

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN David Coom (Applicant)
AND Christchurch City Council (Respondent)
REPRESENTATIVES Jeff Goldstein, Counsel for Applicant
Susan Hornsby, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 27 May 2005
DATE OF DETERMINATION 30 May 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] David Coom was dismissed on 20 April 2005. In a statement of problem lodged in the Authority on 13 May 2005, he says that his dismissal is unjustifiable. One remedy being sought by Mr Coom is interim reinstatement to his former position and he has provided the necessary undertaking for damages. The Christchurch City Council says that it justifiably dismissed Mr Coom for serious misconduct and it opposes interim reinstatement.

[2] The parties attended mediation on 5 May 2005 following a request on 21 April 2005 for mediation assistance. During a phone conference with the Authority, both counsel agreed that further mediation would not assist to resolve the problem. We canvassed whether there could be an early date for a substantive investigation meeting but mid July was the earliest time available. As a result, counsel for Mr Coom asked for a date to be set to investigate interim reinstatement. While the Authority was available earlier, the soonest that both counsel were reasonably available was 27 May 2005. At that meeting, affidavits dated 13 May and 26 May from Mr Coom and an affidavit dated 25 May from Lesley Symington (Mr Coom's manager) were considered as well as helpful submissions from both counsel. The following description of events is for the purposes of resolving the interim reinstatement application. Final findings of fact have to await a substantive investigation meeting, now set for 21 & 22 July 2005.

[3] In any event, there is little or no dispute about what happened. The heart of the grievance dispute is whether the Council was entitled to reach the conclusions it did about Mr Coom's intentions. The question of the Council's justification for its decision, to the extent it is relevant for present purposes, must be considered in light of the statutory test for justification set out in section 103A of the Employment Relations Act 2000 (as amended). Bearing that in mind, it will be helpful to describe what happened, assess whether Mr Coom has an arguable case, consider where the balance of convenience will lie between now and a final decision and determine whether the overall justice favours granting or refusing interim reinstatement.

What happened?

[4] Mr Coom was a *Team Leader, Community Services* from October 2002 until the dismissal. He directly managed about 11 staff and indirectly managed about 50 others. His total remuneration was about \$80,000.00 per annum. The job value statement says that the job exists to add value by establishing and providing leadership to the Community Services Team. It is a senior position within the Council's Community and Recreation Department. Through that Department, the Council contracts with non government community organisations to provide community services for the Council. One such organisation is the Youth and Cultural Development Society Inc (YCD). YCD's manager is Anni Watkin. YCD is required to regularly invoice Council for services provided and Mr Coom's role was to approve invoices for payment by the Council in accordance with the arrangements between Council and the provider.

[5] YCD sent an invoice dated 25 November 2004 to the Council. The payment was approved by Mr Coom and YCD received it on 9 December 2004. Unfortunately, YCD had to break a term investment to cover its outgoings between those dates which resulted in a loss of \$963.00. YCD blames delays caused by the Council for that loss. Mr Coom says that he told Ms Watkin that the *Council would try and reimburse this money as it was our fault that their invoice had been paid late*. YCD sent an invoice (number 862246) dated 11 January 2005 for the contractual payment of \$27,500.00 plus *lost of Interest 900.00*. After that invoice arrived, Mr Coom or someone from the Council must have told Ms Watkin that a claim for interest would not be paid. YCD sent a replacement invoice (number 862247) dated 25 January 2005 for just the contractual payment of \$27,500.00. Mr Coom approved that invoice for payment. On 4 March 2005, Mr Coom left a phone message for Ms Watkin including *...you know that extra money we owe you, about nine-hundred and something? Erm, do you think you could send an invoice in for, erm, erm, and I suggest you head it up, erm ertra training, extra staff training and supervision support. Extra staff training and supervision support, just send it to me. ...* Soon after, Mr Coom contacted Ms Watkin on her cellphone and conveyed the same information to her. In his affidavit, Mr Coom says that he told Ms Watkin that *it was unlikely that this would get through our system as the Council does not pay interest*. He says he suggested that YCD look at some other legitimate costs associated with the programme such as staff training or supervision and the Council could make a grant. It is not clear whether this was said just before the 25 January 2005 invoice or is his account of the phone message and discussion both of which occurred on 4 March 2005.

[6] Following the phone message and discussion, YCD sent a further invoice (number 862250) dated 8 March 2005 for *Lost Interest 963.00*. Mr Coom wrote on this invoice *Sponsoring general training & development of staff at YCD for delivery on contract*. He approved it on 10 March 2005 by signing and dating it and forwarded it through the Council system for payment. An accounts payable officer queried the payment with his or her manager and there was some email communication between various managers before the matter was referred to Ms Symington by the Principal Accountant. Ms Symington was asked if she was aware of any arrangement where Council committed to provide grants by a certain time or reimburse for lost interest. Ms Symington forwarded the email traffic to Mr Coom at 8.53 am on 14 March with her own message: *We need to discuss this*. At some point later that day, Mr Coom went to Ms Symington's office.

[7] It is accepted that Mr Coom was not told that his employment was in jeopardy or afforded any of the cautions that often accompany disciplinary meetings. Mr Coom gave an explanation of events as above and Ms Symington advised him to speak with the Principal Accountant. They then talked about other business. Mr Coom sent an email at 1.46 pm on 14 March 2005 to the Principal Accountant referring to a discussion that morning where he acknowledged his actions were inappropriate and apologising for the extra work his actions had caused. Mr Coom also sent an

email to Ms Symington summarising his discussion with the Principal Accountant and then said *He seemed OK with all of that but whether he will continue to take it further I don't know*. Part of Mr Coom's grievance is that he believed that his discussion with Ms Symington was the end of the matter. I do not see how that argument could prevail when the exchanges with the Principal Accountant followed the meeting with Ms Symington and Mr Coom's email indicates uncertainty about ...*it*, which is a reference his conduct, the explanation and apology in the face of obvious dissatisfaction at a senior level.

[8] Unbeknown to Mr Coom, Ms Watkin had communicated with the general manager responsible for this part of the Council's business and met with him on 15 March 2005. Ms Watkin also wrote a letter to the general manager at his request. The gist of the letter is that YCD was promised payment by a certain date, had to break an investment because of the late payment, received a commitment from Mr Coom to reimburse the loss, sent the 11 January 2005 invoice, was requested by Mr Coom to rewrite the invoice without the reference to interest, and later received the phone message and call on 4 March 2005. Ms Watkin says that she told Mr Coom on 7 March that she would not write an invoice for staff training when it was not for that but she would write an invoice for lost interest hoping that the payment would be honoured. Ms Watkin's account differs from Mr Coom's.

[9] Ms Watkin's communications with the general manager caused him to communicate with Ms Symington. The general manager made it clear to Ms Symington that he saw it as a serious matter and met with her to discuss how it was *to be investigated and make sure appropriate action is taken*. Following this, on 23 March 2005, Ms Symington wrote to Mr Coom to initiate a disciplinary process about his *facilitation and attempted processing of an invoice ...and allegations of financial impropriety, action intending to deceive your employer and action bringing your employer into disrepute*.

[10] Mr Coom instructed a barrister experienced in employment matters who wrote conveying the assertion that the matter had been concluded by the earlier meeting but requiring relevant documents before any further meeting. It took some time to organise a meeting (not due to the Council), in advance of which Mr Coom through counsel provided a written explanation. That letter says that Ms Watkin agreed with Mr Coom to invoice Council for legitimate YCD services instead of interest. Mr Coom was surprised when the 8 March 2005 invoice for lost interest arrived but altered the invoice by adding the words mentioned above. Mr Coom did not hide or conceal anything and had no intention to deceive or mislead anyone. The letter also alleges that there had been a number of issues between Ms Watkin and Mr Coom over the past few years. Matters were discussed at meetings on 14 April 2005 and 20 April 2005. There is a suggestion by Mr Coom that Ms Symington was aggressive and there was an element of predetermination. The evidence in support of those claims is scant.

[11] The 20 April meeting ended with Ms Symington telling Mr Coom that she had decided to dismiss him as she was satisfied that he had deliberately altered the invoice to cover up his failure in making the late payment to YCD. That affected her trust and confidence in him and the dismissal was effective immediately. Later, Mr Coom received a letter dated 22 April 2005 confirming the dismissal as Mr Coom *deliberately falsified an invoice and approved it for payment. ...[A]llegations of financial impropriety, action intending to deceive your employer and action bringing your employer into disrepute were substantiated*. Mr Coom was paid 4 weeks salary in lieu of notice.

Arguable case?

[12] On the information available, I find that there is not an arguable case in respect of Mr Coom's assertion that the matter was ended as a result of his discussion on 14 March 2005 with Ms Symington.

[13] I find that there is arguably an element of predetermination apparent from the tenor of the communication between the general manager and Ms Symington about what should happen. I further find that it is arguable that the Council failed to allow Mr Coom a fair opportunity to respond to the allegations being made against him. Both these aspects emerge from the disclosure by the Council of email communication and a meeting between the general manager and Ms Watkin and between the general manager and Ms Symington. All that had previously been disclosed by the Council to Mr Coom was a copy of Ms Watkin's letter of complaint. It may be that important aspects of Ms Watkin's account were conveyed or reinforced by her in her meeting with the general manager but are absent from her letter. Having found that these points are arguable, I emphasise that it is a low threshold. On the material before me, neither point constitutes a strong case for eventual reinstatement. These are rather matters that I would want to investigate more closely at the substantive meeting.

[14] Counsel for Mr Coom referred to other documents annexed to Ms Symington's affidavit that had not been provided in response to his request for information before the 14 April 2005 meeting. However, the contents of those documents were all known to Mr Coom. Two of the documents are his own emails created after Ms Symington first spoke to him. I find that no unfairness, even to an arguable standard, arises.

[15] The Council's justification for the dismissal must be judged in accordance with section 103A of the Employment Relations Act 2000. The Authority must determine, objectively, whether how the Council acted was what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. There was disagreement between counsel, as there has been more widely, over whether the application of this test makes it more difficult for an employer to justify a dismissal. That comparative debate is not of much assistance at present. The most important aspect in the present case is whether Mr Coom intended to hide a failure to make a timely payment and YCD's displeasure by encouraging a claim and facilitating its payment knowing that the Council had a policy against covering the sort of loss incurred by YCD. Without that intention and knowledge, it is strongly arguable that he should not have been dismissed. The material from which Mr Coom's intention was inferred was Ms Watkin's account of events. At present, I accept that Mr Coom's steadfast denial of a deceitful intention might be preferred to the Council's inference of deceit so it is arguable that he was unjustifiably dismissed.

[16] Counsel for Mr Coom submitted that there is a strongly arguable case of unjustifiable dismissal. If Ms Watkin's account is accurate, it will be difficult for Mr Coom to avoid the inference drawn by the Council. Mr Coom pointed to issues said to exist between himself and Ms Watkin. At this stage, I find they raise a doubt but not a strong one about her account. As a result, I disagree that Mr Coom's is a strongly arguable case of unjustified dismissal.

Balance of convenience

[17] I find this favours the Council.

[18] Mr Coom wants to have his reputation restored because he believes that his career prospects within the not for profit sector are otherwise difficult. There was some media publicity about the

dismissal under the headline *Council catches fraud bid*. While Mr Coom was not named it is likely that any prospective employer would ask about the circumstances of the ending of his most recent employment. It is understandable that public vindication is important for Mr Coom. I should note that the Council seems to have dealt with the media interest in a manner sensitive to Mr Coom's situation and the headline was not created by the Council. Counsel for the respondent made the point that Mr Coom cannot achieve any meaningful vindication by interim reinstatement because it is too soon to express final findings of fact. That must await a full investigation after the evidence has been tested.

[19] Mr Coom's prospects for reinstatement following a substantive investigation are not impaired by maintaining the status quo until July. The Council has sufficient resources to cover Mr Coom's absence meantime in a way that does not negatively affect Mr Coom's prospects for establishing the practicability of reinstatement in July. As the Council knows, any contrary argument based on change in its circumstances over the interim would not be persuasive.

[20] I conclude that what Mr Coom seeks cannot be achieved by interim reinstatement and that his future as a professional community services manager, if wrongly affected by the Council, can be effectively restored in due course by permanent reinstatement and compensation.

[21] No other harm not capable of being met by an adequate award of compensation was advanced by Mr Coom.

[22] Mr Coom's position is one of significant responsibility. The Council rightly should expect high standards of integrity. Ms Symington makes the point that she would be unable to trust Mr Coom if he was reinstated in the interim. That would create some difficulty for Ms Symington. It would also cause disruption, confusion and stress for staff who directly and indirectly report to Mr Coom's position. Ms Symington's other point is that interim reinstatement would convey the message that the Council is unable to enforce adequate controls to safeguard ratepayers funds. On the assumption that the Council is able to establish justification for the dismissal, these effects between now and July are not insignificant and could not be remedied by an award of damages.

Overall justice

[23] Counsel for Mr Coom referred me to *Melville v Chatham Islands Council* [1999] 2 ERNZ 76 as an example of a similar case where the employee received interim reinstatement. I was particularly referred to the view of the Chief Judge at page 100 that it is not often that the employer can establish that it is favoured by the balance of convenience test.

[24] There are important differences between the cases. In *Melville* the employee established a strongly arguable case that he should not have been dismissed. For the reasons expressed above, I do not assess Mr Coom's case in that way.

[25] In *Melville* the employment was the employee's *single most valuable asset, if not his only asset*. There was evidence of the employee's *quite dire* personal circumstances. In those circumstances, the inconvenience to the employer of interim reinstatement could not outweigh the harm to the employee if not reinstated meantime. Here, Mr Coom's application for interim reinstatement essentially relies on his quest for vindication that his behaviour was just an error of judgement and not deceitful. As explained, that vindication is not achieved by interim reinstatement and the prospects for it shortly after the investigation meeting scheduled for July are not materially worsened by not awarding interim reinstatement.

[26] Having found that the balance of convenience favours the Council, there is nothing else about the respective case at this point that would cause me to award interim reinstatement.

Summary

[27] I decline the application for interim reinstatement.

[28] The parties should consider further mediation assistance.

[29] There is agreement about an early sequential exchange of statements of evidence in advance of the investigation meeting. The Authority will contact the parties to arrange a phone conference to attend to any other preliminary points.

[30] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority