

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 418/08
5143446

BETWEEN JAMES ROBERTS
 Applicant

AND CARAT NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Yvonne Oldfield

Representatives: Lewis Turner for Applicant
 Mark Ryan for Respondent

Submissions received: 5 December 2008

Determination: 9 December 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination relates to an application for interim reinstatement. Mr Roberts was dismissed from his employment on Friday 14 November 2008 with one month's pay in lieu of notice. The reason given for the termination of his employment was that his position (Communications Planning Manager) was redundant.

[2] Mr Roberts' acknowledges in his affidavit that the respondent (Carat) has been affected by the current economic situation and in July of this year, to cope with this, reduced staff numbers. However he claims that his purported redundancy was a sham and that his dismissal was in fact a response to a heated altercation which occurred between him and Mr Low, a senior manager of a related business, on Friday 7 November.

[3] In his affidavit Mr Roberts sets out the following account of his final week of employment.

[4] On Monday 10 November, Mr Roberts' manager, Matt Berry, told him he would be given a formal written warning about the incident of the Friday prior. Mr Roberts says that this warning was issued without discussion and despite an acknowledgement from Mr Berry that Mr Roberts had been the wronged party in the altercation. Mr Roberts immediately challenged the warning and told Mr Berry that he felt physically intimidated by Mr Low's presence. (Mr Low worked in an office adjacent to where Mr Robert's work station was situated.) Mr Berry told Mr Roberts to take some time off to decide whether he wished to take further action regarding the incident.

[5] On Wednesday 12 November the two men met again. Mr Roberts says that Mr Berry told him that his position was to be disestablished and that this redundancy was linked to the incident on 7 November. Mr Roberts says that Mr Berry told him that there was no point discussing alternatives to redundancy as senior managers had already made up their minds about making him redundant. Mr Roberts says that there had been no indication to him prior to this that his position might be made redundant. He says that in September of this year he and the Chief Financial Officer, Kevin Greene, discussed the possibility that he might move to an alternative role in 2009 but that is all.

[6] Mr Roberts also says that before concluding their discussions on 10 November Mr Berry recommended that Mr Roberts "*take a redundancy pay-out*" and Mr Roberts says he responded that he would be open to this provided the compensation was of an acceptable level. (Mr Roberts' individual employment agreement provided for one month's pay in lieu of notice in the event of redundancy and did not provide for redundancy compensation.) He says Mr Berry told him he would take Mr Roberts' feedback to senior management for discussion.

[7] On 13 November the respondent's CEO, Rob Roydhouse, met with Mr Roberts and confirmed that he was to be made redundant for business reasons. Mr Roberts states in his affidavit that he "*relayed the discussion with Matt the afternoon previous around Carat making me a redundancy offer to consider.*" Mr Roydhouse did not respond at that stage.

[8] Mr Roberts took the afternoon off and went to see his doctor, who gave him a medical certificate until 24 November. He was called to a further meeting with Mr Berry on the morning of 14 November and received a letter terminating his employment from that day with one months pay in lieu of notice.

[9] There are several points of difference between what Mr Roberts has told the Authority and what the respondent witnesses say. In his affidavit Mr Greene recalls some discussions with Mr Roberts in October rather than September. He says these were initiated by Mr Roberts who told him that he was considering starting his own business. He says Mr Roberts proposed doing so in 2009 and wished to continue to work for the respondent on a part-time basis. Mr Greene understood that part of the reason for this suggestion was a belief on Mr Roberts's part that he did not have enough to do in his current role. Mr Greene says he discussed Mr Roberts' proposal with Mr Berry who confirmed to him that he believed it would benefit the company and that there would not be enough work for a full time Communications Planning Manager if the respondent did not secure significant new business.

[10] Mr Roberts strongly denies that he ever said he did not have enough to do in his existing role. Indeed he says that right up until his final week of work he was completing 50-60 hours per week.

[11] Whatever the content of these discussions, it is not in dispute that they were not taken to a conclusion at that stage. Then in late October the company failed in a pitch for a major account (one that Mr Roberts had been heavily involved in preparing.) The respondent's position is that Mr Greene, Mr Roydhouse and Mr Berry then considered whether the company should shed the Communications Planning Manager position immediately rather than wait until 2009. By Wednesday 11 November they say they had decided that it should.

[12] This decision was followed by the meetings of 12, 13 and 14 November described by Mr Roberts. Mr Roydhouse and Mr Berry concur with some of what Mr Roberts said about those meetings however Mr Berry strongly refutes the suggestion that in the meeting of 12 November he told Mr Roberts that there was no point discussing alternatives to redundancy. He says on the contrary that he encouraged Mr Roberts to put his suggestion to Mr Roydhouse. Mr Berry also says that he did not

recommend that Mr Roberts take redundancy but rather when asked as a friend what he would do, he said “if it was me I’d take redundancy.” Mr Berry, Mr Roydhouse and Mr Roberts all assert that the dismissal was for redundancy and that the timing was coincidence. It is also the respondent’s position is that it was open to having Mr Roberts contract to Carat on an “as and when required” basis but that Mr Roberts chose not to pursue this option.

