

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 329/09
5273643

BETWEEN NICOLA WEE
 Applicant

AND SKYCITY ENTERTAINMENT
 GROUP LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Eska Hartdegen, counsel for Applicant
 Richard McIlraith and Kylie Dunn, counsel for
 Respondent

Investigation Meeting: 4 September 2009

Determination: 11 September 2009

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

[1] For determination by the Authority is an interim reinstatement application under s 127 of the Employment Relations Act 2000. It has been brought in the following circumstances.

[2] Ms Nicola Wee, the applicant, was employed from January 2008 until her dismissal, which was effective from 10 July 2009.

[3] Her employer was one or more of the several companies comprising the Skycity group.

[4] The documentary evidence before the Authority shows that while Ms Wee's employment agreement was expressly with Skycity Management Limited, confirmation of her dismissal for redundancy was given under Skycity Auckland

Limited letterhead and was signed by an employee of Skycity Entertainment Group Limited.

[5] Further, the PA position to which Ms Wee seeks reinstatement is apparently a position with Skycity Entertainment Group Limited rather than Skycity Management Limited. Ms Wee's work permit in her passport expressly stipulates Skycity Auckland Limited as the company she was and is able to work for, yet she has cited Skycity Entertainment Group Limited as her previous employer as well as the employer to which she seeks reinstatement.

[6] This seemingly random or interchangeable use by Skycity of the names of these distinct corporate entities is well illustrated in the employment agreement which although headed **SKYCITY MANAGEMENT LIMITED** and signed by Ms Sue Hughes expressly on behalf of that company, is printed on paper marked SKYCITY Entertainment Group Limited.

[7] Any serious issues that arise out of this situation have not been raised by counsel for the parties in the course of arguing the s 127 application. That is not to say they may not be raised in the substantive investigation. I have taken nothing from the array of companies present and, as have counsel, I shall refer to the employer simply as Skycity.

[8] Ms Wee's employment ended when Skycity purported to make her position of Finance Administrator redundant. Although she applied for redeployment into other Skycity positions, Ms Wee was not successful in obtaining any of them.

[9] Five days after her dismissal Ms Wee lodged an application in the Authority seeking interim reinstatement and various remedies for several substantive claims made by her. The remedies set out in the amended statement of problem are:

- Lost salary from 11 July 2009;
- Compensation of \$20,000 for disadvantage in employment;
- Compensation of \$20,000 for unjustified dismissal and loss of dignity, humiliation, stress and distress;
- Penalties for breach of contract and good faith.

[10] It is clear from the statement of problem that compensation is also sought in relation to a claim of discrimination under the prohibited grounds, at s 105 of the Act, of colour, race and ethnic or national origin.

[11] Ms Wee refers to herself Asian and her work permit shows that she is a citizen of Singapore.

[12] Upon commencement of her job in January 2008 Ms Wee worked for and reported to Ms Sue Hughes, the General Manager Commercial Services.

[13] In February 2009 Mr Ian Potter became employed by Skycity as its Group Procurement Manager. In March he commenced a review of the structure of the Commercial Services team. He began by dis-establishing a number of positions and creating nine new roles within that team. Three employees had their employment terminated as a result.

[14] Next Mr Potter looked at the Finance Administrator role then being performed by Ms Wee, to assess the need for retaining that position.

[15] Amongst other things, in his assessment Mr Potter took account of the relocation that had recently occurred of the Commercial Services team to a different building in the Auckland CBD. He found a consequence of the move was that some of the duties of Ms Wee's position were no longer required to be performed. A possibility was considered by Mr Potter that some work could be done directly by members of the team rather than by the Finance Administrator, Ms Wee.

[16] Also, Mr Potter considered that he needed the support of a dedicated PA for his role in which he is responsible for all Skycity procurement issues in New Zealand and Australia. He formed the view that a new position of PA to him as the Group Procurement Manager should be created, and he helped develop a position description for it.

[17] Ms Wee attended meetings with Mr Potter to discuss the proposed restructuring of her position and the creation of the PA role. As invited to, she expressed her views about the changes under consideration.

[18] Mr Potter decided to proceed with the restructuring by dis-establishing Ms Wee's position and creating the new PA role. He met Ms Wee on 27 May and

advised her of his decision. This was confirmed in writing and Ms Wee was given four weeks notice of the termination of her employment, in accordance with her employment agreement. She was advised that Skycity would look for alternative employment opportunities for her during the notice period, and the letter also informed her of an entitlement to redundancy compensation.

[19] Ms Wee was notified when recruitment began for the PA role and she asked to be considered for appointment to it.

