

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 89
5370065

BETWEEN	JOSEPHINE ELIZABETH HART Applicant
AND	DAMIEN GRANT trading as WATERSTONE INSOLVENCY Respondent

Member of Authority:	Alastair Dumbleton
Representatives:	Blair Edwards, counsel for Applicant Michael O'Brien, counsel for Respondent
Submissions Received	29 February, 2 and 6 March 2012
Determination (on papers)	8 March 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant Ms Josephine Hart raised personal grievance claims against the respondent Mr Damien Grant. They arose from an employment relationship Ms Hart had with Mr Grant when she worked in his firm. Ms Hart claimed that Mr Grant unjustifiably disadvantaged her in November 2011 and then unjustifiably dismissed her on 26 January 2012.

[2] To resolve her grievances Ms Hart has applied to the Authority under s 127 of the Employment Relations Act 2000 for an order of interim reinstatement to her former employment, and also for an award of compensation for distress, humiliation and hurt feelings under s 123(1)(c)(i) of the Act.

[3] The grievance claims are amenable to mediation as a preferred dispute resolution method and the parties have made arrangements for that to take place urgently before the Authority investigates further.

Preliminary issue

[4] For the event, if it occurs, that the matter remains unresolved after mediation, an issue has been identified as to whether Ms Hart is legally prevented from seeking reinstatement. As it seems likely to have a bearing on the approach the parties may take in mediation when trying to resolve the employment relationship problem, submissions on the issue have been provided by counsel Mr Edwards and Mr O'Brien enabling the Authority to give a decision ahead of mediation.

[5] For Mr Grant it is contended that Ms Hart's present bankruptcy is a bar to her being able to seek reinstatement, whether on an interim or permanent basis.

[6] Ms Hart was adjudged bankrupt by the High Court on 20 October 2011 while employed in Mr Grant's Waterstone Insolvency practice or firm. Correspondence from him with regard to the unjustified disadvantage and unjustified dismissal grievances raised on Ms Hart's behalf refers to the reason for dismissal as being her refusal to follow a lawful instruction and the making of false statements to Mr Grant while he was investigating her conduct or performance. It appears that the occurrence of bankruptcy was not an issue for Mr Grant, who was aware of it at the time.

[7] Ms Hart first applied to the Authority in early February 2012. That application was later withdrawn by consent after attention was drawn by counsel Mr O'Brien to provisions of the Insolvency Act 2006, the effect of which is that before bringing legal proceedings Ms Hart needed to obtain consent from the Official Assignee as the administrator of her bankruptcy.

[8] A fresh application was lodged by Ms Hart later in February. She continued to seek reinstatement, both interim and permanent, and also claimed compensation for humiliation, loss of dignity and injury to feelings. She dropped her earlier claim for payment of lost wages as a remedy for her personal grievance.

[9] Accompanying her latest application was an email from an Insolvency Officer of the Ministry of Economic Development, sent to Ms Hart on 16 February 2012, which states:

Thank you for your email dated 9th February 2012 and in response please note the following:

- *Pursuing causes of action in relation to personal damages does not vest in the Assignee pursuant to section 103 of the Insolvency Act 2006 and the Assignee therefore has no interest in them. It follows that the Assignee can have no objection to you issuing proceedings for damages.*
- *Any causes of action which relate to your rights of property (including, but not limited to any claim for economic loss), do vest in the Assignee and could only be pursued by the Assignee.*

As you intend to pursue the claim relating to economic loss, the Official Assignee will not consent to this as this will not provide any benefit to creditors.

[10] The parties accept the effect of this advice is that Ms Hart may pursue her claim for compensation as a remedy, because it relates to pain and suffering felt by Ms Hart in respect of her body, mind or character and is not a claim made with reference to any rights of property she has.

[11] The preliminary issue for the Authority now to determine is whether Ms Hart's claim for reinstatement relates to 'property' within the meaning of the Insolvency Act 2006, in which case the claim requires the Assignee's consent. At s 3 of that Act property is defined as;

.....property of every kind, whether tangible or intangible, real or personal, corporeal or incorporeal, and includes rights, interests, and claims of every kind in relation to property however they arise.

[12] The extensive submissions received from counsel have been most helpful, as were a number of decisions from the courts provided by Mr Edwards and Mr O'Brien.

Determination

[13] After considering the submissions I conclude that Ms Hart is not barred from seeking reinstatement, whether as an interim or permanent remedy able to be ordered by the Authority in a successful claim of personal grievance.

[14] Reinstatement is a statutory remedy available in any personal grievance where the claim raised has been sustained. The effect of reinstatement is to restore an employee to performance of an employment relationship that is subject to all rights and obligations agreed to by the parties under the terms of their employment agreement. Fundamental to the remedy is the recognition of an employee's right to be

offered work by the employer and the employee's obligation to perform that work for the employer in return for remuneration. The employee's rights and obligations arise under a contract that is recognised in law as being one for 'personal services' ; see *Matheson v Transmissions and Diesels Ltd* [2000] 1 ERNZ 233 at 240. Performance of the contract cannot be transferred like many types of property, for example by lease, sale, assignment or bequest.

[15] From the Ministry's advice given to Ms Hart on 16 February it is clear that a distinction has been drawn between the purpose of the remedies of damages or compensation and claims for recovery or reimbursement for economic loss. The Ministry considers that the latter claims relate to rights of property. Reinstatement is quite clearly distinguishable as a remedy, its purpose being to restore a personal relationship and performance of rights and obligations under that relationship rather than compensate or reimburse monetarily.

[16] The decision in an old case, *Beckham v Drake* (1849) 2 HLC 579 referred to in cases provided by counsel, gives a good example of a right of action that did not pass to the Assignee or equivalent officer because the remedy (damages) was not quantifiable with reference to rights of property. The example is the action for breach of promise of marriage (now obsolete in many jurisdictions) which did not pass because of the personal nature of that kind of claim.

[17] Comparisons made in submissions with the common law action of wrongful dismissal and the ability to claim damages for breach of contract are of limited if any help in considering this issue, as reinstatement is a statutory remedy. It springs not from breach of contract but from the statutory construct of justification and the presence or absence of justification as a determinant of an established personal grievance claim.

[18] Similarly reference to the common law action for specific performance and the historical unavailability of that as a remedy for wrongful dismissal, is of little if any relevance when there has been provided by statute a particular remedy, which is called reinstatement.

[19] Comparison with injunctive relief generally available to be sought by Assignees on behalf of bankrupts is also not to the point, as reinstatement under the

Employment Relations Act is not identical to that kind of relief but is a truly unique remedy in law.

[20] Under s 101 of the Insolvency Act, on a bankruptcy all property belonging to the bankrupt vests in the Assignee and the powers the bankrupt could have exercised over that property vest in the Assignee. It is not suggested however that the Assignee was able to step into the shoes of Ms Hart if the Assignee had wanted to perform the employment herself. If that were the situation then Mr Grant purportedly dismissed the Assignee in January 2012, as by that time Ms Hart had been adjudged bankrupt.

[21] I note further the advice given on 29 February by the Ministry of Economic Development to Ms Hart that a bankrupt does not need the Assignee's consent to be employed by anyone except a relative of the bankrupt or an entity which is owned, managed or controlled by a relative of the bankrupt.

[22] Ms Hart having being dismissed by Mr Grant became subject to a duty to mitigate her loss and by now may well have sought other employment, in case she is not reinstated. It cannot be the situation that she could enter into new employment with another employer but have no effective way to challenge a dismissal by applying for reinstatement. In this regard the Ministry's advice was that:

The OA [Official Assignee] encourages bankrupts to earn at their full potential and assess their living expenses against their income to determine what contributions should be made: s.147 Insolvency Act 2006.

There is a basic difference between compensation for lost wages and the right to earn an income. The former is a chose in action which must be assigned but the latter is not a right that vests in the OA and does not require any assignment of a right by the OA or, other than in the circumstances set out above, the OA's consent.

The right to work and earn an income is a personal right of the bankrupt. If that were not the case we would be able to assign it to anyone for consideration.

(My underlining)

[23] If the law permits a bankrupt person to continue in their employment or to seek new employment, then it may be taken that bankrupt employee is also permitted to retain the protections given by the law against unjustified dismissal and consequent termination of work performance under the agreement.

[24] In submissions Mr O'Brien acknowledged that it is appropriate for the Assignee to encourage bankrupts to earn at their full potential, so that contributions can be made in accordance with s.147 of the Insolvency Act and so that eventually bankrupts can be discharged from the Assignee's administration. It is not in the interests of creditors to have a bankrupt barred from trying to return to paid employment after an unjustified dismissal by invoking legal remedies or relief such as reinstatement.

[25] Mr O'Brien in his submissions described the essence of the issue before the Authority as follows:

... there is a clear difference between the right to work and earn an income, and the right to claim specific performance for a breach of contract by way of reinstatement. The former does not vest in the Official Assignee (although it is limited in scope by the Official Assignee) and the latter is a property right that immediately vests in the Official Assignee upon adjudication.

[26] Ms Hart has not sought or claimed 'specific performance for a breach of contract' but has invoked statutory remedies by raising a personal grievance and seeking a determination that she was unjustifiably disadvantaged and dismissed. Her remedies are provided by the Employment Relations Act 2000, especially s.103A and s 123(1)(a) and (c).

[27] In summary, the Authority determines that Ms Hart's claim for reinstatement is personal to her and did not pass with bankruptcy to the Assignee. She may proceed with her claim to be reinstated, by having it investigated and determined by the Authority.

[28] In the event mediation does not resolve this matter, upon being advised of that by Mr Edwards the Authority will give further directions as to timetabling and a date for an investigation meeting.

A Dumbleton

Member of the Employment Relations Authority