

IN THE SUPREME COURT OF NEW ZEALAND

**SC 16/2006
[2006] NZSC 37**

AND BETWEEN GILLIAN MOANA BUCHANAN AND
 LYNETTE CATHERINE SYMES
 Applicants

AND CHIEF EXECUTIVE OF THE
 DEPARTMENT OF INLAND REVENUE
 Respondent

Court: Elias CJ, Blanchard and Tipping JJ

Counsel: D G Dewar for Applicants
 T Arnold QC and C Inglis for Respondent

Judgment: 6 June 2006

JUDGMENT OF THE COURT

- 1. The application for leave to appeal is dismissed.**
- 2. The applicants must pay to the respondent \$2,500 in costs.**

REASONS

[1] The applicants seek leave to appeal from a decision of the Court of Appeal on appeal¹ from a decision of the Employment Court, itself an appeal on a “non-*de novo*” basis from the Employment Relations Authority pursuant to ss 179(3) and (4) of the Employment Relations Act 2000.

[2] The case concerned the dismissal of the applicants, long-standing employees of the Department for accessing the files of relatives, in breach of the code of

¹ CA2/05, 22 December 2005, (Chambers, O’Regan and Panckhurst JJ).

conduct maintained by the Department. In the Employment Relations Authority and on appeal in the Employment Court, the employees were ordered to be reinstated. In the Employment Court the Authority's determination that the applicants were guilty of serious misconduct was set aside. The applicants also succeeded in upholding the Authority's determination that there had been a disparity between their treatment and the treatment of other employees and that, on that basis, they should be reinstated.

[3] In the Court of Appeal, the Department succeeded on its contention that the test applied by the Employment Court for serious misconduct had been wrong. It also succeeded in its contention that the Authority and the Employment Court treated the dismissals as being unjustifiable on the basis of disparity without considering whether the dismissal was justified in all the circumstances, despite disparity of treatment. Both conclusions are the subject of the proposed appeal.

[4] The Court of Appeal held that the Employment Court had misdirected itself as to the tests for serious misconduct and disparity of treatment. Since the Employment Court hearing had not been a *de novo* hearing, the Court of Appeal considered that it was as well placed as the Employment Court to dispose of the claim of unjustifiable dismissal. It held that the dismissal of the applicants was justified. Orders for reinstatement of the applicants made in the Authority, and upheld in the Employment Court, were accordingly quashed. The Court awarded costs to the Department of \$6,000 together with disbursements, after receiving memoranda from counsel on the question of costs. It made no order for costs in relation to the proceedings in the Authority or the Employment Court.

[5] It was acknowledged in the Court of Appeal by the applicants that their accessing the records was properly considered to be misconduct. The issue was whether it amounted to serious misconduct justifying dismissal. The Court of Appeal was of the view that the approach adopted in the Employment Court amounted to a presumption that unless conduct was "wilful," it did not amount to serious misconduct. Such approach was held to be inconsistent with the test adopted in *W & H Newspapers Ltd v Oram*² which requires an overall evaluation as to

² [2000] 2 NZLR 448 at [31].

whether the decision to dismiss was one “a reasonable and fair employer could have taken.” *Oram* was not referred to by the Employment Court.

[6] On the application for leave to appeal to this Court, the applicants do not seek to challenge the test described in *Oram*. The proposed appeal against the Court of Appeal conclusion as to serious misconduct raises no question of general principle. It challenges the application of an established test to the particular facts of the case. Moreover, the test for serious misconduct is now contained in s 103A of the Employment Relations Act. In those circumstances, any reconsideration of the *Oram* test would be of limited general importance. No matter of general or public importance or matter of general commercial significance has therefore been identified in terms of s 13 of the Supreme Court Act 2003.

[7] The applicants also contend that the Court of Appeal misinterpreted the test previously established in *Samu v Air New Zealand*³ as to the effect of disparity of treatment. They say that case held that disparity of treatment, in the absence of adequate explanation, necessarily made the dismissal unjustified. That contention is, however, based on an incorrect understanding of *Samu*. *Samu* held⁴ that

“even without an explanation disparity will not necessarily render a dismissal unjustifiable. All the circumstances must be considered.”

The Employment Court incorrectly applied *Samu*, as the Court of Appeal held. Again, the applicants do not seek to re-visit the test used by the Court of Appeal in *Samu*. Nor do they suggest that the relevant circumstances of the Court took into account in its determination that the dismissal was justifiable were not relevant to that conclusion. No matter of general or public significance is therefore raised in the application of the correct test to the facts of the case.

[8] The applicants complain that the Court of Appeal should have remitted the matter for hearing on a *de novo* basis in the Employment Court. There is no question of the Court’s jurisdiction to determine the question of unjustifiable dismissal itself. Under s 214(5) of the Employment Relations Act it may “confirm, modify or reverse

³ (1995) 1 ERNZ 636.
⁴ At 639.

the decision appealed against, or any part of that decision.” The Court had the option of determining the matter itself under this power or directing reconsideration by the Employment Court under s 215. The parties had been content to proceed on a non *de novo* hearing basis. (The applicants did not seek a direction on their cross-challenge that the hearing be conducted on a *de novo* basis). Matters of primary fact were not in dispute. In those circumstances, the Court of Appeal was as well placed as the Employment Court to determine the question whether the conduct of the applicants amounted to serious misconduct and whether the disparity in treatment made their dismissals unjustifiable. No point of principle such as would justify leave under s 13 of the Supreme Court Act 2003 arises from the approach taken by the Court of Appeal.

[9] There is no error in approach identified by the applicants in the costs order made by the Court of Appeal. The costs award was unexceptional. No grounds for leave under s 13 arise in respect of it.

[10] The application for leave to appeal is accordingly dismissed. The applicants must pay costs of \$2,500.

Solicitors:
Crown Law Office, Wellington