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## Manoharan v Waiariki Institute of Technology (Auckland) [2011] NZERA 540; [2011] NZERA Auckland 352 (9 August 2011)

Last Updated: 24 August 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 352 5349611

BETWEEN

A N D

HELEN MANOHARAN Applicant

WAIARIKI INSTITUTE OF  
TECHNOLOGY  
Respondent

Member of Authority: Representatives:

Investigation Meeting Date of Determination:

Alastair Dumbleton

Catherine Stewart, counsel for Applicant Richard Harrison, counsel for Respondent

2 August 2011

9 August 2011

### DETERMINATION OF THE AUTHORITY

#### Application for interim reinstatement

[1] The applicant Ms Helen Manoharan was employed in a senior management position at the Waiariki Institute of Technology from March 2010 until June 2011 when she was summarily dismissed. Her employer was the Chief Executive of the Institute but will be referred to as Waiariki in this determination. Ms Manoharan had been the Director of Waiariki's School of Nursing and Health Studies.

[2] The reason for her dismissal was given in writing by the Chief Executive, Dr Pim Borren, as a loss of "trust and confidence in your ability to fulfil your role as a Director."

[3] On 27 June 2011 a personal grievance was raised on behalf of Ms Manoharan. In response to it Waiariki explained the reason for the dismissal was "dishonest and deceptive conduct." This was in relation to expenses that had been reimbursed to Ms Manoharan and the way her claims for those had been processed.

[4] The allegation of dishonesty was made with regard to answers Ms Manoharan had given during a disciplinary inquiry. Waiariki considered she had given an untrue explanation of the way she had claimed expenses. The allegation of deception was made with regard to a failure by Ms Manoharan to have her expense claims approved by Dr Borren as her supervisor. Waiariki considered that she had deliberately tried to conceal her spending from him and had done so in collusion with another employee over the way the expense claims were approved.

[5] On the face of the filled in standard claim forms, the other employee had made a claim for her own expenses which Ms Manoharan then approved by signing the form. The reality behind the form was that the expenditure claimed for had been that of Ms Manoharan who was reimbursed by the other employee paying her when that employee received payment on the claim. Contrary to appearances Ms Manoharan was both claimant and claim approver in the claims investigated by Waiariki.

[6] Waiariki considered that by her conduct Ms Manoharan had bypassed a check in the reimbursement of expenses system designed to allow her supervisor, Dr Borren, to monitor her spending, both in the amount and the nature of the purchases. Dr Borren in his affidavit has stated that before the disciplinary enquiry into Ms Manoharan's conduct he had questioned her about her level of spending and the items purchased.

[7] While no allegation was made of misappropriation of money or unauthorised acquisition of goods or services by Ms Manoharan, it seems from Dr Borren's affidavit that he had some suspicions, as he said:

*It is not beyond the realms of possibility that Ms Manoharan made other purchases that were on her personal credit card but not picked up or paid by some other means and then claimed through [the other employee].*

[8] After seeking and receiving explanations from Ms Manoharan and the other employee Dr Borren was satisfied from his inquiry on 15 June that they had lied to him on 9 June about the three expense claims he investigated then before accepting their explanation that an innocent mistake had been made in processing the claims. On 10 June however Dr Borren inquired into some further expense claims of Ms Manoharan. This led to a disciplinary meeting with Ms Manoharan on 15 June and her dismissal that day.

[9] Dr Borren's evidence is that he was more than satisfied Ms Manoharan and the other employee had been dishonest. He said that it was clear to him they had colluded in giving their explanations and he was satisfied their actions had been deliberate. He found that the issue was not just around financial dealings but was also about Ms Manoharan's overall judgement, as he was left with no confidence as to her ability or competence to handle the wider operational matters she was responsible for as a Director.

[10] When the personal grievance remained unresolved Ms Manoharan applied with urgency to the Authority for an order of interim reinstatement under [s 127](#) of the [Employment Relations Act 2000](#). As required by that provision she gave an undertaking to abide by any order to pay damages the Authority might make in determining her employment relationship problem.

[11] Mediation was undertaken but without resolution of the grievance. The Authority accepted Ms Manoharan's request for an urgent investigation and Waiariki facilitated the fixing of a date for an early investigation meeting, which is to commence on 25 August 2011. Before then the parties will provide written evidence according to a timetable set by the Authority in conjunction with counsel Ms Stewart and Ms Harrison.

