



## **Employment relationship problem**

[1] JOH worked in Auckland for a telecommunications company DZL (DZL or the company). JOH's most recent employment agreement document was a product manager fixed term agreement which expires on 28 August 2020.

[2] On about 19 May 2020 DZL informed JOH that his fixed term employment agreement was to end earlier as a result of restructuring. His finish date was initially set for 26 June 2020.

[3] JOH filed a claim in the Authority seeking interim reinstatement to his former position. That application is opposed by the company. At the time JOH filed his claim he was still employed by DZL.

[4] The company extended JOH's employment to 27 July 2020 in response to his claim and to enable mediation to occur. The parties were unable to resolve the matter at mediation.

[5] The Authority sought affidavit evidence. Affidavits were received from JOH (first and reply) and from manager A (currently in charge of product and marketing) and manager B (currently senior product manager) from DZL.

[6] JOH filed extensive material in the nature of submissions, along with factual material, with his claim and in his affidavits. Submissions were filed on behalf of DZL.

[7] I have dealt with this application for interim reinstatement on the basis of untested evidence and submissions. Some matters are disputed and cannot be decided on the basis of such evidence.

[8] 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.

## **Non-publication order**

[9] JOH seeks a non-publication order for his own name and details that would identify him, along with any witnesses or statements they may make. He has worked in the telecommunications industry for the majority of his working life and there are only a small number of employers in that industry. He is very concerned about the

negative effect on his career prospects, particularly in the current economic climate, if he is publically identified.

[10] JOH's son has severe autism along with intellectual disability and some other conditions. There is medical evidence identifying any changes of routine as problematic for him. Stability is thus very important. JOH is worried that publication of his details will likely affect his employment prospects as well as the stability of his family's life, which would seriously impact on his son's condition.

[11] JOH also makes serious allegations against some of the company's managers, which I refer to below. If JOH and the company's name are identified that could lead to the identification of those managers.

[12] DZL abides by the Authority's decision on the non-publication issues, presuming it to be interim at this point. There is thus no opposition to JOH's application.

[13] The test for granting non-publication orders is high.<sup>1</sup> The courts recognise the starting point must be the principle of open justice. Although finely balance, I conclude that JOH should be the subject of a non-publication order, along with DZL.

[14] I make an interim order prohibiting publication of the names of the parties and any information leading to either party's identification. This order remains in place until further order of the Authority. I decline to make any order at this point regarding any witnesses JOH may seek to give evidence.

## **Issues**

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

- (a) Does JOH have an arguable case for unjustified dismissal against DZL or is there a serious question to be tried, and if, after a substantive determination, does he have an arguable case for permanent reinstatement?
- (b) Where does the balance of convenience lie? I must look at the detriment and injury which JOH and DZL may incur as a result of interim

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<sup>1</sup> *Erceg v Erceg* [2016] NZSC 135.

reinstatement being granted or not, as well as whether there is an adequate alternative remedy?

- (c) Where, standing back and considering the case, the overall justice lies until the substantive matter is determined.<sup>2</sup>

[16] Some factors arise under more than one heading but I will focus the discussion on that factor in one place.

### **JOH's employment with DZL**

[17] JOH worked for DZL from 2012, initially as a contractor and later as an employee.

[18] JOH's first affidavit goes into much detail regarding what he refers to as his 2019 grievance. This appears to encompass work and pay issues which arose over a number of years, including claims of bullying by JOH's then manager. That manager is neither manager A nor B.

[19] Subject to any issues about the raising of a grievance and the limitation period under s 114 of the Act, JOH is entitled to pursue claims for unjustified action to his disadvantage. However, my focus in looking at JOH's interim reinstatement claim is on events in 2020 and his dismissal.

[20] Had I been convinced on the basis of the affidavit evidence that this history motivated the company's decision to make JOH redundant I could take it into account in his interim reinstatement claim. However, I am not satisfied of that on the available material.

[21] In 2019 JOH's previous position was made redundant and he accepted a 12-month fixed term employment agreement expiring on 28 August 2020. The role was in a different team, which at that stage was managed by manager B.

[22] JOH does not focus his challenge on whether there were good reasons for offering a fixed term agreement to start with. Rather he claims that from early 2020 he was given assurances that his employment would continue after the expiry of the fixed term and that he was effectively offered and accepted a senior product manager role.

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<sup>2</sup> For example, *X v Y Ltd and the NZ Stock Exchange* [1992] 1 ERNZ 863 and *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36.

He identifies these assurances coming from the creation of a new job description and discussions about pay rises as well as about a new contract.

[23] Manager B has a different perspective, denying that any offer was made. B describes JOH in early 2020 as having capacity to do more, with the two projects he was initially working on not being enough to occupy his time. In addition team portfolios were being realigned. JOH took on the overall mobile portfolio. This is part of JOH's argument that he was in fact promoted to the senior product manager role.

[24] Manager B acknowledges there were discussions with JOH about the prospect of a permanent role in the team but not that one was offered to him. He supported JOH getting a permanent role but that required higher level approval and some human resources processes, including an interview. Manager B's perspective is that things had not got to the point of an offer or guarantee of a senior product manager role at the point when the COVID-19 lockdown began and had not occurred by the time DZL decided to propose restructuring.

### **Restructuring**

[25] Manager A describes the negative effects on the company's business of the closure of retail outlets and non-essential business in lockdown and the substantial reduction in overseas generated revenue as well as tourist revenue. DZL decided to downsize and reduce costs. A proposal was documented which affected the team JOH worked in.

[26] Manager A and a human resources representative met with JOH to talk through the proposal. JOH was sent a letter on 8 May 2020 setting out the potential impact on his role. Feedback was sought from JOH and EAP support offered. JOH provided detailed feedback.

[27] By 19 May 2020 letter, manager A told JOH that his employment with DZL was to end. The reference was to "Friday 26 2020", unfortunately missing the inclusion of June, although this was clarified. JOH's agreement required four weeks' notice of termination.

[28] Manager A and the HR representative met with JOH to outline the on-going support available, including continuation of free and discounted company services,

access to financial management training, preference for re-employment, EAP counselling and outplacement support.

[29] Manager A is currently in a role which is said to be a merger of his previous role and manager B's previous role. Manager B now has a senior product manager role which is described as having a very large portfolio of responsibilities, including mobile but also other portfolios which JOH did not undertake.

### **2020 grievance**

[30] JOH raised a grievance whilst still in employment once it was apparent that DZL regarded him as being under a fixed term agreement. This was for unjustified dismissal and financial disadvantage.

[31] There are a number of aspects to JOH's claim. JOH claims that he was operating as a senior product manager and had been assured he would get such a role. I take the implication of this to be that he either should or could have remained in that role, rather than a senior product manager role in the new structure being given to manager B, who had accepted that less senior role. Thus JOH thinks he would not have been made redundant.

[32] Alternatively JOH argues that, if he was not in the senior product manager role, the early termination of the fixed term agreement still amounted to an unjustified dismissal. He says DZL:

- (a) On occasions used restructures as a means of getting rid of or demoting staff who were not liked;
- (b) Did not discuss redeployment before making him redundant; and
- (c) Did not redeploy him to a role which was vacant and he was suitably qualified to perform, namely the senior product manager role given to manager B.

[33] DZL says that JOH was on a fixed term agreement, his role was genuinely redundant and a fair process was followed prior to giving him notice that the agreement would end early. It says the senior product manager role manager B now holds is predominantly made up of portfolios which JOH never had and is not particularly

experienced in. The company emphasises the steps it took to assist JOH, including the extension of his agreement by a month.

### **Forgery allegations**

[34] JOH alleges that the company and in particular managers A and B (and possibly others) “deliberately created a fake Position Description”, misrepresented a document and “forged” documents.

[35] JOH bases the position description allegation on apparent delays in DZL and/or its representative getting the document to him when requested and the computer properties of the document provided, suggesting it was created some weeks after it is dated and shortly before it was provided to him.

[36] Forgery is strongly denied by manager A, who considers the allegation to be inconsistent with someone who truly wishes to work for the company.

[37] Further forgery is alleged by JOH, with manager B said to have gone back into five months’ weekly work in progress documents and edited them to put his name against JOH’s initiatives.

### **Is there a serious question to be tried?**

[38] Under this heading I examine whether JOH has an arguable case for unjustified dismissal, as well as an arguable case for permanent reinstatement if he is later found to have been unjustifiably dismissed.

### **Is there an arguable case for unjustified dismissal?**

[39] At this stage in the process, in light of my findings below, I do not see it as necessary to decide whether JOH was offered and accepted permanent employment or whether he remained on a fixed term agreement. Regardless of the status of his agreement and whether his job title had changed, there is sufficient agreement between the parties on the sort of work JOH was undertaking. It was that work which DZL decided no longer warranted a full time position.

[40] Under either a permanent or fixed term agreement there was the prospect of JOH being made redundant. The fixed term agreement recognises the possibility of

early termination of the agreement by reason of redundancy.<sup>3</sup> A permanent position could also still have been declared surplus to DZL's needs.

#### *Genuineness of decision*

[41] JOH devotes some space in his lengthy first affidavit to discussion about how DZL could have made different and better decisions about cost savings and restructuring. However, the test under s 103A of the Act is what a fair and reasonable employer could have done in the circumstances, not what JOH, or I for that matter, consider the best solution was. Part of the fair and reasonable employer test is a consideration of the genuineness of the employer's decision, based on business requirements, without the involvement of ulterior motives.<sup>4</sup>

[42] Even if better decisions could have been made, I am not satisfied on the basis of the affidavits that this was a decision based on something other than business requirements.

#### *Predetermination*

[43] JOH suggests that the decision to make his role redundant was predetermined. DVL denies this. This is a question which will need to be tested with witnesses.

#### *Consultation*

[44] JOH's arguments do not focus on the consultation process. From the evidence lodged, DZL:

- (a) provided a proposal for change consultation document to JOH and others, along with a letter setting out the possible implication for him;
- (b) held a meeting with him to discuss the proposal;
- (c) offered the opportunity for feedback, which JOH took;
- (d) provided a confirmation of changes document and letter regarding JOH's situation; and

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<sup>3</sup> Clause 13.7 of the fixed term agreement.

<sup>4</sup> *Grace Team Accounting Ltd v Brake* [2014] NZCA 541 at [85].

- (e) met with JOH again to discuss the outcome and what support DZL could offer.

*Raising of grievances*

[45] JOH raised personal grievances for unjustified disadvantage and dismissal, largely on the basis that he was a permanent employee and the company was not recognising that. DZL's HR representative explored this possibility, including arranging a meeting of those involved, albeit not as soon as JOH would have liked that to occur.

*Selection for redundancy and redeployment*

[46] JOH claims that he should have been given the senior product manager role in the new structure which manager B was given.

[47] DZL has a preference for generic job titles. The structure diagram on restructuring shows three senior product manager roles in the team, albeit with different portfolios.

[48] I am not persuaded that JOH has an arguable case that he was a serious prospect for the senior product manager role which manager B is now in, when compared to B. The structure diagram indicates several portfolios of responsibility, more in keeping with B's experience than with that of JOH. The role is also based in Wellington because of a public sector connection. Manager B works out of Wellington. On the basis of the untested evidence there is no arguable case that JOH was the more suitable candidate for the role manager B now has.

[49] It seems clear that there were no other positions within the immediate team which JOH could have moved into. However, there is little or no evidence of any attempt to identify suitable positions in the wider organisation. I accept that there was a broader cost saving process going on within DZL, at least partly driven by the effects of COVID-19. However, it is arguable, on the basis of the evidence before me, that wider redeployment opportunities in other departments were not explored. JOH's affidavit refers to positions in other departments which were open applications that is, not limited to those in the area losing their roles. On this basis JOH has an arguable case for unjustified dismissal.

### *Conclusion on arguable case of unjustified dismissal*

[50] Having considered the evidence and submissions for JOH and the responses from DZL, I accept that JOH has an arguable case that DZL did not act as a fair and reasonable employer could have done regarding redeployment and therefore he was unjustifiably dismissed.

### **Is there an arguable case for permanent reinstatement?**

[51] I now consider whether it is reasonable and practicable to reinstate JOH, taking into account that reinstatement has returned as a primary remedy.<sup>5</sup> I look at the feasibility or practical workability of JOH working for DZL, noting that it is not sufficient to show resistance and strained circumstances to avoid reinstatement.<sup>6</sup>

[52] Is it feasible to re-impose this employment relationship?<sup>7</sup> In some cases, such as *Maddigan v Director-General of Conservation*, the employment relationship may be too deeply impaired, despite the employee's sense that reinstatement is of particular importance to them.<sup>8</sup>

[53] JOH complains about many aspects of his employment, including bullying by his manager in a previous role and a work environment then which was "hostile and unpleasant to be in". His experience was evidently substantially better when he worked in manager B's team. He does still appear though to have a substantial resentment against a number of employees within DZL. However, perhaps surprisingly, he says he loves DZL.

[54] Were earlier events the only complication, that may not have been sufficient to make reinstatement impractical. However, there is now a serious difficulty with reinstatement to the team JOH worked in this year. JOH alleges that there was forgery and what I describe as deceptive behaviour.

[55] Manager A describes these allegations as coming out of the blue, leaving a strong sense of betrayal. He considers that working with JOH would expose him to too great a level of professional risk for him as well as being an unreasonable burden on his

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<sup>5</sup> Section 125 of the Act.

<sup>6</sup> *Air New Zealand Ltd v Hudson* (unrep) Employment Court, Auckland, AC 46/05, 17 August 2005, Judge Colgan at 8.

<sup>7</sup> *Angus v Ports of Auckland* [2011] NZEmpC 122 at [63].

<sup>8</sup> *Maddigan v Director-General of Conservation* [2019] NZEmpC 190.

team. Manager A says he could not work with JOH, given his allegations. Manager A is the person JOH would have to report to if he was reinstated.

[56] Previously manager B saw himself as having a good relationship with JOH and considered him intelligent and knowledgeable in his work. However, the allegation that manager B made representations about the permanent role have tainted this for him. Manager B describes being surprised and disappointed by JOH's allegations which he sees as a challenge to his honesty and integrity in his dealings with JOH. Manager B says he now no longer has trust in his relationship with JOH. They would be in the same team if JOH is reinstated.

[57] Although the giving of contrary evidence is not necessarily preventative of reinstatement, I accept manager B's view that JOH's evidence contains a theme of deceptive dealings by him as well as other staff.

[58] In his reply affidavit JOH does indicate that he "may" have used the wrong word and apologises if any offence was caused to manager A. No apology is offered to manager B.

[59] I do not consider the reply affidavit to be sufficient to negate this problem. The words forgery and forge were used several times in JOH's first affidavit and were used in relation to more than one situation. Also, the allegations that documents were altered, for example to lessen and undermine JOH's work contribution, continue in JOH's reply affidavit.

[60] JOH's position that he does not have any strong ill feeling towards the managers and is happy to work with them, seems inconsistent with his allegations. JOH says that he should not be penalised because those he has rightly questioned are offended. However, it is hard to see how he himself could practically work with people he has such views about, particularly the person who would be his manager.

[61] I will deal with the issue of whether the evidence supports there being a role for JOH to be reinstated to, under the balance of convenience heading.

#### *Conclusion on arguable case for reinstatement*

[62] I conclude on the basis of the issues above, JOH has not met the test of having an arguable case for permanent reinstatement. This is based primarily on the lack of

practicality of JOH working with those he has accused on being dishonest and deceptive.

### **What is the balance of convenience?**

[63] In the event that I am wrong about the arguable case for reinstatement, I now move on to weigh the interests of JOH and those of DZL, including a consideration of the adequacy of damages.

#### *JOH*

[64] There can be little doubt that JOH will be significantly financially disadvantaged if he is not granted interim reinstatement and is unable to find other work.

[65] DZL was JOH's sole employment and he received an income well above the average wage. That salary has been the main source of income for his family and seems likely to have become the only source, as his wife was declared redundant recently.

[66] Finding another job may be challenging. JOH has specialised knowledge, albeit with no degree qualification in the relevant area. He has applied unsuccessfully for a number of jobs outside DZL in recent years. He has also since May 2020 put in applications for almost 30 jobs, without receiving any positive recruitment feedback or interviews. He is very concerned about the prospect of finding work in the COVID-19 environment. I accept that it may be difficult for him to find a similarly well paid job in the near future.

[67] JOH is worried about the prospect of becoming loaded with credit card debt, possible bankruptcy or having to sell the family house, although little evidence regarding the family's assets was filed.

[68] JOH's son has a serious condition which requires him to be educated at a special school. The school is quite a long distance from the family home and there are obviously costs associated with driving there. JOH says that small changes can have a negative impact on his son's well-being and ability to function day to day. He refers to the possibility of being unable to afford to pay for the therapy needed to improve his son's quality of life and long term outlook although the nature and cost of this are not detailed.

[69] JOH refers to being under a six month restraint of trade from DZL. However, an appendix to the agreement states that a clause preventing involvement in a competitor is not applicable.<sup>9</sup> What remains are limitations on obtaining business from DVL's clients, suppliers or customers JOH dealt with or persuading such people to terminate or restrict trade relations with DZL.<sup>10</sup> There is some suggestion that DZL may have indicated it would waive this provision, although it is not clear that it has done so.

[70] If reinstatement is not granted JOH's loss will be reduced by a month following DZL's undertaking to pay him extra salary for the period until the end of the fixed term agreement. However, it is unlikely that the substantive matter will be heard within that period.

[71] In terms of the adequacy of damages, most of JOH's evidence focused on financial loss which would be compensatable by damages. However, the possible effects on his son would not be and are a significant factor weighing in JOH's favour.

#### *DZL*

[72] I now balance those factors against any detriment which DZL would or could suffer if JOH is reinstated.

[73] DZL is a reasonably large company which may well be seen as able to afford to pay JOH. However, the picture is more complicated than that.

[74] DZL says that the role focused on mobile product manager work has disappeared. JOH describes quantities of work which he says he can continue. While that work presumably could be done, it is not evident from the affidavit evidence that they are projects which the company wishes to pursue in the near future nor has it budgeted for the capital expenditure involved in having the work done. JOH suggests that there are some work streams which can be operated without capital expenditure.

[75] Manager B indicates that some projects are simply not being undertaken at least for the next year or so. This is acknowledged to some extent by JOH, in his suggestion that DZL's shareholders would benefit if progress was made in developing and delivering some projects (which are not currently going ahead).

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<sup>9</sup> Appendix A referring to clause 15(a) of the employment agreement.

<sup>10</sup> Appendix A referring to clauses 15 (b) and (c) of the employment agreement.

[76] Reinstatement would require DZL to create a job, which on the basis of the untested evidence, does not exist in its former manner. Under the Act reinstatement must be to the “former position or the placement of the employee in a position no less advantageous”.<sup>11</sup>

[77] I cannot be satisfied that the former position still exists. The part of the mobile work is described now making up around 20% of manager B’s current work. On the basis of the untested evidence, JOH does not have the expertise to undertake the role manager B does, along the complication that another part of manager B’s role appears to necessitate or fit better with a Wellington base. I cannot reinstate JOH to manager B’s job in those circumstances, even aside from the fact that manager B is in the role.

[78] DZL evidence refers to reinstatement effectively requiring the creation of a part time role with the 20% of mobile work being pulled from manager B’s role. However, a part time role, if paid pro rata of JOH’s former salary could not be said to be “no less advantageous”. JOH’s evidence is also that he requires a salary at around his former level to maintain his son’s arrangements.

[79] As he is required to do, JOH has filed an undertaking regarding damages which may be suffered by DZL as a result of reinstatement. In some instances interim reinstatement has little financial risk for the employee as they will undertake their previous work satisfactorily and be paid for it, resulting in no loss for the employer. However, I am not confident that would be the case here. There is a risk that JOH would have significantly insufficient work due to the projects not being pursued. If he were reinstated to a full time role in those circumstances his undertaking may be called on.

[80] I also note the potential harm to workplace relations given the allegations of forgery as well as the impact on manager B if work is removed from him. These are not things readily compensated by damages.

*Conclusion on balance of convenience*

[81] I acknowledge that JOH and his family have the potential to suffer a significant degree of damage and hardship if he is not reinstated. However, DZL may well expend

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<sup>11</sup> Section 123(1)(a) of the Act.

considerable money having JOH back when there is no existing job for him and what he could do is being done by someone else.

[82] The potential is that recompense will be sought from JOH under his undertaking as to damages for remuneration paid to him when there was no or insufficient work which the company requires him to do. Manager B and the broader workplace could be seriously affected.

[83] The balance of convenience favours DZL.

### **Where is the overall justice of the case?**

[84] I will now stand back and look at where the overall justice of the case lies.

#### *Extension of employment and remuneration*

[85] DZL has already extended JOH's employment for an extra month as well as offering a range of support measures including services, training and preference for re-employment.

[86] The company is also prepared, as set out in the affidavit of manager A to make an additional payment to JOH of another month's salary in the event that the order for interim reinstatement is not made, in order to provide JOH with further financial assistance. It also undertakes in the event of JOH being unsuccessful in his substantive claim, not to seek any form of repayment. The company would however, seek that the sum be taken into account as regards remedies if JOH is successful.

[87] JOH describes the offer as disingenuous, which again suggests a lack of trust in DZL.

#### *Time to a hearing*

[88] JOH is concerned about the time it may take to get to a substantive hearing. The restructuring began over the lockdown period, which lead to a number of the Authority's investigation meetings being postponed.

[89] DZL has indicated that it would be willing to proceed to a substantive hearing as soon as practicable which it sees as a better outcome than interim reinstatement.

### *The workplace*

[90] The team JOH seeks to return to is relatively small with less than 10 staff. In light of the serious accusations made by JOH against team members it is hard to see how a reasonably harmonious workplace could exist and all those involved could operate under the principles of good faith. Manager A, who JOH would have to report to, has said in sworn evidence that he cannot work with JOH.

### *Conclusion on overall justice*

[91] The overall justice favours DZL.

### **Should JOH be reinstated?**

[92] As outlined above, I accept that there is a serious question to be tried regarding whether JOH was unjustifiably dismissed by DVL. However, on the evidence before me I do not consider that JOH has established a serious question to be tried about permanent reinstatement. I have also concluded that the balance of convenience and overall justice favour DVL.

[93] I decline JOH's application for interim reinstatement.

### **What are the next steps?**

[94] An Authority officer will contact the parties' representatives to set up a telephone conference, where arrangements will be made in the lead up to a substantive investigation meeting. This will include a discussion about the prospect of further mediation now that a determination has been issued on the interim reinstatement claim, as well as the filing of amended claim and reply documents.

### **Costs**

[95] Costs are reserved and will be dealt with alongside costs for the remainder of the proceeding.

Nicola Craig

Member of the Employment Relations Authority