

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA88/09
5160117

BETWEEN DAVID WAYNE MOORE
 Applicant

AND SEAVIEW CUSTOM
 ENGINEERING LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Rachelle Boulton, Counsel for Applicant
 Tim McGinn, Counsel for Respondent

Investigation Meeting: 24 June 2009 at Christchurch

Determination: 29 June 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Moore) a tradesman fitter welder, was employed by the respondent, Seaview Custom Engineering Limited (Seaview) on 26 January 2009 and his employment was terminated with effect from 8 May 2009.

[2] Mr Moore was employed pursuant to an individual employment agreement which contained a probationary period of employment. Although the employment agreement was never signed, I am satisfied it formed the basis of the agreement between the parties.

[3] The probationary period was for three months and during that three month period, there were to be monthly reviews. The first of these reviews took place on 26 February 2009. The affidavit evidence of the employer is that Seaview had doubts about Mr Moore *virtually from day one*. After just two days employment Seaview's principal witness considered that Mr Moore *was floundering in the role and very slow*

compared to our other less experienced welders In addition, Seaview apparently were concerned about Mr Moore's punctuality.

[4] Those matters were traversed at the first review on 26 February 2009.

[5] The second monthly review took place on 25 March 2009 and Seaview acknowledged in this meeting that Mr Moore had addressed the punctuality problem which had been evident in the first month's employment. However, work quality was still an issue and Seaview told Mr Moore that *there needed to be a noticeable improvement in his work quality and performance in order to be confirmed in the role.*

[6] In the next period for review, punctuality again seemed to be a problem as was absences for ill health and accordingly, Seaview decided to put in an additional review meeting which was held on 9 April 2009 at which Mr Moore was told that he was not making the progress that Seaview anticipated and that with just two weeks to go before his probationary period ended, *he would need to show substantial improvement and his future was in doubt in the circumstances.*

[7] The final review meeting was held on 24 April 2009 and at the final meeting, Mr Moore was told by Seaview that *expectations of performance for an experienced welder were still not being met, the timeframes for getting work done was still a serious issue and a lack of experience still seemed evident.* On that basis, Seaview terminated Mr Moore's employment on two weeks notice.

[8] Mr Moore brings this application to the Authority seeking interim reinstatement to his employment pending an investigation of the substantive matters which is set down for hearing in Christchurch on 3 August 2009.

[9] Mr Moore has provided the required undertaking as to damages, although the efficacy of that undertaken has been put into question by Seaview who say that Mr Moore has produced no evidence to the Authority to justify a conclusion that he is in fact able to satisfy that undertaking and by virtue of the difficulties that Mr Moore had in paying for his own welding certificate (a requirement of his trade), Seaview contend that his undertaking may be worthless.

Issues

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

[11] The law concerning interim injunctions may usefully be summarised into three issues and it is the examination of those three issues which forms the basis of this determination. Those three issues 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?

[12] I am satisfied that Mr Moore does have an arguable case. Ms Boulton, counsel for Mr Moore urged on me that proposition and Mr McGinn quite properly conceded that Mr Moore does have an arguable case. Mr McGinn was very clear however that in his opinion, Mr Moore did not have a strongly arguable case.

[13] Ms Boulton argued that:

- (a) Seaview failed to adequately monitor Mr Moore's work;
- (b) That Mr Moore would have met timeframes for particular jobs had he been given them;
- (c) That Mr Moore's continuing ill health was not a matter raised during the probationary period and was only raised now in defence of Mr Moore's application to the Authority;
- (d) That Mr Moore's punctuality was also not raised during the probationary period and is only raised now.

[14] For Seaview, Mr McGinn counters by arguing that:

- (a) Taken in its totality, Seaview did a good job in managing its relationship with Mr Moore during the probationary period;

- (b) That while Seaview did offer timeframes in respect to some jobs, it was resistant to doing that because Mr Moore claimed to be an experienced tradesman and such close monitoring ought not to have been required of somebody allegedly so experienced;
- (c) That while the letters sent to Mr Moore during the probation period were less fulsome than was ideal, the paper trail before the Authority confirmed that all of the matters Seaview relied upon were fairly and squarely put to Mr Moore, including in particular his lack of punctuality and his persistent absences allegedly for reasons of ill health.

[15] I carefully listened to the submissions of counsel (some of the highlights of which I have briefly referred to above) and reflected on the affidavit evidence I have before me.

[16] I reached the conclusion that Mr Moore's application clears the relatively low threshold of the *arguable case* test. Clearly there are some questions about the way that Seaview proceeded and that supports the finding that the *arguable case* threshold has been reached.

Does the balance of convenience favour Mr Moore's application?

[17] The essence of the Authority's obligation in relation to this question is to consider the relative inconvenience to each party of the other succeeding. In a practical sense, the Authority must weigh the relative hardship to Seaview of having Mr Moore returned to the employment, against the hardship potentially suffered by Mr Moore in remaining away from the employment for a further period until the substantive hearing determines the matter one way or the other.

[18] Mr Moore submits that his financial circumstances are such that a failure to restore him to the workplace on an interim basis would place him under unreasonable financial stress. I was told that Mr Moore was a single man without a partner and accordingly had to meet his domestic commitments including mortgage and car payments exclusively from his own resources. Since the dismissal, Mr Moore has found some casual work but has found the obtaining of any work, despite his qualifications, very difficult.

[19] Conversely, Seaview argue that reinstatement of Mr Moore to his former position would in effect be putting back on the strength an under-performing, overpriced, absentee employee who would effectively need extensive supervision in order to achieve appropriate outcomes for the employer.

[20] Seaview argue that Mr Moore was simply over-sold in his initial engagement with them and that he never came up to proof. The jobs that he did were, so it is alleged, unsatisfactory in that either too much time was taken or the workmanship was unsaleable or both. Either way, Seaview say that Mr Moore's workmanship was such as to cost them significant money rather than enable them to use him as a profitable unit of labour in their business.

[21] For Mr Moore, Ms Boulton contends that Mr Moore is not just interested in the restoration of his income although that is clearly an important factor. Mr Moore is also interested in the opportunity of proving himself given the grave dissatisfaction which Seaview has with his performance to date. To that end, Ms Boulton told me that she did not favour a garden leave kind of arrangement where Mr Moore was simply returned to the employment without having the opportunity to actually practice his trade.

[22] I have reached the conclusion that the balance of convenience in this matter favours Seaview. This is not a situation where Mr Moore will have to wait for an unreasonable time to have his substantive hearing; this is already set down for 3 August and I am confident that I can give the determination of the substantive matter some urgency shortly thereafter. If Mr Moore were to be permanently reinstated, as a consequence of that substantive hearing, then I am satisfied damages would be an adequate remedy for his interim losses. I am encouraged that that is the proper conclusion by the fact that the substantive hearing is able to proceed in just five weeks from now.

The overall justice of the case

[23] Standing back and evaluating the case on the currently untested evidence before the Authority and the helpful submissions of both counsel, the Authority must look at the overall justice of the case as between the parties.

[24] The untested affidavit evidence before me suggests some grave deficits in Mr Moore's workmanship, punctuality, health status and fundamental contribution to the employer's business.

[25] It is axiomatic that if Mr Moore were to be reinstated to his former position on an interim basis, those significant matters put into evidence by Seaview would of necessity need to be resolved. The only way that that could be achieved, is by significant management input in effect by way of supervision of Mr Moore.

[26] The difficulty I find with that proposition is that Mr Moore is being paid as a senior tradesperson. I was told that he was the second most highly paid tradesman in the workshop and yet was delivering dramatically less than the least highly paid. It seems to me unreasonable to contemplate requiring Seaview to restore Mr Moore to the employment on an interim basis when the effect of that is to impact negatively on Seaview's business in the current economic environment.

[27] Another factor which I must take into account is the intelligence that Seaview is at real risk of running out of work as early as the end of present month and that a re-structure of the workplace involving redundancies is probable. That being the position, restoring Mr Moore to the employment at this juncture would simply provide another headache for Seaview and given the evident instability of the employment in the current depressed economic environment, would not advantage Mr Moore either. It seems to me the safer course of action is to deal with the matter at the substantive hearing by which time the employer will have had an opportunity to work through the period where the employment is most at risk and if there is an improvement in the company's position in the immediate future, then that can be taken into account in the substantive determination were Mr Moore to be successful.

[28] That being the position, I determine that the overall justice of the case favours Seaview and on that basis, the application brought before the Authority by Mr Moore must fail.

Determination

[29] The application is declined for the reasons advanced in the foregoing sections of this determination.

[30] I have already agreed to hear the substantive matter on 3 August next. For the avoidance of doubt, I now direct that Mr Moore is to file and serve his briefs of evidence (if any) by Monday 20 July 2009 at 4 pm and Seaview is to file and serve their briefs of evidence in reply (if any) by Monday 27 July 2009 at 4pm.

Costs

[31] Costs are reserved.

James Crichton
Member of the Employment Relations Authority