

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 132
3089934

BETWEEN TUNUHIA TUPE
 Applicant

AND THE BOARD OF TRUSTEES
 OF TE MANAWA O TUHOE
 TRUST
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Stan Austin, Advocate for Applicant
 Beverley Edwards, Representative for Respondent

Investigation Meeting: On the Papers and by telephone

Determination: 31 March 2020

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Before the Authority is an application for interim reinstatement brought by the Applicant, Mr Tunuhia Tupe, under s 127 of the Employment Relations Act 2000 (the Act).

[2] Mr Tupe was dismissed by the Respondent, The Board of Trustees of Te Manawa O Tuhoe Trust (TMOT) on the basis of redundancy following a restructure. Mr Tupe claims that he was unjustifiably dismissed from his role as Operations Manager, and is seeking reinstatement on both an interim and a permanent basis.

[3] TMOT claims that Mr Tupe's dismissal by reason of redundancy was justifiable and followed a fair and reasonable process. TMOT resists the claim for interim reinstatement and the substantive claim.

[4] The application for an interim injunction was accompanied by an undertaking as to damages and an affidavit by Mr Tupe. An affidavit was also filed in opposition by TMOT.

[5] The parties agreed to the Authority determining this preliminary issue of the interim reinstatement application based on the Statement of Problem and the Statement in Reply, documents submitted by the parties, and on submissions from the parties which were presented by telephone.

Note

[6] Interim reinstatement applications are determined on the basis of the statement of problem, statement in reply, affidavit evidence from the parties, relevant documentation lodged and submissions from the parties.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Principles

[8] I granted Mr Tupe's application for this matter to be dealt with on an urgent basis because this is the usual procedure for dealing with an application for an interim reinstatement. In determining this matter, I must apply the law relating to interim reinstatement as set out in s 127 (1) and (4) of the Employment Relations Act 2000 (the Act) which include recognising that employment relationships are built on the legislative requirement for good faith behaviour and addressing the inherent inequality of power in employment relationships.¹

[9] At the Investigation Meeting held by telephone conference on 19 March 2020, I heard submissions from the parties' representatives in relation to the interim reinstatement application and tested these by questioning how the available untested evidence related to the relevant principles for determining an interim injunction application.² Those principles fall to be addressed by the answers to the following questions:

- (a) whether or not Mr Tupe has established that there is a serious case to be tried in relation to the claim for unjustifiable dismissal; and if so:
- (b) Is there a serious case in relation to the claim for permanent reinstatement?

¹ Employment Relations Act 2000 s 3.

² *McInnes v Western Bay of Plenty District Council* [2016] NZEmpC 36 at [8] ERA Auckland 92 in which Judge Inglis (as she then was) referred to the court of Appeal decision in *NZ Tax Refunds v Brooks Homes Ltd* [2013] NZCA 90.

[10] Also noted as needing consideration are the balance of convenience and the impact on the parties, including any third parties, of granting, or not granting an order for interim reinstatement, and the overall justice of the matter.

Background

Brief Background Facts

[11] TMOT administers the assets of approximately 6,000 beneficiaries. TMOT's principle assets and trading function comprise a dairy farm (approximately 700 head of cattle), a grazing block, and a pine forest in the Whakatane river valley Ruatoki.

[12] Mr Tupe was initially employed in March 2016 by TMOT as Operations Trainee and subsequently was appointed as Operations Manager in July 2018 on a permanent, full-time basis.

[13] The Chief Executive of TMOT retired in mid-2019. During the interim period until a successor was appointed, TMOT appointed an Acting General Manager, Mr Peter Madden, who proposed a restructure of TMOT's management which the Board of TMOT approved.

[14] A consultation document was prepared and forwarded to Mr Tupe by letter dated 20 November 2019. The letter set out TMOT's reason for the restructuring which was that the: "small farming operation cannot continue to carry the cost of the current administrative staff and infrastructure" and it had been: "determined the management and administrative structure must align with the scale of business operated by the Trust".

[15] As a result it was proposed to disestablish a number of existing positions and establish some new positions. The letter dated 20 November 2019 invited feedback on the proposed restructure both in writing, and at a meeting to be held with Mr Peter Madden, the Acting General Manager.

[16] The main change proposed which affected Mr Tupe was that his existing position of Operations Manager, together with the position of the Health and Safety Manager, would be disestablished, and replaced by a new position of General Manager.

