



one of the affidavits filed in support of Oceania Group was not properly sworn. Oceania Group was provided with an opportunity to file a properly sworn affidavit. None has been provided. Accordingly the affidavit of Sue Capernerhurst dated 20 August 2009 is not part of the evidence.

### **Arguable case**

[4] To meet this test the Authority must be satisfied that there is a serious issue to be tried<sup>2</sup>.

[5] Mr France submits Mrs Jackson has a strongly arguable case that her dismissal was procedurally and substantively unjustified and that she is likely to succeed at the substantive hearing. He relies on the evidence as deposed in the affidavits and documents in support and submits:

- The allegations against Mrs Jackson were subjective and vague and not capable of amounting to serious misconduct;
- The investigation into the allegations was deficient;
- The outcome of the investigation was predetermined – the disciplinary investigation was conducted by the manager against whom the allegations of serious misconduct had been made, after protest about this conflict from Mrs Jackson’s solicitor the investigation was passed to a manager with a close relationship to the original investigating manager, there was no reasonable basis upon which Oceania Group could prefer the evidence of the complainants to that of Mrs Jackson when their bone fides was called into question with their secret taping of conversations constructed to entrap;
- The allegations of serious misconduct were not fairly put to Mrs Jackson – the allegations were modified as the investigation progressed leaving Oceania Group vulnerable to the allegation that the information received during the investigation was accepted or discarded on the basis that it fit the developing picture;
- Mrs Jackson did not have a fair opportunity to respond to the allegations of serious misconduct – key documents were not provided with the disciplinary

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<sup>2</sup> *American Cyanamid Co v Ethicon Limited* [1975] 1 All ER 504

letter which contained insufficient detail about the allegations to enable a meaningful response, the identity of the decision-maker was not made clear;

- Oceania Group breached its Code of Conduct in failing to conduct a thorough investigation prior to putting allegations of serious misconduct to Mrs Jackson; and
- Oceania Group failed to give due consideration to Mrs Jackson's response and explanation to the allegations – there was no opportunity to give submissions as to penalty despite a specific request, all the employees including Mrs Jackson who faced related allegations of serious misconduct were dismissed on the same day, Mrs Jackson's unblemished work record was not taken into account or given due consideration.

[6] Oceania Group does not concede that Mrs Jackson can make out an arguable case. It says in relation to the claim of lack of substantive justification:

- The allegations were very serious – they concerned racial tension at the facility and the undermining of a recently appointed manager;
- Mrs Jackson had been involved in discussions with staff members about the manager's perceived racism;
- The four employees facing allegations of serious misconduct gave conflicting explanations for the comments they were alleged to have made;
- The complainants' comments were consistent and the conspiracy explanation was reasonably discounted as too far fetched;
- As a senior health care assistant Mrs Jackson was looked too by other employees for guidance and support; and
- Mrs Jackson was aware of the proper procedures for dealing with staff member's concerns about the alleged racist practises of the manager and chose to discuss those concerns in a way which perpetuated those concerns.

[7] Oceania says its disciplinary process was fair and reasonable:

- Mrs Jackson's concerns about the process, as expressed through her solicitor, were immediately remedied;

- A full opportunity was given to Mrs Jackson to provide her responses and explanations to the decision-maker – the allegations were fully put as were the possible consequences if the allegations were made out; and
- There is no legal authority to support the proposition that a final opportunity to provide submissions as to penalty must be provided.

[8] All that is required to establish arguable case in an interim reinstatement setting is a minimal lack of justification for the dismissal<sup>3</sup>. It is not the role of the Authority to resolve disputed facts at this stage. I find there are serious and arguable issues that will have to be investigated and determined by the Authority broadly, whether a proper investigation was undertaken into the allegations faced by Mrs Jackson, whether Mrs Jackson had a proper opportunity to give an explanation to those allegations and whether the conclusions reached can be said to be reasonable.

[9] Mrs Jackson has established a clearly arguable case that her dismissal was unjustified.

#### **Alternative remedy/Balance of convenience**

[10] It is convenient to deal with these heads together. These tests require the Authority to consider the relative detriment or injury the parties will incur as a result of orders being made or not made<sup>4</sup>, as the case may be.

[11] Mr France submits the balance of convenience favours Mrs Jackson and there is no adequate alternative remedy to reinstatement:

- The manner in which she was dismissed and the financial implications are causing her ongoing stress;
- It is unlikely given Mrs Jackson's age, the manner of her dismissal and the current economic circumstances that she will be able to find alternative employment;
- Mrs Jackson has compelling financial reasons for seeking reinstatement;

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<sup>3</sup> *Ford v Hutt Valley Health Corp Ltd* [1994] 1 ERNZ 593

<sup>4</sup> *X v Y Ltd and NZ Stock Exchange* [1992] 1 ERNZ 863

- Damages cannot adequately remedy the reputational damage Mrs Jackson has suffered and reinstatement will address the speculation raised about her absence from the work place;
- Mrs Jackson has provided an undertaking as to damages; and
- There is no practical barrier to reinstatement.

[12] Ms Kroon submits lost wages and compensation in the event the substantive claims are made out would adequately remedy any loss or damage suffered by Mrs Jackson consequent to her dismissal, Mrs Jackson contributed to the situation giving rise to the grievance, there is no question that Oceania Group cannot pay any award of damages, the applicant is nearing the end of her career and intends to retire and the aged care facility in question is a small site so containing any damage to Mrs Jackson's reputation.

[13] I accept at face value Mrs Jackson's expressed wish to return to work at the aged care facility in question. Mrs Jackson's evidence as to financial hardship is persuasive. Mrs Jackson's age or possible retirement in five years is not a factor which weighs in favour of Oceania Group. In terms of the working relationships and the hardship that may be caused in the work place if Mrs Jackson is reinstated in the interim: the deposed evidence of such concerns was not strong. Mrs Jackson does not hold a managerial or supervisory role. The submission that facilitation will be necessary to reintegrate Mrs Jackson into the workplace is contingent on the findings that Mrs Jackson incited racism in the workplace or made racist comments towards the manager. These findings are disputed. Mrs Jackson denies she acted in a racist way or incited racism in the workplace.

[14] In weighing up the respective hardships I find the balance of convenience favours Mrs Jackson.

### **Overall justice**

[15] I now stand back from the detail of the matter and look at the situation in a more general way. I have found Mrs Jackson has a clearly arguable case and that the question of adequacy of alternative remedy and balance of convenience fall in her favour. This matter is likely to proceed further and in assessing the relative strengths

of the parties' cases I say at this interim stage that it cannot be said Mrs Jackson's claim for permanent reinstatement will not be successful.

[16] The concerns as to how Mrs Jackson can be reintegrated into the workplace given the nature of the allegations against her and the damage to trust and confidence which has resulted, as deposed in affidavits in support of Oceania Group, can be addressed by the manner in which an order for interim reinstatement is framed.

[17] Mrs Jackson's application for interim reinstatement should be granted subject to conditions. Those conditions are that Mrs Jackson is reinstated to the position she held with Oceania Group at date of dismissal and Oceania Group is to elect whether Mrs Jackson actually attends and performs work for the respondent or remains on garden leave.

### **Conclusion**

[18] The application is granted with conditions as set out in paragraph [17] above.

[19] The parties may wish to resume mediation to discuss how those conditions can be exercised in a way which causes minimal disruption to Mrs Jackson and the residents and staff of the aged care facility in which she is employed. The parties have leave to seek further directions from the Authority to the orders made if that should be necessary.

### **Costs**

[20] Costs are reserved pending a final resolution of the substantive matter.

Marija Urlich

Member of the Employment Relations Authority