

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 406/07
5110733

BETWEEN IAIN McDONALD
Applicant

AND INTEGRATED FOODS
LIMITED
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Chris Patterson, counsel for Applicant
Elizabeth Brown, counsel for Respondent

Investigation Meeting: 20 December 2007

Determination: 21 December 2007

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

[1] Application has been made to the Authority by Mr Iain McDonald under s 127 of the Employment Relations Act 2000 for an order requiring his former employer, Integrated Foods Limited (“IFL”), to reinstate him pending the hearing of personal grievances he has raised with the company.

[2] His grievances are claims that he was unjustifiably disadvantaged by the actions of IFL taken against him during a disciplinary inquiry, and that he was unjustifiably dismissed by IFL at the conclusion of that inquiry.

[3] As required by s 127 of the Act, Mr McDonald has filed an undertaking to abide any order that the Authority may make in respect of damages.

[4] Mr McDonald was summarily dismissed by IFL on 4 December 2007. He applied for interim reinstatement three days later, at the same time requesting urgency for the disposal of his application. The parties arranged to attend mediation on 14

December, in Gisborne, but after taking part in that process remained unable to resolve the grievances or make arrangements avoiding the need for this interim application to be determined.

[5] In considering applications for interim reinstatement, under s 127 of the Act 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 of interim injunctive relief requires that four recognised tests or questions are to be applied to the circumstances of the 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 on mutual trust and confidence.

[6] A further relevant object of the Act at s 101(c) is the recognition of reinstatement as a remedy for a personal grievance. Under s 125 it has been made the primary remedy.

[7] The evidence before the Authority for the purposes of determining this interim reinstatement application is in the form of affidavits from three material witnesses. They are Mr McDonald, Mr Gary Alexander, the Managing Director of IFL, and Dr Greg Tattersfield, a veterinarian. As this evidence must necessarily remain untested until the substantive investigation of the grievances, any findings of fact by the Authority are provisional only. The findings may change once the Authority has fully investigated the claims, by having the witnesses give oral evidence which will be subject to examination.

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

- Is there an arguable case?
- Is there an adequate alternative remedy available?
- Where does the balance of convenience lie?
- What is the overall justice of the case?

Concerns raised by IFL, and subsequent inquiry

[9] Mr McDonald has been farming on the East Coast of the North Island for some 20 years. He was employed by IFL in September 2004 to be the manager of several farms in the Motu area. Previously, for some years he was employed in similar work by an Incorporation associated with IFL.

[10] Mr Alexander, the Managing Director of IFL, wrote to Mr McDonald on 23 October 2007, expressing a number of specific concerns about his performance and conduct. Those concerns were in relation to missing or unaccounted for livestock, the management of livestock, animal husbandry and stock transport logistics. Mr Alexander set out in detail the basis for his concerns.

[11] Mr Alexander concluded his letter by requesting that Mr McDonald attend a meeting to examine those concerns. The letter advised Mr McDonald that he could have a support person attend the meeting with him if he wished, although nothing was stated in the letter about the meeting being disciplinary in nature.

[12] This aspect generated a complaint from Mr McDonald that the letter failed to contain any reference to possible disciplinary outcomes and that therefore the employer had not acted in good faith.

[13] After receiving the letter, Mr McDonald instructed counsel, Mr Patterson, who corresponded about the requested meeting and the purpose of it. From this arose a further complaint against IFL, that it had attempted to ambush Mr McDonald and had not therefore acted in good faith towards him.

[14] Mr McDonald declined to meet in person with Mr Alexander. Instead, on his behalf, Mr Patterson wrote a detailed seven page letter responding to the various matters that had been raised in IFL's letter of 23 October.

[15] IFL wrote back to Mr McDonald on 27 November 2007. The employer advised that his responses had been considered and that a decision had been made to proceed with disciplinary action.

[16] Immediately after an express reference in the letter to "allegations," under six separate headings and in considerable detail spanning 12 pages, the letter of 27

November 2007 set out various matters of performance and conduct. They included the matters of concern first raised with Mr McDonald in October.

[17] Mr McDonald was advised he was required to attend a disciplinary meeting with Mr Alexander on 30 November at Gisborne.

