Determination Number: WA 39/06
File Number: 5032176

Under the Employment Relations Act 2000

BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
ER AUTHORITY WELLINGTON OFFICE

BETWEEN	Awhina Vailima (Applicant)
AND	General Distributors Limited (Respondent)
REPRESENTATIVES	R Buchanan for applicant S Langton for respondent
MEMBER OF AUTHORITY	G J Wood
INVESTIGATION MEETING	Wellington 13 March 2006
DATE OF DETERMINATION	20 March 2006

DETERMINATION OF THE AUTHORITY

Background and Facts

1. Ms Vailima is an employee of the respondent (referred to here as "Countdown" or "Countdown Wainuiomata"). Since October 2005 Ms Vailima has been unable to attend work because of stress, which she attributes to work related matters.

2. Since November 2005 she has been placed on unpaid sick leave as she had exhausted her paid sick leave entitlement.

3. Ms Vailima seeks an interim injunction in order for her to reinstated onto Countdown's payroll and be paid for the entire duration of the period that she has been unpaid to date and to continue to be paid until a substantive determination following an investigation by the Authority into her claims that she has suffered from unjustifiable workplace stress and practices. I note here that a finding in her favour in a substantive investigation setting could entitle her to compensation, including reimbursement for wages during the entire period of her unpaid sick leave.

4. Countdown does not accept that Ms Vailima has suffered from unjustifiable workplace stress or practices and has declined to pay her wages while she is unable to work, as she has exhausted her sick leave entitlement

5. Ms Vailima has given an undertaking that she will abide by any order that the Authority may make in respect of damages that are sustained by Countdown through the granting of the order for interim reinstatement (as she describes it) and that the Employment Relations Authority decides that she ought to pay.

6. A substantive investigation into the whole of the issues between the parties has been set down for 26 and 27 June 2006.

7. Ms Vailima claims that she was forced to work excessive hours at Countdown Wainuiomata, averaging 60 per week over a long period and that this, combined with medication she was taking for a dental problem, caused her to collapse at work in mid-2004. She still worked long hours after her return to work for over a year, including additional hours sought to help her pay for a trip to Samoa, but suffered a second major collapse in her health in October 2005. She attributes the reasons for this as being the long and, in some instances, unsociable hours of work required of her, the pressure put on by management to "hard manage" certain employees, and, after she declined to continue this "hard management" process, that she was subject to an insensitive and unnecessary disciplinary process, perhaps as retribution for her refusal to "hard manage" the employees in question.

8. Countdown denied that her working environment was the cause of either period of Ms Vailima's absences from work. They also deny that Ms Vailima was required to "hard manage" certain employees, that there was any retribution in the disciplinary action taken against her, or that it was handled insensitively, and note that the outcome of the disciplinary investigation was that no action was taken against Ms Vailima.

9. In determining whether an interim injunction should be granted, I must assume that Ms Vailima will be able to make out all of her claims.

10. Ms Vailima notes that she and her family are struggling to make ends meet on her husband's income alone and that she has had to rely on outside assistance to help them

get by. She noted that the pressure of her lost income has contributed to her anxiety and impacts heavily on her family, who are also suffering. It is not known when Ms Vailima will be able to return to work at Countdown Wainuiomata.

11. I was concerned about the adequacy of Ms Vailima's undertaking, so questioned her directly on it. I am satisfied that she understood the implication of the undertaking, namely that if she was unsuccessful she could be required to pay significant damages to Countdown. She also stated that while she did not know at this point how she would be able to honour her undertaking, if she was required to do so she would, even by raising a mortgage on her house if necessary.

The Law

12. The tests for an interim injunction are as set out in *Cliff v. Air New Zealand Ltd* [2005] 1 ERNZ 1 at p.9:

> *"Those tests are three:*
>
> - *First, whether the plaintiffs have an arguable case of unjustified dismissal;*
> - *Second, whether the balance of convenience (including the existence of alternative remedies sometimes said to be a separate test) favours the plaintiffs; and*
> - *Third, the remedy being discretionary, where the overall justice of the case lies until it can be heard (including particularly the respective strengths of the parties' case so far as they can be ascertained at this stage)."*

13. Countdown relied, in particular, on *Habgood v. Norske Skog Tasman Ltd* (unreported, R A Monaghan, AA202/05, 31 May 2005). Mrs Habgood, who was unable to work for Norske Skog, wanted reinstatement to the payroll in the interim. My colleague held that in cases such as this justice required Mrs Habgood to persuade her to a more than arguable level that there was some entitlement to which she should be reinstated. Otherwise in reality any order for reinstatement in the terms sought would amount to little more than the grant of a substantial loan, which was not the purpose of interim relief. Ms Monaghan held that Mrs Habgood had no outstanding entitlement to ordinary paid sick leave and it was only barely arguable, if at all, that she had an entitlement to extended sick leave up to 12 months. She therefore declined the application.

