

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 84  
5471150

BETWEEN JAMES THWAITES  
Applicant

AND AOYAMA TRADING  
COMPANY LIMITED  
First Respondent

QIANG LIU  
Second Respondent

Member of Authority: Michele Ryan

Representatives: Phil Mitchell, Counsel for the Applicant  
Lois Gilmore, Counsel for the First and Second  
Respondents

Investigation Meeting: 18 August 2014 at Wellington

Submissions Received: On the day of the investigation

Determination: 25 August 2014

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**DETERMINATION OF THE AUTHORITY**

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## **Employment relationship problem**

[1] The applicant, Mr James Thwaites (James) applied to the Authority for an order for interim reinstatement. His application was accompanied by an undertaking to abide by any order the Authority may make with respect to damages. He requested the matter to be addressed with urgency.

[2] James says he was employed by either the first respondent, Aoyama Trading Company Limited (Aoyama), or the second respondent, Aoyama's director Mr Qiang Liu. He says he worked across a "group" of companies for which either Mr Liu, Mr

Liu's father, or Mr Liu's business partner are cited either jointly or individually as a director<sup>1</sup>.

[3] James says he has been unable to be exact as to the correct identity of his employer because he was never provided with an employment agreement despite several requests to Mr Liu.

[4] James alleges he was unjustifiably dismissed on 7 July 2014 when six trespass notices associated with separate premises under the control of one or other of the various companies referred to in paragraph [2], were served on him simultaneously.

[5] Aoyama and Mr Liu each oppose James' application for interim reinstatement. Mr Liu says James has never been an employee of Aoyama or himself personally. He says James' engagement with businesses owed by the various companies in which he holds a directorship has only ever been as an agent of business associate, Mr Stewart Thwaites (Stewart Thwaites), James' father.

[6] James has made additional claims for arrears of wages, unjustified disadvantage and breach of good faith. He seeks various remedies including compensation for distress and penalties against Aoyama and Mr Liu. A full investigation into all claims is scheduled to occur on 24-25 September 2014.

### **The Authority's investigation**

[7] The Authority received James' application for an order for interim reinstatement on 24 July 2014. Over the following week the Authority sought to locate premises associated with either of the respondents which would receive service of documents. The Authority finally contacted Mr Liu by an email address provided by James. A telephone conference was convened on 1 August 2014. During that discussion the Authority offered to investigate James' substantive claims on 24-25 September 2014. The offer was accepted. However, counsel indicated that his client wished to have the application for interim reinstatement progressed and asked that James be able to attend the investigation. Arrangements as to the exchange of information was premised on the parties attending a directed and agreed mediation.

[8] Mr Liu did not participate in the mediation planned for 5 August 2014. A further telephone conference was convened on 7 August 2014 whereby Mr Liu agreed

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<sup>1</sup> In the Companies Register

and was directed to attend mediation on Monday 11 August 2014 however neither of the respondents nor their representatives presented at MBIE's mediation services as scheduled.

[9] The Authority abridged the timetable for the exchange of documents and an investigation of James' application was undertaken on 18 August 2013. Each of the parties was represented and both James and Mr Liu answered questions from the Authority.

[10] It is apparent from documentation and information prior to and during the investigation that there are significant and substantial conflicts of evidence between James and the respondents. During the course of the investigation meeting the Authority advised it is not in a position to resolve or reach final conclusions on matters in dispute until they can be properly tested in a substantive investigation meeting. In an interim reinstatement setting the Authority is required to take a commonsense approach where facts are contested<sup>2</sup>. Any views recorded in this determination are therefore provisional only and may change following a full investigation of James' claims and after witnesses have been examined.

### **Determination**

[11] Section 127(1) of the Act allows the Authority to order interim reinstatement pending the substantive hearing of a personal grievance. The Employment Court has observed that the Authority's discretion is broad but is not unconstrained.<sup>3</sup> When determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the objects of the Act<sup>4</sup>.

[12] In addition to the statutory framework, an application for interim reinstatement requires the Authority to determine the following issues:

- (a) whether James has an arguable case that his dismissal was unjustified; as defined by s.103A of the Act;
- (b) whether James has an arguable case for reinstatement (applying the test for reinstatement at s.125 of the Act), if he is found to have been unjustifiably dismissed following a substantive investigation;

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<sup>2</sup> *Wellington Free Ambulance Service Ltd v Adams* [2010] NZEmpC 59

<sup>3</sup> *Ibid*

<sup>4</sup> s.127(4)

(c) where the balance of convenience lies between the parties until a substantive determination is issued by the Authority, including the adequacy of other remedies; and

(d) whether the overall justice of the case dictates that interim reinstatement is appropriate.<sup>5</sup>

**Does James have an arguable case, including an arguable case for permanent reinstatement?**

[13] An arguable case in the context of an application for interim reinstatement is “a case with some serious or arguable, but not necessarily certain, prospects of success”<sup>6</sup> James must persuade the Authority that he has an arguable case that he was unjustifiably dismissed and that he should be permanently reinstated into his position. In the particular circumstances of this matter, a further relevant factor for assessment is whether James has an arguable case that he was an employee of Aoyama and/or Mr Liu.

