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Safe Air Limited v Walker CC7/09 [2009] NZEmpC 61 (10 July 2009)

Last Updated: 15 July 2009

IN THE EMPLOYMENT COURT

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IN THE MATTER OF a challenge to a determination of the Employment Relations Authority

BETWEEN SAFE AIR LIMITED

Plaintiff

AND PHILIP TERENCE WALKER

Defendant

Hearing: On the papers - submissions received 7, 8 and 9 July 2009

Appearances: T P Cleary, Counsel for the Plaintiff

M Hardy-Jones, Counsel for the Defendant

Judgment: 10 July 2009

JUDGMENT OF JUDGE A A COUCH

[1] Mr Walker was employed by Safe Air Ltd at its Blenheim airport facility as a purchasing officer. On 10 February 2009 he was dismissed for inappropriate use of company email facilities. He then successfully pursued a personal grievance. In its determination dated 22 June 2009 (CA 86/09), the Employment Relations Authority concluded that Mr Walker had been unjustifiably dismissed and, together with other remedies, ordered that he be reinstated to his former position. By a statement of claim filed on 29 June 2009, Safe Air challenged the whole of that determination.

[2] On 26 June 2009, Safe Air applied to the Authority for a stay of the order for reinstatement pending the outcome of its substantive challenge. In a second determination dated 2 July 2009 (CA 86A/09), the Authority declined that application for stay. By a statement of claim filed on 3 July 2009, Safe Air has now challenged that determination also. This judgment addresses that second challenge.

[3] The order for reinstatement was directed to take effect on 29 June 2009 and Safe Air restored him to the payroll that day. Because Safe Air operates from premises which comprise both Blenheim airport and Woodbourne Air Force base, however, Mr Walker needs to renew two separate security clearances before he can go back on the job. It is anticipated that Mr Walker will receive clearance from Aviation Security Services later this week but the parties have only become aware on 7 July 2009 of the need for him to obtain a fresh New Zealand Defence Force clearance. It is said that this usually takes 4 to 6 weeks to obtain but that the time may be reduced because of Mr Walker's circumstances. The result is that it is uncertain how long the process will take.

[4] In a telephone conference with counsel on Monday 6 July 2009, I gave directions which will result in Safe Air's challenge to the Authority's substantive determination being heard on 30 and 31 July 2009.

[5] Safe Air now seeks only a partial stay of the Authority's order for reinstatement. The company accepts the resumption of its employment relationship with Mr Walker. It also accepts its obligation to pay Mr Walker his salary and that the other benefits of employment, such as annual holidays, will accrue to him. It seeks only to be relieved in the meantime of the obligation to allow Mr Walker to resume work on its premises.

[6] Evidence in support of the challenge was provided in three affidavits of Mr Price, who was Mr Walker's manager at Safe Air. In essence Mr Price says that he has lost trust in Mr Walker's judgment. He says this is the

result of what he regards as two examples of poor judgment by Mr Walker. The first was his admitted actions in sending numerous unacceptable emails from the computer provided to him at Safe Air. The second was what Mr Price regards as Mr Walker's reluctance to admit his error and to apologise for it.

[7] Mr Price puts this evidence in the context of Mr Walker's work for Safe Air. He says that Mr Walker's job involves obtaining aircraft parts and that, in this role, there is no room for error or misjudgment. Mr Price also says that it will be difficult to monitor the work done by Mr Walker and therefore difficult to know whether he has made any errors of judgment.

[8] At a practical level, it appears that, since Mr Walker's dismissal, the work he previously did was done until last week by a temporary employee and is now being shared amongst other staff. The position formally occupied by Mr Walker therefore remains available.

[9] In response, Mr Walker says that there has never been any issue about his work performance. He firmly rejects the proposition that, because he may have breached company policy regarding emails, there is reason to doubt his judgment in carrying out the tasks of a purchasing officer. In support of his views, Mr Walker produces a reference dated 20 March 2009 from the inventory manager at Safe Air which is highly complimentary of his work.

[10] In response to the suggestion that it would be difficult to monitor his work, Mr Walker says that most of that work is done by computer and that Safe Air keeps track of computer transactions. He also notes that his work is carried out in an open plan office in which he can readily be observed or supervised.

[11] Mr Walker says that he has been struggling financially since his dismissal. He also says that being away from work has caused him stress which has interfered with his sleep and his enjoyment of life. He says that he enjoyed going to work and misses the companionship of his work colleagues. For these reasons, he expresses a strong desire to be back on the job.

[12] In deciding this matter, I adopt the approach I took in *PPCS Limited v Vakapuna* WC 28A/07, 13 December 2007. I also have regard to the discussions of principle in *Hill v NZ Rail Ltd* [1994] 1 ERNZ 113 and *Chief Executive of the Ministry of Agriculture and Forestry v Hughes* [2004] NZEmpC 94; [2004] 2 ERNZ 18.

[13] The starting point in considering an application for stay must be s126 of the [Employment Relations Act 2000](#) which provides that an order for reinstatement made by the Authority must be observed notwithstanding a challenge "unless the Authority or the court otherwise orders". While this expression apparently confers an unqualified discretion on the Court, it must be exercised in a principled way.

[14] A fundamental principle applicable to the exercise of any judicial discretion is that there must be material on which to do so – see *Ratnam v Cumarasamy* [1965] 1 WLR 8; [1964] 3 All ER 933 (PC). It follows that the initial onus is on the party seeking a stay to establish good and sufficient reasons why it should be granted.

[15] In considering the material available, the essential issue to be addressed when exercising the discretion is where the overall justice of the matter lies. That largely involves an assessment of the effects on the parties to the proceeding and on third parties of granting or not granting a stay. Another significant factor is the nature of the plaintiff's case in support of its challenge to the Authority's substantive determination.

[16] I consider first the effects on the parties. I accept that Mr Price is genuinely concerned that Mr Walker has demonstrated poor judgment in one aspect of his conduct as an employee and does not wish to take the risk that he may have a similar lapse of judgment in procurement work if allowed to return to it. I also accept that Mr Price has personally lost trust and confidence in Mr Walker. On the other hand, as Mr Price properly concedes, it appears Mr Walker performed his work well for the 18 months he was employed by Safe Air. The reference he received from a manager at Safe Air recommends him to any future employer "without reservation." This supports my view that there is, at most, only a tenuous link between the exercise of judgment in safety sensitive work and misjudgment in the use of email. Viewed objectively, I can place very little, if any, weight on Mr Price's concern that Mr Walker would not perform his purchasing tasks appropriately if he returned to work.

[17] Mr Price is also concerned that having Mr Walker return to the workplace in the interim will cause "disquiet" but he does not explain the basis for his concern other than to say there is uncertainty about the future following the determination of the Authority and the challenge now being pursued by Safe Air. This seems to me to be the natural consequence of litigation quite independent of whether Mr Walker is in the workplace or not. It does not assist me in deciding whether to grant a stay.

[18] The effect on Mr Walker of granting the stay would be to keep him out of the workplace for longer than would otherwise be the case. Putting it in perspective, Mr Walker was dismissed on 10 February 2009 and has therefore been out of the workplace for 21 weeks already. Obtaining the security clearances necessary to return to work will take some further time, perhaps another week or two. There is to be a hearing of the substantive issue in 3 weeks time and it is reasonable to expect that a decision will be given promptly. If Mr Walker is successful in resisting the challenge, the effect of granting a stay would be to extend the period during which he is out of the workplace from 22 or 23 weeks to, perhaps, 26 weeks.

[19] For Mr Walker, it can properly be said that he is entitled to the fruits of the litigation before the Authority. That is reinforced by the provisions of s126 and s180 of the [Employment Relations Act 2000](#). It is a factor which must be given weight. It must be recognised, however, that Safe Air does not seek to deprive Mr Walker fully or permanently of the benefit of the order for reinstatement. Indeed, the company has already restored to Mr Walker the status of an employee and he will receive the salary and other benefits associated with that status. What Safe Air seeks is to have Mr Walker deprived temporarily of one aspect of reinstatement which is the right to work.

[20] It is now well recognised that the employment relationship gives rise in most cases to a right of the employee to work and a corresponding duty on the employer to facilitate the exercise of that right by providing work and by giving access to the workplace. In each case, however, it will be a matter of fact what value should be placed on that right.

[21] Where an employee is engaged in a profession or vocation where reputation or status is dependent on being actively involved in work, the right to work may be of great value. On the other hand, the standing of an employee engaged in process work may be entirely unaffected by a period out of the workplace. In this case, there is no suggestion that Mr Walker's professional or vocational standing would be affected by granting the partial stay sought.

[22] Also to be taken into account is the subjective value placed on work by the employee involved. To some people, being actively engaged in work is important to their self-esteem or to their social standing. Others value leisure above work. In this case, Mr Walker says that being out of work has caused him financial difficulty and personal stress since his dismissal. I put the financial issues to one side as Safe Air has resumed payment of his salary. I infer also that a significant part of the stress Mr Walker experienced was because he had been dismissed and had not found suitable alternative employment. To the extent that his stress was the result of being unemployed, that also has been remedied in the meantime by the resumption of the employment relationship. Mr Walker can properly say that he is now employed by Safe Air.

[23] The essential issue is the effect on Mr Walker of being kept out of the workplace in the context of his employment having resumed. He says that this is the best job he has ever had, that he looked forward to going to work every day and that he misses the atmosphere of the workplace. He also says that, in social situations, people ask him when he will be returning to work and that his absence from the workplace gives the impression that his misconduct was particularly serious. I accept that Mr Walker is sincere in making these statements but they must be put in perspective. To the extent that Mr Walker is aware of any adverse inferences being drawn from the fact that he is not back in the workplace, he is free to explain the reasons. To date, the principal reason has been the delay in his obtaining the necessary security clearances.

[24] I find that granting a stay would prejudice Mr Walker to a small but real extent.

[25] I turn now to the merits of the challenge. While it is not for me in this proceeding to express a view about the likely outcome of the challenge, it is possible to identify some of the arguments potentially available to the parties.

[26] It seems to me that there are at least two significant arguments which may be put forward on behalf of Safe Air. The first is that [s124](#) requires contributory conduct to be reflected not only in the extent of remedies awarded but also in their nature. In a de novo challenge, the Court may reach a different conclusion about the extent of Mr Walker's contribution but, if it were to agree with the Authority's figure of 50 percent, it is arguable that this should mitigate significantly against reinstatement.

[27] The second argument available to Safe Air is that, even if he was ignorant of any specific company policy regarding the use of email, Mr Walker ought to have known as a matter of common sense and life experience that it was inappropriate to send offensive emails from a company email address.

[28] On the other hand, it appears that the issue of possible disparity of treatment may assume greater significance in the de novo hearing before the Court than it did in the Authority's investigation. This may add another string to Mr Walker's bow in terms of liability but, even if he is successful on this ground, issues of contribution still appear likely to arise.

[29] These observations enable me to conclude that the challenge is properly made but little more.

[30] Having regard to all aspects of the matter, the overall justice of the case does not favour granting the stay sought. Rather, it favours full compliance with the order made by the Authority. The only caveat must be that Mr Walker cannot return to the workplace unless and until he has obtained the necessary security clearances.

[31] The challenge is dismissed. As required by [s183\(2\)](#), however, the determination of the Authority is set aside and this judgment stands in its place.

[32] Costs are reserved. The parties are encouraged to resolve costs by agreement. If they are unable to do so, Mr Hardy-Jones is to file and serve a memorandum within 21 days of the date of this judgment. Mr Cleary is then to have a further 14 days in which to file and serve a memorandum in response.

A A Couch

Judge

Signed at 3pm on 10 July 2009