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Interim reinstatement: a cautionary tale

By Catherine Stewart and William Fussey

When can an employer be prevented from dismissing an employee?

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In the novel and precedent-setting decision of *Savage v Wai Shing Ltd* (*Savage v Wai Shing Limited* [2019] NZEmpC 141), the Employment Court determined on an interlocutory basis that an employee awarded interim reinstatement, pending a hearing for permanent reinstatement, cannot be dismissed in any circumstances without an order from the Employment Relations Authority or court varying or rescinding the reinstatement order.

In this case an employee was confronted by the highly unusual situation of being accused of serious misconduct shortly after he had obtained interim reinstatement from the Employment Relations Authority for a redundancy termination.

The facts

Oliver Savage commenced his role as a farm operations manager for Wai Shing Ltd in January 2019 after being recruited from the United Kingdom. However, only six months later he was dismissed on the basis of redundancy because a director of the company missed performing the farm operations manager's role himself and chose to subsume Savage's duties.

The Employment Relations Authority awarded Savage interim reinstatement; however, Wai Shing Ltd did not permit him to return to work on full duties.

Upon returning to work on his first day after obtaining reinstatement, Savage was sent away – ostensibly to go on garden leave. His legal representatives intervened and, as a result, Wai Shing Ltd agreed he could return to work the following day.

However, the next day Savage was sent home once again, this time on the basis that it was too wet for him to perform the duties he had been allocated that day. On the third day Savage was provided with a document setting out his tasks, namely to "cut and clear unwanted plant species" and "use knapsack sprayer to spray smaller unwanted plant species". It was indicated to Savage that he should continue with this work until it was finished.

As a result of Wai Shing Ltd's actions, Savage sought a compliance order from the Employment Relations Authority to properly effect his interim reinstatement, on the basis that the work he was given amounted to no more than one of the 23 key responsibilities in his employment agreement. Savage was successful and a compliance order was granted.

Serious misconduct allegations

At about the same time Savage was seeking a compliance order from the Employment Relations Authority, Wai Shing Ltd asserted it had received information from a co-worker that Savage had made seriously derogatory and racist comments to that co-worker about Frank Wai Shing, a director of the company.

Savage vehemently denied such allegations and asserted Wai Shing Ltd was attempting to thwart the authority's order for interim reinstatement by instigating a disciplinary process with a view to his summary dismissal.

Savage sought an injunction to restrain Wai Shing Ltd from terminating his employment.

At first instance the Employment Relations Authority issued a minute that saw no issue with Wai Shing Ltd exercising its managerial prerogative in completing its disciplinary process however it saw fit. It noted its view that the disciplinary process was a "completely separate issue to that concerning the substantive matter before the Authority" and relied on the finding in *Ports of Auckland v Findlay* [2017] NZEmpC 45 that restraining an employer from proceeding with a disciplinary process will be rare.

Furthermore, Wai Shing Ltd submitted to the Employment Court that "where a separate disciplinary process resulting in dismissal occurs, an aggrieved employee could look to his remedies, both as to substantive justification and the procedural fairness of the dismissal".

In the Employment Court, however, Judge Bruce Corkill overturned the authority's determination. He awarded an interim injunction preventing the employer from terminating Savage's employment without first applying to vary or rescind the interim reinstatement order. His decision was made on the basis of the interpretation of s127 of the Employment Relations Act.

The Employment Relations Act, in giving the Employment Relations Authority the power to make an order for interim reinstatement, does so "pending the hearing of the personal grievance".

The effect of these words is that “the state of interim reinstatement continues until the hearing of the personal grievance”, especially as the Employment Relations Act gives the authority the ability to rescind or vary the interim reinstatement order at any time, bestowing “a broad discretion on the Authority…to consider any circumstance where the interests of justice warrant a rescission or variation of the interim order”.

Judge Corkill notes “a decision as to whether the formal order does or does not apply in particular circumstances should not be left to an employer – particularly in cases [where] there may be a nexus between the making of the interim order, and a subsequent disciplinary process”.

Consequently, were Wai Shing Ltd to have terminated Savage’s employment without an order permitting it to do so, this would have meant the company had unilaterally ended the interim reinstatement order and acted “contrary to the rule of law”.

Although the decision is an interlocutory judgment, it is nevertheless a precedent-setting one. The Employment Court in considering this issue for the first time has held that an employer seeking to terminate the employment of an employee who has obtained interim reinstatement, for any reason whatsoever, must first apply to vary or rescind the interim reinstatement order.

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