

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Taweesak Noi Upathep (Applicant)  
**AND** Taksina Limited (Respondent)  
**REPRESENTATIVES** Chris Patterson, Counsel for Applicant  
Louise Foley, Counsel for Respondent  
**MEMBER OF AUTHORITY** Leon Robinson  
**INVESTIGATION MEETING** 15 June 2005  
Taupo  
**DATE OF DETERMINATION** 17 June 2005

PRELIMINARY DETERMINATION OF THE AUTHORITY

**Application for interim reinstatement**

[1] The applicant Mr Taweesak Noi Upathep (“Mr Upathep”) applies for an order for interim reinstatement to his former employment as Manager of the Tasty Thai restaurant, Taupo. That restaurant is owned by the respondent company Taksina Limited (“Taksina”). Mr Upathep was dismissed as Manager by letter dated 10 February 2005. That letter advised:-

...

*Having found several of the allegations proven against you the company considers that regardless of whether the allegations constitute misconduct it has lose(sic) trust and confidence in your ability and competence to manage the Tasty Thai restaurant. It, accordingly has determined that it can no longer have you working in the role of Manager. Your employment as the manager of Tasty Thai is accordingly terminated. You will be paid two week’s notice in lieu. Please arrange for the immediate return of any company property for example, the modem paid for by the company.*

[2] Mr Upathep lodged an application in the Authority on 19 May 2005 claiming he was unjustifiably dismissed and seeking remedies including interim reinstatement. As required, he has given a formal undertaking to abide by any order made by the Authority in respect of damages that may be sustained by Taksina through the granting of an order for interim reinstatement.

[3] The parties were not able to attend mediation as the Department of Labour’s Mediation Service was unable to accommodate them on an urgent basis. Although I consider mediation is a pre-requisite to the granting of interim injunctive relief, in the circumstances, Mr Upathep shall not be precluded from seeking the relief he now does.

[4] There is to be an investigation meeting of the substantive claim commencing on 4 August and continuing on 5 August 2005 if required.

[5] I have met with the lawyers and Mr Upathep and considered affidavit evidence from Mr Upathep, and Taksina's Mr Prasert Janlar ("Mr Janlar"). Present at the meeting was Mr Upathep's original advocate Ms Gabrielle Saxon ("Ms Saxon") and I heard from her too in relation to a material matter that arose during the course of the meeting.

### **Interim reinstatement**

[6] It has been previously said by the Employment Court that the underlying philosophy of the personal grievance jurisdiction is to make the aggrieved employee whole again. Because of that, reinstatement is the primary remedy.

[7] Applications for interim reinstatement are considered under Section 127 of the Employment Relations Act 2000 ("the Act"). That section requires the Authority to apply the law relating to interim injunctions and to have regard to the objects of the Act. These objects include supporting productive employment relationships founded on good faith behaviour and mutual trust and confidence and, recognising the importance of reinstatement as a primary remedy.

[8] The Authority provides, wherever practicable, for reinstatement where this is claimed and a personal grievance is established. The Authority acts to provide a just solution to the parties' problems in the particular circumstances of each individual case. An order for interim reinstatement may be subject to any conditions that the Authority thinks fit - empowering the Authority to craft pragmatic solutions to do justice in each particular case.

[9] The remedy of reinstatement is interim injunctive relief. An injunction is only available for the protection of a legal right or to prevent the infringement of a legal right and it is a discretionary remedy. 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).

### **An arguable case**

[10] Ms Foley very responsibly conceded that Mr Upathep had an arguable case but she says, not a strong case. I too, having read the affidavit evidence, am satisfied that there is an arguable case. Ms Foley confined her submissions to the remaining tests.

[11] Ms Foley's concession relieves me of the task of making detailed reference to the factual matters much of which were in dispute and the principal one, the details of discussions that took place between the parties in a meeting held on 28 October 2004. Where there is dispute, Mr Upathep is entitled to the benefit of an assumption that he will be able to prove his case when the substantive matter is investigated. In an application for interim reinstatement it is neither possible nor appropriate to reach a conclusion on any contested facts.

[12] My provisional assessment is that it is arguable for Mr Upathep that his dismissal was contrived by Taksina because it wished to replace him with another manager. The evidence of what transpired at the meeting on 28 October 2004 will be critical in establishing that arguable case. There will also be a credibility issue arising out of whether or not issues of misappropriation of funds were raised with Mr Upathep at that meeting.

[13] I find therefore Mr Upathep has an arguable case of unjustified dismissal. I make it clear to the parties that my finding of an arguable case is necessarily no more than only a provisional view and is subject to revision upon a full investigation of all the evidence and information that may emerge at the forthcoming investigation meeting.

[14] Mr Upathep's claim that his dismissal was unjustifiable will be determined according to the statutory test of justification set out in section 103A of the Act (as amended).

### **Balance of convenience**

[15] I next deal with the balance of convenience test considering the relative hardships that may arise between the parties. In this context inconvenience means detriment or injury. In most cases the relative hardship will ordinarily favour the applicant employee.

[16] The test involves balancing on the one hand, declining to grant Mr Upathep reinstatement but it later emerging after investigation that he has a just case, against on the other hand, granting the order sought but it later emerging that Taksina was entirely justified in dismissing Mr Upathep.

[17] The undertaking as to damages which Mr Upathep has provided is important in this test.

[18] Mr Upathep has now secured alternative employment. He says that he is paid significantly less than what he earned as the Manager of the Tasty Thai restaurant and as a consequence he has been under financial strain. He is advisedly the sole income provider for his family.

[19] Mr Upathep also says that his reputation has suffered in the small Taupo community and he is upset and angry by the way in which he was falsely accused and treated by Taksina.

[20] Taksina resists interim reinstatement on the grounds that it no longer has trust or confidence in Mr Upathep. It says that it found proved six of seven allegations against Mr Upathep and that the relationship between Mr Upathep and Taksina's shareholders has broken down. The shareholders believe Mr Upathep misappropriated funds.

[21] Taksina also says that it now has a new manager and the restaurant is very quiet in winter. It says that it does not have the resources to supervise Mr Upathep.

[22] Most importantly however, Taksina by its counsel says that Mr Upathep has delayed in seeking the present relief. I too was concerned about this aspect of matters given Mr Upathep had been dismissed on 10 February 2005 yet did not make the present application until 19 May 2005 – some three months later.

[23] I heard from Ms Saxon. I am satisfied from what she told me that on Mr Upathep's behalf steps were taken to make application for the present relief sought. I am satisfied that a solicitor instructed did not act on those instructions at all. In the end, the file was uplifted and Mr Patterson was instructed on 19 April 2005. This application was not lodged until 19 May 2005. While I am satisfied that there is an explanation for the delay, that explanation does not account for the whole of the delay. I am also asked to take into account that English is not Mr Upathep's first language.

[24] I conclude that there was some degree of delay. I consider that delay together with the scheduled investigation meeting on 4 – 5 August 2005. Mr Upathep has now been out of the employment for eighteen weeks.

[25] Balancing the respective hardships between the parties, in the result, I consider that the grant of the relief would bear more harshly on Taksina (it being ultimately successful) than the refusal of it now would be on Mr Upathep (he being ultimately successful), in all the prevailing circumstances as I have outlined them above. I conclude therefore that the balance of convenience favours Taksina.

## **Overall justice**

[26] Standing back from the detail of the other tests I now decide whether it will be in the interests of justice to grant interim reinstatement.

[27] I am particularly mindful at this juncture, of the primacy now accorded by Parliament to the remedy of reinstatement as a relevant factor in considering interim reinstatement. Final reinstatement “must” be provided wherever practicable. I consider too, in the exercise of the Authority’s equity and good conscience jurisdiction and in determining a whether to grant a discretionary remedy, what options other than those advanced by the parties that the justice of the case requires.

[28] I consider whether other solutions might be appropriate. It is relevant in this regard that Mr Upathep is presently employed. He earns an income and is able to sustain himself and his family on that income. I am not informed as to any period of notice that Mr Upathep would be required to give in the event that he succeeded in this application. He may be required to give notice.

[29] I do not consider that justice would be served by reinstating Mr Upathep to his employment at the Tasty Thai restaurant in the short period until investigation meeting, when he has been to this point absent from that employment for eighteen weeks.

[30] I conclude then that the overall justice of the matter lies with Taksina. As Mr Upathep is presently employed, I do not consider that any other solution is required.

## **Determination**

[31] For all the above reasons **I decline to grant an order for interim reinstatement.**

## **Mediation**

[32] I consider it appropriate to direct the parties to mediation. Pursuant to section 159(1)(b) of the Act:-

- (i) The parties are to use mediation and attempt to reach an agreed settlement of their differences; &
- (ii) The mediation is to be undertaken **before 20 July 2005.**

## **Investigation Meeting**

[33] In the event that the parties are not able to resolve the differences between them by the use of mediation, the Authority's investigation will proceed as follows.

[34] The substantive matter will be dealt with at an investigation meeting commencing on Thursday 4 August 2005 and continuing until Friday 5 August 2005.

[35] Both parties are to lodge and serve witness statements by 4.00 pm on Thursday 21 July 2005. Any reply witness statements are to be lodged and served by 4.00 pm on Thursday 28 July 2005.

[36] I shall discuss the procedure at the investigation meeting and other matters that may arise in a telephone conference with counsel in due course.

## **Costs**

[37] If costs are sought, they are reserved.

Leon Robinson  
**Member of Employment Relations Authority**