

Note: Orders prohibiting the publication of certain information appear in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 331
5423053

BETWEEN	A Applicant
A N D	B Respondent

Member of Authority: James Crichton

Representatives: Murray Osmond, Advocate for Applicant
Richard Harrison, Counsel for Respondent

Investigation Meeting: 30 July 2013 at Auckland

Date of Determination: 9 August 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Pursuant to Clause 10 (1) of Schedule 2 of the Employment Relations Act 2000, the Authority directs that the names of the parties not be published, nor any information identifying the name of either party.

[2] The applicant (A) commenced employment with the respondent (B) on 29 October 2012. A had been “headhunted” to fill the role at B.

[3] Immediately prior to commencing employment at B, on 23 October 2012, A was arrested by Police and charged that day with the offence of dishonest use of a document.

[4] Acting on advice, A did not disclose those events to B; B subsequently satisfied itself that A was correct in maintaining that he had no previous warning of the interests of the Police in his activities and had not spoken with Police on the matter prior to his arrest on 23 October 2012.

[5] The day after the arrest (24 October 2012), A appeared in the Hamilton District Court and was bailed to reappear on 5 March 2013.

[6] Commencing on 4 January 2013, B began to receive anonymous telephone calls relating to A's various appearances in the Hamilton District Court to answer the information against him.

[7] On 8 January 2013, B wrote to A referring to the anonymous telephone calls and sought to meet with A on 10 January 2013 to discuss matters.

[8] It was at the 10 January 2013 meeting that A told B that he had not been aware of the allegations against him until his arrest and that he had been advised not to tell B of the position. A maintained that the allegations against him had no substance and were designed to solicit his cooperation in the Police case against another individual.

[9] By letter dated 14 January 2013, B confirmed its acceptance of the information provided to it by A in the 10 January meeting, together with the documents that he tendered as well, and set out a basis on which the employment could continue meantime. A signed that letter as evidencing his agreement with those arrangements and he returned to duty on 16 January 2013.

[10] Then, on 5 March 2013, A appeared again in the Hamilton District Court at which hearing the original charge was withdrawn and four indictable offences were substituted. Two of those offences were pursuant to s.380 of the Companies Act 1993 and two pursuant to s.228 of the Crimes Act 1961.

[11] A did not volunteer any information to B in respect of the 5 March 2013 hearing but the anonymous phone calls to B continued to provide B with information. In consequence, B sought further and better particulars from A's then counsel. Material was provided by A's then representative, Mr John Moroney, on 13 March 2013 which, inter alia, disclosed that A would have known on and from 5 December 2012 that the substituted charges were likely to be laid.

[12] That intelligence provoked B into writing again to A by letter dated 19 March 2013 setting out a number of concerns, namely the escalation in the seriousness of the charges, the fact that the new indictable information had been signalled as early as the letter from Police dated 5 December 2012, the fact that A had chosen not to assist the Police with their inquiries and the fact that material supplied by Mr Moroney on 13 March 2013 appeared to contradict earlier advice that there had been no documentation from Police to that stage.

[13] A letter from Mr Moroney dated 21 March 2013 sets out the position from A's perspective and makes a number of observations in that regard including A's right to the presumption of innocence, his right to silence, and the wider contention that nothing that A had been accused of impacted on his employment relationship with B.

[14] A meeting between the parties was set down for 4 April 2013 but had to be abandoned because neither A nor his representative turned up, and finally a meeting was arranged for 3 May 2013 at which A was represented by a partner from Mr Moroney's firm, Mark Utting.

[15] The outcome of the 3 May 2013 meeting is disputed; B says that Mr Utting brought with him two files of Police evidence which he offered to make available to B and that view of matters is supported by the correspondence before the Authority, in particular Mr Harrison's letter to Mr Utting dated 20 May 2013 which refers to Mr Utting's "*offer to review the material forwarded through by the Police*". That letter was not responded to either by A himself or by either his current representative or his then representative.

