Attention is drawn to the order prohibiting publication of certain information in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2012] NZERA Auckland 138
5374213

	BETWEEN	O Applicant
	AND	N LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	G Pollak, Counsel for the Applicant C T Patterson and A Reid, Counsel for the Respondent
Determination:	6 June 2012

DETERMINATION OF THE AUTHORITY (NO 2)

A. Recall of determination and the issuing of a substitute determination

[1] As set out below, this matter concerns an application for interim reinstatement which was successful. The determination of the Authority[1] was challenged (on a non-de novo basis) in the Employment Court on the ground that the Authority should have placed the applicant on "garden leave" rather than ordering immediate reinstatement, pending the substantive hearing in the Authority. The challenge was unsuccessful.[2] However, relevant to this determination, an outcome of the proceedings in the Employment Court, heard on 3 May 2012, is that the Court suppressed all details relating to the identity, or possible identification, of the parties. Suppression had not been sought regarding the proceedings of the Authority.

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[1] [2012] NZERA Auckland 138.
[2] *N Limited v O* [2012] NZEmpC 76, Travis J. (unreported 10 May 2012).

[2] The Authority subsequently received memorandum from the respondent (7 May 2012) and from the applicant (11 May 2012) seeking suppression orders from the Authority, consistent with those made by the Court. Given the similar content of the respective memorandums and the associated emails, it is appropriate that the respective applications should be treated by the Authority as a joint application for suppression by consent. Regrettably, due to a period of extended leave, during which the applications for suppression were received by the Authority, I was unable (until now) to take the appropriate steps as sought by the parties, that is: a recall of the original determination and the issuing of an appropriate substitute determination, hence the original determination has not been made available for general distribution.

Orders of the Authority

[3] It is the order of the Authority that the determination issued on 20th April 2012 is recalled and substituted with this determination. The identity of the respective parties is suppressed along with any material that may lead to the identification of the parties and/or the respective office holders or employees of the respondent; or people associated with the applicant in regard to the proceedings. It is further ordered that in the event that any material remains within the body of this substitute determination that may lead, in any manner whatsoever, to the identification of any party to these proceedings, that material is subject to a non-publication order pursuant to clause 10 of Schedule 2 to the Employment Relations Act 2000.

B. Application for interim reinstatement

[4] This matter comes before the Authority pursuant to s.127 of the Employment Relations Act 2000 (the Act). The applicant was dismissed from his employment with the respondent on 13 March 2012. An application seeking urgency was received by the Authority on 15 March 2012 along with a statement of problem, sworn affidavits and an undertaking in respect of damages. Urgency has been accorded to the application pursuant to clause 17 of Schedule 2 to the Act. The applicant says that his dismissal is unjustifiable and he seeks interim reinstatement to his previous position until his personal grievance is determined following a substantive investigation meeting on 15 June 2012.

Background

[5] The applicant has been employed by the respondent for 31 years. Over the years, he has progressed in his career from being an operator in a factory operated by the respondent to that of Sales Executive, grade S4, which is the second senior sales position within the company. The New Zealand operation of the company is accountable to a senior management team based in Australia. Mr G is the Managing Director for Australia/New Zealand (ANZ).

[6] It is apparent that the applicant has been successful in his sales role, having been promoted regularly and he has been the recipient of a number of awards given by the respondent. Ironically, the circumstances pertinent to these proceedings arose from an awards evening held on 3 February 2012, whereby the applicant received a Silver Fern Award from the company in recognition of his sales achievements. For all intents and purposes, the evening appeared to have been a success for all concerned, that is, until the applicant was notified otherwise on 6 February 2012.

The allegations against the applicant

[7] On 6 February 2012, the applicant received an email from Mr A, the Australia/New Zealand Region General Manager for the respondent. The applicant was advised that he was not to travel to Sydney to attend a forthcoming sales meeting. Mr A referred to a "serious incident" involving the applicant at the Silver Fern Awards on 3 February 2012. He was informed further by Mr A that Ms J, the New Zealand Human Resources Manager for the respondent, would contact him to schedule a meeting.

