

Attention is drawn to the order
prohibiting publication of certain
information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

5122022
CA 77/08

BETWEEN

B
Applicant

AND

ATTORNEY-GENERAL in
respect of the Ministry of Social
Development
Respondent

Member of Authority: Paul Montgomery

Representatives: Andrew McKenzie, Counsel for Applicant
Joanna Holden, Counsel for Respondent

Investigation Meeting: 27 May 2008 at Christchurch

Determination: 5 June 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant seeks interim reinstatement to his position with the respondent pending the determination of his substantive claim of unjustified dismissal. The respondent resists the application contending that the applicant's substantive claim is far from strong and that even were B to be successful in that claim, the circumstances surrounding the dismissal were such as to preclude reinstatement and may well attract a significant reduction in remedies that might be awarded.

Arguable case

[2] The respondent concedes the applicant has an arguable case albeit not a strong case.

Balance of convenience

[3] The applicant, by his counsel, deposes that, given the straightened financial conditions he says he currently faces, it would be less convenient for the respondent to reinstate him in the interim, than for B to continue to bear the financial situation in which he now finds himself as a result of his dismissal.

[4] The respondent submits that the bail conditions imposed on B as the result of a criminal prosecution prevent the applicant from being returned, even in the interim, to his former role with the respondent. The applicant's submission is that, as employer, the respondent would be able to assign some tasks which do not breach the bail conditions imposed.

[5] The respondent says it is in no position to accommodate B in any other role than that of youth worker, and is unable to do this given the conditions imposed by the Court. Further, the respondent says that in the event the applicant is successful in the substantive issue before the Authority, it will accept its obligation to meet any remuneration lost upheld by the Authority at that time.

[6] Given the applicant is in employment, even though he deposes his net fortnightly income is some \$350 lower than that he enjoyed when employed by the respondent, there is no evidence in his affidavit that he is prepared to surrender his current employment. The position, as put by his counsel, appears to be that he might surrender his current employment if he was to be reinstated to the respondent's payroll even if not required to attend to his previous duties or to any duties at all.

[7] On consideration, the balance of convenience is near equilibrium. However, I am of the view it marginally favours the respondent. That is because, as the applicant's counsel submits, the respondent is an organisation with *extensive resources* and thus able to meet any orders imposed by the Authority.

[8] On the face of the applicant's own untested evidence, B is suffering financial difficulty rather than hardship. It is to his credit that he has secured employment and is meeting, as best he can, the obligations to his family with the contribution of his partner. In such circumstances, if he fails in his substantive case before the Authority, his capacity to meet his undertaking as to damages is open to question.

Overall justice

[9] This aspect of the Authority's deliberation requires it to stand back and take an overall view of the matter. On the evidence before the Authority, the applicant has accepted that his actions which gave rise to the dismissal constituted an *error of judgment* and placed both the applicant and a young person *at risk in terms of health and safety expectations*. That is a significant concession. Even when considered in the light of B's claims of predetermination and procedural irregularities, the applicant's concession confirms that he accepts he acted inappropriately for an employee in his position.

[10] I have also considered the applicant's submission that the determination of this employment problem ought to be stayed pending the outcome of the criminal proceedings. That would extend the period of interim relief to December 2008 at best. In the circumstances of this particular case, I am of the view that the respondent should not be required to accommodate such a protracted delay at its own cost.

[11] The granting of interim relief is a discretionary power to be exercised in a considered and balanced manner. I have carefully considered the issues put to the Authority and I accept that only untested evidence has been put before me at this stage. I find that the overall justice of the case favours the respondent.

Determination

[12] The application is declined.

Other issues

[13] The issue as to whether the substantive matter before the Authority could or ought to be determined prior to the jury trial has been raised with the Authority. Counsel for the respondent does not oppose such a delay however, it is appropriate that the parties are aware the Authority is prepared to investigate the substantive employment issues before it in August 2008.

[14] Accordingly, submissions from counsel on this matter (in the event they are unable to agree) are to be lodged and served 14 days from the date of issue of this determination.

[15] Those submissions ought also to include Mr McKenzie's proposal in respect of any variation to the extant non-publication order of the Authority. Counsel for the respondent has a further seven days to reply solely in respect of the variation sought.

Costs

[16] Costs are reserved pending the determination of the substantive matters before the Authority and will be addressed in that context.

Paul Montgomery
Member of the Employment Relations Authority