

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 289/10  
5309042

BETWEEN Lydia Moate  
Applicant

AND Allied Investments Ltd t/a  
Allied Security  
Respondent

Member of Authority: Yvonne Oldfield

Representatives: John Minto and Mike Treen for applicant  
Diana Hudson for Respondent

Investigation by telephone conference: 17 June 2010

Determination: 18 June 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This matter was lodged on 16 June and was accompanied by a request for urgency. The problem which the applicant wishes to resolve is alleged ongoing harassment by her employer. Ms Moate seeks:

- a. "A declaration of unlawful conduct by the respondent in seeking to pursue disciplinary action on matters which have been resolved;*
- b. a letter of apology from the respondent to the applicant for the behaviour which has given rise to this problem;*
- c. agreement from the respondent that this behaviour will cease and no further disciplinary action will be taken against the applicant on these matters, and*

*d. a payment reflecting the hurt and frustration which the respondent's unlawful action has caused."*

[2] The application also requests "*an interim injunction restraining the respondent from proceeding with a disciplinary hearing against Lydia Moate.*"

[3] This determination deals only with the application for interim relief.

### **Determination**

[4] **The application for interim relief is declined.**

### **Reasons for determination**

[5] In a telephone conference on 16 June Mr Minto clarified that by way of substantive relief Ms Moate seeks an order permanently restraining the respondent from instigating a disciplinary process in relation to the matters which she says have already been resolved.

[6] The matters giving rise to this employment relationship problem go back to certain events in April when Mr Black was contacted by a reporter regarding an assertion that Allied Security staff were provided with answers to assessments for a Security Guard qualification. Although there is some dispute as to how he came to know of Ms Moate's connection to the call from the reporter, there is no dispute that Mr Black followed up on the call by contacting Ms Moate (on either 15 or 16 April) and established that she had in her possession the guide booklets in question. There is also no dispute that he told her to go home, get the booklets and bring them back to work.

[7] Later in the day Mr Black learnt from Ms Moate's supervisor that she had not handed the booklets in. Mr Black called her and heard that she had instead (on the advice of Mr Sutherland, her union organiser) handed the booklets to him. There is a crucial dispute about what happened next. Mr Black says he just asked Ms Moate to get Mr Sutherland to call him, and left it at that. Ms Moate says that Mr Black also

told her that failing to follow his instructions was misconduct for which she could be dismissed and “*don’t bother coming back to work.*”

[8] Mr Sutherland says that when Ms Moate spoke to him (soon after receiving Mr Black’s call) she relayed to him that Mr Black had threatened to dismiss her. Mr Sutherland called Mr Black back, and the two men arranged a meeting on Tuesday 20<sup>th</sup>. (Ms Moate was not rostered on to work on the Saturday, Sunday or Monday preceding the proposed meeting.) Mr Black says that he understood that the meeting would be disciplinary in nature and was to discuss Ms Moate’s conduct. Mr Black says he did not plan for this meeting to be disciplinary in nature. Mr Black told me that at that stage his immediate concern was the bigger issue surrounding how she and potentially other staff came to have the booklets in the first place and his primary purpose was to gather information about that.

[9] The meeting took place as planned. Ms Moate told me she went into the meeting thinking she could be facing dismissal because she had given the booklets to Mr Sutherland and because she had spoken with the media. However she said that by the end she thought everything was resolved. She said it was agreed that she would not make further contact with the media, the union would return the booklets, and she would not be dismissed. Mr Sutherland told me that he believed all matters were resolved because Mr Black appeared to accept that it was the union (not Ms Moate) who had contacted the media and because Mr Black seemed satisfied that the booklets would be returned.

[10] Mr Black said that as far as he was concerned the meeting was the first stage in ongoing investigations into the booklet issue about which he had very little information except what he had heard from Ms Moate and from the reporter who contacted him. He said he had “*a lot more people to talk to*” and was aware that the relevant industry training organisation (ETITO) would also be conducting its own investigation. He acknowledged that whatever came out of those investigations could give rise to serious misconduct allegations in relation to staff.

[11] However he said he could not recall any discussion, on 20 April of Ms Moate failing to follow his instructions (one of the issues which he now seeks to address in disciplinary proceedings) and reached no conclusions one way or the other in relation

to her conduct. He agrees that his immediate concern (to get the booklets back) was addressed by an undertaking from Mr Sutherland.

[12] On May 19 Mr Black wrote to Ms Moate calling her to a “hearing” to discuss:

- *“Your actions in contacting the media and Unite Union regarding the training book issue and how and why this occurred.*
- *Your refusal to follow an instruction from your employer to return the guide book and your subsequent handing of that booklet to a third party.”*

[13] After getting advice from her union, Ms Moate declined to attend the meeting. In a letter dated June 13 she was called to a further meeting and again declined to attend. She then received from Mr Black a letter dated June 15, which provided additional detail including:

*“I have spoken to and received statements from your Supervisor ... and Operations Manager...*

*Each person has stated that your objection to the issuing of the guidebook in February 2010 was not raised with either of them at the time of its issue and your receiving the guidebook. In fact they state that you continued to file and complete your training documentation and booklets while using this guidebook.”*

[14] Mr Black says these statements were not consistent with what he had originally been told by Ms Moate or her representatives. The letter concluded by asking Ms Moate to respond to the allegations against her by 5pm on June 17.

[15] Ms Moate is now seeking to have the respondent permanently prevented from proceeding with disciplinary action against her on the basis that the matters it seeks to investigate have already been addressed. The respondent disputes that matters known to it on April 20 were fully addressed then and says that after 20 April new information came to light including the statements quoted above in paragraph [13].

**Issues**

[16] In *Credit Consultants Debt Services NZ Ltd V Wilson (No 2) [2007] ERNZ 205* the full Court held that under s.162 of the Employment Relations Act 2000 the Authority has power to award interim, interlocutory and permanent injunctive relief in relation to breaches of an employment agreement.

[17] The issues here are therefore:

- i. whether the applicant has an arguable substantive case;
- ii. whether the balance of convenience favours the applicant, and
- iii. whether overall justice favours the applicant.

**The Authority process**

[18] At a first conference call on the afternoon of 16 June it was established that mediation could not be arranged before 7 July. The respondent subsequently advised the Authority that it was not prepared to agree to a holding pattern for that length of time. The respondent asserted that it would be prejudiced by any further delays in progressing the disciplinary inquiry because the issues in question were serious ones which went to trust and confidence.

[19] Due to the unavailability of the representatives a further conference call was not able to be convened until 4.00pm on 17 June. That call opened with Ms Hudson confirming that the respondent had not revised its original deadline for Ms Moate to respond to its concerns regarding her conduct. This called for a written response from her by 5 pm on 17 June.<sup>1</sup> However Ms Hudson advised that the respondent would agree to push back its deadline for Ms Moate to respond to 5 pm on Friday 18 June in order that the Authority might consider and determine the application for interim

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[1] <sup>1</sup> Mr Black had advised Ms Moate of this in a letter of 15 June. This correspondence was not received by Ms Moate's representative in time to be included in the materials lodged but was provided to the Authority on 17 June.

relief in the meantime. The parties agreed that this should be done without a formal investigation meeting and on the basis of the following:

- i. unsworn witness statements<sup>2</sup> provided by the applicant, Ms Moate, and Damian Black, General Manager of the respondent;
- ii. copies of correspondence between Mr Black and Ms Moate and between Mr Minto, an organiser for Unite union, and Mr Black, and
- iii. information received from Ms Moate, Barry Sutherland, also an organiser for Unite union, and Mr Black in answer to questions put to them during the conference call of 17 June.

[20] My questions to the three individuals mentioned were designed to clarify the nature of the issues between the parties and the scope of the factual matters in dispute. I reiterate, as explained to the parties during the call, that this information is not sufficient for the Authority to make findings on disputed matters of fact.

[21] On 18 June the Authority received a bundle of additional information from Mr Black (a witness statement and other documentation that was additional to that which the parties had agreed should form the basis of my determination in this matter.) Later in the day, in response to this material, a further witness statement and other documentation was received from the union. A brief review of all this material has indicated that it goes primarily to substantive issues. For this reason, as well as the fact that it did not form part of the agreed scope of the investigation, I have not taken it into consideration in respect of this determination.

**(i) Whether there is an arguable case**

[22] For the Authority to restrain a disciplinary process on an interim basis, it must be satisfied that there is at least an arguable case for it to do so when the substantive case is heard.

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<sup>2</sup>Neither potential witness provided the Authority with a formal affidavit although I was provided with a scanned copy of what appeared to be a formal affidavit of Mr Black.

[23] In this case, the substantive relief sought is an injunction permanently restraining the respondent from disciplinary proceedings. Although there is authority for the use of an injunction to delay or postpone a disciplinary process<sup>3</sup> I have been unable to discover (and was not referred to) any instance of an injunction being used to permanently prevent an employer from proceeding with a disciplinary process.

[24] In the *Russell* case Judge Goddard recorded the following observations:

- i. *“In the ordinary course of things an employer is entitled to conduct an investigation into the conduct and performance of an employee that is of concern to it and, indeed, bound to do so in the ordinary course of its business of being an employer.*
- ii. *It is a grave matter for the Court to interfere with this entitlement by some form of prior restraint and to take such a course requires justification on proper grounds;*
- iii. *it follows that there must be a burden on the employee in that situation to show that it is just and convenient that the employer’s ordinary rights should be interfered with or modified.”*

[25] In this case, even if the applicant’s assertions about the meeting of 20 April are accepted it remains that the respondent wishes to put additional allegations to her. There can be no inherent objection to re-opening an inquiry in light of new information. In this case further (or fresh) inquiry is justified if only for the fact that statements are alleged to have been made by her supervisor and manager which are alleged to contradict earlier statements made by Ms Moate or on her behalf.

[26] It follows that Ms Moate will not be able to establish “*justification on proper grounds*” for permanent injunctive relief. In these circumstances I am not satisfied that she has an arguable case.

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<sup>3</sup> *Russell v Wanganui City College* 3 [ERNZ] 1076, 1082

**Balance of convenience and overall justice.**

[27] The conclusion reached on the first issue effectively disposes of this matter. However for completeness I note that I am not satisfied that the overall justice or the balance of convenience favour the applicant. The respondent remains bound by its obligations to conduct a fair process and to justify any disciplinary action it might take against Ms Moate. She remains entitled to raise a personal grievance at any stage. Although Ms Moate will now have to face the stress of a disciplinary process it will not necessarily prejudice her in any other material way.

**Further procedure**

[28] I note that given the circumstances, particularly the respondent's introduction of new material at a late stage this morning, and the consequent additional delay to the issuing of this determination, I would expect the respondent in good faith to further adjust its time for Ms Moate to respond to the allegations contained in the letter of 15 June.

**Costs**

[29] Costs are reserved.

Yvonne Oldfield

Member of the Employment Relations Authority