

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 515/10
5326225

BETWEEN RUSSELL STEEL
 Applicant

AND STEELPIPE LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Garry Pollak for Applicant
 Sherridan Cook and Louise Holden for Respondent

Investigation Meeting: 10 December 2010

Determination: 17 December 2010

DETERMINATION OF THE AUTHORITY

- A. Russell Steel's application for interim reinstatement is declined.**
- B. Costs are reserved.**

Employment Relationship Problem

[1] Steelpipe Limited (SL) dismissed Russell Steel from his job as a senior sales engineer on 22 October 2010. He was dismissed for serious misconduct.

[2] During a regular sales trip in the South Island Mr Steel met with Mike Small of Blastcraft, a Timaru firm which supplied painting services for SL steel pipe products and projects. While talking with Mr Small, Mr Steel unwittingly pressed a button on his mobile phone set up to 'speed dial' the landline office telephone number for his manager Athol Carr. Mr Carr answered the call and, unable to get Mr Steel's attention by speaking loudly and whistling, ended up listening for about 20 minutes to the conversation between Mr Steel and Mr Small.

[3] Mr Carr made some notes during and shortly after the call about what he heard Mr Steel say to Mr Small. He then reported those comments to SL senior managers. This led to a disciplinary meeting at which Mr Steel was dismissed.

[4] Mr Steel considers his dismissal was unjustified. He sought orders for his interim reinstatement pending the Authority's determination of his personal grievance application. He provided the required undertaking as to damages.

[5] The remedies sought for his grievance are reinstatement, lost wages and compensation for stress and humiliation.

[6] In reply SL insists Mr Steel's dismissal was justified. It says the overheard comments inappropriately criticised SL operations manager Keith Young, criticised the quality of SL services and products, and suggested how a commercial dispute between SL and Blastcraft might be settled on terms which Mr Steel was not authorised to discuss and which were less favourable than SL sought. SL says those comments were serious misconduct, breached both the express and implied terms of Mr Steel's employment, and, after hearing from Mr Steel, its general manager James Hawkes fairly decided to dismiss him.

[7] The Authority investigation meeting on the substantive claim is scheduled for 17 February 2011. Mediation, directed on an urgent basis, did not resolve the interim or substantive matter.

[8] The parties lodged affidavits regarding the interim reinstatement application from Mr Steel, Mr Carr, Mr Hawkes and SL chief executive Peter Alexander. I have read those affidavits and heard submissions from the parties' representatives on that application.

Principles on interim reinstatement

[9] Section 127 of the Employment Relations Act 2000 (the Act) requires the Authority to apply the law relating to interim injunctions having regard to the object of the Act. Accordingly Mr Steel must first establish that he has an arguable case,

both that the dismissal was unjustified and that reinstatement would likely be ordered as a remedy once his substantive claim is investigated and determined.

[10] Secondly, the Authority must assess how best to regulate the positions of the parties until that subsequent determination of the substantive issues. That assessment is made on the balance of convenience between the parties. Whether effective remedies, other than interim reinstatement, are available to Mr Steel is considered as part of that assessment.

[11] Finally, the Authority is to take a global view of the justice of the case and decide what should be done to attain that. Throughout the objects of the Act are considered, including under s3 for employment relationships to be built on good faith behaviour and under s101 to recognise the importance of reinstatement as a remedy.

[12] As noted by the learned authors of *Personal Grievances*, Wellington, Brookers, 2002 at 11.3.06:

the Court ha[s] drawn attention from time to time to the importance of not seeking the answer to an interlocutory injunction application in the rigid application of a formula. In reality the considerations of whether there is an adequate alternative remedy, where the balance of convenience lies, and the overall justice of the case will often overlap.

[13] The investigation is confined to the untested evidence given in the affidavits of various witnesses, considering the parties' submissions and reaching a determination after weighing the available information and applying the relevant principles. This may require some commonsense assessment of inherent possibilities regarding unanswered or disputed assertions in the affidavit evidence to determine the respective justices of the situation in the period before the investigation meeting rather than focussing unduly on the merits of the substantive proceedings.¹

[14] If an order for interim reinstatement is to be made, it may be subject to any conditions the Authority thinks fit.

¹ *Wellington Free Ambulance Service v Adams* [2010] NZEMPC 59 (EC, Colgan CJ) at [17]-[18].

Is there an arguable case?

[15] Assuming Mr Steel can prove all the facts he alleges, he must persuade the Authority he has some real or serious, but not necessarily certain, prospect of establishing both that he was unjustifiably dismissed and that he would be reinstated rather than only be compensated monetarily. His case is not, under this aspect of the applicable principles, weighed against any defence which SL may have except for fundamental issues such as jurisdiction (which is not an issue here).² In a personal grievance application of this type, the onus is on SL to justify the decision to dismiss and how it was made. The threshold of 'arguable case' is usually accepted as reached once Mr Steel disputed the basis of the purported justification for the dismissal and sought to put SL to the proof of it.

[16] Nevertheless SL submitted there was no arguable case on the grounds that there is no real prospect that Mr Steel can successfully:

- (i) deny his comments to Mr Small were serious misconduct; and
- (ii) establish that a fair and reasonable employer would not have lost trust and confidence in him in such circumstances; and
- (iii) establish that SL did not consider all alternative options to his dismissal, with SL considering such options were limited because of Mr Hawke's doubts about the genuineness of an apology made by Mr Steel and whether Mr Steel could now ever work harmoniously with Mr Carr and Mr Young (particularly after Mr Steel's representative made allegations at the disciplinary meeting about Mr Carr's credibility); and
- (iv) establish that SL did not fairly weigh Mr Steel's length of service against other factors in deciding to dismiss him.

[17] However I find, from submissions made for Mr Steel and the content of the affidavit evidence, that he does have an arguable case about:

- (i) the legal basis for his summary dismissal; and
- (ii) whether he was fairly given an opportunity to comment on all the factors weighed by Mr Hawkes; and
- (iii) whether all alternatives to dismissal were genuinely explored; and

² See *X v Y Ltd & NZ Stock Exchange* [1992] 1 ERNZ 863, 872-873.

- (iv) whether eventual reinstatement is practicable despite strongly expressed evidence about fractured relationships.

(i) *the legal basis for summary dismissal*

[18] Mr Steel submitted there was a legal argument as to whether his terms of written employment agreement limited the basis on which he could be summarily dismissed and whether SL's actions were outside that limit.

[19] SL argued Mr Steel's comments to Mr Small breached both his implied duties of fidelity and confidentiality to the company and the express written term of his employment agreement allowing for summary dismissal for serious misconduct where:

The employee is guilty of any serious breach or non-observance of any of the conditions of this agreement [clause 6.6.1(ii)] ...

The employee is guilty of any gross negligence in the performance of their duties or obligations [clause 6.6.1(iii)].

[20] Mr Steel disputes whether the express terms of his employment agreement permit summary dismissal for breach of an implied term such as the duty of fidelity. And he argued that even if his comments (in the particular context they were made) were misconduct, it was not at a level of seriousness sufficient to warrant summary dismissal. He submitted SL was permitted, at worst, to dismiss him on notice but not summarily. While I doubt this is an orthodox analysis, at the interim stage without the benefit of full testing of the evidence and full submissions on the legal issues, I cannot say there is certainly no serious or real prospect of such an argument succeeding. On the low threshold, it is arguable.

(ii) *fair opportunity to comment on factors considered by decision-maker*

[21] In the letter of dismissal given to Mr Steel, Mr Hawkes stated he "*did not find any of your responses credible or persuasive, with the result I have lost all trust and confidence in you*". He noted that he was "*particularly disappointed*" by Mr Steel "*attempting to cast aspersions on Athol Carr's integrity and good character*" and regretted that Mr Steel declined an opportunity to resign once Mr Hawkes said he would otherwise be dismissed.

[22] However Mr Hawkes' affidavit also reveals he formed the view during his disciplinary investigation that:

- (i) Mr Steel, despite 39 years of service to SL and previous owners, either did not understand some key issues affecting the business or grossly misrepresented them in his views on the quality of SL products; and
- (ii) Comments by Mr Steel's representative in the disciplinary meeting about Mr Carr were a return to "*divisive actions*" about which Mr Hawkes had warned Mr Steel in October 2008; and
- (iii) Mr Steel's apology for comments about Mr Young lacked genuine contrition or embarrassment; and
- (iv) Mr Steel was not capable of working harmoniously with the SL team or being trusted to have unsupervised contact with clients or key relationships in future.

[23] On the evidence available at this stage it is arguable Mr Steel was not given an opportunity to address Mr Hawkes' conclusions about his work and demeanour or offer any information which might change those views before a decision on his dismissal was made. There is an arguable case he was not fairly heard by the decision maker.

(iii) Alternatives to dismissal

[24] In circumstances where Mr Steel had spent all but three years of his entire working life with the one business, alternatives to his dismissal (even if he had committed serious misconduct) should have been fully and thoroughly considered. On the basis of the limited reference to this aspect in the affidavit evidence of Mr Hawkes and Mr Alexander, I consider there is an arguable case this was not given sufficient attention prior to dismissing Mr Steel.

(iv) prospects for eventual reinstatement

[25] SL's claim that it has lost trust and confidence in Mr Steel has, at the interim application stage, yet to be tested. Mere assertion is not sufficient. SL must be able

to point to some conduct incompatible with Mr Steel's continued faithful discharge of his duties.³

[26] Mr Steel's evidence accepts he made comments along the lines reported by Mr Carr. While he says this was only "venting" to Mr Small, whom he had known for 13 years, some of those comments – I find on an interim basis – were clearly not consistent with faithful service. However it remains arguable, on the low threshold, that a single established instance of apparent infidelity, through careless talk, did not justify a conclusion of an absolute loss of trust and confidence against the background of such long service and previous working relationships with Mr Carr and Mr Young which were largely satisfactory. On that basis the prospects for eventual reinstatement must remain arguable against as-yet-untested evidence of an irreparable loss of trust.

[27] I note under this heading that I have not dealt with what Mr Pollak called a 'technical' issue as to whether Mr Steel's suspension on pay prior to the disciplinary meeting was fairly handled. On the basis of the approach taken by the Employment Court in *Kereopa v Go Bus Transport Limited*,⁴ I doubt the similar circumstances of Mr Steel's suspension on full pay for a short duration would seriously affect SL's ability to justify the eventual dismissal.

Balance of convenience

[28] Identifying the balance of convenience – in the sense of detriment or injury – requires likely financial and other loss to Mr Steel to be weighed against risks and costs to SL and the extent to which these might be managed or minimised.

[29] Mr Steel is a 58-year-old married man. As a result of his dismissal he and his wife are presently living on her income alone. They support a partially dependent adult son who was injured in an industrial accident. They have moved out of their rented residence to stay with Mrs Steel's parents. Mr Steel has had some serious health issues. These included suffering from depression – with a serious episode

³ *Orme v Eagle Technology Group Limited* (unreported, EC Wellington, WEC 40/95, 15 June 1995, Goddard CJ).

⁴ Unreported, AC25A/09, 18 September 2009, Judge Travis at [29].

several years ago but now largely under control. He also has an irregular heart pattern which requires medication.

[30] There is a moderate period of delay before Mr Steel's substantive application is heard – 10 weeks – with probably four or so weeks before a determination is issued.

[31] Mr Steel's employment prospects are limited – both until determination of his claim and, if not reinstated, thereafter. While he had considerable experience in his area of work, it is a relatively specialised industry. His age and indifferent health are, realistically, likely to offset at least some of the advantage of his knowledge and his experience.

[32] Against that 'detriment' to Mr Steel, the following factors suggest the balance of convenience lies with SL:

(i) trusted and largely unsupervised nature of the role

[33] Mr Steel's role was relatively senior and required him to have frequent and largely unsupervised contact with SL customers and suppliers. As deposed by Mr Hawkes, the role required Mr Steel to sometimes make 'on the spot' decisions during one-on-one meetings he attended on behalf of SL.

[34] Given the doubt caused by the information about the conversation with Mr Small, I accept there is an inevitable effect on the practicality of Mr Steel returning to work in the meantime. He would be understandably hesitant about business conversations while his SL managers would harbour some doubts about what he may have said to others about them or the company. This would compromise his effectiveness in carrying out sales calls and participating in feedback and planning sessions with his managers. Mr Hawkes deposed that SL would need to have Mr Steel accompanied on all sales calls or prevent him having direct contact with key clients. Neither option would mean he could carry out the function of senior sales engineer as he had previously. There is also concern that ill-will and tension around the issue would affect the work of Mr Carr, Mr Young and other staff, at least in the meantime.

