

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 22/09
5149891

BETWEEN JEFF LOUWMAN
 Applicant

AND AIRWAYS CORPORATION
 OF NEW ZEALAND LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Jeff Goldstein, Counsel for Applicant
 Stuart Dalzell, Counsel for Respondent

Investigation Meeting: 19 February 2009 at Christchurch

Determination: 26 February 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Louwman) had worked for the respondent (Airways) and its predecessors for some thirty five years until his dismissal for serious misconduct on 21 January 2009.

[2] On 25 July 2008, Mr Louwman received a telephone call from a Ms Dumble an air traffic controller at Tauranga Tower. Mr Louwman considered that Ms Dumble had been rude to him in that conversation and he complained to Airways.

[3] Airways commenced an investigation and in the process of doing so, uncovered various allegations about Mr Louwman's own conduct towards other staff members. In addition Airways, in investigating Mr Louwman's own complaint, was effectively confronted with a complaint about Mr Louwman from Ms Dumble.

[4] There was a lengthy disciplinary process. Airways decision maker was Mr Grant Rawstorn. Mr Rawstorn presided over five disciplinary meetings, the first on 28 August 2008 and the fifth on 21 January 2009 at which the various matters of concern to Airways were investigated and responded to by Mr Louwman.

[5] Mr Louwman was initially represented by the PSA but towards the end of the disciplinary process he engaged his present counsel to assist him.

[6] At the conclusion of the fifth and final disciplinary meeting on 21 January 2009, Mr Louwman was dismissed from his employment for serious misconduct and he brings this application to the Authority seeking interim reinstatement to his employment pending an investigation of the substantive matters, which is set down for hearing in April 2009.

[7] Mr Louwman has provided the required undertaking as to damages, although the efficacy of that undertaking has been put into question by Airways who say that Mr Louwman has produced no evidence to the Authority to justify a conclusion that Mr Louwman is in fact able to satisfy that undertaking.

[8] Moreover, Airways say that the application for interim relief is misconceived because on the termination of his employment, Mr Louwman was paid a combination of notice and annual holiday pay the effect of which was to ensure that Mr Louwman would continue in effect on pay until around the date of the substantive hearing.

[9] Further, Airways deny that Mr Louwman has a strong arguable case for interim reinstatement and consider that the balance of convenience and the overall justice of the case *strongly favour the status quo (ie declining reinstatement)*.

Issues

[10] It is trite law that in order to succeed in an application for interim reinstatement, the Authority must apply the law relating to interim injunctions but also have regard to the object of the Employment Relations Act: s.127(4) of the Employment Relations Act 2000 (the Act).

[11] The law concerning interim injunctions requires the consideration of three issues and it is the examination of those three issues that forms the basis of this determination. Those three issues are:

- (a) Whether the applicant has an arguable case?
- (b) Where does the balance of convenience lie?
- (c) What is the overall justice of the case?

[12] In addition of course, s.127(4) of the Act requires the Authority to have ... *regard to the object of this Act*. It was urged on me by counsel for Mr Louwman that the reference to *the object of this Act* was a reference to the primacy of reinstatement as expressed in s.123 and s.125 of the Act.

[13] I do not accept that submission. In my opinion, the reference in s.127(4) of the Act to *the object of this Act* is a reference to s.3 of the Act. Section 3 lists a number of important matters including building productive employment relationships, promoting good faith behaviour as well as a number of other important matters of principle in the employment relationship, but does not include reference to reinstatement.

Does the applicant have an arguable case?

[14] I am satisfied that Mr Louwman does have an arguable case. Mr Goldstein, counsel for Mr Louwman urged on me that proposition and Mr Dalzell quite properly conceded that Mr Louwman does have an arguable case. However, there was significant argument between the parties as to whether the case for Mr Louwman was *strongly arguable* or not. Not surprisingly, Mr Goldstein encouraged me in the view that it was and Mr Dalzell sought to have me agree that it was no more than arguable.

[15] In making his case for Mr Louwman, Mr Goldstein argued that:

- (a) Airways had adopted a *moving target* approach to the matters of concern such that Mr Louwman was constantly unsure of the allegations he faced;
- (b) That there was pre-determination of the outcome which is demonstrated by written material which evidenced its conclusions having been reached without the input of Mr Louwman;
- (c) Changes in the process of investigation of the disciplinary matters, so as to destabilise Mr Louwman in his defence of his position;
- (d) A failure to provide counsel for Mr Louwman with appropriate particulars of the allegations Mr Louwman was facing;

- (e) A failure to properly investigate and where necessary re-investigate contrary evidence especially in one case where a witness changed his testimony to Airways;
- (f) That the decision to dismiss, even assuming the allegations of misconduct could be sheeted home to Mr Louwman was not the appropriate response of a fair and reasonable employer because dismissal was too harsh a penalty and indeed was not in conformity with Airways' own policy;
- (g) That in failing to make available the transcript of the tape of the telephone discussion of 25 July 2008 which initiated the whole disciplinary process, Airways failed to use in its decision making the *best evidence* of that telephone conversation and failed to act as a fair and reasonable employer would.

[16] For their part, Airways deny that they acted in breach of their own policy, deny that they pre-determined the dismissal, and contend that they ran a robust and fair process which produced a transparent and fair outcome. In particular, Airways say:

- (a) That the decision maker Mr Rawstorn spoke to Mr Louwman as soon as he was seized of the matter and outlined a process;
- (b) That Mr Louwman did not quarrel with the process outlined;
- (c) That Mr Louwman failed absolutely to participate fully and effectively in Airways' own process, in particular by failing to provide in writing (as requested by Airways) a summary of the 25 July 2008 telephone discussion;
- (d) That Airways arranged a measured and transparent process which took place over some six months and involved five separate disciplinary meetings which in consequence gave Mr Louwman more than ample opportunity to respond to allegations;
- (e) That as a consequence of the receipt of the initial complaint from Mr Louwman himself, various other matters came into focus

concerning Mr Louwman's own behaviour and the fact that many co-workers allegedly had difficulty in dealing with him because of his uncertain temper;

- (f) That those fresh allegations were all put to Mr Louwman or withdrawn by agreement and Mr Louwman was given an opportunity to respond to all of the matters on which the Airways' decision maker subsequently relied upon;
- (g) That in the result, Airways was entitled to reach a conclusion which was different from the conclusion Mr Louwman had reached about the same matters and that Airways was entitled to decide that the allegations it found proved against Mr Louwman taken in their totality entitled it to reach a decision to dismiss.

[17] I have carefully listened to the submissions of counsel (some of the highlights of which I have briefly sketched above) and reflected on the affidavit evidence I have before me.

[18] As I have already made clear, I have reached the conclusion that Mr Louwman's application clears the relatively low threshold on the *arguable case* test and I am supported in that conviction by the modicum of common ground that exists between the parties on this matter anyway.

[19] Even if there were not the existence of that common ground, it seems to be plain that there are matters, including some of the matters highlighted by Mr Goldstein and referred to by me above, which raise questions about the way in which Airways proceeded.

[20] To make that observation is no more and no less than to reflect the common experience that, in matters of this kind, there will often be issues about the employer's process about which there may be criticism. Certainly, I note the caution which the Authority must always exercise in matters of this kind where the only evidence before the Authority at this early stage is untested affidavit evidence.

[21] However, having reached the conclusion that there is an arguable case, it is appropriate to move to consider the next issue.

Does the balance of convenience favour Mr Louwman's application?

[22] The essence of the Authority's obligation in this regard is to consider the relative inconvenience to each party of the other succeeding. In a practical sense, the Authority must weigh the relative hardship to Airways of having Mr Louwman returned to the employment against the hardship potentially suffered by Mr Louwman in remaining away from the employment for a further period until the substantive hearing determines the matter one way or the other.

[23] Mr Louwman submits that he needs to continue his employment because he is employed in a monopolistic environment where there is effectively no other employment for a person of his age and skills base other than Airways. It follows, so I am encouraged, that restoring Mr Louwman to the employment now in anticipation of the substantive hearing in early April will materially assist him in that regard particularly as it is contended that Mr Louwman has a strong case for permanent reinstatement as part of a successful claim against Airways in the substantial hearing.

[24] For their part, Airways refute that contention and allege that nothing turns particularly on Mr Louwman's employment status between now and the date of the substantive hearing. If Mr Louwman is permanently reinstated after the investigation meeting concerning the substantive application, then he will be back on the job in a relatively short period of time and there was no particular mischief in him remaining away from the employment in the meantime. Furthermore, any use of his annual holiday pay in the meantime can be corrected in the substantive decision.

[25] That argument is further supported according to Airways, by the fact that the aggregate sum that Mr Louwman was paid on the termination of his employment will actually ensure that he has adequate funds on which to live until the substantive investigation meeting.

[26] Conversely, Mr Louwman argues that the bulk of the monies paid to him on termination were in fact annual holiday pay entitlements and that he prefers not to rely on those monies for his living costs at present but to go back to the status of receiving ordinary salary payments such that his annual holiday pay entitlement can be re-credited and retained.

[27] Airways say that the risk for them is that Mr Louwman may not be able to repay monies advanced to him against his undertaking and that granting the orders

sought would cause significant disruption to Airways because of the *antipathy* generated by Mr Louwman within the wider Airways family.

[28] Airways also draw to my attention the *safety – crucial environment* that they operate in and the requirement that Mr Louwman be returned to that environment might potentially have an impact on safety issues.

[29] Mr Louwman on the other hand contends that the only reasonable recourse he can have to resolving his present employment relationship problem is by way of interim reinstatement now and (by implication) permanent reinstatement later on as a consequence of the substantive hearing. This is because Mr Louwman argues that the worth of any monetary award made by the Authority will not impact realistically on his need to be adequately compensated for the wrong he believes has been done to him by Airways. Of course, it is impossible to predict whether Mr Louwman will be successful or not in the substantive hearing or indeed what path the parties disagreement might take between now and then.

[30] Mr Louwman points out that he has never worked for anybody other than Airways or its predecessor and has superannuation and long service entitlements which have built up over time because of that length of service. Even if his additional service were only a matter of weeks (until the substantive hearing) and he would be required to in effect pay back what he had received if he is unsuccessful in his substantive application, the addition of those few weeks service would presumably impact positively on his superannuation entitlement albeit at a modest level.

[31] Airways encourage me in the view that it is not clear how Mr Louwman could repay monies effectively overpaid to him because there is no evidence of that in his undertaking or his affidavit. I accept that risk. If Mr Louwman is to be granted interim reinstatement, then his obligations are clear; he is represented by very experienced counsel who will have explained to him the consequences of executing his undertaking.

[32] I have reached the conclusion that the balance of convenience favours Airways. This is not a situation where Mr Louwman will have to wait for an unreasonable time to have his substantive hearing; this is already set for early April and I am able to give the issuing of the determination urgency. If Mr Louwman is permanently reinstated, then damages are an adequate remedy for his interim losses

or the Authority could direct that Mr Louwman's annual leave entitlement is restored to him, thus effectively substituting the monies expended as holiday pay to become annual salary.

Overall justice of the case

[33] Standing back and evaluating the case on the currently untested evidence before the Authority and the able submissions of both counsel, the Authority must look at the overall justice of the case as between the parties.

[34] The untested affidavit evidence and the submissions before me suggest a dysfunctional relationship between Mr Louwman and some of his co-workers. Were interim reinstatement to be granted to Mr Louwman, it would seem axiomatic that there needed to be a resolution of the relationship problems between Mr Louwman and some of his co-workers.

[35] Furthermore, Airways impress upon me the need for Mr Louwman to undertake further training in order that he can maintain the appropriate rating that is required for him to meet his professional obligations. That fact, coupled with the issues raised by a safety conscious employer and the apparent difficulties between Mr Louwman and other co-workers identifies real issues about the balance to be achieved in looking at the overall justice of the case.

[36] I think Mr Louwman's situation is a little unusual in his length of service and his singular commitment to one employer since leaving school at aged 17. That does, I consider, make him more vulnerable to job loss than would be the position were he working in an industry where there were many competitor employers. Similarly, his very length of service makes it even more difficult for him to confront unsatisfactory superannuation returns which, by virtue of the particular structure of the scheme which he will be a member of, tend to build up most dramatically in the last few years of the employment. Mr Louwman is 53 years old and the thrust of his submissions is that he faces the prospect of:

- (a) Inadequate superannuation because he has been locked in to a Government scheme which he expected would sustain him until retirement; and

- (b) A likelihood of never being able to practice his craft again because of the unavailability of similar employment in this country.

[37] Against that is Airways' very real concerns about Mr Louwman's relationships with co-workers, the possible impact that might have on safety, and the obvious need for some effort to be made to resolve those relationship issues, if there is to be a continuation of the employment relationship.

[38] I have firmly rejected the notion that Mr Louwman could reasonably return to the workplace because I accept broadly the submissions made by Airways about the risks associated with that course of action, the difficulties about providing training in order that Mr Louwman could actually work and the need for there to be a resolution of relationship issues with co-workers.

[39] Given the relatively short time between now and the substantive investigation meeting, it seems to me impossible for all of those matters to be safely and properly addressed in time.

[40] However, that complexity of difficulties does not apply to the prospect that Mr Louwman be granted his application on the footing that he does not return to the workplace at all, but simply has a period of garden leave until such time as the substantive employment relationship problem has been resolved.

[41] Taking that step would resolve most of Airways objections but not all. In particular, it does not deal with Airways objection to returning Mr Louwman to the payroll and the risk of Mr Louwman being unable to meet his obligations pursuant to his undertaking

[42] In the result, I am not persuaded that awarding a period of garden leave is an appropriate exercise of my discretion in this matter. I reach that conclusion not so much because of any doubt about Mr Louwman's ability to meet his obligations should he be unsuccessful in the substantive hearing but rather because it seems to me that the granting of a period of garden leave is not actually going to make much difference to Mr Louwman's present situation. It is unchallenged that Mr Louwman has sufficient funds to live on until the substantive investigation meeting. That meeting is approximately five and a half weeks away. My expectation is that I will be able to give the substantive determination some urgency and on that basis, it seems to me the potential prejudice to Mr Louwman is slight indeed.

[43] Conversely I think the risks to Airways are real and the issues that they have highlighted in their submissions and that have featured in the affidavit evidence before me suggests a conservative approach is appropriate in the particular circumstances of this case.

[44] That being the position, I determine that the overall justice of the case favours Airways and it follows that the application brought by Mr Louwman must fail.

Determination

[45] The application is declined for the reasons enunciated in the foregoing sections of this determination.

Costs

[46] Costs are reserved.

James Crichton
Member of the Employment Relations Authority