether the termination of Mr Hallwright's employment would be appropriate⁴, and the judge's criticism of the media reporting and the uninformed comment the reporting had prompted. They also emphasised comments relevant to the low level of culpability.

[32] By letter dated 19 September 2012 Mr Paviour-Smith responded to the points arising from the sentencing. He did not agree that Mr Hallwright was being held responsible for the views of uninformed members of the public based on unbalanced media reporting. He said Mr Hallwright was being held responsible for his own actions, with reference to the two specific allegations of misconduct.

⁴ The prospect was discussed in the submissions on sentencing, and the sentencing notes express the view that termination would be unfair and unnecessary. No-one has suggested the view is determinative of the outcome here.

[33] Regarding disrepute, Mr Paviour-Smith accepted certain views could be disregarded, but at the other end of the continuum there were people who were genuinely concerned that an employee of FBL had been convicted of an offence of that nature. He said:

Our business requires a significant degree of public trust. Forsyth Barr has been brought into disrepute through the extensive media coverage of your trial, conviction and sentence, as the employer of an employee who has been convicted of a serious criminal offence, namely causing grievous bodily harm with reckless disregard, albeit one whose actions could be dealt with short of imprisonment.

[34] Regarding Mr Hallwright's ability to carry out his duties, Mr Paviour-Smith confirmed his view that Mr Hallwright's conduct had compromised his ability to carry out those duties.

[35] Accordingly Mr Paviour-Smith confirmed his conclusion that dismissal was appropriate. Mr Hallwright's employment was terminated.

2. Did FBL meet the requirements of a fair procedure

[36] Ms Beck submitted that FBL did not act fairly in reaching its conclusions in that it did not:

- provide Mr Hallwright with sufficient evidence to support its assertions of damage to reputation;
- fully put its concerns to him, with the result that he did not have an opportunity to answer them; and
- genuinely consider information he put forward, with particular reference to the inaccurate and unbalanced media reporting and the effect of that reporting.

[37] Evidence in support of damage to reputation, as put to Mr Hallwright during FBL's investigation in August 2012, took the form of Mr Paviour-Smith's generalised comment about negative feedback and a small representative sample of the feedback received. That feedback amounted to unsolicited emailed messages from members of the public. Not all of the messages produced in the Authority were produced and discussed during the disciplinary investigation, but there was no real disagreement that feedback of that kind was received. Nor was there any real disagreement that

some of the messages were abusive, some were otherwise negative and critical both of Mr Hallwright and FBL as his employer, and some were supportive. Mr Hallwright accepted FBL received complaints and comments from members of the public, but said there was no evidence of such feedback from clients or prospective clients.

[38] For reasons discussed in more detail in the next section of this determination, I do not consider this case turns on whether there is evidence of negative feedback from clients or prospective clients. Accordingly I find that, although FBL did not provide Mr Hallwright with evidence proving actual damage to its reputation in the eyes of clients or prospective clients, this was not a flaw in its procedure.

[39] Ms Beck also pointed out that evidence which FBL staff members gave in the Authority was not put to Mr Hallwright during the disciplinary investigation. That is correct, and if it was relied on in support of the decision to dismiss it should have been put to Mr Hallwright before the decision was made. For my part I understood the evidence was not relied on in that context, rather it was being advanced in the Authority only in response to Mr Hallwright's claim for reinstatement.

[40] I accept that only a generalised statement regarding concerns held by staff members was put to Mr Hallwright at the relevant time. However while the reactions or likely reactions of other staff members can be relevant in cases of this kind, they were not at the forefront of Mr Paviour-Smith's decision-making at the time. I regard as a minor flaw any lack of detail in that respect.

[41] Overall I find that Mr Paviour-Smith put FBL's principal concerns to Mr Hallwright in considerable detail, and Mr Hallwright had an opportunity to answer them.

[42] The last challenge to the fairness of FBL's procedure was that Mr Paviour-Smith did not genuinely consider information Mr Hallwright provided on what he said was inaccurate and unbalanced media reporting. I do not accept that submission. Mr Paviour-Smith did genuinely consider Mr Hallwright's views – but he saw matters differently.

