

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 169/08
5142407

BETWEEN SHANE GIBBONS
Applicant
AND SECRETARY OF JUSTICE
Respondent

Member of Authority: G J Wood
Representatives: Barbara Buckett for the Applicant
Alastair Sherriff for the Respondent
Investigation Meeting: Wellington, 10 December 2008
Submissions: 10 December 2008
Determination: 16 December 2008

**DETERMINATION OF THE AUTHORITY :
INTERIM REINSTATEMENT**

[1] Following extensive consultation the Maori Land Court has recently been comprehensively restructured. Mr Gibbons' position as Chief Registrar of the Court was subsequently disestablished, following appointments to the two new positions which replaced his role.

[2] Mr Gibbons was given notice of the termination of his employment by Mr Stuart White, General Manager, Special Jurisdictions in the Ministry on 31 October 2008. Mr Gibbons was told:

This letter provides you with formal notice of the termination of your employment effective from close of business of 3 November 2008. At that time you will be paid 1 month's pay in lieu of notice, and severance as per your individual employment agreement.

Notwithstanding this advice, I am aware that you have sought a review of the decision to not reassign you to a role within the Maori Land Court and that the outcome of that review may not be known by 3 November 2008. If this is the case, the Ministry will not, at that date, invoke its rights to pay in lieu of notice, but will instead retain you on the payroll during your notice period. You will be placed on garden leave (special leave on pay) during this period. During any period of garden leave you are not required to attend work ...

Should you be appointed to ... a role prior to the termination of your employment, again, this notice of termination will be revoked and you will have no entitlement to severance. ...

[3] On 3 December the Ministry decided to terminate Mr Gibbons' employment. On a without prejudice basis it has, however, agreed to pay him until the Authority makes a determination on this application for interim reinstatement.

[4] Mr Gibbons has not challenged the genuineness of the restructuring that led to the dis-establishment of his position of Chief Registrar of the Maori Land Court. He claims, however, that the Ministry has not met its obligations to him under clause 15 (Management of Change) of his employment agreement:

Where an employer determines that the manager's position is surplus to its requirements, the manager shall be notified of the Ministry's intention to disestablish his/her position.

Following that notification, the employer and the manager shall meet to discuss an appropriate solution. The aim shall be to appoint the manager to another position that is not dissimilar to his/her current position and which is suitable to the manager's skills and abilities. Where such a position is offered to the manager, the employer shall not be obliged to offer any other alternative. If the manager refuses to accept an offer of a such a position, the manager shall be deemed to have resigned.

However, where a position offered to the manager has terms and conditions of employment (other than remuneration) that are, overall, substantially less favourable than his/her exiting terms and conditions, the manager shall not be obliged to accept that offer.

Where the position accepted by the manager has a base salary less than the manager's current base salary, the manager will be paid compensation by way of a lump sum payment to make up for any loss to his/her base salary for the next two years.

If the above process is unsuccessful, the manager will be provided with at least one month's notice of termination and shall be entitled to a severance payment ...

[5] In particular, Mr Gibbons challenges his selection for redundancy (especially as there were and are numerous vacancies under the new structure to which he could have been appointed) and the process used by Justice, for the following reasons:

- that it was too early to dismiss him when there was still options of permanent, ongoing employment open to him;
- that various appointment panels have unfairly failed to appoint him to positions he has sought;
- that he was unfairly not reassigned to any position whatsoever;
- that the Ministry has taken into account irrelevant considerations and deemed him unsuitable for appointment;
- that the Ministry has not properly consulted with him: and
- that the Ministry has not approached the matter with clean hands and, in particular, Mr White has not approached the matter with an open mind.

[6] All of these issues are disputed by the Ministry, but for the purposes of determining the application for interim reinstatement I must assume that Mr Gibbons can prove his complaints at a full investigation meeting.

[7] The principles to be applied in a claim for interim reinstatement are set out in *Cliff v. Air New Zealand Limited* [2005] ERNZ 1 at para.18, namely:

- *first, whether the plaintiff's have an arguable case of unjustified dismissal;*
- *second, whether the balance of convenience (including the existence of alternative remedies sometimes said to be a separate test) favours the plaintiffs; and*
- *third, the remedy being discretionary, where the overall justice of the case lies until it can be heard (including particularly the respective strength of the parties' cases so far as they can be ascertained at this stage).*

Arguable case

[8] Clearly Mr Gibbons has an arguable case that his dismissal is unjustified. The substantive determination will need to assess quite what the words in clause 15 of his agreement mean in relation to each of the options for a new job that Mr Gibbons has pursued. Furthermore, if he is successful in his claim that the Ministry (and Mr White

in particular) have not acted towards him in good faith then his claim for unjustified dismissal will be successful and so strengthen his claim for reinstatement.

