IN THE COURT OF APPEAL OF NEW ZEALAND

CA2/05

	BETWEEN	CHIEF EXECUTIVE OF THE DEPARTMENT OF INLAND REVENUE Appellant
	AND	GILLIAN MOANA BUCHANAN AND LYNETTE CATHERINE SYMES Respondents

Hearing: 21 November 2005

Court: Chambers, O'Regan and Panckhurst JJ

Counsel: T Arnold QC, Solicitor-General and C C Inglis for Appellant
D G Dewar for Respondents

Judgment: 22 December 2005

JUDGMENT OF THE COURT

A Leave to appeal is granted on the points relating to the legal test for disparity and disparity with subsequent cases.

B The appeal is allowed, the personal grievances are dismissed and the orders for reinstatement made in the Authority and upheld in the Employment Court are quashed.

C The costs awards made in the Authority and the Employment Court are quashed.

D The appellant is awarded costs in this Court of $6,000 plus usual disbursements. The liability of the respondents is joint and several.

REASONS

(Given by O'Regan J)

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Introduction

[1] The appellant applied to this Court for leave to appeal against the judgment of the Employment Court delivered by Chief Judge Goddard on 16 December 2004, now reported at [2004] 2 ERNZ 392.

[2] In a judgment dated 9 June 2005, this Court granted leave in relation to one question of law, namely: Does an employee's ignorance of significant employment obligations mean that there is a presumption against a breach of such obligations giving rise to a finding of serious misconduct? In the same judgment, the Court adjourned the application for leave to appeal on two other issues, so that it could hear further submissions at the substantive appeal hearing as to whether leave should be granted. Those two issues are:

(a) Did the Employment Court apply the proper test for disparity of treatment?

(b) In considering a claim for disparity of treatment, is the Court entitled to have regard to subsequent disciplinary action taken by an employer against other employees?

[3] In this judgment we deal with the appeal on the presumption point and the application for leave to appeal on the two points relating to disparity.

Facts

[4] The respondents were long serving employees of the Department of Inland Revenue. Both were well regarded and had good service records. The normal work of the respondents involved processing tax information for members of the public, and they had access to the Department's tax information system for that purpose.

[5] The Department has a policy that staff should not access tax information relating to family, friends or acquaintances. This is set out in the Department's Code of Conduct, with which all employees are contractually bound to comply. The Code is designed to ensure that employees of the Department act in a way which is consistent with the standards required of State Sector employees, as well as the specific standards imposed on the Department by ss 6 and 81 of the Tax Administration Act 1994.

[6] Section 6(1) says that officers of the Department "are at all times to use their best endeavours to protect the integrity of the tax system". The phrase "the integrity of the tax system" is defined in s 6(2). It includes references to the need for taxpayers to be treated fairly and impartially and for confidentiality of the affairs of taxpayers to be maintained.

[7] Section 81 requires officers of the Department to maintain secrecy in relation to matters coming to their knowledge in the course of their duties.

[8] The respondents' terms of employment were contained in the Inland Revenue Collective Agreement. Clause 3.4 of that document set out the work responsibilities

of employees of the Department, and one of these was "Comply with, and promote compliance with, the Inland Revenue Code of Conduct".

[9] The Code of Conduct is a comprehensive document. In relation to secrecy it says:

> Secrecy obligations are a cornerstone of the tax administration system. All employees are subject to the statutory secrecy obligations imposed by Section 81, Tax Administration Act 1994…
>
> Examples of how secrecy is applied include:
>
> - Never accessing a file on behalf of family, friends, or acquaintances.
>
> ***Example**: you should not access a friend's file at their request or out of curiosity*.

[10] In relation to conflicts of interest, the Code says:

> Conflict of interest, for Inland Revenue Code of Conduct purposes, arises when your personal interests compromise or appear to compromise your responsibilities to Inland Revenue, the government and their relationships with the general public…
>
> Examples of how a conflict of interest or the appearance of a conflict of interest may occur:
>
> …
>
> - Do not agree or undertake to deal with requests for information by family, friends or acquaintances. If you are unsure how such requests should properly be dealt with, discuss them with your manager.
>
> ***Example***: *giving information or assistance to an extended family member on how to deal with their disputes regarding tax, child support or student loan affairs.*

[11] The Code of Conduct had been introduced in 2001, and it differed from the Code which had been in force up till that time. In particular, the secrecy provision was expressed in more unequivocal terms than the equivalent provision in the old Code. Because of the changes in the new Code, the Department undertook training for its employees to inform them of the obligations imposed on them by the Code. The respondents attended the training sessions on 14 December 2001, at which they were given their own copies of the Code. After attending the training session, each of the respondents signed a form acknowledging receipt of a copy of "The Inland Revenue Code of Conduct Booklet which sets out the minimum standards of

behaviour expected of me as an Inland Revenue Employee", and also acknowledged attendance at a Code of Conduct induction or discussion group session.

[12] The respondents did not read the Code of Conduct, although they did receive various departmental newsletters stressing the importance of understanding the matters contained in it.

[13] In 2003, the Department carried out an audit of compliance with procedures relating to the issuing and processing of personal tax summaries. This audit revealed that a number of employees had been issuing personal tax summaries to people with the same surname as themselves, and in some cases it turned out that the people to whom the personal tax summaries had been issued were family members of employees of the Department. The Department instigated disciplinary procedures in relation to employees shown to have undertaken that activity. Altogether there were 35 disciplinary inquiries, two of which related to the respondents.

[14] The manager to whom the respondents reported was Mr Lavin. He was deputed to take action in respect of the results of the audit in relation to the respondents and one other employee under his supervision. He caused a report to be prepared on the circumstances of each occasion of access by each of the respondents to the computer database relating to taxpayers having similar surnames to those of the relevant respondent. This revealed that:

(a) Ms Symes had accessed four family members' accounts on 26 separate occasions and had taken actions in relation to those accounts, including changing addresses and issuing and confirming a personal tax summary;

(b) Ms Buchanan accessed five family members' accounts including her own, on 30 separate occasions and her actions included changing addresses, issuing a personal tax summary, granting an extension of time, transferring credits (from one year to another) and issuing and cancelling a dummy personal tax summary.

[15] Each respondent was then summoned to a disciplinary meeting at which the allegations were put to them for comment. Each frankly acknowledged that they had used the Department's database in relation to family members as alleged. They acknowledged that they had received the Code of Conduct and attended the training session, as well as subsequent publications relating to the Code, and also acknowledged that what they had done was contrary to the Code. But, in each case, they said that they did not realise their conduct was wrong. They said they had not read the Code of Conduct and had paid little attention to the discussion group session.

[16] After the second meeting with each of the respondents, each was dismissed.

[17] The Chief Judge described the Department's handling of the disciplinary process in the following terms (at [16] viii):

> It was coordinated nationally by the Group Manager Field Delivery, Mr Martin Scott. His approach was to balance two principles – that cases should be treated consistently, and that each should be decided on its merits. Mr Hewitson, National Manager of Risk and Assurance (Internal Audit), conducted weekly meetings with line managers focused on consistency of process. At each of these meetings the managers discussed in general terms what was being done with regard to similar allegations in different service centres. A lawyer was available to the managers at this meeting.

The decision of the Employment Relations Authority

[18] The respondents claimed before the Authority that their dismissals were unjustified because:

(a) No serious misconduct had occurred;

(b) The process adopted by the Department was unfair;

(c) Their treatment was disparate to other staff of the Department.

[19] The question of the process is no longer an issue. The Authority found it was a fair process and that is no longer challenged. We therefore do not say any more about that aspect.

