IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2019] NZEmpC 141
EMPC 351/2019

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for interim injunction
BETWEEN	OLIVER SAVAGE Plaintiff
AND	WAI SHING LIMITED Defendant

Hearing: By a submissions-only hearing on 8 October 2019

Appearances: C Stewart and W Fussey, counsel for plaintiff
M Hammond, J Muggeridge and F Dalziel, counsel for defendant

Judgment: 10 October 2019

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL
(Application for interim injunction)

Introduction

[1] This judgment resolves an urgent application for an interim injunction, brought in somewhat unusual circumstances.

[2] Oliver Savage's position, as Farm Operations Manager of a large horticultural operation, was terminated on the grounds of redundancy with effect from 8 July 2019. He brought a personal grievance to the Employment Relations Authority. The Authority ordered his interim reinstatement on 2 September 2019.[1] The order was

[1] *Savage v Wai Shing Ltd* [2019] NZERA 511.

made under s 127 of the Employment Relations Act 2000 (the Act), which meant the interim order would continue until the hearing of Mr Savage's personal grievance.

[3] Subsequently, Mr Savage sought a compliance order, claiming that Wai Shing Ltd (WSL) had not allowed him to resume his duties in full as had been required by the determination reinstating him. A compliance order was made.[2]

[4] On 25 September 2019, contending that the compliance order had been breached, Mr Savage initiated a claim in the Court under s 140(6) of the Act, seeking sanctions against WSL, and against one of its directors, Franklyn Wai Shing. Urgency has been granted in respect of that proceeding, and it is set down to be heard on 17 October 2019.

[5] At about the time Mr Savage sought a compliance order from the Authority, WSL asserts that it received information from a co-worker who said Mr Savage had made seriously derogatory and racist comments to that co-worker about Mr Shing. It sought information from Mr Savage about these remarks, via his lawyers, and now wishes to pursue a disciplinary process in which it has been indicated that one of the possible outcomes is dismissal.

[6] Mr Savage asserts that WSL is attempting to thwart the Authority's order for interim reinstatement by instigating a disciplinary process with a view to his summary dismissal. He accordingly applied to the Authority for an urgent interim injunction preventing WSL from dismissing him as a result of the disciplinary proceedings; it was also argued that any dismissal could only be effected by way of an application to vary the Authority's orders for interim reinstatement and compliance. The Authority received submissions from counsel on 27 September 2019 and issued a determination in the form of a minute on 30 September 2019. The Authority stated that the disciplinary process which was being undertaken by WSL was a completely separate issue to that concerning the redundancy matter which was before it. It stated that the outcome of the disciplinary process was unknown, and that dismissal was not a definite outcome. Orders restraining an employer from proceeding with an investigative/disciplinary process into concerns about employee conduct would be

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2 *Savage v Wai Shing Ltd* [2019] NZERA 543.

rare, a conclusion reached in reliance of dicta of this Court in *Ports of Auckland Ltd v Findlay*.[3] The application for the interim injunction was therefore dismissed.

[7] Mr Savage promptly brought a non-de novo challenge to the Court for which urgency was granted. Prior to the hearing, the parties filed affidavits and submissions. A telephone submissions-only hearing took place on 8 October 2019.

[8] Because the challenge was brought on a non-de novo basis, I made a direction at the outset of the hearing that the nature and scope of the hearing was whether the Authority had erred in fact or in law in rejecting the contention on which the present challenge is based.

[9] It was not argued that the challenge was precluded by s 179(5) of the Act; for the avoidance of doubt I find that the proceeding involves a substantive issue for which there is a right of challenge under s 179(1).

Facts pertaining to the WSL investigation

[10] It is necessary to say a little more about the circumstances giving rise to WSL's investigation, as described in the parties' affidavits.

[11] On 18 September 2019, lawyers acting for WSL wrote to lawyers acting for Mr Savage, stating that a co-worker had approached Mr Shing reporting derogatory and racist statements that Mr Savage had allegedly made against him. A written statement summarising the alleged remarks was annexed. The lawyers' letter said that the comments made, if proven, were deeply undermining of the employment relationship. WSL had determined that an investigation should be conducted.