[8] The evidence of the applicant is that on 8 February 2012, he received a phone call from Mr A whom informed him that he should open an email and respond to it urgently. The applicant refers to Mr A's email dated 6 February 2012 and then attests that when he opened the email, it revealed a letter dated 8 February 2012 from Ms J. The applicant was informed that he was required to attend a formal disciplinary meeting on Friday, 10 February 2012 and that:

> The purpose of this meeting is to seek an explanation from you with regards to your behaviour at the Silver Fern Awards evening, Friday 3 February 2012 including:

> 1. Inappropriate comments about the 25 year the respondent ring being made to Mr G, ANZ Managing Director, in front of other the respondent employees.
>
> 2. You placed your hand on the backside of Mr G whilst award photos were being taken.
>
> 3. You preparing both an appropriate and inappropriate award acceptance speech for the evening.

[9] The applicant was informed that the meeting would be attended by Ms J along with Mr B, ANZ Human Resources Manager, that it would be a formal disciplinary meeting and that it was a serious matter; the outcome of which may have an implication for the applicant's continued employment with the respondent. Finally, the applicant was informed that, subject to any explanation that he might give in relation to his alleged behaviour, he may be issued with a warning.

[10] The further evidence of the applicant is that, after reading the letter from Ms J, he phoned her and upon inquiring what it was that he was alleged to have done to Mr G, Ms J informed him that he had *"pinched his* [Mr G's] *bottom"*.

[11] There is conflict between the evidence of the applicant and Ms J. She says that she received a phone call from the applicant at her home on 6 February 2012 (Waitangi Day) and that his call was in response to Mr A's email of the same day. Ms J attests that, without anything being said by her, the applicant said that:

> *… if this is anything to do with me placing my hand on Mr G's backside then I'd be very surprised.*

[12] The further evidence of Ms J is that following a meeting in Australia between Mr A, Mr B and Mr G on 7 February 2012, at which the events of the Silver Fern Awards was discussed, she received notes of the meeting from Mr B and consequently the letter dated 8 February 2012 was sent to the applicant.

[13] The applicant responded via a letter dated 9 February 2012. In regard to the three allegations made against him by the respondent, the applicant first said he was not aware of making any inappropriate comments about a company ring. Then in regard to the allegation pertaining to placing his hand on Mr G's backside while the award photos were being taken, the applicant's explanation was that:

> When I went up on stage on the evening of 3 February to accept my Silver Fern Award I shook Mr G's hand and as I went to pose for the photo the cameraman signalled for us to come closer together for a

> better shot. I put my right arm around Mr G's waist with my left hand holding the award. Without realising it my hand may have slipped down Mr G's side to his hip due to the slipperiness of his suit material and as I moved away from our embrace for the photo this must have been when I possibly touched Mr G's bottom. I have no real memory of touching his bottom as I was moving apart from him to give my speech which I was focusing on and was a little nervous. It was completely unintentional and innocent and I unreservedly apologise for this if this is what I did.

[14] Finally, in regard to the award acceptance speech allegation, the applicant informed that he never had, nor did he prepare, an inappropriate award speech.

[15] The applicant also makes a further point with regard to the allegation of placing his hand upon Mr G:

> I also note again with some concern that the allegation now is different to what you said to me. The allegation is now "placing my hand on [his] backside". This is quite different to "pinching" him. Could you please explain why this allegation has changed?

[16] Apart from the conflict in the evidence that we have between that of the applicant and Ms J regarding the date of their telephone conversation, that is whether it was 6 February or 8 February 2012, Ms J also says that at no stage during her conversation with the applicant did she ever refer to the incident as a "*pinching of Mr G's backside"*.

Disciplinary meeting and further investigation

[17] A disciplinary meeting took place on 10 February 2012. The applicant was represented by Mr Pollak with Ms J and Mr B present for the respondent. Following this meeting, Ms J continued a further investigation pertaining to the three allegations[3].

[18] A number of people were interviewed, including Mr G, on 22 February 2012. Ms J attests that the discussion with Mr G was *"brief and informal"* and he seemed to be embarrassed when informing Ms J that the applicant had *"cupped"* his backside and that he did not know how to react in front of the people gathered at the function on 3 February 2012.

[3] Ms J had been given authority by Mr B to conduct the investigation.

