

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2017] NZERA Wellington 4  
5641983

BETWEEN                      GRAHAM MARTIN  
Applicant

A N D                              ACCIDENT  
COMPENSATION  
CORPORATION  
Respondent

Member of Authority:        M B Loftus

Representatives:              Greg Lloyd, Counsel for Applicant  
David Traylor, Counsel for Respondent

Investigation meeting:        21 December 2016 at Wellington

Submissions Received:        At the investigation meeting

Date of Determination:        1 February 2017

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, Graham Martin, was dismissed by the respondent, the Accident Compensation Corporation (ACC) on 8 September 2016. He claims the dismissal is unjustified.

[2]     Dr Martin also says he is a victim of age discrimination and claims to have been unjustifiably disadvantaged by being treated differently from his colleagues and excluded from activities he would normally have expected to participate in.

[3]     Amidst other remedies Dr Martin seeks reinstatement. He does so on an interim basis pending a substantive consideration of his claims which, due to issues concerning witness availability, is not scheduled till mid-May.

[4] ACC believes it can justify Dr Martin's dismissal and opposes the application for interim reinstatement.

### **Background**

[5] Dr Martin is an experienced medical specialist who was employed by ACC as a Branch Medical Advisor (BMA) in 2001. A BMA is employed to provide advice to case managers in order to assist them make decisions regarding clients, their claims and the management there-of.

[6] By mid-2011 ACC was expressing concerns about Dr Martin's performance and between then and late 2014 it engaged in numerous sessions of coaching and had Dr Martin's work assessed by senior colleagues. There were also formal performance improvements plans (PIPs) along with a formal warning. That said, ACC's criticisms seem to be aimed at the way Dr Martin communicated his advice and not the content there-of and this was reiterated during the presentation of their submissions.

[7] Dr Martin says at least one of the PIPs was nothing more than revenge for his having challenged a decision he be excluded from assisting with the preparation for review and appeal hearings. He also has various criticisms regarding the way the process was conducted and expresses a view the criticisms were subjective, pedantic and incapable of warranting disciplinary action.

[8] In March 2015 a new incumbent, Dr Rasiah, was appointed to the position responsible for managing Dr Martin. She says that while aware of the previous issues she saw an opportunity to apply a fresh set of eyes and chose to effectively start again with an assessment of Dr Martin's performance which was followed by a regime of coaching.

[9] Dr Martin has a different view claiming an entirely new set of 6 standards was imposed in March 2015. He says aside from the fact there was no consultation about the content they were long, complex and experimental. He also adds their appropriateness is undermined by the fact they were then changed shortly before his dismissal.

[10] In August 2015 Dr Martin was advised he was not meeting three of the six standards. Another PIP resulted. It led to a warning for poor performance in

December 2015 and, ultimately, Dr Martin's dismissal. Again Dr Martin takes issue with the standards, the assessment criteria and the way the process was managed.

### **Determination**

[11] Applications for interim relief involve the exercise of a discretion. The answer comes not from the rigid application of a formula but from a consideration of various questions which culminate with a conclusion to the overarching question of what does the overall justice require?<sup>1</sup>

[12] The parties are in agreement as to the questions to be considered with Mr Traylor expressing it as follows:

*... there are four broad areas of inquiry for the Employment Relations Authority to undertake to determine whether to exercise its discretion:*

- a. Is there an arguable case for:
  - i. Unjustified dismissal; and*
  - ii. Permanent reinstatement?**
- b. Is there an adequate alternative remedy available, such as damages?*
- c. Where does the balance of convenience lie?*
- d. What does the overall justice of the case require?*

[13] With respect to the question of whether or not Dr Martin has an arguable case for unjustified dismissal I conclude the answer is yes.

[14] For ACC Mr Traylor has presented a comprehensive submission by answering the questions the Court considered applicable when addressing dismissal for poor or unsatisfactory performance in *Trotter v Telecom Corporation of New Zealand*.<sup>2</sup> In summary he submits there is more than sufficient evidence (to which he refers) to conclude:

- a. ACC had become dissatisfied with Dr Martin's performance given the PIPS and the final disciplinary outcome;

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<sup>1</sup> *Klisser Farmhouse Bakeries Ltd v. Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA)

<sup>2</sup> [1993] 2 ERNZ 659 at 681

- b. ACC clearly informed Dr Martin of its dissatisfaction and its requirement he achieve a higher standard with evidence coming from numerous coaching sessions and assessments along with the formal PIPS;
- c. That the information given by ACC was readily comprehensible and contained an objective statement of the required standard with reference being made to various parts of the evidence;
- d. That a reasonable time, indeed more than reasonable, was allowed for the attainment of ACC's standards given two formal PIPS during Dr Rasiah's management of the issue;
- e. There was an objective assessment of measurable targets but the level of success was sufficiently low that any suggestion the targets were set to high would be rendered nugatory;
- f. Tentative conclusions were fairly put to Dr Martin for his consideration and comment. Those comments were considered with an open mind as was his service record and any responsibility ACC should shoulder for the situation which had developed;
- g. Given the training, counselling and PIPS and they fact they were conducted over a considerable period of time it could be concluded all possible remedial steps had been exhausted.

[15] In summary it was submitted ACC went well beyond what was required of a fair and reasonable employer. It would, in such circumstances, be able to justify the dismissal and it follows Dr Martin does not have an arguable case.

[16] The problem with this approach is it disregards the fact an interim application is decided on untested affidavit evidence. Dr Martin has raised a number of concerns about the process, the appropriateness of both the standards and the measurements applied to them. There are also questions about the underlying rationale for ACC's dissatisfaction and whether or not age discrimination played a part. There are also additional questions with one being the assertion there were no issues with Dr Martin's medical advice with the underlying concern being that it was rendered unusable by virtue of the way he communicated. That, however, is possibly

contradicted by a statement in the affidavit of one of ACC's witnesses<sup>3</sup> which in turn begs questions about just what was going on.

[17] The many differences the parties have over both the facts and the way they can be interpreted make it difficult to reach any view about a possible outcome. That outcome can only be reached through a full and proper testing of the evidence and that can only occur via a substantive investigation. Having considered the affidavits, numerous accompanying documents and the submissions I conclude Dr Martin has an arguable case he was unjustifiably dismissed.

[18] Turning to whether or not Dr Martin has an arguable case for permanent reinstatement. Doubts Dr Martin would attain permanent reinstatement were triggered by his own affidavit. In it he says he is not far from ending his working life<sup>4</sup> before observing ... *realistically it could be half way through next year, or longer, before my substantive case is finally determined....* [this] *would represent a large part of what remains of my working life...*<sup>5</sup>

[19] Answers given by Mr Lloyd during the presentation of his submissions exacerbated my concerns regarding the likelihood of Dr Martin achieving permanent reinstatement in the event he succeeded with his substantive claim. Mr Lloyd essentially advised the interim determination could well be the only consideration of the issue.

[20] There is then the question of alternate remedies. Dr Martin says no amount of financial compensation could adequately compensate for the loss of a significant portion of his remaining career and that will occur should he remain off work between the time of dismissal and the issuing of a substantive decision.<sup>6</sup>

[21] The problem here is the admissions regarding the probability substantive reinstatement may never be addressed. If permanent reinstatement is unlikely to be considered which, as conceded by Mr Lloyd, is a distinct possibility then the available remedies should Dr Martin succeed with his claim would be fiscal. It follows they must be considered eminently acceptable and a viable alternate to reinstatement.

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<sup>3</sup> Ms Reid at paragraph 15

<sup>4</sup> Dr Martin's affidavit at paragraph 126

<sup>5</sup> n 4 at paragraph 129

<sup>6</sup> Also n 4 at paragraph 129

[22] There is then the question of where the balance of convenience lies. When commenting on this Dr Martin says *The primary reason I am seeking interim reinstatement is that I am committed to the work I do as a BMA. I am very good at it and provide a valuable service to ACC, claimants and the wider medical profession. The work is stimulating, challenging and extremely rewarding.*<sup>7</sup> He also comments on the impending end of his career and a view he needs ... *real medical problems to keep in touch with reality.*

[23] He also says, and this appears to be a significant factor in his thinking, that the decision on when he brings an end to his career should be his and not one that is forced upon him.<sup>8</sup>

[24] These, I must say, are not strong arguments.

[25] ACC takes the approach reinstatement is impracticable given Dr Martin's apparent failure to demonstrate insight into its performance concerns and an inability to accept feedback or work constructively on addressing the concerns. It refers to the matters history and submits this suggests attempts to address the issues would be met with resistance and challenge.

[26] ACC also argues Dr Martin may be distracted by preparation for the substantive investigation which would be significant given the large volume of documentation.

[27] Reference is also made to Dr Martin's second affidavit which is characterised as emotive and accusatory towards the very people he would have to work along-side and from whom he would need support if he were to be reinstated. Here reference is made to *Graham v Airways Corporation of New Zealand Ltd*<sup>9</sup> and the observation:

*There is a question as to whether an employer ... should compel by direction other employees to provide on the job training to a person who has expressed some distrust of them.*

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<sup>7</sup> n 4 at paragraph 125

<sup>8</sup> N 4 at paragraph 126

<sup>9</sup> AA 99/03 at [28]

[28] Finally, and perhaps most importantly, ACC submits the impact or potential impact on its clientele must be considered with reference being made to *McKellow v Transportation Auckland Corp Ltd*<sup>10</sup> where it was said:

*Assessing the reasonableness of reinstatement requires a “broad inquiry into the equities of the parties’ cases” and into the prospective effects of an order for reinstatement not only on Mr McKellow and TACL but also any relevant third parties such as, in this case, bus passengers.*

[29] It is submitted the evidence shows that notwithstanding ACC’s effort to avoid or minimise an impact on its clients, there have been some as a result of its issues with Dr Martin and its attempts to address them.

[30] Finally it is noted Dr Martin’s evidence suggests he completes some 1000 opinions a year. ACC claims the evidence suggests approximately 50% of those would *be below the required standard*. ACC asserts it is bereft of the resources needed to monitor that volume which results in unnecessary risk to claimants due to delay or incorrect decisions. Here reference is made to *Harrison v Gough Gough and Hamer Ltd*<sup>11</sup> (AEC24/96, 23 May 1996), where the Employment Court observed:

*The present case is one of those cases in my opinion where reinstatement to a full performance of the employment contract pending outcome of the unjustifiable dismissal claim may amount to brushing aside without consideration the employer's stated reasons for being unable to continue with the employment relationship.*

[31] Having reviewed the submissions and the documentary evidence I find favour with the arguments tendered by ACC. I say bulk as I consider the argument Dr Martin may get distracted preparing for the substantive investigation carries little weight.

[32] Conversely I find the argument about possible risk to ACC’s clientele to be compelling. The period over which the parties have been in disagreement and their inability to resolve their differences indicate there are significant issues. The question of why and with whom responsibility lies remains unanswered and that is the reason I have concluded Dr Martin has an arguable case. It may be that at the end of the process ACC manages to justify its actions and if that occurs then to have reinstated

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<sup>10</sup> [2012] NZERA Auckland 91 at [56]

<sup>11</sup> AEC24/96, 23 May 1996, at page 8

on an interim basis would have placed ACC's clients at unjustifiable risk. This is, I conclude, a situation similar to that commented on by the Court in *Harrison v Gough Gough and Hamer* ([30] above).

[33] Having considered the second affidavit I also see merit in the argument regarding Dr Martin's possible interaction with those who would have to oversee his work should interim reinstatement be ordered.

[34] To that I add the comments about permanent reinstatement never being ruled upon. This raises the possibility of an interim order and the subsequent withdrawal of the substantive claim which, in turn, means the issue is incapable of review and leaves ACC at square one again. That creates an unacceptable situation if ACC's concerns are valid and, again, that can only be properly evaluated by comprehensively testing evidence in a substantive investigation.

[35] Having considered the affidavits and submissions and for the above reasons I conclude the balance of convenience strongly favours ACC.

[36] While Dr Martin has an arguable case permanent reinstatement appears a remote possibility given the concessions made both by him and on his behalf. There is a viable alternate remedy and the balance of convenience strongly favours ACC. The last three points, and particularly the balance of convenience, lead to a conclusion the overall justice favours ACC.

[37] The application for interim reinstatement is declined though notwithstanding comments about reinstatement being an unlikely consideration by the time of the substantive investigation this conclusion does not preclude that possibility should Dr Martin succeed with his claims.

[38] Costs are reserved.