**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI**
**TĀMAKI MAKAURAU ROHE**

[2021] NZERA 483
3152241

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| | BETWEEN | RUTHY NISBET<br>Applicant |
| | AND | AIR CHATHAMS LIMITED<br>Respondent |

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| Member of Authority: | Marija Urlich |
| Representatives: | Natalie Tabb, counsel for the Applicant<br>Carolyn Heaton, counsel for the Respondent |
| Investigation Meeting: | 22 October 2021 (By zoom) |
| Submissions received: | 22 October 2021 from Applicant<br>22 October 2021 from the Respondent |
| Determination: | 1 November 2021 |

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## DETERMINATION OF THE AUTHORITY

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### Employment relationship problem

[1] Air Chathams Limited (ACL) operates air services to the Chatham Islands and New Zealand. Ms Nisbet was employed as a pilot by ACL from 31 August 2016 until she received notice of termination of her employment by reason of redundancy on 27 August 2021 with one month's notice. Her employment ended on 24 September and she received her last pay on 5 October.

[2] On 28 September Ms Nisbet lodged in the Authority a statement of claim for unjustified dismissal, unjustified disadvantage and unpaid wage and leave entitlements. Remedies sought included permanent reinstatement.

[3] Also on 28 September 2021 Ms Nisbet lodged an application for interim reinstatement along with a supporting affidavit and undertaking as to damages. By statement in reply dated 8 October ACL denies Ms Nisbet was unjustifiably dismissed or unjustifiably disadvantaged in her employment or that arrears are owing. It opposes the remedies sought including permanent and interim reinstatement.

[4] This determination deals only with Ms Nisbet's application for interim reinstatement. The investigation of her substantive claim of unjustified dismissal, unjustified actions and wage arrears is scheduled for 30 November and 1 December 2021.

**The Authority's investigation**

[5] On 1 October 2021 the Authority held a case management conference with the parties' representatives to set a timetable for Ms Nisbet's interim reinstatement application. The parties have complied with timetabling directions including attending mediation. By consent the investigation meeting was held by zoom.

[6] In determining this matter affidavit evidence of Ms Nisbet, Craig Emeny and Warren Gleeson has been considered as have the parties' statements of problem and reply, the documents attached thereto and the parties' submissions. Evidential matters in dispute between the parties will not be resolved by this determination because the evidence is untested and in applying the relevant tests the Authority is not required to resolve any disputes.

**The relevant law**

[7] Section 127 of the Employment Relations Act 2000 (the Act) confers jurisdiction on the Authority to grant interim reinstatement. In considering Ms Nisbet's application for interim reinstatement the Authority is required to consider the following:[1]

(i) Does Ms Nisbet have an arguable case for unjustified dismissal and an arguable case for permanent reinstatement?

[1] *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [7].

(ii) Where does the balance of convenience lie? This requires looking at the relevant detriment or injury that Ms Nisbet and ACL will incur as a result of the interim injunction being granted (or not granted)?

(iii) The Authority is then required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

[8] As the court observed in the recent judgment in *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* in determining whether or not to order interim reinstatement, regard must be had to the object of the Employment Relations Act 2000 (the Act) which is to build productive employment relationships through the promotion of good faith:

> One of the central features for the Act is its recognition of the importance of the employment relationship, the obligations both parties have to be responsive and communicative, and that issues ought to be dealt with promptly and between the parties if possible – in other words, supporting constructive employment relationships and repairing them where feasible.[2]

[9] It is with this in mind that applications for reinstatement are to be dealt.

**Arguable case of unjustified dismissal and unjustified disadvantage**

[10] The first question for consideration is whether there is an arguable case Ms Nisbet was dismissed unjustifiably and that she will be permanently reinstated. An arguable case means a case with some serious or arguable, but not necessarily certain prospects of success.[3] The threshold for a serious question or arguable case as stated in *McInnes* is that the claim is not frivolous or vexatious:

> However, as Brooks Homes Ltd makes clear, an applicant must establish that there is a serious question to be tried, in that the claim is not vexatious or frivolous. The merits of the case (insofar as they can be ascertained at an interim stage) maybe relevant in assessing the balance of convenience and overall interests of justice…[4]

[11] Section 103A of the Act sets out the test for assessing whether a dismissal was justifiable. It requires an objective assessment of whether ACL's actions and how it

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[2] *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* [2021] NZEmpC 59, at [5].
[3] *X v Y Ltd v New Zealand Stock Exchange* [1992] 1 ERNZ 863.
[4] *McInnes* above n 1, at [9].

acted were what a fair and reasonable employed could do in all the circumstances at the time the dismissal occurred. The Authority may take into account other factors it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in Ms Nisbet being treated unfairly.[5] The Authority's task is to examine objectively ACL's decision-making process and determine whether what ACL did and how it was done were steps open to a fair and reasonable employer.

