

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 669
3320220

BETWEEN TYLA JAE SCOTT
Applicant
AND SCOTT'S BREWING LIMITED
Respondent

Member of Authority: Antoinette Baker
Representatives: Jaesen Sumner, Ruth Williams counsel for the Applicant
Steph Dyhrberg, counsel for the Respondent
Investigation Meeting: 01 November 2024
Submissions received: 31 October 2024 and on the day
Determination: 12 November 2024

DETERMINATION OF THE AUTHORITY

[1] The applicant, Ms Tyla Scott claims she was unjustifiably dismissed by her former employer, the respondent (SB), by way of a redundancy decision made on 29 July 2024 that resulted in her employment ending on 31 October 2024 after a three month period of paid 'garden leave.' She seeks compensation, interim and permanent reinstatement and costs. All claims are defended by SB.

[2] Ms Scott's estranged husband, Mr Phillip Scott is the sole director of SB. He is 95% shareholder to Ms Scott's 5% shareholding.¹ Together they started SB's brewing business in 2007 moving it from Auckland to its current base in Oamaru in 2013, the year they married. They domestically separated in July 2023.

¹ <https://app.companiesoffice.govt.nz/companies/app/ui/pages/companies/198151>.

[3] Ms Scott says the redundancy was motivated by an ulterior motive being that of Mr Scott intending to oust her from the business operation while they were still in dispute about their relationship property shares in SB's business and/or their respective roles in its ongoing operation.

[4] Ms Scott challenges the right of SB to decide to restructure without her consent based on her saying she is a 'default director'. Notwithstanding that position, Ms Scott says that the process of 'restructuring' was flawed in that she was given little or no information to feedback on; that the decision was predetermined with little time given to feedback; and that the decision was not justified because it was based on the above mentioned ulterior motive and her role still remained and was necessary.

[5] SB says the redundancy was genuine and based on a fair process. It says Ms Scott's role was no longer needed because it had been absorbed by others in the workplace after Ms Scott took a step back from duties months prior to the decision to make her role redundant. It says that to continue to pay Ms Scott a salary for doing nothing was not financially feasible.

[6] This determination only deals with the application for interim reinstatement after the parties were unsuccessful at resolving matters at an urgently scheduled mediation.

The Authority's investigation

[7] Following the lodging of the application for interim reinstatement on 29 August 2024 and the requisite undertaking as to damages, the Authority held a case management conference with the parties' representatives to set a timetable for the application. The parties have complied with timetabling directions. By consent an investigation meeting was held by audio visual link.

[8] In determining this matter I have received and considered the affidavit evidence of Ms Scott including her affidavit in reply and annexed documents. I have also received for SB, affidavits and annexed documents from Mr Scott, and Ms Brooke Kofoed, the Chief Operating Officer (CEO) of SB. I have also considered the parties'

initiating and responding documents and the submissions of representatives. I received the latter the day before the investigation meeting as per my directions and heard oral submissions from respective counsel and asked questions.

[9] Evidential matters in dispute between the parties will not be resolved by this determination because the evidence is untested. In applying the relevant tests for interim reinstatement, the Authority is not required to resolve any disputes.

Approach to interim reinstatement

[10] Section 127 of the Employment Relations Act 2000 (the Act) gives the Authority the power to order interim reinstatement.

[11] When dealing with an application for interim relief the Authority applies legal tests. This has been summarised by the Court of Appeal² as:

The applicant must first establish that there is a serious question to be tried or, put another way, that the claim is not vexatious or frivolous. Next the balance of convenience must be considered. This requires consideration of the impact on the parties of the granting of, and the refusal to grant, an order. Finally, an assessment of the overall justice of the position is required as a check.

[12] The Employment Court has observed that when determining interim reinstatement, the object of the Act should be considered. The object is to build productive employment relationships by promoting the concept of good faith. This includes that both parties should act in a way towards each other that is responsive and communicative in maintaining their employment relationship, and that issues ought to be dealt with promptly, constructively, and where feasible by repairing them.³

Issues

[13] With the above in mind, I will determine the following:

² *NZ Tax Refunds Ltd v Brook Homes Ltd* [2013] NZCA 90 at [12] - [13].

