Determination Issued: WA 117/06
File Number: WEA 416/04

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE

BETWEEN	Peter Herridge (applicant)
AND	The Chief Executive of the Inland Revenue Department (respondent)
REPRESENTATIVES	Gerard Dewar for the applicant Amanda Rapley for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 20 & 21 June 2006
SUBMISSIONS RECEIVED	26 June and 3 & 7July 2006
DATE OF DETERMINATION	6 September 2006

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Mr Peter Herridge says he was unjustifiably dismissed by the Department on 10 October 2003 – statements of problem received on 10 & 12 November 2004. He claims reinstatement, lost wages and compensation for humiliation of $15,000 as well as costs.

2. The Department says Mr Herridge was justifiably summarily dismissed for serious misconduct – statement in reply received on 25 November 2004.

3. The parties have undertaken mediation.

4. A significant cause in the delay of this matter coming on to an investigation was my decision to adjourn the investigation pending the outcome in the Court of Appeal of *Chief Executive of the Department of Inland Revenue* v *Buchanan* [2005] 1 ERNZ 767. The subsequent delay in the issuing of this determination was occasioned by my being on scheduled annual leave: I express my regret to the parties for the frustration these delays will have caused.

Summary of Key Events

5. The following key events are largely not in dispute.

6. Mr Herridge commenced employment with the Department on 6 May 1993.

7. The Department maintains a computer based data system*, "FIRST"*, through which all tax records of tax payers are maintained.

8. A new Code of Conduct was introduced in December 2001. The applicant says he became aware of it at that time. In particular, he recalls attending a meeting during which the new Code was handed out and those attending were told not to look up Paul Holmes' details (*"celebrity surfing"* – parties' term) or any business they were interested in.

9. Mr Herridge confirms he was told to go away and read the Code: he says he did not do so in any detail (par 5 of his statement).

10. Mr Herridge says that, in February 2003, he was next reminded of the Code when a memo was issued following the dismissal of a Department employee for breaching it. He does not recall reading it but assumes he received a copy (par 6, above).

11. On 24 June 2003 Mr Herridge attended a departmental programme called *"Judge for Yourself"* (a.k.a. *J4Y*) during which he realised the Department had a tracking system in place. He says,

> *"A number of us attending that programme became concerned as it was common practice to help clear up spouses and children's tax returns … . This is the first time I became aware of the implications of accessing … family member's files"* (par 7, above).

12. On 8 September 2003, and – according to the applicant – in response to a Department invitation to do so, Mr Herridge advised his manager in writing that he had completed a dummy tax return for his son.

13. By way of an explanation, the applicant says he looked at his son's details *"… just to check that in his first job he had been properly treated as a new tax payer (and) was paying the right tax under the correct code*" (par 9, above). He says it was something he could have done manually, including using his son's pay slips but it would have taken longer.

14. Mr Herridge also admits, after becoming aware for the first time of the implications of accessing a family member's file and of advising his manager, of looking at his son's details again, on 19 September 2003. Other than it being his son's birthday, he cannot account for his action.

15. As a result of his 8 September admission the Department met with Mr Herridge on 8 October. During the meeting he was shown a print-out of the times and occasions he had accessed his son's information. According to the applicant, they totalled *"about"* seven instances (par 15, above). He says he does not remember the first three instances.

16. A second meeting was convened on 10 October during which Mr Herridge was dismissed for serious misconduct.

Parties' Positions

Applicant's Position

17. By advice dated 19 June 2006 counsel for Mr Herridge, Mr Gerard Dewar, advised his client was no longer relying on a letter from his doctor in support of his claim of unjustified dismissal.

18. By submissions received on 26 June, and at par. 1, Mr Dewar confirmed that Mr Herridge had accepted the Authority's suggestion that the investigation hearing be streamlined so as to minimise costs to the parties and in order to focus on the fact that the issues in his application had been narrowly confined by the Court of Appeal's ruling in *Buchanan* (above).

