IN THE COURT OF APPEAL OF NEW ZEALAND

CA21/03

BETWEEN	WAITAKERE CITY COUNCIL Appellant
AND	PONIFASIO IOANE Respondent

CA113/03

AND BETWEEN	PONIFASIO IOANE Appellant
AND	WAITAKERE CITY COUNCIL Respondent

Hearing: 23 August 2004

Coram: Anderson P
Hammond J
William Young J

Appearances: J E Latimer and A M Denton for Waitakere City Council
S R Mitchell for Ioane

Judgment: 9 September 2004

JUDGMENTS OF THE COURT

Judgments

ANDERSON P AND HAMMOND J
(DELIVERED BY ANDERSON P)

[1] These appeals arise from an interim and final decision of the Employment Court (Chief Judge Goddard) in determining an appeal by Mr Ioane from a decision of the Employment Tribunal. The decisions in question having been made under the Employment Contracts Act 1991, no leave is required in this Court but the appeals are of course restricted to questions of law.

[2] This litigation commenced with Mr Ioane bringing a personal grievance for unjustifiable dismissal from his employment by the Council as a parking officer. He was dismissed because, in the Tribunal's words, he consistently breached one of the fundamental terms of an employment contract – the employee's duties to carry out the employer's lawful and reasonable instructions. In dismissing the personal grievance claim, the Tribunal's findings, both as to Mr Ioane's credibility and in respect of misconduct are in the most trenchant terms which need not be reproduced for the purposes of this judgment. On the subsequent appeal Chief Judge Goddard found no basis for disagreeing with those findings. He declined to reverse the Tribunal's decision on credibility and held that its central findings of fact relating to the nature and quality of Mr Ioane's behaviour had to prevail.

[3] Accepting the Tribunal's findings on credibility, the Chief Judge began with the premise that there was material which could have led an employer justifiably to dismiss after following an appropriate procedure to establish whether the grounds for dismissal were made out. He found, however, that there was procedural unfairness in the way Mr Ioane was dismissed.

[4] The reporting line of authority from Mr Ioane was to his team manager, Parking Services Division, who was Mr C P Waite, then to the manager, Field Services Unit, who was Mr M A Wilde, and then to the Director of Operations, who was Mr John Woodward, an officer with power to dismiss employees by way of an authority delegated to him by the Council pursuant to s 119B(5) Local Government Act 1974. The evidence shows that Mr Waite and Mr Wilde had a number of meetings with Mr Ioane in relation to the employment difficulties which had arisen.

Mr Wilde kept Mr Woodward briefed as to developments in a number of meetings he had with him. Matters reached the stage where the Council and Mr Ioane were communicating with each other through solicitors. Mr Woodward decided to dismiss Mr Ioane and instructions were given to the Council's solicitors to notify the dismissal to Mr Ioane's solicitors.

[5] The Chief Judge held that this process was unfair. It is possible he misunderstood the extent to which Mr Woodward was appraised of the situation by Mr Wilde and that the acts of Mr Wilde following the decision to dismiss were executory not determinative. But his conclusion does not call for our examination because that issue has not been advanced on behalf of the Council.

[6] What does concern the Council on its appeal is the Chief Judge's decision not to make any reduction of the very high damages awarded to Mr Ioane, more than $67,500, to reflect the causative impact on the dismissal of Mr Ioane's own misconduct.

[7] Mr Ioane's cross-appeal is concerned with the Chief Judge's declining to make an order for reinstatement of his employment as a parking officer.

[8] In the first of the two decisions the Chief Judge held:

> [44] The appeal is allowed. The Tribunal's decision is set aside. However, the lapse of time since the dismissal and the further delay since the hearing in the Tribunal means that remedies cannot be finally assessed without a further hearing on:
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> - whether reinstatement is practicable today, and
> - whether the whole of the loss of income is due to the grievance or only a part and, if so, what part.
>
> [45] The first of these questions involves an inquiry into the current situation of the parking section and into the appellant's present fitness for the demands of this kind of work.

[9] Mr Ioane's fitness for the demands of the work involved two foreseeable areas of inquiry. The first was Mr Ioane's physical fitness for a job which entailed a good deal of walking. He was a middle aged man who had a number of health concerns and he had not worked in the job for three and a half years. More

significantly there was the issue of Mr Ioane's mental or emotional health about which much had been made in support of his case before the Tribunal and the Employment Court. There was evidence of irrational behaviour and chronic depression which at the time of the Employment Court hearing still required medication.