³ *Humphries v Canterbury District Health Board, Te Poari Hauora o Waitaha* [2021] NZEmpC 59, [5].

- a. Does Ms Scott have an arguable case for unjustified dismissal?
- b. Does Ms Scott have an arguable case for permanent reinstatement?
- c. What detriment and benefit would either Ms Scott or SB incur because of granting or not granting interim reinstatement and who does the balance favour?
- d. When standing back where does the overall justice of this matter lie until the substantive problem can be resolved?

Background

[14] Before considering the issues I will set out the further background to this employment relationship problem based on what is before me in documentation (mainly communications by email) and matters not apparently in dispute or if they are, indicating the extent to which they remain untested.

[15] In 2007 when the Scotts together started a brewing business they incorporated SB to operate it. Initially they were both registered as co-directors.⁴ Mr Scott took the role of brewer and production operations and Ms Scott the administrative side of the business. Ms Scott was employed outside of the business until about 2012.

[16] In 2013 the Scotts moved the SB business from Auckland to Oamaru. On 6 May 2014 Ms Scott ceased to be a director.⁵ Her untested evidence is that she was removed on accounting advice for 'tax purposes' as was the reason for both Scotts to be paid initially a wage and thereafter a 'nominal salary'. There is reference in affidavits to dividends being distributed and shared domestic income arrangements but no details beyond this nor documentation to support. However, even based on the untested evidence before me there are hallmarks of a family 'husband and wife' business here albeit through the mechanism of a corporate structure.

[17] In around 2020, Mr Scott took a step back for various reasons and a head brewer was appointed in June 2021. In January 2022 the Scotts moved away from Oamaru to the top of the South Island and were involved in the business remotely or by attending the premises from time to time utilising accommodation that they still had in Oamaru.

⁴ <https://app.companiesoffice.govt.nz/companies/app/ui/pages/companies/198151>

⁵ As above.

The extent of this involvement in SB either each or individually as employees of SB is either not detailed in the affidavit evidence or it is in dispute and remains untested.

[18] In May 2023 the then general manager for SB, Ms Kofoed was appointed to the position of CEO. Ms Scott's affidavit includes that before being general manager Ms Kofoed was employed to assist Ms Scott when her child was born. There are emails showing some communication between Ms Kofoed and Ms Scott about Ms Kofoed being invited to share in the business.

[19] By May 2023 Ms Kofoed, the head brewer and both Scotts were paid the same salary. Ms Scott says from this time she continued to be involved in the business which included mentoring Ms Kofoed and having overall 'governance'. Ms Kofoed's and Mr Scott's affidavits include that Ms Scott's description of employed list of duties is overstated in terms of what she did in the business. SB has not at this stage provided any documentary evidence of what Ms Scott's duties actually were in the role it decided to disestablish. There is no individual employment agreement. Ms Kofoed in her affidavit refutes she needed mentoring by Ms Scott and refers to Ms Scott critiquing her work. Ms Scott has provided an email showing Ms Kofoed acknowledged Ms Scott picked up on an error on a payroll period that Ms Kofoed had prepared.

[20] Ms Scott has provided a spreadsheet summarising headings of emails in July 2023⁶ and other examples of emails with her affidavit evidence. These show examples of her communications with Ms Kofoed (copying in Mr Scott) about payroll (making suggestions and sometimes changes); invoicing of clients; insurance and building lease matters; liaison with the bank about getting reduced fees; and 'Job Applications.' Ms Scott's affidavit includes that she had time to consider where savings could be made with reduced bank fees after the appointment of Ms Kofoed to CEO.⁷

[21] Mr Scott relocated back to Oamaru in about August 2023. Ms Scott remained living away from Oamaru with their children. She says she made trips to Oamaru for work in 2023 between 6 and 11 August; 28 August to 3 September; 12 September to 18 September; and 14 December 2023 to 16 January 2024. She says the latter was with the

⁶ Affidavit in Reply, Tyla Jae Scott dated 4 October 2024, Annexure "D".