(ii) adequacy of alternative remedies

[35] While Mr Steel has to live on considerably restricted means until his case is determined, he would likely receive orders covering at least a longer notice period and possibly lost wages as well as compensation for distress in the event that his dismissal or how it was carried out is found to be unjustified. This is so whether or not reinstatement on a permanent basis were held to be practicable. Consequently I consider damages are an adequate remedy.

(iii) availability of permanent reinstatement as a remedy not affected

[36] This is not a case where declining to reinstate Mr Steel on an interim basis now might diminish his prospects of permanent reinstatement if he were later determined to have been unjustifiably dismissed. His role has not been filled and SL is on notice that he could be reinstated to it if his claim is successful. He will not meanwhile suffer any significant loss of skill or familiarity with his work and clients.

(iv) real doubt about the short-term practicability of interim reinstatement

[37] There is strongly expressed evidence from Mr Hawkes, Mr Alexander and Mr Carr about the practicability of Mr Steel's reinstatement on either an interim or permanent basis. Mr Hawkes fears interim reinstatement of Mr Steel would be demotivating for Mr Carr and Mr Young and also have a negative influence on the sales engineers with whom Mr Steel works. Mr Carr fears it would be very difficult to manage Mr Steel and all communication between them would have to be in writing or at least recorded. Mr Alexander says everyone involved would struggle to work at the high level of trust needed to effectively carry out their work in the business.

[38] While much could be done to address this – such as mediation assistance – if reinstatement were ordered on a permanent basis, the effort and resources required for a relatively short period are not, I consider, proportionate given the realistic level of doubt there must be about the likelihood of such an order.

[39] I found the balance of convenience lies with SL.

Overall justice

[40] Standing back and taking a global view, I consider the just interim solution is for Mr Steel not to be reinstated pending the substantive investigation. This is for two reasons. Firstly, that hearing is scheduled for around ten weeks, a relatively short period. Secondly, some assessment of the strength of the parties' respective cases may be made under this heading.

[41] In my assessment, again only on interim basis, there are two important weaknesses in Mr Steel's case – the issue of the seriousness of his conduct, and, more importantly, in respect of the question of interim reinstatement, some real doubts about the practicability of this remedy in the long term.

Seriousness of Mr Steel's conduct

[42] Mr Steel disputes some details of his reported and overheard comments to Mr Small. However he does not dispute their general tenor. During the disciplinary meeting he suggested only one word be changed in Mr Carr's report. In that light, he has some difficulty asserting his comments were consistent with faithful service to SL, even on the argument that his words should be understood in the context of a 13-year personal friendship as well as a business relationship with Mr Small. What is not in dispute is that the conversation occurred when Mr Steel was meeting with Mr Small in his capacity as an SL representative, at a time that was within usual working hours, and their exchanges were heard over a company mobile phone. His comments – even if not captured verbatim by Mr Carr's report – about whether Blastcraft or SL should reimburse a client for defective products and negative comments about the work of his senior colleague Mr Young were plainly disloyal. They were comments made to a person who was directly involved in commercial matters with SL and they were comments which, if acted on by Mr Small, would put SL to more cost than it might otherwise face.

[43] Even if SL's actions in dismissing are found to be unjustified for other reasons, Mr Steel's comments will almost certainly contribute to a significant reduction in remedies he might otherwise receive.

Practicability

[44] SL's evidence on the practicability of permanent reinstatement is likely to be of similar tone to the affidavits lodged for interim purposes. While reinstatement is available as a primary remedy for Mr Steel, the personal nature of his comments about Mr Carr and Mr Young (with whom the senior sales engineer's role requires a good working relationship) make the prospects of successfully refuting SL's argument about the practicability of reinstatement less likely, although certainly not absolute. Overall I do not consider such prospects sufficient to make it just to impose the costs of interim reinstatement on SL in the meantime, even on a 'garden leave' basis.

Determination

[45] For the reasons given, Mr Steel's application for interim reinstatement is declined.

[46] Costs on this application are reserved.

Robin Arthur
Member of the Employment Relations Authority