

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 751
3324140

BETWEEN JASBIR RAINA
Applicant

AND HALL'S REFRIGERATED
TRANSPORT
LIMITED
Respondent

Member of Authority: Andrew Gane

Representatives: Philip Mitchell, counsel for the Applicant
Drisana Sheely, counsel for the Respondent

Investigation Meeting: By submissions hearing 30 October 2024 at Auckland
and by audio-visual link

Other: material received: 4 November 2024 from the Respondent

Determination: 17 December 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 7 March 2024 Jasbir Raina was employed as a Class 5 Driver with Hall's Refrigerated Transport Limited (HRTL) from 7 March 2024. On 4 September 2024, Mr Raina's employment ended by way of dismissal.

[2] On 13 September 2024 Mr Raina lodged a statement of problem with the Authority in which he alleged that he was unjustifiably disadvantaged by HRTL arising from a breach of good faith in implementing an unreasonable disciplinary process. He

also alleged that he was unjustifiably dismissed. In his statement of problem, Mr Raina applied for interim reinstatement, supported by an affidavit and an undertaking as to damages.¹

[3] HRTL does not agree that Mr Raina suffered an unjustified disadvantage by implementing a disciplinary process. HRTL states that Mr Raina was justifiably dismissed for serious misconduct and opposes his application for interim reinstatement.

[4] This determination deals only with Mr Raina's applications for interim reinstatement. The investigation of his substantive claims will be held in due course.

The Authority's Investigation

[5] On 9 October 2024, I held a case management conference with the representatives to set a timetable for Mr Raina's applications for interim reinstatement. I advised the parties of the Authority's intention to determine the application on the papers with the parties' representatives speaking to submissions.

[6] In terms of the documents lodged with the Authority, an affidavit from Mr Raina was provided in support of his interim reinstatement application and a further affidavit in reply. On behalf of HRTL a statement in reply and affidavits from Martin Cals, Auckland site manager, Prabhkirat Dadwal, shift manager, Stephanus Schoeman, fleet management and logistics manager, and supporting documents were lodged with the Authority.

[7] During the preliminary investigation meeting on 30 October 2024 submissions were heard from the parties' representatives.

[8] While a significant amount of evidence has been filed, it remains untested. I am not able to resolve evidential matters in dispute between the parties at this early stage of the proceedings. That is the function of the substantive investigation meeting.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this preliminary determination has stated findings of fact and law, expressed conclusions on

¹ Employment Relations Act 2000, s127(4).

issues necessary to dispose of the preliminary matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter, I have carefully considered all the material before me, including all the evidence provided by the parties and their submissions.

The law relating to interim injunctions applications

[10] 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 have 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.

[11] The issues to be determined at this interim stage are:²

- (a) Is there a serious question to be tried in respect of Mr Raina's claim and the relief sought by him?
- (b) Where does the balance of convenience lie pending a substantive investigation and a final determination of Mr Raina's claim?
- (c) Where does the overall justice of this case lie from now until the completion of the substantive investigation and issuing of a final determination?

A serious question to be tried

[12] The threshold for a serious question is that the claim is not frivolous or vexatious. In deciding if Mr Raina's claim is not frivolous or vexatious I must make a judicial assessment of the evidence and the submissions advanced.³

² *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59; and *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36

³ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

[13] This assessment must be applied to both Mr Raina's claim and the relief sought; I must assess whether there is a serious question to be tried that:

- (a) Mr Raina was unjustifiably dismissed.
- (b) Mr Raina should be permanently reinstated.

Background

[14] Before considering whether Mr Raina has an arguable case for unjustifiable dismissal and permanent reinstatement, it is necessary to set out in some detail the relevant facts in order to put the parties' submissions in their proper context.

[15] As stated above, Mr Raina started working for HRTL on 7 March 2024 as a full-time class 5 truck driver. He was employed on individual employment agreement and was paid \$32 per hour for up to 55 hours a week.

[16] HRTL provides storage and transportation of chilled and frozen products around New Zealand by road. HRTL provides a service that covers intermodal operations, integrating chilled and frozen transport, chilled and frozen in storage cross-docking and distribution.

[17] HRTL employs over 700 staff and manages 350 specialist vehicles. It employs around 350 drivers as well as a further 150 owner drivers.

Health and safety

[18] All HRTL drivers undergo an induction when they first begin work. HRTL has dedicated driver trainers going through health and safety matters, including the risks specifically associated with driving. This involves the viewing of videos on various subjects, addressing such risks as mobile phone usage which is prohibited while driving.

[19] On 24 July 2024, Mr Cals held a health and safety meeting with drivers at the Takanini depot. This meeting was partly in response to an accident on 1 June 2024. Mr Raina attended this meeting. Mr Cals reminded all drivers of the risks associated with using mobile phones while driving and HRTL policies prohibiting the use of mobile phones from being used while driving. A handout was given to all drivers about this.

2 August 2024 Incident

[20] On 2 August 2024 Leon Van Heerden, the respondent's Fleet Maintenance Manager, witnessed Mr Raina using his mobile phone while driving his class 5 truck along Spartan Road (a public road connected to a state highway).

[21] Mr Cals said he spoke to Mr Raina that afternoon and told him that he had been seen using his phone while driving and warned him not to do it again unless he was using a hands-free Bluetooth device. Mr Raina apologised.

[22] Mr Schoeman had also seen Mr Raina using his phone on 2 August 2024 while driving around the depot. Mr Schoeman reprimanded Mr Raina for using his phone while driving in the depot. He advised Mr Cals of the incident.

[23] On 3 August 2024 Mr Cals met with Mr Raina to discuss the incident the previous day. Mr Cals said he was disappointed to discover that Mr Raina had been spoken to earlier on 2 August 2024 about using his mobile phone while driving in the HRTL depot, making it twice in one day that he done this. Mr Cals said he spoke to Mr Raina again about the importance of not using a mobile phone while driving, unless he was using a hands-free Bluetooth device. Most HRTL trucks (except a few of the older ones) are fitted with Bluetooth technology to enable drivers to call hands-free.

[24] Mr Cals said Mr Raina admitted the use of a mobile phone while driving and promised him that he would not do so again.

[25] Mr Cals says his conversations with Mr Raina around these incidents were treated informally. He said it was made clear to Mr Raina that using a mobile phone while driving was illegal, and reminded Mr Raina of HRTL policies and expectations.

27 August 2024 Incident

[26] All HRTL trucks are fitted with on board cameras on the dashboard of the truck. The cameras are directed towards the drivers and designed to monitor blink rates and other fatigue indicators. The camera footage is sent to and reviewed by a contractor. Any issues highlighted by this footage, such as fatigue or mobile phone use, are reported to HRTL.

[27] On 27 August 2024 HRTL received from the contractor a video clip showing Mr Raina's mobile phone use. The video footage showed Mr Raina propping his mobile phone up against the onboard camera on the dashboard of his truck and using it while he was driving on the motorway.

Disciplinary process

[28] On the morning of 30 August 2024, Mr Cals gave Mr Raina a letter raising the incident of mobile phone usage. The letter invited Mr Raina to a disciplinary meeting on 3 September 2024 to discuss the allegation.

[29] On 3 September 2024 Mr Raina, Mr Cals and Prabhkirat Singh attended the disciplinary meeting at 6:30am at the Takanini depot. The meeting was not recorded but notes of the meeting were taken.

[30] The meeting then proceeded to discuss the allegation. Mr Raina admitted that he had used his mobile phone to make a call while driving and that it was his mistake. Mr Raina also said he had hardly used his cell phone while driving since he was last spoken to on 3 August 2024.

[31] The meeting was adjourned for Mr Cals and Mr Singh to consider the further steps. When the meeting resumed Mr Cals proposed that Mr Raina's employment would be terminated without notice for serious misconduct. Mr Raina was asked to provide feedback.

[32] Mr Raina did not provide any feedback on the proposed decision to dismiss him without notice. He requested one more chance and promised it would not happen again. Mr Cals told Mr Raina that he had already been spoken to about it several times and it should not have happened again.

[33] On 4 September 2024, the HRTL wrote to Mr Raina confirming the outcome of the disciplinary process that he was dismissed without notice. Mr Raina's last day of employment with the respondent was 4 September 2024.

Serious question to be tried

[34] The first question for consideration is whether there is an arguable case Mr Raina was dismissed unjustifiably and that he will be permanently reinstated. An arguable case means a case with some serious or arguable, but not necessarily certain, prospects of success.⁴

Arguable case of unjustified dismissal

[35] Section 103A of the Act sets out the test for justification which requires an objective assessment of whether HRTL's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. An employer's decision to dismiss an employee must be, when examined objectively, substantively justifiable and procedurally fair for it to survive scrutiny by the Authority or the Employment Court.

[36] Mr Raina referred to several grounds as to why he had an arguable case for unjustified dismissal. In summary, his arguments fell into the following categories:

- (a) The disciplinary process carried out by HRTL was unfair.
- (b) There was no adequate investigation by HRTL.
- (c) HRTL pre-determined the outcome of the disciplinary process.
- (d) The decision to dismiss was not substantively justified.

The disciplinary process carried out by HRTL was unfair

[37] Mr Raina submitted that the disciplinary process undertaken by Mr Cals was unfair in a generic sense, and that HRTL also failed to comply with HRTL Performance and Disciplinary Policy (the policy).

[38] The letter inviting Mr Raina to the disciplinary meeting on 3 September 2024 did not inform Mr Raina he could bring a representative or support person, in breach of

⁴ *X v Y Ltd v NZ Stock Exchange* [1992] 1 ERNZ 863 at 872

the policy. The policy goes to state that once a disciplinary process is embarked upon the company will advise the employee of their right to "representation, union or other support." It was only when he arrived at the meeting at 6.30 am that he was advised he could have a support person present.

[39] It is unlikely that had he known that he could bring a support person, someone would have been available at such short notice. The failure by HRTL to advise accordingly and follow its own policy is a serious and substantial breach of process, and not one that can be referred to as a "minor procedural defect."

[40] Mr Raina said that in regard to the two earlier incidents of phone use while driving on 2 August 2024 he was not disciplined and did not receive prior warnings, but was casually spoken to by Mr Cals. Given his previous interactions with HRTL management regarding the issue he was not expecting to be dismissed. If he had known this was a serious possibility, he would have adjourned the meeting until he had representation.

There was no adequate investigation by HRTL

[41] Mr Cals said that after viewing the video he did not believe he had to carry out any further investigation, other than speaking to Mr Raina and hearing his explanation.

[42] Mr Raina submitted that a preliminary investigation was not only warranted in these circumstances, but was mandated by HRTL's own policy. Mr Raina stated that the reason he was using the phone was because he had been in communication with dispatch at the depot and this was how HRTL dispatchers contacted the HRTL drivers when they were working.

[43] Mr Raina also stated that the truck he had been driving was not fitted with Bluetooth and therefore he had to use his phone when speaking to dispatch.

[44] Mr Raina said that Mr Cals should have investigated these issues as they were relevant as a defence to the allegations and at least should have been take into account in mitigation.

The decision to dismiss was not substantively justified

[45] Mr Raina submits that summary dismissal should be reserved for the most serious kinds of misconduct within employment. Mr Raina was dismissed for using his work cell phone while driving a company motor vehicle. Mr Raina's position is that a low-level traffic offence such as mobile phone use while driving is not serious enough to warrant dismissal without some prior formal warnings.

[46] HRTL's performance and disciplinary policy states on page 3 that:

Typically, steps in the warning process are as follows: Warning, Final warning, Dismissal.

[47] Mr Raina had received no formal warning in regard to the previous incidents.

[48] Mr Raina claims that the reason he needed to use the cell phone while driving was to answer calls from dispatch.

[49] HRTL has argued that the summary dismissal was justified as Mr Raina had been previously warned about telephone use whilst driving, and that he posed a grave health and safety risk to himself and other road users.

[50] Mr Raina submitted that if he posed such a serious risk then logically, he should have been suspended or placed on non-driving duties pending the outcome of the disciplinary process. But he was allowed by his employer to continue driving a heavy truck, all day 30 August and 2 September 2024.

HRTL pre-determined the outcome of the disciplinary process

[51] The policy document ends with a statement that, "No decisions relating to disciplinary matters will be predetermined."

[52] Mr Raina argues the outcome of the process followed by HRTL in this case was clearly predetermined. The meeting of 3 September was relatively short, lasting approximately 15 to 30 minutes. Mr Cals gave no consideration to whether other possible sanctions such a final warning would be appropriate.

[53] HRTL says there is no arguable case for unjustified dismissal. Dismissal was an appropriate outcome for serious misconduct and was fair and reasonable in the circumstances.⁵

[54] HRTL emphasised it has obligations under the Health and Safety at Work Act 2015 to provide and keep a safe work environment. Employees have a responsibility to take reasonable care of their own health and safety and to take reasonable care that what they do or don't do does not adversely affect the health and safety of other people.

[55] The Employment Court in *B v Virgin Australia (NZ) Employment and Crewing Ltd* stated:⁶

The reasonableness or otherwise of the employer's actions cannot be assessed in a vacuum. They must be viewed in context, and in light of all of the circumstances. This includes the nature of the employer's business and the employee's role, and the history of the employment relationship. The defendant operates in a safety conscious industry. Public safety is a core concern. The plaintiff held the position of pilot. It is self-evident that the defendant must have the utmost trust and confidence in its pilots. I accept too that its reputation, particularly as it relates to public safety, is particularly important to it given the nature of the industry. It cannot be criticised for adopting a conservative, risk averse approach to matters relating to public safety.

Conclusion on arguable case of unjustified dismissal

[56] Based on all the information that I have before me, I accept that Mr Raina has an arguable case that the HRTL did not act as a fair and reasonable employer could have done with respect to the disciplinary process it undertook and this may render his dismissal unjustified. I am satisfied Mr Raina's claims meet the low threshold of an arguable case for his personal grievances against HRTL.

Is there an arguable case for permanent reinstatement?

[57] Mr Raina must not only establish an arguable case for unjustifiable dismissal, but he must also establish that he would be reinstated if successful in his claims.

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

⁶ *B v Virgin Australia (NZ) Employment and Crewing Limited, previously known as Pacific Blue Employment and Crewing Limited* NZEMPC CHCH [2013] NZEMPC 40 at [134].

[58] This is also a low threshold and requires the Authority to consider whether re-imposing Mr Raina into the employment relationship is practicable and reasonable.⁷ Section 125 of the Act states that reinstatement is the primary remedy. Here I look at the feasibility or practical workability of re-imposing this employment relationship.

[59] Mr Raina had only been employed since March 2024. Prior to August 2024 there had been no issues raised about the level of competency of his driving. There was no evidence of any previous formal disciplinary action having been taken against him.

[60] Mr Cals says in his affidavit that he made his decision to terminate Mr Raina's employment because he had lost trust and confidence in him to not use his cell phone whilst driving.

[61] While I am yet to question Mr Raina and Mr Cals regarding their evidence, based on a broad impression of what is before me, I see difficulties in Mr Raina returning to his role.

[62] HRTL must have trust and confidence in its drivers to comply with the law and its policies for their own safety and the safety of others. Mr Raina was fully trained and was aware that any mobile phone use while driving was in breach of the law and HRTL's policies and would be taken seriously.

[63] I do not consider HRTL's health and safety concerns to be exaggerated. As HRTL emphasised, the footage of Mr Raina's driving shows him interacting with his phone for at least 30 seconds before he placed the phone on the dashboard. Mr Raina was driving a 40-tonne vehicle on the Auckland motorway at rush hour traffic time. HRTL submits that at such a time Mr Raina is required to give his driving undivided focus and attention is even more crucial.

[64] The onus of proof of practicability rests with the employer.⁸ In this case HRTL submitted it must also take a consistent approach to all drivers. Ms Flinkenberg stated

⁷ Employment Relations Act 2000, s 125(2).

⁸ *Lewis v Howick College of Board of Trustees* [2010] NZCA 320 at [7].

that other truck drivers had also been dismissed for using a mobile phone while driving and that was why HRTL could not continue to employ Mr Raina.

[65] I am satisfied that Mr Raina has a case of permanent reinstatement, but the merits are not strong. However, as a relatively large organisation, HRTL should be able to work with Mr Raina to potentially accommodate his return to the workplace.

[66] HRTL submits it does not have confidence in Mr Raina's commitment to health and safety. His role requires a high degree of trust in that he works largely on his own unsupervised, and it is neither practicable nor reasonable to actively monitor him every second of every day. On that basis it is impracticable to reinstate Mr Raina to his role as a truck driver.

Conclusion on arguable case for reinstatement

[67] Based on the evidence before me and considering all the relevant issues, my assessment at this early stage is that Mr Raina has a weakly arguable case for permanent reinstatement.

Balance of convenience

[68] 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.⁹

[69] There is a serious case to be tried in relation to unjustified dismissal and permanent reinstatement, the merits in relation to both are arguable. My preliminary view, based on untested evidence, is that the claim of unjustified dismissal is arguable and the claim for permanent reinstatement is arguable but weak. This weighs in favour interim reinstatement when assessing where the balance of convenience lies.

⁹ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

[70] The balance of convenience weighs the potential effect on Mr Raina if he were declined interim reinstatement against the potential effect on HRTL if interim reinstatement were granted. This comparison is sometimes referred to as considering the relative hardships to the parties and any relevant third parties.¹⁰ The period under assessment is from the date of this determination on the interim issue until the date of issue of the Authority's substantive determination on Mr Raina personal grievance claims.

