



New Zealand Employment Relations Authority Decisions

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Lamb v Burnside Dairy Farms 2008 Limited [2011] NZERA 210; [2011] NZERA Christchurch 53 (20 April 2011)

Last Updated: 9 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 53
5339427

BETWEEN RODNEY KEITH LAMB

Applicant

A N D BURNSIDE DAIRY FARMS

2008 LTD Respondent

Member of Authority: Representatives:

Investigation Meeting: Date of Determination:

James Crichton

Tim Jackson, Advocate for Applicant

Simon Menzies, Counsel for Respondent

14 April 2011 at Timaru

20 April 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Lamb) applies to the Authority for interim reinstatement together with substantive relief including permanent reinstatement, compensation and penalties for the alleged unjustified dismissal and alleged disadvantage by unjustified actions of the employer respondent (Burnside Farms). The substantive claims and the interim relief sought are all resisted by Burnside Farms.

[2] The parties were directed to mediation by the Authority but they were unable to resolve their differences in that forum. An investigation meeting was convened at Timaru on 14 April 2011 exclusively to deal with the interim reinstatement application, during which Mr Menzies was heard via speaker phone.

The law

[3] The Authority is required to apply the law relating to interim injunctions "having regard to the object" of the Act in considering interim reinstatement applications: Section 127(4) of the Employment Relations Act 2008 (the Act).

[4] Reinstatement is no longer the primary remedy and thus can no longer inform the Authority's consideration of the "object" of the Act which, under the previous statutory framework required the recognition of "the importance of reinstatement as a remedy": Section 125 as amended by s.16 [Employment Relations Amendment Act 2010](#) (The Amendment Act).

[5] In adopting this view of the law, I prefer Mr Menzies' view to the submissions of Mr Jackson who argued that, as the

dismissal predated the change in the legislation (albeit by a matter of days) the earlier legislation should apply. I agree with Mr Menzies' submission that in the absence of transitional provisions in the Amendment Act on the point, the Amendment Act's provisions apply from the operative date of the statute, irrespective of the date of the dismissal.

[6] Some care needs to be taken then in placing too great a reliance on case law determined under the old formulation, at least insofar as those decisions turn on the primacy of reinstatement as a preferred remedy. Under the Amendment Act, reinstatement is simply one of a number of remedies available to the Authority and is no longer the preferred one.

[7] The law relating to interim injunctions is usually formulated in a series of questions, thus:

- (a) Does the applicant have an arguable case?
- (b) Where does the balance of convenience lie?
- (c) What is the overall justice of the case?

[8] I note that the representatives differed over whether the wording of the initial question should refer to an "arguable case" or "a serious question to be tried". I am satisfied nothing turns on the difference; they are simply different ways of formulating the same proposition, derived from different decided cases.

[9] An element of the "serious question" or "arguable case" relates not just to the underlying substantive relief sought but also to the practicality of the reinstatement itself. In *Burttton v. Talleys Group Ltd* (2010) NZ Employment Court 123, the Chief Judge said *the strength of the arguable case for reinstatement will be a factor going to the Court's assessment of where the balance of convenience may be* para.[40].

Does Mr Lamb have an arguable case?

[10] Mr Lamb was dismissed for redundancy on 16 March 2011 from his position as manager of Burnside Farms. As well as being its manager, Mr Lamb was also a shareholder in Burnside Farms. Mr Lamb claims the redundancy was a sham when Burnside Farms reneged on a deal to buy Mr Lamb's share in return for his resignation.

[11] Mr Lamb also maintains that it was a condition of his employment that he be an equity manager, that is, that he maintain a shareholding while employed.

[12] Both of these propositions are hotly contested by Burnside Farms. In essence, they deny that it was a condition of Mr Lamb's employment that he maintain a shareholding and they deny there was ever an agreement to buy his shares.

[13] As to the claim that Mr Lamb must hold shares, Burnside Farms point to the absence of any documentation supporting this contention. There is no completed employment agreement, nor is there any other document which would support Mr Lamb's claim, save for his own affidavit in support. The description of Mr Lamb as an "equity manager" in Burnside Farms' publicity is not evidence for Mr Lamb's claim, but simply a statement of fact, according to Burnside Farms. Mr Lamb is, they say, both a manager and a shareholder but the one is not prerequisite of the other.

[14] Considering now the contention that there was an agreement with Mr Lamb for Burnside Farms to buy his shares, Burnside Farms say there was no such agreement. What happened was Mr Lamb offered to resign his managerial position if his shares were purchased. Burnside Farms never agreed to make that purchase. Indeed, Burnside Farms point out that the sale of shares is governed by the Shareholders' Agreement which contains an explicit mandatory process for selling all shares. It is inherently improbable that Burnside Farms would have agreed to an alternative process for purchase, without reliance on the Shareholders' Agreement. Moreover, they say correspondence relied on by Mr Lamb to prove his contention really only goes to establish that Burnside Farms was trying to confirm if Mr Lamb maintained his stance of "no sale, no resignation".

[15] The Authority concludes on the basis of the untested affidavit evidence available that there is no arguable case for Mr Lamb or if there is, it is a weak one indeed. Mr Lamb's focus seems to be in demonstrating the "sham" nature of the restructuring proposal undertaken by Burnside Farms but the Authority has not been persuaded that the restructuring is anything other than a lawful exercise of management discretion undertaken after establishing that Mr Lamb had not resiled from his ultimatum of "no sale, no resignation".

[16] Under pinning that fundamental conclusion of the Authority is the acceptance of Burnside Farms' submissions that Mr Lamb was not "required" to hold equity in the firm and that there was never an agreement by Burnside Farms to buy Mr Lamb's shares. I have carefully looked at the documentary evidence before the Authority and all it seems to me to demonstrate is that Mr Lamb held equity in the firm (not that he was required to) and that he demanded Burnside Farms buy his shares in return for his resignation - "no sale, no resignation" para.18 of his affidavit (not that Burnside Farms ever agreed to that).

Where does the balance of convenience lie?

[17] I am satisfied the balance of convenience favours Burnside Farms. This is a case where Mr Lamb's position has been

disestablished as a consequence of a restructure. In truth, the position he seeks to be reinstated to on an interim basis, no longer exists. A lower level position has effectively taken over some of the responsibilities of Mr Lamb's position; Mr Lamb was given opportunities to apply for the position but chose not to.

[18] Despite the disestablishing of Mr Lamb's role, he has been allowed to remain in the accommodation for two months beyond the date of termination. Arguably, this gives Mr Lamb the chance to seek alternative roles from the security of a house property where his wife and children are settled. The end of the employment was not a complete surprise to Mr Lamb; he had himself indicated a wish to move on, albeit on his own terms.

[19] Both the matters in dispute between the parties (taking of leave and the sale of the shares) are matters which can properly be dealt with by monetary remedies albeit that one (the sale of the shares), is not a matter the Authority has jurisdiction over.

[20] In the end, balancing the disadvantage to Burnside Farms of Mr Lamb being returned to the employment against the disadvantage to Mr Lamb of not gaining reinstatement, I am satisfied the balance test favours the employer for the reasons I have advanced.

What is the overall justice of the case?

[21] Standing back and considering the case in the round, the Authority must determine where the overall justice lies.

[22] As I noted in the last section, Mr Lamb's real issue is the shares and there is no order that the Authority can make in that regard. It is difficult to avoid the conclusion that Mr Lamb's application was brought to bring pressure to bear on Burnside Farms to pick up his shares. In a real sense, the parties are at one on the severing of the relationship; the only real issue of dispute is the disposition of Mr Lamb's shares.

[23] That being the conclusion of the Authority, the overall justice of the case must also favour the respondent.

Determination

[24] Mr Lamb's application for interim reinstatement has failed. The substantive claim can be heard in the second half of June.

Costs

[25] Costs are reserved.

James Crichton

Member of the Employment Relations Authority