⁷ Affidavit in Reply, Tyla Jae Scott dated 4 October 2024, paragraph 9 and Annexure "C".

intention of Mr Scott having time with the children while she worked at SB. It remains untested what employed duties Ms Scott carried out during these visits.

[22] In November 2023 Ms Kofoed as CEO, communicated in writing through the accountant for SB that she wanted both of the Scotts to stop attending at the SB business unless she required them to. She asked them to take a step back over the Christmas period (saying she had the business all in hand) until matters of Mr and Ms Scott's ongoing roles could be discussed in the New Year in the context of the Scott's domestic separation. The reason for this request was communicated by Ms Kofoed as problems with the Scott's domestic tensions affecting the business and staff. There are no details in the communication as to what this specifically related to. Ms Kofoed indicated some project maintenance work that Mr Scott would be doing in the Christmas period that required him to be on site. Both Scotts agreed to step back but the terms of that are not documented by SB in any material before me. Ms Kofoed's email request says that there would be a meeting to discuss how the Scott's roles going forward would happen in the 'New Year'. Correspondence from the SB accountant supports this as a proposed aim. In February 2024 the accountant for SB communicated by email⁸ to the Scotts, urging them to meet to discuss their joint business interests.

[23] It is in dispute whether the Scotts each in fact did step back or if they did, for how long and to what extent. Ms Scott claims Mr Scott did not step back as was agreed but used the opportunity of being back in Oamaru to become more involved in the business and to 'orchestrate' her removal from the business. This remains untested. Ms Kofoed's affidavit includes that Ms Scott did not carry out duties after November 2023. As noted above, Ms Scott provides email communications to support her activities.

[24] There is an email exchange right on Christmas 2023 (after Ms Kofoed had asked the Scotts to take a 'step back.') Ms Kofoed emailed Ms Scott saying she objected to the way Ms Scott had spoken to her on the phone about Ms Kofoed's handling of an employee, an employee related by family ties to Ms Scott. Ms Kofoed says she felt Ms Scott had 'threatened' her job if she took steps to affect that relative's employment. Ms Scott responded to Ms Koefed that she intended a different message and that she considered the handling of her relative's employment to have been driven by Mr Scott

⁸ Email from SB accountant to both Scotts 28 February 2024.

trying to oust her and her family from the business. Ms Scott gave her view that Ms Kofoed was caught in the middle. Ms Scott communicated an apology. Ms Kofoed replied that they would resolve matters in the New Year.

[25] There is no evidence before me to show that SB, Ms Kofoed, or either of the Scotts organised to 'sort things out' about the Scotts' respective roles in the business in the New Year.

[26] It is further apparent by what has been lodged in this interim matter that there were written communications between various representative counsel regarding relationship property division (focused on SB) and financial child support issues in the lead up to, and alongside, the following events that culminated in SB's decision to disestablish Ms Scott's employed role.

[27] On 17 May 2024 Ms Scott sent a lengthy email to Ms Kofoed and Mr Scott setting out in detail the things she wanted to change about SB's marketing. She included that she did not want to be ignored and wanted to hear from Ms Kofoed and Mr Scott as to how to facilitate the work she intended doing about marketing. She indicated she would return to work at the business. She referred to her status as a 'co-owner'. I have no response to this email before me. There is an apparent change of tone from previous email examples in prior months.

[28] On 28 May 2024 Ms Scott sent a lengthy email to Mr Scott and the accountant for SB setting out that she wanted them to review the performance and remuneration for 'key personnel' including Ms Kofoed and the head brewer. She asked for a stock take to be done as a comparative exercise across several years noting the context of the 'separation proceedings' and 'all our entities'. I do not have a response to this email before me.

[29] On 4 June 2024 Ms Scott's counsel wrote to SB to say that Ms Scott intended to return to Oamaru three days each month and that Mr Scott could then spend time with their children when she did. The letter referred to Ms Kofoed having asked Ms Scott to step away in November 2023 and that Ms Scott considered 'sufficient time has passed' and that it was 'appropriate to restore her participation in Scotts and its management to 2023 levels.'

[30] On 10 June 2024 Ms Scott emailed Mr Scott and Ms Kofoed with two points. She referred to having altered the time paid on an employee entry on the proposed payroll for that pay period and the reason for this. She referred to waiting on a 'final call' from Mr Scott on 'child support for a staff member then I can confirm'.

[31] Mr Scott responded to the above. There are no responses like this before me from Mr Scott to previous payroll issues that Ms Scott had been raising or suggesting changes on. Those prior emails show Ms Kofoed responding with no apparent challenge to Ms Scott's ongoing 'payroll' notes. Mr Scott's communication above tells Ms Scott not to make changes to payroll because it was Ms Kofoed's role as CEO; that he had reverted the changes Ms Scott had made and that, 'p.s. I am not a staff member'.

[32] On 12 July 2024, less than two days after the above email exchange between the Scotts, SB's counsel emailed Ms Scott attaching a letterhead communication from SB proposing a restructuring of Ms Scott's position because it was 'surplus to requirements'. The letter was undated and gave no indication of who the human author was. The letter set out the following:

RESTRUCTURING PROPOSAL

As a result of the breakdown of your marriage with Phil, you have not been working in the business for over 6 months. You have continued to be paid your full salary and accrue annual leave.

Your role carrying out the company's administration, payroll and human resource functions has been able to be picked up by the Chief Executive and other staff. This is working well.

The company therefore proposes to disestablish your position because it is surplus to requirements. The company does not see any potential redeployment options, but it is open to a discussions about alternative options.

If there is no other alternative position available for your deployment, the company will give you notice of redundancy. As you do not have a written employment agreement with the company, we propose to pay you 3 months' notice plus your accrued annual leave. You would not be required to attend to any duties in this time and your access to business systems will be disabled.

Please provide any feedback on this proposal by close of business Thursday 18 July 2024. Communications will be channelled through our respective lawyers. [SB then indicates its present counsel as representing it in this process].

You have been asked several times to provide the passwords and access rights as Administrator for the company's email and internet accounts. Please provide these immediately. This is a lawful direction.

Ngā mihi

Scotts Brewing Company Limited

[33] Ms Scott through her counsel asked for an extension of time to respond which was granted but for less time than requested. Ms Scott instructed a nine page response be sent on 22 July 2024. In her response Ms Scott challenged the authority for the restructuring initiative because she was a 'de facto' director and considered that Mr Scott was using his legal sole directorship to oust her from the business. Ms Scott's letter concluded that it was likely Mr Scott penned the restructuring letter to circumvent the other ongoing processes of property division relating to SB.

[34] The above letter included that notwithstanding the above Ms Scott challenged SB's contention that her role was superfluous and that SB's description of her role as 'administration, pay roll and human resources' was a 'significant mischaracterisation of the role' that Ms Scott had enjoyed since 2007 and developed into thereafter. Ms Scott set out a list of duties and responsibilities that she had included in the above mentioned letter on 4 June 2024 stating she intended to return to her 'pre December 2023' duties. As noted above, the extent of Ms Scott's role and what employed duties it entailed remains untested.

[35] On 29 July 2024 Ms Scott was sent a second SB letter head letter, this time it was signed by Mr Scott. It is in the same format as the earlier proposal document. The letter was headed RESTRUCTURING – DECISION and included:

Your lawyer's letter dated 22 July 2024 has been considered. The points you make are not accepted. You are not a director and therefore have no governance role in respect of the company. ... You have not been carrying out your duties for over 6 months, and in that time, the company has managed to reallocate your duties. The role is therefore surplus to requirements and will not be filled. ... There are no deployment options, and this letter therefore constitutes notice of termination of your employment for redundancy.

[36] The above letter concludes with saying that Ms Scott was:

... given a lawful direction to provide the passwords and access rights as Administrator for the company's email and internet accounts. You have refused to do so unless assurances are given that you will retain access. That is not a reasonable position. If you fail to provide the passwords and access rights immediately, you will face a disciplinary process for refusing to follow a lawful direction. If you are found to have committed serious misconduct, you could face the possibility of summary dismissal, i.e. termination without payment of notice.

