

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 250
3146663

BETWEEN	JOHN WELTEN Applicant
AND	MCKAY LIMITED First Respondent
AND	OJI FIBRE SOLUTIONS (NZ) LIMITED Proposed Second Respondent

Member of Authority:	Marija Urlich
Representatives:	Lou Yukich, advocate for the Applicant Anthony Drake and Rosie Judd, counsel for the First Respondent David France, counsel for the proposed second respondent
Investigation Meeting:	12 May 2022 (by Audio Visual Link)
Submissions received:	At the investigation meeting from Applicant At the investigation meeting from the Respondent
Determination:	15 June 2022

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Welten was employed by McKay as an instrument technician providing back fill cover at Oji Fibre Solutions (NZ) Limited's (Oji) Kinleith Mill site from 4 March 2019 until his dismissal on 17 March 2022.¹ From 11 September 2020 until his dismissal, he was stood down from duties on full pay. McKay's decision to stand Mr Welten down followed concerns raised by Oji about his performance.

¹ Mr Welten is a control systems engineer. The Authority understand the role of instrument technician resulted from negotiation of his employment agreement.

[2] On 21 March 2022 Mr Welten lodged in the Authority a statement of claim for unjustified dismissal, unjustified disadvantage and unpaid wage and leave entitlements. Remedies sought include permanent reinstatement.² He also lodged an application for interim reinstatement along with a supporting affidavit and undertaking as to damages. In addition, his substantive claims include an application to join Oji as a controlling third party.³

[3] By statement in reply and notice of opposition dated 29 April 2022 McKay denies Mr Welten has been unjustifiably dismissed or unjustifiably disadvantaged in his employment or that arrears are owing. It opposes the remedies sought including permanent and interim reinstatement including onto the payroll.

[4] This determination deals only with Mr Welten's application for interim reinstatement which, at the investigation meeting, he clarified is an application to be reinstated to the payroll pending determination of his substantive claim.

The Authority's investigation

[5] Following Mr Welten lodging an application for interim reinstatement on 29 March 2022 the Authority held a case management conference with the parties' representatives to set a timetable for the application. The parties have complied with timetabling directions including attending mediation. By consent the investigation meeting was held by audio visual link.

[6] In determining this matter I have received and considered the affidavit evidence of Mr Welten, Thomas Mahutonga, who is employed as McKay's acting supervisor at Kinleith, Ross Rowe, McKay's Bay of Plenty and Waikato regional manager and Stuart McDonald, McKay's general manager – people and culture. The parties' initiating and responding documents, the documents attached thereto and the parties' submissions have also been considered.

² Mr Welten lodged a related claim in August 2021.

³ For completeness Oji were provided the opportunity to file information in respect of the interim reinstatement application.

[7] Evidential matters in dispute between the parties will not be resolved by this determination because the evidence is untested and in applying the relevant tests the Authority is not required to resolve any disputes.

The relevant law

[8] Section 127 of the Employment Relations Act 2000 (the Act) confers jurisdiction on the Authority to grant interim reinstatement. In considering Mr Welten's application for interim reinstatement the Authority is required to consider the following:⁴

- (i) Does Mr Welten have an arguable case for unjustified dismissal and an arguable case for permanent reinstatement?
- (ii) Where does the balance of convenience lie? This requires looking at the relevant detriment or injury that Mr Welten and McKay will incur as a result of the interim injunction being granted (or not granted)?
- (iii) The Authority is then required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

[9] As the court observed in *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* in determining whether or not to order interim reinstatement, regard must be had to the object of the Employment Relations Act 2000 (the Act) which is to build productive employment relationships through the promotion of good faith:

One of the central features for the Act is its recognition of the importance of the employment relationship, the obligations both parties have to be responsive and communicative, and that issues ought to be dealt with promptly and between the parties if possible – in other words, supporting constructive employment relationships and repairing them where feasible.⁵

[10] It is with this in mind that applications for reinstatement are to be dealt.

⁴ *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [7].

⁵ *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* [2021] NZEmpC 59, at [5].

Does Mr Welten have an arguable case?

Is there an arguable case for unjustified dismissal?

[11] An arguable case means a case with some serious or arguable, but not necessarily certain prospects of success.⁶ The threshold for a serious question or arguable case as stated in *McInnes* is that the claim is not frivolous or vexatious:

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...⁷

[12] Section 103A of the Act sets out the test for assessing whether a dismissal was justifiable. It requires an objective assessment of whether McKay's actions and how it acted were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred. The Authority may take into account other factors it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in Mr Welten being treated unfairly.⁸ The Authority's task is to examine objectively McKay's decision-making process and determine whether what McKay did and how it was done were steps open to a fair and reasonable employer.

[13] McKay accepts Mr Welten may have an arguable case that his dismissal was unjustified.

[14] It appears, albeit on untested evidence, that early on in this employment relationship problem McKay formed a view the concerns raised about Mr Welten's work by Oji were reasonable or at least were required to be actively accommodated. It is not entirely clear to the Authority on the information provided how McKay formed this view for example, what the outcome of its investigation into the substance of the concerns was or how it put the concerns and/or the outcome of any such investigation into those concerns to Mr Welten to comment. Further, it is not clear how Mr Mohutonga's comments in support of Mr Welten have been weighed or Mr Welten's concerns about the impact of his health and safety representative role or his health and safety complaint have been weighed and considered. McKay's concerns about Mr

⁶ *X v Y Ltd v New Zealand Stock Exchange* [1992] 1 ERNZ 863.

⁷ *McInnes* above n 1, at [9].

⁸ Section 103A Employment Relations Act 2000.

Welten's engagement in the proposed practical assessment might most reasonably be viewed against this background.

[15] These issues go to the reasonableness and justifiability of the dismissal decision. The Authority is satisfied Mr Welten has an arguable case to be tried in respect of his claim of unjustifiable dismissal.

Is there an arguable case for permanent reinstatement?

[16] Mr Welten says he is a competent, capable and well qualified instrument technician who wishes ultimately to be reinstated on a permanent basis. He says he has made reasonable attempts to find alternative employment with McKay and does not understand why these attempts have not been successful. He also says given he is near retirement age and the location of his residence that he apprehends there may be limited employment options available to him and that these are factors towards reasonableness of reinstatement. Given reinstatement is a primary remedy his submission is he has a strong case for permanent reinstatement.

[17] The difficulty Mr Welten's claim for permanent reinstatement faces is McKay does not control the Kinleith site and the legislation does not provide the remedy sought on a permanent basis.⁹

[18] To this end McKay submits permanent reinstatement is not only not practicable or reasonable it is impossible because it is not a remedy which the Authority can award. Further, it says it has tried to find other work for Mr Welten without success, it has only one maintenance contract which is with Oji which are where Mr Welten's skills lie and his short employment with McKay and long period of suspension weigh against successful reintegration to the workplace.

[19] While Mr Welten may not be able to be reinstated on a permanent basis to the Kinleith Mill site it may be reinstatement is possible in light of the specific terms of the parties' employment agreement and the scope of McKay's business beyond the Kinleith site.¹⁰ I am satisfied Mr Welten has established there is a question to be tried in regard to his claim for reinstatement.¹¹

⁹ Section 123A(2) Employment Relations Act 2000.

¹⁰ Clause 5 of the employment agreement provides Mr Welten's place of work is McKay's Tokoroa workshop and any other reasonable location as directed.

¹¹ *Genysis Telecommunications Laboratories Limited v Brendon Scott* [2019] NZEmpc 113.

Balance of convenience

[20] This ground for consideration involves the relative detriment or injury the parties will incur if interim reinstatement to the payroll is granted or not. An assessment of what might happen if the interim position is reversed in any substantive determination including consideration of whether damages can adequately compensate any harm if reinstatement is not ordered is also to be made.

[21] McKay submits damages would be an adequate remedy for Mr Welten. It says given he has been suspended on full pay for some time (more than 18 months) and was on notice of the possibility his employment could end by way of dismissal, he has had a reasonable opportunity to arrange his affairs. It also points to the lack of evidence of the impact of lost income. McKay submits its attempts to resolve the employment relationship problem with Mr Welten have been considerable and significantly resourced and that Mr Welten has not shown the same constructive approach given his response to the practical competency assessment McKay proposed. It submits in these circumstances to reinstate him to the pay roll would be unreasonable.

[22] Mr Welten submits that the impact of his dismissal on his financial circumstances and that of his family favour reinstatement to the payroll. His affidavit evidence is his McKay salary was a major contributor to the household income and without it the household may have difficulty meeting its outgoings. The evidence of the financial impact of losing Mr Welten's income on his household is limited and there is little evidence of steps taken or attempted to mitigate any deficit particularly in light of the income Mr Welten received during his suspension. The financial loss weakly favours Mr Welten.

[23] Mr Welten is an experienced instrument technician who is close to retirement age and wishes to continue to work for McKay at the Kinleith site. He says his employment opportunities are limited due to his age and where he lives. Careful consideration has been given to whether the specialised nature of Mr Welten's role as an instrument technician is a relevant factor in the assessment of balance of convenience. Only very limited weight can be given to this factor given Mr Welten does not seek reinstatement to work in the interim and there is a statutory bar to the Authority ordering permanent reinstatement to a workplace controlled by a third party.

[24] If Mr Welten is successful in his substantive claim, the merits of which I have assessed as in his favour, and he is able to establish he has taken reasonable steps to mitigate any lost wages, then any entitlement to an award of lost wages may be for a significant portion of the period he claims if not the whole period. Reinstatement to the pay roll is unlikely to be able to address his wish to be reinstated to work at the Kinleith Mill and the financial impact may well be met by damages.

[25] Considering all the relevant factors the balance of convenience favours McKay. Mr Welten is assessed as able to bear the burden of not being reinstated to the payroll in the period until his substantive claim is heard and determined.¹²

Overall justice

[26] Standing back from the detail of the claim where on balance does the overall justice lie? This has been described by the Court of Appeal as:

The overall justice assessment is essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and balance of convenience.¹³

[27] Mr Welten has established he has an arguable case his dismissal was unjustified and that there is a question to be tried for permanent reinstatement. It is accepted the loss of income has had a negative impact on Mr Welten's household.

[28] The circumstances of Mr Welten's dismissal have unusual features including the root cause of his removal from duties being at the initiation of a third party and the long period of his suspension which has created a bar to his ability to exercise his health and safety representative role. The evidence suggests these features have had a profoundly negative impact on Mr Welten which may in part be attributable to the lack of control he has had in the situation - despite McKay's acknowledged attempts to resolve this employment relationship problem the length of the suspension was in its hands as were the communications with Oji.

[29] While reinstatement might have gone some way to ameliorate the negative impact of dismissal on Mr Welten at least in the interim that is not possible and indeed

¹² The Authority is holding dates in late September 2022 for the substantive investigation.

¹³ *NZ Tax Refunds Limited v Brooks Homes Limited* [2013] NZCA 90 at [47].

is not sought and this is not a situation where reinstatement to the pay roll is on offer.¹⁴ The assessment of overall justice does not favour Ms Welten's reinstatement to the payroll.

Outcome

[30] Mr Welten's application for interim reinstatement to the McKay payroll is unsuccessful.

Costs

[31] Costs are reserved and will be dealt after determination of the substantive investigation.

Marija Urlich
Member of the Employment Relations Authority

¹⁴ *Christieson v Fonterra* [2021] NZEmpC 142 at [65].