

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

**[2019] NZERA 511
3067132**

BETWEEN OLIVER SAVAGE
 Applicant

AND WAI SHING LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Catherine Stewart & William Fussey, Counsel for Applicant
 Mark Hammond, Counsel for Respondent

Investigation Meeting: 29 August 2019 at Auckland

Determination: 02 September 2019

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

[1] Before the Authority is an application for interim reinstatement brought by the Applicant, Mr Oliver Savage, under s 127 of the Employment Relations Act 2000 (the Act).

[2] Mr Savage was dismissed by the Respondent, Wai Shing Limited (WSL) on the basis of redundancy. Mr Savage claims that he was unjustifiably dismissed from his role as Farm Operations Manager, and is seeking reinstatement on both an interim and a permanent basis.

[3] WSL claims that Mr Savage's dismissal for redundancy was justifiable and followed a fair and reasonable process. WSL resists the claim for interim reinstatement and the substantive claim.

[4] The application for an interim injunction was accompanied by an undertaking as to damages and affidavits in support of the application by Mr Savage. Affidavits were also filed in opposition by WSL.

[5] An investigation meeting to deal exclusively with the interim reinstatement application was convened at Auckland on 29 August 2019.

Note

[6] Interim reinstatement applications are determined on the basis of the statement of problem, statement in reply, affidavit evidence from the parties, relevant documentation lodged and submissions from the parties.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[8] During the Investigation Meeting WSL agreed to extend the vacation date of the rental accommodation occupied by Mr Savage and his wife until 14 September 2019.

Brief Background Facts

[9] WSL is a large commercial growing operation with three directors, Mr Clinton Wai Shing, Mr Wellingford Wai Shing and Mr Frank Wai Shing (the Directors). Mr Clinton Wai Shing is responsible for WSL's packing houses; Mr Wellingford Wai Shing is responsible for head-office based activities including financial management, office administration and fisheries, food and residential subdivisions; and Mr Frank Wai Shing is responsible for activities associated with the use of land and the growing of crops.

[10] Mr Wellingford Wai Shing became ill in late 2017 and was unable to work for a period of time, during which time Mr Frank Wai Shing took responsibility for managing Mr Wellingford Wai Shing's part of the business operation. This was in addition to his own responsibilities and in order to provide him with support it was decided by the Directors to create the position of Farm Operations Manager.

[11] Mr Frank Wai Shing contacted Mr Savage by email dated 11 June 2018. The email stated that the position in relation to which Mr Savage was being contacted would involve managing everything on a day-to-day basis and offered: "Top remuneration" to be paid: "to the correct person ..."

[12] Mr Savage responded on 12 June 2018 stating that he was: "very interested" in principle and suggesting that the very earliest he could start employment would be January 2019.

[13] In an email to Mr Frank Wai Shing Mr Savage set out his expectations of the position and his remuneration expectations. In the email he had stated:

I appreciate this is a bigger request than originally offered, but I am making the biggest commitment to WSL I have ever made to anyone and I would ask that you realise my intention is to make a big impact on your business for the rest of my working life

[14] Mr Savage was provided an individual employment agreement (the Employment Agreement) which he signed on 15 July 2018. The Employment Agreement set out terms of employment which included an annual remuneration of \$162,500.00, and the potential to earn two bonus payments of a total of \$37,400.00, to be paid in two instalments on 14 June and 14 January of each year. Payment of the bonuses was dependent on achievement of yields of crops. WSL also provided Mr Savage and his wife with a house on a subsidised basis.

[15] WSL covered relocation costs for Mr Savage and his wife from the UK to New Zealand. Clause 12 of the Employment Agreement covered this arrangement and stated:

12.0 Relocation

12.1 ...

12.2 The employer will pay all costs associated in getting a 20-foot shipping container from York, England to Patumahoe, New Zealand.