[12] A response was sent on behalf of Mr Savage on 23 September 2019. Attached was an affidavit sworn by him in which he strongly denied the accusations, explaining that the language he was alleged to have used was actually language expressed by the co-worker himself. On the same day, the co-worker swore an affidavit, affirming his earlier account. In the result, there are two different accounts of the key conversation.

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[3] *Ports of Auckland Ltd v Findlay* [2017] NZEmpC 45 at [23].

[13] Mr Savage made two other points in his affidavit. He said that language used at the horticultural operation by employees and directors was often vulgar and coarse; he gave examples of that language, and of texts sent by Mr Shing himself which he said supported this contention. He also said that he did not accept the information provided by the co-worker was unsolicited. He believed Mr Shing had been discussing his circumstances at length with employees as a reaction to his reinstatement. He referred to other factors which he said showed WSL did not want him to return; this was reflected in the limited selection of tasks he had been asked to perform following the reinstatement. These contentions were rejected by the directors of WSL in their evidence.

[14] The next step in the process is for an interview with Mr Savage, for which a request was first made on 23 September 2019. Initially, there were logistical issues in arranging the meeting, and then Mr Savage suffered a work-related injury which affected his ability to participate in such a meeting. To this point, the meeting has not been conducted.

Submissions

The case for Mr Savage

[15] Ms Stewart submitted in summary for Mr Savage:

a) The object of the application which is before the Court was not to injunct the disciplinary process which WSL wishes to advance (the issue considered by the Authority), but to ensure that if the point of dismissal is reached, an appropriate application is placed before the Authority or to the Court if the personal grievance has been removed. Ms Stewart said an application for removal would be made; I express no view as to whether such an order should be made.

b) Section 127(1) provides for interim reinstatement pending the hearing of the personal grievance, and provides in s 127(6) for variation and recision of an interim order. Were Mr Savage to be dismissed without an order of the Authority or Court permitting such a step, there would be a breach of the sub-section, and of the interim reinstatement order. If s 127

were to be read so as to allow for termination of employment by a separate process from that to which the interim reinstatement order related, there would be no need to provide for recision or variation. There is a strongly arguable case that WSL would breach s 127 were it to effect a dismissal without applying to the Authority or Court to rescind or vary the reinstatement order.

c) The balance of convenience favoured Mr Savage, as he would be certain to lose his hard-won employment by means of dismissal if interim relief was not awarded. This would cause significant harm to his reputation and ability to obtain worthwhile remedies from his personal grievance claims. Damages would not be an adequate remedy if he lost his job. The only inconvenience to WSL were an injunction to be awarded, would be that arising from having to apply to the Authority or Court for variation or recision.

d) Overall justice favoured Mr Savage. WSL was attempting to set up allegations that are spurious, vexatious and untrue, in order to dismiss him; and as a means of circumventing the reinstatement order. The integrity of judicial orders must be protected in accordance with the rule of law.

[16] Mr Hammond submitted in summary for WSL:

a) The approach adopted for Mr Savage fundamentally confused the process of redundancy, and the process of discipline. There should be a focus on the final phrase of s 127(1), where jurisdiction to grant interim reinstatement is given "pending the hearing of the personal grievance". Whilst the section allows for a temporary period of reinstatement so as to enable the personal grievance to be heard, an order made under the sub-section could not preclude the employer from undertaking a separate process in which it could exercise its right of managerial prerogative to dismiss.

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. The personal grievance for redundancy would have no bearing on that outcome which would be considered and determined on its own merits.

An employer must be able to consider the full range of circumstances where managerial prerogative may be exercised, including not only serious misconduct, but also performance, medical incapacity, or abandonment of employment. To deny the right to pursue those options would abrogate not only managerial prerogative, but also undermine contractual rights in the individual employment agreement.

An application for variation or recision under s 127(6) may be made if it relates to the circumstances which led to the making of the interim order pending the hearing of the personal grievance.