Balance of Convenience

[9] Damages will not be a sufficient remedy for Mr Gibbons in the long term because he wants permanent reinstatement with the Ministry. In the interim, however, even if he were not be reinstated, damages would meet his financial needs. Given the requirement under the State Sector Act for Justice to notify vacancies and give preference to the person who is best suited to them, Mr Gibbons should not be prejudiced, if he were not reinstated, in any applications for a new jobs he has currently made or may wish to make in the future. He would still, however, be denied the right to work and may lose contact with the development of the new Court.

[10] Clearly Mr Gibbons considers that there is project work for him to do in the interim. Although the Ministry claims that that work is not available, or at least not for the limited period before an Authority determination, I accept that legitimate work could be found in the Ministry of Justice for an experienced lawyer, legal administrator and Court manager such as Mr Gibbons. Assessed overall, given the period of time involved (4-5 months), damages are not as adequate a remedy as they could be and therefore this factor slightly favours Mr Gibbons.

[11] The interests of third parties are important in addressing the balance of convenience. I conclude that there are no such interests here. Mr White's evidence of concerns held by himself and senior management of the Maori Land Court that Mr Gibbons may, even unconsciously, impede the progress of the new Court are merely untested perceptions and I do not take them into account accordingly. Furthermore, Mr Gibbons has not sought reinstatement to any particular position (perhaps because the position he held has disappeared) and thus the Ministry would not have the tensions associated with having two people in one position to deal with in the interim.

[12] That leaves questions of relative hardship and moral justice between the parties. The usual principle is that it is not often that an employer can convincingly assert that the hardship of being required to take the unwanted employee back for a short time is greater than the hardship of keeping out an employee who has been unjustifiably dismissed - *Melville v. Chatham Islands Council* [1999] 2 ERNZ 76.

This proposition is not the case where redundancy is involved, however, see for example *Port of Wellington v. Longwith* [1995] 1 ERNZ 87 (CA) and *Rush v. Central and Hawkes Bay District Council*, unreported, Goddard CJ, 29 September 1998, WC62/92. In *Rush* it was held, however, that where there is a dispute about whether the redundancy is genuine or necessary then that presumption may be rebutted.

[13] Even although there is no substantive position for Mr Gibbons to be reinstated back into, he is claiming (and I must assume he can prove) that he ought to have been reassigned or otherwise appointed to one of the vacancies in the new Court.

[14] Finally, given that Justice is holding Mr Gibbons to his undertaking as to damages the obvious alternative of garden leave would not assist him. In any event he is not prejudiced by the delay in monetary terms, because his redundancy compensation will, if treated as remuneration, cover the period in issue.

[15] I conclude that the balance of convenience slightly favours Mr Gibbons, despite his position having been disestablished and therefore not available for him to be reinstated into, because of his claims that he should have been appointed to some job in the Court, the lack of any clear evidence of any moral considerations and the relative inadequacy of damages.

Overall Justice

[16] It is important to stand back from the detail of the case and - looking at the matter in a broad or global way - ask where the overall justice of the case lies (*Melville*). Here it is important to note the hurdles that Mr Gibbons must overcome if he is to be reinstated into the Ministry's employ.

[17] First, he must demonstrate that clause 15 of his employment agreement requires the Ministry to look beyond similar positions when considering appropriate solutions for him. Second, if it is required to do so, the Ministry must be shown to have applied its discretion unfairly and/or unreasonably. In this regard the need to give preference to people best suited to vacancies is important. Furthermore, claims of a closed mind by Mr White causing Mr Gibbons to not be appointed to a new job in the Maori Land Court face certain difficulties. First, Mr White was not a member of several of the panels where Mr Gibbons failed to win appointment. Second, at an early stage of the planned restructuring he offered Mr Gibbons a two year secondment at his current level of pay, which would have significantly delayed, if not averted,

many, if not all, of the issues here. Mr Gibbons signed his acceptance to that secondment proposal, but then changed his mind. Finally, the Authority would have to determine which position or positions Mr Gibbons should have been appointed to, over the now incumbents.

[18] Mr Gibbons can, however, point to the favourable recommendations from independent reviews over some appointment processes (one of which was overridden) and evidence by Mr White and submissions from counsel at a previous investigation meeting that the Ministry expected him to get a job in the new structure. Despite these factors the above points are significant hurdles to overcome. Findings of procedural unfairness (such as early notice or improperly constituted appointment panels) will not result in reinstatement, and the Authority must apply the law of redeployment as set out in *NZ Fasteners Ltd v. Thwaites* [2000] 1 ERNZ 739 (CA), (confirmed since the 2004 amendments to the Act in *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825), whereby, subject to the parties' contract, it cannot constitute unjustified dismissal not to offer an employee a different position. Therefore Mr Gibbons can not be said to have a strong case for reinstatement. This factor outweighs the slight advantage that Mr Gibbons has demonstrated in relation to the balance of convenience (*Longwith* applied).

[19] I therefore dismiss the application for interim reinstatement.

Costs

[20] Costs are reserved until the final determination of the employment relationship problem between the parties.

G J Wood
Member of the Employment Relations Authority