

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 478
3304160

BETWEEN ALEKSANDAR
 MILOSAVLJEVIC
 Applicant

AND FIRST SECURITY GUARD
 SERVICES LIMITED
 Respondent

Member of Authority: Peter Fuiava

Representatives: Julia Leenoh, counsel for the Applicant
 Matthew Dearing, counsel for the Respondent

Investigation Meeting: 19 July 2024 in Auckland

Submissions received: At the investigation meeting

Determination: 8 August 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] Aleksandar Milosavljevic, a former Field Services Officer (FSO) for First Security Guard Services Limited (FIRST Security or the company) from 10 October 2022 until his dismissal for serious misconduct on 11 June 2024, seeks reinstatement on an interim basis pending the outcome of his substantive claims against the company of unjustified dismissal and unjustified disadvantage. The application for interim reinstatement is opposed.

How was the preliminary issue investigated?

[2] The Authority is a creature of statute and under s 127 of the Employment Relations Act 2000 (the Act) it may, if it thinks fit, order interim reinstatement for an employee pending the hearing of their personal grievance. In considering such applications, the Authority must apply the law relating to interim injunctions and having

regard to the object of the Act which is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship.¹

[3] As required by s 127(2) of the Act and cl 7 of the Employment Relations Authority Regulations 2000, Mr Milosavljevic provided a written undertaking to abide by any order from the Authority in respect of damages. He also provided an affidavit in support (18 June 2024), an affidavit in reply (15 July 2024), and written submissions (19 July 2024) from his counsel, Ms Leenoh. Although two additional affidavits from former employees of FIRST Security were also provided, with the agreement of both counsel, this information will be considered at the substantive hearing only.

[4] For FIRST Security, submissions and a synopsis in opposition (both dated 19 July 2024) and an affidavit in opposition (11 July 2024) from National Operations Manager, Farish Khan, were provided.

What is the relevant background?

[5] Mr Milosavljevic's individual employment agreement (IEA) describes his position as FSO to carry out any field-related work and his key responsibilities include accurately and effectively responding to all jobs dispatched to him and to follow set procedures, protocols, and guidelines. As FSO, Mr Milosavljevic's IEA required him to act in the best interest of the business at all times and to ensure that all clients, matters, and tasks were dealt with in such a way that the company's position was protected and enhanced on all occasions and its principles upheld.²

[6] On 4 February 2024, Mr Milosavljevic was invited to a disciplinary meeting for failing to comply with the correct process for accounting for electronic monitoring equipment. On 8 February 2024, and following a disciplinary meeting, a final written warning effective for the next 12 months was issued. Mr Milosavljevic says that he was not previously consulted about that outcome before it was given.

[7] The present application for interim reinstatement arises from a subsequent incident. FIRST Security has an interactive live-time camera in their vehicles which

¹ The Act, s 3(a).

² IEA, Schedule B, Field Services Officer, Position Summary.

alerts the driver when they trigger actions and/or behave in a way that raises an issue such as using a phone in their hand while driving or looking like they are falling asleep or fatigued. The device sounds an alarm when a person does not have their eyes on the road or is inattentive and footage is recorded and sent to FIRST Security's internal health and safety team for follow up by the relevant manager.

[8] On 25 May 2024, Mr Milosavljevic was recorded on camera using his cell phone while operating a company vehicle. In particular, video footage provided to the Authority showed that:

- (i) on 25 May 2024, at approximately 1:25 pm, he was using a work cell phone while operating a company vehicle. When alerted by the camera, Mr Milosavljevic said "oh my God, I am going to look at the phone even more." He then showed his middle finger to the camera.
- (ii) On 25 May 2024, at approximately 3:40 pm, Mr Milosavljevic was observed using his work cell phone while operating the company vehicle on what appears to be a country road. When the dash cam says he is distracted his response is "yeah I know" and he raises both hands in the air momentarily out of frustration.
- (iii) On 25 May 2024, at approximately 9:47 pm, Mr Milosavljevic was observed using the same cell phone while operating the company vehicle.
- (iv) On 25 May 2024, at approximately 11:18 pm, he was observed using the cell phone while operating the company vehicle.

[9] On 27 May 2024, Farish Khan, FIRST Security's National Operations Manager invited Mr Milosavljevic in writing to attend a disciplinary meeting on 30 May to discuss with him his use of the cell phone while operating a motor vehicle and inappropriate behaviour while at work.

[10] On 28 May 2024, after the disciplinary invite letter was sent, there was a further recorded instance of Mr Milosavljevic using his cell phone while operating a company motor vehicle.

[11] On 29 May 2024, Mr Khan and a senior HR advisor for FIRST Security met with Mr Milosavljevic. Hand written notes of that meeting were taken in which Mr Milosavljevic is said to have stated:

“... it’s just using my phone while I drive if the police pulled me over and issue me a fine, I will own it.”

[12] Mr Milosavljevic does not agree with Mr Khan’s summary of the disciplinary meeting in which he made no “admissions” but was trying to explain what happened that day. It seemed to Mr Milosavljevic that Mr Khan and the HR representative were trying their best to catch him out and that he was not given the opportunity to properly respond to their concerns. Mr Milosavljevic further stated that he felt confused because at a subsequent disciplinary meeting with Mr Khan and the HR representative they accepted that if he had been using the phone on its holder, that would not have been an issue. However, using the phone this way would still mean that his eyes would not be on the road.

[13] On 31 May 2024, FIRST Security sent Mr Milosavljevic a tentative decision concluding that his actions amounted to serious misconduct and that termination of his employment without notice was proposed. Mr Milosavljevic was invited to a further meeting on 4 June 2024 to discuss the tentative decision and to receive his feedback before a final decision was made.

[14] At 12:38 pm, on 4 June 2024, FIRST Security received an email from Mr Milosavljevic’s newly instructed counsel, Edwin Morrison, in which counsel sought information including his client’s employment file, file notes, minutes, and time and wage records. In addition, counsel advised that he wished to review the requested material in advance of their meeting which would need to be postponed to the following week as he was outside the country. On 7 June 2024, the requested information was provided to counsel.

[15] FIRST Security says that later that day on 4 June 2024, Mr Khan telephoned Mr Milosavljevic to propose that he be placed on paid suspension as a matter of urgency due to his representative advising that he was in Sydney and would not be available to meet until the following week. Mr Milosavljevic disputes receiving prior notice of his suspension which he claims amounts to an unjustifiable disadvantage.

[16] The parties met on 10 June 2024 and it is said that during the meeting, Mr Milosavljevic laughed after witnessing the dashcam footage. However, he disputes having laughed and says that he smiled because he was stressed at the time and that people deal with stress differently.

[17] On 11 June 2024, FIRST Security sent written confirmation of its final decision to terminate his employment without notice due to serious misconduct. On 14 June, Mr Milosavljevic raised a personal grievance with the company and asked that he be reinstated on an interim basis.

What is the relevant law?

[18] In considering the application for interim reinstatement, I am required to consider the following four key principles:

- (i) is there an arguable case that Mr Milosavljevic was unjustifiably dismissed?
- (ii) is there an arguable case of permanent reinstatement?
- (iii) where does the balance of convenience lie?
- (iv) what does the overall justice of the case require?

Is there an arguable case of unjustified dismissal?

[19] The first question for consideration is whether there is a serious question to be tried that is not vexatious and frivolous.³ The serious question threshold though is a “relatively low” one,⁴ and an arguable case is one with some serious or arguable, but not necessarily certain, prospects of success.⁵

[20] Counsel for Mr Milosavljevic submits that summary dismissal should be reserved for the most serious kinds of misconduct within employment.⁶ Mr Milosavljevic was dismissed for using his work cell phone while driving a company motor vehicle and responding to work-related calls. The alleged incidents occurred on the same day (25 May 2024) but in that month Mr Milosavljevic had worked 214 jobs for FIRST Security.

³ *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90 at [12].

⁴ *Humphrey v Canterbury District Health Board* [2021] ERNZ 153 at [8].

⁵ *X v Y Ltd v NZ Stock Exchange* [1992] 1 ERNZ 863 at 872.

⁶ *NZ Baking Trades etc IUOW v Mister Baker Ltd* [1990] 3 NZILR 155 at p 8.

[21] Counsel submits that Mr Milosavljevic's behaviour did not justify summary dismissal particularly when there was a lack of any meaningful engagement and/or education around his use of the work phone. In any event, using a mobile phone while operating a motor vehicle was a traffic infringement only and at the disciplinary meeting, FIRST Security conceded that using the phone while driving was condonable if it was on its holder. Counsel further submits there was disparity in the way Mr Milosavljevic was treated as he was held to a different standard to other employees who were given a verbal warning for the same behaviour. Finally, because Mr Milosavljevic was allowed to carry on working immediately after the incidents in question, FIRST Security's health and safety concerns about him are exaggerated.

[22] Counsel for FIRST Security, Mr Dearing, submits in response that Mr Milosavljevic does not have an arguable case of unjustifiable dismissal and not one that can be regarded as strong. As a security guard in an FSO role, a high degree of trust and confidence was required of him which has been lost because he was already on a 12-month final written warning as of 8 February 2024 and had used the work cell phone multiple times while operating a company vehicle. He acted inappropriately by raising his middle finger to the in vehicle camera; showed no real remorse for his behaviour at the disciplinary meeting; said that if he was pulled over by the police and fined that he would "own it"; and after receiving his disciplinary invitation letter was recorded using his cell phone again showing a clear disregard towards the company's health and safety requirements.

[23] A copy of FIRST Security's company vehicle policy (the policy) was provided which records that traffic infringements, including speed camera fines, are the responsibility of the driver and not the company. The policy specifically mentions that speeding infringements may be the subject of an investigation and disciplinary process. However, there is no specific reference to other traffic infringements such as using a cell phone while driving.

[24] Whether this omission advances matters for Mr Milosavljevic remains to be seen especially as his IEA requires him to take reasonable care of all property his employer may allocate to him,⁷ and that the use of the on board camera was permissible

⁷ IEA, cl 24.

as a means of monitoring an employee for various purposes including ensuring a healthy and safe workplace.⁸

[25] There was a phone holder in the company vehicle which also had Bluetooth. Mr Milosavljevic is of mature age and intelligence to be reasonably able to utilise the vehicle's Bluetooth function which would have enabled him to take a call 'hands free' without minimal compromise to his own health and safety and that of other road users. When I asked Mr Milosavljevic why he was not able to pull over to the side of the road to answer his work cell phone, there was no meaningful response to my question.

[26] Mr Milosavljevic was recorded using a cell phone and raising his middle finger to the on board camera. I accept that his gesture was not to anyone in particular and was done out of frustration. Even so, the on board camera is there for good reason. It is to alert him if he is distracted or is inattentive to the road which is for his benefit, the company's benefit, and the benefit of other road users. This particular footage shows Mr Milosavljevic driving a company vehicle on the far right lane of a busy motor way surrounded by other vehicles. There is other footage of him driving on what appears to be a country road where both his hands are momentarily off the steering wheel. Another video from the same day captures Mr Milosavljevic performing a U-turn at an intersection at night with a cell phone in his hand. An employer such as FIRST Security would be remiss not to treat Mr Milosavljevic's cell phone use seriously.

[27] The question remains though whether, when all considered, does Mr Milosavljevic's actions give rise to serious misconduct? I was referred to *Taufua & Flynn v Fonterra Brands (New Zealand)*,⁹ a case where the applicants were dismissed after Fonterra discovered YouTube videos of them and other employees doing their version of the "Harlem Shake."

[28] The horseplay in that case when there was no surveillance equipment of the employer recording might be distinguished with the present matter on the basis that, when alerted by the dashcam, Mr Milosavljevic did not react like other employees. Instead of putting the cell phone down and apologising, he carried on with no apparent corrective behaviour.

⁸ IEA, cl 26.

⁹ *Taufua & Flynn v Fonterra Brands (New Zealand) Limited* [2013] NZERA Auckland 230.

[29] In assessing the question of serious misconduct and the test of justification at s 103A of the Act, it will be relevant to understand how FIRST Security may have treated other employees who have acted similarly, not once but on multiple occasions. If there is a case of disparity in treatment, Mr Milosavljevic's dismissal may not have been substantively justified.

[30] Mr Milosavljevic has provided two affidavits from former employees of the company. However, this was new information that FIRST Security was not made aware would be provided for the interim reinstatement application and for which it required more time to properly respond. By agreement, this affidavit evidence has not been considered for the purposes of this preliminary determination. I am therefore not in a position to assess the strength or weakness of any alleged disparity in treatment.

[31] There are also other procedural aspects that warrant further investigation namely whether FIRST Security genuinely considered Mr Milosavljevic's explanations as required by s 103(A)(3)(d). His sense is that the disciplinary meetings he had in February and May 2024 with Mr Khan and the HR representative were not fair in that he was being forced to admit to things that he did not agree to and that there was a "I got you" tone to their questioning.

[32] In addition, it is alleged that it had not been put to Mr Milosavljevic that he was recorded using his cell phone on another day (28 May 2024) subsequent to being invited to attend a disciplinary meeting for that very behaviour. Mr Milosavljevic attests in his affidavit in reply to the Authority that he was not made aware of this additional incident for which no notice or any information about has been provided. He further attests to never being given an opportunity to respond to this matter as the disciplinary procedure only dealt with the incidents that occurred on 25 May 2024 and not any other day.

[33] Although the parties' recollections of the disciplinary meetings differ and cannot be resolved at this early stage in the proceedings, I am satisfied that there is an arguable case of unjustified dismissal but its merits are not strong.

Is there an arguable case for permanent reinstatement?

[34] Section 125 of the Act states that reinstatement is the primary remedy but it must both be practical and reasonable to do so. Here I look at the feasibility or practical

workability of re-imposing the employment relationship. Mr Khan says in his affidavit that he made his decision to terminate Mr Milosavljevic's employment because he had lost trust and confidence in him.

[35] As a roving security officer who worked predominantly on his own, Mr Milosavljevic's position as FSO was an autonomous one which required trust and confidence. I do not consider Mr Milosavljevic's earlier final warning determinative of matters as the warning relates to a different subject matter altogether which has more to do with the correct recording of electronic equipment.

[36] That said, how Mr Milosavljevic conducted himself at the disciplinary meeting for that matter could not have been any more different. The meeting notes show that he was genuinely remorse and understood the importance of recording correctly the whereabouts of electronic monitoring equipment. This is to be contrasted with the meeting notes for the present matter which FIRST Security says shows a lack of remorse or acceptance of responsibility.

[37] Using a cell phone while driving may be perceived as just a traffic infringement offence that results in a fine only. Mr Milosavljevic is said to have made the comment that he would own any such fine. However, FIRST Security says that what he fails to appreciate is the harm to its commercial reputation if he is stopped by the side of the road by Police while driving one of its vehicles.

[38] I do not consider FIRST Security's health and safety concerns to be exaggerated. Had the company suspended Mr Milosavljevic immediately after the four recorded incidents of him using his cell phone on 25 May 2024, it would have been seen as a prelude to his dismissal and the argument would have been that the outcome was predetermined.

[39] It may be that, on 25 May 2024, Mr Milosavljevic was simply having a bad day at work which may have been better received and understood by his employer had that been the response. While I accept that, at this early stage, what was said by those present at the disciplinary meetings is a matter for further investigation, Mr Milosavljevic appears to have failed to provide FIRST Security with the necessary

reassurance that he was not a risk and that he could be trusted to drive more responsibly in the future.

[40] Such an assurance would have gone a long way in satisfying FIRST Security that he did have an understanding of the basic health and safety risks of using a cell phone while driving a vehicle and that he was not a risk to himself and other road users. However, in the absence of such an assurance, the view taken was that the company could not afford to let Mr Milosavljevic drive one of its vehicles again which is a key component to his role as FSO.

[41] While trust and confidence in a driving position has been damaged, it remains that there may be alternative positions in the company for Mr Milosavljevic. I was advised by Mr Dearing that there is no such position. Whether this is so or whether there might be some other position he can be placed into that is no less advantageous to him requires further investigation. Consequently, with respect to the feasibility and practicality of alternative redeployment, I am satisfied that Mr Milosavljevic has a case of permanent reinstatement but the merits are not strong.

Where does the balance of convenience lie?

[42] The balance of convenience requires an assessment regarding the impact on each party if interim reinstatement is granted or not. The Supreme Court has held that the merits of the case (in so far as they can be ascertained at the interim injunction stage) may be relevant in assessing the balance of convenience and the overall interests of justice.¹⁰ Here, while there is a serious case to be tried in relation to both unjustified dismissal and permanent reinstatement, the merits in relation to both are weakly arguable and not strong.

[43] During the submissions hearing for this application, I learnt from Mr Milosavljevic that he is a New Zealand permanent resident who is renting and who has no dependents. He is currently working two part-time jobs comprising a food delivery service role and employment as a barman. From working both jobs, he is able to work up to 40 hours per week. Mr Milosavljevic stated that he has tried to obtain alternative employment in the security industry but his dismissal with FIRST Security is something

¹⁰ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

that has weighed on his mind. This appears to have prevented him from finding similar work.

[44] I am told by counsel for FIRST Security that there are many opportunities in the private security industry for Mr Milosavljevic whose certificate of approval with the Private Security Personnel Licensing Authority remains valid.

[45] If Mr Milosavljevic is not reinstated, he would still be in employment but his earnings may not be the same as an FSO for FIRST Security. If he is ultimately successful with his claims of unjustified dismissal and/or unjustified disadvantage, the company will have the resources to compensate him for lost wages and compensation for hurt and humiliation. In other words, there are adequate alternative remedies available. The investigation meeting for Mr Milosavljevic's substantive claims is set down for 21-22 November 2024 which is in three-and-a-half months' time.

[46] For FIRST Security, the cost of reinstating Mr Milosavljevic is the disproportionate effect this would have on its clients and other employees due to the health and safety risks, the reputational risks, and financial risks he poses to himself and to other road users.

[47] It is acknowledged that there is no evidence of actual harm, injury or accident as a result of Mr Milosavljevic's cell phone use while driving a company vehicle but this has more to do with good luck than good management. While it is impossible to predict what might occur if Mr Milosavljevic is reinstated into his former role, because FIRST Security no longer has the requisite trust and confidence in him, it is most unlikely it would allow him to get behind the wheel of one of its vehicles again. That is a risk it is not prepared to take.

[48] It may be possible to use Mr Milosavljevic as a static guard, but FIRST Security would still need to make the necessary arrangements to have him transported from location to location which is impractical given the investigation meeting is some time away. The cost to the company is not insignificant and there is no operational benefit to the business in simply returning Mr Milosavljevic to the payroll. In all the circumstances, it is incongruous and disproportionate to require FIRST Security to

carry the cost of reinstating Mr Milosavljevic into his former role. The balance of convenience lies against interim reinstatement.

Where does the overall justice of the case require?

[49] The Court of Appeal stated that the overall justice assessment was 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.¹¹

[50] In terms of the merits, I do not assess Mr Milosavljevic's claims of unjustified dismissal or for permanent reinstatement particularly strong. The balance of convenience favours FIRST Security. The overall justice of this matter does not favour interim reinstatement. The application is unsuccessful and is declined.

Costs

[51] Costs are reserved.

Peter Fuiava
Member of the Employment Relations Authority

¹¹ *NZ Tax Refunds Ltd v Brooks Homes Ltd*, above n 1, at [47].