IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

[2016] NZERA Wellington 40
5613164

	BETWEEN	JOHN LAWSON Applicant
	AND	CHIEF EXECUTIVE, WESTERN INSTITUTE OF TECHNOLOGY Respondent

Member of Authority:	Michele Ryan
Representatives:	Peter Cranney, Counsel for Applicant Peter Chemis and Jennifer Howes, Counsel for Respondent
Investigation Meeting:	24 March 2016 at Wellington
Submissions received	For the applicant: 15 March 2016 and at the investigation meeting For the respondent: 23 March 2016 and at the investigation meeting
Determination:	6 April 2016

DETERMINATION OF THE AUTHORITY

Application for removal

[1] The Chief Executive Western Institute of Technology (WITT) has given the applicant, Mr John Lawson, notice of his dismissal. His employment is scheduled to terminate on 4 May 2016.

[2] Mr Lawson has raised personal grievance claims, alleging that the dismissal is:

- an unjustified action pursuant to s.103A of the Employment Relations Act, and

- a discriminatory action arising from his involvement in union activities (within the meaning of s.104(1), s.107(1)(a) and/or s.107(1)(g) of the Employment Relations Act).

[3] Mr Lawson seeks to have the whole of the employment relationship problem removed urgently to the Employment Court on two grounds.[1] The first ground is that there are important questions of law likely to arise in the matter other than incidentally.[2] The second ground is that the case is of such a nature and of such urgency that it is in the public interest that it be removed immediately to the Court.[3]

[4] WITT opposes the application for removal. It says no important questions of law will arise other than incidentally nor does it accept there are public interest issues that warrant removal to the Court. The essence of WITT's opposition centres on its view that it will be the facts that are decisive of the case rather than questions of law. It says that inquiry is properly the domain of the Authority.

Employment relationship problem

[5] It is useful to briefly set out the events leading to the notice of dismissal to provide context to Mr Lawson's application for removal.[4] It needs to be noted that any evidence relevant to Mr Lawson's claims is yet to be tested.

[6] Mr Lawson is employed by WITT as an academic staff member. He is also the Branch President of the Tertiary Education Union ("TEU" or the "union"). There is an agreement between Mr Lawson and WITT that 0.2 of his role allows for TEU related activities.

[7] Between early December 2015 and 4 March 2016, WITT undertook an investigation into concerns regarding Mr Lawson. As the investigation progressed it conducted several searches of Mr Lawson's email, (both sent and received), on its system.

[8] WITT points to two incidents where it alleged Mr Lawson engaged in serious misconduct. The first relates to Mr Lawson's response to an email forwarded to him which initially had been sent to the union's organiser. The email was sent by a

[1] Section 178
[2] Section 178(2)(a)
[3] Section 178(2)(b)
[4] As recorded in the parties respective pleadings and associated documents

parliamentary researcher inquiring into the issues at WITT. Amongst other things the researcher asked if the events were "*another example of poor governance from the [Chief Executive]*". Mr Lawson, in reply, noted the statement and stated "*Can you expand on this please. What other examples are you aware of?"*

[9] The second matter related to events before and during a scheduled meeting on 23 November 2015 between the union, the Chief Executive and WITT's Executive Team. WITT says prior to the meeting Mr Lawson took a lead role amongst union members to move a vote of no-confidence against the Chief Executive, and later encouraged that motion to be presented at the scheduled meeting. WITT considers that action was contrived. It says the no-confidence motion was not foreshadowed as an agenda item for discussion. There are additional allegations that Mr Lawson and the union organiser mislead WITT as to how the motion occurred and that Mr Lawson altered union minutes to justify its introduction.

[10] Mr Lawson says at all material times he was acting as a union representative for an on behalf of TEU members and that WITT has no authority to access confidential email communications concerning TEU's activities. WITT says that despite Mr Lawson's union representative status both events have led it to conclude he has breached obligations to it of fidelity and good faith as an employee. It says its Computer Regulations policy allows it to monitor access activity on its computing facilities.

The law

[11] In *McAlister v. Air New Zealand Ltd*[5], the Court summarised the principles to be applied where s.178(2)(b) is alleged[6], as follows

> *1. An applicant for special leave under section 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 a matter other than incidentally or the case is of such a nature and of such 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 a case other than incidentally.*
>
> *3. It is necessary to decide the importance of the question.*

[5] EMC Auckland AC22/05, 11 May 2005 at [9]-[10]
[6] citing *Hanlon v International Educational Foundation (NZ) Inc* [1995] 1 ERNZ 1

> *4. It is not necessary that the question should be difficult or novel.*
>
> *5. The importance of a 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 the decision of a case or a material part of it.*
>
> *Even if an important question of law 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 the 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 with properly in the Employment Relations Authority; and whether this is a case which will inevitably come to the Court by way of challenge in any event.*

[12] The Authority's residual discretion requires it to consider, even where a statutory test for removal has been satisfied, whether there are good reasons not to order removal.[7]

The questions

[13] Mr Cranney on behalf of Mr Lawson submits that the conduct for which Mr Lawson has been dismissed are both examples of "involvement in the activities of a union". He submits two important questions of law arise, neither of which have been comprehensively dealt with by the Court.

[14] The first question is:

> *The correct identification and application of discrimination law to the circumstances (i.e. the extent and scope of the protection against dismissal or punishment on the grounds of union membership is defined by the ERA).*

[15] During oral submissions Mr Cranney submitted that core issue is whether "union activities" have an absolute protection in law from dismissal.

[16] The second question is:

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[7] *Auckland District Health Board v X (No 2)* [2005] ERNZ 551 at [30]

Whether the seizing and use of a union's minutes and emails against that union official for disciplinary and dismissal purposes is permissible under law.

[17] Mr Chemis for WITT says that the questions put forward to support Mr Lawson's application obscure the core issues in this matter. He says the focus should be on the reasons given by WITT for terminating Mr Lawson's employment, and it is within this context that an assessment as to removal should be considered.

Analysis

Novel questions

[18] Dealing firstly with the submission that the questions raised have not been fully considered by the Court. I am not satisfied that this reason alone warrants removal to the Court. The statutory test at s. 178(2)(a) does not require an important question of law to be novel or complex, but that it is likely to arise other than incidentally.

[19] Turning to Question 1, Mr Cranney submits that the question involves the interpretation and application of ss 104[8], 107[9], 119[10] of the Employment Relations Act to the facts of this matter. I agree the question will require an exercise in statutory interpretation and is therefore a question of law. However any question about the construction of the Employment Relations Act is a function that the Authority is statutorily able to perform[11] and I do not consider the interpretation of the Act's provisions in and of itself sufficient to grant removal.

[20] Question 2 is very broadly stated. I do not consider it entirely reflects the factual circumstances (as currently presented to the Authority) in which the question is said to arise. At issue is whether Mr Lawson's email using WITTs IT system is confidential when engaging in union business. A determination about whether information is confidential is best decided on a case by case basis depending on the particular circumstances. I consider this is a matter that Authority is well positioned to determine.

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[8] Section 104(1) defines what may be regarded as discriminatory actions (directly and indirectly) in employment, including that "involvement in the activities of a union" is a prohibited ground
[9] Section 107 defines what actions may be regarded as "involvement in the activities of a union"
[10] Section 119 provides that if the employee establishes that the employer acted or omitted as described at s. 104 and the discrimination was by reason directly or indirectly of the employees involvement in union activities then the claim is accepted unless the presumption can be rebutted by the employer
[11] Employment Relations Act, Schedule 2, cl.1(b).

Are the questions important and likely to arise?

[21] In *Hanlon v. International Foundation (New Zealand) Inc*[12] the Court defined an important question of law (for the purposes of removal to the Court) in the following way:

> *Questions of law cannot always be categorised into important and unimportant ones. The importance of the question of law is a relative matter. Its importance has to be measured in relation to the case in which it arises. A 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 about a decision of it or a material part of it.*

[22] The questions raised on Mr Lawson's behalf raise issues about the protection of union activities. I accept that one of both of the questions *may* be important and decisive of the employment relationship problem or some important aspect of it. However this finding does not conclude the matter.

[23] It is clear the parties sharply diverge as to the reasons for Mr Lawson's dismissal. WITT says Mr Lawson was dismissed for serious misconduct as an employee. In contrast Mr Lawson's view is that dismissal is, by reason, directly or directly, a consequence of his involvement in union activities.

[24] That dispute brings into question whether Mr Lawson's important questions are "*likely to arise*" other than incidentally. Question 1 can only arise if it is established that Mr Lawson has been dismissed because of his "involvement in union activities". That question cannot be answered before an investigation into WITT's basis for dismissal.

[25] Question 2 can only arise if WITT's search of email was used to obtain union information to dismiss Mr Lawson. It is submitted that WITT will need to point to a statutory or regulatory provision which allowed it to conduct its search and that the action was properly exercised. Again that is a matter that requires prior investigation.

[26] I consider there is a measure of uncertainty as to whether the questions raised by Mr Lawson will be determinative of his matter. I am not satisfied that the statutory grounds at s 178(2)(a) have been met to warrant removal at this juncture. I agree with Mr Chemis' submissions that to the extent that one or both of the alleged important

[12] [1995] 1 ERNZ 1 at p.7

questions do (having assessed the evidence) arise, the Authority is able to refer the question to the Employment Court for its opinion.[13]

Is the case of such a nature and of such urgency that it is in the public interest that it be removed to the Court?

[27] Mr Cranney has indicated Mr Lawson will be seeking interim reinstatement whether or not the matter is removed to the Court. I accept that Mr Lawson wishes to have his claims urgently resolved given his employment is scheduled to conclude in a month. However I was not provided with any information which would lead me to conclude that the urgency of the matter is such that it is in the public interest to remove the matter. I note also that s. 178(2)(b) requires *both* the nature *and* the urgency of the case to be such that it is "in the public interest" to order removal to the Court. In any event the Authority will make available an early opportunity to have the substantive claims heard.

[28] Mr Cranney says the nature of the case, particularly as to whether an employer can search employees' email regarding union activity has the potential to affect all union members throughout the Tertiary Education sector and therefore is in the public interest. I consider this submission is essentially a re-casting of Question 2 referred to above. As noted, the lawfulness and/or justifiability of WITT's accessing of Mr Lawson's email is a matter yet to be determined on the facts using the Authority's investigative process.

[29] I am not persuaded that the nature and urgency of Mr Lawson's personal grievances is a matter this warrants removal to the Court.

Determination

[30] I have declined Mr Lawson's application for an order to remove his personal grievance claims to the Court. The Authority will convene an urgent case management conference call to discuss with the parties the progression of Mr Lawson's claims. Alternatively if Mr Lawson wishes to request special leave from the Court to have his case removed, the Authority should be notified of that event as soon as is reasonably possible.

[13] Section 177

Costs

[31] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority