

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 262/08
5127059**

BETWEEN ESE TATUPU
 Applicant

AND BLEDISLOE NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Joseph Ka, Advocate for Applicant
 Peter MacDonald, Advocate for Respondent

Investigation Meeting: 30 June 2008

Further Information: 3 July 2008

Determination: 18 July 2008

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

[1] The applicant Mr Ese Tatupu (“Mr Tatupu”) makes application to the Authority for an order for interim reinstatement to his former employment as Funeral Director at Bledisloe New Zealand Limited's ("Bledisloe") Manurewa funeral home. Mr Tatupu was dismissed from his employment with Bledisloe for incompatibility, as confirmed in advice dated 28 May 2008.

[2] Mr Tatupu lodged his application in the Authority on 12 June 2008 claiming he was unjustifiably dismissed and seeking remedies including interim reinstatement. As required, he also lodged an undertaking to abide by any order made by the Authority in respect of damages that may be sustained through the granting of an order for interim reinstatement.

[3] In its reply lodged in the Authority to the application for interim reinstatement, Bledisloe says that as a direct result of Mr Tatupu's actions the employment relationship had become so undermined as to be dysfunctional. It says that a reasonable employer in such circumstances would have dismissed Mr Tatupu.

[4] The parties were unable to resolve the differences between them by the use of mediation. They have attended at more than one mediation.

[5] There is to be an investigation meeting of substantive claims in relation to a warning issued to Mr Tatupu and his dismissal. The date for that substantive investigation is yet to be set.

[6] I have met with the representatives and considered affidavit evidence from Mr Tatupu, Mr Gavin Murphy and Ms Wendy Hunt.

Interim reinstatement

[7] Applications for interim reinstatement are considered under Section 127 of the *Employment Relations Act 2000* ("the Act"). The established tests for interim reinstatement are these:-

- (i) whether the applicant has an arguable case of unjustified dismissal; and
- (ii) whether the balance of convenience (including the existence of alternative remedies sometimes said to be a separate test) favours the applicant; and
- (iii) 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).

The merits

[8] I do not proceed to assess this application on its merits. That is because I consider Mr Tatupu is not able to meet the undertaking he has lodged.

[9] Mr Tatupu did not understand the effect of the undertaking when I asked him if he knew what he had signed. Before I met with the parties on 30 June 2008 I issued a Minute of 27 June 2008 advising that I considered the evidence lodged suggested Mr Tatupu did not have the means to satisfy the undertaking he had provided. I advised I required him to attend to give evidence in support of that situation and also, as to his contended financial hardship.

[10] At the investigation meeting Mr Tatupu produced a letter from his mother-in-law Mrs Ruta Pili. Mrs Pili wrote that she was ready, willing and able to borrow money against the equity of her residential property at Hamill Road, Otara. Mr Tatupu could not tell me the value of such equity. Nor could he tell me about a caveat registered on the title.

[11] In addition to the pledge by Mrs Pili, Mr Tatupu told me he and his wife have six children aged from 12 years to 8 months. He also produced a weekly budget prepared with the assistance of the Otara Budget Service Inc testifying his personal expenditure exceeds the income he earned while employed by Bledisloe. I am not advised of any other means of income available to Mr Tatupu.

[12] The pledge by Mrs Pili is insufficient. I am doubtful whether Mrs Pili could be compelled to meet her pledge. Her pledge is not an undertaking from Mr Tatupu and it is an undertaking from him personally that is required. Further, I have no information as to what is the value of her equity in the property.

[13] The requirement for an undertaking is significant in applications for reinstatement. Undertakings can of themselves materially sway the balance of convenience test. This is recognised by section 127(3) of the *Employment Relations*

Act 2000 which prescribes that the undertaking "must" be referred to in any order for reinstatement and "is part of it".

[14] The Employment Court, providing guidance to the Authority on matters of substantive law, has reaffirmed the significance of undertakings and sounded this caveat to applicants for reinstatement¹:-

[38] Unlike in the Authority where it provided none, the plaintiff has now given evidence of its ability to back its undertaking as to damages. That is an essential element of the case of any plaintiff seeking injunctive relief where a consequence of the grant may be the financial loss to the party enjoined that the plaintiff undertakes to meet if so ordered by the Court. Such information is frequently omitted in cases seen by this Court and applicants for interlocutory injunctive relief should be on notice that unless it is provided, relief may be postponed at best and refused at worst.

[15] I conclude that Mr Tatupu does not have the means to satisfy the undertaking he had provided. **Accordingly, the application for reinstatement is not supported by an effective undertaking. For that reason I decline to consider the application for interim reinstatement any further and I decline to grant it.**

Other orders

[16] I consider these parties ought to attend mediation. **I direct them to attend mediation within 21 days of this Determination.**

[17] I will hold a telephone conference with the representatives to make arrangements for an investigation meeting of the substantive application.

Leon Robinson
Member of Employment Relations Authority

¹ *NZ Amalgamated Engineering Printing & Manufacturing Union Inc -v- Air Nelson Limited*, unreported, CC12/07, 17 June 2007, Colgan CJ