

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2021] NZERA 45
3061172

BETWEEN	ADRIAANUS WILFRED STRAAYER Applicant
AND	WORKSAFE NEW ZEALAND Respondent

Member of Authority:	Geoff O’Sullivan
Representatives:	Applicant in person Greg Cain and Katie Alexander, counsel for the Respondent
Investigation Meeting:	29 January 2021
Submissions	At the investigation meeting
Date of Determination:	9 February 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Adriaanus Wilfred Straayer finished his employment with the respondent, WorkSafe New Zealand, (WorkSafe) on 6 October 2018. His employment ended through redundancy as a result of a restructure which ultimately had led to the disestablishment of Mr Straayer’s role. Mr Straayer has filed a statement of problem (15 May 2019) and amended statement of problem (20 May 2020) challenging the restructure, raising personal grievances for disadvantage, and challenging his dismissal. One of the remedies he seeks in his amended statement of problem is permanent reinstatement. Mr Straayer’s claims although before the Authority are yet to be heard.

[2] On 11 November 2020, Mr Straayer applied for interim reinstatement, seeking to be reinstated into his position or into a similar position with WorkSafe until his personal grievances are finally disposed of by the Authority. He says he needs this interim relief because he has identified a position he believes is suitable for reinstatement but which WorkSafe may fill before his substantive case is heard. Further, Mr Straayer considers interim reinstatement will increase his chances of finding alternative employment, although he did not provide adequate reasons why this is so.

[3] WorkSafe resists Mr Straayer's personal grievances, including his claim of unjustified dismissal. It also strongly opposes Mr Straayer's application for interim reinstatement. It resists this on a number of grounds but what it seems to thrust to its opposition is:

- (a) The length of time that has passed since the redundancy;
- (b) The lack of an appropriate role that Mr Straayer could be reinstated to on an interim basis; and
- (c) The effect on a number of staff who have filed affidavits supporting WorkSafe's position and who say they would feel uncomfortable to the point of resigning should Mr Straayer be reinstated.

Legal Framework – Interim Orders

[4] The legal framework which I must follow in respect of the application for interim orders can be summarised as follows:

- (a) Step one – the applicant must establish that there is a serious question to be tried;
- (b) Step two – consideration must then be given to the balance and convenience and the impact on the parties of the granting of, or refusal to grant, the interim orders sought. The impact on any third parties will also be relevant to the weighting exercise.
- (c) Step three – the overall interests of justice are to be considered, standing back from the detail required by these steps.

[5] The parties have each provided evidence by way of affidavit and spoke to written submissions at the investigation meeting on 29 January 2021.

A serious question to be tried

[6] The threshold for a serious question, is that the claim is not frivolous or vexatious; analysing this is not an exercise of a discretion, rather it must be based on a judicial assessment of the evidence, albeit untested, and the submissions advanced.¹ The serious question to be tried covers the question as to the genuineness or otherwise of WorkSafe's restructure, the disestablishment of Mr Straayer's position, and whether or not the termination of his employment was something a fair and reasonable employer could do under all the circumstances.

[7] At the commencement of the investigation meeting, counsel for WorkSafe, helpfully and properly conceded that Mr Straayer's case was arguable.

[8] That must be so when the fact of the dismissal is acknowledged and the onus of justifying the end of Mr Straayer's employment through redundancy lies with WorkSafe. Mr Straayer's case is focussed on WorkSafe's obligations in terms of s 103A of the Employment Relations Act 2000 (the Act) and specific contractual provisions, with him saying these obligations have not been met.

Balance of convenience

[9] Assessing the balance of convenience requires a comparative analysis of the impact on each party and third parties if the interim orders sought are either granted or not.

[10] I must then assess what happens if the interim position is reversed in any substantive determination. For Mr Straayer, this means assessing the consequences to him of not reinstating him on an interim basis. For WorkSafe, this means assessing the consequences of requiring it to reinstate Mr Straayer on a temporary basis into a position within the organisation with the Authority then subsequently deciding either against Mr Straayer or against the remedy of reinstatement.

[11] An immediate obstacle facing Mr Straayer's application is the fact there has been a delay of over two years in applying for an interim reinstatement. Mr Straayer listed a number of reasons explaining the delay, namely:

- (a) His distressed state of mind;

¹ *Western Bay of Plenty District Council and NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

- (b) Uncertainty over the strength of his case;
- (c) Fear over committing to unknown damages in respect of an unsuccessful application;
- (d) Fear of uncontrollable legal costs;
- (e) A lack of evidence;
- (f) A belief the ERA investigation would be conducted and concluded in a timely manner;
- (g) Realising through applying for five vacancies that re-employment is not possible by means other than reinstatement; and
- (h) Finally realising through making over 80 job applications that re-employment is increasingly unlikely by means other than re-instatement.

[12] Mr Straayer felt that an application for interim re-instatement should not have been necessary, as an earlier investigation would have determined the issue of reinstatement before now. The flaw in Mr Straayer's last submission is that there is of course no guarantee that even if Mr Straayer is successful in his personal grievance for dismissal, that the remedy of reinstatement would have been given to him.

[13] While Mr Straayer's view is entirely understandable, I do not consider any of the reasons put forward by Mr Straayer justify a delay of over two years in filing for interim reinstatement.

[14] Interim reinstatement is generally sought to preserve a status quo. Whilst Mr Straayer's reasons may well have justified a shorter period of delay, they do not justify a delay of over two years. The significance of this, is the delay inevitably tips the balance of convenience in favour of WorkSafe.

[15] For WorkSafe, its arguments regarding the balance of convenience are based on three main premises, namely:

- (a) Mr Straayer's position has been disestablished;
- (b) Positions which Mr Straayer seems to have identified as being suitable for interim reinstatement are not suitable because Mr Straayer is not qualified for them; and

- (c) A number of staff have significant concerns should Mr Straayer return and some have indicated they would resign.

[16] The arguments on behalf of WorkSafe in respect of allegations that other staff could not work with Mr Straayer are not particularly strong. This is because Mr Straayer's employment ended by way of redundancy. In other words this was a no-fault termination of employment. Indeed, Mr Straayer pointed this out in his submissions referring to *Genesys Telecommunications Laboratories v Scott*² where he quoted Judge Corkill at page 151:

It is arguable that the deterioration in work relationships is a product of the redundancy process. If so, it is only weakly arguable that relationship issues should lead to a conclusion that permanent reinstatement is not practical and reasonable given the particular circumstances.

[17] Whilst the Authority must take cognisance of third-party interests, I find these are not particularly compelling in this case although I accept these are very real concerns which could arise should I grant an interim injunction.

[18] It is also relevant to my assessment as to whether or not the impact on Mr Straayer would be a harm that could also be adequately compensated by damages. It seems to me this would be less of an issue to Mr Straayer than it would be to WorkSafe. This is especially so considering Mr Straayer's significant delay in bringing the interim injunction application. Should Mr Straayer later be reinstated by the Authority and/or the Court, it is doubtful he would have suffered any loss that has not already occurred and which could not be fixed by an award of damages..

[19] On the other hand, should Mr Straayer be reinstated on an interim basis, WorkSafe would be required to restructure its workplace after some two years and perhaps face resignation and/or unhappiness of other staff. It has not replaced Mr Straayer so may face paying a further salary.

[20] Although the merits of Mr Straayer's case are also relevant to the balance of convenience and some of the grounds relied on in opposition by WorkSafe are not particularly strong, those grounds, coupled with the excessive delay mean that the balance of convenience favours WorkSafe and counts against granting the interim injunction. I stress that such a finding should not be construed as giving any indication whatsoever as to the strengths or

² [2019] NZEmpC 113

weaknesses of Mr Straayer's personal grievances and either parties chances of success in any subsequent substantive hearing.

[21] The overall justice assessment is essentially a check on the position which has been reached after analysis of the serious question to be tried and the balance of convenience. As I have said, Mr Straayer has an arguable case but the lengthy delay, and the reasons for it, lead me to conclude the balance of convenience does not favour granting the interim injunction.

Conclusion

[22] Whilst on one hand I am faced with protecting Mr Straayer's rights in respect of his remedies should he later be successful with his claims and succeeds in his application for permanent reinstatement, on the other hand he has already been away from the workplace for over two years. Accordingly, whilst Mr Straayer has an arguable case, the balance and convenience and overall justice of the case do not support an interim order being made and accordingly the application for an interim injunction is declined.

Costs

[23] Costs are reserved.

Geoff O'Sullivan
Member of the Employment Relations Authority