[20] On the issue of serious misconduct, the Authority concluded that it was open to Mr Lavin to conclude that the respondents had committed serious misconduct: they "had so let themselves down by not pursuing their responsibilities to learn the contents of the Code despite being given copies of it, training, further communications and discussions at team meetings, that they left themselves wide open to unconsciously committing a serious breach of their responsibilities as employees". The Authority noted that Mr Lavin faced a difficult decision because of the sustained excellent work records of the respondents and because they acted throughout in the genuine belief that they had done nothing wrong. But ultimately it was not appropriate for the Authority to substitute its judgment over that of the Department's managers, whose job it was to make the difficult decisions on disciplinary matters.

[21] On disparity, the Authority noted there were 35 investigations, and considered that there were three cases where there was disparity of treatment between that of the respondents and that of the other Departmental employees. The three other employees were given final warnings rather than being dismissed. The Authority was satisfied that there was no proper basis for this disparity of treatment. In relation to two of these employees, their disciplinary processes took place after the dismissal of Ms Symes and Ms Buchanan. But the Authority determined that it was appropriate to take those cases into account because they were part of a continuing series of investigations.

[22] The Authority therefore concluded that the respondents had been unjustifiably dismissed because three other employees had committed similar offences at the same time in similar circumstances and were given final warnings rather than being dismissed. The Authority ordered that the appellants be reinstated, but be given a final warning.

Employment Court decision

[23] The Department challenged the decision of the Authority on disparity, and the respondents challenged the decision of the Authority on serious misconduct. Neither party sought a de novo hearing.

[24] On the serious misconduct issue, the Chief Judge noted that some of the activities undertaken by the respondents were serious because it suggested preferential treatment for close relatives of employees of the Department, and could even give rise to a perception of favouritism bordering on corruption.

[25] However the Judge said that the respondents were ignorant of the rules contained in the Code of Conduct, notwithstanding the measures taken to inform them of it. He noted that serious misconduct required actions "such as to cause a loss of trust and confidence in the employee". He said this required loss of confidence in the employee's faithfulness.

[26] The Chief Judge then added (at [39]):

> Where, as here, the explanation is accepted by the decision-maker, that the problem was not the flouting of rules, but ignorance of the existence of rules then the question of honesty or fidelity is not ordinarily engaged. There is misconduct but it is not serious misconduct.

[27] The Chief Judge said that the acceptance of the respondents' explanation rendered their repeated actions less culpable, and that they were therefore entitled to succeed in their challenge to the Authority's finding that they were guilty of serious misconduct.

[28] The Chief Judge then turned to the issue of disparity. He referred to the leading cases and said that the principles emerging from them were (at [43]):

> a. If disparity is established, an employer may be found to have dismissed unjustifiably unless an adequate explanation is forthcoming.
>
> b. If the explanation is adequate, the disparity becomes irrelevant.

[29] The Chief Judge found that the Authority had been correct to find that the respondents were not treated consistently with other employees being dealt with at about the same time at similar levels of blameworthiness. He therefore upheld the Authority's decision to reinstate the respondents, and left the issue of monetary remedies to be resolved either by mediation or by the Authority.

Issues before the Court

[30] The issues before the Court are those outlined in [1] and [2] above. We will deal first with the issue of serious misconduct, in respect of which leave has already been given. We will then turn to the two issues relating to disparity.

Serious misconduct

[31] In *Northern Distribution Union v BP Oil New Zealand Limited* [1992] 3 ERNZ 483 at 487, this Court described serious misconduct as follows:

> Definition is not possible, for it is always a matter of degree. Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship. In the context of a personal grievance claim … questions of procedural and substantive fairness are also relevant. In the end, the question is essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances.

[32] More recently, this Court slightly modified that test in *W & H Newspapers Limited v Oram* [2000] 2 ERNZ 448 at [31] as follows:

> 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 [*Northern Distribution Union v BP Oil New Zealand Limited*].

