

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 177
5339723

BETWEEN KABEER KHAN
 Applicant

AND ORACLE NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Applicant in person
 Carl Blake and Stephanie van der Wel, counsel for
 Respondent

Investigation Meeting: 21 April 2011

Determination: 2 May 2011

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

[1] Before the Authority is an application for interim reinstatement brought by Mr Kabeer Khan under s 127 of the Employment Relations Act 2000.

[2] When Mr Kahn was dismissed in February 2011 he was employed by the respondent Oracle New Zealand Limited as Principal Consultant, the position to which he seeks reinstatement.

[3] After he lodged his application Mr Khan attended mediation with Oracle but was unable to resolve his employment relationship problem. That problem encompasses a number of specific claims including a personal grievance claim that he was unjustifiably dismissed.

[4] As required by s 127 of the Act, an undertaking has been given by Mr Khan to abide by any order that the Authority may make in respect of damages in determining

his employment relationship problem. Oracle too has given that undertaking, to strengthen the grounds the company has put forward in opposition to interim reinstatement.

[5] Mr Khan seeks an order requiring Oracle to reinstate him pending the full investigation and determination of his unjustified dismissal claim and other claims. To remedy those he seeks permanent reinstatement, reimbursement of lost salary and payment of expenses, and compensation of \$15,000 for loss of dignity, humiliation and stress caused by his unjustified dismissal. He also seeks from Oracle \$15,000 compensation for unjustified disadvantage in his employment, and penalties for breach of the employment agreement and good faith obligations under the Employment Relations Act 2000.

[6] In considering interim reinstatement applications the Authority is required to apply the law relating to interim injunctions and have regard to the object of the Employment Relations Act 2000. The relevant law requires that four recognised tests or questions are to be applied to the circumstances of each case. In relation to the object of the Act, the Authority must have regard to the principle that productive employment relationships are founded on good faith behaviour and on mutual trust and confidence.

[7] Until 1 April this year it was also expressly a relevant object of the Act, at s.101(c), that reinstatement was to be recognised as an important remedy for any personal grievance, and under s 125 of the Act reinstatement was to be the “primary remedy.” The latest amendments to the Act have repealed ss 101(c) and 125. Now under s 125(2) as amended, reinstatement is to be provided by the Authority if it is practicable and reasonable to do so.

[8] These changes are not retrospective but are addressed to the present, whenever the Authority has determined that an employee has a personal grievance and is considering whether to provide reinstatement as an interim or permanent remedy. The Authority took that view recently in *Lamb v Burnside Dairy Farms Ltd* [2011] NZERA Christchurch 53.

[9] The evidence before the Authority for the purpose of determining this interim reinstatement application has been presented as usual in affidavit form by Mr Khan and a number of witnesses on behalf of Oracle. As Mr Khan named 11 Oracle

employees as having been involved directly or indirectly in actions he complained had been taken against him in his employment leading to disadvantage and dismissal, it was necessary for evidence to be provided by several of those persons. They extended up to an Oracle overseas based Senior Vice President who had met Mr Khan on a visit to New Zealand and later received from him by email some views and suggestions about improving the business and its operations.

[10] As the affidavit evidence must necessarily remain untested until the substantive investigation of the unjustified dismissal personal grievance and other claims, any findings of fact by the Authority in this determination are provisional only and may change later once the claims have been fully investigated and all witnesses, including Mr Khan and various Oracle employees including those he has impugned, have been examined on their evidence.

[11] The standard tests or questions the Authority must consider in determining this application are:

- Is there an arguable case?
- Where does the balance of convenience lie?
- Are other adequate remedies available?
- Where does the overall justice of the case lie?

Mr Khan's employment

[12] Mr Khan commenced employment with Oracle in October 2007. The terms and conditions of his position as Principal Consultant were contained in an individual employment agreement which provided for him to be paid a salary of \$105,000 per annum. This had increased to \$120,000 by the time the employment ended.

[13] On 9 February 2011 at a meeting with Mr Roger Hooper, an Oracle Practice Manager, he was told that his role was to be disestablished with immediate effect. Mr Khan had earlier been advised of a proposal to that effect on 25 January, while he was overseas on an extended assignment for Oracle in China. Between 25 January and 9 February there were further discussions between Mr Hooper and Mr Khan about the on-going work situation, the possibility of restructuring and redeployment options.

[14] Mr Khan was given one month's notice of termination but not required to work out any of that period. In a letter Mr Hooper gave to Mr Khan on 9 February he was encouraged to explore alternative redeployment options with Oracle, and he was advised of out placement support available and also of the company's Employee Assistance Programme.

[15] The employment agreement at clause 14 contemplated that if Mr Khan believed he had cause for a personal grievance against Oracle he would communicate that directly to the company and attempt to settle the grievance by discussions with the company before lodging an application in the Authority. The first Oracle heard from Mr Khan of his grievance claims was not until service upon the company of his application for interim reinstatement. This occurred shortly after 31 March 2011, the date on which Mr Khan had applied with urgency to the Authority and seven weeks after his dismissal. The raising of the grievance claims was not done directly and, having regard to the nature of a claim for interim reinstatement, neither was it timely.

The evidence

[16] Mr Khan claims that his dismissal was not justified because it did not result from a genuine redundancy, as Mr Hooper claimed it had in his letter of 9 February 2011 when referring to the "restructure and disestablishment of the role of Principal Consultant".

[17] Mr Khan in his affidavit asserted that at the hands of various Oracle employees he had been victimised and made to suffer retaliation for things he had done. He asserted, "I was isolated, I was discriminated against and I was denied equal employment opportunities within Oracle, resulting in my career growth in the company being impacted and prevented." He also asserted that Oracle employees had manipulated events, to try and find reasons for placing blame on him and ultimately for making him redundant. In this regard Mr Khan said in his affidavit, "they saw me as a troublemaker and used redundancy as a way to get rid of me out of the company." He said that he had told Oracle he considered his redundancy was "well planned in advance and that it was retaliatory."

[18] Mr Khan directly related his dismissal to two particular events, which he referred to as follows:

... my complaint about the term "Indian" made on 28 October 2009, and my sending an email to Casey Poon [Oracle Vice President] suggesting ideas and ways for improvement on 26 March 2010.

[19] Both events, the complaint and the email to Mr Poon, were dealt with comprehensively by witnesses for Oracle in their evidence. In relation to the first, Ms Elizabeth McCusker, a Practice Director for Oracle, put into evidence email communications she had with Mr Khan. On 28 October 2009, Mr Khan had emailed her:

Hi Liz – In the last few months I've observed that 'Oracle SSI' folks are usually referred to as 'Indians' in our OCS NZ practice.

I suggest to refer them as 'Oracle SSI' or 'Consultants' instead, that may sound more professional to everyone.

*Regards,
Kabeer*

[20] Ms McCusker replied to Mr Khan less than an hour later on the same day with the following:

Fair enough Kabeer – thanks for bringing to my attention –

[21] The evidence of Oracle is that this matter was raised and dealt with in that brief exchange of emails and afterwards Mr Khan appeared to have no further issue about it or complaint, as he expressly confirmed in an email to Ms McCusker on 11 March 2010 which stated, "there is no issue with regards to equal opportunities or diversity."

[22] However, in September 2010, Mr Khan laid a formal complaint in respect of a number of matters, including workplace racial discrimination, about which he complained:

6. *Openly cracking jokes in office by calling 'Indian origin' Oracle New Zealand employees or Oracle IBC Employees as 'onsite Indians' or 'Indians.'*

[23] He sought a full investigation of his various allegations including the one above, in September 2010.

[24] In relation to the second matter – sending an email to Casey Poon, Senior Vice President of Oracle, in which he had suggested ideas and ways for improvement – he complained that after expressly asking Mr Poon to keep his identity confidential when

passing on his suggestions to any others Mr Poon had revealed his identity to Ms McCusker and that as a result he had been exposed to the risk of “retaliation.”

[25] The request made of Mr Poon by Mr Khan had been;

.....keep my identity confidential, and [I] do not expect any kind of retaliation. If you need to forward these details to others, simply copy the contents and paste it in a new email.

[26] From the affidavit evidence, which includes an email from Mr Poon to Ms McCusker, that request was met by Mr Poon in passing on information to Ms McCusker in March 2010. The evidence shows that Mr Poon did not breach the request for confidentiality but acted within the conditions Mr Khan himself set, by not revealing his name and only passing on the content of the suggestions and ideas for improvement.

[27] Ms McCusker said that when she received the information from Mr Poon she had been able to guess who had given it to him, because Mr Khan had previously discussed with her the same suggestions and ways for improvement.

[28] This second matter also became the subject of a complaint by Mr Khan in September 2010 when, under one of “four heads of allegation” he referred to “retaliation and bullying.” This included “when issues were reported to Senior Management – when diligently reported issues that led to a big project’s failure.”

[29] The evidence from Oracle is that the company had promptly responded to Mr Khan’s complaints of September 2010 and had endeavoured to investigate them but that Mr Khan would not cooperate, instead making unreasonable requests for the complaint investigators to be appointed from outside of the employer’s New Zealand operations.

[30] For Oracle several witnesses in their affidavits gave consistent evidence of consideration that had been given to restructuring by the company towards the end of 2010, because of a fall off in work available for employees in positions such as Mr Khan held. The company evidence is that Mr Khan’s position was disestablished following a major downturn in needs from clients both present and future, and a lack of work requiring the employment of a Principal Consultant limited by the specific skill-set and areas of expertise and experience Mr Khan had.

[31] In assessing the evidence available from affidavits provided to it by the parties, the Authority must look at facts or what it can assume will later be established as facts. Establishing fact is the purpose of evidence. Mr Khan's evidence contains a good deal of assertion and statement of belief, but the Authority must look at facts upon which assertions made and beliefs held may reasonably be based on.

[32] The Authority has considered the tests required to be met in granting interim reinstatement.

Is there an arguable case?

[33] As submitted on behalf of Oracle by counsel Mr Blake, as a matter of principle not only must Mr Khan establish an arguable case that he was unjustifiably dismissed, he must also establish that if successful with his claim he will be reinstated in addition to or instead of being compensated monetarily. The Employment Court drew attention to this facet of an s 127 application in *Cliff v. Air New Zealand Ltd* (CA6A/05, Colgan J, 24 February 2005), at para.[12] as follows:

So whilst plaintiffs must establish an arguable case of personal grievance (unjustified dismissal), they must also establish an arguable case that they will thereafter be reinstated in employment and not simply compensated monetarily for their grievances.

[34] I find from the affidavit evidence presented to the Authority that at best there is only a weakly arguable case that Mr Khan's dismissal resulted from something other than a situation of genuine redundancy, as claimed by oracle to be the only grounds for his dismissal. Even allowing that the threshold for establishing an arguable case is low, Mr Khan's case is marginal with regard to this test.

[35] I take into account well established law that in relation to redundancy decisions the management of a business is for the employer and it is not for a court (or the Authority) to substitute its judgement for this. What the Authority is entitled to do is to satisfy itself that the dismissal was decided upon because the employer considered that the employee was surplus to the employer's needs. These principles were identified and applied by the Court of Appeal in *GN Hale & Sons Ltd v Wellington etc Caretakers etc IUOW* [1990] 2 NZLR 1079, at 1087.

[36] The evidence in this case indicates that Oracle's decision was made with reference to the position of employment Mr Kahn held and not with reference to him

personally as an individual, except insofar as his qualifications, skills and experience were relevant to considering the work that was available for him to do.

[37] In relation to the procedure followed by Oracle to decide whether to disestablish Mr Khan's position and terminate his employment by dismissal, the case is a little stronger, as there are aspects of the timing of consultation that took place that raise questions.

[38] Procedural defects however in a genuine redundancy situation may not be sufficient to lead the Authority to order reinstatement where a dismissal is found to be unjustified. As it was put by the Court of Appeal in the *Hale* case (above) at page 1085;

Failure to follow a fair procedure does not mean that reinstatement will necessarily be practicable, but it is likely to have a bearing on other remedies.

[39] As mentioned above, since 1 April this year reinstatement is no longer the primary remedy and instead the focus is to be on the practicability and reasonableness of that remedy. It is unlikely to be regarded as practicable or reasonable for an employer to be required to revive a genuinely redundant position so that an employee dismissed without procedural justification can be re-engaged into it.

[40] On my finding there is at the very best only a weakly arguable case by Mr Khan that he will be reinstated if he establishes his grievance of unjustifiable dismissal, especially if any unfairness or unreasonableness was procedural only.

Where does the balance of convenience lie?

[41] The Authority is satisfied that the balance of convenience lies in not ordering interim reinstatement but in providing reasonably promptly a full investigation of the substantive claims including unjustified dismissal. The Authority is able to conduct that investigation within the next four weeks, on 3 June.

[42] In looking at this test I must take it into account that for some unexplained reason Mr Khan delayed by seven weeks the lodging of his urgent application for interim reinstatement. He was paid one month in lieu of notice. His affidavit evidence sworn on 31 March is that he was then unemployed and looking for a job. It may be that since then he has found some paid work, but that is not clear. Assuming he has not had employment since termination, he has given no evidence as

to his means or ability to support himself and his family. I also must take into account the inconvenience to Oracle if it has to create a position previously disestablished, arguably for reasons of genuine redundancy, to comply with the Authority's order.

Are other adequate remedies available?

[43] I find that in the circumstances, the remedies of reimbursement of lost wages and compensation for hurt feelings, humiliation and distress will provide adequate remedies to Mr Khan in the event he is found to have been unjustifiably dismissed or has any other type of personal grievance. He claims to be suffering from loss of reputation but, as submitted by Oracle, genuine redundancy as contended to have occurred here, is a no-fault situation in which reasonably minded people would not attribute blame to the redundant employee, especially in times when there is a higher incidence of redundancy.

Where does the overall justice of the case lie?

[44] I find that the overall justice of the case lies in declining the application for interim reinstatement. The weight of evidence, untested though it is, indicates at this stage a genuine redundancy situation that Oracle endeavoured to deal with by the lawful action of reducing the number of positions of employment. Further investigation may or may not show that procedurally there was a lack of justification arising from a compressed timetable set by Oracle which limited Mr Khan's reasonable availability to be consulted in person at the beginning of the consultation process.

[45] There is only a weak case in support of permanent reinstatement, the balance of convenience favours leaving matters as they have been since 9 February 2011 for a few weeks more until a full investigation can be held. Monetary remedies are adequate in the circumstances.

Trust and confidence

[46] Relevant to the practicability and reasonableness of reinstatement is the evidence given by Oracle witnesses of their concerns that Mr Khan has made very strong attacks against their character and professional integrity. He has accused up to 11 employees from company Vice President down of, in effect, conspiring to get rid of him on the pretext of redundancy but for the real reason that he was a

troublemaker. As mentioned at the beginning of this determination, the Authority is required to have regard to the object of the Employment Relations Act 2000. This includes the principle that productive employment relationships are founded on good faith behaviour and also on mutual trust and confidence. I accept as valid the concerns of the Oracle witnesses that the accusations directed at them indicate a strong lack of trust and confidence on the part of Mr Khan, the presence of which could reasonably be expected in an employee seeking to be reinstated immediately to his former position.

Determination

[47] For the above reasons, the discretion the Authority has in relation to this interim reinstatement application is exercised by not making the order sought under the Act.

[48] Shortly the Authority will consult Mr Khan and Mr Blake about the parties' availability and the timetable for an investigation meeting to be held on 3 June 2011, or on such alternative date near then as may be decided upon.

Costs

[49] Costs are reserved, pending the final determination of all Mr Khan's claims. I simply note at this point and leave for determination later, that Oracle has clearly raised an issue as to whether the disadvantage grievance claims were raised within 90 days. There has been no consent given by Oracle to them being raised outside the statutory period. Depending on developments, this issue may become relevant in the context of costs.