

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 224
5382499

BETWEEN	SIMON MAXWELL EDWARDS Applicant
A N D	TWO DEGREES MOBILE LIMITED First Respondent
A N D	ERIC BENNETT HERTZ Second Respondent

Member of Authority: Alastair Dumbleton

Representatives: Michael O'Brien and Nura Taefi, counsel for Applicant
Penny Swarbrick, counsel for First Respondent

Investigation meeting: 29 June 2012

Date of Determination: 3 July 2012

DETERMINATION OF THE AUTHORITY

- A. Mr Edwards' application for interim injunction is declined.**
- B. By consent, orders restricting the disclosure and publication of particular evidence given by Mr Edwards are made as set out in paras [50] and [51] of this determination.**
- C. The substantive claims brought by Mr Edwards against Two Degrees Mobile Ltd and Mr Eric Hertz will be investigated by the Authority at a meeting to commence on 22 August 2012.**
- D. Costs are reserved.**

Application for interim injunction

[1] At the beginning of February 2012 the applicant, Mr Simon (Tex) Edwards, received from his employer the first respondent, Two Degrees Mobile Ltd, a proposal to disestablish Mr Edwards' role within Two Degrees' telecommunications business.

[2] The proposal, which was made in a letter from the second respondent, Mr Eric Hertz, the CEO of Two Degrees, referred to the role of "Strategist" performed by Mr Edwards, as follows:

Strategy development is a responsibility of all members of the SMT [Senior Management Team], and in particular the Head of Strategy and Business Development and the Marketing Function. As a consequence of this, and the evolution of the company, it is my belief that there is no longer a place in our structure for the stand alone role of Strategist which you hold.

I am therefore formally proposing that the Strategist role you currently occupy be disestablished.

[3] Mr Hertz in his letter invited Mr Edwards to take time to consider the proposal and to then meet and provide any feedback about it. Over several weeks there were extensive communications in writing and at face-to-face meetings between Mr Edwards and Two Degrees and their legal representatives, Mr O'Brien and Ms Swarbrick.

[4] On 27 April 2012, Mr Edwards was advised by letter that Two Degrees had decided to disestablish his role. He was also advised that the implementation of the decision, including its timing, would be discussed with him within a week.

[5] A personal grievance was raised by Mr Edwards with Two Degrees on 4 May. He claimed to have been unjustifiably disadvantaged in his employment as a result of the decision made to disestablish his role, and he warned that he would seek orders restraining Two Degrees if it proceeded to implement that decision.

[6] Further discussions took place up to 15 May when Mr Edwards received notice from Two Degrees advising that on the ground of redundancy his employment was terminated on notice of two months' expiring on 15 July 2012.

[7] On 18 June, Mr Edwards applied to the Authority for an order of interim injunction restraining Two Degrees from ending his employment as notified.

[8] The application was heard on the afternoon of 29 June, with evidence given in affidavit form by Mr Edwards, Mr Hertz and other witnesses on behalf of Two Degrees. Submissions were addressed by Mr O'Brien and Ms Swarbrick to the evidence and the legal principles to be applied by the Authority in determining the application.

[9] As the evidence in affidavit form was not subjected to cross-examination the Authority must proceed on the basis that any findings of fact by it are provisional only and may change after the claims have been fully investigated and all witnesses have been examined, where required, at an investigation meeting. The parties have agreed to the dates of 22, 23 and 24 August 2012 for that meeting to take place.

Tests for granting interim injunctive relief

[10] The standard tests or questions the Authority must consider when an interim injunction has been applied for are:

- Is there an arguable case?
- Where does the balance of convenience lie?
- Are other adequate remedies available?
- Where does the overall justice of the case lie?

Arguable case

[11] I find there is an arguable case favouring a grant of the order sought. It is, however, a weak case I find. The arguable case is that the decision to disestablish Mr Edwards' role as Regulatory Strategist or Strategist was predominantly motivated by an adverse view taken of Mr Edwards personally rather than by considering his position of employment and whether that position was one needed by the business. It is arguable that the disestablishment proposal and consideration given to it by Two Degrees was a pretext to cover up a different motive for ending the employment of Mr Edwards. On that basis the dismissal of Mr Edwards will arguably be unlawful under s 103A and the personal grievance provisions of the Employment Relations Act 2000.

[12] Evidence that an adverse view has been taken of Mr Edwards was pointed to by him in the form of an email sent by Mr Hertz on 2 February 2012, the day before

the disestablishment proposal was made. In his email Mr Hertz was responding to advice he had received that Mr Edwards wished to “wrap up a deal” to settle shareholding issues he had been discussing with Two Degrees. With reference to Mr Edwards, in his email Mr Hertz said the following:

This is a bit of positioning and gaming on his part. He knows very well that I do not have a mandate to agree on shareholder matters. He uses this kind of technique to delay, distract and defer. I will not let that happen. My intention is to drive this to a place, within NZ employment law, where he obtains a formal support or legal representative who will guide Tex to a solution. If that is not possible, then we will likely be eliminating his position or entering a performance disciplinary process that will end up in a mediated negotiation of settlement or an employment court proceeding.

We cannot afford the distraction any longer and we are simply not well served by his presence inside the business.

[13] Other evidence relied upon by Mr Edwards as showing that his position of employment had not been the focus of the employer’s considerations was that, in discussions, Two Degrees had not suggested that cost was a factor in proposing the disestablishment of the Strategist position. Also, Two Degrees had offered Mr Edwards ongoing work in his specialist area, although as a consultant rather than an employee. To any extent that the strategist work previously available to Mr Edwards had dried up, this has been claimed by him to have resulted from a deliberate plan to remove work from him.

[14] The email of 2 February sent by Mr Hertz was shortly after acknowledged by him and Two Degrees as problematic and for that reason Mr William Sherriff, the Chairman of Directors of Two Degrees, became directly involved in the process, in late March 2012, upon Mr Hertz’s impartiality being called into question. Mr Edwards relies on evidence he says shows that Mr Sherriff, the ultimate decision-maker in the disestablishment of his position, also predetermined the outcome of the consultation over the proposal, so that there was no consideration given by the employer with an open mind. Considerable reliance was placed on a statement Mr Sherriff made on 12 April during the course of discussions about the disestablishment proposal, which took place with Mr Edwards and the legal representatives of both parties.

[15] As that two hour long discussion was recorded, a transcript is part of the evidence and the Authority has been able to listen to the sound recording itself. It was

submitted that during the discussion Mr Sherriff put forward a view that the disestablishment proposal should be adopted unless Mr Edwards could persuade him otherwise. It was submitted that Mr Sherriff had said his thinking was based on three factors:

- A brief meeting he had had earlier that morning with Mr Eric Hertz; and
- Mr Sherriff's intrinsic knowledge and familiarity with what Mr Edwards had been doing as an individual within the Two Degrees organisation; and
- Reliance on Mr Eric Hertz, the CEO of Two Degrees who had the power to make a decision such as that under consideration.

[16] The Authority was directed to a particular passage in the transcript where Mr Sherriff is recorded as saying:

No, no, no. I think – I mean, it's based on a number of factors, it's based upon the discussions we had at the meeting this morning. It's based upon my intrinsic knowledge and familiarity with what Tex actually does as an individual within the organisation, is it a waste of his job description. And then it also comes from a reliance upon a CEO who is empowered to make a decision such as this.

[17] Immediately after this passage, Mr O'Brien is recorded as saying, "...that's a reliance on Eric who made it clear that one way or another Tex was going".

[18] On one view of what Mr Sherriff meant he was not independently assessing the need to retain Mr Edwards' role but was simply adopting as his own the view of Mr Hertz whose impartiality had been questioned earlier before he purported to withdraw from having any further part in the decision making.

[19] As submitted, the standard to which it must be shown by an applicant that there is an arguable case is a low one. To that standard I am satisfied Mr Edwards has an arguable case that a genuine redundancy is not the reason why his position has been declared disestablished and that therefore, arguably, his dismissal will be shown to be unjustifiable under the test of s 103A of the Employment Relations Act. Arguably redundancy was a pretext to remove Mr Edwards from the business of Two degrees rather than a genuinely considered way that the business could be made more efficient.

Balance of convenience

[20] This test favours the continuation by Two Degrees of Mr Edwards' employment until his substantive claims have been determined by the Authority following the meeting scheduled for later in August. Before that meeting the parties expect to undertake mediation, possibly by the end of this month or early in August, and their engagement in that process also to some extent favours the continuation of employment in the meantime.

[21] There is no evidence that Two Degrees will be put to unreasonable expense in continuing the employment on an interim basis.

[22] Mr Edwards' believes that his reputation will be adversely affected if he is dismissed. He is a public figure because of his high profile in the telecommunications business. While it may be natural to fear public opinion and speculation about his departure from Two Degrees, there has not been even the slightest suggestion in this case, or the earlier one heard by the Authority, that Mr Edwards has been involved in some wrongdoing or impropriety while employed by Two Degrees or at any other time. The offer by Two degrees to retain Mr Edwards as a consultant provides some evidence that no misconduct of any kind by him underlies the decision to disestablish his position of employment. From the evidence, it is also a possibility that what happened is that Two Degrees has moved to a new phase in its growth from the initial one that Mr Edwards has been so crucially concerned with, and like any employer Two Degrees has been entitled to assess its ongoing needs in having a workforce, to take account of development and change. I do not consider reputational damage to be a strong factor in this case.

[23] Although Mr Edwards as an employee has a right to be offered work as well to be paid, there is a body of evidence from the management of Two Degrees that it has run out of useful work for him. Going into a new phase of development and operation the employer has been redistributing the tasks of Mr Edwards' stand alone position among members of the senior management team. Mr Edwards argues that this has been carried out as part of a deliberate plan to remove him from his employment.

[24] The balance of convenience is also evened by an offer that has been made to Mr Edwards to remain employed on garden leave until his employment relationship

problem is resolved, whether that occurs by mediation or from a determination of the Authority following an investigation.

Availability of alternative remedies

[25] Mr Edwards considers that he must remain working in the employment of Two Degrees to protect his investment in the company's shares from loss of value or other harm. If there is a risk to him in that regard, damages or remedies other than reinstatement may not be sufficient to protect his equity.

[26] Mr Edwards' shareholding in Two Degrees is through his investment company known as KLR. Over the last two years he has been in discussions with Two Degrees about the sale of the shares, from which naturally he wishes to make a profit. In his evidence Mr Edwards has claimed that Two Degrees, in purporting to disestablish his position, has targeted him because of his shareholding. He has deposed:

99. *..... The value of my stake will become at risk if I am no longer employed by the company. The last five years has proven that I need to be in the company to preserve the value of my investment (because of dilutive rights issues, faulty strategy, poor disclosure by the company, and a general disregard for capital by the company).*

100. *If my employment with Two Degrees is terminated, I believe this would have a significantly detrimental effect for my shareholding. This is because my employment has always been intrinsically tied to my shareholding. The way that Two Degrees has dealt with me has reflected this reality.*

[27] Mr Edwards has also deposed to his concern about the future of Two Degrees' business if he cannot remain closely involved in devising and implementing strategy and generally helping to run the business. His evidence is:

104. *Given my significant personal investment in the company, I need to remain in my employment to assist with the issues that face Two Degrees at present and in the coming year.*

[28] The untested evidence given so far does not show the link Mr Edwards says exists between his contract of employment and his investment in Two Degrees shares. I have been unable to see yet that Mr Edwards' right or interest through KLR in those shares was acquired or exists through his becoming an employee of the company or as a term or condition of that employment.

[29] On that basis, such remedies Mr Edwards may have to protect his shareholding would not be available in the Employment Relations Authority by reinstatement following the investigation and determination of any problem arising from a relationship of employment. Such protection as may be available at law to Mr Edwards or KLR is likely to be in the civil courts and it is noted that some proceedings have been commenced in the High Court.

[30] While Mr Edwards considers that he is almost indispensable to Two Degrees if the business is not to fail and put his shareholding at risk, it is *the employer's* consideration which must be examined in a claim that redundancy is unjustified or unlawful. As stated by the Court of Appeal in the leading case of *GN Hale & Sons Ltd v. Wellington etc Caretakers etc IUOW* [1992] NZILR 1079, an employer is entitled to make its business more efficient and an employee does not have a right to continued employment if the business can be run more efficiently without him.

[31] The issue to be determined is whether *the employer* considered the employee to be surplus to his needs. The evidence to this point I find is strong that that was the employer's consideration overall, despite the unpromising start of the process. That process was something of a trial in itself with much correspondence, information and views exchanged, and with lengthy meetings involving both parties and their legal representatives. No doubt along the way there were slips of the tongue and ambiguous remarks made by participants, but their words should not be put under microscopic focus. The overall impression gained by the Authority from the affidavit evidence is that genuine redundancy was the predominant motive for the decision to disestablish Mr Edwards' role as Strategist.

[32] Mr Matt Bolland the senior manager to whom Mr Edwards has reported provided a detailed examination of Mr Edwards' Strategist role and how the tasks that he so effectively and crucially performed during the start up phase of the business have since been absorbed into the roles of others within the specialised senior management team, as the business has become established in the market and fully operational.

[33] Mr Bolland's evidence and that of Mr Paul Matthewson, General Counsel and Head of Regulatory of Two Degrees, in particular provide a counter to the claim that a plan was hatched to remove Mr Edwards from Two Degrees and that no genuine

consideration was given to whether his position was needed in the future by the business.

[34] As an employee who has raised a personal grievance and who is likely to raise another if his dismissal is effected on and after 15 July, I consider that Mr Edwards does have adequate alternative remedies to interim reinstatement, as in effect is the remedy now being sought by way of interim injunction. Those remedies include compensation for loss of remuneration following his dismissal as well as for hurt feelings, humiliation and similar harm. Any unlawful treatment of Mr Edwards or KLR as a minority shareholder will arise from a relationship or relationships regulated by the law applying in other jurisdictions such as the High Court.

Overall justice of the case

[35] I find that the overall justice of the case does not favour the grant of an interim injunction. In standing back to consider this final test, I have had regard to the weakness of the arguable case and to another factor that I consider, in exercising the discretion of the Authority, does substantially address any imbalance of convenience if Mr Edwards does not obtain an interim injunction restraining Two Degrees from effecting a termination of his employment from 15 July.

[36] Mr O'Brien accepted that in principle Two Degrees as an employer had been able to step back from the point reached by Mr Hertz, whose email of 2 February had raised the appearance of bias or predetermination by him in the decision under consideration. There was extensive evidence about the appropriateness of Mr Sherriff then taking over as the decision-maker. It is clear that he is well qualified and knowledgeable of both the Two Degrees telecommunications business at its particular level in the international market and the way the company operates. He is also well acquainted with Mr Edwards personally from meeting him several times a year during his visits to New Zealand for board meetings.

[37] I do not accept from the evidence so far that Mr Sherriff became involved simply to rubber stamp a decision already made by Mr Hertz but which he could not implement because of the appearance given by the wording of his 2 February email.

[38] A particular challenge made to the impartiality of Mr Sherriff was his remark made during the meeting of 12 April with regard to "... a reliance upon a CEO who is empowered to make a decision such as this". I agree with the submissions of

Ms Swarbrick that the remark cannot be focused on in isolation from the discussion that preceded it during the two hour meeting. I consider that the context in which the remark was made was not the necessity for having the Strategist position but was the nature or scope of the position in terms of a job description. From listening to several minutes of the recorded discussion that preceded the remark, it seems to me that Mr Sherriff, in referring to his own “intrinsic” knowledge and familiarity with the work Mr Edwards was doing, and in expressly referring to “his job description”, was backing up his own view with a similar one he understood Mr Hertz to hold as to the nature of Mr Edwards’ job within the organisation.

[39] Mr Sherriff’s affidavit evidence is that he did not involve Mr Hertz in the decision at all and that he had carefully considered everything said and provided to him, after which he came to the view that the stand alone role of Strategist was not required in the company.

[40] The Authority has also been cautious in placing too much weight on Mr Hertz’s email, although the wording of it is regretted by him. To the extent that his words may be taken to be a reflection of his thinking at the time he wrote them, the ideas appear somewhat mixed. It would seem though that Mr Hertz was anxious after some two years of discussions with Mr Edwards to conclude the search for some arrangement by which Mr Edwards and the company could part ways. Whether that was to be by negotiated exit, performance management or identifying a redundancy situation remained open, according to the email, but the action taken was expressly intended by Mr Hertz to be “within NZ employment law,” part of which is that an employee may not be dismissed unjustifiably.

[41] If, as submitted for Mr Edwards, there had been from the beginning a covert plan by Mr Hertz to dismiss Mr Edwards unjustifiably, in my view, taking the evidence as a whole, the reassignment of the responsibility to Mr Sherriff was a step back to allow a lawful path to be taken. In discharging his responsibility Mr Sherriff did, I find to this stage, consider the needs of Two Degrees as an employer in relation to the continuation of a position of employment rather than the employee, Mr Edwards, who had held that position.

[42] I do not consider that the offer made to Mr Edwards of consultancy work detracts from there having been a genuine redundancy situation with regard to the employed position of Strategist. From figures mentioned in the evidence it seems that

the remuneration for the consultancy had been discussed at a figure of about half of the salary being paid to Mr Edwards.

[43] Although it is trite that redundancy is about positions rather than individuals employed in those positions, the circumstances of this case presents something of a challenge in that regard because in some ways Mr Edwards was the position or defined the position. That is not surprising as unlike the employees in many redundancy cases, in relation to his employer Mr Edwards had been a founder, financier, visionary, “ambassador”, “entrepreneur” and person of great drive who played a substantial and pivotal role in creating the business by overcoming considerable financial and regulatory obstacles.

[44] The evidence to this point suggests to the Authority that Two Degrees had set about assessing its future needs for certain work to be done in the business once it had passed the start-up phase Mr Edwards had been so key to, and was looking to move forward into a new phase as an established business competing with other telecommunication companies.

[45] In assessing that the arguable case is weak, I have taken account of legal principle recognised by the Courts to be applicable, as taken from the *Hale* judgment of the Court of Appeal. More recent cases from the Employment Court, notably *Simpsons Farms Ltd v. Aberhart* [2006] ERNZ 825 have confirmed that the principles in the *Hale* case continue to apply under the Employment Relations Act 2000.

[46] A passage in the judgment of Somers J in the *Hale* case is instructive where the Court observed:

The needs of the employer are not to be confined to any particular set of circumstances. Whether a dismissal for redundancy is justified will depend first on whether it was made bona fide by the employer on that ground and, secondly, on whether it is accompanied by fair and reasonable treatment.

If the dismissal is made because the employer genuinely considers the employee is superfluous to the needs of the business it will to that extent be justified. The management of a business is for the employer and it is not for the Court to substitute its judgment for his. What the Court is entitled to do, however, is to satisfy itself that the dismissal was made because the employer considered that the employee was surplus to his needs.

[47] For the purposes of determining this interim application which is based on affidavit evidence, when considering the overall justice the Authority is satisfied that

Mr Edwards' dismissal on notice can strongly be argued to have resulted from his employer, Two Degrees, determining that the Strategist position was surplus to the company's needs. This was the employer's consideration to give, not the employee's, although Mr Edwards was entitled to and did provide input for the employer to consider. I find on the evidence given for the purpose of this interim application it is strongly arguable that Two Degrees considered, genuinely, that the position was surplus to its needs.

The garden leave offer

[48] The further discretionary factor I have referred to above is the offer made by Two Degrees to Mr Edwards on 18 June 2012, by letter from Ms Swarbrick to Mr O'Brien as follows:

1. *Mr Edwards' last day at work will be Friday 13 July as scheduled (or earlier if agreed between the parties).*
2. *After that date, the First Respondent will retain Mr Edwards on its payroll until either 31 August 2012, or the date of resolution of the matters between the parties, or the date the Authority gives its decision on the unjustified dismissal claim, whichever is the earliest.*
3. *This timeframe will enable both an all issues mediation, and if necessary a substantive hearing on the unjustified dismissal claim, to take place.*
4. *In the period between 13 July and 31 August (or the earlier date if applicable) Mr Edwards will formally be an employee but will not be required to attend to any work on behalf of the company, or to attend at its premises, or to access its systems. Furthermore, Mr Edwards will not contact 2degrees' staff or Trilogy's staff, nor make any public comment regarding 2degrees' business or the claims he has made against 2degrees. He will in effect be on garden leave for the period.*

[49] Although Mr Edwards rejected the offer, counsel Ms Swarbrick advised the Authority that it remains open to be accepted by him. I consider that the offer does address any significant imbalance of convenience between the parties and it is also relevant that there is a comparatively short timeframe before the stage of mediation will be reached or, after that, the investigation meeting in the Authority. Weighed together with the relatively weak arguable case, I consider that the overall justice lies with the Authority, as an exercise of its discretion, declining to grant the application sought. The application is determined accordingly.

Non-disclosure and non-publication orders

[50] By consent, orders are made with regard to the following paragraphs in the affidavit of the applicant Mr Simon Maxwell Edwards sworn on 15 June 2012, and also in an exhibit attached to that affidavit, as follows:

- Paragraphs 16, 20, 21, 22, 23, 24, 103 (limited to the reference to the sum of money at line 7 of the paragraph), and Exhibit TE-4 of the affidavit.

[51] In respect of the contents of those paragraphs and that exhibit, the Authority orders that they:

- (a) Are viewed only by the parties to these proceedings and the Authority and are not discussed with any other person; and
- (b) Are prohibited from publication.

Costs

[52] Costs are reserved.

A Dumbleton
Member of the Employment Relations Authority