[10] At the resumed hearing Mr Ioane gave evidence in a manner which did nothing to dispel concern about emotional instability. The Chief Judge said:

> 3. I would have expected to hear expert evidence about the appellant's state of health in view of the medical evidence that was given before the Tribunal of his suffering from depression. I was also interested in evidence of his physical fitness given the lapse of time since he last worked and, as emerged at the hearing, the significant amount of walking required for the job. The appellant was unable to furnish either kind of medical evidence and demonstrated very early in the hearing that he is still emotionally fragile. In these circumstances I am unable to conclude that reinstatement is practicable today. That being so, the remedy of reinstatement is refused.

Mr Ioane's question of law

[11] It took some discussion between counsel and the Bench before a question of law apt to cover Mr Ioane's grievance could be articulated. It was expressed, at first amorphously, in terms of unfairness because there were no updated medical reports before the Employment Court when the Chief Judge dealt with the second hearing. Counsel suggested that the Judge should have raised the issue of a grant of leave to call more evidence since new evidence could not be adduced at the second hearing without such leave. Leave was not in fact sought on Mr Ioane's behalf. It is a matter of speculation what updated medical reports might have disclosed, although the concerns expressed by the Chief Judge after he had actually observed Mr Ioane as a witness may give a clue.

[12] Eventually counsel submitted that the Chief Judge is not entitled to act on the evidence before him without allowing a reasonable opportunity for updating evidence and this raised the question whether in the circumstances, as a matter of natural justice, the Judge should not have denied reinstatement on medical grounds without having or calling for updated medical reports. That is as high as the

question can be put in support of Mr Ioane's case for reinstatement but it is not a question that can be answered in his favour. It was perfectly plain from the terms of the Chief Judge's reasons for arranging a further hearing that Mr Ioane's fitness, physical and mental/emotional, would be examined at the subsequent hearing. The Chief Judge was under no obligation, still less would he have authority, to require Mr Ioane to have a medical examination for updating purposes. Nor could the Council. It was of course open to the Judge to suggest this, specifically, but he was not obliged to and the concluding terms of his first judgment define the areas of concern which the parties would have to address. There was ample time between the delivery of the interim judgment and the resumption of the hearing for Mr Ioane to have arranged for a new examination and report as to his fitness.

[13] Mr Ioane's appeal in relation to reinstatement must therefore be dismissed.

The Council's question of law

[14] As we mentioned above, the Council's concern is with the Chief Judge's declining to reduce Mr Ioane's damages on the basis that his own fault contributed to the situation that gave rise to his dismissal. The Council's argument that the Chief Judge should have made such a reduction has a legislative foundation in ss 40(2) and s 41(3) of the Employment Contracts Act 1991:

> **40 Remedies**
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> …
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> (2) Where the Tribunal or the Court determines that an employee has a personal grievance by reason of being unjustifiably dismissed, the Tribunal or Court shall, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance, consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and shall, if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.
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> **41 Reimbursement**
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> …
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> (3) Where—
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> > (a) The Tribunal or the Court is obliged to make an order under subsection (1) of this section; and

> (b) The Tribunal or the Court is satisfied that the situation that gave rise to the personal grievance resulted in part from fault on the part of the employee in whose favour the order is to be made,—
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> the Tribunal or the Court shall reduce, to such extent as it thinks just and equitable, the sum that would otherwise be ordered to be paid to the employee by way of reimbursement.

[15] Ms Latimer posited the question of law in relation to the Council as whether the Chief Judge was obliged by s 40(2) and s 41(3) to reduce Mr Ioane's damages and failed to do so.

[16] As we have mentioned, the Chief Judge did not differ from the Employment Tribunal's assessment of credibility and fact. Those findings conclusively show that Mr Ioane's own conduct was causative of his dismissal. In the words of the Employment Contracts Act s 40(2) "The actions of the employee contributed towards the situation that gave rise to the personal grievance", and in terms of s 41(3)(b) "…the situation that gave rise to the personal grievance resulted in part from fault on the part of the employee."

