

Attention is drawn to the permanent order that the names of the parties and information identifying either party in this determination are not to be published.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 414
5457760

BETWEEN A
 Applicant

A N D THE COMPANY
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Samuel Hood, Counsel for the Applicant
 Legal Representative of the Respondent

Investigation Meeting: 26 and 27 August 2014 at Hamilton

Submissions Received: Oral submissions by counsel for applicant and legal
 representative of respondent on 27 August 2014
 followed by written submissions on 3 September 2014
 from counsel for applicant and on 10 September 2014
 from legal representative of the respondent

Date of Determination: 9 October 2014

DETERMINATION OF THE AUTHORITY

- A. Mr A's suspension by the respondent company was unjustified. The company is ordered to pay Mr A the sum of \$2000 compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) for hurt and humiliation suffered by him.**
- B. The company's continuation of its disciplinary process into Mr A's conduct while the Police were conducting an investigation was unjustified in the circumstances and affected his employment to his disadvantage. No award of compensation is made.**

C. Mr A's dismissal was unjustified. To remedy the grievance Mr A is to be reinstated to his former position of local business manager with the company, effective from the date of dismissal. Reinstatement is to occur within 7 days of the date of this determination. No award of compensation is made.

D. Costs are reserved.

Employment relationship problem

[1] The respondent (the company), is a large financial institution with a number of offices throughout New Zealand and overseas. The nature of the company's business and reputation in the marketplace depends upon the utmost trust, loyalty and honesty of its employees.

[2] The importance of these attributes is emphasised in the letter from the company to the applicant (Mr A) offering him employment. The letter states that before being employed prospective employees are to undergo police and credit checks because of the "*high standards of integrity and trustworthiness required of the [company's] employees...*"

[3] Mr A was employed by the company for about two years as a local business manager until his suspension in March 2014 and summary dismissal in June. Mr A's dismissal followed an investigation by the company into whether it could continue to have trust and confidence in him as a result of the Police commencing an investigation into his conduct.

[4] The Police investigation included the execution of a search warrant at Mr A's home and at a local branch of the company. At the time of the Authority's investigation meeting on 26 and 27 August, the Police investigation was ongoing and no charges had been laid against Mr A. Between the time of the investigation meeting and the issuing of this determination, the Police have decided that no charges are to be laid against Mr A.

[5] Mr A says he is innocent of any wrongdoing, wishes to clear his name and says his suspension and subsequent dismissal by the company were unjustified. Mr A says the company commenced a disciplinary investigation into his conduct as a result of the Police investigation. However, because of the Police investigation, Mr A says

he was unable to engage fully in the company's disciplinary investigation. If Mr A answered or failed to answer questions posed by the company in its disciplinary process, Mr A was concerned that he might prejudice his right to a fair criminal trial in the event that charges were laid by the Police against him. Despite being aware of his right to a fair criminal trial, Mr A says the company continued to carry out a disciplinary investigation. In all the circumstances, Mr A says a fair and reasonable employer could not have reached a conclusion that he should be suspended and subsequently dismissed from his employment.

[6] Mr A has brought a number of personal grievance claims arising out of the process undertaken by the company in conducting its disciplinary investigation. Further, Mr A claims his dismissal by the company was unjustifiable and seeks to be reinstated to his former position. Mr A also seeks reimbursement for lost remuneration and compensation for hurt feelings, humiliation and distress he says he has suffered as a result of the dismissal. Penalties are sought by Mr A in relation to alleged breaches by the company of the Employment Relations Act 2000 (the Act) in conducting its disciplinary investigation.

[7] The company denies Mr A's claims. The company says the fact that the Police were conducting a criminal investigation and had executed search warrants at Mr A's home and at one of its branches was very serious and raised significant concerns over the company's continuing trust and confidence in Mr A as an employee.

[8] The company says it carried out a fair and proper disciplinary investigation which was modified to ensure Mr A's right to silence was not jeopardised. However, following its disciplinary investigation, the company determined it had suffered an irreparable loss of trust and confidence in Mr A. The company says its decision to dismiss Mr A was a decision a fair and reasonable employer could make in all the circumstances.

[9] Despite attempts by the parties to settle the grievances, including receiving mediation assistance on two occasions, no resolution was reached and the matter proceeded to an investigation by the Authority. The investigation meeting took place over two days at the end of which oral submissions were submitted by counsel for both parties followed by written submissions on 3 and 10 September.

