

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Hugh Wells (Applicant)

AND Landco Farming Limited (Respondent)

REPRESENTATIVES Peter Macdonald, Advocate for applicant
Dean Organ, Advocate for respondent

MEMBER OF AUTHORITY James Crichton

SUBMISSIONS RECEIVED 19 July 2005
26 July 2005

DATE OF DETERMINATION 10 August 2005

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

[1] The applicant Hugh Wells, (Mr Wells), applies for an order for interim reinstatement to his former employment as a senior machinery operator with Landco Farming Limited (Landco).

[2] The evidence available to the Authority in an interim application of this sort is untested evidence and, as such, must be treated with a measure of caution. That said, the basic factual position can be set out but always with the gloss that the evidence for contested propositions must be treated with circumspection.

[3] Mr Wells had worked for a previous entity, Wharfedale Farming Company (Wharfedale), from 1997 on the same property and doing the same sort of work. Effective 30 June 2004, the property that Mr Wells worked on was sold and his employer became Landco.

[4] There was a meeting on 1 April 2004 at which Landco spoke to the staff of Wharfedale and advised them that they would be able to continue their employment with Landco on terms and conditions which would be similar to, if not better than, their current employment. Subsequently, on 30 June 2004, Landco acquired the assets of Wharfedale and Mr Wells commenced employment with Landco effective 1 July 2004.

[5] There were ongoing employment relationship difficulties between the parties commencing with an issue about the quantum of Mr Wells' salary and whether it indeed was the same or better than the salary he had previously enjoyed with Wharfedale. But then, according to Landco, there were further issues of *performance and conduct* put to Mr Wells. A final written warning was issued to Mr Wells by Landco on 16 February 2005 in respect to six matters of concern to Landco.

[6] By letter dated 17 May 2005, Landco raised further issues with Mr Wells and sought another meeting which took place on 25 May 2005. At that meeting, after discussion between the parties, Mr Wells was dismissed by Landco.

[7] A letter dated 27 May 2005 confirmed the basis of the dismissal.

[8] The essence of the decision to dismiss is contained in the following paragraph:

It was concluded that you had deliberately and repeatedly refused a reasonable instruction from the company [Landco] and that you have presented misleading information to the company for the purpose of your pecuniary gain. Your actions and your previous conduct have seriously eroded the trust and confidence that the company had in you. The company has found your behaviour to be negative, uncooperative and surly. From your actions you have demonstrated resentment towards the company from the early stages of your employment. You have chosen to seek additional monies from the company in a less than open manner. The decision to dismiss is unfortunate but in the circumstances there has been little choice. Dealing with your conduct has been an unpleasant and costly business with the company being put to over \$10,000 in unnecessary legal expense.

[9] Mediation has proved unsuccessful in resolving matters and an investigation meeting on the substantive claim has been set down for 30 and 31 August and 1 September 2005.

Interim reinstatement

[10] Applications for interim reinstatement are considered pursuant to section 127 of the Employment Relations Act 2000 (the Act). Wherever practicable, the Authority seeks to promote reinstatement where it is claimed and where a personal grievance can be proved. Interim reinstatement is interim injunctive relief which of necessity can only be provided for the protection of legal rights or preventing the abrogating of legal rights. It is by its very nature discretionary.

[11] There are established tests for interim reinstatement and the law is well settled on these. The tests are as follows:

- (a) Whether there is an arguable case of unjustified dismissal;
- (b) Whether the balance of convenience (including the existence or otherwise of alternative remedies) favour the applicant; and
- (c) Because the remedy is discretionary where the overall justice of the case lies recognising that the effect of the granting of interim injunctive relief is to effectively create a *holding pattern* until the substantive matter is dealt with.

The arguable case test

[12] The applicant was dismissed for failing to obey a reasonable and lawful instruction relating to the provision of information about his former rate of pay, and for seeking to gain a pecuniary advantage by presenting misleading or incomplete information in that regard. According to Landco's submission, those two factors, taken together, effectively remove the trust and confidence that the employer needed to have in Mr Wells.

[13] Mr Wells says that he was employed by Wharfedale on a verbal employment agreement, that he provided Landco with all the information that he had on the terms of that agreement and that in dismissing him for effectively failing to provide further and better particulars, Landco was not acting as a fair and reasonable employer.

[14] Of course, Landco argues that Mr Wells was effectively trying to extort money from them by way of a salary package to which he was not entitled. Landco accepts that they promised Mr Wells that he would be paid on the same or better terms than he was with Wharfedale. But Landco claims that Mr Wells has not provided any evidence for the quantum of salary that he claims he was paid by Wharfedale or certainly not evidence sufficient to satisfy Landco that that salary was actually the salary that he previously had enjoyed. Landco says that Mr Wells deliberately misled them by providing insubstantial, incomplete information.

