

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 308
5346552

BETWEEN HAYLEY CHAIMOWITZ
Applicant

AND GOLDMAN HENRY
CAPITAL MANAGEMENT
LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Jo Phipps, advocate for Applicant
Andrew Caisley, counsel for Respondent

Investigation Meeting: 7 July 2011

Determination: 14 July 2011

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

[1] The applicant, Ms Hayley Chaimowitz, was employed by the respondent, Goldman Henry Capital Management Limited (GHCM), from May 2009 until May 2011 when she received written confirmation that her employment was being terminated on the grounds of redundancy.

[2] Ms Chaimowitz raised personal grievance claims of unjustified dismissal and disadvantage on 27 May 2011. Following an unsuccessful mediation with GHCM in mid June, she applied to the Authority under s 127 of the Employment Relations Act 2000 for an order of interim reinstatement.

[3] As required by s 127, an undertaking was given by Ms Chaimowitz to abide by any order to pay damages made by the Authority in determining her employment relationship problem.

[4] To resolve her grievance Ms Chaimowitz seeks reinstatement to her previous position of employment, or to one substantially similar, reimbursement of lost remuneration for a period of three months and reimbursement for the loss of the paid leave available under the Parental Leave and Employment Protection Act 1987. She also seeks compensation for emotional distress caused by her dismissal, pursuant to s 123(1)(c)(i) of the Employment Relations Act.

The employment

[5] Under the written employment agreement between Ms Chaimowitz and GHCM her position was described as Analyst; Special Projects Manager of GHCM which is a financial services company. Later during her employment she was referred to as the Chief Financial Officer or CFO of the firm. Her experience as an Investment Banker was set out in a CV she had provided to her employer.

[6] When she commenced employment Ms Chaimowitz had a child of about one year old. She became pregnant again in 2010 and informed Mr Brian Henry, Managing Director of GHCM, about seven weeks later.

[7] Upon the birth of her baby, expected to be on 30 June 2011, Ms Chaimowitz intended taking paid parental leave from GHCM under the Parental Leave and Employment Protection Act. She made inquiries with the government departments that administer that Act about her eligibility to the leave. She understood that her first payment under the Act would be made by the Inland Revenue Department a week in arrears on 7 July 2011. An application for the 14 weeks paid leave was completed by Ms Chaimowitz and signed by Mr Henry on 22 March 2011.

[8] When Ms Chaimowitz first advised Mr Henry of her pregnancy a discussion took place around a request she made for her statutory parental leave pay to be topped up by GHCM and, upon her return to work, for her salary to be increased. There is an issue between Ms Chaimowitz and Mr Henry as to whether the discussion led to any agreement. Ms Chaimowitz sought extra pay she said because of the added cost and pressure of having a second child. She said in her affidavit evidence that she became concerned enough about her financial situation with the expected addition to her young family that she wrote to the Chairman of GHCM about it.

[9] At the beginning of 2011 compliance processes and procedures used by GHCM underwent review by the firm. Issues of concern were identified with a

number of the firm's practices. In respect of one of those a need was seen for segregating the performance of particular duties so as not to have them carried out by the same person. Having them split up to be performed by more than one staff member was seen as an effective measure that could be taken to reduce the risk of an employee dishonestly misusing a position for financial or other advantage. The need to separate out the functions of initiating, conducting and reconciling financial services transactions, work Ms Chaimowitz had been doing, in particular was seen as a key issue by GHCM and by its accountants, auditors, other advisers and board members.

[10] Ms Chaimowitz was advised on 15 March that a proposal had been developed to remedy the issue by separating out strands of work concerned and placing them in different hands. As her role was responsible for the three work strands, her CFO position would be disestablished if the proposal was implemented. In that event a new part-time role was to be created and the remaining tasks of the CFO contracted out. In presenting the issue to Ms Chaimowitz it was emphasised that GHCM had no alternative but to meet the compliance requirements for its business. She was invited to provide any feedback, comment or input about the proposal before the employer made a final decision. She was offered time for that and an opportunity to involve a support person at a further meeting where her views could be given.

[11] Following that next meeting, which took place on 9 May, a Director of GHCM wrote to Ms Chaimowitz advising that the company had decided to proceed with the restructuring and disestablish her CFO role. She was advised that as there were no comparable alternative positions able to be offered, her employment would terminate on the grounds of redundancy effective from 16 May 2011. In lieu of the contractual period of notice she was offered pay of four weeks salary.

[12] As the termination of employment occurred before the birth of her second child which was due on 30 June, Ms Chaimowitz was unable to qualify for the 14 weeks paid parental leave. In submissions made on her behalf in support of the s 127 application, the order sought for interim reinstatement is referred to as a requirement for "a technical reinstatement" only to her former position, as she would go on parental leave and receive payments from the IRD. It is submitted in that event GHCM would not have to pay Ms Chaimowitz her salary, except for a very short period between the dismissal and commencement of the parental leave. It is

submitted that her reinstatement could be managed in a way that would cause little or no disruption to both GHCM and Ms Chaimowitz.

[13] In their submissions the representatives of both parties, Ms Phipps, advocate for Ms Chaimowitz, and Mr Caisley, counsel for GHCM, referred to the standard tests or questions the Authority must consider in determining an application for interim reinstatement. They are:

- Is there an arguable case?
- Where does the balance of convenience lie?
- Are other adequate remedies available?
- Where does the overall justice of the case lie?

[14] In considering those questions in the light of the evidence given by Ms Chaimowitz and Mr Henry in particular, it has been kept in mind by the Authority that their affidavit evidence has not been tested and will not be until the substantive investigation of the personal grievance. This means that 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 all witnesses have been examined on their evidence.

Is there an arguable case?

[15] As submitted by Mr Caisley, in principle not only must Ms Chaimowitz establish an arguable case that she was unjustifiably dismissed, she must also establish that if successful with her claim she will be reinstated in addition to or instead of being compensated monetarily. The Employment Court drew attention to this aspect of a s 127 application in *Cliff v. Air New Zealand Ltd* AC6A/05, Colgan J, 24 February 2005, at para.[12] as follows:

So whilst plaintiffs must establish an arguable case of personal grievance (unjustified dismissal), they must also establish an arguable case that they will thereafter be reinstated in employment and not simply compensated monetarily for their grievances.

[16] I find that Ms Chaimowitz's case reaches the relatively low threshold of showing an arguable case that she was unjustifiably dismissed and/or unjustifiably

disadvantaged. Mr Caisley conceded that there was an arguable case she has a personal grievance claim, although a weak case only. I find it has not been established she has an arguable case that she will be reinstated as a remedy for a personal grievance in addition to or instead of being compensated.

[17] This follows from the finding I also make that the termination of Ms Chaimowitz's employment was on the grounds of genuine redundancy, after a decision was made for business or commercial reasons by GHCM. The firm considered it necessary to address the concerns raised by the auditor about the risk associated with having all the work in the transaction chain done by a single pair of hands, consequently exposing GHCM to fraud and a risk that dishonesty would not be detected. I accept that the directors of the firm acting responsibly had been compelled to address that issue raised by the auditor by implementing the changes. If that had not been done the accounts of the firm would have been 'tagged' by the auditor, I accept, and this in turn would have had significant commercial and legal implications for the continuing operation of the firm.

[18] Reinstatement under s 125 of the Act is subject to the condition that it is practicable and reasonable for the Authority to provide that remedy. If for procedural reasons only Ms Chaimowitz is found to have a personal grievance, whether of unjustified dismissal or unjustified disadvantage, it will be neither practicable nor reasonable to recreate a position which has been disestablished for compelling business or commercial reasons, or genuine redundancy, as I find established by the evidence at this stage.

[19] With some justification in my view, Ms Chaimowitz has complained that she was unlawfully suspended when Mr Henry required her to go on gardening leave during the redundancy consultation process. It appears he may have assumed greater medical knowledge and expertise than Ms Chaimowitz's own doctor, who had certified her as fit to continue employment until the birth of her baby at the end of June.

[20] Further investigation may or may not show that procedurally there was a lack of justification in the way the employer consulted Ms Chaimowitz and implemented its decision, or in the way it required her to take garden leave, but as observed by the Court of Appeal in *GN Hale & Sons Ltd v. Wellington etc Caretakers etc IUOW* [1992] NZLR 1079 at 1087:

Failure to follow a fair procedure does not mean that reinstatement will necessarily be practicable, but it is likely to have a bearing on other remedies.

[21] There is also a matter that is undisputed between the parties and which raises a further serious issue as to the practicability and reasonableness of reinstatement. In November 2010 during her employment Ms Chaimowitz disclosed to a former employee information about another employee's recent salary increase. This was only discovered after her termination in May 2011. While Ms Chaimowitz has admitted showing poor judgement in sending the particular email to the former employee, a friend working in a law firm, she explained her conduct as having resulted from anger and upset which had caused her to act thoughtlessly and in the heat of the moment.

[22] Ms Chaimowitz in her position as CFO had been employed to exercise good judgement and to a high degree. She had expressly undertaken in her employment agreement not to disclose to any person, except as necessary for the proper performance of their duties or as required by law, any confidential information acquired by her in the course of performing her services under the agreement. Her act of venting, as she termed it, to a friend employed outside of GHCM, was a clear breach of that undertaking. I accept Mr Henry's evidence that since discovering the disclosure he has lost all trust and confidence in Ms Chaimowitz as an employee. Given her position and the nature of the work she was employed in, a significant level of mutual trust and confidence was clearly a requirement and expectation of both parties and I find on the evidence, to this point at least, that it would be impracticable for Ms Chaimowitz to be reinstated when by her own actions she has destroyed or seriously damaged that trust and confidence.

Where does the balance of convenience lie?

[23] The Authority is satisfied that the balance of convenience lies in not ordering interim reinstatement, particularly when that is sought as a remedy on a technical basis only. Ms Chaimowitz seeks reinstatement to the payroll only of GHCM so that she can access paid parental leave. She is not seeking to return immediately to perform work for the firm.

[24] Generally, provided it is for cause, an employer is entitled to give to an employee notice of termination before the employee might otherwise become entitled

to statutory benefits such as paid parental leave. Cause for dismissal might be provided by serious misconduct or persistent poor performance to a sufficiently high degree or, as in this case, genuine redundancy. Statutory entitlements or benefits missed out on should not be accessed through artificial interim reinstatement. The remedy of compensation is available if an employee is denied such entitlements as a consequence of the employers unjustified actions.

[25] The timing of a termination, whether before or after paid parental leave can be taken, is a matter for assessment when the reasonableness of the employer's conduct is reviewed. It has been explained in this case and it is accepted by the Authority that if GHCM had not acted in accordance with the auditor's advice its accounts would have been tagged as at the end of the half year period in June. It seems therefore that the restructuring was reasonably undertaken in May rather than left any later. That time, unfortunately for Ms Chaimowitz, was only shortly before she was due to become entitled to the paid parental leave.

[26] The Authority is able to conduct a full investigation of the substantive claims including unjustified dismissal within the next four weeks, subject to the availability of Ms Chaimowitz. GHCM has indicated that it will make itself available within a short timeframe. A full investigation able to be provided reasonably promptly tips the balance of convenience further in favour of leaving the situation as it now is.

Are other adequate remedies available?

[27] With regard to the loss of paid parental leave, other remedies are available for that if Ms Chaimowitz is successful ultimately with her claims of personal grievance. She can also be compensated for loss of wages between the date of her termination and the start of the paid parental leave and for a period after that leave has been taken, if required. Interest is available on some of the monetary remedies and she can be compensated for hurt feelings, humiliation and distress if that harm resulted from a successfully established grievance.

Where does the overall justice of the case lie?

[28] I find that the overall justice of the case lies in declining the application for interim reinstatement. The affidavit evidence indicates at this stage a genuine redundancy situation brought about by GHCM's need to protect its business by acting in the way it did. I do not consider from the evidence to this point that the

restructuring and reasons provided to Ms Chaimowitz for it were contrived or used as a convenient pretext merely to get rid of her. It has been contended that the employer discriminated against her because she was a pregnant employee. I do not consider, on the evidence, that GHCM rather than having serious concerns about the compliance issue was reacting to an employee whom it thought was likely to become a burden by being less productive because of a pending increase in her young family, or become more demanding for an increase in remuneration to compensate for the addition of another child to her family.

[29] Ms Chaimowitz fastened onto the use by Mr Henry of a common expression “we will cross that bridge when we come to it.” He accepted that was an expression used by him some two years earlier when she was first employed and when she expressed a wish to have more children in the future. She would have it that Mr Henry had indicated by using those words that he was anti-family or anti-motherhood, but his expression is one commonly used in conversation not as conveying anything necessarily meaningful or decisive but simply when someone wants to say something rather than remaining silent. There was also evidence given to the Authority that Mr Henry had not been discriminatory in relation to the employment of young mothers in GHCM’s business.

Determination

[30] For the above reasons, the discretion of the Authority in relation to this interim reinstatement application is exercised by not making an order of interim reinstatement as was sought under the Act.

[31] The Authority will shortly consult Ms Phipps and Mr Caisley about the parties’ availability and about the timetable for an investigation meeting to be held within the next three or four weeks or at such time as may be agreed upon.

Costs

[32] Costs are reserved, pending the final determination of all Ms Chaimowitz’s claims.

A Dumbleton
Member of the Employment Relations Authority