[33] On behalf of the Department, the Solicitor-General, Mr Arnold QC, argued that the Chief Judge had adopted an incorrect legal test for the determination of serious misconduct. He said that the essence of the Chief Judge's decision was that, where an employee is ignorant of her obligations, however fundamental, there is a presumption that a breach cannot give rise to a finding of serious misconduct, even where the employer has made reasonable efforts to ensure that the employee is aware of those obligations. He said that this finding did not accord with principle or logic. In particular:

(a) It did not recognise sufficiently the reciprocal nature of the employee relationship. In the present case, the appellants contracted to act professionally and impartially, and to comply with the Code. These obligations were particularly significant for the appellant, because employees of the Department undertake actions in his name as Commissioner of Inland Revenue;

(b) It created perverse incentives, rewarding employees for remaining ignorant of their employment obligations;

(c) It therefore undermined the obligations imposed by ss 6 and 81 of the Tax Administration Act, the Department's Code of Conduct and the Public Service Code of Conduct.

[34] On behalf of the respondents, Mr Dewar said that the Chief Judge had not found that employers were precluded from making a finding of serious misconduct in a situation such as the present case. He acknowledged that the Chief Judge had referred to ignorance of the rules, but said the Chief Judge had also taken into account the good service records of the respondents, their openness and honesty after the misconduct was discovered and the fact that they did not know their actions were prohibited. He said the Chief Judge had differentiated the respondents' behaviour from those who had knowingly and deliberately breached the Code, and that it must be surely right to do so. He said the Chief Judge had found that the respondents' conduct, while serious, did not deeply impair or destroy the basic trust and confidence the Department had in them, and therefore could not be serious misconduct. He said this was consistent with the test in *Oram*. He said this was based substantially on the fact that the decision-maker had accepted that the respondents had not appreciated the significance of the relevant parts of the Code of Conduct.

[35] Under the test in *Oram*, the question for the Chief Judge was whether the decision to dismiss was one which a reasonable and fair employer could have taken in the particular circumstances. We agree with the Solicitor-General that the effect of the Chief Judge's finding in this case is that there is a presumption that actions

involving non-compliance with the Code of Conduct by employees who do not wilfully defy the rules in the Code but are ignorant of them do not constitute serious misconduct. Although the Chief Judge did not refer to the *Oram* test, the effect of his ruling seems to be that, in circumstances where an employer accepts that the employee did not know the rules, the breach of the rules, no matter how fundamental, will not ordinarily amount to conduct which could lead a reasonable and fair employer to decide to dismiss.

[36] In our view, the correct approach is to stand back and consider the factual findings made by the Authority and evaluate whether a fair and reasonable employer would characterise that conduct as deeply impairing, or destructive of, the basic confidence or trust essential to the employment relationship, thus justifying dismissal. We do not agree with the Chief Judge that a failure to establish wilfulness creates a presumption that the conduct is not serious misconduct. What must be evaluated is the nature of the obligations imposed on the employee by the employment contract, the nature of the breach that has occurred, and the circumstances of the breach. This was correctly done by the Authority and led to the Authority's finding that it was open to Mr Lavin to reach the conclusion that the conduct was serious misconduct and that dismissal was the appropriate sanction.

[37] Of course, there will be circumstances where an employee could not be expected to know of a particular obligation, but we cannot see how this case could be so characterised. The statutory obligations on employees of the Department under ss 6 and 81 of the Tax Administration Act are significant in this context. The Department made a concerted effort to ensure that employees were made aware of the Code of Conduct and, having done so, it was entitled to expect employees to meet their contractual obligation to comply with the Code of Conduct. It is not as if the particular requirements of the Code of Conduct in the present case are ones which could be described as unusual or unexpected for employees of a Department having the statutory obligations referred to earlier.

[38] Applying the *Oram* test, we conclude, as the Authority did, that it was open to Mr Lavin to dismiss the respondents in the circumstances of this case, having regard to the importance to the Department of compliance with its obligations of

secrecy and impartiality. The actions of the respondents, even if they were undertaken in ignorance of the strict requirements of the Code, were clear breaches of the Code which the respondents had contracted to comply with. Having had the Code drawn to their attention and received training on it, the respondents were under an obligation to acquaint themselves with its requirements and to comply with it. They failed to do so. The consequences for the Department in the light of its statutory obligations were such that it was open to the Department to conclude that their actions deeply impaired its basic confidence in them as employees.

[39] We therefore conclude that the Chief Judge was in error on this aspect of the case in that he applied the wrong legal test. That was an error of law. Applying the correct test, we conclude, as the Authority did, that the dismissal of the respondents was not (when considered without reference to the disparity issue, to which we will now turn) unjustified.

Disparity: legal test

[40] Mr Arnold argued that the Chief Judge had applied the wrong legal test in his consideration of the disparity issue. He said that the Chief Judge defined a two stage test, but omitted a crucial third stage which would have substantially affected the outcome in this case.

[41] The test outlined by this Court in *The Airline Stewards and Hostesses of New Zealand Industrial Union of Workers v Air New Zealand Limited* [1985] ACJ 952 at 954 was:

> We accept that if there is a prima facie case of disparity or enough to cause inquiry to be made by the Arbitration Court into the issue of disparity, the employer may be found to have dismissed unjustifiably unless an adequate explanation is forthcoming.

[42] This was refined by this Court in the later case, *Samu v Air New Zealand Limited* [1995] 1 ERNZ 636 at 639 where the Court, having set out the quotation reproduced above, added:

> Thus if there is an adequate explanation for the disparity, it becomes irrelevant. Moreover, even without an explanation disparity will not

> necessarily render a dismissal unjustifiable. All the circumstances must be considered. There is certainly no requirement that an employer is for ever after bound by the mistaken or overgenerous treatment of a particular employee on a particular occasion.

[43] Mr Arnold said this approach was supported by a line of English authorities which emphasise that disparity will be relevant to the issue of the fairness of a dismissal only in very limited circumstances. He highlighted the following proposition from the judgment of Waterhouse J, sitting in the Employment Appeal Tribunal in *Hadjioannou v Coral Casinos Limited* [1981] IRLR 352 at 355:

> 24 In resisting the appeal, counsel for the respondents, Mr Tabachnik, has submitted that an argument by a dismissed employee based upon disparity can only be relevant in limited circumstances. He suggests that, in broad terms, there are only three sets of circumstances in which such an argument may be relevant to a decision by an Industrial Tribunal under s 57 of the [Employment Protection (Consolidation) Act 1978]. Firstly, it may be relevant if there is evidence that employees have been led by an employer to believe that certain categories of conduct will be either overlooked, or at least will be not dealt with by the sanction of dismissal. Secondly, there may be cases in which evidence about decisions made in relation to other cases supports an inference that the purported reason stated by the employers is not the real or genuine reason for a dismissal...Thirdly, Mr Tabachnik concedes that evidence as to decisions made be an employer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that it was not reasonable on the part of the employer to visit the particular employee's conduct with the penalty of dismissal and that some lesser penalty would have been appropriate in the circumstances.
>
> 25 We accept that analysis by counsel for the respondents of the potential relevance of arguments based on disparity. We should add, however, as counsel has urged upon us, that Industrial Tribunals would be wise to scrutinize arguments based upon disparity with particular care. It is only in the limited circumstances that we have indicated that the argument is likely to be relevant and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument.

[44] That statement was approved by the English Court of Appeal in *Paul v East Surrey District Health Authority* [1995] IRLR 305 at [34]. The approach outlined in *Hadjioannou* and *Paul* has been applied in subsequent decisions of the Employment Appeal Tribunal: *Hughes v Lyons Bakeries (UK) Limited* [1996] EAT 1162 and *Etienne v London Underground Limited* [2000] EAT 219. There was no suggestion that the first and second sets of circumstances referred to in *Hadjioannou* applied in this case. Mr Arnold argued that the third did not either.

[45] In essence, therefore, the argument for the Department is that the Court must consider three separate issues, namely,

(a) Is there disparity of treatment?

(b) If so, is there an adequate explanation for the disparity?

(c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

[46] Mr Arnold said that the Chief Judge had omitted the third question, which led him to find that the dismissals were unjustifiable on the basis of disparity because of the existence of disparity and the lack of an adequate explanation. It appears that the same approach was taken by the Authority.

[47] Mr Dewar argued that the thrust of the case for the Department was a challenge to the findings that there had been disparity and that it was not adequately explained. He said these were not questions of law and were not therefore amenable to the granting of leave to appeal to this Court.

[48] We are satisfied that the Chief Judge omitted the third element of the test we have described in [45] above. He conflated the second and third elements of the test by defining adequacy of explanation as meaning "adequate in the sense of satisfactory enough to warrant a conclusion that the dismissals were justifiable" (at [44] of his judgment).

[49] We are satisfied that the test to be applied in disparity cases is a question of law, and that it is of sufficient general importance to justify the grant of leave to appeal. We are also satisfied that the Chief Judge was in error in this case, and that this aspect of the appeal should succeed. Before determining how we should dispose of the appeal in the light of that finding, we will first consider the second disparity issue.

Disparity: subsequent cases

[50] This point can be disposed of briefly.

[51] The Department's contention is that disparity necessarily involves consideration of the present case against previous disciplinary processes, and that it was not open to the Authority or the Employment Court to consider disparity between the treatment of the respondents and the treatment of other employers of the Department who were dealt with after the respondents were dismissed. Mr Arnold said that this was consistent with the general proposition that the justification for a dismissal must be judged by what was known at the time of the dismissal itself: *Pacific Forum Line Limited v NZ Merchant Service Guild IUOW* [1991] 3 ERNZ 1035 at 1046. As the Employment Court said in that case, information which comes to light after the dismissal may affect remedies but cannot provide an ex post facto justification for the dismissal or a further basis for challenge to its justification.

[52] Both the Authority and the Employment Court took into account the treatment of other employees of the Department who were dealt with after the respondents had been dismissed. The Chief Judge gave the following explanation for taking that approach (at [46]):

> Normally consistency would be required only with cases that were already in the past. I accept that in this case technically there were different disciplinary processes being dealt with by different line managers in different offices of the department. The common sense reality of the situation, however, is that they were part of a single process emanating from a single audit report and were all taking place at around the same time. Therefore, consistency across the relatively brief period of time of these disciplinary enquiries could be expected.

[53] We can see no basis for criticising that approach. It would be artificial to consider only prior cases when the Department had a co-ordinated disciplinary process for a number of employees whose conduct had come into question as a result of the audit. We think that provides a proper basis for an exception to the general rule that subsequent matters will not affect the justifiability of a dismissal. We accept the general statement of principle in the *Pacific Forum* case, but that principle

yields to common sense in the present case where a large number of cases are being considered as part of a single co-ordinated disciplinary process.

[54] Although the issue raised by the Department is facts-specific, it is a point of some general importance affecting employers who undertake co-ordinated investigations of apparent breaches of employment contracts by a number of employees. For that reason, we grant leave to appeal on this aspect of the case, but for the reasons set out above, we reject this ground of appeal.

Disposal of appeal

[55] Section 214(5) of the Act provides that this Court may, in its determination of an appeal, confirm, modify or reverse the decision appealed against, or any part of that decision. This is amplified in s 215(1), which says that this Court may, instead of determining an appeal under s 214, direct the Employment Court to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates.

[56] At the hearing of the appeal, we discussed with counsel what approach would be appropriate in the event that we were to determine that the Employment Court was in error in relation to the first two points on appeal. Mr Arnold pointed out that this Court had, in the *Oram* case, determined for itself that the dismissal was justified, and had quashed the order for reinstatement. He argued that this Court was as well placed as the Employment Court to deal with the issues of disparity. He noted that the Employment Court hearing was not a de novo hearing, and so the Employment Court proceeded on the basis of the written record from the Authority, which meant it was in no better position than this Court which also had that record before it.

