IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 97
ARC 72/13

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	S Plaintiff
AND	L Limited Defendant

Hearing:	6 June 2014 (heard at Auckland)
Appearances:	Y, advocate for the plaintiff R Harrison and E McWatt, counsel for the defendant
Judgment:	18 June 2014

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This is a challenge to the determination of the Employment Relations Authority (the Authority) declining to order S's reinstatement in employment with L Limited pending a substantive hearing and decision on his claim that he was dismissed unjustifiably, and for remedies including reinstatement.[1]

[2] To avoid infringing non-publication orders made by other courts, and to preserve the integrity of earlier orders made in this Court, I have made orders prohibiting publication of the name of S, his advocate Y, L Limited, its staff and any information that may identify any of these.

[1] *A v B* [2013] NZERA Auckland 331.

[3] S works in what might be described broadly as the financial services sector. L Limited is a substantial entity operating in that sector. After having worked for another employer in another part of the financial services sector, S was approached on behalf of L Limited to work for it. He agreed to do so and was appointed to the position of Work Force Planner. Before S was able to start his employment, he was arrested by the Police and charged with an offence allegedly relating to events which took place before his engagement by L Limited. S says, and it appears that L Limited accepts, that until his arrest by the Police, S had no knowledge of that possibility or that he was the subject of investigation for financial impropriety. In these circumstances, L Limited does not criticise S for not disclosing to it these potential future issues at the time of his engagement by it.

[4] Following his arrest, S was granted bail to appear in the District Court on a specified date. He did not provide information as to what had happened or as to the ongoing prosecution.

[5] Some person or persons, however, informed L Limited that S was facing "fraud charges". This information caused L Limited to raise these matters with S. Although L Limited kept S on in employment for some period, this was subject to conditions that the company says S did not abide by. Ultimately, S was dismissed by L Limited.

[6] The Court must decide, first, whether the plaintiff has an arguable case both that he was dismissed unjustifiably and that he will be reinstated in employment as a remedy or as part of his remedies for unjustified dismissal. Second, if so, the Court must consider where the balance of convenience will lie between the parties pending the substantive outcome. Finally, because the remedy is discretionary, the Court must stand back from the detail of the first two tests and determine where the overall justice of the case lies. A material consideration in this third test in this case will be the factor of delay between the Authority's determination being delivered and this hearing, and the further fact that the substantive hearing is able to be heard in the near future.

[7] S has a number of concerns about his circumstances and his treatment by others, not simply related to, or by, L Limited. For example, not only is S understandably upset that he has been prosecuted by the Police but he alleges that this has come about because he has declined to assist the Police in prosecuting others connected with the alleged frauds. S is also very suspicious of the motives of the person or persons who brought his circumstances to L Limited's attention after he was arrested and charged. There are other similar aspects of his recent and current circumstances with which S is clearly dissatisfied but I must be careful to consider only those elements of his circumstances for which L Limited is allegedly responsible, in determining whether he has an arguable case of unjustified dismissal and for reinstatement in employment.

Chronology

[8] S was offered employment with L Limited on 25 September 2012. The employment commenced on 29 October 2012; however he was arrested and charged with a criminal offence on 23 October 2012. S appeared in a District Court on 24 October 2012, and was remanded on bail to appear again on 5 March 2013. At the time he did not inform L Limited that this had occurred.

[9] The telephone calls to L Limited about S's predicament began on 4 January 2013. An apparently anonymous caller said S had appeared on fraud charges and was to appear again on 5 March 2013. L Limited first wrote to S on 8 January 2013 asking to meet with him two days later to discuss these matters.

[10] At the meeting of 10 January 2013, S told L Limited's representatives that, at all relevant times during his recruitment process, he had not been aware of the allegations against him and that, following his arrest, he had been advised not to tell L Limited of the situation. S told L Limited that there was no substance to the criminal allegations against him and asserted that he had only been prosecuted to solicit his cooperation with the Police against another individual or individuals. He provided a prepared statement, the essence of which was that the charge brought against him could not be sustained. Attached to it was a partially redacted letter

from the Police to S which stated the charge brought against him was a starting point only.

