

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA201/09  
5159479

BETWEEN                      TRUDY BUTTERWORTH  
   Applicant  
  
AND                                TBA COMMUNICATIONS  
   LIMITED  
   Respondent

Member of Authority:        Alastair Dumbleton  
  
Representatives:              Mark Ryan, counsel for Applicant  
   Richard Harrison, counsel for Respondent  
  
Investigation Meeting:        16 June 2009  
  
Determination:                23 June 2009

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**DETERMINATION OF THE AUTHORITY**

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**Application for interim reinstatement**

[1]     Under s 127 of the Employment Relations Act 2000, Ms Trudy Butterworth seeks interim reinstatement to the employment she had with TBA Communications Limited (TBA) but was dismissed from.

[2]     Ms Butterworth was given notice of termination in mid March 2009, when she was advised by TBA that it intended to proceed with restructuring affecting her position.

[3]     Ms Butterworth raised a grievance challenging the justification for her dismissal, alleging that redundancy was not a genuine reason for it and that TBA had not followed a fair process in terminating the employment.

[4]     The application for interim reinstatement was lodged in the Authority on 22 April 2009. In a reply from TBA the company contended that the employment

was terminated on the grounds of genuine redundancy after following a fair and lawful procedure.

[5] The parties attended mediation on 7 May 2009 but were unable to resolve the employment relationship problem.

[6] Ms Butterworth seeks an order requiring TBA to reinstate her pending the full investigation and substantive determination of the grievance claim. The substantive remedies claimed by her to resolve the unjustified dismissal claim are permanent reinstatement, compensation for lost earnings and compensation for loss of dignity and injury to feelings.

[7] As required by s 127 of the Act, an undertaking has been given by Ms Butterworth to abide by any order that the Authority may make in respect of damages.

[8] In considering interim reinstatement applications, the Authority is required to apply the law relating to interim injunctions and to also have regard to the object of the Act. The relevant law requires that four recognised tests or questions are to be applied to the circumstances of each case. In relation to the object of the Act, the Authority must have regard to the principle that productive employment relationships are founded on good faith behaviour and also on mutual trust and confidence.

[9] A further relevant object of the Act, at s 101C, is the recognition of reinstatement as a remedy for any personal grievance. It has been made the primary remedy under s 125.

[10] In accordance with usual procedure, the evidence before the Authority for the purpose of determining the application was presented in affidavit form by the parties' witnesses, Ms Butterworth and Mr William Carruthers on behalf of TBA.

[11] As the evidence must necessarily remain untested until the substantive investigation of the grievance, any findings of fact by the Authority in this determination are provisional only and may change later after the claims have been fully investigated and once all witnesses, including Ms Butterworth and Mr Carruthers, have been examined about their evidence where necessary.

[12] The standard tests or questions the Authority must consider in determining this application are:

- Is there an arguable case?
- Is there an alternative remedy available?
- Where does the balance of convenience lie?
- What is the overall justice of the case?

[13] Ms Butterworth commenced employment with TBA in May 2003. Her position was described in the employment agreement as “*Mac Operator Part Time*,” and the hours of work were to be 9am to 2.30pm. Initially those hours were worked on three days a week, but by the beginning of January 2009 the total had increased to 25 hours each week. She had also been promoted in July 2007 to “*Studio Manager/Mac Operator*.”

[14] From the affidavit evidence there is no dispute that in January 2009 Mr Carruthers raised with Ms Butterworth the prospect of making her Studio Manager position full time. Further discussions took place about that issue over the next few weeks. The evidence of Ms Butterworth is that although she questioned the need for a full time position she told Mr Carruthers she could extend her finish time until 4pm each day. Her evidence is that on 4 March 2009 she advised Mr Carruthers that she could work the hours but that he had told her the job would be advertised and she could apply for it.

[15] After she had received the advertisement for a full time studio manager she raised a disadvantage grievance. On 13 March she was advised that restructuring was going to proceed and that her final day of employment in her role would be 4 April 2009. Ms Butterworth did not apply for the advertised position.

[16] She denies that Mr Carruthers at any time discussed with her restructuring as the reason for disestablishing her part time role and creating a full time position. She maintains that the full time position advertised was substantially similar to hers, the only difference being that it was labelled as full time whereas she had been working, and had agreed to work, until 4pm as her normal hours.

[17] A major point of difference in the evidence of Mr Carruthers is his claim that from the first discussions in early January 2009 he had used the word “*restructure*” to make it clear that a significant change was being proposed to Ms Butterworth’s position. He also maintains that she was given an opportunity to provide feedback, which she had done, and that there was further discussion several times about whether she would be able to work full time. He says she made it clear she would not.

[18] Mr Carruthers’ evidence is that on 2 March he told Ms Butterworth of his decision to proceed with the restructuring and advertise for a full time Studio Manager. He says that he told her an application from her would be considered favourably because of her service and experience in the role.

[19] Mr Carruthers confirmed that Ms Butterworth had raised her disadvantage grievance on 10 March 2009 but says it was not until 1 April that she advised that she did not wish to apply for the advertised role.

[20] In opposition to the application for interim reinstatement, Mr Carruthers claims that the previous role performed by Ms Butterworth no longer exists and there has been an appointment made to the advertised position of full time Studio Manager.

### **Arguable case**

[21] I find that Ms Butterworth has an arguable case that she was unjustifiably dismissed. This was conceded by Mr Harrison counsel for TBA.

[22] Her claim meets the relatively low threshold under this particular test of raising a serious question as to whether TBA consulted Ms Butterworth about a proposal to restructure her part time position and also whether, on 4 March 2009, she had accepted the full time position when Mr Carruthers discussed it with her. If she did, TBA’s actions in advertising that position and appointing someone else to it could not be justified.

[23] Ms Butterworth’s evidence about this is that when she told Mr Carruthers she could work the hours, he had advised that a copy of the advertisement would be given to her so that she could apply.

[24] Although I have found the existence of an arguable case, I consider that Ms Butterworth’s affidavit evidence of acceptance of the full time position is not

strong. It seems to me that if Ms Butterworth had unequivocally accepted the requirement to work until 5.30pm she is likely to have been given the position, as there is no suggestion that TBA held any concerns about her ability to perform the role. The only issue was the daily hours she was able to work for.

### **Availability of adequate alternative remedies/balance of convenience**

[25] I find the balance of convenience favours TBA.

[26] A person has now been appointed to the position of Studio Manager, following the termination of Ms Butterworth's employment.

[27] It seems almost inevitable, as both parties accept, that interim reinstatement, if granted, would not result in Ms Butterworth performing the role of Studio Manager (in which someone else is currently employed), but in her being placed on garden leave. That situation highlights the other aspect of this test that an adequate remedy is available to compensate Ms Butterworth for what she will lose in the interim if not reinstated. Her loss would be remuneration payable while on garden leave rather than the opportunity to perform her occupation.

[28] While she currently has no income, an order for lost remuneration, if her grievance is successful, can include loss of interest on the money. The remedy of compensation is also available to redress harm caused to Ms Butterworth through any actions of the employer found to have been unjustified.

[29] A further aspect of this situation is that the position to be reinstated to is the part time role, which no longer exists, although the argument is as to whether the employer's actions in disestablishing the part time role were lawful

[30] I also take into account under this test the relatively short period of time there will be before a substantive investigation meeting can take place, probably next month in the week commencing 27 July. I find it is more convenient for the present post dismissal situation to be maintained until the grievance can be finally determined.

### **Overall justice of the case**

[31] Standing back and looking globally at the situation presented in evidence and submissions, the Authority finds that the overall justice of the case favours TBA. Therefore, the Authority must decline to order interim reinstatement.

[32] Although an arguable case is present, it is not one of any great weight or strength and is not sufficient to influence the overall justice to the point where an order should be granted.

[33] The evidence, although in affidavit form, raises no suggestion that this was not a genuine redundancy situation in the sense that the decision to disestablish or change Ms Butterworth's position was driven by commercial considerations rather than anything to do with Ms Butterworth personally or her performance. Mr Carruthers' untested evidence points to a genuine redundancy situation existing.

[34] It seems more likely that if Ms Butterworth were to succeed with her grievance claim it would be because of the alleged failure on the part of TBA to consult with her before implementing the restructuring. Also, it is possible that a finding could be made on the evidence, once it has been given and tested, that Ms Butterworth did signify her acceptance of a position offered to her in the full time role discussed by Mr Carruthers. Success with her grievance on this basis would not necessarily lead to reinstatement as being a practicable remedy in the circumstances where an appointment has been made to the position advertised, and more likely the remedies would be monetary only, to address lost wages and hurt feelings, humiliation and distress.

### **Determination**

[35] For the reasons given above, the Authority declines to grant interim reinstatement to Ms Butterworth.

### **Further directions**

[36] The Authority has a number of available dates from mid-July to the end of that month on which the investigation meeting may take place. Contact will be made with counsel, Mr Ryan and Ms Stone, to consult them before fixing the date. Further directions will also be given for written statements of evidence to be provided by the parties' witnesses.

## **Costs**

[37] Costs are reserved.

A Dumbleton

**Member of the Employment Relations Authority**