[57] Mr Dewar initially asked that the matter be referred back to the Authority, but it is clear that s 215(1) does not permit that. In view of that, Mr Dewar modified his position and asked that the matter be referred back to the Employment Court with a direction that any further hearing in the Employment Court be on a de novo basis, allowing the parties to place before the Court all relevant evidence relating to the

issue of disparity on which the Court's determination would be required. He said that the nature of the Authority's processes was that the Employment Court did not have a full record of proceedings in the Authority, and there may well be material factual matters which were not before the Employment Court and are not before this Court which could bear on the question at issue, namely whether the dismissal was justified notwithstanding disparity which has not been adequately explained.

[58] We are satisfied that this Court is as well placed as the Employment Court would be to reach a view on the application of the correct legal test for disparity. As the Employment Court hearing was not a de novo hearing, that Court proceeded on the basis of the written record of the Authority's proceedings, but without any transcript of the cross-examination of witnesses. That was a choice which both parties made, and we do not think it is open to them to revisit that during the course of a second appeal. We will therefore determine the matter in this Court.

Applying the test for disparity

[59] The Authority found that there was disparity between the treatment of the respondents and the treatment of three other employees. The information before the Court on disparity is contained in a schedule of 35 cases arising from the Department's audit. This schedule was prepared for use in the Authority. In this schedule, the entry in relation to Ms Symes records that she had unauthorised access to the computer system on 26 occasions between 12 December 2001 and 10 June 2003. It describes her behaviour as follows:

> Accessed 4 family members' accounts. Actions included changing address, issuing and confirming PTSs and inquiring on family members' accounts.

[60] The equivalent entry for Ms Buchanan records that she had unauthorised access on 30 occasions between 10 August 2001 and 16 June 2003. It records her activities as:

> Accessed 5 family members' accounts (including her own). Actions included changing addresses, issuing and cancelling a dummy PTS, issuing and confirming a PTS, granting an extension of time, transferring credits and inquiring on family members' accounts.

[61] The reference to "confirming a PTS" was inaccurate: she issued, but did not confirm a PTS.

[62] The respondents' treatment was found to be inconsistent with that of one other employee whose case was dealt with before that of the respondents (referred to in the schedule as employee 13). Employee 13 was the subject of a final warning rather than dismissal. The entry in relation to employee 13 indicates that the employee had unauthorised access to the system on eight occasions between 30 July 2001 and 17 March 2003. The activities of the employee are described as follows:

> Accessed 2 family members' accounts. Accessed in inquiry mode. Created then cancelled a dummy PTS on two occasions, created and issued a PTS on one occasion.

[63] There was also found to be disparity in relation to two employees who were dealt with after the respondents, employee 14 and employee 25. These employees were also given final warnings.

[64] The entry in respect of employee 14 indicates that the employee had unauthorised access to the system on nine occasions between 28 June 2002 and 16 June 2003. The description of the activities of this employee is as follows:

> Accessed 2 family members' accounts. Issued PTSs over two years and enquiries.

[65] In relation to employee 25, the schedule shows that the employee had unauthorised access to the system on 16 occasions between 10 September 2001 and 15 April 2003. The employee's conduct is described as follows:

> Accessed 4 family members' accounts. Actions were an inquiry mode, issued IRD numbers, amended FAM entitlements, issued PTSs, added family support details.

[66] Of the 35 employees referred to in the schedule, 15 (including the respondents) were dismissed. Seventeen (including employees 13, 14 and 25) were subject to final warnings, one was subject to a warning and two were subject to no disciplinary outcome.

[67] The reasons which the Authority gave for finding disparity were as follows (at [37]-[38]):

> 37. There were three workers investigated as part of the general audit, however, who were given final warnings rather than being dismissed, who had committed similar breaches of the Code to those of Ms Symes and Ms Buchanan. None of those workers were managed by Mr Lavin…. In particular, these workers had issued personal tax summaries after accessing family members' accounts on several occasions. One of the workers was given his/her warning before Ms Symes and Ms Buchanan were dismissed and the other two occurred between a week and a month later.
>
> 38. I determine that there is disparity of treatment between that of Ms Symes and Ms Buchanan compared to the cases of workers 13,14 and 25, as highlighted above. No explanation was given, other than that set out in a confidential table and covered above, that distinguished the behaviour of Ms Symes and Ms Buchanan from that of the others. In this respect I take into account that there were no other factors in Ms Symes' and Ms Buchanan's cases other than those discovered in the audit that could have possibly led to a more serious conclusion for them than the other three cases identified. In particular, it is important to note their lack of deliberate intent to breach the Code, their contrition, their long and excellent work records and their assistance generally in the disciplinary process. It therefore follows that while the three other workers were given a final warning and thus a chance to retain their employment, this opportunity was not extended to Ms Symes and Ms Buchanan in very similar if not almost exactly the same circumstances as the other three workers identified.

[68] The Chief Judge found disparity on a different basis. His position was summarised at [44] as follows:

> The decision-maker's acceptance that the two employees were ignorant of the prohibition they transgressed meant that their position could not be treated as comparable with that of employees who were not ignorant of the rule. Yet they were so treated, the decision to dismiss being influenced by the number of occasions of access and the period of time of their occurrence.

[69] With respect to the Chief Judge we can see no evidential for that finding. The only evidence before the Chief Judge was the schedule referred to above, and there is no indication in that schedule that the respondents were treated as having equal culpability to those who had wilfully breached the Code of Conduct. There was no challenge to the Authority's finding of fact in the Employment Court and no challenge in this Court, and we must evaluate the issue before us on the basis of the finding of fact made in the Authority as to disparity, and the Authority's finding that the Department did not adequately explain that disparity.

[70] Applying the third element of the test outlined in [45] above, and based on that finding of fact, we are satisfied that the disparity in this case was not of such magnitude as to call into question an otherwise justified dismissal of the respondents. In our view, Mr Lavin was entitled to come to the view, notwithstanding the treatment of other employees, that the conduct of these respondents was of such gravity as to deeply impair the employment relationship and call into question the Department's trust in them, thus justifying their dismissal. Another employer may have reached a different view, but the conclusion reached by Mr Lavin was open to him. The different outcomes in the cases of employees 13, 14 and 25 involve different judgment calls being made by different managers in relation to different circumstances, but do not indicate an unreasonable decision on Mr Lavin's part. There were, of course, a number of other cases where the employee was dismissed, as a result of a judgment call by the relevant manager, in relation to different circumstances. We are satisfied that, if the Authority had addressed the third element of the legal test for disparity it would have concluded that the dismissals were justified in the present case.

Result

[71] Accordingly, we dispose of the appeal as follows:

(a) We grant leave to appeal on the points relating to the legal test for disparity and disparity with subsequent cases;

(b) We allow the appeal, dismiss the personal grievances and quash the orders for reinstatement made in the Authority and upheld in the Employment Court.

Costs

[72] The appellant seeks costs in this Court, and also asks that the costs awards made in the Authority and the Employment Court in favour of the respondents be quashed. At our request counsel filed a consent memorandum after the hearing

outlining the costs orders which have been made in the Authority and the Employment Court. We were advised in that memorandum that the Authority awarded costs of $3,750 to each of the respondents and the Employment Court awarded a global figure of costs of $5,350. The Department paid those costs on receipt of an undertaking from each respondent that they would be repaid if this Court were to order repayment. We therefore quash the costs awards made in the Authority and the Employment Court.

[73] We are satisfied that costs should follow the event in this Court. We award costs to the Department of $6,000 plus usual disbursements. The Department did not seek an order for costs in its favour in relation to the proceedings in the Authority or the Employment Court.

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