

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 43
5548699

BETWEEN JOHN GEMMELL
 Applicant

AND QUALITY ROADING &
 SERVICES (WAIROA) LIMITED
 Respondent

Member of Authority: Trish MacKinnon

Representatives: Paul Harman, Counsel for Applicant
 Jim Ferguson, Counsel for Respondent

Investigation Meeting: 24 April 2015 at Napier

Submissions received: 21 and 24 April 2015 from the Applicant
 21 and 24 April 2015 from the Respondent

Determination: 24 April 2015

ORAL DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is an application by John Gemmell for interim reinstatement to his position of Site Supervisor with Quality Roding & Services (Wairoa) Limited (QRS) in Wairoa. A substantive investigation of his claims to have been unjustifiably disadvantaged in his employment and unjustifiably dismissed has been scheduled for 15 July 2015.

[2] QRS employed Mr Gemmell for approximately three years before dismissing him on 23 February 2015. It provided Mr Gemmell with two weeks' notice which it elected to pay out. QRS opposes Mr Gemmell's application for interim reinstatement and denies he was either unjustifiably disadvantaged or unjustifiably dismissed.

[3] Mr Gemmell has given an undertaking, as required by s.127 of the Employment Relations Act 2000 (the Act), to abide by any order that the Authority may make in respect of damages sustained by QRS if interim reinstatement is granted and he is ultimately unsuccessful with his claims.

[4] The parties attended mediation but were unable to resolve the matter. An investigation meeting was convened in Napier under urgency to deal exclusively with the issue of interim reinstatement. The Authority dealt with the matter by way of untested affidavit evidence and submissions from counsel. As such any findings of fact made in this determination are provisional and could change once Mr Gemmell's personal grievances have been fully investigated and the evidence has been fully tested.

[5] This determination was issued orally following an adjournment for the Authority to consider the material provided by the parties.

The key legal principles

[6] Section 127(4) of the Act requires the Authority, when determining whether to make an order for interim reinstatement, to apply the law relating to interim injunctions having regard to the object of the Act. Section 3(a) states the object of the Act as:

... to build employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship –

- (i) *By recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour;*

[7] The following tests are relevant to an application for interim reinstatement:¹:

- *Whether the plaintiff has an arguable case that he was dismissed unjustifiably as defined by s.103A of the Act;*
- *Whether the plaintiff has an arguable case for reinstatement in employment under s.125 of the Act if he is found to have been dismissed unjustifiably;*
- *Where the balance of convenience lies between the parties in the period until the Court's judgment is given on those issues; and*
- *The overall justice of the case.*

¹ *McKean v. Ports of Auckland Ltd* [2011] NZEmpC 128 at [4]

Relevant background

[8] At the time of his dismissal Mr Gemmell was working as Site Supervisor on a worksite in Campbell Street, Wairoa. QRS's Construction Manager, Andrew Heron, who says he was Mr Gemmell's immediate manager, although that appears to be disputed by Mr Gemmell, gave him an instruction to remove a portaloo from the worksite. While there is some dispute over the date Mr Gemmell was first given the instruction, I find on the basis of the evidence before me it was most likely to have been given explicitly on 14 February 2015, and repeated on 16 and 17 February.

[9] Mr Gemmell was informed verbally at the Campbell Street worksite at approximately 4.30 p.m. on Wednesday 18 February 2015 that he was suspended on pay (stood down) from his employment. He was also advised he was required to attend a disciplinary meeting scheduled for 1.30 p.m. on Friday 20 February. This was communicated to him by QRS's Human Resources Manager, Jeremy Harker. When Mr Harker attempted to hand Mr Gemmell a letter confirming the suspension, Mr Gemmell refused to accept it.

[10] Another QRS employee, Malcolm Tuahine, who had accompanied Mr Harker to Mr Gemmell's worksite, tried later that afternoon at the company's depot to give the letter to Mr Gemmell. Mr Gemmell refused once again to accept it.

[11] Mr Gemmell attended the disciplinary meeting, which was chaired by Mr Harker, on 20 February. He was accompanied by support persons. During the meeting he provided his explanations for his actions following which the meeting was adjourned until Monday 23 February at 8.30 a.m.

[12] Mr Gemmell attended the meeting of 23 February for a brief period, accompanied by five support persons, all of whom were QRS employees. He left the meeting because people he considered to be key personnel were not present. These included the QRS Chief Executive Officer (CEO) and the company's Health and Safety Advisor. Mr Gemmell was informed by telephone that day of the decision to terminate his employment. He received written notification of this by letter dated the same day.

