

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Neil Richard Taylor (Initiating party)
AND eCOM New Zealand Limited (Responding party)
REPRESENTATIVES Neil Richard Taylor In person
Chris Patterson, Counsel for Responding party
MEMBER OF AUTHORITY Dzintra King
INVESTIGATION MEETING 7 December 2005
DATE OF DETERMINATION 12 December 2005

DETERMINATION OF THE AUTHORITY

The applicant, Mr. Neil Taylor, seeks an interim injunction reinstating him to his employment with the respondent, eCom New Zealand Limited. Mr. Taylor was employed as the respondent's Business Development Executive and was dismissed on 28 October 2005.

The Law

Section 127 (4) Employment Relations Act 2000 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 this Act.

The criteria to be taken into account are:

- Is there an arguable case?
- Where does the balance of convenience lie, including the existence of alternative remedies?
- Where does the overall justice of the case lie?

Arguable case

The respondent denied that there was an arguable case. However, the evidence shows that there are aspects of the procedure that are open to challenge. These include the possibility of predetermination. The respondent chose to have a without prejudice meeting prior to giving Mr. Taylor details of any allegations. The email Mr. Cornelius sent to Mr. Taylor on 4 October states:

I need to meet with you this week to discuss the complaints and more importantly your future with eCom.

The initial decision to suspend was made without input from the applicant. Mr. Patterson's letter of 7 October states:

Your client is suspended on full pay in the interim until my client can make a decision as to whether it is appropriate to suspend him pending the outcome of its investigation.

There are issues as to the manner in which evidence was obtained and regarding the failure to provide details of allegations when requested by the applicant's counsel.

Also contested are issues regarding substance and whether, even if proved, they would be sufficient to justify a dismissal. Additionally, there is the fact that Mr. Taylor raised concerns regarding the non-payment of performance incentives prior to the issues relating to the dismissal being raised with him.

Mr. Patterson submitted that the applicant's failure to return the respondent's laptop when requested to do so was an important consideration. Mr. Taylor says he was instructed by his lawyer to keep the laptop which he needed to obtain information relating to his wages claim. The respondent says this shows a lack of trust in the employer and that Mr. Taylor, despite receiving legal advice, still need to make an independent decision. A person is, of course, not bound to act on legal advice. However, it is not to be unexpected that a layperson will act upon legal advice and I see nothing nefarious in Mr. Taylor's actions.

Mr Taylor has a tenable arguable case.

Balance of convenience

On 14 October Mr. Patterson wrote to Mr. Edwards:

- 1. My client is in the process of re-determining its current structure. My client has identified your client's position as being possibly superfluous to its requirements.*
- 2. My client wishes to engage in a consultative process with your client as to the future of his position. It intends to invite your client to meet with its managing Director, Aaron Cornelius to discuss his preliminary assessment of the continuing feasibility of your client's position. He will do this depending on the outcome of the investigation which he is currently conducting in relation to your client's conduct and behaviour.*
- 3. Aaron Cornelius will not meet with your client and his position will be declared redundant in the event that your client's employment is terminated for serious misconduct or gross incompetence following the conclusion of the investigation.*

Mr. Patterson submitted that the respondent did not have any positions which would be no less advantageous and that the Authority lacked jurisdiction to order reinstatement to a position that has ceased to exist. As I noted during the hearing, the genuineness of the redundancy was clearly a matter that would be at issue during the substantive hearing. This cannot at this stage be a factor that favours the employer.

The respondent says there is an irreconcilable incompatibility between Mr. Cornelius and Mr. Taylor. However, I note that Mr. Taylor wrote in response to the allegations: "I certainly did not think that there was an irreconcilable break down in the relationship between Aaron and myself". Mr Cornelius is strongly opposed to Mr Taylor's reinstatement and the deterioration of the relationship is the factor that most strongly favours the respondent.

The respondent maintains that the fact that Mr. Taylor was declared unfit for work because of workplace stress means that the respondent cannot guarantee his safety. I have little hesitation in saying that this argument strikes me as specious.

Mr. Taylor has been without income since four weeks after his termination. He has deposed that he is getting married on 27 December and that he has bought a house with his future wife and they are to take possession of it on 24 February 2006. Mr. Taylor is willing to be reinstated on the basis of garden leave; that would have been an option which I would have considered even if he had not indicated his willingness to be reinstated on that basis.

The respondent produced an affidavit from Mr. Martin Barry regarding employment prospects for a person of Mr. Taylor's qualifications and experience. The problem with this affidavit is that it makes no reference to the undoubted difficulty caused by a dismissal, albeit Mr. Taylor is contesting that dismissal.

I indicated to the parties that I could hear the substantive matter in January. However, I am not at this stage aware of whether Mr. Taylor would be represented at that investigation (he was unrepresented at this hearing) and whether his counsel would be available. There is also the fact that evidence relating to a computer search would need to be made available and that that may take some time. In the circumstances I do not think that damages would be an acceptable alternative remedy.

The balance of convenience favours the applicant.

Overall Justice

The applicant has established that he has an arguable case.

Mr. Patterson suggested that I should take into account what he called the applicant's failure to mediate in good faith as his alleged failure to do so disqualified him from the equitable remedy of reinstatement. In Snaith v S & A Ltd (in rec) 9/5/05, L Robinson (member), AA169/05 the Authority held that not only is it statute-barred from enquiring into the mediation process but a mediation is a confidential process, conducted on a without prejudice basis. The Authority held that it was unable to investigate claims of bullying in mediation.

It is also my view that an investigation of the nature sought by Mr. Patterson is statute-barred. He attempted to distinguish process from substance but the simple fact is that even if an investigation into process were permissible such an investigation would be limited by the inability to inquire into substance and any findings would therefore be, ipso facto, inadequate and of no worth.

I am also disturbed by the attempt to raise this issue again during the interim reinstatement hearing when the matter had already been dealt with by another member of the Authority.

Mr. Patterson submitted that there had been a delay in seeking interim reinstatement and that the real reason for seeking urgency was to have the wages matter dealt with. The delay was short and the view that the real issue is that of wages is mere conjecture.

The respondent maintains that there is very little prospect of the applicant being reinstated permanently. It is clear that the respondent does not want the applicant to be reinstated. That, however, is a different issue from the consideration of whether any reinstatement would be

practicable and I am not convinced at this stage that the issues are sufficiently clear for me to be able to say that the prospect of permanent reinstatement is impracticable or unlikely.

Decision

Mr. Taylor has an arguable case, the balance of convenience favours him as does the overall justice of the case. I order that Mr. Taylor is to be reinstated on a garden leave basis. If the respondent, who objected to making “an interest free loan” wishes to have Mr. Taylor attend work and carry out duties the parties should discuss this and are liberty to apply at any time for a variation of this order.

Costs

At this stage the matter of costs will be deferred until after the substantive hearing. Should the parties resolve their difficulties prior to that and wish to have the matter of costs determined either party is able to make an application to the Authority for such a determination.

Dzintra King
Member of Employment Relations Authority