



LET THE PUNISHMENT FIT THE CRIME

Taking a DVD from work was “very much on the cusp” of behaviour for which dismissal may be justified, according to a recent Employment Court finding. Although the employee’s dismissal was unjustified, his misconduct meant he received a significantly reduced award, says Paul Robertson.

THEFT AS AN EMPLOYEE IS

a serious matter and it will usually be regarded as serious misconduct by an employer.

Does serious misconduct include taking one blank DVD from your employer? Yes says the Employment Court, but this doesn’t necessarily justify dismissing an employee.

DISMISSAL FOR THEFT

In a recent Employment Court case the IT manager of a health board challenged his dismissal for theft. He had been disciplined for failing to ensure that a computer system had been backed up and for using DVDs to record a programme about martial arts.

The employer accepted his explanation about the failure of the computer backup, but found that he did take one or more blank DVDs.

His dismissal was upheld by the Employment Relations Authority and this decision was challenged in the Employment Court.

SERIOUS MISCONDUCT?

The IT manager admitted taking one or more DVD disks. Was that serious misconduct justifying his dismissal? The Court took account of the following factors:

- The cost of the DVD was minimal, a dollar or thereabouts, but if such thefts were condoned, it could add up to a significant cost to the employer;
- The manager had not been working for the health board for long;
- He had a previous warning (albeit concerning a failed backup) and there had been complaints about his behaviour from other staff members;
- The manager said he intended using the video as part of a course he offered to staff on martial arts. The health board had, in the past, funded the course and the IT manager hoped that such funding would be renewed. A witness who could substantiate this expectation was not interviewed.

Taking all these factors into account, the Court found that taking the DVD was “... very much on the cusp of behaviour for which a dismissal may ... be justified.”

On balance the misconduct did not justify dismissal and hence the dismissal was held to be unjustified.

ASSESSING REMEDIES

When assessing remedies, the misconduct was taken into account and the amount awarded was significantly reduced.

Mr Dumolo claimed \$53,545 as lost salary but was only awarded the equivalent of three months (to be calculated). He sought \$25,000 for the upset he had suffered, but he was awarded only \$3000. He was given the opportunity to apply for costs.

ERROR OF JUDGEMENT

Commenting on the pilfering of stationery, the Court said that Mr Dumolo had very much been the author of his own misfortune in this matter. It was clear that he took a casual attitude

to removing property without authorisation.

The Court noted businesses often have their logo printed on pens and other stationery items for advertising purposes and there is an inference they expect them to be used outside the workplace.

“In such a case they might not take the approach which LDHB has in this case to such items.

However, Mr Dumolo was given a number of DVDs which were clearly to be used in his role as an Information Systems Support Technician with his employer and he has committed a considerable error of judgement in deciding to take the DVD.

“This is so even if he believed he might use the downloaded film at a later date if funding was approved for him to carry out the self defence courses on behalf of the LDHB.”

Dumolo v Lakes District Health Board [2014] NZEMPC 40



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