

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 197
3103572

BETWEEN

DARREN BARRY

Applicant

A N D

KATHMANDU LIMITED

Respondent

Member of Authority: Peter van Keulen

Representatives: Andrew Marsh, counsel for the Applicant
Peter Macdonald, advocate for the Respondent

Investigation Meeting: 13 May 2020

Submissions Received: 12 and 13 May 2020 from the Applicant
12 and 13 May 2020 from the Respondent

Date of Determination: 14 May 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Kathmandu Limited is a subsidiary of Kathmandu Holdings Limited a publically listed company in New Zealand. Kathmandu operates an international chain of retail and online stores selling travel and outdoor clothing and equipment. This includes 165 retail stores in New Zealand and Australia.

[2] In March and April 2020 the imposition of the Covid-19 Alert Level 4 restrictions in New Zealand and similar restrictions imposed internationally in response to the Covid-19 pandemic, meant Kathmandu had to close its retail stores and online sales reduced significantly.

[3] Kathmandu took immediate steps to respond to the unprecedented loss of revenue (both actual and predicted) including accessing government assistance, raising additional capital from its shareholders and restructuring.

[4] The restructuring Kathmandu undertook was designed to reduce outgoings and save costs. It was also designed to provide a better structure for Kathmandu to respond to the changed economic environment during the differing periods of Covid-19 Alert Level restrictions in New Zealand and periods of restrictions internationally, and to provide a better structure for Kathmandu to operate in the significantly different operating environment likely to emerge when the restrictions are lifted.

[5] Kathmandu's aim with the restructuring was to protect jobs of employees across New Zealand and Australia. However, restructuring still meant there were job losses as roles were disestablished, including General Management and senior roles. One senior employee who lost his job as a result of the restructure was Darren Barry who was employed by Kathmandu Limited as Group Design Manager, which he had held since May 2014.

[6] Mr Barry says his dismissal was unjustified as Kathmandu did not consult properly with him over the proposed restructuring including any redeployment opportunities. Mr Barry says it was also unjustified because Kathmandu did not redeploy him to one of two available roles in the new structure, Head of Apparel and Senior Womenswear Designer (the Roles), which he says he has the skills and experience to do. Mr Barry's claim is that Kathmandu was required to offer him one of the Roles.

[7] Mr Barry lodged a statement of problem in the Authority claiming unjustified dismissal. Mr Barry seeks an order that Kathmandu offer him redeployment in one of the Roles and compensation for the unjustified dismissal.

[8] Mr Barry also seeks an urgent interim injunction preventing Kathmandu from offering either of the Roles or appointing anyone to either of the Roles, pending my investigation and determination of his unjustified dismissal claim.

[9] Kathmandu denies that it unjustifiably dismissed Mr Barry and it opposes the orders sought.

[10] In a case management conference on 8 May 2020 I granted urgency in respect of the application for an interim injunction. I then held an investigation meeting on 13 May 2020 to hear submissions from each party on the application.

[11] In investigating the application I did not hear any oral evidence. The evidence I have considered was presented through unsworn affidavits from Mr Barry and Mason Tolerton of Kathmandu, both of whom affirmed their evidence by telephone on 13 May 2020.¹

[12] As permitted by s174E of the Employment Relations Act 2000 (the Act), my determination has not recorded all of the evidence and submissions given but has stated relevant findings of fact and law that I am able to make at this interim stage so that I can express a conclusion on whether the interim order sought should be granted or declined.

Mr Barry's claim

[13] The employment relationship problem is substantively a personal grievance of unjustified dismissal. It follows that if Mr Barry is successful then he may be entitled to any of the remedies provided in s 123 of the Act, which includes under s 123(1)(a) that I may reinstate Mr Barry to his former position or a position no less advantageous to him. It is worth noting in the context of this claim I cannot order an injunction as a remedy for a personal grievance² nor can I order compliance under s 137 of the Act as this relates to preventing further breaches of obligations under the Act.