[11] On 14 January 2013 L Limited wrote to S. It was accepted that S had been unaware of pending fraud charges at the time of his initial interview with L Limited in September 2012. It was also accepted that S's counsel had advised him not to disclose to L Limited the fact of criminal charges being brought against him. The letter included the following passage:

> … While we don't necessarily agree with the advice given to you, we do accept that you acted in good faith on this advice and that at the time of your job interview and the appointment process, you were not in a position to disclose the charge which has since been laid by the Police.

[12] The letter continued:

> The remaining issue is the fraud charge itself and whether or not this could adversely impact on your employment with [L Limited]. In these circumstances and based on the information that yourself and your counsel have provided to us including the fact that you intend to contest the charge, we are prepared to reserve our position on this issue and await the outcome of the Court process. Once this process is complete we would expect to revisit this issue and the impact, if any, the outcome would have on your ongoing employment with [L Limited]. We accept that it would not be appropriate at this time to make such an assessment given that there appears to be an ongoing Police enquiry involving another person who it is understood the Police consider to be of greater interest and in turn this may impact on any charges that may proceed against you. It is our view that in the interim the situation is manageable from an employment point of view, providing that there is full disclosure, in particular that you keep us informed of the following:
>
> - The Police investigation with respect to your charge and should this be withdrawn and/or whether any further charges are laid against you and the nature of these charges.
> - Court dates and times including those that you will need to make an appearance.
> - Any changes in your approach to the charge (or any additional charges) including any change of plea.
> - The date(s) of any trial should the charge proceed to a full hearing and the final outcome when it is known to you.

[13] L Limited then proposed a return to work two days later if the foregoing conditions were acceptable to S, but re-emphasised that if he did return to his normal

duties with the company he would need to keep it informed of developments which it would keep confidential, and emphasised that the position might be reviewed upon completion of the Police inquiries. S accepted these conditions and returned to work on 16 January 2013.

[14] When S appeared next in the District Court in early March 2013, the original single charge was withdrawn by the Police and four new indictable charges were substituted. Two of these charges were pursuant to s 380(1) of the Companies Act 1993 and the other two pursuant to s 228(b) of the Crimes Act 1961.

[15] S did not advise L Limited of the fact of these changes to the situation, at least immediately. Rather, in response to a request made to his counsel by L Limited, S's counsel sent an email to L Limited on 13 March 2013. Counsel's email alleged in some detail bad faith on the part of the Police. Attached to the email were copies of letters from the Police to S dated 6 November 2012, 5 December 2012 and 28 February 2013. Particularly significant is the fact that the letter of 5 December 2012 made it clear to S's lawyer that further changes would be laid against S. This fact had not been conveyed by S to L Limited at any time.

[16] S's counsel noted that the Police had not provided any disclosure at that point and would not do so until "the time for formal written statements under the indictable criminal procedure" was reached. S's counsel assured L Limited that he would forward to the company "copies of communications with police".

[17] L Limited was concerned by the new information which had been received. It set out its concerns in a detailed letter of 19 March 2013 to S, and stated that senior representatives of L Limited wished to meet with S to discuss the concerns raised, and to hear responses. This was met with a reply from S's lawyers of 21 March 2013, stating in essence that S had been truthful, and raising a concern that the company appeared to have a mindset that S should be assisting the Police. It was suggested that a meeting would serve little purpose and would only incur legal fees for S. This was rejected by L Limited, and after difficulties in attempting to set up a meeting, one eventually took place some weeks later on 3 May 2013.

[18] S attended the meeting with his lawyer; senior representatives of L Limited also attended. S's lawyer had two files of Police disclosure evidence with him, and offered to show this to representatives of L Limited. This was declined at the time but taken up subsequently in a letter confirming the outcome of the meeting sent by L Limited's lawyers on 20 May 2013. Included in the letter was the following:

> 1. A representative on behalf of [L Limited] will take up the offer to review the material forwarded through by the Police in order [to] report back in confidence to my client. I understand that there is further material to arrive and it would make sense for this exercise to be carried out once you are in receipt of all the material. The person who will be undertaking this exercise is [J] who undertakes investigations of this nature for [L Limited]. The review of this material would be undertaken on your premises and it is accepted that no documents would be removed or copied from the file without your agreement. [J] may take some notes in order to assist with his report back to the company. [J] will make contact with you directly to make necessary arrangements.
>
> 2. [L Limited] will take the precaution in the interim period of removing any access that [S] has to electronic systems that are not considered to be critical for him to work in his role.
>
> 3. If [L Limited] is to continue with the earlier arrangement then my client would require an assurance that you will maintain regular and proactive contact with [L Limited] in order to advise of any developments in terms of these proceedings; including appearances, charges, evidence and [S's] defence including any change to his status as a witness/defendant. This also includes any communications you may receive that indicate that such changes may be pending, as occurred in December 2012 but which were not advised to [L Limited] at the time of meeting in January, when they initially sought clarification around the situation.

[19] Attempts were subsequently made to arrange the file review indicated in the letter on five occasions between 21 May 2013 and 13 June 2013. There was discussion as to the possibility of garden leave being provided on the understanding that there was a response by 18 June 2013. In the absence of any response from S to any of this correspondence, on 18 June L Limited wrote to S stating there had been no progress made in terms of the issues set out in earlier correspondence, and that there remained an absence of cooperation which had been expected following the meeting of 3 May 2013. The letter went on to record that it was now apparent that L Limited was not going to receive the cooperation required, nor was L Limited confident it could manage S's continued employment in the circumstances.

Accordingly L Limited had decided to terminate S's employment with immediate effect.

[20] S applied to the Authority seeking an urgent ex parte interim injunction, apparently to restrain the employer from proceeding with its investigation and/or termination. S stated in his evidence that urgency was not granted, and that his employment was terminated before his application could be heard. The application was accordingly amended to seek an order of interim reinstatement.

Arguable case

[21] The Authority made the following statement in the course of its determination:[2]

> [35] It follows from the foregoing brief analysis that the essence of the reason for [L Limited] dismissing S is not because of misconduct relating to the criminal charges but because of its conclusions around [S's] complete failure, first to honour his obligations in terms of the 14 January 2013 agreement, secondly to mislead [L Limited] as to the actual position with the criminal charges (whether by design or neglect), and thirdly to simply withdraw from contact with [L Limited] thus creating an environment where S, on [L Limited's] view of matters, was not being communicative and responsive with his employer in terms of his obligations under s 4 of the Act.

[22] These are some, but not all, of the issues which must be assessed for arguable case purposes. Counsel for L Limited accepted that there is an arguable case with regard to these factors and, as will be seen, I agree.

[23] The first issue relates to the question of whether S complied with his obligations under the January agreement. At this stage the assessment of that issue turns primarily on the content of the letter from L Limited to S which contained conditions that he accepted. However at the investigation meeting, it will be necessary to explore the context, and in particular the understandings that each party had as a result of the meeting of 10 January 2013, from which the letter arose. An important element of the agreement related to the first condition wherein L Limited stated that it wished to be kept informed as to the investigation of the charge, and

---

[2] *A v B*, above n 1.

desired to be informed if the charge was withdrawn and/or whether any further charges were laid and the nature of those charges.

[24] S argues that via his counsel's email of 13 March 2013 he complied with that agreement; and moreover, by reason of the information he conveyed to L Limited at the meeting of 10 January, he had indicated there was a clear prospect of more serious charges being laid. For its part, the company asserts that although a partially redacted letter of 6 November 2012 from the Police to S's lawyers was provided at the January meeting, the thrust of S's advice to L Limited at that time in his written statement was that the charge brought against him could not be sustained, that the Police had brought the charge only to obtain evidence from him against another party, and that the letter from the Police supported such a conclusion.

[25] Clearly there are two competing contentions as to whether S clearly conveyed to L Limited the extent of any risk of further charges being laid, and if so, the nature of those charges. This issue will have to be resolved by a testing of the evidence. I consider that S has an arguable case with regard to this aspect of the matter.

[26] The second issue relates to whether S misled L Limited as to the actual position with the criminal charges which were laid in early March 2013, whether by design or neglect.

[27] S's position on this point is:

a) Sufficient notice as to the possibility of more charges being laid was given at the 10 January meeting.

b) Information as to the new charges as in fact laid was provided in a timely way via S's counsel.

[28] For L Limited it is submitted that S had obviously been aware of the prospect of future charges at the time of the meeting in January, and subsequently following a further letter from the Police in late February. L Limited asserts that it should therefore have been put squarely on notice of these factors, because L Limited was

very surprised to learn on 11 March from S's counsel about the laying of further and more serious charges. Further, it is submitted S did not provide timely advice of the fresh charges when they were laid.

[29] Again, I consider S has an arguable case on this point. It is related to the first point. Its resolution will turn on a testing of the evidence as to what was known at the time of the January meeting.

[30] The third point is whether or not it was appropriate for the company to conclude that S simply withdrew from contact with L Limited after the meeting of 3 May 2013, which left L Limited concluding that he was not being communicative and responsive to it. An aspect of this issue relates to S's contention that in this period, the employer was requiring S to provide to it Police disclosure evidence to enable it to assess and determine S's guilt or innocence before his trial: see para 11 of the statement of claim. S also asserts that the requirements imposed upon him included in effect a requirement that he was "to waive his right to silence, including the rights of natural justice and those contained within the Bill of Rights (sic)": see para 12 of the statement of claim. S places considerable weight on these contentions.

[31] I find that it is very strongly arguable for the defendant that it did not purport to require S to go as far as has been alleged by him. A careful examination of the documentation recording the outcome of relevant events arguably supports the evidential accounts given by witnesses for the company.

[32] Analysis of those requirements begins with L Limited's letter of 14 January 2013, in which it sought S's agreement to keep it informed of relevant developments. These conditions which S accepted were carefully worded to allow L Limited to deal with the actual and potential consequences to it of the charges against S. They were arguably of minimal intrusion. Contrary to S's pleaded assertion, they were not for the purpose of allowing L Limited to assess and determine S's guilt or innocence, or to require S to waive his rights as a defendant to criminal proceedings, or to otherwise compromise his difficult position.

[33] As far as the meeting of 3 May 2013 is concerned, the defendant has a more strongly arguable correct case of what occurred at that meeting than does the plaintiff. The attendees at that meeting were, on the plaintiff's side, S himself and a partner in the firm of lawyers representing him in the criminal proceedings and, probably also, representing him in his employment relations dealings with L Limited. For L Limited, present were a General Manager, a Human Resources Manager, and counsel for the defendant in the present proceedings, Mr Harrison.

[34] Mr Harrison's subsequent letter to S's solicitors dated 20 May 2013 (which appears to have a typographical error when it refers to the meeting having been "last Friday, 3 May 2013") is consistent with the defendant's witnesses accounts of what transpired at that meeting. The contents of Mr Harrison's letter were apparently not objected to at the time. It refers to an offer by S's lawyer to review the documents disclosed by the Police, two files of which at least were brought to the meeting by the lawyer and other files which were alluded to by him at the meeting.

[35] The evidence adduced does not support, at least strongly, the plaintiff's contention that the disclosures that he claims he was required to make to L Limited would have deprived him of the presumption of his innocence, of "his right to remain silent" and his claim that he would have been "faced with a set of one-sided allegations which he would be unable to respond to", as asserted in para 13 of the statement of claim.

[36] The defendant has submitted that it did not seek information for those purposes. It submits that the concern was to manage the not insubstantial risk to it of publicity about the charges against S and the potential consequences to it of the loss of very valuable business within the financial services sector, including the loss of a substantial number of jobs of others if a major bank discontinued its significant commercial relationship with L Limited as a consequence of publicity. Counsel for L Limited submitted that it was undertaking the first step envisaged in *Wackrow v Fonterra Co-operative Group Ltd.*[3] It was submitted that if as a result of having accepted the offer made by S's lawyer to look at the documents there was a necessity to ask S about events which were the subject of the criminal charges, that would

[3] *Wackrow v Fonterra Co-operative Group Ltd* [2004] 1 ERNZ 350 (EmpC).

have involved a separate process which would need to have been the subject of consultation and consideration of any representations made in that regard, including consideration of S's rights under the New Zealand Bill of Rights Act 1990.

[37] Moreover, a careful consideration of the correspondence which followed the 3 May meeting shows that despite multiple initiatives by representatives of L Limited to secure S's cooperation, no substantive responses were given. L Limited was left in a position of S not engaging with it. No satisfactory reasons for this situation have been advanced for S, at least at this stage.

[38] I assess this third issue as being just arguable, but on the affidavit evidence provided for present purposes it is the defendant who has a strongly arguable case.

[39] A related point raised by S is that it is arguable there was predetermination on the part of L Limited. S asserts that L Limited decided to terminate S's employment in early March, after it had concluded that S had not provided the information to L Limited, which he had agreed to provide.

[40] For its part, L Limited submits that there is no arguable case on this point. It points to the chronology where it went to some trouble first to set up a meeting to discuss the issues which had arisen. It says this was difficult in and of itself, and that it then went to considerable lengths to follow up on what it understood had been agreed at the meeting on 3 May, with little if any constructive engagement from S. On the untested evidence I consider that L Limited went to considerable lengths to secure S's cooperation. However, this is a matter which will have to be the subject of further evidence. I conclude, given the relatively low threshold which is required to determine whether there is an arguable case, that this point just clears that threshold.

[41] The final point which I should consider relates to S's assertion that L Limited acted in a procedurally unfair way by failing to disclose:

a) The full extent of the anonymous calls which it received between 4 January 2013 to 17 May 2013. While L Limited disclosed the fact it

had received anonymous calls, it did not state how many there were or whether it was in fact aware of the identity of any of the callers, or their phone numbers.

b) Nor did it disclose that L Limited had arranged for an investigator to attend the District Court on 5 March 2013 when S was scheduled to appear before the Court. The (hearsay) evidence which has been placed before the Court indicates the investigator reported as to what happened when the case was called, and the report carries an implication that the investigator had spoken to Police about the charges brought against S.

[42] L Limited submits that neither of these points are issues of substance. In effect L Limited invokes s 103A(5) of the Employment Court Relations Act 2000, the effect of which is that process issues which are minor and do not result in an employee being treated unfairly cannot lead to a determination that a dismissal is unjustifiable because of those defects in process.

[43] I consider that this particular point is arguable for S.

[44] In summary, S has points available to him which are arguable; however the defendant's position in relation to S's main contention is strongly arguable against him.

Is there an arguable case for permanent reinstatement?

[45] For S it is asserted:

a) At the time of dismissal, S was regarded as performing well at work.

b) If the subject events had not occurred, it is more probable than not that he would still be employed by L Limited now.

c) Whilst L Limited asserts that it has reorganised its affairs so that it no longer has a role for a Work Force Planner, that was not the position at

the time of dismissal, and that is the point in time on which the Court should focus.

d) Inordinate delay has been created by the need to obtain documents. It was necessary to make and pursue an application for appropriate orders. That this was necessary has created delay which should not be attributed to S but to L Limited.

e) S should have been placed on garden leave.

[46] For the employer, it is asserted:

a) There is no evidence that S would comply with the provision of relevant information regarding his prosecution. It was only in response to a question from the Court that information was conveyed as to the present state of the prosecution, including when the investigation meeting is likely to take place. In other words, there has been a continued and ongoing reluctance to provide information.

b) S in his evidence, asserted that company witnesses had told untruths. It was submitted for L Limited that this is of considerable concern because it indicates that there is little prospect of a resumed employment relationship which has the necessary attributes of trust and confidence.

c) The company points to evidence that the role of Work Force Planner does not exist anymore; and that garden leave is not an option, because such could only be appropriate if there is at least the possibility of reinstatement to "the employee's former position or the placement of the employee in a position no less advantageous to the employee".[4] The company asserts that the prospect of reinstatement is neither practicable nor reasonable.[5]

---

[4] Section 123(1)(a).
[5] Employment Relations Act 2000, s 123(1)(a).

[47] Evaluating the above contentions, I consider that the employee has (just) an arguable case for permanent reinstatement. But that will depend on the outcome of all the above issues - and perhaps others – which will have to be fully tested at the investigation meeting. I am particularly concerned at the unfortunate and inappropriate remarks which were made by S in his affidavit about the employer's evidence which would not augur well for a constructive employment relationship if S were to be reinstated.

Balance of convenience

[48] There is little doubt that S is suffering economically as a result of his dismissal, combined with the circumstances of a prosecution that was instituted in September 2012 and which is unlikely to be resolved for at least another year. He is unlikely to obtain alternative employment in his chosen field, and he has lost a well-paid position. It also seems that persons with an axe to grind against S have deliberately and vindictively set out to damage him in his employment. Whether they have breached orders of the District Court is another issue on which it is inappropriate for this Court to comment.

[49] That said, however, the focus of these proceedings is on how L Limited dealt with what was made known to it and which raised real and significant concerns as S's employer in circumstances in which a high level of trust and confidence was expected of him.

[50] The other discretionary consideration which I consider is the Authority's consistent preparedness to commence an investigation of S's substantive grievance. In the second determination of the Authority (which dealt with the issue of whether the matter should be removed to this Court), the Authority recorded that support staff had attempted to get a substantive investigation underway following the issuing of the first determination, and amongst other things protected a range of dates in which the Authority's investigation meeting might take place. The Authority said that despite cooperation of counsel for L Limited it was not possible to arrange an

investigation meeting with S or his then representative.[6] Later in the determination the Authority recorded:

> [21] Nor am I persuaded that the matter is as urgent as [S] now contends. The Authority quite properly granted urgency at first instance and dealt with the interim reinstatement application as promptly as it was able. Once that matter had been disposed of, the Authority then offered dates to the parties within a little over four weeks of the issue of the determination on the interim relief, such dates being in September 2013.
>
> [22] [S] failed absolutely to engage with the Authority in respect of its efforts to try to move the matter ahead promptly and nothing was heard from [S], save for the notification of his challenge in the Court, until just prior to Christmas that year when [S] purported to file an application for removal.
>
> [23] Even if [S]'s advocate misunderstood the position and thought that the Authority would proceed to deal with the application without the filing fee provided by law, the three month gap between September and December does not suggest any sense of urgency on the part of the applicant party.

[51] I shall shortly return to the question of when the substantive hearing may occur, but I hold that the balance of convenience undoubtedly favours the defendant who has been prepared to move promptly to a substantive hearing throughout; the plaintiff has not, in spite of his financial difficulties. This finding applies notwithstanding the fact that some time was taken in obtaining documents by Court order; they were obtained in order to support a contention that company witnesses had lied and perjured themselves; whilst company witnesses can be questioned further about those issues in due course, on the face of the affidavit evidence which is before the Court this contention is misconceived.[7]

Overall justice

[52] The Court gave leave to the parties to file and serve memoranda following the hearing on 6 June 2014, so that the Court could be informed as to when the Authority could conduct its investigation meeting. The result is the Court has been provided with a Notice of Direction which the Authority issued on 10 June 2014 indicating that it would have been prepared to hear the matter in the week of 14-18 July 2014, but as that appeared to be problematic for S's representative and because another fixture had been vacated, it was now possible to deal with the matter

---

[6] *A v B* [2014] NZERA Auckland 104 at [3].
[7] See *S v L* [2014] NZEmpC 18.

in the week of 7-11 July 2014. The entire week has been blocked out to that end. The Authority Member has stated that if the matter cannot proceed in the course of the week which has been offered, he would be unavailable to offer dates until September 2014.

[53] Counsel for L Limited confirms that the company is again available to proceed on the offered dates. Counsel for S has filed a memorandum today suggesting that there may be logistical challenges if the Authority were to proceed in the week of 7 July 2014. It is not for the Court to speculate on how such issues should be dealt with by the Authority.

[54] S needs to advance his claim. Once again the Authority has indicated a willingness to hear the matter promptly when asked. The availability of hearing dates on multiple occasions, and now in only three weeks time, is a factor which I must consider when standing back and assessing the matter.

[55] In assessing the overall justice of the matter, I am particularly influenced by the fact that the application for permanent reinstatement is only just arguable; and the fact that the Authority is available to conduct its investigation in the near future. Whilst S is undoubtedly in an impecunious position, the availability of the Authority to hear the matter soon is such that overall justice requires that this application should be dismissed.

[56] Costs in connection with the application for an interim reinstatement order are reserved, and may be dealt with after the Authority's determination has been issued.

B A Corkill
Judge

Judgment signed at 4.55 pm on 18 June 2014