

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2012] NZERA Auckland 299  
5371633

BETWEEN                      PETER DAVID HALL  
Applicant

A N D                              DIONEX PTY LIMITED  
Respondent

Member of Authority:        James Crichton

Representatives:            Tony Drake, Counsel for Applicant  
Daniel Erickson, Counsel for Respondent

Investigation meeting:      26 July 2012 at Auckland

Date of Determination:      31 August 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Mr Hall) alleges that the respondent (Dionex) committed various breaches of his employment agreement, unjustifiably dismissed him, committed various actions of an unjustified nature causing him disadvantage, failed to pay him commission owing to him, and in respect of various breaches of his employment agreement and of the Employment Relations Act 2000 (the Act) Dionex ought to suffer penalties and that those penalties ought to be paid to Mr Hall.

[2]     Dionex resist those claims.

[3]     The statement of problem was filed in the Authority on 18 May 2012. By application filed on 26 June 2012, Mr Hall sought to remove to the Employment Court the whole of the matter filed in the Authority. That application is itself resisted by Dionex.

## Removal

[4] Section 178 of the Employment Relations Act 2000 sets out the grounds on which the Authority may remove a matter to the Employment Court. The grounds on which this particular removal application is promoted relies essentially on the contention that a important question of law is likely to arise in the matter “other than incidentally”.

[5] It is convenient to set out in full the nature of the application:

1. *Was it justifiable for the respondent to assign or transfer to a person who was not a director, officer or employee of the respondent the rights and obligations which the respondent had and owed to the applicant when conducting a disciplinary process involving the applicant, the outcome of which could be dismissal from his employment, without first -*
  - (a) *obtaining the applicant’s agreement to such an assignment or transfer; or*
  - (b) *giving the applicant reasonable notice of such an intended assignment or transfer; or*
  - (c) *consulting with the applicant?*
2. *If it was not justifiable for the respondent to have transferred or assigned rights and obligations (as referred to in question 1 above), did this vitiate the decisions and actions taken on behalf of the respondent during the disciplinary process?*
3. *In a situation where the applicant’s reputation and ability to work in his chosen field of employment could be injuriously affected by dismissal for alleged serious misconduct, was the respondent required, by the obligations the employer owed under contract, statute and common law, to ensure a careful thorough and fair investigation had been carried out, to a standard commensurate with the gravity of the accusation and the potential effect on the applicant, prior to deciding to dismiss the applicant?*
4. *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?*

[6] In summary then Mr Hall relies on two broad contentions to ground his application for removal. The first is the contention that by relying on an individual who, to use counsel’s phrase, was *a stranger* to the employment agreement to progress the disciplinary investigation which led to Mr Hall’s dismissal for serious misconduct, Dionex brought themselves within the terms of s.178(2)(a) of the Act by effectively raising an important question of law, namely whether it was competent for

a stranger to the employment agreement to dismiss a senior manager for serious misconduct without consulting the employee, giving him reasonable notice of that intention, or obtaining his consent.

[7] The second aspect that Mr Hall relies upon is the contention that, by being subjected to dismissal for serious misconduct so as to injuriously effect his potential future employment and reputation, Dionex again bring themselves within the terms of s.178(2)(a) by effectively raising the question of whether damages for injury to reputation in such circumstances might be available in the Court but not in the Authority and thus by implication, an important question of law is involved.

[8] Dionex oppose removal. They say in summary that no important question of law arises, that the matters relied upon by Mr Hall relate to issues of procedural fairness which the Authority habitually deals with and that none of the questions posed by Mr Hall (and enumerated by the Authority above) are determinative of the employment relationship problem between the parties but that even if the Authority were to conclude that there was an important question of law involved, it should still exercise its residual discretion against removal.

[9] This is because, Dionex argue, there are a number of disputed facts which the Authority is well placed to determine by its investigative process, there is a right of challenge to the Court in the event of either party being unhappy with the Authority's determination and the Authority will be able to deal with the matter more expeditiously than would be the case if the matter were removed to the Court.

### **The law**

[10] The legal position is clear. In *New Zealand Tramways and Public Passenger Transport Employee's Union v. Wellington City Transport Limited* [2011] NZEmpC 78:

*The legal principles relevant to applications for special leave to remove are well established. ...*

1. *An application for special leave under s.178 of the Employment Relations Act 2000 carries the burden of persuading the Court that an important question of law is likely to arise in the matter other than incidentally, or the case is of such a nature and of such an urgency that the public interest calls for its immediate removal to the Court.*

2. *It is necessary to identify a question of law arising in the case other than incidentally.*
3. *It is necessary to decide the importance of the question.*
4. *It is not necessary that the question should be difficult or novel.*
5. *The importance of the question of law can be gauged by factors such as whether its resolution can affect large numbers of employers or employees or both. Or the consequences of the answer to the question are of major significance to employment law generally. But importance is a relative matter and has to be measured in relation to the case in which it arises. It 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 the case or a material part of it.*

*Even if an important question is likely to arise, the removal of a matter to the Court is discretionary. Factors which have been considered relevant to the exercise of that discretion have been whether any useful purpose would be served by ordering a removal to the Court; whether the case is one which turns on a number of disputed facts which can be more properly dealt with in the Authority; whether the case is of such urgency that it should be dealt properly in the Employment Relations Authority; and whether this is a case which will inevitably come to the Court by way of a challenge in any event.*

[11] Working backwards then from that elegant summary of the law, the first point to note is that the Authority has a discretion such that, even if the grounds, or one of the grounds under which removal may be contemplated, is made out, the Authority still has a discretion not to order removal: *EPMU v. Carter Holt Harvey Ltd* [2002] 1 ERNZ at 74.

[12] Next, an important question of law will often either have major significance for employment law generally or will affect a large number of employers and/or employees: *Hanlon v. International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1.

[13] There is no requirement that the question of law should be either difficult or novel: *Auckland District Health Board v. X (No.2)* [2005] 1 ERNZ 551 per Chief Judge Colgan at para.35.

[14] The cases are clear that whether a question of law is an important one or not will usually be *a relative matter. Its importance has to be measured in relation to the case in which it arises. The 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 out a decision of it or material part of it: per Goddard CJ in Hanlon supra.*

### **Analysis**

[15] The first question of law identified by Mr Hall concerns the nature of the decision maker in Mr Hall's disciplinary process and subsequent dismissal.

[16] It is a matter of fact that the decision maker was Ms Amanda Jane Cameron who at the relevant time held the role of Director, Scientific New Zealand and was an employee of Thermo Fisher Scientific New Zealand Limited (Thermo Fisher NZ). Thermo Fisher is an international company with a head office in the United States. Thermo Fisher NZ is a part of the Thermo Fisher Group. In May 2011, Thermo Fisher internationally acquired the world-wide business of Dionex Corporation which included the respondent company Dionex.

[17] When that acquisition took place, Mr Hall was the Sales and Service Manager for New Zealand for Dionex. He reported to Dionex's Country Manager.

[18] There was a process of integration whereby Dionex personnel became part of Thermo Fisher NZ. The policies and procedures of Thermo Fisher NZ were promulgated to Dionex staff (including Mr Hall).

[19] Subsequently, there was a wide ranging disciplinary inquiry involving a large number of Dionex managers, including Mr Hall. As a consequence of that wide ranging disciplinary inquiry, Mr Hall's direct report, the Dionex Country Manager for New Zealand, was dismissed. That officer, to whom Mr Hall reported, reported in turn to Ms Cameron.

[20] The Dionex Country Manager was at the time of his dismissal one of three Directors of Dionex. The other two were respectively domiciled in South Australia and in Massachusetts. It was the Massachusetts Director who delegated the authority to Ms Cameron to undertake the disciplinary investigation and impose any disciplinary sanction in respect to Mr Hall's alleged wrongdoing.

[21] Mr Hall says that his employment agreement contained an implied term that Dionex would itself undertake any disciplinary inquiry and/or impose any disciplinary sanction. As a matter of fact Ms Cameron, the decision maker, was not a director,

officer or employee of the respondent but Dionex say that she was given the authority to act in the matter by a Director of Dionex. That is hardly surprising because, were it not for the dismissal of the Country Manager for Dionex, the natural expectation would have been that it would have been he who conducted the disciplinary investigation into Mr Hall's alleged wrongdoing, he being Mr Hall's direct report. But by virtue of the Dionex Country Manager's earlier dismissal, that was impossible.

