

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 212/08
5123124

BETWEEN GEOFFREY GWILT
 Applicant

AND BRIGGS & STRATTON
 LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: R Poole, Counsel for Applicant
 M Round, Advocate for Respondent

Investigation Meeting: 13 June 2008

Determination: 18 June 2008

**DETERMINATION OF THE AUTHORITY
OF APPLICATION FOR INTERIM REINSTATEMENT**

Employment Relationship Problem

[1] Briggs & Stratton Limited (“Briggs & Stratton”) is in business as a manufacturer and supplier of small engines to the lawn and garden industry. It employed Geoffrey Gwilt as a salesperson in June 2004. In January 2006 it appointed him as technical, training and warranty manager. It dismissed him in 2008 because of its view that he had refused to run technical and service training courses, despite having been provided with the necessary training to do so.

[2] Mr Gwilt has raised a personal grievance saying that the dismissal was unjustified. He seeks reinstatement.

[3] Mr Gwilt also seeks an order for interim reinstatement. The parties attended mediation, but were unable to resolve Mr Gwilt’s personal grievance or reach an arrangement in respect of the application for an interim order.

[4] This determination addresses the application for an order for interim reinstatement.

The circumstances of the dismissal

[5] The following account of the facts is based on the material before me in the context of the interim application, and is not based on full statements of evidence or detailed questioning. If this matter proceeds to an investigation of the substantive employment relationship problem, the findings of fact for the purposes of that investigation will be determined by the evidence available at the time.

[6] According to Mr Gwilt, when he was appointed to the position of technical, training and warranty manager he agreed to take on the role provided he had all the support and training necessary. He believes that, in 2006, his Australian counterparts were sent on service courses not made available to him. In 2007 he attended various training courses in Australia and New Zealand, and, with assistance, presented several courses in New Zealand. However, also in 2007, it came to his attention that there were other relevant 'train the trainer' courses which he was not attending. Overall he does not believe he was given sufficient training or technical knowledge to present courses on his own.

[7] In February 2008 Glenn Woollett, the national manager, asked Mr Gwilt for a training calendar for the year. Mr Gwilt had not prepared one, and indicated he did not believe he was in a position to prepare one. During a further discussion in March 2008 Mr Gwilt indicated to Mr Woollett that he would require more 'train the trainer' training before he was in a position to carry out the training aspect of his role competently.

[8] Mr Woollett's position is that Mr Gwilt indicated he was uncomfortable with teaching, had lost confidence, and would no longer run the technical and service training schools.

[9] In a letter dated 8 April 2008 Mr Woollett set out his view that Briggs & Stratton had given Mr Gwilt 12 months to settle into the new role of technical, training and warranty manager, and summarised the assistance that had been given.

He also referred to the March 2008 meeting, and Mr Gwilt's apparent fear of teaching. The letter ended by saying Briggs & Stratton must run its training schools, and required its technical training and warranty manager to carry out those duties. A meeting was sought for the next day, Wednesday 9 April.

[10] The meeting was rescheduled for 11 April. Mr Gwilt attended with his representative.

[11] Mr Woollett raised his concern that Mr Gwilt was refusing to perform part of his job, namely the training duties. Mr Gwilt's position was that he simply required suitable training himself first. At the time, and subsequently, he denied refusing to carry out the training duties. There followed a discussion about a possible new position, in which the training element would be removed but Mr Gwilt would also lose his company vehicle. Mr Gwilt believed, too, that the new position would considerably increase his workload.

[12] After the meeting Mr Gwilt was provided with a proposed written employment agreement for the new position, and his response was sought. At the same time there were discussions between Mr Gwilt's representative and a company representative about a possible exit package. Mr Gwilt prepared a response to the matters discussed on 11 April, and to the contents of the proposed employment agreement. He set the response out in a letter dated 18 April.

[13] Meanwhile by 18 April Mr Woollett had become concerned because of his view that Mr Gwilt had refused to conduct the training, the possibility of an exit agreement had not been resolved, and Mr Gwilt had not formally responded to the offer of an alternative position. The letter went further and said that, since Mr Woollett understood Mr Gwilt had refused the alternative position, Mr Woollett had appointed someone else. Mr Woollett sought a meeting on 23 April in order to discuss these matters. He warned Mr Gwilt that his employment was in jeopardy. All of this was set out in a letter also dated 18 April.

[14] The meeting went ahead on 23 April. Mr Gwilt had prepared a further written response to the matters raised in Mr Woollett's 18 April letter. In it he challenged the conclusion that he had turned down the alternative position and queried the apparent

appointment of someone else. The parties discussed the matters raised in the various items of correspondence, and the meeting was adjourned.

[15] By letter dated 24 April 2008 Mr Woollett advised that Mr Gwilt's employment was terminated with 4 weeks' notice. The reason given for the dismissal was Mr Gwilt's refusal to run technical and service training schools, despite having received the necessary training himself. Mr Woollett did not consider Mr Woollett's explanation adequate.

[16] Mr Gwilt was not required to work his four week period of notice.

[17] Mr Woollett deposed that, after receiving the letter, Mr Gwilt became very agitated and heated. Mr Woollett offered to take Mr Gwilt home, to which Mr Gwilt replied 'that wouldn't be a good idea because you probably wouldn't see the day out'. Mr Woollett took that as a threat to kill him, and reported it to the Police. For his part, Mr Gwilt deposed that he said only 'that wouldn't be a good idea'.

[18] Briggs & Stratton has relied heavily on this exchange in support of its view that reinstatement is inappropriate.

Whether an order for interim reinstatement should be made

[19] The parties acknowledged that the issues to be addressed in determining this interim application are:

- (a) whether there is an arguable case of unjustified dismissal;
- (b) whether the balance of convenience favours Mr Gwilt or Briggs & Stratton; and
- (c) where overall justice lies.

1. Arguable case

[20] For the purposes of an application for interim reinstatement, the threshold for reaching the level of an arguable case is not high. Here I accept Mr Gwilt has an arguable case in respect of whether he had himself received sufficient training to carry

out his training duties, whether he had refused outright to carry out the duties, and whether a dismissal based on Briggs & Stratton's view of those matters was justified.

[21] Mr Gwilt has also raised other concerns, such as a view that the reason given for the dismissal was not the real reason and a view that Briggs & Stratton was deliberately putting him into a position where he had no alternative but to resign. My primary finding is as set out above. The additional concerns will have to be tested by evidence, but for present purposes I would say they are at most barely arguable.

2. Balance of convenience

[22] Mr Gwilt says he will suffer irreparable financial damage, as well as damage to his reputation and opportunities for re-employment, if his application for interim reinstatement is not granted. However my assessment of these matters has not been helped in that there was no evidence beyond bare assertion in support of any of them.

[23] In particular Mr Gwilt gave no information regarding his financial position other than stating the amount of his mortgage, no details of likely difficulties in making repayments, and no other details that would enable an assessment of the likelihood of financial stress or whether the point should weigh in favour of granting the application for interim reinstatement. In addition Mr Gwilt made the bare assertion that he would have to sell his house and cash in his superannuation. Both of those are symptoms of extreme financial distress but there was nothing to indicate Mr Gwilt is at any risk of being forced into such a position particularly if, as is the case, his substantive application can be heard in the next 6 – 8 weeks. Overall, while I can assume Mr Gwilt will experience financial disadvantage if he does not receive his salary for a period, I am in no position to say any more.

[24] Mr Gwilt also made much of concerns about loss of reputation should he not be reinstated. However he did not provide any information capable of indicating his concerns were more than fears and had some basis in fact. On the contrary, in the light of his assertions regarding his relationships with customers, it would be surprising if any more than a small number of them took an adverse view of his dismissal. Moreover, any possible loss of reputation could be prevented by a suitably worded announcement as to why he had left his employment.

[25] Regarding opportunities for re-employment, again Mr Gwilt gave no foundation for his assertions. There is a general belief that an employee seeking new employment is in a stronger position if the application is made while still in employment. Otherwise, however, Mr Gwilt's CV discloses a wide range of skills, and considerable experience in the warehousing and spare parts industry. He told me the CV has been described as strong. As I detail later in this determination, he had been seeking alternative employment prior to and independently of his dismissal and the process leading to it, and had received offers. While his ability to obtain alternative employment might be weakened as a result of his loss of employment, on the material I have the possibility is best described as speculative.

[26] Finally, Mr Gwilt cited his age (47) as possibly exacerbating any difficulty he will have obtaining re-employment. However his age does not appear to have been an obstacle in responses he has received to his applications for alternative employment made in the last 6 months.

[27] As mentioned the principal concern expressed on behalf of Briggs & Stratton arises out of Mr Woollett's accusing Mr Gwilt of having threatened to kill him, and an associated concern about the appropriateness of reinstating Mr Gwilt in such circumstances. Mr Woollett also asserted that two other employees would refuse to work with Mr Gwilt, but there was no evidence in support of the assertion. Moreover there was no foundation for the assertion that, if Mr Gwilt were reinstated, Mr Woollett would have to order all of the employees to stay away from the office.

[28] Regarding the alleged threat to kill, if I accept for present purposes that Mr Gwilt spoke the words attributed to him, then I believe Mr Woollett has placed too much emphasis on what was likely to have been a statement made in the heat of the moment. Mr Woollett took the matter seriously but he did not take into account the lack of any history of threatening or abusive behaviour towards anyone on Mr Gwilt's part, the previously good relationship he had with Mr Gwilt, or that Mr Gwilt's conduct is generally acknowledged to be polite and gentlemanly. Further there is no evidence that Mr Gwilt did any more than make the statement attributed to him - for example there was no other accompanying threat of violence and no follow up threat of any kind.

[29] For my part, I take into further account aspects of the affidavit of Mr Gwilt's wife. Mrs Gwilt spoke to her husband shortly after he had received the letter of dismissal, and also collected him from work that day. She described his demeanour as calm, but sad about the way matters had ended.

[30] I believe the alleged threat to kill has not been considered in its proper context, and that the words allegedly used are unlikely to amount to a threat to kill in all of the circumstances. Nevertheless I have been asked to treat the matter as amounting to a threat to kill disentitling Mr Gwilt to an order for reinstatement. For the reasons just set out, I do not give it that weight.

[31] Mr Woollett also believes that, if Mr Gwilt returns to work, he is likely to 'continue to try to sabotage the company's business.' There was no evidence that Mr Gwilt has ever tried to sabotage the company's business, and no evidence of a risk he would do so if reinstated. I do not give that concern any weight.

[32] The next consideration is the adequacy of other remedies, in particular from Mr Gwilt's point of view compensation and the reimbursement of lost remuneration. Frequently these remedies are considered insufficient to redress aspects of the effect of the loss of an employee's employed status. Here, however, there is minimal evidence that Mr Gwilt is at risk of losing benefits flowing from that status.

[33] Similarly, there is no evidence to justify a finding that any financial difficulty Mr Gwilt might experience in the short term will be incapable of redress in the event he obtains orders for payment of reimbursement and compensation in the substantive matter.

[34] I was not addressed on the adequacy of other remedies from the employer's perspective.

[35] I am left with a paucity of evidence in support of what I consider to be a number of overstatements on Mr Gwilt's part, but nothing from Briggs & Stratton beyond its reliance on the alleged threat to kill. I consider that reliance to be misplaced. On that basis the balance of convenience tends to favour Mr Gwilt.

3. Overall justice

[36] Assessing the overall justice of the case involves stepping back and assessing the relative strength of the parties' cases, as well as taking account of the matters just addressed and any other relevant matters. On the facts of this problem, the likelihood of an order for reinstatement in association with the substantive matter is relevant.

(i) Relative strength of the parties' cases

[37] Further to the relative strengths of the parties' cases, it is likely that the outcome in the substantive matter will be influenced by the content of detailed and objective discussion of Mr Gwilt's abilities, the training made available to him, the adequacy of that training, whether other training should have been available to him but was not, and the reasonableness of the parties' views on those points.

[38] These matters will in turn have a bearing on how the parties' discussions in April 2008 are viewed. In particular, the seeming conflict in evidence about whether Mr Gwilt refused to undertake training duties or said that he required better training himself may be more apparent than real although that too has yet to be determined.

[39] A further factor likely to be relevant is Mr Woollett's attempt to address the problem by removing the training duties and creating a new position. It may be that the attempt was fair and reasonable, although Mr Gwilt sees it as an unfair attempt to alter his employment. Whatever the outcome might be, I do not accept the submission that it is strongly arguable that these efforts amounted to an attempt to force Mr Gwilt to resign, or are indicative of bad faith.

[40] The correspondence exchanged in the week leading up to the dismissal also indicates a possibility on the one hand of miscommunication, misunderstanding or error regarding Mr Gwilt's response to the proposals for the alternative position, or on the other hand of inconsistency or uncertainty in Mr Gwilt's response. Full evidence is necessary before findings can be made about the underlying facts, and their significance.

[41] For the purposes of the interim application, I am unable to say whether one party's case is likely to be stronger than the other. I do not accept the overall submission that Mr Gwilt's case is strongly arguable, and can say only that both parties' positions are arguable. I cannot say whether one or the other is more likely than not to succeed.

(ii) Likelihood of reinstatement in the substantive matter

[42] Even if Mr Gwilt is successful in the substantive matter, I have considerable doubt about whether reinstatement will still be sought, or if it is still sought whether it is likely to be implemented in the spirit intended. Orders for reinstatement envisage that, at least at the time they are made, the parties intend a continuing relationship.

[43] However Mr Gwilt has been searching for alternative employment outside New Zealand since mid-late 2007. The search was not prompted by the dismissal, and was well in train by the time the dismissal occurred. Mr Gwilt said at the investigation meeting he is looking for a change and his focus is on a move to Australia. By the end of 2007 he had already applied for and obtained licences to import his motor vehicles into Australia. In or about October or November 2007 he was offered, but declined, alternative employment outside New Zealand. In or about late November 2007 Briggs & Stratton itself canvassed with Mr Gwilt the possibility of a transfer to Melbourne.

[44] In January 2008 Mr Gwilt visited Brisbane further to an application for employment in a position in the mining industry. He was shown around the site and introduced to the people he would work with. He approached a letting agent regarding a rental for a period of several weeks, saying in evidence that he did so because he needed accommodation while he found a house. Clearly the recruitment process was well advanced. However as a result of the visit Mr Gwilt decided not to take the position. He found the position unsuitable.

[45] In or about March 2008 Mr Gwilt applied for a position as a parts controller in Perth. He travelled to Perth on 21 March 2008 to meet with his potential employer. Again he chose not to take the position, because he concluded it was not the position he had discussed prior to the visit.

[46] Mr Gwilt's wife has also been seeking employment in Australia. She, too, applied for a position in Perth in or about March 2008. She is currently employed on a fixed term contract which expires at the end of June 2008.

[47] Finally, Mr Gwilt has been in contact with a real estate agent in Perth regarding property to rent. Up to the time of his dismissal he was still looking for employment and accommodation in Perth. He said at the investigation meeting that he ceased his enquiries at that point because he was uncertain of what he should do as a result of the dismissal.

[48] I consider all of this a clear indication that Mr Gwilt is not committed to remaining in his position with Briggs & Stratton or even in New Zealand at all. Further, over a period of less than 6 months at least three other organisations have been willing to employ him. The nature and extent of Mr Gwilt's efforts to find alternative employment lead me to consider it possible reinstatement will not continue to be sought as a remedy in the substantive matter. Moreover if the remedy is still sought, then the practicability of such an order in the light of Mr Gwilt's acknowledged wishes and plans is very doubtful.

[49] Most of the factors to be taken into account in deciding whether or not to make an order for interim reinstatement have been thinly supported or finely balanced. This one is not, and I find it determinative of the outcome.

Conclusion

[50] For the above reasons the application for an order for interim reinstatement is declined.

[51] The Authority will contact the parties shortly to make arrangements for an investigation meeting.

Costs

[52] Costs are reserved pending a final resolution of this matter.

R A Monaghan

Member of the Employment Relations Authority