

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 168/09
5281385

BETWEEN	GARRY BEGLEY Applicant	
AND	CROPMARK LIMITED Respondent	SEEDS

Member of Authority: James Crichton

Representatives: Jane Costigan, Counsel for Applicant
Scott Wilson, Counsel for Respondent

Investigation Meeting: 2 October 2009 at Christchurch

Determination: 5 October 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Begley) seeks urgent injunctive relief preventing the respondent (Cropmark) from taking further steps in relation to a restructuring proposal and in respect of a disciplinary process concerning Mr Begley until a receivership application filed in the High Court at Christchurch is heard and determined. The application is opposed by Cropmark.

[2] Mr Begley is presently Marketing Manager at Cropmark and his affidavit evidence is that he has been involved with Cropmark since June 1996 in a variety of capacities. Those capacities included that of shareholder until 2007.

[3] Since 3 September 2009, Mr Begley has been suspended on full pay pending the outcome of a disciplinary process entered into by Cropmark in respect of certain issues that were of concern to it.

[4] Moreover, on 9 June 2009, Cropmark announced its intention to restructure its business. A consequence of that restructure proposal was that Mr Begley's position

was to be disestablished. There were four new senior management positions established, all of which Mr Begley indicated he wished to be considered for. Cropmark indicated its willingness to consider Mr Begley for three of the four new positions, but rejected his interest in the senior position with a financial focus as Mr Begley did not have the requisite accounting qualifications.

[5] It is the essence of Mr Begley's application that, in taking the action it is, both in the disciplinary context and in the restructuring proposal, Cropmark is not acting in good faith and is in fact activated by impure motives designed to remove him, one way or the other, from the organisation. In his affidavit in support, Mr Begley advances a number of arguments which he says support those contentions.

[6] Mr Begley also contends that the effect of the upcoming High Court proceedings concerning Cropmark will potentially have negative consequences on him which he seeks to avoid. Further, he says that the negative consequences he is concerned by would effectively put him in a worse position than would be the case if a receiver were not appointed. In particular, he contends that a receivership would not necessarily have the usual powers of the employer and that in consequence if Mr Begley were to be dismissed and if the Authority or the Court were to make orders in relation to his reinstatement to Cropmark, the receiver might not be in a position to abide by such orders, thus abrogating Mr Begley's employment law rights.

[7] For Cropmark, Mr Wilson characterised this argument as one of *ifs*, *buts*, and *maybes*. Mr Wilson submitted that Mr Begley was effectively seeking a contingent order based on a hypothetical set of circumstances which did not exist yet and might not exist. He urged on the Authority the proposition that Cropmark dealt with Mr Begley's concerns by offering an undertaking that if a receiver is appointed by the High Court, Cropmark would consent to orders from the High Court directing the receiver to accept and abide by any decision of the Authority or the Employment Court concerning Mr Begley. Cropmark maintains that even if Mr Begley's concerns are justified (and that is denied), the tendering of the undertaking deals with any possible concern.

Issues

[8] It is a truism that an application for interim relief of this kind requires the Authority to apply the law relating to interim injunctions and, in the present case, there are four issues that require to be considered. Those issues are:

- (a) Whether the applicant has an arguable case?
- (b) Are there other remedies available to the applicant?
- (c) Where does the balance of convenience lie?
- (d) What is the overall justice of the case?

Does the applicant have an arguable case?

[9] The threshold to be reached in respect of the question whether there is an *arguable case* is of course a relatively low one and typically the applicant party can point to defects in process which, on their face, suggest questions about the way that the other party has proceeded.

[10] In the present case, Mr Begley makes a series of claims in his affidavit evidence which, broadly speaking, allege bad faith on the part of Cropmark in respect of both the restructuring proposal and the disciplinary process.

[11] However, those allegations are hotly contested by the affidavit evidence in support of Cropmark's position which contends that the restructuring proposal is a genuine attempt to refocus the entity on the business opportunities in the future and that the disciplinary process is to pursue and investigate allegations of serious misconduct by Mr Begley.

[12] Furthermore, Cropmark points out that the Courts have typically been most reluctant to interfere in the employer's general right to restructure its business and the equivalent right of the employer to investigate cases of alleged wrongdoing by staff. Cropmark correctly points out that the interference with either or both of those rights by the Courts has been infrequent and typically circumscribed. What is more, Cropmark alleges that the effect of the granting of the injunctive relief Mr Begley seeks would be to have the Authority drawn into the High Court dispute involving Cropmark which has nothing whatever to do with Mr Begley's employment. In that

regard, I observe that the High Court proceedings referred to are multi-faceted. One aspect only is concerned with the proposal that a receiver be appointed pursuant to s.174 of the Companies Act to manage the affairs of the company, certain shareholders having allegedly lost confidence in the direction of the company. It is the case that whatever the High Court proceedings are, they are outside the ambit of the Authority concerning as they do issues about the governance and management of a limited liability company and the relationships between the shareholders of that company.

[13] I accept without reservation the proposition that an employer has the right to restructure its own business. As Cropmark observes in its submissions, that right has been re-affirmed by a number of leading cases of which a recent example is a decision of the Chief Judge in *Aberhart v. Simpson Farms Ltd* [2006] ERNZ 825. In the same connection, I also accept the general principle that the Courts are loathe to interfere with an employer's right to conduct disciplinary proceedings. The decision of Goddard CJ in *Russell v. Wanganui City College* [1998] 3 ERNZ 1076 confirms that principle.

[14] However, Mr Begley prefers to direct the Authority's attention to the decision of Judge Shaw in *Wackrow v. Fonterra Cooperative Group Ltd* [2004] 1 ERNZ 350. In that decision, Her Honour declined to allow Fonterra to ask all of the questions it wanted to ask Mr Wackrow (an employee) in a disciplinary, because Mr Wackrow was already facing criminal charges on the same facts. Judge Shaw concluded that forcing Mr Wackrow to address some issues prejudiced his right to silence in respect of the criminal proceeding. Mr Begley says that this is an analogous situation. I do not agree. In my opinion, the decision in *Wackrow* makes clear that the right to a fair hearing in a criminal proceeding is a special, unique right and the suggestion that that is somehow analogous to the relief which Mr Begley seeks in the present case I explicitly reject.

[15] I think the argument that Mr Begley has an arguable case in respect of the substantive matter is, on the basis of the untested affidavit evidence available to the Authority, not especially strong but I accept that, with the benefit of hearing the witnesses and testing their evidence in the normal way, that evidence may appear rather more compelling. Accordingly, I find that Mr Begley has an arguable case.

Is there an adequate alternative remedy?

[16] I am satisfied that Mr Begley does have an adequate alternative remedy. If the injunctive relief sought is not granted, then presumably Cropmark will proceed with its restructure and its disciplinary inquiries. The outcome of either or both of those undertakings may be that Mr Begley's period of employment with Cropmark comes to an end. If that is the case, then Mr Begley has alternative remedies provided for in the Employment Relations Act 2000. Nothing prevents Mr Begley from challenging any termination of his employment he considers unfair through the process mandated by the Employment Relations Act 2000.

[17] I am simply not satisfied that Mr Begley does not continue to enjoy precisely the same remedies that are available to every other employee in New Zealand simply because the entity that employs him is the subject of a most unusual application to have a receiver appointed to a solvent, viable trading entity because of arguments between shareholders and as between shareholders and the company.

[18] Mr Begley seems particularly concerned about the prospect that he might lose the right to be reinstated to his position if a receiver were appointed and if the Authority or the Employment Court were to award reinstatement either on an interim basis or indeed permanently. I do not accept that the insignificant contingent risk of this happening is more important than the real and present risk that Cropmark's legitimate responsibility as an employer to run its business both in terms of restructuring it and in terms of pursuing disciplinary matters, is challenged or interfered with.

[19] The risk to Mr Begley is, I hold, almost hypothetical. In order for him to be exposed to this risk, a number of events which have not happened and may never happen need to each come to pass. First, Mr Begley must be dismissed from his employment. That is certainly possible, but by no means a given. Then, Mr Begley must get an order of the Employment Relations Authority or of the Employment Court requiring reinstatement in one or other of its forms. Again, that is by no means a given, but is certainly possible. One of the mitigating factors against reinstatement in Mr Begley's case is the self-evident collapse of his relationships within the company. On his own admission, Mr Begley's relationships with the principal protagonists in Cropmark are poor and deteriorating and that is certainly a factor

which the Authority and the Employment Court would consider in any reinstatement issue.

[20] Next, a receiver must be appointed by the High Court to Cropmark. The application to appoint a receiver is, in the New Zealand jurisdiction, unusual to say the least and so far as Cropmark has been able to establish, is not a course of action which the New Zealand High Court has ever previously acceded to. The nearest the Court has come is the appointment of a receiver in respect of an incorporated society, but there is no case law which I have been directed to which suggests that the Court has ever previously appointed a receiver to a limited liability company under s.174 of the Companies Act. That being the position, there can be no certainty that a receiver will be appointed by the High Court. The factors that the High Court will need to consider in that application are outside the ambit of the Authority's jurisdiction, but given the rarity of the application, it seems reasonable to conclude that the High Court is more likely to reject the application to appoint a receiver than to agree with it.

[21] Even if the receiver is appointed, Cropmark has offered an undertaking (to which I have already referred), the effect of which is that, if a receiver is appointed by the High Court, Cropmark will consent to High Court orders directing the receiver to accept and abide by any decision of the Authority or the Employment Court concerning Mr Begley.

[22] In my opinion, that undertaking, taken together with the other matters before the Authority, represents a significant contribution to providing Mr Begley with *an alternative remedy*. The undertaking relies on the ability of the High Court to direct the receiver to take any particular action and also draws on an understanding of the English decisions concerning the like power to appoint a receiver to a solvent trading entity.

[23] On balance then, I think the evidence before the Authority is unequivocal that there are alternative remedies available to Mr Begley short of the granting of the injunctive relief that he seeks.

Does the balance of convenience favour Mr Begley?

[24] The Authority's obligation in considering this aspect of the matter is to consider the relevant inconvenience to each party of the other succeeding. In a practical sense, the Authority must weigh the relevant hardship to Cropmark of having

Mr Begley succeed with his interim injunction against the hardship that is potentially suffered by Mr Begley if his application for injunctive relief is denied.

[25] I am satisfied that the balance of convenience strongly favours Cropmark. Mr Begley's application is based on hypothesis and unsubstantiated allegation and the relief that he seeks is predicated on a series of events happening, one after the other, some of which are reasonably unlikely. Furthermore, the granting of the injunctive relief sought by Mr Begley would undermine the fundamental right that Cropmark has both to investigate alleged wrongdoing by its staff and restructure its business so that it can continue to prosper on into the future. Both of those employer rights are well supported by case law and, in my opinion, could only be abrogated by the kind of injunctive relief sought in the present case, with the strongest of arguments. As I have already made clear, I do not think Mr Begley's argument is strong at all and as it is based on a series of hypotheses, each of which has its own uncertainty, I think the proper view is that the balance of convenience strongly favours Cropmark.

Overall justice of the case

[26] Standing back and evaluating the case on the currently untested evidence before the Authority and the able submissions of both counsel, the Authority must look at the overall justice of the case as between the parties.

[27] I am satisfied that the overall justice of the case strongly supports Cropmark rather than Mr Begley.

[28] I accept the submission of Cropmark that there is simply no basis for the Authority to become involved in the proceedings before the High Court. I am not satisfied there is any real injustice to Mr Begley in denying his application and leaving matters to take their natural course. In that regard, I do not accept the submission of counsel for Mr Begley that *the decision in the High Court will determine who Mr Begley's employer is*. We already know who Mr Begley's employer is; Mr Begley is employed by Cropmark, and the issue for the High Court is not, in my judgment, anything to do with Mr Begley's employment. It is a separate issue, properly raised but concerning disputes which have nothing whatever to do with Mr Begley's employment at Cropmark.

[29] In reaching the decision I have that the interim relief application should be rejected, I am influenced by the potential effect on third parties if the Authority were

to grant the relief sought. In the restructure, Mr Begley is a candidate for three of the four senior management positions. So are other employees of Cropmark who are also affected by the restructure. If Cropmark is prevented from considering Mr Begley as a candidate for any or all of those three positions, then it follows that Cropmark cannot make appointments in respect of any one of those positions and that means that the interim relief sought would have impacts on those other staff as well. That seems to the Authority profoundly unfair to those innocent third parties, particularly when, as I have expressed more than once in this determination, the alleged benefit of the injunctive relief sought to Mr Begley is more apparent than real.

Determination

[30] The application is declined for the reasons enunciated in the foregoing sections of this determination.

Costs

[31] Costs are reserved.

James Crichton
Member of the Employment Relations Authority