

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 66
5375619

BETWEEN SHANE TAGGART
Applicant
AND CDF NATIONAL LIMITED
Respondent

Member of Authority: David Appleton
Representatives: Linda Ryder, Counsel for Applicant
Robert Thompson, Advocate for Respondent
Investigation Meeting: 13 April 2012 at Christchurch
Submissions received: 13 April 2012 from Applicant
13 April 2012 from Respondent
Determination: 16 April 2012

DETERMINATION OF THE AUTHORITY

- A. The application for interim reinstatement is declined.**
- B. Costs are reserved.**

Employment Relationship Problem

[1] On 27 March 2012 Mr Taggart applied to the Authority for an order for interim reinstatement to his former position as a painter and foreman with the respondent. His application was accompanied by a signed undertaking from him as to damages, in accordance with s. 127(2) of the Employment Relations Act 2000 (“the Act”).

[2] The Applicant had been dismissed on 20 March 2012 without notice for alleged serious misconduct. The dismissal followed an investigation by the respondent, at the conclusion of which the respondent determined that the applicant had, in breach of the terms of his employment agreement and his duties of fidelity and

trust and confidence, attempted to solicit employees of the respondent to work for a business that it believed he and his twin brother were in the process of setting up.

The background facts

[3] Mr Taggart's employment agreement, which he had signed, included the following clauses:

3.4 The Employee agrees to perform their duties in accordance with the instructions of the Employer and to perform them diligently and in a manner, which will promote the interests of the Employer.

19.1 The three most valuable and essential assets of the Employer are its Employee relationships, customer relationships and proprietary information.....The Employee agrees to work with the Employer to protect, preserve and grow these assets.

21.1 During the term of the Employees [sic] employment by the Employer and for a period of 3 months following the termination of such employment for any reason whatsoever, the Employee will not, either directly or indirectly, on the Employees [sic] behalf or on behalf of others, solicit, divert or hire, or attempt to solicit, divert or hire any person employed by the Employer.

[4] The solicitation attempts carried out by Mr Taggart are alleged to have occurred in a pub on 23 February 2012, a few days after Mr Taggart had expressed dissatisfaction with his pay, as compared with another foreman. It is undisputed that Mr Taggart had also told the respondent shortly before 23 February that he was thinking of starting his own business with his twin brother.

[5] The respondent's concerns with respect to Mr Taggart's alleged attempts to solicit the respondent's staff were first drawn to his attention in a meeting on 1 March 2012. Mr Taggart denied at the meeting that he had attempted to solicit his co-workers for his own business. Mr Taggart alleges that, at the conclusion of the meeting, he had been told that he could not be guaranteed any more work from then on, and that he was being given two weeks' notice, which would be given to him in

writing. Mr Taggart alleges that the respondent later denied that he had been given two weeks' notice. The respondent denies that it had ever given him notice on 1 March, and that the comment relating to not guaranteeing him work was a reference to not taking him back on if he chose to leave to work on his own, and then changed his mind.

[6] The respondent followed up its concerns about the alleged solicitation by way of a letter to Mr Taggart dated 7 March 2012. The letter set out that Mr Taggart had recently stated that he was going to resign but not until he had set up his own company; that he had been soliciting other staff and that the respondent's concerns were serious. The letter stated that Mr Taggart's employment could be at risk, and that disciplinary action, including dismissal, was being considered. Mr Taggart was directed to attend a disciplinary meeting on 9 March 2012 and was told that he could have a support person or representative with him.

[7] A disciplinary process ensued during which both parties were represented by counsel throughout. Following the disciplinary meeting, which actually took place on 13 March, the respondent's advocate wrote a letter to Mr Taggart's counsel on the same date which stated that the respondent had formed several views:

(a) that Mr Taggart had solicited and attempted to divert the respondent's employees away from the respondent;

(b) that Mr Taggart had instructed the respondent that he had already applied for or been registered with EQC to undertake work for them;

(c) Mr Taggart had instructed the respondent that he was resigning and would notify them of the date once he had found his first job in competition with the respondent;

(d) that the respondent had trust and confidence issues in relation to Mr Taggart's behaviour.

[8] The respondent's advocate also stated in the letter that the respondent had formed the preliminary view that Mr Taggart had not acted in good faith, that he had

undermined the duty of trust and confidence and had failed to adhere to the provisions of the employment agreement. The letter also stated that Mr Taggart had relied on confidential information to determine what pay rates to offer the employees in order to entice them into an employment relationship with him. The respondent was therefore considering dismissing Mr Taggart but invited him to make written comments first.

[9] A written response was provided by Mr Taggart's counsel on 19 March. In it she took issue with certain aspects of the process that had been followed by the respondent. She referred to the respondent allegedly having told Mr Taggart that it could not guarantee him work in two weeks' time. She stated that Mr Taggart intended to be bound by his contractual obligations, but that he denied attempting to solicit employees, and that what he had said to his colleagues in the pub had been *pub talk*.

[10] Mr Taggart's counsel also advised the respondent's advocate that his brother had not registered with EQC as Mr Taggart had first believed, and that Mr Taggart was prepared to make it clear to employees that he had no intention of offering them employment. She stated also that Mr Taggart would be prepared to accept a longer period of post termination restraint if he were not to be dismissed.

[11] On 20 March 2012, the respondent's advocate replied to Mr Taggart's counsel disagreeing with points made by her in her letter in relation to the process followed.

The letter also stated:

Our client is clear that your client has attempted to induce and encourage our clients' employees to breach an employment agreement.

Our client has instructed both you and your client that finding alternative employees in this current market is difficult and if not impossible. [Sic] Skilled employees are hard to come by and our client is currently taking active steps in attempting to recruit both within and outside of New Zealand.

Our client is now faced with the very real prospect of your client continuing to solicit and remove employees from the workplace. Our client has to make a decision on the balance of probabilities as to whether both employees who provided statements were credible witnesses. Your client accepted that he had met with the individuals, knew their hourly rate and assumed that they were dissatisfied in their current positions. Your client's behaviour cannot go unnoticed.

It is your client's obligation that while he is employed by our client, to spend his time and energy dedicating to the future growth and prosperity of our clients business. [Sic]. It is for these reasons that our client has determined that your client has breached the essential elements of trust and confidence and good faith.

Accordingly, we confirm that the employment relationship is terminated.

The dismissal was without notice.

[12] Sworn affidavits were provided to the Authority by the following people:

- (a) Mr Taggart,
- (b) Mr John Shivas, (a director of the respondent),
- (c) Mr Grant Shivas (Manager of the respondent),
- (d) Megan Duffy (a director of the respondent, and its administrator),
- (e) Mr Jeffs (Operations Manager of the respondent),
- (f) Mr Taitoko (a foreman, who is one of the employees to whom it is alleged Mr Taggart offered work, and more money, on 23 February),
- (g) Mr Schraa (a foreman, who is the other employee to whom it is alleged Mr Taggart offered work, and more money, on 23 February) and
- (h) Mr Wilson (a painter/general hand, who also alleges that he was offered work and more money by Mr Taggart. A conversation between Mr Wilson and Mr Taggart was surreptitiously recorded by Mr Taggart a few days before the dismissal).

[13] Mr Taggart's employment agreement with the respondent was also supplied to the Authority, together with copy correspondence between the parties, hand written statements prepared by Mr Taitoko and Mr Schraa and a transcript of the recorded conversation between Mr Taggart and Mr Wilson, the accuracy of which is disputed by the respondent.

Principles of interim reinstatement

[14] The correct approach to be adopted by the Authority in determining an interim reinstatement application is by applying the law relating to interim injunctions whilst also having regard to the object of the Employment Relations Act 2000 (s. 127(4)). This means, in practice, that Mr Taggart must first establish that he has both an arguable case of personal grievance for unjustified dismissal and an arguable case that he would thereafter be reinstated in employment rather than simply compensated financially.

[15] Next, the Authority must apply an assessment of the respective positions of the parties until the investigation and determination by the Authority of the substantive issues by considering the balance of convenience between the parties. This assessment includes considering whether interim reinstatement is necessary if other remedies would be adequate.

[16] Finally, as the remedy is discretionary, the Authority steps back to take a global view and determines where the overall justice of the case lies until it can be heard (which includes considering the respective strengths of each parties' case as far as they can be ascertained at this stage).

[17] Reinstatement is no longer a primary remedy but remains one measure which may be selected from the range of remedies provided at s123 of the Act to settle a personal grievance, provided it is "*practicable and reasonable to do so*".

[18] A recent case in which the Court of Appeal examined practicability of reinstatement was *Lewis v Howick College Board of Trustees*. [2010] NZCA 320. The Court of Appeal reiterated the Court of Appeal's judgment in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School*

[2010] NZCA 320 (*NZEI*) which had, in turn, affirmed the test applied by the Labour Court in first instance in that case. The Employment Court in *NZEI* said:

Whether ... it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future..... Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.

[19] The Employment Court in *Angus v Ports of Auckland* [2011] NZEmpC 160 held, when considering the new requirement of reasonableness, as follows:

[65] Even although practicability so defined by the Court of Appeal very arguably includes elements of reasonableness, Parliament has now legislated for these factors in addition to practicability. In these circumstances, we consider that Mr McIlraith was correct when he submitted that the requirement for reasonableness invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.

[66] In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.

[67] Reinstatement in employment may be a very valuable remedy for an employee, especially in tight economic and labour market times. The Authority and the Court will need to continue to consider carefully whether it will be both practicable and reasonable to reinstate what has often been a previously dysfunctional employment relationship where there are genuinely held, even if erroneous, beliefs of loss of trust and confidence.

[68] *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.*

Arguable case for unjustified dismissal?

[20] The relevant sections of the Employment Relations Act 2000 that the Authority must have in mind when considering an interim reinstatement application include s103A and s125. Section 103A provides as follows:

(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).

(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

(3) In applying the test in subsection (2), the Authority or the court must consider—

(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and

(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and

(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and

(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.

(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—

(a) minor; and

(b) did not result in the employee being treated unfairly

[21] Section 125 provides as follows:

(1) This section applies if—

(a) it is determined that the employee has a personal grievance; and

(b) the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in section 123(1)(a)).

(2) The Authority may, whether or not it provides for any of the other remedies specified in section 123, provide for reinstatement if it is practicable and reasonable to do so.

[22] In reviewing the employer's decision, the Authority must be satisfied that the evidence in support of conclusions reached by the employer is as convincing in its nature as the alleged serious misconduct was grave. *Honda NZ v NZ Shipwrights Union* ERNZ Sel Cas 855 at 858 (CA).

[23] An arguable case means a case with some serious or arguable, but not necessarily certain prospects of success. *X v Y Ltd and the New Zealand Stock Exchange* [1992] 1 ERNZ 863.

[24] It is my view that the applicant does have an arguable case that he will prove his case of a personal grievance of unjustified dismissal. My reasons for reaching this view are as follows.

No opportunity given to Mr Taggart and his counsel to question the two key witnesses

[25] Mr Schraa and Mr Taitoko had provided written statements for the respondent's investigation which had only been made available to Mr Taggart on the morning of the disciplinary meeting held on 13 March 2012. The wording of statements, which were both written on the same piece of paper, was as follows:

To whom it may concern

On the 23th Feb Shane asked me if I wood go and work for him instead of C.D.F I turned down his offer moor money. [sic].

Kane Taitoko

I also on the 23rd Feb asked if I would come and work for him when he goes out on his own, he also said he would pay more than what I was on now. [sic]

William Schraa

[26] Mr Taggart and his representative were not provided with the opportunity to question these two witnesses, whose evidence was absolutely critical to the allegations being levelled at him. Although the respondent's representative states that Mr Taggart and his representative did not request to interview them, this does not excuse the respondent from the obligation of providing Mr Taggart with that opportunity. It is a fundamental principle of natural justice that someone facing summary dismissal for serious misconduct, based solely or largely on the allegations of third parties, should be afforded the opportunity to question those third parties as part of a fair disciplinary or investigatory process.

[27] This opportunity was important in this case even though Mr Taggart states that he had told the two men that he and his brother were thinking about starting their own business, that he might be looking for some staff at some stage in the future, and that he may have said that he would offer more pay than what they were on now. Mr Taggart's affidavit evidence was that he had been speaking about a possibility only because he had not got his own business at that point, he would have had to have consulted with his brother before offering anyone a job and he did not have any work that the men could do.

[28] Mr Taggart's counsel submits that his comments were taken out of context, were not to be taken seriously, and were *pub talk* and *bravado*. Mr Taggart and his representative should have been allowed to have addressed and questioned the two men in order to ascertain their reaction so that the decision makers in the respondent could gauge whose evidence was more credible. The respondent claims that it did ask the two men about the context in which Mr Taggart had made his statements, and that

the two men had confirmed that they had understood that Mr Taggart had been making a serious offer, and had not made a throw away comment. Mr Taggart's counsel asserts that the respondent most likely did not put this question to the two men as claimed as no affidavit evidence stated that it did. I am unable to reach a conclusion on that particular assertion at this stage, but am convinced that the failure to afford an opportunity to Mr Taggart and his counsel to question Mr Schraa and Mr Taitoko amounts to a fundamental breach of the principles of fairness which gives Mr Taggart a strongly arguable case of procedural unfairness.

Predetermination

[29] Mr Taggart's counsel also asserts that the decision to dismiss him was predetermined, relying on various matters, including the statements allegedly made to him on 1 March about having been given notice and not guaranteeing him work. On the affidavit evidence before me, I prefer the evidence of Mr Taggart that he was told that there would be no guarantee of work and that he was told he was being given notice. This therefore does raise the spectre of predetermination. For this reason as well, therefore, I believe there is an arguable case.

Follow up investigatory checks not done?

[30] The affidavit evidence from the respondent's witnesses does not detail whether follow up enquiries were made to check whether or not Mr Taggart and his brother really were registered with EQC after Mr Taggart's counsel had stated that they were not in her pre dismissal letter of 19 March. It appears from the affidavit evidence that the respondent merely believed that they were registered because Mr Taggart had told the respondent that he was waiting for his first job. A failure to follow up this new piece of evidence from Mr Taggart's counsel, that Mr Taggart had been mistaken in saying his brother had registered with EQC, would also have constituted a procedural failing.

Is there an arguable case on substantial fairness?

[31] A separate issue to be considered is whether it was substantively fair to have dismissed the applicant, putting aside the procedural failing already identified. It is, however, impossible to reach a firm conclusion on this issue at this stage when it is

not possible to ascertain whether the conversation with Messrs Schraa and Taitoko in the pub on 23 February was a serious attempt to solicit them, or mere braggadocio commonly heard in pubs throughout the land. Which it was may become evident, and would be relevant to contribution, at the substantive hearing of this matter. Suffice it to say at this stage that if, following a full disciplinary investigation by the respondent in which the two men had been available to have been questioned by Mr Taggart and by his counsel, it had been reasonable for the respondent to have concluded that Mr Taggart had made serious attempts to solicit the men, this would have been likely, in my view, to have constituted a sufficiently serious breach of his employment agreement so that dismissal would have been what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred, in order to have protected it from loss of staff through internal poaching.

[32] In summary, taking into account all these issues, I am persuaded that the applicant does have an arguable case that he has a personal grievance for unjustified dismissal.

Balance of convenience

[33] The Authority must now weigh the relative inconvenience – in the sense of detriment or injury – to the respondent of having to bear the burden of an order reinstating the applicant until his substantive case is heard, against the inconvenience to the applicant who may have a just case, of having to bear the detriment of unjustifiable action until his case is heard. *X v Y Limited* [1992] 1 ERNZ 863, 872-3 (CA).

Mr Taggart's arguments

[34] Mr Taggart refers in his second affidavit to the financial hardship he will suffer if he has to wait for a substantive investigation meeting and the subsequent determination. At present, his personal grievance could be investigated by the Authority in a substantial investigation meeting in July 2012 and, all things being equal, he would have a written determination from me within four weeks of the meeting. He is therefore currently likely to be facing a further four months before his case be determined.

[35] Whilst I have no reason to doubt the assertions made by Mr Taggart in relation to the financial hardship occasioned by his dismissal, it is not uncommon for an applicant to suffer financial hardship following a dismissal and that, in itself, is not sufficient to persuade the Authority to order interim reinstatement.

[36] The reference in *Angus v Ports of Auckland* cited above to *tight economic and labour market times* is also a commonly but validly pleaded argument by applicants seeking reinstatement. However, in this case, there is an unusual aspect of the prevailing job market which I cannot ignore. Due to the unfortunate, devastating earthquake that occurred in February 2011, Christchurch is currently facing an unprecedented demand for tradesmen, including painters. I drew to the attention of the parties at the interim injunction hearing a statement made on 10 April 2012 by the head of Trade Me Jobs that *Canterbury showed explosive growth with the number of jobs being advertised up 81 per cent compared with a year ago. ...As building sites emerge and redevelopment plans are drawn up, the market is especially hot for site managers, labourers, machine operators, and painters and decorators.* (*Canterbury job market jumps on rebuild*, Stuff.co.nz, Business Day section, 10/4/2012). It is undisputed that the job market in Christchurch for tradesmen is very buoyant at present.

[37] Counsel for Mr Taggart stated that he will not be able to take advantage of this buoyant market however because his reputation is likely to have been damaged by reports of his dismissal having been spread in the industry by the respondent which will have damaged his prospects. In addition, she stated that no reference had been offered by the respondent.

[38] The allegations regarding the respondent spreading reports of the dismissal are purely speculative, and so cannot be taken seriously by me without cogent proof having been provided. With respect to the non provision of a reference, at the interim injunction hearing the respondent's advocate stated that the respondent is prepared to provide a reference for Mr Taggart in relation to his work output, and that he is willing to liaise with Mr Taggart's counsel to facilitate a mutually agreeable text. I am heartened to hear that, and record that commitment in this determination in the expectation that the parties and their representatives will, without delay, seek to agree the text of that reference so as to enable Mr Taggart to find alternative work as soon as possible, so he can mitigate his losses, as is his duty.

[39] A further consideration to take into account is the fact that Mr Taggart has now started advertising on Facebook the business he referred to setting up with his twin brother. It is called Twin Effects. This evidence was disclosed to the Authority by the respondent very shortly before the interim reinstatement hearing, and Mr Taggart did not have time to respond to it, so I do not infer from it that Mr Taggart now has a fully functioning business. However, it is a factor to keep in mind, in that work may start to flow in from his advertisement in the near future.

[40] Taking these factors into account, I do not believe that the balance of convenience strongly favours Mr Taggart, as he has significant opportunities to positively address his financial difficulties in a very real way before the substantive investigation meeting.

The respondent's arguments

[41] Turning to the effect upon the respondent of reinstating Mr Taggart, it relies heavily on a stated loss of trust and confidence in him. Trust and confidence is an issue that I must consider when weighing in the balance any prejudice that would be suffered by the respondent if I were to grant reinstatement. It is possible that, if Mr Taggart had been able to have questioned Messrs Schraa and Taitoko in the presence of the respondent's decision makers, the latter may have been convinced that Mr Taggart had not been seriously soliciting his colleagues, and so trust and confidence may have been preserved. However, I can only rely at this stage upon the affidavit evidence that has been adduced by the respondent, including affidavits sworn by Messrs Wilson, Schraa and Taitoko, and on the basis of those affidavits there is a credible argument that Mr Taggart had attempted to solicit his colleagues. In such a case, it would be reasonable for the respondent to have lost trust and confidence in Mr Taggart.

[42] I am also mindful that Mr Taggart has now clearly started advertising his new business and have sympathy for the respondent's concerns that, if Mr Taggart were to be reinstated, he would have access to staff who it believes he solicited for the new business.

[43] Another issue to bear in mind is that Mr Taggart has given an undertaking which I have concerns he may not be able to honour were he to be reinstated and he were to solicit staff away from the respondent, causing it to lose business as a subsequent consequence of a shortage of skilled painters. In such a circumstance, the respondent may wish to call upon the undertaking. However, on his own evidence, Mr Taggart's financial means are limited and he has financial needs which could exhaust the assets he deposes he has available to him to cover the undertaking.

[44] A final objection from the respondent is that staff have intimated to it that they will refuse to work with him if Mr Taggart were to be reinstated, because of their objections to him covertly recording a conversation with Mr Wilson and because of his alleged solicitation attempts. There was little direct evidence presented to the Authority of these concerns from staff, however, and so I am inclined to discount them as unsubstantiated.

[45] Weighing up the potential prejudice to Mr Taggart of not reinstating him against the potential prejudice to the respondent of doing so, I am clear that the balance favours not reinstating him, for the reasons set out above. It is for these reasons that I am also content to conclude that monetary compensation alone would be an adequate remedy for Mr Taggart were he to succeed at substantive stage.

Overall Justice

[46] In its exercise of the discretion to grant interim reinstatement the Authority must consider where the overall justice of the case lies until it can be heard, including particularly the respective strengths of the parties' cases so far as they can be ascertained at this stage. *Cliff v Air New Zealand* [2005] ERNZ 1 at [18] (EC). This requires me to stand back and take a global view.

[47] Whilst it currently appears likely that the Authority will find at a substantive investigation meeting that there was a non minor flaw in the disciplinary process followed by the respondent which could result in an unjustified dismissal finding, there is also a chance on current evidence that the Authority will find that Mr Taggart's conversations in the pub on 23 February 2012 were such as to lead to a significant reduction in remedies by way of contribution pursuant to s 124 of the Act.

[48] In addition, the mischief that could be done if Mr Taggart were to attempt to solicit staff away from the respondent after reinstatement could be significant and the risk is not one that the respondent would be in a position to easily prevent.

[49] In these circumstances, and taking into account the factors articulated above, I believe that the overall justice of the case does not favour reinstatement.

[50] Finally, I strongly encourage the parties to attempt to resolve their differences by way of mediation, which has hitherto not been attempted due to the interim nature of the application.

Costs

[51] Costs are reserved.

David Appleton
Member of the Employment Relations Authority.