

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 228/09  
5155106

BETWEEN                      KEVIN LONGLEY  
   Applicant  
  
AND                                TBA COMMUNICATIONS  
   LIMITED  
   Respondent

Member of Authority:        Alastair Dumbleton  
  
Representatives:              Mark Ryan, counsel for Applicant  
   Gretchen Stone, counsel for Respondent  
  
Investigation Meeting:        8 July 2009  
  
Determination:                13 July 2009

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**DETERMINATION OF THE AUTHORITY**

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**Application for interim reinstatement**

[1]     Under s 127 of the Employment Relations Act 2000, Mr Kevin Longley seeks interim reinstatement to employment he had with TBA Communications Limited (TBA) and from which that company dismissed him.

[2]     Mr Longley was dismissed twice within 12 months after starting work as Art Director for TBA on 3 June 2008. As grounds for dismissal in each case TBA relied on inadequate performance.

[3]     The first dismissal was on 27 February 2009. In respect of that action Mr Longley raised a personal grievance and applied to the Authority for interim reinstatement.

[4]     After mediation an agreement was reached under which he returned to work on 30 March 2009. TBA also paid him for wages lost up to then as a result of the dismissal.

[5] The grievance raised by Mr Longley about his first dismissal has not been fully resolved. The justification for it is yet to be determined and an assessment made of any compensation that may be payable to Mr Longley under s 123(1)(c)(i) of the Employment Relations Act 2000, if the Authority finds he has a grievance about that dismissal.

[6] The second dismissal of Mr Longley was on 15 May 2009, about seven weeks after he had been reinstated at the end of March.

[7] Mr Longley seeks an order requiring TBA to reinstate him pending the full investigation of his second dismissal and a substantive determination of the grievance he raised about that. The substantive remedies claimed by him are permanent reinstatement, compensation for lost earnings and compensation for loss of dignity and injury to feelings.

[8] As required by s 127 of the Act, an undertaking has been given by Mr Longley to abide by any order that the Authority may make in respect of damages.

[9] In considering interim reinstatement applications, the Authority is required to apply the law relating to interim injunctions and to also have regard to the object of the Act. The relevant law requires that four recognised tests or questions are to be applied to the circumstances of each case. In relation to the object of the Act, the Authority must have regard to the principle that productive employment relationships are founded on good faith behaviour and also on mutual trust and confidence.

[10] A further relevant object of the Act, at s 101C, is the recognition of reinstatement as a remedy for any personal grievance. It has been made the primary remedy under s 125.

[11] In accordance with usual procedure, the evidence before the Authority for the purpose of determining the application was presented in affidavit form by the parties' witnesses, who were Mr Longley, Mr William Carruthers, the General Manager of TBA, and three others on behalf of the company.

[12] As the evidence must necessarily remain untested until the substantive investigation of the grievance, any findings of fact by the Authority in this determination are provisional only and may change later after the claims have been

fully investigated and once all witnesses, including Mr Longley and Mr Carruthers, have been examined about their evidence.

[13] The standard tests or questions the Authority must consider in determining this application are:

- Is there is an arguable case?
- Where does the balance of convenience lie?
- Are other remedies available to the applicant?
- The overall justice of the case.

### **Arguable case**

[14] Both dismissals occurred after attempts made by TBA to get Mr Longley to improve his work performance. The employer's concerns and how it addressed them with Mr Longley are well documented in the evidence provided so far to the Authority.

[15] In relation to the first dismissal, TBA concedes there is an arguable case that it was unjustified. I agree. After TBA had sought to 'extend' the probation period on 18 December 2008 (some three months after the initial probation period under the employment agreement had expired) it dismissed Mr Longley without notice on 27 February 2009. Even if TBA's arguably invalid extension of the probation period may be viewed as more a technical or procedural matter than substantive, there is still a question as to the fairness of the way TBA went about seeking improvements in his performance.

[16] This arises particularly from the short space of time before Mr Longley was dismissed for the first time.

[17] He says in his affidavit that he was first notified by TBA of performance concerns on 18 December 2008. In a letter of that date Mr Carruthers confirmed three key reasons for "*extending your probation period*" to 28 February 2009.

[18] The law applicable in cases where performance concerns have led to dismissal is to be found in the clear statements of Goddard CJ in *Trotter v. Telecom Corp of NZ*

[1993] 2 ERNZ 659 at 679. The Court held that fairness and reasonableness required that the specific reasons for the employer's dissatisfaction with the employee's performance were to be advised to the employee; a reasonably specific and measurable improvement demanded of him or her; and a reasonable period of time given for it to be established whether the employee was able to achieve that improvement, and at the end of that time a dispassionate consideration given to the question whether enough progress had been made to avert dismissal.

[19] It is arguable, as TBA concedes, whether in the circumstances the company acted fairly and reasonably towards Mr Longley in accordance with the *Trotter* principles, before dismissing him.

[20] It is also arguable whether in any event any failure in the performance of Mr Longley justified immediate dismissal without notice. The employment agreement required that Mr Longley be guilty of an act of gross incompetence before TBA could dismiss him without notice.

[21] In relation to the second dismissal I also find there is also an arguable case. It occurred only a few weeks after Mr Longley had been reinstated by agreement.

[22] I consider that the second dismissal cannot be disassociated or viewed on its own from the first dismissal. Arguably the brevity of time allowed for improvement before the first dismissal, if that was a problem, pervaded the second dismissal.

[23] The same considerations as to whether sufficient time was allowed for the improvements sought by TBA will arise in relation to the second dismissal and the claim that it was unjustified. The affidavit evidence also shows there is room for argument as to whether TBA sufficiently put aside the matters that led to the first dismissal, and the subsequent reinstatement of Mr Longley, and started afresh without being tainted by its earlier actions in the exercise of fairly and reasonably seeking the performance improvements it wanted.