An interpretation that meant the employer would have to apply to the Authority or Court in any case of potential dismissal would be precedent-setting, onerous and impracticable. The Court should conclude, in effect, that Mr Savage's interpretation of the section is not arguable.

b) WSL's primary position was that as there was no serious issue to be tried, the Court did not need to consider the balance of convenience. If weighed, however, the balance heavily favoured WSL having regard to such factors as the evidence before the Court of the strain on those concerned of unresolved serious misconduct allegations; the fact that WSL's workforce is multi-racial and there is an imperative that the allegation be addressed and resolved; and that Mr Savage had the option of pursuing his remedies.

c) With regard to the overall interests of justice, the effect of an injunction would be to impinge on WSL's management prerogative and leave the issues at the heart of the process unresolved.

Legal principles

[17] In *NZ Tax Refunds Ltd v Brooks Homes Ltd*, the Court of Appeal described interim injunction principles as follows:[4]

> The approach to an application for an interim injunction is well established. The applicant must first establish that there is a serious question to be tried or, put another way, that the claim is not vexatious or frivolous. Next, the balance of convenience must be considered. This requires consideration of the impact on the parties of the granting of, and the refusal to grant, an order. Finally, an assessment of the overall justice of the position is required as a check.
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> The grant of an interim injunction involves, of course, the exercise of a discretion ... This is subject to the qualification, however, that whether there is a serious question to be tried is an issue which calls for judicial evaluation rather than the exercise of a discretion.

[18] The Supreme Court, in its consideration of the *Brooks Homes* litigation, stated that the merits of the case (insofar as they can be ascertained at the interim injunction stage) have in New Zealand been seen as relevant to the balance of convenience and to the overall justice of the case.[5]

[19] Also relevant is the principle that where an interim injunction will effectively dispose of the issue arising from the plaintiff's proceeding, as here, something more than a barely arguable case is required.[6]

[20] I proceed on the basis of these principles.

Analysis

Serious case

[21] Section 127 of the Act reads as follows:

> **127 Authority may order interim reinstatement**
>
> (1) The Authority may if it thinks fit, on the application of an employee who has raised a personal grievance with his or her employer, make an order for the interim reinstatement of the employee pending the hearing of the personal grievance.

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4 *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12]-[13] (footnotes omitted).

5 *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

6 *Lyttelton Port Company Ltd v Maritime Union of New Zealand Inc* [2017] NZEmpC 6 at [33].

(2) The employee must, at the time of filing the application for an order under subsection (1), file a signed undertaking that the employee will abide by any order that the Authority may make in respect of damages—

(a) that are sustained by the other party through the granting of the order for interim reinstatement; and

(b) that the Authority decides that the employee ought to pay.

(3) The undertaking must be referred to in the order for interim reinstatement and is part of it.

(4) When determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the object of this Act.

(5) The order for interim reinstatement may be subject to any conditions that the Authority thinks fit.

(6) The Authority may at any time rescind or vary an order made under this section.

(7) Nothing in this section prevents the court from granting an interim injunction reinstating an employee if the court is seized of the proceedings dealing with the personal grievance.

[22] The Court must interpret the section according to well-known principles. Text and purpose are the key drivers of statutory interpretation. In determining purpose so as to check the meaning of the words used, regard must be given to the immediate and general legislative context.[7]

[23] Counsel's submissions focused, as indicated earlier, on the closing phrase of s 127(1). Do those words simply explain the circumstances in which an interim order of reinstatement may be made; and any application for recision or variation under s 127(6) arises only in that limited context? Alternatively, once an interim order is made, is the employer precluded from terminating the employment of the affected employee for any reason, except by way of recision or variation?

[24] Addressing text, it is to be noted that the words of the sub-section are expressed in broad terms. They contain no qualification which might suggest that the order of reinstatement is relevant only to the personal grievance which is to be heard. In my view, the final phrase relates to the duration of the interim order, which has a continuing effect for a defined period.

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[7] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

[25] It is next necessary to consider other elements of s 127. Section 127(4) confirms that the Authority must apply the law relating to interim injunctions, having regard to the object of the Act. The object is found in s 3. It emphasises that the Act is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship, giving specific indicators as to how that object is to be achieved. The reference to the object of the Act confirms the context within which any application for interim reinstatement may be considered, but it does not suggest a relevant qualification as to jurisdiction.

[26] The reference to the law concerning interim injunctions is significant and requires consideration of that law as it is applied in the courts of general jurisdiction.

[27] Before doing so, however, it is worth mentioning the genesis of s 127. Under the Employment Contracts Act 1991, there was no such statutory provision, but the Employment Court and Court of Appeal concluded that the Employment Tribunal and Employment Court could grant orders of interim reinstatement having regard to the broad descriptions of the jurisdiction possessed by each institution.[8] On this topic, the Court of Appeal said:[9]

> ... it would be an extraordinary situation if something so fundamental as the preservation of the position of an employee complaining of unjustified dismissal could not be preserved pending resolution of his or her personal grievance, when the Act provides for reinstatement as a remedy.

[28] Later, that court confirmed that the jurisdiction was wide enough to encompass the High Court's powers to make interim injunctions relating to contracts.

[29] These conclusions plainly led to the enactment of s 127, which codified the position – and indeed enhanced it, because it appears such an application may be made by a person who has raised a personal grievance which may mean that person has not yet filed a statement of problem.

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8 *X v Y Ltd* [1992] 1 ERNZ 863; *Hobday v Timaru Girls' High School Board of Trustees* [1993] 2 ERNZ 146.

9 *Hobday v Timaru Girls' High School Board of Trustees*, above n 8, at 162.

[30] Turning to general principles, an interim injunction is an equitable and flexible remedy of very longstanding.[10]

[31] In *Finnigan v New Zealand Rugby Football Union Inc (No 2)*, Casey J described the purposes of an interim injunction in the following terms:[11]

> It has long been recognised that the Court has a jurisdiction to make orders preserving the status quo until the dispute between the parties has been disposed of at a full hearing. In such an application the Court is concerned with first, the maintenance of a position that will more easily enable justice to be done when its final order is made; and secondly, an interim regulation of the acts of the parties that is, in other respects, most convenient and reasonable in all the circumstances.

[32] An interim injunction is fundamentally different to a permanent injunction. Under the general law, at the interim stage the parties legal or equitable rights are uncertain. At that time, the object is to preserve the Court's ability to give effect to the parties substantive legal or equitable rights at trial. It has been described as a "holding remedy" to address a present position until the merits of the case can be fully adjudicated;[12] or as a process to "hold the ring" pending final determination of the merits or other disposal of the dispute.[13] It does so by maintaining the status quo, which is the last settled position between the parties.

[33] In determining whether an interim injunction should be granted, the decision-maker must exercise a discretion according to the principles identified earlier.[14] It involves a broad and flexible inquiry where, at the end of the day, the decision-maker must assess the overall justice of the circumstances.

[34] These then, are some of the principles which apply according to the law relating to interim injunctions, as referred to in s 127(4) of the Act.

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10 ICF Spry, *The Principles of Equitable Remedies* (9th ed, Thompson Reuters, Sydney, 2014) at 462-469.

11 *Finnigan v New Zealand Rugby Football Union Inc (No 2)* [1985] 2 NZLR 181 at [183]; this dicta reflects the statement made in the leading commentary on this topic: Spry, above n 9, at 463.

12 *Resene Paints Ltd v Orica New Zealand Ltd* [2003] 3 NZLR 709 at [22].

13 *United States of America v Abacha* [2014] EWCA Civ 1291, [2015] 1 WLR 1917.

14 Above at [17]-[19].

[35] Parliament saw fit to reinforce two particular concepts that arise from the general law.

[36] The first is found in s 127(5) of the Act, which makes it clear that any order for interim reinstatement may be subject to any conditions that the Authority thinks fit; a possibility which endorses the broad scope of the jurisdiction to make an interim reinstatement order.

[37] The second is described in s 127(6) of the Act, which provides for recision or variation of a reinstatement order, at any time. This too is an endorsement of well established principles relating to the discharge or variation of interlocutory injunctions. A convenient summary of such a possibility was described by Greig J in *Foodtown Supermarkets v Tse*.[15] There, the Court observed:[16]

> There remains, however, a coexistent right in the case of a continuing order like an interim injunction to apply for its dissolution or recision and that is not curtailed or affected by the rules of the High Court that I have mentioned or the rule against review or reconsideration. It is, I think, consistent with the nature of an interim injunction which is a temporary but continuing matter restraining, for the time being and until the resolution of the substantive proceeding, any further or particular action or conduct by the defendant. The defendant must be entitled, without having to go to the Court of Appeal, to seek recision of the order and a variation of it should the circumstances change and so require in justice that recision or variation. Moreover, such an order, as was done in this case, is made subject to the further order of the Court so that it remains within the purview and authority of the Court to supervise and to vary or to rescind the order as circumstances require.

[38] The courts of general jurisdiction, then, retain a broad discretion to vary and rescind an order which is temporary, and which has a continuing effect; any modification is to be made as in justice the circumstances may require.

[39] The courts have resisted any suggestion that there are limited grounds upon which an interim injunction will be rescinded;[17] if circumstances have changed so that it could no longer be said, for example, that a serious question exists, the Court may

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15 *Foodtown Supermarkets v Tse* (1987) 2 PRNZ 545.
16 At 546.
17 *Carter Holt Holdings Ltd v Fletcher Holdings Ltd* [1980] 2 NZLR 80 at 83-84.

discharge the interim injunction.[18] In short, those courts are able to consider applications for variation and recision on a wide range of grounds.

[40] In my view, s 127(6) of the Act was also intended to reflect this aspect of the law relating to interim injunctions. The provision is unqualified. It was intended to bestow a broad discretion on the Authority, and by derivation the Court under s 127(7), when dealing with orders of interim reinstatement. The Authority and the Court are thereby able to consider any circumstance where the interests of justice warrant a recision or variation of the interim order. Often, but not always, it will be necessary to consider whether there has been a material change of circumstances since the making of the interim order. A hypothetical example might involve consideration of an issue as to whether the original finding that there is an arguable case for reinstatement should be revisited in light of subsequent misconduct by the employee.

[41] The sub-sections just analysed reinforce my conclusion that the reference in s 127(1) to "interim reinstatement of the employee pending the hearing of the personal grievance" is not to be read down, with the result that the order has application to some circumstances and not others, as was advocated by WSL. The interim order is to be of continuing effect for a limited period; the final phrase is intended to make it clear that the state of interim reinstatement continues until the hearing of the personal grievance.

[42] This is for good and proper constitutional reasons. Once the Authority, or Court, has made an order of interim reinstatement, then it is to be respected. It would be contrary to the rule of law for an employer to proceed on the basis that the order was relevant for some purposes, but not others. 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 such as are alleged here that there may be a nexus between the making of the interim order, and a subsequent disciplinary process undertaken during the currency of that order.

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[18] *Motor Vehicle Dealers Institute Inc v Nationwide Vehicle Auctions Ltd* HC Auckland CP 348-SW/00, 8 August 2000. See also Steven Gee *Commercial Injunctions* (6th ed, Sweet & Maxwell, London, 2016) at [21-057]; and David Bean, Isabel Parry and Andrew Burns *Injunctions* (13th ed, Sweet & Maxwell, London, 2018) at 6-13, 6-14.

[43] Rather, once the Authority/Court has been persuaded to make an order of interim reinstatement binding the employer, if that party considers that such order should no longer apply, or either party considers it needs to be varied, due process must take place via an application to rescind or vary.

[44] I find for present purposes that the plaintiff's interpretation of s 127 is strongly arguable.

[45] Mr Hammond submitted that on an application of the present sort where the main question is one of statutory interpretation, if there is no basis for an interim injunction, the application must fail without the balance of convenience needing to be considered.[19] In fact, I have found that the reverse is the case: the defendant's position as a matter of statutory interpretation is not arguable. However, conscious that the Court is having to deal with the issues on an urgent and interlocutory basis, I consider it appropriate to go on and evaluate the orthodox principles regarding interim injunctions.

Balance of convenience

[46] Mr Hammond submitted that the process of an employer having to formally apply for an order of variation or recision was impracticable, and that it was unclear how such a process would be followed. He also said that were a decision of dismissal to be made, then Mr Savage could pursue his remedies.

[47] An employee could, in such circumstances, apply again for reinstatement under s 127; that fresh application would be assessed on interim injunction principles. Although it would be a matter for the Authority or Court, an application for recision or variation may well be similar to the process adopted when making an order in the first instance. Given the similarity of the two processes, I do not consider that having to apply for recision or variation could be regarded as being unduly impracticable.

[48] Mr Hammond also suggested it would be undesirable for an employer to be put to making a formal application to rescind or vary where there had been obviously

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19 *Carter Holt Holdings Ltd v Fletcher Holdings Ltd* above n 17.

serious misconduct such as the use of violence in the workplace by the employee. Nevertheless, such an employer would not be without options, including an application for urgency to which serious consideration will always be given by the Authority and Court, as provided for in the Act. In any event, the present case was not argued on the basis that there is evidence suggesting a risk of such an event occurring. For all these reasons, this factor does not tip the scales of the balance of convenience in favour of WSL.

[49] Mr Hammond referred to the strain on those concerned of serious misconduct allegations being unresolved. In response, Ms Stewart referred to the stress which she says Mr Savage is experiencing with regard to the various processes he is facing, including the possibility of being subjected to what he says is an unjustified process. I regard the issue of stress as being neutral.

[50] Mr Hammond also submitted that WSL's workforce is multi-racial, and there is an imperative that such an allegation is addressed and resolved. If that is so, there is nothing stopping WSL from proceeding with its investigation, in respect of which there are several hypothetical outcomes. One involves the possibility that the allegations are not substantiated, or that in all the circumstances disciplinary outcome is not called for. Another is that a warning is considered appropriate. In all these cases, the matter would go no further. It is only if the conclusion is reached that Mr Savage should be dismissed that the possibility of an application to the Authority and Court actually arises. I express no view as to the merits of any of these options. The key point for present purposes is that making an interim order would not preclude WSL from investigating the matter further.

[51] In this case, I do not consider that the possibility of obtaining damages could be a reason for declining relief. It is clear from the evidence before the Court that Mr Savage relocated from the United Kingdom to commence his role. The history of the litigation thus far points strongly to his wish to retain the role, rather than being restricted to monetary claims. I do not, in the particular circumstances, consider that damages would be an adequate remedy.

[52] Given the clear view which I hold as to the merits of the legal point, I find the balance of convenience favours Mr Savage.

Overall justice

[53] Ms Stewart pointed to a number of factors which she said showed the allegations now brought against Mr Savage were untrue, vexatious and were being undertaken so as to circumvent the orders of the Authority. WSL, for its part, says that there is not a shred of evidence to suggest that the complaint it wishes to investigate is not genuine.

[54] There is no doubt that there are some issues between the parties, if regard is had only to the problems which have arisen regarding the interim reinstatement order; a compliance order has already been made, and now the Court is being required to consider the possibility of sanctions for breach of that order.

[55] It is not appropriate for the Court to make any comment on the pros and cons of the allegations and counter-allegations. However, the extent of differences between the parties suggest that a limited form of oversight is appropriate, which would be effected by requiring WSL to make an application to the Authority for recision or variation if it concluded dismissal was justified. Given that factor, and the strength of the plaintiff's case on the statutory interpretation point, I conclude overall justice favours the making of the order which is sought.

Disposition

[56] The Authority impliedly rejected the point which is the subject of this judgment. I find that it thereby erred in fact and in law. The challenge is allowed. An interim injunction should be ordered.

[57] Until further order of the Court, WSL is not to terminate the employment of Mr Savage, unless the Authority or Court rescinds or varies the interim reinstatement order dated 29 August 2019, and the compliance order of 20 September 2019.

[58] Mr Savage is entitled to costs for the purposes of this proceeding. Counsel should discuss that topic directly in the first instance. If agreement does not prove possible, any application for costs should be filed and served within 21 days of the date of this judgment, with the response being filed and served within 21 days thereafter.

B A Corkill
Judge

Judgment signed at 1.55 pm on 10 October 2019