

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 315/08
5132713**

BETWEEN KENNETH WILSON
 Applicant

AND PACIFIC DIRECT LINE LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Jim Roberts and Rosslyn Warren, Counsel for Applicant
 Daniel Erickson and Gemma Mayes, Counsel for
 Respondent

Investigation Meeting: 29 August 2008

Determination: 2 September 2008

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

[1] The applicant Mr Kenneth Wilson ("Mr Wilson") applies for interim reinstatement to his former employment as Fleet Manager with Pacific Direct Line Limited ("PDL").

[2] Mr Wilson lodged his application in the Authority on 8 August 2008 claiming he was unjustifiably dismissed and seeking remedies including interim reinstatement. As required, he also lodged an undertaking to abide by any order made by the Authority in respect of damages that may be sustained through the granting of an order for interim reinstatement.

[3] In its statement of reply, PDL says Mr Wilson was justifiably dismissed on the basis that his conduct has irretrievably destroyed the parties' employment relationship.

[4] The parties were unable to resolve the differences between them by mediation. There is to be an investigation meeting of the substantive claim on 21 and 22 October 2008.

[5] I have met with the representatives and considered affidavit evidence from Mr Wilson, Ms Tammy Hamawi PDL's Group General Manager ("Ms Hamawi"), Mr Olivier Ravel PDL's Chief Executive Officer ("Mr Ravel"), and Mr Frederic Bladinieres, PDL's Chief Financial Officer ("Mr Bladinieres").

[6] This Determination deals only with what should happen until a full investigation of Mr Wilson's claim. It is no more than that and is in no way a final determination or any influence on how his claim of unjustifiable dismissal might eventually be determined.

Interim reinstatement

[7] Applications for interim reinstatement are considered under Section 127 of the *Employment Relations Act 2000* ("the Act"). The Authority is required to apply the law relating to interim injunctions and to have regard to the objects of the Act. The Authority may provide, wherever practicable, for reinstatement where this is claimed and a personal grievance is established.

[8] An order for interim reinstatement is an interim injunctive order. The established tests for interim reinstatement are these:-

- (i) whether the applicant has an arguable case of unjustified dismissal; and
- (ii) whether the balance of convenience (including the existence of alternative remedies sometimes said to be a separate test) favours the applicant; and
- (iii) the remedy being discretionary, where the overall justice of the case lies until it can be heard (including particularly the respective strengths of the parties' cases so far as they can be ascertained at this stage).

An arguable case

[9] It is neither possible nor appropriate to reach a conclusion on any contested facts. My views hereafter are provisional only until the pending substantive investigation.

[10] Mr Wilson was dismissed at a meeting held with him at about 5.00pm on 24 July 2008. The dismissal was confirmed by letter of the same date as follows:-

Dear Kenneth

For some considerable time we have had some difficulties in the way you have been approaching your work with us and the effect that it is having, not only on your fellow employees, but also on our joint venture partners, who have expressed difficulty in being able to work with you.

In terms of your employment contact with us, we have the right to summarily dismiss you from our employ, if you act in a way which is, in our reasonable opinion, likely to prejudicially affect our interests. Unfortunately, we have come to the view that your attitude in your work, does in fact, in our reasonable opinion, prejudicially affect our interests.

This letter will therefore serve to confirm that we are terminating you(sic) employment with effect from 5pm Friday 1st August 2008. Should you wish to leave prior to that date, then we are prepared to agree to that. You will however be paid one month's salary on top of any salary due to you between now and the time that you leave. You will of course also receive any allowances to which you might be entitled for that same period. Please ensure that all of our property, such as computers, manuals etc, as well as your keys to the office, are returned to me by that time.

In terms of your contract, you are also entitled to be reimbursed certain expenses that you may have incurred on our behalf. Please therefore complete the necessary claim form for any such expenses up until the date of your departure and submit them to Nishi Chhabra for reinstatement in the normal manner.

Yours sincerely,

Olivier Ravel

Director

[11] Mr Wilson's claim that his dismissal was unjustifiable will be determined according to the statutory test of justification set out in section 103A of the *Employment Relations Act 2000* ("the Act").

[12] Mr Erickson would not concede that Mr Wilson has an arguable case. It is my view Mr Wilson does have an arguable case of unjustifiable dismissal.

[13] The stated justification for the dismissal is that Mr Wilson's attitude in his work "prejudicially affected" PDL's interests. It appears from the dismissal letter that PDL's reference to summary dismissal indicates Mr Wilson was summarily dismissed.

[14] I consider it arguable for Mr Wilson that he was not actually dismissed for serious misconduct justifying summary termination, but rather, that he was dismissed for poor performance. If that turns out to be so, then it is arguable that Mr Wilson had not in fact committed serious misconduct justifying immediate termination.

[15] If in fact Mr Wilson was actually dismissed because of his poor performance, it is arguable that the dismissal is unjustifiable because he was not treated fairly and reasonably or in good faith.

[16] The principles applicable in situations of dismissal for poor performance are set out in *Trotter -v- Telecom Corporation of New Zealand Limited*¹. I find it is arguable for Mr Wilson that he was not given specific reasons for any dissatisfaction with his work. I consider it is also arguable that no reasonably specific and measurable improvement was demanded by his employer and also, that Mr Wilson was not given any reasonable period in which to achieve improvement and that any such trial period was not fair or the results of it considered dispassionately.

[17] Overall however, I am persuaded at this juncture, that there are issues surrounding the formal communication to Mr Wilson that his continued employment was in jeopardy such that he was given to understand and could have no doubt that he was on notice of termination. Although it appears on the affidavit evidence there was some communication with Mr Wilson about his work, I am to be persuaded that such communication was sufficiently formal and disciplinary so as to amount to clear notice to Mr Wilson of very serious consequences in the absence of improvement.

[18] I consider the above matters the most salient arguable grounds for Mr Wilson. I am satisfied that there is a tenable arguable case and I find accordingly.

Balance of convenience

[19] In the exercise of the Authority's discretion I weigh up the inconvenience to PDL of having to bear the burden of interim relief before the substantive case is dealt with at investigation meeting against the inconvenience to Mr Wilson who may have a just case of having to bear the detriment of wrongful or unjustifiable action until the case has been fully investigated. It is also considered in terms of how best to regulate the positions of the parties until, after a full investigation meeting by the Authority has been able to take place, the employment relationship problem is finally determined.

¹ [1993] 2 ERNZ 659.

[20] Material also is that I have arranged to investigate the substantive employment relationship problem on 21 and 22 October 2008. The availability of an early substantive investigation is particularly persuasive in the exercise of my discretion.

[21] I turn now to Mr Wilson's undertaking as to damages. In an earlier determination² I referred to what I said was a caveat from the Employment Court³ to applicants for interim reinstatement. That reference was incorrect because the Court there was not concerned with an application for reinstatement. I accept the reference therein was to the general law of injunctions and in particular applications for "interlocutory" relief. Here of course as I was too in my earlier determination, I am concerned with an application for "interim" reinstatement, a statutory remedy said to "resemble" an injunction.

[22] In *Air New Zealand Limited -v- Bisson*⁴, the Employment Court stated, in a challenge concerning interim reinstatement, that it is not wise for any party not to provide some evidence of its ability to meet an award of damages.

[23] The Authority must apply the law relating to interim injunctions. That is to be distinguished from the law relating to "interlocutory injunctions". In addition, the Authority must have regard to the object of the Act. The primacy of reinstatement is crucial and there must be regard for it. It would be quite wrong I now consider, to require, in the way of a pre-requisite, applicants for interim reinstatement to prove their means, and even more wrong, to deny applications solely on that basis without more. As a matter of principle, it cannot be right that an applicant deprived of their means by an employer's unlawful action, should also be denied interim relief as a consequence of their involuntary impecuniosity. It would also compromise a clear object of the Act that reinstatement is the primary remedy. I am persuaded that means is not a prerequisite for interim reinstatement. Means, or ability to meet an undertaking, may be put in issue and may be rebutted. I think it right that the issue of means and the adequacy of such means, in the context of applications for interim reinstatement, is properly a consideration to be weighed when considering the balance of convenience.

² *Tatupu & Bledisloe New Zealand Limited*, unreported, AA262/08, 18 July 2008, L Robinson

³ *NZ Amalgamated Engineering Printing & Manufacturing Union Inc -v- Air Nelson Limited*, unreported, CC12/07, 17 June 2007, Colgan CJ

⁴ unreported, Employment Court, Christchurch, CC6A/05, 17 June 2005, Shaw J

[24] I am satisfied from what Mr Wilson told me, that he does have the means to satisfy the undertaking he has provided. I also accept the submission made on his behalf that if he is reinstated to earn his salary, that will ensure his means.

[25] PDL argues that it no longer has confidence and trust in Mr Wilson. It says it has concerns about his judgment and behaviour. It says that it has grave concerns that his reinstatement will seriously exacerbate the damage he has already caused to both its internal and external relationships. It says further that his return will significantly undermine attempts it has made to rebuild and repair damage to relationships that he has caused. It also says Mr Wilson has actively worked against it. These matters are submitted as demonstrating PDL has lost trust and confidence in Mr Wilson and this should weigh against interim reinstatement.

[26] Next PDL says that Mr Wilson can be ultimately compensated by an award of damages and that is an alternative remedy to interim reinstatement. It says too that Mr Wilson does not need to remain employed to keep his skill levels constant or to maintain a particular status. It also says that Mr Wilson has failed to establish its actions have caused damage to his reputation so as to hinder his prospects of finding alternative employment.

[27] PDL submits that it will suffer damage to its relationships with clients, suppliers, agents, employees, joint venture partners and other third parties. For such consequences it says damages cannot adequately compensate it.

[28] Finally PDL says the short duration to substantive hearing weighs against interim reinstatement. It also points out that Mr Wilson was paid one month's salary in lieu of notice for the period from 1 August 2008 to 31 August 2008.

[29] Mr Wilson submits there is no risk to PDL if he is reinstated. He says the fact that it allowed him to work out a week's notice period and beyond conflicts with PDL's submission that it will be caused irreparable damage. Mr Wilson says he is in a position to carry out his duties, and he is ready, willing and able to do so. He says he is suffering harm from being without remuneration and without the other benefits of

employment. He says the situation is causing him stress and anxiety both on a personal level and from a financial perspective.

[30] It is not possible in the context of an interim application to resolve the factual conflicts. The most significant matter is of course the allegations about Mr Wilson's performance, his particular conduct and his judgement. It is also significant that PDL says its efforts to retrieve the situation caused by Mr Wilson's performance will be harmed by his return and perhaps irretrievably so. There is untested correspondence of dissatisfaction with Mr Wilson's performance from outsiders. It is not clear whether those statements were solicited by PDL.

[31] I am unable to assess the merits of these arguments given they are seriously disputed. PDL is unable to rely on established acts or conduct by Mr Wilson for its assertions to be persuasive. That said however, I accept that there is evidence of concerns about Mr Wilson's performance. Whether that is a reasonably held view is another matter. It remains to be determined whether PDL's concerns were well founded and whether its responses to such concerns were fair, reasonable and justifiable. But in the context of this interim application, I am not persuaded that PDL is able to say that for good and proper reasons it has no trust and confidence in Mr Wilson. It does not satisfy me of any established conduct on Mr Wilson's part that is incompatible with his continued faithful discharge of his duties.

[32] But I have no doubt that Mr Wilson is without income and the satisfaction of continuing employment. That fact is sufficient to establish continuing harm to him. There is of course, the possibility that he has been deprived of his income stream unlawfully and that too, yet to be proven, is no doubt the cause of considerable anxiety for him. I accept the submission that the time elapsed to substantive investigation is not unduly delayed.

[33] Having regard to the above and in all the circumstances, I conclude it would bear more harshly on Mr Wilson who may have a just case, of having to bear the detriment of wrongful or unjustifiable action until the problem has been investigated and determined, than it would on PDL to have to bear the burden of interim relief before the substantive case is dealt with. I find therefore that the balance of convenience favours Mr Wilson.

Overall justice

[34] Standing back from the detail of the other tests I now decide whether it will be in the interests of justice to grant interim reinstatement. I stand back and ask where the overall justice lies. I am mindful of the primacy accorded by Parliament to the remedy of reinstatement as a relevant factor in considering interim reinstatement. That primacy has recently been reaffirmed by the Employment Court where it has said that section 125 of the Act amounts to Parliament directing that unless reinstatement is impracticable, it must be provided⁵.

[35] I am to be persuaded that PDL acted sufficiently to put Mr Wilson on formal notice that it had serious concerns about his performance, that it addressed these performance matters with him and that it gave him counselling, support and measurable objectives to achieve in a reasonable timeframe. I am also to be persuaded that it assessed his efforts towards improvement dispassionately. My preliminary view is that such a process is not immediately apparent from the affidavit evidence lodged.

[36] I am also influenced particularly by the undisputed evidence that on the morning of 24 July 2008, PDL was in discussions with Mr Wilson about his motor vehicle entitlements which indicates to me as an objective observer, that the parties were engaging on the basis of a continuing employment. But by 5.00pm that afternoon, the situation was revealed to be quite the opposite. Mr Wilson's employment was terminated. The two events on the same day are plainly inconsistent.

[37] I consider that the overall justice of the matter favours the grant to Mr Wilson of the order sought by him for interim reinstatement.

[38] I stand back now and give consideration to crafting an appropriate practical solution, other than those advanced by the parties and which, in equity and good conscience, will meet the justice of the case. There were no submissions by the lawyers in this regard. I do not consider any solution other than what is sought is warranted.

⁵ *Sefo -v- Sealord Shellfish Ltd*, unreported, CC4A/08, 17 April 2008, Colgan CJ at paragraphs [51] and [52]

[39] I am obliged to give consideration to conditional reinstatement. I do not consider that there is a need for any conditions to the order I now make.

Determination

[40] For all the above reasons, in considering the best way to regulate matters between now and the investigation meeting on 21 and 22 October 2008 and determination, I make the following orders:-

(i) On the basis of the undertaking Kenneth Wilson has provided, I order that Kenneth Wilson be reinstated to his employment and the parties' lawyers are to liaise with each to make arrangements forthwith for Kenneth Wilson's reinstatement;

(ii) This order is deemed to have effect from the date of the termination of Kenneth Wilson's employment;

(iii) These orders will continue in effect until the Authority's Determination on the substantive matter is issued.

Costs

[41] If costs are sought they are reserved.

Leon Robinson

Member of Employment Relations Authority