[17] Mr Tupe attended a meeting to discuss his feedback on the proposal with the Acting General Manager on 28 November 2019. He was accompanied by Mr Austin, and a representative of the EMA also attended the meeting on behalf of TMOT.

[18] Following the meeting Mr Austin wrote to TMOT on behalf of Mr Tupe stating Mr Tupe's view that the General Manager role was substantially similar to his existing position,

and he should therefore be redeployed to that position. The letter dated 29 November 2019 stated:

...

We notice that the Consultation Document does not mention or suggest there is any potential for redundancy – perhaps this reflects the reality that all of Tunuhia’s duties will remain to be performed. It is axiomatic therefore that Tunuhia’s position is not surplus to requirements. There is no potential for redundancy. ...

We agree with the underlying rationale for change ...

Accordingly we agree with the proposal to remove the position of Chief Executive Officer.

We also say that we agree that the present position of Health and Safety Manager should be discontinued ...

The effect of the removal of CEO should in our view be to simply alter Tunuhia’s line of reporting to be directly to the Board of Trustees through the Chairperson. ...

We note that we have said that in our view the proposed position of general Manager is substantially the same as Tunuhia’s present position even if there are moderate changes.

Tunuhia is confident he can perform the duties of the General Manager. After all, as we have said, the General Managers position proposed includes all of Tunuhia’s present duties. That said Tunuhia would accept a modest level of further training We envisage that appropriate training could be delivered on an on the job basis ...

[19] Mr Madden replied to Mr Tupe on 4 December 2019 advising him of TMOT’s decision to proceed with the proposed restructure and the disestablishment of his role as Operations Manager.

[20] The letter dated 4 December 2019 (the TMOT letter) stated:

... We note that you agreed with the underlying rationale for change and with the removal of the CEO and Health and Safety Manager positions.

... We have considered this feedback and believe that this would not be consistent with the need for a continued focus on Health and Safety at a time when obligations are becoming more strenuous in nature. We are also keen for the GM to have senior management experience that would be applied consistently through the year. ...

... after full feedback of all feedback received ... we have made the decision to proceed with the proposal to restructure. Accordingly this letter serves as formal notification that the Operations Manager position will be disestablished.

[21] Mr Tupe was advised that he would be considered for selection, as would the Health and Safety Manager, whose role was also being disestablished.

[22] During the selection process the applicants for the General Manager position would be scored by the Acting General Manager on a variety of factors relating to the General Manager role. Following this stage, the preliminary scores based on TMOT’s assessment of Mr Tupe

and the Health and Safety Manager were shared with them, and they were offered the opportunity to meet to provide feedback or challenge them.

[23] The TMOT letter concluded by advising Mr Tupe that should he wish to be considered, there would be a selection meeting to be held on 9 December 2019 to discuss the preliminary rating, with the outcome of the selection process being advised on 11 December 2019.

[24] Mr Madden stated in his untested affidavit evidence that Mr Tupe was asked to confirm if he was not interested in applying for the General Manager position by 6 December 2019, and a proposed date for interview was 6 December 2019. This date was confirmed in an email to Mr Austin dated 5 December 2019. The Health and Safety Manager was interviewed on 5 December 2019.

[25] Mr Madden stated that attempts to interview Mr Tupe during the remainder of 2019 were unsuccessful for various reasons, including the alleged unavailability of Mr Austin, challenges to Mr Madden's authority, and to the interview material and scoring system.

[26] Mr Madden sent an email to Mr Tupe on 14 January 2020 providing possible interview dates of 20 or 21 January. Mr Madden stated in his untested affidavit evidence that between 12-19 January he attempted to arrange an interview with Mr Tupe with a final date set for acceptance on 19 January, however neither Mr Tupe nor his representative Mr Austin confirmed their availability. He had subsequently seen Mr Tupe in the street on 20 January 2020 and attempted to flag him down and tried to ask if he would be attending the interview, however Mr Tupe ignored him.

[27] On the basis that he believed Mr Tupe had made it clear to him that he was not prepared to be interviewed because his view was that he should be automatically deployed into the proposed General Manager position, Mr Madden had made the decision to terminate Mr Tupe's employment, advising Mr Tupe of the decision in an email dated 20 January 2020:

You have missed several opportunities since early December 2019 to interview for the new GM position with Te Manawa o Tuhoe (TMOT). You have not responded to my most recent request for an interview today either. Your actions leave me with no alternative but to draw the conclusion you do not want to be consider for the new GM position, and will leave the organisations of your own accord, in accordance with the change Management process approved by the trustees in October 2019.

[28] Mr Tupe in his untested affidavit evidence stated that on 14 January 2020 he had consulted with Mr Austin about the dates offered for interview. On the morning of 20 January he said he was about to reply to Mr Madden to confirm that either an interview on the suggested dates of 20 and 21 January would be suitable when he received the email from Mr Madden dated that day terminating his employment with TMOT on two weeks' notice.

Employment following termination

[29] Mr Tupe stated in his untested affidavit evidence that he has been able to obtain alternative employment with Nation Logging Ltd which is part owned by TMOT and manages TMOT's logging and forest maintenance in addition to other contracts.

Is there a serious question to be tried in relation to the claim of unjustifiable dismissal?

[30] As a matter of principle, Mr Tupe must establish that there is a serious question to be tried in respect of his claim of unjustifiable dismissal and for permanent reinstatement. A serious question was described in *Brooks Homes Ltd v NZ Tax Refunds Ltd* as an arguable case.³

[31] The threshold for a serious question or arguable case as stated in *Brooks Homes* and *Western Bay of Plenty District Council v Jarron McInnes* is that the claim is not frivolous or vexatious. As stated in *Western Bay of Plenty*:

[9] ... However, as *Brooks Homes Ltd* makes clear, an applicant must establish that there is a serious question to be tried, in that the claim is not vexatious or frivolous. The merits of the case (insofar as they can be ascertained at an interim stage) maybe relevant in assessing the balance of convenience and overall interests of justice ...⁴

[32] My findings expressed in this determination are solely for the purposes of resolving Mr Tupe's application for interim reinstatement. At the substantive hearing there will be opportunity to fully test the relevant evidence and disputed questions of fact and law.

[33] Mr Tupe submits he has an arguable case that he was unjustifiably dismissed and that the untested affidavit evidence surpasses the threshold of a *prima facie* case.

[34] The basis of the dismissal arose from a restructure as a result of which Mr Tupe's position was made redundant because that position was to be absorbed into the new role of General Manager. During the process of selection for the General Manager position, Mr Tupe was advised that his employment had been terminated on 20 January 2020.

[35] The letter dated 20 January 2020 confirming the dismissal stated that Mr Madden had reached the conclusion that Mr Tupe did not want to be considered for the General Manager position.

[36] At the time that decision was made, a date for the interview for the General Manager position was still available being 21 January 2020, and Mr Tupe states in his untested affidavit

³ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

⁴ See n2 and n3 above.

evidence that he was about to email Mr Madden to confirm his availability to attend an interview on either 20 or 21 January 2020 when he received the letter dated 20 January terminating his employment.

[37] Good faith is an important component of the employment relationship. Terminating Mr Tupe's employment prior to a date provided as being available for an interview being reached and/or a definite indication that Mr Tupe did not intend to accept that date for interview I find raises an arguable case that TMOT failed to exercise good faith towards Mr Tupe.

[38] As stated in the letter from Mr Austin to TMOT dated 29 November 2019 Mr Tupe believed his existing role was the same or substantially the same as that of the General Manager role and he should be redeployed to that role. Whilst TMOT assumed that Mr Tupe was no longer interested in being considered for the General Manager position I find that this assumption resulted in the termination of employment prior to the issue of Mr Tupe's suitability for the position being determined.

[39] This in turn I find to raise an arguable case that the dismissal was based upon a false assumption.

[40] In those circumstances I find there is a serious issue to be tried in respect to whether or not the dismissal was made pre-emptively and/or on an assumption.

[41] The threshold in respect of whether there is a serious question is relatively low. I find in the circumstances of this case, Mr Tupe has an arguable case for interim reinstatement based upon unjustifiable dismissal.

Is there a serious issue to be tried for permanent reinstatement?

[42] Mr Tupe must not only establish an arguable case for unjustifiable dismissal but must also establish that he would be reinstated if successful in such a claim.

[43] Reinstatement is now the primary remedy and s125 (2) of the Act states the Authority must provide for reinstatement if it is practicable and reasonable.

