

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 156
5400613

BETWEEN THOMAS JUDE WAIGTH
 CHAMBERLAIN
 Applicant

AND NEOCOM LIMITED
 Respondent

Member of Authority: Michele Ryan

Representatives: Stuart Webster, Counsel for the Applicant
 Gary Tayler, Advocate for the Respondent

Investigation Meeting: 22 November 2012 at Napier

Submissions Received: Oral submissions for the Applicant at the investigation
 meeting
 Written and oral submissions for the Respondent at the
 investigation meeting

Determination: 10 December November 2012

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

[1] Tom Chamberlain says he been unjustifiably disadvantaged and unjustifiably dismissed from his position with Neocom Limited (Neocom). He seeks an order for interim reinstatement pending determination by the Authority of his substantive claims.

[2] In or around September 2012, Neocom commenced negotiations with a prospective purchaser for the sale of its business.

[3] Mr Chamberlain says that Neocom did not properly consult with him about the proposal to sell the business and the effect this may have on his employment. In early

October he was becoming anxious as to whether he had ongoing employment with Neocom.

[4] Mr Chamberlain took an authorised day off from work on 9 October 2012. At approximately midday he contacted Mr Paul Hughes, the director of Neocom, to request an urgent meeting later that day to discuss his future employment. Several calls were exchanged between Neocom and Mr Chamberlain and a meeting was scheduled for 4.00pm that afternoon. Mr Chamberlain was aware Ms McGahey, the wife of the prospective purchaser would also be at the meeting.

[5] In the period between making initial contact with his employer and the meeting scheduled for 4.00pm, Mr Chamberlain reports he *“drank at least three bottles of wine”*.

[6] The meeting commenced at 4.15pm. Mr Chamberlain concedes he was angry and confrontational during the meeting. It is apparent from a transcript of the meeting that Mr Chamberlain made derogatory statements about Mr Hughs and Ms McGahey, used offensive language and threatened to harm Neocom and Mr Hughes.

[7] Later that evening, Mr Chamberlain entered Neocom’s website host “Harvest”, which held information confidential to the company. Mr Chamberlain was one of two employees at Neocom with authorisation as an administrator to assess the site. Mr Chamberlain says that he accessed “Harvest” to obtain information about his work performance so that he could persuade the prospective purchaser of Neocom of his value, or to provide information to any other future employer if he was made redundant. He says he inadvertently deactivated the account and archived the other administrator and Mr Hughes, thereby denying their access to the website. The following morning he says he discovered his mistake and made arrangements to reinstate the information archived.

[8] On 10 October 2012 Neocom commenced a disciplinary investigation into Mr Chamberlain’s conduct during the meeting of 9 October and his actions and use of Neocom’s confidential information on “Harvest”.

[9] Mr Chamberlain obtained representation and provided responses to the allegations against him. At the conclusion of the disciplinary process on 18 October 2012 Mr Chamberlain was summarily dismissed for serious misconduct and outstanding salary and holiday entitlements were paid out.

[10] On 5 November 2012 Mr Chamberlain filed an urgent application for interim reinstatement. His application was accompanied by a sworn affidavit and an undertaking as to damages as is required pursuant to s127(2) of the Employment Relations Act 2000.

[11] The parties were directed to mediation but did not resolve their differences.

[12] Neocom opposes Mr Chamberlain's application. It says Mr Chamberlain's behaviour, both during the meeting and with the employer's website, was reprehensible and it no longer has trust and confidence in him.

[13] After Mr Chamberlain's dismissal but prior to the Authority's investigation, Neocom's business was sold and is no longer trading. Neocom says that Mr Chamberlain's behaviour towards Ms McGahey during the meeting on 9 October 2012 precluded him from securing ongoing employment with the purchaser of its business. Neocom says that had Mr Chamberlain not been dismissed, his employment would have ended no later than Tuesday 13 November 2012 when his position was made redundant.

[14] An investigation meeting to deal exclusively with the interim reinstatement application was held on 22 November 2012. As is usual with applications for interim relief, the evidence provided to the Authority was not tested by cross examination.

The law as it applies to interim reinstatement

[15] Section 127(1) of the Employment Relations Act provides that the Authority may order interim reinstatement pending the substantive hearing of a personal grievance. Section 127(4) of the Act provides:

When determining whether an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the object of this Act.

[16] In addition to the statutory framework the recent judgments of the Employment Court in *Angus v Ports of Auckland*¹ and *McKean v Ports of Auckland*² each noted that in determining an application for interim reinstatement the Authority must have regard to the following tests:

¹ [2011] NZEmpC 125 at [3]

² [2011] NZEmpC 128 at [4]

- (a) Whether the applicant has an arguable case that the dismissal was unjustifiable as that is now defined by the new provisions of s.103A of the Act;
- (b) Whether the applicant has an arguable case for reinstatement to his employment at the respondent, applying the new test of reinstatement under s.125 of the Act, if he is found to have been unjustifiably dismissed following a substantive hearing;
- (c) Where the balance of convenience lies between the parties until a substantive determination has issued by the Authority, including the adequacy of other remedies; and
- (d) Whether the overall justice of the case dictates that reinstatement to employment at the respondent is appropriate.

Is there an arguable case that Mr Chamberlain was unjustifiably dismissed?

[17] Mr Chamberlain must persuade the Authority that he has some real, but not necessarily certain, prospect of establishing that his dismissal was not an action that fair and reasonable employer could have made in all the circumstances at the time the dismissal occurred.

[18] Mr Chamberlain claims that Neocom did not properly consult with him about the impending restructure to the business. Neocom denies this claim. There is an inference contained in Mr Chamberlain's evidence that Neocom's alleged failure to consult led to his increased anxiety which culminated in his drinking to excess on 9 October 2012.

[19] Mr Chamberlain says that at the beginning of the 9 October meeting Neocom's representatives were aware that he was intoxicated and had questioned whether he had the capacity to discuss his concerns. He says a fair and reasonable employer would not have proceeded with the meeting in circumstances where it was clear he was drunk.

[20] Neocom concedes that Mr Chamberlain has an arguable case that he was unjustifiably dismissed to the extent that it dismissed Mr Chamberlain and where he

has raised a personal grievance. It agrees that there are matters of dispute between the parties and on this basis it accepts Mr Chamberlain has an arguable case, but asserts that his claim is weak.

[21] Having assessed the untested evidence it is clear that there are matters in dispute between the parties including whether Neocom complied with its obligations to properly consult with Mr Chamberlain as to its proposal to restructure by way of sale and whether Neocom's decision to dismiss was fair and reasonable in the circumstances at the time.

[22] Without testing the evidence it is difficult to assess the strength of Mr Chamberlain's case however I consider Mr Chamberlain's claim satisfies the relatively low threshold required to establish an arguable case.

Does Mr Chamberlain have an arguable case for reinstatement if found to have been dismissed unjustifiably?

[23] Mr Chamberlain is also required to establish that he has an arguable case that if his dismissal is found to be unjustified he would be reinstated on a permanent basis.

[24] Reinstatement is no longer the primary remedy where a personal grievance has been established. Section 125(2) of the Act provides:

The Authority may, whether or not it provides for any of the other remedies specified in s.123, provide for reinstatement if it is practicable and reasonable to do so.

[25] In *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School*³ the Employment Court considered the practicability of reinstatement and said:

Whether ... it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future... Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.

³ [1992] 3 ERNZ 243

[26] The Employment Court's approach was subsequently endorsed when the matter was heard before the Court of Appeal⁴ and more recently in *Lewis v Howick v College Board of Trustees*⁵.

[27] Neocom says that its business was sold on 12 November 2012 and all the indicia of its business including its commercial rental property and customers are gone. It says there is no position into which Mr Chamberlain could be reinstated as Neocom has ceased trading and there is no work to be performed.

[28] It appears Mr Chamberlain accepts that there is no role to perform or premises in which to work. However he says in these circumstances it remains practical and reasonable for Neocom to place him on garden leave. I understand Mr Chamberlain to say that reinstatement would return him to the status of a Neocom employee and that he would then be able to exercise options that may have been available to him but for his dismissal, such as payment of notice following a redundancy or an offer of employment with the purchaser of Neocom.

[29] I consider Mr Chamberlain's view is mistaken. Whilst the primary purpose of an order for reinstatement is to preserve the position of the employee until his or her substantive claims can be heard, it is clear that conditions which existed at Neocom prior to Mr Chamberlain's dismissal no longer exist.

[30] Neocom's business has been sold and Mr Chamberlain's position has been made redundant. In his affidavit Mr Chamberlain acknowledges that an offer of a position with the new employer is unlikely given his conduct on 9 October towards Mrs McGahey.

[31] The options that may have been available to him but for his dismissal have passed. If Mr Chamberlain's claims for unjustified dismissal are successful he may receive remedies associated with his dismissal but in a temporal sense an order for interim reinstatement will not recapture the circumstances of his employment prior to his dismissal nor the options he seeks.

[32] I do not consider that the reasons set out above on which Mr Chamberlain bases his application for interim reinstatement are relevant factors in an assessment as to whether it is practicable and reasonable to reinstate Mr Chamberlain.

⁴ [1994] 2 ERNZ 414

⁵ [2010] NZCA 320

[33] I was not provided with any further evidence or information to support a proposition that it would be both practicable and reasonable to reinstate Mr Chamberlain on an interim basis. When I consider Mr Chamberlain's reasons for making his application for interim reinstatement it is also clear that he does not wish to be reinstated permanently into his position should his claim for an unjustified dismissal be successful.

[34] In *Port of Wellington v Longwith*⁶ the Court of Appeal, commenting on the Employment Court's decision, noted that its order for interim reinstatement of an employee into a position was in conflict with the parties' common ground that the position was surplus to the employer's requirements.

[35] Neocom has no customers, work or employees. It is effectively a shell company and Mr Chamberlain's role at Neocom simply no longer exists. There is no suggestion that Neocom is continuing to trade or conduct business in another guise. In these circumstances I do not consider it is practicable and reasonable to reinstate Mr Chamberlain on either an interim or permanent basis.

Where the balance of convenience lies between the parties until a substantive determination including the adequacy of other remedies

[36] In an assessment as to where the balance of convenience lies, the Authority is required to weigh up the respective hardships that may arise between this determination and a final determination if the interim relief sought by the employer is granted. A factor in this assessment is whether alternative remedies other than interim reinstatement would be satisfactory.

[37] The substantive investigation into Mr Chamberlain's claims is scheduled to occur within eight weeks of the investigation of this application. Mr Chamberlain says he has suffered a loss of earnings from the time of his dismissal. However Mr Chamberlain had not provided any evidence as to his financial state or information which would persuade me that interim reinstatement would remedy this concern in a way that damages following a successful determination would not.

⁶ [1995] 1 ERNZ 87

[38] Mr Chamberlain says that interim reinstatement would restore the effects his dismissal has had on his reputation although I was not provided with any detail as to who was aware of the circumstances of his dismissal or evidence that his dismissal had impacted on opportunities to obtain alternative employment. I do not have sufficient information to persuade me that that the balance of convenience should sway in Mr Chamberlain's favour as a consequence of a general perception that his reputation has been negatively impacted.

[39] In *Hunter v Nationwide Computers (NZ) Ltd*⁷ the Employment Court held that the balance of convenience pointed away from interim reinstatement as the employer was no longer trading and it would be inappropriate to reinstate the employee to a management role where there was no role that the employee could perform in a trading situation.

[40] Neocom says that should Mr Chamberlain be reinstated, Neocom would be required to create a position it does not want or need and which would give rise to ongoing debt it is not in a position to pay. These factors persuade me that it would be a considerable inconvenience to Neocom if it was required to continue to employ Mr Chamberlain.

[41] I consider the balance of convenience favours Neocom.

The overall justice of the case

[42] The remedy of interim reinstatement is discretionary. In its exercise of discretion to grant interim reinstatement, the Authority must consider where the overall justice of the case lies until it can be heard. I am required to stand back and take a global view of the strengths and weaknesses of Mr Chamberlain's application.

[43] Whilst I have found that Mr Chamberlain has met the relatively low threshold that he has an arguable case, my determination has predominately focussed on whether reinstatement of Mr Chamberlain to his position at Neocom is both practical and reasonable. This is because the legislation makes it clear that these two elements are both required before an order for reinstatement should be made. In the

⁷ [1994] 1 ERNZ 70

circumstances of this matter it is clear that reinstatement is not practical and reasonable.

[44] I find that the overall justice of the case does not favour the grant of interim reinstatement.

Determination

[45] Mr Chamberlain's application for interim reinstatement is declined for the reasons set out in this determination.

The substantive hearing

[46] Mr Chamberlain's claims are scheduled to be investigated by the Authority on 16 January 2013 and arrangements as to the exchange of relevant documentation have been agreed by the parties.

Costs

[47] Costs are reserved.

Michele Ryan
Member of the Employment Relations Authority