

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2020] NZERA 393  
3113613

BETWEEN            JGD  
                                 Applicant  
  
AND                    MBC LIMITED  
                                 Respondent

Member of Authority:     Michael Loftus  
  
Representatives:           Applicant in person  
                                 Alastair Espie, counsel for the Respondent  
  
Investigation Meeting:     8 September 2020 at Wellington  
  
Date of Determination:     1 October 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant, JGD, was dismissed from his employment in a senior role by the respondent, MBC, on 9 June 2020. He says the dismissal was unjustified and, amidst other remedies, seeks reinstatement.

[2]     JGD also seeks reinstatement on an interim basis pending a substantive consideration of his claims. It is that application this determination addresses.

[3]     MBC is of the view it can justify the dismissal and opposes the application for interim reinstatement.

**Background**

[4]     JGD was, as already said, employed in a senior capacity by MBC and had been in the role for about 8 months. He says he was engaged to implement considerable change and that as a result there was occasional conflict with some of

MBC's clients. One of those was UTE which MBC considers a very significant client but with whom there was a history of tension which was, in JGD's view, exacerbated by the fact they were, to some extent, change resistant.

[5] Further issues, which MBC viewed as significant, arose as a result of covid which caused a significant increase in the amount of work being performed for UTE. It is MBC's view about a third of JGD's role involved the management of work performed for UTE and it is now known a number of potentially costly and/or embarrassing errors occurred in March 2020 which were not identified at the time due to overextended staff who did not perform the normal range of checks.

[6] MBC's senior leadership team learnt of these issues in May and there is a suggestion JGD initially hid the problem. The leadership team's knowledge of the issues led to an instruction to all staff that UTE be treated with extreme care and deference.

[7] On 5 June there was a regular quarterly meeting with UTE though JGD, who would normally attend, was absent due to a family bereavement. At the meeting UTE expressed disappointment and, according to MBC, raised various concerns which it considers attributable to JGD and his performance.

[8] The meeting was followed, some four days later, by minutes distributed by one of MBC's staff. It prompted what MBC characterises as an aggressive email response from JGD on 10 June which was copied to various managers within UTE. On the same day an internal audit report into the March errors was also distributed. It contained criticisms that, in MBC's view, could be attributed to JGD.

[9] JGD's email led to an instruction he cease interacting with UTE. It also led to communication between his manager and one of those within UTE who received the email. JGD characterises this as an attempt to undermine him by soliciting criticism. MBC sees it as an attempt to repair what was becoming a critical situation which might lead to the loss of an important client.

[10] From there things rapidly degenerated with JGD claiming he was then ostracised while MBC says it was trying to address the issues. In doing so it embarked upon a disciplinary investigation which ultimately led to JGD's dismissal.

[11] The dismissal was attributable to a conclusion:

- a. JGD had engaged with UTE in a way that was inappropriate and had the potential to bring MBC into disrepute (both as a result of UTE's feedback and more specifically the sending of the 10 June e-mail); and
- b. JGD had known about the errors in mid-April but failed to advise his managers before they found out by other means in May; and
- c. JGD's conduct had seriously damaged MBC's trust and confidence in him to the extent it amounted to serious misconduct; and
- d. The appropriate response was dismissal.

## **Discussion**

[12] Applications for interim relief involve the exercise of a discretion. The answer comes not from the rigid application of a formula but from a consideration of various questions which culminate with a conclusion about the overarching question of what does the overall justice require?<sup>1</sup>

[13] There are four broad areas of inquiry which are considered on the basis of untested affidavit evidence. They are:

- a. Is there an arguable case for both a finding of unjustified dismissal and permanent reinstatement?
- b. Is there an adequate alternative remedy available, such as damages?
- c. Where does the balance of convenience lie?
- d. What does the overall justice of the case require?

[14] The legal framework which I must follow in respect of the application for interim orders can be summarised as follows:

- a. Step One - The applicant must establish that there is a serious question to be tried;
- b. Step Two - Consideration must then be given to the balance of convenience and the impact on the parties of the granting of, or refusal

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<sup>1</sup> *Klisser Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA)

to grant, the interim orders sought. The impact on any third parties will also be relevant to the weighting exercise;

- c. Step Three - The overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

*A Serious Question to be Tried*

[15] The threshold for a serious question is relatively low with the requirement being that the claim is not frivolous or vexatious. In this instance it has not been suggested that is the case with MBC conceding JGD's claims are arguable. That said MBC also says that while arguable JGD's chance of success is weak and that is an issue that should go to the later consideration of overall justice.

[16] In arguing this it is asserted the process was fair and the inquiry comprehensive. While a simplistic summation of a more complex argument it is essentially stated the result was attributable to JGD's failure to appreciate the situation and his denial of any possibility he might have acted inappropriately. This meant he both failed to adequately address the issues during the investigation and, perhaps more importantly, failed to give MBC any confidence problems would not reoccur.

[17] Unfortunately I have to say JGD's approach and submission tended to support that view with, for example, a denial the e-mail could have caused problems given it was intended to protect the relationship with UTE when there is strong evidence the opposite occurred. Another example is an assertion JGD could handle the errors and had no duty to notify senior managers of the issue. There are others.

[18] As to the question of whether or not permanent reinstatement is possible the answer must be yes. Reinstatement is a primary remedy and it is one JGD seeks. Indeed it is clearly his goal as he seeks the resumption of what can only be considered a superior salary. If, therefore, he succeeds with his substantive claim it would be for MBC to establish reinstatement is not practicable and/or reasonable though again, the papers suggest it may well be capable of doing so.

[19] In particular it is clear from the affidavit evidence MBC's leadership team has lost trust and confidence in JGD and lack the resources to adequately supervise him should he return. There is also a strong suggestion UTE's views are similarly negative and while JGD disputes this, their importance to MBC would suggest he may

well be impeded from returning to the job as it previously existed. There is also evidence that if JGD were to return, the present job would likely have to be reconfigured to an extent it bore little resemblance to that which previously existed and there is unlikely to be an alternate. Finally there is evidence JGD has also lost the confidence of those he previously managed.

[20] In other words, and while untested, there are strong indications that even if JGD were to be successful, permanent reinstatement will prove neither practical nor reasonable.

[21] This raises the issue of alternate remedies. If, as appears distinctly possible, reinstatement is not attainable on a permanent basis there is only one available remedy and that is financial recompense. In other words it appears, at least at present and on the basis of untested evidence that even if JGD were to be successful the most likely remedy which is an alternate to reinstatement is, and remains, available.

#### *Balance of Convenience*

[22] Assessing the balance of convenience requires a comparative analysis of the impact on each party and third parties if the interim orders sought are either granted or not. I then must also assess what happens if the interim position is reversed in any substantive determination.

[23] JGD's argument emphasises four main points. The first is MBC will be incapable of substantiating a number of the conclusions it reached and therefore its decision to dismiss. That has already been discussed when addressing arguable case and while JGD may ultimately be correct the evidence as it presently stands, albeit untested, suggests MBC will at least have a chance.

[24] JGD's other main arguments are that there remains a job he can perform and he should therefore be allowed to do so; that he faces significant financial disadvantage and that he faces severe reputational issues when his absence becomes widely known.

[25] JGD's argument his job remains and he is capable of performing is based on an opening assertion it is only 5% client facing and does not involve working with UTE. This argument is not only undermined by MBC's evidence which makes it clear UTE is a large client which provides a significant portion of the work managed

by JGD , it is also undermined by JGD's own evidence. He asserts his main role was to champion significant change in the face of resistance from clients such as UTE. Success in such a role must surely be reliant on consultation, aimed at attaining buy in, from the clients. JGD's own evidence convinces me he must, to be successful, have considerable interaction with the clients as to force change would inevitably increase resistance and risk an ongoing relationship with the client.