Issues

[10] The following issues require determination by the Authority:

- (a) Was Mr A's suspension by the company on 20 March 2014 justified;
- (b) Was the continuation by the company of its disciplinary process into Mr A's conduct while the Police were conducting a criminal investigation justified;
- (c) If not, did the continued investigation affect Mr A's employment to his disadvantage;
- (d) Was Mr A's dismissal by the company justified?

First Issue

Was Mr A's suspension by the company on 20 March 2014 justified?

[11] On 23 January 2013, Mr A commenced employment with the company in a senior position as one of its local business managers. There were no issues of concern about Mr A's employment. This situation altered dramatically in early 2014.

Police Investigation

[12] On 13 February 2014, the company was served by the Police with a production order requiring that it produce certain information including its Code of Conduct under the Search and Surveillance Act 2012 (Search and Surveillance Act). Ms X, the head of the company's Human Resources Department, was informed of the production order and that Mr A was not to be told about the production order or its contents, or the company would be in breach of the Official Information Act 1982 (OIA).

[13] Search warrants under the Search and Surveillance Act were issued on 18 March on the grounds that the Police had reasonable grounds to suspect that offences of "*corruptly receiving payments under s.4 of the Secret Commissions Act 1910 ... and money laundering under s.243 of the Crimes Act 1961*" may have been

committed, and seeking certain evidence from the company including information from Mr A.

[14] On 18 March, Mr A's immediate manager, Mr Y, attended a meeting with his manager, a senior executive with the company. Also in attendance were Ms X and the company's legal representative. At this meeting, Mr Y was informed that search warrants were to be executed on Mr A at his home and at one of the company's branches. Mr Y was told by his manager that the Police required the investigation to be kept confidential and that Mr A was not to be told about it. Mr Y was extremely shocked. Mr Y said it was vital that he have complete trust and confidence in all members of his team and he was very concerned to protect the company's reputation as a financial institution. Mr Y considered, in the circumstances, it would be appropriate to propose to Mr A that his employment with the company be suspended while it carried out its own disciplinary investigation.

[15] At about 7pm on 19 March, the Police searched one of the company's branches. Mr Y asked the police officer executing the search warrant when he could speak with Mr A and was informed that he could do so after the Police had searched Mr A's home the following day.

[16] Shortly after 7am on 20 March, the Police executed a search warrant at Mr A's home. This was a complete surprise and shock to Mr A.

[17] Following the execution by the Police of the search warrant at his home, Mr A was taken to the Police station for a formal interview, which took approximately five hours. Mr A was asked if he would like a lawyer present at the Police interview but declined the offer as he did not feel he required legal representation.

20 March - Suspension Meeting

[18] Mr Y and Ms X were contacted by a police officer and informed that the Police interview with Mr A had concluded. Mr Y and Ms X went to the local Police station to speak with Mr A. Mr Y took with him the letter he had prepared on 18 March proposing that Mr A be suspended while the company conducted its own disciplinary investigation.

[19] Mr Y and Ms X met with Mr A in a room at the local Police station. Mr Y offered Mr A the choice of meeting at the Police station, at his home or at the

workplace. Mr Y did not offer to delay the meeting and did not offer Mr A the opportunity of a support person. Mr A agreed to have the meeting at the Police station but did not ask for the meeting to be delayed or for a support person as he wished to get home to his family as quickly as possible.

[20] Both Mr Y and Ms X were aware that the Police had searched Mr A's home that morning and that it would have been a complete surprise to him. Mr Y and Ms X also knew Mr A had been questioned by the Police at the Police station and were told by Mr A that the Police interview had lasted some five hours.

[21] Mr Y and Ms X both acknowledged it would have been a stressful time for Mr A. However, neither Mr Y nor Ms X felt Mr A was uncomfortable and both were of the view that if Mr A had expressed any concerns about meeting with them at the time, the meeting would not have gone ahead.

[22] Ms X says that her assessment, with the benefit of more than 20 years in human resources, was that Mr A was not distressed or uncomfortable. Ms X felt Mr A was able, in her view, to meet with them at that time.

