

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN John Bisson (First Applicant)
AND Carl Gardner (Second Applicant)
AND Andrew Cameron (Third Applicant)
AND Martin King (Fourth Applicant)

AND Air New Zealand Limited (Respondent)

REPRESENTATIVES Andrew Little, Counsel for Applicants
Peter Kiely and Daniel Erickson, Counsel for Respondent

MEMBER OF AUTHORITY Paul Montgomery

INVESTIGATION MEETING 31 March 2005

DATE OF DETERMINATION 4 April 2005

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] The applicants were dismissed from their employment with the respondent on 26 November 2004. They have lodged personal grievances claiming their dismissals were unjustified. In an application lodged with the Authority on 9 March 2005, their counsel Mr Little, sought interim reinstatement for them supporting the application with an affidavit from each applicant.

[2] The respondent denies the dismissals were unjustified and opposes the application for interim reinstatement.

The issues to be tested

[3] The Authority adopts the tests to be applied in applications for interim relief as they are set out in the High Court rules.

[4] They are:

- Does the applicant party have an arguable case;
- Where does the balance of convenience lie;
- The overall justice of the case.

[5] The Authority needs also to consider the adequacy of remedies available to the unsuccessful party.

Arguable case

[6] Mr Little is correct when submitting that on the untested evidence before it, the Authority is unable to determine the possible failure of the respondent to sufficiently induct and train the applicants in the company's policies and protocols regarding internet use and disclosure of personal passwords.

[7] For the applicants Mr Little submits that the respondent, at the time of the dismissals, had insufficiently detailed information on which to base its decision to dismiss.

[8] Mr Kiely submits that in order to succeed in meeting this interim test, the applicants must also establish an arguable case that if their grievance claims are successful they will be reinstated and not merely compensated in monetary terms. He submits that in the affidavits provided to the Authority the applicants have not established a sufficiently robust evidential basis to support the Authority finding an arguable case is available to them.

[9] The applicants however, are issuing a determined challenge based on the accuracy and adequacy of the information on which the decision to dismiss was based.

[10] The threshold for meeting the criteria for an arguable case is relatively low and I find in this case the applicants have met that standard.

Balance of convenience

[11] Under this test the Authority is required to weigh in the balance the relative detriment to either party in electing to make or not make the orders sought by the applicants.

[12] For the applicants Mr Little submits that they have been out of work for a considerable period and that while each has secured casual or temporary work assignments, they have individually suffered financial detriment. Further, he submits that two of the applicants secured work with a contractor servicing the gardens and surroundings of the respondent's premises, but lost that work due to the alleged interference of the respondent.

[13] Mr Little submits the cost to the employer in meeting an interim reinstatement order would be modest, and the security for costs provided gives the respondent the assurance of reimbursement should the company successfully repel the applicants' challenge at the trial of the substantive issues.

[14] Further, Mr Little challenged the employer's claim that it had lost trust and confidence in the applicants due to their alleged breaches of company policy and procedure. He opined that in this case loss of trust and confidence was *too trenchant* a phrase to describe the true position as he said, fellow workers did not have difficulty working with their former colleagues.

[15] That is not actually the point. Whether the company can substantiate its claim of loss of trust and confidence is a matter to be tried later and does not hang on the perception of fellow workers but on that of the company.

[16] Mr Kiely mounted a substantial attack on the applicants' cases in this section of his submissions. In addressing the adequacy of damages he submitted that the applicants could be adequately compensated should they succeed in their grievance claims. He also sought to distinguish this matter from that of *Cliff and Groom v Air New Zealand Limited*, pointing out that the applicants in this case were considerably less specialised and thus more able to find alternative employment than the two highly specialised engineers involved in the other matter.

[17] In his submissions Mr Kiely strongly challenged the adequacy of the undertaking as to damages. He said, *The Authority should take care that an undertaking that is filed is sufficient to provide the protection envisaged by the Act; and The EPMU is not a party to the proceeding and the Authority has no jurisdiction to award damages against it.* Mr Kiely referred me to several cases which I have studied following the investigation meeting. Each is, in my view, clearly distinguishable from the instant case.

[18] In giving the undertaking, the union has agreed, contracted if you will, to *abide by any order that the ERA may make in respect of the damages.* In essence the EPMU has waived its position as a non-party and agreed to make good the undertaking it has given. In such circumstances the Authority accepts the undertaking, and should it be required will call in the undertaking given. The ability of this union to meet any such demand is not questioned by the Authority.

[19] Mr Kiely also addressed the matter of third party impact in the event of an interim reinstatement being ordered. His submissions were confined to consideration of those who had replaced the dismissed applicants and to the potential for sexual harassment in the workplace. I heard no allegation that any applicant had forwarded undesirable material to others, and simply observe that if the company chose to permanently replace the applicants when a challenge to dismissal was highly probable, that may provide it with some difficulties but they are unlikely to be insurmountable.

[20] In his submissions Mr Kiely also referred to the delay in the making of the application for reinstatement to the Authority.

[21] Having heard only from counsel on this matter the Authority sets this issue aside for the present. It will be examined fully in the substantive investigation on an evidential rather than a submissions basis.

Overall justice

[22] Mr Kiely based his submissions on the issue of *low chance of success* for the applicants. He referred me to several cases including *W & H Newspapers Ltd v Oram* [2002] 2 ERNZ 448. His submissions are sound and yet the Authority is faced with a claim that the employer failed to induct and train the applicants in the appropriate use of the internet and that the information upon which the dismissals were based was insufficiently precise and specific to allow the employer to summarily dismiss. These are serious allegations and need to be fully tested.

[23] Having considered the matter carefully the balance in this particular matter is rather fine. However, I find that the weight modestly favours the applicants. It falls now to them to establish the unjustifiability of their dismissals.

Determination

[24] Returning applicants to the payroll without requiring them to work for their wages pending the Authority's determination of the substantive issues is not a particularly just situation from an employer's perspective. Accordingly, I order that the applicants are to be reinstated on an interim basis effective at 7.30 am on Wednesday, 6 April 2005.

[25] The reinstatement order is subject to the following conditions:

- (a) Each applicant is to change his log on ID and password immediately upon returning to employment.
- (b) Each applicant is to hold his access codes in total confidence.

- (c) The respondent is to disable internet access to each of the terminals operated by the applicants prior to their interim reinstatement.
- (d) Each applicant is prohibited from operating any computer terminal other than his own for whatever purpose.
- (e) Each applicant, if required to leave his computer terminal, must ensure it is logged off and inaccessible to all other personnel.
- (f) Each applicant who is required in the course of his duties to access the internet is to have his supervisor (or a person designated by the respondent) undertake such access on his behalf. The supervisor (or designated person) is to record such access on an event by event basis.
- (g) Each applicant is to refrain from discussing any matters related to his dismissal, interim reinstatement or his personal grievance with any person within the workplace.

[26] If, at the respondent's election, it prefers to return the applicants to the payroll and not have them attend at the employer's premises for work, formal notice of such an election is to be served on the applicants, their counsel and the Christchurch office of the Employment Relations Authority no later than 4 pm on Tuesday, 5 April 2005.

Paul Montgomery
Member of Employment Relations Authority