

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 76
3246599

BETWEEN OLEKSANDR ZHURAVEL
Applicant

AND NANOSHINE LIMITED
First Respondent

AND CERAMIC PRO LIMITED
Second Respondent

Member of Authority: Alex Leulu

Representatives: Steven Westwood, advocate for the Applicant
Emma Butcher and Charlotte Joy, counsel for the
Respondents

Investigation Meeting: On the papers

Submissions and further information received: 21 November 2023 and 22 December 2023 from
Applicant
20 November 2023 and 29 November 2023 from
Respondent

Determination: 12 February 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 27 January 2000 Oleksandr Zhuravel started work for Nanoshine Limited (Nanoshine) as a vehicle wrap specialist. Whilst still working in the same role, his employer changed to Ceramic Pro Limited (CPL) on 1 June 2023.

[2] On 10 July 2023 CPL dismissed Mr Zhuravel from his employment after several allegations were made against him for alleged dishonest behaviour. Mr Zhuravel disputed CPL's decision and applied to the Authority to investigate his claims against Nanoshine and CPL. He also claimed he was unjustifiably dismissed by CPL.

[3] Mr Zhuravel also asked the Authority to exercise its discretion to reinstate him to his previous role for CPL on an interim basis while his claims are being investigated.¹ CPL opposed Mr Zhuravel's application and said the balance of convenience and overall justice of the case did not support his application.

The Authority's investigation

[4] The parties agreed for Mr Zhuravel's interim reinstatement application to be heard on the papers. The Authority had considered Mr Zhuravel's statement of problem, CPL's statement in reply, and affidavits and submissions lodged by both parties.

[5] Affidavits were lodged by Mr Zhuravel, CPL supervisor Lam Chum Roentgen Ng and CPL directors Aidan and Sofia McDougall. Affidavit evidence was accepted on an untested basis, but assessment of unanswered or disputed assertions in those sworn or affirmed statements may be made on a common-sense basis when considering whether to order interim reinstatement.²

[6] As permitted by s 174E of the Employment Relations Act 2000 (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. It has not recorded all evidence and submissions received.

Interim reinstatement principles

[7] The Authority has jurisdiction to grant interim reinstatement.³ When determining whether to order interim reinstatement, the Authority must have regard to the object of the Act to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and employment relationship.⁴

[8] When considering interim reinstatement, the following three step process applies:

¹ Employment Relations Act 2000, s 125.

² *Wellington Free Ambulance Service v Adams* [2010] NZEmpC 59 at [17]-[18].

³ Employment Relations Act 2000, s 127.

⁴ Employment Relations Act 2000, s 3.

- (a) Does Mr Zhuravel have an arguable case he was unjustifiably dismissed and should be reinstated permanently?
- (b) Where does the balance of convenience lie? This includes looking at the relative detriment or injury each party would incur because of an interim reinstatement decision.
- (c) To ascertain where the overall justice of the case lies until the substantive matter can be determined.

CPL's decision to dismiss Mr Zhuravel

[9] As part of his role for CPL, Mr Zhuravel was responsible for surface detailing of customer vehicles. On 27 June 2023 CPL sent Mr Zhuravel a letter informing him of three allegations against him (the disciplinary letter). The allegations against Mr Zhuravel were for:

- Removing a tyre inflation device from a customer's vehicle and placing it in his own vehicle;
- Not carrying out work on another customer's vehicle and informing Mr McDougall that he had completed the work; and
- Unauthorised access to Mr Ng's vehicle without good reason.

[10] The disciplinary letter invited Mr Zhuravel to attend a disciplinary meeting on 3 July 2023. CPL also suspended Mr Zhuravel from work up until his disciplinary meeting.

[11] On 5 July 2023 Mr Zhuravel attended the disciplinary meeting with Mr McDougall. Mr Zhuravel admitted the allegations and explained his actions in respect of each allegation.

[12] On 10 July 2023 CPL sent Mr Zhuravel a disciplinary outcome letter (the outcome letter). The outcome letter acknowledged Mr Zhuravel's admissions but concluded that Mr Zhuravel's actions were dishonest and amounted to serious misconduct. As a result, CPL dismissed Mr Zhuravel from his employment effective from 10 July 2023.

[13] On the same day, Mr Zhuravel responded to CPL's outcome letter by email. In his email, Mr Zhuravel disputed CPL's decision and its recollection of what was discussed during the disciplinary meeting.

Arguable case for unjustified dismissal

[14] For an application for interim reinstatement, establishing an arguable case for unjustified dismissal has a low threshold. The threshold being whether there is a serious question or arguable case to be considered and the claim is not frivolous or vexatious.⁵

[15] CPL had acknowledged the low threshold and accepted Mr Zhuravel had an arguable but weak case for unjustified dismissal.

Arguable case for permanent reinstatement

[16] Establishing an arguable case for permanent reinstatement also has a low threshold. Mr Zhuravel did not provide any arguments to support his return to the workplace. However, he said he had good relationships with his former work colleagues and was still in contact with them.

[17] CPL disputed Mr Zhuravel's views about his relationship with his former work colleagues. It relied on Mr Ng's evidence as Mr Zhuravel's CPL supervisor. Mr Ng said Mr Zhuravel was not liked by other CPL staff because he would argue with both CPL staff and its customers.

[18] CPL also disputed Mr Zhuravel's claim for permanent reinstatement because his reinstatement would not be reasonable and practicable for several reasons. Firstly, CPL had experienced a change in its financial circumstances and would not be in a financial position to accommodate Mr Zhuravel's return to the paid workforce. It said the change to its financial position was because of a reduction in customer demand. Due to its financial position, CPL were unable to recruit a replacement for Mr Zhuravel's previous role. CPL did not provide any evidence of its financial situation.

[19] Secondly, CPL argued Mr Zhuravel's evidence showed acrimony and mistrust between himself and CPL. It said this made any potential good faith employment relationship impractical. Mr McDougall referred specifically to Mr Zhuravel's

⁵ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

statement of problem where he had made several accusations against Mr and Ms McDougall including accusing them of drug use.

[20] Thirdly, CPL said Mr Zhuravel's permanent reinstatement would be impractical because he was dismissed for several instances relating to dishonest behaviour. It said his alleged behaviour had destroyed CPL's trust and confidence in him for any return to the workforce.

[21] CPL had considerable grounds for opposing Mr Zhuravel's claim for permanent reinstatement. However, there is a possibility Mr Zhuravel could still prove he has a positive work relationship with both CPL staff and Mr and Ms McDougall. There is also a potential situation where CPL's financial situation may change. For these reasons, Mr Zhuravel met the low threshold of an arguable case for reinstatement.

The balance of convenience

[22] Mr Zhuravel did not provide any submissions on why the balance of convenience in this case should be in his favour. However, in his affidavit he said he was the main income earner for his family and the loss of his job had a significant impact on them. He also confirmed he had subsequently found work elsewhere. This new role paid him less than what he earned with CPL and was different from his previous role.

[23] Mr Zhuravel also disputed CPL's submissions about its financial circumstances (and their ability to re-employ him). He referred to CPL carrying out remodelling work on its "city branch" and inferred this was contrary to CPL's views of its difficult financial position.

[24] CPL argued the balance of convenience should be held to be in its favour because:

- Mr Zhuravel did not have a strong case for unjustified dismissal or permanent reinstatement. He had also been out of the workplace for a considerable amount of time.
- There was insufficient evidence to show Mr Zhuravel would be able to pay damages and repay his salary in the event he was awarded interim reinstatement (but was unsuccessful in his claim for permanent reinstatement).

- Mr Zhuravel had the opportunity to mitigate any negative financial impacts resulting from the disciplinary process leading to his dismissal. After his dismissal, CPL had openly offered a goodwill payment which he rejected. Any negative impact of his dismissal may be addressed in the event he is successful in his substantive claims.

[25] CPL also relied on its previous arguments about the financial and practical implications on CPL and its staff.

[26] Due to the limited information and submissions from Mr Zhuravel, it was difficult to fully assess the relevant circumstances which favour his position on the balance of convenience. From what can be gleaned from his affidavit, Mr Zhuravel's arguments focussed on the immanent financial impact on him and his family. However, this impact had been mitigated due to him being able to find other work. Given there was little detail around the circumstances of his current work (such as the rate of pay and whether it is permanent), it was unclear to what degree his financial circumstances have been mitigated.

[27] CPL's concerns in Mr Zhuravel returning to the workplace are reasonable. Although Mr Zhuravel disputes CPL's allegations of his dishonesty, he admitted to taking the device and accessing Mr Ng's vehicle without authorisation. The allegations against Mr Zhuravel relate to the trust and confidence between him and CPL (and its staff). Without resolution of Mr Zhuravel's substantive claims, his reintroduction into the workplace would likely create unreasonable disruption to the workplace. For this reason, the balance of convenience weighed against interim reinstatement.

Overall justice

[28] Stepping back from the circumstances considered as part of an arguable case and the balance of convenience, an order for interim reinstatement was not in the interests of justice in this case.

[29] The merits of Mr Zhuravel's case for permanent reinstatement were not strong enough to make his prospects of success sufficiently clear. It was also not sufficiently clear whether a workable solution could be found to overcome the financial, relational and practical barriers presented by his return to the workplace for an interim period.

[30] Accordingly, Mr Zhuravel's application for interim reinstatement is declined.

Next Steps

[31] The Authority will convene a case management conference to set timetable directions for the investigation of Mr Zhuravel's personal grievance application.

Costs

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

Alex Leulu
Member of the Employment Relations Authority