[13] It is relevant (and undisputed) background that during almost two years of employment Mr Roberts’ performance had never been questioned. In August 2008 he received a positive performance review and a pay rise of \$10,000.00 and on 7 November 2008 he received an award for “Best Innovative Thinker.” In submissions for the applicant it was noted that the respondent is part of the largest independent media group in the world, and that Communications Planning (the role occupied by Mr Roberts) is a core function for Carat, as demonstrated by material on the respondent’s website.

[14] Mr Roberts considers the incident of 7 November, the warning of 10 November and the dismissal itself all amount to breaches of his rights as an employee. He says that given the current financial situation there are few employment opportunities available to him right now and: *“discussions with recruitment agents and industry contacts indicate that many companies are currently under a “hire freeze” and are not looking to employ staff this side of Christmas. I am not in a position to set up on my own, especially given the sudden loss of income that has been thrust upon me.”* Mr Roberts says that his redundancy was a sham and that he should be reinstated as Communications Planning Manager.

[15] Carat says that Mr Roberts should not be reinstated because there is no job for him to do. In addition it says that his relationship with senior management has soured as a result of the employment relationship problem.

Issues

[16] The issues for determination in an application for interim reinstatement are as follows:

- i. Whether the applicant has an arguable case;

- ii. Where the balance of convenience lies (including consideration of the availability and adequacy of other remedies should interim relief not be granted), and
- iii. Where the overall justice of the case lies, until it can be heard.

(i) Arguable case

[17] In a personal grievance of unjustified dismissal the onus is on the employer to justify (both procedurally and substantively) the termination of employment. The threshold of “arguable case” is usually met once a grievant disputes the basis of the purported justification and seeks to put the respondent to proof of it. This case is no different. The substantive and procedural issues raised give rise to an arguable case.

[18] The Authority must also consider whether the applicant has an arguable case for reinstatement as a remedy. Where a grievance arises out of a redundancy situation this may not always be so. However in this case, the applicant has put forward a tenable argument that the redundancy is a sham. I am also satisfied that in the current economic climate he will face difficulty finding alternative employment at the same level. Given the primacy of reinstatement as a remedy he therefore has an arguable case for permanent reinstatement as a remedy.

(ii) Balance of convenience

[19] As summarised in submissions for the respondent, the Authority must evaluate the inconvenience to the respondent of having to bear the burden of interim relief until the substantive claim is dealt with, against the inconvenience to the Applicant if interim reinstatement is not granted.

[20] The respondent argues that it is not practical to reinstate Mr Roberts because his job has gone and the work he carried out in that role is no longer performed by the respondent.

[21] The applicant argues that because there has been no evidence of any process to support the decision to make the position redundant, the respondent cannot at this point demonstrate that the job has indeed gone. Nor has it shown that other work is not available for the applicant.

[22] This submission is accepted. It is correct that, apart from the evidence as to the failed pitch in October, the respondent has not shown how it established that the position was redundant. Nor has it explained what consideration was given to the “Insights Manager” position discussed in October, or other redeployment options. The question whether the redundancy is a sham cannot be determined until the evidence is traversed in a full investigation.

[23] The respondent also argues that the trust and confidence necessary for an ongoing employment relationship has been damaged. Once again, however, it does not back this up with specifics except to refer to the effects of Mr Roberts pursuing an employment relationship problem, and the effects of his ongoing tensions with Mr Low. I am not satisfied that it has been established that the relationship issues are so serious as to preclude interim reinstatement.

[24] Turning finally to the adequacy of alternative remedies, I note that the applicant has two main reasons for seeking interim reinstatement. The first is the damage the dismissal will cause to his reputation and career prospects. The second is financial hardship in the period between his notice payment running out and a full investigation of his employment relationship problem. Remedies awarded at a later date will not address these immediate problems.

[25] I am satisfied that the balance of convenience favours Mr Roberts.

(iii) Overall justice of the case

[26] Standing back from the details of the other tests, I must now answer the question whether it is in the interests of justice, overall, to grant interim reinstatement.

[27] For the applicant it is argued that overall justice is in his favour as he has a strong case and there is no financial difficulty for the respondent in reinstating him. It

is noted that he is willing to attend mediation in good faith as part of a managed return to work and:

“an order of a period of garden leave during which the parties would be required to mediate the issues around a return to work, backed by a deadline for that return such as 19 January 2009, may be the best approach.”

[28] For its part, the respondent reiterates what it sees as the impracticality of reinstating Mr Roberts because the role has been disestablished.

[29] I am satisfied that overall justice favours the applicant however given the respondent’s assertion that it has no work for him I accept that an order for garden leave may be more appropriate than an order that he return to his former duties.

[30] Interim reinstatement is therefore ordered on a “garden leave” basis however it is at the respondent’s discretion to call Mr Roberts in to work if it finds that it has work available for him.

[31] Meanwhile I note that I have been advised by the representatives that mediation in this matter was cut short due to Mr Ryan’s commitments in the High Court. I consider it would be useful for the parties to attempt further mediation before the substantive employment relationship problem is investigated. A direction to mediation is attached. In the meantime, a further teleconference will be called to discuss the timetabling of the substantive problems.

Costs

[32] Costs are reserved pending disposal of the substantive employment relationship problem.

Yvonne Oldfield

Member of the Employment Relations Authority