[14] Whilst, Mr Barry's statement of problem does not refer to reinstatement the order sought is effectively reinstatement and, as set out above, this is the only remedy I can grant if

¹ In line with the Authority's arrangements for investigating claims during alert Covid-19 Alert Level 3, as set out in the Authority's Covid-19 update of 21 April 2020.

² See s 162 of the Act providing the Authority's jurisdiction in relation to injunctions, but restricting that to matters related to an employment agreement, and see, *J P Morgan Chase Bank NA v Lewis* [2015] NZCA 255 at [108] and *AFFCO New Zealand Limited v New Zealand Meat Workers & Related Trades Union Inc* [2016] NZEmpC 154 at [55].

Mr Barry is successful with his unjustified dismissal grievance that would facilitate his placement into one of the Roles. When I raised this with Mr Barry's counsel he submitted that the Authority could treat Mr Barry's claim as seeking reinstatement, but that it should be reinstatement to one of the Roles, being reinstatement to positions no less advantageous to Mr Barry.

[15] So to clarify, I will treat Mr Barry's claim for orders that he be offered one of the Roles as a claim for reinstatement to one of the Roles, being roles no less disadvantageous to him.

[16] Turning next to the order that is sought in the interim application that I am determining, this is an injunction prohibiting Kathmandu from offering or filling either of the Roles. This is to protect Mr Barry's potential remedy of reinstatement to one of the Roles, pending resolution of his personal grievance but it is not an application for interim reinstatement pursuant to s 127 of the Act.

[17] The Authority has jurisdiction to grant interim injunctions pursuant to s162 of the Act in relation to protecting employee's rights under their employment agreement³, in this case the right to be properly consulted over and potentially redeployed to an alternative role.

The law

[18] The law relating to interim applications was usefully summarised by the Employment Court in *Western Bay of Plenty District Council v Jarron McInnes*.⁴ The issues to be determined at this interim stage are:

- (a) Is there a serious question to be tried, that Kathmandu has unjustifiably dismissed Mr Barry and that I should order Kathmandu to offer him one of the Roles, i.e. reinstate him to one of the Roles; and
- (b) Where does the balance of convenience lie pending a substantive investigation and a final determination of Mr Barry's claim; and

³ See, *J P Morgan Chase Bank NA v Lewis* [2015] NZCA 255 at [108] and *AFFCO New Zealand Limited v New Zealand Meat Workers & Related Trades Union Inc* [2016] NZEmpC 154 at [55].

⁴ *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36 referring to the Court of Appeal in *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

- (c) Where does the overall justice of this case lie from now until the completion of the substantive investigation and issuing of a final determination?

A serious question to be tried

[19] Based on *Western Bay of Plenty District Council and NZ Tax Refunds v Brooks Homes Limited*,⁵ the threshold for a serious question is that the claim is not frivolous or vexatious; analysing this is not an exercise of discretion rather it must be based on a judicial assessment of the evidence, albeit untested, and the submissions advanced.

[20] The serious question to be tried issue covers two aspects, that there is a serious question to be tried that:

- (a) Mr Barry was unjustifiably dismissed;
- (b) As a consequence of any unjustified dismissal I should reinstate Mr Barry to one of the Roles.

Serious question to be tried regarding unjustified dismissal

[21] Mr Barry has been dismissed so in terms of the unjustified dismissal claim the onus shifts to Kathmandu to establish that Mr Barry's dismissal was justified in line with s 103A of the Act. That justification in a restructuring and redundancy situation was considered by the Court of Appeal in *Grace Team Accounting v Brake*.⁶ The Court said at [85]:

If an employer can show the redundancy is genuine and that the notice and consultation requirements of s.4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s.103A test.

[22] So, my first consideration is whether the redundancy is genuine, which involves considering the underlying business reason for the dismissal. Mr Barry does not advance his claim on the basis that there was not an underlying business reason for the restructuring and given the commercial situation Kathmandu was faced with as described in the opening paragraphs of this determination, that is entirely appropriate.