[14] James says in July 2013 Mr Liu approached him personally and “*begged*” him to work for the group. He says he raised with Mr Liu the matter of his father, Stewart Thwaites’, involvement in Mr Liu’s businesses but was assured that the familial relationship would not be an issue. He says between September 2013 and May 2014 he worked as a Duty Manager in various bars including ‘Bru on Cuba’, ‘The George on Willis’, and at liquor outlet store, ‘Capital Liquor’. He also says that because of his experience his role extended to keeping an eye on the various businesses Mr Liu was a director of.

[15] James attests he is not sure who owns what from a legal perspective. He says Mr Liu always purported to own the businesses and he considers Mr Liu to ultimately be his boss. In this regard he says the employment relationship was with Mr Liu, not his father. In support of his claim James provided a copy of an email detailing his IRD and bank account numbers which was sent to Mr Liu on 23 September 2013 when he commenced his employment. James says staff were provided with payslips intermittently but that throughout his employment his wages were consistently paid by

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<sup>5</sup> *Angus v Ports of Auckland* [2011] NZEmpC 125 at [3], *McKean v Ports of Auckland* [2011] NZEmpC 128 at [4]

<sup>6</sup> *X v Y Limited v New Zealand Stock Exchange* [1992] 1 ERNZ 863

Aoyama. He produced two separate payslips to support his claim<sup>7</sup>. Both documents record “*aoyama trading company ltd*” at the top of the page. Each payslip itemizes James’ then current weekly and year to date earnings, corresponding PAYE and KiwiSaver payments, and hours of annual leave owing.

[16] The focus of all information provided<sup>8</sup> to the Authority by Aoyama and Mr Liu is dominated by an emphatic denial that Mr Thwaites was employed by the first or second respondent. Mr Liu says there was never an offer of employment to James by either of these entities and points to the lack of an employment agreement existing between James and Aoyama or himself as evidence that there is no such relationship.

[17] By way of background Mr Liu advised that he, his father, and his business partner have had an ongoing commercial relationship with Stewart Thwaites. He says Stewart Thwaites had set up (it appears with Mr Liu’s consent) various companies involved in the sale of liquor. He says Stewart Thwaites arranged through his lawyers to organise the incorporation of the respective companies and that he (Mr Liu) had not received legal advice at that time. Mr Liu’s testimony is that the relevant company records name Mr Liu and/or his father and/or business partner variously as either sole or joint director of those entities because Stewart Thwaites is an adjudged bankrupt and unable to form or incorporate limited liability companies.

[18] Mr Liu says neither respondent has any authority over James whose involvement with the various companies was on the direction of Stewart Thwaites. Mr Liu produced correspondence sent to James in October 2012 (prior to the time James asserts he commenced employment) which records Mr Liu’s father and Mr Liu’s business partner as holding in trust a number of shares<sup>9</sup> attached to the company, Capital Liquor Limited, on James’ behalf. The inference I understand Mr Liu wishes to the Authority to take from this evidence is that there is commercial relationship history between his family and the Thwaites family as opposed to a relationship of employer/employee.

[19] There is further evidence of an email sent by James to Mr Liu’s business associate on 7 May 2014 which suggests James’ agreement to be “*made redundant from my full time position at Capital Liquor*”. Mr Liu further notes that both ‘Capital

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<sup>7</sup> For the week ending 18 May 2014, and 15 June 2014

<sup>8</sup> Telephone conferences of 1, 7 & 11 August 2014, statement in reply dated 13 August 2014, and statement to the Authority dated 15 August 2014

<sup>9</sup> Associated with one of the companies in the group

Liquor Limited' and 'The George on Willis'- the premises on which James largely performed his tasks - are not owned by either of the respondents.

[20] Mr Liu further states that Stewart Thwaites has recently commenced legal action in the High Court against him but has not produced documents relevant to that matter (and to this) so as to allow Mr Liu to adequately defend himself. Mr Liu says that the furnished payslips were prepared by either James or Stewart Thwaites' domestic partner who is also involved with the businesses.

[21] I have little doubt that a dismissal of an employee effected by way of a trespass notice in substitution of accepted minimum standards of procedural fairness set out at s.103A of the Employment Relations Act is likely to be found to be unjustified. In this regard I consider James has a strongly arguable case that he was unjustifiably dismissed. This preliminary view however is premised on James establishing he was an employee and further that his employer is either or both of the respondents.

[22] Having assessed the competing evidence furnished to the Authority I consider James has met the relatively low threshold of an arguable case that he was employed by Aoyama and/or Mr Liu. I accept that the identification of a particular entity as the payer of wages and/or the producer of payslips does not always lead to finding of an employment relationship<sup>10</sup>. However, I have no reason to doubt the authenticity of the payslips other than Mr Liu's assertion that they were not authored with his permission. I consider their existence, coupled with the email sent by James to Mr Liu in September 2013 (whereby information relevant to the payment of wages was provided), indicates there is an arguable case that James was an employee of Aoyama and/or Mr Liu.

#### *Arguable case for reinstatement*

[23] Section 125 of the Act provides that the Authority may reinstate if it is both practicable and reasonable to do so, although reinstatement is no longer the primary remedy for an unjustified dismissal.

[24] Mr Liu argued that reinstatement should not be available in circumstances where trespass notices exist. I have no information as to the basis for Aoyama's service of a trespass notice against James (although it is difficult not to form an

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<sup>10</sup> Judge Inglis in *Hutton v Provencocadmus Ltd (in Rec)* [2012] NZEmpC 207

impression that the trespass notices are in direct response to legal action initiated by Stewart Thwaites against the Liu family and associates).

[25] I am unwilling to accept an argument that a trespass notice prevents an order for interim reinstatement being made. I consider it is within Aoyama's power and/or Mr Liu's to have the trespass notice lifted and do not accept that the existence of that notice in and of itself makes an order for reinstatement impracticable and unreasonable.

[26] Nor was I was not provided with any evidence that serious misconduct or poor performance feature as reasons which may prevent an order of interim reinstatement for James. In this respect I consider there is an arguable case that if successful with his claims James may be reinstated. However the Authority is obliged to consider in a common sense way the prospective effects of an order for reinstatement. I find there are two practical impediments which militate against an order for interim reinstatement. The first is that although I have found there is an arguable case that James was employed by one or other of the respondents there remains some considerable uncertainty on this matter. Mr Liu's evidence, which has not been disputed, is that 'The George on Willis - the bar in which James was working at the time he was issued with trespass notices - is not owned by either of the respondents cited.

[27] The second reason is compelling. During the course of the investigation meeting James advised that he has "*no real intention*" of returning to work for Aoyama or Mr Liu and does not wish to be return to any of the premises owned by either of the respondents. James says all trust and confidence he previously had with Mr Liu has now gone.

[28] It needs to be noted that it remains unclear why James is seeking an order that has the effect of returning him to the workplace if that is not his objective. In these circumstances I do not consider reinstatement is at all practicable and reasonable on either an interim or permanent basis.

**Where does the balance of convenience lie between the parties including whether damages are an adequate remedy?**

[29] An assessment of where the balance of convenience lies requires an examination of the relative hardship which may arise if James is refused an order for interim reinstatement compared to the detriment to Aoyama and/or Mr Liu if an order for interim reinstatement is made but James' claims are not upheld.

[30] It emerged during the investigation meeting that James has obtained full time employment in the time between lodging his application with the Authority and the investigation. At the time of the investigation he has been working in his new position for two weeks. He says the application for interim reinstatement was made at a time he suddenly found himself without employment and a consequent income.

[31] Questions as where the balance of convenience lies includes consideration of how best to regulate the parties' respective positions for the period between the application for injunctive relief and when the substantive claims will be investigated, and whether monetary damages would be an appropriate alternative remedy. It is clear that James has proactively sought to mitigate his losses and his actions in this respect are commendable. However, having found alternative employment and with it a corresponding salary, the imperatives associated with this application appear to have already been addressed. It was clear from James' evidence that an award of compensation following a successful determination of his claims is his primary objective. I am unable to determine what (if any) compensation is appropriate until after James claims have been investigated and the evidence is examined.

[32] In the absence of persuasive reasons as to why damages are not an adequate remedy I am unable to find the balance of convenience favours James.

**Overall Justice**

[33] The Authority is required to stand back from the detail of the matter and consider where the overall justice lies. Section 127(4) of the Act provides that, when determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the object of the Act: "to *build productive employment relationships...*"

[34] I have found that James has a strongly arguable case that he may have been unjustifiably dismissed if it can be established that he was employed by one or both of the respondents.

[35] However James does not wish to physically return to his previous position and has obtained alternative employment. Further, the identity of his employer is yet to be established. In all the circumstances I find that the most appropriate response is to decline the application for reinstatement until a substantive determination can be made as to the status of the relationship between the parties. The application for interim reinstatement is declined.

### **Further mediation**

[36] James' claims are scheduled to be investigated in approximately 4 weeks' time on 24-25 September 2014. The Authority will be in contact with each of the parties in the near future to discuss a timetable for the exchange of evidence. In the interim the parties are directed to attend mediation with 10 days of this determination and endeavour in good faith to resolve their differences.

### **Costs**

[37] Costs are reserved.

Michele Ryan  
**Member of the Employment Relations Authority**