[20] Advertising that position drew over 150 applicants. Ms Wee was one of only 10 shortlisted candidates interviewed by Mr Potter but was not successful in her application. She was advised of this by him on 2 July. As she had not obtained any other work with Skycity, her employment finished on 10 July 2009.

[21] The claim by Ms Wee of unjustified disadvantage is that Skycity had given her an assurance that her employment was secure in the position of Finance Administrator. She claims that she acted on that representation to her detriment, by not pursuing other employment opportunities as they had arisen within Skycity.

[22] Ms Wee also claims to have been disadvantaged as a result of her dismissal because the loss of employment with Skycity has affected her ability to obtain the necessary New Zealand Immigration permission enabling her to live and work in this country permanently.

[23] The claim of discrimination is that Mr Potter, in rejecting her application for appointment to the role of his PA, instead appointed a person who in Ms Wee's words:

... looks like the stereotypical PA Barbie.

[24] Ms Wee commented in her evidence on the person appointed, as follows:

I estimate her to be about 26 years old and she has long blonde hair whereas I do not fit the stereotype at all being Asian.

[25] From her work permit it can be seen that Ms Wee is a generation older than the appointee, assuming she is in her mid-twenties.

[26] Ms Wee claims that her “*image*” was not the right one for Mr Potter, whereas the appointee had exactly “*the right look.*” In submissions on behalf of Ms Wee this was put another way, that a “*typical New Zealand girl*” had been appointed to suit Mr Potter’s preferences. Unlike Ms Wee the appointee was not a Skycity employee when she applied for the position.

[27] The claim of unjustified dismissal has been brought on the basis that Ms Wee’s position as Finance Administrator was not surplus to the requirements of Skycity but was retained, although with some minor modifications and under a new title, as the role of PA to the Group Procurement Manager, Mr Potter. Accordingly, Ms Wee claims that there was no genuine redundancy situation and that the restructuring did not result in a new PA position being created. Ms Wee seeks interim reinstatement to that position of PA.

[28] The claims of breach of contract include an alleged failure by Skycity under an express term of the Employment Agreement to encourage Ms Wee to remain in employment, through making “*reasonable endeavours to identify suitable redeployment opportunities*” for her. In relation to such opportunities Ms Wee claims that Skycity was not communicative or proactive and did not therefore act in good faith towards her.

[29] In its statement in reply Skycity contends that there is no basis for any of the claims brought by Ms Wee and it has opposed her application for interim reinstatement and other relief. Skycity objects on a practical as well as legal basis to the reinstatement claim, because the position of PA to Mr Potter has been filled and the appointee is now performing that role.

[30] The claim of discrimination against Ms Wee in particular is viewed by Skycity as preposterous. Mr Potter deposes to being offended by the allegations made in this regard.

[31] After the statement of problem and application under s 127 had been lodged in the Authority, the parties attended mediation on 24 July but were unable to resolve the grievance claims and other employment relationship problems raised by Ms Wee.

[32] As required by s 127 of the Act, an undertaking has been given on behalf of Ms Wee to abide by any order that the Authority may make in respect of damages. Mr McIlraith, counsel for Skycity, confirmed to the Authority that there was no issue

taken as to the ability of Ms Wee to meet her undertaking should that become necessary.

[33] In considering interim reinstatement applications the Authority is required to apply the law relating to interim injunctions and to also have regard to the object of the Act. The relevant law requires that four recognised tests or questions are to be applied to the circumstances of each case. In relation to the object of the Act, the Authority must have regard to the principle that productive employment relationships are founded on good faith behaviour and on mutual trust and confidence.

[34] A further relevant object of the Act, at s 101C, is the recognition of reinstatement as a remedy for any personal grievance. It has been made the primary remedy under s 125.

[35] In accordance with usual procedure, the evidence before the Authority for the purpose of determining this application was presented in affidavit form by the parties' witnesses, among whom were Ms Wee and Mr Potter.

[36] As their evidence must necessarily remain untested until the substantive investigation of the grievance claim, any findings of fact by the Authority in this determination are provisional only and may change later once the claims have been fully investigated and all witnesses have been examined about their evidence.

[37] The substantive investigation is to commence in four weeks time on 7 October 2009.

Tests to be applied

[38] The standard tests or questions the Authority must consider in determining this application are:

- Is there an arguable case?
- Where does the balance of convenience lie?
- Are other adequate remedies available?
- Where does the overall justice of the case lie?

Arguable case

[39] Skycity has not conceded the existence of an arguable case. Mr McIlraith submits that if the Authority finds one to be present, at best it will be only a weak case.

[40] I am satisfied that an arguable case is clearly present in the circumstances deposed to by the witnesses. I find there is a serious question to be answered as to whether the positions of Finance Administrator and of PA to Group Procurement Manager, are essentially the same although having different titles and with some modifications having been made to the duties of the latter.

[41] In reviewing the evidence of the parties about the two positions of employment and their differences, I have kept in mind the test formulated in *Carter Holt Harvey Ltd v. Wallis* [1998] 3 ERNZ 984 at 995, which reads:

Would a reasonable person, taking into account the nature, terms and conditions of each position and the characteristics of the [employee], consider that there was sufficient difference to break the essential continuity of the employment?

[42] This test was referred to with approval by the Court of Appeal in *Auckland Regional Council v. Sanson* [1999] 2 ERNZ 597 in which the Court also observed that the question must be determined objectively and that it is essentially one of fact and degree.

[43] The Authority at this interim stage is not required to determine the arguable case, or answer the serious question. It is enough to be able to see from the position descriptions and the evidence given in affidavits about the two positions that there was some fluidity in the Finance Administrator position which makes it capable of conforming substantially to the specification for the position of PA to Mr Potter. Ms Wee's evidence is that before the restructuring she had been performing some work of that kind for him.

[44] Ms Wee's Finance Administrator job description did not specify any particular weightings or percentages of the total job for the various duties prescribed in it. Under the head "Scope" the position was specified to provide "*confidential and senior administration support to the Commercial Manager [Ms Hughes] and Auckland finance team.*"

[45] The predecessor of Ms Wee, Ms Katherine Walker, who performed the role for seven months, in her evidence estimated that no more than 15% of her role had involved performing duties personally for Ms Hughes.

[46] Whatever the way she had chosen to deploy Ms Walker, Ms Hughes it seems from her evidence made rather more use of Ms Wee who she said had performed 40% of her role by providing personal “*support/PA*” activities to her, as well as providing administration services and support to the Commercial Services team. Ms Hughes described the “*confidential and senior administration support*” to her as the GM Commercial Services as making up a significant percentage of the role.

[47] Ms Hughes’ comparison of the two position descriptions for Ms Wee’s role and the new PA role led her to comment that they are very similar in real content, although she has not asserted in her affidavit that the positions were substantially one and the same.

[48] The description of the purportedly new PA position does express percentages of the total job in relation to the various duties listed in it. For providing “*effective secretarial support to the Group Procurement Manager*” the given weighting is 50%. In providing an effective administration support the weighting is 30%. It is 10% for excellent customer service, 5% for maintaining a professional image and 5% for completing special projects.

[49] While the positions are not identical, it seems that some of the differences may come down to a matter of the priority that is given to particular duties by the person appointed Group Procurement Manager at any time. There was obviously flexibility in this regard in the Finance Administrator position which saw Ms Wee working 40% directly to Ms Hughes, compared with 15% for Ms Walker doing the same job. Arguably this flexibility could have allowed Ms Wee to be used like that up to and beyond 50%, the same as the weighting given in the PA job description.

[50] Differences like this of degree rather than substance may draw attention to the obligation an employer, particularly a large one like Skycity, to provide training in areas where skills and/or experience may be lacking to meet change within the same position.

[51] It seems that Mr Potter’s position was at a higher level within Skycity’s management structure than Ms Hughes’ had been, although this is not absolutely

clear. If so this might support a need for a person with greater experience of PA work, but does not of itself indicate a fundamental difference in the work to be performed for Mr Potter as distinct from that performed personally by Ms Wee for Ms Hughes, at the rate of 40% apparently. I am not persuaded that the PA position is a more senior one to the extent that this factor alone makes it a different position.

[52] In her evidence Ms Hughes acknowledged a difference in the mandatory level of experience required for the two positions; three years in the Finance Administrator job description and five years minimum in the PA job description. The actual experience of the appointee has not been given in evidence, although Mr Potter has deposed that she had “*several*” years experience. What the actual selection criteria were that Skycity applied to her may be a matter to be examined at the substantive investigation, particularly in relation to the discrimination claim.

[53] With regard to the discrimination allegations I consider any arguable case falls away when there is found to be present a serious question that Ms Wee was dismissed from a position that was not surplus to Skycity’s requirements. If the PA position had been Ms Wee’s all along then she was entitled to retain it. While Ms Wee continued to hold it as a permanent position, no one should have been considered for appointment to it, whether by selection on the basis of unlawful discrimination or any other way.

[54] The discrimination claim is dependent on Ms Wee having applied for the PA role as a different position from the one she was dismissed from, but in that situation reinstatement, whether interim or permanent, is not available as a remedy.

[55] The allegations of discrimination are based entirely on a perception of Ms Wee that Mr Potter selected his PA solely on the basis of colour, race and national or ethnic origin, as well as, gender, age and appearance. What the appointee herself thinks of the allegations and the insinuation in them about her, is not known to the Authority. It is implied that Mr Potter had no regard for the appointee’s intelligence and personality, or her skills, qualifications and experience.

[56] If it is ultimately established that is what happened, as Ms Wee claims, Skycity may expect the scale of remedies given to Ms Wee to reflect the unlawfully discriminatory conduct. As well as statute law, such discrimination would breach an

express obligation Skycity had under Ms Wee's employment agreement, to provide her with;

Leadership that values an empowered and diverse work force, with the highest standards of integrity, ethics, mutual trust and individual dignity.

[57] I accept the submission of Mr McIlraith that it is unlikely Skycity went to the trouble and expense of restructuring an arm of its operations, making several people redundant in doing so, simply to keep Ms Wee out of the position of PA to Mr Potter.

[58] What is more arguable is that Skycity acted with the genuine intention of restructuring by creating what it believed would be a new and separate position of PA, and that in doing so it would make the Finance Administrator position surplus to requirements. The serious question to be investigated is whether that was the result achieved. Was the PA role a new one, or was it simply a revised Finance Administrator position?

[59] If there was a genuine redundancy situation as strongly contended by Skycity, the disadvantage claim based on assurances made to Ms Wee that her job was secure, even if arguable could not support a claim to reinstatement to a position that was redundant. There are other remedies for misleading and deceptive behaviour, if found to have occurred.

[60] The same must be true in relation to the claim of breach of the employment agreement and breach of good faith. If the position of Finance Administrator was genuinely redundant, reinstatement even on an interim basis is not an appropriate remedy.

Balance of convenience - availability of alternative remedies

[61] Given the strong personal attacks made by Ms Wee directly against Mr Potter and his character, that he is dishonest, racist, sexist and generally disrespectful of human rights in relation to employment, it would clearly be impracticable to reinstate, on an interim basis even for only a few weeks, Ms Wee to work as Mr Potter's personal assistant. I accept as a reasonable and understandable one his view that they could not possibly work together in the same team again. Let alone could he have Ms Wee work as his PA.

[62] Also, another person has been appointed to that position and has commenced working in it. The inconvenience resulting from an order reinstating Ms Wee to a position currently occupied by another person, and the impracticability of reinstatement to work with or for Mr Potter, has been overcome in this case with an accommodation made by both parties that Ms Wee can be reinstated to the payroll but without performing any work for Skycity if it does not require that in the interim.

[63] For that reason, where interim reinstatement will be only to the payroll rather than to full performance of a job, there are adequate remedies available to Ms Wee to compensate for not being reinstated, if she ultimately succeeds with her substantive grievance claim. She can be reimbursed for lost remuneration (plus interest) and compensated for hurt feelings, humiliation and distress. She was not dismissed for misconduct or poor performance, so this is not a case where there is lost reputation that can be restored through interim reinstatement.

[64] The hearing of the substantive claims is a short time away, about four weeks, on 7 October. There is though likely to be a few weeks further delay before a determination can be issued by the Authority, even if this case is given some priority over others.

[65] The question of Ms Wee's immigration status raised in argument, in my view, does not come into the balance of convenience, because there is no suggestion that Skycity had undertaken any responsibility in relation to her eligibility to obtain permanent residence and become a New Zealand citizen.

[66] Ms Wee was eligible to work in New Zealand and she was offered and accepted employment by Skycity. On the evidence seen so far that is as far as her employer's obligations to her went. I will await with interest further argument, if any, that Skycity owed some duty in law to Ms Wee to preserve her ability to apply for permanent residence.

[67] I find the balance of convenience lies with Skycity, particularly given the availability to Ms Wee of adequate remedies as an alternative to interim reinstatement.

Overall justice

[68] Standing back and looking at the situation as a whole, I consider the overall justice favours Skycity. While I consider the strength of the arguable case is about 5 on a scale of 1 to 10, and is not therefore weak, I do not find that it is so strong as to overcome the balance of convenience in Skycity's favour and lead to a conclusion that the overall justice requires interim reinstatement. Things should be left as they are for the time being, until the substantive application can be determined in a few weeks time.

Determination

[69] For the above reasons, the application for interim reinstatement is declined.

Costs

[70] Costs are reserved until the substantive claims have been determined.

A Dumbleton
Member of the Employment Relations Authority