[13] Mr Gemmell was entitled under the QRS disciplinary and dismissal procedures to have the opportunity to speak to the CEO. He had a telephone

conversation with the CEO that day which did not result in any change to the decision to terminate his employment.

Is there an arguable case for unjustifiable dismissal?

[14] The question of whether a dismissal is justifiable is to be objectively determined by applying the test set out in s.103A(2) of the Act. This is “*whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal ... occurred*”. The Act sets out a number of procedural steps to be considered by the Authority in applying this test.

[15] Counsel for Mr Gemmell submits that the investigative process leading to his dismissal was fatally flawed. In support of this submission Mr Harman refers to the following (and I précis his submissions):

- a. The failure of QRS to pay any regard to clause 19 of Mr Gemmell's individual employment agreement (IEA) before initiating, executing and completing its investigative process;
- b. Predetermination on the part of QRS in relation to Mr Gemmell's suspension;
- c. Lack of clarity over the process to be followed by QRS and the speed of that process;
- d. Denial of Mr Gemmell's right to submit to the Chief Executive Officer on penalty in any meaningful way.

[16] Mr Harman has, however, acknowledged some fault on Mr Gemmell's part, for example in refusing to accept the letter of 18 February from his employer, which may be relevant to the issue of contribution.

[17] Counsel for QRS traversed the events leading up to Mr Gemmell's dismissal in some detail and submits that, looked at objectively, dismissal was within the range of reasonable responses available to a fair and reasonable employer in all the circumstances at the time. He submits that compliance with the directions of the employer is a fundamental obligation of the employment relationship going to trust

and confidence. Mr Gemmell was in a position of responsibility and QRS says he was required to set a standard for the employees he supervised.

[18] Mr Ferguson has denied the alleged flaws in the procedure followed by QRS (and again I précis). He refers to Mr Gemmell, by his own actions in refusing to accept the letter of 18 February from his employer, and in walking away from the meeting of 23 February, depriving himself of the opportunity to respond in a considered manner to the company's concerns and to hear and respond to the employer's decision.

[19] Notwithstanding what he refers to as "*self-inflicted*" consequences, Mr Ferguson submits there were no matters of procedure that affected Mr Gemmell's ability to respond and to be heard fairly in respect of the employer's concerns. If there were any defects in the process, counsel submits they were minor and did not result in Mr Gemmell being treated unfairly.

[20] I have considered the opposing viewpoints of counsel and disagree with some of each of their submissions. I disagree with Mr Harman's submissions on the application of clause 19 of the IEA, and the schedule to which it refers. The concerns raised, and investigated, by QRS into Mr Gemmell's failure to carry out instructions are not the employment problem referred to in clause 19 and Schedule 1. I do not accept Mr Gemmell "*disputed*" the instruction to remove the portaloos: I find he simply failed to comply with it.

[21] I am supported in that finding by the notes of the meeting of 20 February, the accuracy of which Mr Gemmell has accepted. In that meeting Mr Gemmell said he had not refused to comply: he was "*dragging his heels*", citing the example of *Parihaka* and passive resistance. I find the employment relationship problem consists of Mr Gemmell's personal grievances for unjustifiable disadvantage and unjustifiable dismissal. Mr Gemmell notified those personal grievances in writing on 4 March 2015, through Mr Harman, requesting a response from QRS by the following Monday, 9 March.

[22] The wording of the relevant part of schedule 1 to Mr Gemmell's IEA suggests that the first step is a verbal raising of the employment problem. If the employer is unable to resolve the problem within 5 days, the party initiating the problem is to reduce it to writing and give it to the other party which must respond in writing within

10 working days. This is step two of the process. Mr Gemmell went straight to step 2, bypassing the verbal notification of the problem. QRS responded within 10 working days as it was obliged to do. The parties then attended mediation, again in accordance with the provisions set out in clause 19, and schedule 1, of the IEA.

[23] I note Mr Harman's submissions regarding the process relating to Mr Gemmell's suspension on 18 February but find they have little relevance to the subject of the current application, which is solely concerned with his claim for interim reinstatement. Those submissions will be relevant to the claim for unjustifiable disadvantage which will be heard in the substantive investigation meeting.

[24] Nor am I convinced by Mr Harman's submission that Mr Gemmell was not afforded his right under the respondent's termination processes and procedures to submit on penalty and to speak with the CEO. It was Mr Gemmell's choice not to remain at the meeting of 23 February. Had he done so, he would have had the opportunity to respond to Mr Harker on the disciplinary matters. This is clear from the notes of the disciplinary investigation meeting held on Friday 20 February, as well as from Mr Harker's second affidavit.

[25] Mr Gemmell did have the opportunity to speak with the CEO and by his, and Mr Browne's evidence, a conversation took place between them. Their accounts of the conversation differ although it appears from both their versions that they were talking past each other rather than engaging in a productive discussion. On the untested evidence I can make no finding other than that Mr Gemmell was afforded the opportunity to speak with the CEO and did so.

[26] I also have difficulty with Mr Ferguson's submission that there were no flaws in QRS's procedure or, if there are found to be flaws, they are of a minor nature and did not result in Mr Gemmell being treated unfairly. From the evidence before me I have identified at least two problematic aspects to the procedure followed by the respondent.

[27] The first is the short time frame between Mr Harker informing Mr Gemmell, in the late afternoon of 18 February, of concerns about his performance and his required attendance at the meeting scheduled for 1.30 pm on Friday 20 February. Nothing in the letter of 18 February, or in Mr Harker's affidavit evidence, indicates there was flexibility over the timing of that meeting. While Mr Gemmell was

informed he was entitled to bring a representative to the meeting, the shortness of time between his being informed of the meeting, and the occurrence of the meeting, did not provide a reasonable opportunity for him to take legal advice on his situation or to arrange representation which could have assisted him. I am not persuaded by Mr Ferguson's submissions on this matter.

[28] The second problematic aspect is the short time frame between the meeting of Friday 20 February, which ended approximately 3pm according to the undisputed notes of the meeting, and that of Monday 23 February which was scheduled to start at 8.30 am. Not only was there, once again, insufficient time for Mr Gemmell to obtain representation, should he have so elected, but also there was a possible breach of the QRS Disciplinary and Dismissal Processes as set out in its Human Resources Manual.

[29] I note the different procedures in the HR Manual at 8.1 pertaining to "*Managing a Non-Performing Employee*" and that at 8.2 for "*Disciplinary Procedure for Misconduct*". I note that the letter of 18 February is headed "*Concern Raised Regarding Performance*" which suggests the procedures of paragraph 8.1 of the manual will apply, although there is also reference to misconduct in the letter.

[30] It seems that a non-performing employee is entitled to receive a letter between the first and second meetings setting out the "*considerations*" of the company's authorised delegate. There are requirements the employer must adhere to in this written notification.

[31] There is not the same requirement at 8.2 for notification in writing between the first and second meetings, if a second is required. In Mr Gemmell's situation, a second meeting was required and there was no communication in the intervening weekend. The question arises whether the employer notified a performance concern and applied the procedures applicable to misconduct.

[32] Mr Ferguson's submissions on the matter are that the company clearly raised this as a matter of serious misconduct, despite the heading of the letter of 18 February, and followed the appropriate procedure. I am not convinced by that submission.

[33] I make no definitive finding on this matter but the issues over procedure that I have raised as being problematic lead me to find there is an arguable case that Mr Gemmell was dismissed unjustifiably as defined by s. 103A of the Act.

Is there an arguable case for permanent reinstatement if Mr Gemmell is found to have been dismissed unjustifiably?

[34] Reinstatement is no longer the primary remedy for a personal grievance for unjustifiable dismissal. It is a discretionary remedy that is available where it is found to be practicable and reasonable².

[35] Mr Harman submits that reinstatement in the interim period is both practicable and reasonable and, further, submits that it may be a likely outcome of the substantive hearing of Mr Gemmell's grievances.

[36] Mr Ferguson submits reinstatement is neither practicable nor reasonable for a number of reasons. These include the "*irreparable damage*" done to the employment relationship by Mr Gemmell's refusal, in front of other workers, to comply with decisions conveyed by his supervisor. Other reasons he cites are Mr Gemmell's "*uncooperative*", "*confronting and aggressive*" behaviour during the disciplinary process and his involvement of other staff in the disciplinary meetings. Mr Ferguson also cites Mr Gemmell's apparent unrepentance, as evidenced by his affidavits; his "*offensive*" references to the current CEO and HR Manager, and his querying of Mr Heron's claim to be his manager.

[37] I note Mr Harker's affidavit evidence that he found Mr Gemmell's attitude at the second meeting on 23 February to be aggressive and threatening. He also refers to feeling intimidated by Mr Gemmell's posture, words and manner and said he feared violence from him if he delivered the letter of dismissal to Mr Gemmell's house. Mr Harker deposed his concern that the relationship between QRS and Mr Gemmell had been so badly damaged that he would find it difficult to carry out his job as HR Manager if Mr Gemmell were to be reinstated.

[38] Mr Harman suggests in submissions that Mr Harker's fear may be overstating the situation and may be a self-serving response by QRS. He submits the employment relationship is not irreparably damaged. Mr Harman in his submissions also addressed Mr Harker's affidavit evidence regarding Mr Gemmell's obstinacy in his reluctance to follow the instruction from Mr Heron and his "*belligerence towards those in authority*". He submits there may have been justification for Mr Gemmell's obstinacy, based on his "*honest belief*" that the instruction might be unlawful.

² Section 125 of the Act

[39] I am not persuaded by that submission. The evidence from Mr Gemmell's three affidavits and from the notes of the meeting of 20 February do not suggest to me that Mr Gemmell had an honest belief that the instruction he had received to remove the portaloo was unlawful. In his own words he was "*dragging (his) heels to obey an instruction*" and using "*passive resistance*". Although he referred in the 20 February meeting to health and safety concerns in relation to retaining the portaloo on site, the notes record his acknowledgement that he did not raise health and safety concerns on any form.

[40] If he had been seriously concerned on health and safety grounds, it was incumbent on Mr Gemmell to make his views known to management in a timely manner. Had he done so, rather than conveying to his employer by his inaction that he had no intention of complying with Mr Heron's instruction, the matter may have been resolved at the workplace without recourse to these proceedings.

[41] Mr Gemmell has displayed an attitude towards QRS management in his affidavit evidence that undermines the submissions made on his behalf by Mr Harman. I find his refusal to accept the letter of 18 February; his querying of Mr Heron's authority; his bellicose behaviour towards Mr Harker; and the comment he made regarding the previous and current CEOs makes the prospect of permanent reinstatement unlikely.

Where does the balance of convenience lie between now and the determination of Mr Gemmell's personal grievance?

[42] This requires considering the detriment that Mr Gemmell and QRS may incur as a result of interim reinstatement being granted or not. It also entails an inquiry into whether an adequate alternative remedy is available to Mr Gemmell if he is not reinstated but is ultimately successful in his claims.

[43] Mr Gemmell has been away from his position since being stood down by letter from his employer dated 18 February 2015. He received remuneration up to 9 March 2015. His affidavit evidence refers to the financial hardship he faces in servicing his mortgage. Mr Harman submits that damages will not compensate him for the loss of employment, social humiliation and stress. He also refers to the right to work being particularly pertinent in a town such as Wairoa because of its lack of opportunity and high unemployment.

[44] QRS does not dispute that the loss of his employment is a serious matter for Mr Gemmell. However, Mr Ferguson submits that the financial impact upon Mr Gemmell would be mitigated by a monetary award if he were to succeed in his claims at the substantive investigation. He also submits that Mr Gemmell's "*adverse views of management and the manner in which he sees their influence upon how he considers the business should be operated*" would mean he would be a disruptive influence if reinstated.

[45] I agree with Mr Ferguson's submissions on this matter. Mr Gemmell may have been very honest in his affidavit evidence but has done himself no favours in displaying an attitude towards management which, at best, shows a lack of respect and, at worst, is dismissive, bordering on contemptuous. Despite the assertions that Mr Gemmell would be on his best behaviour, I find it difficult to believe he would reintegrate successfully into the QRS workforce in the interim, and more likely that he would be disruptive and divisive, particularly as he has already involved other employees in this matter by taking them to the two disciplinary meetings.

[46] After considering the views of the parties I find that the balance of convenience favours QRS. In the event Mr Gemmell is successful in the substantive hearing of his claims in eleven and a half weeks' time, monetary awards will provide sufficient remedy. In coming to this conclusion I also take into account the possibility that, if successful, Mr Gemmell may be found to have contributed to the events that led to his personal grievances.

Where does the overall justice lie?

[47] I am required, having considered the other tests for interim reinstatement, to stand back and consider where the overall justice lies until such time as the substantive investigation of the matter takes place. This includes reflecting on the strengths of the respective parties' cases, bearing in mind that there has not yet been an opportunity for testing of the evidence.

[48] I have found Mr Gemmell to have an arguable case under s.103A to have been unjustifiably dismissed. However, I have found he does not have a strong case for permanent reinstatement in the event that his claim to have been unjustifiably dismissed succeeds. I have found the balance of convenience favours QRS.

[49] On the basis of the findings I have made in relation to the tests above I am not persuaded that the overall justice favours Mr Gemmell.

Determination

[50] This leads me to determine that Mr Gemmell should not be reinstated to his position as Site Supervisor with QRS until such time as his substantive claims have been determined in the Authority.

Costs

[51] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority