

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 106/08
5103521

BETWEEN HOONG KHEONG (OSCAR)
LEE
Applicant

AND FISHMART LIMITED
Respondent

Member of Authority: Robin Arthur

Representatives: Garry Pollak for Applicant
Simon Stokes for Respondent

Memoranda lodged: 18 March 2008 from Respondent and 19 March 2008
from Applicant

Determination: 19 March 2008

DETERMINATION OF THE AUTHORITY

[1] The Respondent, by counsel's memorandum of 18 March 2008, asks for an Authority direction "as soon as possible" postponing investigation of the Applicant's personal grievance application pending the outcome of a Police investigation.

[2] The Applicant opposes any postponement of the investigation meeting, notified for 29 April 2008. His counsel, by reply memorandum of 19 March, says the Respondent's memorandum seeking postponement was the first that the Applicant had heard of his former employer making a complaint to the Police.

[3] The complaint to the Police is said to be about "*stolen company products, including money*". The Applicant's personal grievance claim arises from his dismissal for "*serious misconduct*". The Respondent's letter of 10 August 2007 to the Applicant, confirming his dismissal, gives "*stealing*" as the reason.

[4] I have sufficient information from counsels' Memoranda and the statements of problem and reply, with attached documents, to decide the Respondent's postponement application and do so on the papers.

Determination

[5] I decline to make the procedural direction for postponement sought by the Respondent. The reasons are as follows.

[6] The Applicant's statement of problem was lodged on 19 October 2007 and the Respondent's statement in reply was lodged on 8 November 2007.

[7] By telephone conference with counsel on 5 February 2008 a timetable for investigation was agreed. On 7 March 2008 the Applicant lodged a witness statement in compliance with that timetable and witness statements are due from the Respondent on 28 March 2008.

[8] There is no reference in the statements of problem and reply or the Applicant's witness statement to a Police investigation. During the 5 February telephone conference there was no reference to a Police investigation or the prospect of one. It appears that if such an investigation is now underway, it is a result of a complaint made by the Respondent after the Authority's timetable for its investigation was set and, in any event, relates to events which allegedly occurred prior to the Applicant's dismissal, some seven months ago.

[9] There are circumstances where the Authority, in principled exercise of statutory discretions, may postpone its investigation so as not to compromise a party's right to silence in response to a Police inquiry or a judicial hearing on alleged criminal matters.

[10] Those circumstances do not exist here. Mr Pollak advises that his client's instructions are that he "*is more than happy to produce a statement to Police*" and "*does not wish to invoke his right to silence*".

[11] I do not accept Respondent counsel's bare submission that it would be "*in the interests of fairness to both parties that the criminal investigation by the Police should be completed before the investigation by the Authority proceeds further*".

[12] Even if matters had progressed to the state where a Police inquiry had concluded and criminal proceedings begun, there is no presumption that determination of employment proceedings should be postponed until a criminal case is concluded.

[13] Both proceedings operate on a different basis. Criminal proceedings, and a Police inquiry which would have preceded it, would be concerned with whether there is proof beyond reasonable doubt that the Applicant took the items and money as alleged by the Respondent but adamantly denied by him. In employment proceedings, the issues are determined on the balance of probabilities and the employer is not required to prove an employee's dishonesty. Rather the employer must show that it held an honest belief; conducted a full and fair investigation into the allegations of dishonesty and misconduct; and gave the employee an opportunity to explain. Adverse information about the employee or his actions that was not known to the employer at the time of dismissal may become important if contribution needs to be considered but only after the question of justification has been resolved.

[14] Under s103A of the Employment Relations Act 2000 ("the Act") the burden on the employer remains that of showing conclusions were reached and action taken only after a full and fair investigation was carried out and on the basis of what that investigation disclosed: *Murphy v Steel & Tube New Zealand Limited* (unreported, EC Christchurch, CC 18/07, 16 October 2007) at [59]. Waiting for whatever a Police investigation may or may not reveal and result in, will not change that question of justification to be considered in the Authority's investigation.

[15] The timetable for the lodging of witness statements, as directed by Minute of 5 February 2008, remains in place.

Robin Arthur
Member of the Employment Relations Authority