

[5] 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 any 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.

[6] 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.

[7] In accordance with usual procedure, the evidence before the Authority for the purpose of determining the application has been presented in affidavit form by witnesses, who were Mr Watson and Progressive's General Manager – Fresh, Mr Brett Ashley.

[8] As all of this evidence must necessarily remain unquestioned until the substantive investigation of the grievance, any findings of fact by the Authority in this determination are provisional only and may change later once the Authority has fully investigated the claims and after all witnesses, including Mr Watson and Mr Ashley, have been examined about their evidence where necessary.

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

- Is there an arguable case?
- Is there an adequate alternative remedy available?
- Where does the balance of convenience lie?
- What is the overall justice of the case?

The dismissal

[10] From 2003 until his dismissal Mr Watson was employed by Progressive as Divisional Manager – Meat. This executive position was subject to a written employment agreement, most recently updated by the parties in January 2007.

[11] On 9 February 2009, having accepted another position in Australia with Coles Group Limited, Mr Watson gave Progressive two months notice of his resignation, as required by his employment agreement. In his resignation letter Mr Watson anticipated that he would continue working for Progressive during the period of notice.

[12] As Coles and Progressive's parent company, Woolworths, are directly in competition, the resignation of Mr Watson led to a check being made by Progressive of his work computer and email system. The check revealed that on several occasions in the days before he resigned Mr Watson had sent from work to his home email address a number of documents. Most of those were Progressive documents, some of which were regarded as commercially sensitive.

[13] When told what had been found Mr Watson permitted a member of Progressive's loss prevention team to retrieve his home computer and take it for forensic analysis of its contents. While that was being done Mr Watson volunteered advice that he had also downloaded documents onto a memory stick. After he had produced it for examination, some 13 documents were found to have been copied across to the memory stick from Progressive's computer system. This had been done between 5 and 8 February 2009, in the days before Mr Watson's resignation.

[14] Progressive initiated a disciplinary process that led to a meeting taking place on 18 February 2009. It was attended by Mr Watson, his lawyer Mr Harrison, Mr Ashley, and Progressive's General Manager Human Resources, Ms Catherine Flynn.

[15] At the meeting Mr Watson provided his explanation to the allegation that, contrary to an express provision of his employment agreement, he had taken confidential information belonging to Progressive or Woolworths and had done so with the intent of using it in a manner inconsistent with his employer's interests.

[16] Mr Watson explained that he had forwarded some of the company documents to his home computer because they were about him, and that he had sent other documents to enable him to prepare reports and provide information for the assistance of his team in managing his departure.

[17] During the meeting Mr Harrison, on behalf of Mr Watson, was insistent that Progressive should explain how Mr Watson had breached his employment agreement

in the way alleged by the company. Mr Ashley and Ms Flynn were also asked to specify the particular documents regarded as confidential and to provide a list of those together with copies. A report prepared from the forensic examination of the computer was also demanded.

[18] The meeting of 18 February became acrimonious, to a point where Mr Harrison was told by Mr Ashley to leave Progressive's premises and was warned that he would be removed if he did not go.

[19] The following day, 19 February 2009, Progressive provided Mr Watson a list of the additional documents that had been discovered on the memory stick. Progressive also advised that it had privileged documents which had been created in the course of its inquiry but that they would not be disclosed. Progressive invited Mr Watson to view the discovered documents at a suitable time at the company's offices.

[20] After further correspondence, Progressive advised that the documents could be inspected at Mr Langton's offices. Mr Harrison in turn advised that he was unable to attend to the matter immediately because of his work commitments for the remainder of the week. Progressive then offered to defer the requested meeting with Mr Watson until 25 February and to also make the additional documents available to Mr Harrison at his own offices, provided an acceptable undertaking about the use of that material was given.

[21] There was no further meeting or inspection of documents before Mr Harrison wrote to Mr Ashley on 25 February. Mr Harrison advised that an application had been filed in the Employment Relations Authority seeking to compel the disclosure of a report thought to have been prepared by Progressive's loss adjustment officer, Mr Ian Seed.

[22] In his letter to Mr Ashley, Mr Harrison said:

As to a meeting time, I have already outlined my week and it is simply not possible to review the documents in the time you suggest nor am I able to meet this evening. The speed at which you are trying to push ahead with this inquiry process is unreasonable. Furthermore, I have already indicated to you that Allister is not well and this was evident following our meeting with him and since then matters have moved along at such a pace that I have not been able to liaise properly with him. At this point I ask that you take no further steps until our application to the Employment Relations Authority for full disclosure

has been considered (or we otherwise reach agreement) and that there is also time to consider the documents that you are now going to provide.

[23] Progressive declined Mr Harrison's request not to take any further steps, and Mr Ashley was not prepared to further delay making a decision on the misconduct allegations.

[24] Mr Ashley considered and rejected the explanations given by Mr Watson up to 25 February, that he had removed company documents to his home computer so he could prepare hand over notes for his team. Mr Ashley concluded that Mr Watson's behaviour amounted to serious misconduct and he decided Mr Watson should be summarily dismissed.

[25] The dismissal was communicated in writing to Mr Watson by email sent to Mr Harrison on 26 February 2009. As at that date, the period of notice given by Mr Watson still had some 43 days to elapse, although from 10 February he had been placed on garden leave under a provision of the employment agreement.

The claims

[26] As well as reinstatement, compensation of \$25,000 for hurt and humiliation is sought and also a penalty for an alleged breach of good faith. Further, Mr Watson has sought a compliance order requiring Progressive to provide him with access to information under s 4(1A)(c) of the Employment Relations Act. In particular, the information sought is any report and/or information compiled by the loss adjustment officer Mr Ian Seed in relation to the disciplinary investigation, and any other information not yet disclosed.

[27] The claim for penalty will be determined after an investigation meeting at which evidence can be presented and examined and consideration can be given to the substantive merits of the grievance.

[28] The claim for a compliance order may have now been resolved following advice from Mr Langton on 13 March that Progressive is prepared to waive the privilege previously claimed for Mr Seed's report. Progressive maintains that privilege was properly claimed during the disciplinary investigation and the waiver of that is no admission to the contrary.

[29] I turn to the tests to be applied in considering an application for interim reinstatement.

Arguable case

[30] In his submissions Mr Langton realistically conceded that Mr Watson has an arguable case that he was unjustifiably dismissed.

[31] Clearly, there are serious questions to be answered as to whether, during the disciplinary inquiry it conducted, Progressive fully disclosed all information falling under s 4(1A) of the Act. There is a serious question as to whether Mr Ashley's rejection of Mr Watson's explanations for the allegations was reasonable and also whether the conduct alleged and concluded to have been carried out by Mr Watson was misconduct or misconduct of sufficient seriousness that would justify summary dismissal.

[32] There is a further question as to whether, in conducting its disciplinary inquiry, Progressive unreasonably truncated the opportunity it had offered Mr Watson and Mr Harrison to view the confidential information found on Mr Watson's computer and to provide any further explanations. The arguable case in this respect gains some strength from the fact that Progressive decided to dismiss Mr Watson straight after being advised by Mr Harrison that an application had been made to the Authority to challenge the company's actions to that point.

[33] Progressive will need to explain why it could not have further deferred concluding the disciplinary investigation for another week or so. This would have allowed Mr Harrison to attend to his other commitments and also ensured that Mr Watson was well enough to take part in the continuing investigation process. Mr Ashley had been advised on 25 February that Mr Watson had become unwell.

[34] Also, a deferral would have made time available for Mr Watson's application to the Authority, made on 25 February, to be considered on an urgent basis, so that any rights of Mr Watson being infringed by Progressive during the disciplinary inquiry could be enforced before any dismissal occurred.

[35] These issues provide an arguable case as to whether the test of justification under s 103A of the Act can be met by Progressive in the circumstances.

An adequate alternative remedy available?

[36] In my view it is relevant that Mr Watson is not seeking permanent reinstatement in the sense that he wishes to resume working for Progressive indefinitely, as was his entitlement under the employment agreement. Mr Watson acknowledges and accepts that his reinstatement may only be for the duration of the notice period, until about 12 April 2009, and may also be to a garden leave situation in which he will not perform any work.

[37] Although the Authority does not raise the permanency of reinstatement sought as an issue going to jurisdiction in this case, it is nevertheless a relevant factor that interim reinstatement as a remedy is not an end in itself. It is an intermediate remedy or holding pattern to be used along the way to obtaining a final determination of the case on its substantive merits. Mr Watson has ruled out the possibility of permanent reinstatement by his acceptance of a position with Coles and by his intention consequently to no longer work for Progressive.

[38] In this regard, I note the observations of the Court of Appeal in *Madar v. P&O Services (NZ) Ltd* [1991] 2 ERNZ 174, that where there is no real prospect of permanent reinstatement it cannot be said that there is a strongly arguable, or even an arguable case for interim reinstatement. Reinstatement in the circumstances of this case will not be for the purposes contemplated by the Act in making provision for that as an interim remedy.

[39] Understandably Mr Watson will be apprehensive about the way Coles may view his dismissal and the reasons made known for that, but any harm to Mr Watson in relation to his new employment is best repaired as far as possible with a final determination of the merits of his claim of unjustified dismissal. Interim reinstatement is a temporary repair only, and then for any harm done primarily to the employment relationship existing at the time of dismissal, rather than to subsequent or future employment.

[40] Given those qualifications on the remedies Mr Watson is seeking, in my view there is an adequate alternative remedy available to him. He can be reimbursed lost wages for the period of notice and compensated for hurt feelings and humiliation suffered as the result of any unjustified dismissal or other unlawful action on the part of the employer.

[41] Some damage may have already been done to Mr Watson's reputation in the meat industry, as acknowledged by Mr Harrison in his submissions. I do not consider that interim reinstatement is likely to repair or contain that damage now. It also seems likely to be only a matter of time before Mr Watson's new employer, if it has not already, becomes aware of the dismissal and reasons given for it by Progressive. Interim reinstatement pending a full investigation and final determination will not necessarily remove any doubts that Coles may have about its new employee, even in the event that he is later found to have been unjustifiably dismissed.

The balance of convenience

[42] I find that the balance of convenience lies in favour of maintaining the current position, which is that Mr Watson has been dismissed from his position but may be found, after a substantive investigation, to have been unjustifiably dismissed. He may seek appropriate remedies at that time, but by his own choice those will be limited to monetary remedies and not include permanent reinstatement.

[43] It is, in my view, more convenient for Mr Watson to wait (now little more than a fortnight) until the full investigation meeting can take place and a determination issued, rather than to have him reinstated for an equally short period by his choice, before he departs to take up his new position in Australia after 12 April 2009.

[44] I do not consider there has been shown to be any real financial hardship likely to affect Mr Watson in his current situation and which markedly tips the balance of convenience in his favour.

The overall justice of the case

[45] Standing back and looking globally at all the circumstances and the conclusions reached under the earlier tests, I consider the overall justice of the case favours Progressive. Its decision to dismiss should be left undisturbed at this stage.

[46] It is strongly arguable, as submitted by Mr Langton, that emailing and copying Progressive's confidential information were steps taken towards using, or was an attempt to use, that information outside the course of Mr Watson's duties and were not actions taken for the sole benefit of the company. It is therefore strongly arguable that by his actions he breached clause 5(b) of the employment agreement. There remains a question as to his intentions in acting this way.

[47] It cannot be immediately seen at this stage that Mr Watson's intentions were entirely innocent so that interim reinstatement should justly be ordered now. The timing of the emailing and copying, the number of documents involved and their contents, justified Progressive becoming at least suspicious of Mr Watson's motives. This traffic occurred after Mr Watson had accepted the new job with Coles but before he had notified Progressive of that. In not telling Progressive until 9 February about the new position, Mr Watson was also arguably acting in breach of an express requirement of his employment agreement to advise his employer that he had accepted other employment.

[48] In substantively determining this case the Authority will need to consider whether Progressive was not merely suspicious but had reasonable grounds for believing that Mr Watson had misused or was intending to misuse the confidential information on some future occasion.

[49] In considering the overall justice of the case I agree with Mr Langton it is relevant that before the decision was taken to dismiss him Mr Watson had provided an explanation for his actions and had done so after being given an opportunity to see many of the documents he allegedly misused. No new or further explanation not previously made has since been put forward by him. But a question remains whether his employer's rejection of his explanations was reasonable. A valid point also made is that Mr Watson could reasonably be expected to have been quite familiar with the contents of the documents he emailed and copied, given the special purposes he said he had for deciding to keep them and the brief time that went by afterwards before he was asked to explain his actions. If so, any failure to provide Mr Watson with access to the documents may not have prejudiced him in explaining his conduct.

Determination

[50] For the reasons given above the Authority declines to grant interim reinstatement to Mr Watson.

Further directions

[51] As the parties have advised they are available for an investigation meeting on Friday 3 April 2009, a Notice of Investigation Meeting will be sent out confirming that fixture.

[52] A copy of the report from Mr Seed for which privilege has now been waived is to be supplied forthwith by Mr Langton to Mr Harrison.

[53] Written statements of evidence of both parties' witnesses are to be exchanged and filed by noon on Monday 30 March 2009.

[54] If required, a telephone conference may be arranged through Mr Steve Berry who is the case support officer.

Costs

[55] Costs are reserved.

A Dumbleton
Member of the Employment Relations Authority