

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 277/08  
5128938

BETWEEN                      DAVID EDMUNDS  
   Applicant  
  
AND                              UNITED GROUP (NZ)  
   LIMITED  
   Respondent

Member of Authority:      Marija Urlich  
  
Representatives:            Kerry Amodeo, for Applicant  
   John Rooney, for Respondent  
  
Investigation Meeting:     30 July 2008  
  
Determination:              4 August 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] David Edmunds was dismissed from his employment as Chief Executive Officer of United Group (NZ) Limited (“UG NZ”) on 24 June 2008. He had been employed in that role since 2003.

[2] On 1 July 2008 Mr Edmunds filed an application in the Authority seeking interim reinstatement<sup>1</sup> pending the determination of his personal grievance for unjustified dismissal. The application was accompanied by an affidavit and undertaking as to damages.

[3] UG NZ opposes the application.

[4] The Authority convened a telephone conference with the counsel on 2 July 2008. The parties were directed to attend mediation on 11 July 2008 and, in the event

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<sup>1</sup> Pursuant to section 127 Employment Relations Act 2000

mediation was unsuccessful in resolving this employment relationship problem, an investigation meeting for the interim application was scheduled for 25 July 2008. During the telephone conference a timetable for the filing of a statement in reply, affidavits in opposition and reply affidavit was set. That timetable has been complied with. Investigation meeting dates were scheduled for 21, 22 August 2008 with back-up dates for 22, 23 September 2008.

[5] The investigation meeting for the interim application proceeded as scheduled. I received submissions from counsel in support of their client's respective positions. Those submissions addressed the tests applicable to an application for interim reinstatement:

- (i) arguable case;
- (ii) adequacy of alternative remedy;
- (iii) balance of convenience; and
- (iv) overall justice.

[6] A non-publication order applies to all evidence provided in these proceedings relating to United Group NZ and Australia 2007/2008 financial information.

### **Arguable case**

[7] All that is required to establish arguable case in an interim reinstatement setting is a minimal lack of justification for the dismissal<sup>2</sup>. It is not the role of the Authority to resolve disputed facts at this stage.

[8] UG NZ accepts, given the low threshold involved, Mr Edmunds has an arguable case in relation to his claim of unjustified dismissal.

[9] On the whole the evidence is not disputed that Mr Edmunds was called into a meeting, the purpose of which he had no notice and advised he was dismissed with

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<sup>2</sup> *Ford v Hutt Valley Health Corp Ltd* [1994] 1 ERNZ 593

effect from Friday 27 June 2008<sup>3</sup>. The minimum standards of fair treatment in a disciplinary setting are well established<sup>4</sup>.

[10] The reasons given to Mr Edmunds for his summary dismissal were unsatisfactory results and performance which did not reach expected standards. Mr Edmunds avers that his performance with UG NZ was never formally challenged and his dismissal came as a great shock. Affidavits filed in support of UG NZ aver the writing was on the wall for some time for Mr Edmunds and reference emails spanning December 2006 to June 2008 expressing concern about Mr Edmunds' budget forecasting.

[11] It is arguable that UG NZ did not have reasonable grounds for dismissing Mr Edmunds for poor performance because these issues had not been drawn to his attention in a fair manner and he was not given a reasonable opportunity to address UG NZ's concerns.

[12] Mr Edmunds has made out an arguable case that his dismissal was unjustified.

### **Alternative remedy**

[13] Mr Edmunds' affidavit avers that he is an experienced senior executive whose professional reputation is very important to him. He avers no amount of money will compensate for the fact he is out of work, is unable to work because of the affect of the restraining clauses of his employment agreement and that his reputation has been damaged because in the eyes of the public he is a non-performing CEO.

[14] Mr Rooney submits that the substantive investigation meeting is proximate, that damages can be readily quantified by the Authority and can adequately compensate Mr Edmunds for any lose he may have suffered.

[15] He submits that in contrast UG NZ will not be able to quantify its damages if Mr Edmunds is reinstated to the role of Chief Executive. The affidavits in support

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<sup>3</sup> Mr Edmunds has received three months pay in lieu of notice.

<sup>4</sup> *NZ Food Processing Union v Unilever NZ Ltd* (1990) 3 NZELC 97, 567

aver the business will be severely disrupted if Mr Edmunds' is reinstated<sup>5</sup>, that the concerns about Mr Edmunds' performance are genuine and will be very difficult to manage if he is reinstated.

[16] Notwithstanding the proximity to dates for an investigation meeting damages cannot adequately remedy the damage Mr Edmunds reputation may suffer as a consequence of not being reinstated to his role with UG NZ.

### **Balance of convenience**

[17] In this test the Authority must consider the relative detriment or injury the parties will incur as a result of the orders being made or not made<sup>6</sup>. If Mr Edmunds' substantive application is successful, given that reinstatement is a primary remedy<sup>7</sup> it is a real possibility that he will be reinstated on a permanent basis.

[18] I accept at face value Mr Edmunds expressed desire to return to work at UG NZ and his concern about maintaining his reputation in the business community. There is no evidence of financial hardship.

[19] Affidavits filed in support of UC NZ aver his reputation with senior colleagues in Australia is poor and that it would be disruptive to staff and clients to have Mr Edmunds reinstated. Mr Rooney submits that UG NZ has lost trust and confidence in Mr Edmunds and his averred denials of any performance issue reinforces this view.

[20] The balance of convenience is evenly weighted.

### **Overall justice**

[21] Standing back from the detail of the matter and looking at the situation in a more general way, I consider that overall justice requires Mr Edmunds' application for interim reinstatement is granted subject to the conditions set out in the minute of 31 July 2008. A copy of that minute should be attached to this determination.

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<sup>5</sup> Including the incumbent CEO reportedly saying he will go to Australia if Mr Edmunds is reinstated.

<sup>6</sup> *X v Y Ltd and NZ Stock Exchange* [1992] 1 ERNZ 863

<sup>7</sup> Section 125 Employment Relations Act 2000

[22] I have ordered reinstatement with conditions to balance UG NZ's concerns as to how reinstatement, in the short term, could be accommodated with Mr Edmunds arguable case that his dismissal was unjustified and the risk of damage to his professional reputation.

**Costs**

[23] Costs are reserved.

Marija Urlich

Member of the Employment Relations Authority

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AND	UNITED GROUP (NZ) LIMITED Respondent

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Representatives: Kerry Amodeo, Counsel for the applicant  
John Rooney, Counsel for the respondent

Date: 31 July 2008

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**MEMBER'S MINUTE**

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**Employment Relationship Problem**

[1] At the conclusion of yesterday's hearing I indicated to the parties that the determination of the interim reinstatement application would be issued by Friday 31 July 2008. I will not be able to complete the determination in that timeframe.

[2] The following orders are made to regulate the matters between the parties between now and the investigation meeting and determination of the substantive issues:

- (i) on the basis of the undertaking David Edmunds has provided, I order David Edmunds be reinstated to his employment;
- (ii) David Edmunds will not be required to perform his work duties and United Group (NZ) Limited shall not be required to allow him to perform those duties;
- (iii) This order is deemed to have effect from the date of the termination of David Edmund's employment;
- (iv) These orders will continue in effect until the Authority's determination on the substantive issue.

[3] A determination setting out the reasons for these orders will be issued early new week.

Marija Urlich  
Member of the Employment Relations Authority