

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2012] NZEmpC 8
CRC 29/11**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN MARGOT ELIZABETH GAZELEY
Plaintiff

AND OCEANIA GROUP (NZ) LIMITED
Defendant

Hearing: 24 January 2012
(Heard at Nelson)

Appearances: Anjela Sharma, counsel for the plaintiff
Kylie Dunn, counsel for the defendant

Judgment: 24 January 2012

ORAL JUDGMENT OF JUDGE A A COUCH

[1] The defendant (Oceania) operates more than 50 rest homes and other elder care facilities throughout New Zealand. One of those operations in Nelson is called Woodlands. It comprises a rest home and a hospital.

[2] Oceania operates Woodlands and many others of its facilities under aged care residential agreements with district health boards. In the case of Woodlands, the agreement is with the Nelson Marlborough District Health Board. Under the agreement, Oceania is obliged to comply with a detailed specification of the nature and quality of services provided.

[3] In July 2009, Mrs Gazeley was appointed as Facilities Manager of Woodlands. That was the most senior role at Woodlands and Mrs Gazeley had responsibility for all aspects of the operation. On 30 September 2011, Mrs Gazeley

was dismissed by Geoff Hipkins, the Chief Executive Officer of Oceania. That dismissal followed a period of suspension and a relatively lengthy investigation.

[4] Mrs Gazeley raised a personal grievance that her dismissal was unjustifiable. She lodged proceedings in the Employment Relations Authority seeking both permanent and interim reinstatement. In its determination dated 18 November 2011¹, the Authority declined the application for interim reinstatement. Mrs Gazeley challenges that determination and the matter proceeded before me today by way of a hearing de novo. Because the Authority has so far only determined Mrs Gazeley's application for interim relief, the proceedings before the Court at present are necessarily limited to that issue.

[5] An application was made to remove the entire matter into the Court, but that application was declined by the Authority in a second determination dated 20 December 2011². It follows that the substantive merits of Mrs Gazeley's personal grievance remain before the Authority.

[6] As usual, where only interim relief is in issue, evidence was provided by affidavit. Mrs Gazeley swore three affidavits and 12 affidavits by other persons were filed in support of her claim. Those other deponents were Mrs Gazeley's husband, five employees or former employees of Woodlands, three relatives of residents at Woodlands and three women who have worked with Mrs Gazeley at other facilities. Three of these people gave evidence relating directly to the issues relied on by Oceania for Mrs Gazeley's dismissal. Otherwise, the evidence in support of Mrs Gazeley related to wider issues at Woodlands or was in the nature of character evidence.

[7] In the course of the hearing today, Ms Sharma told me that five of those affidavits were not before the Authority and named the relevant deponents. None of those deponents dealt directly with the issues relied on by Oceania to dismiss Mrs Gazeley. Rather, they gave context evidence, character evidence, or evidence of Mrs

¹ [2011] NZERA Christchurch 180.

² [2011] NZERA Christchurch 207.

Gazeley's competence in previous roles. All of the significant evidence in the other seven affidavits was before the Authority.

[8] For Oceania, five affidavits were provided. These included detailed affidavits from Mr Hipkins and from Katie Hoyle, a Human Resources Manager for Oceania. Other affidavits were from Susan Harzer, who was appointed as Facilities Manager at Woodlands following Mrs Gazeley's dismissal, Janine Rogers, the administrator there, and Guy Eady, the Acting Chief Executive at Oceania. With the exception of Mr Eady's brief affidavit, all of this material was also before the Authority.

[9] Attached to the affidavits were numerous documents evidencing in detail the nature and source of the concerns Oceania had about Mrs Gazeley's conduct and the disciplinary process which eventually led to her dismissal.

[10] From this very substantial amount of evidence, it is clear what the issues were, what the background to them was and the sequence of events. As to the validity and seriousness of the concerns which Oceania had, however, there is conflicting evidence. That evidence is untested and, while I can form broad impressions from it, I am unable to resolve the conflicts or reach firm conclusions. That is the purpose of a substantive hearing.

[11] The general principles by which applications for interim reinstatement are to be decided are settled and well known. They may be summarised in the form of three questions. Is there an arguable case? Where does the balance of convenience lie? What does the overall justice of the case require?

[12] The first question requires some elaboration. Not only is it a question whether Mrs Gazeley has an arguable case that she was unjustifiably dismissed but, if that is so, whether she has an arguable case for permanent reinstatement as a remedy. Recent amendments to the Employment Relations Act 2000 have altered the tests to be applied in resolving these issues. The statutory test of justifiability in s 103A of the Act has been changed so that the question is now what a fair and reasonable employer "could" have done in all the circumstances rather than what

such an employer “would” have done. The circumstances in which reinstatement will be ordered have also changed. Reinstatement is no longer a primary remedy which must be ordered whenever practicable. Reinstatement is now a remedy which may be ordered, if it is practicable and reasonable to do so.

[13] The effect of these changes has been to expand the scope for employers to justify their actions and to make reinstatement a discretionary remedy which must be not only practicable but reasonable. The extent to which a plaintiff seeking interim reinstatement has an arguable case must be assessed in terms of these more challenging provisions.

Background

[14] Mrs Gazeley is a registered nurse by profession. In about 1994 she became a Facilities Manager in Dunedin for a competitor of Oceania. In 2007 she moved to Nelson where she initially managed a rest home in Stoke. In 2009 Mrs Gazeley applied for the position of Facilities Manager at Woodlands and was appointed in July 2009. Woodlands caters for about 65 residents, some in the rest home, others in the hospital. About 60 staff are employed there.

Events leading to the dismissal

[15] Beginning in December 2010, there was a series of events which ultimately led to Mrs Gazeley’s dismissal on 30 September 2011. These events are well summarised in the Authority’s determination at paragraphs [7] to [16]. The broad sequence was as follows.

[16] Between December 2010 and 11 April 2011, Mrs Gazeley was very largely involved in working at other facilities in the Nelson area operated by Oceania. She then returned to Woodlands for about seven weeks before going on leave on 31 May 2011 for a period of some five and a half weeks. On 7 July 2011, while Mrs Gazeley was on leave, Nelson Marlborough District Health Board conducted an unannounced audit of operations at Woodlands. The auditors reported a number of deficiencies including clinical issues and issues relating to Mrs Gazeley’s personal conduct. The

district health board considered these sufficiently serious that, pursuant to its contractual right to do so, it appointed a temporary manager to take over the operation of Woodlands.

[17] Following her return from leave on 11 July 2011, Mrs Gazeley was suspended and a disciplinary investigation conducted. That investigation was detailed and extensive. Mrs Gazeley was represented throughout by Ms Sharma and, with her assistance, played a full and active role in the process.

[18] Mrs Gazeley was dismissed on 30 September 2011. That dismissal was effective immediately but she was paid four weeks' salary in lieu of notice. The reasons for the dismissal are set out in detail in Mr Hipkins' letter to Mrs Gazeley of 30 September 2011 and are accurately summarised in paragraph [16] of the Authority's determination.

[19] Following Mrs Gazeley's suspension on 11 July 2011, Oceania appointed an Acting Facilities Manager, Susan Harzer. She took up that role on 28 July 2011. Ms Harzer was an experienced facilities manager who had previously managed another Oceania facility. Ms Harzer was permanently appointed to the position of Facilities Manager at Woodlands with effect from 17 October 2011. Mr Hipkins says that, at the time this appointment was made, Mrs Gazeley had not raised a personal grievance about her dismissal. Ms Harzer has continued in that role since.

[20] When Ms Harzer began at Woodlands, the site was under the control of the temporary manager appointed by the district health board. Ms Harzer's evidence is that, following her appointment, she worked with the temporary manager, staff, and others involved with Woodlands to address the concerns which had led to the temporary manager being appointed. She says that the district health board was sufficiently satisfied this had been done and removed its temporary manager on 1 November 2011.

[21] Ms Harzer goes on to say that she has now settled in to the role of Facilities Manager at Woodlands, that she is developing relationships with staff and that they are now working together well as a team.

Is there an arguable case?

[22] The evidence and issues relevant to this consideration are also well detailed by the Authority in its determination - see paragraphs [17] to [27]. I note here, however, one issue raised by Ms Sharma about this part of the Authority's determination. She submitted that the Authority was wrong to characterise Mrs Gazeley's response to Oceania's concerns about her clinical management as "bare denials". Having regard to the evidence Ms Sharma relied on for that submission, I think there is substance in it, but this does not alter the overall view I have formed.

[23] Having conducted my own review of the extensive evidence provided in the affidavits and in the documents annexed to them, I agree with the Authority's assessment. I, too, find that Mrs Gazeley has an arguable case, but not a strongly arguable case, that her dismissal was unjustifiable and an arguable, but not strongly arguable case for permanent reinstatement.

[24] It also seems to me that, if Mrs Gazeley is found to have been unjustifiably dismissed, there is a very real prospect that she will be found to have contributed significantly to the circumstances giving rise to her dismissal. That would reduce the prospect of her being permanently reinstated.

[25] I have formed these views on the basis discussed earlier, that is the provisions of s 103A and s 125 of the Employment Relations Act, as amended from 1 April 2011.

Balance of convenience

[26] The essential consideration here must be the potential effect on the plaintiff if interim reinstatement is not granted compared to the potential effect on the defendant if it is granted. It is also important to consider the potential effect on third parties.

[27] In its determination, the Authority concluded by saying that an investigation meeting of the substantive claims in this case would likely take four days and that it was unlikely it could be conducted before March or even April 2012. It would then

take some time to complete a determination. Realistically, it may be June or even July 2012 before the substantive issues are decided. In considering the balance of convenience, therefore, I must consider the potential consequences over the next five to six months.

[28] The case for Mrs Gazeley rests almost entirely on the loss of income she has had following her dismissal. She says that, despite her efforts to do so, she has been unable to obtain paid employment since her dismissal. She also says that she is not eligible for a benefit. This is apparently because of her husband's income. He earns a little over \$500 per week.

[29] Mr and Mrs Gazeley live rent-free in a home owned by a family trust. They own two cars. As at 29 December 2011, being the date on which Mrs Gazeley swore her second affidavit, they had savings of \$15,000. Their liabilities were said to be \$2000. In her second affidavit, Mrs Gazeley also records what she says are their household outgoings. These total more than \$2000 per month for food, car running costs, insurances, rates, medical insurance and expenses, electricity and telephone. She also says, "Our monthly credit card purchases amount to approximately \$2500." Mrs Gazeley does not elaborate on this and, given the comprehensive nature of the outgoings specifically quantified, it cannot be regarded as necessary expenditure additional to those outgoings. Other than this credit card expenditure, it appears that Mr Gazeley's earnings are sufficient to meet the majority of the couple's essential outgoings, so long as he is working. Ms Sharma accepted my calculation that the shortfall would be no more than \$1000 a month in that case.

[30] A significant factor in this equation, however, is that Mr Gazeley is scheduled to have surgery in February which may require him to be off work for up to 12 weeks. He has two weeks' sick leave available.

[31] I accept that uncertainty about her husband's impending surgery and recovery makes Mrs Gazeley genuinely anxious about their financial situation. On the evidence, however, it appears that she and her husband are in a position to meet their outgoings for a period of up to six months at least, even allowing for Mr Gazeley being unable to earn for up to 10 weeks. In the event that Mrs Gazeley's savings are

exhausted before this matter is substantively determined, she also has \$24,000 in a Kiwisaver account which she can apply to access.

[32] In her affidavit, Mrs Gazeley also refers briefly to two other factors. The first is that she enjoyed her work and feels aggrieved that she is no longer able to do it. I agree with the Authority that this is a matter which can be remedied by compensation if she is substantively successful. Mrs Gazeley also says that her reputation has been damaged by publicity of her dismissal. While that may well be so, interim reinstatement would not remedy that situation because, by its very nature, interim relief involves no conclusions about whether the dismissal was justifiable.

[33] A key factor in assessing the balance of convenience is whether there is an adequate alternative remedy available. As Ms Sharma responsibly conceded, the damage which Mrs Gazeley might suffer if I decline interim reinstatement can be fully remedied by the payment of money.

[34] For Oceania, the principal concern expressed by Mr Hipkins and echoed by Mr Eady is that interim reinstatement would require the company to rely on a manager in whom they have lost trust and confidence. While that begs the question whether Oceania was justified in losing trust and confidence in Mrs Gazeley, I accept that Mr Hipkins is sincere in his concern. He also makes the point that Oceania needs to be able to have a high degree of trust and confidence in the Facilities Manager of Woodlands because it is remote from the head office in Auckland and it is the most senior position on site.

[35] It seems to me that an equally, if not more, significant point is that interim reinstatement of Mrs Gazeley would have the potential to disrupt the operation of Woodlands. The evidence is that, following the upheaval associated with the appointment of a temporary manager, operation of the facility has settled down under the management of Ms Harzer and is currently satisfactory.

[36] This leads me to consideration of the interests of third parties. Ms Harzer was permanently appointed as Facilities Manager some three months ago. She is keen to remain in the position. While it can properly be said that Oceania should

have expected Mrs Gazeley to challenge her dismissal, Mr Hipkins seems to be correct when he says that Mrs Gazeley did not raise a personal grievance between the date of her dismissal on 30 September and the date of Ms Harzer's appointment on 17 October 2011. If Mrs Gazeley is reinstated, this would almost inevitably be at Ms Harzer's cost.

[37] The other third parties deserving of a great deal of consideration are the residents of Woodlands. They are particularly vulnerable to any disturbance in the operation of the facility which is their home. It follows that I must give weight to even a slight risk of disruption or disharmony at Woodlands.

[38] Overall, I find the balance of convenience weighs against interim reinstatement.

Overall justice

[39] I turn then to the overall justice of the matter. In doing so, I take into account one additional factor. That is the status quo ante, being the situation which obtained prior to the dismissal. That situation is unusual in this case. During the nine months prior to her dismissal, Mrs Gazeley had only been fully engaged in managing Woodlands for a period of seven weeks prior to her departure on extended leave on 31 May 2011. From 28 July 2011 Ms Harzer was the Facilities Manager. The effective status quo then was that Mrs Gazeley was not engaged in management for quite some time prior to her dismissal.

[40] Standing back and having regard to all aspects of the matter, including the particular factors I have discussed, I find that the overall justice of the matter does not favour reinstatement.

Conclusion

[41] The challenge is unsuccessful. Notwithstanding that, by operation of s 183(2) of the Employment Relations Act 2000, the determination of the Authority

is set aside and this decision stands in its place. To the extent I have referred to parts of the determination in this decision, however, they form part of the decision.

[42] I have taken that unusual step for three reasons. The significant evidence before me was effectively the same as that before the Authority. On many of the issues, I have reached the same conclusions as the Authority for very similar reasons. Adopting parts of the Authority's determination has enabled me to give this decision today rather than delay the outcome and prolong the uncertainty of the parties.

Costs

[43] As this decision resolves all of the issues currently before the Court, the question of costs arises. Costs are reserved today. I think it best that they be resolved following the outcome of the substantive proceeding which remains before the Authority. The process of fixing costs in the Court should be initiated by a memorandum on behalf of Oceania, filed and served not more than 30 working days after the Authority's substantive determination is given. Counsel for Mrs Gazeley will then have 20 working days after service of that memorandum in which to respond.

AA Couch
Judge

Judgment delivered orally at 3.00pm on 24 January 2012