[22] Arguably though, it was equally natural that Ms Cameron would undertake the task of conducting the disciplinary investigation because, although she was not an officer, director or employee of Dionex, she was the Country Manager for Dionex's direct report and so in his absence (he having been dismissed) it would seem natural that Ms Cameron would be the next logical person to deal with a disciplinary matter in relation to Mr Hall.

[23] Mr Hall pleads that Ms Cameron had no direct association with Dionex and as he neither consented to Ms Cameron's involvement, nor was given notice of that involvement, or even was consulted about that involvement, she ought not to have had the involvement even if it were delegated to her by one of Dionex's directors.

[24] Mr Hall reminds the Authority that employment agreements are agreements of personal service and an employment agreement, in consequence, cannot be assigned to a stranger.

[25] Mr Hall draws the Authority's attention to s.103(2) of the Employment Relations Act 2000 (the Act) which defines a representative in relation to an employer and requires that that representative be employed by the employer. Further, Mr Hall relies on s.4(2) of the Act which lists the various forms of employment relationship. Mr Hall submits that there is nothing in s.4(2) which would allow the Authority to conclude that a different employer could act in a disciplinary matter. The Authority is also reminded that good faith obligations cannot be assigned either.

[26] Mr Hall says that at the date the disciplinary inquiry into his alleged wrongdoing commenced, Dionex had directors and staff and one of them ought to have undertaken the disciplinary process.

[27] For their part, Dionex say that Mr Hall's argument completely ignores the commercial realities of the situation. With effect from May 2011, Dionex became a subsidiary of the Thermo Fisher Group internationally and while it remained

incorporated as a limited liability company in its own right, its ownership had fundamentally changed.

[28] Dionex invite the Authority to draw conclusions from the fact that there had been an integration process between the Thermo Fisher Group and Dionex in New Zealand, which Mr Hall was involved with, and that the very purpose of that integration process was to draw the previously separate entities together.

[29] Further, Dionex remind the Authority that the Country Manager for Dionex who, in the normal course of events would have been responsible for any disciplinary investigation involving his immediate subordinate (Mr Hall) had been dismissed and in a practical sense, the Dionex Country Manager's direct report (Ms Cameron) was the logical person to conduct a disciplinary inquiry into Mr Hall's alleged wrongdoing given the absence of the Dionex Country Manager. Further, the two other directors of Dionex (beside the Dionex Country Manager) were domiciled overseas and on the affidavit evidence before the Authority, had little if any day-to-day involvement in the New Zealand business.

[30] On this particular point, Dionex rely on the decision in *New Zealand Seamans Union IUOW v. Gear Bulk Shipping (NZ) Limited* (1990) 3 NZELC 97. The defendant company (*Gear Bulk*) was the wholly owned subsidiary of a Norwegian company whose directors were a nominee of the Norwegian parent, a senior employee of the Norwegian parent, and a senior employee of an Australian company also owned by the Norwegian parent.

[31] The plaintiff Union (the Union) challenged the redundancy dismissal of some of its members because the decision was made by the Norwegian parent. The Labour Court had to consider whether it could or should lift the corporate veil. The Court held that it was a question of facts as to whether the subsidiary was carrying on the business of the parent or was trading on its own account.

[32] In that decision given by Judge Colgan (as he then was) His Honour said: "*the decision to remove the management of (the vessel) from the New Zealand company was one made by ...Gearbulk (Bergen)...It may well have been a decision which was not made or otherwise participated in by ... the New Zealand company. (However)....Gearbulk (NZ) made or at least significantly participated in the decisions which led to the dismissals ... in the sense that the major shareholder*

*together with the most significantly active and participating director reached these conclusions on behalf of the company and conveyed them to its New Zealand based general manager for dissemination to the union and employees.”*

[33] Dionex say that, contrary to the submission of Mr Hall, the issue is essentially a factual one and not a question of law at all and that the *Gear Bulk* decision supports that conclusion. Dionex say that the essence of the dispute between the parties is a question of whether Mr Hall was unjustifiably dismissed or not and that a sub-set of that question is the narrower point of whether the process that was used by Dionex (including in particular the question of whether Dionex could or should have delegated the disciplinary inquiry) was appropriate or not. Dionex submit that the Authority is well placed to investigate and determine issues of fact. If, so the argument goes, the purported delegation of Dionex to Ms Cameron is found to be improper, then that is a factual conclusion capable of being reached by the Authority in respect to the process adopted by Dionex in conducting the disciplinary inquiry. According to Dionex, this analysis effectively disposes of the second question raised by Mr Hall, namely whether the effect of the involvement of a stranger to the employment relationship vitiated the decisions taken by Dionex or not.

[34] The essence of Dionex’s position here is that it is no more and no less than a standard factual inquiry that the Authority must undertake to establish whether the dismissal of Mr Hall was fair or not and that the question of the delegation or otherwise to Ms Cameron is simply an aspect of the process used by Dionex to achieve the outcome complained of.

[35] Mr Hall says that if it were found that it was available to an employer like Dionex to delegate disciplinary matters to a stranger, then the corollary must be that a lawyer acting for an employer could dismiss an employee on the employer’s behalf. But arguably there are situations where precisely that process happens, for example in managed exits where it is not uncommon in practice for these to be effected by a third party rather than by the employer itself. The short point is that the reference by Mr Hall to Ms Cameron being a stranger to the contract draws rather a long bow because Ms Cameron was, for all practical purposes, part of the same wider entity for which Mr Hall worked. She was a senior manager of Dionex’s parent, so to say that she was stranger to the employment relationship in the Authority’s opinion puts the matter too strongly. Looked at in the round, Mr Hall and Ms Cameron were working for the

same organisation albeit that they had had no direct relationship before the disciplinary matters Mr Hall is concerned about.

[36] The Authority is not persuaded that the determination of this issue of delegation 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*: per Goddard CJ in *Hanlon*. In the Authority's judgment, the question here is whether Mr Hall was justifiably dismissed or not and the process by which that happened is simply part of the factual matrix which the Authority must investigate. If the Authority were to find that the delegation process by which Ms Cameron was drafted to undertake the disciplinary investigation was flawed in any way then that would impact on the overall finding about whether or not there was an unjustified dismissal. But on its own, the question of whether Ms Cameron ought to have been involved or not is unlikely to be determinative of the final result and as a consequence, in the Authority's considered opinion, it is difficult to see how Mr Hall's case is made out.

[37] Perhaps of even more consequence in this general regard is the Authority's view that the matters Mr Hall is troubled by in relation to Ms Cameron's involvement are not, strictly speaking, questions of law at all but are matters of fact which could be adjudicated upon by the adversarial system offered by the Employment Court or investigated by the Authority using the inquisitorial system it is required to adopt. But either way, in the Authority's view, the central issues are factual ones and the Authority is well placed to investigate and decide those pursuant to the very clear tests enunciated in the statute and now developed by the Court in such recent decisions as *Angus v. Ports of Auckland* [2010] NZEmpC 160. It seems to the Authority that Mr Hall's argument must fail unless he can succeed in convincing the Authority that first there is a legal rather than a factual issue in play and second that the issue is central to a determination of the matter rather than peripheral.

[38] On the Authority's analysis, even if it is mistaken about the nature of the question in dispute, that is that the question in dispute is indeed a question of law rather than a question of fact, unless that question is *decisive* of the matter or at least *strongly influential* in deciding the matter, Mr Hall cannot succeed. In the Authority's judgment, neither proposition can be true; whether Mr Hall was unjustifiably dismissed or not is a question of fact which the Authority must examine using the three step process suggested in *Angus*. If as a consequence of the application of that

three step process, the Authority concludes that Ms Cameron's involvement was inappropriate that is not conclusive of the question because the question remains whether Mr Hall was unjustifiably dismissed or not and the process by which Dionex got to the point of dismissal is only part of the question.

[39] The third question identified by Mr Hall which he says is an important question of law arises in relation to whether the standard of the investigation undertaken by Dionex was sufficiently apposite to Mr Hall's status. In effect, this proposition is a variant of the principles enunciated by the Court of Appeal in *Honda New Zealand Ltd v. New Zealand Boiler Makers Union* [1991] 1 NZLR at 392.

[40] In seeking to deal with this particular allegation, Dionex point out that Mr Hall was a salesperson, a senior and experienced salesperson but a salesperson none the less whereas the precedents requiring a higher standard of investigation in the event of potential damage to reputation relate to professional persons.

[41] In *George v. Auckland Regional Council* 2010 NZEmpC 138 the plaintiff was a chartered accountant and in the English authority of *Salford Royal NHS Foundation Trust v. Roldan* [2010] EWCA CIV522 the employee in question was a nurse. Dionex submit that reputational damage (put loosely) as it applies to the professions is potentially far more damaging than would be the case for sales executives, albeit a senior one.

[42] In particular, Dionex point up the supervisory role that professional standards organisations have in respect to the professions and the inevitable damage to future employment that a finding amounting to professional misconduct could have on future career options.

[43] Dionex say, with some force, that none of that can be true of Mr Hall. First, the allegations against Mr Hall are not specifically related to his expertise or otherwise in his selling role and second, by virtue of the fact that there is no professional supervisory body governing the operation of sales people and no independently maintained professional standards either, there is no sense in which an adverse disciplinary finding automatically precludes the prospect of future employment in the individual's chosen career.

[44] The Authority accepts those submissions and agrees with Dionex that the leading cases can be distinguished from the present factual matrix essentially because

the nature of Mr Hall's employment is not part of a profession and no consequence of the dismissal are visited on Mr Hall beyond that initial impost created by the dismissal itself. By contrast, were Mr Hall to have been employed as a teacher for instance, in a New Zealand school, and he was dismissed for misconduct, his employing Board of Trustees would be under a statutory obligation to report the dismissal to the Teachers Council. If the dismissal were activated by matters going to the heart of the professional obligations of a teacher then the Teachers Council might well decide to remove Mr Hall's ability to practice as a teacher. Were that the situation Mr Hall was in, then the Authority thinks that the argument Mr Hall advances would be made out, but that is simply not the position on the facts and accordingly, the Authority prefers Dionex's view that whether the investigation was carried out to a standard commensurate with the effect on the applicant is not an important question of law and can only go to the factual matrix which the Authority or the Court must consider in terms of making an assessment as to whether or not Mr Hall has been unjustifiably dismissed from his employment.

[45] Finally, Mr Hall contends that an important question of law arises on the question of whether he is entitled to special damages or injury to his reputation as a consequence of the dismissal.

[46] Mr Hall has pleaded personal grievances both for unjustified dismissal and disadvantage caused by the unjustified actions of Dionex and a common law action for breach of contract. In respect of the breach of contract allegation, Mr Hall has claimed \$65,000 in general damages.

[47] Until recently, the law on reputational damage arguably was settled by the decision of the Court in *Trotter v. Telecom Corporation of New Zealand Limited* [1993] 2 ERNZ 658 where the Court determined that damages for injury to reputation might be available in a personal grievance. Whether it was or not is a question of fact which would be assessed in the normal way.

[48] However, in *George v. Auckland Regional Council*, the Employment Court reflected on the English Court of Appeal decision in *Edwards v. Chesterfield Royal Hospital NHS Foundation Trust* [2010] EWCA CIV571. The English Court of Appeal judgment is authority for the proposition that damages from injury to reputation may be recoverable if there has not been a proper disciplinary inquiry by the employer.

[49] However, *Edwards* has been overturned in the United Kingdom by the Supreme Court of that country. It seems to follow that as the decision of the English Court of Appeal in *Edwards* is no longer good law, the position in this country must be that enunciated in *Trotter*.

[50] On the basis then of the Authority's conclusions in respect to each of the questions posed by Mr Hall, the issue of the Authority's residual discretion need not be considered as the Authority has answered each of Mr Hall's questions in the negative, that is to say the Authority has not accepted that any of Mr Hall's questions in fact are important questions of law at all.

### **Determination**

[51] The Authority is not satisfied that any of the questions posed by Mr Hall constitute an important question of law, other than incidentally and on that basis the Authority declines to remove the matter to the Court and considers that Mr Hall's employment relationship problem should be investigated by the Authority in the usual way.

### **Costs**

[52] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority