

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Kenneth Worsley (applicant)
AND	AFFCO New Zealand Limited (respondent)
REPRESENTATIVES	Stuart Webster for the applicant Anthony Drake for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Napier, 15 September 2006
DATE OF DETERMINATION	19 September 2006

**DETERMINATION OF AUTHORITY: Application for Interim Reinstatement and for
Urgency**

Employment Relationship Problem

1. By way of urgency, Mr Worsley seeks an order for interim reinstatement under s. 127 of the Act – application received 8 September 2006.
2. The Company opposes the application – statement in reply received on 13 September.

3. The parties have undertaken mediation.
4. During a telephone conference convened on 11 September the parties agreed to a one-day investigation in Napier on 15 September. They usefully provided affidavits and relevant documents in advance of the investigation.

Background

5. Mr Worsley was employed by the Company from 1968 until 1992, when he was made redundant, and from 1995, until dismissed on 11 July 2006. Mr Worsley asks that he be reinstated to his position of Cool Store Supervisor, Wairoa.
6. On or about 20 November 2005 the Company received information that theft was occurring at the Wairoa plant. It engaged private consultants and undertook a surveillance of the plant for several months, as well as interviewing staff. The Company says the consultants identified significant stock losses from the Company's cool store – the applicant's area of responsibility. It came to the conclusion that Mr Worsley "*falsified company records and ... failed to act and work with reasonable skill and care*" (par 22, statement in reply).
7. The Company says, after conducting a proper investigation, it reached the view that Mr Worsley's continued and deliberate failure to adhere to its inventory protocol and policies,

... so deeply impaired, and was so destructive (of), the basic confidence and trust essential to their employment relationship that the company had no option but to dismiss him.

...

We also note that Mr Worsley exacerbated matters by instructing a member of his staff to delete a file from (the Company's) inventory system while he was on suspension.

(letter from Company's solicitors dated 3 August 2006)

Parties' Positions

Applicant's Position

8. In his application and during the investigation, Mr Worsley advanced a number of arguments in support of his claim for interim reinstatement, including the following: he says he has not delayed bringing his claim for interim reinstatement, and that the intervening period was properly made use of by himself, with counsel's assistance, attempting – directly and through mediation – to resolve this employment relationship problem. No disadvantage has been occasioned the employer as the Wairoa plant has not operated during this period and (as was confirmed during the investigation) no recommencement date has yet been scheduled by the respondent.
9. Mr Worsley disputes the basis of his termination, i.e. the respondent's claim he failed to follow policy and protocol. He says no such policy or protocol exists or was in place. The applicant has difficulty in accepting he breached something that does not exist. He similarly denies continually and deliberately failing to adhere to the Company's inventory protocol and policies, but does accept that he instructed a staff member to delete a file from the respondent's inventory system while he was suspended. Of the latter, Mr Worsley expresses regret for his action, that he cannot explain it, accepts it would have inconvenienced other staff, but says it is unrelated to the matters being investigated and his suspension.
10. The applicant describes himself as a long-serving employee with a hitherto unblemished record. He says he is now employed as a member of a road gang, doing bridge work. He describes the work as involving heavy labour, constructing gabion walls beneath the Matawai Bridge, which has taken its toll on him physically. He also says that, because of current employment, he has to live away from home during the week. He works 11 hour days, at \$13 per hour, i.e. nearly half of what he was paid by the Company. Mr Worsley says it is not an option for him to move out of the region (in search of better paid work) as that would significantly impact on contact with his wider family, particularly his 5 grandchildren.
11. The applicant says the dismissal has caused him to lose standing within the community and has impacted on his health. Damages would not, Mr Worsley says,

adequately compensate him for job loss as he was earning \$54,000 p.a. with the Company and better employment is not available in the region. Damages would also not address the ongoing humiliation he feels or the damage to his reputation. The killing season is due to recommence shortly and the practical implementation of an order for permanent reinstatement will, as a result, become more difficult if an interim order for reinstatement is not made.

12. While admitting to instructing the deletion of a work programme, Mr Worsley says its impact on the respondent was at a low level, that it was not an attempt to cover up but, while he cannot explain it, his action was occasioned by the stress he was under following his first disciplinary interview on 4 July: it was not typical behaviour and should not disentitle him to interim reinstatement.

Respondent's Position

13. The Company opposes Mr Worsley's interim reinstatement on several grounds, including their view that the position of Cool Store Supervisor is a management position requiring a high degree of trust and confidence. It says that Mr Worsley, while trained in its computerised inventory system, failed to implement appropriate procedures for dealing with missing stock, in particular to investigate reasons for stock missing and to ensure the freezer was secured. His actions caused the Company significant financial loss that it measures as over \$210,000.
14. The Company says that Mr Worsley's direction to a subordinate to delete a forward working plan was a deliberate act of sabotage, which of itself amounted to serious misconduct, and is a serious bar to his reinstatement. It also says the applicant has delayed in bringing on his personal grievance and that, also, is a bar to reinstatement. Reinstatement is not acceptable to the Company because, it says, Mr Worsley's actions concealed or allowed a culture of dishonesty. The applicant has previously displayed strong resistance to change and, since his departure, the Company has introduced new and further controls and procedures.
15. There is no evidence of irreparable harm to Mr Worsley in the event his application for interim relief is refused, whereas the impact on the Company's operation would be significant because of the evidence of dishonesty on the applicant's part,

including directing another employee to delete a work plan and directing the deletion of missing stock from the Company's inventory without conducting a proper investigation into the reasons for its absence.

16. The applicant failed in his duty of care to the respondent, to act with skill and care: that failure goes to trust and confidence, which cannot be re-established.
17. The balance of convenience lies in the Company's favour for two reasons: first, Mr Worsley turned down the opportunity to have a substantive investigation into his grievance as early as November of this year. Second, because of contributory fault, the applicant is unlikely to enjoy reinstatement as a substantive remedy.
18. In respect of overall justice, there are no circumstances applying to the applicant that could be said to be exceptional. His personal grievance is of a standard nature. The argument of limited job opportunities in Wairoa does not suffice. The test to be applied must be that of what is sensible and practicable for both parties. Other remedies, including compensation, are available to the applicant, as is an early date for a substantive investigation.

Discussion

19. The law in respect of urgent, interim reinstatement applications is well known, in particular the following standard questions:
 - a. *Does the applicant have an arguable case of unjustifiable dismissal?*
 - b. *If so, does the balance of convenience favour the grant of interim relief?*
 - c. *Nevertheless, are there alternative remedies available to the applicant?*
 - d. *Where does the overall justice of the case lie?*

(Baker v Armourguard Security Ltd [1998] 1 ERNZ 424 at 435)

20. These four elements are not to be applied mechanically and it appears from many decisions of the Employment Court that the balance of convenience is the most important and guiding principle.

Arguable Case

21. It is well settled in relation to personal grievances that an employer must justify the dismissal. Nothing emerged from the interim investigation to suggest otherwise and counsel for the respondent, Mr Anthony Drake, properly conceded that his client accepted Mr Worsley had an arguable case.

Balance of Convenience and Alternative Remedies

22. Mr Worsley has employment, albeit of a physically more demanding nature, with less attractive hours and pay, and one that requires him to spend the working week away from his home. If successful with his grievance, the applicant stands to recover lost income and compensation for humiliation, etc less any contributory fault reduction should it be applicable. The plant is not operating at present and no date has been set for the resumption of the killing season. Dates for a substantive investigation were available in November (as advised to the applicant), but Mr Worsley advised he wanted instead to proceed with the interim investigation. The balance of convenience and alternative remedies do not support Mr Worsley's interim reinstatement.

Overall Justice

23. As I made clear to the Company during the investigation, the respondent faces serious difficulty in justifying Mr Worsley's dismissal. This is because of the absence of protocols or procedures, written and/or oral, that he is said to have breached. The evidence provided by the Company during the interim investigation only made clear that it would struggle to justify Mr Worsley's dismissal: there is little evidence so far to support its claim that he continually and deliberately failed to adhere to those policies and protocol. This is because the Company concedes that, until its dismissal of the respondent, it appears Mr Worsley had a blameless record

and that it is almost certain these matters were never previously put to him, by way of a performance evaluation or the like.

24. A reference produced by the applicant on the day of the interim investigation, signed off by the plant's previous manager, Mr Mike Laurence, and dated 1 July 2006, describes the applicant in entirely positive terms. Of course it is unlikely Mr Worsley would bother to produce a reference that did not describe him in that manner. However, the Company admits it knows of no earlier performance issues in respect of the applicant. I am therefore satisfied that it is likely Mr Worsley met protocol and procedural requirements previously administered by the respondent's most senior manager at the plant, Mr Laurence, and that he had no reason to believe or imagine he might need to perform differently.
25. Tellingly, I find, the Company's senior manager responsible for the investigation into Mr Worsley and his dismissal, Mr Tony Miles, elected not to interview Mr Laurence before dismissing the applicant. The reason he gave is that he believed the latter's evidence would not be credible, as Mr Laurence resigned his position at or around the same time and that his resignation was linked to the Company's investigation. I do not accept Mr Miles' approach as fair or reasonable. I find instead that Mr Miles deliberately ignored an important source of information with which to properly evaluate the applicant's conduct.
26. I am therefore satisfied that the primary claim advanced by the Company, that Mr Worsley failed to act with reasonable care and skill (par 15 of the statement in reply) is so far not made out, is highly unlikely to be able to succeed in the context of a substantive investigation and therefore the applicant is most likely to succeed with his claims.
27. There is similarly no evidence to support the Company's claim the applicant falsified Company records (par 22 of the statement in reply), or that his conduct included intentional and deliberate acts of falsification of Company records (par 24 (a) (iii)) and/or that Mr Worsley instructed or requested another staff member to falsify records by incorrectly writing off or reclassifying missing stock, without proper investigation (par 24 (a) (iv)).

28. Setting aside for one moment Mr Worsley's admission of directing another employee to delete a work programme, there is therefore no basis to the Company's claim it cannot have trust or confidence in the applicant.
29. But, should Mr Worsley's admission of directing another to delete a work programme disentitle the applicant to interim reinstatement as a matter of overall justice? For the following reasons I am satisfied it should not:
- The evidence the direction may have been in support of a cover up of missing stock was not clearly made out and is hotly denied by Mr Worsley. It is a matter best dealt with in a substantive investigation, when examples of the work plans can be compared with the copy of the one that the applicant is said to have directed to be deleted and contributory fault more adequately measured.
 - In the absence of any evidence of actual damage, Mr Worsley should not be barred from reinstatement on the basis alone of his admission his actions would have inconvenienced his colleagues; that instead is a matter for a contributory fault finding.
 - It would be unjust for what appears to be an exemplary work record of 30-years to be set aside by what has all the appearance of being a spur of the moment, low-level action brought about by the self-evident stress the applicant found himself under at the first disciplinary interview on 4 July.
30. Finally, I am reinforced in my finding by the following: there is strong preliminary evidence of the Company running a grossly unfair investigation into Mr Worsley's performance and of predetermining its outcome. That is because of the admission from both the respondent's independent investigator into the missing stock problem at Wairoa, Mr Peter Archer, and from Mr Miles, that – between the first disciplinary interview on 4 July and the applicant's dismissal 7 days later, on 11 July – the latter had determined to dismiss the applicant. The second meeting was therefore a charade. The explanations the applicant attempted to give in it clearly counted for nothing. Mr Worsley's assessment, from the body language of the management

representatives with whom he met at the 4 July meeting, that he was to be dismissed, was both perceptive and accurate.

31. Because of the startling absence of apparent evidence in support of the major ground for dismissing the applicant, his otherwise blameless 30-year service, the seriously flawed investigation by the respondent and the strong indications of predetermination, and notwithstanding the applicant's apparent contributory fault, the overall justice is in favour of Mr Worsley's reinstatement to his position on an interim basis with effect from the date of this determination.
32. As advised to the parties today, and so as to assist what is clearly an urgent employment relationship problem, and because of fixture fall out, I am now able to move to a substantive investigation on 3 or 4 or 5 and 6 October 2006, subject to the convenience of the parties. In the meanwhile, and because of the conclusions reached above, I am satisfied that parties would benefit from further mediation and direct them to do so no later than Friday 29 September 2006: s. 159 of the Act applied. A telephone conference will be convened with the parties in the near future to timetable the filing of witness statements and documentary evidence, as well as statements of problem and in reply in respect of the substantive proceedings.

Determination

33. I find in favour of the applicant, Mr Kenneth Worsley's, claim that he be granted interim reinstatement to his position with the respondent, AFFCO New Zealand Limited, as Cool Store Supervisor, Mahia.
34. Costs are reserved.

Denis Asher
Member of Employment Relations Authority