A COMMON PRACTICE THAT'S A MINE FIELD

Having conducted an investigation, an employer will often set out its findings—and outline likely outcomes. The problem here is that doing so may lead the employee to believe the employer's mind is already made up. Paul Robertson looks at how to avoid this problem in an investigation.

DISCIPLINARY COMPLAINTS ARE normally resolved at face-to-face meetings focusing (a) on whether the misconduct occurred, and (b) on the penalty. Blurring the line between these two enquires can cause liability.

Chief Judge Colgan in *Edwards v BOT of Bay of Islands College* [2015] NZEmpC 6 at [306]-[312] raised a concern about a common practice of employers.

"[306] ...having conducted an investigation, an employer then sets out, in a comprehensive letter, the employer's findings arising from that investigation, and the employer's conclusion that the appropriate sanction or outcome is or will be dismissal. The employer, nevertheless, invites the employee to a further meeting, in effect to allow the employee an opportunity to dissuade the employer from the course of action it has indicated it is going to, is likely to, or may well take."

Judge Colgan referred to the Employment Relations Act that provides that when assessing whether disciplinary action is justified, the Court must consider (s103A(3)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."

Judge Colgan's concern was that in spite of saying that they have reached "... a preliminary view", the employer may have already made its mind up. A clearly stated preliminary view could dissuade the employee from making any more submissions, or alternatively, any further submissions may not be properly considered.

"[307] ... the natural reaction of many employees in such circumstances, particularly after a lengthy, complex, and difficult investigation by the employer, will be to shrug his or her proverbial shoulders and say: "What's the point? The employer's mind's already been made up and, especially following an investigation in which I have participated, there is really nothing more I can say that will change the employer's mind. The die is already cast."

The overall requirement is that the employer must genuinely consider the employee's explanation before deciding to dismiss the employee.

How should an employer carry out the investigation to avoid this problem?

THE SAFE OPTION

The secret to a robust investigation is to separate out the enquiry by considering firstly whether the misconduct occurred, and secondly the appropriate penalty. This will usually involve:

1. Ensuring that the employee is provided with all relevant information before the first disciplinary meeting;
2. Giving the employee a fair hearing with an open mind;
3. Reaching a decision on whether the alleged misconduct took place;
4. Telling the employee what the decision is in relation to the allegations; and
5. Then (and only then) considering what disciplinary outcomes are appropriate.

The decision on whether the misconduct occurred can be given on a preliminary basis so long as a genuine opportunity is given for the employee to respond by refuting the underlying facts/the findings.

Judge Colgan said that it was appropriate to put an employee on notice that the allegations were serious, and the kinds of outcomes that were possible, (ie, summary dismissal) but, face-to-face and in correspondence, the employer needs to make clear that no final decision has been made.

It is very common for a preliminary view to be given. Some collective agreements even require this to happen. In spite of Judge Colgan's concerns, they have a place in the decision making.

Judge Colgan's decision again emphasises the need for the employer to be scrupulously fair when considering allegations of misconduct.

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