

Justification Test Reviewed by Full Court

Last week, the Full Bench of the Employment Court (ie all four Judges) delivered an important decision about the test of justification which “lies at the heart of the large majority of personal grievances”.

The enactment of section 103A of the Employment Relations Act 2000 (“ERA”) in 2004 was intended to clarify the test of justification (ie a test that ensured employers’ actions and how they were carried out were just and reasonable in all the circumstances). 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. The Court, in the case of *Air New Zealand v V*, has now decided how that test should be interpreted and applied as a matter of “general importance”.

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”.

Section 103A

This section provides that:

“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.”

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.

Air New Zealand v V

V worked in a safety sensitive area involving the operation of heavy machinery. He had worked for Air New Zealand for 17 years and had an unblemished employment record. In 2005, Air New Zealand introduced an alcohol and other drugs programme, which required all employees to maintain a zero blood alcohol level and to remain drug free at all times (“Policy”). V knew that a positive drugs test could lead to disciplinary action, including dismissal. He had regularly smoked cannabis and said he considered cannabis harmless. In September 2006, V failed a random drugs test for cannabis, which was 20 times the threshold level for the test. After a full disciplinary hearing, V was dismissed summarily for serious misconduct.

Authority Determination

The Authority found that V was guilty of serious misconduct. However, it determined that, in all the circumstances, a fair and reasonable employer would not have dismissed V and would have provided him with a rehabilitation programme.



Employment Court Decision

The Court considered the following issues:

- The construction of section 103A, particularly whether the previous decisions of individual Judges of the Court were correct;
- Even on the construction of section 103A applied by the Authority, whether V's dismissal was justifiable.

In relation to the first issue, the Court held the following:

- Section 103A requires the Court to determine the question of justification on an objective basis and in all the circumstances at the relevant time;
- The standard required of the employer by section 103A is "what a fair and reasonable employer would have done in all the circumstances". By reverting to the word "would", section 103A imposes on the Authority or Court an obligation to judge the actions of the employer against the objective standard of a fair and reasonable employer;
- The requirement that the assessment of the employer's actions be conducted in light of the circumstances "at the time the dismissal or action occurred" necessarily includes the dismissal or disadvantageous action itself. In other words, the Authority and Court must assess an employer's decision about whether misconduct occurred, and its seriousness. It must also, review and assess the employer's decision about the appropriate penalty.

In relation to the second issue, the Court concluded that, contrary to the Authority's determination, Air New Zealand's decision was one that a fair and reasonable employer would have taken in all the circumstances. First, the Court found that V had, during the investigation process, been given an opportunity to comment on factors relevant to Air New Zealand's decision to dismiss him (including his views about the need to abstain from alcohol as part of any drug rehabilitation process and whether he accepted he had done anything to put himself or others at risk). The Court also went on to find that the Authority had misconstrued the Policy as rehabilitation was only one of a range of options to be considered in the event that V's employment was *not* terminated.

Does this change anything?

No doubt Air New Zealand, V and their representatives will be considering whether to appeal the Court's decision. In a sense, neither party got the answer they wanted. However, we think there is some clarity around the interpretation of section 103A and some guidance about how employers should conduct disciplinary investigations. Section 103A requires the Authority or the Court 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. In other words, in unjustified dismissal cases, the employment institutions are required to assess, on an objective basis:

- Whether the misconduct in question justifies serious misconduct; and
- If so, whether the employee should have been dismissed in all the circumstances.

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