[16] Notwithstanding that, the Authority understands from the affidavit evidence filed in support of his application by A that he does not agree that such an offer was made by Mr Utting or, in the alternative if such an offer was made, it was not made on his instructions. The Authority must be cautious about reaching judgments on affidavit evidence only, but it is difficult to see how A can maintain the position that he does on this question when, by all accounts (including his own), he was present at the 3 May 2013 meeting and could presumably have advanced a view about the proposed disclosure at the time.

[17] In any event, the short point is that from the 3 May 2013 meeting onwards, there is effectively no substantive response from A or his representatives to B and

after a series of further communications from B warning of the imminence of dismissal because of the failure to engage, a decision to dismiss was made on 18 June 2013.

[18] Prior to the decision to dismiss A, he filed an application for interim injunction seeking to prevent further disciplinary action by B but once the dismissal was effected, the matter proceeded before the Authority in the usual way, as an application for interim reinstatement.

[19] A has provided the required undertaking as to damages, although the efficacy of that undertaking has been put into question by B which says that A has provided no evidence to the Authority to justify a conclusion that he is in fact able to satisfy that undertaking.

Issues

[20] It is trite law that in order to succeed in an application for interim reinstatement, the Authority must be satisfied by the application of the law relating to interim injunctions.

[21] Section 127 of the Employment Relations Act 2000 (the Act) confers power on the Authority to order interim reinstatement pending the hearing of a personal grievance. Pursuant to subsections (4) and (5) of that section, the Authority has power to grant such orders subject to any conditions the Authority thinks fit, and the Authority is required to apply the law relating to interim injunctions "*having regard to the object of this Act*".

[22] It follows that four issues need to be considered. These are:

- (a) Whether the applicant has an arguable case;
- (b) Whether damages would be an alternative remedy;
- (c) Where the balance of convenience lies; and
- (d) What is the overall justice of the case?

Does the applicant have an arguable case?

[23] Both parties in the present matter accept that there is an arguable case. For the record, the Authority is also satisfied that A's application clears the relatively low threshold required to meet the standard of an "*arguable*" case.

[24] The factual position is plain on the affidavit evidence before the Authority; A was employed by B, B dismissed him having allegedly lost trust and confidence in him, and A protests that decision.

[25] There is no dispute that A was a good and able employee of B and that the matters which brought about the end of the employment relationship were not matters impacting on the performance of A's duties at B.

[26] However, the effect of the law as it is now settled is that as well as satisfying the Authority that he has an arguable case, A must also demonstrate that if he were successful in his substantive claim, the Authority would reinstate him permanently to the employment: *Cliff v. Air New Zealand Ltd* [2005] ERNZ 1.

[27] The Authority's considered view is that it is by no means inevitable that A could expect reinstatement if he were successful in his substantive personal grievance claim. Reinstatement must be both "*practicable*" and "*reasonable*". Because the test is conjunctive rather than disjunctive, the provision of s.125(2) of the Act requires that reinstatement must be both reasonable and practicable in order for it to be contemplated. For reasons that will become apparent from the body of this determination, the Authority is not persuaded that reinstatement, whether interim or permanent, is either reasonable or practicable.

[28] That said, the Authority must address the twin allegations that B is interfering with A's right to the presumption of innocence and/or that B is interfering in A's right to maintain his silence in the face of criminal allegations against him.

[29] Both parties have referred the Authority to the leading cases on the right to silence. A maintains that the employer has not treated him fairly and in effect has sought to compromise his defence of the criminal matters by its pursuit of information about the criminal charges. Conversely, B says that it does not seek to compromise A's rights but simply seeks information about the nature of the charges that he is facing in order that it can appropriately manage the effects on its business going

forward. In his submissions to the Authority, Mr Harrison sought to emphasise that what B was seeking was assistance from A in the provision of information which would enable B to adequately manage its business risk. In particular, B had to address the relationship between the possible public disclosure of A's circumstances with the effect on B and its clients of A's personal circumstances.

