

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Z (Initiating party)
AND University of Canterbury (Responding party)
REPRESENTATIVES Jeff Goldstein, Counsel for Initiating party
Neil McPhail, Advocate for Responding party
MEMBER OF AUTHORITY James Crichton
INVESTIGATION MEETING 27 March 2006
DATE OF DETERMINATION 4 April 2006

DETERMINATION OF THE AUTHORITY

Prohibition on Publication

[1] By virtue of the nature of some of the matters transversed in these proceedings, I have determined that the name of the applicant and the name of a significant witness ought to be private, at least for these interim proceedings.

[2] Accordingly, I prohibit from publication any details that may identify Mr Z, the applicant or Witness A pursuant to Clause 10(1) of schedule 2 of the Employment Relations Act 2000.

Application for interim reinstatement

[3] The applicant, Mr Z, seeks an order for interim reinstatement to his former employment as a senior lecturer at the University of Canterbury (the University).

[4] Mr Z was dismissed from his position after an extended disciplinary process which culminated in a final disciplinary meeting held on 16 February 2006.

[5] In the written record of the University's decision to dismiss, there is reference to a number of matters but the most serious allegation which, according to the University, founds its decision of serious misconduct, is the collection of responses made by Mr Z to a particular co-worker, Witness A.

[6] The document concludes with an indication that Mr Z is dismissed summarily for serious misconduct and the description of what Mr Z is alleged to be responsible for and to ground the dismissal is as follows (with some deletions for the sake of brevity):

Fundamentally, viewing [Mr Z's] conduct overall as an employee of the University, and more particularly his conduct towards [Witness A], the University is not confident that

it can trust [Mr Z] not to conduct himself in a similar manner towards [Witness A] in the future. In considering whether dismissal is the appropriate penalty the University is not reassured by the lack of recent incidents; there has been little or no opportunity to do so since these issues were raised, i.e. calls to [Witness A] occurred between the complaint by [Witness A] and notification of the complaint to [Mr Z].

This loss of trust and confidence is reinforced by [Mr Z's] apparent inability (except when strongly prompted) to accept responsibility for his own actions. This feature of his personality is evident in his email exchanges with [Witness A] ...On numerous occasions during the disciplinary interview on 21 December 2005, [Mr Z] expressed his regret regarding other people's "perceptions" of his behaviour, but could not, without substantial prompting, accept that the problem was his behaviour not how people perceived it. Even today, whilst apologetic [Mr Z] lapses into transferring the blame to [Witness A].

[7] Mr Z lodged an application in the Authority on 3 March 2006 claiming unjustifiable dismissal and seeking remedies including interim reinstatement. Mr Z has given the formal undertaking to abide by any order that I make in respect of damages. I have set the matter down for an investigation of the substantive matter from 20-22 June 2006.

[8] I convened a meeting at which the parties' representatives were heard exclusively on the interim reinstatement application on 28 March 2006.

The legal position

[9] Section 127 of the Employment Relations Act 2000 (the Act) confers power on the Authority to consider applications for interim reinstatement. In essence, the section requires the Authority to apply the law on interim injunctions but also to have regard to the objects of the Act. Of particular importance in the latter regard is the importance of reinstatement as a primary remedy.

[10] It follows then that the granting of an application for interim reinstatement is interim injunctive relief. An injunction of course is only available for the protection of a legal right or to prevent the infringing of a legal right. The remedy is discretionary and may be granted subject to conditions.

[11] The established tests for interim reinstatement are as follows:

- (a) Has the applicant an arguable case of unjustified dismissal?
- (b) Does the balance of convenience favour the applicant?
- (c) Where does the overall justice of the case lie until the substantive matter can be heard?

Arguable case

[12] Before I set out to traverse the issues required of me in reaching my determination, it is wise to remind oneself that the facts at issue in this matter are yet to be tested and so my reference to factual matters in this determination are in that context. In an application for interim reinstatement, the Authority simply cannot reach a conclusion on contested facts. My views in this determination are expressed provisionally and only for the purpose of deciding if Mr Z should be reinstated on an interim basis.

[13] As it happens, it is probably fair to say that there is no substantive dispute about the salient facts with the dispute between the parties turning rather on the meaning of those facts.

[14] Mr Z's claim that his dismissal is unjustified will be considered pursuant to the statutory test in s103A of the Act.

[15] In the particular circumstances of the instant case, the applicant alleges a significant number of matters are relevant in considering the question of whether there is an arguable case. He says that his intention, and the behaviour complained of, is relevant and claims that his intention was innocent. The University says that the fact that Mr Z had an innocent intention but still caused distress to a colleague is itself cause for concern and gives support to its argument rather than to Mr Z's.

[16] Mr Z says that the University predetermined the matter and he refers to a very early document which predates the disciplinary process and which Mr Z reads as creating a climate negative to him amongst the potential decision-makers in the University who subsequently were responsible for dismissing him.

[17] Mr Z also refers to the refusal of the University to attend mediation despite his several requests.

[18] The Authority was told in submissions on Mr Z's behalf that a witness for Mr Z will say, in the substantive hearing, that the decision was already made to dismiss Mr Z before the process of considering his responses was complete. Again, this observation is advanced to encourage the Authority in the view that there may be some evidence of predetermination by the University.

[19] Next, Mr Z says that the respondent University failed to act promptly when he asked for help and it is alleged that almost 12 months before the dismissal, Mr Z had asked his Head of Department for assistance in managing his relationship with Witness A but had only been told to *act professionally*. Mr Z says that had the University provided proper help when he asked for it, this whole unfortunate proceeding might have been avoided.

[20] Mr Z also alleges breaches of good faith by the University and that the University failed to provide him with all the information he is entitled to in respect of the disciplinary process.

[21] Mr Z also complains about the issues that arise out of the University's decision to dismiss, noting in particular some objection to the expression of the written termination decision, particularly in terms of what matters resonated for the University in terms of its decision to dismiss.

[22] On balance, I have reached the conclusion that Mr Z does have an arguable case to be tried. I am particularly influenced by the doubt about just what matters appear to have moved the University to dismissal. I am also influenced to reach this conclusion by Mr Z's contention that there is or may have been predetermination and may have been breaches of good faith.

[23] Finally, I think Mr Z's contentions that the respondent University failed to act as a good employer when, 12 months before the dismissal (or thereabouts) he sought help and was not given it, is a salient issue as is the contention that the University was discouraging about the prospects of obtaining mediation assistance despite more than one request.

Balance of convenience

[24] The essence of the Authority's task here is in weighing up the inconvenience to the University in having the interim relief granted against the inconvenience for Mr Z in not having it granted until the substantive matter is determined.

[25] Mr Z says that because reinstatement is the primary remedy, the Authority ought to grant it where it is sought. With the greatest respect to that submission, that rather over-simplifies the law in respect of interim reinstatement.

[26] Of more relevance is Mr Z's anxiety about financial matters. Given the nature of his employment as a highly specialised academic with a focused area of professional interest, Mr Z's ability to find alternative work is perhaps limited. I was told that Mr Z was not presently working and is accordingly without income. That obviously is a significant factor which I must weigh up.

[27] Conversely, Mr Z argued that there was no loss to the University and certainly the University through its representative made clear that it was in a position to meet the financial impost that resulted from any decision that the Authority made. However, Mr Z's submission in this regard rather overlooks the University's wider interest.

[28] The University, not unnaturally, drew my attention to its obligation to protect its staff and it contended that Witness A was harassed by Mr Z and even might continue to be harassed.

[29] Mr Z's response was to say that, apart from denying any continuing interaction with Witness A, he would give an undertaking that, if interim reinstatement were granted, he would continue to avoid all contact with Witness A as he indicated he had been able to evidence in the past. Mr Z also pointed to the extensive collection of affidavits in support of him from work colleagues.

[30] The University, however, noted that with one exception only, those affidavits in support were from men and principally from men who were effectively at the same level as Mr Z and so not really analogous to Witness A's situation.

[31] I have given earnest consideration to the balance of convenience test and, for a number of reasons which I will refer to shortly, have reached the conclusion that the balance of convenience favours the University.

[32] My first reason for reaching this conclusion is that I am influenced by the affidavit evidence of Mr Z's academic managers who say they have lost trust and confidence in him. I think that a requirement by the Authority that Mr Z be returned to employment would effectively weigh more negatively on the University than is appropriate in all the circumstances.

[33] I am also influenced by the University's quite proper anxiety to protect its staff while the matter is being resolved.

[34] I accept that Mr Z will suffer financial hardship as a consequence of continuing to be unemployed, but the only benefit which interim reinstatement would give him is a return of an income stream. Mr Z has not been physically at work since July 2005 because of a combination of sick leave and garden leave and were I minded to grant interim reinstatement to Mr Z, in all the circumstances of this particular case, it would be on garden leave or some such variant.

[35] Mr Z's affidavit does not dwell particularly on the financial aspects of his unemployment but rather focuses, understandably enough, on the effect on his professional reputation of having a dismissal on his curriculum vitae. My difficulty in that regard is, if interim reinstatement were to be granted that, arguably does not respond in any way to the issue of professional reputation.

[36] Finally, I am influenced by the University's decision to hold Mr Z's job open until the determination of the substantive matter.

Overall justice

[37] The overall justice of the case requires the tribunal to stand back from the minutiae of the other tests and decide whether the interests of justice demand that interim reinstatement be granted.

[38] Not unnaturally at this point, I remind myself of the primacy that Parliament has given to reinstatement as a remedy.

[39] However, I must consider the other aspects and in particular the University's emphasis on the safety of its staff.

[40] I also must be influenced by the academic managers of Mr Z emphasising their lack of trust and confidence in him. Both those factors seem to me to make it more difficult to contemplate permanent reinstatement than might otherwise be the case. The passage of time since Mr Z attended at the University for work purposes also makes permanent reinstatement more problematical.

[41] I understand Mr Z's argument that the University is a large organisation and must be able to arrange matters so that the people who claim to be anxious about Mr Z can be as it were kept from him. I think the practical reality of that submission may be more apparent than real. The University is naturally concerned at an observation in Witness A's affidavit to the effect that she would feel under *huge pressure to leave [her] employment immediately ...* if Mr Z were reinstated.

[42] I accept that Mr Z has significant support from colleagues and I have carefully studied their affidavits and reflected on what they say. The thrust of those affidavits is to suggest that there is no interpersonal difficulty between Mr Z and others at the University and that he could be reinstated with safety. I am, however, mindful of the submission in relation to those affidavits by the University and I believe I would be failing in my duty if I did not err on the side of caution.

[43] I am satisfied that the arguments advanced by the University to resist Mr Z's application are soundly made. I find therefore that the overall justice of the case lies with the University rather than with Mr Z.

Determination

[44] For the reasons I have advanced above, I decline Mr Z's application for interim reinstatement.

Costs

[45] Costs are reserved.

James Crichton
Member of Employment Relations Authority