



Employment Court of New Zealand

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PPCS Limited v Vakapuna WC 28A/07 [2007] NZEmpC 159 (13 December 2007)

Last Updated: 22 December 2007

IN THE EMPLOYMENT COURT

WELLINGTONWC 28A/07WRC 35/07

IN THE MATTER OF an application for stay of proceedings, an application for urgency and abridgement of time

BETWEEN PPCS LIMITED

Plaintiff

AND VILIAMI VAKAPUNA

Defendant

Hearing: 13 December 2007

(Heard at Wellington)

Appearances: T P Cleary, Counsel for the Plaintiff

S M Moran and A Hughes, Counsel for the Defendant

Judgment: 13 December 2007

ORAL JUDGMENT OF JUDGE A A COUCH

[1] The defendant, Mr Vakapuna, was employed by the plaintiff for approximately 20 years at its plant in Shannon. There was some history of difficulties between Mr Vakapuna and management. Evidence about the extent of those difficulties varied but it seems to be common ground that there was such a history.

[2] On 18 January 2007 a particular incident occurred in which Mr Vakapuna was alleged to have abused his supervisor. That was investigated by the plaintiff and Mr Vakapuna was ultimately dismissed on 25 January 2007. An official of Mr Vakapuna's union immediately gave notice that he would be pursuing a personal grievance. That was confirmed by letter on 9 February 2007. It appears mediation subsequently took place but was unsuccessful.

[3] Proceedings were then filed within the Employment Relations Authority seeking a range of remedies including reinstatement but that did not occur until 26 June 2007. An investigation meeting took place on 30 August 2007 but submissions arising out of that were variously provided subsequently and not completed until 5 October 2007. The Authority gave its determination on 21 November 2007.

[4] The Authority found that the defendant, Mr Vakapuna, had been involved in misconduct but that his dismissal was unjustifiable. The Authority reached that conclusion partly on grounds that a finding of serious misconduct was not warranted and partly because the Authority determined that the investigation was not as thorough as it ought to have been.

[5] The Authority found that Mr Vakapuna contributed significantly to the situation giving rise to his personal grievance and assessed the level of contribution at 40 percent. The Authority ordered immediate reinstatement of Mr Vakapuna to his former position. It also ordered payment of arrears of wages but only for a period of 3 months and then after deduction of any earnings Mr Vakapuna had derived in the meantime and 40 percent further for contribution.

[6] The plaintiff immediately filed a challenge in this Court to aspects of that determination. Specifically the plaintiff's challenge relates to the remedies. Within the challenge, the focus of the plaintiff is on the order of the Authority that Mr Vakapuna be reinstated.

[7] That challenge was filed on 23 November 2007, so it was done very promptly after the Authority's determination had been received. At the same time, the plaintiff sought an urgent hearing of that challenge and sought a stay of the order for reinstatement in the meantime.

[8] On 27 November 2007, Judge Shaw granted an interim stay pending the outcome of mediation between the parties which had been arranged for 3 December 2007. On 4 December 2007 Judge Shaw extended that interim stay until today when a hearing of the plaintiff's application was scheduled.

[9] The application for stay is opposed. Indeed, it is fair to say that it is vigorously opposed.

[10] Numerous affidavits have been filed; four in support, and four in opposition. I have considered the contents of those affidavits carefully. I have also had the benefit of thoughtful submissions by counsel for both parties.

[11] The starting point in considering the application for stay must be [s126](#) of the [Employment Relations Act 2000](#) which provides that where the remedy of reinstatement is provided by the Authority the employee must be reinstated immediately or in accordance with the Authority's order despite any challenge to or appeal against the determination of the Authority. It says that:

The provisions for reinstatement remain in full force pending the outcome of those proceedings unless the Authority or the Court otherwise orders.

[12] There is no guidance given in the statute to the exercise of the discretion conferred by that expression "otherwise orders" but clearly it must be exercised in a principled way and that is what I do.

[13] As to the appropriate principles, Mr Cleary referred me to the decision in *Chief Executive of the Ministry of Agriculture and Forestry v Hughes* [\[2004\] NZEmpC 94](#); [\[2004\] 2 ERNZ 18](#) where a series of criteria were listed. For the defendant, Miss Moran relied on the decision of Judge Travis in *Lawrence McDonald Holdings v McDonald* AC 51/02, 21 August 2002. She also referred me to a decision of the Court of Appeal in *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [\[1999\] NZHC 1324](#); [13 PRNZ 48](#). During the adjournment prior to giving this decision, I have had an opportunity to look at those decisions and have made myself familiar with what they say.

[14] It seems to me that the specific principles enunciated and applied in those cases, and in the several other cases in which these issues have come before the Court, all derive from the one fundamental issue which is where the overall justice of the matter lies. I adopt that as my guiding principle.

[15] To a large extent, assessing the overall justice of the matter is a process of identifying and assessing what the effects would be on the parties respectively of granting or not granting a stay. I also take into account as a relevant factor the nature of the plaintiff's case in support of the challenge. Clearly, if there is no discernable argument in favour of the plaintiff's challenge then that would count against the grant of a stay. Having said that, it is not for me at this stage to determine what the outcome of that challenge might be.

[16] I look first at the issues which impress me in respect of the plaintiff's case in support of the stay. The most powerful factor advanced on behalf of the plaintiff is that if a stay is not granted, Mr Kealey, who has been the plant manager for the last 10 years, says he will resign. He swore an extensive affidavit to which he annexed a draft letter of resignation. Mr Kealey says on oath in his affidavit that this accurately reflects his intention. I note here that Mr Kealey gives detailed reasons in his affidavit for this view and he acknowledges the seriousness of taking such a step.

[17] If Mr Kealey does resign, it seems to me that this will amount to a substantial and effectively irreversible loss to the plaintiff. It is significant here that, although Mr Kealey was the officer of the company who effected the dismissal of Mr Vakapuna, he was not the employer. What I must have regard to here is the effect on the employer namely PPCS Ltd which is Mr Vakapuna's employer and the party to these proceedings.

[18] Miss Moran submitted that I should not have regard to this evidence. She characterised it as an attempt to improperly put pressure on the Court. With respect, I do not read it that way. I accept on the basis of Mr Kealey's affidavit that this is a statement of fact and that it is not advanced for any ulterior motive or with disrespect to the Court. In simple terms, it is not a bluff. I therefore regard this as an important factor to be taken into account in assessing the overall justice of the matter.

[19] The plaintiff also says that the defendant's history of disruption in the workplace and misconduct is such that if he is reinstated this is likely to happen again. The plaintiff says it should be given an opportunity to challenge the Authority's determination before being required to accept the risk that this might happen.

[20] The evidence in support of that proposition is equivocal. The plaintiff's witnesses, and indeed one of the defendant's witnesses, say that things have progressed more smoothly in the workplace since Mr Vakapuna's dismissal but they gave differing reasons for that view. Two of the defendant's witnesses say simply that things are

the same as they have always been regardless of whether Mr Vakapuna was there or not. In respect of this issue, I find that I can place only very small weight on it.

[21] I have given considerable thought to the nature of the plaintiff's case. It is significant that the plaintiff does not challenge the finding that the dismissal was unjustifiable. The plaintiff challenges only the remedies awarded by the Authority in respect of that finding. On reflection, however, it seems to me that that does not greatly alter the situation. If the plaintiff is successful in its challenge, the order for reinstatement will be set aside and that is the focus of the plaintiff's case.

[22] In terms of the arguments in support of the plaintiff's case, it seems to me that there are two significant arguments which can be put forward. The first is that a finding of 40 percent contribution may be difficult to reconcile with the wording of [s124](#) of the [Employment Relations Act 2000](#) which requires the Authority in these circumstances to reflect the extent of contribution in both the nature and the extent of remedies.

[23] Closely allied with that first issue, is that this case raises the novel and potentially important issue of the effect on [s124](#) of the [Employment Relations Act 2000](#) of [s125](#). In simple terms, the issue is the effect of reinstatement being a primary remedy on the requirement under [s124](#) of the Act for the Authority to reflect contribution in the nature of remedies.

[24] Although I have identified these issues, it is not for me to express a view as to how they might ultimately be decided and I do not do so. That will be for the trial judge to decide. I simply say at this point that these amount in my view to real and substantial arguments. It follows, therefore, that I regard the challenge as being properly grounded.

[25] I turn then to the defendant's position. As Miss Moran very correctly said, the defendant is entitled to the fruits of litigation before the Authority. That is reinforced by the provisions of [s126](#) and [s180](#) of the [Employment Relations Act 2000](#). That is a factor which must be given weight. It must, however, be put in context. What is sought by the plaintiff in this application is not to deprive Mr Vakapuna entirely or permanently of the fruits of his litigation but rather to temporarily deny him one aspect of it which is the right to work.

[26] The second point advanced by Miss Moran was that Mr Vakapuna wants to return to work. It might be said that Miss Moran advanced this argument passionately on Mr Vakapuna's behalf.

[27] It is now, I think, well recognised that the employment relationship gives rise in most cases to a right by the employee to work and an obligation by the employer to facilitate that both by the provision of work and giving access to the workplace.

[28] The evidence of the extent to which Mr Vakapuna wants to actually return to work is, however, minimal. I have looked carefully at his affidavit. In paragraph 4 he says

All I want is my job back so that I can earn my way and provide for my family. I want to and am ready to go back to work.

[29] In paragraph 13 he says:

I am 61 years old and I need my job back. I also do not want to continue to suffer the stress I have suffered for the past 9 months since my dismissal.

[30] What comes through to me from that evidence is that Mr Vakapuna's principal concern is to be back in a state of employment and to be paid. He certainly says that he is ready and willing to return to work but expresses no particular passion for doing so.

[31] The third factor urged on me by Miss Moran was that Mr Vakapuna has already been out of work a long time and it would be unjust to keep him out of work any longer. It is clear from the evidence that Mr Vakapuna has been out of the workplace for nearly 11 months now but I note that interim reinstatement was not sought and the 5 month delay in referring this matter to the Employment Relations Authority remains unexplained, either in the Authority's determination or in the affidavits filed in the Court.

[32] A factor in this regard must be the length of time for which any stay would operate. A substantive hearing is available in early February 2008 so that that would be a period of less than 2 months from now. On that basis, the time for which Mr Vakapuna was out of work if a stay were granted would be 13 months compared with the current situation of nearly 11 months. As it happens, a hearing in early February would be inconvenient to counsel and so a hearing in early March 2008 is now contemplated but I take into account the availability of dates in early February for the purposes of deciding this application for stay.

[33] Taking all aspects of the matter into account, and I include there aspects of it to which I have not explicitly referred in this judgment as well as those to which I have referred, I find that the overall justice favours the grant of a stay and it will be granted subject to the following conditions.

The stay will be in effect until completion of the substantive hearing. It will be a matter for the trial judge to decide whether it continues after that time and prior to judgment being given.

The plaintiff is to cooperate fully in quantifying the arrears of wages owing to the defendant in terms of the Authority's determination and to pay that sum to Mr Vakapuna immediately the calculation is completed. I note in this regard that the manner in which the Authority has worded its order regarding arrears of wages requires input from Mr Vakapuna or on his behalf in terms of the income he may have derived from other

sources during the 3 month period in question.

The plaintiff is to pay Mr Vakapuna during the period of the stay on the basis of his average earnings during the similar period a year ago. If any difficulties should arise in arriving at a fair figure, either party may refer the matter back to me for further directions.

In all other respects, save only Mr Vakapuna's physical attendance in the workplace, he is to be reinstated with effect from 21 November 2007. I make that point in the event that there are other benefits associated with employment. If there are, then Mr Vakapuna is to receive those from the date upon which the Authority ordered his reinstatement.

The plaintiff is to comply with timetable and other orders in relation to the substantive hearing which will be set out in a separate minute.

Leave is reserved to the defendant to apply for a discharge of the stay if the plaintiff does not comply with these conditions or if there are any significant changes in circumstances.

Costs

[34] Costs in relation to this application are reserved.

AA Couch
JUDGE

Judgment signed at 2pm on 13 November 2007