[30] Moreover, the Authority is persuaded that the real issue in respect of the "*right to silence*" issue is whether in fact B's behaviour interfered with A's right, or not. B says that all it was trying to do was to elicit information, that it wanted A to inform it of the progress of his personal circumstances in order that B could continue to manage its business risk.

[31] B made the point to the Authority in its submissions on the interim reinstatement application, and it reiterates B's filed affidavit evidence, that effectively it provided services to some very large clients including in particular a major bank. The affidavit evidence before the Authority suggested that there was a genuine risk that a major bank would take its business elsewhere if it became troubled by any prospect of taint, as a consequence of A's personal circumstances.

[32] B sought from A continuing engagement about the progress of his personal matter and it says that it did not receive that and that in failing to keep it apprised of developments in respect of his criminal proceedings, A failed in his obligations of good faith and ultimately simply ran out of the goodwill that had previously existed between the parties.

[33] B's position is that at the meeting between the parties in January 2013, there was an agreement reached that A would keep B advised of progress.

[34] In fact, it is B's submission to the Authority that it received more information from a succession of anonymous callers to its offices than it ever received from A himself. At its heart, B, having originally given A the benefit of the doubt as conveyed in its letter of 14 January 2013, eventually reached the conclusion by March of 2013 that A had failed to keep it advised of the position, was, either by neglect or deliberate omission, misleading B as to his actual circumstances, and that after 3 May 2013 when B understood there had been agreement that certain Police material would be shared with it on a confidential basis, A simply withdrew from any contact with his employer.

[35] It follows from the foregoing brief analysis that the essence of the reason for B dismissing A is not because of misconduct relating to the criminal charges but because of its conclusions around A's complete failure, first to honour his obligations in terms of the 14 January 2013 agreement, secondly to mislead B as to the actual position with the criminal charges (whether by design or neglect), and thirdly to simply withdraw from contact with B, thus creating an environment where A, on B's view of matters, was not being communicative and responsive with his employer in terms of his obligations under s.4 of the Act.

[36] The outcome might well have been quite different if A had worked collaboratively with B to manage the business risk that was occasioned by his facing criminal charges which, by common consent, had nothing whatever to do with the performance of A's duties at B.

[37] In all the circumstances, the Authority considers that A has met the relatively low threshold to ground an arguable case but the Authority would be failing in its duty if it did not also make clear that it thinks the prospect of permanent reinstatement being both a practicable and reasonable remedy, is weak indeed.

Where does the balance of convenience lie?

[38] The essence of the Authority's obligation in this regard is to consider the relative inconvenience to each party of the other succeeding. In a practical sense, the Authority must weigh the relative hardship to B of having A returned to the employment against the hardship potentially suffered by A in remaining away from the employment for a further period until the substantive determination to decide the matter one way or the other.

[39] Unsurprisingly, A maintains that the balance of convenience favours him. He argues, amongst other things, that he needs continuity of income and the suggestion is that, if B is unhappy about having him back actually working, he could be placed on garden leave.

[40] What is more, A makes the point that he is unable to obtain alternative employment while the charges are outstanding because he would have to disclose those charges and it is suggested that no employer would offer him a job.

[41] Conversely, B points to a number of factors. The first is that the Authority is able to deal with the substantive matter urgently and indeed offered the parties a substantive investigation in not much more than 14 days from the date of the interim reinstatement hearing. A's advocate was unable to accept that date because of other commitments, but the fact remains that the Authority was prepared to deal with the matter urgently and could offer such a date.

[42] Further, B points to the real prospect that a major bank may review its insurance arrangements if A was to be reinstated even on an interim basis.

[43] It is difficult for the Authority to assess how real that prospect is, but on balance, it seems likely that a large client bank would be anxious about some of the services being provided to it, either by a person who was facing criminal charges going to his financial probity or even where the provision of those services was provided by an organisation which continued to employ such a person notwithstanding that that person was not actually doing a major bank's work.

[44] Moreover, B refers to the wider risk of reputational damage, not just from a major bank but from other clients and of course from staff who may be reluctant to continue working with or supporting A because of the possible risks to the business and the prospect, however remote, of job loss in the event of the loss of a substantial client.