[17] The Chief Judge declined to reduce the damages for contribution, giving his reasons in these terms:

> [40] It is made clear by s41(3) of the Employment Contracts Act 1991 that, for any contributory actions to be taken into account in reduction of remedies, the Tribunal or the Court must be satisfied that the situation that gave rise to the personal grievance resulted in part from fault on the part of the employee.
>
> [41] The Tribunal was obviously so satisfied. The Court sees the matter in a different light. The situation in question embraces the whole transaction. All relevant facts can be taken into account. In this case, however, the appellant had done nothing wrong since the end of May 1999. A process was being followed. The appellant submitted some responses on 23 June 1999. Then on 30 July, out of the blue and without prior warning or discussion, he was summarily dismissed. As Mr Mitchell colourfully put it, the rubber was not allowed to hit the road. His earlier behaviours could not have influenced the decision to treat him in this way. They merely explain why he was being spoken to.
>
> [42] The quality of his conduct is in dispute. I cannot assess it. The Tribunal should not have when Mr Woodward did not. Plainly the Tribunal thought that the appellant deserved to be dismissed but it was not for the Tribunal to say so when the proper officer of the respondent had not turned his mind to the matter and any possible explanation or excuse that the appellant may have offered, given the chance.

> [43] The appellant may have been tenacious of his views and perhaps he went too far. On the other hand, changes of work practices were being made that needed to be patiently explained if staff were not to be confused. At least two were. The outburst of 24 May was unfortunate but the appellant was clearly unwell at the time. I do not consider any reduction of remedies to be warranted.

[18] With respect to the Chief Judge, we have difficulty with the logic of those reasons. For him to have said that Mr Ioane had done nothing wrong since the end of May 1999, a date when he stormed irrationally from a meeting and failed thereafter to return to work, suggests that the situation that gave rise to his dismissal is confined to the period of his absence from work and that all of the serious misconduct, as found by the Tribunal is to be ignored. That cannot be so. In any event, there was no opportunity for Mr Ioane to have done anything wrong since the end of May because he had not been carrying out any work.

[19] We also have difficulty with the Chief Judge's holding that the quality of Mr Ioane's conduct was in dispute and he could not assess it. Its quality was clearly articulated by the Tribunal whose findings of credibility and fact were accepted by the Chief Judge. By any objective standard it was, qualitatively, a significant and substantial cause of Mr Ioane's dismissal. The objectively assessable facts were clearly such as to require the Chief Judge to reduce, to such extent as he thought just and equitable the damages to be awarded to Mr Ioane.

[20] It follows that the Council's appeal must be allowed. This Court's powers under s 135(3) Employment Contracts Act permit it to modify the decision appealed against or any part of that decision. In the interests of finality to this now five year old grievance, this Court will itself reduce the damages for contribution if the parties cannot reach their own agreement in that respect.

Result

[21] For the reasons given Mr Ioane's appeal in CA113/03 is dismissed. The Council's appeal in CA21/03 will be allowed but to what extent the decision under appeal will be modified is a matter which must be reserved for further argument and

is accordingly adjourned for that purpose to a date to be fixed by the Registrar. The question of costs will also be addressed at that further hearing.

WILLIAM YOUNG J

[22] I agree with the judgment prepared by Anderson P but wish to add comments about the approach which should be adopted for the assessment of compensation in cases where a dismissal is held to have been unjustifiable on procedural grounds.

[23] It is likely, to say the least, that a fair process would have resulted in Mr Ioane's justifiable dismissal. The approach adopted by the Chief Judge made no allowance for this possibility and this seems to me to be contrary to the principles which underlie the fixing of compensation.

[24] If a fair process would unquestionably have resulted in Mr Ioane's justifiable dismissal, the Council's "unfair" process was not causative of any significant loss of remuneration.

[25] If such an outcome (ie justifiable dismissal) was likely but not inevitable, some conceptual difficulty arises, see for instance *Benton v Miller and Poulgrain Ltd* CA118/03 15 June 2004 at paras [43] – [52] and [103].

[26] I favour a loss of chance approach in this situation. This would recognise the possibility or probability of justifiable dismissal amongst the contingencies which would have affected Mr Ioane's likely future employment had he not been unjustifiably dismissed. In this regard I refer to *Telecom New Zealand Ltd v Nutter* CA 127/03, 21 July 2004 at para [81] where we observed:

> Those fixing compensation in this area must have regard to the actual loss suffered by the employee. … We also emphasise that … in no circumstances should an award be made which exceeds the properly assessed loss of the employee. The assessment must allow for all contingencies which might, but for the unjustifiable dismissal, have resulted in termination of the employee's employment. For instance, where a dismissal is regarded as unjustifiable on purely procedural grounds, allowance must be made for the likelihood that had a proper procedure been

followed the employee would have been dismissed. In this regard we draw attention to the English jurisprudence reviewed in 16 *Halsbury's Laws of England* (4th ed, reissue) at para [529].

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