⁵ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

⁶ *Grace Team Accounting Ltd v. Brake* [2014] NZCA 541.

[23] The next aspect I must consider for justification as set out in *Grace Team Accounting*, is whether the process by which the consultation over the proposed redundancy occurred was a fair one. And, in this regard, the requirements of s 4 of the Act and s 103A of the Act are the starting point for that.

[24] In *Stormont v Peddle Thorp Aitken Limited*⁷ the Employment Court summarised the consultation requirements as follows:

[54] The key requirements in relation to consultation can be summarised as follows. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change and even start anew.

[25] Mr Barry says the process of consultation did not meet the standards set out in the case law.

[26] The consultation that Kathmandu undertook as part of the restructuring was short and carried out quickly:

- (a) In a letter of 3 April 2020 Mr Barry was advised of the proposed restructure and invited to a meeting to discuss it.
- (b) Mr Barry attended the consultation meeting, by Zoom, on 6 April 2020.
- (c) After the consultation meeting Kathmandu sent Mr Barry a second letter of 6 March 2020 providing further information and confirming the proposed structure. In the 6 March letter Mr Barry was invited to provide any feedback by 7 April 2020.
- (d) Mr Barry responded in an email on 6 March 2020 and in that email he asked to be considered for both Roles.
- (e) Kathmandu responded to Mr Barry, by letter on 8 April 2020, confirming that the restructure would proceed, that Mr Barry's role would be disestablished

⁷ *Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71.

and he would be made redundant. In the 8 April letter Kathmandu simply referred to having reviewed alternative positions or redeployment opportunities and finding nothing suitable for Mr Barry.

- (f) After this consultation there was a further exchange of correspondence around redeployment in which Kathmandu set out in more detail its rationale for deciding not to appoint Mr Barry to either Role.

[27] It is clear to me there is a serious question to be tried regarding possible unjustified dismissal based on this process, particularly as that pertains to the adequacy of information provided, the opportunity for Mr Barry to respond and whether Kathmandu consulted properly and sufficiently over redeployment.

Serious question to be tried regarding orders sought

[28] Counsel says Mr Barry has a right to be redeployed because he has the skills and experience to carry out the Roles. Counsel relies on cl 19.2.2 of Mr Barry's employment agreement and case law.⁸

[29] Clause 19.2.2 of Mr Barry's employment agreement provides:

In the event the Employer considers that the Employee's position could be effected by redundancy or could be declared redundant, the Employer will, except in exceptional circumstances, consult with the Employee regarding the possibility of redundancy and, before a decision to proceed with the redundancy is made, whether there are alternatives to dismissal (such as redeployment to another role). In the course of this consultation the Employer undertakes to provide the Employee with sufficient and relevant information to enable the Employee to understand and engage in meaningful consultation and the Employer further undertakes to consider the views of the Employee with an open mind before making a decision as to whether or not to declare the Employee's position redundant.

[30] I have considered carefully counsel's submission on the interpretation of this clause and am not persuaded that this clause imposes an obligation on Kathmandu to redeploy Mr Barry to a role. The obligation in the clause is for Kathmandu to consult with Mr Barry regarding the possibility of redundancy and whether there are alternatives to redundancy such

⁸ *Tracey Jinkinson v Oceana Gold (NZ) Limited* [2010] NZEmpC 102 and *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142.

as redeployment. There are additional obligations around the extent and timing of that consultation but the clause does not create an obligation to redeploy.

[31] Turning to the relevant case law. Counsel says the Employment Court in *Tracey Jinkinson v Oceana Gold (NZ) Limited*⁹ and *Wang v Hamilton Multicultural Services Trust*¹⁰ reinstated both employees in circumstances where they should have been redeployed to the roles in question. Counsel says this means, if there is a role that an employee can be redeployed to because they have the appropriate skills and experience then an employer must do so, and a failure to not redeploy renders the subsequent dismissal unjustified. He also says in this case as Mr Barry has the skills and experience to do both Roles, Kathmandu was obliged to redeploy him and as it failed to do that I must reinstate him to one of the Roles.

[32] Whilst the argument is compelling, particularly in light of *Jinkinson*, I am not satisfied that it is as categorical as Counsel submits. I read the case law as establishing the principle Counsel suggests in circumstances where the employer accepts the employee can fulfil the role adequately and therefore after consulting and establishing this, the employer must redeploy the employee to the role. And on this basis the cases can be distinguished from many other situations where the obligation to consult extends only to consulting meaningfully over redeployment¹¹ which is the extent of the obligation here.

[33] A lot of the affidavit evidence in this matter and the submissions were directed at the parties' respective positions on Mr Barry's suitability for undertaking either of the Roles. I have spent considerable time assessing the evidence and the arguments.

[34] I will not set out the evidence or arguments advanced, as that is unnecessary at this stage. My conclusion based on my assessment is that I am not convinced the evidence and case law is in Mr Barry's favour, i.e. I am not sure that there is a strong arguable case that Mr Barry should be reinstated to one of the Roles. That said I accept there is, at least, a serious question to be tried that Mr Barry should be reinstated to one of the Roles because the case advanced is certainly not frivolous or vexatious.

[35] The other relevant consideration is that, despite not specifically requesting reinstatement to a position no less favourable, the stronger case for Mr Barry is just

⁹ *Tracey Jinkinson v Oceana Gold (NZ) Limited* [2010] NZEmpC 102.

¹⁰ *Wang v Hamilton Multicultural Services Trust* [2010] NZEmpC 142

¹¹ See for example, *Catherine Stormont v Peddle Thorp Aitken Limited* [2017] NZEmpC 71.

reinstatement, which I will consider in the alternative in the substantive claim. In this regard there is a serious question to be tried that I should reinstate even if Roles are filled and even if there is no role for Mr Barry in Kathmandu.¹²

[36] So, there is a serious question to be tried regarding unjustified dismissal and reinstatement.

The balance of convenience

[37] Assessing the balance of convenience requires a comparative analysis of the impact on each party and third parties if the interim order is granted or not. This comparative analysis requires assessing the impact of granting the interim injunction on Kathmandu and any third parties and the impact of not granting the interim injunction on Mr Barry and any third parties.

[38] Then I must assess what happens if the interim position is reversed in any substantive determination:

- (a) For Mr Barry this means assessing the consequences of not preventing Kathmandu from filling one of the Roles but then subsequently reinstating Mr Barry.
- (b) For Kathmandu this means assessing the consequences of preventing it from filling the Roles now and then subsequently deciding Mr Barry should not be reinstated.

[39] Mr Barry says if I do not protect the Roles now, when it comes to reinstating him to a Role (should he be successful with his unjustified dismissal claim) then there will be no role for him at Kathmandu, he loses the right to be reappointed and he will face an uncertain and potentially lengthy period of unemployment.

[40] I do not accept this is a compelling argument. The simple point is if I find that Mr Barry was unjustifiably dismissed and that reinstatement is practicable and reasonable then he can be reinstated to a role no less disadvantageous to him. This does not need to be one of the

¹² *Genysis Telecommunications Laboratories Limited v Brendon Scott* [2019] NZEmpc 113.

Roles nor does there even need to be a suitable role for him.¹³ Kathmandu runs the risk of that occurring and accommodating Mr Barry's reinstatement (should I order this) if it fills the Roles in the interim. Not granting the injunction now makes no difference to whether Mr Barry can be reinstated and therefore weighs against the balance of convenience being in Mr Barry's favour. The detriment Mr Barry says he faces can be avoided regardless of whether I grant the interim injunction or not, by the appropriate remedy being granted if Mr Barry is successful with his unjustified dismissal claim.

[41] For Kathmandu the argument regarding balance of convenience is more compelling. It says:

- (a) Mr Barry does not have the requisite skills and experience for either Role and his offer to temporarily fill both Roles if the injunction is granted does not address the immediate needs of Kathmandu.
- (b) If the injunction is granted then Kathmandu faces delays in filling both roles at a time when it has already taken urgent and dramatic steps to address the changed economic climate it is operating in and will continue to face for some time. It needs to continue with its restructuring as part of these steps being taken to stabilise Kathmandu and ensure it can achieve its goals.
- (c) Any delay in offering the Roles to suitable candidates creates a significant risk that any preferred candidate could be lost.

[42] I accept that these are very real concerns that arise if I grant the interim injunction.

[43] Relevant to this assessment is the question of whether the impact on a party is harm that can be adequately compensated by damages.

[44] I have already established that there is no detriment to Mr Barry in not granting the interim injunction.

[45] In addition, Mr Barry has not sought interim reinstatement so I assume there is no immediate financial consequences of his dismissal which cannot be compensated by remedies that I might award on his unjustified dismissal claim, if he is successful.

¹³ *Genysis Telecommunications Laboratories Limited v Brendon Scott*, above n. 12.

[46] So there is no issue as to whether damages will adequately compensate Mr Barry if I do not grant the injunction but then reinstate him.

[47] In contrast it would appear that if, as Kathmandu submits, the delay in filling the Roles impacts Kathmandu's ability to get the best candidates for the Roles and/or it impacts its ability to move forward with its new structure and its actions designed to deal with the crisis it currently faces, then damages are unlikely to be an adequate remedy. This is because quantifying damages would be problematic and any damage could be ongoing, potentially spanning past my resolution of the unjustified dismissal claim.

[48] So, it appears that damages are unlikely to compensate Kathmandu if I grant the injunction but then do not reinstate Mr Barry to one of the Roles.

[49] The relative merits of the case are also relevant to the balance of convenience. In this regard Mr Barry's case that I reinstate him to one of the Roles is not strong.

[50] In conclusion I am not satisfied that the balance of convenience favours granting the interim injunction.

[51] I am however satisfied that the balance of convenience favours Kathmandu, as any detriment to Kathmandu cannot be remedied if the injunction is granted but then I do not appoint Mr Barry to one of the Roles. Granting the injunction means a delay in filling both Roles and Kathmandu moving forward with its new structure and plans to deal with the economic climate it faces, regardless of the outcome of my investigation of Mr Barry's unjustified dismissal claim. The impact of this delay could be considerable given the current economic climate and it is difficult to see that damages would be an adequate remedy.

[52] In terms of the balance of convenience, this is weighted strongly in favour of not granting the interim injunction.

The overall justice

[53] The overall justice assessment is essentially a check on the position that has been reached after my analysis of the serious question to be tried and the balance of convenience.¹⁴

[54] My starting point is that there are serious questions to be tried, but there is not a particularly strong case in respect of reinstatement to one of the Roles and the balance of convenience favours not granting the interim injunction.

[55] When I stand back and look at this case, the overall justice favours not granting the injunction. At its simplest I am faced with protecting an employee's right to argue he should be granted a specific role in a company against the employer's right to take what it describes as urgent and necessary steps to protect its business and therefore many employees' continued employment in these exceptional circumstances. On this basis I simply cannot accept that Kathmandu should be restrained from filling the Roles as part of the bigger strategy it is implementing.

Conclusion

[56] I am satisfied that there is a serious question to be tried in respect of the unjustified dismissal claim but not a particularly strong case in respect of the remedy sought that I reinstate Mr Barry by ordering Kathmandu to employ Mr Barry in one of the two roles he seeks. The balance of convenience and overall justice of this case do not support an interim order being made and therefore Mr Barry's application for an interim injunction is declined.

Next steps

[57] An Authority Officer will contact the representatives to arrange a case management conference so that an investigation meeting can be set for Mr Barry's unjustified dismissal claim and appropriate directions made.

¹⁴ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

Costs

[58] Costs are reserved.

Peter van Keulen
Member of the Employment Relations Authority