IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 331/10
5297926

	BETWEEN	LAURA JANE GEORGE Applicant
	AND	AUCKLAND REGIONAL COUNCIL Respondent

Member of Authority:	Yvonne Oldfield
Representatives:	A. R. Drake for Applicant T. Clarke for Respondent
Investigation Meeting:	14 July 2010
Determination:	22 July 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms George is a qualified chartered accountant who was employed by the respondent (the Council) as Group Manager, Accounting Services. On 4 February 2010 she was dismissed for serious misconduct. The reasons given for the dismissal related to the alleged recruitment of a casual employee in breach of the respondent's recruitment policy and to concerns about the truthfulness of explanations Ms George gave in response to that allegation.

[2] Ms George's employment relationship problem (as set out in an amended statement of problem dated 31 May 2010) includes claims of unjustified disadvantage, unjustified dismissal, breaches of contract and breaches of the Employment Relations Act 2000. Ms George claims the usual remedies in relation to her personal grievance. In addition, in relation to the alleged breaches of her employment agreement, she claims special damages and damages for damage to reputation. Finally she also claims penalties in respect of alleged breaches of contract and of the Act.

[3] The applicant now asks that the whole problem be removed to the Employment Court. The respondent is opposed to that. The parties having already been to mediation, Mr Drake and Mr Clarke requested that the Authority determine the removal issue after taking submissions in a short meeting. I now proceed to do so. I note that the submissions were thorough and helpful and have been carefully considered but in order to expedite this determination, they have not been discussed here in detail.

Issues

[4] The application for removal is made pursuant to section 178 (2) (a) of the Employment Relations Act 2010, that is, on the ground that an important question of law is likely to arise in the matter other than incidentally. The applicant says that four such questions are likely to arise in this case. The respondent opposes the application on the grounds that:

"(a) there is no question of law which is likely to be decisive or strongly influential in deciding the case or an important part of it;

(b) accepting for the purposes of argument that one of the statutory grounds can be established, the relevant factors favour declining removal."

[5] The issues for determination are therefore whether one or more of the four questions identified meets the criteria set out in section 178 (2) (a) and if so, whether the Authority should exercise its discretion to remove the matter to the Court.

(i) The first question

[6] The first question relied on by the applicant is:

"*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, is it justifiable for the employer under s.103A Employment Relations Act 2000:*

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?"*

[7] Mr Drake argued that there are two divergent lines of authority on this issue and suggested that this case represents an opportunity to clarify and confirm the law on it. He reminded the Authority that a question need not be novel or difficult in order to be important. Its importance must be assessed in relation to the case in which it arises, that is the question must be "*decisive of the case or some important aspect of it or strongly influential in bringing about a decision or material part of it."*[1]

[8] Mr Clarke argued that it is well established that, during the course of investigation into allegations against an employee, an employer may add a further allegation of serious misconduct arising out of the employee's responses to the original allegations. In relation to that further allegation the issue for determination is whether the employer adopted a fair procedure in investigating the additional allegation and whether it was able to justify the conclusions it reached. The respondent argues that those questions are for the Authority because:

"*The Authority is well-equipped to make a determination on the facts of this case as to whether a fair and reasonable employer, in the respondent's circumstances, would have decided that the* [applicant] *has been dishonest during the investigation."*

[9] I accept that, as Mr Clarke has asserted, the law on question [1] is well settled. The key matters to be resolved in relation to the issue of the additional allegations against Ms George are factual rather than legal and it cannot therefore be said that the question identified will be strongly influential in bringing about a decision or material part of it.

[10] The first question does not, therefore, amount to an important question of law in terms of s.178 of the Employment Relations Act 2000.

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[1] *Hanlon v International Educational Foundation (NZ) Inc [1995] 1 ERNZ 1, at p.7.*

(ii) The second question

[11] The next question which the applicant says is an important question of law is:

"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 Chief Executive for a local authority 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] The respondent accepts that the respondent: "*was obliged to carry out a careful, thorough, and fair investigation, to a standard commensurate with the allegations made against the applicant."* The respondent's position is that in this case it did so.

[13] Given that the parties agree on the nature and standard of the investigation required of an employer, the only live issue relating to question 2 is whether or not the Council's investigation met that standard. That is a factual question which is for the Authority to decide. It follows that no important question of law arises in relation to this point.

(iii) The third question

[14] The next question identified by the applicant is:

"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?"

[15] Mr Clarke agrees that damages can be awarded for reputational damage and also that reputational damage can be compensated for in terms of the personal grievance remedies. As before, he says that the matters in dispute between the parties are primarily factual, not legal, and there is no important question of law here.

[16] As with question [2] the respondent's acknowledgement of the legal position disposes of the question of law that the applicant identified, leaving only factual issues between the parties. There is no important question of law here.

(iv) The fourth question

[17] The final question identified by the applicant is:

"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 Makaurau Reorganisation) Act 2009 ("the Act"):

a. Is the Court's power to order reinstatement of the employee limited or otherwise affected by the Act?

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:

i. for future loss of income?

ii. for loss of benefits, including but not limited to the benefit of stable permanent employment?"

[18] The respondent notes that the issue of reinstatement will only arise if:

a. "the applicant is successful in her claim that she was unjustifiably dismissed; and

b. the Authority is minded to order reinstatement rather than reimbursement of lost remuneration"

[19] The respondent notes that if the applicant were to be reinstated before 31 October 2010 then she would be in the same situation as if she had not been dismissed. Otherwise, the respondent says:

"the answer to this question is no different from any other situation whereby an employee brings a personal grievance claim for unjustified dismissal against an employer who is restructuring his business."

[20] As for the calculation of lost wages, the respondent says this is not an important question of law. It says that should remedies fall to be determined, the Authority would be able to adopt the usual approaches including counterfactual analysis and consideration of any potential loss of chance for redeployment.

[21] The respondent also notes that section 35 of the Local Government (Tamaki Makaurau Reorganisation) Act 2009 provides that the acts, obligations and omissions and resultant obligations of the respondent will transfer to the new Auckland Council.

[22] Once again I accept the respondent's submissions in their entirety. I am not satisfied that any important questions of law arise in relation to remedies.

Discretion to remove

[23] Since the applicant has failed to establish a statutory ground pursuant to s. 178 it is not necessary for the Authority to address the question of the exercise of the discretion to remove.

[24] The application for removal is declined. As advised previously, costs are reserved until the completion of the Authority's investigation into the substantive matters.

Yvonne Oldfield
Member of the Employment Relations Authority