

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Russell Harris (Applicant)
AND Charter Trucks Limited (Respondent)
REPRESENTATIVES Robert Thompson, Advocate for Applicant
Philip James, Counsel for Respondent
MEMBER OF AUTHORITY Paul Montgomery
INVESTIGATION MEETING 7 December 2005
DATE OF DETERMINATION 13 December 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Harris seeks interim reinstatement to his position as a driver with the respondent. His position was declared redundant by the respondent after an injury the applicant sustained while at work on 9 August 2005. After a period on ACC the applicant returned to work on 5 September 2005.

[2] Upon returning the applicant was given a letter notifying him of a formal meeting at which Mr Harris's position and the time he had had off work were to be discussed. The respondent also said it would discuss the possibility of his position being declared redundant. The applicant was not required to attend work until a meeting which took place on 12 September 2005. The applicant alleges this was an unlawful suspension on pay. The respondent says that there was insufficient work for the applicant at the time, so his attendance at the work place was not required.

[3] The applicant seeks reinstatement pending a determination of the substantive matter.

Undertaking as to damages

[4] Mr Harris has signed an undertaking agreeing he will abide by any order the Authority may make in respect of damages that are sustained by the respondent through the granting of an order for interim reinstatement.

[5] The respondent, by its counsel, refers to the primary affidavit and the affidavit in reply from Mr Harris. At paragraph 22 of his original affidavit the applicant states:

I have no money and I am having difficulty paying my mortgage payments and other bills.

At paragraph 13 of his affidavit in reply Mr Harris confirms his financially stretched circumstances.

[6] It has to be said that in the absence of any other financial evidence from the applicant the undertaking must be regarded as having little substance.

Arguable Case

[7] The applicant maintains that the redundancy was a sham, that the alleged suspension disadvantaged him unjustifiably and that the process of selection was seriously flawed.

[8] The respondent says the merging of the two companies gave rise to opportunities for economies to be achieved and that with the pending withdrawal of its principal client, on whose work the applicant was largely employed, justified its decisions in respect of the applicant. The respondent claims that subject to the duty to act fairly towards Mr Harris, it has the right to organise its business affairs as it sees fit.

[9] Considering the threshold of an arguable case is relatively low, I find the applicant has an arguable case.

Balance of convenience

[10] For the applicant, Mr Thompson submits that his client will be unable to find alternative employment readily due to *his connections and his past record*. The applicant states he is facing financial hardship as a result of his dismissal and further, claims that the respondent has work he can usefully perform pending the outcome of his personal grievance proper.

[11] The respondent, through Mr Sutherland's affidavit, states that in the period Mr Harris was on ACC following a shoulder injury, the truck used by Mr Harris was idle. Further, his affidavit states that the company had to consider its best alternatives given that a very large client, whose contract provided the bulk of the applicant's employment, gave notice that it would not require the respondent's services as of 1 December 2005.

[12] In those circumstances, said Mr Sutherland, a review of the company's operations took place leading to the eventual decision to declare Mr Harris's role surplus to requirements. The respondent says it removed the swing lift from the vehicle used by Mr Harris placing it on an older truck and advertising it for sale. The truck used by Mr Harris was integrated into the general cartage section of the business.

Alternative remedies for the applicant

[13] The question to be decided is whether, if the applicant succeeds in his personal grievance against the respondent, will damages awarded against the respondent provide an adequate remedy for Mr Harris?

[14] Mr James submits that damages are, in this case, an adequate alternative remedy. He also submits that in the event that Mr Harris is reinstated and the company successfully repels his personal grievance, the respondent would be unlikely to retrieve any money from Mr Harris because of his parlous financial position.

[15] Having weighed this aspect of the issue carefully I find that the balance of convenience favours the respondent as the prospect of loss to it is greater than that likely to be sustained by the applicant.

The overall justice of the case

[16] Standing back and evaluating the evidence in support of and in opposition to the application, I am particularly mindful of the base plank in the respondent's defence, that is, that the applicant was not dismissed on any ground other than the redundancy of his position.

[17] Against that is the assertion of the applicant that he was dismissed for other reasons and that there is work that he could gainfully undertake for the respondent.

[18] The respondent denies that there is work available and if interim reinstatement were to be ordered, it would in effect be paying Mr Harris for doing nothing.

Determination

[19] The status quo is to remain. The application for interim reinstatement is declined. The matter of costs is reserved.

[20] As discussed with the representatives at the investigation meeting in respect of this applicant, the Authority has held Thursday 2 February 2006 for the investigation of the substantive issue.

[21] The parties are directed to mediation. Mr Thompson is to contact the Mediation Service to arrange a prompt meeting in that forum. He is to liaise with Mr James on dates and once finalised, he is to notify the support officer at the Authority.

[22] In the coming week the Authority support officer will be in touch with both parties by way of telephone conference in order to schedule the lodging and service of evidential statements.

Paul Montgomery
Member of Employment Relations Authority