[24] Mr Longley also challenges the open mindedness of his employer when assessing his performance. He has given evidence of comments made to him on 8 April 2009, barely a week after he had been reinstated. His evidence is that Mr Ken James, who is a director of TBA and the chair of its Australian parent company, abused him by saying he was going to sue him for loss of productivity and that he considered him to be "*fucking useless*" and did not want him around.

[25] Mr James in his affidavit denies that he would have said to anyone that they were “*fucking useless*” but admits saying to Mr Longley that he was “*fucking angry*.” Mr James says he also told him “*In my opinion you are not doing this job to the level of ability that the job requires and that you are being paid to do. If you wish to take these points to your lawyer you may do so.*”

[26] There is no evidence given at all by Mr Carruthers as to what he saw or heard of this episode, although it is clear from both Mr Longley and Mr James that he was present in the room with them. Mr James says that he had asked Mr Carruthers to take notes so that there was a record, but if any were taken they have not been produced to the Authority.

[27] There was a contemporaneous complaint made by Mr Longley about Mr James’ the following day. When Mr Carruthers asked Mr Longley why he had left the office early on 8 April, he replied by email:

*I advised you and you could see I was distressed. Ken James had just abused me in front of you, saying:*

- *he was going to sue me for ‘loss of productivity’*
- *that he considered me ‘fucking useless’*
- *that he ‘didn’t want me around’*

[28] If Mr James did make the comments as claimed by Mr Longley, as seems likely from the affidavit evidence, he may have unreasonably increased the burden on Mr Longley to demonstrate good performance, as well as deflating his enthusiasm, commitment, trust and confidence in his employer.

[29] These are matters that can only be resolved by testing the evidence of witnesses including Mr Longley of course, and Mr James and Mr Carruthers.

### **Balance of convenience**

[30] I consider that the balance of convenience favours Mr Longley in his application for interim reinstatement. He has been reinstated once already by agreement with the company and there is certainly no logistical reason why he could not be reinstated again, at least for a short period until a determination of the substantive claim can be reached. The position he occupied as Art Director has not been filled by anyone else.

[31] It is possible, but cannot be put any higher, that the loss of confidence by TBA in Mr Longley may flow through to the agency's one and only client. Potential repercussions for TBA could include loss of that client which provides the only business for the agency.

[32] It is also possible that another staff member may decide to leave her employment with TBA because of her strong feelings about Mr Longley and her inability to work with him again.

[33] On Mr Longley's side, there is the loss of income and, I am satisfied, for several reasons including his wife recently finishing employment in anticipation of having a baby and the economic times limiting the ability of Mr Longley to get comparable work, he will soon be in a serious situation financially if he cannot resume employment at the level of remuneration he received from TBA or close to that.

#### **Availability of other remedies**

[34] Against that, it seems to me that awards of lost wages or remuneration and compensation for hurt feelings, distress and humiliation, as well as interest and costs, will be able to substantially repair any financial disadvantage to Mr Longley suffered through waiting a few more weeks until a substantive hearing can take place and until a determination can be given.

#### **Overall justice of the case**

[35] As to the last part of the exercise, standing back and asking where the justice of the case lies, I cannot think that justice will be served by reinstating Mr Longley, even as an interim measure. It seems to me taking that course would simply set him on the road for yet another dismissal, whether justified or unjustified. There is evidence of a mutual loss of trust and confidence that is likely to undermine any return to a productive employment relationship.

[36] The Authority must have regard to the principle that productive employment relationships are founded on good faith behaviour and also on mutual trust and confidence, and certainly the latter seems absent on both sides of the employment relationship. The employer's views as allegedly strongly expressed by Mr James seem plain enough in this regard.

[37] There is no evidence of any collateral purpose behind the dismissal, as submitted by Mr Ryan was present. It likely that TBA did become dissatisfied with the performance of Mr Longley and dismissed him because he failed to improve. As observed by the Court in *Trotter* (above) it is not for the Court (or Authority in this case) to be the arbiter of the employer's standards or of the employer's conclusion over the question whether those standards have been met.

[38] The Authority does however judge whether the dismissal is fair. That is to be determined under the test at s 103A of the Act, according to what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. The affidavit evidence of Mr Roy Phillips in particular goes some way towards answering in TBA's favour the questions stated by the Court (p 681) to be relevant in this exercise. Mr Phillips appears to have reached the end of his tether in patiently trying to assist Mr Longley to meet the standards and requirements of the company.

[39] For Mr Longley's part, it seems unfortunate that when he returned after being reinstated he allowed the presence of his legal advisers in the background to be felt by copying Mr Ryan into emails sent to the company and, allegedly, talking to uninvolved staff at work about his personal grievance claims.

[40] As a relevant consideration, I have taken into account that the period before there is a substantive investigation meeting and determination following that could have been a relatively short one, and also that further mediation is likely to assist the parties. The date of 31 July 2009 (two weeks away) was being held for the substantive investigation meeting but it seems that on medical advice Mrs Longley wishes to have the meeting deferred for up to two months.

[41] The reason why an early meeting may not take place is accepted but any resulting delay cannot be the responsibility of TBA.

### **Determination**

[42] For the above reasons, I find that the justice of the case lies in declining the application for interim reinstatement.

### **Investigation meeting**

[43] There will be a telephone conference to discuss the arrangements for the investigation meeting, including a new date.

**Direction to mediation**

[44] I direct that the parties are to return to mediation with urgency before the investigation meeting. A written direction will be issued after the telephone conference.

**Costs**

[45] Costs are reserved.

A Dumbleton  
**Member of the Employment Relations Authority**