14. Ms Vailima relied, in particular, on *Whelen v. Board of Trustees of Hagley Community College* [1996] 2 ERNZ 97. In that case, Ms Whelen had been diagnosed as suffering from sick building syndrome. She took a year off on paid sick leave because of her illness. At the beginning of the next year, Ms Whelen indicated she wanted to return to work but she objected to what she saw as an unreasonable request from the College about where she was to work. She was granted an interim injunction requiring the College to pay her salary until the application for a permanent injunction was heard, as she had an arguable case and the balance of convenience and overall justice of the case favoured her.

15. In *Whelen*, as here, the employer declined to pay the worker as they were unable to meet their terms of the "wage/work" bargain. In particular, Ms Whelen believed she could not reasonably undertake the teaching duties required of her as head of department by working from a relocatable classroom outside the main teaching block. The essence of Ms Whelen's claim was that she had in effect been unjustifiably suspended. The Court noted, in particular, at p.111-113:

"In my view, upon the presently untested evidence, Ms Whelen has shown she has an arguable case concerning a contended personal grievance of being unjustifiably disadvantaged in her employment situation. I conclude there certainly are serious questions to be tried as between the plaintiff and the first defendant.

More particularly, I now stress, the plaintiff has an arguable case in the material and unusual circumstances of the case, that she has been, in substance, disciplined irregularly for contended breach of her employment contract – the emphasis is mine – because the disciplinary process provided for by the collective employment contract has not been followed.

> *…I now turn to the balance of convenience and the overall justice of the case in my determination as to whether the interlocutory injunction now sought by the plaintiff should, in the exercise of my principled discretion, be granted or withheld in this particular setting. To the extent that this approach is possible upon the material presently untested affidavit evidence, I have attempted to test the relative strengths of the respective parties' cases. … I have concluded that I should justly grant an interlocutory injunction in favour of Ms Whelen, rather than withhold interim injunctive relief as the first defendant has urged me to do. Having so concluded, however, I shall*

grant an interlocutory injunction upon particular terms which certainly are more restrictive in their contemplation than those expressly framed by the plaintiff.

… What is necessary, I conclude, given that Ms Whelen should not be required to work in, or recurrently have the need for significant access to the main building at the college until appropriate remedial work is undertaken to correct its sick building syndrome, is an ordered structured means which will facilitate the plaintiff substantially fulfilling the duties of her employment working essentially from a relocatable building available to her. Through a process of constructive purposeful dialogue between the parties I believe that with committed goodwill they can resolve the present significant difficulties which exist. I consider such an outcome could have been achieved if the parties had engaged in a course of purposeful constructive discussion earlier and appropriately plan for the plaintiff working from a relocatable building with sufficiently structured/planned assistance from the first defendant which would minimise Ms Whelen's present inability, for occupational health reasons, to have access to the main building. I am confident further mediated assistance can, with committed goodwill from the parties, lead to the plaintiff resuming both her teaching duties at the College at a relatively early date and also the discharge of her duties as the head of the social science department."

16. In *Whelen*, mediation was therefore ordered on 22 April and pay was ordered to be reinstated from 10 April until 28 June, or until further order of the Court subject to leave for further orders. I note here that the application was made before Ms Whelen's sick leave ended, even although the Court did not hear the case until after Ms Whelen's pay had been stopped.

17. These were the only cases directly on point to the issue with respect to a claim where an employee or ex-employee wanted to be reinstated to the payroll without having to work for that pay because they were unable to attend a workplace because of illness.

Determination

18. While framed in that way I do not consider this is a claim for interim reinstatement. Rather it is in effect, as described above, a claim for an interim injunction for Ms Vailima to be paid for a period of absence through illness. The Authority's jurisdiction to entertain this sort of application, while currently disputed in some areas, is provided for in *Jerram v. Franklin Veterinary Services (1997) Ltd* [2001] ERNZ 157.

19. In both *Hobgood* and *Whelen*, the employee had no contractual right to further paid sick leave, as is the case with Ms Vailima. Neither case advances the law in any general or specific way, I hold, except that *Whelen* is authority for the proposition that

interim relief can be awarded to employees who will in effect be on paid sick leave even although they have utilised their contractual right to sick leave. I must therefore reject Countdown's submissions on the issue of whether or not an application can ever succeed in circumstances such as here, as the Employment Court's judgment is binding on the Authority. One distinguishing factor in *Whelen*, however, was that Ms Whelen was willing to return to work, albeit that the parties could not agree on all the terms of that return, while Ms Vailima is unable to return to work at present.

20. I find that Ms Vailima does have a tenable, arguable case (*Cliff* applied). If Ms Vailima can make out her claims in fact (which we must assume at this interim stage), then Ms Vailima would be entitled to claim compensation for the lost remuneration she has suffered from having to go on unpaid sick leave. Whether or not she does succeed will depend on matters of credibility, the strength of medical evidence about the cause of her illness and the appropriateness of Countdown's responses to it. While I acknowledge that it appears that Ms Vailima has not directly raised workplace stress as the cause of her first collapse at work at least, there is no need for the detailed assessment of risk as required in *Attorney-General v. Gilbert* [2002] 1 ERNZ 31 in relation to claims that Countdown required her to act in breach of its duty of trust and good confidence in her, such as by "hard managing" other staff, or by carrying out a disciplinary investigation into her conduct in an unreasonable way.

21. I turn now to the balance of convenience. This is a matter of examining the question of relative hardship as between the parties. There is no issue of Ms Vailima being deprived of her right to work, at least in the interim, so this matter is in essence one about loss of income. Ms Vailima's continued employment with Countdown is not in jeopardy – she remains on staff. If she is successful in her claims in June she will be entitled to remedies, including interest on monies ordered, that will fully compensate her for the wrongs found to have been done to her. Ms Vailima cannot claim, as did Ms Whelen, that she was in effect being unjustifiably suspended. These factors favour Countdown.

22. While it will be inconvenient to Countdown Wainuiomata, in a budgetary sense, to meet additional payments, as would be required by reinstating Ms Vailima to the payroll, it's parent company is a substantial commercial entity and will not suffer as

greatly relatively in financial terms as Ms Vailima would if her application were not granted, even although Countdown will not be getting any benefit in terms of work output from the reinstatement of Ms Vailima to the payroll. There is nothing in this case that suggests that Ms Vailima is an undeserving applicant either. It therefore follows that the balance of convenience tilts in Ms Vailima's favour on these matters (*Melville v. Chatham Islands Council* [1999] 2 ERNZ 76 applied).

23. Neither *Whelen* nor *Hobgood* assessed the issue of the adequacy of damages directly. The present and ongoing financial difficulties suffered by Ms Vailima are reasons why a later order by the Authority for reimbursements of lost remuneration would not be adequate damages for her, I hold (*Godfrey v. Sensation Yachts Ltd* (unreported, Travis J, AC44A/99, 29 June 1999) applied). The fact that Ms Vailima could currently mortgage the family house to fund this application is not sufficient grounds to negate this finding, as absolute impecuniosity by an employee is not necessary in this context, see for example *Air New Zealand v. Bisson* (unreported, Shaw J, CC6A/05, 17 June 2005). Furthermore, it would not be consistent with the objects of the Act to build productive employment relationships to suggest that Ms Vailima was under any obligation to resign and find alternative employment in order to mitigate the losses she is currently suffering.

24. On the other hand, Ms Vailima does have the option to co-operate with Countdown over a return to work, subject to the state of her health, of course. Furthermore, there is no doubt that Countdown will be able to meet any financial award against it and an award of interest would cover the "time cost of money" inherent in the investigation process. There are therefore competing factors in respect of whether damages are an adequate remedy for Ms Vailima, all of which must be considered as part of the balance of convenience test.

25. With respect to the adequacy of Ms Vailima's undertaking as a remedy for Countdown were it to be ultimately successful, I accept that Ms Vailima's statements about her undertaking were made genuinely. The question must still remain, however, particularly in the absence of financial information in support of the undertaking, about whether the undertaking would in fact be adequate, from Countdown's perspective at least, were Countdown to be ultimately successful. This is particularly

important in a situation where the applicant employee is not being required to work for their pay and this is not at the election of the employer.

26. Balancing all of these factors I find that the balance of convenience favours Countdown, albeit by a small margin.

27. I turn finally to the criterion of overall justice. The only new factor applicable here is the relative strength of the parties' cases. It will be for Ms Vailima to persuade me that the actions of Countdown have unjustifiably disadvantaged her. She will have substantial hurdles to meet in terms of her claim for compensation for workplace stress resulting from excessive hours of work, particularly as she does not appear to have raised them with Countdown directly before her health broke down in October 2005, yet sought additional hours in that period, for the reasons provided by the Court of Appeal in *Gilbert*. Furthermore, there is nothing on the face of the disciplinary investigation carried out by Countdown against Ms Vailima, which resulted in no disciplinary action being taken against her, which lends itself to the immediate conclusion that it was carried out in a harsh, insensitive or retributive way. On the other hand, Ms Vailima's claim that she was required to "hard manage" staff unjustifiably basically involves a finding on credibility and is not amenable to any form of preliminary pre-assessment. Overall, therefore, an assessment of the relative strength of the parties gives no cause to adjust my conclusion that the overall justice of the matter, like the balance of convenience, favours Countdown.

28. I therefore dismiss Ms Vailima's application for an interim injunction.

29. Ms Vailima remains without income accordingly. Therefore I consider it advisable that she and her medical advisers cooperate speedily and fully with Countdown to provide an agreed rehabilitation programme that will facilitate Ms Vailima's full return to work as soon as possible. That should occur as a matter of good faith between the parties to this employment relationship. It is not necessary for Ms Vailima to wait until the Authority determines the substantive issues between the parties, given the duties of good faith between the parties, unless Ms Vailima's medical advisers, in full knowledge of this determination, conclude otherwise. Even then it would seem advisable for preliminary steps to be undertaken. This will allow

the parties to get back on track with their employment relationship, rather than simply focus on issues of dispute between them.

Costs

30. Costs are reserved.

G J Wood
Member of Employment Relations Authority