**IN THE EMPLOYMENT COURT OF NEW ZEALAND**
**AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA**
**TĀMAKI MAKAURAU**

**[2019] NZEmpC 113**
**EMPC 274/2019**

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| IN THE MATTER OF | a challenge to a determination of the Employment Relations Authority |
| AND IN THE MATTER | of an application for a stay of execution |
| BETWEEN | GENESYS TELECOMMUNICATIONS LABORATORIES LIMITED<br>Plaintiff |
| AND | BRENDON SCOTT<br>Defendant |

Hearing: 26 August 2019
(Heard at Auckland)

Appearances: P Kiely and S Worthy, counsel for the plaintiff
C Eggleston, counsel for the defendant

Judgment: 30 August 2019

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**JUDGMENT OF JUDGE B A CORKILL**

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## Introduction

[1] This judgment resolves a challenge to the making of an interim reinstatement order by the Employment Relations Authority (the Authority).[1]

[2] Mr Brendan Scott was employed by Genesys Telecommunications Laboratories Limited (Genesys) from April 2014. In late 2018, the company commenced a process which raised the possibility of his role being disestablished. In

[1] *Scott v Genesys Telecommunications Laboratories Ltd* [2019] NZERA 470.

due course, he was advised that his position of Senior Principal Solution Consultant in Auckland was surplus to requirements; his employment was accordingly terminated on 7 June 2019.

[3] Mr Scott immediately raised a personal grievance for unjustified dismissal, asserting that there had not been a fair and reasonable basis for the employer's decision having regard to the rationale of the decision and the process it followed, and in light of its failure to consider appropriate alternatives.

[4] On 26 June 2019, Mr Scott filed a statement of problem in the Authority seeking an interim reinstatement order on an urgent basis, as well as a final order of reinstatement, lost remuneration, and compensation for humiliation, loss of dignity and injury to feelings.

[5] The Authority investigated the application for interim reinstatement on 2 August 2019. Its determination was issued on 13 August 2019. After applying the standard principles relating to such applications, it determined that Genesys should reinstate Mr Scott on an interim basis until the investigation meeting to consider his substantive claim could be heard, scheduled for 19 and 20 November 2019. The Authority's order was subject to the following conditions:[2]

i. That Mr Scott be restored to the Genesys payroll at his usual rate of pay from 14 August 2019.

ii. That Genesys, at its discretion, arrange for Mr Scott to then attend work from that date, or in order for it to make any necessary arrangements, from a day suitable to it within the next five working days after the date of the determination.

iii. During the period of interim reinstatement, Genesys, at its discretion after first consulting with Mr Scott about any such proposal, could opt to direct him to carry out duties as a Solutions Consultant (SC) either in Auckland or, should its operational needs require, from any of its other

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2 At [82].

usual business locations in New Zealand, Australia or elsewhere in the Asia/Pacific region.

iv. Genesys could, also at its discretion, choose to place Mr Scott on garden leave for some or all of the period of his interim reinstatement.

v. The parties were to cooperate, on a good faith basis, in the operation of the Authority's order and its conditions, and were directed to seek mediation assistance if they could not, after utilising best endeavours, resolve necessary arrangements for Mr Scott's return to work and dealings with his managers and other colleagues.

vi. Leave was reserved for the parties to seek any necessary variations to the conditions, but they were directed not to seek such leave without first attempting to resolve any problem with mediation assistance.

[6] On 16 August 2019, Genesys filed a challenge to the conclusions of the Authority on a de novo basis. In essence, it asserted that the termination had been justified, and that in considering the applicable principles relating to interim reinstatement, the Authority should not have exercised its discretion to reinstate the defendant on an interim basis. It accordingly sought an order setting aside the Authority's determination in its entirety.

[7] Genesys also sought an application for stay of the Authority's determination, pending the resolution of the challenge by the Court. It also sought urgency.

[8] I held a telephone directions conference on 19 August 2019. After hearing from counsel, I concluded that the circumstances justified an urgent hearing; timetabling orders for the filing of evidence were made on that basis. The hearing of the challenge, and the application for stay proceeded before me on 26 August 2019.

[9] The Court has before it all the affidavit evidence and documents which had been considered by the Authority, as well as further affidavits from each of the witnesses who had provided affidavits to the Authority.

[10] As in the Authority, the challenge has been brought on, heard and decided at short notice. There has been no testing of the evidence, although detailed submissions were received at the hearing. At this preliminary stage, the views of the Court are necessarily provisional.

## Essential facts

[11] Genesys is part of a global business providing customer experience and call-centre technology to businesses and organisations across a wide range of industries. In New Zealand it operates two offices, one in Auckland and one in Wellington.

[12] Genesys is a New Zealand registered company; it is 100 per cent owned by Genesys Laboratories Australasia Pty Limited and these two related entities operate jointly. Their business locations are in New Zealand, Australia and elsewhere in the Asia/Pacific region.

[13] Prior to Mr Scott's disestablishment, he was based in the Auckland office serving customers in what is known as the Genesys "Enterprise" market segment, comprising larger customers and prospects. Two other employees worked in that office servicing what was described as Genesys "Commercial/Mid-market" interests, predominantly using different products than those on which Mr Scott worked.

[14] In the Genesys Wellington office, Genesys employed PM, an Account Executive (AE), whose work focused primarily on Enterprise market segment customers, but with some Commercial/Mid-market responsibilities as necessary.[3]

[15] Mr Scott's job description stated he was required to work with AEs on developing new business across all Genesis product lines, working in a consultative role to understand customer needs, and to customise Genesys' software as required. The object of the role was to help AE's progress and close sales opportunities. Client interactions would be necessary from time to time.

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[3] Because some Genesys staff members involved have not given evidence about their own circumstances, natural justice considerations mean it is appropriate to anonymise their names. This was the procedure followed in the Authority.

[16] Initially, Mr Scott was, he says, the sole SC Engineer based in New Zealand, focusing on Enterprise customers. He says he handled at least 95 per cent of that work nationally, working significantly with PM.

[17] In December 2016, after Genesys acquired Interactive Intelligence Inc, two more SCs, and a new AE, were employed in Auckland. Mr Scott was promoted to Senior Principal Solutions Consultant. He says that 10 per cent of his time was spent with AEs based in Auckland and Australia, with the remaining 90 per cent of his time working alongside the Wellington-based AE, PM.

[18] Mr Timothy Brown is an employee of the parent company, responsible for leading and managing the SC team within the Australia and New Zealand region. Mr Scott was one of his direct reports.

[19] On 5 September 2018, Mr Scott met Mr Brown for an annual review meeting. On that occasion, he learned that RG wished to relocate from Brisbane to Wellington. Mr Brown says he told Mr Scott RG would be transferring to Wellington; and that this was for family reasons.

[20] Mr Scott considered that RG was regarded as a "star performer within the SC team" and he was unsurprised that Genesys would try to retain his services if possible.

[21] There is a dispute between the two as to whether Mr Brown also told Mr Scott that there was a headcount problem in Auckland. Mr Scott says this observation was indeed made by Mr Brown, and that this led to a discussion as to whether one of the employees based in the Auckland office, expected to retire within 18 months, could be placed in a different role. Mr Brown says he does not recall referring to a headcount problem. However, he acknowledges there was a discussion as to whether one of the Auckland SCs might be placed in a different role. He also stated there was a discussion as to how Genesys needed to make better use of its SCs.

[22] During the same meeting, there was discussion between Mr Scott and Mr Brown as to the former's working relationship with PM. Mr Scott says that in the course of the meeting, Mr Brown said "your reputation is in tatters", and indicated that

his behaviour would need to change or else he would be performance managed. For his part, Mr Brown says that in the course of 2018, he held regular discussions with PM and Mr Scott as to how they could best work together. Weekly meetings had been set up to encourage coordination and communication. He said he had also held concerns as to whether certain challenges Mr Scott was facing in his personal life had affected his work performance. He confirmed he told Mr Scott that if the issues continued, a formal performance improvement plan may need to be considered.

[23] In October 2018, RG's relocation to Wellington was announced. Mr Scott was concerned as to how the creation of the new role would impact on his employment. He requested a catch-up by phone with Mr Brown to discuss this issue. The two spoke on 24 October 2018.

[24] In the course of that call, Mr Scott asked Mr Brown how the relocation might affect his work. Although there is again a dispute as to precisely what language was used, Mr Scott believed he was assured that his employment would be secure. Mr Brown says he would have said that Genesys had no plans to make any resourcing changes at that time. Fifty per cent of RG's future work would still be Brisbane-based. He also understood that future Enterprise work in New Zealand would be shared between RG and himself, regardless of the location of the work.

[25] Mr Scott says that within weeks of the relocation in November 2018, RG took over at least 80 per cent of the Enterprise opportunities on which Mr Scott had been working. He also says that little future work was then allocated to him thereafter, so that he was effectively side-lined.

[26] Mr Scott says that much later he learned that in mid-November 2018, the Auckland employee who Mr Brown had mentioned might be interested in moving into a different role had been asked whether he wished to do so; but he had indicated he was not interested in such a step. It appears Mr Scott believes this was a step taken by Genesys to address a headcount problem.

[27] In November and December, Mr Scott said he also undertook what was his first Australian-based work in almost five years of employment with Genesys, with trips to Melbourne and Canberra.

[28] On 14 December 2018, Mr Scott took part in a video conference with Mr Matt Surridge, the parent company's Vice President for Business Consulting and Solutions, APAC, Ms Maddie Lown, Senior Human Resources Generalist Australia and New Zealand, and Ms Kristie Twomey, a Director of the New Zealand company and its parent company; Ms Twomey is employed by the latter company as Vice-President, Human Resources, Asia Pacific. Mr Surridge announced a proposal to make Mr Scott's position redundant. Essentially, Mr Scott was told that there was now a surplus of resources in the Auckland office, and that his current duties would be reallocated to the Wellington office, that is, to RG.

[29] On the same day, a letter was sent to him by Genesys, outlining the proposal in detail. It was stated the aim was to achieve greater efficiency, and to ensure that the company had "the right pre-sales/solutions consulting coverage in the right areas to support the future growth of the business". The company considered there was a surplus of staffing resources/capacity in the Auckland office. Growth in the Auckland market would centre around the Commercial and Mid-market sector, so that there was no longer a need for a full-time Senior Principal Solution Consultant role serving Enterprise customers in that location. Then it was stated:

> As you may be aware, the majority of our large Enterprise customers are based in Wellington. The majority of our future Enterprise business is likely to be government based and having resources on the ground in Wellington is seen as critical to realising this growth. Reducing the need for travel to pre-arranged meetings, along with co-locating with the Account Executives with the associated Pre-Sales resources will allow us to be much more responsive to customer demands.

[30] Disestablishment of Mr Scott's role was therefore proposed, with a reallocation of the remaining work to staff outside of Auckland. A meeting for feedback on the proposal was proposed for 21 December 2018.

[31] On that day, Mr Scott provided a preliminary response questioning the apparent assumptions which underlay the proposal. He noted he had not seen or analysed the

data Genesys had used to forecast future growth in the Auckland and Wellington Enterprise market, and said that what was being asserted did not accord with his experience as a key-player in that market. He gave examples to support his opinion, emphasising that in order to support particular prospects, location had not been a significant issue for a range of customers throughout Australasia. He sought the information which would have been used by Genesys when considering its forecast. He also offered to relocate to Wellington during 2019 to continue his duties from that office.

[32] There then followed extended correspondence between the parties, which soon after involved lawyers on each side.

[33] Mr Scott's lawyer, Mr Eggleston, reiterated Mr Scott's request for further information; through its lawyer, Mr Kiely, Genesys asserted that all relevant information had been provided.

[34] Mr Eggleston also suggested that the proposed redundancy had only come about because RG had been transferred to Wellington and was now providing services for Enterprise prospects which would previously have been undertaken by Mr Scott. Mr Kiely stated he was instructed that RG's move had been approved prior to Genesys commencing consideration of a potential restructure. The two events were not connected.

[35] Mr Kiely also advised that a review had been undertaken by members of Genesys' management from late November to early December 2018, and that there were no relevant documents with regard to that review which could be disclosed. Nor was it considered appropriate to provide any further information under the Privacy Act 1993.

[36] Mediation took place on 9 May 2019, but the parties were unable to resolve their differences.

[37] Correspondence continued. Mr Eggleston said that documentation relating to the review that had given rise to the Genesys' proposal had still not been provided,

and that this was sought under the Privacy Act 1993, including advice as to what had been discussed in that review; even if not recorded since such information would be readily retrievable under Principle 6 of that Act. Reference was made to a case note of the Privacy Commissioner to that effect.[4]

[38] In an email of 10 May 2019, Mr Eggleston recorded that Mr Scott had reviewed current sale forecasts for the Auckland and Wellington offices. This suggested, he said, that the figures initially provided in December 2018 had been inaccurate and/or that there had been a significant movement in the projections. It was no longer apparent that there was a weighting in favour of Wellington, as had been outlined in the proposal. The Wellington forecast had reduced 45 per cent in three and a half months for reasons not yet understood, whereas the Auckland forecast had increased significantly.

[39] A comprehensive response was given by Genesys via Mr Kiely on 17 May 2019. He said Genesys rejected the assertion of inaccuracy of its forecasts, which would change periodically. In any event, they were only one factor in the company's proposal. Mr Kiely stated his instructions were that the growth of Genesys' Enterprise business over the next few years would be driven from Wellington, and that the current structure was too heavily weighted towards resources in Auckland. The best interests of long-term growth and customer service required one Enterprise SC based in Wellington, and two Commercial Mid-market SCs based in Auckland. Further feedback was invited.

[40] On 20 May 2019, Mr Scott put forward a range of suggestions as alternatives to the disestablishment proposal. He advanced seven suggestions, which included the possibility that he would relocate to Wellington, or to Canberra where he understood a position had been advertised.

[41] On 4 June 2019, Genesys wrote to Mr Scott confirming its proposal to disestablish his role. In that letter, Genesys summarised the correspondence, and stated that all feedback provided had been considered. Responding to several issues raised by Mr Scott, Genesys stated that although the original proposal had noted the

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4 *Case Note 210106* [2010] NZ PrivCmr 14.

benefits of reducing the need for travel, this was not its main rationale. Reduction in travel costs would be a minor benefit.

[42] Mr Scott had stated he was prepared to change the focus of his role, but Genesys already had roles focusing on other products which would fulfil its requirements.

[43] The assertion that the restructure proposal had been predetermined and that RG had taken his role was not accepted. RG had been offered employment in New Zealand in late September 2018 and relocated to the Wellington role prior to Genesys considering a potential restructure. All relevant information had been provided. It was not accepted that the proposal was not genuine.

[44] In response to Mr Scott's assertion that the company should look at the New Zealand market as a whole rather than focusing on a regional office, Genesys responded by stating that it needed to deal with an issue of excess capacity in the Auckland office. Forecasts had been provided, and considered, but these were only projections and would change periodically. They were only one factor in the proposal. Having considered Mr Scott's feedback, Genesys still considered the growth of its Enterprise business over the next few years would be driven from Wellington.

[45] Redeployment options had been considered. The possibilities to which Mr Scott had referred suffered from the problem that there would still be a surplus of resource. There were no available roles in Asia/Pacific for Mr Scott, but if he was able to identify such a role he was welcome to apply. The Canberra position had been extended to include Brisbane-based candidates and had been filled.

[46] In the result, notice of termination of employment by reason of redundancy was given, with Mr Scott's last date of employment being 7 June 2019. Mr Scott would be paid for time worked up to 7 June 2019, one month's notice, untaken holiday pay, and six weeks' redundancy pay.

[47] On the final two days of Mr Scott's employment, several events occurred. Mr Brown had travelled from Melbourne to Auckland to facilitate handover

arrangements with Mr Scott. A problem arose with regard to data concerning Mr Scott's personal affairs held on his laptop, which needed to be returned to the company. The details of that issue will be discussed later.

[48] In the course of his interactions with Mr Brown, Mr Scott recorded a conversation in which material instructions were given by Mr Brown to him. He did not disclose the fact of the recording at the time, and indeed did not do so until he filed an affidavit in reply in the course of the Authority's investigation. The various issues which have as a result been raised by Genesys will also be discussed later.

[49] Finally, Mr Eggleston wrote to Mr Kiely on 7 June 2019 stating that Mr Scott would be raising a personal grievance for unjustified dismissal, and that he held instructions to issue urgent proceedings in the Authority seeking interim reinstatement. At the same time, he recorded that in the original proposal for redundancy, Genesys had stated Mr Scott would be consulted about alternative positions. It was noted that no such consultation had taken place; Mr Scott had simply been advised there were no available redeployment options. Copies of all documentation held by Genesys relevant to the redeployment process had been requested.

[50] Mr Kiely responded on 19 June 2019 stating Mr Scott had been fully consulted about redeployment options. Genesys had not been able to locate any suitable roles for redeployment. As far as the Canberra role was concerned, it had first been advertised in January 2019; on 18 March 2019 the location for the role had been extended from Canberra to include Brisbane; on 20 March 2019, the successful candidate applied for the role; this was offered to him on 22 May 2019; the salary for the role was formally approved on 29 May 2019.

[51] The dismissal grievance was submitted on behalf of Mr Scott to Genesys on 18 June 2019.

## Submissions

*Genesys' case*

[52] In submissions presented for Genesys, Mr Kiely emphasised three points. First, he said Mr Scott's role no longer existed. The role had not been replaced, and the Auckland office now had one less member. There was no work or role to which he could be reinstated. Moreover, the role was disestablished as a result of a genuine restructure process in which his position was identified as being surplus to requirements.

[53] Second, Genesys had irretrievably lost trust and confidence in Mr Scott. This was because on his final days of work he had not obeyed the lawful and reasonable instructions of his employer. He had also secretly recorded his manager. It was submitted that Mr Scott clearly did not trust Genesys, and now Genesys did not trust him. An employment relationship would be untenable, and neither interim nor permanent reinstatement would be practicable or reasonable.

[54] Third, Mr Scott was paid on termination the sum of $58,718.52. He had received the equivalent of 18.5 weeks' salary, being a calculation based on his base salary of $3,169.39 per week. This meant that he had been paid in effect until 9 October 2019. An order for reinstatement required Genesys in effect to pay Mr Scott twice because he would receive his salary in addition to the amount already paid. If Mr Scott were indeed to be reinstated permanently after the investigation meeting in mid-November, there would only be a short period during which Mr Scott would be without income; accordingly, he would not be materially disadvantaged were interim reinstatement to be declined. Were such an order to be made, he would be placed in a better position than he would have been if in fact he had not been dismissed.

[55] Dealing with each of the topics which need to be addressed for interim reinstatement purposes, Mr Kiely submitted in summary that Genesys would satisfy the test of justification in s 103A of the Employment Relations Act 2000 (the Act) and considered Mr Scott's argument he was unjustifiably dismissed to be weak at best. However, it accepted the grievance claim met the threshold of an arguable case.

[56] However, it submitted there was no serious question to be tried in relation to the remedy of permanent reinstatement, because it would not be practicable or reasonable for the Authority to make such an order. This was because there was no available work, there had been a loss of trust and confidence through a failure to follow instructions, a covert recording had been made, and because work relationships had deteriorated.

[57] Turning to the balance of convenience, Mr Kiely submitted that this assessment favoured Genesys, because to make the order would result in Mr Scott being paid twice, and the merits were at best weak. Damages would be an adequate remedy.

[58] Finally, addressing overall justice, it was submitted that any harm to Mr Scott would be minimal between now and the November investigation; and any financial loss could be compensated for if necessary. The factors weighing against an order meant the interim reinstatement order should not have been granted.

*Mr Scott's case*

[59] For Mr Scott, it was submitted in summary that the six causes of action which had been raised to support the dismissal grievance showed he has a strong case. There were multiple substantive and procedural flaws in Genesys' redundancy process.

[60] Against that background, Mr Scott's claim for reinstatement should be allowed, since he had a right to have his job back. The various problems alluded to by Genesys were, in effect, overstated.

[61] Mr Eggleston submitted the balance of convenience favoured Mr Scott. In effect, were he not to be reinstated he would likely be out of work for a minimum of four and a half months, and up to seven and a half months. That amounted to a loss of base salary, alone, of between $44,000 to $95,000. After a five-month break there would be a reduced prospect that reinstatement would be a viable or successful option. It was submitted that damages would not be an adequate remedy. Concerns that had been raised by Genesys as to the adequacy of Mr Scott's undertaking should not preclude the grant of relief.

[62] Finally, in considering overall justice, the strength of Mr Scott's case was the pivotal factor. It was submitted that a grave injustice would occur if Genesys, which had created the problem in the first place through an inadequate redundancy and redeployment process, should be allowed to claim there was a loss of trust and confidence, and thus avoid the consequences of its own shortcomings. To do so would be to reward Genesys for its own failings.

## Legal framework

[63] The legal principles are not in dispute.

[64] Section 123(1)(a) of the Act provides for the remedy of reinstatement of an employee to his or her former position, or placement to a position no less advantageous to that employee.

[65] Section 125 provides that reinstatement is to be a primary remedy, if it is sought by an employee and if it is determined that such a person does have a personal grievance. The Authority or Court must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy under s 123 of the Act.

[66] Under s 127 of the Act, the Authority may order interim reinstatement where such an application is made by an employee who has raised a personal grievance, if the Authority thinks fit. When determining whether to make such an order, the Authority must apply the law relating to interim injunctions, having regard to the object of the Act. The order may be subject to any conditions which the Authority thinks fit.

[67] The object of the Act is set out in s 3 of the Act and describes the manner in which productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship, arise. These include the fact that employment relationships must be built not only on mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and by acknowledging and addressing the inherent inequality of power in employment relationships.

[68] In *NZ Tax Refunds Ltd v Brooks Homes Ltd*, the Court of Appeal confirmed interim injunction principles as follows:[5]

> 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.
>
> 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.

[69] Judge Inglis, as she then was, emphasised in *Western Bay of Plenty District Council v McInnes*, that in a claim for reinstatement the question of whether there is a serious question to be tried raises two sub-issues:[6]

a) Whether there is a serious question to be tried in relation to the claim of unjustified dismissal; and, if so,

b) whether there is a serious question to be tried in relation to the claim of permanent reinstatement.

[70] 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.[7]

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

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

6 *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [8].

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

## Serious questions to be tried: Mr Scott's claim of unjustified dismissal

[72] As noted, Genesys accepts that Mr Scott's claim of unjustified dismissal clears the initial threshold as to whether there is a seriously arguable case, in the sense that his causes of action are not frivolous or vexatious.

[73] However, it says those claims are in fact at best weak. For Mr Scott it is asserted that they are strong.

[74] At this stage it is necessary to describe each of Mr Scott's causes of action, and for convenience I will make observations as to the relative merits as I proceed, which will, at a later stage of the judgment, be relevant to balance of convenience and overall justice considerations.

*First cause of action – predetermination*

[75] Mr Scott says that Genesys purported to consult with him from December 2018 as to the possibility of disestablishing his role and transferring his duties to another employee. He alleges Genesys had already predetermined that outcome in September 2018 when it agreed to relocate RG to Wellington, and when it was already aware of a perceived headcount problem in Auckland. Since his relocation, Genesys had transferred the bulk of Mr Scott's existing and future work to RG. Genesys had accordingly purported to consult with Mr Scott over a decision that had already been made and put into effect without consultation.

[76] In her evidence, Ms Twomey said that the restructure process was not predetermined. She said she became aware of RG's potential move in August 2018, and that it was completely separate from the proposal to restructure the Auckland office.

[77] She said that the restructure proposal arose out of discussions that took place in November and December 2018, regarding concerns over surplus resourcing in the Auckland office. RG had moved to Wellington before these discussions began. The timing had been a complete coincidence.

[78] For present purposes, I observe that the review followed closely behind RG's transfer to Wellington, at which point he engaged in Enterprise work which would otherwise have been undertaken by Mr Scott.

[79] The key issue is timing. Documents have been sought relating to the review, including a description of the matters that were discussed during the review. Genesys says there are no such documents. A detailed account of the review has not been provided by its participants. Such evidence may well be relevant to an understanding of timing, and as to the scope of discussions in the course of the review.

[80] However, on the evidence which is currently before the Court, it is arguable the company cannot discharge the onus which will fall on it to show that the steps it took could have been those of a fair and reasonable employer in all the circumstances.

*Second cause of action – mixed motives*

[81] Mr Scott alleges he was advised at the review meeting by Mr Brown that his reputation was "in tatters". He was advised that if his behaviour did not change he would be performance managed. He says this was the first occasion he had been made aware that there were any issues regarding his performance, and that he was not advised what aspects of his behaviour required changing.

[82] It was at this stage that he was told of the negotiations relating to RG's transfer to Wellington.

[83] It is asserted that his subsequent redundancy was improperly motivated by unaddressed performance concerns which had not been put to him, or in respect of which he had not been given a proper opportunity to rectify.

[84] Ms Twomey responded to this assertion by stating that Mr Scott's performance was irrelevant to the restructure process, and that she did not take it into account when making her decision. She says she was not involved in any discussions with Mr Scott about his performance, and no formal performance improvement process was ever conducted.

[85] She said that the redundancy decision was based on a need to address a genuine concern about excess resourcing in the Auckland office, and Genesys' desire to increase operational efficiency.

[86] Mr Brown says he would not have used the language attributed to him, although he did raise the possibility of Mr Scott having to undertake a performance improvement plan.

[87] Again, the absence of documentation relating to the content of the review discussions leading to the redundancy means it is arguable the company would not discharge the onus it will carry on the dismissal grievance.

*Third cause of action – failure to carry out a selection process*

[88] Mr Scott argues that if Genesys was genuinely concerned it had too many SC staff based in New Zealand, which he denies, it should have carried out a fair and objective selection process to determine which of its two New Zealand-based Enterprise SCs would be made redundant; either Mr Scott himself who was based in Auckland with five years' New Zealand service and who was willing to relocate to Wellington if required; or RG who had only just been relocated to Wellington from Brisbane, and who was still undertaking 50 per cent of his work in Brisbane.

[89] Further, he alleges that if Genesys was genuinely concerned it had too many SC staff within the Australasian region, which he denies, then it should have carried out a fair and objective process to determine which of its Australasian SCs would be made redundant. However, as Genesys had at all material times been actively recruiting for additional SC staff in Australia, no selection process was in fact required.

[90] Ms Twomey said that these assertions misunderstand the intent of the Genesys proposal. She said the issue she wished to address was the surplus of staffing resources in the Auckland office, particularly given the anticipated growth in the Auckland market of the Commercial and Mid/market sectors, as opposed to Enterprise customers, which was the focus of Mr Scott's role. She said that as a result there was no need to consider the potential disestablishment of all three SC roles in Auckland,

or the potential disestablishment of all four SC roles in New Zealand as part of the restructure proposal. The focus was on Auckland only.

[91] This cause of action does not rest on an assertion of predetermination, as is the case under the first cause of action; rather, it proceeds on the basis that if the timing of the relocation to Wellington was purely coincidental, and it was only after that event that Genesys first determined there might now be a surplus of resources in Wellington, there was nonetheless a situation where there were two New Zealand-based SCs, and a perception that future Enterprise work would largely be Wellington-based.

[92] It is arguable that a fair and reasonable employer confronted with that situation could not have concluded that there was now a surplus of resources in the Auckland office, and focus solely on that employee; rather, such an employer could have recognised that it now had two Enterprise-based SCs located in New Zealand, potentially insufficient work to keep them both employed, and could have carried out a transparent and objective selection process.

*Fourth cause of action – estoppel by convention*

[93] Mr Scott asserts that it would be unconscionable to allow Genesys to resile from an agreement which he says was reached with him in October 2018, when Mr Brown told him his employment was secure, and that all future work opportunities would he shared equally between himself and the new Wellington-based employee.

[94] Mr Brown's evidence is that he did not assure Mr Scott his employment was "secure" in October 2018. Ms Twomey says she was certainly unaware of Mr Brown making any such comment, and if he did, she did not authorise it. Further, even if Mr Brown had told Mr Scott his employment was secure, that was always going to be subject to the directors' prerogative to make changes as to how the company runs its business.

[95] Mr Eggleston acknowledged that this was not Mr Scott's strongest cause of action. But he went on to argue that the point was not that a company was precluded from revisiting future options as an aspect of the proper management of its business,

but that it should have been aware of the impact on Mr Scott if doing so, and to have consulted with him at the time.

[96] The issues raised by this cause of action are arguably subsumed in other causes of action.

*Fifth cause of action – refusal to provide adequate information*

[97] Mr Scott alleges that there are multiple categories of documentation which were requested and not provided, thus compromising necessary consultation. These include details of the review which Genesys says it undertook; data to support Genesys' forecasts, both those made at the outset, and to support Genesys' rejection of Mr Scott's own detailed analysis in May 2019; travel information in support of the aspect of the proposal which mentioned the benefit of reduced travel expenses; details of RG's job description and travel costs to Brisbane, where he would spend 50 per cent of his work time; and as to the various alternative proposals advanced by Mr Scott.

[98] Ms Twomey stated that Mr Scott had been provided with all relevant information on which she had relied in coming to her decision, as well as additional information on which she did not rely, but which had been requested.

[99] She said that to her knowledge there was no further information to be provided about the review undertaken by Genesys in November and December 2018, although she says she was not present when it occurred. She also said that as she was not party to it, she did not rely on anything said in the course of the review. Accordingly, she could not see how Mr Scott had been disadvantaged.

[100] With regard to information concerning forecasts, she had relied on the disclosed forecast for 2019. She did not consider that previous forecast reports, to which Mr Scott had referred, were relevant. In her final letter she had explained how sales forecasts could fluctuate.

[101] Ms Twomey said it had not been necessary to provide details of travel expenses of other staff as these were not relevant to the proposal to disestablish Mr Scott's role.

She reiterated that the issue of travel expenses was not a driver of Genesys' proposal, only a possible outcome. Nor were RG's job description and travel costs relevant to the proposal. Rather, the point of the restructure was to deal with an excess of capacity problem in the Auckland office.

[102] Ms Twomey said Genesys had responded to the various relocation options raised by Mr Scott; moreover, having him move to Wellington would not solve an excess of capacity issue; it would simply transfer the problem of surplus capacity from Auckland to Wellington.

[103] Section 4(1A)(c) of the Act is relevant to this cause of action. That imposes, as an aspect of the duty of good faith, an obligation on an employer proposing to make a decision that would, or would be likely to, have an adverse effect on the continuation of employment, to provide to an affected employee access to relevant information, as well as an opportunity to comment on that information.

[104] In summary, there are issues as to: why a detailed explanation of the matters that were considered in Genesys' review were not provided and as to the role these considerations played in the subsequent process; why data relating to forecasts was not provided; why Genesys did not proactively provide information as to relocation options; and why Genesys did not provide information when asked about travel expenses. It is arguable that the steps taken by Genesys with regard to the requests for information were not those of a fair and reasonable employer, given the obligations of s 4(1A)(c) of the Act.

*Sixth cause of action – failure to consult regarding redeployment opportunities*

[105] Mr Scott asserts that in its proposal for redundancy of 17 December 2018, Genesys had said it would consult with him further about alternative employment options. It is also alleged there was a good faith obligation to do so.

[106] Reliance is placed by Mr Scott on the fact that on 21 May 2019, he said that he would be willing to consider redeployment to a newly created SC position in Canberra, which had been vacant since January 2019.

[107] Mr Scott says that prior to the redundancy decision of 4 June 2019, Genesys had not consulted with him on this issue. On 6 June 2019, when meeting with Mr Brown in Auckland, he reiterated he was interested in applying for the Canberra role, which was still showing on the Genesys intranet as being available. Mr Brown told him the role was available, but later in the same meeting advised that an offer had been made on it, and that it was no longer available to Mr Scott.

[108] Mr Scott goes on to say that he subsequently sought details as to when the offer was made in respect of this role; he has been informed that an offer was made on 22 May 2019, the day after he indicated his interest in the role. He said this supports his view that the redundancy was not genuine.

[109] Ms Twomey said that the role in which he had expressed an interest was no longer available. The successful candidate had applied for the role on 20 March 2019, and it was offered to that person on 22 May 2019. An offer of employment was signed on 10 June 2019. She said the process of making the offer was "all but completed" at the time Mr Scott first raised his interest in the role, on the evening of 21 May 2019.

[110] On the evidence before the Court, by the time Mr Scott expressed his interest in the Canberra role, there had been a great deal of discussion as to the pros and cons of redundancy; he had also indicated a willingness to be flexible so as to address the company's concerns. Mr Scott wished to continue working for Genesys. It is arguable that in these circumstances, despite the candidate who was ultimately successful having been interviewed, a fair and reasonable employer could have consulted in good faith with Mr Scott as to that option.

*Evaluation of Mr Scott's claims*

[111] In my assessment at this stage and on the basis of the untested evidence before the Court, I consider aspects of Mr Scott's claims to be strong rather than weak; in particular, those relating to predetermination, the need to provide a fair selection process, the requests for further information, and as to the consideration of alternative employment options.

## Serious question to be tried: permanent reinstatement

[112] Mr Kiely advanced four main reasons as to why, ultimately, the Authority would not award permanent reinstatement, because it would not be practicable or reasonable. The points which he raised were responded to by Mr Eggleston. They provide a sensible framework for a consideration of this issue.

*No available work*

[113] I have already referred to Mr Kiely's submission that Mr Scott's role was surplus to requirements, and that it no longer exists. Genesys also says it would have to make work for Mr Scott if reinstated, and would need to commence another restructuring process to address the surplus in resourcing.

[114] Mr Scott said that if Genesys was not comfortable putting him in front of customers during the interim reinstatement period, he could nonetheless support other members of the team with a range of constructive behind-the-scenes activities. Mr Brown said such tasks were already in hand with other employees and seemed like "make-work".

[115] Mr Eggleston submitted that any problems Genesys may have in this regard were because they had chosen to reallocate the tasks formerly undertaken by Mr Scott to RG; and because redeployment had not been properly considered. In other words, Genesys was the author of its own misfortunes, and should not, when it comes to considering reinstatement, be permitted to have the advantage of its own shortcomings.

[116] Mr Eggleston also referred to the well-known dicta in *Ashton v Shoreline Hotel*, where former Chief Judge Goddard referred to the important criterion that employees are entitled not to be deprived of their employment unjustifiably, and when they have, they ought ordinarily to be reinstated, if that is their wish, unless there are features in the case or indications pointing in a contrary direction that outweigh that right.[8] He emphasised that there would need to be substantial reasons and not mere

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8 *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421.

assertions by an employer that it does not want to be forced to employ the employee who should never have been dismissed in the first place.[9]

[117] In the same judgment, the Court confirmed that employment protection is the dominant goal of the legislation, and concluded:[10]

> That goal is not obtained by substituting a money judgment for the job. Unless the employee has done something to merit forfeiting his or her employment, or unless reinstatement is for other good reasons unjust, to award routinely compensation for the job loss instead of reinstating is to create a system for licensing unjustifiable dismissals.

[118] The value of the remedy was again emphasised by a full Court in *Angus v Ports of Auckland Ltd (No 2)*.[11]

[119] Genesys' submission that there is no available work for Mr Scott must be weighed against these objects of the statutory remedy. It is arguable that if the dismissal grievance is made out, Genesys will have taken a step not open to it as a fair and reasonable employer. In those circumstances it is also arguable it would have been the author of its own misfortunes, and it could not therefore assert it would be unreasonable or impracticable to reinstate Mr Scott.

[120] Indeed, it is arguable that in any event there may well be work available having regard to the nexus between Genesys and its parent company, the size of the joint operation, and the mix of available Trans-Tasman work as demonstrated by RG's responsibilities.

[121] Finally, it is also arguable that a consideration of another restructuring process is premature.

*Failure to follow instructions*

[122] On his final day at work, an issue arose in connection with Mr Scott's obligation to return the company's laptop.

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9 At 436.
10 At 436.
11 *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466 at [67].

[123] The Court has received detailed evidence from Mr Scott and Mr Brown on this topic; also before the Court is a transcript of a recording made by Mr Scott of a discussion between him and Mr Brown as to the steps that would need to be taken to effect the return.

[124] A key issue was Mr Scott's concern that personal data held on the laptop would not be retained by Genesys. Mr Brown initially told Mr Scott that he had been informed the laptop should not be reformatted, that is, restored to its factory settings. Mr Scott told Mr Brown he regarded this as being very strange, and that he was uncomfortable with the proposal. I infer this was because he believed reformatting was necessary to ensure removal of his personal data.

[125] Following this discussion, Mr Scott said he believed Mr Brown understood, agreed and confirmed that only work-related files were of interest.

[126] Mr Scott said his understanding of the agreed details was that he would ask Genesys IT to remove backups so that personal data would not thereby be retained; he would copy work files to a shared drive called SharePoint, thus enabling staff to have access to his work data; and he would reformat the laptop.

[127] That evening, Mr Scott sent an email to an IT colleague, confirming he had uploaded all work files to SharePoint, and requested all backups to be removed. He copied Mr Brown into this email. No mention was made as to the reformatting.

[128] Early in the afternoon of 7 June 2019, and after a discussion between the two, Mr Brown emailed Mr Scott stating that the laptop and all associated data was the property of Genesys, and that the laptop needed to be returned by the end of that day with all backups remaining as per company policy. Although this apparently had implications for his personal data, Mr Scott accepted this instruction. There was no reference to reformatting.

[129] By this time Mr Scott had commenced the process of restoring the laptop to its factory settings. Because Mr Brown had to return to Melbourne, the laptop was handed over to Mr Scott partway through that process, and he completed it. No

objection as to reformatting was raised by Mr Brown when the laptop was returned to him. He stated in his evidence that he saw little point in doing so, although he was clear he had given an instruction that reformatting would not happen, since Mr Scott was about to cease his association with Genesys.

[130] However, the issue surfaced when the Authority considered Mr Scott's application for interim reinstatement.

[131] In his affidavit, Mr Brown described the sequence of events in some detail and suggested that Mr Scott had erased data by commencing a reformatting process without informing him he was doing so, and before returning the laptop.

[132] Mr Brown said that there were also implications as to personal use of the laptop in breach of Genesys' IT Acceptable Use Policy. In light of these circumstances, he could not see how he could work with Mr Scott again, given he had chosen to disobey his instructions. He would not be able to trust Mr Scott to follow his instructions, or to comply with the obligations of his employment agreement.

[133] For his part, Mr Scott said that although he accepted Mr Brown said he had initially been told the laptop should not be reformatted, he understood there had been agreement that only work-related files were of interest, that this issue would be dealt with by the uploading of work folders to the SharePoint drive, and that there was therefore no difficulty with his preference to reformat. Moreover, he had accepted Genesys' instructions that backup should remain, so the company would have access to all his material in any event.

[134] The parties returned to this topic in the evidence filed in Court for the purposes of the challenge. A point of potential prejudice was raised by Mr Brown for the first time in the final affidavit he filed in the Court. He said it was his understanding, after checking with Genesys IT, that on Genesys Mac laptops, backups related to the user profile only. But, he said, it was possible Mr Scott could have created a local profile on his laptop that would not have been backed up. That meant it was possible for folders to have existed outside the user profile which would not have been caught by

Genesys backups. Thus, Genesys had no way of knowing if these folders existed or what they may have contained since they would have been deleted by the reformatting.

[135] Having regard to the sequencing of the filing of evidence for the purposes of the challenge, it was not possible for Mr Scott to reply to this late point.

[136] Mr Kiely submitted that there was deliberate insubordination. Mr Eggleston submitted a more likely explanation was that a misunderstanding occurred.

[137] At this stage, Genesys' concern as to prejudice is based on speculation. Given the untested evidence before the Court, it is arguable that a misunderstanding occurred, which could not have implications for trust and confidence.

*Covert recording*

[138] As mentioned, a further issue with regard to interactions between Mr Brown and Mr Scott related to the undisclosed recording of his conversation with Mr Brown, when handover arrangements were discussed.

[139] Mr Scott said that he had checked online as to whether it was permissible for him to undertake such a recording prior to doing so, and that he wished to ensure he had a clear record of what was discussed and agreed regarding his departure, in case this was ever disputed.

[140] Mr Brown says this was a premediated and deep betrayal of trust. He says he was very disappointed that Mr Scott could not bring himself to understand this problem. He considered it showed Mr Scott does not appreciate the consequences of his actions, and he could not see how he could trust him again. It is also suggested that the way in which the recording came to light – via Mr Scott's affidavit in reply in the Authority – suggested that he had been slow to disclose its existence, which also supported his concerns as to trust and confidence.

[141] In *Talbot v Air New Zealand Ltd*, the Court of Appeal considered the topic of secretly taped telephone conversations.[12] It was emphasised that the question of

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12 *Talbot v Air New Zealand Ltd* [1995] 2 ERNZ 356.

whether this is unfair involves a fact-based assessment of the relevant circumstances, to be assessed in light of implied obligations of trust and confidence. Mr Kiely submitted that this dicta now needed to be considered in light of the subsequent enactment of the statutory obligations of good faith.

[142] For present purposes, I consider it remains the case that the common-sense conclusion reached in *Talbot* continues to apply. The propriety of making a secret recording depends on the circumstances, albeit assessed in the context of good faith obligations.

[143] Here, it is arguable there was an error of judgement by Mr Scott in not disclosing the recording. But the circumstances between Mr Scott and Genesys were, by this time, difficult. Mr Scott's employment was being terminated against his wishes, and in circumstances in which he had strong views as to justification. The step he took needs to be assessed in that context.

[144] The Court's assessment must be an objective one. Arguably the recording of the conversation with Mr Brown by Mr Scott for the reasons he gave, without disclosing he was doing so, could not reasonably lead to a conclusion that trust and confidence was irreparably destroyed, so that reinstatement would be neither practicable nor reasonable.

*Work relationships*

[145] Genesys submits that reinstatement would not be practicable or reasonable due to Mr Scott's feelings towards the company and his colleagues. Emphasis is placed, in particular, on his own evidence of an increasingly strained relationship with PM, the Wellington AE, which led to proactive steps having to be taken by Mr Brown to facilitate a productive working relationship.

[146] Genesys also points to Mr Scott's dissatisfaction as to allocation of work by PM in favour of RG, which resulted in discussion between RG and Mr Scott in December 2018 to clear the air. Then, it is argued personal relations deteriorated further in 2019, as Enterprise work was assigned to RG, rather than to Mr Scott.

[147] In summary, it is submitted that the tension in Mr Scott's relationships with PM, RG and Mr Brown renders reinstatement impracticable.

[148] Finally, it is submitted reinstatement would have an injurious effect on other employees and on customers and clients of Genesys.

[149] In response, it was submitted that Genesys had clearly been monitoring Mr Scott's relationship with PM since January 2018, and that the circumstances had not in fact led to a performance improvement plan.

[150] Mr Scott said that the frequency of his interactions with PM had diminished in 2019, because of the drop off occasioned by RG undertaking Enterprise work. He said he and RG had known each other for some years, and that although his relationship altered after RG's relocation, he did not foresee an issue in future professional interactions. Mr Scott said he had also known Mr Brown for some time, and the two had enjoyed a good relationship at all times.

[151] It is arguable that the deterioration in work relationships is a product of the redundancy process. If so, it is only weakly arguable that relationship issues should lead to a conclusion that permanent reinstatement is not practicable and reasonable, given the particular circumstances.

[152] Finally, it is arguable that relationships with third parties are capable of appropriate management.

*Assessment*

[153] Mr Scott has a seriously arguable case in respect of permanent reinstatement.

[154] For present purposes, I find that his case for permanent reinstatement is strong, not weak.

## Balance of convenience

[155] Mr Kiely submitted that there were several factors which strongly suggested the balance of convenience favours Genesys. Again, each has been responded to by

Mr Eggleston. They provide a convenient framework for the assessment of this issue, which is to weigh any factors that are relevant to the exercise of the discretion to grant interim relief.[13] At this stage the Court is involved in weighing whether an injustice would occur in the granting or refusing of an interim injunction.[14] But it is first necessary to consider whether damages would be an adequate remedy.

*Are damages an adequate remedy?*

[156] For Genesys, it is submitted that an award of lost remuneration would, if the dismissal grievance is established, sufficiently compensate Mr Scott. It was also argued that at worst, there would be a short period from the date of the Court's judgment through to the date when the Authority issues its substantive determination following a substantive hearing, assuming he is unable to obtain new employment. Any financial prejudice would thus be short-lived. Obviously, the date by when the Authority might issue its determination is unknown, although the Authority Member stated that the period could extend up to three months following the substantive hearing.[15]

[157] It is also submitted that there is no need to reinstate Mr Scott on an interim basis to maintain the status quo or to ensure reinstatement remains an open prospect pending substantive determination of his claims, since he had not been replaced.

[158] Mr Scott's case on this issue is, first, that whilst the redundancy proposal was hanging over his head in early 2019, for some six months he used his best endeavours to attempt to locate alternative work. There were very few vacancies, he said, for which he could apply, and only one role where he became one of two final applicants. He was unsuccessful in his endeavours, since he was specialised in Genesys software rather than software produced by other vendors. He said that he had worked with Genesys products since 1998, and that from 2014 his focus had been 100 per cent on these, with the result he had lost touch with related skills with other operating systems and related software. In short, he says, there is a limited market for his skills.

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13 *NZ Tax Refunds Ltd v Brooks Homes Ltd*, above n 5, at [42].
14 *Cayne v Global Natural Resources plc* [1984] 1 All ER 225 (CA) at 237.
15 *Scott v Genesys Telecommunications Laboratories Ltd*, above n 1, at [65].

[159] Then, Mr Scott points to his financial circumstances; two particular commitments are child support, and meeting payments in respect of a mortgage secured over a former family home. He says that were he to be unable to service the mortgage, the family home would have to be sold, which could impact on his children's intermediate and secondary school plans, as any substitute property would not remain in the relevant school zone.

[160] Although not referred to under this head, reference was made in the course of the hearing to Mr Scott having significant legal fees, which is likely to be a further contributor to financial stress.

[161] In these circumstances, I find that an inability to obtain income for between three and six months, is likely to give rise to financial difficulties. The period is too long to regard as amounting to a short-term inconvenience. Accordingly, damages awarded subsequently would not be an adequate remedy.

*Adequacy of Mr Scott's undertaking as to damages*

[162] A concern raised by Genesys is that Mr Scott's evidence indicates he would have difficulty honouring his undertaking as to damages. This assertion relies on the financial pressures just referred to, but also on issues relating to the ownership of the former family home. The significance of this point is that Mr Scott says Genesys can have confidence that he would be able to meet any damages award pursuant to his undertaking, if necessary, because there is a 30 per cent equity in that property.

[163] Initially there was a concern as to whether his former wife still held an interest in that property; however, Mr Scott stated that she no longer holds such an interest.

[164] Mr Scott told the Court, but not the Authority, that the property is held in a family trust. This led to Genesys submitting that the house to which Mr Scott had referred to was owned by a separate legal entity against which Genesys could not recover.

[165] There was some discussion at the hearing as to whether the trustees of that trust might provide a separate undertaking as to damages to meet that objection, and that the Court could make the provision of this a condition of an order of reinstatement.[16]

[166] Mr Eggleston also submitted, however, that were a damages award ultimately to be made against Mr Scott, Genesys would be in a position to pursue enforcement proceedings as it saw fit; if Mr Scott wished to avoid the adverse consequences of enforcement, he would have an option of obtaining the assistance of the trustees of the family trust.

[167] The trust deed is not before the Court; nor does the Court have any evidence as to the identity of the trustees or beneficiaries that would have facilitated an assessment of the trust's circumstances. It is preferable to proceed on the basis that Mr Scott may be able to obtain assistance from the trustees of the family trust, if facing enforcement of an award of damages in favour of the company, but that is a matter for him.

[168] It is difficult to assess the quantum of any such damages since that would depend on such factors as how long interim reinstatement continued.

[169] An award of damages might also require consideration of whether Mr Scott had worked in the interim reinstatement period as he wishes to do; and whether it was in fact reasonable for Genesys to place him on garden leave, and then seek damages.

[170] Having considered the various issues that could arise in respect of Mr Scott's undertaking, and although there are some uncertainties as to the financial consequences which could follow the Authority's substantive determination, I do not regard this factor as tilting the balance of convenience significantly in Genesys' favour.

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[16] For example, *Danswan v The Docks Ltd* HC Auckland CIV 2006-404-006608, 1 November 2006 at [34].

*Mr Scott would be paid twice*

[171] As mentioned earlier, Ms Twomey said that the effect of reinstatement, having regard to the sum paid to Mr Scott upon termination, would be to have Genesys pay his salary twice, until 9 October 2019.

[172] However, as Mr Eggleston submitted, the calculation made by the company relies in part on his holiday pay of $22,633, which amounts to approximately 7.14 weeks of base salary. Mr Scott was entitled to that payment, whether or not his position was disestablished. At best, if Genesys' reasoning was to apply Mr Scott was paid to 21 August, rather than 9 October 2019.

[173] Mr Eggleston also submitted other adjustments to the termination payment were necessary, such as a deduction for the legal fees incurred which have had to be met from that sum; and that the analysis carried out by Genesys did not take into account a reasonable expectation of commission, which would alter the calculation of the asserted double payment.

[174] The primary submission made for Mr Scott is correct: he was entitled to holiday pay and that component should not feature in the calculation. I find that were such an analysis to apply, the material date is 21 August 2019, which has passed. This issue is no longer relevant when considering whether, in effect, the interim reinstatement order should continue.

*The merits, and assessment of the balance of convenience*

[175] I have concluded earlier that Mr Scott's cases, both in respect of the dismissal grievance and in respect of permanent reinstatement, are arguably strong.[17]

[176] Standing back, the balance of convenience favours Mr Scott because if he is denied interim relief and turns out to be correct in his claim of unjustified dismissal warranting permanent reinstatement, he will suffer greater prejudice in the interim, than would be suffered by Genesys if it is required to reinstate him for the same period.

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[17] At [111] and [154].

## Overall justice

[177] As noted earlier, the Court of Appeal in *NZ Tax Refunds* stated that the overall justice assessment is essentially a check on the position that has been reached, following the analysis of the earlier issues of serious question to be tried, and balance of convenience.

[178] Given my assessment of the merits, and the range of factors which the Court has been required to consider, I conclude that overall justice favours the making of an interim order of reinstatement. It would be unjust in the circumstances to deny relief.

## Disposition

[179] When it reached this stage, the Authority outlined the various conditions referred to earlier, stating that this would, in the exercise of the Authority's discretion "more closely match the merits of the situation and the respective interests of the parties between now and final determination".[18]

[180] No submissions were made by either party to suggest that the terms of the conditions should be revisited.

[181] From the Court's perspective on a de novo challenge, I consider those conditions to be appropriate in the particular circumstances which are before the Court. A range of options were allowed for consistent with the broad reach of the remedy, which permits reinstatement to a former position, or to one no less advantageous: s 123(1)(a) of the Act.

[182] In the result, Genesys' challenge is dismissed. The Authority's determination, and in particular the order it made, must stand.[19]

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[18] *Scott v Genesys Telecommunications Laboratories Ltd*, above note 1, at [82].

[19] *Scott v Genesys Telecommunications Laboratories Ltd,* above n 1, at [82]; and at para [5] of this judgment.

[183] Since the Court's judgment has been issued promptly, it is not necessary to consider Genesys' application for stay pending resolution of the challenge. That application is accordingly dismissed.

[184] I discussed with counsel whether a direction as to mediation should be made. I am advised that this possibility is to be discussed with the Authority at an upcoming directions meeting. I note that the Authority has in any event directed mediation with regard to interim reinstatement, if need be. It is preferable that I leave the management of mediation process to the Authority at this preliminary stage.

[185] Finally, I deal with costs. My provisional view is that those should follow the event and be paid on a Category 2, Band B basis, under the Court's Guideline Scale as to Costs. Counsel should confer promptly with a view to resolving this issue directly. If this does not prove possible, Mr Scott may make an application for the assessment of costs within 21 days, and Genesys may reply within 21 days thereafter.

B A Corkill
Judge

Judgment signed 12.25 pm on 30 August 2019