[12] To resolve her grievance Ms Manoharan seeks permanent reinstatement to her former position, reimbursement of lost income resulting from the grievance and payment of compensation for humiliation, loss of dignity and injury to feelings. She also seeks payment of compensation for loss of any benefit she might reasonably have been expected to obtain if the grievance had not arisen.

[13] There is a further claim for remedies arising from post-dismissal conduct of Dr Borren. On 11 July he sent an email to Nursing and Health Studies staff of Waiariki in which he referred to Ms Manoharan's grievance and forbade staff from providing any support to her or anyone working on her behalf. This was conveyed expressly as an instruction of the employer of those staff who received the email.

[14] Ms Stewart immediately brought an application to the Authority alleging that giving the instruction amounted to an act of contempt. The developing situation was however able to be addressed in the interim by agreement between the parties and without the Authority making any orders. Dr Borren withdrew his earlier instruction and gave an express assurance to staff that they could give evidence about Ms Manoharan without fear of any reprisals by way of disciplinary action or other adverse consequence.

[15] The lawfulness of Dr Borren's actions in sending his 11 July email, the remedies that may be available to Ms Manoharan for any harm or loss caused by his action and whether it amounted to contempt, remain matters to be considered at the substantive hearing that will begin on 25 August.

### **Interim reinstatement - tests to be applied**

[16] Counsel Ms Stewart and Mr Harrison provided comprehensive submissions to assist the Authority in determining this application. As expected the submissions were addressed to the standard tests or questions the Authority must consider when interim reinstatement has been applied for. They are:

- Is there an arguable case?
- Where does the balance of convenience lie?

- Are other adequate remedies available?
- Where does the overall justice of the case lie?

[17] As submitted, in addition to applying the established legal principles relating to interim injunctions, under [s 127\(4\)](#) of the Act the Authority is required to have regard to the objects of the Act. Reference was made by Ms Stewart to the particular object that "employment relationships must be built on good faith behaviour." A further relevant object is recognition that employment relationships are built on mutual trust and confidence.

[18] In considering the tests to be applied in [s 127](#) applications where the evidence is usually by way of affidavit and without cross-examination, the Authority keeps it in mind that any findings of fact are to be provisional only and may change after the claims have been fully investigated and all witnesses have been examined on their evidence at an investigation meeting.

### **Arguable case**

[19] Ms Stewart accepted it must be established by Ms Manoharan that not only does she have a personal grievance but also that if the grievance is successful she will be reinstated and not just compensated monetarily.

[20] Mr Harrison acknowledged that the arguable case test is a relatively low one to be met.

[21] Although there is little dispute about what Ms Manoharan did in making and having approved her claims for expenses there are inevitably issues around the employer's conclusions as to why she acted in the way she did. There is an issue as to whether she intended to act dishonestly or deceptively. Ms Manoharan claimed there were circumstances surrounding her conduct explaining or excusing that conduct as being inadvertent, caused by ignorance of her employer's rules and policies and by the distraction of a heavy engagement and commitment in carrying out her role as Director.

[22] Ms Stewart referred to the *Honda* case - [1989] 3 NZILR 82 - in which the Labour Court held that where an allegation of the greatest gravity has been levelled against an employee and forms the basis of justification for dismissal the evidence in support of the allegation must be "as convincing in its nature as the charge is grave." Ms Manoharan was dismissed for dishonesty and deceit which are among the most serious forms of misconduct there can be in a relationship required to be based on trust and confidence.

[23] Mere suspicion of dishonesty or deceit will not satisfy the standard of proof required before a dismissal will be justified. A serious issue in this case is whether the grounds Dr Borren had for believing Ms Manoharan had been dishonest and deceptive were reasonable and sufficient to the degree necessary to establish such a grave allegation made of her.

[24] Waiariki had accepted on 9 June that Ms Manoharan's conduct was a result of genuine mistake and not a deliberate act of dishonesty. Dr Borren decided not to take any disciplinary action apart from giving a warning that he would be scrutinising future expense claims carefully. The following day however after further investigation a number of other expense claims from Ms Manoharan were found, causing Dr Borren to begin another disciplinary enquiry into her conduct. For that purpose a meeting was held on 15 June. Ms Manoharan's evidence is that it was a very brief meeting, lasting about 10 minutes, during which she gave her explanation before Dr Borren withdrew to consider what action was necessary. He returned after about 30 minutes and advised Ms Manoharan of her dismissal with effect from the end of that afternoon.

[25] The relative brevity of that meeting (Dr Borren says it was 15 minutes long) that resulted in the most serious consequences to Ms Manoharan raises an issue as to whether her explanations had been properly and fully considered by Dr Borren with an open mind.

[26] There is also an issue arising out of the duty of good faith under [s 4\(1A\)\(c\)](#) of the [Employment Relations Act](#). It requires an employer proposing to make a decision that will have an adverse effect on the continuation of any employee to provide the employee with:

- access to information, relevant to the continuation of the employees' employment, about the decision; and*
- an opportunity to comment on the information to their employer before the decision is made.*

[27] Ms Manoharan was not told by Dr Borren that he proposed to dismiss her before he announced at the same time both the verdict and sentence, as it were.

[28] Overall, there is an arguable case I find as to whether in terms of the refocused test of justification at [s 103A](#) of the Act the actions of Waiariki and how Waiariki acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal of Ms Manoharan occurred. In applying that test the Authority since 1 April 2011 must also consider the factors specified by [s 103A\(3\)](#) and also such other factors as it thinks appropriate.

[29] I find it established to the relatively low level of an arguable case that Ms Manoharan will be reinstated in the event she is successful with her personal grievance claim. Her position, which is clearly a key one within Waiariki, has been held open while her claim is being investigated and determined by the Authority. While Dr Borren has expressed strong opposition to reinstatement on the grounds that he has lost trust and confidence in Ms Manoharan as a member of the senior management

team, it remains to be seen whether this is just a feeling of his or whether he had a sufficient and reasonable basis in fact for losing trust and confidence.

[30] Although no longer the primary remedy reinstatement arguably would be practicable and reasonable, and therefore an available remedy under the Act. In the short time Ms Manoharan was Director she had been acknowledged for her considerable achievements in managing the Nursing School and overcoming problems it had experienced before her appointment. She was well regarded by Dr Borren and reported on very favourably up until the disciplinary inquiry was commenced into the way her expense claims had been processed. It is also significant that even if on a finding that Ms Manoharan was unjustifiably dismissed Dr Borren might still be inclined to bear a grudge against her, that ought not to have any direct impact as Dr Borren has, according to the affidavit of Ms Manoharan, recently resigned from Wairiki to take up a new position in Australia in November 2011.

[31] The first of the tests is met, as I am satisfied there is an arguable case that Ms Manoharan has a personal grievance and there is also an arguable case that she will be reinstated if her grievance is successfully established. Precise measurement is not required at this stage but I consider the arguable case is more than borderline.

#### **Where does the balance of convenience lie?**

[32] A significant factor to be weighed in the balance of convenience is the timing of the steps that will lead to a final determination by the Authority of the grievance claim. The investigation meeting is set to commence in less than three week's time, on 25 August. Ms Manoharan acted promptly in seeking interim reinstatement but even so to this point several weeks have gone by since she was dismissed on 15 June. She applied to the Authority on 11 July. A date was fixed with the parties for the interim reinstatement hearing which took place on 2 August. That was dictated by the 28 July date of mediation the parties had pre-arranged.

[33] It was urged on the Authority by Ms Stewart that interim reinstatement is necessary to prevent or contain reputational loss and also to allow Ms Manoharan the right to perform her specialist senior level management work. As usual in this type of case there is little or no evidence of reputational loss, but it can reasonably be assumed that this has occurred to some degree. In my view, whatever damage has now been done is unlikely to be undone in the next period of three weeks and the time after that it may take for a determination to be issued by the Authority.

[34] A publicly accessible decision on interim reinstatement does not give a determination of the substantive merits of a personal grievance claim. The investigation meeting itself is not an inquiry into whether Ms Manoharan actually did anything wrong, but an inquiry into whether Wairiki acted fairly and reasonably when it investigated her conduct and drew conclusions about that. It is only for the purposes of assessing contributory fault in relation to awarding remedies, if the grievance is successfully established, that the Authority can directly examine the employee's conduct and make findings as to what in fact that was.

[35] As to the right to work, it seems to me that in a period of three weeks it could not reasonably be expected that Ms Manoharan would be able to fully apply herself to her work, with the distraction of her case coming up and her involvement in that which will include examination by the Authority and cross-examination by counsel for Wairiki. That she is prepared to surrender her financial responsibilities, an integral part of her management role, indicates that performance of the work is not uppermost in her objectives for seeking interim reinstatement. It is also likely that an order for interim reinstatement would lead the parties to have further mediation as to how the order should be met, and this too would occupy some of Ms Manoharan's time in the next three weeks.

