

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURĀU ROHE**

[2020] NZERA 145
3098073

BETWEEN

WAYDE VERMUELEN
Applicant

AND

MIKES TRANSPORT
WAREHOUSE LIMITED
Respondent

Member of Authority: Vicki Campbell
Representatives: Nadia Tu'itahi, advocate for Applicant
Mark Flyger, advocate for Respondent
Investigation Meeting: On the papers
Submissions Received: 7 April 2020
Determination: 9 April 2020

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. Mr Vermuelen's application for interim reinstatement pending the Authority's investigation and determination of his personal grievance for unjustified dismissal is declined.**
- B. Costs are reserved.**

Employment relationship problem

[1] Mr Vermuelen was employed by Mikes Transport Warehouse Limited (MTW) as a sales representative from January until March 2020. Mr Vermuelen is from South Africa and his employment in New Zealand was subject to a work visa.

[2] There is a dispute between the parties as to how the employment relationship came to an end. Mr Vermuelen says he was dismissed on 5 March 2020, that the dismissal was unjustified and he has applied to the Authority for interim and permanent reinstatement among other remedies.

[3] MTW opposes the application for interim reinstatement. It says Mr Vermuelen was not dismissed. MTW says in March Mr Vermuelen resigned from his role as a sales representative and the parties mutually agreed he would continue to work for in the finishing bay for Modern Transport Engineers Limited (MTE). MTE and MTW are both part of a wider group of Modern Transport companies that operate out of different premises and under separate legal identities. Mr Len Smith, the General Manager for MTE says that because of Mr Vermuelen's visa conditions he was unable to work in for MTE and that employment relationship ended.

[4] Mr Vermuelen's application is against MTW seeking reinstatement to his former sales representative role with MTW. MTE is not a respondent in this matter.

[5] In support of his application for interim reinstatement Mr Vermuelen has provided an undertaking as to damages together with written evidence in the form of a witness statement. The Authority has received three written witness statements in opposition to the application from Mr Robin Ratcliffe the Managing Director for the Modern Transport Group of companies, Mr Robert Pasley the Business Development Manager for the Modern Transport group of companies and Mr Len Smith.

[6] Mr Vermuelen applied for and was granted urgency on his application for interim reinstatement. Unfortunately the substantive application cannot be scheduled due to the covid-19 situation currently affecting New Zealand.

[7] All written statements provided by the parties in these proceedings have not been lodged in affidavit form due to Covid-19. Instead each witness was contacted by a Member of the Authority and confirmed by way of affirmation the truthfulness of the statements made in each of their statements. While not strictly in affidavit form I have accepted these statements as being their sworn testimony for the purposes of dealing with this interim application.

Background

[8] There does not appear to be any dispute that in November 2019 Mr Vermuelen approached MTW enquiring about work opportunities. Following a number of interviews Mr Vermuelen was offered and accepted a role of sales representative.

[9] On the basis of the formal offer of employment Mr Vermuelen applied for and was granted a New Zealand Essential Skills work visa on 24 December 2019. The visa stipulated that Mr Vermuelen could only work as a Sales Representative in the Waikato for Mikes Transport Warehouse Limited and was valid for twelve months.

[10] Mr Vermuelen started working for MTW on 7 January 2020. During January Mr Vermuelen says he raised concerns about his role, asserting that the job was more of a business development role and not just a sales representative role and the parties agreed to alter the job title and description.

[11] MTW says Mr Vermuelen approached Mr Flyger, Human Resources Manager, and advised that if the employment agreement was for a business development manager he could apply to have his visa changed to three years and this would also allow his wife and child to stay in New Zealand with him.

[12] On 31 January 2020 the parties signed a second employment agreement which reflected a change in the position title from sales representative to business development manager and a change to the hours of work provisions which reduced from 50 hours each week to 40. No changes were made to the salary payable under the employment agreement.

[13] Both the previous employment agreement signed by Mr Vermuelen on 15 November, and the January employment agreement contained a description of the tasks to be carried out by Mr Vermuelen. The employment agreement signed in January added a task of "Develop sales". In all other respects the duties were identical.

[14] Mr Vermuelen applied to Immigration New Zealand seeking to change his Visa conditions from twelve months to three years on the basis of the new employment agreement. This was rejected by Immigration New Zealand. MTW was required to advertise the position and demonstrate that the position could not be filled by New Zealanders before Immigration New Zealand would agree to any changes to Mr Vermuelen's work visa.

[15] MTW did not wish to advertise a new role of business development manager and advised Mr Vermuelen that he would continue in his role as sales representative.

[16] Mr Vermuelen says that between January and March 2020 he received inconsistent instructions about what and how he should perform his sales role and as a consequence could not perform it effectively. He says MTW limited the range of products he was allowed to sell and his performance suffered as a result.

