

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 114
5499467

BETWEEN WARREN NEWETT BANKS
Applicant

AND HOCKEY MANAWATU
INCORPORATED
Respondent

Member of Authority: Trish MacKinnon

Representatives: Barbara Buckett, Counsel for Applicant
Phillip Drummond and Ruth Oakley, Counsel for
Respondent

Investigation Meeting: 31 October 2014 at Palmerston North

Submissions Received: Oral and written from the Applicant and the Respondent
at the investigation meeting

Determination: 10 November 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Banks was employed as the Operations Manager with Hockey Manawatu Incorporated from 2008 until the termination of his employment for medical incapacity on 28 September 2014. Mr Banks has filed an application for interim reinstatement to his former position pending determination of the substantive personal grievances he has also filed.

[2] Hockey Manawatu Incorporated (HM) opposes interim reinstatement and the substantive claims relating to the personal grievances Mr Banks has raised.

[3] Mr Banks has given an undertaking, as required by s.127 of the Employment Relations Act 2000 (the Act) to abide by any order that the Authority may make in

respect of damages sustained by HM if interim reinstatement is granted and he is ultimately unsuccessful with his claims.

[4] The parties attended mediation at my direction but were unable to resolve the matter between themselves. An investigation meeting was convened under urgency to deal exclusively with the issue of interim reinstatement. Evidence was heard mainly by way of affidavit but also, to a limited extent, orally. Written and oral submissions were made by counsel for the parties. A further investigation meeting to hear the substantive grievances and Mr Banks' application for permanent reinstatement has been scheduled for 25 February 2015.

The law

[5] Section 127(4) of the Act requires the Authority, when determining whether to make an order for interim reinstatement, to apply the law relating to interim injunctions having regard to the object of the Act. Of particular relevance is s.3(a) which states the object of the Act is:

... to build employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship –

- (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour;

[6] The Authority must also apply the following tests relevant to an application for interim reinstatement, as reinforced by the Employment Court in *McKean v. Ports of Auckland Ltd*¹:

- *Whether the plaintiff has an arguable case that he was dismissed unjustifiably as defined by s.103A of the Act;*
- *Whether the plaintiff has an arguable case for reinstatement in employment under s.125 of the Act if he is found to have been dismissed unjustifiably;*
- *Where the balance of convenience lies between the parties in the period until the Court's judgment is given on those issues; and*
- *The overall justice of the case.*

¹ [2011] NZEmpC 128 at [4]

Relevant background facts

[7] HM is a community based incorporated society with few employees. It relies on subscriptions, sponsorship and community grants for its income. Its Board comprises volunteers. Mr Banks was the most senior employee with staff management responsibilities for two other part-time employees amongst his other duties.

[8] Tensions arose between the Board and Mr Banks during 2013 resulting in a meeting between Mr Banks, the Board Chairman and another Board member in December 2013 in which some issues in the employment relationship were discussed. Mr Banks had concerns over the Board's decision to engage a consultant to carry out a review of the organisation's personnel processes. The review report, which Mr Banks did not receive until mid-July 2014, canvassed governance and operational matters identifying areas for improvement.

[9] On 30 May 2014 Mr Banks notified the Chair of HM's Board of a number of organisational and staff issues he had identified which in his view required resolution. Shortly thereafter the Board Chairman, David Annear, wrote to Mr Banks inviting him to attend a mediation to be organised through the Ministry of Business, Innovation and Employment. The reason was the Board's view that both parties to the employment relationship were experiencing difficulties "*..and mediation is a safe space for everyone to explore the issues and possible options for resolution*".

[10] Mr Banks responded through a solicitor on 18 June 2014 that he was considering the request but wished to know what "*difficulties*" the Board wished to discuss. He requested documentation relating to the issues for discussion, stating that he was "*unaware of any specific concerns*". He was unwilling to commit to mediation until he had a greater understanding of his employer's position.

[11] The Board retracted the invitation to mediation, by letter dated 30 June 2014, advising it would be inappropriate in circumstances where Mr Banks could not recall conversations held with him. Mr Annear informed Mr Banks it intended to engage a Human Resources (HR) Consultant to work with the Board and Mr Banks "*...to develop clear KPI's and put in place a system whereby there is continuous feedback on those measures*".

[12] Through his solicitor Mr Banks expressed disappointment that the invitation to mediation had been withdrawn and stated his opposition to the Board's intention regarding the development of KPIs and a continuous feedback system. This was described as a unilateral variation to his terms and conditions of employment. The letter from Mr Banks' solicitor put the Board on notice that the "*instruction he engage with a third party to discuss any variation to his employment is neither lawful nor reasonable*". It notified a personal grievance for unjustified disadvantage and requested the Board's attendance at mediation.

[13] The Board Chairman's response of 16 July 2014 included:

- a. the Board's anticipation of "*..resolving the current issues with you in good faith*";
- b. the Board's agreement to attend mediation with Mr Banks;
- c. an explanation of the reason for engaging an HR Consultant;
- d. a denial of any attempt to vary unilaterally Mr Banks' employment agreement;
- e. acknowledgement of Mr Banks' raising of a personal grievance and advice of the Board's rejection of the validity of that grievance;
- f. the Board's view that Mr Banks was taking an "*unnecessarily aggressive approach*"; and
- g. a statement of the view of the voluntary Board, which said it professed no HR expertise, that it was trying to find a fair way to work through the issues (which were specified in the letter).

[14] On 13 August 2014 Mr Banks obtained a medical certificate stating he was "*medically unfit for work*". He would be on "*indefinite sick leave on medical grounds. To be reviewed according to progress*".

[15] The parties attended mediation on 28 August 2014, while Mr Banks was on sick leave, without resolution of the matters at issue between them.

[16] On 1 September 2014 the Board's employment representative requested the return of the work vehicle and work mobile phone in Mr Banks' possession, explaining HM's need for those items while he was not at work. The communication noted that there was to be no negative inference taken from the return of those items, which would be available to Mr Banks when he was medically cleared to return to work.

[17] The request was at first met with resistance but was complied with some days later "*under protest*" and on notification that this matter was now the subject of a further personal grievance.

[18] On 14 September 2014 the Board wrote to Mr Banks noting he had been absent from work for a month and seeking an update of his medical status and a prognosis regarding his return to work. The update could be provided by way of a further medical certificate from Mr Banks' medical practitioner or following examination by a registered medical practitioner of HM's choice, and at HM's expense.

[19] Mr Banks' representative rejected the Board's entitlement "*to that which it demands*", stating that Mr Banks was "*not absent for reasons of a medical condition, but because the unhealthy workplace is having an impact on his well-being*". Nonetheless, Mr Banks provided HM with an updated medical certificate from his own medical practitioner on 19 September 2014. The following excerpt is from the certificate:

"...I regret to say that (since the doctor's last examination of Mr Banks on 13 August 2014) the situation affecting his health is worse rather than improved and an extension of "unfit to work" certificate is necessary.

I conclude that for his own health and for the good of the association, he should remain off work. It is clear he could not concentrate or communicate well with others on the board meetings while there is such a conflict of ideas. This has built up over the last year and resulted in September 2013 in recurrent severe headaches needing a neurology specialist referral. His life sleep and general health are still disrupted by stress and increasingly a feeling of anger at the poor progress to achieving any resolution of matters.

I therefore advise that Warren is to remain off work for another month with review of situation in mid-October".

[20] On 22 September 2014 the Board wrote to Mr Banks requesting a meeting on 26 September for the purpose of investigating, and receiving submissions from Mr Banks, on two issues. The first of these was the advice given in correspondence by Mr Banks' representative that her client was not absent for reasons of a medical condition. Mr Banks had produced a medical certificate dated 13 August stating he was medically unfit for work. On the basis of that certificate HM had been paying him sick leave from 14 August to 11 September when his entitlement to paid leave expired and he was put on unpaid sick leave.

[21] The Board wished to investigate whether Mr Banks had breached his obligation to deal with the employer in good faith by producing a medical certificate advising he was medically unfit for work and accepting payment for sick leave "*on the basis of medical rationale that was untrue*". He was advised that the result of this investigation "*into the potential issue of alleged dishonesty*" could result in the summary termination of his employment.

[22] The second issue the Board wished to investigate was the inability of HM to hold Mr Banks' role open indefinitely. The letter noted Mr Banks' senior status within the organisation and the fact that in his absence volunteers had stepped up and some paid staff were taking on more responsibilities. It noted this situation could not continue indefinitely and that HM was left in a precarious situation by Mr Banks' continued absence with, in particular a national test and two international tests being imminent.

[23] The Board's letter also noted that the most recent medical certificate advised the deterioration in Mr Banks' condition since 13 August. As he had not been at work during the intervening period, the Board's view was that his condition could not be caused by workplace matters. If stressors external to his employment were the cause of his worsened condition, even if he were to return to work, the situation may not improve. The letter advised Mr Banks of the possibility that his employment could be terminated under the *Termination on Medical Grounds* provision of his individual employment agreement.

[24] Mr Banks' representative notified HM that it would be inappropriate for him to attend the meeting of 26 September 2014 as he was on sick leave. A further personal grievance, arising from the request for his attendance, was also notified. A letter setting out Mr Banks' situation and objections to the meeting was provided to HM on 24 September 2014.

[25] Mr Banks was notified by letter dated 28 September 2014 of the outcome of the Board's deliberations on the two issues it had raised. In relation to the first issue, the Board considered the medical certificate of 13 August 2014 was likely to be genuine, despite Mr Banks' representative's assertion that he was not absent from work because of a medical condition. That aspect was now at an end.

[26] In relation to the second matter the Board noted it had no information regarding the prospect of Mr Banks returning to work. It had considered a number of factors including the description of the work environment as dysfunctional, unhealthy and toxic in submissions on behalf of Mr Banks. The Board noted that his position of Operations Manager was a key one within the organisation and advised its decision to dismiss him for medical incapacity in accordance with Clause 13.4 of his employment agreement.

Issue

[27] The sole issue for determination is whether Mr Banks should be reinstated on an interim basis to his position with Hockey Manawatu Inc. pending the investigation into his substantive personal grievances.

Does Mr Banks have an arguable case that he was unjustifiably dismissed?

[28] HM says it dismissed Mr Banks for medical incapacity as provided for in his individual employment agreement. It says the position of Operations Manager is a critical one within its organisation and, with no information from Mr Banks regarding his ability to return to work in the near or distant future, it was justified in invoking the contractual medical incapacity provisions.

[29] The relevant provisions are contained at clause 13.4 of Mr Banks' individual employment agreement:

13.4 Termination on Medical Grounds

In the event the employee has been absent from work for 4 weeks which should represent an extended break from employment because of illness, the Employer shall be entitled to require the Employee to undergo a medical examination by a registered medical practitioner nominated by the Employer, at the Employer's cost. In assessing the Employee's fitness for work, the Employer shall take into account any medical report provided by the Employee within a reasonable time-frame. If, in the reasonable opinion of the Employer, the Employee is incapable of the proper performance of their duties by reason of illness, the Employer may terminate this agreement by the provision of at least 4 weeks notice.

[30] Mr Banks rejects the employer's right to invoke that clause and submits the employer followed the wrong procedure. It did not require him to obtain a medical certificate from a practitioner of its nomination as required before the clause can be

invoked. That meant it did not have the report of that second medical practitioner in front of it before it decided to dismiss him.

[31] I do not find that to be a compelling argument. The clause does not provide that the employer must require the employee to undergo a medical examination by a registered medical practitioner of its nomination: it provides that the employer is "*entitled*" to do so. The employer in this instance gave Mr Banks the choice of undergoing a medical examination by a registered medical practitioner of its choosing or by his own medical practitioner. I do not find this to be inconsistent with the contractual provisions.

[32] Mr Banks also submits the employer acknowledged it lacked information about his prospects of returning to work when it made the decision to dismiss him, and it was wrong to proceed to dismissal without attempting to obtain this information.

[33] HM says that its attempts to obtain that information were rebuffed by Mr Banks' legal representative, Ms Buckett, on 18 September when she denied the employer had an entitlement to a medical update and prognosis for Mr Banks' return to work. Mr Banks' failure to attend the meeting of 26 September 2014 denied HM the opportunity to question him on that matter. Ms Buckett's letter to the employer of 24 September 2014, which it treated as written submissions for Mr Banks, referred to the "*dysfunctional, unhealthy and toxic*" work environment, and gave no indication when Mr Banks would be returning to the workplace.

[34] HM says it took Ms Buckett's letter of 24 September into account before deciding both matters it had raised with Mr Banks. It did not seek further information from Mr Banks regarding an indication of when he might be ready to return to work as it had already requested that information and he had failed to address it. The latest medical information before the Board was that Mr Banks' condition had worsened after four weeks absence on sick leave and that he should remain on sick leave with a further review in a month's time.

[35] Mr Banks also raised an issue over the Board's decision making and whether the decision-maker had the appropriate delegation carry out the dismissal. This is more an issue for the substantive investigation meeting and, while some evidence has been received, it is not a matter on which I am able to make a finding at this time.

[36] The question of whether a dismissal is justifiable is to be objectively determined by applying the test set out in s.103A(2) of the Employment Relations Act 2000 (the Act) which 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....occurred.*" The Act sets out a number of procedural steps to be considered by the Authority in applying the test. In this instance it is the sufficiency of the employer's investigation into the prognosis for his return to work that is particularly questioned by Mr Banks.

[37] Referring to medical incapacity former Chief Judge Goddard said in *Innes-Smith v Wood*²

"A dismissal because of continued incapacity is not a dismissal for misconduct and it is therefore not a matter of putting suspicions or allegations to an employee and affording an opportunity for a response. Nor is it an inquiry, as in a redundancy situation, into what the employee actually does and into whether there are other openings in the organisation that the employee could fill. In the case of incapacity, the inquiry is into the nature and likely duration of the incapacity, its nature being relevant in the sense that alternatives to a return to full duties can also be explored. It is only when the employer is in possession of the full facts, including the medical situation, that a sensible decision can be made that is fair to both employer and employee."

[38] The question of the sufficiency of HM's investigation is one better suited for determination in the substantive investigation meeting. For the present purposes I find it is at least arguable that HM acted prematurely in dismissing Mr Banks on the basis of medical incapacity when it did not have a prognosis for his return to work.

Does Mr Banks have an arguable case for reinstatement in the event he is found to have been unjustifiably dismissed?

[39] Reinstatement is no longer the primary remedy for a personal grievance for unjustifiable dismissal, but it remains a discretionary remedy that is available where it is found to be practicable and reasonable.³ Judge Inglis, citing *Madar v P & O Services (NZ) Ltd*⁴, restated in *McKean* that an assessment of the prospect of ultimate reinstatement was a proper and necessary consideration on an application for interim reinstatement.⁵

² [1998] 3 ERNZ 1298 at 1304.

³ Section 125 of the Act.

⁴ [1999] 2 ERNZ CA 174 at 181.

⁵ n1 at paragraph 41.

[40] Counsel for Mr Banks argues that it is both practicable and reasonable to reinstate him. Mr Banks had six years of experience in HM's top role which currently remains open. He was "*best suited to understand and implement the changes*" the organisation was seeking. The termination of his employment had been for medical incapacity, and not for reasons relating to his performance or conduct. He was an integral part of NZ Hockey, not just Hockey Manawatu Inc., and his reinstatement would be beneficial to HM. Ms Buckett submits that "*supporting guidelines*" from the Authority would assist with Mr Banks' reinstatement. Counsel also notes that the issue here is about reinstatement and not about a return to work.

[41] Mr Banks himself said he was well and rested and refreshed following his period of sick leave. He did not provide medical evidence before, or at, the investigation meeting. However, on 4 November 2014 he provided the Authority with a medical certificate, which he obtained from his general practitioner on 3 November 2014. The certificate notes that Mr Banks' "*stress induced symptoms have mostly subsided*" and refers to mechanisms he has learned to "*enable him to cope with usual pressures of his job*".

[42] The post-investigation meeting evidence is not consistent with the two affidavits supplied to the Authority by Mr Banks before the 31 October 2014 meeting. In the second of those affidavits, signed eight days before the investigation meeting, he refers to his health issues and the severe levels of the stress and anxiety he has suffered. In that affidavit Mr Banks notes that the first of his medical certificates had given a clear message from his medical practitioner that if the matters that were of concern to him at work were resolved then he could return to work, but that until that time he should remain off work for the sake of his health.

[43] Mr Banks said "*(t)he option open to HM was to resolve the outstanding issues and I could return to work*". Later in the same affidavit Mr Banks says "*The position still remains the same. Resolution of the stressors which make my workplace unsafe remains the key to my return.*" Towards the end of the affidavit he refers to the breakdown, which I assume he means between himself and the Board of HM, as not being irretrievable. He views the origin of the breakdown as "*the result of fundamental misunderstandings and confusion by some Board members of the demarcation between governance and administration (operations), rather than a genuine employment relationship issue.*"

[44] There is some tension between the various statements made by Mr Banks and his counsel and his request for reinstatement. Ms Buckett suggests this is not a medical situation but an employment relationship problem. Mr Banks says it is not a genuine employment relationship matter but one resulting from the Boards' confusion and misunderstanding of its role. The implication of Mr Banks' affidavit referred to above is that any work problems are of his employer's making and it is up to his employer, not himself, to resolve the issues in order that he might safely return to work.

[45] If the relationship between the parties were able to be restored it would require significant input from both Mr Banks and the Board of HM. I am not confident of Mr Banks' willingness to engage with his employer to resolve the issues between them. His evidence, both affidavit and oral, indicates that his relationship with the Board, particularly with the two members with whom he predominately deals, is difficult and unlikely to improve in the foreseeable future.

[46] Mr Banks' attitude to the Board and his reference to members "*coming and going*", in contrast to the Operations Manager who was a constant presence in HM, appeared quite negative. While he may have accurately reflected their status as members who are elected for a finite period in accordance with HM's constitution, he undervalued the importance of the Board to which he would again be required to report, if reinstated. The relationship difficulties with the Board must be a significant factor in assessing the practicability and reasonableness of reinstatement under s. 125.

[47] On the basis of the information currently before me I find Mr Banks does not have a realistic prospect of ultimate reinstatement if he is eventually found to have been unjustifiably dismissed.

Where does the balance of convenience lie between now and the determination of Mr Banks' grievances?

[48] A consideration of this test entails assessing the detriment that may occur to each of the parties and determining in whose favour the balance of convenience lies. Included in this test is an assessment of the alternative remedies available to Mr Banks if he is not reinstated but is ultimately successful in his claims.

[49] Mr Banks submitted the effect on him would be greater if he were not to be reinstated on an interim basis, than the effect on HM if he were to be so reinstated.

As well as suffering a lack of income over the Christmas period, he says his connection with the sport and the various hockey organisations with which he had a liaison would suffer. He sees his reinstatement as beneficial to his employer because of his relationships within the wider hockey community. He was described by his representative as being HM's best resource.

[50] Mr Banks said he did not wish to be penalised by what he described as failures by his employer to engage with him on some work matters. He also submitted his "*advanced age*" would militate against his ability to obtain alternative work in a regional town like Palmerston North. Compensation would not be an adequate remedy in his view.

[51] HM's differs in its view of compensation which, it submits, will provide an adequate remedy if his grievances are upheld in the substantive investigation. It notes Mr Banks has not provided any evidence relating to his financial situation but that he has provided the required undertaking for damages. That implies he would be in a position to repay the salary he would receive for up to four months in the event of successfully obtaining interim reinstatement but failing in his bid for permanent reinstatement in February 2015. on him than it would be on HM

[52] In HM's view the dysfunctional relationship between Mr Banks and the Board makes interim reinstatement neither practicable nor reasonable. Nor was it in the parties' best interests for reinstatement to occur in terms of their well-being and the fulfilment of obligations to stakeholders. The organisation needs stability.

[53] I am not persuaded by Mr Banks that the balance of convenience favours him. This is because I have already found, for the reasons given above, that he does not have a realistic prospect for reinstatement under s.125. If, when the evidence is tested in the substantive investigation meeting, that view proves incorrect, there are adequate financial remedies available to him.

[54] For these reasons I find the balance of convenience does not favour Mr Banks' interim reinstatement.

Overall justice of the case?

[55] Having considered the other tests for interim reinstatement, I am required to stand back and consider where the overall justice lies until such time as the

substantive investigation of the matter takes place. This includes reflecting on the strengths of the respective parties' cases, bearing in mind that there has not yet been the opportunity for thorough testing of the evidence.

[56] I have found Mr Banks to have an arguable case to have been unjustifiably dismissed. However, I have also found he does not have a realistic prospect of reinstatement in the event his personal grievance for unjustifiable dismissal succeeds. That conclusion is based on a number of factors that are discussed above. I have also found the balance of convenience does not favour his reinstatement on an interim basis.

[57] I am mindful that Mr Banks has described the work environment, and its effect on him, in very negative terms and has put the major onus for improving that environment on HM. If that improvement did not occur it seems likely that Mr Banks would again absent himself from the workplace which would prove unsatisfactory to his employer and impose an unfair burden upon a small, largely voluntary organisation.

[58] I find a consideration of the overall justice of the case favours Hockey Manawatu Inc. and I accordingly decline Mr Banks' application to be reinstated pending the substantive investigation of the grievances he has raised.

Costs

[59] The issue of costs is reserved.

Trish MacKinnon
Member of the Employment Relations Authority