Employment Court of New Zealand

Wellington Free Ambulance v Adams [2010] NZEmpC 59; [2010] ERNZ 128; (2010) 9 NZELC 93,512; (2010) 7 NZELR 393 (17 May 2010)

Last Updated: 2 December 2011

IN THE EMPLOYMENT COURT WELLINGTON

[2010] NZEMPC 59

WRC 15/10

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

BETWEEN WELLINGTON FREE AMBULANCE SERVICE INC

Plaintiff

AND ALANA ADAMS Defendant

Hearing: 11 May 2010

(Heard at Wellington)

Appearances: Paul McBride and TC Mitchell, Counsel for Plaintiff

TB Blake, Counsel for Defendant

Judgment: 17 May 2010

JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] This is a challenge by hearing de novo to the Employment Relations Authority's determination[1] granting Alana Adams an order for interim reinstatement in employment with Wellington Free Ambulance Service Inc (WFAS) from which she was dismissed.

[2] The duration of the interim order for reinstatement (which has been stayed subsequently by the Authority pending this judgment) is uncertain. The Authority is scheduled to investigate Ms Adams's personal grievance alleging unjustified dismissal for which she seeks remedies including reinstatement, on 15 and 16 June

2010 and it is very likely that the Authority will reserve its determination thereafter.

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[3] The statutory authority for making an interim order for reinstatement is in s 127 of the Employment Relations Act 2000 (the Act). The Authority's discretion is broad ("if it thinks fit") but not unconstrained. Subsection (4) provides that "[w]hen 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."

[4] The Authority recorded in its determination issued on 28 April 2010, following an investigation meeting held two days earlier, that there were three tests to be applied. The first was whether Ms Adams had an arguable case for determination by the Authority that she had been unjustifiably dismissed. If so, the second test applied by the Authority was to consider where the balance of convenience lay. Finally, the Authority determined the overall justice of the position.

[5] There are two unusual features of the application by the Authority of that methodology. First, it is not clear whether it

considered both that Ms Adams had an arguable case that she had been dismissed unjustifiably, but also an arguable case for reinstatement in employment upon that finding. The case law establishes that it is not simply the first test of arguable case of unjustified dismissal that must be satisfied. The Authority must also assess the prospects of an order for reinstatement in employment when considering that first test.

[6] The second unusual feature of the case is that the Authority found that the balance of convenience between the parties was in equipoise. It could not decide whether the disadvantages to Ms Adams, in the event that she was not reinstated pending its investigation but was later to be reinstated upon a finding of unjustified dismissal, outweighed the disadvantages to WFAS of an interim order for reinstatement in the event that the employer was ultimately successful in establishing justification for dismissal. Therefore, the Authority decided the application for interim reinstatement on the overall justice of the case which it found to have favoured the employee.

[7] There is a further factor in the Authority's methodology applied to the application for interim reinstatement that warrants comment. Because it adopts statements contained in judgments of this Court, I should not be thought to be critical of the Authority when I respectfully disagree with the absolute nature of those statements of the law. They say that in an application for interim reinstatement in employment, the Court or the Authority should assume that the applicant's claims will be upheld at the substantive hearing. Whilst that is an appropriate methodology in deciding an application to strike out proceedings or causes of action before trial, I do not agree that it is necessarily the appropriate methodology for determining interlocutory injunctive relief in cases of dismissal from employment.

[8] The Authority put it this way at para [2]:

This analysis [of the three tests] will need to be determined on the assumption that the claims made out in Ms Adams' affidavit and subsequent evidence in reply can be upheld in a subsequent investigation meeting on the substantive issues to be held on 15 June 2010. Because the evidence has been untested at this point her claims must be accepted unless clearly untenable. (my emphasis)

[9] Cases in which that principle has been stated and applied include *NZ Stevedoring Co Ltd v NZ Waterfront Workers Union*,[2] *Kendall v Presbyterian Support Services*,[3] *Grey Advertising (New Zealand) Ltd v Marinkovich*,[4] and, most recently, *NZEMPU Inc v Zeal 320 Ltd.*[5]

[10] The principles for deciding applications for interlocutory injunctive relief are traceable to the House of Lords in the United Kingdom via judgments in the High Court and the Court of Appeal such as *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd.*[6] These referred to and adopted the judgments in the House of Lords in *American Cyanamid Co v Ethicon.*[7] In that case, Lord Diplock stated at p 406:

... where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. It is given on

affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if upon that incomplete untested evidence the court evaluated the chances of the plaintiff's ultimate success in the action at

50 per cent. or less, but permitting its exercise if the court evaluated his chances at more than 50 per cent.

[11] Later, Lord Diplock stated at p 407:

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that "it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing": ... So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

[12] It is probably this last sentence which may have led to judges considering that an applicant's allegations of fact should be presumed to be the position that will be established at trial.

[13] The English Court of Appeal in *Fellowes & Son v Fisher*[8] contained significant reservations about the Diplock approach set out above in *American Cyanamid.* Browne LJ and Sir John Pennycuick stated:

Though the approach of the House of Lords in the *American Cyanamid* case to an application for an interlocutory injunction appears incompatible with that laid down in the *Stratford v. Lindley* case and represents a departure from generally accepted

practice, it is a direct decision on the point which the courts are bound to follow and apply. ...

... The House of Lords by the *Cyanamid* decision appears to overlook the many situations where on the previously accepted approach it had been possible (by deciding at the interlocutory stage the strength of the party's respective cases) to put an end to the necessity of further legal proceedings.

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[14] I too consider that it is difficult to reconcile the necessity for an assessment of the relative strengths of the parties' cases (as one element of determining the balance of convenience) with an approach which requires the Court to accept the applicant's factual allegations as part of the arguable case test. The latter is a rigid approach inappropriate to the many cases in which, even at an interlocutory stage, the Court can gauge safely not only the respective strengths of the parties' contested cases but also, in some, the truth of allegations and counter allegations.

[15] I prefer, therefore, a more flexible approach involving an assessment of the strengths of the parties' cases but also allowing for such an irreconcilable situation that, only so far as it is necessary to leave that to decision at trial, the applicant's evidence may be accepted in the interim.

[16] That is because, in the employment field at least, such is the significance of interlocutory injunctive relief that it cannot always be said that the plaintiff's undertaking as to damages is an effective counter balance to the acceptance of a plaintiff's assertions that later prove to be wrong. Such an approach might also lead unscrupulous plaintiffs to make careless or calculatedly false allegations of fact in reliance upon their acceptance at interlocutory injunctive stage and in the hope or expectation that the proceeding will not eventually get to trial. I say this theoretically and not with reference to this case of course.

[17] The more flexible approach includes, for example, a commonsense determination of inherent possibilities of an unanswered assertion or even of a disputed assertion. In its extreme form, the rigid approach adopted by the Authority in this case would also preclude consideration of contradictory evidence called for a respondent, even powerful and persuasive contradictory evidence.

[18] The Court or the Authority must decide such an application on the evidence before it even although this will be unlikely to have been able to be tested at trial and may also be incomplete. That is not, however, the same thing as deciding the case on assertions made in pleadings or even in one party's affidavits and especially if there is no evidence to support these assertions. Such a presumptive approach also tends to focus unduly on the merits of the substantive proceedings between the

parties rather than the respective justices of alternative scenarios in the period before trial.

[19] It is not entirely clear whether the Authority applied that methodology in practice in deciding Ms Adams's application for interim reinstatement despite having said it would do so. As will be obvious, however, I will not so decide the case.

[20] On this challenge I have, by consent, considered the original affidavit evidence that was before the Employment Relations Authority plus further updated evidence and also evidence in reply by Ms Adams that was given orally to the Authority member but of which there was no record.

[21] The plaintiff's central emergency communications centre is one of three ambulance and emergency medical communications centres in New Zealand. It provides road and air emergency and non-urgent responses for the lower North Island. It employs emergency medical dispatchers (EMDs) on shift work of two days and two nights on followed by four days off. Start and finish times are staggered between 0600 hours and 0800 hours and, with one exception all EMDs have assigned a covered shift pattern ensuring that they work within a familiar and generally predictable team environment. The plaintiff currently has 36 EMD staff, some two short of its establishment. Fifteen work as dispatchers and the majority are call takers. There are four team managers responsible for shifts. Unsurprisingly, the centre operates following strict procedures and protocols with an emphasis on avoiding failures.

[22] At the time of her dismissal Ms Adams had been an employee of WFAS for almost three years. She was an EMD in the employer's emergency ambulance communication centre in Wellington. For the about the last 15 months of her employment, Ms Adams had also acted as a volunteer ambulance paramedic supporting WFAS's professional ambulance paramedics. She is studying at the Whitirea Polytechnic towards a degree in health science as a qualification for being a paramedic. Given that Ms Adams is aged 22 years, it seems clear that she is committed wholeheartedly to an emergency paramedic or medical career. That is

illustrated by her close links to WFAS sports teams and much of her social life and networks are also built around the WFAS community.

[23] In late 2009 there was a contretemps between Ms Adams and her supervisor as a result of which she was counselled informally as too, it appears, was the supervisor.

[24] On 31 January 2010 Ms Adams was working in the emergency communications centre. A colleague complained of her rudeness and condescension towards him during their shift and also complained that she had abused him on the "Facebook" electronic social medium on the following day. Ms Adams's colleague's written complaint to the employer complained of three things.

[25] First, he alleged that he was spoken to "in an extremely rude manner" by Ms Adams about a disagreement between them over when they would take their meal breaks. The colleague alleged that "Every time I spoke for the rest of the night she would mutter smart comments under her breath."

[26] Second, the colleague's complaint letter deals with a disagreement between the two employees over the coding of a job and that Ms Adams spoke to her colleague "as if I was stupid." The colleague complained: "She spoke down to me and did not treat me like part of the team. This made me feel extremely uncomfortable and upset."

[27] Finally, the colleague complained that on the next afternoon, when he logged on to his "Facebook" page, there was a short derisory comment about him that had been placed there by Ms Adams. The colleague responded and there ensued a "dialogue" conducted almost continuously and consisting of short exchanges in which Ms Adams again insulted the colleague and there were less harshly worded mutual recriminations about the events of the previous day. Although Ms Adams accepts the veracity of her colleague's account of that Facebook interchange, she says that he omitted some important elements of it from his complaint to the employer. There is, as yet at least, no better account of the exchange than the colleague's recollection of it. It may have been conducted through a form of instant

messaging service in which the messages created and sent are not retained on the participants' computers' hard drives and may be difficult to access from the network's servers.

[28] The employer undertook an investigation of these complaints over a period of five weeks during which time Ms Adams continued in her position including interacting with other staff and, potentially at least, with the complainant. It appears that, acting on the original complaint, the employer did not then take matters so seriously as to consider suspending Ms Adams from her emergency medical dispatcher duties. That may, however, be explained by what emerged only during that investigation.

[29] Although accepting that she had not behaved professionally, Ms Adams claimed that her complainant "gave as good as he got" but she assured her employer that her misconduct would not be repeated. The manager of the communications centre did not accept Ms Adams's assurance that there would be no repetition of this behaviour which she denied as being aggressive or rude but accepted consisted of one sarcastic comment and the Facebook exchange which must really speak for itself because it is in the form of writing.

[30] Although a matter requiring the attention of the employer and an appropriate reprimand of, and behaviour modification by, Ms Adams, the foregoing incidents with her work colleague were both related and not the most serious of exchanges imaginable between young and somewhat immature employees. Although more than the proverbial "storm in a teacup" as Mr Blake categorised these incidents, they strike me as being more stupid, arrogant, and even manipulative than threatening and deliberately destabilising as the plaintiff eventually treated them by dismissing Ms Adams summarily.

[31] What the employer's investigation did uncover, however, was a widespread degree of significant dissatisfaction with Ms Adams by her work colleagues. This was based on their experience, both personalised and observed, of similar behaviours by her that had resulted, among other things, in staff resignations, EMDs not wishing to work on the same shift as Ms Adams, and belated complaints of very similar

conduct by her which had brought about the employer's investigation. What began as effectively a single complaint of interpersonal misconduct expanded in both its scope and intensity at the end of which Ms Adams was summarily dismissed.

[32] The Authority's determination appears to have focused more on the question of justification for Ms Adams's dismissal rather than on the assessment of the practicability of reinstatement as a remedy. Whilst there is an arguable case of a failure to meet the s 103A test for justification, and it is necessary to find at least an arguable case of this to be able to move on to the question of reinstatement, the latter remedy should have been the focus of the Authority's inquiry and must now be this Court's.

[33] Although the statute categorises reinstatement as the primary remedy, its grant turns on practicability. The Court must consider carefully, on the evidence presently before it, first, whether Ms Adams has an arguable case both that her dismissal was unjustified, and for reinstatement. Even if that is so, the strength of the case for reinstatement will be an important consideration in the balance of convenience for the period until the personal grievance can be investigated and determined. That is because the test is to determine on balance whether it will be more just (convenient) that Ms Adams is reinstated in employment until the Authority may determine either that she was not dismissed unjustifiably or, even if she was, that she should not be reinstated or, on the other hand, that she should remain out of work until the Authority may determine that she was both dismissed unjustifiably and should be reinstated.

[34] The plaintiff's opposition to Ms Adams's reinstatement (including the interim reinstatement ordered by the Employment Relations Authority) may be summarised by what it says is the serious and widespread antagonism between Ms Adams and other staff with whom she would have to work collaboratively. Its case is that this is irreconcilable with the nature of that work as an emergency medical dispatcher in an ambulance control room. Employees, individually and sometimes collectively, must be able to focus on complex and difficult tasks without the distraction of other issues or problems in the workplace. The plaintiff says that it has no other roles to which Ms Adams could be assigned, even temporarily, given her range of skills and

experience and also that it would not be possible to provide her with a level of constant supervision to ensure the avoidance of interpersonal conflict with other employees.

[35] The plaintiff says that even although some of its employees who have expressed their opposition to Ms Adams's reinstatement do not work on the same shift as she did, the organisation must have the flexibility to move staff between shifts and employees themselves must have the flexibility to arrange cover when they may not be able to work as scheduled. The plaintiff is concerned at the possibility of staff from other shifts refusing to undertake work with Ms Adams on green shift if she is reinstated. The plaintiff also emphasises that shifts are not mutually exclusively scheduled but many have cross over periods with their predecessor and successor shifts. Some employees on a shift will start earlier or finish later than others to ensure appropriate coverage at peak emergency call periods. Its case is that many other employees would work potentially with Ms Adams even if they were not members of her green shift.

[36] Ms Adams has an arguable case of unjustified dismissal under s 103(A). It is possible to so conclude because, in the Authority, WFAS conceded that substantial and significant information sought and obtained by it in the course of its inquiry that led to her dismissal, was never disclosed to her. If that is so (because it is now disputed by counsel who did not act for the employer in the Authority), it is difficult to see how it could be said that a fair and reasonable employer would have so conducted an inquiry into serious allegations and relied on such information in dismissing Ms Adams. So the important focus, not only for the Employment Relations Authority when it comes to determine the substantive proceedings, but also on this application, is the appropriateness and likelihood of an order for reinstatement in employment.

[37] Although, assuming a finding by the Authority that Ms Adams was dismissed unjustifiably, reinstatement is to be the primary remedy by statute, whether that is granted depends on its practicability.

[38] I conclude that if Ms Adams is to be reinstated in employment by the Employment Relations Authority, that will have to be a carefully crafted remedy in the sense that its practicability in the short term at least will not be enhanced by a simple direction that, as from a specified date, Ms Adams is to be reinstated in the role of an EMD on green watch as was the effect of the Authority's order for interim reinstatement.

[39] To ensure long term practicability of any order for reinstatement, there will need to be a carefully planned and mutually agreed process of training and counselling of Ms Adams and perhaps, also, counselling of other employees. That may need to be assisted by a mediator and although, if Ms Adams is to be reinstated by the Authority her remuneration may commence immediately, it is likely to be a little while before she again performs call taking or dispatching duties as a team member on a shift.

[40] Counsel are confident that the Authority is likely to deliver its determination in the substantive proceedings before it by mid-July, that is about two months hence. I do not understand loss of remuneration to be Ms Adams's most significant concern: she is fortunate that her parents can assist her in the meantime. So, too, can her polytechnic course continue although the practical elements of this that she satisfied previously by working as a volunteer paramedic with WFAS might have to be postponed. It was suggested, also, that these practical components of Ms Adams's training may be able to be undertaken with the separate ambulance services provided by the Wairarapa District Health Board.

[41] Given my sure view that, if granted by the Authority, any reinstatement will have to be carefully planned and undertaken gradually with retraining and counselling, the relative proximity of an outcome in the Employment Relations Authority favours the plaintiff's resistance to interim reinstatement.

[42] Even making allowance for some of the rhetorical statements of other employees on affidavits taken from a polarised workforce, there is a substantial and important concern established by the plaintiff's opposition to interim reinstatement that was not addressed sufficiently by the Authority. Ms Adams's return to that

working environment, without a careful and structured reintegration, is likely to prove disruptive, even if, true to her undertakings, Ms Adams proverbially keeps her head down. I find these effects more significant than the Authority did and also the flow on to the high standards of performance and service that EMDs must have, both individually and in their teams, in a unique working environment.

[43] In these circumstances, and contrary to the conclusion of the Authority, I find the balance of convenience favours the plaintiff's position in the meantime.

[44] Standing back from the detail of the first two tests, I also conclude that the most just interim solution is for there to be no reinstatement. Among my reasons for so concluding are the examples of poor judgment on the part of Ms Adams in her dealings with former colleagues after her dismissal.

[45] For the foregoing reasons the Authority's determination reinstating Ms Adams temporarily is set aside and replaced by this judgment which declines that application.

[46] At the request of counsel, costs on the challenge are reserved.

GL Colgan
Chief Judge

Judgment signed at 9.15 am on Monday 17 May 2010

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[1] WA81/10, 28 April 2010.
[2] [1990] 3 NZILR 308.
[3] [1992] 2 ERNZ 413.
[4] [1999] NZEmpC 212; [1999] 2 ERNZ 844.
[5] (2009) 6 NZELR 655.
[6] [1985] NZCA 70; [1985] 2 NZLR 129.
[7] [1975] UKHL 1; [1975] AC 396.
[8] [1976] 1 QB 122, 123