[23] At the meeting, Mr Y asked Mr A about the Police investigation and Ms X took notes. Mr Y handed Mr A the letter proposing suspension which said:

PROPOSAL TO SUSPEND YOU FROM YOUR EMPLOYMENT

I am writing to advise you that on behalf of [the company], I am proposing to suspend you from your employment. [The company] is concerned that

- (1) Your alleged conduct is currently being investigated by the New Zealand Police; and*
- (2) Your alleged conduct may have occurred during [the company's] working hours and may have involved [the company's] customers.*

These allegations are serious, and, if proven, could result in disciplinary action being taken against you up to and including the summary termination of your employment with [the company] for serious misconduct. As such, I am proposing to suspend you from your employment in accordance with clause 7.5 of your employment agreement pending this investigation and decision as to what further action, if any, will be taken. I would like to hear any response/feedback that you may have to the above proposal. Once you have provided me with your response/feedback I will consider it before I make my decision.

Yours sincerely,
[Mr Y]
Regional Manager
[The company]

[24] Mr Y asked Mr A for feedback. Mr A acknowledged at the meeting that, in hindsight, he should have said something earlier about a group of the company's clients, but had not. There are conflicts in the evidence regarding some of what was said by Mr A and Mr Y at the meeting. For example, Mr A claims at the meeting he mentioned a previous discussion with Mr Y about one of the company's clients and that Mr Y acknowledged the previous discussion. In other words, Mr A says Mr Y was aware of the situation with some of the company's clients. Mr Y denied making such a statement at the meeting and this denial was confirmed by Ms X. Mr Y denied being aware of the situation with the company's clients as claimed by Mr A.

[25] Mr Y and Ms X had differing recollections of whether Ms X brought Mr A's employment agreement to the meeting and whether she pointed out the suspension clause in it to him. Ms X says she did bring the employment agreement to the meeting and gave a copy of it to Mr A. Mr A agrees with this. Mr Y says the employment agreement was not brought to the meeting.

[26] Ms X took handwritten notes of the meeting but did not keep a copy. This is unfortunate as they may have assisted the Authority in better understanding what was discussed at the meeting. Ms X says she typed up the notes into a file note on Saturday, 22 March. The company has been unable to provide the Authority with any emails to assist it in determining when the final file note was completed. This has not been helpful.

[27] The company failed to send the handwritten notes or the file note of the meeting to Mr A. Mr A did not receive a copy of the file note until his lawyer formally requested it on 9 April, almost 3 weeks after the suspension meeting. There is a duty to provide information to an employee which is relevant to the continuation of their employment¹. The company belatedly provided Mr A with a copy of Ms X's file note. I consider the failure to promptly provide Mr A with the file note was unfortunate but it does not follow that Mr A's subsequent suspension was unjustified.

¹ Section 4(1A)(c); *Vice Chancellor of Massey University v Wrigley* [2011] NZEmpC 37, [2011] ERNZ 138 at [49]

Section 103A Employment Relations Act 2000 - Test of Justification

[28] Mr A claims the suspension was unjustified. By raising grievances about his suspension and subsequent dismissal and bringing them to the Authority for investigation and determination, the Authority is required to apply the test of justification in s.103A of the Act. Under the test, the question of whether the suspension of Mr A was justifiable must be determined, on an objective basis, by considering whether the company's actions and how the company acted were what a fair and reasonable employer could have done in all the circumstances at the time the suspension occurred. The same test will be applied when considering Mr A's subsequent dismissal by the company.

[29] In applying s.103A, the Authority must also consider four particular factors set out in s.103A(3), as well as any others it thinks appropriate. Section 103A(3) includes the following that must be considered by the Authority:

- Whether, having regard to the resources available to the company, the company sufficiently investigated the allegations against the employee before taking action against the employee, in this case the suspension; and
- Whether the company raised the concerns that it had with Mr A before suspending; and
- Whether the company gave Mr A reasonable opportunity to respond to the company's concerns before suspending; and
- Whether the company genuinely considered Mr A's explanation in relation to the allegations against him before suspending.

[30] The test in s.103A is to be applied with the proviso that the suspension must not be determined to be unjustifiable solely because of process defects, if they were minor, and did not result in the employee being treated unfairly.

[31] The Authority has had the benefit of extensive evidence on all matters material to the resolution of this and other grievances raised by Mr A. It has also received comprehensive submissions in relation to the law regarding Mr A's right to silence

during the company's disciplinary investigation while the Police conducted a criminal investigation and in relation to the test of justification under s.103A of the Act.

[32] Clause 7.5 of Mr A's employment agreement states:

In the event that grounds may exist for terminating your employment, the Company may immediately and without consultation suspend your employment pending an investigation and decision as to what further action, if any, will be taken. This Agreement shall remain in force, including remuneration, for the duration of any suspension period.

[33] This is the provision the company relied upon when suspending Mr A at the meeting on 20 March. The letter from Mr Y on 21 March confirming the suspension referred to the reasons given to Mr A in the letter proposing suspension. These reasons were that:

... his alleged conduct is currently being investigated by the New Zealand Police; and

... his alleged conduct may have occurred during [the company's] working hours and may have involved [the company's] customers.

And further that Mr A had said at the meeting that he should have informed Mr Y of the dealings he was having with certain customers.

[34] There is no dispute that Mr A had finished a five hour interview with the Police when Mr Y and Ms X attended the Police station and requested to meet with him. Ms X and Mr Y both acknowledged that it would have been a distressing time for Mr A. Mr Y and Ms X were also aware that a Police search had been executed at Mr A's home. Mr A was not given the opportunity to have a support person or to delay the meeting.

[35] The matter was clearly of great concern to the company. It had a brand and reputation to protect. The nature of the company's business meant any police investigation could seriously tarnish its brand and reputation and could undermine it in the eyes of its customers. These were real and serious business concerns for the company.

[36] However, the company has considerable resources at its disposal. It could in my view have taken some steps which would have addressed its business concerns while ensuring its employee, Mr A, was treated fairly. Delaying the meeting for even

a short time to allow Mr A the opportunity to understand the situation he was in and obtain support was one such step. It is my view such a delay was important to allow Mr A a reasonable opportunity to respond to the company's concerns before suspending him. The company's failure to do so and its decision to suspend Mr A in the circumstances was not the action of a fair and reasonable employer. In my view such action was in breach of the company's obligations under s103A(3) of the Act.

[37] It is my view that the suspension was unjustified and that Mr A suffered a disadvantage as a result. The answer to the first issue is "No". I order compensation in the sum of \$2000 to be paid by the company to Mr A.

Second Issue

Was the continuation by the company of its disciplinary process into Mr A's conduct while the Police were conducting a criminal investigation justified?

[38] Following his suspension, Mr A obtained legal representation. Mr A's lawyer and the company's legal representative exchanged numerous emails and correspondence. Much of the correspondence focussed on the ability of the company to undertake a disciplinary investigation in respect of Mr A while the Police were conducting a criminal investigation into his alleged conduct.

The Company's disciplinary investigation

[39] On 27 March, Mr Y wrote to Mr A requiring a meeting to hear his response to allegations as follows:

As you know, you are currently being investigated by the New Zealand police for matters arising out of your relationship with [the company's] customer[s]...[and] related entities...Each of these customers were assigned to your ...portfolio for relationship management by you....[The company] understands from the police that depending on the outcome of these investigations, criminal charges may be laid against you.

[40] The company sought responses from Mr A to a number of questions, including the impact of the police investigation on its trust and confidence in him, alleged failure to declare certain monetary exchanges, alleged failure to refer certain client dealings to his manager and alleged failure to keep client information confidential.

[41] Mr A's lawyer replied by pointing out that the company's disciplinary enquiry had the potential to prejudice Mr A's right to a fair trial in the event the Police

investigation led to the laying of criminal charges. Mr A's lawyer sought an adjournment of the company's disciplinary investigation for one month to enable Mr A to obtain further legal advice regarding the information being sought and whether providing such information may prejudice his right to silence. This request was declined.

Privilege against self-incrimination (Right to Silence)

[42] The presumption of innocence is an important principle in our society. It is not open to the company or to this Authority to pre-empt a decision that properly rests with the criminal courts. However, in the Employment Court decision in *Wackrow v. Fonterra Co-operative Group Ltd*², Judge Shaw stated in a case such as this one there are competing interests and rights. Namely, the "*employee's right to silence in the face of potential or actual criminal prosecution for serious offences as against the employer's interest in investigating the conduct and performance of the employee raised by allegations of criminal behaviour.*"