12.3 If the employee leaves the employer within two years then the air tickets and all costs associated with getting the 20-foot shipping container from York, England to Patumahoe, New Zealand, will be totally refundable to employer at 100% of the original cost.

[16] Mr Savage commenced employment at WSL on 14 January 2019.

[17] During the course of 2019 Mr Wellingford Wai Shing told Mr Clinton Wai Shing and Mr Frank Wai Shing that he had recovered from his illness and was able to resume working in his position on a full-time basis. The result of this was that Mr Frank Wai Shing had capacity to resume his previous area of responsibility.

[18] Mr Savage stated in his untested affidavit evidence that he received a telephone call from Mr Frank Wai Shing on 8 June 2019 and was asked to attend a meeting with him and Mr Wellingford Wai Shing on Monday 10 June 2019.

[19] During that meeting Mr Savage said he was presented with a memorandum signed by Mr Frank Wai Shing and dated 10 June 2019. The memorandum stated:

When the role of Farm Operations Manager was created last year, it was based on the objective of my role in the business changing to support another director, Welly, with his work ...

Over recent times, I have realised that I have missed my previous role, and I am now wanting to return to what I was doing, as I believe I am better suited to this type of work than working in Welly's area, given my knowledge, contacts and understanding of this part of the business.

After discussing this with the Directors, we are therefore proposing that the role of Farm Operations Manager which you currently hold, be disestablished. The reason for this proposed change in the business does not require two people to manage this area.

[20] The letter asked Mr Savage to consider the proposal and provide his feedback with his written feedback to be presented at a meeting to be held on 17 June 2019. The letter advised that the Directors would carefully consider Mr Savage's feedback and stated:

I will arrange to meet with you in later in the week of 17 June to outline the Director's decision and associated implementation plan, should the new structure be adopted. You are welcome to bring a support person to this meeting.

[21] Mr Savage stated in his affidavit that the memorandum was a shock because he had made it clear to Mr Frank Wai Shing from the outset that he would not want to relocate his family from the UK unless the employment prospect in New Zealand was to be on a long-term basis.

[22] In the written feedback which he provided on 17 June 2019 Mr Savage stated his view as being that he felt he had been 'lured' to the job with WSL and that WSL was aware of his intention to remain with WSL for the remainder of his working life. Mr Savage stated:

You have provided no further information as to why this proposal, or my redundancy, is necessary, not have provided any proper rationale for it. Your proposal does not appear to be motivated by any genuine business need, and therefore, if you decide to proceed with it, this would clearly be unjustified.

[23] Mr Savage was invited to attend a meeting on 27 June 2019 at which he was accompanied by Mr Daniel Church, Barrister. Present for WSL were Mr Frank Wai Shing, Mr Wellingford Wai Shing and Mr Greg Tims, HR Consultant. During the meeting Mr Savage was given a further memorandum signed by Mr Frank Wai Shing which stated:

It is important to state that when the role of Farm Operations Manager was created in 2018, there was a genuine intention for it to remain a permanent position within the business.

As you know, I have been responsible for the farm operations area for the business for a number of decades, and I did not fully appreciate the impact of not being fully involved in managing this would have on me personally until after the role of Farm Operations Manager was in place. The company never had a role like this before.

In the memo you received on 10 June 2019, it was proposed that I return to my former Director role, which would therefore subsume all of the current responsibilities of the Farm Operations Manager position which you currently hold.

At this stage, it is our intention to proceed with implementing the proposed disestablishment for the reasons provided in the 10 June 2019 memo and above, but we remain open to discussing this further with you.

[24] There is a disagreement between Mr Church and Mr Tims as to whether or not the meeting was ‘without prejudice’ or ‘on the record’. This is an issue I will address in this determination however I note from the untested affidavit evidence that there is no suggestion that the meeting was acrimonious.

[25] Following the meeting, an offer to settle the matter was made to Mr Savage about which there is some disagreement between the parties as to whether or not this was made on a ‘without prejudice’ basis, however in the event, Mr Savage did not accept it.

[26] Mr Savage received an email from Mr Frank Wai Shing dated 1 July 2019 in which it was confirmed that his position was disestablished and his last day of work would be 8 July 2019.

[27] The letter also confirmed that Mr Savage would have rent free use of the rented house provided by WSL until 31 August 2019. In regard to relocation expenses the letter stated:

We have also decided to waive the reimbursement of the relocation costs that is covered in Clause 12.3, because we have made the decision to disestablish the role. Given your indication of the need to relocate to the UK for your future career, we will also pay \$14,000 towards your relocation back to the UK.

[28] Mr Savage raised a personal grievance for, *inter alia*, unjustifiable dismissal on 11 July 2019.

Principles

[29] I granted Mr Savage’s application for this matter to be dealt with on an urgent basis because this is the usual procedure for dealing with an application for an interim reinstatement. In determining this matter, I must apply the law relating to interim reinstatement as set out in s 127(4) of the Employment Relations Act 2000 (the Act) which include recognising that employment relationships are built on the legislative requirement for good faith behaviour and addressing the inherent inequality of power in employment relationships.¹

[30] At the Investigation Meeting on 29 July 2019, I heard submissions from Counsel in relation to the interim reinstatement application and tested these by questioning how the available untested evidence related to the relevant principles for determining an interim

¹ Employment Relations Act 2000 s 3

injunction application². Those principles fall to be addressed by the answers to the following questions:

- Whether Mr Savage has an arguable case involving a consideration of whether or not he has an arguable case both for an unjustified dismissal and an arguable case for permanent reinstatement as being practicable and reasonable) for unjustifiable dismissal as defined by s 103A of the Act;
- Where the balance of convenience lies between the parties
- What is the overall justice of the case

An Arguable Case for Unjustifiable Dismissal and for interim reinstatement

[31] As a matter of principle, Mr Savage must not only establish an arguable case for his unjustifiable dismissal, but must also establish that if he is successful in such a claim he will be reinstated in addition to, or instead of, being compensated monetarily, such as to support an application for interim reinstatement.

[32] My findings expressed in this determination are solely for the purposes of resolving Mr Savage's application for interim reinstatement. At the substantive hearing there will be opportunity to fully test the relevant evidence and disputed questions of fact and law.

Arguable case for Unjustifiable Dismissal

[33] Mr Savage submits he has an arguable case that he was unjustifiably dismissed and that the untested affidavit evidence surpasses the threshold of a *prima facie* case.

[34] In *X v Y Ltd and the NZ Stock Exchange*³ the relevant principles of an arguable case were stated to be:⁴

What the Court is concerned with, so far as the evidence goes, is to see whether, assuming that the plaintiff can prove all the facts which he alleges, he then has an arguable case. That is to say, a case with some serious or arguable, but not necessarily certain, prospects of success.

[35] WSL dismissed Mr Savage on the basis of redundancy. The dismissal must satisfy the Test of Justification as set out in s 103A of the Act, namely it must be an action that a fair and reasonable employer could have taken in all the circumstances at the relevant time.

² *Cliff v Air New Zealand* CA6A/05, per Colgan J at para [12]

³ [1992] 1 ERNZ 863

⁴ *Ibid* at pg 872-873

[36] Mr Savage claims that the decision to dismiss him was not justifiable. A redundancy must be justifiable both substantively and procedurally.

[37] The reason given in the 10 July 2019 letter for the redundancy was that Mr Frank Wai Shing missed his previous role and : “The reason for this proposed change is that the business does not require two people to manage this area”.

[38] In the 27 June 2019 Mr Frank Wai Shing stated: “I did not fully appreciate the impact of not being fully involved in managing this would have on me personally”.

[39] A redundancy decision must be based on a genuine business rationale. The fact that Mr Frank Wai Shing may have missed carrying out his full area of responsibility and wished to resume doing so is not a genuine business reason for redundancy. There is no evidence that a business or financial case for the disestablishment of his role was placed before Mr Savage for his consideration. In particular no operational benefits of the director returning to his role were outlined in either the first or second memoranda.

[40] It further appears that the role carried out by Mr Savage still exists in its entirety and its duties subsist, which undermines the basis for the redundancy of the role of Farm Operations Manager.

[41] Procedurally there is concern that the feedback provided by Mr Savage was not given full consideration prior to a decision by WSL to proceed with the disestablishment of his position.

[42] The decision to dismiss must be one a fair and reasonable employer could have reached in all the circumstances at the relevant time. The circumstances included the fact that Mr Savage had relocated from the UK to New Zealand and the decision to disestablish the role to which he was recruited was made within six months of that relocation.

[43] I find that Mr Savage was explicit in the email dated 8 July 2018 that his interest in accepting the position at WSL was on the basis of it being a long-term commitment. His belief that WSL intended that to be the case is reasonable based upon the fact that he was offered a permanent position with WSL rather than a fixed term or other limited duration contract, and the inclusion of a relocation clause including the total refund of the relocation costs paid by WSL if Mr Savage voluntarily left WSL’s employment within two years after commencement.

[44] The threshold for an arguable case is relatively low. I find in the circumstances of this case, there are issues regarding the genuineness of the business justification for the

redundancy and the reasonableness of the decision in light of the understanding in which Mr Savage accepted the role and relocated to New Zealand.

[45] In these circumstances, I find that Mr Savage has an arguable case for interim reinstatement based upon unjustifiable dismissal.

Arguable case for interim reinstatement

[46] Mr Savage must not only establish an arguable case for unjustifiable dismissal but must also establish that he would be reinstated if successful in such a claim.

[47] Reinstatement is now the primary remedy and s125 (2) of the Act states the Authority must provide for reinstatement if it is practicable and reasonable.

[48] As stated by the Employment Court in *Angus v Ports of Auckland Limited (No 2)*⁵:

In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.

[49] The onus of proof of practicability rests with the employer.⁶ In this case WSL submits that Mr Wellingford Wai Shing's return to health has rendered Mr Frank Wai Shing's position partially redundant whilst the position of Farm Operations Manager exists. This partial redundancy affects Mr Frank Wai Shing's source of income in that his role would become part-time rather than full-time.

[50] I accept that reinstatement may be inconvenient for WSL but that does not necessarily render it impracticable. The partial redundancy of his role may affect Mr Frank Wai Shing's source of income, however as a Director of WSL would presumably share in its profitability

[51] It appears from the untested affidavit evidence that the relationship between the parties prior to the dismissal of Mr Savage was a good one. Mr Savage and Mr Frank Wai Shing worked together. There were no disciplinary or performance issues raised with Mr Savage and therefore no reason to believe that the relationship cannot be restored to its former footing once the parties have moved beyond the litigation process.

⁵ *Angus v Ports of Auckland Limited (No 2)* [2011] NZEmpC 160 at [66]

⁶ *Lewis v Howick College of Board of Trustees* [2010] NZCA 320

[52] Mr Savage has secured casual employment but his untested affidavit evidence is that he can return to his role of Farm Operations Manager immediately should he be awarded reinstatement.

[53] I find it is both practicable and reasonable for Mr Savage to be reinstated.

[54] Taking all the submissions into consideration, and on the basis of the untested affidavit evidence as presented to the Authority, I am able to conclude that Mr Savage has a strongly arguable case that he should be reinstated on an interim basis.

Balance of convenience

[55] As set out in the Employment Court case *X v Y Limited*⁷ this principle requires that the Authority balance the relative inconvenience, in terms of detriment or injury, to WSL who will have to bear the burden of an order reinstating Mr Savage until the substantive case is heard, against the inconvenience to Mr Savage who may have a just case, of having to bear the detriment of unjustifiable action until the case is heard.

[56] It is submitted on behalf of Mr Savage that the balance of convenience lies with him because not being granted interim reinstatement will cause significant inconvenience to him for the following reasons:

- His living accommodation is tied to his employment at WSL. He currently resides on WSL's farm, where he has been living since his relocation to New Zealand. Should interim reinstatement not be granted he will need therefore to obtain accommodation elsewhere after 14 September 2019. This could either be in New Zealand or the UK, either option would require him to find alternative accommodation.
- He works in a specialist role for which there are few equivalent positions in New Zealand and he would find it difficult as a result to obtain work in an equivalent role until such time as the application for permanent reinstatement is heard which is unlikely to be for some months.
- His skill set is becoming outdated and he has a concern that he will not be able to keep up with horticultural developments.

⁷[1992] 1 ERNZ 863, at pg 10

- He may be forced to return to the UK to seek employment which is not desirable as he and his wife are happy here. They have family here and prefer to remain in New Zealand.
- There will be a significant financial impact if he is not able to obtain interim reinstatement. The employment he has obtained since his dismissal is casual and remunerated at a low level. This is a stressful situation as Mr Savage is the main breadwinner and his wife works on a part-time basis only earning just above the minimum wages rate.

[57] The inconvenience to WSL of having Mr Savage reinstated would be that Mr Frank Wai Shing would be in a position of having less involvement in the side of the business operations for which he is responsible and to which he wishes to return. This may cause him some injury to feelings.

[58] It may also affect Mr Frank Wai Shing's source of income, although I observe that he will continue as a Director and will most likely continue to draw a director's salary although at this stage evidence on that point is necessarily limited.

[59] It has been observed by the Employment Court that damages as a remedy do not recognise the inherent value of a person working for their living. As observed in *Auckland District Health Board v X (No 1)*: "The right to work was a valuable one. If not restored to the defendant, his career might have suffered lasting damage."⁸

[60] Mr Savage states in his untested affidavit evidence that he believes the harm to his career will be irreparable if he is not reinstated on an interim basis. Further that if he were to obtain damages, this would most likely not obviate the need for his having to return to the UK to obtain a similar position, and it would be too late to address his accommodation issue.

[61] Having considered all the circumstances and the submissions put forward by the parties, balancing the potential prejudice to Mr Savage of not reinstating him, against the potential prejudice to WSL of so doing, I find that the balance favours the interim reinstatement of Mr Savage.

Overall Justice

[62] The Authority must assess the overall justice of the case from a global perspective.

⁸ *Auckland District Health Board v X (No 1)*[2005] ERNZ 487 at [33]

[63] There were no issues raised with Mr Savage during his period of employment at WSL. Whilst there is some concern as to relationship between the parties since the legal challenge to the dismissal challenge was raised, it is not unexpected that emotions and tensions accompany such a process.

[64] However there is no evidence to support a view that they will subsist and prevent the previous cordial relationship being re-established.

[65] Having taken into consideration all the circumstances, I find that the overall justice of the case subsists in granting Mr Savage's application for interim reinstatement.

Interim Reinstatement

[66] For the above reasons the Authority exercises its discretion in relation to interim reinstatement by making the orders sought.

[67] Mr Savage is presently residing at the house rented from WSL and can be available to start work immediately.

[68] I therefore order the interim reinstatement of Mr Savage as Farm Operations Manager of WSL with effect from the next working day after the date of this determination.

[69] The agreement regarding the subsidised nature of the house provided by WSL and the associated rental payments are to be resumed at the same time as the interim reinstatement takes place.

Next Steps

[70] The Authority will convene a case management conference to set timetable directions for the investigation of Mr Savage's substantive claims.

Costs

[71] Costs are reserved for determination following the substantive investigation meeting and its outcome or until this matter otherwise ceases to be before the Authority.

Eleanor Robinson
Member of the Employment Relations Authority