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Spence v Spence (Auckland) [2017] NZERA 144; [2017] NZERA Auckland 144 (12 May 2017)

Last Updated: 25 May 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2017] NZERA Auckland 144
5595822

BETWEEN DONNA SPENCE Applicant

AND MURRAY SPENCE Respondent

Member of Authority: Robin Arthur

Representatives: Erin Burke, Counsel for the Applicant

Andrew Foster, Counsel for the Respondent

Investigation Meeting: On the papers

Determination: 12 May 2017

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Donna Spence has sought interim orders enjoining her employer, Murray Spence, from dismissing her on the grounds of redundancy from her role as a farm manager and from evicting her from the house she lives in on the farm. She wants those orders to be in place until the Authority completes an investigation of her personal grievances. An investigation meeting about grievances raised in 2015 and

2016 was adjourned part heard in November 2016. It was due to continue in February

2017 but Mr Spence did not attend. The presiding member reluctantly again adjourned the meeting after receiving what she described as an inadequate medical certificate from Mr Spence. The investigation meeting is now due to continue on 29 and 30 June 2017.

[2] As well as those delays, Ms Spence's application for interim orders occurred in some other unusual circumstances. Mr Spence, 73, is not only the employer of Ms Spence, he is also her father. Ms Spence, 48, has lived on the farm all her life. Since

2005 she has worked full-time on the farm in a role that Mr Spence confirmed in 2011 was as the farm manager. She was raised in the house she lives in on the farm. The

house used to be the family home of her parents and, before them, her grandparents. Mr Spence lives in a separate house elsewhere on the farm that he and his former wife had built and moved into in 1977.

[3] The farm is a 70 hectare dairy and kiwifruit property about seven kilometres north of Te Awamutu. The land is held by a family trust, of which Mr Spence was the settlor. He leases the land and operates the farm business. The trust owns the houses on the farm.

[4] The present employment relationship problems between Ms Spence and Mr Spence arose in a context of significant family discord. Ms Spence says her role on the farm included not only her work, but also support of Mr Spence after his marriage to her mother broke up in 2012 and his health became frail. Her brother, who left the farm in 2005, has been involved in

litigation of his own over control and use of

property held by another family trust.¹ Ms Spence's relationship with one of her

sisters has also deteriorated. This is said to have occurred because her sister developed a close relationship with a man who Ms Spence had arranged to work on the farm while she had extended time off for knee surgery. Ms Spence alleged the man's lack of knowledge and experience had caused problems in the farm's operation.

[5] In her statement of problem lodged on 23 August 2016 Ms Spence sought investigation of personal grievances for unjustified disadvantage. She alleged Mr Spence had physically and verbally abused her, had made it impossible to carry out her role and had breached her terms and conditions of employment. She sought compliance orders and a declaration that a promise she said Mr Spence made to transfer a parcel of land on the farm to her was a term of her employment.

[6] Against that background of work and family disharmony and delays in Authority investigation, Ms Spence's application for an urgent interim injunction was lodged on 3 May 2017. On 2 May she had received a letter from Mr Spence advising he had decided to disestablish her position and she was "being made redundant" as of

31 May 2017. She was also told she had to remove all her belongings and vacate the

farm house by 26 May 2017.

1 *Spence v Spence* [2015] NZHC 2005 and *Spence v Spence* [2016] NZHC 2472.

[7] Between the adjournment of the Authority's investigation meeting on 9

February and Ms Spence getting notice of dismissal on 2 May, three relevant events had occurred.

[8] Firstly, there was a dispute over whether Ms Spence should take annual leave. On or soon after 9 February she was told to take four weeks leave. She opposed that requirement and proposed she take one week's leave a month for each of the following four months.

[9] Secondly, Ms Spence was issued a trespass order preventing her working on the farm. On 2 March Ms Spence and Mr Spence had an argument over who would carry out the afternoon milking of the dairy herd. Mr Spence said Ms Spence had refused to take annual leave and disrupted the afternoon milking. Ms Spence recorded part of what was said. In her application to the Authority she said the recording included Mr Spence saying: "I am not having you in the shed again. You're finished. You've been made redundant". Mr Spence called the Police. The Police issued Ms Spence with a trespass notice warning her not to enter the dairy farm and the kiwifruit block for two years. The prohibited area does not prevent her access to the house she lives in on the farm. Mr Spence did not agree with requests Ms Spence made to lift the trespass order, so she has been unable to work on the farm since then. Another employee and a relief milker have carried out the milking duties instead. Although she is not permitted to work on the farm, Mr Spence has continued to pay Ms Spence her usual wage.

[10] Thirdly, on 29 March, Ms Spence was advised of a proposal to restructure the farm's dairy operation and make her position redundant from 31 May. A letter from Mr Spence, which noted it was drafted with assistance from counsel, set out advice he said he had from his accountant and a consultant that the dairy operation could not sustain the cost of a full-time employee. Her feedback was required by 5 April, seven days later. Ms Spence, through counsel, then sought full copies of reports provided by the accountant and consultant as well as wage and time information about the farm's dairying and calving operations in recent months. Mr Spence, through counsel, declined to provide the requested documents on the basis that the 29 March letter was "reasonably all-embracing" and had quoted extensively from those reports. Ms Spence, again through counsel, then provided her feedback to the proposal in a five-page letter on 5 April. It described the proposal as nonsensical and the attempt at

consultation as a farce. On 2 May, some 27 days later, she got the notice of dismissal for redundancy and to leave the house.

The Authority's investigation

[11] The Member presiding in the investigation of Ms Spence's substantive grievances was overseas on leave when her interim injunction application was lodged. By agreement with counsel I investigated and determined the interim application 'on the papers'.

[12] Ms Spence had lodged a detailed application for urgent interim injunction, an affidavit and an undertaking as to damages. At a case management conference held by telephone on 5 May directions were set for Mr Spence to lodge an affidavit in reply by 9 May and for counsel for both parties to lodge written submissions on 10

May about application of the relevant principles and based on the untested affidavit evidence. Other documents already lodged, including witness statements and the statements of problem and reply, were also available. I declined to read three further affidavits Ms Spence's counsel lodged outside those directions and without first having sought leave to do so. It would have required further delay to give Mr Spence an opportunity to reply to new material and was inconsistent with the

supposed urgency on which the application was made. I had advised counsel in the 5 May call that a determination on in the interim injunction application would be made promptly. If either or both parties were dissatisfied by the outcome, they could then consider exercising their rights to elect to have the matter heard by the Employment Court.

[13] As permitted by 174E of the [Employment Relations Act 2000](#) (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

Jurisdiction and powers

[14] The Authority has the power to grant interlocutory, interim and permanent injunctions in respect of matters within its jurisdiction.² Its remedial jurisdiction

conferred by [s 162](#), to make any order the High Court or a District Court may make

² *Credit Consultants Debt Services v Wilson (No 2)* [\[2007\] ERNZ 205](#) at [66] and *JP Morgan Chase*

Bank NA v Lewis [\[2015\] NZCA 255](#) at [\[108\]](#).

under an enactment or a rule of law relating to contracts, includes granting injunctions to preserve contractual rights in employment agreements.³ The Authority's jurisdiction to determine employment relationship problems, and to which those remedial powers apply, include personal grievances and matters related to a breach of an employment agreement.⁴

[15] The Authority's role is to determine problems according to the substantial merits of the case, without regard to technicalities. In doing so it must generally further the object of the Act, which includes acknowledging and addressing the inherent inequality of power in the employment relationship. While not doing anything inconsistent with the Act, it must act as it thinks fit in equity and good conscience. It is not bound to treat a matter as being a matter of the type described by the parties, and may, in investigating the matter, concentrate on resolving the employment relationship problem, however described. It may also find a personal

grievance is of a type other than that alleged.⁵

How an interim injunction application is determined

[16] Determination of this application for an interlocutory interim injunction required consideration of whether Ms Spence had a tenably arguable case she would be successful in a later Authority investigation of her grievances, where the balance of convenience lay between the parties meanwhile, and where the overall justice of the case lay. The outcome is determined after considering the parties' submissions on those factors and the untested affidavit evidence.

The application

[17] Ms Spence's application sought four outcomes:

(i) a declaration her occupation of the house on the farm was not a service tenancy, so Mr Spence's direction to vacate the house by 26 May 2017 was not enforceable; and

(ii) an interim injunction enjoining Mr Spence from taking any further action

in relation to Ms Spence's ongoing employment while the matter was

before the Authority for investigation and determination; and

³ *Credit Consultants Debt Services v Wilson (No 2)*, above n 2, at [44].

⁴ [Employment Relations Act 2000, s 161\(1\)\(c\)](#) and (e).

⁵ [Employment Relations Act 2000, s 157, s 3\(a\)\(ii\), s 160\(3\)](#) and [s 122](#).

(iii) a declaration that Ms Spence's terms of employment were breached by Mr Spence's refusal to remove the trespass order and allow her to return to work since 2 March; and

(iv) any other order or declaration that the Authority saw fit.

[18] The two declarations sought could not be made now. They were matters for consideration in a subsequent Authority investigation. What was relevant, and could be determined, was whether Ms Spence had a tenably arguable case that Mr Spence's most recent actions were unjustified so that, depending on the assessment of the balance of convenience and overall justice, an interim injunction was warranted.

An arguable case?

[19] An arguable case is one that had some tenable although not necessarily certain prospect of success.

[20] Ms Spence has not yet lodged an amended statement of problem incorporating her grievances about more recent events and the remedies sought for them. I have dealt with this application on the basis of its substantial merits and the power of the Authority to concentrate on resolving the problem however described. The nature of Ms Spence's most recent grievances were apparent from her interim injunction application and had been foreshadowed in her 5 April response to the restructuring proposal.

[21] She must establish she has a tenably arguable case that she was unjustifiably disadvantaged by the trespass order and that Mr Spence acted unjustifiably in reaching the decision to dismiss her for redundancy. Related to the unjustified dismissal grievance is the question of whether her occupation of the farm house is a term of her employment, amounting to a service tenancy which may be ended with the end of her employment, or has some other character.

The trespass order – an arguably unjustified disadvantage

[22] The events of 2 March occurred during an unresolved dispute over whether Ms Spence should have been on annual leave at that time. Mr Spence considered she should not be working on the farm that day. Another worker, who had been away, had returned and was able to do the milking. In his affidavit Mr Spence said Ms

Spence arrived and refused to leave the shed despite repeated requests to do so. He said he later found out she “secretly recorded certain events on her cell phone” and had “annoyed, provoked and goaded me into action in directing her away from the shed”. This appears to be a reference to what Ms Spence's application said were his recorded comments that she had “been made redundant”.

[23] It was strongly arguable that Mr Spence's actions in then having Ms Spence issued with a trespass order preventing her from working on the farm were not what a fair and reasonable employer could have done in all the circumstances at the time. This was so because of the unresolved dispute over whether she was obliged to take annual leave at that time as directed and whether, even if she were, his action over the trespass order was proportionate.

Dismissal for redundancy – an arguably unjustified disadvantage?

[24] Mr Spence submitted his actions in considering a restructuring of the dairy operation, and deciding to disestablish the position held by Ms Spence and to dismiss her on the grounds of redundancy, were within the “domain of management”. He relied for that proposition on the 1991 Court of Appeal decision in *G N Hale & Son*

Limited v Wellington Caretaker IUW.⁶ However the more recent Court of Appeal

decision in *Grace Team Accounting Limited v Brake* confirmed the Authority can inquire further into such decisions in considering whether the employer's actions met the objective standard of what a fair and reasonable employer could have done:⁷

If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s

4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test.

[25] The Court of Appeal accepted the Authority could consider whether the employer had exercised proper care in its evaluation of its business decision and had

not made a redundancy decision on a false premise, such as evaluating its options by

⁶ [\[1991\] 1 NZLR 151](#).