[43] *Wackrow* concerned an employee against whom criminal charges had been laid. The employee applied to the Employment Court for a stay of the employment investigation until criminal proceedings had been determined. Judge Shaw summarised the relevant principles and guidelines in such a situation. The guidelines are set out at para.[54] and summarised by counsel for the plaintiff as follows:

- *The employer is entitled to conduct an investigation, and in fact is bound to do so;*
- *It is a grave matter for the Court to interfere with this entitlement;*
- *The burden is on the employee to show it is just and convenient that the employer's ordinary rights are interfered with or modified;*
- *No party is entitled as of right to have a civil proceeding stayed because of a pending or possible criminal proceeding;*
- *The Court's task is one of balance and justice between the parties taking into account all relevant factors;*
- *Each case must be judged on its own merits;*

² [2004] 1 ERNZ 350

- *Two factors to take account of are the right to silence and the undesirability of exposing a person to double jeopardy;*
- *There must be a real and not merely theoretical danger of injustice in the criminal proceedings having regard to factors such as:*
 - *the possibility of publicity of a civil proceedings that might reach and influence jurors or others;*
 - *the proximity of the criminal proceedings;*
 - *the possibility of a miscarriage of justice by disclosure of the defence;*
 - *the burden of preparing for two proceedings;*
 - *the effect on the employer when considered and weighed against the effect on the defendant; and*
 - *whether the proceeding can be allowed to proceed to a certain stage before being stayed.*

[44] *Wackrow* highlights the real challenges for parties where there is a criminal investigation into an employee's alleged conduct. An employer is faced with a very difficult situation because a criminal investigation may take months, if not years, to conclude. The employer's disciplinary investigation will often traverse the same or very similar issues as those being investigated by the Police. An employer is faced with the prospect of having to delay its own disciplinary investigation so as not to interfere with the employee's right to silence. If there is a criminal conviction the employer must continue its disciplinary investigation with no real likelihood of recovering wages paid during the suspension.

[45] And from the employee's perspective they may suffer "*double jeopardy*" if dismissed because of the criminal investigation or charge but no conviction, and if subsequently found to be innocent of the criminal charge.

[46] The issues are complex and challenging and in the case of *Wackrow* Judge Shaw stated:

[67] In applying the guidelines from McMann and Russell the Court must be satisfied that there is a strongly arguable case that there is a real and not merely theoretical danger of injustice to Mr Wackrow in the criminal proceedings should he be required to attend and take part in a disciplinary hearing as it is presently planned. The potential for injustice is twofold.

- (a) *The danger of injustice which would arise were he to attend a meeting and answers questions prejudicial to his criminal trial put by Fonterra; and*
- (b) *The danger of injustice if he were to attend and not answer any such questions put by Fonterra.*

[68] *Both must be judged in the light of the seriousness of the Court interfering with an employer's right and obligation to conduct an investigation where it has concerns about the behaviour of its employee. There are a number of factors relevant to this.*

[69] *In the absence of criminal charges Fonterra would be entitled to conduct an investigation into Mr Wackrow's conduct and care must be taken before the Court forestalls an employer's disciplinary process. Where such an inquiry has the potential to infringe the lawful rights and protections of an employee the Court can intervene to prevent it.*

[47] *Wackrow* was decided in the context of an application by an employee for an injunction to restrain the employer from taking disciplinary steps including suspension, pending the outcome of a criminal prosecution. In *Wackrow*, Judge Shaw accepted that there were issues of trust and confidence which Fonterra wished to investigate. However, Judge Shaw stated that she would allow the disciplinary proceedings to be conducted by Fonterra as long as they did not stray into areas covered by the criminal charges. On that basis, Fonterra was entitled to conduct its investigation into disciplinary procedures. However, it was restrained from asking the plaintiff any questions which bore on or related to the substance of the criminal charge which he faced until the final disposition of that charge.

[48] At para.[85] Judge Shaw states:

[85] *The Court is faced with ensuring that Mr Wackrow's right to a fair criminal trial is not compromised. Against this is Fonterra's assertion that it would be unreasonably burdened by being required to continue to employ Mr Wackrow on full pay for up to two years until the criminal proceedings are completed without having an opportunity to deal with the serious issues of trust and/or damage to Fonterra's reputation to be determined between the parties now.*

[49] In the current case following lengthy exchanges of correspondence between respective legal representatives, the company refocused its disciplinary investigation in order not to infringe upon Mr A's right to silence. In line with the *Wackrow* guidelines, questions to Mr A were restricted to alleged breaches of the conflict of

interests clauses contained in the company's code of conduct and in Mr A's employment agreement. There were also questions regarding the impact of the Police investigation on the company's ability to continue to have trust and confidence in Mr A, a senior manager in the company. However, the questions still referred to the Police investigations and in my view there was a direct relationship between those investigations and the company's employment investigation.

[50] Standing back and considering the evidence, I am satisfied that in the particular circumstances of this case, the continuation by the company of its disciplinary process into Mr A's conduct while the Police were conducting a criminal investigation was unjustified.

[51] It was because of the Police investigation that the company chose to conduct its own investigation. There was a direct relationship in my view between the issues under Police investigation and those being investigated by the company, even after refocusing its enquiry. Mr A was put in an impossible position. Answering the company's questions in order to retain his employment meant he may jeopardise his right to a fair trial if criminal charges were subsequently laid.

[52] At the time the company commenced its investigation in March, no criminal charges had been laid against Mr A. No charges were laid in the almost 3 month period leading up to Mr A's summary dismissal on 12 June. Mr A requested the company delay its investigation for a month to allow him to seek further advice about whether in responding to the company's questions he may prejudice any criminal trial. Also, to allow time to see if the police were going to lay charges. Mr A's request was declined. As it happened no charges were laid by the Police. The answer to the second issue is "No".

Third Issue

If the company's action in continuing the investigation was not justified was Mr A's employment affected to his disadvantage?

[53] Under s103(1)(b) of the Act, to be successful in a claim for unjustifiable disadvantage an employee must show that his/her employment, or one or more conditions of it, were affected to the employee's disadvantage by some unjustifiable action by the employer.

[54] I have found the company's action in continuing its investigation in the circumstances was not justified. Mr A's employment was affected to his disadvantage in my view. Mr A was suspended while the company investigated his conduct, Mr A could not properly engage in the process because to do so would prejudice his right to silence. Mr A was unable therefore to address the real issues of concern to the company, which were the same as those being investigated by the Police. Ultimately in my view this led to his dismissal. The answer to the third issue is "Yes". No order for compensation is made as this matter is inextricably related to the fourth issue, Mr A's dismissal. In my view a separate award of compensation is not warranted in the circumstances.

Fourth Issue

Was Mr A's dismissal by the company justified?

Unpaid Sick Leave - Paid Suspension

[55] On 4 April, Mr A was diagnosed with depression and prescribed medication. Mr A was certified by his Doctor as being unfit to resume work for a period of 6 weeks.

[56] The company's response in relation to Mr A's sick leave was to place him on paid sick leave until 2 May, the date the medical certificate expired. Mr A was informed that any further sick leave would be unpaid as his accrued sick leave entitlement would have expired. The disciplinary meeting and any decisions regarding Mr A's ongoing suspension were postponed until 5 May when Mr A was fit to return to work.

[57] On 12 May, Mr A through his Counsel confirmed he was fit to return to work on 13 May. The company sought a medical report to confirm Mr A's fitness to return to work. The company responded that, upon receipt of the medical report, the company would consider whether Mr A would remain on unpaid sick leave or have his suspension reinstated.

[58] Mr A says by placing him on sick leave while he was suspended on pay was a tactic to put financial pressure on him. I agree. If Mr A had not had to go on sick leave, he would have remained suspended on pay while the company continued its investigation. By placing Mr A on sick leave, Mr A exhausted his sick leave entitlement at a time when in reality he was suspended on pay. This in my view was

to exert financial pressure on Mr A to secure his participation in the disciplinary process. In the circumstances this was not the action of a fair and reasonable employer.

Summary Dismissal – 12 June

[59] Mr A was summarily dismissed by the company on 12 June. The reasons for the dismissal were as set out in the company's letter of 29 May.

[60] The letter of 29 May stated that the company's preliminary view was:

- that given the Police investigations into Mr A's conduct, it had serious questions of trust and confidence in him as one of its local business managers;
- the Police investigations could have a negative impact upon the company's workplace and raise important questions about the trust and confidence the company had in Mr A as one of its employees;
- in light of the Police investigations, the company could not hold Mr A out as one of its representatives in whom it had trust and confidence, either internally or externally;
- Mr A's involvement in the Police investigations does not promote or protect the company's interests;
- regardless of whether charges have been laid, the Police investigations could impact negatively on the company's reputation within the local area and more broadly;
- the company's reputation would be impacted if Mr A remained employed by the company as a local business manager, a role requiring a high level of trust and confidence.

