



## **The Investigation**

[3] During a telephone conference call on 29 January 2010 the parties agreed to a one-day investigation in Napier on 23 March, and to a timetable for filing witness statements.

[4] Despite efforts at the investigation, the parties were unable to settle this matter on their own terms.

## **Background**

[5] The key facts are largely agreed by the parties.

[6] On 28 October 2009 the Company suffered a serious event in respect of its computer system.

[7] It called in a consultant to investigate the cause of the malfunction, who advised the problem appeared to have been caused by external hacking.

[8] At the consultant's recommendation, the matter was formally reported to the Police.

[9] Ms Brocklehurst and other staff had some knowledge of these matters, including the complaint to the Police.

[10] A former Company employee was interviewed in respect of the alleged hacking. Criminal proceedings were later brought against that person.

[11] As a result of their investigation, and on 12 November 2009, a plain clothes detective arrived at the Company's premises and advised its director of his wish to interview Ms Brocklehurst.

[12] The director approached Ms Brocklehurst and advised a policeman wished to speak to her.

[13] An interview followed, out of sight and hearing of other staff.

[14] Following the interview the police officer advised the director that he did not see Ms Brocklehurst as being involved but that he had agreed with her to go to her home and look at her personal computer.

[15] As a result of the interview and inspection of her personal computer the Police were satisfied Ms Brocklehurst had no involvement in the hacking.

[16] On 13 November the Company received a letter from Ms Brocklehurst's then representative advising of a personal grievance. Details were not provided but the respondent was advised not to make direct contact with the applicant. The Company was also advised that Ms Brocklehurst was on sick leave. As it happened she never returned to work.

[17] Details of Ms Brocklehurst's grievance were set out in a letter dated 18 November. Amongst other things, the allegation was made that the respondent had not met its legal obligations in respect of investigation procedures and had undertaken a trial by ambush. Various remedies were sought including financial compensation.

[18] On the same date the Company advised it was seeking mediation assistance.

[19] By letter dated 19 November the police officer advised he was not acting for the Company but was undertaking a police investigation into a suspected offence.

[20] The Company acknowledges deductions were made from the applicant's pay for the week ending 17 November (\$350.33 for annual leave provided in advance and \$2.40 in respect of her personal account) and that they technically constitute a breach of the Wages Protection Act. The Company says it erroneously interpreted the provision in Ms Brocklehurst's employment agreement whereby the applicant had given signed authority to make deductions, not appreciating that it was only in respect of her final pay, whereas (at that time) the applicant had not resigned. As it happened, shortly thereafter that pay became Ms Brocklehurst's final pay and no issue was raised at the time.

[21] A statement of problem was filed on 14 December 2009.

[22] The applicant formally resigned her employment on 25 January 2010.

### **Ms Brocklehurst's Position Summarised**

[23] As set out in par 1 above, the question for the Authority is: is the employer vicariously liable for the actions of a police officer when investigating a criminal matter at the request of an employer?

[24] If the answer to that question is yes then the next question is, did the police officer breach the laws of procedural fairness when interrogating Ms Brocklehurst?

[25] The facts make clear that the Company was justifiably concerned about the wilful destruction of parts of its electronic database by unknown persons. It contacted the Police who commenced an inquiry under s. 250 of the Crimes Act 1961 (the Crimes Act) and identified an ex-employee of the respondent's as the possible offender. The police officer covertly visited the workplace with the intention of obtaining the Company's approval to interview Ms Brocklehurst. As a result of two subsequent interviews, the applicant never returned to the workplace. The interviews also resulted in these proceedings.

[26] Ms Brocklehurst's evidence of the police officer's objectionable conduct is to be preferred.

[27] While the Police are tasked with the duty of enforcing criminal statutes on behalf of the crown, that role does not extend to being used by employers to carry out employment investigations parallel to criminal investigations. In this case, an enquiry into the Crimes Act was juxtaposed with an inquiry into whether the applicant was engaged in serious misconduct in regards to the wilful destruction of Company property, resulting in fundamental breaches of the employment relationship of trust and confidence.

[28] A penalty is sought in respect of an illegal wages deduction.

## **The Company's Position Summarised**

[29] Because I adopt and adapt the Company's submissions it is not necessary that I summarise the respondent's position.

## **Discussion and Findings**

### **Unjustified Disadvantage**

[30] There is no evidence of the Police acting as the Company's agent in any capacity.

[31] There is no evidence of the Company initiating any disciplinary process in respect of Ms Brocklehurst, formally or otherwise.

[32] The uncontested evidence provided by the police officer concerned is that, in response to a formal complaint, the Police carried out an investigation into an alleged breach of the Crimes Act.

[33] The officer also advanced uncontested evidence that he was quickly able to eliminate Ms Brocklehurst as a suspect.

[34] Unfortunately, and it is equally uncontested, by then Ms Brocklehurst had undergone what has all the appearance of a seriously traumatic experience, and had formed the view that the Police's action was at the behest, and on behalf of, her employer; her distress was plainly and painfully clear.

[35] Any complaint Ms Brocklehurst may have of the Police interview is best addressed by way of a complaint to the relevant Police complaints authority.

[36] In a sense Ms Brocklehurst's view was right: it was the respondent who filed a complaint, but it was a legitimate complaint resulting in an equally legitimate Police inquiry. And I am satisfied the Police acted at all times statutorily independently of the Company, and never in any employment context, again formally or otherwise, as its agent.

[37] Any trial by ambush was not at the Company's behest or on its behalf: it had no control on the approach adopted by the Police.

[38] There is no evidence of malice or bad faith aimed by the Company at Ms Brocklehurst. There is no evidence that the Company, by laying a complaint and triggering a Police investigation, sought to 'get' the applicant or should have realised that that is how it would be perceived.

[39] In *Kumar v Elizabeth Memorial Home Ltd* [2000] ELB 37 the Employment Court upheld an earlier Employment Tribunal decision; including a finding that the employer, in that case, was entitled to commence an investigation without the knowledge of the employee and without informing the employee of Police involvement. The Tribunal was found not to have erred and to have applied the appropriate test of natural justice (p12).

[40] To the extent that the Company was able to influence a statutorily independent process it did so by ensuring no other staff members were aware of Ms Brocklehurst's Police interview; it is also to the respondent's credit that it promptly sought mediation when informed of the applicant's grievance, in an attempt to sort matters out and put them right.

[41] The Police are not required to comply with natural justice as understood and applied in an employment context, nor are they required to comply with the terms of an employment agreement when conducting a criminal investigation.

### **Penalty**

[42] A penalty is claimed in respect of an acknowledged breach of the Wages Protection Act.

[43] In *Xu v McIntosh* [2004] 2 ERNZ 448, 451 the Employment Court found that:

*In determining the quantum of penalties to be imposed for the breaches of the ERA ... the first question to ask was, how much harm had the breach occasioned? Further, how important was it to bring home to the party in default that such behaviour was*

*unacceptable, or to deter others from it? The next question ... was: was the breach technical or inadvertent, or was it flagrant and deliberate?*

[44] No evidence has been provided as to any harm caused Ms Brocklehurst by the breach. Little argument has been advanced as to how and why the behaviour was unacceptable or why (given the specific facts of this case) a penalty is appropriate so as to deter others. There is no evidence of the breach being flagrant and deliberate.

[45] Having regard to these considerations I decline to award any penalty in respect of the respondent's failure to meet s. 65 of the Act.

### **Determination**

[46] Ms Brocklehurst's claims of unjustified disadvantage and for a penalty are dismissed.

[47] As requested, costs are reserved.

**Denis Asher**

**Member of the Employment Relations Authority**