[71] In this case evaluating the relative strength or weakness of aspects of Mr Raina's case is helpful in assessing the balance of convenience. As noted earlier, this evaluation is reached from reading untested affidavit evidence and hearing the parties' submissions. At this stage of the proceedings, conclusions reached are provisional and subject to change when the evidence is fully tested through questioning at the eventual substantive meeting.

[72] I take into account that Mr Raina wishes to return to work. I accept that the longer he is not working, the harder it may be for him reintegrate into the workforce.

[73] The extent to which HRTL could have or should have done more to consider alternatives to Mr Raina's dismissal will need to be explored in the Authority's substantive investigation of his claim.

[74] There is no evidence of harm, injury or accident as a result of Mr Raina's cell phone use while driving a truck, however this has more to do with good luck than good management. The potential for harm is great as set out by Mr Cals in his reference to a fatal accident on 1 June 2024, where an HRTL driver caused an accident while using his mobile phone while driving his truck. In that case the driver crossed the centre line while distracted by his phone, causing the death of an oncoming motorist.

[75] While it is impossible to predict what might occur if Mr Raina is reinstated into his former role, because HRTL no longer has the requisite trust and confidence in him,

¹⁰ *Angus v Ports of Auckland Limited* [2011] NZEmpC 125 at [56].

it is most unlikely it would allow him to get behind the wheel of one of its vehicles again. HRTL state this is a risk it is not prepared to take.

[76] On balance, it could not be said with certainty either that Mr Raina was highly likely to be reinstated or, conversely, that the evidence was sufficient to say there was no practicable or reasonable prospect of restoring a sufficiently constructive relationship.

[77] I take into account the potential disruption for HRTL if interim reinstatement is granted, the evidence was previously drivers have been dismissed for unlawful phone use while driving.

[78] The intervening period would not be without some financial pressure, but if Mr Raina were successful with his grievance claim, this could be adequately addressed by awards of lost wages and compensation. There was also nothing to suggest that, if reinstated as an ultimate outcome following the substantive investigation, there would not be a driver's role of the same or similar nature to which he could be appointed.

Conclusion on balance of convenience

[79] Weighing up this assessment, I find that the balance of convenience weighs in favour of HRTL and against the granting of interim reinstatement.

Overall justice

[80] 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

[81] Standing back from the details considered in relation to the factors concerning an arguable case and the balance of convenience, an order for interim reinstatement is not in the interests of justice in this case.

[82] Mr Raina submitted he would face a financial hardship by having to wait for the substantive hearing. He is also the provider for his elderly parents in India who are

¹¹ *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA at [47]

reliant on his income. However, any financial burden could be compensated for if he is successful with his substantive claim.

[83] HRTL submitted Mr Raina had not provided sufficient evidence to show he could not support himself financially on an interim basis while the substantive matters are being investigated by the Authority.

[84] Apart from his affidavit, there was no supporting documentation to support his expressed views about his finances and the impacts of that on him (or any other steps he had taken to mitigate his current circumstances).

[85] The merits of Mr Raina's case are not strong enough to make his eventual prospects for permanent reinstatement sufficiently clear. HRTL states that trust and confidence are critical in the day-to-day operations of its business. Ensuring health and safety obligations are met are a non-negotiable as it concerns the public. HRTL is not confident that Mr Raina will take his responsibilities and obligations seriously should he be reinstated.

Conclusions on overall justice

[86] Standing back from the details considered in relation to the factors concerning an arguable case and the balance of convenience, in terms of the merits, I assess Mr Raina's claim of unjustified dismissal arguable, but his claim for permanent reinstatement not particularly strong. The balance of convenience favours HRTL. The merits of Mr Raina's case are not strong enough to make his eventual prospects for permanent reinstatement sufficiently clear.

[87] The overall justice of this matter does not favour interim reinstatement.

Conclusion

[88] As outlined above, whilst I am satisfied that there is a serious question to be tried regarding whether Mr Raina was unjustifiably dismissed by HRTL, the balance of convenience weighs in favour of HRTL and the overall interests of justice also favours HRTL. As a result, I decline Mr Raina's application for interim reinstatement.

[89] Mr Raina's application for interim reinstatement is unsuccessful.

Next steps

[90] Having not granted the interim reinstatement application, the next step is for the Authority Officer to schedule a case management call to timetable evidence and confirm an investigation meeting date in the new year. Parties have attended mediation, however, if further mediation would assist then a direction can be made.

Costs

[91] Costs are reserved pending the outcome of the substantive investigation of Mr Raina's grievance application.

Andrew Gane
Member of the Employment Relations Authority