

She has signed an undertaking for damages. AGC has indicated it has the ability to pay quantifiable monetary remedies.

[2] Prior to the investigation meeting the respondent made an application to prohibit the publication of certain information on the grounds that the information is commercially sensitive. I accept that potentially there is commercially sensitive information involved. That information is prohibited from publication. For the avoidance of any doubt I agree to order the material referred to in the respondent's application for confidentiality orders dated 20 August 2008 not to be published until the substantive investigation meeting where I will revisit the matter.

[3] There was also an application made to have only the parties present during the Authority's substantive investigation meeting: that application is declined because the public access to justice is an important right and the investigation meeting can be managed with the public being excluded when necessary and in the circumstances where commercially sensitive information may be referred to. The Authority's investigation meeting will be managed to enable the meeting to be open to the public when the substantive matter is investigated on 2 October 2008.

[4] I have withheld the detail and other names concerning the issue of the commercially sensitive information.

[5] The parties have had mediation provided by the Department of Labour.

The Background Facts

[6] Ms Gibson was employed by AGC as an account manager, switching, based in Wellington, but trading under the banner Nova Gas. She commenced in the role on 5 June 2007. There was a letter of offer of employment and a signed off employment agreement, including a separate confidentiality agreement. General terms and policies and procedures apply also. Ms Gibson's job involved identifying potential new customers, approaching companies, commercial sites and new buildings for new connections and by-passing other gas and energy providers. In other words her role was to switch customers from other retailers to AGC. She also undertook project work.

[7] AGC has 21 employees and three are based in Wellington that included Ms Gibson.

[8] On 23 July Mr Keith Kincaid the senior account manager had a catch-up meeting with Ms Gibson at work. Their relationship had become strained because of what Ms Gibson says were changes being made to her duties. AGC has a different view of that. Jennifer Munro, Human Resources Manger from Todd Energy and acting for AGC, deposed that Ms Gibson was unhappy in her work, and they met on 26 June to discuss concerns Ms Gibson had about her role. Also, Mr Hamish Tweedie, the General Manager of Nova Gas Limited, the parent company of AGC deposed that Ms Gibson was given an opportunity to write a description and prepare a business plan for a new job to help resolve the matter. He says the purpose of that did not relate to her job as she says. This was supported by Ms Munro who added that the opportunity was given to Ms Gibson to write a description and business plan on what she could do because Ms Gibson was unhappy in her job. In particular Ms Munro said:

1. Ms Gibson no longer wanted to do switching.
2. Ms Gibson did not like Mr Kincaid and emotionally mentioned that she wanted to kill him.
3. Ms Gibson had been looking elsewhere for positions and had had discussions with other employers.
4. Ms Gibson wanted Mr Kincaid's role.

[9] Ms Gibson says she has an issue about her duties and Mr Kincaid's role. Ms Gibson alleged Mr Kincaid, on 23 July, asked her how he could help her find alternative work and recommended that she take leave to pursue opportunities to find work elsewhere. He says that the conversation needs to be considered in the context of Ms Gibson's attitude to her work and that she was looking for another job anyway. He says she then made a comment that he considered was an admission of disclosure of confidential information to another person outside AGC, but worked in the industry. He says he reported that to the company's financial manager and that person reported it to Mr Tweedie.

[10] On 25 July Mr Kincaid and Ms Gibson had a further meeting off site, and discussed various work related matters and Ms Gibson's role. Ms Gibson has a different recollection of the matters discussed then.

[11] On 28 July Mr Tweedie, Mr Kincaid and Ms Munro met to discuss Mr Kincaid's report that Ms Gibson had breached confidentiality. In the meantime Mr Tweedie had taken the matter up with Todd Energy's General Manager and General Counsel. It was decided that Mr Tweedie would meet with Ms Gibson.

[12] On 29 July Ms Gibson met with Mr Tweedie and Ms Munro. The purpose of the meeting was not made clear to Ms Gibson beforehand and was not invited to attend with a representative. Mr Tweedie used the information he had that Ms Gibson had been looking for alternative employment to get the meeting underway. Ms Gibson was asked to explain her concerns she had in her work and they discussed what she was doing in her role, including being given an opportunity to identify the elements of her role she wanted and what she had done about the offer from the company to write a description and business case for a new job since she was unhappy. Mr Tweedie and Ms Munro say they then heard Ms Gibson comment about talking to a third party working in the industry amounting to a disclosure of confidential information to that person.

[13] Mr Tweedie says he was taken back and gravely concerned about what Ms Gibson had said and he queried Ms Gibson who he says confirmed what she had told the other person. He says he was shocked. He says he advised her that it was a serious matter and that he would have to think about the breach of confidentiality. Ms Gibson says the meeting was to discuss her problems and she says she was not informed that it was to discuss anything to do with confidential information. Her deposed evidence falls short of denying Mr Tweedie's evidence above although she has a different opinion about the meeting.

[14] Mr Tweedie and Ms Munro then deliberated over Ms Gibson's alleged disclosure. They say they obtained advice. Part of their consideration involved suspending her, but this was ruled out in favour of a decision to dismiss her for serious misconduct. A dismissal letter was then prepared.

[15] On 30 July 2008 Ms Gibson was required to attend a meeting that included Ms Munro, Mr Tweedie, Mr Kincaid, and Mr Hall, Todd Energy's general counsel. Again she was not advised of the purpose of the meeting and not advised to take a representative. She says they alleged that at the meetings on 23 and 29 July she had said that she had spoken to a person from outside AGC and that she had disclosed information about a project that was confidential, thus breaching confidentiality. She says she denied the allegation and asked to be represented. She says she was then handed a pre-typed letter and dismissed with immediate effect.

[16] The letter reads as follows:

30 July 2008

FORMAL NOTICE OF SUMMARY DISMISSAL

This is to advise you that Nova Gas is summarily terminating your employment for serious misconduct. The misconduct is breach of your employment agreement by disclosing confidential information to a third party, which may put Nova Gas at a disadvantage, namely [information and name withheld].

As you voluntarily admitted that to me in the presence of Jenny Munroe at an informal meeting on Tuesday 29 July 2008, we find we have no option but to terminate your employment.

You will be paid up to and including today Wednesday 30 July including holiday pays and commission payments owing to you.

*Yours sincerely
Hamish Tweedie
Group Manager Gas*

[17] The respondent has accepted that Ms Gibson was dismissed by Mr Tweedie. The company contended the dismissal was justified. It has opposed reinstatement.

The Issues

[18] Since this is an interim matter I am first required to determine whether or not there is an arguable case. Second, I am required to determine whether there are alternative remedies more appropriate to reinstatement, the balance of convenience and the overall justice of the matter.

[19] This is not the place to make any findings on the substantive matters. However, starting from the assumption that the applicant will be able to prove her case it is open to me to make some observations on whether or not there will be any likelihood of success considering both parties' positions. I have been assisted by the deposed evidence presented in affidavits and replies from both parties that I will refer to as necessary at this stage.

Is there an Arguable Case?

[20] There is clearly a problem between the respondent and Ms Gibson about her performance, and role and relationship with Mr Kincaid in undertaking her employment. The company has raised previous matters to do with Ms Gibson's performance (that she has denied), her attitude (there is common ground she had difficulties working with Mr Kincaid) and that she had been considering other new employment. Although the AGC's witnesses say that these issues had nothing to do with the decision there is a possibility that a substantive investigation could find that such issues coloured the employer's action.

[21] It is certainly clear that both parties have different versions of what happened and whether or not Ms Gibson said that she had disclosed confidential information to another person outside AGC. She says that she denied that she had breached any confidentiality. Ms Gibson accepted she had had a discussion with the person from outside AGC and had talked about job opportunities and what she was doing in her job.

[22] On a factual basis there is clearly an arguable case that will have to be heard about what Ms Gibson said and whether what she said amounted to a breach of confidentiality in regard to what AGC says was commercially sensitive information.

[23] The respondent has to justify the dismissal; the factual conflicts will be central to that. In addition there are questions raised about the procedure the respondent has followed and the impact of that in regard to what a fair and reasonable employer would have done in all the circumstances on an objective basis.

[24] Ms Gibson was not informed and not put on notice in advance that what she said was a breach of confidentiality involving serious misconduct and that she faced the

possibility of being dismissed. This will need to be scrutinised closely in regard to who said what at the meeting on 29 July. She was not told that there had been consideration given to suspending her, and that that had been rejected. Thus, she had no input into an alternative option. The decision to dismiss her was made before the meeting on 30 July and the pre-prepared letter was handed to her at that meeting. There is a strong issue of predetermination and procedural failure. AGC has relied upon Ms Gibson's comments being made in front of her managers disclosing what they say was a breach of confidentiality; that the options were carefully considered, and that summary termination was an appropriate outcome where any other course of action would not have generated any different outcome. They say that Ms Gibson has tried to back-track on her position and made untruths. The point of course that this misses is the right to natural justice and once Ms Gibson denied the allegation there is an issue of what was an appropriate course of action for the employer to follow.

[25] The procedural failures could go to the very core of the case and impact on the substantive justification of the dismissal. Reinstatement will, however, remain a live issue. There is a serious question about whether or not it would be practicable to reinstate Ms Gibson to her former position or to a position not less favourable.

[26] There is a strongly arguable case.

The Further Tests

[27] The next consideration has to do with alternative remedies and the balance of convenience. Reinstatement is a prime remedy under the Act. The applicant appears to be genuinely seeking reinstatement. She is entitled to work and has provided an undertaking for any damages. Nothing has been raised to suggest that the remedy will be affected or eroded waiting for a substantive investigation on the date scheduled. AGC has not offered any undertakings and agreement has not been reached on garden leave; where Ms Gibson might be required to pay back any wages if she happens to be unsuccessful in her claim. The respondent has submitted that it faces the risk if Ms Gibson can not pay any damages. Such damages have not been adequately quantified.

[28] It does appear there has been a financial impact on Ms Gibson with the loss of her job and earnings. She says she is facing financial difficulties and I accept that,

given her changed circumstances in her employment. She has had to rely on holiday pay and apparently that has now run out. She was not paid any notice because the employer relied on serious misconduct. Her evidence suggests that she does have an immediate financial difficulty but there is nothing to suggest that, in the longer term, she cannot pay for damages under the undertaking she has given.

[29] She says that there has been an emotional impact on her and her health has been affected and that the situation will make it very difficult for her to obtain other employment. There is no corroborating evidence about the impact on her, although Ms Gibson's evidence of the impact on her has been challenged by another witness, an employee of AGC. There is evidence of Ms Gibson visiting her doctor, but no independent evidence of the doctor's conclusions on the impact of this matter and relating it to her employment and dismissal. She has not adequately explained any difficulties she has experienced in trying to get alternative employment, including outside the industry given her skills and experience, and her curriculum vitae would suggest she is employable.

[30] The nature of the arguable case and the procedure followed by the employer are such that there is a presumption that the applicant will be able to prove her case. However, the employer has opposed reinstatement on the basis that there are three witnesses who say Ms Gibson made comments to them and they have lost trust and confidence in her. The evidence from these witnesses is unequivocal. Ms Gibson has not highlighted any reasons to suggest at this stage their evidence will be found wanting, except for her denials. AGC contended that its concern about not trusting Ms Gibson was not just an assertion, but a real concern given the contrasting evidence. There is a conflict between the witnesses from AGC and Ms Gibson. AGC's witnesses highlight that Ms Gibson's evidence has changed, is doubtful, is wrong and has not been put into context and that a fair portion of her evidence has questionable relevance. Those are matters for a substantive investigation meeting.

[31] Furthermore the respondent says her role required the use of confidential information about the business and that she would have to be "*quarantined...from any confidential customer or other information, which would mean there would be almost nothing that she could usefully do as the nature of Ms Gibson's role involves her working largely unsupervised*". Mr Tweedie added that AGC has no ability to

“effectively monitor her in her discussions with customers and suppliers”. No other details of any other possible alternatives were provided. Ms Gibson has explained that AGC is part of a wider arrangement involving Todd Energy, and indeed she was involved in a change of role between companies earlier. She says there are a number of other Todd employees working around her. This does not counter the issues of supervision and what else she could do given she is employed by AGC.

[32] There are issues in the background to do with Ms Gibson’s performance (that she has denied), the relationship between her and Mr Kincaid (where clearly there is some discord and she had made a throwaway comment that she wanted to kill Keith [Kincaid] out of frustration, and was not something she really meant), and what her duties would be in her role. The respondent’s witnesses have another point of view to that held by Ms Gibson on the issues in the parties’ relationship that in context give rise to the relationship having its difficulties and that she would need to be closely supervised.

[33] Ms Gibson’s contribution, if any, in the situation giving rise to any finding of a personal grievance, especially if there is a finding she made a disclosure will have an impact on remedies and will be central to any issue of permanent reinstatement. This is especially so if Ms Gibson actually disclosed information that was commercially sensitive to another person outside AGC as opposed to making a comment that was a mistake or even inaccurate or misunderstood. The consideration of permanent reinstatement will be a major issue and require findings in regard to whether or not it is practicable.

[34] Also there is the person outside AGC who allegedly Ms Gibson disclosed confidential information to and who may assist the Authority. That witness’s evidence may be important. It could be of some relevance to the question of any reinstatement and contribution. The applicant welcomes that witness being called. Indeed that person has voluntarily provided an affidavit that the applicant did not disclose any confidential information. However that person’s evidence will need to be carefully tested around the central aspect of the comment Messrs Tweedie and Kincaid, and Ms Munro say Ms Gibson told them she had made to the person, and if what she allegedly said was commercially sensitive.

[35] The matter has been set down for a substantive investigation meeting on 2 October as the Company's General Counsel was not available for earlier dates. That means the applicant will have to wait some six weeks without earnings from AGC. Her pay ceased from 30 July 2008. I have not been satisfied that Ms Gibson has exhausted other avenues to cover the financial impact in the meantime, but accept it would be inconvenient to her to have to look for alternative work for the six weeks before an investigation meeting. It has been suggested by AGC's witnesses that there will be difficulties making alternative arrangements for Ms Gibson to work and avoid her having access to confidential information for the period until the Authority determines the matter. This leaves open the option of garden leave.

[36] There is evidence of distrust between the parties and the relationship has its difficulties including what Ms Gibson could do working in a small team and with the same managers. Indeed it seems she will have to work with the same people and they clearly have strongly held views about the relationship given what they say Ms Gibson allegedly told them and their prior discussions held over her work and relationship with her manager. Despite these matters the applicant still wants her job back. Given that if a proper process had been followed more time would have elapsed before any decision was made. Ms Gibson has been denied the opportunity to look for other work while she is in paid employment. Balancing the competing interests and especially considering the strongly arguable case and the parties' availability for an investigation meeting I find that the balance of convenience favours the applicant.

[37] Finally, I turn to the overall justice of the matter. The parties have tried mediation. The applicant is clearly frustrated with the employer's reaction to her claim and the time it took for the employer to reply and respond when she wants to clear her name. The employer has taken issue with any criticism of delaying the matter. In any event that is a matter for costs and can be dealt with later.

[38] There is an arguable case with a serious issue on the procedure followed by AGC. The evidence suggests that on credibility the employer is in a strong position, but not necessarily one it will be successful on given the arguably defective procedure and background potentially colouring the decision. Indeed I am left in some doubt as to whether or not the applicant was acting maliciously and deliberately given the conflicting evidence.

[39] There is also a serious issue about whether or not reinstatement will be practicable and there is more than just an assertion about trust and confidence that may cut both ways. It is probable given the difficulties in the relationship that if the applicant was to return to work, then the work environment would be unpleasant and much time might be spent on determining what the applicant could do and how she would be managed, but given the nature of what has happened and the discussions the parties were previously having I would expect them to manage this now the applicant is represented. In the meantime garden leave remains the best option available given the competing circumstances, unless the company decides to call Ms Gibson in to work. The overall justice favours the applicant.

Order of the Authority

[40] The application for interim reinstatement has been made out. I order the respondent to re-instate the applicant, but on garden leave. I leave it open to the company to decide to call Ms Gibson back to work if it wishes to. This order is to be carried out as soon as practicable, and in the meantime the parties should seriously consider further mediation services.

[41] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority