

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 472/09
5291396

BETWEEN MICHAEL MANNING
Applicant

AND TORPEDO7 LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Rose Alchin, Counsel for Applicant
Kate Sullivan, Counsel for Respondent

Investigation Meeting: 24 December 2009

Determination: 24 December 2009

DETERMINATION OF THE AUTHORITY

[1] Michael Manning was dismissed from his position as purchasing and planning manager with Torpedo7 Limited on Friday 11 December 2009. On 18 December Mr Manning filed an application for interim reinstatement pending the hearing of his personal grievance for unjustified dismissal. The application was accompanied by a supporting affidavit and an undertaking as to damages.

[2] A teleconference was held with the parties' representative on 22 December subsequent to which the respondent filed a statement in reply and supporting affidavit in opposition to Mr Manning's application. The investigation of the substantive matter will be heard in late March/early April 2010.

[3] At the hearing of the interim application I received submissions from Ms Alchin and Ms Sullivan which addressed the tests applicable to an application for interim reinstatement¹.

¹ Section 127(4) Employment Relations Act 2000

Arguable case

[4] To meet this test the Authority must be satisfied that there is a serious issue to be tried².

[5] Ms Alchin submits Mr Manning has a strongly arguable case that his dismissal was procedurally and substantively unjustified and that he is likely to succeed at substantive hearing. She relies on the evidence as deposed in the affidavit and documents in support and submits:

- Torpedo7 was obliged to follow a fair and reasonable process in restructuring its business and dismissing Mr Manning for redundancy;
- The restructure and redundancy were not substantively justified – the sales team role is not significantly different to Mr Manning’s role as purchasing and planning manager in that the reporting lines are virtually identical and the changes are in name only;
- The restructure and redundancy were not motivated for genuine business reasons – the only significant change to the business structure is a new role (supply chain and business intelligence manager which Torpedo7 had previously tried to move Mr Manning to, one of the business’ directors and shareholders (and current sales team manager) does not like working with Mr Manning, Mr Manning was not given an opportunity to apply for the sales team manager position and the restructure has no obvious benefits to the business;
- The restructure and redundancy process were procedurally flawed – there was no consultation over the restructure, the implementation of the new structure was implemented with undue haste, there was inadequate time provided to consider the proffered role of business analyst supply manager, there was no advice that the alternative to declining the business analyst role was redundancy, Mr Manning’s attempts to engage in the process were thwarted by Torpedo7’s attempt to negotiate an exit package and ultimately dismissal; and
- Repeated suggestions to attend mediation were unreasonably rebuffed.

² *American Cyanamid Co v Ethicon Limited* [1975] 1 All ER 504

[6] Ms Sullivan submits Mr Manning can not make out a strongly arguable case:

- There are significant factual disputes which can only be determined at a substantive hearing;
- There was a genuine need to restructure the business to improve cash flow and refocus the business;
- This need had been foreshadowed to Mr Manning in September; and
- The respondent engaged in a genuine consultation process which Mr Manning refused to participate in.

[7] All that is required to establish arguable case in an interim reinstatement setting is a minimal lack of justification for the dismissal³. It is not the role of the Authority to resolve disputed facts at this stage. I find there are serious and arguable issues that will have to be investigated and determined by the Authority broadly, whether there was a genuine motive for the restructuring and redundancy and whether a fair and reasonable restructuring process was undertaken by Torpedo7 and more specifically whether Mr Manning or Toprpedo7 initiated the *exit package* discussion, whether Mr Manning had been fairly notified of the consequences of declining the proposed new position in the structure and whether Mr Manning's dismissal was precipitate given agreement between counsel to defer a final meeting until Mr Manning had had an opportunity to put to his position to Torpedo7 in writing.

[8] Mr Manning has established a clearly arguable case that his dismissal was unjustified.

Alternative remedy/Balance of convenience

[9] It is convenient to deal with these heads together. These tests require the Authority to consider the relative detriment or injury the parties will incur as a result of orders being made or not made⁴, as the case may be.

[10] Ms Alchin submits the balance of convenience favours Mr Manning and there is no adequate alternative remedy to reinstatement:

³ *Ford v Hutt Valley Health Corp Ltd* [1994] 1 ERNZ 593

⁴ *X v Y Ltd and NZ Stock Exchange* [1992] 1 ERNZ 863

- It is unlikely given Mr Manning's specialised skills and the time of year that he will be able to find alternative employment quickly;
- There is a very limited chance Mr Manning could secure a similar role in Hamilton;
- Damages cannot adequately remedy the reputational damage Mr Manning has suffered – his employment with Torpedo7 was for a short period and this would reflect badly on his work record, he lives in a small community and understands members of his Church community have been informed of his work situation via contacts within Torpedo7;
- Mr Manning and his family will have to relocate to Auckland having very recently moved to accommodate his employment, causing upheaval;
- Mr Manning could take up the restructured role – Torpedo7 has purported to fill it on an interim basis and it is very similar to his disestablished role;
- In the days following the announcement of the restructuring Mr Manning demonstrated his ability to continue to work professionally under difficult circumstances;
- Mr Manning has provided an undertaking as to damages;
- Reinstatement is a primary remedy;
- There is no practical barrier to reinstatement; and
- Garden leave is a possible alternative.

[11] Ms Sullivan submits lost wages and compensation in the event the substantive claims are made out would adequately remedy any loss or damage suffered by Mr Manning consequent to his dismissal:

- It would be enormously inconvenient for Torpedo7 to create another position for Mr Manning to fill – the positions in the new structure which Mr Manning could perform have been filled;
- Mr Manning has expressed a lack of trust and confidence in the Torpedo7 management and this has damaged the relationship;
- Any reputational damage is minimal given this is a redundancy;
- It would be inequitable to lay the consequences of a poor job market at the feet of Torpedo7;

- Mr Manning does not have particularly specialised skills;
- There is no evidence and it would be difficult to prove Torpedo7 is responsible for any reputational damage within Mr Manning's community;
- Mr Manning's final pay effectively runs to the end of January meaning he would be without pay for a reasonably short time before the substantive hearing; and
- There is no evidence of financial hardship caused by the dismissal.

[12] I accept at face value Mr Manning's expressed wish to return to work at Torpedo7 – he has very recently relocated his family in the understanding his employment was secure, his employment has been of short duration and he has averred his willingness to continue working for Torpedo7. The evidence of his expressed lack of confidence in Torpedo7's management is disputed. Torpedo7 has been on notice from an early stage of Mr Manning's intention to seek interim reinstatement. Presumably with this in mind the positions in the new structure have been filled from existing staff.

[13] In weighing up the respective hardships I find the balance of convenience favours Mr Manning.

Overall justice

[14] I now stand back from the detail of the matter and look at the situation in a more general way. I have found Mr Manning has a clearly arguable case and that the question of adequacy of alternative remedy and balance of convenience fall in his favour. This matter is likely to proceed further and in assessing the relative strengths of the parties' cases I say at this interim stage that it cannot be said Mr Manning's claim for permanent reinstatement will not be successful. He has raised serious issues regarding the genuineness of his redundancy and the fairness and reasonableness of the process followed.

[15] The concerns as to how Mr Manning can be reintegrated into the workplace given his role in the senior management team, his alleged concerns about the team and the consequent damage to trust and confidence, as deposed in Torpedo7's supporting

affidavit, can be addressed by the manner in which an order for interim reinstatement is framed.

[16] Mr Manning's application for interim reinstatement should be granted subject to conditions. Those conditions are that Mr Manning is reinstated to the position he held with Torpedo7 at date of dismissal (or a position no less advantageous) and Torpedo7 is to elect whether Mr Manning actually attends and performs work or remains on garden leave.

Conclusion

[17] The application is granted with conditions as set out in paragraph [17] above.

[18] The parties are directed to mediation, with some urgency, to discuss the parties' employment relationship problem and how the conditions upon which reinstatement has been ordered can be exercised in a way which causes minimal disruption to Torpedo7 and Mr Manning. The parties have leave to seek further directions from the Authority to the orders made if that should be necessary.

Costs

[19] Costs are reserved.

Marija Urlich

Member of the Employment Relations Authority