

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

ATTENTION IS DRAWN TO  
THE ORDER PROHIBITING  
PUBLICATION OF  
CERTAIN INFORMATION  
REFERRED TO IN THIS  
DETERMINATION

[2019] NZERA 645  
3073995

BETWEEN        SIMON MURPHY  
                         Applicant

AND                ATLANTIC AUSTRALASIA  
                         PROPRIETARY LIMITED  
                         Respondent

Member of Authority:    Helen Doyle

Representatives:        Robert Thompson, advocate for the Applicant  
                         Andrew Riches and Claire McCool, counsel for the Respondent

Investigation Meeting:    1 November 2019

Submissions [and        1 November 2019  
further Information]  
Received:

Date of Determination:    8 November 2019

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**DETERMINATION OF THE AUTHORITY**

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**A        The application for interim reinstatement is declined.**

**B        Costs are reserved**

## **Prohibition from publication**

[1] I prohibit from publication under clause 10 (1) of the second schedule to the Employment Relations Act 2000 (the Act) information that is commercially sensitive and has not been set out in the determination.

## **Employment Relationship Problem**

[2] Simon Murphy was advised that his position of national sales manager for Atlantic Australasia Proprietary Limited (Atlantic) was terminated for reason of redundancy by letter dated 26 August 2019. This letter followed advice of a proposed restructuring, subsequent exchanges between Mr Thompson and Mr Riches, provision of some further information and a meeting on 22 August 2019. Two weeks' notice was paid to Mr Murphy in lieu.

[3] Mr Murphy has lodged a statement of problem with the Authority alleging unjustified actions causing disadvantage and unjustified dismissal. He says that his dismissal was both procedurally and substantively unjustified.

[4] He has made an application for interim reinstatement and has signed an undertaking as to damages in support of his application.

[5] Atlantic opposes the application for interim reinstatement and says that the termination of Mr Murphy's position on the basis of redundancy was substantively and procedurally justified.

## **The approach to take with an application for interim reinstatement**

[6] Section 127 (1) and (4) of the Act provide as follows:

(1) The Authority may if it thinks fit, on the application of an employee who has raised a personal grievance with his or her employer, make an order for the interim reinstatement of the employee pending the hearing of the personal grievance.

(4) When determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the object of this Act.

[7] The object of the Act is found in s 3 and is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship.

[8] Mr Thompson and Mr Riches referred the Authority to an Employment Court judgment of Judge Inglis as the Chief Judge was then in *Western Bay of Plenty District Council v Jarron McInnes*.<sup>1</sup>

[9] There was reference in that Employment Court judgment to the approach to interim injunctions stated by the Court of Appeal in *NZ Tax Refunds v Brooks Homes Limited*.<sup>2</sup> It was stated in *Brooks Homes* that the approach to the application for an interim injunction is well established. The applicant needs to establish a serious question to be tried, or in other words that the claim is not vexatious or frivolous. The balance of convenience needs to be considered with the impact on the parties of granting or refusing to grant an order. Finally an assessment of the overall justice by standing back is required as a check.

[10] While the power to make an order for interim reinstatement is a discretionary one, the assessment of whether there is a serious issue to be tried is not and requires judicial evaluation.<sup>3</sup>

[11] For a claim for interim reinstatement the question of whether there is a serious question to be tried needs to be considered as two issues:

- (a) Whether there is a serious question to be tried in relation to the claim of unjustified dismissal; and if so
- (b) Whether there is a serious question to be tried in relation to the claim of permanent reinstatement.

## **The Background**

[12] In order to assess the application for interim reinstatement in line with the approach outlined above it is necessary to set out the background.

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<sup>1</sup> *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZempC at 8.

<sup>2</sup> *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90, (2013) 13TCLR 531 at [12] - [13].

<sup>3</sup> Above n 1 at [8].

[13] In doing so I will refer to the correspondence between the parties. I will indicate the areas of dispute between the parties as I traverse the background. It is important to note that the Authority is not required at this interim stage to determine any dispute or any issues about justification of the dismissal.

[14] Mr Murphy commenced his employment with Atlantic on 1 July 2016. He was party to a written employment agreement dated 9 June 2016. His role was the only employee role in New Zealand. Atlantic is based out of Hawthorn in Victoria Australia.

[15] Stephen Shanahan is a director of Atlantic. In his affidavit on behalf of Atlantic opposing interim reinstatement he states that the company is a wholesaler of plumbing equipment, primarily electric hot water systems as well as electric panel heaters and other equipment.

[16] He set out in his affidavit the sale of hot water systems to various customers in New Zealand was undertaken in two ways. The first is an online shop selling various products which are primarily electric panel heaters. The second is the direct sale of hot water systems to New Zealand plumbing merchants upon orders being made.

[17] In 2016 Atlantic decided to employ a New Zealand based sales person. Mr Shanahan stated in his affidavit that was to deal with the side of the business which deals with the sale of electric hot water systems to local wholesale plumbing merchants.

[18] One of the areas of dispute raised during the restructuring process is what products and sales Mr Murphy assumed responsibility for in New Zealand and what should be taken into account in any profitability assessment of sales. A job description may have assisted but as Mr Thompson observed there was no job description for Mr Murphy.

[19] Mr Murphy in his affidavit evidence says that he is responsible for all the products and sales in the New Zealand market and that it is “illogical to suggest that he would only sell hot water systems.”<sup>4</sup>

*Proposal to restructure – 29 July 2019*

[20] On 29 July 2019 Mr Shanahan wrote to Mr Murphy advising that Atlantic was proposing to restructure his role.

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<sup>4</sup> Affidavit of Simon Murphy in reply [4]

[21] The letter set out the business reasons for the proposed restructure as follows:

As you are aware, the company operates an online presence in New Zealand and wholesales its plumbing products to various plumbing merchants across New Zealand. Your role was predominantly to drive the sale of our products to those merchants.

We have been considering the profitability of the New Zealand based operation and find with the exclusion of the online sales which we do not believe would be effected by your role, for the year ended 30 June 2019 the company has suffered a loss as a result of the operation. We are therefore considering some restructuring in order to ensure the profitability of this business.

When we consider the cost of doing business we can identify that the Christchurch operation has direct employment, related costs of salary, ACC, PAYE etc in the amount of [ ]. There is an additional [ ] relating to vehicle hire and expenses and a further [ ] spent on entertainment. This means that the cost of operating your role in New Zealand comes to [ ]. The sales attributed to your position are [ ] meaning there is a ratio of approximately 20 percent.

[22] There was reference in the letter to the company previously using contractors for various roles and that it was considering a proposal in which Mr Murphy's role would be disestablished with the role of driving sales within New Zealand undertaken by a contracted commission only sales person.

[23] A commission only contractor in the North Island was referred to in the letter and it was stated that person had indicated that they would be prepared to expand their role and take on sales previously handled by Mr Murphy's role. It was noted that if this proceeded the contractor would be paid a percentage referred to in the letter of any sales on long-term projects and on annual projects for the first three years. It was considered this would be a significant saving on the current 20% ratio referred to above.

[24] The letter referred to redeployment although as Mr Murphy was the only employee in New Zealand this was not seen as a possibility. Mr Murphy was invited to a meeting on 31 July 2019 with Mr Shanahan flying to New Zealand for that meeting. It was set out that the purpose of a meeting would be for submissions including opposing the proposal, putting forward alternatives such as ways to boost the profitability of the local business or putting forward a proposal for redundancy.

*Mr Thompson is instructed*

[25] Mr Thompson was then instructed and communicated with Mr Shanahan to advise that it was impossible for Mr Murphy to attend the meeting with the tight time frames. He also requested some further information in an email dated 30 July 2019.

*Mr Riches is instructed*

[26] Mr Riches was instructed and responded to Mr Thompson on 30 July 2019. He provided a copy of the proposal put to the contractor referred to in the 29 July letter who I shall refer to as D. It was understood that D had agreed in principal to the proposal if the restructuring proposal was to proceed. Mr Riches advised in his response that given the commercial sensitivity of the finances of the companies they would be provided at the meeting but not earlier. He reiterated the nature of the restructuring proposal was to remove the upfront fixed cost of the salaried employee for a lower per unit cost of the contractor.

*Further correspondence before meeting*

[27] Mr Murphy received an email from D dated 2 August 2019 to the effect that D had not agreed to any terms with Atlantic for commission on future sales. That was not inconsistent with Atlantic's views. D also wrote that he would not agree to an offer with the percentage of sales disclosed in the restructuring proposal as it was not financially viable. D further wrote that he was told in early July he was not the right person for the job and all previous offers made were withdrawn.

[28] Mr Thompson wrote again to Mr Riches on 2 August advising that there was no evidence that a commission agent would work for the percentage of sales set out in the 29 July letter.

[29] Mr Murphy on 7 August received an email from a client to the effect that somebody had said Mr Murphy no longer worked for Atlantic.

[30] Mr Thompson wrote again to Mr Riches seeking further information in an email dated 7 August 2019.

[31] Mr Riches responded to the request for further information on 15 August 2019. Mr Thompson had amongst other matters posed a question whether Mr Murphy would be offered

a commission only role. Mr Riches in his response on 15 August 2019 stated that matters with D were not advanced to final agreement because that would pre-determine the outcome of the restructuring proposal. He stated that if the company proceeded with a redundancy then it would need to negotiate a final agreement with D or another commission only contractor salesperson. Mr Riches noted the enquiry from Mr Thompson and stated that it appears Mr Murphy could also be an option for this role.

*Meeting 22 August 2019*

[32] A meeting was held on 22 August 2019. Mr Riches was present together with another solicitor from his office and Mr Murphy and Mr Thompson were also present. Two directors from Atlantic, Ewen Stephenson and Mr Shanahan, attended by telephone from Atlantic's head office in Australia.

[33] The meeting was recorded however a transcript was not available at the time that this application was heard.

[34] On 26 August 2019 Mr Riches wrote a lengthy letter to Mr Thompson. It set out amongst other matters what it considered Mr Murphy's opposition to the restructuring to be:

- (a) The company was profitable whereas the profit and loss statement shows it to be unprofitable;
- (b) Terminating the national sales manager position would be detrimental to the company as it requires "boots on the ground to work with customers";
- (c) The New Zealand operation has extremely positive projections and in the coming months and years will see significant increases of sales which would render the operation profitable; and
- (d) The proposed contractor simply wouldn't do it and by inference nor would any other contractor do so at the rate of [%].

[35] Mr Riches addressed each of these matters at some length in the letter. They were not accepted. It was also stated in the letter that at the meeting Mr Murphy and/or Mr Thompson had advised that the proposal was not genuine and the outcome was pre-determined. The letter stated that this was rejected. In the letter Mr Riches did not accept the directors had approached clients and told them not to deal with Mr Murphy. There was also reference to Mr Thompson prior to the meeting asking why Mr Murphy had not been offered a

commission only sales role. The response was that Atlantic would not offer anyone any role pending the completion of the process. It was noted that there has not been a response to the matter and it was not raised by Mr Thompson at the meeting [on 22 August 2019].

**Is there a serious question to be tried in relation to the claim of unjustified dismissal?**

[36] Mr Thompson submits that there is a serious issue to be tried in respect of the claim of unjustified dismissal.

[37] Mr Riches accepts that there is a serious issue to be tried in relation to Mr Murphy's claim of unjustified dismissal in so far as it is not a frivolous or vexatious claim. He submits that the merits of the claim are not strong and that regardless of any procedural issues which he described as minor and inconsequential the redundancy is substantively justified.

[38] Mr Thompson submits that no information was provided that the restructure and subsequent redundancy of Mr Murphy's role was genuine.

[39] The basis for the restructuring proposal as set out in the letter of 29 July 2019 was that on an assessment of the profitability of the New Zealand based operation and excluding online sales Atlantic had suffered a loss. 20% of the sales revenue was spent on the direct cost of Mr Murphy's position and it was proposed a viable solution was to engage a commission only sales person with lower costs of sales and flexibility.

[40] It is arguable that there was a genuine reason for the proposed restructuring in that a commission only contractor could remove the fixed cost of Mr Murphy's position and replace it with a variable one viewed against a background where sales of hot water systems to break-even point had not been reached for year ending 30 June 2019.

[41] The duty of good faith in s 4(1A)(c) of the Act requires an employer who is proposing to make a decision that is likely to have an adverse effect on continuation of employment to provide access to information relevant to the continuation of employment and an opportunity to comment on that information.

[42] There were figures provided in the 29 July 2019 letter of the costs of Mr Murphy's position and the sales that Atlantic attributed to Mr Murphy and how the basis for the ratio of 20% was arrived at.

[43] It is arguable that Mr Riches on behalf of Atlantic answered Mr Thompson's questions and provided information before the meeting on 22 August 2019 which was required before Mr Thompson and Mr Murphy were prepared to meet. At the meeting a profit and loss statement was provided.

[44] Mr Thompson refers to shifting sands in his submission. This is on the basis he submits that the position of Atlantic shifted from the business making a loss, to a desire to engage a contractor on a base commission for all NZ sales and a position that Mr Murphy was not responsible for all sales within New Zealand.

[45] It is arguable that it was always clear from the letter of 29 July 2019 about the proposed restructuring that online sales were to be excluded from the profitability of the New Zealand operation and on that basis a loss was suffered. It is arguable that there was a proposal to replace the role with a commission only salesperson and a contractor was mentioned. It is less arguable that those matters changed or shifted as submitted by Mr Thompson.

[46] It is arguable that there was a lack of clarity about any commission on sales for a contractor if the proposal was finalised and/or the nature of the responsibility for sales in New Zealand.

[47] A profit and loss sheet was provided at the meeting on 22 August 2019 to Mr Murphy. Mr Thompson submits that it was inaccurate and did not contain all of the New Zealand sales but did contain all the New Zealand outgoings.

[48] The exclusion of online sales was a matter discussed at the consultation meeting on 22 August 2019.

[49] In Mr Shanahan's affidavit<sup>5</sup> he deposes that Mr Murphy at the meeting on 22 August 2019 could not make any submission as to the impact on heater sales from discontinuing his role and did not identify any customer or steps taken by him to sell heaters. He deposed that the highest point on heaters was that Mr Murphy stated he was representing the company in generating sales in heaters.

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<sup>5</sup> Affidavit of Stephen Shanahan [16]

[50] Mr Murphy in his affidavit in reply refers to the 25 July 2019 proposal sales contract with D that refers to product as Steatite & Vertigo electric storage water heaters “and panel heaters.” He deposes that the offer to D included panel heaters but Atlantic suggests he was not accountable for the panel heaters.

[51] On the untested affidavit evidence it could be arguable that all sales in New Zealand should have been included in assessing profit and loss but it is also arguable that there may not be a discernible impact between the online sale of panel heaters and Mr Murphy’s position and that it was reasonable to not consider the online sales in assessing the profitability of Mr Murphy’s role. It is more strongly arguable that outgoings associated with the excluded online sales should not have been included in assessing profitability. I do accept it is arguable that the sales proposed to be undertaken by the commission only contractor include the sale of panel heaters and sales may not have not been measured like for like.

[52] There was no affidavit evidence to support a challenge to the sales revenue from the hot water systems for the year ending 30 June 2019 not reaching the threshold required for a break-even point.

[53] At this point in time it is difficult to assess the strength of any arguable case about pre-determination. There is an email dated 7 August 2019 from someone in the plumbing industry to Mr Murphy saying that he had spoken to another person who heard from another who said “Simon does not work for us anymore.” Mr Shanahan denied in his affidavit telling anyone that the role was terminated and says that at that time they were trying to organise a meeting with Mr Murphy.<sup>6</sup> The email does have aspects of hearsay from one person having heard from another who heard from another.

[54] It is arguable that there was a lack of clarity about the percentage basis any commission salesperson would be working for or whether they would accept that percentage and take on the role. That was an issue for Mr Murphy after he received an email from D to that effect and his view that there had been a misrepresentation by Atlantic. Percentages payable could impact on proper conclusions about any cost savings at the heart of the restructuring.

[55] The strength of that argument however has to be weighed with an expressed “buffer” for the company in its letter of 26 August 2019 even if the percentage payable on sales

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<sup>6</sup> Affidavit of Stephen Shanahan [42]

increased given the 20% ratio for Mr Murphy's position. Further that Mr Shanahan deposed in his affidavit that after termination of Mr Murphy's employment negotiations with D have resulted in an "ongoing formulation" of a memorandum of understanding that is now signed. It was attached as an annexure to the affidavit and shows an increased commission within the North Island but still considerably lower than the 20%.

[56] It is arguable that there should have been discussion with Mr Murphy about a commission contractor role. There seemed to be that possibility from the letter of 26 August but the letter also records there was no discussion at the meeting on 22 August about that.

[57] I find in conclusion that Mr Murphy does have an arguable case of unjustified dismissal. Some aspects are less strongly arguable than others.

**Is there a serious issue to be tried for permanent reinstatement?**

[58] The Authority may provide for permanent reinstatement if it is practicable and reasonable to do so under s 125(2) of the Act irrespective of whether it provides for any other remedy. Reinstatement is now the primary remedy.

[59] Mr Thompson submits that reinstatement is practicable and reasonable. He submits that there were no disciplinary or performance issues and that there is no reason the relationship cannot be restored.

[60] Mr Riches does not accept that there is a seriously arguable case for Mr Murphy for permanent reinstatement.

[61] There are some aspects in this matter that are unusual. Mr Murphy was the only New Zealand employee. That would have to be weighed in the likelihood of permanent reinstatement whether it is practicable or reasonable.

[62] The ability of Atlantic to restructure its operations in the manner in which it has decided to do so would also need to be carefully assessed with respect to practicableness and reasonableness of permanent reinstatement. Permanent reinstatement would impact on the effect of its final decision that there is no longer to be an employee in New Zealand. It would impact on the ultimate ability Atlantic has to restructure in the way it proposed to do and has done.

[63] Mr Riches places some weight in his submissions on an email Mr Murphy sent to the directors of Atlantic dated 12 April 2019 which was attached to the statement of problem. It was put forward on the basis that the email raised a personal grievance. Mr Riches submitted that it was evidence of an increasingly strained relationship between Mr Murphy and the directors of Atlantic.

[64] It is arguable that it could be suggestive of some difficulties. Working relationships was something in the email that Mr Murphy wanted to talk about during a planned conference call. There was reference to language directed at him that he stated in the email was aggressive, abusive, degrading and that he felt attacked, bullied and unappreciated.

[65] Mr Thompson submits that there is a strong case for permanent reinstatement. I cannot conclude there is no serious issue to be tried with respect to permanent reinstatement. At this point on the untested affidavit evidence I do not conclude it is a strongly arguable case.

### **Balance of Convenience**

[66] As a result of the Authority workload a prompt date for a substantive investigation meeting is not possible. I accept that Mr Murphy has referred to the financial hardship that he is suffering and the likelihood this will continue. He does not consider the matter could be remedied by way of compensation and lost wages. I weigh that as a factor favouring Mr Murphy in the balance of convenience.

[67] The position Mr Murphy held is front facing. Mr Shanahan in his affidavit refers to concerns about no day to day supervision and an inability to monitor what is occurring if Mr Murphy is reinstated on an interim basis. He questions given the unaccountability and concerns about client contact and potential damage how Atlantic could operate a wholesale business in New Zealand under these circumstances with an order for interim reinstatement.

[68] Mr Murphy has deposed in his affidavit in reply that he would be happy to provide detailed timesheets or information about his whereabouts on a day to day basis and who he is contacting. He says that he would not take steps to undermine his current reputation or that of Atlantic if reinstated on an interim basis.

[69] Even weighing what Mr Murphy has deposed in his affidavit the front facing, unsupervised and autonomous nature of the role is a factor favouring Atlantic in the balance

of convenience. Both directors are in Australia and it would be difficult to alleviate concerns that they have about potential issues and concern that even a lack of motivation could have on sales.

[70] I also weigh that there is potential for ongoing costs to the business if Atlantic is required to reinstate Mr Murphy to a role that has been disestablished on the basis of sales revenue generated. There is also the potential for an order to impact on any final agreement with D as Atlantic does not accept that the two roles could co-exist because of potential client confusion and the possibility of loss of sales that D could have generated. Clients have been advised that Mr Murphy following his termination is no longer with the company and that could cause disruption if he was to return. These factors favour Atlantic in the balance of convenience.

[71] Mr Murphy deposes to having suffered some reputational damage as a result of his redundancy. I am not persuaded in all the circumstances of this case where the relationship ended by reasons of redundancy that reputational issues favour Mr Murphy in the balance of convenience.

[72] Mr Thompson submits that the right to work is a valuable right. The right to work is valuable but other matters need to be weighed under this test.

[73] I accept that Mr Murphy has suffered and will continue to suffer serious financial difficulties. There will be a considerable delay until the substantive investigation. That is a neutral factor because it favours of both parties in the balance of convenience.

[74] I have found that the balance of convenience does not favour Mr Murphy's reinstatement on an interim basis. Mr Murphy would be working unsupervised and autonomously as the sole employee in New Zealand in a role that has been disestablished because of concerns about sales revenue. The sales revenue that is not online sales was not challenged. I also weigh that on the untested evidence permanent reinstatement is arguable but it is not strongly arguable.

[75] I find the balance of convenience favours Atlantic.

### **Overall Justice**

[76] I now stand back and consider where the overall justice lies.

[77] I find that the overall justice of the case requires that the interim reinstatement application be declined.

### **Costs**

[78] I reserve the issue of costs until after the substantive investigation.

### **Further steps**

[79] An Authority Officer will contact the parties to make arrangements for a substantive investigation meeting.

Helen Doyle  
Member of the Employment Relations Authority