

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 495
3064052

BETWEEN IAN MURRAY STEWART
Applicant
AND RAVENSDOWN AEROWORK
LIMITED
Respondent

Member of Authority: Michael Loftus
Representatives: Brittany Gibson, counsel for the applicant
Scott Wilson, counsel for the respondent
Investigation Meeting: 16 July 2019 at Whanganui
Date of Determination: 21 August 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ian Stewart, was employed by the respondent, Ravensdown Aerowork Limited (Ravensdown), as a pilot. He was dismissed on 21 March 2019 after Ravensdown concluded Mr Stewart has irreparably damaged the trust and confidence that underpinned the employment relationship by seeking to advance opportunities to compete with his employer.

[2] Amidst other claims Mr Stewart says the dismissal was unjustified. He seeks reinstatement.

[3] Mr Stewart also seeks reinstatement on an interim basis pending a substantive consideration of his claims which is likely to be heard in November.

[4] Ravensdown believes it can justify the dismissal and opposes the application for interim reinstatement.

Discussion

[5] Applications for interim relief involve the exercise of a discretion. The answer comes not from the rigid application of a formula but from a consideration of various questions which culminate with a conclusion to the overarching question of what does the overall justice require?¹

[6] There are five broad areas of inquiry which are considered on the basis of untested affidavit evidence. They are:

- a. Is there an arguable case for a finding of unjustified dismissal?
- b. Is there an arguable case for a finding of permanent reinstatement?
- c. Is there an adequate alternative remedy available, such as damages?
- d. Where does the balance of convenience lie?
- e. What does the overall justice of the case require?

[7] Obviously Mr Stewart is of the view he has an arguable case and bases that on a number of factual assertions which include a view Ravensdown cannot actually prove its assertion he sought to complete and reached its conclusion by failing to properly explain itself thus procuring an alleged confession which it misunderstood in any event. He also says there are other factors such as the safety and serviceability of the aircraft he was provided which affected events and mitigated his actions which should have been taken into account but weren't.

[8] Ravensdown is of the view there was no misunderstanding and it took account of all relevant factors. It follows it believes it had a valid confession upon which it could rely. Indeed, and for a variety of reasons, Ravensdown argued strongly that Mr Stewart simply could not succeed.

[9] The relevant case law strongly suggests the threshold to be crossed when establishing whether or not an arguable case exists is, for the applicant, relatively low with, for example, the Court saying:

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

¹ *Klisser Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA)

*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.*²

[10] While I note the argument s Ravensdown proffered I have to conclude that if Mr Stewart can prove the facts he alleges he will undoubtedly have an arguable case. That said I am not so sure as too how strong as some of the facts upon which he relies, such as exactly what he said to a Napier operator and about which there appears to be conflict, will have to await a substantive hearing during which the evidence can be properly tested.

[11] Turning to the question of whether or not Mr Stewart has an arguable case in respect to permanent reinstatement. Assuming Mr Stewart is successful with his claims, I conclude this is finely balanced given the facts as currently presented which include allegations that go to the dismissals procedural propriety as opposed to substantive.

[12] On one hand, and in Mr Stewart's favour, is the fact reinstatement is again a primary remedy.

[13] On the other is the fact that if Ravensdown can establish it is correct with respect to its conclusions about what was said when Mr Stewart approached other operators, which he accepts he did, then there is a strong chance it will, notwithstanding the loss implied in this consideration, have an arguable proposition that Mr Stewart has destroyed the element of trust and confidence required of a viable employment relationship and reinstatement is no longer practical or reasonable. The answer to this will only become apparent after a substantive investigation.

[14] From that follows the question of whether or not there are adequate alternate remedies. The only other remedies are monetary and they remain available. Given my conclusion the viability of permanent reinstatement is finely balanced and it may not be attainable, the answer is the other available remedies may well be the limit of those available. It follows they may well be considered adequate.

[15] Turning next to the balance of convenience.

[16] Aside from his assertions regarding the substantive merits of his claim, Mr Stewart argues three main points. The first is reputational damage and here reference

² *X v Y* [1992] 1 ERNZ 863 at 872

was made to various rumours circulating in the local community that assert the dismissal was attributable to conduct on Mr Stewart's part that simply did not occur. One of those is he allegedly stole an aircraft. As I observed in the investigation the issuing of this determination will, in itself, remove those issue and make it clear he was dismissed for allegedly seeking to act in way which might undermine or compete with the commercial interest of his employer.

[17] Mr Stewart's second argument is he remains committed to Ravensdown and wants to work for none other. Indeed it was said he has rejected possible work opportunities so as to keep the possibility of a return alive. Even if that is so and he is ultimately reinstated his present situation does not preclude him from accepting offers in the interim. The simple fact it appears he can source work also undermines his third point and that is he is suffering financial hardship as there appears an element of choice in this matter.

[18] While Ravensdown's argument centred on its view it can withstand the substantive claim and it would therefore be unreasonable and improper to return Mr Stewart I have to say that can only be determined by a substantive hearing. That said I again note my view, given the albeit untested evidence to date, that Ravensdown may well resist permanent reinstatement even if it fails with its defence to the claims. That means it could well find itself in an extremely disadvantageous position from which there is little or no redress should reinstatement be ordered on an interim basis but not a permanent one.

[19] The above leads to a conclusion the balance favours Ravensdown. Mr Stewart's key arguments revolve around issues that can either be allayed or addressed temporarily while Ravensdown faces a possible imposition that cannot be rectified – namely reinstatement when that is not ultimately found to be viable.

[20] By way of summary, and having considered the affidavits and submissions, I conclude Mr Stewart has an arguable case though there is a doubt about whether he will attain permanent reinstatement and the balance of convenience favours Ravensdown. It follows that leads to a conclusion the overall justice also favours Ravensdown, at least in respect to the interim reinstatement application.

Conclusion and orders

[21] For the above reasons I remain unconvinced I should exercise the discretion in Ms Stewart's favour and reinstate him on a temporary basis. The application fails.

[22] An officer of the Authority will now approach the parties to schedule a substantive investigation of Mr Stewart's claims.

[23] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority