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The Truth about Lies

An employer's ability to dismiss on the grounds of lies told during a disciplinary process has been the subject of a recent Court of Appeal decision, **Laura Jane George v. Auckland Council** [2014] NZCA 209.

Many years back, it was the Employment Court's view that lies told during a disciplinary hearing were a separate issue and required a separate disciplinary hearing. Back in 1993, the then Chief Judge of the Employment Court said in **Macadam v. Port Nelson Ltd (No 1)**:

"As a general rule, an employee who is called to answer an allegation that he has been guilty of conduct of a particular kind cannot be dismissed if suspicion emerges during the course of an inquiry into that allegation that the employee may have been guilty of conduct of a different kind, including lying to the employer. That needs to be the subject of a separate set of disciplinary proceedings."

Some subsequent Employment Court cases differed with this view, but it was relied upon in the recent Court of Appeal case challenging Ms George's dismissal.

However, the matter has now been clarified by the Court of Appeal in **George**.

The Facts

Ms George was a chartered Accountant who held a position as Team Leader, Transitional Services with the Auckland Regional Council (which later became the Auckland Council). Late in 2009, Ms George recruited a casual employee in the Accounts Payable section of the Council. It was alleged by the Council that Ms George had recruited the casual staff member without the necessary approvals required by the Council's recruitment policy. The Group Manager of Finance, Mr Kerr was concerned that Ms George had not only breached policy, but had also ignored instructions he had given to Ms George as to the process to be followed and advice given to her by the Human Resources Manager.



Among the allegations put to Ms George in the letter inviting her to a disciplinary meeting was that she had stated that the Human Resources Manager had told her that approval by the Position Approval Team was not required for the casual appointment.

Ms George provided a detailed written response to the allegations and she and her lawyer met with Council representatives. The Council then investigated further and issued another invitation to attend a disciplinary meeting to discuss allegations of serious misconduct relating to the recruitment of the casual employee and that employee's access to the Council's confidential systems. Included in the letter was a further allegation raising "serious concerns about the truthfulness of your explanation given that parts of your evidence are wholly inconsistent with evidence of other factual witnesses". The letter went on to advise:

"If it becomes evidence that your explanation has not been truthful then this may in itself constitute serious misconduct."

During the disciplinary process the Council concluded that Ms George was guilty of **misconduct** in relation to the hiring of the casual employee and that her lack of truthfulness amounted to **serious misconduct**. After an opportunity to comment on the consequences of the serious misconduct, Ms George was dismissed. Ms George then challenged her dismissal, however the Employment Court upheld the dismissal.

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This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail, Raewyn Gibson, or Peter Zwart**.

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Ms George then sought leave to appeal to the Court of Appeal, arguing among other things that the allegations of lying should have been the subject of a separate set of disciplinary proceedings as in the **Macadam** case.

The Court of Appeal examined the Employment Court's decision, and agreed with the Court's rejection of the **Macadam** principle that there was a necessity for a separate disciplinary process in relation to lying. The judgement of the Employment Court which was under appeal had held:

"[101] In order to undertake a fair and proper disciplinary process an employer is obliged to meet certain minimum standards, including adequately particularising the concerns that he/she has; identifying the potential consequences of a finding against the employee; providing sufficient information and a reasonable time to respond; and giving adequate consideration to any explanation given. I do not accept, however, that an employer who becomes concerned that an employee is not being truthful in his/her responses is obliged to conclude a disciplinary process that is already in train and then embark on a new process, or initiate parallel processes. That would lead to unnecessary complexity, delay, and inefficiency. Provided that the requirements of fair process are met, an employer may identify a concern about truthfulness and deal with that concern in the course of a pre-existing process. Whether the process that was adopted in this case met the minimum standards is answered by a consideration of what in fact occurred, rather than an application of blanket rules."

[Emphasis added]

The Court also added:

"[111] Honesty and integrity are core elements of the employment relationship. Ms George was a senior employee with responsibility for financial management within the Council. Her role necessarily required that her employer could repose a high degree of trust and confidence in her. The Council could reasonably expect that she would be open and frank in explaining her actions and inactions."

"[112] I am satisfied that the procedure followed by the Council in relation to the truthfulness allegations was full and fair, and that there was a sufficient basis for Mr Winder and Ms Wiegandt-Goude's conclusion that Ms George had not provided truthful responses during the course of the investigative and disciplinary process, and to reach the view that this amounted to serious misconduct warranting dismissal."

In rejecting Ms George's application for leave to appeal, the Court of Appeal said:

"[32] In relation to the Macadam judgment, the remarks of Chief Judge Goddard we have cited at [23] above were obiter since there was no finding that the employees concerned had lied in the course of the disciplinary process into another matter. With respect, we are unable to agree with the proposition that a separate disciplinary process is required if the employer relies on lies made by the employee during an investigation in order to justify a summary dismissal. However, a fair process must be followed as we discuss below."

"[33] The general proposition we have stated is subject to the observation made by Colgan J (as he then was) in the New Zealand Sugar case that it is not open to an employer to inquire into and dismiss an employee on one ground of complaint and then to seek subsequently to justify the dismissal on an entirely new ground. That did not happen here."



"[35] We find ourselves in complete agreement with the conclusions reached by Judge Inglis on the questions of law Ms George seeks leave to appeal. In particular, we are satisfied that an employer may seek to rely on the untruthfulness of an employee

in his or her responses to other allegations of misconduct."

And

"We also agree that, provided a fair process is followed with a proper opportunity for the employee to respond to the allegations (which must be adequately detailed), it is unnecessary for the employer to commence a fresh disciplinary process. As the Judge said, this would give rise to unnecessary complexity, delay and inefficiency."

The Court of Appeal went on to find:

"[36] We emphasise that mere differences in recollection are likely to be commonplace during the course of the disciplinary process including any earlier investigation stage. Differences of recollection or inconsistencies are not in themselves sufficient to support a finding that the employee has lied. An employee may honestly, but mistakenly, have a different recollection of events. In order to establish that the employee has lied, there must be proof of a deliberate untruth on the employee's part. The standard of proof is the civil standard but to a level commensurate with the seriousness of such an allegation."

The key message arising from this case is that if lies are proven during the course of a disciplinary process, then these can be relied upon to dismiss an employee provided there is proof of a deliberate lie, and provided the employee is under notice that the alleged lie will be taken into consideration as part of the process.