IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 83
ARC 91/10

IN THE MATTER OF	an application to remove proceedings from the Employment Relations Authority
AND IN THE MATTER OF	an interlocutory application
BETWEEN	LAURA JANE GEORGE Plaintiff
AND	AUCKLAND COUNCIL Defendant

Hearing: 2 May 2012
(Heard at Auckland)

Appearances: Tony Drake, counsel for plaintiff
Tim Clarke, counsel for defendant

Judgment: 17 May 2012

INTERLOCUTORY JUDGMENT OF JUDGE B S TRAVIS

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[1] Mr Drake, counsel for Ms George, filed a memorandum in which he advised that he wished to draw the Court's attention to an actual or apparent conflict of interest on the part of the Auckland Council's (AC) solicitors and its counsel. He sought directions from the Court concerning this alleged conflict of interest. In support, he referred to an affidavit of Ms George, sworn on 30 March 2012, and an earlier affidavit sworn on 31 May 2010. He also annexed to his memorandum his exchange of letters with the AC's solicitors concerning this matter.

[2] The AC filed a notice of opposition in which it advised it was opposed to the making of the orders sought in Ms George's application, principally on the grounds that there was no conflict of interest which would disqualify the AC's solicitors and

counsel from continuing to act. An affidavit of Duncan Alexander Bremner, who held a number of positions in the human resources department of the Auckland Regional Council (ARC), now amalgamated into the AC, was filed in opposition.

[3] Mr Drake relied on r 13.5.3 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules 2008 (the Rules) which reads as follows:

> **Independence in Litigation**:
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> 13.5 A lawyer engaged in litigation for a client must maintain his or her independence at all times.
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> …
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> 13.5.3 A lawyer must not act in a proceeding if the conduct or advice of the lawyer or of another member of the lawyer's practice is in issue in the matter before the court. This rule does not apply where the lawyer is acting for himself or herself, or for the member of the practice whose actions are in issue.

[4] Mr Drake was initially also concerned about the involvement of Mr Clarke in the disciplinary investigation, a matter which may have been covered by r 13.5.2 of the Rules if Mr Clarke was likely to be required to give evidence. When it became clear that Mr Clarke would not be required to give evidence, Mr Drake did not pursue that aspect.

[5] As to r 13.5.3, Mr Drake concentrated on what he submitted was the key legal issue in the grounds relied on by the AC for Ms George's dismissal. As background he referred to the circumstances set out in Ms George's affidavit of 31 May 2010. In that affidavit, she deposes that in December 2009 she received a letter containing ten allegations, nine of which, she submits, all concerned the same issue, that was whether a university student had been employed by the ARC without the necessary authorisation having been obtained. The tenth item concerned a charitable donation and, after explanation, was not pursued by the ARC.

[6] Mr Drake relied on definitions in the discipline and dismissal policy of the ARC which were said to be terms of Ms George's employment agreement and contended that an alleged breach of a recruitment policy was "misconduct" under that policy for which a written first warning could have been issued if a breach of policy was established. He submitted that if such a breach was established, it could

not amount to serious misconduct as defined in the policy and could not have led to Ms George's dismissal.

[7] A meeting was held between Ms George and the ARC on 1 December 2009 in which one of the representatives of the ARC was Mr Bremner. Mr Drake alleges that Mr Bremner was tasked with preparing correspondence relating to this matter and, following the 1 December meeting, he prepared a report and a draft letter which instructed Ms George to attend a disciplinary meeting on 9 December 2009 to respond to nine out of the ten original allegations. In the process of disclosure, AC disclosed a draft letter dated 23 December 2009 which set out the nine allegations. Mr Drake alleges that Mr Bremner then sought and obtained advice from the ARC's solicitors in relation to the disciplinary process and the disciplinary meeting to be held with Ms George. He contended that following that advice being provided, Mr Bremner's draft letter was amended and the letter in its final form, dated 12 January 2010, was sent to Ms George. The 12 January letter contained the following paragraph which was not in the 23 December draft:

> We also have serious concerns about the truthfulness of your explanation given that parts of your evidence are wholly inconsistent with evidence of other factual witnesses. We would invite your response to these concerns. If it becomes evident that your explanation has not been truthful then this may itself constitute serious misconduct.

[8] Mr Drake relied on Ms George's second amended statement of claim in ARC 91/10 which pleads that the new wording was not one of the ten specific allegations set out in Mr Bremner's report. Following further meetings, Ms George was dismissed on 4 February 2010 on the basis that her explanation as to the perceived inconsistencies was not accepted, her truthfulness was doubted, and that this amounted to serious misconduct.

[9] Mr Drake submitted that when the proceeding comes to trial, a significant issue will be whether it was fair or lawful for the ARC to have elevated what he described as a relatively minor incident of alleged misconduct in relation to the recruitment policy, for which the harshest penalty was a written warning, to serious misconduct based on Ms George's explanation about the relatively minor incident of alleged misconduct. In his letter to the defendant's solicitors of 1 March 2012, Mr

Drake contended that the advice that was given to the ARC about whether such an additional allegation could justify a dismissal for serious misconduct was not supported by, or consistent with, case law and, had the legality of the issue been properly researched, the Employment Court's decision in the *Iakopo v Waikato Electricity Ltd*[1] with the following reasoning would have been found:[2]

> That aside, taking annual leave at short notice was not in itself an act of misconduct for which he was liable to be dismissed. That is clearly acknowledged by both Mr Taylor and Mr Parmenter. I cannot accept that even if it was shown that he had consistently lied about his reasons for doing something for which he was not liable to be dismissed, then those lies should in the circumstances of this case be elevated to the status of something so destructive of the employment relationship that they justified instant dismissal.

[10] Mr Drake also relied on the following submission which he had made in that letter:

> Further, it should have been evident to an experienced employment lawyer that it could not be lawful for an employer to simply decide to elevate an incident of relatively minor misconduct to an offence of serious misconduct by electing to not believe the employee's explanation. If that was lawful then the effect would be the routine circumvention by employers of the statutory protection employees have against unjustified dismissal under the Employment Relations Act 2000. That is, it would be a very simple matter for employers to summarily dismiss their employees for any minor incident of alleged misconduct and claim justification for doing so on the basis of the employer saying that it did not accept the employee's explanation and doubted the truthfulness of the explanation.

[11] In their written response, the AC's solicitors did not accept Mr Drake's contention that the addition of a new allegation of dishonesty during an investigation into lesser allegations could not amount to serious misconduct and cited as examples: *Honda NZ Ltd v NZ (with exceptions) Shipwrights etc Union*,[3] *New Zealand Sugar Co Ltd v Connelly,*[4] *Blaker v B & D Doors (NZ) Ltd*[5] and *Featherston v Ravensdown Fertiliser Cooperative Ltd*.[6] They observed the *Iakopo* decision was decided in 1994 and stated it was distinguishable on a number of bases.

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[1] AEC36/94, 24 June 1994.
[2] At 15.
[3] [1990] 3 NZILR 23 at 27.
[4] [1998] 3 ERNZ 198 at 208.
[5] AC8B/07, 21 September 2007 at [96]-[97].
[6] CA45/09, 9 April 2009.

[12] Mr Drake submitted that the four cases all had one common feature which was that the original act of misconduct by each of the employees was itself serious misconduct, as specified in the applicable employment agreement or established at common law and, if proven, could have justified a dismissal. He submitted that Ms George's situation was different because she was alleged to have breached a recruitment policy which was not serious misconduct and for which she could not have been dismissed. He submitted that the *Iakopo* decision was directly on point and must also still represent an accurate statement of the present law regulating unjustified dismissals.

[13] Mr Clarke, for the AC, accepted that there was an issue for trial as to whether Ms George could be dismissed for lying during an investigation into a matter which might not of itself have led to dismissal but, rather than engage in detailed legal submissions on this point, defended the application on other grounds. He observed that there were specific provisions in the ARC dismissal policy which refer to serious misconduct as including but not being limited to: "Serious breach of ARC Policy"; "Misuse of computer equipment including email, internet and content"; and "Abuse of ARC authority, including delegated authorities, such as delegated financial authorities". He submitted that the nine allegations of misconduct arguably involved breaches of these aspects of the relevant policy.

[14] Mr Clarke also relied on provisions in s 4 of the Employment Relations Act 2000 (the Act) which were not in force at the time of the *Iakopo* decision. Parties to an employment relationship must deal with each other in good faith and must not either directly or indirectly do anything to mislead or deceive each other, or which is likely to mislead or deceive each other (s 4(1)(b)). The parties to an employment relationship must be active and constructive in maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative (s 4(1A)).

[15] I agree that these are all issues which will need to be resolved at trial.

[16] Mr Drake submitted that this was one of the situations which Chief Judge Colgan described in his exchange of letters with the Auckland District Law Society

Inc Employment Law Committee (which is referred to in the judgment of Judge Ford in *Walker v ProCare Health Ltd*)[7] following the decision of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.[8] The Chief Judge, in his letter dated 5 September 2011 to the Convenor of the Committee stated:

> I need to emphasise that the Judges' concern is with a relatively few and extreme cases. Examples of these have included situations where a lawyer has conducted the investigative and dismissal process personally, correspondence has been on the lawyer's letterhead, and controversial decisions about processe and substance have been the lawyer's. In such cases, the issues of justification have come to be ones of justification for the lawyer's actions rather than the employer's. In such cases, counsel are in a very real sense seeking to justify their own actions rather than those of their client.

[17] Mr Drake sought to distinguish *Walker* which he submitted dealt with the issue of whether correspondence written by the defendant's counsel acting on the defendant's instructions should disqualify that counsel from continuing to act. In that case Judge Ford found that the correspondence between counsel was not in issue and was unexceptional and the involvement of the respective counsel in the disciplinary investigation would not have led to their disqualification. In *Walker*, *Vector Gas* was distinguished because that case dealt with the interpretation of correspondence from the respective lawyers which was, Mr Drake submitted, directly in issue before the Supreme Court. That, he submitted, was precisely the situation in the present case where the advice given by the defendant's solicitors as to the inclusion of the dishonesty allegations was directly in issue.

[18] Mr Drake observed that neither the Act nor the Employment Court Regulations 2000 provide a procedure for bringing a conflict of interest to the Court's attention. However, in accordance with the Chief Judge's letter to the Employment Law Committee, Mr Drake said he had taken the step of bringing the matter to the Court by filing his memorandum. He noted that the High Court Rules have a specific provision about conflicts, r 1.20, and cited a passage from *McGechan on Procedure* where the High Court prevented a solicitor from representing a party where the solicitor had previously given advice that was at issue before the Court.[9]

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[7] [2011] NZEmpC 95.
[8] [2010] NZSC 5, [2010] 2 NZLR 444.
[9] *McGechan on Procedure (looseleaf ed, Brookers)* at [HR1.20.05]: *Iron Ore New Zealand Ltd v Rio Tinto Mining and Exploration Ltd* [2010] 20 PRNZ 478..

Mr Drake observed that his actions were not tactical but part of his duty to raise a possible conflict of interest.

[19] Mr Drake noted that Mr Bremner had not said in his affidavit whether or not the new allegation of dishonesty was added on advice given by ARC's solicitors and had not stated that the additional paragraph was his idea or something that had been suggested by one of ARC's management. Mr Drake submitted that, because this was not expressly dealt with in Mr Bremner's affidavit it supported Mr Drake's conclusion that the additional paragraph was added on the advice of the defendant's solicitors. He noted that the AC had not waived legal professional privilege to enable the advice that had been received to be disclosed which may have revealed whose idea it was to include the additional paragraph. He submitted that its inclusion must have been in the nature of a "u-turn" from the ARC's investigation into the 10 allegations and must have come from its solicitors, based on legal advice received, which advice was wrong and inconsistent with the case law upon which the defendant's solicitors had relied in their reply to him. He sought a declaration to that effect from the Court.

[20] Mr Clarke submitted that there was no conflict of interest which precluded the defendant's solicitors from continuing to act for the AC. He submitted that Mr Drake's conclusions contained in his letter of 1 March and in Mr Drake's submissions to the Court, were based on Mr Drake's own speculations and on a number of assumptions Mr Drake had made about the advice that he contends was allegedly given by the ARC's solicitors. Mr Clarke submitted that Mr Drake's conclusions were unsupported by any evidence.

[21] Mr Clarke submitted that Mr Drake was inviting the Court to speculate on the content of privileged communications which was contrary to public policy. He confirmed that privilege in any advice given by ARC's solicitors to the ARC or in any other information, was not waived by the AC. He observed that the rationale for legal advice privilege is that the administration of justice requires that everyone should be able to consult a lawyer without fear that any information given to the lawyer would later be revealed in Court against their wishes and interests.

[22] Mr Clarke observed that Mr Bremner's affidavit was not contradicted by any evidence filed on Ms George's behalf and dealt with the chain of events that had led to the dismissal.

[23] Turning to the issue of whether the alleged advice was in issue, Mr Clarke commenced by observing that the courts generally regard the right to counsel of choice as an important right which is not lightly to be overridden and the courts' jurisdiction to intervene should be exercised only rarely. He cited four cases in support of that proposition.[10]

[24] Mr Clarke submitted that the *Vector Gas* case was distinguishable as Ms George's personal grievance claim does not involve the interpretation of practitioners' correspondence or other documents authored by counsel. He correctly pointed out that in *Vector Gas*, the case involved the interpretation of letters exchanged between the parties' lawyers and then counsel from both firms argued the respective meaning of the letters which their own firms had drafted and had forwarded on behalf of their respective clients. The Supreme Court warned against the dangers of counsel acting as witnesses and also the risk of losing objectivity. It stated:[11]

> Whatever the court or tribunal in which they are appearing, it is undesirable for practitioners to appear as counsel in litigation where they have been personally involved in matters which are being litigated. In that situation, counsel are at risk of acting as witnesses and of losing objectivity.

[25] Mr Clarke also referred to the *Walker* case and the exchange of letters between the ADLS Employment Law Committee and Chief Judge Colgan. He stressed the passage set out at [16] above that the Court will only be concerned with a relatively few and extreme cases and submitted this was not one of those cases.

[26] Mr Clarke observed that Judge Ford in the *Walker* decision had endorsed the approach contained in the correspondence between the Chief Judge and the

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[10] *Beggs v Attorney-General* [2006] 2 NZLR 129 at [40]; *Solicitor-General v Alice* [2007] 1 NZLR 655 (CA) at [23]; *G v Minter Ellison Rudd Watts* (2008) 18 PRNZ 1017 at [22]; *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641 (CA) at 651.

[11] At [147] per Wilson J.

Committee, noting that employment lawyers have often become involved in disputes right from the start and that Judge Ford stated:[12]

> In general terms, the early involvement of counsel in this area of the law in giving advice to a client in relation to an employment problem and then acting on the client's instructions as the case progresses should not give rise to the type of conflict situation which occurred in *Vector*. Instances of such cases frequently come before the Court and do not give rise to any problem. In fact, it would be a rare employment case that does not involve such a scenario.

[27] In reliance on Mr Bremner's affidavit, Mr Clarke submitted that this was not one of the extreme situations where lawyers personally have assumed responsibility for the conduct of the process that led to a dismissal but that, at all times, the solicitors had acted on the ARC's instructions and it was always the ARC which had made the relevant decision. Mr Bremner had deposed that as a result of the way in which Ms George had responded to the original allegations, the ARC decided to add a new and separate allegation of dishonesty. He deposed that the ARC had conducted the disciplinary process and it was the ARC's decision to add the separate allegation of dishonesty. Mr Bremner also deposed that the decision to dismiss Ms George was made by the ARC.

[28] Mr Clarke observed that r 13.5.3 is probably drafted too widely in its use of the words "if the … advice of the lawyer … is in issue in the matter before the court." He gave the example of a client seeking advice on restructuring proposals and the process that an employer should adopt. If that process was later challenged, it could be argued that the employer's lawyers should be sidelined because they had given advice on process.

[29] Mr Clarke accepted that the issue of whether a new allegation of lying could be added to an investigation inquiry may be the subject of submissions at the hearing but the legal advice that may or may not have been given was not an issue in itself. He submitted that, taken to its logical conclusion, Ms George's argument that a legal firm cannot act in a contentious matter in which a lawyer has given pre-litigation advice on substantive or procedural matters would mean that:

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[12] At [20].

(a) The client's right to his or her counsel of choice would be overridden if the matter were to become contentious;

(b) the Court and parties would need to know the scope of pre-litigation legal advice – or speculate every time privilege is not waived; and

(c) the client would be put to the trouble, cost and delay of instructing new solicitors every time a matter became contentious.

[30] Mr Clarke submitted that the AC's solicitors' involvement in the pre-litigation matters was unexceptional in this case and that Ms George's application should be dismissed with costs awarded to the AC.

Conclusion

[31] I accept Mr Clarke's submissions and reject those of Mr Drake.

[32] Because of the non-waiver of legal privilege, Mr Drake's submission necessarily proceeded, on a speculative basis, that the advice given by the ARC's solicitors was an issue in this case. There is no such evidence. It is equally open to speculation that if the ARC was concerned about issues of dishonesty in Ms George's responses, officers involved in the investigation may have sought legal advice as to what they needed to do to raise the issue. To advise a client that if an issue was to be the subject of possible disciplinary action, the allegation must be raised and the client given the opportunity to respond would be incontestably trite law in accordance with the classic Court of Appeal decision in *Auckland City Council v Hennessey*.[13]

[33] I give this hypothetical example only to demonstrate that, in the absence of clear evidence that a solicitor's advice is pivotal, disqualification should not follow.

[34] In the absence of any clear evidence that controversial legal advice has been given by the AC's solicitors which is now in issue in the matter before the Court,

[13] [1982] ACJ 699; (1982) ERNZ Sel Cas 4.

there is no basis to declare that there is a real or apparent conflict of interest in terms of r 13.5.3.

[35] The position would have been different in the hypothetical situation where ARC's solicitors had advised Ms George's solicitors that they had given certain advice which had been accepted by the ARC and which now was arguably controversial and relevant to the issues before the Court.

[36] I also agree with Mr Clarke that the guidelines from *Vector Gas* are not engaged in the present case where the AC's lawyers are not seeking to justify the advice they gave. I conclude that this is not one of the exceptional cases contemplated by the Chief Judge in his correspondence

[37] To declare that solicitors should be disqualified and a client prevented from having counsel of its choice, where s 236 of the Act permits any employee or employer to be represented by any person, must be confined to the clearest of cases. This is not one of those. The application is therefore dismissed with costs in favour of the AC.

[38] Those costs are reserved.

BS Travis
Judge

Judgment signed at 1.30 pm on Thursday 17 May 2012