IN THE EMPLOYMENT COURT
AUCKLAND

[2010] NZEMPC 138
ARC 91/10

IN THE MATTER OF	an application for special leave to remove proceedings from the Employment Relations Authority
BETWEEN	LAURA JANE GEORGE Plaintiff
AND	AUCKLAND REGIONAL COUNCIL Defendant

Hearing: 13 September 2010
(Heard at Auckland)

Appearances: Melissa Perkin, counsel for the plaintiff
Tim Clarke, counsel for the defendant

Judgment: 22 October 2010

JUDGMENT OF JUDGE B S TRAVIS

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[1] Ms George has applied to this Court, on 11 August 2010, for special leave to remove to the Court a claim brought by her in the Employment Relations Authority (the Authority) against the defendant, the Auckland Regional Council (the ARC). Ms George had applied to the Authority to have the employment relationship problem removed in its entirety to the Court. The application for removal was made pursuant to s 178(2)(a) of the Employment Relations Act 2000 (the Act), that is, on the ground that an important question of law is likely to arise in the matter other than incidentally.

[2] The Authority, in its determination issued on 22 July 2010,[1] declined the removal application. When the Authority declines to remove any matter, special leave may be sought from the Court which must apply the following criteria set out in paragraphs (a) to (c) of sub-section (2) of s 178:

> a) an important question of law is likely to arise in the matter other than incidentally; or
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> b) the case is of such a nature and of such urgency that it is in the public interest that it may be removed immediately to the Court; or
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> c) the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues; or
>
> …

Factual Background

[3] Ms George is a qualified chartered accountant who commenced permanent employment with the ARC on 4 May 2006 in the role of Group Manager Accounting Services, transferring to the role of Team Leader Transactional Services in October 2009. On 4 February 2010, Ms George was dismissed for serious misconduct. The reasons given for the dismissal related to both the alleged recruitment of a casual employee in breach of the ARC's recruitment policy and to concerns about the veracity of explanations Ms George gave in response to that allegation.

[4] Ms George's employment relationship problem (as set out in her affidavit in support of her application for special leave sworn on 11 August 2010) includes claims of unjustified dismissal, unjustified action causing disadvantage, breaches of contract and breaches of the Act. In addition to claiming the usual remedies for her personal grievances, Ms George claims special damages and damages for injury to reputation in relation to alleged breaches of her employment agreement and penalties in respect of the alleged breaches of her contract and of the Act.

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[1] AA331/10.

Issues

[5] The sole ground relied on for special leave by Ms George is that contained in s 178(2)(a). Ms George says that there are four important questions of law that are likely to arise in the matter other than incidentally. These four questions are set out in the application for special leave and I will deal with each in turn.

Determining the issues

First question

> Where the employer concludes during a disciplinary process that the employee has committed an act of misconduct, for which the employee could not have been dismissed, it is justifiable for the employer under s.103A Employment Relations Act 2000:
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> a) To add, before concluding the disciplinary process, an allegation of serious misconduct based on how the employee had responded to the original allegation?
> b) To dismiss the employee for serious misconduct based on how the employee responded to the original allegation?

[6] In addressing the first question, Ms Perkin, for the plaintiff, noted that the defendant admits that a new allegation of serious misconduct about the truthfulness of the plaintiff's explanation in relation to the initial allegation was added during the disciplinary process. She submitted that whether the defendant was justified in adding that additional allegation and then dismissing the plaintiff for that reason is an important question of law that will arise and have to be determined.

[7] Mr Clarke, for the defendant, argued that whether the defendant was justified in adding the additional allegation does not raise an important question of law. He submitted that it is settled law that an employer may add an allegation of serious misconduct during an investigation process based on the way that the employee responded to the employer's original allegations. He further submitted that there are decided cases establishing that an employee's dishonesty, during an investigation into lesser allegations, can itself amount to serious misconduct that can be used as grounds to justify a dismissal, citing *Honda NZ Ltd (with exceptions) Shipwrights etc*

Union,[2] *New Zealand Sugar Company Limited v Connelly*[3] and *Blaker v B & D Doors*.[4]

[8] Ms Perkin cited two cases, *Port Nelson Ltd v Macadam (No. 1)*[5] and *Iakopo v Waikato Electricity Limited*[6] to support her position that the law is not settled in this area. Chief Judge Goddard in *Macadam* stated that:[7]

> As a general rule, an employee who is called to answer to an allegation that he has been guilty of conduct of a particular kind cannot be dismissed if suspicion emerges during the course of an inquiry into that allegation that the employee may have been guilty of conduct of a different kind, including lying to the employer … [t]hat needs to be the subject of a separate set of disciplinary proceedings…

Judge Finnigan in *Iakopo* stated that:[8]

> … I cannot accept that even if it were shown that he had consistently lied about his reasons for doing something or which he was not liable to be dismissed, then those lies should in the circumstances of this case be elevated to the status of something so destructive of the employment relationship that they justified instant dismissal.

[9] Ms Perkin distinguished both *Connelly* and *Blaker* on the basis that in those cases the original allegation raised against the employee involved actions which are well recognised examples of serious misconduct. She submitted that in neither of those cases was the Court referred to the earlier decisions in *Macadam* and *Iakopo* and therefore did not consider the analysis which Chief Judge Goddard and Judge Finnigan carried out in those cases. Ms Perkin further submitted that this Court has not subsequently held that either *Macadam* or *Iakopo* are no longer good law.

[10] The Authority accepted the submissions on behalf of the defendant that the law on the first question is well settled and thus found that it did not amount to an important question of law in terms of s 178 of the Act. I respectfully disagree with the Authority's finding. It is clear that the case law provides no definitive answer as

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[2] [1990] 3 NZILR 23 at 27.
[3] [1998] 3 ERNZ 198 at 208.
[4] AC8B/07, 21 September 2007.
[5] [1993] 1 ERNZ 279.
[6] AEC36/94, 24 June 1994.
[7] At 289.
[8] At 15.

to whether an employer may add an allegation of serious misconduct during an investigation process based on the way that the employee responded to the employer's original allegations. Ms Perkin referred to *Hanlon v International Educational Foundation (NZ) Inc* where Chief Judge Goddard stated:[9]

> … A question of law arising in a matter will be important if it is decisive of the case or some important aspect of it or strongly influential in bringing about a decision of it or a material part of it.

[11] I agree with counsel for the plaintiff that this is an important question of law that will provide certainty to an issue which is likely to arise other than incidentally and will add to the body of employment law generally.

Second question

> In a situation where an employee's reputation and ability to work in their chosen field of employment could be injuriously affected by a dismissal for alleged untruthfulness, is the employer required, by the obligations the employer owes under contract, statute and common law, to ensure a careful, thorough and fair investigation has been carried out, to a standard commensurate with the gravity of the accusation and the potential effect on the employee, prior to deciding to dismiss the employee?

[12] In relation to the second question, Ms Perkin cited the recent English Court of Appeal decision of *Salford Royal NHS Foundation Trust v Roland*,[10] issued on 13 May 2010, as authority for the proposition that it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite.

[13] Ms Perkin also referred to the defendant's statutory obligation under the Local Government Act 2002 (LGA) to be a 'good employer' pursuant to Schedule 7, Part 1, cl 36.

[14] Mr Clarke submitted that there are no unique or additional obligations owed by an employer where there is a risk to reputation and that the principles to be applied in that situation are the same as for any in an unjustified dismissal claim.

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[9] [1995] 1 ERNZ 1 at 7.

[15] Mr Clarke further submitted that the requirement in the LGA that a local authority be a 'good employer' is no different than an employer's obligation to be fair and reasonable. Mr Clarke cited *Matthes v New Zealand Post Ltd (No 3)*[11] in which the Court stated that, in the absence of more compelling authority, it was not satisfied that the duty to be a good employer was more onerous than an employer's general obligation to act fairly. He also cited *Corlett v Hamilton City Council,*[12] where Chief Judge Goddard viewed the application of good employer principles as an attempt to bring employment in the public sector under the same regime that had been introduced for the private sector by the Labour Relations Act 1987.

[16] In its determination, the Authority found that the parties in this matter had agreed on the nature and standard of the investigation required of an employer. On consideration of the submissions of the parties, I respectfully disagree with this finding and the Authority's view that whether the defendant's investigation met that standard is purely a factual question, which is for the Authority to decide.

[17] Although courts in this country are not bound by decisions of English courts, decisions of the English Court of Appeal are highly persuasive in this jurisdiction. The *Roland* decision may well affect the standard to be applied to a disciplinary investigation in New Zealand when an employee's reputation and ability to work in a chosen field are at risk.

[18] For this reason, although I consider the second question is a weaker ground than the first question for removal to this Court, it is also an important question of law that will arise other than incidentally.

Third question

> Are damages able to be awarded for damage caused to an employee's reputation resulting from their employer's failure to carry out disciplinary proceedings fairly, in accordance with its contractual and statutory obligations?

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[10] [2010] EWCA Civ 522.
[11] [1992] 3 ERNZ 853 at 890.

[12] [1995] 2 ERNZ 1 at 8-9.