[17] Mr Vermuelen says he attended a meeting on 5 March with Mr Ratcliffe where he was berated and humiliated and subsequently dismissed. Mr Vermuelen says he was desperate to stay employed and when he asked if there was any other work available for him he was offered a role for MTE working in its finishing bay.

[18] MTW says Mr Vermuelen was instructed early on in his employment to focus his sales on high value products such as plywood and lighting as those items tended to be sold in bulk and a single sale could be worth thousands of dollars.

[19] MTW accepts Mr Vermuelen was not performing at the level expected of him. Mr Ratcliffe says he was aware Mr Vermuelen was new to New Zealand and wanted to give him the benefit of his experience in the New Zealand market and try to help him achieve sales. He invited Mr Vermuelen to attend a meeting with him for that purpose. Mr Ratcliffe says that during that meeting Mr Vermuelen advised him he could not do the job and resigned.

[20] Mr Ratcliffe says Mr Vermuelen became upset during the meeting which he says possibly arose from his concern about the impact his resignation would have on his immigration status.

[21] Mr Ratcliffe says Mr Vermuelen asked if there were any other roles he could do and was offered the job in the finishing bay working for MTE.

[22] Mr Ratcliffe says he and Mr Vermuelen discussed the terms of his employment and it was agreed he would work a 50 hour week and that his gross earnings would be approximate to his salary as a sales representative.

[23] Mr Ratcliffe says that on the basis of that agreement Mr Flyger was instructed to prepare a new employment agreement between Mr Vermuelen and MTE.

[24] It is common ground that Mr Vermuelen started in the new job the following day on 6 March. Mr Vermuelen says that when he was meeting with Mr Flyger to sign the new employment agreement, Mr Flyger commented on the difficulties with his work visa only allowing him to be employed as a sales representative. Mr Vermuelen did not sign the employment agreement that day but continued working for MTE.

[25] Mr Vermuelen says he was called into a further meeting on 12 March at which time he was summarily dismissed. Mr Vermuelen says he was dismissed because MTW was not prepared to assist him to have his visa conditions amended to reflect his new job.

[26] Mr Smith says it was not until a few days after Mr Vermuelen started working for MTE that he discovered the difficulties with Mr Vermuelen's work visa conditions which required him to work exclusively for MTW. Mr Smith says he met with Mr Vermuelen and explained that MTE would be in breach of the law if it continued to employ him.

[27] Mr Smith says Mr Vermuelen was referred to Success Personnel, a recruitment company with experience in assisting migrants with work visas. Mr Smith says Mr Vermuelen was advised that if he could get a change to the conditions attached to his visa he could continue working for MTE but until that happened it would be unlawful for MTE to continue employing him.

[28] Mr Vermuelen has not undertaken any further work for either MTW or MTE.

Interim application

[29] An application for interim reinstatement involves the exercise of discretion. The basis on which applications for interim orders are to be decided are summarised as follows:

- a) Mr Vermuelen must establish there is a serious question to be tried. In a claim such as this the questions of whether there is a serious question to be tried raises two sub issues:
 - i. Is there an arguable case that Mr Vermuelen was unjustifiably dismissed? and

- ii. Is there an arguable case in relation to the claim for permanent reinstatement?
- b) Consideration must then be given to the balance of convenience, and the impact on the parties of the granting of, or the refusal to grant, an order.
- c) Finally, the overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

[30] The merits of this case, insofar as they can be ascertained at the interim stage, are relevant in the assessment of the balance of convenience and the overall justice of the case. The assessment relies on the as-yet-untested evidence in the affirmed statements of witnesses and what can be discerned from the pleadings and documents provided by the parties.

[31] Any findings of fact made by the Authority in this determination are provisional only and may change later once the Authority has fully investigated the claims and after all witnesses have been examined about their evidence where necessary.

[32] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the evidence and submissions received I have carefully considered everything.

Arguable case of unjustified dismissal?

[33] An arguable case means a case with some serious or arguable, but not necessarily certain prospects of success.¹ The test for assessing whether a dismissal was justifiable is set out at s 103A of the Act. It requires an objective assessment of whether the employer's actions and how the employer acted were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred.

[34] The Authority may take into account other factors as it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in Mr Vermuelen being treated unfairly.

¹ *X v Y Ltd and the New Zealand Stock Exchange* [1992] 1 ERNZ 863.

[35] The Court of Appeal has confirmed that the effect of section 103A(3) is that there may be a variety of ways of achieving a fair and reasonable result and that the overall requirement is for an assessment of substantive fairness and reasonableness, rather than minute and pedantic scrutiny to identify failings.²

[36] The Authority's task is to examine objectively the employer's decision making process and determine whether what the employer did and how it was done were steps that were open to a fair and reasonable employer.³

[37] Mr Vermuelen says he was dismissed on 5 March when he was told he was not succeeding as a sales representative and had no choice but to accept the finishing bay role with MTE because of his immigration status. MTW says the decision about Mr Vermuelen standing down from his role was a mutual decision and was not imposed upon him.

[38] On the basis of the untested evidence and the documents lodged with the Authority, I am satisfied Mr Vermuelen has an arguable case. There is clearly a dispute about how Mr Vermuelen's role as a sales representative came to an end.

[39] If Mr Vermuelen's employment as a sales representative ended at the initiative of the employer it is arguable its actions were not what a fair and reasonable employer could have done in all the circumstances at the time. That could lead to an outcome of dismissal which would be unjustified.

[40] Having said that it is also possible, after a thorough investigation and testing of the evidence that Mr Vermuelen may be found to have initiated his removal from the role of sales representative and in those circumstances a finding of dismissal may not be made.

Is there an arguable case for permanent reinstatement?

[41] There are difficulties with Mr Vermuelen's claim for permanent reinstatement. He seeks reinstatement to the sales representative role for MTW, however when the employment relationship finally ended on 12 March he was not working for MTW. Mr Vermuelen had already started working for MTE.

² *A Ltd v H* [2016] NZCA 419 at [46].

³ *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160; [2011] ERNZ 466 at [26].

[42] Mr Vermuelen says he really had no option but to take the finishing bay role with MTE when it was offered to him and that he was coerced into accepting the role as a result of his immigration status.

[43] There is no dispute that Mr Flyger was instructed to draft a new employment agreement between Mr Vermuelen and MTE. Mr Vermuelen started working for MTE on 6 March 2020. However when he was offered the written employment agreement to sign the hourly rate did not match what he believed Mr Ratcliffe had promised at the meeting the day before. He challenged this with Mr Flyger and refused to sign the employment agreement. Despite the differences in opinion Mr Vermuelen continued to work in the finishing bay role for MTE until that relationship ended on 12 March 2020.

[44] In submissions MTW states its business is currently closed as a result of the Covid-19 lockdown. It states that after the lockdown has been lifted MTW will need to urgently re-assess its business and redundancies are a likely result. It is highly likely, given that Mr Vermuelen was on a temporary visa for twelve months, that he would be included in any redundancy.

[45] There is currently no evidence that Mr Vermuelen's sales representative role is no longer available and it seems to me that a sales representative will be an important role in building MTW's business after the lockdown has been lifted. Any redundancy at this point in time is speculative only.

[46] My assessment at this early stage Mr Vermuelen has an arguable case that he was unjustifiably dismissed and for permanent reinstatement although the case is not strong.

Balance of convenience

[47] The question of balance of convenience requires an assessment of the impact on the parties of granting or not granting the interim order, having regard to, amongst other things, the relative merits of the case. Relevant to this assessment is the question of whether the impact on a party is harm that can be adequately compensated by damages.

[48] Identifying the balance of convenience – in the sense of detriment or injury – in this case requires the likely impact on Mr Vermuelen to be weighed against the potential impact to MTW and the extent to which such risks might be managed or minimised.

[49] Mr Vermuelen has lodged an undertaking as to damages. MTW has raised concerns about Mr Vermuelen's ability to honor his undertakings which I share. Mr Vermuelen has not provided any supporting evidence to demonstrate that he would be able to discharge his obligations under the undertaking if he is called upon to do so. This weighs against an interim order.

[50] It is unknown when the substantive matter can be heard. Until the lockdown has been lifted the Authority is not undertaking any face to face investigation meetings. I considered whether the matter may be able to be brought on early through the use of video technology but have rejected that on the basis that credibility of evidence will need to be thoroughly tested and a face to face investigation meeting will be the most suitable forum for that to occur.

[51] Another factor in considering the balance of convenience is the term of Mr Vermuelen's work visa which is for a limited period of twelve months from 24 December 2019. This is a factor that may impact on any consideration of making an order for permanent reinstatement because even if an investigation meeting was held in July or August a determination may not issue before October or November.

[52] There is no evidence MTW will not be able to meet an award of lost wages and compensation in the event that Mr Vermuelen is successful in his substantive claims. Even if he is not successful in this interim application Mr Vermuelen does not lose the prospect of pursuing his claim for permanent reinstatement.

[53] I have concluded the balance of convenience weighs in MTW's favour against interim reinstatement.

Overall justice

[54] The Authority's assessment of the overall interests of justice require it to stand back and review the overall position regarding interim reinstatement. I conclude the overall interests of justice follow the balance of convenience and favours declining Mr Vermuelen's application for interim reinstatement.

Next steps

[55] The Authority will convene a case management conference to discuss a date to investigate Mr Vermuelen's substantive claims after the Covid-19 lockdown has been lifted.

Costs

[56] Costs are reserved pending the outcome of the substantive matter.

Vicki Campbell
Member of the Employment Relations Authority