Preliminary decision

[19] The outcome of her investigation was that Ms J reached a preliminary decision in regard to the allegations made against the applicant and his continued employment with the respondent. This decision was conveyed to the applicant via a letter dated 27 February 2012 to Mr Pollak. The letter is very comprehensive and sets out the discussion that took place at the disciplinary meeting on 10 February 2012, relative to the allegations and the applicant's response. Ms J provides details of her investigation, including the names of people she interviewed and her conclusions. A reference is also made to a copy of a still photograph of the applicant and Mr G and a video of the applicant receiving his Silver Fern Award and the interaction between the applicant and Mr G. Ms J provides her observations and interpretation of the content of the video. The preliminary decision of Ms J is then set out in the letter:

> We have conducted a thorough and formal investigation relating to this matter. In weighing up all the relevant evidence and supporting information, we consider that there are only two reasonable and realistic options available to us.
>
> - To demote O and put him on a probationary period;
> - To terminate O's employment with the respondent.
>
> Due to the seriousness of this matter and loss of all trust and confidence in O, we have however made a preliminary decision to terminate O's employment with the company on the grounds that he has acted in an unprofessional manner, breached the company's harassment policy by engaging in sex based behaviour and that his conduct has destroyed all trust and confidence in him to act in an appropriate manner in the best interests of the company. We have little confidence that O will not repeat this type of behaviour or adhere to the company's Business Conduct Policies in the future. His behaviour on the night of the Silver Fern Awards was inexcusable and outrageous. The termination of O's employment is a decision that the company would like to avoid if possible.
>
> We wish to give O an opportunity to consider the company's preliminary decision and to make any comments or provide further information for our consideration before the respondent proceeds to finalise its decision. O should regard this invitation as being an opportunity to avoid the company's preliminary decision being confirmed as a final decision. We are willing to meet and/or receive in writing any comments or information that O wishes to present, but no later than 4pm Friday 2 March 2012. Please confirm by no later than 12 noon on Thursday 1 March 2012 that O wishes to meet and/or provide a response in writing. The company's preliminary decision as set out in this letter is to be regarded as its final decision in the event we do not receive an affirmative response from you by that time.

[20] Via a letter dated 29 February 2012, Mr Pollak provided a most comprehensive response on behalf of the applicant. Among other things, much is made of Mr G's possible role in the investigation and decision-making process, albeit Ms J had previously informed that he was not involved other than making a complaint and, of course, being interviewed by Ms J. The letter concludes:

> The main purpose of this letter is to ask you to reconsider your decision to dismiss. Should your decision be to summarily dismiss O, we have been instructed to file an application for an injunction to reinstate him. We should point out that O, as he has said to you at our meeting, loves his employment at the respondent, he values it very highly, he would not intentionally do anything to jeopardise that, and his track record speaks for itself. If you could see it to decide something other than his dismissal, O will do whatever is required to protect his employment. We are also available to meet with you should you wish.

A final offer

[21] It is unclear as to just what interaction there was between the parties following Mr Pollak's letter of 29 February 2012. But in an email dated 8 March 2012, from Ms J to Mr Patterson, counsel for the respondent, Ms J instructs Mr Patterson as follows:

> the respondent cannot agree to what Garry [Mr Pollak] has counter offered. I never take the termination of any employee, least of all a long serving one, lightly. I would like to avoid a termination if possible. Other than a termination the below is the other option that I believe is open to me and warranted in the circumstances. Anything less would create a dangerous precedent and would be tantamount to condoning O's behaviour and unwillingness to accept responsibility for his behaviour. Our final offer is that the company retain O as a sales rep:
>
> - demote him to a S2 grade with a total cash compensation of $62,725 pa (this is a drop of $28,985 from his current compensation). Please note that this demotion to S2 would also impact his tool of trade vehicle from a Group 3 to a Group 4 vehicle.
>
> - place him on a one year probation meaning that he would be terminated immediately for any misconduct during this one year period.
>
> - that he does not attend the Silver Fern Award trip.
>
> - the agreement has to be in full and final settlement of the issues as we do not want to relitigate this matter. It is important that he accepts the consequences of his actions. Otherwise, we may as well proceed with our preferred option of termination.

- that we do not cover any legal costs.

- a written apology is made to Mr G for his behaviour at the Silver Fern Awards night. Mr G has been asked if he would accept an apology. He said he would not. However I believe it is important that a written apology is still forthcoming.

[22] It appears that the applicant did not respond to this "final offer" or if he did there is no evidence of such. Ms J attests that:

> *By his failure to inform the respondent otherwise within the required timeframe, O rejected the respondent's offer.*

Termination of employment

[23] By a letter dated 9 March 2012, but emailed to Mr Pollak on 12 March 2012, the employment of the applicant was terminated with one month's notice. The dismissal was effective from 13 April 2012 but the applicant was not required to attend work during the notice period. The dismissal letter is most comprehensive and addresses the three allegations made against the applicant (truncated and paraphrased as follows):

(a) **The inappropriate speech allegation**: The applicant is informed that Ms J has decided that the allegation is not made out and that no further action should be taken in regard to it.

(b) **The company ring allegation**: Ms J informs that, had this been an isolated issue, the decision would have been to issue a first and final warning.

(c) **The Buttock allegation**: The applicant is informed that this is: "… *by far the most serious of the three allegations"* and by itself would lead Ms J to consider the termination of the applicant's employment. Ms J informs that:

> the company's Harassment Policy defines Sexual Harassment as "… harassment … that is sex-based behaviour". This is consistent with Mr G's statement that Mr O placed his hand on his backside – cupping his left buttock. I regard the act of cupping another person's buttock as being sex-based behaviour as opposed to, as an example only, an unwelcome slap on another person's back. I have reached a finding that the Buttock allegation is made out and that Mr O has breached the company's Harassment Policy. I also regard his behaviour as being serious misconduct which is capable of

> destroying all trust and confidence that the respondent would have in him to conduct himself in a reasonable manner.

[24] The letter then proceeds to set out the approach that Ms J has taken in regard to her decision to dismiss the applicant, including a consideration of his long service. But on balance, the decision to dismiss is confirmed.

The Law

[25] Section 127 of the Act provides that the Authority may order interim reinstatement pending the substantive hearing of a personal grievance. Section 127(4) provides that, when determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the object of the Act: being to build productive relationships through the promotion of good faith and implied mutual obligations of trust and confidence.

[26] In addition to the statutory framework pertaining to interim reinstatement, the accepted tests relevant to interim injunctions must be applied. In regard to the circumstances of this case, the Authority is required to determine:

(a) whether the applicant has an arguable case that his dismissal was unjustifiable: as that is now defined by the new provisions of s.103A of the Act;

(b) whether the applicant has an arguable case for reinstatement to his employment at the respondent (applying the new test for reinstatement under s.125 of the Act), if he is found to have been unjustifiably dismissed following a substantive hearing;

(c) where the balance of convenience lies between the parties until a substantive determination is issued by the Authority, including the adequacy of other remedies; and

(d) whether the overall justice of the case dictates that interim reinstatement to employment at the respondent is appropriate.[4]

[4] *Angus v. Ports of Auckland Ltd* [2011] NZEmpC 125, Colgan CJ, 5 October 2011

Is there an arguable case of unjustified dismissal and for reinstatement?

[27] The applicant says that his dismissal was unjustified because it was not what a fair and reasonable employer could do in the circumstances at the time the dismissal occurred[5]. The applicant says that he did not commit serious misconduct. In particular, the applicant categorically denies, and always has, that he intentionally "cupped" Mr G's buttock. The applicant denies that there was a "*sex-based act*" as set out in the company's *Harassment Policy* or that there was any sexual harassment of Mr G at all.

[28] Given that the Authority has to determine this interim reinstatement matter solely upon the affidavit evidence available, the testing of any contentious evidence, by a more rigorous process, must be left to the substantive hearing. In addition to the respective affidavit evidence, documents and submissions received, the Authority has available a compact disc copy of the video that was taken of the Silver Fern Award proceedings on 3 February 2012. There is also a copy of the still photo that was taken of the applicant and Mr G together. I have closely viewed this photographic evidence several times as it seems that, during her investigation, Ms J formed a quite definitive view of the respective demeanour and body placement of the applicant and Mr G. For example, in the letter dated 27 February 2012, in which a preliminary decision is conveyed, Ms J makes the following observations:

> (i) O's arm and hand were pointed down towards Mr G's left buttock. This is consistent with Mr G's statement that O placed his hand on his backside – cupping his left buttock.
>
> (ii) Mr G makes an awkward and nervous laugh as the photo is taken.
>
> (iii) Mr G pulls back and retracts as soon as the photo is taken.
>
> (iv) O looks down and composes himself before he looks up to commence his speech.
>
> (v) As soon as the photo is taken, Mr G puts his arm out to distance himself from O.

[29] But with due respect to Ms J, none of these observations (or interpretations) is even remotely collaborated by the video recording.

[30] The evidence of Mr G is that:

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[5] Section 103A of the Act

> *O and I were asked to stand quite close together for the photo, and whilst standing close O took the opportunity to place his hand on and cup my left buttock. I was understandably shocked and appalled by such a brazen act which I considered an absolute violation of my personal space and my being, and stepped away from O as soon as the photographer had taken the photo. I found such an act to be extremely offensive, and it left me feeling angry and disrespected and intimidated among other things. In my mind it seemed to go on for a long time. I am in no doubt that it was intentional. What makes it more bizarre is that I don't know O at all other than as mentioned in this affidavit. I don't know what I've done to him to make him behave in this manner.*

[31] But again, with due respect to Mr G, having viewed the video record a number of times; I have reached the inescapable conclusion that none of what Mr G attests to is even slightly confirmed by his demeanour. On the contrary, at all times he appears to be quite happy, smiling, and jovial towards the applicant. Mr G does not show even the slightest hint of being treated by the applicant in the manner he describes. Mr G's evidence is that he would not *"create a scene"* or spoil what was a special event for the respondent employees, which of course, is accepted. But I have to say that my observations are that his recorded conduct was more than just covering an alleged distasteful experience. Rather, Mr G appears to be genuinely happy with his involvement with the applicant from the time that the applicant comes up to receive his award. Following the taking of the photograph, Mr G touches the applicant on the arm in a friendly gesture while still smiling, apparently genuinely; and then indicates to the applicant he should make his speech to the gathering. All of which appears to be done in a very friendly and buoyant manner. If Mr G was feeling *"angry and disrespected and intimidated among other things"*, then his ability to disguise his feelings, if that is what he did, was little short of an Oscar-winning performance.

[32] On the other hand, I am cognisant of Mr G's senior and professional status with the respondent and I have to accept that he would not lightly make the complaint that he did without closely considering the consequences of doing so; as he has attested. Clearly, the overall evidence remains to be tested at a substantive hearing, but for the purposes of these interim proceedings, the observations of Ms J and the evidence of Mr G are not corroborated by the video evidence and hence a conflict between their evidence and that of the applicant, on such a substantial matter, must be resolved in favour of the applicant having an arguable case. Given his long service and impeccable employment record to date, I conclude there is no tangible evidence

(at this point) as to why the applicant would engage in the alleged behaviour attributed to him.

[33] The respondent says that it lost trust and confidence in the applicant given that he would not acknowledge any wrong doing, or at least give acknowledgement to the extent that the respondent required. Therefore, the respondent has concerns that the applicant may engage in the alleged behaviour again. But again, given the applicant's employment record over a period of more than 30 years; and of course his stance that he did not commit serious misconduct, there is no valid reason for the loss of trust and confidence that has been relied upon by the respondent, at least until it is tested further in a substantive hearing. And of course there is the matter of the "final offer" that was made to the applicant. It was not a "without prejudice" offer and while it was conditional on various sanctions being imposed, it has to be noted that the respondent was prepared to continue the applicant's employment if he had accepted the terms of the offer.

[34] There is one area of evidence that I conclude is more favourable toward the respondent. This is the evidence of Ms J pertaining to her discussion with the applicant on 6 February 2012; corroborated, to some extent, by the evidence of Mr J. Ms J has attested that the applicant referred to the matter of placing his hand on Mr G's backside before any mention had been made of such by her. The submissions for the respondent also refer to the applicant making a "rude and inflammatory comment" to Mr G regarding the company service ring which, combined with the alleged "cupping" of Mr G's buttocks by the applicant, is said to amount to serious misconduct that, on the balance of probabilities, has been made out. However, given the overall unreliability of the evidence currently before the Authority, I do not accept that it is made out at all.

[35] In summary, I find that the applicant has an arguable case for reinstatement - subject of course, to the overall evidence being put to the test at a substantive hearing.

Balance of convenience - including the availability of alternative remedies

[36] An assessment and balancing of the respective inconvenience to the parties of allowing or not allowing interim reinstatement is required. A factor in this exercise is the duration of any order for reinstatement. A substantive hearing has been set down for 15 June 2012 and then there will be a period of some weeks (depending on the

other commitments of the Authority) before a final determination will be issued. But in this case, the timeframe involved is reasonably short, as far as these things go.

[37] It is submitted for the respondent that the potential loss of income for the applicant is minimal as he was dismissed on one month's notice and hence has been paid until 13 April 2012. And he will be paid holiday pay and long service pay which will be the equivalent of 14 weeks' pay: this will ensure that he is paid to beyond the date set for the substantive hearing.

[38] The respondent also says that an order for reinstatement will cause significant inconvenience to the company. In support of this proposition, the respondent says the applicant was dismissed for serious misconduct, namely sexual harassment. The respondent considers that any return to work by the applicant could potentially place fellow the respondent's staff, its customers, and the respondent as a company, at risk, should the applicant ever act in the same manner again. It has been submitted that the respondent has an obligation to provide a safe workplace and the company considers that this would be in jeopardy should the applicant be reinstated.

[39] But I do not find that argument to be compelling. As previously noted, the applicant is a long serving employee and has an impeccable record and it appears he is loyal to the company, takes his role within the respondent seriously and acts conscientiously. There is not the slightest hint of any previous misconduct on his part and I believe that it can be reasonably concluded, that it is unlikely there will be any risk of such in the future.

[40] It is also submitted for the respondent that reinstatement will seriously undermine the company's decision to terminate his employment and that if the applicant were to be reinstated, it would "send a message" to the respondent's employees that such behaviour is acceptable; and that there will be no consequences for such behaviour. The respondent also says that a real risk exists that Mr G will not only continue to feel he is the victim of a sex-based act, but if the Authority reinstates the applicant, it will be determining that such [alleged] behaviour is acceptable.

[41] There is little evidence before the Authority of how much knowledge other employees within the respondent have regarding the alleged conduct of the applicant and the reasons for his dismissal. The evidence of Mr Z, a colleague of the applicant, is that he has been allocated "the bulk" of the applicant's customers and has heard

nothing but "glowing compliments" about the applicant, his work and customer relationships. Mr Z attests that there would be no real inconvenience to the operation of the sales team if the applicant returned to work.

[42] In regard to the argument that reinstatement would send the wrong message to other employees and would be seen to be condoning the alleged behaviours, I accept that would be so if the evidence about this alleged behaviour was more convincing, but as set out during the consideration of whether there is an arguable case, on the evidence currently before the Authority, the alleged behaviour is far from proven on the balance of probabilities. On the other hand, I accept that Mr G has strong feelings about the applicant's actions. But all the evidence remains to be tested in a substantive hearing. It has to be said that this matter will eventually, most probably, be decided on weighing the credibility of the two men at the centre of this matter after their evidence is put to the test.

[43] It is submitted for the applicant that there is immediate and financial hardship. He has returned his company motor vehicle and has a large mortgage. The applicant also says it will be difficult for him to obtain alternative employment given the circumstances of his departure from the respondent without a reference. It is also said that the applicant will be at a significant disadvantage in regard to his superannuation entitlements.

[44] But the financial hardship argument is hardly sustainable given that the applicant will retain an income for some time; and while it is derived from accrued leave entitlements, that can be remedied if the applicant is successful in the substantive hearing; with reinstatement and reimbursement of wages and lost benefits being remedies that are available.

[45] In the round, I conclude that the question of inconvenience is finely balanced. However, there is one particular factor that tips that balance towards the applicant. This is that the longer he is away from his customer base the more likely it is that detriment will be incurred and that the allegation of sexual harassment will permeate through the respondent customer and staff circles. Given that the applicant makes his living by using his proven sales skills, I conclude that the balance of convenience must go in his favour. The right to work and maintain skills has been recognised in

many cases and the common theme is that reinstatement should occur unless it is unworkable[6].

[46] Finally, it has been submitted for the respondent that, if the applicant is successful at the substantive hearing, adequate remedies will be available to him, including reinstatement to his job that still remains open. That is true, but I conclude that the inability to maintain his sales skills and customers is more compelling. I find that the balance of convenience is in favour of the applicant.

The overall justice of the case

[47] Having found that the applicant has an arguable case for reinstatement and that the balance of convenience favours the granting of the interim relief sought, it is necessary to stand back from the detail and consider where the overall justice lies. Given my earlier findings, I must and do conclude, that the overall justice of the case favours the applicant.

Orders of the Authority

[48] Pursuant to s.127 of the Act, the applicant has given the required undertaking as to damages, which it appears he can provide in the event he is unsuccessful in the substantive hearing. It is ordered that the applicant be reinstated to his previous position, on an interim basis, with full benefits and entitlements as from the date of the expiry of the one month notice period; that is, as I understand it, 13 April 2012. The applicant is ordered to repay the accrued holiday pay and long service leave that has been paid to him by the respondent.

[49] The interim reinstatement order is not subject to any other conditions pursuant to s.127(5) of the Act.

The substantive hearing

[50] It has been agreed that the substantive hearing will take place on 15 June 2012 and a timetable for witness statements has been provided to the parties.

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[6] *Auckland DHB v. X (No 1)* [2005] ERNZ 487 at paras.[35] and [36]

Costs: Costs are reserved.

K J Anderson
Member of the Employment Relations Authority