[26] While it is evident the dismissal will inevitably cause significant financial distress the evidence is JGD is in the fortunate position of having some support via his partner (though he argues her position is also vulnerable given covid but he offers no further insight). He also argues he cannot attain alternate employment as to try and do so would require him to disclose his present circumstances. That is a position he might yet face. His third argument, that he has no prospect of future employment in his chosen profession, faces two problems. First it is not supported by evidence and that I have shows JGD is well qualified in a range of diverse fields.

[27] Opposing these arguments, which I consider have weakness, there are MBC's.

[28] First there is the argument, already addressed when considering those proffered by MBC, that in absence of an ability to work with UTE there is effectively only a part job. The evidence supports that.

[29] I also note points already discussed which tend to support MBC's view JGD failed to understand the issues to an extent he poses a significant risk should he return. He would therefore require significant supervision and the evidence again supports a conclusion MBC lacks the necessary resources though here I have to add that is not surprising – few organisation would consider it necessary to pedantically supervise someone of JGD's seniority.

[30] More importantly though I again return to the significance of UTE as a client. While JGD argues this, MBC's evidence convinces me his return could well prompt UTE's withdrawal as a client. Given I have to also consider the effect on third parties that is, in my view, too great a risk as the evidence satisfies me that would result in a significant loss of revenue which could easily result in redundancy for a number of innocent staff – MBC estimates around 25.

[31] Once again there is also evidence staff who previously reported to JGD would have some reticence about doing so given a lack of trust generated by a view he

improperly tried to blame others for his transgressions. That is a fraught environment to consider creating especially in circumstances where the chance of attaining permanent reinstatement is questionable.

[32] For the above reasons I consider JGD's arguments to be weak, at least when compared to MBC's, and for that reason conclude the balance of convenience strongly favours MBC.

#### *Overall justice*

[33] JGD has an arguable case but in terms of the factors I must weigh that, unfortunately, appears to be about it. The evidence as it presently stands would suggest his case is far from strong and even if he were to be successful there is a serious question over whether or not he will be attain permanent reinstatement. Add to that the act the balance of convenience strongly favours MBC and the only available conclusion is that JGD has failed to convince me the overall justice favours temporary reinstatement.

#### *Non-publication*

[34] MBC seeks a prohibition on the publication of anything that might identify it and UTE. MBC also asks there be a prohibition on the publication of anything that might identify JGD on the grounds that his identification would allow any informed bystander to identify it and give them a good chance of identifying UTE.

[35] JGD does not oppose the application.

[36] Notwithstanding the presumption of open justice I conclude there are two reasons to grant the application, at least on a temporary basis pending a conclusion better informed by the substantive investigation.

[37] The first is the evidence strongly suggests the relationship with UTE is fraught and it might not take much to tip it over. The evidence also suggests identification of the parties and with it the probable identification of UTE, could well embarrass the latter to the extent it would withdraw its business. As already discussed there is evidence that could have a destructive effect on MBC's business and lead to job losses for a number of its staff.

[38] Decisions that have such consequence should, in my view, be properly informed. That requires the substantive investigation which raises the second reason for granting the application on a temporary basis. As Judge Holden observed, the appropriate approach is to preserve the position of the parties until such time as a full and informed consideration can be undertaken.<sup>2</sup>

### **Conclusion and orders**

[39] For the above reasons I conclude JGD has failed to convince me he should be temporarily reinstated. His application for reinstatement should be properly tested and the parties will soon be contacted regarding the scheduling of a substantive investigation.

[40] There is a temporary prohibition on the publication of anything which might identify the applicant, the respondent and the client identified as UTE.

[41] Costs are reserved but I suggest they are best left to be dealt with after the substantive investigation.

Michael Loftus  
Member of the Employment Relations Authority

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<sup>2</sup> Refer *Kennedy v Oranga Tamariki – Ministry for Children* [2020] NZEmpC 58 at [15] and [21]