[44] As stated by the Employment Court in *Angus v Ports of Auckland Limited (No 2)*⁵:

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

⁵ *Angus v Ports of Auckland Limited (No 2)* [2011] NZEmpC 160 at [66].

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.

[45] The onus of proof of practicability rests with the employer.⁶ In this case TMOT submits that Mr Tupe's position was terminated in effect on 4 December 2019 when it was declared redundant. The redundancy followed a restructure which reduced three roles to one on the basis of valid commercial grounds.

[46] TMOT submits that it is impracticable to reinstate Mr Tupe to the role of Operational Manager which has been disestablished and the Health and Safety Manager is fulfilling the newly established role of General Manager in the capacity of Acting General Manager.

[47] The Applicant submits that the Acting General Manager⁷ has resigned. Whether or not this is correct, it appears from the evidence that this is a 'holding' position pending external recruitment.

[48] It appears from the untested affidavit evidence that there were no disciplinary or performance issues with Mr Tupe prior to the restructure, and in his untested affidavit evidence Mr Tupe has stated that he is presently employed by Nation Logging Ltd, a wholly owned company of TMOT in which two Trustees of TMOT serve as company directors.

[49] I accept that reinstatement may be inconvenient for TMOT but that does not necessarily render it impracticable. I find it is both practicable and reasonable for Mr Tupe to be reinstated.

[50] Taking all the submissions into consideration, and on the basis of the untested affidavit evidence as presented to the Authority, I conclude that Mr Tupe has a strongly arguable case that he should be reinstated on an interim basis.

Balance of convenience

[51] As set out in the Employment Court case *X v Y Limited*⁷ this principle requires that the Authority balance the relative inconvenience, in terms of detriment or injury, to TMOT who will have to bear the burden of an order reinstating Mr Tupe until the substantive case is heard, against the inconvenience to Mr Tupe who may have a just case, of having to bear the detriment of unjustifiable action until the case is heard.

[52] It is submitted on behalf of Mr Tupe that the balance of convenience lies with him because:

⁶ *Lewis v Howick College of Board of Trustees* [2010] NZCA 320.
⁷[1992] 1 ERNZ 863, at pg 10.

- a) The financial costs of interim reinstatement to TMOT are in effect neutral in that the cost of employing Mr Tupe will always be borne by TMOT whether directly or indirectly via his current employment with Nation Logging Ltd;
- b) Mr Tupe's dismissal renders null and void his right to claim redeployment which means he has been unjustifiably disadvantaged by the extinguishment of valuable rights. Any right to advance his arguments now will be from a position of disadvantage and with the added burden of first arguing for obtaining reinstatement if he wishes to attain the position of General Manager. Interim reinstatement will restore the rights.
- c) There is a dispute regarding Mr Tupe's right to redeployment which can only be litigated with the added burden of establishing a right of remedy of reinstatement which would not be the case had Mr Tupe not been dismissed.
- d) It is submitted that damages in the form of an award of monies for hurt and humiliation would not be adequate compensation for the lost opportunity or redeployment.
- e) It is submitted that there is no evidence that Mr Tupe could not return to his former position and re-establish harmonious relationships with other staff or colleagues.

[53] TMOT submits that Mr Tupe would have access to remedies including financial compensation.

[54] Having considered all the circumstances and the submissions put forward by the parties, balancing the potential prejudice to Mr Tupe of not reinstating him, against the potential prejudice to TMOT of so doing, I find that the balance favours the interim reinstatement of Mr Tupe.

Overall Justice

[55] The Authority must assess the overall justice of the case from a global perspective.

[56] Whilst TMOT submits that its employment relationship between Mr Tupe has irrevocably broken down due to TMOT having no trust and confidence in him, I find that his employment by Nation Logging Ltd belies this position.

[57] Having taken into consideration all the circumstances, I find that the overall justice of the case subsists in granting Mr Tupe's application for interim reinstatement.

Interim Reinstatement

[58] For the above reasons the Authority exercises its discretion in relation to interim reinstatement by making the orders sought.

[59] I therefore order the interim reinstatement of Mr Tupe as Operations Manager with effect from the next working day after the date of this determination.

Next Steps

[60] The Authority will convene a case management conference to set timetable directions for the investigation of Mr Tupe's substantive claims.

Costs

[61] Costs are reserved for determination following the substantive investigation meeting and its outcome or until this matter otherwise ceases to be before the Authority.

Eleanor Robinson
Member of the Employment Relations Authority