[15] The admittedly incomplete information provided by Mr Wells suggests that there was an income splitting arrangement between Mr Wells and his wife and that the sum of these two salary amounts equals the figure that Mr Wells is claiming he is due.

[16] The evidence in favour of this view (setting aside the legality of such an arrangement so far as the Income Tax Act is concerned) is that both amounts seem to have been paid into the same bank account and the wage records that have been made available to the Authority seem to proceed on the footing that both individual's remuneration is paid under the same IRD number.

[17] Conversely, the former manager of the property when Wharfedale was in charge in a testimonial or reference kind of document, refers to Mr Wells and his wife being employed by Wharfedale but as if they were employed separately. The relevant paragraph is as follows:

Hugh's (Mr Wells) wife Brenda was also employed by the station at times helping my wife with maintenance of the owners house and station grounds, as well as looking after her own house grounds. Brenda also cooked for shearers and other casual staff at various times and also helped tailing.

[18] I have reflected on the matter at some length and reached a conclusion that Mr Wells has an arguable case and I find accordingly.

The balance of convenience

[19] The essence of this test is to balance the potential harm to Landco of Mr Wells being returned to its service until the substantive matter is dealt with against the potential harm to Mr Wells of needing to find another source of income until the substantive issue has been completely disposed of.

[20] Mr Wells has, it seems, obtained some alternative income and the indication from Mr Wells' advocate is that Mr Wells will continue to seek casual work for the very understandable reason that he has a wife and family to provide for. The total amount earned by Mr Wells to date since dismissal is said to be \$1,336.98 although Landco say Mr Wells is in full time employment.

[21] Landco says unequivocally in its affidavits that it no longer trusts Mr Wells, that he would be a disruptive influence if he were to return to the workplace and that the relationship has effectively broken down. Landco refers to the size of the workplace, the record of negativity that they say characterise their relationship with Mr Wells, the suggestion that Mr Wells' return would be viewed negatively by other staff and so on. Landco also refers to the fact that at the time of his dismissal, Mr Wells was on a final written warning for failure to follow lawful instructions in a variety of matters to do with the operation of their business and they say that they could have dismissed him then but chose to give him a second chance.

[22] Given the indicative evidence before me that Mr Wells has been able to obtain alternative income, I must of necessity consider whether an adequate alternative remedy exists. On the face of Mr Wells' affidavit, it would seem that the only deficit to him of not being in employment is the

absence of income. That impression is reinforced with his claim that he ought to be reinstated on an interim basis to *garden leave*.

[23] The respondent draws attention to its anxiety about Mr Wells straightforwardness in dealing with monetary matters and raises the prospect that, given the history of the employment relationship, Mr Wells might *double dip* if he were to be placed on garden leave.

[24] Significantly, this substantive matter is set down for hearing in three weeks time and briefs of evidence for that hearing are already to hand from one of the parties. That being the case, I incline to the view that the alternative remedy of lost earnings and compensation can be considered then.

[25] I have reached the conclusion that the balance of convenience favours Landco in that I am not persuaded that the detriment to Mr Wells is so great as to overwhelm Landco's very real concerns about its ability to have any trust and confidence in Mr Wells given the history of the employment relationship. I find therefore that the balance of convenience favours Landco.

The overall justice of the case

[26] In reflecting on the overall justice of the case, the Authority stands back from the detail of the other tests and decides whether the interests of justice demand interim reinstatement. In that regard, the Authority will always be particularly careful to reflect on the primacy given by Parliament to the remedy of reinstatement in the statute.

[27] The ample evidence offered by both parties is that this employment relationship has irretrievably broken down. In those circumstances I confess to some diffidence in ordering interim reinstatement.

[28] I am particularly influenced by the proximity of the substantive hearing, the fact that one party's briefs of evidence are already to hand, and that lost earnings and compensation are adequate responses to lost income.

[29] There are no unique, peculiar or special matters referred to in Mr Wells affidavit in support which would lead me to depart from the conviction that, given the proposal that I grant interim reinstatement on the basis of garden leave, the only issue at stake here is one of money and Mr Wells has already demonstrated his ability to earn income since his dismissal. In my view, it would be doing neither party a service by returning Mr Wells to the payroll given the nature of the relationships between the parties.

[30] I am satisfied then that there are reasons to disentitle Mr Wells to the equitable relief that he seeks and which discourage me from exercising the Authority's discretion in his favour. I do not think that the overall justice of the case favours Mr Wells.

Determination

[31] I decline to grant an order for interim reinstatement.

Costs

[32] Costs are reserved.

James Crichton
Member of Employment Relations Authority