IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 111
ARC 42/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	SIMON MAXWELL EDWARDS Plaintiff
AND	TWO DEGREES MOBILE LIMITED Defendant

Hearing: 12 July 2012
(Heard at Auckland)

Counsel: Michael O'Brien and Joey James, counsel for plaintiff
Penny Swarbrick and Aimee Credin, counsel for defendant

Judgment: 12 July 2012

ORAL JUDGMENT OF JUDGE B S TRAVIS

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[1] This is a challenge by the plaintiff to a determination of the Employment Relations Authority[1] which declined his application for an interim injunction restraining the defendant from dismissing him. That dismissal was on the grounds of redundancy and was to take effect on Sunday 15 July 2012.

[2] Urgency was granted to this hearing to enable the challenge to be dealt with before the dismissal took effect. Counsel are to be commended for their co-operation in dealing with this matter on an urgent basis and the assistance they have provided to the Court. This has included the provision of all of the material that was before the Authority when it reached its determination including the submissions of counsel. Since that time, I have also been provided with supplementary affidavits and supplementary submissions for today's hearing. The issues between the parties

[1] [2012] NZERA Auckland 224. The factual background is well summarised in the determination.

are complex and much detailed material was placed before the Court. As presently organised, these will be investigated by the Authority in a meeting commencing on 22 August 2012, and extending for some three days.

[3] What I am required today to deal with is the situation at least up until that hearing. That effectively means the challenge is to be dealt with on the same terms as interim relief, namely an arguable case, the balance of convenience and the overall justice of the case as guidelines and factors to the Court's overriding discretion whether or not to grant the interim relief sought.

[4] I note, at the outset, that this is not an application for interim reinstatement and there is some issue between the parties as to whether the principles contained in those cases which have dealt with interim reinstatement should apply. Suffice it to say that in the timeframe that I have for being able to give this matter full deliberation, I can see there is some assistance and guidelines in helping the Court to view this matter by looking at some of those decisions. Time, however, has prevented me from so doing.

[5] There are precedents for the Court to grant interim injunctions restraining employers from acting to dismiss while there is arguable case that such a dismissal would be unjustified. Two examples were given to the Court, which I will mention in the final version of this oral judgment.[2]

[6] In the event, the parties agreed that there was an arguable case for the plaintiff that the dismissal might well be unjustified should it be allowed to take effect on 15 July. That was a concession that required some wringing from the defendant which wishes to argue that it has a strong case that this was a genuine redundancy, that there is no work available for the defendant and that it ought to be able to proceed with its dismissal. Against that, the plaintiff was contending that this was not a genuine redundancy, that there was an ulterior motive and that it was also carried out in a procedurally unfair manner.

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[2] *New Zealand Seafarers' Union Inc v Silver Fern Shipping Ltd* [1998] 3 ERNZ 768; *Carruthers v London Bookshops Ltd* WEC 66/94, 14 December 1994. See also *Eden v Horticultural and Food Research Institute of New Zealand Ltd* AC 27/00, 19 April 2000.

[7] Because of the complex state of the evidence, I am unable to conclude at this point in time whether the arguable case that the plaintiff has presented is strongly arguable or weakly arguable. I note, however, that there are some interesting issues of law likely to arise as to the effect of s 103A, as presently constituted by the legislature on redundancy cases. These include whether *Simpsons Farms Ltd v Aberhart*[3] is still good law in light of those legislative changes and more recent decisions of the full Court on the effect of the requirement under s 103A for the Court to consider all the circumstances of the case in determining whether the actions of the employer were those of a fair and reasonable employer.[4] On the face of it, those words may be wide enough to include an analysis of the business decision itself. This, however, is a controversial issue which will require submissions in due course.

[8] There is also an issue between the parties as to the exact position the plaintiff held, he asserting that he had a wide position described in his own terms, in a somewhat self-effacing manner, as "worker". The defendant takes the view that his position was that of a "strategist" and that this position was surplus to its requirements. These are all issues which will need to be determined.

[9] Further even, the employment terms are in issue. The plaintiff is relying on an individual employment agreement entered into in 2002 which purports to state, after setting out the obligations of the defendant in a redundancy situation to consult, that any dismissal for cause requires three years' notice. It is arguable that that clause was varied by agreement by a letter evidenced dated 2006. Again, an arguable issue.

[10] What this all drove the Court to, was a consideration of the balance of convenience and what is to happen in the period between the urgent hearing today and when the Authority can come to grips with the substantive matters. The view of the plaintiff, very strongly, is that he should be able to continue the work he has undertaken in the past and the work he wishes to undertake in the future. In this context, I note that the plaintiff was the founder of the defendant company and has

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[3] [2006] ERNZ 825.
[4] *Air New Zealand Ltd v V* [2009] ERNZ 185; *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160.

clearly a wide knowledge of its circumstances and important connections he considers would be of benefit to both himself and the defendant.[5]

[11] The defendant, by contrast, takes the view that the company has entered into a new era and the skills and abilities that the plaintiff has exhibited are no longer necessary and that his position is surplus because his role can be performed by others. It goes further and says that his presence in the company at present is causing confusion amongst staff and may lead to some disruption. It maintains that there is at present no work for him. It is not possible to resolve these conflicts on the material before the Court.

[12] I am, however, satisfied that there is strong evidence that the dismissal should not be allowed to proceed, both because of the arguability of some of the issues that I have touched upon and also because of the consequences it could have upon the plaintiff as he has referred to in his affidavits in the interim period. I consider it necessary to try to reach an arrangement on the balance of convenience that does the least harm to both parties. I also consider it important not to make a ruling that in any way indicates a firm view on any aspect of these complex issues which could compromise the position of the parties in the mediation which is scheduled to take place next Tuesday. Indeed it was tempting to have adjourned these proceedings until after that mediation, but, as the situation developed, it became clear that a decision this evening would be necessary.

[13] The balance of convenience favours the grant of the injunctive relief sought, but not on an unconditional basis. The defendant has made several offers to place the plaintiff on garden leave but on terms which were unacceptable to the plaintiff. In the course of this hearing the defendant has changed the form of its most current offer into an undertaking to place the plaintiff on garden leave until 31 August or earlier if the parties resolve the issue, or the Authority issues a determination substantively resolving the matters before that time.

[14] It appears, however, from the submissions of Mr O'Brien, that the matter may become a little more confused as there is an application to remove the

[5] These matters suggested that damages would not be an adequate alternative remedy.

proceedings from the Authority to the Court. That may or may not have consequences on the date of the investigation by the Authority of the substantive matters. For this reason and for this reason only, I consider that the undertaking in its present form is not quite acceptable, although it comes very close to dealing with the current inconveniences of both sides. I have therefore, as will become clear shortly, made an order that is in slightly wider terms, but preserves, I hope, the respective rights of the parties.

[15] I was satisfied from the material that was put before me that the overall justice of the case required such an order to be made to simply hold the position, the status quo, until the parties can have their substantive matters resolved either by mediation or by the Authority. To have declined the application or to have granted it in the unconditional terms that the plaintiff has sought, would, in my view, have not been just and what I have attempted to do is to achieve a balance.

Suppression Order

[16] I note that the parties agreed to a consent order in relation to earlier material contained in the initial affidavit the plaintiff swore on 5 July in support of this challenge. Since that time, however, they have agreed that a blanket order would be appropriate. I incorporate at this point in my judgment the blanket suppression order I made.

[17] The grounds for that order were that the matters were in relation to confidential commercial information which was commercially sensitive. Since that time, further material has been put before the Court by way of affidavit evidence. In view of the urgency of this hearing and the narrow timeframe, it is not possible to go through and make selective orders freeing from any suppression those matters which are not confidential. Counsel have agreed, very properly, that there should therefore be a blanket suppression order of all evidence presently before the Court, except any matters that need to be referred to in any subsequent judgments on the grounds of commercial sensitivity and the need for them to remain confidential. The order I make has the effect that none of the affidavit material or that contained in submissions or in the statement of claim, can be viewed by anyone other than the

parties to this action without further order of the Court, such order only being made after the parties have had the opportunity to be heard on any such application for viewing that material.

Terms of the interim injunction order

[18] I turn now to the terms of the order that I consider to be appropriate. I will, however, reserve leave to the parties to make further submissions on any of the conditions I am about to give if that creates some difficulty that they have not yet had the opportunity to address.

[19] For the reasons I have given, the challenge is allowed and there will be an order restraining the dismissal of the plaintiff until further order of this Court, on the following conditions:

a) from 5pm on Friday 13 July 2012 the plaintiff will commence garden leave and will not be required to attend to any work on behalf of the defendant or attend at its premises or access its systems;

b) the defendant will pay to the plaintiff all his contractual entitlements as an employee;

c) because the plaintiff was prepared to continue full employment with the defendant, the defendant will not be entitled to recover from the plaintiff pursuant to his undertaking as to damages should the plaintiff be unsuccessful in the substantive proceedings;

d) the defendant will advise the plaintiff of any vacancies to which he might be redeployed;

e) leave is reserved to the parties to apply for a variation of these conditions or the underlying order should there be any change of circumstances including any change in the dates of the investigation or the hearing of any substantive matters.

[20] Costs are reserved.

B S Travis
Judge

Oral judgment delivered at 5.36pm on 12 July 2012