

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2012] NZERA Wellington 121  
5389942

BETWEEN            IGOR KARDAILSKY  
                                 Applicant  
  
AND                    AGRESEARCH LIMITED  
                                 Respondent

Member of Authority:    Michele Ryan

Representatives:        Alan Millar, Advocate for Applicant  
                                 Erin Burke, Counsel for Respondent

Investigation Meeting:    20 September 2012 at Palmerston North

Submissions received:    Oral submissions for the Applicant on the day of the  
                                 investigation.  
  
                                 Written and oral submissions for the Respondent on the  
                                 day of the investigation.

Determination:            1 October 2012

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]    On 23 July 2012 Dr Igor Kardailsky was dismissed for serious misconduct from his position as a senior scientist employed by AgResearch Limited (AgResearch) at its research facility ‘Grasslands’ in Palmerston North.

[2]    Dr Kardailsky’s dismissal related to alleged actions and omissions as regards his research involving genetically modified material. AgResearch says that Dr Kardailsky allowed genetically modified ryegrass plants to flower (and potentially release pollen) without adequate protection. It says these actions were in breach of regulations issued by the Ministry for Primary Industries (MPI).

[3] On 31 August 2012, five weeks after Dr Kardailsky was dismissed, the Authority received a statement of problem and signed undertaking in relation to an application for interim reinstatement in accordance with s.127(2) of the Employment Relations Act together with a signed affidavit from Dr Kardailsky. Dr Kardailsky alleges he has been unjustifiably dismissed and seeks an order for interim reinstatement until his claims can be heard.

[4] AgResearch opposes Dr Kardailsky's application for interim reinstatement.

### **The Authority's investigation**

[5] On 5 September 2012 AgResearch raised concerns as to the content of Dr Kardailsky's statement of problem, and in particular references made to a Calderbank letter made by AgResearch and information provided during a prior mediation between the parties. As a consequence another Authority Member reviewed the documentation and Dr Kardailsky resubmitted his statement of problem on 18 September 2012.

[6] During a telephone conference on 7 September the parties were advised that an investigation into the application for interim reinstatement could be heard on 20 September 2012, alternatively Dr Kardailsky's substantive claims of unjustified dismissal could be investigated on 24 October 2012. Dr Kardailsky's representative opposed having the application for interim relief decided on the papers and reported that his client wished to have his application for interim reinstatement heard urgently. This determination deals with that application.

[7] Of note, Dr Kardailsky's statement of problem does not seek permanent reinstatement. During the Authority's investigation meeting an inquiry was made as to whether an application for permanent reinstatement had been inadvertently omitted. Dr Kardailsky's representative advised that Dr Kardailsky was undecided as to whether he wished to pursue permanent reinstatement as a remedy.

[8] On behalf of AgResearch Ltd, Dr Anthony Conner provided a sworn affidavit dated 12 September 2012. Both parties attached to their documentation copies of emails between Dr Kardailsky and two other AgResearch scientists on 24 May, 25

May and 28 May 2012. A copy of AgResearch's investigation report was also attached to Dr Kardailsky's statement of problem.

[9] This interim reinstatement application has been determined on affidavit evidence and documents lodged with the Authority by Dr Kardailsky and AgResearch to prosecute and defend respectively the application. In these circumstances the testing of any evidence in dispute between the parties was not able to be examined as part of the investigation and will be undertaken at the substantive hearing.

### **Summary of events leading to dismissal**

[10] Prior to Dr Kardailsky's dismissal, he was engaged in conducting experiments with genetically modified ryegrass plants. Research as it relates to genetically modified plant material is subject to a range of legislative controls<sup>1</sup> which are enforced by the Environmental Protection Agency (EPA) and the Ministry of Primary Industries. AgResearch also has a number of prescribed protocols in its "Containment Glasshouse Manual" which govern management of experiments by researchers.

[11] On Thursday 24 May 2012 during a brief period of annual leave Dr Kardailsky received email notification from the Delegated Facility Officer that a portion of Dr Kardailsky's ryegrass plants under experimentation were flowering. He was informed that the flowering plants needed to be cut back or bagged to prevent pollen spread. Dr Kardailsky was asked to confirm that the interventions proposed would be undertaken immediately or the flowering plants would be discarded. Additionally, Dr Kardailsky was advised that he was to provide a plan by week's end as to how similar incidents would be prevented from occurring in the future. Dr Kardailsky promptly replied and advised he was away. He noted:

*...there should not be that many that are flowering, and definitely none that are any close to antithesis<sup>2</sup>; the heads that emerge are immature.*

*I'll take a look tomorrow, but please don't cut anything back; I am going to be collecting floral tissue...*

[12] The Delegated Facility Officer responded approximately 45 minutes later and stated "Can I please remove any mature flower spikes? We can sort out a plan later." No

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<sup>1</sup> For example the Hazardous Substances and New Organisms Act 1996

<sup>2</sup> The period during which a flower is fully open and functional.

response to the email was received and the Delegated Facility Officer proceeded to take photographs of the flowering plants and remove them from the glasshouse. She sent a subsequent email to Dr Kardailsky advising him of the action undertaken.

[13] The following morning (25 May 2012) Dr Kardailsky sent a follow up email to Delegated Facility Officer which stated, inter alia:

*I do need plant to produce floral structures to record these phenotypes, and obviously we don't want any environmental influences that would affect normal development.*

*The only reason I still have those mature plants there is that we don't have enough records of later stages of flowering for the effective lines and controls...*

[14] In an email dated 28 May 2012 Dr Kardailsky sent an email to Greg Bryan, Team Leader, Plant Biotechnology. Materially he stated:

*I also struggle to understand why [the Delegated Facility Officer] did that. The only words that come to up to me to describe her behaviour are malicious, ignorant and bullying.*

*Those plants were from the final stages of the experiment that was going on for at least two years, if not more. The only way I can now produce the phenotypic description of late floral morphology of transgenic is by repeating the induction, which would take at least 10 weeks, if not more, and a considerable amount of labour.*

*Her actions were completely unjustified.*

*I monitor those plants on a regular basis, observe and record inflorescence emergence, and clip the unnecessary floral tillers.....*

[15] On 30 May 2012 AgResearch commenced an employment investigation. Dr Kardailsky met with representatives of AgResearch on 13 June 2012 to respond to allegations that he may not have sufficiently contained the ryegrass under experimentation and that his actions were in breach of EPA and MPI regulations, in particular those which relate to the control of pollination of genetically engineered plants.

[16] AgResearch's investigation report titled "*Report on Investigation into Allegation of Contravention of ERMA Best Practice and the Hazardous Substances and New Organisms Act*" dated 27 June 2012 states that Dr Kardailsky responded by advising that he had followed procedures and that the parameters of his research required observation of flowering ryegrass. Dr Kardailsky advised the investigators

that there was a contradiction between Environmental Risk Management Authority<sup>3</sup> (ERMA) processes and the terms of the contract governing the experiment, and that AgResearch's manual was out of date. He said that there was nothing in the relevant controls that specified that plants could not flower. Dr Kardailsky further advised that he considered that there were issues of systemic non-compliance in the way the Grasslands facility was managed.

[17] AgResearch made further inquiries as to how the relevant control mechanisms were understood and applied by other researchers and it interviewed five senior researchers involved in work similar to that of Dr Kardailsky.

[18] The investigation report concluded that Dr Kardailsky had breached AgResearch's "*Corrective Action Policy*" by failing to follow the procedures and regulations outlined in 'ERMA Best Practices', the Hazardous Substances and New Organisms Act, and/or the Animal Welfare Act and the Biosecurity Act concerning genetic research activity. The report also advised that the investigators found Dr Kardailsky had refused to obey a lawful and reasonable instruction and that his actions were deliberately non-compliant with AgResearch policy.

[19] Dr Kardailsky met with AgResearch on 20 July 2012. He was advised of the investigation's preliminary findings, AgResearch's proposed outcome and provided with an opportunity to comment on both matters prior to a final decision.

[20] Dr Kardailsky was summarily dismissed on 23 July 2012.

### **Principles of interim reinstatement**

[21] Section 127 of the Employment Relations Act provides that the Authority may order interim reinstatement pending the substantive hearing of a personal grievance. In addition to the statutory framework, the recent judgments of the Employment Court in *Angus v Ports of Auckland*<sup>4</sup> and *McKean v Ports of Auckland*<sup>5</sup> each noted that in determining an application for interim reinstatement the Authority must have regard to the following tests:

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<sup>3</sup> Now known as the Environmental Protection Agency (EPA)

<sup>4</sup> [2011] NZEmpC 125 at [3]

<sup>5</sup> [2011] NZEmpC 128 at [4]

- (a) whether the applicant has an arguable case that his dismissal was unjustifiable: as that is now defined by the new provisions of s.103A of the Act;
- (b) whether the applicant has an arguable case for reinstatement to his employment at the respondent, applying the new test for reinstatement under s.125 of the Act, if he is found to have been unjustifiably dismissed following a substantive hearing;
- (c) where the balance of convenience lies between the parties until the Authority's determination is given on those issues and the adequacy of other remedies;
- (d) whether the overall justice of the case dictates that interim reinstatement to employment at the respondent is appropriate.

### **Is there an arguable case of unjustified dismissal?**

[22] Dr Kardailsky must persuade the Authority that there is an arguably serious or real (although not necessary certain) prospect that the Authority will determine that the dismissal was unjustifiable (according to the statutory test set out as s103A of the Act), that his dismissal was not an action that a fair and reasonable employer could have made in all the circumstances at the time the dismissal occurred.

[23] Dr Kardailsky's sworn affidavit is noticeable for its brevity, its contents are replicated below:

I, Igor Kardailsky ...swear as follows;

1. I have lodged a personal Grievance alleging unjustifiable dismissal with the Employment Relations Authority.
2. Additionally I seek an order from the Authority to grant me interim reinstatement.
3. To the best of my knowledge the experiment I conducted at the time of my dismissal had continued without any significant alteration under the oversight of another scientist.
4. Placing me back in charge of the experiment would not therefore disrupt anything.
5. Therefore reinstating me would not interfere with my ex-employer's business and would not create any additional cost factor other than my wages which I have undertaken to repay in the event that my Personal Grievance proves to be unsuccessful.
6. I have no hesitation in assuring the Authority that I will carry out any procedure required by my ex-employer in the conduct of my duties.<sup>6</sup>

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<sup>6</sup> The affidavit was sworn by Dr Kardailsky before a Registrar of the High Court of New Zealand on 22 August 2012.

[24] Dr Kardailsky's representative states that his dismissal is both substantively and procedurally unjustifiable.

[25] Although not referred to in Dr Kardailsky's affidavit, it appears from the information contained in AgResearch's investigation report that Dr Kardailsky does not dispute that he intended to allow the ryegrass to flower. The issue of contention between the parties appears to centre on a dispute as to which regulations and/or manuals governed the work performed by Dr Kardailsky.

[26] Dr Conner, on behalf of AgResearch, submits that although Dr Kardailsky does have an arguable case for unjustifiable dismissal he asserts that his case is weak. In particular Dr Conner refers to Dr Kardailsky's conduct and points to the content of his email exchange between him and the Delegated Facility Officer, and the Team Leader, Plant Biotechnology, as evidence that Dr Kardailsky intended to allow the plants he was observing to flower and that these actions were intentional and against regulations. Dr Conner also says that AgResearch conducted procedurally fair and lengthy investigation over the course of two months.

[27] Should Dr Kardailsky proceed to have his claims investigated, the Authority will be required to consider whether AgResearch's decision to dismiss was a decision that a fair and reasonable employer could make. If it is found that the decision to dismiss Dr Kardailsky was not a decision a fair and reasonable employer could make in all the circumstances, then Authority will be required to consider if and to what extent Dr Kardailsky contributed to the situation that gave rise to his personal grievance.

[28] The Authority considers that Dr Kardailsky has met the relatively low threshold that he has an arguable claim of unjustified dismissal in that there is no dispute he was dismissed. However in circumstances where it appears that the substantive conduct complained of by AgResearch did occur, Dr Kardailsky will need to dispel an assessment that he contributed to the situation which led to his personal grievance. I find that Dr Kardailsky does have an arguable case for an unjustified dismissal but on the information provided I consider his case may not be strong.

**Is there an arguable case for permanent reinstatement?**

[29] The Authority is obliged to consider whether, following an investigation into Dr Kardailsky's claims, it would be "*practicable and reasonable*" to make an order that Dr Kardailsky be permanently reinstated to his employment position with AgResearch.

[30] The onus lies with Dr Kardailsky to demonstrate he has an arguable case that following a successful determination of his claims, permanent reinstatement would be practicable and reasonable.

[31] However Dr Kardailsky has not sought permanent reinstatement. As noted, during the investigation Dr Kardailsky's representative advised that he had not yet decided whether he wished to pursue permanent reinstatement as a remedy.

[32] The Authority can only consider the application it has before it on the terms that have been pleaded. AgResearch attended the Authority's investigation and opposed Dr Kardailsky's application based on the allegations made and the relief sought by Dr Kardailsky, as is its right. I consider it would be inappropriate and unfair for the Authority to consider this aspect of Dr Kardailsky's application in the context where no application for permanent reinstatement has been made.

[33] I find that Dr Kardailsky does not have an arguable case for permanent reinstatement in circumstances where an application for permanent reinstatement has not been made.

**Balance of convenience - including the availability of alternative remedies**

[34] Any assessment of the balance of convenience must weigh up the detriment or injury that may occur to each of the respective parties. In the circumstances of this matter the Authority must consider what if any detriment may occur for Dr Kardailsky if interim reinstatement is not ordered and he must wait until his substantive claims are determined, against the burden AgResearch would bear if Dr Kardailsky is reinstated on an interim basis but that his substantive claims are later found to be unsuccessful.

[35] Dr Kardailsky states that to the best of his knowledge his experiment has continued since his dismissal under the oversight of another scientist without any significant alteration. He says in these circumstances reinstatement would not interfere with AgResearch's business nor would it create any additional cost factor other than his salary which he has undertaken to repay in the event that his personal grievance is unsuccessful. The inference I take from his evidence is the proposition that AgResearch would not suffer a detriment if Dr Kardailsky was reinstated.

[36] Dr Conner on behalf of AgResearch says that the plants in which Dr Kardailsky was conducting experiments are being safely maintained by other employees and that no experimental procedures have been conducted involving the plants since Dr Kardailsky's dismissal. He says Dr Kardailsky has already been away from his research for nearly two months and any further duration of absence pending the outcome of the substantive hearing will not affect the experiment. I understand this evidence to infer that there is no requirement by AgResearch for Dr Kardailsky's experiments to be concluded, and therefore no injury occasioned to Dr Kardailsky by delay to that work.

[37] Dr Conner also says that the work of scientists at AgResearch is temporal in nature and that there is no meaningful work for Dr Kardailsky to engage in on a temporary basis.

[38] AgResearch further advises that the breach to containment of pollen was reported to MPI and that MPI have deemed the breach to be an event of "*critical non-compliance*". Critical non-compliance is defined by MPI as "*a major failure in an operation of system that caused, or could have caused a serious risk to biosecurity, the environment, or the health and safety of people and communities.*" AgResearch reports that the matter has not yet been concluded by MPI and temporary reinstatement of Dr Kardailsky may require MPI to reassess AgResearch's Grasslands facility and increase restrictions on all other researchers and therefore negatively impact current research.

[39] Dr Conner says that AgResearch's reasons for dismissing Dr Kardailsky were that he did not adhere to MPI regulations. He says that any further breaches could have a serious impact on AgResearch's business and current research.

[40] I have assessed AgResearch's submission that Dr Kardailsky's experiment can be resumed after a substantive determination without any negative impact occasioned by delay, against Dr Kardailsky's request to continue his work in the interim. On the information provided there does not appear to be any requirement for immediate continuation of the research Dr Kardailsky was conducting beyond his desire to do so. I find that as regards the balance of convenience there is insufficient information contained in Dr Kardailsky's affidavit to favour his claim in this respect.

[41] Although I was not provided with detailed information as to how real or remote the risk that MPI may restrict AgResearch should Dr Kardailsky be reinstated, I am persuaded by Dr Conner's affidavit evidence that MPI has classified the incident leading to Dr Kardailsky's dismissal as a "*critical non-compliance event*". In these circumstances it appears there is a possibility that further sanctions may occur if Dr Kardailsky is reinstated, and if so, these are likely to affect ongoing work conducted by AgResearch and its scientists. This information leads me to conclude that the balance of convenience is persuasive in AgResearch's favour.

[42] Dr Kardailsky's affidavit makes no comment as to the insufficiency of alternative remedies if his application for interim reinstatement is unsuccessful. In contrast Dr Conner on behalf of AgResearch states that if Dr Kardailsky is successful at a substantive hearing he can be compensated for loss of remuneration for the intervening period as well as access to remedies for humiliation and distress at the time of determination of the substantive matters.

[43] Having assessed all the relevant information I find the balance of convenience favours AgResearch.

### **The overall justice of the case**

[44] The remedy of interim reinstatement is a discretionary one. In its exercise of discretion to grant interim reinstatement, the Authority must consider where the overall justice of the case lies until it can be heard, including particularly the respective strengths of the parties' cases so far as they can be ascertained at this stage<sup>7</sup>. The Authority should stand back and take a global view.

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<sup>7</sup> *Cliff v Air New Zealand* [2005] ERNZ 1

[45] I find that the overall justice of the case does not favour the grant of interim reinstatement. The purpose of an order to have an employee reinstated on an interim basis is to preserve the employee's position until his or her claim as to the practicability and reasonableness for permanent reinstatement can be determined. In the current circumstances where Dr Kardailsky has not applied for permanent reinstatement, the primary reason for ordering reinstatement does not arise. I decline to make an order for interim reinstatement.

[46] I have also already found that Dr Kardailsky does have an arguable case that he was unjustifiably dismissed, but do not consider his case to be strong in circumstances where it does not appear to be in dispute that the genetically modified ryegrass plants were allowed to flower by Dr Kardailsky. As noted, at the substantive investigation Dr Kardailsky will need to refute evidence that supports a finding of contribution to the situation which led to his dismissal.

[47] My decision to decline the making of such an order is further reinforced by a lack of information to evidence that Dr Kardailsky will be disadvantaged until his substantive matter is heard. Should Dr Kardailsky be successful with his claims it is clear AgResearch has the resources to pay whatever monetary compensation may be awarded.

[48] I find that AgResearch has a stronger case overall than that of Dr Kardailsky.

### **Determination**

[49] Dr Kardailsky's claim for interim reinstatement is declined for the reasons set out in this determination.

### **The substantive hearing**

[50] Arrangements as to the exchange of relevant documentation have been agreed to by the parties and the substantive claims of Dr Kardailsky are scheduled to be investigated by the Authority on 19 and 20 December 2012.

**Costs**

[51] Costs are reserved.

**Michele Ryan**  
**Member of the Employment Relations Authority**