[43] I conclude that, with reference to the considerations identified in s 103A, FBL acted fairly in concluding Mr Hallwright was guilty of serious misconduct.

Did FBL have reasonable grounds for concluding serious misconduct occurred

[44] Broadly speaking, Mr Hallwright says the incident was not work-related, his conduct in it has been dealt with in the appropriate forum, and it is not for his employer to further penalise him by terminating his employment. With more specific reference to the two grounds FBL identified as affecting the employment relationship and amounting to serious misconduct, Mr Hallwright says there was no evidence FBL's reputation was damaged by his actions and he denies that his ability to carry out his duties was affected. Perceived difficulties for FBL were the result of inaccurate and unbalanced media coverage – a matter outside the parties' control.

[45] The applicable law is set out in the leading case of *Smith v Christchurch Press Company Limited*.⁵ The relevant questions in relation to dismissals for conduct outside the workplace are whether there is a link between an employee's conduct and the employee's employment, and whether the conduct had an adverse effect on the employment. When there is such a link, an employer may consider dismissal for serious misconduct. A link can be identified with reference to whether:

- the employer's business may be damaged;
- the conduct is compatible with the proper discharge of the employee's duties;
- there is an impact on other employees; or
- there are other factors undermining the necessary trust and confidence between the parties.

1. Whether FBL's business may be damaged

[46] The first of the grounds of serious misconduct which FBL relied on - that Mr Hallwright's actions amounted to conduct bringing his employer into disrepute - falls under this heading.⁶

⁵ [2000] 1 ERNZ 624 (CA)

⁶ As acknowledged in *Smith* at p 630, and illustrated in several cases since, conduct outside the work relationship but which brings the employer into disrepute may warrant dismissal

[47] Mr Hallwright does not believe his conduct brought his employer into disrepute. He says: there is no evidence of this; there is no evidence of clients lost; adverse comments have come only from people who are not clients; and there has been no negative comment from existing clients.

[48] I do not accept the case for justification fails if there is no evidence of damage. As the Court of Appeal said in *Smith*:

[25]... It is not so much a question of where the conduct occurs but rather its impact or potential impact on the employer's business ...

[28] We do not accept that it is necessary for there to be demonstrated actual adverse effect on the employment situation before the employer is entitled to conclude that the conduct warrants dismissal. ... The employer does not have to wait for a negative impact on the working environment before dismissing an employee when such impact is inevitable. In many situations the potential for such an effect is clear enough.⁷

[49] FBL acknowledged it could not prove an actual loss of business. Instead it pointed to the evidence of what I accept was almost constant linking in the media of Mr Hallwright and FBL as his employer, and to evidence from a senior and experienced PR consultant of the effect of this.

[50] The consultant's evidence was that linking Mr Hallwright's name with FBL will have caused damage to FBL's reputation, and had the potential to cause significant ongoing damage. Her view - and that of Mr Paviour-Smith - was that it was critical for the public to perceive an ability to exercise good judgment on the part of employees in the finance industry, particularly in the light of events since the global financial crisis. Not only that, Mr Paviour-Smith said the nature of the offence itself caused concern. It brought discredit on Mr Hallwright and, by association, on FBL.

[51] Mr Hallwright says, in effect, that if there is any actual or potential damage to FBL's reputation or its business then the cause of the damage is the inaccurate and biased media reporting. I accept that early media reports in particular suggested Mr Hallwright had become angry, had deliberately driven at or 'run over' Mr Kim, and had fled the scene. These elements were even reflected in the more serious of the charges Mr Hallwright faced, but which was dismissed.

⁷ p 631

[52] Although more detailed accounts followed, the tone was set. None of the early reports available to me presented the incident with an emphasis on Mr Hallwright's point of view, showing the incident in a different light. This is explained to a degree by Mr Hallwright's decision not to comment publicly on the matter but also, as the PR consultant put it, information of that kind was not 'the story'.

[53] The facts were aired in full at Mr Hallwright's trial in the District Court. That process allowed the nature of his actions to be aired from both sides, and resulted in the dismissal of the more serious charge. Although Mr Hallwright was convicted of a lesser, but still serious, charge his level of culpability was also aired and he received favourable comments from the judge in that respect. While those comments themselves attracted media attention that did not assist Mr Hallwright, for present purposes the point is that more accurate versions of the facts became available and Mr Hallwright's account of his actions was publicised.

[54] Importantly, even if the media coverage included inaccuracy and over-statement, the fact remains that the serious incident described in this determination occurred and Mr Hallwright received a criminal conviction as a result. Media attention was attracted as might be expected in an incident of that kind. The industry in which Mr Hallwright worked and the nature of his employment meant media attention extended to his employer. The existence of the underlying conduct means it cannot be said that the media attention, rather than the conduct, was the cause of any damage to FBL's reputation. I do not accept that any such damage can be laid at the feet of the media to the extent that Mr Hallwright's dismissal was unjustified.

[55] Just as importantly, it is clear that Mr Paviour-Smith did not adopt the view of Mr Hallwright's conduct suggested by the early accounts of it. He began by regarding Mr Hallwright as innocent until proved guilty, and when Mr Hallwright was convicted he listened to the arguments regarding the level of culpability. He remained concerned, as he was entitled to be, about the nature of Mr Hallwright's conduct and conviction, the extensive adverse publicity, and the effect on FBL's reputation.

[56] For these reasons I find that, in all of the circumstances at the time, Mr Paviour-Smith's conclusions were conclusions a fair and reasonable employer could reach.

2. Compatibility of the conduct with the proper discharge of Mr Hallwright's duties

[57] The second of the grounds of serious misconduct relied on – breach of Mr Hallwright's obligation not to engage in activity likely to compromise the ability to carry out his duties – falls under this heading.

[58] Mr Hallwright commented on his role in interacting with representatives of the media and on occasion with clients, and in having his name associated with information promulgated by FBL. He said interactions with the media and clients in particular comprised only a very small part of his overall duties, and did not agree that his ability to carry his duties out was compromised. He pointed out that he had in any event offered to step back from those duties on a temporary basis, or to otherwise co-operate in methods of addressing the effect of the media attention, but was not given the opportunity to do so.

[59] FBL did not agree the duties were as limited in scope as Mr Hallwright contended, or that stepping aside from them on a temporary basis was an adequate solution. It said any temporary stepping aside would not address the day to day performance of the role, nor the need to mitigate damage to FBL's reputation.

[60] There is a reliance on businesses to provide goods or services to the necessary or expected standard of quality or competence, in accordance with any legal obligations, and in accordance with necessary or expected standards of service. Perceptions of employees' integrity and behaviour are closely related to perceptions of whether a business meets those standards, particularly senior employees in positions of trust. The personal reputations of such employees are an important component of the reputation of the business.

[61] I accept that Mr Hallwright was able to continue carrying out duties related to the financial and strategic analysis of listed companies in the industries he covered, and to the expected standard. However these duties were carried out at a senior level, in circumstances where his own reputation, integrity and behaviour were relevant to overall perceptions of the way FBL conducted its business. The conduct of which he was guilty discredited him personally and tainted his position overall. Accordingly

the conclusion that it compromised his ability to carry out his duties was one a fair and reasonable employer could have reached.

3. Impact on other employees

[62] As I have noted, there was relatively little evidence concerning this factor and it was not a material consideration in the decision to dismiss.

4. Other factors undermining trust and confidence

[63] No other factors have been relied on.

Could a fair and reasonable employer have decided to dismiss

[64] For the above reasons I find dismissal was the action a fair and reasonable employer could take in all of the circumstances.

[65] Accordingly I find the dismissal was justified.

Costs

[66] Costs are reserved.

[67] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

R A Monaghan

Member of the Employment Relations Authority