

July 2010

Employment Law

Justification Test to Change. Again.

On Sunday, Prime Minister John Key made several announcements about changes to employment law. The most controversial changes are the extension of the 90-day trial period for new workers to all businesses (see our "[90-Day Trial Scheme Expanded](#)" article), union access rights and the provision of medical certificates for workers after one days' sick leave.

What has not hit the headlines, however, is the Government's plans to change the justification test for all unjustified dismissal and disadvantage personal grievance claims (ie whether the employer's actions were just and reasonable in the circumstances). The new test, when enacted, will have a significant impact on the success (or otherwise) of employees' personal grievance claims. It is so important, in fact, that last year the Full Bench of the Employment Court said the test of justification "lies at the heart of the large majority of personal grievances".

The enactment of section 103A of the Employment Relations Act 2000 (**ERA**) by the previous Government in 2004 was intended to clarify the test of justification. Section 103A introduced the first codified test for justification in 2004. The former Minister of Labour proposed codifying the test of justification to address the "inherent inequality of power in employment relationships".

However, the substantial body of case law about the interpretation of section 103A suggests that employers have had considerable difficulty in interpreting and applying this section. In June 2009, we wrote about the case of *Air New Zealand v V*, which involved the Court overturning an Authority finding that V was justifiably sacked. You may recall that V failed a random drugs test for cannabis, which was 20 times the threshold level for the test.

On Sunday, Minister of Labour, Kate Wilkinson, said "there are cases where the reason for firing a worker is justified, but the decision goes against the employer because they failed to dot every "i" or cross every "t"". We think, perhaps, that she was thinking about *V v Air New Zealand* when she made this comment.

So, what can we expect the Amendment Bill to include? Section 103A currently provides:

"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."

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The debate, which followed about the interpretation of section 103A, largely concerned whether Parliament intended to subject all of the employer's relevant actions to objective assessment against the standard of what a fair and reasonable employer would have done in all the circumstances.

We expect, therefore, that section 103A will be amended to remove any reference to objectivity – the word "would" will be changed to "could", which will mean that the Authority or Court will not have to judge the actions of the employer against the objective standard of a fair and reasonable employer. In other words, if an employer's decision to dismiss an employee is one which the employer can take, considered subjectively, then the Authority or Court cannot substitute its views for the actions taken by the employer.

What will the new test mean?

In unjustified dismissal cases, the Authority or Court will still have to determine, on an objective basis, whether the misconduct in question amounted to serious misconduct (being a "sackable" offence). However, the Authority or Court will have less say over whether the employee should have been dismissed in all the circumstances.

If you have any questions or need more information, please contact Erin Davies.

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