

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2024] NZERA 509
3304060

BETWEEN ANDRIES GOUWS
 Applicant

AND OPTIMAL FIRE LIMITED
 Respondent

Member of Authority: Robin Arthur

Representatives: Paul Wicks KC and Beth Smith, counsel for the
 Applicant
 Andrew Swan, counsel for the Respondent

Investigation Meeting: 2 August 2024 in Auckland

Determination: 26 August 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination concerns an application by Andries Gouws for interim reinstatement to his employment with Optimal Fire Limited (OFL) until the Authority has investigated and determined whether he has a personal grievance of unjustified dismissal.

[2] Mr Gouws had been employed as OFL's Assistant Commercial Manager from March 2022 until 31 May 2024 when he was dismissed for serious misconduct.

[3] Mr Gouws had been involved in OFL's business since its establishment in 2019. He has a 25 per cent shareholding in OFL and several related companies and, at the time of his dismissal, was a director of OFL.

[4] There are three other directors who each also have a 25 per cent shareholding and hold working positions in OFL's business: its Technical Director, Pieter von Benecke; its Project Director, Pedro Dos Santos Monteiro; and its Managing Director

– Sales and Marketing, Raymond Beetge. All three signed the letter of dismissal sent to Mr Gouws terminating his employment on the grounds that he had misappropriated company funds.

[5] They made that decision based on the analysis of a forensic accountant they had appointed to examine financial transactions of OFL for “irregularities and possible fraudulent conduct”. The accountant’s reports concluded Mr Gouws had used company’s funds, without appropriate approval by OFL’s board, for payment of personal expenses and repayment of a loan he had made to the company.

[6] Mr Gouws said OFL’s inquiry was flawed, incomplete and applied a different standard to him than the other directors. In an affidavit for the Authority’s investigation of his interim reinstatement application Mr Gouws said he now understood that how he and other directors had sometimes used company money and received payments from OFL was “unorthodox” but he was “never dishonest or seeking to take money from OFL (or any of the businesses) that I was not entitled to”. He said he had provided an explanation for each identified transaction of concern and identified those that the other directors were aware of at the time of the transaction.

[7] He sought interim reinstatement, primarily on financial grounds. He referred to commitments for a mortgage, family costs, household expenses, insurances and legal fees. The burden of those costs was greater than it might typically be because his wife, Estene Gouws, had also been dismissed by OFL on 31 May 2024. She had worked as the company’s human resources manager. She has made her own personal grievance application to the Authority, presently awaiting mediation.

[8] OFL said Mr Gouws’ dismissal was justified because of his involvement in “multiple transactions” misappropriating its funds. It said its decision was supported by further information gathered after the dismissal which suggested he had deleted some files and emails from company records and devices during its investigation.

[9] The three directors have also since taken steps to remove Mr Gouws as a director of OFL. The Companies Register record for OFL shows Mr Gouws ceased to be a director on 12 August 2024.

[10] OFL opposed interim reinstatement because the three directors said they could not reestablish their trust and confidence in their working relationship with Mr Gouws

and the company could incur irrecoverable losses if he was returned to his previous employment until the outcome of his personal grievance application was known.

The Authority's investigation

[11] Mr Gouws' application for interim reinstatement has been determined after considering the contents of his statement of problem and OFL's statement in reply; affidavit evidence from him (17 June and 1 August 2024) and the three directors (Mr von Benecke, 30 July 2024; Mr Monteiro, 30 July 2024; and Mr Beetge, 30 July 2024); relevant background documents lodged with those statements and affidavits; and submissions from the parties' representatives. Mr Gouws has also lodged the required undertaking as to damages.¹

[12] The representatives attended an investigation meeting to give oral submissions, speaking to detailed written submissions, about the relevant principles regarding interim reinstatement and how they applied in this case. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination states findings, expresses conclusions and specifies orders made. It does not record all evidence and submissions received.

[13] While affidavit evidence is considered on an untested basis, some commonsense assessment of unanswered or disputed assertions in those sworn or affirmed statements may be made in considering whether to order interim reinstatement.²

Principles regarding interim reinstatement

[14] In determining whether to order interim reinstatement the Authority must apply the law relating to interim injunctions and have regard to the object of the Act.³ The object is to build productive employment relationships through promoting good faith in all aspects of employment relationships.⁴

[15] Assessment of an interim reinstatement application follows a three-step process.⁵

¹ Employment Relations Act 2000, s 127(2).

² *Wellington Free Ambulance Service v Adams* [2010] NZEmpC 59 at [17]-[18].

³ Employment Relations Act 2000, s 127(4).

⁴ Employment Relations Act 2000, s 3.

⁵ *XYZ v ABC* [2017] NZEmpC 40 at [5] and [6].

[16] At the first step Mr Gouws must show he has an arguable case, that is a case with a possible (but not necessarily certain) prospect of success and one that is not merely frivolous or vexatious.

[17] The arguable case must be able to answer 'yes' to two questions. Firstly, was there a tenable argument that OFL's decision to dismiss Mr Gouws, and how it reached that decision, would fail to meet the statutory test of justification that OFL must satisfy? Secondly, if the Authority's eventual substantive determination did find OFL had unjustifiably dismissed Mr Gouws, was there a tenable argument that he would then have a realistic prospect of reinstatement to his employment with OFL, in the same position or another position no less advantageous?

[18] The next step looks at the balance of convenience during the interim period, that is until the Authority has determined the substantive claim. This concerns the relative effects on Mr Gouws and OFL of granting or refusing to grant an interim reinstatement order. Factors to be weighed also include the potential effect on third parties and whether other remedies that might ultimately be ordered would likely be adequate.

[19] The third step stands back from the detail required by the earlier steps and considers the overall interests of justice.

[20] Assessing the balance of convenience and the overall justice may include an evaluation of the merits of the case, as far as they can be discerned at an interim stage.

[21] If an order for interim reinstatement is made, it may be subject to any conditions the Authority thinks fit.⁶

An arguable case of unjustified dismissal

[22] From a review of the affidavits and documents lodged by the parties Mr Gouws appeared to have crossed the relatively low threshold for an arguable case, with the following tenable arguments that OFL's inquiries and decision to dismiss him failed to meet the statutory standard of what a fair and reasonable employer could have done:⁷

- (i) He was suspended without a fair opportunity to comment on whether it was necessary or how such a suspension from carrying out his role should be put into effect.

⁶ Employment Relations Act 2000, s 127(5).

⁷ Employment Relations Act 2000, s 103A.

- (ii) He was required to explain a range of transactions which changed in number and without access to some relevant, background information about why they were of concern.
- (iii) He was denied access to potentially relevant comparator information about payments made to other directors.
- (iv) The investigation abruptly concluded with his dismissal on 31 May, without OFL providing him with an opportunity to respond to its conclusions or to respond to a proposal that he be dismissed based on those conclusions.
- (v) The evidence available to OFL, properly examined, could not have warranted a conclusion that Mr Gouws was using funds in a way not known to directors and that amounted misappropriating OFL's funds.
- (vi) Further allegations regarding his conduct, made post-dismissal, might be relevant to any remedies that could be awarded but the legitimacy or otherwise of the dismissal itself had to be evaluated on the information available to OFL at the time of terminating Mr Gouws' employment on 31 May.

(i) No consultation about the fact or conditions of suspension

[23] Mr Gouws found out about OFL's investigation and his suspension from work when Mr Beetge and Mr Monteiro made an unannounced visit to his home around 6.30pm on 29 April 2024. They gave him two letters signed by all three directors.

[24] One letter gave him "notice of a formal meeting" scheduled for 2pm on 7 May to discuss "various transactions identified in the Company's bank accounts, which you have conducted and which need to be examined and explained". The letter asked him to confirm his availability to meet at the time stated and encouraged him to bring a support person or representative.

[25] The second letter gave him notice of his suspension, on full pay, until 7 May. It directed him not to enter company premises, not to perform any duties, not to access any of the company's communication platforms or bank accounts and not to communicate with any of its suppliers or customers. This letter referred to a clause in his employment agreement which said the company could require him to undertake reduced duties or remain away from work, on pay, where it considered it necessary to investigate his conduct or performance.

[26] The clause in his employment agreement also referred to the prospect of “reduced or alternative duties consistent with your abilities”.

[27] The suspension, initially set until 7 May, ended up being extended through the following weeks until Mr Gouws was dismissed.

[28] There was a clearly tenable argument, that is one that was more than frivolous and vexatious, that a fair and reasonable employer could not have suspended Mr Gouws without at least giving him an opportunity to comment on whether suspension required a complete cessation of duties and a ban from company premises, communications and contact with any customers.

(ii) An unfair investigation of a changing tally of transactions

[29] On 1 May Mr Gouws asked OFL’s counsel for some information about what “various transactions” he would be asked to explain.

[30] On 4 May he was sent a spreadsheet described as a “schedule of sums under investigation”. This initial transaction list had hundred of items but no indication of what specific transactions OFL intended to investigate. Querying this, Mr Gouws was told he would be provided with an itemised list of transactions relating to him, with supporting documents for each transaction, at the 7 May meeting.

[31] He was provided with a list and supporting documents at that meeting. Those documents mostly comprised Xero invoices and records. The list identified 24 transactions between 2020 and 2024 OFL wanted him to explain. The value of the transactions ranged from \$741 to \$150,000.

[32] At that meeting, and in the following days, the parties went backwards and forwards over how Mr Gouws would have access to documents and information about the background to the 24 identified transactions, including whether he could speak to the company’s accountant who had been directed not to talk to him.

[33] While Mr Gouws was then provided access to his OFL email account, this was limited to emails sent or received in the previous 12 months. He also did not have access to WhatsApp messages exchanged with other directors, which he considered were relevant to whether or not they knew about some transactions.

[34] By 20 May Mr Gouws had prepared and provided what he called a “formal response”, addressing each of the 24 identified transactions. His response explained those transactions as being:

- (a) Repayments of loans he had made to OFL;
- (b) Sums drawn against the balance accrued in his shareholder’s account;
- (c) Sums paid for purchase of a property in Silverdale for OFL;
- (d) Sums paid in lieu of “directors’ drawings”;
- (e) Sums paid on behalf of JAG, a consulting company owned by Mr Gouws, and which were subsequently repaid;
- (f) Sums paid to cover director’s expenses; and
- (g) Sums drawn against accrued “directors & shareholders drawings”.

[35] Two days later OFL responded, through counsel, with a “formal response” of its own. This included a column setting out comments, queries or additional information on each item.

[36] A covering email to OFL’s response told Mr Gouws he had a further day to respond formally and noting that “if an allegation of misconduct is established, disciplinary action may be taken and your employment may be in jeopardy”.

[37] As explained in his affidavit evidence, Mr Gouws was unclear from OFL’s comments at that time which of the identified transactions remained of concern and required some further response.

[38] At that point Mr Gouws instructed counsel of his own who wrote to OFL’s counsel on 30 May seeking further information and clarification on the specific issues with each transaction that needed to be addressed. Counsel also raised a personal grievance of unjustified disadvantage.

[39] The following day OFL’s counsel replied that the information requested was either irrelevant or already in Mr Gouws’ possession and his request was “simply a delaying tactic”.

[40] Within two hours of Mr Gouws’ counsel being sent that message on 31 May, Mr Gouws was issued with a letter by email terminating his employment with OFL.

The letter, signed by Mr von Benecke, Mr Beetge and Mr Monteiro gave the following reasons for his dismissal:

An extensive investigation has revealed multiple instances of misconduct, including but not limited to:

1. Misappropriation of company funds through invoices not addressed to the company, instead directed towards personal expenses.
2. Private expenses paid through company accounts without proper authorization or justification.
3. Expenses not linked to normal company operations or business activities.
4. Invoices linked to your private residence, indicating a direct personal benefit from company funds.
5. Various payments from JAG Consulting to the company's bank account as loans, which were then transferred back to JAG Consulting after the financial year-end.

A number of transactions have been put to you for explanation, despite which either no explanation has been provided and/or the explanation was manufactured.

...

In addition to termination of your employment, we will be requiring full reimbursement of all monies misappropriated from the company. Shortly we will provide you details of every fabricated transaction and the sum sought to be reimbursed. In the absence of payment, we do intend to pursue legal remedies to recover the misappropriated funds.

[41] As described by Mr Gouws in his 1 August affidavit, OFL had provided seven different lists during its investigation and post-dismissal investigation of transactions said to be of concern or not satisfactorily explained. Faced with what he submitted were those 'shifting sands', Mr Gouws had an arguable case that he was not provided with a fair opportunity to prepare and put forward his explanation for matters which had raised concerns. It was also arguable, on the tentative assessment made at this stage from the affidavit evidence and the related documents, that it was unclear whether OFL had accepted some explanations and which items were still of concern.

(iii) Information about payments made to other directors not provided

[42] Mr Gouws asked for and was denied access to information about the financial transactions and payment of other directors from OFL funds. This included information about personal expenses paid through company accounts, drawings taken or not taken, payment of car allowances, salaries taken by directors and their wives, and amounts invoiced to OFL by companies related to any of the OFL directors.

[43] Responding to the request for that information, Mr von Benecke wrote in an email to the company's own counsel on 31 May that the three directors were "not

subjects of the current investigation” about specific transactions and financial activities, so the requested information “may not be relevant to the matter at hand”. He referred to Mr Gouws request as an effort “to provide context regarding potential allowances or financial arrangements” but said “justifications unrelated to the scope of the investigation may be viewed as an attempt to obfuscate or distract from the primary issues at hand”.

[44] There was a clearly tenable argument that the requested information was relevant “context” to whether or not practices or payments Mr Gouws was being asked to explain were also followed or received by the other directors. It was directly relevant to the allegations that he was engaging in activity not known about by other directors and was receiving funds to which he was not entitled. If examination of that information showed Mr Gouws was doing something quite different from the other directors, this would have strengthened the grounds for OFL’s concerns. If the other directors followed the same or similar practices, and received payments authorised or made in the same way, they would have more difficulty justifying that they had fairly and reasonably concluded that what was happening with Mr Gouws was a misuse of company funds in a manner that was unknown to them.

[45] On that basis, there would be a tenable argument that the directors who had commissioned the inquiry had compromised its integrity by limiting its scope so their own potentially relevant comparator payments or spending was not examined.

[46] There is some reason for doubt around this point, however, because of an extract from a third and final report of the forensic accountant commissioned by OFL which was among documents attached to Mr von Benecke’s affidavit. An undated page, headed “conclusion and recommendation”, begins with these words: “Our findings about the irregular transactions identified are summarized and allocated to the different directors below”. An inference can be taken from the wording of that sentence that “irregular” transactions relating to other directors had also been identified by the forensic accountant. However only the pages relating to Mr Gouws have been disclosed to the Authority and Mr Gouws’ counsel.

(iv) No opportunity to comment on conclusions or a proposal to dismiss

[47] Because of the lack of detail in the findings described to him in the 31 May dismissal letter Mr Gouws had a tenable argument that the directors had not genuinely

considered his formal response before making their decision to dismiss him. As submitted by Mr Gouws he was not told what specific sums OFL had concluded he had misappropriated or how various payments amounted to serious misconduct or which of his explanations were considered to be “manufactured”.

(v) *No substantive justification for dismissal*

[48] The aspects of OFL’s actions already considered in this determination primarily concern the process or procedure followed, although some could have an effect on the substantive justification for OFL’s decision to dismiss Mr Gouws.

[49] He did also have a tenable argument, that is one with some but not necessarily certain prospect of success, that the reasons given for his dismissal would not withstand scrutiny in the Authority’s substantive investigation.

[50] The Authority’s investigation will require some detailed analysis of payments made and funds used, the rationale for doing so and what authority was given by or known to the directors for making those transactions.

[51] At the interim stage, however, there were explanations given by Mr Gouws for certain transactions which it was arguable, if reasonably considered, could not have then warranted a conclusion they amounted to misappropriation of company funds.

[52] Some examples, sufficient for the purposes of this determination, were:

- (a) The repayment of personal funds of Mr Gouws and Mrs Gouws used to purchase a Silverdale property for OFL.
- (b) Payment of expenses for a storage unit for OFL equipment.
- (c) Payments made and recorded on a ‘tracker spreadsheet’ said to account for income accrued with OFL and for expenses paid that Mr Gouws said he intended to be deducted from his director’s drawings. Mr Gouws said other directors knew about the spreadsheet.

[53] Some of the transactions questioned clearly raised issues about the tax obligations for payments made. Examples included payments made from OFL funds for building work being carried out on Mr Gouws’ own house. He said those sums were for money OFL owed him but it was not clear how the value of those payments, which amounted to income Mr Gouws said he was entitled to, was accounted for in respect of any tax liabilities. In the employment jurisdiction, however, the central issue

was not about the tax but rather whether Mr Gouws had been dishonest with OFL as his employer, including with what known by his then-fellow directors, about use of those funds. He had a tenable argument, to be tested in the Authority's substantive investigation, that the practices and payments were known of them.

(vi) *Subsequently discovered conduct relevant to remedies, not justification*

[54] Since Mr Gouws' dismissal, and once litigation about it was underway, OFL has raised further allegations about his conduct. As set out in Mr von Benecke's affidavit, one allegation claimed Mr Gouws had improperly deleted records and emails from his OFL devices and email account while his conduct was under investigation. Another allegation was that Mr Gouws had, in carrying out his role, failed to certify variations to payments on certain projects. OFL said those variations were valued at more than \$2 million and were "causing significant losses" for the company.

[55] Mr Gouws, in his 1 August affidavit, gave explanations responding to those allegations. In respect of a list of 129 emails he was said to have deleted, he said some were deleted when he did not have access to OFL's devices or his email account or before he knew about any concerns over his conduct. Other items deleted were only "meeting request" calendar items. He denied intentionally deleting any emails.

[56] He also denied understanding OFL's allegation regarding a failure to certify variations for payment claims. The allegation did, however, appear to be belatedly raising a potential performance issue rather than being directly relevant to his dismissal for serious misconduct for financial irregularities.

[57] Further, as submitted by Mr Gouws, the later allegations could be relevant to determining appropriate remedies if he was found to have been unjustifiably dismissed, but were not directly relevant to determining the prior issue of whether what OFL did up to when it dismissed him was what a fair and reasonable employer could have done in all the circumstances at the time.⁸

An arguable case for permanent reinstatement

[58] Considering whether Mr Gouws has an arguable case for permanent reinstatement arises only under the scenario that OFL is found, through a full testing of

⁸ *Salt v Fell & Ors* [2008] NZCA 128 at [82], [85] and 96].

evidence at the Authority's substantive investigation of his personal grievance, to have acted unjustifiably. Conclusions reached at this *interim* stage about that prospect being arguable, and then a likely order of permanent reinstatement being arguable, does not presume those two conclusions will necessarily be the *substantive* outcome. Rather, this is an assessment of a possibility and then, in respect of permanent reinstatement, a probability.

Relevant principles about the remedy of reinstatement

[59] If a person found to have been unjustifiably dismissed has sought reinstatement, s 125 of the Act says that remedy must be ordered wherever it is practicable and reasonable to do so. For such an order to be denied, the employer must prove at the substantive stage that reinstatement is neither reasonable nor practicable.⁹

[60] Practicability means more than simply being possible, regardless of consequences. It must be capable of being carried out in action, be feasible, and have the potential to successfully restore the employment relationship. It involves a wide range of considerations, including matters which may not have been reasons for the dismissal but are nevertheless germane to the prospects for a renewed working relationship.

[61] Reasonableness also considers the prospective effects of an order, not only upon the individual employer and employee, but on other affected employees of the same employer, and in some cases, third parties who may be affected by the reinstatement. The Authority must inquire broadly into the equities of the parties' cases when considering the prospect of reinstatement and balance the interests of the parties and the justice of their respective cases.¹⁰ This balancing, weighing the evidence on a case-by-case basis, concerns not only the past but also, and more particularly, the future.

[62] An employer cannot continue to oppose reinstatement on the grounds of a loss of trust and confidence in the former employee if "a review of the circumstances [of the dismissal] discloses that, reasonably and objectively, the employer did not have grounds or at least such sound grounds to lose trust and confidence".¹¹

⁹ *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59, [2021] ERNZ 153 at [42].

¹⁰ *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160 at [65].

¹¹ *Harris v The Warehouse Limited* [2014] NZEmpC 188 at [162].

Assessment in this case

[63] Within the potential future scenario of reinstatement being considered as part of the remedies, because a finding of an unjustified dismissal has been made, there are two further sub-scenarios.

[64] One sub-scenario is where the dismissal is found to have been unjustified because of defects in the investigation process carried out by OFL that resulted in Mr Gouws being treated unfairly but where the substantive concerns were found to be reasonably based. In that sub-scenario, a likely outcome is an award of compensation for distress caused by the faulty process. An order for reinstatement would, however, be less likely because the findings on the substantive basis for the concerns would support the view that it would not be practicable or reasonable to order reinstatement.

[65] The second sub-scenario concerns where the dismissal is found to be unjustified because the substantive grounds for it, here being the alleged financial impropriety, were not soundly established. In that situation, reinstatement is required when requested unless it is otherwise impractical or unreasonable.

[66] The OFL directors have deposed that Mr Gouws could not be reinstated on any count because they have lost trust and confidence in him as a result of seeing the information in the reports of the forensic accountant.

[67] Mr von Benecke described Mr Gouws as “stealing” from his fellow directors and said he did not consider he could ever trust Mr Gouws again. He said he would not accept Mr Gouws back in the business in any capacity. He opposed interim reinstatement because of the danger that Mr Gouws could “tamper” with OFL’s records leading up to the substantive investigation meeting.

[68] Mr Monteiro deposed that the business had operated “primarily on trust” with each director managing their own part of the business, without being “micromanaged” by one another. He opposed reinstatement of Mr Gouws because he said “Mr Gouws has taken a significant amount of money from [OFL] without right, authorisation or approval”.

[69] Mr Beetge deposed that he felt “betrayed” by Mr Gouws and was “totally opposed” to working alongside him ever again.

[70] Their strongly expressed views reflected the social and personal connections between the four men throughout their involvement in the business. In some cases, their wives also worked for the business. They are all originally from South Africa. The forensic accountant they appointed to inquire into various transactions was still in South Africa as many of the messages and other documents that needed to be examined in his inquiry were in Afrikaans.

[71] Each directors' opposition to reinstatement was predicated on the prospect that their decision to dismiss Mr Gouws and the reasons they gave for doing so would be found to be justified.

[72] If that were found not to be the case, particularly in respect of lacking a substantive foundation regarding use of funds in a way not known to the other directors or also done by them, they could no longer say there was a good reason for their view that the relationship with Mr Gouws was irreparably broken.

[73] While the parties in that circumstance would need to undergo some form of restorative process to re-establish a productive working relationship, the affidavit evidence of the three directors did not establish a practical or reasonable basis for declining reinstatement, if their actions had been found to be unjustified. Accordingly, Mr Gouws had an arguable case, at this interim stage, that an order for his permanent reinstatement was likely if his dismissal was found to be unjustified for substantive reasons.

[74] The question of whether he should or could be reinstated on an interim basis depended on the factors regarding balance of convenience and overall justice, considered in the remainder of this determination.

Balance of convenience

[75] An assessment of the balance of convenience concerns the relative positions of the parties during the interim period. This comparison is sometimes referred to as considering the relative hardships to the parties and any relevant third parties.¹² Factors for consideration can include the adequacy of damages as a remedy, the impact

¹² *Angus v Ports of Auckland Limited* [2011] NZEmpC 125 at [56].

on third parties, the relative strength of the parties' cases, and any other uncompensable disadvantages to either party.

Adequacy of damages

[76] OFL submitted Mr Gouws need not be reinstated on an interim basis because, if his dismissal was proved to be unjustified, he could be adequately compensated for the cost of that by an award of lost wages and distress compensation. The relative hardship in that scenario lay more heavily on Mr Gouws. He faces an extended period from now into, likely, the first quarter of 2025 before his substantive case is investigated and determined. This is compounded by three factors – firstly, his wife has lost her own income from her former employment with OFL; secondly, some of his income came from his role as a director so he was affected by what had become both an employment and business dispute; and, thirdly, the nature of allegations may make it difficult to find comparable employment while his case is pending. In this case, the potential prospect of an award of damages is not likely a sufficient answer about what should happen in the interim period.

Relative strength of the parties' cases

[77] As apparent from the assessment of whether Mr Gouws has an arguable case, he has a relatively strong case regarding the inadequacy of at least some of the process followed by OFL to reach its conclusions.

[78] OFL's case raised reasonable concerns about Mr Gouws approving payments by OFL of personal expenses associated with building his house, childcare and purchase of consumer items. However, Mr Gouws has also provided an extensive explanation of the rationale for those payments, charged against funds he expected to receive as a director or shareholder. This does not discount the concerns about how those payments were made but is relevant to the substantive issue of whether they were deliberately dishonest misappropriation of company funds.

[79] On the tentative assessment permitted at the interim stage, based on untested affidavit evidence only, Mr Gouws' case was at least marginally stronger than that presented by OFL.

Impact on third parties

[80] No submissions addressed the potential impact of interim reinstatement on third parties, such as other OFL employees or the company's customers.

Other uncompensable disadvantages to either party

[81] OFL submitted interim reinstatement of Mr Gouws would be too difficult for an organisation of its size to manage. This included a concern about the risk that Mr Gouws could access and 'tamper' with its records. OFL had sufficient resources to engage a forensic accountant, based as already noted in South Africa, and to arrange for restoration of electronic records and messages said to have been deleted from the devices or accounts used by Mr Gouws. This suggested, as Mr Gouws submitted, that OFL would also have the capacity to arrange to limit or monitor his access to its IT and other internal systems if he were reinstated on an interim basis.

[82] OFL's submission that interim reinstatement of Mr Gouws could "cause dysfunction in the workplace" because the parties were "no longer compatible" was based on the notion that it was entirely justified and correct in its conclusions. That remains tentative at this stage and was not sufficient to establish that Mr Gouws could not perform any useful function for OFL during a period of interim reinstatement.

[83] Similarly, OFL's assertion that Mr Gouws might not be able to meet the cost of his undertaking as to damages, if he was not ultimately successful in his personal grievance application, was not a factor weighing in the company's favour in the balance of convenience. A former employee in this situation is not required to provide positive proof, in advance, of an ability to meet the cost of such an undertaking, if later required to do so. Even if the employee was required to do so, limited resources at the time would not necessarily establish that an undertaking could not be met. It would not account for the prospect that the employee might meet the burden of any payments eventually ordered, in reliance on the undertaking, by raising funds from family, friends or a financial institution. To set the high bar suggested by OFL, regarding advance proof of an ability to meeting an undertaking at this stage, would also convert the requirement to provide an undertaking into something akin to security for costs and effectively limit the right to seek interim reinstatement to only former employees with substantial assets. It would be contrary to a requirement under the object of the Act to

acknowledge and address inherent inequalities of power in the employment relationships.¹³

[84] Weighing the factors discussed above, the balance of convenience favoured reinstatement of Mr Gouws in the interim period from now until the eventual determination of his personal grievance.

Overall justice

[85] Standing back from the detail set out in the parties' affidavits and submissions, the overall justice in this case also favoured an order for the interim reinstatement of Mr Gouws.

[86] One potential benefit of such an order would be that OFL could continue its investigation of some of the transactions of concern and could expect the full co-operation of Mr Gouws in doing so because his good faith obligations as a current employee would be restored during that period.¹⁴ Both parties in the employment relationship are required to be active, constructive, responsive and communicative.

[87] OFL's concern about access to records can be addressed by appropriate limits to its IT, accounting and financial systems. If it considers that cannot be achieved, OFL may opt to restore Mr Gouws to the payroll but not require him to work.

[88] If OFL chose to exercise the option not to use Mr Gouws's skills in the interim period, it would not however be able to seek to recoup the cost of his salary if it were later successful in establishing its decision to dismiss him was justified.

Summary and orders

[89] On an assessment of whether he has an arguable case, the balance of convenience and overall justice in the interim period, Mr Gouws has established he should be reinstated on an interim basis to his employment with OFL.

[90] In reliance on the undertaking provided by Mr Gouws in support of his application, OFL must reinstate Mr Gouws to its employment pending the hearing of his personal grievance. This order is subject to the following conditions:¹⁵

¹³ Employment Relations Act 2000, s 3(a)(ii).

¹⁴ Section 4(1) and (1A).

¹⁵ Employment Relations Act 2000, s 127.

- (i) OFL must restore Mr Gouws to its payroll from the date of this determination.
- (ii) Allowing time for OFL to make any necessary arrangements for his return to work, Mr Gouws must report to work by no later than 48 hours of being advised by OFL of its requirement he do so.
- (iii) OFL may also opt to have Mr Gouws serve the period of interim reinstatement *either* on a ‘working from home’ basis (carrying out assigned tasks with any necessary electronic devices and internet access provided by the company) *or* on ‘garden leave’, that is not attending the workplace and not being required to carry out any work, but remaining on the pay roll. If OFL elects one of those options, it must advise Mr Gouws by no later than Monday, 9 September 2024.

[91] Leave is reserved to the parties to revert to the Authority for further directions about this order but they should, in the first instance, seek to resolve any difference by direct discussion or with mediation assistance.

Costs

[92] Costs in relation to the interim application are reserved. If not otherwise agreed between the parties, they may be assessed following investigation and determination of the substantive application.

Next steps

[93] A case management conference is to be convened to discuss arrangements for and timetabling of the Authority’s substantive investigation meeting.

Robin Arthur
Member of the Employment Relations Authority