19. In the same submissions, and in light of the Court of Appeal's ruling, Mr Herridge conceded his actions were in breach of the work rules applicable to him as defined by the Code of Conduct. While he believes the integrity of the tax system was never compromised in any way by his actions, he accepts that his misconduct in accessing his son's tax information – in view of the Court of Appeal's finding – amounted to serious misconduct (par. 2 above).

20. Mr Herridge contends however that there was significant disparity in the treatment he received to that of other employees. While acknowledging that the Court of Appeal found that the Authority had in the *Buchanan* case initially misdirected itself as to the applicable test to be applied where parity is raised, Mr Herridge's submission is that – when the test, as defined by the Court of Appeal, is applied to the facts of his case – the Authority must apply the law as refined by the Court of Appeal to his case.

21. The applicant says *Buchanan* is authority for the proposition that where there is disparity of treatment which is not adequately explained the Authority (in this case) must ask itself whether or not the dismissal is justified *"notwithstanding the disparity for which there is no adequate information"* (par 45, (c), above).

22. The Court of Appeal has not said that disparity is not to be considered when a dismissal is challenged. Rather, the Court has *"refined (confined)"* (par. 3, above) the ambit of a Tribunal or a Court's inquiry in such circumstances. Thus a dismissal in which parity of treatment is raised and not adequately explained might still be held to be unjustifiable.

23. Section 103A of the Act was introduced subsequent to Mr Herridge's dismissal. The amendment itself may mean that parity is less significant in future cases but remains something that will always fall for consideration within work places and is a critical factor in the applicant's case. The Court of Appeal in *Buchanan* determined that the different outcomes by different managers in three cases to which the Authority had compared were not of such *"magnitude"* as to call into question (par. 70 of that judgement).

24. Mr Herridge's case is that he was treated more harshly than others who had conducted activities demonstrably more serious than his, as deposed by his witnesses (one of whom received a first warning notwithstanding actions taken to procure refunds for direct family members). The Department's own disciplinary process calls for, *"Outcomes … consistent across all parts of the organisation, i.e. given the same or very similar facts or circumstances, the same or very similar actions should be taken in the same or similar outcome reached"* (enclosure 3 of the applicant's documents). The same document also provides, *"Where disparity of treatment occurs, disciplinary action may be found to be unjustified for that reason."*

25. The Department has not produced comparative data. Mr Herridge is entitled to have his case assessed for consistency *"across all parts of the organisation"*, i.e. in respect of all employees who underwent disciplinary proceedings in respect of suspected inappropriate access to the FIRST system during 2003, and not just those subject to disciplinary outcomes as a result of the PTS audit.

26. In the circumstances the Authority may find that unexplained disparity has occurred.

27. The Department's reliance on access by Mr Herridge of his son's details on 19 September 2003 is flawed as there is some chance that the screen lay-out (of up to 12 tax payers' names, listed alphabetically) results in accidental viewing arising out

of legitimate accessing of other tax payer details. It is any way a trivial event. The 19 September event should therefore be approached with considerable caution.

28. Mr Herridge calculates that the total time engaged in his accessing family details via FIRST over 21 months (from December 2001 to October 2003) amounts to 20 minutes. No family member received an advantage, no refund was paid and no information was altered for the general convenience of family members. His case should be measured by his employer against the conduct of others. The refined test adopted by the Court of Appeal is not demonstrative of an employer's right to act capriciously.

Respondent's Position

29. The Department says Mr Herridge was justifiably dismissed, that he was not subjected to disparate treatment and that the facts are largely not in dispute. It says the applicant repeatedly accessed the information of a taxpayer (his son) for non work reasons in breach of his statutory and employment obligations. Following a fair investigation, and being unable to provide an adequate explanation, Mr Herridge was dismissed.

30. Mr Herridge concedes his actions constituted serious misconduct (par. 2 of the applicant's 26 June submissions), although he attempts to minimise those actions as simple, minor or trivial work rule breaches. The Department does not agree with Mr Herridge's assessment. It relies on *Buchanan* for the view that unauthorised access to the taxpayer database amount to important breaches of statutory obligations applicable to all of its employees. The Court of Appeal considered those breaches to be obvious and fundamental to the continuing employment relationship (pars 36 & 37).

31. In the same decision, the Court of Appeal confirmed the three state test set out by the Court in its decision in *Samu* v *Air New Zealand* [1995] 1 ERNZ 636, namely:

(a) Is there disparity of treatment?

(b) If so, is there an adequate explanation for the disparity?

(c) If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

32. In respect of the first arm, and other than bald assertions and the evidence of Ms Sheryl Anton, the Department says there is no evidence of disparity.

33. Ms Anton's actions (asking other colleagues to access her own family's accounts) were not expressly forbidden – unlike the applicant's. They were still considered inappropriate and she was given a written warning. Her actions are clearly very different from those of the applicant's.

34. The second arm is met because there is an adequate explanation for any alleged disparity, due to the particular facts of Mr Herridge's case, in particular his repeat accessing (unlike Ms Anton).

35. The applicant also knew for sure that he was forbidden from accessing his son's account before he accessed the account again on 19 September 2003: his actions amounted to a deliberate breach of both his employment and legislative obligations.

36. In all the circumstances of the case, and per the comments of the Court in *Buchanan*, particularly pars 36-38, and – as referred to in those paragraphs – by application of its decision in *W & H Newspapers Limited* v *Oram* [2000] 2 ERNZ 448, Mr Herridge's dismissal was justified.

37. There is no issue of ignorance of the rules in this case: Mr Herridge conceded he read the Department's Code of Conduct, but just *"not in any detail"* (par. 5 of the applicant's first witness statement).

38. In the circumstances of the case and in accordance with *Oram*, it was open to the Department to dismiss the applicant.

39. The Department is not required to produce the *"comparative data"* (see par. 25 above) as sought by the applicant. Consistent with the Authority's direction during a telephone conference, it was prepared to provide clear and specific parameters in response to any information request: instead, an unreasonably broad request was

again put to it. In the absence of anything specific, the Department offered to provide summarised data: the applicant did not respond to that offer. The same offer was repeated a week before the investigation but again received no response.

40. Unlike *Buchanan*, Mr Herridge was not caught by the PTS audit but rather after he *"confessed"*. He was therefore not part of a single process emanating from a single audit report. For this reason, comparative tables (unlike the *Buchanan* hearing in the Employment Court) are not relevant, and were not provided to the Authority because the applicant chose not to take up the Department's offer to provide the same. Because of the absence of any evidence of disparity as claimed by Mr Herridge the Authority is unable to undertake any comparison, as he urges it to do.

41. It is now known that Mr Herridge accessed his other son's tax information on two occasions very shortly after his J4Y training, as well as other taxpayers (refer to the respondent's bundle of documents, p. 121-123): while the applicant was not dismissed for this behaviour, by his own admission he knew by 24 June 2003 he should not access the files of his family. That knowledge did not stop him from continuing to act contrary to his legislative and Code of Conduct obligations.

42. It should also be noted that Mr Herridge did not admit until the Authority's investigation that he accessed confidential and tax secret data relating to his sons, his wife's employer, his wife's colleague and another. It is implausible to suggest this accessing, including of archived material, was work related or accidental.

43. There is no basis to Mr Herridge's claims that the interviews culminating in his dismissal were traps or that they were hostile. The applicant told the Department he had breached his obligations only once: the respondent was entitled to investigate Mr Herridge's story and to put any inconsistencies to him.

44. The Department is satisfied from its records that there was nothing accidental about Mr Herridge, without his son's consent or knowledge, accessing the latter's tax details on 19 September 2003. The amount of time spent (in accessing family, etc) data is irrelevant: the applicant knew without a shadow of doubt he was forbidden to access those taxpayers' information but elected nonetheless to do so. Mr

Herridge's deliberate breach of his obligations destroyed the necessary trust and confidence that is fundamental to any employment relationship.

Discussion

45. As is made clear above, the investigation of this employment relationship problem was delayed so as to take account of the Court of Appeal's decision in *Chief Executive of the Department of Inland Revenue* v *Buchanan* [2005] 1 ERNZ 767.

46. I am satisfied that, at the core of this employment relationship problem, are the three separate question reiterated by *Buchanan*: is there disparity of treatment? If so, is there an adequate explanation for the disparity? If not, is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation?

47. The applicant's position is that there has been disparity for which there is not an adequate explanation. The Department says there is no evidence of disparity of treatment. I find it is difficult, if not impossible, to conclude that any disparity has occurred. This is because Mr Herridge admits to the serious misconduct and knew it was wrong at the time, having attending the J4Y course and being aware of a dismissal for the same action.

48. In the alternate, and in the event of being wrong in answering the first question, I am also satisfied that a proper resolution of the parties' differing position can be found in the answer to the third question, i.e. is the dismissal justified, notwithstanding the disparity for which there is no adequate explanation? By way of answering the third question, I am satisfied that Mr Herridge was justifiably dismissed for the following reasons. The applicant knew of the Code of Conduct from the time of its introduction in 2001. Mr Herridge also accepts he was reminded of the Code from February 2003. He is not claiming ignorance of the provisions of the Code. Mr Herridge voluntarily disclosed a breach of the Code to his employer in September of that year. For reasons he cannot explain, he admits to breaching the Code shortly thereafter. During the Authority's investigation, and therefore not known to or relied on by the Department when it dismissed the applicant, Mr Herridge admitted to accessing on other, earlier occasions, confidential and tax secret data relating to his

sons, his wife's employer, his wife's colleague and another. Mr Herridge now accepts his actions amounted to serious misconduct.

49. Unlike the detailed disparity evidence put before the Authority in *Buchanan* (including a schedule of 35 cases), and because of the parties' agreement as to the narrower focus resulting from the Court of Appeal's decision, significantly less comparative evidence was provided in respect of Mr Herridge's application. I am satisfied that has not disadvantaged the applicant and does not prevent me from determining this matter, as *Buchanan* can be relied on to arrive at a proper understanding in respect of the effect of alleged disparity.

50. *Buchanan* specifically addresses other employees whose conduct in accessing confidential family details was, by way of unauthorised access to the computer system, including the unauthorised accessing of family members' accounts, was no different than that of Mr Herridge (pars 59-66 inclusive). Notwithstanding the Authority's finding of fact (that the Department did not adequately explain disparity of penalties applied to offending employees – par 69), the Court of Appeal was:

> *… satisfied that the disparity in this case was not of such magnitude as to call into question an otherwise justified dismissal of the respondents. In our view* (the Department) *was entitled to come to the view, notwithstanding the treatment of other employees, that the conduct of these respondents was of such gravity as to deeply impair the employment relationship and call into question the Department's trust in them, thus justifying their dismissal. Another employer may have reached a different view, but the conclusion reached by* (the Department) *was open to* (it)*.*

51. I am unable to see how Mr Herridge can escape the Department's same conclusion in his case, particularly as it is not open for the Authority to substitute its view for that of the employer.

52. In the event of a finding that Mr Herridge was unjustifiably dismissed and/or a finding of procedural shortcoming – which I do not accept – the applicant would any way face another major if not insurmountable difficulty, that of significant contributory behaviour resulting in his grievance. Given his admissions of knowing of the Code and of reporting one breach of it while in fact there were many others,

but of continuing to effect illegal access to FIRST, it is likely his contributory fault would amount to 100%.

Determination

53. I find against the applicant, Mr Peter Herridge's, claim that the respondent, the Inland Revenue Department, unjustifiably dismissed him.

54. Costs are reserved.

Denis Asher
Member of Employment Relations Authority