

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 683
3185919

BETWEEN FJW
Applicant

AND BT MINING LIMITED
Respondent

Member of Authority: Nicola Craig

Representatives: The applicant in person
Joseph Harrop, counsel for the respondent

Investigation Meeting: 15 November 2022 by audio-visual link

Submissions received: 10 and 15 November 2022 for the applicant
10, 15 and 18 November 2022 for the respondent

Date of determination: 20 December 2022

DETERMINATION OF THE AUTHORITY

- A. FJW's application for interim reinstatement is granted to the extent that BT Mining Limited is to reinstate him to the payroll within three days of the date of this determination.**
- B. The parties are directed to attend mediation by 10 February 2023.**
- C. An interim non-publication order is made.**
- D. Costs are reserved.**

What is the employment relationship problem?

[1] FJW is an accountant who worked for BT Mining Limited (BT or the company) from 16 May 2022 in a management accountant role. The company operates a number of mines in New Zealand and is part of the Bathurst Resources group.

[2] FJW was dismissed at the end of his probation period. He claims that the dismissal was unjustified, and he should be reinstated on an interim basis until the Authority can fully determine his claim. BT asserts that it took a number of steps before dismissing FJW and that its decision was justified. It also strongly opposes his interim reinstatement application.

[3] Extensive affidavit evidence was filed, from FJW and BT's Craig Kinane (Group Manager, Site Commercial), Aaron Bennett (Management Accountant, Finance Business Partner), four other BT accountants and a mine manager.

[4] An investigation meeting to heard submissions was held by audio-visual link on 15 November 2022. The parties had filed written submissions prior to the meeting and provided oral submissions at the meeting. After the meeting FJW filed an affidavit in support of an application for non-publication order, which had not been discussed at the meeting. BT was given an opportunity to comment, and a memorandum was filed on its behalf.

[5] As the parties were advised, I was indisposed for a period since the meeting and unable to complete this determination as anticipated.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

What are the issues?

[7] The issues for determination in this interim reinstatement matter are:

- (a) Should a non-publication order be granted?
- (b) Is there a serious question to be tried - does FJW have an arguable case for unjustified dismissal and for permanent reinstatement?
- (c) Where does the balance of convenience lie?
- (d) Where, standing back and considering the case, does the overall justice lie until the substantive matter is determined?¹

¹ For example, *X v Y Ltd and the NZ Stock Exchange* [1992] 1 ERNZ 863, *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 and *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* [2021] NZEmpC 59.

[8] Where a factor is relevant under more than one head, I have focused my discussion in one part of the determination.

Should a non-publication order be granted?

[9] FJW sought a permanent non-publication order regarding his name and details. BT opposes the making of a permanent order but consents to an order prohibiting publication of his name in the interim reinstatement determination alone. I must still consider the application and decide if there is an appropriate basis for it.

[10] The Authority has the power to make non-publication orders.²

[11] FJW asserts that publication has a strong potential to deter him from securing future jobs. He relies on observations of the Chief Judge in *Chief of New Zealand Defence Force v Darnley* that damage to future career prospects was a factor to be balanced.³ Sound reasons, “*generally involving specific adverse consequences*”, were described as needed to depart from the principle of open justice.⁴

[12] The open justice principle is seen as having greater weight at the substantive determination stage, as the parties will have had the opportunity to give oral evidence, be subject to cross examination and the Authority will issue final findings.⁵

[13] FJW asserts that the employment of accountants requires background checks, which he believes would deter his ability to obtain other work. Whilst I accept that background checks may well be undertaken for the appointment of accountants, there are many other professions and occupations where checks are also likely to occur.

[14] Although the main reason here for dismissal was performance related, this determination refers to a serious matter raised regarding FJW’s interview attendance, which cannot properly be explored at this stage on affidavit evidence.

[15] FJW refers to his family being in extreme financial hardship if he cannot obtain a job. Due to his visa status, he is unable to qualify for an unemployment benefit.

[16] I am satisfied that there is sufficient reason to grant an interim non-publication order regarding FJW’s name and details. However, it should not be assumed that a

² The Act, Sch 2, cl 10.

³ *Chief of New Zealand Defence Force v Darnley* [2021] NZEmpC 40 at [3].

⁴ Above at n 3, at [2].

⁵ *JGC v MBC* [2020] NZEmpC 193.

permanent order will automatically follow. A sufficient evidential basis would need to be established.

[17] An order should also be made regarding FJW's health information. This is consented to by BT.

[18] On an interim basis, until further order of the Authority, FJW's name and identifying details along with details of his health situation are not to be published.

What happened with FJW's work?

[19] FJW was introduced to BT via a recruitment agency. He was interviewed twice by the recruitment agent, then had three interviews, through Zoom and in person, with BT personnel. At one of the zoom meetings FJW had his camera turned off. Having observed FJW's work later, it crossed the mind of one of the interviewers, who has provided an affidavit, that someone else may have provided the interview, essentially because FJW's work seemed not to match the impression given by the person interviewed.

[20] The employment agreement between FJW and BT contained a three-month probation period. The clause required BT to review FJW's performance and at least orally advise him of deficiencies and steps to achieve satisfactory performance. A review at the end of the period was also required, including discussion of work performance and listening to any reasons proffered by the employee. Good faith obligations are acknowledged.

[21] The management accountant role is described by BT as a senior and pivotal role in the business. Mr Bennett was FJW's manager and primarily responsible for his induction. Mr Kinnane also undertook check ins with FJW.

[22] Mr Bennett and Mr Kinnane describe noticing some red flags with FJW's capabilities, skills and knowledge quite early on. This included FJW seemingly not understanding the concept of accruals, an accounting basic. Mr Bennett and Mr Kinnane picked up work which it had been anticipated FJW would undertake by this point. Mr Bennett kept a log regarding FJW's performance and other events.

[23] BT's assessment was that, despite extensive training, in his second month FJW was still a long way short of what was expected. He was seen as operating at an assistant

accountant level rather than a management accountant on the top of the pay band for that group. BT had anticipated that training would be needed on mining specific accounting, but its concerns were about general accounting knowledge and skills.

[24] The affidavits of the various company accountants and mine manager provide evidence of FJW seemingly struggling to perform his job. References include one finding it “*extremely odd*” that FJW seemed not to have the basic accounting knowledge to deal with a wrong code, him “*clearly struggling with basic accounting*” and seeming “*a million miles*” from being able to undertake the tasks expected.

[25] FJW offered explanations, including for example that accruals can be carried out, as he did, in a non-reversing way and that the previous incumbent in the role had used the same practice. He talks of poor communication to him of tasks and their due dates, people misunderstanding him, and important event context not being referred to by the BT managers.

[26] A BT accountant is also referred to as breaking into tears after abrupt and intense treatment from FJW during a busy work period, leading to her manager taking over further dealings with him. This incident seems isolated.

[27] In addition to its views on FJW’s accounting knowledge, the company raised attendance concerns about his working from home, tardiness and lack of availability and communication during working hours.

[28] Broadly, FJW’s response to BT’s concerns was that there was no evidence or instances of the various failings alleged. He did not seem to accept any difficulties with his performance other than the usual induction learnings with a new industry.

[29] On the basis of the affidavits and documentary evidence an outline of later 2022 events are:

- 1 July meeting – catch up about where FJW was at and plan for month-end. Mr Bennett enquires about FJW’s feedback on the way training was undertaken and indicates that he (Mr Bennett) often had a feeling the other was not understanding things. FJW does not criticise the training but noted that people often learn best by doing rather than just listening.

