

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 415/08
5141643

BETWEEN	CRAIG BUSCH Applicant
AND	ZION WILDLIFE GARDENS LIMITED First Respondents
AND	ZION WILDLIFE SERVICES LIMITED Second Respondents

Member of Authority: Yvonne Oldfield

Representatives: Wayne Peters and Laura Currie for Applicant
Tony Drake and Laurene Holley for Respondents

Investigation Meeting: 3 December 2008 at Whangarei

Submissions received: 5 December 2008

Determination: 9 December 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Busch was dismissed from his position as operator of Zion Wildlife Gardens on 3 December 2008. A meeting to investigate the substantive employment relationship problem has been set down to commence on 27 January 2009. In the meantime Mr Busch seeks interim reinstatement to his employment. This determination is confined to the application for interim relief.

[2] Mr Busch was originally sole shareholder and director of Zion Wildlife Gardens Limited and Zion Wildlife Services Limited, which (in conjunction with other companies owned by Mr Busch) set up Zion Wildlife Gardens (“the park”) on its current site in 2004.

[3] By July 2006 the park faced heavy debts. To ensure its survival, Mr Busch accepted a financial rescue package from his mother, Patricia Busch. He did so on the basis that he would remain the licensed operator of the park but relinquished control of the first and second respondents, with his mother taking over as sole director of both companies. It was also agreed that he would become an employee of the first respondent and Country Developments Limited (“CDL,” the company that owns the land on which the park is situated.) However no written employment agreement was ever entered into between Mr Busch and CDL or either of the respondents.

[4] Unfortunately, in the period since this agreement was reached, mother and son have become embroiled in a bitter dispute about the proper operation of the park. It has culminated in the appointment, by Mrs Busch, of a former zoo director (Glen Holland) and a business consultant (Barry Nalder) to assist her with the running of the park.

[5] During October 2008, with Mrs Busch’s approval, a successful application was made for Glen Holland to become an additional licensed operator of the park. Then, on or about 24 October Barry Nalder suspended Mr Busch while he conducted an investigation into allegations of serious misconduct by Mr Busch.

[6] The allegations included some matters that might arguably be characterised as performance issues, including a failure to keep proper training records, incorrect cash handling procedures and causing loss of revenue through cancellation of tours. However, they also included very serious allegations of major breaches of safety protocols, inappropriate behaviour in the workplace, and misuse of a company vehicle.

[7] Mr Busch declined to attend a disciplinary meeting to be held on 31 October and Mr Nalder proceeded, without Mr Busch’s input, to consider the information he had. On 3 November Mr Nalder wrote to Mr Busch advising that he had concluded that Mr Busch was “guilty of serious misconduct” and dismissed him, effective immediately.

[8] As a result of Mr Busch being dismissed the Ministry of Agriculture and Forestry (“MAF”) cancelled his license to operate the park. MAF has also instructed that because he is no longer an employee of the park, he must not be permitted to enter the animal enclosures. In order to regain his licence as operator of the park Mr Busch would be required to make a fresh application and satisfy MAF that he is a “fit and proper person” to hold such a licence pursuant to the relevant Biosecurity standard.¹

[9] It is also relevant that Mr Busch has recently suffered an injury to his foot. He is no longer in a cast but continues to wear a boot and walks with the aid of crutches. So far, his dismissal has not caused loss of remuneration because he is in receipt of earnings related compensation. He has informed the Authority that he expects to be seen again by the specialist before Christmas and hopes to get the boot off then. He was not able to tell me what further therapy he might need before being able to return to work, or how long this could be expected to take.

[10] Mr Busch strongly denies any serious misconduct and challenges the competence of Mr Holland and Mr Nalder to evaluate either his management skills or his wildlife expertise. His primary purpose in seeking reinstatement is not financial. He is even prepared to put up security to reinforce his undertaking as to damages. His principal concern is that he wishes to be able to work with the animals at the park once more. I note that there is a dispute between the parties as to who owns the animals. The respondents say that like the chattels to be found on the property, the animals themselves belong to the respondents. Mr Busch says they are his.

[11] Mr Busch, like his mother, lives rent free in a house within the park. He has remained there since his dismissal. It is his position that his status as a principal shareholder entitles him to live in the house. In the alternative he says that he has a service tenancy. The respondents concur with the view that Mr Busch has a service tenancy.

¹ Ministry of Agriculture and Forestry Biosecurity Standard 154.03.04: *Containment Facilities for Zoo Animals*.

[12] The final matter of relevance to the application for interim relief is the complete breakdown in the relationship between Mr Busch and not just his mother, but most of the staff at the park. As it was expressed to me at the meeting, the dispute has polarised the staff. As well as Mrs Busch, Mr Nalder and Mr Holland, four staff members (out of seven) gave either affidavit evidence or appeared in person to tell me that they found that Mr Busch had become impossible to work for. Several said they would resign if he came back.

[13] For his part, Mr Busch asserts that the staff have taken this approach because his mother has undermined his authority with them and because they are dependent on her goodwill for their livelihoods.

Issues

[14] The issues for determination in relation to an application for interim reinstatement are as follows:

- i. Whether the applicant has an arguable case;
- ii. Where the balance of convenience lies (including consideration of the availability and adequacy of other remedies should interim relief not be granted) and
- iii. Where the overall justice of the case lies until it can be heard.

[15] In addition two preliminary issues have arisen. The first relates to the identity of Mr Busch's employer, the second to a request for restrictions on publication of the proceedings. For convenience these will be dealt with first.

(i) Preliminary issues

[16] When this matter was lodged in the Authority Mrs Busch was named as third respondent. The applicant now concedes that Mrs Busch did not personally employ him and by consent she has been removed as respondent.

[17] The first and second respondents both take the position that the first respondent employed Mr Busch and say that the second respondent also should be removed from the proceedings. I have declined to do so at this stage on the basis that the question of who employed Mr Busch cannot be decided until there has been a full hearing of the relevant evidence.

[18] As for the second preliminary issue, on 26 November TVNZ requested to film the investigation meeting set down for 3 December 2008. That request was declined for the reasons set out in my Minute of 28 November 2008 (attached.) I concluded that Minute by noting that there was also a joint application from the parties to restrict publication of the proceedings and noted that:

“whether publication of particular evidence should be restricted will be determined as and when the issue arises.”

[19] I subsequently received affidavits and witness statements which contained material relating to matters which are or may become the subject of proceedings in other Courts. I am satisfied that this material should be subject to a non-publication order, particularly given that the evidence has yet to be properly tested. Having regard to the parties’ submissions regarding the discretion to limit publication in relation to interlocutory applications (Minute, 28 November, attached) and having regard to the practical difficulties in placing restrictions on parts of the evidence I concluded that the Authority’s meeting with the parties on 3 December should be treated as being in the nature of a chambers’ meeting. The press was therefore excluded.

[20] However I have not found it necessary in this determination to give specifics of the material to which I have referred in paragraph [19]. It has not therefore been necessary to make a non-publication order in relation to any part of this determination.

(ii) Arguable case.

[21] In a personal grievance of unjustified dismissal the onus is on the employer to justify (both procedurally and substantively) the termination of employment. The threshold of “arguable case” is usually met once a grievant disputes the basis of the

purported justification and seeks to put the respondents to proof of it. I am satisfied that the substantive and procedural issues raised in this matter give rise to an arguable case.

[22] The Authority must also consider whether the applicant has an arguable case for reinstatement as a remedy. The respondents has argued that the complete breakdown in the relationship between Mr Busch and most of the other staff means that he does not have an arguable case for permanent reinstatement.

[23] Although it is a matter of dispute who is responsible for this breakdown, the fact and extent of the bitterness is not. From what I have heard from witnesses for both parties it will be difficult for them to repair this damage. Nonetheless, it is not required for the applicant to show that he has a strongly arguable case, but merely a tenable arguable case. I conclude that this threshold has been met, and proceed to consider the other tests.

(iii) The balance of convenience

[24] The Authority must now evaluate the inconvenience to the respondents of having to bear the burden of interim relief until the substantive claim is dealt with, against the inconvenience to the Applicant if interim reinstatement is not granted.

[25] The applicant's primary reason for seeking interim reinstatement is his attachment to the park and in particular to the animals. In addition he notes that his field is highly specialised and that he will find other work opportunities very limited. The applicant argues that neither of these matters can be remedied in any way other than interim reinstatement.

[26] The respondents note that Mr Busch no longer has an operator's licence and assert that the respondents could not conscientiously support any application he might make for one. He could not therefore return directly to his former role as operator. Nor, they say, can Mr Busch be trusted to accept direction from Glen Holland as current licensed operator of park. The respondents say that Mr Busch has never acknowledged his status as an employee and has persisted in acting as though he were still the owner of the park. They say that the presence on site of a staff member who

would not take direction from Mr Holland, and who (in Mr Holland's view) could not be relied on to follow standard safety practices would pose a threat to the health and safety of staff and public alike, and would place Mr Holland at risk of liability as MAF approved operator for anything that went wrong. The respondents also rely on the evidence that Mr Busch has been aggressive and threatening in his behaviour to staff and that some have indicated that they will leave if required to work with him again.

[27] The respondents note that over the past year MAF has required considerable remedial work at the park and says that the applicant's poor management whilst operator was the reason this remedial work was needed. The respondents assert that MAF has lost confidence in Mr Busch and might close down the park if Mr Busch returned to work there.

[28] In summary, the respondents argue that the applicant is a liability to the park and his return could damage its reputation and jeopardise its survival. The respondents dispute that the applicant owns any significant assets and doubts that he can meet his undertaking as to damages. In any event, it says, damages will not be an adequate remedy for the respondent given the extent of the damage that his return could cause.

[29] Reports provided to the Authority confirmed that MAF has required a number of concerns to be addressed over the last year. As licensed operator, primary responsibility for how the park was run lay with Mr Busch. However he asserts that any problems the park has experienced have arisen because he has been blocked in his attempts to manage it properly as he did before. He also notes that many of the respondents' assertions (including the assertion that MAF has no confidence in him) are not supported by direct evidence.

[30] Regarding the adequacy of alternative remedies for the applicant the respondents say that there will be minimal detriment to him if he is refused interim reinstatement because he is in receipt of earnings related compensation and is not yet fit to return to work. Given that the Authority investigation into the substantive employment relationship problem will begin on 27 January 2009, the respondents say he may remain on ACC until the substantive matter is disposed of.

[31] In relation to the issue of Mr Busch's use of on-site accommodation Counsel for the respondents advises that notice has not been served in relation to the tenancy but if it were, Counsel gives an undertaking that the respondents will pay for equivalent alternative accommodation in the period until the matter is finally determined.

Determination

[32] The applicant is correct in noting that some of the respondents' assertions have yet to be backed up by evidence. However, some matters have been established. First of all, Mr Busch cannot take up his former duties until and unless he regains a license to operate, something which is at the discretion of MAF. In the meantime, if he were reinstated, he would have to work under the direction of Mr Holland. After hearing from Mr Busch himself, I am not confident that he would be prepared to do so. The likely conflict that would ensue would be a major disruption to the respondents.

[33] Secondly, Mr Busch is not so far suffering financial hardship and has only a short time to wait for a full investigation into his employment relationship problem. (Indeed, while he continues to be unfit for work any order for reinstatement will be of no practical effect.) The only significant issue for him at present is the fact that he is not in charge of the care of the animals, but as we have seen, while he remains unlicensed he will remain unable to take on that role. In the meantime the park is being operated by Mr Holland with MAF's approval.

[34] Next, the majority of the respondents' staff have said they do not wish to work with Mr Busch and some feel so intimidated by his presence that they have said that if he returns they will leave. I am satisfied that the two from whom I heard in person were entirely genuine about this. Whatever caused this state of affairs, it is a reality and I must take into consideration the respondents' obligations to those employees as well as Mr Busch.

[35] Finally, although the applicant has not relied on his occupancy of a house in the park as an issue in support of his claim for interim reinstatement, I note that the respondents have proposed an acceptable solution in relation to Mr Busch's accommodation arrangements.

[36] I am satisfied that the balance of convenience favours the respondents.

(iv) The overall justice of the case.

[37] Under this head it is argued for Mr Busch that he has little chance of finding employment in a similar role and is concerned about the welfare of the animals. It is submitted that, even if subject to conditions, interim reinstatement is the most appropriate course at this point.

[38] The respondents note that the allegations of misconduct which led to the applicant's dismissal were very serious and still have not been fully responded to. The respondents assert therefore that Mr Busch's substantive case is weak. The respondents also say that Mr Busch is not entitled to equitable relief because he does not have clean hands (having behaved inappropriately to other staff.) Finally the respondents note that there is no alternative position into which Mr Busch could be placed.

Determination

[39] I am not prepared, at this stage, to make an assessment of the relative strengths of the parties' cases. Many key matters in this case are the subject of considerable dispute. Each party blames the other for any problems the park faces. The witnesses from whom I heard have also shown that there are strong differences of opinion about what constitutes good practice in the care of the animals and in the running of the operation. In short, many factual differences remain to be resolved and on those, it is not yet possible to form a preliminary view.

[40] The following matters have however been established and are relevant to the overall justice of the application for interim relief:

- i. Mr Busch's main concern is his desire to get back to the animals. However, it is up to MAF to decide who may operate the facility, and it has done so. The welfare of the animals is a matter for MAF, not the Employment Relations Authority.

- ii. Neither of Mr Busch's other concerns (potential loss of income and unemployment) is an issue at present. He is not yet fit to return to work at all, let alone in the challenging environment of a wildlife park, and I heard nothing to indicate when this situation might change.
- iii. While an order for garden leave must always be considered as an option, in this case it would not address Mr Busch's desire to work with the animals and would have no practical effect while he remains on earnings related compensation.
- iv. Finally, the substantive matter will be investigated on 27 January 2009.

[41] Against this background I do not consider an injustice will be done by requiring Mr Busch to wait until for the very short time remaining until a full investigation can be completed. The application for interim reinstatement is declined.

Costs

[42] The issue of costs is reserved until the substantive matters have been disposed of.

Yvonne Oldfield

Member of the Employment Relations Authority