

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 139
5436826

BETWEEN JANET WALTERS-GLEESON
Applicant

AND WHANGAREI DISTRICT
COUNCIL
Respondent

Member of Authority: Robin Arthur

Representatives: Anthony Russell for the Applicant
Samantha Turner and Simon Clark for the Respondent

Submissions: 7 March 2014 from the Applicant and
14 March 2014 from the Respondent

Determination: 11 April 2014

DETERMINATION OF THE AUTHORITY

- A. The application of Janet Walters-Gleeson for an order for this matter to be removed to the Employment Court to hear and determine without a prior Authority investigation is declined.**
- B. Costs on this application are reserved.**

Removal application

[1] Janet Walters-Gleeson (Ms Walters) sought an order for removal of her personal grievance application to the Employment Court on the grounds that:

- (i) her case raised an important question of law about what limits a local authority employer could put on its employees' democratic freedoms; and
- (ii) both employers and employees needed the Court's guidance as it had not previously considered this question; and

(iii) there was significant public interest in the outcome of her case.

[2] Whangarei District Council opposed the application because it said no important question of law was raised; there were already well-established principles on issues actually raised by Ms Walters' case so no particular guidance was needed from the Court; and the matter lacked the urgency necessary for it to be in the public interest for removal to be granted. It also argued that, if the Authority did find the application met the statutory tests for removal, there were other relevant factors weighing against the Authority exercising its residual discretion to remove the proceedings to the Court. Those factors were said to include reserving rights to challenge and minimising costs to the parties by having factual disputes determined by the Authority at first instance.

Employment relationship problem

[3] The Council dismissed Ms Walters on 12 September 2013. She was the personal assistant both to the Council's mayor and to its chief executive, Mark Simpson.

[4] On 15 August 2013 Ms Walters signed a form nominating Stan Semenoff as a candidate in the mayoral election being held that year. Mr Semenoff had served four previous terms as mayor since 1989, most recently between 2007 and 2010.

[5] Mr Simpson met three times with Ms Walters to seek explanations from her about signing Mr Semenoff's form. He then decided her action breached the council's Code of Conduct (the code) and its Election Protocols for Employees (the protocols) and was serious misconduct. He also decided to dismiss her because he was not satisfied with what she said to him about what she did. In his letter of dismissal he said this was because her role gave her access to highly sensitive confidential information and she must be "*beyond reproach*". He said he no longer trusted her to "*make sound judgement calls*" in accordance with guidance given to her and her obligations under the code and the protocols.

[6] Ms Walters raised a personal grievance. Her statement of problem to the Authority claimed her dismissal was unjustified for three reasons:

- (i) Her action in signing a mayoral nomination form did not breach the Council's policies as those policies should be interpreted consistently with the Local Electoral Act 2001 (the LEA) which conferred any elector with the right to nominate a candidate in their area; and
- (ii) Even if her action breached the Council policy, the policy could not legitimately limit her statutory rights under the LEA; and
- (iii) She was not treated consistently with another employee who was permitted to be involved with the campaign of a different mayoral candidate.

[7] The Council's reply denied its actions were unjustified. It maintained its protocols did not restrict Ms Walters' rights under the LEA but rather required her to balance those rights with her obligation as an employee of a local authority to maintain public confidence and avoid any appearance of bias. It said it followed a fair process in reaching its decision, including by considering Ms Walters' explanation. It also denied any disparity of treatment saying the other employee referred to had sought prior approval for his activities from Mr Simpson, as required by the protocols.

Issues

[8] In determining the removal application under the criteria set by s. 178 of the Employment Relations Act 2000 (the ERA), I considered the following issues:

- (i) Was the asserted question of law important and the answer to it likely to be decisive or strongly influential in any significant part of Ms Walters' case?¹
- (ii) Were the asserted novelty and need for guidance from the Court relevant factors?
- (iii) Was the nature and urgency of the case such that it was in the public interest to remove the matter to the Court?
- (iv) Were there other discretionary factors that meant the case should or should not be removed?

(i) An important and decisive question of law?

[9] Ms Walters submitted the important question of law in her case was whether a local government employer could develop and enforce policies that purported to

¹ *McAlister v Air New Zealand* (unreported, EC, AC 22/05, 11 May 2005, Judge Shaw) at [9].

restrict her statutory right to participate in the democratic process of council elections. This was said to involve considering where the common law rights of the council to manage its employees (through policies such as its code and its protocols) could supersede the council's obligations under the LEA (to allow her to exercise certain rights). At s.4 the LEA stated a principle that local electors would "*have a reasonable and equal opportunity to nominate one or more candidates*" and, at s.26, the right to nominate a candidate. Section 4 also stated that "*local authorities ... must, in making decisions under this Act or any other enactment, take into account [such] principles ... that are applicable ... so far as is practicable in the circumstances.*"

[10] She submitted that the balancing of her rights under the LEA with those of the Council also necessarily involved considering rights declared in the New Zealand Bill of Rights Act 2000 (NZBORA). In her case they were said to be Electoral Rights (s.12) and Freedom of Association (s.16) for which there was no "*demonstrably justified*" limit available to the council under s.5 of NZBORA.

[11] Her central submission on why the asserted question of law was important to the resolution of her case was that her employment "*was terminated for nominating a mayoral candidate and for no other reason*" and that "*this was the action that resulted in her summary dismissal*".

[12] I have not accepted that submission was necessarily accurate or established the importance of the asserted question of law.

[13] The starting point for assessing whether an asserted important question of law is likely to arise in this matter other than incidentally is to consider the actual issues for determination. On the basis of what is disclosed by the statement of problem, statement in reply and various background documents lodged by the parties to date, the central issues to determine are whether a fair and reasonable employer could have:

- (a) found Ms Walters' conduct in signing Mr Semenoff's mayoral nomination form, in the circumstances that she did, was serious misconduct; and
- (b) reached the view that Mr Simpson formed of Ms Walters' explanation for what she did and why she did it; and
- (c) if so, then concluded its trust and confidence in the employment relationship was so deeply impaired that dismissal was appropriate (including the question of why

this was so with her but not another employee who had been involved with a different candidate's campaign).

[14] The content of the code and the protocols are clearly incidental to resolving those issues as Ms Walters' conduct in signing the form, and then what she said about having done so, were said by the Council to have fallen below the standards required by the code and the protocols.

[15] However the removal application argued, in effect, that those standards, as expressed in the code and protocols, were more restrictive than the LEA and NZBORA permitted.

[16] As a matter of interpreting statutes and their application, that is a question of law. Being a question of law however does not then automatically make it 'important' in terms of the criterion for removal given at s178(2)(a) of the ERA. Clause 1 of Schedule 2 of the ERA empowers the Authority to consider any question connected with the construction of "*any other Act*" that arises in the course of an investigation. In the present case that could include considering whether the code and the protocols were too restrictive in light of the LEA and NZBORA provisions.

[17] The Council argued its protocols were consistent with legislative requirements, particularly its obligation under the Local Government Act 2002 (LGA) to ensure "*all employees maintain proper standards of integrity, conduct and concern for the public interest*".² It also argued the protocols did not prevent employees exercising rights they may have under the LEA. Rather the protocols included a process whereby employees could balance exercise of those rights with their employment obligations, as Council staff, to avoid the appearance of bias. The process required an employee to seek approval from the Council CEO for any direct involvement in a candidate's campaign. This was submitted to be a reasonable measure to allow the Council to then manage that employee's access to information so she or he and the Council could avoid the appearance of bias or conflict and reduce the risk of allegations that one candidate was getting an unfair advantage.

[18] The Council also argued NZBORA provisions did not apply to this matter. Section 12 referred only to national elections. And Ms Walters was not, it said,

² Clause 36(3) of Schedule 7 of the Local Government Act 2002.

dismissed for associating with a mayoral candidate so the s.17 freedom of association did not apply. On that basis, issues of justifiable limitations under s.5 did not arise.

[19] Although not included in the Council's submissions, there would be a further arguable defence that if Ms Walters' freedom of association was impinged by the terms of the code and the protocols, such limits were reasonable and justified in a democratic society (considering the Council's obligation to maintain public confidence in the integrity of its election processes).³

[20] In my view, on the basis of the material lodged by the parties to date and their respective submissions made on the removal application, the Council's argument on the law in respect of the relationship between the local government legislation and the general terms of its code and the protocols was probably correct (without reaching any conclusion on the factual question of whether particular terms fairly applied to Ms Walters' actions or situation). It would be a surprising outcome if there were not some reasonable and legitimate requirements made of local government employees to minimise the risk of appearing biased or unduly influencing the elections of councillors and mayors. Those requirements could be expected to be similar to standards of political neutrality required of state servants.⁴

[21] However, while the answer to a question of law may seem obvious, it may still be important and be likely to arise other than incidentally (so that it is potentially central to the ultimate decision in the case or some important aspect of it).⁵

[22] In this case that turns on this extract from the protocols:

- *It is not appropriate and is not acceptable conduct for employees to obviously align themselves or support candidates, whether an incumbent or aspiring member.*
- *Any action that leaves employees open to allegation of bias could potentially cause serious problems for both themselves personally and for Council as an organisation.*

[23] In determining the legitimacy of the decision that the Council made about Ms Walters, based on the standards stated in its protocols, it would be decisive if the prohibition on supporting candidates – declared to be “*not acceptable conduct*” – was

³ See *Poole v The Horticulture & Food Research Institute of NZ Limited* [2002] ERNZ at [220].

⁴ See, for example, *Guidance for the 2014 Election Period: State Servants, Political Parties, and Elections* at www.ssc.govt.nz.

⁵ *McAlister v Air New Zealand* (unreported, EC, AC 22/05, 11 May 2005, Judge Shaw) at [36].

held to be inconsistent with the right to nominate provided in s.4 and s.26 of the LEA. Although I have not seen the wording of the particular nomination form, the act of nominating someone for a particular post in any organisation, great or small, is generally understood to be a statement of support for that person and their suitability for the role. In that sense the act of nomination would appear, at first glance anyway, to fall within the scope of the reference in the protocols to aligning oneself with or supporting a candidate.

[24] However there are further contextual questions about what sort of activities were covered by the direction in the protocols that an employee must first seek the prior approval of the CEO. Such approval was said to be required for “*any direct involvement in a candidate’s campaign*”. The protocols refers to “*tak[ing] part in political campaigns*” and “*all campaigning activities*” but the specific examples given were attending private strategy meetings and running public meetings.

[25] On that basis I have accepted there is an important question of law raised about the relationship between provisions of the LEA, LGA, the code and the protocols.

(ii) Novelty and a need for guidance – relevant factors?

[26] Ms Walters submitted the question of law was novel, not previously considered by the Authority or the Court, with local authority employers and employees “*entitled to guidance from the specialist Court*”, and a decision from the Court was likely to assist with updating of protocols and to bring an “*element of clarity*” to “*a fraught and uncertain area*”. I have not accepted any of those propositions as established.

[27] Firstly, novelty is not a relevant factor in the statutory test.⁶

[28] Secondly, the question of limits on the freedoms of local government employees to do what other ordinary ratepayers or citizens might choose to do has been considered in previous decisions. *Hobbs v North Shore City* was one example – which concerned the issue of a council employee writing letters about council policy

⁶ *New Zealand Amalgamated Engineering, Printing & Manufacturing Union Inc v Carter Holt Harvey Limited* [2002] 1 ERNZ 71 at [30]

to a local newspaper.⁷ Another was *Lowe v Tararua District Council* where the Court accepted the duties of a local authority employee must be considered in the context of the council's statutory duties and the employment environment.⁸ It also recognised that a council can have rules limiting the activities of officers but said the scope and extent of such limits should be articulated with great clarity so that those officers were in no doubt about their obligations. However, in both cases, the ultimate decision turned on the obligation of the council to act fairly and reasonably as an employer, as the answer to Ms Walters' case would have to in due course.

[29] Thirdly, Parliament has provided no 'entitlement' to first instance access and guidance from the specialist Court. Rather it has created discretions in the ERA at s177 for the Authority to refer questions of law to the Court and at s178 to remove matters meeting specific criteria, along with a further discretion for the Court to grant special leave for removal under s178(3). Otherwise the ERA provides for the Authority to determine, at first instance, the issues arising in personal grievances such as those of Ms Walters. To do so the Authority is empowered to consider any question connected with the construction of "*any other Act*" that arises in the course of an investigation, which in this case could include interpreting the LEA and NZBORA in relation to the code and the protocols.⁹

[30] Fourthly, no information presently before the Authority suggested the content of the Council's code and protocols was either similar to, or significantly different from, whatever rules might apply in other local authority areas. On that basis the notion that a ruling from the Court would assist in updating protocols generally is merely speculative. Neither do I accept that the topic is fraught, unclear or uncertain. As noted earlier the general principles concerning political neutrality and avoiding the appearance of conflicts of interest are widely known and understood in both central and local government. That is not to say that there was no uncertainty or doubt in the particular circumstances of Ms Walters' case or the Council's protocols, but that is a matter for further evidence and examination, yet to occur.

⁷ [1992] 1 ERNZ 32 (ET).

⁸ [1994] 1 ERNZ 887, at 900-901.

⁹ Clause 1 of Schedule 2 of the Employment Relations Act 2000.

(iii) A public interest?

[31] Ms Walters submitted that significant attention on her case in Northland media and the public interest in the operation of the democratic process satisfied the criteria for removal at s178(2)(b) of the ERA.

[32] Media interest or what the Court has referred to as “*the curiosity of the public*” about a particular case is not a relevant factor for removal under the ERA.¹⁰ Section 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. Even if I accepted there were public interest concerns – that is being of public importance as matters of principle and policy – there was no information before the Authority suggesting Ms Walters’ case needed to be resolved more promptly than others who are waiting to have their personal grievance applications heard. The urgency ground was not established.

(iv) Other discretionary factors?

[33] Finding an important question of law might be decisive to an aspect of the outcome of the case – here, whether the Council’s code and protocols were more restrictive than relevant legislation allowed – does not automatically result in an order for removal. The Authority (and the Court in relation to special leave applications) must then consider whether there are any factors that weigh against removal. *NZEPMU v Carter Holt Harvey* is one example.¹¹ As that case did, I have found discretionary considerations that must be applied, in addition to the establishment of at least one of the statutory tests, favour declining removal. They are:

- While the legal question raised in the application for removal is interesting, its importance is to be measured relative to the case in which it arises – that is it should not be given disproportionate weight when considering how best to deal with the whole case at first instance.
- There are a number of factual issues about how Mr Simpson’s concerns over Ms Walters’ conduct were investigated that are likely to be important to the ultimate decision on the justifiability of what he decided and how he went about deciding it. These include the circumstances of how she came to sign Mr Semenoff’s form,

¹⁰ *Vice-Chancellor of Lincoln University v Stewart (No. 2)* ERNZ 249 at [35].

¹¹ [2002] 1 ERNZ 74 at [38].

what was done when the fact of having done so became known, who inquiries were made of, how Mr Simpson responded to Ms Walters' explanation, and whether he, in fact, treated her differently to another employee.

- Even if there is some complexity in the relationship between the LEA, NZBORA, LGA, ERA, the terms of Ms Walters' employment agreement, implied or common law obligations, and the code and the protocols, such complexities (to the extent that they ultimately prove relevant under the test of justification) are routinely investigated and determined by the Authority in considering personal grievance applications.
- The parties' opportunity to have the matter dealt with at what is likely to be a lower cost in the Authority and to preserve its statutory right of challenge should not be lightly put aside.¹²
- There is no inevitability to either party challenging the Authority's eventual determination.¹³

Outcome

[34] Having declined Ms Walters' application for an order removing her personal grievance application to the Court, the Authority will now proceed with the steps necessary to carry out its investigation, unless Ms Walters decides to first exercise her right to directly ask the Court for special leave to remove her case there.

Costs

[35] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority

¹² *Hall v Westpac New Zealand Limited* [2013] NZEmpC 66 at [24].

¹³ *Vice-Chancellor of Lincoln University v Stewart (No. 2)* [2008] ERNZ 249 at [40].