⁷ [\[2014\] NZCA 541](#); [\[2014\] ERNZ 129](#) at [\[85\]](#).

using incorrect information. It said a fair and reasonable employer could not have acted in such a way.⁸

[26] Ms Spence has a strongly arguable case that the decision to dismiss her for redundancy was unjustified on several grounds.

[27] Firstly, there was the arguable prospect, relying on Mr Spence's 2 March recorded comments to her, that a decision to dismiss her was taken well before the restructuring proposal was prepared. Those comments were made 27 days before Ms Spence received the restructuring proposal letter which said no such decision had yet been made. The redundancy decision could not be justified if it was predominantly made for the ulterior motive of dismissing a disliked employee. There was ample evidence of Mr Spence's dislike of Ms Spence as his employee. The issue for determination, ultimately, would include

whether that dislike was a greater factor in the decision than the business need.

[28] Secondly, Ms Spence had several arguably cogent arguments about the financial rationale for disestablishing her role as a full-time employee. Those arguments involved matters of process, particularly about whether she was given a genuine opportunity to consider and comment on the information on which Mr Spence said he had relied to make his decision. Those failures, to provide full copies of the reports from the accountant and consultant and to allow Ms Spence to analyse the wage and time information for the purpose of commenting on the financial viability of the dairy operation, arguably then had a substantive effect. Ms Spence's submissions identified what she said was flawed information Mr Spence provided his advisors that then affected the reliability of their advice, on which Mr Spence said he had relied for his decision. One example was a reference to "low milk production figures". However Ms Spence said it was the income from the production that was low, not the production itself. She said this had resulted from Fonterra suspending collection for around four months when Mr Spence had refused to comply with its regulations. Another example concerned the notion that the dairying operation could no longer sustain her full-time role. However she said this mis-described her role which had involved both the dairy and calving operation rather than being engaged

full-time in dairy work.

8 Grace Team Accounting Limited v Brake, above n 7, at [94].

Is the use of the house on the farm arguably not a term of employment?

[29] On the issue about the legal basis on which she occupies the farm house in which she presently lives, Ms Spence reached the low threshold for an arguable case that her use of it was not solely related to her status as an employee. However Mr Spence had an at least as equally tenable case that Ms Spence had acknowledged her use of the house was due to her employment. His affidavit suggested she would be paying rent for its use if it were not employment related. And he pointed to Ms Spence having described, in a witness statement lodged with the Authority and dated

4 October 2016, her terms at the start of her employment as being "a salary of

\$30,000 plus accommodation". However, rent free arrangements may also exist as a result of familial and friendship relationships, so that evidence was not necessarily conclusive.

[30] Neither party's argument on this issue was without merit or so compelling that the answer was obvious. But there was a clearly relevant question: was Ms Spence's use of the house a term of her employment so that she could justifiably be asked to leave the house if her employment was also justifiably at an end? While there was no completed and signed employment agreement between the parties, the question of an implied or oral term about the use of the house was within the jurisdiction of the Authority to determine, either in respect of whether there was a contractual right as an employee or as a matter of its value for the purposes of setting remedies if her dismissal for redundancy was found to be unjustified.

Balance of convenience

[31] The balance of convenience considers the relative effects on the parties, and others, if the interim order sought was granted or refused.

[32] One factor for consideration was the relative strengths of the parties' arguments about the merits of the case. On the untested affidavit evidence Ms Spence had the stronger case on the question of whether the decision to dismiss her for redundancy was justified or not. Its timing, the reasons advanced for it and how it was carried out, appeared to have flaws that were not likely to reach the statutory standard of actions that a fair and reasonable employer could have taken in all the circumstances at the time. Good faith considerations included whether Mr Spence could have moved in the way that he did while the Authority's investigation of the

earlier grievances was underway. Given his decision about restructuring was likely to have an adverse effect on the continuation of Ms Spence's employment, Mr Spence also probably needed to do more to meet the statutory obligation of good faith to provide access to relevant information and an opportunity to comment before the

decision was made.⁹

[33] Mr Spence's role in the delay of the Authority investigation in February, on the basis of what the presiding member had said was his inadequate medical certificate, also weighed against him in the assessment of merits. He had sought to be excused from going ahead with the February meeting on the basis that he had felt "stressed" in the previous week and felt he would not be able to sit through lengthy meetings. If those were the criteria that a party could routinely apply to have Authority investigation meetings postponed, few would ever proceed as parties typically feel stressed and under pressure in preparing for and attending them. If the meeting had gone ahead as planned in February, the matter then under investigation would likely have been completed and determined before Mr Spence began the restructuring process he embarked on in late March. His role in that delay favoured him bearing the inconvenience of now being delayed in not being able to proceed as quickly or to the extent that he has sought to since by dismissing Ms Spence before the Authority

investigation was complete.

[34] The effect of delay resulting from the grant of an interim injunction also needed to be considered in relation to what it might mean for the financial viability and operation of Mr Spence's farm business. The financial burden would be no different or greater than that the business had carried since Ms Spence was, by the trespass order, effectively suspended on pay. Ms Spence submitted Mr Spence had effectively been paying three or four times the necessary cost for milking work. This comprised paying one worker who worked one week on and one week off for the same amount she was paid for working all weeks, having a relief milker engaged for the alternate weeks, paying one other worker who had been too unwell to work recently and also paying her wages while at the same time preventing her from working. Mr Spence's affidavit referred to financial "decline" of the dairy operation but did not disclose any immediate financial peril to the farm business as a whole if

that arrangement continued for an interim period, although common sense would

9 [Employment Relations Act 2000, s 4\(1A\)\(c\)](#).

suggest it was not sustainable long term. The only pressing reason Mr Spence's submissions gave for having the restructured operation, without Ms Spence on its books, underway from 1 June 2017 was one of accounting convenience. The farm's financial year starts then. While there might be some ongoing financial and accounting inconvenience for Mr Spence from an interim order, the balance here favoured Ms Spence.

[35] Mr Spence submitted another factor related to delay favoured declining the interim order sought. He suggested the investigation meeting due to continue on 29 and 30 June 2017 would have insufficient time to include the current issues, that now included Ms Spence's dismissal. The meeting was continuing from the two days held on 21 and 22 November 2016. The June meeting had been expected to only deal with evidence from Mr Spence and Ms Spence but the redundancy issue would likely now also require evidence from the accountant and the consultant from whom Mr Spence said he got advice. Those were matters for the presiding Member to determine. If a further day was required it might be added to the two already notified or further days might be available without much delay. And if delay was inconvenient, there was an argument Mr Spence should bear that burden as the result of delay caused by him in February. This factor did not favour Mr Spence.

[36] Mr Spence also submitted the balance favoured him because Ms Spence would have adequate alternative remedies if she chose to bring a personal grievance about the end of her employment and was later found to have been unjustifiably dismissed. However Ms Spence submitted that money, if she were eventually to be awarded compensation for such a grievance, could not really compensate her for the distress that, on Mr Spence's plan, would include her being evicted from her home of 48 years. In the circumstances of this case, it was unlikely money remedies would be adequate. Even if she was reinstated, money would not likely be a satisfactory salve for the emotional distress or damage caused between now and then.

[37] Mr Spence also submitted that the balance favoured him as Ms Spence had not provided what he called the 'usual' evidence of an ability to pay damages referred to in the undertaking lodged with her interim injunction application. He relied on this reference in Ms Spence's affidavit referring to the prospect of eviction after her dismissal: "I have nowhere else to go and without any funds or employment I will

essentially be homeless". This is a reference to her immediate cash reserves, not evidence that she could not, if called upon, somehow find the resources to meet an order for damages if one were later made in reliance on her undertaking.

[38] In the employment jurisdiction, it could not justly be required that employees just dismissed from their jobs, and income, must provide positive proof of present funds sufficient to immediately pay damages if called upon to do so. It would not be reasonable or in accord with the Act's object of addressing inequality in the employment relationship. A mere assertion from the party resisting their claim, that the former employee could not support the undertaking, is not evidence that is necessarily so. Such an employee may have the ability to borrow from friends or family members or liquidate other assets that are not immediately accessible funds.

[39] One further factor to assess in the balance was the potential effect on third parties if the interim order sought were granted. In this case this included whether, if Ms Spence stayed in the job and consequently the house for a further interim period, another worker might be denied accommodation. Mr Spence's affidavit said he would not be able to use the house for a farm worker's accommodation if he was not able to obtain vacant possession of it. His affidavit, however, disclosed no immediate need to do so. And, if Ms Spence's redundancy was truly genuine and part of a necessary downsizing in staffing, it seemed unlikely an additional staff member would be recruited and need to live in the house. The restructuring proposal letter Ms Spence was asked to respond to in late March referred to alternatives of engaging a self-employed contractor on specified hours to manage the dairy herd or having an experienced part-time person involved in the dairy operation. It gave no indication either such role would require on-farm accommodation.

[40] Mr Spence's submissions referred to his employment relationship with Ms Spence having become dysfunctional and untenable since 2015. It was a factor to consider in the balance of convenience as to whether an interim order could be

granted. The arrangements in place, as a result of the trespass order Mr Spence arranged to be issued on 2 March, meant they had little if any personal contact. The affidavits of Mr Spence or Ms Spence did not refer to any after that date. Any communication appeared to be by correspondence, through counsel. The status quo, consequently, appeared to be that an order would not create any increased contact between the two.

[41] Weighing all the factors assessed, the balance of convenience favoured making the interim order sought by Ms Spence.

Overall justice

[42] As a check the Authority must assess the overall justice of the case, during the interim period until the Authority can determine the substantive matter.

[43] Because there was a real risk of severe injustice to Ms Spence meanwhile, I concluded an interlocutory interim injunction should apply to stop Mr Spence terminating her employment until the Authority has investigated and determined her grievances about her employment, including whether Mr Spence's decision to terminate her employment for redundancy was justified in all the circumstances at the time. There were strong arguments Mr Spence had not acted justifiably in making that decision and the balance of convenience, assessed on a range of factors, favoured Ms Spence.

[44] While the delay causes some burden for Mr Spence's farm business, the consequence was likely less severe than if it were later found that Ms Spence was unjustifiably put out of her present job and house before the Authority's investigation meeting in June. If she was put out, the consequences for her meanwhile could not later be fully mended or readily reversed. However, if it came to pass that the Authority found Mr Spence's decision was justified and could be implemented, the consequences for his business would likely have less long term effect.

[45] The interim order, effectively suspending the termination of Ms Spence's employment, also meant Mr Spence cannot proceed with or enforce a requirement that Ms Spence vacate the house meanwhile.¹⁰ This does not determine the issue of whether or not she is entitled to occupy it by reason of her employment or on some other basis. That is a matter for the Authority to determine after further investigation, testing the evidence of the parties and hearing submissions from their counsel.

Rather, for the moment, it simply follows from Mr Spence's own affidavit evidence

that Ms Spence lives in the house, rent free, as a term of her employment.

¹⁰ In *Seymour v Chatham Island Farm Ltd* [2017] NZERA Auckland 56 the Authority made a similar order in a matter pending investigation of a personal grievance for unjustified dismissal.

[46] While the order has the effect that Mr Spence must continue to pay Ms Spence her usual pay during its term, it does not govern whether or not he seeks to have her carry out any work on the farm in return for that pay. It is a matter in his own hands as, to do so, Mr Spence would have to take steps to get the trespass order lifted. If he did so, Ms Spence would have to honour her obligations as an employee to work as reasonably and lawfully instructed. Both parties would also be bound by their respective good faith obligations to be active, responsive, communicative and constructive in maintaining a productive employment relationship.

Order

[47] Mr Spence is ordered not to proceed with the termination of his employment of Ms Spence until the Authority has investigated and determined her personal grievances or otherwise varies this order. The order is made in reliance on the undertaking as to damages given by Ms Spence.

[48] The order is made under [s 162](#) of the Act. It relates to contractual rights within the exclusive jurisdiction of the Authority, specifically matters related to a breach of an employment agreement and personal grievances.

Costs

[49] Costs are reserved.

Robin Arthur

Member of the Employment Relations Authority