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Imperial Tobacco New Zealand Limited v Pereira [2012] NZEmpC 39 (2 March 2012)

Last Updated: 16 March 2012

IN THE EMPLOYMENT COURT WELLINGTON

[\[2012\] NZEmpC 39](#)

WRC 2/12

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER OF an application for stay of proceedings

BETWEEN IMPERIAL TOBACCO NEW ZEALAND LIMITED

Plaintiff

AND DOMINIC PEREIRA Defendant

Hearing: 23 February 2012 (Heard at Wellington)

Appearances: Rachel Burt and Sarah Backhouse, counsel for the plaintiff

Carolyn Heaton, counsel for the defendant

Judgment: 2 March 2012

INTERLOCUTORY JUDGMENT OF JUDGE A D FORD

The application

[1] On 15 February 2012, the plaintiff (Imperial Tobacco) filed a statement of claim electing under [s 179](#) of the [Employment Relations Act 2000](#) (the Act) to have the whole of a determination^[1] of the Employment Relations Authority (the Authority) dated 25 January 2012 heard de novo by this Court. The Authority had concluded in its determination that Imperial Tobacco had unjustifiably dismissed the defendant, Mr Dominic Pereira, from his employment. Imperial Tobacco was ordered to

reinstate Mr Pereira to his former position and to pay him compensation of \$7,500 for injury to his feelings reduced by one third to \$5,000 on account of his own

blameworthy conduct. In the application before me, which is also dated

15 February 2012, Imperial Tobacco seeks an interim stay of the reinstatement order. The application was granted urgency and was heard on 23 February 2012.

[2] Counsel for the plaintiff, Ms Burt, freely accepted that a stay is an exception to the general rule that an order for reinstatement is to remain in full force, notwithstanding a challenge to a determination. [Section 180](#) of the Act provides that:

180 Election not to operate as stay

The making of an election under [section 179](#) does not operate as a stay of proceedings on the determination of the Authority unless the Court, or the Authority, so orders.

The jurisdiction to grant a stay is unfettered and depends only on the exercise of the Court's discretion in the interests of justice. As Chief Judge Colgan noted in *Secretary for Justice v Dodd*,^[2] "Stay is an interim order and the Court needs to balance the interests of, and prejudices to, the parties in determining what will be the most just course for that period."

The Authority's findings

[3] Mr Pereira was dismissed on 12 April 2011 for serious misconduct. He had worked at the company's cigarette manufacturing factory in the Hutt Valley for

35 years and had not previously been involved in any disciplinary action. At all material times Mr Pereira was the store supervisor responsible for two employees, Mr Joshua Ross and Mr Belford Rodrigues. He also sometimes supervised a third worker, Mr Gilbert Milne. Mr Pereira reported to Mr Graham Chote who had been appointed Logistics Manager in October 2009.

[4] Imperial Tobacco suspended Mr Pereira from work on 18 March 2011 following a complaint from Mr Ross that he had been harassed and bullied by Mr Pereira during a meeting at work on 14 March 2011. The meeting had taken place in a porta-cabin style office used by Mr Pereira in the material stores area of the factory. At the meeting Mr Chote was discussing arrangements for managing materials when Mr Ross was absent from work. An argument began between

Mr Ross and Mr Pereira. It was alleged that "without provocation" Mr Pereira had

leaned over his desk towards Mr Ross and accused him of shaking his head when he (Mr Pereira) had told Mr Chote that materials were put away correctly. It was further alleged that Mr Pereira had then stared at Mr Ross, waved his finger at him and verbally assaulted him by saying, "I can see what's going on here now" remarking to Mr Chote "this little shit has been in your ear."

[5] Imperial Tobacco's factory manager, Mr Mike McInnarney and the human resources manager, Ms Patricia Wylie, proceeded to conduct a disciplinary investigation. After carrying out preliminary interviews they notified Mr Pereira of three additional allegations, apart from the 14 March 2011 incident, and they asked for an explanation in relation to all four. The Authority Member described the allegations in these terms:

(i) behaving in an aggressive and intimidating manner towards Mr Ross on 14 March 2011; and

(ii) verbally and physically threatening Mr Chote on 23 September 2010;

and

(iii) behaving in an insubordinate manner towards Mr Chote and threatening him in a discussion in February 2010; and

(iv) creating an unsafe and fearful working environment by comments made and behaviour towards Mr Milne and Mr Ross.

[6] A disciplinary meeting was held on 31 March 2011. Mr Pereira requested further information, suggested some other employees be interviewed and proposed that the parties attend mediation. Mr McInnarney agreed to mediation which was held on 8 April 2011 without resolving the matter. A further disciplinary meeting was held on 12 April 2011 during which Mr Pereira provided detailed responses to the allegations. Following an adjournment of the meeting, Mr McInnarney informed Mr Pereira that he was dismissed. On 14 April 2011, Mr McInnarney provided Mr Pereira with a six-page letter setting out an account of his investigation, his findings on the allegations and his reasons for imposing the penalty of dismissal.

[7] Mr McInnarney concluded:

1. During the 14 March 2011 meeting, Mr Pereira "behaved in an angry and forceful manner towards Mr Ross" in a way that amounted to harassment.

2. In relation to the 23 September 2010 incident, Mr McInnarney found that Mr Pereira had "verbally and physically threatened Mr Chote" after Mr Chote had questioned why he had stopped an employee from another department going into the material stores to remove some wall units. Mr McInnarney accepted Mr Chote's account of the incident, namely, that Mr Pereira had raised his fist to him and told him he was "this close to getting a smack".

3. In relation to the February 2010 incident, the allegation was that Mr Pereira had ignored a reasonable and lawful instruction from Mr Chote about quarantine procedures by walking away from Mr Chote in the middle of the conversation and not returning to talk to him when asked to do so. He was alleged to have threatened Mr Chote by saying, "if it was anybody else asking me, I would smash them". Mr McInnarney did not record a specific finding in relation to that allegation but noted that Mr Pereira accepted he was angry and heated in the meeting and he concluded that Mr Pereira was aggressive and insubordinate towards Mr Chote.

4. The fourth allegation about creating an unsafe and fearful working environment was based on alleged threats by Mr Pereira to Mr Milne and his behaviour towards Mr Ross in the workplace which Mr Ross claimed "made him afraid". Mr

McInnarney concluded that Mr Pereira “created a workplace environment that was unsafe and fearful”.

[8] The Authority correctly recorded that, in terms of the test of justification set out in [s 103A](#) of the Act, whether Imperial Tobacco’s decision to dismiss Mr Pereira and how it reached that decision was justified is to be assessed against the objective standard of what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. The Authority concluded that Imperial

Tobacco’s decision that Mr Pereira’s behaviour amounted to serious misconduct and that he should be dismissed for that behaviour were not conclusions a fair and reasonable employer, having conducted a full and fair inquiry, could have reached in all the circumstances at the time. It held that aspects of the disciplinary inquiry were not sufficiently investigated and consequently Imperial Tobacco did not or could not genuinely consider Mr Pereira’s explanations. It concluded that those defects were not minor and accordingly Mr Pereira’s dismissal was unjustified.

[9] In summary, the Authority concluded that the alleged incidents in February 2010 and September 2010 could fairly only have been dealt with much closer to the time that they occurred and a fair and reasonable employer could not have included those incidents in the disciplinary inquiry conducted in March 2011. In relation to the 14 March 2011 incident, the Authority concluded that Mr McInnarney’s findings were based on “a less than full account of what actually occurred”. In this regard, the Authority held that there was an important piece of information about the incident that had not been reported to Mr McInnarney, namely, that shortly before Mr Pereira’s outburst Mr Ross had provoked Mr Pereira by calling him a liar. The Authority accepted that while that did not necessarily excuse Mr Pereira’s behaviour towards Mr Ross that day, it was something Mr McInnarney should have been able to consider as a mitigating factor. The Authority also concluded that Mr McInnarney had given unreasonable weight to negative comments about Mr Pereira from other employees and inadequate consideration to alternatives to dismissal.

Findings on reinstatement

[10] The Authority recorded that Imperial Tobacco opposed reinstatement on the grounds that it was not practicable and reasonable given the conclusion of its disciplinary inquiry that Mr Pereira had created an unsafe and fearful environment for the employees he supervised and for Mr Chote. The Authority did not accept that submission because it was based on conclusions it found were not justifiably reached. The Authority referred to the recent decision of the full Court in *Angus v*

Ports of Auckland Ltd^[3] and stated: “Assessing the reasonableness of reinstatement

requires “a broad inquiry into the equities of the parties” cases” and into the prospective effects of an order for reinstatement not only on Mr Pereira and (Imperial Tobacco) but also other employees, including in this case Mr Chote, Mr Ross and Mr Milne.

[11] The Authority stated “the remedy of reinstatement is particularly important to Mr Pereira’s prospects for continuing a working life”.^[4] It noted that he was 54 years old and had spent the last 35 years working in the one factory. It also noted that his prospects of re-employment in a similar position or level of seniority elsewhere “were, realistically, limited”.^[5] The Authority acknowledged that Mr Pereira’s return to work “would not be without some difficulties and an effort required from all parties”^[6] but it noted that his position had not been filled with his tasks being shared out between others while his personal grievance application was being considered. The Authority stated that if there was any real substance to Mr Chote’s claim of feeling intimidated by Mr Pereira then that could adequately be addressed by the support Mr Chote could expect from Mr McInnarney and the human resources officer. It also noted that the “fearfulness” said to have been expressed by Mr Milne and Mr Ross would be assuaged by undertakings Mr Pereira had given to change his behaviour and his understanding of how his manner of speaking might affect Mr Milne and Mr Ross.

[12] The order for reinstatement of Mr Pereira was made on the basis that he would be reinstated to his former position and to the payroll from the date of the determination. The order also provided that Imperial Tobacco “may, at its discretion, direct Mr Pereira not to return to work for a period of up to 28 days” and, in that event, certain directions were given for steps be taken during the 28-day period. Imperial Tobacco exercised its discretion under the order and Mr Pereira was not due to return to work until 21 February 2012. The urgent application for a stay was filed on 15 February 2012 and in a minute dated 17 February 2012 I ordered, pursuant to [s 126](#) of the Act, the stay of the Authority’s reinstatement order pending delivery of this interim judgment.

Submissions

[13] Submissions were made against the uncontested background covered in affidavit evidence that there have been significant changes over the last 12 months in the way in which Imperial Tobacco conducts its operations at the Hutt Valley manufacturing plant. The changes result from the introduction of “Project Switch” which was announced at the end of 2010 and is expected to be completed in August 2012. The project is aimed at increasing production at the plant three-fold. Project Switch is referred to in the pleadings as “a major project involving substantial renovations to the factory including the installation of new machinery and processes to build from an output of 1.2 billion sticks (cigarettes) to 3.8 billion sticks.” It

was explained that the very significant increase in production arises out of contractual obligations Imperial Tobacco has entered into with its Australian counterpart, Imperial Tobacco Australia.

[14] It is claimed by Imperial Tobacco that as a result of these developments there has been a significant increase in the inventory in the stores area compared with how it was when Mr Pereira last worked at the factory in March 2011. Other changes are identified in an affidavit from Mr Chote who deposed that Mr Pereira's "role as Stores Controller has changed significantly". Counsel for Mr Pereira, Ms Heaton, accepted that there had been changes but noted that Mr Ross had been primarily responsible for stores during Mr Pereira's absence and, as Ms Heaton submitted: "It is therefore difficult to understand why Mr Pereira, a manager with significantly more experience and seniority, is not to be accorded the same opportunity as other Imperial employees, including Mr Ross, to rise to the challenge that project Switch apparently presents." Mr Pereira deposed in an affidavit that during his 35 years at the factory he had experienced "many significant changes in the quantity and quality of work, technology, staffing levels, nature and quality of materials and so on". He did not accept that Imperial Tobacco had any reason to doubt his ability to cope with the changing demands of the role.

[15] In her submissions, Ms Burt claimed that Imperial Tobacco will be "substantially prejudiced" if the stay is not granted. The strongest ground she advanced under this head was that two "valuable employees" have indicated that they will resign if Mr Pereira is reinstated. The first is Mr Ross who is the materials

handler in the stores area. He would be working directly under Mr Pereira. In anticipation of Mr Pereira being reinstated on 21 February 2012, Mr Ross tendered his resignation to the company on 7 February 2012 to take effect on Friday,

17 February 2012. The resignation was stated to be, "On the condition of and due to Dominic's return on the 21st of Feb". A medical report was produced from Dr Simon Ryder-Lewis, a qualified Specialist Occupational Physician, who saw Mr Ross on 21 February 2012. Dr Ryder-Lewis stated:

He is very worried about the possible return to work of Dominic. He was so upset and concerned I felt it best to give him 7 days off work for medical reasons. His sleep and his appetite are poor and he does not think he can work with Dominic again. In my opinion it seems the relationship has broken down between them to such an extent that he would find it extremely difficult (medically) to ever work with Dominic in the future.

[16] The other employer who has threatened to resign if Mr Pereira is reinstated is Mr Chote who is now the Supply Chain Manager at the manufacturing factory. Mr Chote has deposed in an affidavit that he has been suffering from insomnia and worry over Mr Pereira's pending reinstatement and that he is, "seriously considering resigning". He stated:

22. I found myself looking at properties in the country the other day. I realised that I was looking for a hideaway because the prospect of staying where I am is currently so unappealing.

In reference to Mr Ross, Mr Chote deposed:

19. The problem is that with Dominic's re-instatement Josh has handed in his resignation. If Dominic returns, Josh will leave. Josh is absolutely clear on this. If Josh leaves, he takes all the knowledge with him and the task of managing the stores area, which his already stretched, becomes fraught.

[17] In response to this issue, Ms Heaton referred to that part of the Authority's determination which stressed the importance of the role of the human resources department and indicated that, "Messrs Chote and Ross can be advised that the reinstatement will be interim if the appeal is successful, and that they will be assisted in the meantime."

[18] Imperial Tobacco duly complied with the order made by the Authority that

Mr Pereira be reinstated to the payroll and he has been receiving his wages since the

date of the determination. Ms Burt submitted that Mr Pereira will, therefore, not be

injuriously affected if a stay is granted because he "has already been off work for

11 months, since he was suspended in Mid March 2011. A further short delay, particularly as he will be a paid employee, will not injuriously affect Mr Pereira." Ms Burt also made reference to an article which appeared in the New Zealand Herald on 3 February 2012 under the heading, "„I'm no monster"" – accused workplace bully" in which Mr Pereira is reported to have said, "To me the job is not that important, it's my reputation and my family name [that] has been dragged through the gutter." Mr Pereira, who deposed that his wife also works at the factory, claimed that he had been misrepresented and at this stage of the proceedings, I am unable to make findings on contested issues of that nature.

Discussion

[19] Mr Pereira lodged his personal grievance application in the Authority on

5 May 2011. The Authority's investigation meeting was held on 15 September 2011 and the determination was issued on 25

January 2012. The Authority Member regretted the delay which was said to be due to the demands of other Authority matters. The delay is unfortunate but, as Ms Burt pointed out in her submissions, no application had been made by Mr Pereira under [s 127](#) of the Act for an order for interim reinstatement pending the hearing of the personal grievance.

[20] Responsibly, Ms Heaton accepted that Imperial Tobacco's challenge to the determination was brought in good faith. She also did not seek to challenge the seriousness of Mr Ross' threat to resign if Mr Pereira is reinstated or the medical evidence produced in support of that threat. As I have indicated, this is not the time and place for the Court to get involved in issues of credibility and I, therefore, put to one side completely the rather extensive affidavit evidence on those matters. Issues involving findings of credibility can only be properly assessed and dealt with at the substantive hearing. Both parties have agreed to mediation and, to their credit, they have also agreed to work to a tight timetabling schedule which would enable the substantive hearing to proceed on 2 and 3 April 2012. That is an important factor in my decision.

[21] I am now required to go through a balancing exercise to determine the merits of the respective claims and the overall justice of the case. After giving the matter careful consideration, and taking into account that the burden of proof is on the plaintiff, I have been persuaded that it is in the interests of justice that the application for a stay should be granted. It is not every threat of resignation, of course, that would give grounds for a stay. Each case must depend upon its own particular circumstances. Suffice it to say that in the case before me, I accept that the resignation threats are genuine and that they have not resulted from any prompting or encouragement on the part of the plaintiff. I am satisfied that potentially the plaintiff will suffer resulting serious prejudice if a stay is not granted. At the same time, I am equally satisfied that any countervailing prejudice to the defendant would be minimal. For these reasons, I allow the application and grant the stay sought which will remain in effect until delivery of judgment following the substantive hearing. In the meantime, Mr Pereira is to remain on the plaintiff's payroll.

[22] Costs are reserved and I direct the Registrar to arrange an early telephone directions conference to finalise the timetabling leading up to the hearing.

A D Ford

Judge

Judgment signed at 4.10 pm on 2 March 2012

[1] [2012] NZERA Wellington 8.

[2] WC 28/09 at [3].

[3] [2011] NZEmpC 160 at [65] and [68].

[4] [2012] NZERA Wellington 8 at [81].

[5] [2012] NZERA Wellington 8 at [81].

[6] [2012] NZERA Wellington 8 at [83].

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