

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 332
5421308

BETWEEN GINA TRUDY KENSINGTON
Applicant

A N D AIR NEW ZEALAND
LIMITED
Respondent

Member of Authority: T G Tetitaha

Representatives: L Keys/M Dignan, Counsel for Applicant
D France, Counsel for Respondent

Investigation Meeting: On the papers

Submissions received: 17 July 2013 from Respondent
25 July 2013 from Applicant

Date of Determination: 1 August 2013

INTERIM DETERMINATION OF THE AUTHORITY

A. The applicant's bank records and Facebook pages for the period 8 to 9 March 2013 are admissible.

B. Costs are reserved.

Employment relationship problem

[1] At a teleconference on 11 July 2013 the Authority made the following directions:

- a) The Applicant is to file with the Authority and serve upon Counsel only copies of her bank accounts and Facebook pages for 8 and 9 March 2013 within 7 days (18 July 2013)

- b) If the parties cannot agree on admissibility of the above evidence, submissions on admissibility shall be filed simultaneously 7 days thereafter (25 July 2013)
- c) The decision on admissibility shall be dealt with on the papers.

[2] No agreement on admissibility was reached between the parties. The respondent now seeks to admit the evidence because it is relevant to assess the veracity of the applicant's explanations and the employer's findings. It refers to the Statement of Problem and the assertion the applicant did not misuse sick leave and that a reasonable employer would have concluded the applicants sister was sick and required care.¹

[3] The applicant opposes the evidence being admitted. She submits the principles of natural justice will not be served by disclosure because of prejudice to the applicant. The respondent did not have this information before it when the decision to dismiss was made, it never proposed to the Applicant alternatives to dismissal would have been imposed if full disclosure occurred, the evidence merely confirms she was caring for her sister and it is well accepted in New Zealand there are general and legal privacy expectation about peoples personal and financial information.

[4] The Authority may take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not (s.160(2)). The touchstone for admitting evidence is relevance.

[5] Although the Evidence Act 2006 does not expressly apply to the Authority, its principles will affect and guide the exercise of its discretion to admit evidence.² The Authority is not entitled to ignore the rules of evidence and is likely to apply them if, in doing so, they support the role of the Authority set out in s.157 of the Act.³

[6] Section 37 Evidence Act 2006 governs evidence of veracity. Parties may not offer evidence in a civil proceeding about a person's veracity unless the evidence is substantially helpful in assessing that person's veracity.

[7] The evidence is relevant. In determining remedies under s123 subsequently discovered information can be taken into account when determining wages

¹ Statement of Problem (SOP) para 4.1(b) and (d)

² *Maritime Union of New Zealand Inc v TLNZ Ltd* [2007] ERNZ 593 (EmpC) at [14]

³ *Vollmer v The Wood Life Care (2007) Ltd* [2012] NZERA Christchurch 257.

reimbursement and humiliation compensation under s 123.⁴ It may also impact upon reinstatement under s125⁵, a remedy sought by the applicant. The explanation for taking sick leave must be tested for veracity. The evidence sought to be admitted is veracity evidence showing places and activities the applicant was undertaking on relevant dates she is alleged to have taken sick leave. It shall be substantially helpful to the Authority in determining whether there was any subsequently discovered conduct and its impact (if any) upon remedies.

[8] Accordingly the evidence is admissible.

[9] Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority

⁴ *Salt v Fell, Governor for Pitcairn, Henderson, Ducie and Oeno Islands* [2008] NZCA 128, [2008] 3 NZLR 193, [2008] ERNZ 155 at [54] and [56] per Hammond J; at [103 and [104] per Chambers J

⁵ See above at [85].