

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 36
5332049

BETWEEN DIETER RAVNJAK
 Applicant

AND WELLINGTON
 INTERNATIONAL AIRPORT
 LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Paul McBride for the Applicant
 David Burton and Charles McGuinness for the
 Respondent

Investigation Meeting: 3 March 2011 at Wellington

Submissions Received: 3 March 2011

Determination: 7 March 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Ravnjak has filed his application against Wellington Airport Limited. In actual fact, Mr Ravnjak's employer was Wellington International Airport Limited (WIAL), as is clear in the parties' signed employment agreement and as was noted by the respondent in its statement in reply. I have altered the intituling in this determination accordingly, in the expectation that WIAL will voice no objection to this, given that it has not objected to the claim in the first place.

[2] Mr Ravnjak seeks reinstatement to the employ of WIAL. Because WIAL has made no undertakings to resolve matters before the Authority can hold a substantive investigation meeting on 25 March 2011, he has chosen to seek interim reinstatement.

He has filed an undertaking as to damages accordingly, to which no objection has been taken. Therefore, I assume that if necessary the undertaking can be enforced.

[3] The issues for the determination over whether Mr Ravnjak should be reinstated in the interim are whether Mr Ravnjak has an arguable case of unjustified dismissal; whether the balance of convenience favours Mr Ravnjak; and where the overall justice in the case lies.

Factual discussion

[4] The Authority can not make clear findings of fact at the interim investigation stage. In *Wellington Free Ambulance Service Inc v. Adams* [2010] NZEMPC 59, the Court made it clear that in making its tentative findings of fact at the interim stage, the Authority must provide:

A commonsense determination of inherent possibilities of an unanswered assertion or even of a disputed assertion ...

The Authority must decide such an application on the evidence before it even although this will be unlikely to have been tested at trial and may also be incomplete. That is not, however, the same thing as deciding the case on assertions made in pleadings or even in one party's affidavits and especially if there is no evidence to support these assertions.

[5] Thus none of the provisional findings of fact set out in this determination can in any way be presumed to be repeated unaltered in the substantive determination, given the benefit of full and fully tested evidence.

[6] Mr Ravnjak had worked for WIAL for over 20 years before his summary dismissal on 16 December 2010. For many years, Mr Ravnjak was employed in the role of duty manager. He reported to the Manager, Terminal Services and was responsible for the terminal and land side of the airport.

[7] For reasons which are disputed, WIAL installed a covert camera into its emergency operations centre in August 2010. The centre is not only a base for emergency operations but also contains important material for use in the event of emergencies, such as civil defence and Police radios and vital computer equipment, much of which is kept in a separate room that was kept locked.

[8] In the three month period the camera was installed and working properly, it showed that Mr Ravnjak entered the centre while on duty on many occasions, for a period of over 14 hours in total, sometimes for periods of up to half an hour.

[9] Mr Ravnjak denies WIAL's claims that he had been told not to enter the centre, which had recently been shifted to keypad entry to enhance safety and security and hence its use could be monitored remotely. Mr Ravnjak was not the only one to have access to the centre at all times, but there has been no evidence of use of the centre by other managers for unauthorised or authorised purposes.

[10] The video also disclosed several occasions when Mr Ravnjak was accompanied by a female employee who reported to him. On two of these occasions, the pair entered into what can only be described, despite them both being clothed, as sexual activity. Mr Ravnjak indeed admits in evidence to *groping* her. On both these occasions, the pair then adjourned for several minutes to a separate locked room not covered by video surveillance. Mr Ravnjak denied, in evidence, that anything of a sexual nature occurred in that room. The other room contained emergency security equipment such as computers, which Mr Ravnjak stated he had been admiring on at least one of the times he had been in there. Certainly there was no sexual activity after they returned from the locked room. By contrast, WIAL claims that the female subordinate admitted to having a sexual relationship with Mr Ravnjak, which took place in the emergency operations centre.

[11] For the majority of time he was in the emergency centre, Mr Ravnjak was watching television, drinking coffee, talking to his subordinate, or using the telephone.

[12] WIAL claims that the camera was only monitored once before it was removed, when it was shifted to show greater coverage of the room. That is disputed by Mr Ravnjak, in part at least because WIAL could have found out who was using the room through its monitoring of the swipe card use.

[13] On 23 November, after having had the video footage reviewed, the findings were put into the hands of the Terminal Services Manager. He wrote to the Chief Operating Officer, in terms that could be seen at least as having taken a strong view on matters (given what was reported to him by the person who compiled the dossier

on what had happened in the video, and a limited viewing of it) and in a way that could be described as potentially having made up his mind about what had happened.

[14] A disciplinary investigation was set in place, which involved Mr Ravnjak from 7 December. This took the form of a letter claiming (without being bound by strict definitions – as is mentioned in the employee handbook):

- serious misconduct (i.e. conduct resulting in serious incompatibility with other staff members, or damaging a cooperative work environment; engaging in conduct of a kind likely to bring the company into disrepute; and the non-defined claim of gross waste of company time and resources) and
- Misconduct, being leaving his duties during working hours without approval.

[15] Prior to the disciplinary meeting, the Terminal Services Manager suggested that Mr Ravnjak might engage the services of Mr McBride. He did not do so at that time, at least in part because he felt that the Terminal Services Manager was being supportive of him. Instead, he was supported at the meeting by his wife.

[16] My following provisional findings of fact (as best as can be done at this point of proceedings) are taken from the WIAL edited record of the meetings that have not specifically been contradicted by Mr Ravnjak. At the meeting Mr Ravnjak was asked if he wanted to see the video footage in question, but declined, although he did ascertain at some point that the camera had no vision of the separate computer room.

[17] Mr Ravnjak then read from a prepared response, which WIAL claims included comments that he did not deny the allegations and that he did not have a sexual relationship with his subordinate. He did, however, admit to wasting time in the centre and made it clear that he did not want to lose his job, having worked very hard for 20 years and having even spent eight months as Acting General Manager.

[18] Of particular dispute was an interruption by the Human Resources Manager when Mr Ravnjak raised the issue of not having a sexual relationship with his subordinate, which he felt was to the effect that those matters were not subject to the investigation. By contrast, WIAL considers that this restriction on the investigation related solely to moral issues about sexual activity between staff, and not operational activities such as potential favouritism etc.

[19] Whatever the reality of the situation, Mr Ravnjak made no more comment about the issues of his relationship with his subordinate throughout the investigation process, believing it was now outside the scope of the investigation.

[20] The meeting was adjourned while the Human Resources and Terminal Services Managers met with the two top managers at WIAL. On their return, Mr Ravnjak was told that WIAL considered him guilty of gross misconduct, that they were not sure how that could be rectified, and WIAL then gave Mr Ravnjak a day to recommend how he could be trusted in the future.

[21] Mr Ravnjak went away and prepared a document, with the assistance of the Terminal Services Manager, proffered by the latter, to support Mr Ravnjak not losing his job. This occurred despite the Terminal Services Manager purportedly being the decision-maker.

[22] At the next meeting on 9 December, Mr Ravnjak was so upset that he could not read out the prepared statement, so the Terminal Services Manager did it for him. In this response, Mr Ravnjak noted that he would consider any proposal to place him in another role, but that he wanted to stay on as duty manager. He also stated that he loved working for WIAL and had an excellent performance record, although he had let the parties down over the last three months, which was *not the real me*. He guaranteed he would not make the same mistakes and that he would undergo extensive monitoring of his performance and even counselling to help him with his recent behaviour. He also offered WIAL reparation of his *time wastage in monetary terms or subtracted from my annual leave balance*. Mr Ravnjak then clarified the frustrations that had caused him to get into this state.

[23] The same managers then adjourned the meeting to again discuss progress with the company's top management. The Chief Operating Officer suggested that it would be necessary to talk to the female subordinate before making any decisions. Mr Ravnjak was then told of these developments.

[24] At the interview with the subordinate, the Terminal Services Manager claims that she admitted to having a sexual relationship with Mr Ravnjak. Mr Ravnjak was then put on annual leave while WIAL decided what action it would take against him.

[25] Mr Ravnjak claims that in the interim there were further positive signals from the Terminal Services Manager, including a disputed statement that he did not need a lawyer.

[26] At the final meeting, which took place on 16 December, Mr Ravnjak was given another opportunity to raise any further issues, which he did not wish to do. It does not appear that Mr Ravnjak was informed by WIAL of what the subordinate had told it.

[27] Mr Ravnjak was then dismissed for serious misconduct because of:

- Significant waste of company time;
- Accessing an area that he was not supposed to be in;
- Acting inappropriately during work hours and on work property with a direct report;
- The complete loss of trust and confidence in him as a result.

[28] The dismissal was confirmed by letter dated the next day. Mr Ravnjak then contacted Mr McBride, who raised a personal grievance on 20 December. In particular, that letter sought reinstatement, including interim reinstatement if required, and asked for all information held about his client. Unfortunately, the Christmas break intervened and mediation was not able to be held until 31 January given, in particular, the unavailability of WIAL's lawyers for much of that period.

[29] Mediation did not result in the problems being resolved. On 4 February the Terminal Services Manager again wrote to Mr Ravnjak, providing a *review* of his decision, noting that the dismissal would stand because of a loss of trust and confidence in him, with particular emphasis on the relationship with his subordinate which was said to be particularly serious given the seniority of his role. For what appears to be the first time Mr Ravnjak was accused of lying to the Terminal Services Manager.

[30] The claim for interim reinstatement was made promptly thereafter and filed in the Authority on 18 February. Unfortunately the matter had been complicated in the interim by an extensive restructuring exercise being entered into by WIAL, which was

announced on 1 February. Following consultation, the final structure was announced on 18 February. The impact on Mr Ravnjak's position has been significant, as it is to be disestablished, along with those of the Terminal Services Manager to whom he reports and the Assistant Duty Managers who report to him, along with many others. In particular, it appears that there will be four new positions as Airport Managers, which report directly to the Chief Operating Officer, replacing the roles of the Duty Managers and the Terminal Services Manager. Furthermore, such airport managers will be responsible for air-side as well as land-side operations. The pay for Airport Managers is significantly greater than that for Duty Managers currently. Airport Managers will be responsible for all parts of the airport and are there to effectively provide 24/7 cover at management level.

[31] Some of the duties of the Duty Managers appear also to have been given to lower graded positions of Airport Operations Coordinators, who will have hands-on responsibilities, again for both air-side and land-side operations. All of the aforementioned jobs have been advertised internally and externally.

[32] A directions conference was held on 22 February 2011, during which a timetable was set for a substantive investigation meeting on 25 March. In the absence of any undertakings, Mr McBride advised that Mr Ravnjak would also seek interim reinstatement, given that the restructuring process was to come into effect in early April. Mr McBride accepted that there was only a short delay between the interim investigation meeting and the substantive investigation meeting, but that because of the restructuring, if Mr Ravnjak was not granted interim reinstatement, he could not be reinstated into a new position as of right after the restructuring had come into effect.

[33] Unfortunately, for earthquake-related reasons, the interim investigation meeting had to be delayed until 3 March, despite having been timetabled for 1 March. That delay is not relevant to Mr Ravnjak's claim.

[34] In the meantime, Mr Ravnjak and his wife provided affidavit evidence and the respondent provided a statement in reply as well as affidavit evidence.

[35] At the investigation meeting Mr Ravnjak made it clear that he required interim reinstatement and WIAL made it equally clear that it was not interested in reinstatement in any form.

The law

[36] When settling a substantive personal grievance, the Authority may provide for reinstatement of the employee to the employee's former position, or the placement of the employee in a position no less advantageous to the employee. Reinstatement must be provided wherever practicable if sought. In relation to claims for interim reinstatement the Authority must apply the law relating to interim injunctions, and any order may be subject to any conditions that the Authority thinks fit.

[37] The law on interim reinstatement has been set out by the Employment Court in *Cliff v. Air New Zealand Ltd* [2005] ERNZ 1 at para.[18], as involving the need to address three tests as follows:

- *first, whether the plaintiffs have an arguable case of unjustified dismissal;*
- *second, whether the balance of convenience (including the existence of alternative remedies sometimes said to be a separate test) favours the plaintiffs; and*
- *third, the remedy being discretionary, where the overall justice of the case lies until it can be heard (including particularly the respective strengths of the parties' cases so far as they can be ascertained at this stage).*

[38] At para.[33] of *Adams* the Court also held:

Although the statute categorises reinstatement as the primary remedy, its grant turns on practicability. The Court must consider carefully, on the evidence presently before it, first, whether Ms Adams has an arguable case both that her dismissal was unjustified, and for reinstatement. Even if that is so, the strength of the case for reinstatement will be an important consideration in the balance of convenience for the period until the personal grievance can be investigated and determined. That is because the test is to determine on balance whether it would be more just (convenient) that Ms Adams is reinstated in employment until the Authority may determine either that she was not dismissed unjustifiably or, even if she was, that she should not be reinstated or, on the other hand that she should remain out of work until the Authority may determine that she was both dismissed unjustifiably and should be reinstated.

Arguable case

[39] I accept that Mr Ravnjak has a *tenably* arguable case that he was unjustifiably dismissed and may be reinstated. First, there is a question about the reasons for his dismissal and in particular whether his relationship with a subordinate was specifically excluded from its scope in the course of the investigation process.

Second, the Terminal Services Manager's involvement is at issue over his alleged support for Mr Ravnjak and whether in fact he was the decision-maker, particularly given the close involvement of WIAL's top management in the decision to dismiss. Third, there is a dispute over whether Mr Ravnjak knew that he was not allowed in the emergency operations centre rooms. Fourth, Mr Ravnjak was dismissed for wasting company time, amongst other things, yet the 14 hours he was noted as spending in the emergency rooms over three months constituted significantly less than his break times, which he said he could not take at his own work station. Fifth, Mr Ravnjak appears not to have been given all of the information that he may have been entitled to before dismissal, such as the notes of the interview with his subordinate.

[40] Failure on any one of these grounds is likely to prove the dismissal unjustified and some of them may also lead to a finding that reinstatement would be ordered.

Balance of convenience

[41] I accept that in the ordinary course of events it is not often that an employer can convincingly assert that the hardship of being required to take an unwanted employee back for a short time is greater than the hardship of keeping out an employee who has been unjustifiably dismissed: *Melville v. Chatham Islands Council* [1999] 2 ERNZ 76. In this case, however, unlike many others, there is no evidence of any financial need for Mr Ravnjak's interim reinstatement. Furthermore, his is a position that requires considerable autonomy.

[42] Mr Ravnjak accepts that the interim injunction is only sought, given that the substantive investigation meeting is set for less than four weeks hence, because he believes that if he is not reinstated in the interim he will be locked out from *permanent* reinstatement because of the restructuring.

[43] However, I do not accept that Mr Ravnjak's claim is necessarily correct because of four reasons. First, both the Airport Manager and Airport Operations Coordinator positions are being advertised publicly to external applicants, and therefore Mr Ravnjak can apply for them whether he is reinstated in the interim or not.

[44] Second, "permanent" reinstatement can not be ordered to a lesser position because of the definition of s.123(1)(a), so interim reinstatement will not advance

Mr Ravnjak's opportunities in respect of the redeployment to a position as a Coordinator.

[45] Third, Mr Ravnjak can still claim that he should be redeployed or reinstated into an Airport Manager role at the substantive investigation meeting, pursuant to cases such as *Wang v. Hamilton Multi-Cultural Services Trust* [2010] NZEMPC 142. Such a claim does not necessarily require Mr Ravnjak to have been an employee at the time of the restructuring, particularly given the artificiality of him being reinstated on an interim basis to his employment pending investigation into his claim for unjustifiable dismissal and permanent reinstatement. By way of a counter-factual example, employees who are dismissed may claim redundancy compensation even if not employed at the time of a redundancy that took place subsequently, provided they have been unjustifiably dismissed and they can establish that they would most likely have continued in employment until the redundancies took effect.

[46] Fourth, if there are no redeployment opportunities that the Authority can provide by way of reinstatement, then Mr Ravnjak's claim may be dealt with by monetary remedies alone.

[47] Given the short period to the substantive investigation, I therefore determine that the balance of convenience favours WIAL.

Overall justice

[48] I do not accept that there have been any delays or lack of clean hands by either party. In particular, Mr Ravnjak was entitled to (and indeed it was appropriate) to wait over the Christmas period before filing for interim reinstatement, given that mediation could not take place while the respondent's lawyers were on holiday. Subsequent to mediation, Mr Ravnjak filed with the Authority promptly. Thus no other factors are relevant here, other than the assessment below of the respective strengths of the parties' cases.

[49] Mr Ravnjak has an arguable case for permanent reinstatement. The particular factors here include his length of unblemished service, which could continue in the future, potential findings as set out above about what could be seen as deceptive actions by WIAL over the whole process, the degree of involvement by senior managers when the Terminal Services Manager was a decision-maker, the issue about whether Mr Ravnjak had indeed wasted company time given his claim that he took his

breaks in the emergency centre, the non-provision of information to Mr Ravnjak and the danger of accepting mere assertions that an employer has lost trust and confidence in an employee, together with the potential for Mr Ravnjak to act as a trustworthy employee in the future.

[50] On the other hand, there are a number of issues in dispute, any of which could, if WIAL's assertions were found to prevail at the substantive investigation meeting, mean that reinstatement would not be practicable:

- (a) The Airport Manager job may be so dissimilar to that of the Duty Manager job Mr Ravnjak held that redeployment would not be appropriate (compare the factual situations in cases such as *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825 for instance with *Wang*). Here, the increased salary range together with a shift from a tier 4 to tier 3 management position could militate significantly in favour of a finding that the jobs were quite dissimilar.
- (b) WIAL may establish that Mr Ravnjak was under a duty not to engage in activity of a sexual nature (*groping* in Mr Ravnjak's own words has been accepted) with a subordinate while on duty at its premises (whether on a break or not). First, the rooms (whether or not access to them was restricted to some employees only) are WIAL's premises and are not authorised for such use. Second, it is always a risk to the smooth running of an employer's business to have a manager and a subordinate entering into a relationship of a sexual nature, given the reporting relationship between them, without notification to the employer so that steps to avoid any conflicts of interest etc can be taken. Third, the involvement by a manager in such activity may provide evidence of the sort of poor judgment that would demonstrate impracticability of reinstatement.
- (c) WIAL may establish that Mr Ravnjak has misled it (and the Authority) over his denial of a *sexual relationship*, or that anything of a *sexual nature* took place in the separate computer room with his subordinate. Even though this was not given as a reason for dismissal, managers can not expect reinstatement to senior positions if found to have misled their employer in its investigations. Here Mr Ravnjak will have to

satisfy the Authority that despite video evidence of sexual activity (*groping* in his own words) in the emergency room and an apparent statement by the other party that further sexual activity did take place between them, that they did not go to a more private room to undertake such activities but instead, on the one occasion he could remember, *just looked at some new equipment*. Mr Ravnjak's apparent questions about whether the camera could see into this other room may be instructive here. No employee could expect reinstatement in the light of such significant contributory actions in the workplace, should it be established.

[51] I consider that these issues and the evidence of WIAL in support of them to date outweigh, in relative terms, the factors supporting reinstatement. Therefore, the relative strengths of the parties' cases and thus overall justice in this case favour WIAL. Finally, I note that reinstatement to the payroll only was not suggested by either party. I accept that it or any other alternative interim remedies would not advance the interests of either or both parties.

[52] Given that both the balance of convenience and overall justice tests favour WIAL, I hereby dismiss Mr Ravnjak's application for interim reinstatement.

Costs

[53] Costs are reserved pending the substantive investigation.

G J Wood
Member of the Employment Relations Authority