- 11 July meeting – Mr Kinnane explains that FJW was not performing to the standard expected by BT. A review at the end of the probation period, 16 August 2022, was identified.
- 22 July letter – BT identifies areas of concern – including lack of foundational accounting and Excel knowledge, not carrying out and completing tasks in timely and competent manner and lack of availability and communication. BT sets up a meeting to discuss performance and put a plan in place. Mr Bennett is to monitor performance in the lead up to the end of the probation period. A table provided identifies areas where performance was seen as substandard, and the standard expected. A draft performance improvement plan (PIP) provided.
- 25 July letters - FJW raises a personal grievance based his claim of unreasonable and unfair treatment by BT. He seeks to have the PIP withdrawn. In his second letter a response to BT's concerns is provided.
- 29 July meeting – discussion of BT's concerns about FJW's shortcomings. He asks the company to attend mediation.
- 3 August letter from BT's lawyer and meeting – BT rejects mediation, believing it would be pointless. The company believes it is legitimately raising performance concerns, using a fair process.
- 9 August letter – FJW writes that he is worried and stressed, suffering from headaches and declining mental health.
- 11 August letter – BT offers to extend the probation period by a month and makes an employee assistance programme (EAP) available.
- 13 August email – FJW indicates his concerns and personal grievance were being ignored, he was working in a “stressful and anxious” mental state and seeks to be placed on leave pending resolution. He rejects the offer to extend the probation period given BT's approach to his grievance and the fact that as a permanent employee he could be assessed at any time.

- 15 August discussion – Mr Kinnane talks to FJW, enquiring about his wellbeing and indicates that if he was unwell or stressed, he need not be at work. FJW then leaves the office.
- 16 August email – BT offers again to extend the probation period by a month to allow further time for BT to provide training and support and FJW to demonstrate that he was capable to carry out the role.
- 18 August letter – BT invites FJW to a meeting to review his performance and suitability in accordance with the probation period. It rejects paid special leave, although invites FJW to take sick leave when unwell. An updated table to performance issues and induction log is attached. Mr Kinnane offers to accept written feedback if a meeting was not preferred. FJW provides written feedback.
- 22 August email – FJW again rejects that BT has fairly and objectively assessed his performance.
- 23 August letter – BT concludes that FJW had not satisfactorily completed his probation period and elects to terminate his employment. The primary reason is his lack of foundational accounting knowledge as required for the senior role of management accountant.

Is there an arguable case regarding unjustified dismissal?

[30] As acknowledged by BT, this is a relatively low threshold.⁶ The company argues that the test is still not met or if it is, that FJW’s case is only weakly arguable.

[31] FJW’s position is that there was no substantive justification for the dismissal and the company did not carry out a fair process. He argues:

- BT failed to provide clear, reasonable and measurable performance expectations, with problematic descriptions including “*high quality analysis and reporting*” and “*comprehensive spreadsheets*”.

⁶ *Humphrey* at n 1.

- A secret log was kept of allegations against him which he only discovered when the PIP letter was sent. Entries from the first day of his employment (onwards) indicate predetermination.
- BT failed to investigate the allegations with reliance on Mr Bennett’s “*subjective recollection of events*”.
- The company did not genuinely consider his personal grievance and explanations before issuing the PIP. It did not have factual justification for implementing a PIP. There were no warnings and no review of the PIP or work performance. The performance review process appeared rushed.
- The process was not completed before the end of the probation period on 16 August 2022.

[32] BT relies on FJW being on a probation period under his employment agreement. In terms of timing, the employment agreement does specify that termination may take place up to one week after the expiry of the probation period. Counsel for BT, Mr Harrop, was only able to identify one case of an interim reinstatement claim being made where such a period was in place. There the application was unsuccessful.⁷

[33] Probationary periods enable an employer to assess the suitability of the employee to the job, including in terms of skills and diligence.⁸ The inclusion of such an arrangement in an employment agreement does not affect the applicability of the unjustifiable dismissal law, so the employer’s actions must still be those of a fair and reasonable employer in all the circumstances.⁹

[34] BT went through a fairly extensive process in dealing with FJW. He has a challenge ahead, particularly as he was on notice that he was employed with a probation period.

[35] With an interim application reliance must be placed on untested affidavit evidence and that makes it difficult to appraise the genuineness of assessments of

⁷ *Moore v Seaview Custom Engineering Limited*, Employment Relations Authority, CA88/09, 29 June 2009. Member Crichton.

⁸ *Nelson Air Limited v NZ Airline Pilots Association* [1994] ERNZ 665 CA.

⁹ The Act, ss 67(1)(b) and 103A(2).

performance difficulties particularly, as here, when there is a questioning of interpretation, recollection and context.

[36] The reasonableness of BT's actions, including use of objective standards, absence of predetermination, and the offering of sufficient training and support will need to be examined.

[37] Situations where a grievance is raised during a process and the employer chooses to press on and not attend mediation, need to be scrutinised carefully and this is not the time for that. Similarly, the extent to which BT was informed of FJW's health situation and took appropriate action will need to be examined. In terms of FJW's actions, his rejections of BT's offers to extend the probation period will need to be considered.

[38] I am satisfied that there is an arguable case that FJW was unjustifiably dismissed.

Is there an arguable case for permanent reinstatement?

[39] Again this is a low threshold. Is it arguably reasonable and practicable to reinstate FJW? The return of reinstatement as a primary remedy must be factored into this assessment.¹⁰ What is the feasibility or practical workability of re-imposing this employment relationship? It is not sufficient to show resistance and strained circumstances to avoid reinstatement.¹¹

[40] BT emphasises the level of oversight which would be needed of FJW's work and the degree to which tasks would have to be transferred off him to others.

[41] Submissions for BT describe as unrealistic FJW's view that he could be reinstated to allow investigation into the allegations against him. The company is said to have already done that to the extent necessary with performance concerns and explained itself to him, leaving the parties at an impasse. Any return is seen as likely to cause on-going conflict.

[42] There is resistance to FJW's return to BT from the managers and a number of colleagues. This is outlined in more detail below. The relationship between Mr Kinnane and Mr Bennett on the one hand and FJW on the other is described as

¹⁰ The Act, s 125.

¹¹ *Angus v Ports of Auckland* [2011] NZEmpC 122 at [63] and *Air New Zealand Ltd v Hudson* (unrep) Employment Court, Auckland, AC 46/05, 17 August 2005, Judge Colgan at p 8.

irretrievably broken. This relates to a lack of confidence in relying on him to carry out his role adequately. Substantial supervision would be required.

[43] On the other hand, Mr Kinnane and Mr Bennett fairly acknowledge that there were some improvements in FJW's performance at times. FJW believes the relationship with other BT accountants would be more productive if he was reinstated, as he sees BT's race against the probation period expiry as marring the relationship previously.

[44] On the basis of the affidavit evidence there would be some difficulties with the practical workability of a return to work, but it seems feasible that the parties could work together although current BT employees may find it frustrating.

[45] I have more doubt about whether it is reasonable to expect BT to undertake the level of oversight they describe as needed but ultimately conclude that FJW has a weakly arguable case for permanent reinstatement.

What is the balance of convenience?

[46] I now turn to weigh the interests of FJW against those of BT.

FJW

[47] FJW describes putting a great deal of mental energy into his BT job. However, his evidence focuses on the benefits the job gives him in terms of money and immigration prospects.

[48] FJW does not have permanent residence and thus cannot receive the unemployment benefit. He reports his salary being his only source of income and his wife being on about the minimum wage. FJW has three children to support.

[49] Despite applying for well over 20 other jobs, as yet FJW has been unable to obtain employment elsewhere. BT suggests he would be better off applying for more standard accounting positions, rather than the management accounting roles he has been applying for.

[50] FJW considers himself unlikely to gain another job, with references from previous employers needed. He has made it to a second interview with several jobs but

then been declined. His belief, based on feedback received, is that this is because of reference difficulties.

[51] A steady job is needed to support FJW's immigration aspirations. Immigration New Zealand has announced it will resume assessment of skilled migrant residents visa expressions of interest from 9 November 2022. FJW is currently on a work visa and has been waiting for over two years for this category to reopen, after it was suspended due to the Covid pandemic. He reports scoring highly on the points system but seemingly only with a suitable job. I accept this is an important goal for FJW but note BT's submission that further application windows have been indicated and this BT job is not uniquely necessary for his application.

BT

[52] I turn to weigh the detriment which BT would or could suffer if FJW is reinstated.

[53] Submissions for BT stress that the company would not receive the benefit of FJW's work if he was reinstated as he is incapable of performing the duties in his position description.

[54] Mr Kinnane and Mr Bennett both express feeling very stressed during FJW's employment – trying to keep an eye on him, help him lift his game and take over some of his work. Their perspective is that they expended significant energy and effort to support and assist him but were confronted by a combative response with denial of shortfalls.

[55] Mr Kinnane and Mr Bennett are worried about the impact a reinstatement would have on their and other accountants' workload. There is a lack of confidence that FJW will be able to carry out the role to the required standard. It is seen as imposing an unfair workload on other accountants to have to check and correct FJW's work.

[56] Allowing FJW to work in a less supervised manner is said to risk the company not being able to make good decisions across multiple worksites, as someone competent is needed in the role.

[57] I was informed at the investigation meeting that FJW's role had been filled but given it seems this must have been done on notice of his interim reinstatement claim, I do not regard BT as able to rely on that as a detriment.

Concluding comments on the balance of convenience

[58] The burden on FJW should he be unemployed for an extended period is likely to be significant. He has three young dependent children and is unable to obtain an unemployment benefit due to his visa status. His immigration prospects could be much reduced.

[59] The burden of having FJW back in the workplace also appears substantial. On the basis of the affidavit evidence BT has little or no faith in FJW's ability to either acknowledge and learn from his shortcomings or undertake the management accountant role at a satisfactory level.

[60] The balance favours FJW. Some of the potential impact on him and his family would not easily be remedied by damages.

Where does the overall justice lie?

[61] In terms of the merits, it is clear that BT underwent a fairly extensive process with FJW which was largely documented. The details may need to be examined but suffice it to say, FJW's unjustified dismissal case does not appear particularly strong. His arguable case for permanent reinstatement is relatively weak.

[62] In terms of the substantive matter, due to events regarding other cases, I have availability to hear it in around April 2023.

[63] I note the point made by Chief Judge Inglis in the *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* decision, that the re-introduction of reinstatement as the primary remedy "*reflected a Parliamentary intention to raise the bar that employers would have to negotiate in order to provide that reinstatement was neither reasonable nor practicable*".¹²

[64] BT is a company operating a number of mines and is part of a larger group. No concerns were raised regarding its financial position. However, BT is strongly opposed

¹² *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* above at n 1, at [42].

to the prospect of FJW being reinstated to the pay roll, regarding at as a windfall for a three-month employee and being concerned about recovery of the money.

[65] BT has chosen to replace FJW, despite notice of this claim. Most of the company's concerns focus on having to supervise and rely on FJW's work when it does not believe he has the skill level needed for a management accountant. He is seen as having some ability to perform basic accounting functions. I conclude that the most just solution on an interim basis is for FJW to be returned to the payroll as this largely deals with the burden on him of being without work and does not impose burdens on the other BT staff required to supervise and/or take over his work.

[66] I order BT Mining Limited to reinstate FJW to the payroll within three days of the date of this determination. Both parties are to co-operate with all reasonable steps necessary to allow that to happen.

[67] Unless other arrangements are agreed between the parties, FJW will on an interim basis be receiving the benefit of his salary but without providing his labour in return. He should be aware that if his dismissal is found to be justified or he is not entitled to any remedies, BT may seek to rely his undertaking to require him to pay back the salary paid under this order.

[68] I direct the parties to attend mediation by 10 February 2023. The parties are encouraged to explore whether there are tasks FJW could undertake, even if remotely, during his period of interim reinstatement. The parties are free to return to the Authority if a variation to the order is sought.

[69] The Authority will be in contact regarding the next steps in this proceeding.

Costs

[70] Costs are reserved.

Nicola Craig

Member of the Employment Relations Authority