[45] Lastly, B draws the Authority's attention to the utility of A's undertaking as to damages and points out that while giving that undertaking, A has also given evidence in his affidavit that he is a person of very limited means. On that footing, it is suggested that the undertaking is nugatory.

[46] It is also observed on B's behalf that nothing in the affidavit evidence from A suggests that he would behave differently if he were given another chance. In particular, B is understandably troubled by the complete absence of any response to the various attempts that B made to communicate with A in the last month of the employment. In effect, from the 3 May 2013 meeting onwards, A and his advisers simply ceased to communicate with B. That is not the action of an employee acting in conformity with the good faith obligation and such behaviour invites the very consequence visited on A by B, namely a finding that B had lost trust and confidence in A to the extent of being unable to continue him in the employment.

[47] In all the circumstances, the Authority is not persuaded that the balance of convenience favours A. Indeed, the Authority is satisfied that the totality of the evidence supports the conclusion that the balance of convenience favours the existing status quo, that is, that A has not satisfied the Authority that the balance of convenience is with him.

Are there other remedies available to A?

[48] If A's application for unjustified dismissal proceeds to a substantive hearing and is successful, the Authority is satisfied that it is more likely than not that damages will be the dominant remedy. This is because, for reasons already advanced, the Authority is not persuaded that A can realistically look at any certainty of permanent reinstatement to his former position.

[49] There has been a complete breakdown of trust and confidence between A and B and that breakdown in trust and confidence has been amply contributed to by A's failure to appropriately engage with his employer.

[50] As B points out, A has now been committed for trial in respect of a number of matters including matters relating to his financial probity, and as he does not have name suppression, brand damage if there is an association with B, is almost inevitable.

[51] The Authority is not persuaded that A can aspire to permanent reinstatement with B if his substantive personal grievance is successful and it is likely as a consequence that the alternative remedy of damages will be awarded if A were to be successful.

Where does the overall justice lie?

[52] The Authority concludes that the overall justice of the case favours B. In the Authority's opinion, the employer has the stronger case overall than does A and accordingly it is B that is entitled to receive the benefit of the Authority's discretion.

[53] A is, in the Authority's opinion, the architect of his own misfortunes. The Authority is told by A's advocate that A always acted on advice and if that is so, the Authority must opine that some of that advice was wrong headed. A, like every other

employee, has obligations to his employer which, whatever his personal circumstances, he is required to comply with.

[54] In particular, an employee informed by the good faith principle would work collaboratively with his employer to manage the employer's risk as a consequence of something he had contributed to, would provide that employer with information to assist in that process, would be open and communicative, and would seek throughout to respond within appropriate timeframes to requests for information, deal promptly with correspondence, provide up-to-date relevant advice and generally act in a manner that is beyond reproach.

[55] While it is plain to the Authority that B has taken every possible step to try to support A in what must be a very difficult situation for him, A has not reciprocated in kind. Indeed, as the Authority has been at pains to point out in this determination, A has consistently failed to fulfil his obligations as a good employee. The Authority accepts B's claim that it has literally "*gone out on a limb*" for A by maintaining him in the employment notwithstanding the risk to the business, at least until it became apparent that the information on which B was acting to make that decision, was fatally flawed.

[56] As B made clear in its submissions to the Authority, even in terms of this application for interim reinstatement, there is still no intimation from A as to why he has failed to engage substantively with his employer since 3 May 2013, save for the bare contention that A has throughout, acted on advice. If that is so, as the Authority has already noted, that advice is deficient.

[57] Moreover, fundamental to the Authority's consideration of the overall justice of the case is its conviction that permanent reinstatement for A to B's service is neither practicable nor reasonable. Given the discretionary nature of the remedy sought and the equitable principles that the Authority is required to apply in assessing the matter, the Authority is satisfied that the overall justice of the case lies with B.

Determination

[58] A's application for interim reinstatement is declined for the reasons set out in this determination.

Costs

[59] Costs are reserved.

James Crichton
Member of the Employment Relations Authority