[18] The response of Mr McDonald to the letter of 27 November, given through counsel Mr Patterson by email, was to advise that he would not be attending the requested meeting. Further, IFL was advised:

He [Mr McDonald] has instructed me to apply for a declaration that the investigation process is a sham and its outcome has been pre determined amounting to a breach of the company's duties of good faith, trust and confidence. I have also been instructed to seek a compliance order.

[19] This advice concluded with a request that IFL suspend the investigation process and agree to attempt mediation on an urgent basis.

[20] Mr Patterson received from IFL a reply to his email, on 4 December 2007. It was from Mr Alexander, who advised that he had decided to summarily terminate Mr McDonald's employment with immediate effect.

[21] Mr Alexander, addressing Mr McDonald, advised;

On the basis of the information available and after taking your comments and explanations into consideration it has been decided that your actions and/or inactions have resulted in considerable and unacceptable harm to the Company's interests including significant financial and production loss as well as exposing your employer to potential adverse ramifications in the areas of livestock production, animal welfare, health and safety and customer/supplier relations.

Your actions, and inactions, have irrevocably destroyed the trust and confidence that is an essential element of the employment relationship.

[22] Mr McDonald was offered an opportunity to apply to IFL to extend the tenancy of his company farm house beyond a two week notice period expiring on 18 December, to 7 January 2008. This opportunity was offered because the Xmas – New Year period was drawing nearer.

Is there an arguable case?

[23] IFL concedes the existence of an arguable case. There is a question as to whether the employer acted unfairly in dismissing Mr McDonald by prejudging or

predetermining the outcome of its disciplinary inquiry into his conduct and performance. Ultimately, this question of fact can only be resolved by having the evidence of IFL witnesses fully examined at a substantive meeting.

Adequacy of alternative remedies/Balance of convenience

[24] Assuming Mr McDonald's reputation may have been tarnished by his dismissal, an order of interim reinstatement from a tribunal is not a wand that can be waved to restore any loss in this regard. An order is only a holding pattern until the dismissal can be fully investigated, with the possibility that the Authority may yet confirm the dismissal as being justified. Another possibility is that Mr McDonald is found to have been substantially at fault in what he did that led to an unjustified dismissal, and loss of reputation in those circumstances will be a natural and predictable outcome.

[25] Allowing Mr McDonald to be seen working on and about the farm again but on a temporary basis only, will do little to change adverse opinion formed about him in the community.

[26] Equally, IFL is entitled to protect its reputation as the owner and operator of a competently managed farm on which good practice is put into use. Some in the community have seen that this was not so, and in several serious respects.

[27] I consider that compensation will provide an adequate remedy if the reputation of Mr McDonald has been harmed in any measurable way by a dismissal found to be unjustified.

[28] IFL has agreed to extend until 28 January 2008, on a rent free basis, the tenancy of the farm accommodation used by Mr McDonald, his family and his working animals. In my view this is a reasonable response to the several concerns he has raised about losing the accommodation.

[29] Matters of lost reputation, loss of accommodation and loss of income, must be weighed in the balance along with merits of the IFL's case that it had grounds to dismiss Mr McDonald. In this regard I consider that balance of convenience clearly favours IFL against the making of an interim reinstatement order.

[30] The grounds for dismissal arise out of the conduct and performance of Mr McDonald as farm manager. This is in respect of not one matter but several. They are serious, and they are also matters at the core of farming and farm management.

[31] Mr McDonald was fully advised of what those matters were. In detail he provided IFL with his views and advice about those matters. IFL considered his response and decided to elevate its investigation into a disciplinary enquiry. Mr McDonald was then given an opportunity to attend a meeting at which, if he wished, face to face with Mr Alexander he could have discussed and debated further the matters and the conclusions Mr Alexander ought fairly to reach about them.

[32] Mr McDonald chose not to do that. Without his direct and personal participation in the disciplinary enquiry IFL claims that nevertheless it “considered and deliberated” over all the information it had obtained, which included his earlier written response to the concerns when first raised, before deciding to dismiss.

[33] The only thing to contradict this claim is Mr McDonald’s claim that the employer had closed its mind against him. If so, any consideration and deliberation would not have been unbiased and would have been unfair to Mr McDonald.

[34] In his affidavit, Mr McDonald states his belief that Mr Alexander had predetermined to get rid of him at some point before the letter of 23 October 2007 was written and sent to him. He says also:

The basis of my belief is that he has attempted to rush through an investigation process, has not considered my response to the first set of allegations with an open mind and has expressly stated that my actions had destroyed the trust and confidence essential in the employment relationship before giving me any fair opportunity to persuade him otherwise.

[35] In part, Mr McDonald is obviously referring to what is said about loss of trust and confidence at the end of the letter of 27 November from Mr Alexander.

[36] It will need to be the subject of argument at the substantive investigation, but the letter is not necessarily to be construed as a statement of formed (and predetermined) belief that IFL had lost trust and confidence in the ability of Mr McDonald to carry out his duties. The letter is divided up under headings into six numbered parts, the contents of which are expressed to be “allegations” The final part reads:

6. LOSS OF TRUST AND CONFIDENCE IN YOUR ABILITY TO CARRY OUT YOUR DUTIES

We believe that, given the foregoing, your actions have irrevocably destroyed the confidence or trust that is an essential element of the employment relationship.

You have undertaken deliberate action that was adverse and/or harmful to the employer's interests, such as its reputation, and significant monetary and non-monetary costs.

[37] The next paragraph under part 6 reads as follows:

You need to be aware that these allegations may constitute serious breaches of your contractual and statutory obligations and the consequences could include the issuing of a final written warning or dismissal for serious misconduct.

[38] It is arguable, therefore, that IFL intended by its letter to advise Mr McDonald of what was alleged against him rather than what had been found established to have occurred. The letter cannot easily be read as setting out allegations under the first five headings but advising of a finding or determination of the employer in the sixth and last. That is not the way the letter seems to have been written or constructed.

[39] Nevertheless Mr McDonald says in his affidavit that he took the sixth part of the letter under its heading to be a statement of decided fact or belief. On that basis he could see no purpose in attending the meeting if his employer had already determined his guilt.

[40] There is nothing I have seen or heard to suggest that Mr McDonald was dismissed because he did not attend the meeting requested by Mr Alexander in his letter of 27 November. There is nothing to suggest that Mr McDonald was found guilty of misconduct merely by default in not attending the meeting, or that his non attendance at the meeting was taken as an admission of guilt.

[41] Given the number, weight and nature of the allegations against Mr McDonald and also given the thrust of his earlier explanations about these matters, it is not surprising that after due consideration of all this information IFL concluded there were grounds for dismissal established against Mr McDonald.

[42] It is unfortunate that Mr McDonald passed up the opportunity offered by Mr Alexander to have direct input into the disciplinary enquiry. The part of the 27 November letter under the sixth and final heading may have too readily been

seized upon by him as a silver bullet, to be used later to destroy the employer's claim of justification for the dismissal and other action.

[43] Although there are difficulties with the wording of the letter in part 6, an experienced employment lawyer such as Mr Patterson who was representing Mr McDonald, will know that expressions about loss of trust and confidence have become a familiar mantra of employers and must, as Mr Patterson urged, be read in context. It would obviously have been nonsense for Mr Alexander to have made his own thoughts and attitude the subject of an allegation" by him.

[44] The letter needed to be given more careful thought before it was simply taken at part 6 to be a statement of formed intent or belief. It is reading too much into it to think that Mr Alexander had taken care over 11 pages of the letter to set out "allegations" in great detail under five headings, and then on the final page had simply blurted out his real view that the employment was finished. The overall context suggests that this was not the purport of the final part of the letter.

Overall justice of the case

[45] I find that the overall justice of the case favours IFL against the making of an order of interim reinstatement. The strength of IFL's grounds for dismissal, so far as can be measured in an application for a form of interim injunctive relief, leads the Authority to reach that conclusion.

Determination

[46] For the above reasons, no order is made under s 127 of the Employment Relations Act 2000 for the interim reinstatement of Mr McDonald.

[47] Arrangements will be made with counsel Mr Patterson and Ms Brown, to enable the Authority to conduct the substantive investigation into the matter.

Costs

[48] Costs are reserved.