

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 91/09  
5165009

BETWEEN                      SHAUN MCGOWAN  
   Applicant  
  
AND                              PROGRAMMED  
   MAINTENANCE SERVICES  
   LIMITED  
   Respondent

Member of Authority:      James Crichton  
  
Representatives:              Rachel Brazil, Counsel for Applicant  
   James Turner, Counsel for Respondent  
  
Investigation Meeting:      25 June 2009 at Invercargill  
  
Determination:                29 June 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]      The applicant (Mr McGowan) was, until his dismissal on 29 May 2009 for serious misconduct, the Southland manager of the respondent (PMS).

[2]      PMS provides maintenance services for other enterprises including, in particular, painting of large structures. One of its large Southland clients was the Southland Institute of Technology (SIT).

[3]      Mr McGowan was asked to attend a meeting at SIT on 6 May 2009 at which certain irregularities in the commercial relationship between PMS and SIT were discussed and explored.

[4]      From that meeting, it became apparent to PMS that there were questions that required investigation and accordingly, on the evening of 6 May 2009, PMS suspended Mr McGowan on pay to enable it to investigate matters further.

[5] Mr McGowan was then summoned to a meeting with PMS on 26 May 2009. The meeting traversed the issues of concern to the employer, most of which notice had been given of to Mr McGowan. There were, however, two matters of which Mr McGowan had no notice prior to the meeting and it was agreed that he would respond to these two matters in writing after the meeting concluded.

[6] Mr McGowan in fact furnished an affidavit in relation to those two matters. The employer considered the affidavit together with Mr McGowan's verbal responses at the meeting of 26 May and, in the result, reached the conclusion that Mr McGowan was guilty of serious misconduct and the only appropriate response to that was dismissal. Mr McGowan was then advised that his position had been terminated.

[7] Notice of Mr McGowan's personal grievance was then promptly raised with PMS and the remedies sought included an application for interim reinstatement.

[8] The usual undertaking as to damages has been provided by Mr McGowan although the efficacy of that undertaking is called into question by PMS which points out that Mr McGowan's own evidence is that he is struggling to make ends meet. Moreover, the damage done to PMS's reputation by Mr McGowan may well result in a significant claim against him in the order of \$1m. This is because PMS fears it may either lose the SIT contract as a consequence of Mr McGowan's alleged behaviour or, at the very least, sustain significant loss of revenue because of SIT's refusal to meet invoices already rendered in relation to PMS's work.

### **Issues**

[9] The Authority is required to apply the law relating to interim injunctions but to also have regard to the object of the Employment Relations Act 2000 to any application for interim reinstatement: Employment Relations Act 2000 s.127(4).

[10] There are three issues broadly that the Authority needs to concern itself with. These are:

- (a) Whether the applicant has an arguable case;
- (b) Where the balance of convenience lies; and
- (c) What is the overall justice of the case?

**Does the applicant have an arguable case?**

[11] Both parties concede the applicant has an arguable case.

[12] Ms Brazil, for Mr McGowan, argued that:

- (a) PMS had not conducted a proper investigation at all and relied on its client's investigation;
- (b) The suspension was unlawful;
- (c) In relying on the investigation of SIT rather than conducting its own investigation, PMS failed to follow its own contractual obligations;
- (d) PMS had failed absolutely to properly consider the explanations offered by Mr McGowan and had not adequately given him an opportunity to be heard in circumstances where he claimed to have a complete defence to the allegations made against him.

[13] Conversely, Mr Turner, for PMS, argued that:

- (a) The matters of concern to SIT were of the gravest nature;
- (b) The 6 May meeting called by SIT identified the prospect of serious wrongdoing by an employee of SIT which arguably Mr McGowan had an involvement in;
- (c) Mr McGowan's potential involvement from that initial meeting included breaches of his obligations in respect of conflict of interest, passing of confidential information to third parties, improper receipt of moneys and failing to account, and adding an additional margin to a client's bill to benefit a third party;
- (d) In all the circumstances, an urgent suspension was not only appropriate but necessary;
- (e) In the round, Mr McGowan's apparent dishonesty was at the most concerning end of the spectrum and a complete loss of trust and confidence was an inevitable consequence.

[14] I am satisfied then that Mr McGowan's application clears the relatively low threshold required of the *arguable case* requirement. There are some questions about the way in which PMS proceeded in this matter and that of itself justifies the conclusion.

**Does the balance of convenience favour Mr McGowan's application?**

[15] The essence of the Authority's obligation in relation to this question is the consideration of the relative inconvenience to each party of the other being successful. In a practical way, the Authority has to weigh the hardship, relatively speaking, to PMS of Mr McGowan being successful against the potential hardship for Mr McGowan in remaining away from the employment until the substantive matter is dealt with and there is a determination one way or the other.

[16] Ms Brazil argued strongly for the view that Mr McGowan believed he could completely exonerate himself at the substantive meeting and that, on that footing, remaining away from the workplace now would further damage his reputation and cause additional financial stress which was already apparent.

[17] Ms Brazil contended that the complaints about Mr McGowan had effectively arisen as a consequence of investigation by a third party (SIT) and that Mr McGowan had become caught up in that matter, in effect as a *bit* player.

[18] Conversely, Mr Turner argued that if PMS was required to accept Mr McGowan back into the organisation, his reputation for potential dishonesty would precede him and there would be no way that he could reasonably reintegrate into the workforce. Furthermore, the complete loss of trust and confidence which Mr McGowan would face from PMS would make it doubly difficult as the only available role was the one that he vacated on dismissal and that was effectively a branch management position remote from any physical supervision other than some 200kms away in Dunedin.

[19] Further, and equally seriously from PMS's perspective, was the fact that returning Mr McGowan to the workplace would have a deleterious effect on PMS's already troubled relationship with SIT and its attempt to resolve that relationship satisfactorily.

[20] One must, of course, have sympathy for Mr McGowan in his efforts to meet his family obligations with the sudden loss of his income, but I am not persuaded that the balance of convenience favours interim reinstatement. If Mr McGowan were to be reinstated to his former position on an interim basis, I think the damage to PMS would be so great as to outweigh any short term benefit to Mr McGowan in being returned to the payroll. If Mr McGowan were to be permanently reinstated as a consequence of the substantive hearing, then I am satisfied damages would be an adequate remedy for his losses in the meantime.

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

[21] Standing back and evaluating the case on the untested affidavit evidence before the Authority and the very able submissions of both counsel, the Authority must look at the overall justice of the case.

[22] The allegations against Mr McGowan are at the most serious end of the dishonesty scale and encompass a variety of significant allegations of wrongdoing. Mr McGowan says he has a complete answer to the allegations made against him which form the basis for his dismissal and he claims he has not had the opportunity to adequately deal with those matters in any forum to date. He seeks vindication of his reputation in the substantive hearing.

[23] Conversely, PMS contends that it has conducted a proper inquiry into the allegations against Mr McGowan and formed a view that the matters on which Mr McGowan stands accused are of such a grave nature as to cause it to lose trust and confidence in him and reach a conclusion that he has been guilty of serious misconduct. Furthermore, there are still inquiries under way and it is said that the Police may be inquiring into the matters that the Authority is concerned with here.

[24] In the circumstances, it seems to me axiomatic that a cautious approach is required. Mr McGowan seeks the opportunity to vindicate himself and sees the substantive investigation meeting as his opportunity to do that; PMS says there are still inquiries continuing so it seems to me premature to conclude it is an appropriate time for Mr McGowan to be restored to the workplace when the potential damage to PMS would I think gravely outweigh the short term benefit which Mr McGowan might enjoy.

[25] If, as Mr McGowan contends, he has a complete defence to the allegations made against him, then damages against PMS and the prospect of permanent reinstatement after that vindication are the appropriate way to address those matters.

[26] That being the position, I determine that the overall justification of the case favours PMS.

**Determination**

[27] The application is declined for reasons advanced previously.

**Costs**

[28] Costs are reserved.

James Crichton  
Member of the Employment Relations Authority