

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 9/10
5288502

BETWEEN GERT VISSER
 Applicant

 WAIOTAHU CONTRACTORS
AND LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: S Austin, advocate for applicant
 K Stretton, advocate for respondent

Submissions received: 21 and 30 December 2009 from applicant
 No submissions from respondent

Determination: 14 January 2010

**DETERMINATION OF THE AUTHORITY
ON APPLICATION FOR INTERIM REINSTATEMENT**

Employment relationship problem

[1] Waiotahi Contractors Limited (WCL) employed Gert Visser as a project manager in its civil engineering business. It terminated his employment by reason of redundancy in November 2009.

[2] Mr Visser says he was dismissed unjustifiably and seeks reinstatement.

[3] Mr Visser also seeks an order for interim reinstatement. The parties attended mediation, but were unable to resolve the substantive problem or reach an arrangement in respect of the application for an interim order. Accordingly this determination addresses the application for an order for interim reinstatement. By agreement with the parties, the application for an interim order was heard on the papers.

- [4] The issues to be addressed in determining the application are:
- a. whether there is an arguable case of unjustified dismissal;
 - b. whether the balance of convenience favours Mr Visser or WCL; and
 - c. where overall justice lies.

Failure to meet timetabling arrangements

[5] Preliminary arrangements regarding this application were agreed during a conference call between the Authority and the parties on 1 December 2009. A second call was convened on 16 December. Its primary purpose was to timetable the filing of submissions, although the filing of a further affidavit from the respondent was also discussed and timetabled.

[6] The timetable was set following discussion about the practical difficulties posed by the looming holiday break on the one hand, and the urgency of the matter on the other. It was confirmed to the parties and Mr Visser has complied with it.

[7] WCL did not. Its further affidavit was filed late, although the affidavit was at least received before the break. Submissions were to be filed on 24 December 2009, but were not received. There was neither request for an extension of time for filing submissions, nor any approach to the Authority on the matter at all.

[8] I have therefore determined this application without taking into account the three pages of submissions received from WCL on 8 January 2010. However WCL's position was also set out in some detail in the statement in reply, and I have taken into account the matters raised in it.

Background

[9] The following account of the facts is based on the affidavits filed for the purpose of the interim application. The account does not amount to findings for the purpose of any final determination of the substantive claim.

[10] Mr Visser's position was created at the end of 2008. It was intended to incorporate some of the activities then being carried out by WCL's directors, and assist with what was expected to be a growing workload.

[11] According to the first affidavit of WCL's managing director, Richard Claydon, the New Zealand economy 'took a dive' and the local civil engineering sector became very competitive. Poor trading in the winter of 2009, coupled with decreasing turnover and increasing overheads, led to a recommendation from the company's accountant that measures be taken to reduce overheads. A copy of the company's profit and loss report for October 2009 tended to support Mr Claydon's statements.

[12] In a memorandum to staff dated 17 June 2009 WCL addressed the anticipated quiet winter period and expressed a view that economic conditions were likely to make matters worse. There was an attempt at a positive tone but the possibility that staff would be asked to take annual leave was raised, as was the possibility that ongoing work shortages may mean a need to reduce staff numbers. Material of this kind tends to support Mr Claydon's statements that the company needed to consider ways of protecting its position in the light of anticipated trading conditions.

[13] Mr Visser did not agree with Mr Claydon's general statements about the New Zealand economy or the local trading environment.

[14] During a directors' meeting on an unspecified date, the future of the roles of both the CEO and the project manager were debated. The debate was called for in a letter from another of the directors. The letter was omitted from Mr Claydon's affidavits and was not available as at 24 December 2009. I proceeded without it.

[15] The directors decided to disestablish both positions. Mr Claydon said the decisions in respect of both positions were made for commercial reasons, in that neither position could be justified from an operational or financial perspective.

[16] Mr Claydon said further that the directors agreed the CEO, Kenrick Knowlson, should advise Mr Visser that his continued employment was under consideration. Since Mr Claydon has in effect said he also consulted with Mr Visser himself, it is not necessary to address whether Mr Knowlson was asked to or did give the advice Mr

Claydon indicated. In any event, Mr Knowlson did not provide an affidavit and his views are not properly part of the evidence.

[17] According to Mr Claydon, on 13 November 2009 he spoke to Mr Visser, advising that the company was considering whether it could justify continuing Mr Visser's role. Mr Visser raised a concern about his immigration status, and the directors undertook to take that matter into account. Mr Claydon said in addition that he suggested a meeting on 16 November to further discuss the possible disestablishment of the position. Mr Visser did not approach him on 16 November. The directors concluded Mr Visser had nothing more to say.

[18] Mr Visser disputed Mr Claydon's account of the discussions of 13 November to the extent that they related to arrangements for a further meeting. He said he attempted to approach Mr Claydon on 16 and 17 November. For present purposes I accept that he did so, but also that Mr Claydon was unaware of the attempts.

[19] On either 17 or 18 November Mr Claydon informed Mr Visser of the decision to make him redundant. Mr Claydon said he first confirmed whether Mr Visser had any ideas that would help keep his role. Mr Visser disputed that, saying he was told the directors' decision had not changed, and he was to be made redundant.

[20] Also on 18 November Mr Claydon issued a memorandum to staff advising of the disestablishment of the CEO's and project manager's positions. The memorandum went on to comment on the company's workload, referring to new contracts in Whakatane and Opotiki to a total value of approximately \$1m and to other ongoing work. Mr Claydon said in his affidavit that the Opotiki contract was to be overseen by an Opotiki-based director of WCL.

[21] Information about workload, of the kind set out in the memorandum, comprises one of the reasons why Mr Visser does not accept WCL's workload was such that the disestablishment of his position was justified. For his part Mr Claydon said the memorandum was issued to reassure the remaining staff that the company had work available. He said that in fact the work was fairly minor, and some was priced very aggressively to allow WCL to keep some of its specialist staff in employment.

[22] Mr Visser was given 14 days' notice of the termination of his employment and was not required to work on the company's premises during the second half of that time.

Arguable case

[23] The submission that Mr Visser has an arguable case for unjustified dismissal relied first on a challenge to the genuineness of the redundancy. Mr Visser believes his position still exists, and is necessary. He believes the downturn in the winter of 2009 was part of the usual seasonal fluctuation, and that work remains available.

[24] Mr Claydon says the restructuring, involving the disestablishment of two senior positions and the redistribution of the duties, was imposed for genuine reasons. It was prompted by WCL's view of its current and likely future workload, and in light of that WCL was entitled to act to protect and preserve its trading position. In doing so, in effect it reverted to the structure under which it operated immediately prior to Mr Visser's appointment 12 months earlier.

[25] If Mr Visser is relying on the continued existence of his former duties when he says his position still exists, then WCL was entitled to redistribute the duties provided it did so for genuine reasons. The mere continued existence of the duties does not necessarily mean the position continued to exist.

[26] If Mr Visser is going further to say he believes the workload is such that his position is still required and should not have been disestablished, again the question is primarily one of the good faith and genuineness of WCL's decision. Otherwise it is still the law that business decisions are for the employer to make. If WCL assesses, for genuine reasons, that the workload does not justify the continuation of the position then it is entitled to make that assessment and act on it.

[27] Further to the availability of work, since the company continues to trade and to maintain a workforce then the continued tendering for and obtaining of work is unremarkable. The mere fact that work remains available, or continues to be sought, is not an indicator that the redundancy was not genuine. For example Mr Austin referred in submissions to Mr Visser's belief that he could project manage the two

new tenders referred to in WCL's 18 November memorandum. Although that may be work Mr Visser would have undertaken were it not for the redundancy, Mr Claydon said the Opotiki tender in particular is to be overseen by a company director who lives in Opotiki. That is consistent with WCL's position on the decision to restructure and to redistribute the duties, rather than an indicator that the redundancy was not genuine.

[28] Next, Mr Visser disputed the genuineness of the redundancy in that he said two new positions were created – one in July 2009 and one in November 2009 – both of which had job descriptions virtually identical to his. Mr Claydon denied the allegation, saying the positions to which he believed Mr Visser referred involved pricing for tenders and did not involve duties which Mr Visser had carried out. I have no other information about the positions or the duties.

[29] Mr Visser also pointed to the fact that WCL filled other vacancies between July and November 2009. This was an indicator that the financial pressures on WCL were not as serious as Mr Claydon was arguing. In reply Mr Claydon provided a schedule identifying the new employees and their positions, and saying the positions were necessary for operational reasons. Most of the positions were junior or unskilled positions, with one management position being a replacement for an employee who left. Accordingly I regard the information as consistent simply with the fact that the company continued to trade. WCL was entitled to continue to employ staff to meet its operational needs.

[30] In another ground of challenge to the genuineness of the redundancy, Mr Visser says he was targeted for redundancy.

[31] He did not expand to the Authority on his reasons for this view except that he said in or about May 2009 he was informed the directors liked his work, and he was given a pay rise. Then on or about 29 July 2009 Mr Claydon gave him a final written warning out of the blue. He now seeks or will seek to dispute its justification, although as I understand it he did not seek to dispute the matter at the time because he was unaware that he could. I have no information about the warning beyond that, and the letter of warning was not produced.

[32] While it was not necessary for the purposes of the application for an interim order to present the full evidence in support of Mr Visser's allegation that he was targeted, bare statements of the above kind are not sufficient to indicate even whether the matter is arguable. Although the question of whether Mr Visser was targeted, for some reason not yet specified, remains open to be addressed during the substantive investigation, I cannot make any finding on whether the issue is arguable. For present purposes I set it aside.

[33] Secondly, Mr Visser says an unfair procedure was followed in respect of his redundancy, citing in particular the lack of consultation.

[34] The applicable law is set out in the decision of the Employment Court in **Simpsons Farms Limited v Aberhart**¹. There the court summarised earlier case law regarding an employer's obligation to consult with an employee who may be affected by a redundancy, as well as discussing the effect on redundancy dismissals of s 103A of the Employment Relations Act 2000. It pointed out that s 4(1A) of the Act – which detailed aspects of the statutory obligation to deal in good faith – included requirements that an employer proposing to implement redundancies provide to the affected employees access to information about the proposal, and an opportunity to comment on it, before the decision is made. The court concluded:

“[65] Following the new s 103A, the Authority or the Court must consider on an objective basis whether the decisions made by the employer, and the employer's manner of making those decisions, were what a fair and reasonable employer would have done in all the circumstances at the relevant time. The statutory obligations of good faith dealing and, in particular, those of s 4(1A)(c) inform the decision under s 103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s 4 including as to consultation because a fair and reasonable employer will comply with the law.”²

[35] Even if I resolved in WCL's favour any conflict in the accounts of the consultation process, on the available material I would find it arguable that the consultation process did not meet the above requirements.

¹ [2006] ERNZ 825

² P 842

[36] Mr Austin went further, submitting that WCL's breaches of process are so serious as to cast doubt on the genuineness of the redundancy. If he meant that a proper process of consultation would have led WCL to decide not to disestablish Mr Visser's position, I regard that as no more than weakly arguable. If, as seemed to be the case, he says the employer is obliged to show there was no possible alternative to the redundancy, and the failure to properly consult meant it could not do so, I am aware such a test has been suggested but not that it has been followed and applied as the correct test in law.

[37] For the above reasons I find Mr Visser has an arguable case that his dismissal on the ground of redundancy was unjustified, although on the available material I consider his case in respect of the genuineness of the redundancy to be no more than weakly arguable.

The balance of convenience

[38] In his first affidavit Mr Visser said the balance of convenience favours him because of his financial circumstances and the effect of the loss of employment on his immigration status. In a supplementary affidavit he indicated that his immigration status has been resolved, so I do not address it any further.

[39] Regarding his financial circumstances, Mr Visser supports his family including his wife and two sons. Mrs Visser has casual relief work which is not sufficient for the family without Mr Visser's income.

[40] Mr Visser said Mr Austin has approached WINZ on his behalf, to be advised that Mr Visser does not qualify for any support through that agency. Whether or not Mr Visser is entitled to support from WINZ I accept that the loss of his income has a significant effect on the family finances.

[41] To the extent that WCL's position on the balance of convenience is contained in its statement in reply, it says any losses Mr Visser suffers can be remedied by the orders available if his dismissal is found to be unjustified. There was also an allegation that Mr Visser has redundancy insurance, which was denied.

[42] Beyond saying there was no position for Mr Visser, there was no further information about why the balance of convenience favours WCL.

[43] In these circumstances I conclude the balance of convenience favours Mr Visser.

Overall justice

[44] Assessing overall justice involves stepping back and assessing the relative strength of the parties' cases, as well as taking account of the matters just addressed and any other relevant matters.

[45] I have found that Mr Visser has an arguable case principally on the ground of the adequacy of WCL's consultation process measured against the test in the **Simpson's Farms** case. I have also found the balance of convenience favours him.

[46] There is another relevant factor. Although the primacy of reinstatement as a remedy was pointed out, the prospect of ultimate reinstatement is an appropriate consideration in an application for an order for interim reinstatement³. The prospect must be assessed with reference to the fact that reinstatement is the primary remedy, but also that it is to be ordered wherever practicable. In general when a position has disappeared and a genuine redundancy has resulted, it is unlikely reinstatement will be found to be practicable.

[47] Here I have found that the concerns about the genuineness of the redundancy are weakly arguable. Mr Visser says work is still available to the company and that most (if not all) of his duties are still required. It is probable this can be proved, although there was nothing to suggest the duties have not been redistributed as Mr Claydon indicated. Mr Visser does not accept that the company is facing the commercial difficulties it says it is, but Mr Claydon has provided some information in support of his explanations of several of the observations Mr Visser invoked in support of his view. If the explanations are supported by full evidence during the

³ **Madar v P & O Services (NZ) Limited** [1999] 2 ERNZ 174; **Counties Manukau District Health Board v Trembath** [2001] ERNZ 847

substantive investigation, Mr Visser will in effect be disagreeing with a business decision to an extent not open to him.

[48] The weakness of the argument regarding genuineness leads me to consider there to be a strong likelihood reinstatement will be found not to be practicable even if Mr Visser's dismissal is found to be unjustified. Accordingly an order for interim reinstatement is not appropriate.

Conclusion

[49] For the above reasons the application for an order for interim reinstatement is declined.

Costs

[50] Costs are reserved pending a final resolution of this matter.

R A Monaghan

Member of the Employment Relations Authority