[37] On 6 August 2024 Ms Scott raised a personal grievance against SB for unjustified dismissal and indicated she would seek interim reinstatement pending the outcome of that matter. She lodged her claims in the Authority on 19 August 2024.

Does Ms Scott have an arguable case?

Is there a case for unjustified dismissal?

[38] Whether a case is arguable is based on asking whether it has serious or arguable prospect of success but not necessarily certain as to that outcome, and that it is not based a 'frivolous or vexatious' claim.⁹ Sometimes called the threshold, the standard is not high.

[39] Section 103A of the Act provides factors to determine when considering whether a dismissal was justifiable, both in substance (the reasons) and procedurally. It will be for SB to prove this at the substantive stage. The overall test is to examine whether the employer acted in a way that a fair and reasonable employer could have done in all the circumstances at the time.

[40] In the context of dismissal for redundancy the Authority considers if the redundancy was genuine (including any claim regarding an ulterior motive) and then whether the proposal and decision to make the employee's role surplus to requirements was procedurally fair. This includes considering whether the employer acted in good faith under s 4 of the Act by providing the affected employee with access to all relevant information supporting the reason for the redundancy, the detail of how it will be

⁹ *X v Y Limited v New Zealand Stock Exchange* [1992] 1 ERNZ 863.

implemented and an opportunity for the then fully informed employee to comment on any redundancy proposal and have that feedback genuinely considered before a decision is finalised. Redeployment options should also be explored.

[41] I find Ms Scott has a seriously arguable and strong case that she was unjustifiably dismissed for the reasons I set out below.

[42] Ms Kofoed's affidavit includes that the reason to propose the restructuring only arose after she talked to Mr Scott *after* Ms Scott indicated she would return to her role in May 2024, and they then decided her role had been reallocated and was no longer required because it was working well. For Ms Scott it is submitted I take note of the opening line of the proposal letter on 12 July 2024 to disestablish Ms Scott's role: 'As a result of the breakdown of your marriage with Phil, you have not been working in the business for over 6 months.' It is submitted for SB that this just refers to context. I find Ms Scott's submission at this stage persuasive that the proposal was a reaction to Ms Scott saying she was returning. I also find the words at the start of the proposal arguably indicate the reason for the proposal was linked to the situation of the Scotts' marital separation and not a genuine reason for restructuring of what was only to be a single focus on Ms Scott's employed role.

[43] The proposal to disestablish Ms Scott's role includes that her 'role' had been 'picked up' by Ms Kofoed and 'other staff.' There is nothing to show Ms Scott was provided with details of what 'other staff' had picked up her duties, what they were or what other options could be considered to reduce any position for SB's business reasons. It is submitted for Ms Scott that just because an employer arranges to get a role done by others does not mean the role is no longer needed by the employer. I agree this arguably points to a lack of genuine reason to disestablish Ms Scott's role.

[44] As already noted, I am unable to determine, as I will need to if the matter continues to be substantively tested, the actual duties in the employed role Ms Scott held. Emails point to her doing something, rather than nothing, in the lead up to the redundancy and she herself refers to returning to her duties at '2023 levels'. However, to examine the reasonableness of the employer's decision to dismiss in the context of a redundancy I will need to consider what actual role SB considered was 'surplus to requirements'. If it cannot be clear what that role was it is arguably difficult to show

what role it concluded was 'surplus to requirements'. This supports a seriously arguable case that SB made Ms Scott redundant from a role it was unclear about as to its detail.

[45] The above background shows me even at an untested stage that the timing of the proposal to restructure was significantly linked in time alongside other communication exchanges between the Scotts regarding the ongoing shared wealth and operation of SB and child support issues.

[46] It is seriously arguable that SB's decision through the sole director, Mr Scott, came at a time that arguably supports his motivation was linked to what was happening with separation issues with Ms Scott rather than a genuine need for SB to disestablish the role Ms Scott had been performing, albeit the extent and detail of which is yet to be tested.

[47] It is submitted for SB that Ms Scott did nothing to initiate her 'return' in the New Year of 2024. It is unclear if this means SB's position is that Ms Scott had somehow abandoned her employment as SB's justification to then reallocate her duties because she simply did not return. The proposal letter makes a link to her separation from Mr Scott as a reason for her duties having been reallocated. However, the reason Ms Scott 'stepped back' in November 2023 was because Ms Kofoed, the CEO of SB asked her and Mr Scott to do so and not the other way around.

[48] Standing back from the above it is difficult not to conclude that Ms Scott has a seriously arguable and likely a strong case that SB's proposal and decision to disestablish her role was more closely connected in timing to her indication to return to the workplace and the background arguments she was having with SB's sole director, Mr Scott.

[49] In summary Ms Scott's employed role was arguably unclear and no options for other roles were provided for consideration or disestablishment. The timing and acrimonious familial separation context intertwined closely with the proposal and decision of redundancy to arguably support the ulterior motive claimed.

[50] I find Ms Scott has a seriously arguable and strong case for unjustified dismissal.

Is there an arguable case for permanent reinstatement?

[51] Section 125(2) of the Act says that the Authority must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy.

[52] It is submitted for SB that reinstatement is neither practicable nor reasonable, that there would be flow on adverse consequences for employees and Mr Scott, and it would be unreasonable to continue to pay Ms Scott for doing nothing as well as adverse risks in returning her to the workplace given things SB alleges she has done or may do. For Ms Scott it is submitted that there is no evidence employees will be adversely affected, she refutes the risk allegations and while Mr Scott says he will be adversely affected Ms Scott submits their roles can be operated separately from each other.

The adverse effect on other employees and Mr Scott by reinstating Ms Scott

[53] SB says there would be an adverse effect on other employees and the business should Ms Scott be reinstated. It is submitted for Ms Scott that SB has provided no evidence to support the effect on employees nor the claim in Mr Scott's affidavit that he was concerned that employees would leave. There are no affidavits from employees. The closest I have at this point before me is an email exchange with Ms Scott and a senior employee who offers her support. It is undated but I accept it relates to when Ms Scott attempted to challenge the quality of the brew production and communicated directly with that person. Ms Kofoed in her affidavit does not include detail about the effect on specific employees. I find nothing to support that employees are likely to leave if Ms Scott returns as is stated in Mr Scott's affidavit.

[54] The above noted, I accept both the accountant and Ms Kofoed had likely reasons to ask for both Scotts to step back in December 2023 temporarily. The extent to which this situation remains is untested but equally what is before me shows a significant dispute between the Scotts personally. It is arguable that it is not practicable for Ms Scott to return in person to the workplace while this situation remains.

[55] Mr Scott explains that he would be adversely affected by Ms Scott returning to the workplace. I have little to further explain this human angst other than a fair assumption it relates to the separation difficulties. I accept that the Scotts have likely taken different areas in the business to work in traditionally however steps had been taken to not have them attend to duties in the business due to their separation tensions. On the face of it, these steps were taken by Ms Kofoed with the support of the accountant for SB. While all untested, it is arguable that for the sake of SB's business it remains impractical for Ms Scott to return to her employed workplace duties. Whether she has rights to attend to business duties in another capacity is not within the jurisdiction of the Authority to make decisions or orders about.

Ms Scott's reason for returning to the workplace

[56] The primary remedy of reinstatement in the Act focuses on the preservation of the employment relationship¹⁰. Ms Scott has consistently expressed in her affidavit evidence and in her communications with SB that she wants to return to work because she is a 'default co-owner' of the business. SB submits that this is the reason she seeks to return, and this sets her outside of this jurisdiction to argue this as a reason to be reinstated.

[57] I find it arguable but weakly arguable that in the context of this family business that Ms Scott seeks to be reinstated to preserve the employment relationship. Her 'employed' duties are in dispute and her focus is arguably on her controlling share in running or sharing in the wealth of what has for many years been a family business.

Ms Scott as a risk to the business

[58] I am not in a position to assess evidence that alleges Ms Scott will risk the SB business upon her return other than noting the emails from her to Ms Kofoed that show detail and understanding with the running of the business in terms of payroll, taxation, invoicing, insurance, and bank fees. None of this points to someone wanting to sabotage the business that SB operates.

¹⁰ Employment Relations Act 2000, s125.

Summary

[59] I find based on the above that it is arguable that Ms Scott returning physically to the workplace (remotely or on site) would not be without challenges. As I understand it this is a family business and there remain significant areas of dispute between the human couple that have been at the heart of the business. It is arguable this could reasonably still spill over into the matters that caused Ms Kofoed and the accountant for SB to be concerned enough in November 2023, to ask the Scotts to step back.

[60] I find Ms Scott has an arguable but weakly arguable case for permanent reinstatement.

Balance of convenience

[61] As noted above I find a weakly arguable case for reinstatement. I need then to consider where the balance of benefit and detriment lies in terms of whether an interim reinstatement order should be made.

[62] I have found above that Ms Scott is likely focused on her return to duties for reasons that are beyond just being an employee. To that extent I find the benefit she says she would have, in returning to her professional status in the company, is linked to her continued claims to an equal stake in the business that it is submitted she is the face of. On the other hand, SB claims a detriment in Ms Scott returning to her work duties because of the adverse effect on staff and Mr Scott. I have already considered this above. While I have not found anything supporting the adverse effect on employees I acknowledge a potential detriment that likely still exists for SB in having both the Scotts attend to their work duties even if, as Ms Scott contends, they could work separately. To date this appears not to have been working as it may have done in the past before the couple separated. To that extent there must be some form of detriment to SB in reinstating on an interim basis to whatever Ms Scott's employed duties are in the unfortunate situation that the Scotts find themselves in. I particularly rely on the recognised detriment to SB by Ms Kofoed and the accountant to SB when asking both Scotts to step back from duties in November 2023.

[63] Ms Scott submits that if I do not reinstate her to employed duties then I should reinstate her to the salary she is now 'out of the blue' without. SB says it would be a detriment to it if I consider reinstatement to the payroll only. This is because it would have to pay Ms Scott for doing nothing. It has provided no financial documentation to support this as a company could have. There have also been months where, in SB's view, it has continued to pay a salary to Ms Scott without apparent concerns raised for what it now says was for doing nothing at all. This included the time SB through the CEO asked Ms Scott and Mr Scott to 'step back' from duties. There was no reference to reducing or cutting their respective salaries.

[64] Ms Scott on the other hand says the 'nominal salary' is her only income, again not providing any documentary support for this but I accept her situation is that she has primary care of the couple's children and no control over any dividends from SB given she is not a registered director.

[65] Considering the above I find the balance favours Ms Scott to be reinstated but only to the payroll pending the determination of the substantive matters.

Overall justice

[66] As I understand it this is a family business and there remain significant areas of dispute between the human couple that have likely been at the heart of the business for some years until their own personal relationship ended. They now seek to reconcile this in part by utilising employment relationship mechanisms, SB through its director through a redundancy decision of Ms Scott's role, to which I have found there is a strongly arguable case that this was an unjustified dismissal, and Ms Scott now wanting to be reinstated to employed duties which are not clearly defined and disputed, and in the context of her wanting to continue to run the business as a 'co-owner'.

[67] I find that based on the untested evidence before me there is a strongly arguable case for unjustified dismissal, a weakly arguable case for reinstatement and that it would appear to be a pragmatic solution to restore Ms Scott to the payroll only on an interim basis, something I have found as a result of considering where the balance of convenience lies.

Orders

[68] Tyla Jae Scott is to be reinstated to the payroll of Scott's Brewing Limited at the rate and payment intervals of her salary as it stood on 31 October 2024, to be calculated as continuing from 1 November 2024.

[69] Tyla Jae Scott is not reinstated on an interim basis to attend or perform any duties in relation her role as employee with Scott's Brewing Limited.

[70] A telephone phone conference will be arranged as soon as possible to discuss preparation and timetabling to further the substantive investigation process.

Costs

[71] I reserve the issue of costs, and these will be dealt with after the substantive investigation.

Antoinette Baker
Member of the Employment Relations Authority