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Secretary for Justice v Dodd WC28/09 [2009] NZEmpC 138 (22 December 2009)

Last Updated: 8 January 2010

IN THE EMPLOYMENT COURT

WELLINGTONWC 28/09WRC 52/09

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

AND IN THE MATTER OF an application for stay of execution of order for reinstatement in employment

BETWEEN SECRETARY FOR JUSTICE

Plaintiff

AND CATHERINE ANNE DODD

Defendant

Hearing: 21 December 2009 (by telephone conference call)

Appearances: Alastair Sherriff and Brigette Shone, Counsel for Plaintiff

Susan Hughes QC, Counsel for Defendant

Judgment: 22 December 2009

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] Should the Employment Relations Authority's order reinstating Catherine Dodd to her former position as the Ministry of Justice's courts' manager at New Plymouth be stayed until this Court can hear and decide the employer's challenge to the Authority's determination that Ms Dodd's dismissal was unjustified and that she should be reinstated in employment?

[2] This application has been heard very urgently. After an investigation meeting on 1 and 2 December 2009, the Employment Relations Authority delivered a detailed written determination on 17 December 2009 (WA 201/09). This provided for Ms Dodd's reinstatement with effect from 22 December 2009.

[3] Whether a determination of the Authority should be stayed (particularly one, as here, where there is an order for reinstatement) is broadly discretionary and the interests of justice are to be the determiner. [Section 180](#) of the [Employment Relations Act 2000](#) ("the Act") provides only that "*The making of an election under [section 179](#) does not operate as a stay of proceedings on the determination of the Authority unless the court, or the Authority, so orders.*" Stay is an interim order and the Court needs to balance the interests of, and prejudices to, the parties in determining what will be the most just course for that period. One important question is its likely duration, not only until the challenge can be heard but, even more importantly, until it can be decided. The Court has 3 days available on 10, 11 and 12 March 2010 and the parties agree that will be sufficient time, given that the plaintiff has elected a hearing de novo so that all matters in the Authority will again be in issue for this Court.

[4] The following is the relevant background. In addition to having been the Ministry's courts' manager in Taranaki, Ms Dodd was also the registrar of the District and High Courts there and sheriff. Ms Dodd was dismissed by Andrew Hampton, the Ministry's general manager for Higher Courts and the plaintiff's delegate, on 17 September 2009 as a result of events that began in mid January 2008 when her nephew was charged with an offence in the District Court at Hawera. There was a complaint to Ms Dodd's superior, the regional manager of District Courts for the central region, made by the complainant in the prosecution, alleging that Ms Dodd might influence improperly the prosecution in one of "her" courts. The regional manager considered there was no substance to the complaint but, in any event, the matter was drawn to Ms Dodd's attention and the case was

transferred to the Whanganui District Court beyond Ms Dodd's region.

[5] In mid May 2009 the father of the complainant in the criminal proceeding complained to the general manager for District Courts, Tony Fisher, about Ms Dodd's conduct in relation to the prosecution including dealings with her nephew, the complainant, the accused's lawyer and others, to do with a victim impact statement. An investigation into this second complaint was begun by the Ministry. There was also a concurrent investigation into these matters by the police.

[6] In mid July 2009, Lance Rowe, the Whanganui crown solicitor, also complained about Ms Dodd's conduct to Mr Fisher. A further investigation was instituted into this complaint.

[7] Ms Dodd was suspended and a formal inquiry undertaken by the plaintiff in which the defendant participated with the assistance of senior counsel. The outcome of this inquiry was Ms Dodd's summary dismissal in mid September 2009.

[8] The following were the grounds relied on by the plaintiff to dismiss the defendant summarily. First, she made contact with the complainant in a prosecution for assault brought against one of her relations. Next, the defendant accessed on several occasions the Ministry's computer system's details relating to that prosecution. Next, the plaintiff was concerned about how the defendant related her dealings with an historic conflict of interest situation which was brought up in discussion as an example of how she might appreciate the existence of conflicts and deal with these. Next, these misconducts were said to have amounted to breaches of the Ministry's code of conduct for staff. Penultimately, the plaintiff says she could not have been assured that such breaches would not occur again. Finally, and collectively, these circumstances were said by the plaintiff to have meant an irreparable loss of trust and confidence in the defendant to perform her role.

[9] The Employment Relations Authority conducted its investigation into Ms Dodd's claim of unjustified dismissal on 1 and 2 December 2009. In a determination issued on 17 December 2009 the Authority concluded that Ms Dodd had been dismissed unjustifiably but that her contribution to the circumstances leading to dismissal was such that she should not have any remedies other than an order for reinstatement in employment to take effect on 22 December 2009.

[10] Although the Authority concluded that Ms Dodd's communications with the complainant in the prosecution of her nephew amounted to serious misconduct in all the circumstances, it held that dismissal was not the inevitable consequence of this finding. The Authority determined that a number of the plaintiff's conclusions about Ms Dodd's conduct were unwarranted. It also found that the plaintiff's delegate had taken into account a number of other issues in deciding to dismiss but of which Ms Dodd had no notice or opportunity to answer. The Authority concluded, applying the test in [s103A](#) of the Act, that a fair and reasonable employer would not, in all the circumstances, have dismissed Ms Dodd summarily.

[11] The Secretary for Justice has filed a comprehensive challenge to the Authority's determination. She not only opposes the order for reinstatement but, in challenging the determination by hearing de novo, contests the Authority's findings that led it to the conclusion of unjustified dismissal.

[12] In favour of staying the order for reinstatement are the following features of the case:

- As courts' manager for Taranaki (and sheriff), the defendant operates largely unsupervised on a day to day basis.
- The plaintiff must have trust and confidence in a senior officer responsible for the operations of a number of courts.
- Payment of the defendant's remuneration will alleviate the financial hardships of her dismissal, especially as the Authority declined to grant any other remedies including reimbursement of remuneration lost.

[13] Factors against staying the reinstatement order include the following:

- Reinstatement has been ordered in a strong decision of a very experienced Authority member following multi-faceted findings of an absence of justification for dismissal.
- Implicit in the Authority's determination is a finding that the employer does not have grounds to doubt seriously her trust and confidence in the defendant.
- The incidents which led to the defendant's dismissal are unlikely to be repeated, especially in the interim period before hearing and decision of the challenge. There has been no criticism of the defendant's general job performance.
- Although not decisive, it is not insignificant that the plaintiff allowed the defendant to remain in her role during the investigations into what were then serious allegations against her.
- The Employment Relations Authority has clearly investigated, and decided deliberately, the issue of reinstatement in employment.
- Although the plaintiff now proposes that the defendant should be paid her salary from 22 December 2009 but be on gardening leave until the challenge is heard and determined, that does not address fully the entitlement of a successful litigant to the benefits of that success.
- If potential conflicts of interest arise for the defendant in the interim period, the Authority is clearly confident

that the defendant will be able to recognise these and deal with them appropriately.

- There is no apparent opposition or resistance from Taranaki court staff or others including lawyers, police officers and Judges, to the defendant's reinstatement and indeed the evidence considered by the Authority was of a significant level of support for her.

[14] The plaintiff expresses a concern that Ms Dodd's reinstatement now will make it more difficult for the employer to later argue that she should not be reinstated. I do not agree. All issues, including justification for dismissal and, if appropriate, the remedy of reinstatement will be for reconsideration by the Court on the plaintiff's challenge and, if dismissal is found to have been justified or, even if not, reinstatement is not practicable in all the circumstances, then Ms Dodd will have to relinquish her roles. That is a risk she has expressed herself as prepared to take.

[15] I should record, also, that although I offered the parties the opportunity to resolve this dispute on their own terms which may be more flexible than the outcomes available to the Court, this was declined because of the defendant's insistence upon reinstatement and the plaintiff's implacable opposition to it.

[16] Mr Sherriff acknowledged the potential difficulties faced by his client where there is a continued assertion of loss of trust and confidence in an employee even after the Employment Relations Authority has concluded that this view is unfounded. Although in employment of a very different nature, that same scenario was addressed by this Court not long ago in *Sefo v Sealord Shellfish Ltd*^[1]. There the Court noted relevantly for this case also:

[58] To refuse reinstatement, especially where there is a strong claim to it because of a grievant's circumstances, requires more than an acceptance of the employer's assertion, through relevant witnesses, that the employer has lost trust and confidence in the employee. That is more particularly so where, as will very frequently happen, the Authority or the Court has found a dismissal based on loss of trust and confidence to have been unjustified. Such a finding at least implies that, applying the objective test required by s 103A, the Court or Authority has found that the employer could not reasonably have lost trust and confidence in the employee, at least to the extent that may have justified dismissal. In this case, as no doubt in many others, that will not alter the employer's subjective view that there was a loss of trust and confidence.

[17] Whilst remuneration is important, so too is reputation and status which are, in this case, not able to be addressed by an order for payment of salary but the placement of Ms Dodd on gardening leave. Although not enjoying the confidence of senior officials in the Ministry of Justice, it is clear that the defendant commands considerable local respect and support in Taranaki from a variety of persons including local Judges, legal practitioners, police, probation officers, other court staff, and local community leaders. Just as the protestations of senior Ministry managers about their loss of trust and confidence in the defendant must eventually yield to an objective assessment of the justification of that stance in law, so too must the popular support for Ms Dodd not overwhelm the consequences in employment law of what she did or did not do. But until those analyses can be conducted at trial and by a judgment of the Court, the determination of the body that Parliament has invested with the primary resolution of these issues must be respected as one of the considerations in this interim balancing exercise.

[18] Whether to grant or refuse a stay is a finely balanced question but that balance has been tipped against the grant of a stay and in favour of the defendant being reinstated as directed by the Authority, by the undertakings provided to the Court by Ms Dodd. These are that, pending the decision of the plaintiff's challenge, she:

- will not use the computerised database system known as CMS without the consent of her regional manager and on such conditions of supervision as the regional manager may impose;
- will report, if called upon as frequently as daily, to the regional manager and/or the national manager of District Courts; and
- will accept supervision and/or training as the plaintiff may direct.

[19] In reliance on these undertakings by the defendant, I decline to stay the order for reinstatement in employment in her roles as manager of Taranaki District Courts and registrar and sheriff of the High Court at New Plymouth, with effect from today's date, 22 December 2009.

[20] Costs on this application are reserved.

[21] I confirm that there will be a callover of the case at 8.30 am on Friday 5 February 2010 to timetable the challenge to a hearing and that a tentative fixture has been made for the case on Wednesday 10, Thursday 11 and Friday 12 March 2010.

GL Colgan

Chief Judge

Judgment signed at 3 pm on Tuesday 22 December 2009

[\[1\] \[2008\] ERNZ 178; \(2008\) 5 NZELR 407](#)

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