

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 31
5547356

BETWEEN MAT BENNETT
 Applicant

AND HUTT CITY COUNCIL
 Respondent

Member of Authority: Trish MacKinnon

Representatives: P Cranney and F Fitzsimons, Counsel for Applicant
 C McGuinness, Counsel for Respondent

Investigation Meeting: 26 March 2015 at Wellington

Submissions Received: On the day, orally and in writing from the Applicant
 On the day, orally and in writing from the Respondent

Determination: 27 March 2015

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application by Mat Bennett for interim reinstatement to his position of Operations Manager at the Huia Pool in Lower Hutt. A substantive investigation of his claims has been scheduled for 4 and 5 June 2015.

[2] Hutt City Council (HCC or the Council) operates the Huia Pool. It employed Mr Bennett for three years, initially as a Team Leader, and then as an Operations Manager. Mr Bennett was dismissed on notice for serious misconduct and breaching HCC's Code of Conduct on 3 March 2015 following a disciplinary process. He claims his dismissal was unjustifiable.

[3] Mr Bennett has given an undertaking, as required by s.127 of the Employment Relations Act 2000 (the Act), to abide by any order that the Authority may make in

respect of damages sustained by HCC if interim reinstatement is granted and he is ultimately unsuccessful with his claims.

[4] HCC opposes Mr Bennett's application for interim reinstatement and denies he was unjustifiably dismissed.

[5] The parties attended mediation but were unable to resolve the matter. An investigation meeting was convened under urgency to deal exclusively with the issue of interim reinstatement. The Authority dealt with the matter by way of untested affidavit evidence and submissions from counsel on the day.

[6] An oral determination was issued following an adjournment for the Authority to consider the material provided by the parties.

Key legal principles

[7] Section 127(4) of the Act requires the Authority, when determining whether to make an order for interim reinstatement, to apply the law relating to interim injunctions having regard to the object of the Act. Section 3(a) states the object of the Act as:

... to build employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship -

(i) *By recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour.*

[8] The following tests are relevant to an application for interim reinstatement¹:

- *Whether the plaintiff has an arguable case that he was dismissed unjustifiably as defined by s.103A of the Act;*
- *Whether the plaintiff has an arguable case for reinstatement in employment under s.125 of the Act if he is found to have been dismissed unjustifiably;*
- *Where the balance of convenience lies between the parties in the period until the Court's judgment is given on those issues; and*
- *The overall justice of the case.*

¹ *McKean v. Ports of Auckland Ltd* [2011] NZEmpC 128 at [4]

Relevant background

[9] Mr Bennett was informed by a letter dated 18 December 2014 signed by HCC's Divisional Manager, Human Resources, that the Council had received reports of possible drug use by some staff at Huia Pool. It had commissioned an independent fact-finding employment investigation and asked Mr Bennett to meet with the investigator as soon as reasonably convenient.

[10] Mr Bennett met the investigator, former Employment Relations Authority Member Denis Asher, on 22 December 2014. In the course of his interview with Mr Asher, Mr Bennett acknowledged occasionally smoking cannabis at home but said he never smoked cannabis at work. Mr Asher noted to Mr Bennett that he would be informing the employer of this acknowledgment.

[11] On Mr Bennett's return to work on 7 January 2015 following a period of annual leave, he was asked by an HCC manager to undertake a drug test. The manager handed Mr Bennett a letter dated 6 January 2015 and signed by Marcus Sherwood, a Divisional Manager for the respondent.

[12] The letter referred to Mr Bennett's admission to Mr Asher of recreational cannabis use; noted Mr Bennett's role was a *safety-sensitive* one; and stated that:

Because of our concerns and obligations regarding health and safety at the pool, and because of the potential for impairment from recreational cannabis use, we have decided to ask you to take a drug test under our probable cause testing policy.

[13] The letter informed Mr Bennett that, if he agreed to take the test, it would be carried out that afternoon and, if he declined to take the test, his response "*may be taken into account in any disciplinary outcomes*".

[14] Mr Bennett agreed to take the test and signed a consent form accordingly. The test, which was administered by the New Zealand Drug Detection Agency, proved "*non-negative*" for cannabis. He was suspended ("*stood down*") from duties on full pay pending confirmation of the result. A subsequent verification test carried out by Canterbury Health Laboratories confirmed a positive reading for cannabis. Mr Bennett remained on suspension from duties pending the outcome of Mr Asher's fact-finding investigation.

[15] Mr Bennett was asked, by letter dated 21 January 2015, to attend a formal disciplinary meeting with his employer. He was informed of his employer's concern that he had worked under the influence of drugs on 7 January 2015 and that he may have been doing so on prior occasions. The letter informed him that the Council considered the allegations to be serious and if substantiated, disciplinary action, including termination of his employment, could be the outcome. In the course of the disciplinary meeting that took place on 27 January 2015, Mr Bennett said he had last had a "*cannabis cigarette*" on New Year's Eve 2014.

[16] The Council's General Manager, Community Services, Matt Reid, notified Mr Bennett in a letter dated 29 January 2015 of the employer's proposed decision. This was that he had committed serious misconduct in breaching both the Council's drug and alcohol policy and its Code of Conduct. Mr Reid informed Mr Bennett of his belief that he would be justified in terminating Mr Bennett's employment summarily.

[17] However, in view of Mr Bennett's "*apparent honesty and request for the Council to consider rehabilitation*" during the disciplinary meeting, Mr Reid proposed an alternative outcome. This entailed Mr Bennett receiving a final written warning for serious misconduct and agreeing to undergo a Council-approved Drug and Alcohol Rehabilitation Programme (DARP).

[18] The programme would take three months to complete during which time Mr Bennett would be on unpaid leave. Upon successful completion of the programme, he would return to work to a full time lifeguard position and be paid at the rate for that role.

[19] Over the next five weeks, submissions were made on behalf of Mr Bennett, discussions took place and correspondence was exchanged between the parties. During this time HCC made offers to modify its original proposal. Documents attached to the parties' affidavits reveal the last offer to have been conveyed by telephone from counsel for HCC to counsel for Mr Bennett on the afternoon of 26 February 2015.

[20] This proposal entailed Mr Bennett receiving a final written warning and undergoing rehabilitation. He would remain on his current Operation Manager's salary and would perform alternative duties throughout the rehabilitation period. He

would then work as a lifeguard at a different pool until 1 October 2015 when he would be put back into a Team Leader position.

[21] That offer was rejected by email on 27 February 2015 in the course of which counsel for Mr Bennett asked for clarification regarding the serious misconduct for which a final warning was proposed, and sought further clarification of future pay increase implications for Mr Bennett. The email stated that Mr Bennett was now seeking dialogue to resolve issues and ended by asking that HCC be requested to reconsider its approach.

[22] The only response to that email was HCC's letter of 3 March 2015 in which Mr Bennett was given notice of the termination of his employment, on notice, effective from Friday, 6 March 2015.

Is there an arguable case for unjustifiable dismissal?

[23] The question of whether a dismissal is justifiable is to be objectively determined by applying the test set out in s.103A(2) of the Act which is "*whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred*". The Act sets out a number of procedural steps to be considered by the Authority in applying the test.

[24] Counsel for Mr Bennett submits HCC did not have reasonable cause to ask Mr Bennett for a drug test on 7 January 2015. He says the drug test was unlawfully obtained and cannot be relied on by HCC.

[25] HCC has a Drug and Alcohol policy that provides for testing if the Council has reasonable cause to suspect that the employee is working under the influence of drugs or alcohol. Schedule A of the policy states that:

When determining "reasonable grounds", physical symptoms and/or unusual or out of character onsite observable behaviours must be considered. Noticeable signs may incorporate more than one type of behaviour.

[26] The Schedule cites 26 examples of physical symptoms or behaviours in a non-exclusive list. There was no evidence presented to suggest that Mr Bennett was considered to have exhibited any such symptoms or behaviours.

[27] The schedule also states that:

Reasonable grounds testing may also take place where Council learns, in circumstances which suggests that the report may be credible and reliable, that the Employee... is working under the influence of drugs and/or alcohol or where the Employee... is observed using, possessing, distributing or consuming drugs or alcohol during work time or during any breaks, whether on or off Council premises.

[28] Submissions for HCC were that Mr Bennett's submissions on 22 December 2014 to Mr Asher regarding his occasional cannabis use were a sufficient basis for him to be asked to take a reasonable cause drug test.

[29] Drug testing was considered by the Employment Court in *Parker v. Silver Fern Farms Ltd (No 1)*² where Chief Judge Colgan stated:

Employee drug testing regimes impinge significantly upon individual rights and freedoms. Not only must policies and their applications meet the legal tests of being lawful and reasonable directions to employees, but, where these are contained in policies promulgated by the employer, these should be interpreted and applied strictly. A fair and reasonable employer in all the particular circumstances of a case is unlikely to have insisted justifiably on compliance with an unlawful and/or an unreasonable direction to an employee.

[30] While I make no final finding on this matter, I consider it to be strongly arguable that HCC asked Mr Bennett to submit to a drug test in the absence of reasonable cause as defined in its own Drug and Alcohol policy.

[31] If the drug test was taken without reasonable cause for requesting it, HCC's procedure flowing from that test will be compromised. I note that counsel for Mr Bennett has made a number of other submissions in relation to whether Mr Bennett has an arguable case. While there may be merit to some of those submissions, I do not find it necessary to explore them further at this point.

[32] I find an arguable case has been established that Mr Bennett was dismissed unjustifiably as defined by s.103A of the Act for the reasons stated above.

² [2009] ERNZ 301 at [26]

Does Mr Bennett have an arguable case for permanent reinstatement in the event he is found to have been unjustifiably dismissed?

[33] Reinstatement is no longer the primary remedy for a personal grievance for unjustifiable dismissal, but it remains a discretionary remedy that is available where it is found to be practicable and reasonable³.

[34] Mr Reid's evidence is that he was conflicted following Mr Bennett's positive testing for drugs. He needed to have trust and confidence in Mr Bennett but that had been adversely impacted by the results of the drug test. However, he was impressed by Mr Bennett's honesty about the private pressures he had been under at the time he said he had smoked cannabis, and by Mr Bennett's regret at having done so. Mr Reid was prepared to offer rehabilitation to Mr Bennett and to modify the terms on which that rehabilitation was to occur as a result of submissions by and on behalf of Mr Bennett.

[35] His affidavit evidence reveals that Mr Reid began to doubt Mr Bennett's sincerity following a meeting between the parties on 12 February 2015 attended by Mr Bennett, Fleur Fitzsimons, a PSA solicitor, and Mr Laird, a PSA organiser.

[36] Mr Reid's evidence makes it clear he lost patience and questioned Mr Bennett's motives when Mr Bennett rejected what Mr Reid described as "*the best possible rehabilitation plan opportunity*". It was shortly after that rejection that Mr Bennett's employment was terminated.

[37] Submissions by counsel for HCC are that reinstatement on either an interim or a permanent basis is neither reasonable nor practicable. The reasons given include the substantial harm that has been done to the relationship "*especially given the applicant's refusal to undertake a DARP*". Other reasons given are Mr Bennett's degree of fault in making the choices that led to his current predicament, and certain statements in Mr Bennett's affidavit evidence that HCC points to as demonstrating his belief that he is entitled to determine whether he is impaired at work or not.

[38] I have considered those submissions but disagree with them. I am persuaded by Mr Bennett's evidence that he was willing to undergo rehabilitation albeit he had reservations over some of the other terms proposed by HCC in relation to a final warning and alternative duties. I also note Mr Bennett has volunteered to undergo

³ Section 125 of the Act

fortnightly drug tests at his own expense until such time as the matter is resolved by the Authority.

[39] I have also considered Mr Reid's evidence that he has lost confidence that Mr Bennett can go back to his position as Operations Manager. I can to some extent understand that he was frustrated by Mr Bennett's rejection of the rehabilitation plan offered to him. However, I find that Mr Reid's willingness over a period of several weeks to contemplate rehabilitation points to the reasonableness and practicability of Mr Bennett's reinstatement in the longer term provided that suitable conditions can be put in place.

Where does the balance of convenience lie between now and the determination of Mr Bennett's personal grievance?

[40] This test requires a consideration of the detriment that Mr Bennett and HCC may incur as a result of interim reinstatement being granted or not. It also entails an inquiry into whether an adequate alternative remedy is available to Mr Bennett if he is not reinstated but is ultimately successful in his claims.

[41] Mr Bennett has been away from his position since being stood down in early January 2015 and his remuneration will cease from 2 April 2015. His affidavit evidence refers to the possibility of losing his house. Mr Bennett has also stated his unwillingness to accept a position of lifeguard at another pool which he refers to as a "*big demotion*". I note he supplied his employer with a clean drug test result undertaken at his own expense on 26 February 2015, evidence of which was attached to his affidavit.

[42] HCC submits that the financial impact upon Mr Bennett would be mitigated if he were to succeed in his claims at the substantive investigation due to take place in approximately 10 weeks. While that is correct, it does not take account of an employee's right to work and maintain skills and that is something which has been recognised as a valuable right: *Auckland District Health Board v. X (No 1)*⁴.

[43] HCC also submits that the factor weighing most heavily is that of trust, not only its trust in the applicant, trust that he will not consume drugs and will not endanger other staff and the public, but that he will not pose a risk to others in the workplace.

⁴ [2005] ERNZ 487

[44] I have considered that view and while I accept that safety is a significant consideration for the respondent, I believe its concerns can be adequately addressed by putting in place conditions for Mr Bennett's return which entail not only rehabilitation but regular drug testing.

[45] With that proviso, I consider the balance of convenience to favour Mr Bennett.

Where does the overall justice lie?

[46] I am required, having considered the other tests for interim reinstatement, to stand back and consider where the overall justice lies until such time as the substantive investigation of the matter takes place. This includes reflecting on the strengths of the respective parties' cases, bearing in mind that there has not yet been an opportunity for thorough testing of the evidence.

[47] I have found Mr Bennett to have an arguable case under s.103A of the Act to have been unjustifiably dismissed. I found it strongly arguable that he was asked to take a drug test in circumstances where his employer did not have reasonable cause for that request. I have found he has an arguable case for permanent reinstatement in the event that his claim to have been unjustifiably dismissed succeeds at the substantive investigation. I have also found the balance of convenience to favour him rather than HCC.

[48] On the basis of the findings I have made in relation to the tests above and, in particular, to the issue of reasonable cause for asking Mr Bennett to take a drug test, I am persuaded that the overall justice favours Mr Bennett.

Determination

[49] This leads me to determine that Mr Bennett should be reinstated with immediate effect until such time as his substantive claims have been determined in the Authority. However, I am mindful of HCC's concerns and obligations with regard to health and safety and, for this reason, Mr Bennett's interim reinstatement is subject to the following conditions, as permitted under s.127(5) of the Act:

- (a) Mr Bennett must agree to undertake a rehabilitation programme (DARP) as reasonably directed by HCC;

- (b) Mr Bennett must agree to undertake alternative duties during his period of rehabilitation;
- (c) During this time, Mr Bennett is to be remunerated as Operations Manager; and
- (d) The parties are directed to mediation urgently for the purpose of agreeing, if possible, the alternative duties to be undertaken until Mr Bennett has successfully completed the DARP. In the event they do not agree, those alternative duties shall be as reasonably determined by HCC.

Costs

[50] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority