

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 157/09
5157339

BETWEEN MOHAMMED KHAN
 Applicant

AND AIR NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Eska Hartdegen for Applicant
 Peter Kiely and Gemma Mayes for Respondent

Investigation Meeting and 14 May 2009
Submissions:

Determination: 18 May 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter concerns an application for interim reinstatement pending the investigation and determination of Mr Khan's personal grievance of unjustified dismissal.¹ As is well established, the issues for determination are:

- i. whether Mr Khan has an arguable case of unjustified dismissal;
- ii. whether the balance of convenience (including the existence of alternative remedies) favours Mr Khan, and
- iii. where the overall justice of the case lies.

¹ Mr Khan has also lodged a personal grievance of unjustified disadvantage which is subject to an assertion by the respondent that it was not raised within 90 days of the grievance having arisen. Like his personal grievance of unjustified dismissal, the 90 day issue in respect of the alleged disadvantage grievance is to be investigated and determined at a later date.

[2] In reaching the determination which follows, I have taken into consideration affidavits provided by Mr Khan and by three deponents for the respondent. None of this evidence has been properly tested, and for this reason any findings recorded here are temporary and will be subject to final determination when the employment relationship problem is investigated in full. I note however that much of Mr Khan's relevant employment history (as recorded below) appears not to be in dispute.

[3] In addition, at the request of Counsel, I convened an investigation meeting for the purpose of taking submissions. All deponents attended. I took the opportunity to ask questions going to the balance of convenience as did Counsel. I did not however permit full questioning on the merits of the case, despite both representatives having indicated that they proposed to make submissions about the relative strengths of the parties' cases. Conflicts of evidence on the merits do not fall to be determined in relation to an application for interim relief. Rather, applicants for interim relief are given the benefit of an assumption that they will be able to prove the case when it comes to the substantive hearing.²

Is there an arguable case?

[4] Mr Khan was first employed by the respondent on a part time basis in June 2000. In 2002 he gained permanent full time employment as a loading foreman in Ramp Services. He was a member of his union (EPMU) and his employment was covered by a collective agreement between EPMU and the respondent.

[5] On 31 May 2007, in the performance of his duties, Mr Khan attempted to lift a 38 kg bag which had not been correctly tagged. As a result he injured his back. At first he continued in his role but later, as the full severity of his injury became apparent, he required a period of leave on earnings related compensation.

[6] In March 2008, despite some abatement of his symptoms, a Vocational Independence Report confirmed that he would not be able to return to his former job. However it identified types of work which would not be precluded by his injury. On

² *NZ Stevedoring Co Ltd v NZ Waterfront Workers IUOW* [1990] 3 NZLR 308

13 March 2008 he was notified that he was now considered vocationally independent and given three months notice that his earnings related compensation would cease.

[7] Also from 13 March 2008, as part of a return to work plan, Mr Khan took up light duties, at first part time and eventually building to 35 hours per week. He continued to perform similar temporary duties (on pay) after his earnings related compensation ceased on 13 June 2008. Meanwhile, on 10 September and 25 September the respondent held meetings with Mr Khan to review his status and explore what suitable (permanent) alternative roles might be available for him. By the end of October he had not been placed in a job. A further meeting was held on 30 October and at its conclusion Mr Khan was given four weeks notice of termination.

[8] It is common ground that Mr Khan cannot go back to his original role as a loading foreman. His personal grievance is based on an assertion that the respondent failed to meet its obligations to assist him into alternative work and could have found a suitable role for him.

[9] The respondent says it met all its obligations in this regard. Mr Kiely noted that the threshold of “arguable case” is not high but submitted that Mr Khan needed to show that he had a real prospect not just of succeeding with his personal grievance, but of eventually obtaining an order for permanent reinstatement. The respondent disputed that the applicant had put forward a sufficient evidentiary basis for either proposition. In particular, Mr Kiely argued that:

- i. Mr Khan had clear and specific notice of the respondent’s concerns about his ongoing employment;
- ii. in terminating his employment the respondent adopted a fair procedure, throughout which Mr Khan was supported by EPMU;
- iii. in light of the medical restrictions on his ability to work, it was difficult to find a role for him at Air New Zealand, and
- iv. in the circumstances, dismissal was the only option.

[10] In the alternative, Mr Kiely argues that if the Authority accepts that there is an arguable case, the factors set out under this heading should be taken into account in assessing the relative strengths of the parties' cases.

[11] For Mr Khan, Ms Hartdegen submitted that her client's case is not just arguable, but strong. She notes that it is not disputed that Air New Zealand caused the injury and that this means that it bears a greater than usual responsibility towards Mr Khan. She says the applicant can show that Air New Zealand failed in its duty to:

- i. advise him, in a timely fashion, of the need to start looking for an alternative job;
- ii. review Mr Khan's rehabilitation plan and consider what alternative roles might be suitable;
- iii. assess what jobs were available and what Mr Khan could do;
- iv. provide vocational training to equip him for alternative work, and
- v. consider both external and internal jobs.

[12] Ms Hartdegen acknowledged that Mr Khan could not be reinstated (in the interim or permanently) to his old role. She argued however that permanent reinstatement would be possible (pursuant to s.123) since an order that he be placed in a position which fits his vocational assessment would amount to reinstatement to a position no less advantageous to him.

[13] In the interim, she suggests an order of the type made in *Cliff & Air New Zealand 1 ERNZ 1*, where the plaintiffs were reinstated to the payroll on the basis that Air New Zealand could call on them to work. (In Mr Khan's case, as and when suitable work was found.) Alternatively, she cited authority³ for the proposition that the Authority has a residual jurisdiction (not covered by the code of s127 of the

³ *Counties Manukau District Health Board v Trembath ERNZ 847.*

Employment Relations Act 2000) to make orders preserving the employment until the matter is substantively disposed of, and argued that a “preservation order” of this type would be appropriate here.

Determination

[14] The onus is on the respondent to justify its decision to dismiss, and the applicant has raised serious issues about the basis of that decision. There is an arguable case that the personal grievance could succeed.

[15] Mr Kiely makes a good point when he says that (notwithstanding the primacy of reinstatement as a remedy) Mr Khan’s medical issues may prove an impediment to permanent reinstatement. Again, however, I consider that it is at least arguable that Mr Khan would be entitled to reinstatement to a position no less advantageous to him than his original role.

[16] I am satisfied that Mr Khan has an arguable case. He has met the first test for interim reinstatement.

Where does the balance of convenience lie?

[17] Between them, the parties have identified a number of factors which go to the balance of convenience. The first of these is the length of time which has elapsed since the notice of termination. On 26 November 2008 Mr Khan raised a personal grievance. He then spent several months seeking legal advice and saw several different representatives before obtaining assistance from Ms Hartdegen. She lodged his problem in the Authority on 31 May 2009. The parties agreed to proceed to mediation but could not arrange a mutually acceptable date earlier than 1 May 2009. Thereafter they complied with a tight timetable in relation to the investigation of the application for interim relief.

[18] The respondent submitted that delay in commencing proceedings must be a factor weighing against the granting of interim relief.⁴ For the applicant it was

⁴ See *Mitchell v Te Reo Irirangi O Ngati Raukawa Trust* (Colgan J, AEC 73/96, 4 November 1996)

countered that this delay was not of his making, but a result of his difficulties in obtaining representation and advice.

[19] The respondent also noted (correctly) that the investigation of the substantive matter will be conducted within three months at most. Mr Kiely has argued that this is not long for Mr Khan to wait given the time which has already passed since he received notice of termination.

[20] The next factor to be considered is Mr Khan's inability to go back to his original role or anything similar to it. If he were reinstated in the interim it would of necessity be to light duties of the type he was doing as part of his return to work programme, or to some work of the type identified in his vocational assessment. Both options would entail the respondent finding something suitable which it disputes it can without creating a "make work" situation. This it says would cause significant disruption as would the need to supervise him to ensure that he does not endanger himself.

[21] The only other option would be a type of "garden leave." This however is not Mr Khan's preference. He has become depressed and demoralised by his prolonged unemployment and wishes to get back to a normal, active working life as soon as possible. These intangible benefits to Mr Khan of returning to work are of course a further factor to be weighed in the balance. Ms Hartdegen argues that subsequent monetary compensation will not meet his emotional and psychological need to get back into the workforce.

[22] As for the tangible benefits of interim reinstatement, Mr Khan told me that he has been unemployed since he left Air New Zealand, despite efforts to obtain work. He does not qualify for any form of social welfare assistance because his wife is working full time as a nurse. He told me that he faces serious financial difficulties. Indeed, Ms Hartdegen described him as impecunious.

[23] When asked how (in these circumstances) he would be able to meet his undertaking as to damages he told me that he believed he would be able to turn to family members for assistance should he be required to pay damages. Mr Kiely

argued in response that this was insufficient to establish that the undertaking would be met.

Determination

[24] In response to Ms Hartdegen's submissions on the delay, I record that I accept that Mr Khan did not "stand by" and fail to take action over his problem. However, the elapse of time is a factor in the respondent's favour whether or not it was entirely Mr Khan's fault. Interim relief is for the purpose of preserving the status quo. In this case, the status quo for Mr Khan is not employment with Air New Zealand. The issue of delay is weighed in the respondent's favour.

[25] So does the fact that Mr Khan cannot return to his old job. Even if an order were made on similar terms to that in the *Cliff* case (as suggested) there would remain the task of finding suitable safe work for Mr Khan. Whether this can be done is of course the nub of the whole case. Even if it is possible it is reasonable to expect it to take considerable resources. Alternatively, given the limited time before the substantive matter is heard, any such order may default to one of garden leave. Mr Khan would not then gain the intangible benefits he seeks.

[26] The matter of Mr Khan's financial situation is evenly balanced. If he were placed on what will effectively become garden leave, he would gain some benefit in relation to his immediate financial problems but would be exposed to a potential claim for damages if he were later unsuccessful in his case. This is a real concern given that we have been told that he is impecunious.

[27] Overall, the balance of convenience does not favour a grant of interim relief. The long period since the dismissal, the fact that Mr Khan cannot be put back in his old job, and the uncertainty and added burden of finding an alternative position, all outweigh the benefits to him (tangible and intangible) of immediate reinstatement. In addition, I am satisfied that there is a basis for the concern raised about his ability to meet any undertaking. While this is not determinative, it reinforces the conclusion that the balance lies in the respondent's favour.

Where does the overall justice of the case lie?

[28] Each party has argued that it has the stronger case. As I indicated to Counsel at the investigation meeting, I do not consider myself in a position to make a finding on this. What I can say is as follows. Mr Khan has raised serious issues about the efforts the respondent made to assist him and I am able to accept that he has at least a “tenable arguable case” (to adopt the phrase used in *Cliff*, supra) that he has a personal grievance. However he has furnished very little evidence as to what suitable jobs he says there were for him. Given the constraints on what he can do (as set out in his Vocational Assessment Report) I do not find myself in a position, at this stage, to say that he has anything more than an arguable case for permanent reinstatement.

[29] Mr Khan’s situation is a tragic one. He was injured through no fault of his own and now finds himself unemployed. His earnings related compensation has ceased and he is ineligible for income support. His age, (58) the restrictions on what he can safely do, and the worsening labour market all combine to hinder his chances of finding work outside Air New Zealand. As Ms Hartdegen argued, if the respondent, (which knows his good work history and is one of the country’s largest employers) does not have work for him, it is hard to see who would. Indeed, his circumstances give rise to the question whether it was reasonable for his earnings related compensation to be stopped, but that is a matter outside my jurisdiction.

[30] Nonetheless, I remain unconvinced that a case has been made for interim reinstatement. The balance of convenience favours the respondent, and the overall justice of the situation is not such as to tip the scales the other way.

Costs

[31] Costs are reserved pending the completion of the investigation into the substantive matter.

Yvonne Oldfield

Member of the Employment Relations Authority

