

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 42  
5443740

BETWEEN

MELISSA ANN HANSON  
Applicant

AND

CROWE CONSTRUCTION  
AND ASSOCIATES LIMITED  
First Respondent

ROSS ALFRED CROWE  
Second Respondent

Member of Authority: Michele Ryan

Representatives: Peter Cullen, Counsel for the Applicant  
Michael Gould, Counsel for the First and Second  
Respondents

Investigation Meeting: 16 April 2014 at Wellington

Submissions Received: 16 April 2014 for the Applicant and the Respondent

Determination: 28 April 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Melissa Hanson has applied to the Authority for an order for interim reinstatement. Her application is accompanied by an undertaking to abide by any order the Authority may make with respect to damages and she asked for the matter to be addressed with urgency.

[2] Ms Hanson says she was unjustifiably dismissed by Crowe Construction and Associates Ltd (CCA) on 21 March 2014. She states CCA breached obligations to her under the Parental Leave and Employment Protection Act 1987 by failing to keep her position available to her. Additional claims of unjustified disadvantage and/or breach of implied terms of contract have also been made. Ms Hanson seeks various remedies

including penalties against CCA and the director of CCA, Ross Crowe. A full investigation into Ms Hanson's claims is scheduled to occur on 19-20 May 2014.

[3] CCA opposes Ms Hanson's application for interim reinstatement. It accepts that Ms Hanson had previously been an employee but says on 29 August 2008 her employment with CCA ceased and she became a working director/shareholder. It says Ms Hanson was not an employee on 21 March 2014 and cannot therefore bring a claim of unjustified dismissal.

[4] As is usual with applications for injunctive relief, evidence furnished to the Authority was presented in sworn affidavits and not able to be tested.

[5] Ms Hanson's application was accompanied by a sworn affidavit and attached documents. In opposition to Ms Hanson's application, CCA filed affidavits from Mr Crowe as well as the company's accountant, Richard Print, and two employees of CCA, office manager, Anna Clisby, and CCA receptionist, Darlene Morgan. Mr Crowe's wife, Jacqueline Crowe, also provided an affidavit.

[6] As advised during the course of the investigation meeting, it is not appropriate to reach final conclusions on matters in dispute. The Authority is required to take a commonsense approach where facts are contested. Any views recorded in this determination are therefore provisional only and may change following a full investigation of Ms Hanson's claims and after witnesses have been examined.

### **Relevant information**

[7] Ms Hanson was first employed by R Crowe Holdings Limited in 1996 as an office administrator. By 2006 she held a senior management role including oversight of the company's finances. Throughout her employment with R Crowe Holdings Limited she was paid weekly wages.

[8] In May 2006 Ms Hanson, via changes to the content of payslips and bank statements, became aware her wages were now being paid by Crowe Construction Ltd. No written employment agreement accompanied her transfer of employment and Ms Hanson says she continued to perform the same duties and was paid at the same hourly rate.

[9] Concurrent with this time period, CCA was incorporated on 26 May 2006. Ms Hanson was invited by Mr Crowe to a shareholding of 17%. Alongside Mr Crowe she became a director of CCA, although trading did not commence until almost a year after its incorporation. Ms Hanson's wages continued to be paid by Crowe Construction Ltd until mid 2007.

[10] From June 2007 onwards CCA paid Ms Hanson's weekly wages. There appears to be no dispute that Ms Hanson then became an employee of CCA although again there was no written employment agreement governing terms and conditions or how the relationship might end.

[11] A little over a year later, on 29 August 2008, Ms Hanson's weekly wages ceased and she began receiving a monthly salary.

[12] There is an important dispute about whether the salary was paid for work as an employee or whether it was remuneration for work as a director /shareholder.

[13] Mr Crowe's affidavit evidence is that a decision was made between himself, the company's accountant and Ms Hanson that she become a working director. He says her new role assumed greater responsibility including the ability to engage and remove staff.

[14] Ms Hanson states the proposal to change to a salary was made by Mr Crowe on the basis that he wished to cap "*her pay*" in circumstances where she frequently worked up to 70 hours per week and was paid an hourly rate. She says no indication was given to her that acceptance of a salary would alter her employment status or that she would no longer be an employee of CCA. When Ms Hanson commenced on a salary she "*regarded [herself] as an employee on a salary as opposed to a wage*". She reports that she continued to perform the work as she had done previously.

[15] In or about August 2012 Ms Hanson became aware she was pregnant. Initial tests indicated that the baby's health may be compromised.

[16] In November 2012 it was confirmed that the baby had a chromosomal condition associated with severe physical abnormalities. CCA office staff, including Mr Crowe, were kept aware of the baby's prognosis.

[17] On 20 December 2012 Ms Hanson was advised by her specialist that the baby was unlikely to survive long after birth.

[18] Ms Hanson attended work later that day. She did not disclose any detail relating to her consultation other than to advise Mr Crowe and office staff that the appointment had not gone well.

[19] On 21 December 2012 a disagreement about work matters resulted in Mr Crowe telling Ms Hanson in moderately strong language that CCA office staff found her difficult to work with. The discussion was brief but resumed later in the day with office manager Anna Clisby also present. Ms Hanson reports she felt devastated by the statements made about her.

[20] Following the 2012/2013 Christmas holiday break Ms Hanson returned to work. She gave Mr Crowe a letter (dated 7 January 2013, copied also to the company's solicitor and accountant) which advised amongst other things that she had decided to "*exercise [her] right to take parental leave. Starting from 1 February*".

[21] Ms Hanson worked full time until early February 2013. The relevant affidavits each report in various ways that the atmosphere at work was strained during this time. There were occasional conversations between Ms Hanson, Mr Crowe and Ms Clisby about how Ms Hanson's duties would be managed although there are evidential conflicts as to when these occurred.

[22] During one discussion Ms Hanson says Mr Crowe told her that her job would be kept open for her and says discussions about her leave were premised on an assumption that she would be away from work for a year. She accepts that she did not specify how long she intended to remain on leave or when she intended to return to work.

[23] Mr Crowe denies that he made any commitment to keep Ms Hanson's position available. His evidence is that Ms Hanson made it clear she was no longer interested in the sustainability of the business and wished to refocus on herself and her family. Mr Crowe points to Ms Hanson's failure to comply with notice and documentation requirements of the Parental Leave and Employment Protection Act as proof that Ms Hanson was not an employee at this juncture and that CCA has no obligations to Ms Hanson pursuant to that Act.

[24] From 8 February 2013 Ms Hanson reduced her hours and worked from home until 11 April 2013.

[25] Ms Hanson gave birth to her son on 16 April 2013. He died shortly afterwards.

[26] According to the evidence there was limited contact between Ms Hanson and CCA until 28 August 2013 when Mr Crowe paid a visit. Ms Hanson says Mr Crowe advised her that he “*intended to close down CCA and revert to using Crowe Construction Ltd*”. She says that Mr Crowe advised she should seek work with a former employer.

[27] Mr Crowe says he had considered winding down CAA and that this option was discussed with Ms Hanson and the company’s accountant but that no decision on that matter had been finalised.

[28] Between October 2013 and March 2014 there was an exchange of correspondence between the parties and each obtained legal representation. Ms Hanson sought to make arrangements to transition back to work but says she was impeded by CCA.

[29] On 20 March 2014 Ms Hanson’s representative wrote to CCA and advised she wished to resume full time work on 25 March 2014. The following day, CCA, by its representative responded, reiterating its view that Ms Hanson was not an employee. The correspondence further stated there was no position for Ms Hanson to return to and asked that she not come to the company’s premises the following week. The letter concluded by advising that Mr Crowe considered it inappropriate for Ms Hanson to remain a director and she was invited to resign from that position.

[30] On 3 April 2014 Ms Hanson applied to the Authority for an order for interim reinstatement. During a case management call on 7 April 2014 the Authority offered to investigate Ms Hanson’s substantive claims on 13-14 May but the offer was declined. The parties were directed to attend mediation on 8 April 2014 but were unable to resolve their differences.

## Determination

[31] Section 127(1) of the Act allows the Authority to order interim reinstatement pending the substantive hearing of a personal grievance. The Employment Court has observed that the Authority's discretion is broad but is not unconstrained.<sup>1</sup> When determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the objects of the Act<sup>2</sup>.

[32] In addition to the statutory framework, an application for interim reinstatement requires the Authority to determine the following issues:

- (a) whether the applicant has an arguable case that her dismissal was unjustified; as defined by s.103A of the Act;
- (b) whether the applicant has an arguable case for reinstatement (applying the test for reinstatement s.125 of the Act), if she is found to have been unjustifiably dismissed following a substantive investigation;
- (c) where the balance of convenience lies between the parties until a substantive determination is issued by the Authority, including the adequacy of other remedies; and
- (d) whether the overall justice of the case dictates that interim reinstatement is appropriate.<sup>3</sup>

### **Does Ms Hanson have an arguable case, including an arguable case for permanent reinstatement?**

[33] Ms Hanson must persuade the Authority that there is an arguably serious or real (although not necessary certain) prospect that the Authority will, following an investigation into her substantive claims, find that she has been unjustifiably dismissed and also that she will be permanently reinstated into her position.

#### *Arguable case*

[34] There was no suggestion by the parties that a director of a company cannot concurrently hold a position as an employee in the same company. However the real

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<sup>1</sup> *Wellington Free Ambulance Service Ltd v Adams* [2010] NZEmpC 59

<sup>2</sup> S.127(4)

<sup>3</sup> *Angus v Ports of Auckland* [2011] NZEmpC 125 at [3], *McKean v Ports of Auckland* [2011] NZEmpC 128 at [4]

nature of the relationship between Ms Hanson and CCA was a dominant issue during the investigation meeting.

[35] Whether Ms Hanson continued to be an employee after 29 August 2008 forms part of my assessment as to whether Ms Hanson has an arguable case. Ms Hanson is aware that at the substantive investigation meeting she will need to establish that she was an employee of CCA on 21 March 2014 for her claim that her unjustified dismissal to succeed.

[36] CCA's submissions refer Ms Hanson paying provisional tax following receipt of a director's salary as opposed to PAYE. It further refers to documents<sup>4</sup> which collectively reveal Ms Hanson was paid final wages and outstanding holiday pay up to 29 August 2008 and that she began receiving a monthly salary from September 2008 onwards. I am unable to accept this evidence alone determines the matter in CCA's favour in circumstances where there is no dispute that Ms Hanson ceased collecting weekly wages and commenced on a salary.

[37] Counsel for Ms Hanson submits that the deduction of provisional tax does not preclude a finding of an employment relationship.<sup>5</sup> He also submits there is no evidence which exhibits a clear intention by the parties or agreement that Ms Hanson's employment ceased on 29 August 2008.

[38] I am unable to resolve this dispute at an interim stage. However, having assessed the competing arguments I find the existence of the dispute alongside the available evidence indicates Ms Hanson may have continued to be an employee and she has an arguable case in this respect.

[39] CCA submits that if the Authority finds Ms Hanson was an employee of CCA, it says she was not dismissed. CCA asserts Ms Hanson did not comply with the statutory requirements of an employee seeking parental leave and "*walked away*" from CCA in February 2013. Little by way of evidence was provided to the Authority to support this contention although this is perhaps unsurprising given CCA's primary argument that Ms Hanson was not an employee.

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<sup>4</sup> Documents which accompanied the first respondent's statement in reply and exhibits B and N, attached to the applicant's affidavit.

<sup>5</sup> *Smith v Practical Plastics Ltd* [1998] 1 ERNZ 323

[40] Ms Hanson rejects CCA's contention and this is an area of further dispute between the parties. Ms Hanson says she only became aware that there was no position available for her when she received the letter of 21 March 2014. I was not given any information as to the basis or process associated with CCA's assertion that there was no position for Ms Hanson or why she was asked not to attend work on 25 March 2014.

[41] If ultimately it is determined Ms Hanson remained an employee after September 2008, I consider it is strongly arguable that the decision to terminate her employment was not what a fair and reasonable employer could have done in all the circumstances.

*Arguable case for reinstatement*

[42] Section 125 of the Act provides that the Authority may reinstate if it is both practicable and reasonable to do so.

[43] There is no evidence that serious misconduct or poor performance feature as the basis for CCA's instruction that Ms Hanson stay away from the work place. They are therefore not matters which require my consideration in an assessment of the practicability and reasonableness of an order for permanent reinstatement.

[44] It is clear that the work previously undertaken by Ms Hanson is necessary to the functioning of the company and continues to be performed amongst CCA's office-based employees. The absence of an apparent justifiable cause for termination of employment (if it is found Ms Hanson was an employee) coupled with the availability of work tends to support an arguable case that reinstatement is practicable.

[45] However, the Authority is obliged to consider in a common sense way the prospective effects of an order for reinstatement. The combined requirement of practicability and reasonableness requires an appraisal as to whether or not relationships in the workplace can be reasonably restored and includes assessing whether relationships between employer and employee and other affected employees can be rebuilt.<sup>6</sup>

[46] CCA's working environment comprises a small close-knit office staffed by 4-6 people at any given time. If reinstated Ms Hanson would need to interact daily with

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<sup>6</sup> *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160

Ms Clisby and Ms Morgan and be involved in making management decisions with Mr Crowe.

[47] Ms Morgan and Ms Clisby both referred to Ms Hanson's behaviour becoming increasingly erratic and unacceptable between December 2012 and April 2013. Ms Morgan says she considered resigning as a consequence. Ms Hanson does not appear to dispute that her relationships at CCA deteriorated during this time frame.

[48] Mr Crowe's affidavit states that "*the bitterness Ms Hanson feels against me and the accusations she has made ...are simply not able to be brushed over*". I note however that no examples were provided to the Authority to evidence what the accusations are that Mr Crowe refers to. I also regard with caution Mr Crowe's reported loss of trust and confidence in Ms Hanson. This assertion appears to arise solely as a result of some content contained in Ms Hanson's affidavit which is regarded by both Mr and Mrs Crowe as private.

[49] It has not been difficult to form an impression that Mr Crowe's view of Ms Hanson has declined further between the time she went on leave and this application. I have not been provided with any additional information as to why this apparent deterioration has occurred other than Ms Hanson initiating this action in the Employment Relations Authority.

[50] Ms Hanson submits that the affidavits of Mr Crowe and two co-workers grossly exaggerate the level the dysfunction at CCA and that the breakdown in her relationships at the time they occurred must be considered in the context of her then distressing personal circumstances. She considers her relationships within the office are salvageable. I am cognisant that Ms Hanson has worked for, and alongside, Mr Crowe for almost 20 years.

[51] Having assessed the affidavits provided I consider Ms Hanson does have, to an extent that it is arguable, a case that permanent reinstatement is both practicable and reasonable. However I consider the relative strength of this aspect of her case is marginal and a great deal of compromise will likely be required to restore an harmonious relationship between the parties.

**Where does the balance of convenience lie between the parties including whether damages are an adequate remedy?**

[52] An assessment by the Authority of where the balance of convenience lies requires an examination of the relative hardship which may arise if Ms Hanson is refused an order for interim reinstatement compared to the detriment to CCA if an order for interim reinstatement is made but Ms Hanson's claims are not upheld. It also includes consideration of how best to regulate the positions of the parties for the period between this application and when the substantive claims will be investigated, and whether monetary damages would be an appropriate alternative remedy.

[53] At the forefront of my conclusion that the balance of convenience lies with CCA is my view that it is yet to be determined that Ms Hanson was, at material times, an employee of CCA. I consider there will be a greater inconvenience to CCA to have Ms Hanson reinstated to an employment position that may not exist.

[54] Ms Hanson's affidavit focussed on the increased financial hardship her family is experiencing. She has additional concerns that CCA's assets are being diverted and says that any remedies she may ultimately be awarded (including the value of her shareholding) will be worthless if the company's equity has gone.

[55] Mr Crowe denies dissipating company assets and says the downturn in CCA's turnover is a function of the business environment. There is no evidence that CCA is being wound down and is unable to meet a future cost of damages if that is ultimately awarded.

[56] I have no reason to doubt Ms Hanson's assertions with respect to financial pressure but that in itself is not sufficient to persuade the Authority to order interim reinstatement. I consider Ms Hanson's financial concerns (with the exception as to the value of shares) are capable of being compensated by an award of reimbursement of lost salary by the Authority should her claims be successful.

[57] I accept that Ms Hanson considers she is unlikely to find available work in the immediate future in Levin at the level of remuneration she has previously enjoyed. However Ms Hanson has been away from the workplace for approximately a year which tends to detract from an argument for urgent interim reinstatement.

[58] I am further persuaded that the balance of convenience lies with CCA in circumstances where an investigation meeting is scheduled to occur in three weeks. I consider the potential for disruption in the workplace by an order for interim reinstatement, coupled with the possibility that such an order may be fleeting due to the proximity of a substantive investigation, creates a greater inconvenience for both parties compared to maintaining the status quo in the interim.

### **Overall Justice**

[59] The Authority is required to stand back from the detail of the matter and consider where the overall justice lies.

[60] I have found that Ms Hanson has a strongly arguable case that she may have been unjustifiably dismissed and that she has an arguable case for permanent reinstatement although I regard this aspect of her case is less strong. Those assessments however have been premised on the basis that Ms Hanson is able to establish that she was at all material working as an employee and not as a director.

[61] Section 127(4) of the Act provides that, when determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the object of the Act: “to *build productive employment relationships...*”

[62] Where there is an important but unresolved dispute about the true nature of the relationship between the parties I consider it inappropriate to impose by way of an order for interim reinstatement pursuant to s.127, an employment relationship where there is a possibility that no employment relationship exists or has existed for 5 years.

[63] In all the circumstances I find that the most appropriate response is to decline the application for reinstatement until a substantive determination can be made as to the status of the relationship between the parties. I conclude that the overall justice lies with CCA and follows my findings with respect to the balance of convenience. Ms Hanson’s application for interim reinstatement is declined.

### **Further mediation**

[64] Scheduling for the substantive investigation has already taken place. In the interim I recommend the parties seek further mediation and endeavour to resolve their

differences with respect not only to the claims before the Authority but also the matters as regards directorship and shareholdings.

**Costs**

Costs are reserved.

Michele Ryan  
**Member of the Employment Relations Authority**