IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 76
ARC 27/12

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	N LIMITED Plaintiff
AND	O Defendant

Hearing: 3 May 2012
(Heard at Auckland)

Counsel: Chris Patterson and Anneke Reid, counsel for plaintiff
Garry Pollak, counsel for defendant

Judgment: 3 May 2012

Reasons: 10 May 2012

REASONS FOR ORAL JUDGMENT OF JUDGE B S TRAVIS

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[1] On 3 May 2012 I dismissed the challenge of N Ltd (the plaintiff) and reserved costs.[1] These are my reasons for so doing.

[2] This was a non-de novo challenge to parts of a determination of the Employment Relations Authority, issued on 20 April 2012.[2] The Authority allowed the defendant's application for interim reinstatement to his previous sales position until his personal grievance is determined, following a scheduled substantive investigation meeting on 15 June 2012. The interim reinstatement order was not subject to any conditions other than that the defendant was entitled to full benefits and entitlements as from 13 April 2012, which was the expiry of a one month's

[1] [2012] NZEmpC 74.
[2] [2012] NZERA Auckland 138.

notice period following the defendant's dismissal on 13 March 2012. The defendant was also ordered to repay the accrued holiday pay and long service leave that had been paid to him by the plaintiff.

[3] The challenge sought an order varying the determination of the Authority that the defendant be reinstated by including a condition that the reinstatement be to the payroll only and that the plaintiff was under no obligation to provide the defendant with any work.

[4] The Court was informed that, in accordance with the interim determination, the defendant attended work at 9 am on 23 April 2012 but was instructed to go home. Counsel were agreed that what the plaintiff was seeking was to place the defendant on "garden leave" until the Authority's substantive investigation. The defendant objected to being placed on garden leave and has expressed his willingness to resume his duties in full in accordance with the interim determination.

[5] Following the Authority's determination, the plaintiff immediately filed its challenge and an interim application for stay and sought urgency. These papers were first filed in Court on 23 April 2012 and a telephone directions conference was convened at 9.30 am the following morning. It was accepted that the plaintiff's challenge was urgent and counsel agreed that it would take a half day to be heard and the hearing was to commence at 10 am on Thursday 3 May 2012. It was agreed by counsel that the evidence for the challenge would be restricted to the affidavit evidence that was before the Authority. A timetable for the exchange of submissions was agreed upon. It was also agreed that the interim application for stay would be determined by the Court on the papers already filed.

[6] In view of the short time between the directions conference and the hearing of the substantive challenge against the terms of the interim reinstatement order, I allowed the stay. The effect of the stay was that the defendant would remain on garden leave on full pay and conditions, including the use of a motor vehicle, until further order of the Court or the conclusion of the hearing on 3 May 2012.

[7] It was also agreed by counsel that all details relating to the plaintiff, the defendant, and the complainant, whose complaint led to the defendant's dismissal, should be suppressed in the interim until further order of the Court and that the proceedings would thereafter be referred to as N Limited v O. It was understood that the parties would then apply to the Authority for appropriate suppression orders. I considered that there were adequate grounds for making those suppression orders by consent.

[8] Because of the limited nature of the challenge, it being accepted by the plaintiff that the defendant had an arguable case for reinstatement and that the overall justice of the case favoured the defendant, the only issue was whether the balance of convenience required the imposition of the condition of garden leave to the order of interim reinstatement.

[9] By the conclusion of the hearing, the plaintiff had offered an undertaking that it would not seek to recover any monies paid to the defendant during the period of garden leave, if that was imposed by the Court, by invoking the defendant's undertaking as to damages if the plaintiff was ultimately successful in defending the defendant's personal grievance claim that he had been unjustifiably dismissed. The plaintiff also undertook not to challenge the practicality of permanent reinstatement on any ground relating to the defendant's absence whilst on paid leave in the interim. It further undertook that if the defendant was ultimately successful in his claims and received the remedy of permanent reinstatement, that it would transfer the defendant back to the client base previously assigned to the defendant (who is a salesperson) and in good faith would take all reasonable steps to facilitate an efficient return back to his duties. The latter undertaking, however, was subject to the caveat that there could not be any guarantee in the interim that there would be no structural changes in the way that the plaintiff carried on its business. If there were any structural changes, the plaintiff undertook that these would be both genuine and conducted in good faith.

[10] Mr Patterson, on behalf of the plaintiff, explained that the plaintiff was going through a constant state of changes but that the defendant, as a salesperson, would

enjoy the most secure position in the company as to his job security should he obtain permanent reinstatement.

[11] These undertakings did not meet the defendant's wish to resume his work. It was common ground that there was no provision for garden leave in the relevant employment agreement. The defendant was concerned that his continued suspension from dealing with the plaintiff's clients allocated to him and their confusion as to the defendant's interim status, could render his claim to permanent reinstatement, should he be successful in his grievance, less practicable and reasonable in terms of s 125 of the Employment Relations Act 2000 (the Act), when the Authority came to consider the appropriate remedies.

[12] Mr Pollak, counsel for the defendant, submitted that it was critically important for the defendant to maintain his right to work without the imposition of garden leave and expressed concerns as to the effect of the possible delays as a result of the Authority conducting its substantive investigation and then issuing a determination. Mr Pollak contended that this could take up to a total of six months.

[13] Mr Patterson was confident that in view of the expeditious way this matter had been progressed by the Authority when dealing with the interim reinstatement application, the substantive matter could result in a determination in a much tighter timeframe. However, it was clear that if the challenge was allowed and the defendant placed on garden leave, he would have been out of work for the period from 13 March to 15 June at the earliest, a period of three months, plus the additional time that a determination would take to be issued.

[14] Mr Pollak cited *Angus v Ports of Auckland Ltd*[3] where the full Court dealt with the change in the wording of s 125 of the Act and cited from the Court of Appeal judgment in *Lewis v Howick College Board of Trustees*[4] that there was no dispute between the parties in that case that the onus of proof of lack of practicability rests with the employer.[5] The full Court in *Angus* stated:[6]

[3] [2011] NZEmpC160.
[4] [2010] NZCA 320.
[5] At [7].
[6] At [68].

> As in other aspects of employment law, it is not a matter of laying down rules about onuses and burdens of proof but, rather, on a case by case basis, of the Court or the Authority weighing the evidence and assessing therefrom the practicability and reasonableness of making an order for reinstatement. The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some cases, others, for example affected health care patients in institutions.

[15] The factors discussed in *Angus* were in the context of permanent reinstatement following a finding of unjustifiable dismissal but I consider that they also provide guidance as to the practicability of interim reinstatement. There was no challenge to the Authority's determination in the present case that if the defendant is successful at the substantive hearing adequate remedies will be available to him including reinstatement to his job, if that still remains open.

[16] Mr Patterson in his supplementary oral submissions contended that there was no evidence of the defendant's need to physically return to the workplace in the interim. He referred to the defendant's evidence concerning his personal circumstances which, he submitted, would be met by his reinstatement to the plaintiff's payroll.

[17] Mr Patterson submitted that both parties were concentrating on the confusion to customers the defendant had previously serviced, depending upon whether or not he was reinstated to garden leave, as the plaintiff sought. He referred to the evidence of the plaintiff's human resources manager who had sworn an affidavit in opposition to the interim reinstatement application. This had annexed an email from her reporting on advice from the customer services team that they had taken a call from a client expressing disappointment at the defendant's dismissal, in which she expressed doubt as to who had used the word "dismissed" and customers were being advised that the defendant was "no longer employed by [the plaintiff]." The human resources manager expressed the view that if the defendant was allowed to return to work this would cause significant confusion to the plaintiff's customers.

[18] Mr Pollak submitted that client confusion was the only basis the plaintiff could call upon to support its claim that the reinstatement should only be to garden leave and submitted that client confusion would increase over time if the plaintiff

was successful in this challenge. He stressed that this was an unusual case given that the defendant had been employed by the plaintiff for 31 years, that he had an exemplary work record, and that there had been no disharmony until the issue that led to his dismissal.

Discussion

[19] Because of the suppression order, the impending substantive investigation by the Authority, the fact that the material before the Court is based on untested affidavits, the very limited nature of the challenge and the acceptance of the other matters in the Authority's determination, I do not propose to canvas the background facts. I note, however, that the events that led to the dismissal were not initially considered sufficiently serious to warrant the defendant's suspension, although I accept the force of Mr Patterson's submission that the investigator considered the defendant should have the benefit of being presumed to be innocent until proven guilty. However, once the investigator had found against the defendant he was offered the opportunity to accept demotion, probation and, as Mr Patterson described it, a "path to redemption" which would have allowed him to remain in employment. This does suggest that full interim reinstatement, rather than garden leave, was the more appropriate order in the interim.

[20] As this is a non-de novo challenge, the plaintiff has the burden of showing that the Authority was wrong not to have imposed the condition it now seeks of garden leave.

[21] Mr Patterson submitted that in making its assessment of the balance of convenience, the Authority had conceded that the question of inconvenience was "finely balanced"[7] between the parties. The Authority then went on to state (with references that would breach the suppression orders removed):[8]

> However, there is one particular factor that tips the balance towards [the defendant]. This is that the longer he is away from his customer base the more likely it is that detriment will be incurred and that the allegation of sexual harassment will permeate through [the plaintiff] customer and staff

[7] At [42].
[8] Ibid.

> circles. Given that [the defendant] makes his living by using his proven sales skills, I conclude that the balance of convenience must go in his favour. The right to work and maintain skills has been recognised in many cases and the common theme is that reinstatement should occur unless it is unworkable.

[22] The Authority's cited *Auckland District Health Board v X (No 1)*[9] in support of that last proposition. That was a decision of mine dismissing a non-de novo challenge to an Authority determination granting the interim reinstatement of a highly skilled medical practitioner with a previously unblemished and excellent working history.

[23] Mr Patterson accepted that the right to work and maintain skills has been recognised in many cases but when no evidence as to the importance of the right to work has been presented, the presumption that everyone needs to maintain continuity of employment, cannot be true either in logic or in law. He submitted if that was to be the case then no person who had taken any extended period of leave, be it to travel overseas, or to further one's formal education, or to raise a family, would ever be employed, over a person who had not taken such time out of his or her employment to do the same.

[24] Mr Patterson submitted that although it is accepted that more than just surgeons (as was the case in *Auckland DHB*) and opera singers may need to maintain general continuity of their employment[10] this cannot be true for all employees equally. He submitted there must be a spectrum, for example with surgeons at one end and general labourers at the other, in which specific occupations are required to maintain general continuity of employment in order to maintain the skill level required to perform the job successfully. Those at the other end of the spectrum cannot assert the same he contended. He submitted that, with all due respect to the Authority, there was no evidence provided or any submissions made on behalf of the defendant to attest to the fact that the defendant needed to be in close and regular contact with his customers, in order to prevent any detriment to him and to maintain his sales skills.

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[9] [2005] ERNZ 487 at [35]-[36].
[10] Citing *Hill v NZ Rail Ltd* [1994] 1 ERNZ 113.

[25] Mr Patterson submitted there was no need for the defendant to return to work pending the substantive determination and referred to a submission he had made to the Authority that there was nothing in the defendant's trade or profession that required him to remain an employee in order to maintain any specific privileges. He submitted that the *Auckland DHB* case could be distinguished on the facts as an example of an employee who needed to enforce his right to work to maintain both his skills and his status. He submitted the Authority was incorrect to ultimately find the balance of convenience was in favour of the defendant.

[26] As there was no challenge to the interim reinstatement order, but only as to its terms, I first observe that it does not appear from the determination that it was submitted that if interim reinstatement was granted, it should be limited to garden leave. Whilst I accept Mr Patterson's submission that there was no direct evidence that the defendant needed to work over the ensuing months in order to retain his selling skills, it was equally open to the Authority to conclude, as it did, that the severance of his client relationships for the months, until the investigation and "the period of some weeks (depending on the other commitments of the Authority) before a final determination will be issued",[11] to use the Authority's own words, may well impact on the practicability of final permanent reinstatement should the defendant succeed in his grievance. Further, there is a risk of the reorganisation of the plaintiff's business during the period of interim reinstatement and a suspension on garden leave could cause him detriment if he was not present.

[27] I find there is considerable force in the Authority's view that detriment will be incurred the longer the defendant is away from his customer base with the attendant risk that the allegations that led to his dismissal will permeate through both customer and staff circles. These are matters which could well affect the practicability and reasonableness of any ultimate reinstatement. The Authority was also correct to stress the right to work and the common theme that reinstatement should occur unless it is impracticable and unreasonable, to use the amended wording of s 125 of the Act.

[11] At [33].

[28] For these reasons I was not persuaded that the Authority's determination was incorrect in not imposing the condition of garden leave and I therefore dismissed the plaintiff's challenge.

[29] If costs cannot be agreed, a memorandum as to costs should be filed and served within 30 days from the date of this judgment with a memorandum in reply filed and served within a further 30 days.

BS Travis
Judge

Judgment signed at 2 pm on Thursday 10 May 2012