[36] I consider on balance that it is more convenient for Ms Manoharan to continue for a further three weeks without resuming employment, having already spent seven weeks in that situation, than for Wairiki to experience some inevitable unsettlement by having Ms Manoharan return.

[37] A large public institution such as Wairiki is likely to have a strong interest in maintaining stability as far as possible in a situation like this, especially where there is a relatively short period before a final determination of the dispute can be given. This is also not a situation where an applicant is completely without funds or capital for financial support over a relatively short period.

[38] A period of three weeks or so before there is a final determination is tiny by comparison to the 35 years over which Ms Manoharan has built up her extensive qualifications and experience as a senior manager within nursing education. I do not consider there is any real risk of her losing her skills by not being able to work for that time, particularly when she is likely to be diverted from work by the needs of preparing for her case in the Authority.

[39] In my view reimbursement of lost wages and compensation for humiliation and hurt feelings and for loss of benefit expected from the employment will be an adequate remedy. There are also potentially claims for remedies arising from Dr Borren sending his email to all nursing staff instructing them not to assist Ms Manoharan in pursuing her grievance claim before the Authority. It seems to me these matters can still be effectively dealt with as part of a final determination of the grievance following the forthcoming investigation meeting. Penalties for example if awarded against Wairiki or Dr Borren

personally, can be an effective public condemnation of any actions of his found to be in breach of any applicable employment relationship or the [Employment Relations Act](#).

[40] The consequences of Waiariki reporting Ms Manoharan to the Nursing Council are also unlikely to be addressed by an interim reinstatement order of the Authority but will require a full and final investigation and determination of the matter by the Council before it can consider what, if any, action should be taken about Ms Manoharan's registration.

[41] It also seems undesirable for Ms Manoharan to resume her Director position when many of the staff reporting to her were instructed by Dr Borren not to support her with regard to character references. The unlawfulness of that instruction and harm caused by it have yet to be determined. An employer should not in principle profit from its own wrong, if that is what occurred here. The fact is that there has been an absence of witnesses supporting Ms Manoharan in her claim for interim reinstatement. Despite Dr Borren retracting his instruction just one employee gave support and there is some evidence that she did so in fear of losing her job.

[42] To the extent that this factor has weighed against interim reinstatement Ms Manoharan should be entitled to a greater measure of remedies if successful with her grievance or with her claim that Dr Borren acted wrongfully in forbidding staff to assist her.

[43] I therefore find that the balance of convenience and the associated availability of other adequate remedies are in favour of Waiariki in this case.

### **Overall justice in the case**

[44] The Authority has found that there is an arguable case both as to the existence of a personal grievance (which may also extend to alternative forms of grievance such as unjustified disadvantage) and as to reinstatement being an appropriate remedy for a grievance if established. The arguable case in both respects is clearly above borderline in my finding. On the other hand the balance of convenience, the guiding principle, favours leaving the situation as it has been for the last seven weeks until a final determination of the claim can be given in about three weeks time.

[45] It is not in dispute that Ms Manoharan was discovered to have been responsible for a significant irregularity in the management of financial controls. This in itself is a matter of competence on the part of an employee in a senior management position and should have been a significant concern to Waiariki and potentially a matter for disciplinary action based on performance alone. Beyond that there existed a reasonable basis for Dr Borren to at least question the honesty of Ms Manoharan. It is his conclusions about her that are to be examined in the investigation shortly to take place before there is a final determination of this claim.

[46] The Authority was urged by Ms Stewart that there is a wider public interest -among the Nursing School, its students, stakeholders and nursing community - in seeing a return by Ms Manoharan immediately to her employment without any further delay. I do not consider that assessment can be so readily made as to where the public interest lies in a case like this. Clearly in some minds the need for transparency in financial management and control will be paramount, particularly where a large amount of public money is being given to an institution required to be accountable for its use. In those minds seeing this matter finally investigated and determined may be more important than the risk of some disruption to the School for a relatively brief period until that occurs.

[47] Therefore assessing the situation overall, I agree with the submissions of Mr Harrison that the justice of it favours the employer Wairiki.

### **Determination**

[48] For the above reasons, the discretion of the Authority in relation to this interim reinstatement application is exercised by not making the order that has been sought under [s 127](#) of the Act.

### **Costs**

[49] Costs are reserved, pending the final determination of all Ms Manoharan's claims against Waiariki and/or Dr Borren.

A Dumbleton

### **Member of the Employment Relations Authority**