[12] In considering a dismissal for redundancy the Authority must apply the test for justification set out at section 103A of the Act. The legal principals to apply to such a consideration are set out in the following statements of the Court of Appeal in *Grace Team Accounting Limited:*

> [80] We consider that the appropriate approach to statutory interpretation in this case is the orthodox approach beginning with the words of the section and considering them in light of the purpose of the statute. When the words of s 103A are considered in light of the purposes of the statute set out in s 3 and the overarching duty of good faith provided for in s 4, we do not consider that the reference in s 103A to a 'fair and reasonable employer' can properly be read down to mean 'a genuine employer', in the sense used in *Hale* (an employer not using redundancy as a pretext for dismissing a disliked employee).
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> [81] Given the explicit requirements for disclosure of information and consultation that now apply in redundancy situations, the reality is that the Employment Court will have before it the information provided by the employer to the employee justifying the redundancy. Whatever may have been the case in the pre-s 103A environment, the clear words of s 103A now require the Employment Court to determine on an objective basis whether the employer's actions and how it acted were what a reasonable employer would have done. That test has little in common with this Court's pronouncements in *Hale* and *Aoraki*.
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> …
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> [85] Having said that, however, we do not dismiss the importance of the Employment Court addressing the genuineness of a redundancy decision. If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test. In the end the focus of the Employment Court has to be on the objective standard of a fair and reasonable employer, so the subjective findings about what the particular employer has done in any case

[5] Section 103A Employment Relations Act 2000.

> still have to be measured against the Employment Court's assessment of what a fair and reasonable employer would (or, now, could) have done in the circumstances.[6]

[13] ACL is New Zealand's third largest airline employing between 113 and 131 employees. Ms Nisbet is a qualified and experienced commercial pilot with 20 years' experience. At the time of her dismissal she was flying Convair aircraft having flown Metroliner aircraft for ACL between June 2018 and August 2019.

[14] The context of Ms Nisbet's dismissal for redundancy is ACL's recent retirement of Convair aircraft from its operation following a review of aircraft types and pilot staffing needs. The review was carried out between 6 and 12 April 2021. The results of the review were published to ACL pilots including Ms Nisbet on 12 April. Ms Nisbet did not participate in the review and was not provided with supporting information when the review results were published.

[15] Ms Nisbet accepts she has known for at least 18 months that ACL planned to retire the Convair aircraft. She says she was led to believe she would be transferred to another aircraft, these assurances have not been met and have caused her disadvantage in her employment. There is a dispute as to whether Mr Emeny, the owner of ACL, told Ms Nisbet that when the Convair was retired she would return to flying the Metroliner aircraft. At this stage this dispute cannot be resolved but the evidence suggests ACL put Ms Nisbet on notice the retiring of the Convair may impact on her, that opportunities for her to fly other aircraft would be looked into and she would be kept informed.

[16] After 12 April there was no further information provided to or discussion with Ms Nisbet about the potential impact on her job until she was told in July she could be made redundant.

[17] On 19 July Mr Gleeson sent Ms Nisbet a text message inviting her to meeting the following day. The text message did not set out the reason for the meeting and it provided no supporting information. Ms Nisbet was not advised she could bring a support person. At the meeting, at which ACL was represented by Mr Gleeson and Mr Emeny, Ms Nisbet was provided a restructuring document which was discussed and she was asked to provide feedback by 30 July which she did. The document proposed to

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[6] *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494.

disestablish the positions of pilots flying Convair aircraft as a consequence of the retiring of the Convair aircraft. Ms Nisbet was told ACL was having difficulty identifying redeployment opportunities for her including that there was no position on the Metroliner for her and she could not do the training for it because of Covid related travel restrictions. She was offered access to Employee Assistance Program for support. This was the only meeting Ms Nisbet attended with ACL regarding the restructuring and potential impact on her employment.

[18] Ms Nisbet was advised by letter dated 27 August that her employment was to be terminated by way of redundancy. She said this came as a shock because she had understood she would be transferred to the Metroliner craft. There were three other Convair pilots made redundant and one not for reasons not entirely clear on the untested evidence before the Authority.

[19] Ms Nisbet says her dismissal was unjustified on the following grounds:

(i) it was predetermined;

(ii) pilot involvement in the review and subsequent restructuring/redundancy process was unreasonably limited;

(iii) selection criteria was not objective and not fairly implemented;

(iv) consultation was inadequate;

(v) ACL failed to provide adequate information; and

(vi) failed to consult on or consider other options including redeployment or reduced hours.

[20] ACL accepts Ms Nisbet has an arguable case that her dismissal was unjustified in that it is not vexatious or frivolous but says it is not a strong case because the redundancy was genuine given the underlying business reasons for the dismissal and ACL have complied with the notice and consultation requirements in section 4 of the Act.

[21] It is not clear on the untested evidence why ACL waited until July to commence the restructuring process when by at least April it was aware August was the likely retirement date for the Convair aircraft. It is also not clear why procedural elements

such as fair notice of and the ability to bring a support person to the July meeting were not complied with. Given the redundancy process in the parties' employment agreement it will also be for ACL to show it has discharged the obligation to have consulted fairly and considered Ms Nisbet's feedback with an open mind. There are questions over the selection criteria ACL applied in its decision to make Ms Nisbet redundant. These are issues which go to the reasonableness and justifiability of the restructuring decision. The Authority is satisfied Ms Nisbet has a strongly arguable case to be tried in respect of Ms Nisbet's unjustifiable dismissal claim.

**Arguable case for permanent reinstatement**

[22] Where it is practical and reasonable to do so and sought, the Authority must provide for reinstatement as a primary remedy[7]. The question is whether it is feasible or practical to re-impose the employment relationship. It is not sufficient to show resistance and strained circumstances to avoid reinstatement.[8]

[23] Ms Nisbet says she was a loyal and hard-working employee who wishes to be reinstated, is a competent and capable pilot with good working relationships at ACL with whom ACL has indicated a wish to continue the employment relationship in the future and that ACL has flexibility in its workforce due to use of contractors. Given reinstatement is a primary remedy her submission is she has a strong case for permanent reinstatement.

[24] ACL submits permanent reinstatement is not only not practicable or reasonable it is impossible because her role no longer exists, she is not presently qualified to fly any other aircraft operated by ACL and even if she was there are no roles available. It says further due to the impact of COVID-19 and the down turn in the industry current roles may face the same uncertainty.

[25] Can the employment relationship be successfully re-imposed?[9] There is evidence before the Authority that the employment relationship was positive, Ms Nisbet was a well-regarded employee who is competent and hardworking and ACL has put in place steps to reengage her when this is possible.[10]

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[7] Section 125(2) of the Employment Relations Act 2000.
[8] *Angus v Ports of Auckland* [2011] NZEmpC 122 at [63] and *Air New Zealand Limited v Hudson* (unrep) Employment Court, Auckland, AC 46/05, 17 August 2005, Judge Colgan at p 8.
[9] *Smith v Fletcher Concrete & Infrastructure Ltd* [2020] NZEmpC 125 at [20].
[10] ACL has developed a reengagement plan for the redundant employees including Ms Nisbet.

[26] Ms Nisbet is not currently certified to fly the Metroliner aircraft or the ATR72 or Saab aircraft which ACL operate. It is likely she is capable of gaining such certification and that control of certification lies with ACL though it is accepted the practical reality of attending the training in Melbourne for the Metroliner is restricted.

[27] Is it reasonable to require Ms Nisbet to return? Ms Nisbet has worked successfully for ACL for some years. With the appropriate certification she can fly for ACL again. There is untested evidence before the Authority that not all Convair pilots were made redundant and changes in the current industry and Covid restrictions may support pilot re-employment. There is a serious question to be tried that Ms Nisbet should be reinstated.[11]

[28] Ms Nisbet has established there is a serious question to be tried in regard to her claim for reinstatement.

**Balance of convenience**

[29] This ground for consideration involves the relevant detriment or injury the parties will incur if interim reinstatement is granted or not. An assessment of what might happen if the interim position is reversed in any substantive determination including consideration of whether damages can adequately compensate any harm if reinstatement is not ordered is also to be made.

[30] Ms Nisbet says the balance of convenience favours her:

- as a hard working loyal employee with good relationships with ACL which expresses hope to renew the relationship in the future;
- she would require retraining but is capable and ACL has in house training capacity;
- retraining is within the control of ACL;
- given the size and flexibility of pilot workforce;
- she could be included in the government wage subsidy;
- there is a significant impact on third parties if she is not reinstated namely Ms Nisbet's family; and

[11] *Genysis Telecommunications Laboratories Limited v Brendon Scott* [2019] NZEmpc 113.

- she is unlikely to be able to find alternative employment given pilot jobs are scarce.

[31] ACL submits damages would be an adequate remedy for Ms Nisbet. There is strength in this argument given the substantive hearing of this matter falls well within the s 128 three month lost wages period.[12] If Ms Nisbet is successful in her substantive claim, the merits of which I have assessed as strongly in her favour, and she is able to establish she has taken reasonable steps to mitigate any lost wages, then she would be entitled to an award of lost wages for at least the period for which she seeks to be reinstated on an interim basis.

[32] If Ms Nisbet was reinstated on an interim basis this would, on the affidavit evidence, be a financial and operational burden for ACL because she is in the short term unlikely to be able to perform work for ACL. In the period before the investigation of her substantive claim and under current COVID-19 restrictions it is unlikely she would be able to travel to Melbourne to undertake the certification tests necessary to fly the Metroliner and consequent to the ACL pilot cohort reduction caused by the restructuring and related and ongoing decrease in workload there is no space in the crew roster for her to fly on the ATR72 aircraft even if she undertook the New Zealand based recertification. These issues go to the financial viability and operation of ACL and weigh in its favour.

[33] I have carefully considered Ms Nisbet's submission that the balance of convenience favours her given the specialised nature of her role. It is wholly accepted Ms Nisbet is a well-regarded professional pilot. The difficulty with this argument is the evidence suggests if she was reinstated it is unlikely she could fly for ACL in the short term.

[34] Careful consideration has also been given to Ms Nisbit's submission that the impact of her dismissal on her financial circumstances and that of her family favour reinstatement. Ms Nisbet's affidavit evidence is her ACL salary was a major contributor to her household income and without it the household may have difficulty meeting its outgoings including the prospect of a mortgagee sale of the family home.

[12] Ms Nisbet's last pay from ACL was received 5 October 2021.

The evidence of the household income, the financial impact of losing Ms Nesbit's income and the risk to the family home is limited. There is little evidence of steps taken or attempted to mitigate any deficit. This factor weakly favours Ms Nisbet.

[35] Ms Nisbet's was a no fault dismissal and there is no suggestion in the evidence that she was anything but a well-respected, competent, hard-working employee. This is not then the type of situation where interim reinstatement could mitigate a negative impression to third parties caused by a dismissal or is a necessary step to repairing a broken employment relationship.

[36] Considering all the relevant factors the balance of convenience favours ACL. Ms Nisbet is assessed as able to bear the burden of not being reinstated in the relatively short period until her substantive claim is heard and determined.

**Overall justice**

[37] Standing back from the detail of the claim where on balance does the overall justice lie? This has been described by the Court of Appeal as:

> The overall justice assessment is essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and balance of convenience.[13]

[38] Ms Nisbet has established she has a strongly arguable case her dismissal was unjustified and an arguable case for permanent reinstatement. It is accepted Ms Nisbet has a specific set of skills for which I am satisfied she needs to work as a pilot to maintain. It is also accepted the loss of her income has an ongoing impact on her household. However, albeit on untested evidence, reinstatement is unlikely to be able to address her wish to fly because in the short term there is no opportunity for her fly for ACL and the financial impact may well be met by damages.

**Outcome**

[39] Ms Nisbet's application for interim reinstatement is declined.

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[13] *NZ Tax Refunds Limited v Brooks Homes Limited* [2013] NZCA 90 at [47].

**Costs**

[40] Costs are reserved and will be dealt after determination of the substantive investigation.

Marija Urlich
Member of the Employment Relations Authority