

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 86A/09
5153358

BETWEEN PHILIP TERENCE WALKER
 Applicant/Responding Party

AND SAFE AIR LIMITED
 Respondent/Initiating Party

Member of Authority: Helen Doyle

Representatives: Murray Hunt, Counsel for Applicant
 Tim Cleary, Counsel for Respondent

Telephone conference: 30 June 2009

Documents received: Application for stay 26 June 2009
 Affidavit in support 29 June 2009
 Notice in Opposition 29 June 2009

Determination: 2 July 2009

**DETERMINATION OF THE AUTHORITY
ON APPLICATION FOR A STAY**

[1] In my determination dated 22 June 2009 I found that Mr Walker had been unjustifiably dismissed from his employment on 10 February 2009 and I made an order reinstating him to his previous position as Purchasing Officer with Safe Air Limited from 29 June 2009. I assessed that there was contribution by Mr Walker and ordered payment to him of compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 taking contribution into account in the sum of \$1,000. I also found that Mr Walker should be reimbursed for lost wages from the time of dismissal until the date of reinstatement taking into account an *ex gratia* payment of one month's pay, wages that Mr Walker earned during that period and contribution.

[2] The determination has been challenged and Mr Cleary, on behalf of Safe Air Limited (Safe Air) seeks an order staying the order for reinstatement until the

challenge can be dealt with. Mr Cleary does not seek a stay in respect of the other orders made by the Authority. Safe Air have provided an affidavit of Wayne Price, who is Mr Walker's Manager, in support of the application.

[3] Mr Hunt on behalf of Mr Walker, has lodged a notice of opposition and yesterday a memorandum, but was not able, given the very tight timeframe to lodge an affidavit.

[4] I held a telephone conference with both counsel on 30 June 2009, and heard from them in terms of the application for stay.

[5] Mr Cleary objected to the memorandum provided by Mr Hunt on 1 July 2009 because it was after, he understood, the Authority's investigation had concluded.

[6] I am not satisfied that that precludes Mr Hunt from providing a memorandum or indeed having the Authority consider the matter provided Mr Cleary has an opportunity for response. In the circumstances I do not find that I need to consider any issues other than those that were discussed during the telephone conference and those matters contained in the documents provided to the Authority prior to 1 July 2009.

[7] Mr Cleary has made some inquiries with the Registrar of the Employment Court as to when it is likely the challenge could be heard. Mr Cleary understands that it could be heard within three months, but it may be earlier if the matter could be heard in Christchurch or Wellington. The employment relationship problem arose in Blenheim.

[8] I do record at the outset that Mr Walker does need security clearance before he can undertake work at Safe Air and I shall return to this matter.

[9] The grounds advanced by Safe Air for the stay are:

- the applicant has been away from work for some 4½ months from February 2009;
- there is another employee in his position;
- the applicant's Manager has lost trust and confidence in the applicant to carry out the Purchasing Officer's role;

- urgency will be sought for the challenge fixture.

[10] Mr Cleary said during the telephone conference that the primary ground relied on was that Mr Price has lost trust and confidence in Mr Walker.

[11] Mr Price in his affidavit deposed to the following:

- That Safe Air was seeking a partial stay in terms of Mr Walker reporting for work. He deposed that all other orders will be complied with and Mr Walker will be paid from 29 June 2009.
- Mr Price said he has lost trust in Mr Walker to continue in his role as Purchasing Officer, which he describes as a high trust, responsible and relatively independent role that requires considerable use of internet, email and other computer applications and interface with suppliers. Mr Price deposes to this loss of trust because Mr Walker sent 425 non-work related emails over a period of six months, of which a number were offensive and inappropriate and some were sent to external addresses with the Safe Air logo.
- That Mr Walker refused to accept any wrongdoing until the day after the Authority investigation and down played his own accountability by blaming workplace culture.
- That the General Manager of Safe Air agreed with Mr Price in terms of his assessment of lost trust and confidence.
- That the other person appointed to cover Mr Walker's position was on a fixed term basis and will finish at the end of this week.
- Mr Walker did not have security clearance when he presented for work on 29 June and that will be sorted out.

[12] Mr Hunt in his notice of opposition said:

- Mr Walker after dismissal immediately made it known he was seeking reinstatement and lodged an application for interim reinstatement. There was a telephone conference with the Authority on 4 March 2009 and the

parties agreed to an early substantive date on 1 May 2009 instead of proceeding with the application for interim reinstatement. Mediation took place between these dates.

- Mr Walker wishes to return to work and the conduct that gave rise to the issue leading to his dismissal took place some six months prior to his dismissal and no performance issues were raised in the interim.
- That Mr Walker was sent home after turning up to work on 29 June 2009 in breach of the Authority's order.

There is no evidence before the Authority on exactly what occurred when Mr Walker presented to work. In those circumstances I place no weight on that matter.

The issues

[13] Mr Cleary referred me to the unreported Employment Court judgment of *PPCS v. Vakapuna* (Judge Couch) WC28A/07, in respect of the law on application for stay. *Vakapuna* also concerned an application for a stay of an order for reinstatement.

[14] Judge Couch stated in *Vakapuna* that the starting point in considering the application for a stay must be s.126 of the Employment Relations Act 2000 which provides:

Where the remedy of reinstatement is provided by the Authority or the Court, the employee must be reinstated immediately or on such date as is specified by the Authority or the Court and, despite any challenge to or appeal against the determination of the Authority or the Court, the provisions for reinstatement remain in full force pending the outcome of those proceedings unless the Authority or Court otherwise orders.

[15] Judge Couch, although noting there was no guidance as to the exercise of the discretion conferred by *otherwise orders* found that the discretion must be exercised in a principled way.

[16] The principles to be applied in terms of a stay are set out in the Employment Court case of *Chief Executive of the Ministry of Agriculture and Forestry v. Hughes* [2004] 2ERNZ 18. The tests are:

- If no stay is granted then will the benefit of a successful challenge to the Authority's determination be lost?

- Will Mr Walker be unduly prejudiced if the stay of reinstatement is granted?
- Is the challenge by Safe Air genuine?
- Is reinstatement likely to be prejudicial to Safe Air or another person?
- The novelty or importance of the questions involved?
- The overall justice of the case at present?

[17] These form the basis of the issues to be determined by the Authority.

If no stay is granted then will the benefit of a successful challenge to the Authority's determination be lost?

[18] I am not satisfied that the first test favours Safe Air as there is no suggestion that Safe Air's rights in terms of a challenge will be defeated or prejudiced if the order for reinstatement is not stayed.

Will Mr Walker be unduly prejudiced if the stay of reinstatement is granted?

[19] I accept that the prejudice to Mr Walker is lessened somewhat by the payment of his salary until the challenge is dealt with.

[20] Mr Walker would be deprived of the benefit of actually working for the salary in the work environment. That is a significant matter in my view, particularly in light of the Employment Relations Act 2000 which provides that reinstatement is a primary remedy, subject of course to reinstatement being practicable.

[21] Mr Walker wants to return to work. He presented at the workplace in accordance with the order on 29 June 2009. Shortly after his dismissal he made an application for interim reinstatement and there was no delay on his part in pursuing this matter.

[22] Some reliance has been placed by Safe Air on the amount of time that Mr Walker has already been out of work and suggests that a further three months until the challenge is dealt with would not be a long period in all the circumstances. I find that a period of three months away from the workplace on top of the 4½ months that

Mr Walker has already been absent from Safe Air would involve an undue amount of prejudice to him.

[23] A right to work is more than simply a right to be paid. In addition, there are other factors which could prejudice Mr Walker. The compensatory award for the distress and humiliation suffered by Mr Walker is expressed in the determination to take into account any the order for reinstatement.

[24] I find that this test favours Mr Walker.

Is the challenge by Safe Air genuine?

[25] There is no suggestion that the challenge was other than one brought in good faith by Safe Air and this test, although in some respects a neutral test given that a party always has a right to challenge a determination, could be seen to favour Safe Air.

Is reinstatement likely to be prejudicial to Safe Air or another person?

[26] This is the primary ground relied on by Safe Air, that it has lost its trust and confidence in Mr Walker and would be prejudiced if a stay is not granted. This is based on the matters referred to in Mr Price's affidavit and includes Mr Walker's alleged attitude, the responsibility and independent nature of his role in terms of the use of computers and the like and the secure nature of the workplace itself.

[27] Balanced against that is the emails which were of concern to Safe Air did not, on the basis of the findings made by the Authority in its determination, continue beyond September 2008. There were some months, therefore, between that point and when Mr Walker was dismissed in February 2009 when no issues of concern were raised or noticed and Mr Walker continued on in the workplace. The grounds advanced by Safe Air as a basis for a stay are the same or very similar to those advanced in opposing reinstatement and they were not successful.

[28] I am not satisfied that the prejudice to Safe Air in having Mr Walker return to work is greater than the prejudice to Mr Walker in not being able to return to the workplace.

The novelty or importance of the questions involved

[29] This is a neutral matter. The challenge is on a *de novo* basis.

The overall justice of the case at present

[30] I now stand back and consider the overall justice as to whether a stay should be granted.

[31] I have taken all the factors before me into account. I find that the prejudice to Mr Walker in not being able to work outweighs that of Safe Air in having him work for a short period until the challenge is dealt with.

[32] I do not find that the overall justice favours the grant of a stay.

Determination

[33] The application for a stay of the reinstatement order made by the Authority in its determination until Safe Air's challenge is dealt with is declined.

[34] Mr Cleary and Mr Hunt agree that Mr Walker cannot attend at work at Safe Air until he is cleared for security purposes. Mr Walker and Safe Air are to expeditiously take all steps in that regard to obtain the necessary clearances so that Mr Walker can return to work as soon as possible.

[35] I reserve leave for either party to return to the Authority if there are any difficulties in that respect.

Costs

[36] I reserve the issue of costs.

[37] Mr Hunt has until 22 July 2009 to lodge and serve submissions as to costs and Mr Cleary has until 12 August 2009 to lodge and serve submissions in reply.

Helen Doyle
Member of the Employment Relations Authority