[19] In addressing the third question, which I find also relates to the second question, Ms Perkin cited another recent English Court of Appeal decision, *Edwards v Chesterfield Royal Hospital NHS Foundation Trust.*[13] This case held that an employee who suffers damage as a result of findings of misconduct, leading to dismissal and loss of professional status, that were made against the employee in disciplinary proceedings conducted in breach of a contractual disciplinary procedure, may recover damages for the employer's failure to carry out proper disciplinary proceedings.

[20] Mr Clarke submitted that the courts have previously considered the question of damages to reputation and cited *Trotter v Telecom Corporation of New Zealand*[14] as authority for the proposition that damages for injury to reputation may be available in a personal grievance setting. He says that the Authority can decide this question under the well-established principles in that case. Furthermore, Mr Clarke submitted that as the matters in dispute between the parties are primarily factual, not legal, there is no important question of law here.

[21] Ms Perkin argued that the plaintiff is claiming, as a distinct and separate cause of action, damages for breach of contract resulting from the defendant's failure to carry out disciplinary proceedings fairly and in accordance with its contractual and statutory obligations. The plaintiff, she says, is seeking damages for injury to her reputation in her breach of contract claim under common law in addition to other remedies which may be awarded to the plaintiff for the unjustified dismissal in the context of her personal grievance claim.

[22] As with the second question, I respectfully disagree with the Authority's findings that there is no question of law but only factual issues between the parties. Therefore, as with the previous question, due to the recent English Court of Appeal decision in *Edwards* and the persuasive nature of decisions from that Court, I consider that the availability of reputational damages is an important question of law that is likely to arise other than incidentally.

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[13] [2010] EWCA Civ 571.

[14] [1993] 2 ERNZ 659.

Fourth question

> In a proceeding commenced before 1 November 2010 where the employer is a local authority that will be dissolved, or was dissolved, on that date pursuant to the Local Government (Tamaki Makarau Reorganisation) Act 2009 ("the Act"):
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> a) Is the court's power to order reinstatement of the employee limited or otherwise affected by the Act?
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> b) If the employee is not reinstated, what is the correct approach for the Court to adopt when determining the amount of compensation to award the employee:
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> i) for future loss of income?
>
> ii) for loss of benefits, including but not limited to the benefit of stable permanent employment?

[23] This question relates to the question of remedies if the plaintiff is found to have been unjustifiably dismissed.

[24] Ms Perkin submitted that prior to being dismissed the plaintiff was confident that she would be engaged by the new Auckland Council and would continue in a secure position for an indefinite period. The plaintiff is seeking to be reinstated.

[25] In support of her submission that the fourth question is a ground for removal, Ms Perkin submitted that a serious question of law is likely to arise when the Court has to determine if it has power, under the applicable legislation relating to the local government reorganisation, to order reinstatement. Furthermore, she submitted that if it does have such power, there is a question as to what are the relevant considerations that should be taken into account in these unique circumstances. In addition, Ms Perkin submitted that there is a question as to the correct approach for the Court to take to determine the amount of compensation for future loss of income and for other losses if reinstatement is not ordered.

[26] Mr Clarke submitted that the issue of reinstatement will only arise if the plaintiff is successful in her claim that she was unjustifiably dismissed and the Authority is minded to order reinstatement rather than reimbursement of lost remuneration. Citing the Authority's decision in *Li v Auckland University of*

Technology,[15] Mr Clarke submitted that the answer to the fourth question is no different from any other situation whereby an employee brings a personal grievance claim for unjustified dismissal against an employer which is restructuring its business.

[27] In addition, Mr Clarke submitted that the calculation of lost wages is not an important question of law and, should remedies fall to be determined, the Authority could adopt its usual approach to determining the amount of lost remuneration to be awarded to the plaintiff. Mr Clarke noted that s 35 of the Local Government (Tamaki Makaurau Reorganisation) Act 2009 provides that the acts, obligations and omissions and resultant obligations of the defendant, including as to its existing contracts and legal proceedings, will transfer to the new Auckland Council.

[28] I accept Mr Clarke's submissions and agree with the Authority's finding in respect of the fourth question that no important question of law arises in relation to remedies.

Decision

[29] I am satisfied that the criteria set out in s 178(2)(a) has been met in relation to the first, second and third questions and there being no reason why the residual discretion should not be exercised in favour of the plaintiff, I grant special leave to remove the plaintiff's proceedings from the Authority to the Court.

[30] Costs are reserved.

B S Travis
Judge

Judgment signed at 11.45am on 22 October 2010

[15] AA407/04, 13 December 2004.