[61] For these reasons the company proposed Mr A's summary dismissal for serious loss of trust and confidence in him. Mr A had through his lawyer already responded to the company's concerns regarding its trust and confidence in him as a result of the Police investigations. The letter on behalf of Mr A and dated 12 May stated that:

“[The company] can continue to have trust and confidence in [Mr A] because he has done nothing wrong, [Mr A] would like to explain why he has done nothing wrong, as he is confident that he can clear his name - however Mr Mabey QC has advised [Mr A] not to comment on the substance of the police investigation....[Mr A] does not accept that his mere involvement in a police investigation breaches his obligation to [the company]. Rather, the issue is whether [Mr A’s] underlying conduct breaches his obligations.[MrA] would like to defend his actions but has been advised to exercise his right to silence...”

[62] It is clear from the company’s letter of 29 May and confirmed in the letter of dismissal dated 12 June, that Mr A was dismissed because of the Police investigations into his conduct. Each of the reasons given in the letter of 29 May relates directly to the police investigations. At the Authority’s investigation meeting when asked whether he dismissed Mr A because of the police investigation, Mr Y’s reply was “No”. I do not accept this to be the case, it is my view Mr A was dismissed because of the Police investigations.

[63] At the Authority’s investigation meeting, Mr Y also gave as reasons for dismissing Mr A, Mr A’s responses during the suspension meeting, that Mr A had not told the truth at the suspension meeting, that the company had uncovered irregular transactions and the company was short staffed and this would be burdensome. The parties had agreed when the disciplinary investigation was refocused that some of these matters could not be considered by the company because they would infringe on Mr A’s right to silence. They clearly were considered. Also, it appears issues including Mr A’s responses, not telling the truth and staff shortages and the impact of this were raised in the letter indicating a preliminary view to dismiss. The issues had not been raised with Mr A by the company before it reached its preliminary view. For all these reasons the company’s process was not justified.

[64] Applying the test in s103A of the Act, it is my view that the summary dismissal of Mr A in the overall circumstances known to the company at the time it made that decision, was not what a fair and reasonable employer could have done. Not only did the company act in breach of s103A(3), the conclusions reached about Mr A were directly related to the Police investigations and Mr A was unable to

properly respond to the allegations. The decisions made about Mr A by the company were accordingly defective and resulted in unfair treatment.

[65] The dismissal was therefore not justifiable and Mr A has established his personal grievance in that regard. The answer to the fourth issue is “No”.

Remedies

[66] I order payment by the company to Mr A of \$2000 in respect of the first issue, being his unjustified suspension. I do not make orders in respect of the second and third issues for the reasons given. Mr A seeks reinstatement in respect of the fourth issue, his unjustified dismissal.

[67] In my view there is a compelling case for Mr A to be reinstated. At the time of Mr A’s dismissal and at the time of the Authority’s investigation meeting, no charges had been laid against Mr A. The Police investigation was the primary reason for Mr A’s suspension and dismissal. The company can now if it so wishes, conduct an investigation into matters which were the subject of the Police investigations without fear of infringing Mr A’s right to silence.

[68] I consider that reinstatement will be reasonable and practicable in all the circumstances. Mr Y agreed at the investigation meeting that he had not been approached by clients seeking information about Mr A or his whereabouts.

[69] I order Mr A be reinstated to his former position as local business manager with the company, on a permanent basis. Reinstatement is to take effect from the date of termination on 12 June for the purposes of payment of lost salary since that time to Mr A and in respect of restoring Mr A’s terms and conditions of employment. The company is to reinstate Mr A to his position of local business manager with the company within 7 days of the date of this determination.

[70] I am required under s.124 of the Act to consider whether Mr A contributed to his dismissal. I do not consider Mr A contributed to his dismissal. The Police investigation which led to the suspension and dismissal was not something Mr A had any control over.

Costs

[71] Costs are reserved. Mr A has 14 days from the date of this determination to file and serve a memorandum as to costs. The company has 14 days from receipt to file a memorandum in response.

Anna Fitzgibbon
Member of the Employment Relations Authority