

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 334/08
5129374

BETWEEN MUKESH ARORA
 Applicant

AND SATO NEW ZEALAND
 LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Ken Nicolson, counsel for Applicant
 Jo Douglas, counsel for Respondent

Investigation Meeting: 19 September 2008

Determination: 23 September 2008

DETERMINATION OF THE AUTHORITY

Application for Interim Reinstatement

[1] Application has been made to the Authority by Mr Mukesh Arora under s 127 of the Employment Relations Act 2000 for an order requiring his former employer, Sato New Zealand Limited, to reinstate him pending the investigation and substantive determination of a personal grievance he has raised with the company.

[2] Mr Arora's grievance is a claim that he was unjustifiably dismissed by Sato.

[3] As required, Mr Arora has filed an undertaking to abide by any order that the Authority may make in respect of damages.

[4] Mr Arora was advised by Sato of his dismissal on 13 June 2008, after several disciplinary meetings had taken place. Following the application for interim reinstatement which was lodged on 3 July 2008, mediation was undertaken by the parties but they were unable to resolve the grievance through that process.

[5] In considering applications under s 127 of the Act the Authority is required to apply the law relating to interim injunctions and to also have regard to the object of the Act. The relevant law of interim injunctive relief requires that four recognised tests or questions are to be applied to the circumstances of any case. In relation to the object of the Act, the Authority must have regard to the principle that productive employment relationships are founded on good faith behaviour and on mutual trust and confidence.

[6] A further relevant object of the Act, at s 101C, is the recognition of reinstatement as a remedy for any personal grievance. Reinstatement has been made the primary remedy under s 125.

[7] In accordance with usual procedure the evidence the Authority has for the purpose of determining this interim reinstatement application was presented in the form of affidavits from material witnesses including Mr Arora, Mr Paul Ryan, the Managing Director of Sato, and several other persons whose evidence was put forward by the company in support of its strong opposition to the application.

[8] As all of this evidence must necessarily remain untested by questioning until the substantive investigation of the grievance, any findings of fact by the Authority in this determination are provisional only and may change once the Authority has fully investigated the claims and after the witnesses have been questioned about their evidence where necessary.

[9] The standard tests or questions the Authority must consider in determining this application are:

- Is there an arguable case?
- Is there an adequate alternative remedy available?
- Where does the balance of convenience lie?
- What is the overall justice of the case?

[10] Mr Arora was employed from June 2006 by Sato as its General Manager, Shared Services. In that position he was effectively the chief financial officer of the company, reporting to Mr Ryan its Managing Director. Mr Arora had become certified as a Chartered Accountant at the end of 2007.

[11] His dismissal followed an inquiry by Sato into his performance during an audit of the company carried out in April 2008 by Deloitte.

[12] In the course of it Mr Arora had supplied information and data at various times to personnel of Deloitte including Mr Andrew Dick, the partner responsible for the audit.

[13] On 29 May 2008 after completing the audit Mr Dick wrote to Mr Ryan requesting payment of additional fees for an overrun of time taken by the audit.

[14] In his letter Mr Dick did not single out Mr Arora as being responsible for the extra work needed but made it clear that he regarded Sato as having failed to meet prescribed accounting standards in relation to the audit. Mr Dick advised Sato that the budget overrun on the exercise had been \$41,000, although he substantially discounted this to \$23,000 which he sought as additional fees from Sato.

[15] A copy of Mr Dick's letter was sent to Mr Arora on 4 June together with a request that he attend a meeting with Mr Ryan to discuss the following:

It is alleged that you may have mislead or obstructed Deloitte in carrying out their audit. It appears that you have provided inaccurate or false information to Deloitte about Sato's inventory ageing.

It is also alleged that your failure to provide timely and accurate information has caused inaccurate financial reports to be prepared and filed during the course of the year and that these financial reports did not comply with the requirements of International Financial Reporting Standards.

If proven, these allegations may amount to serious misconduct and/or serious breaches of your duties and obligations.

[16] Mr Arora attended three meetings with his representative Mr Nicolson to discuss the allegations and provide his explanation in respect of them. The meetings were adjourned from time to time to enable further information to be checked or obtained from personnel of Sato and Deloitte.

[17] Mr Arora denied the allegations that he had given wrong information to the auditors knowingly, or that he had done so at all. He provided a memorandum explaining in detail his work for the audit.

[18] At the end of the third meeting, on 13 June, Mr Ryan advised Mr Arora that he had decided to instantly dismiss him on the grounds of serious misconduct.

[19] A letter dated 16 June 2008 confirming the dismissal, provided the following advice to Mr Arora:

The Company finds that the allegation that you provided misleading and false information to the external auditor is true. The stock ageing information provided to the Auditors on 29 April 2008 was substantially incorrect.

Furthermore, the Company believes that you are responsible for the accuracy of the Company's financial statements and you did and/or should have known that the information provided was false.

The Company also finds that your failure to provide accurate information caused the Company to file inaccurate financial reports during the course of the financial year.

[20] With reference to submissions made during the disciplinary process by Mr Nicolson that no penalty was warranted for Mr Arora's conduct, or that any disciplinary sanctions against him should be limited, Mr Ryan advised of the following in his letter:

However, we are gravely concerned by your apparent lack of understanding as to significance of this error, and your lack of understanding or acknowledgement of your responsibility to accurately report the true financial position of the Company.

We also note that you have stated that you do not believe you are responsible for the accuracy of the information and that you produced the report from the Company's financial system. You contend that if there is an error, the Company should seek recompense from the provider of the financial system. The Company believes that it is the responsibility of the financial controller to verify the information provided.

In light of the above and given that you have not accepted any responsibility for the provision of the incorrect information to the external auditors in conjunction with the serious implications the false information had for the Company, we have decided that your actions amount to serious misconduct, and that instant dismissal is the appropriate course of action.

Is there an arguable case?

[21] Sato concedes the existence of an arguable case that dismissal was unjustified, but not a strongly arguable case.

[22] I find there is an arguable case as to Mr Arora's culpability in respect of incorrect, inaccurate or incomplete information that was supplied by him to Deloitte, particularly with regard to aged inventory and obsolescent stock. Discrepancies of several hundred thousand dollars in the audit were risked by Mr Arora's actions when supplying information.

[23] Also there is an arguable case as to whether in supplying incorrect or inaccurate information Mr Arora's actions had amounted to "*falsifying*" information or records, as required under the employment agreement to support a conclusion that serious misconduct had occurred.

[24] There is also an arguable case in respect of the particular weight placed by the employer on what it found to be a lack of understanding and acknowledgement by Mr Arora of his responsibility to accurately report the financial position of the company. As well, it is arguable whether his apparent lack of acumen in this regard aggravated the misconduct found by Sato and elevated it to serious misconduct justifying instant dismissal.

[25] I agree though with the respondent that the arguable case supporting the application is not a strong one. I find from the affidavit evidence that Mr Arora did supply to Deloitte material information that was substantially inaccurate or incorrect or incomplete. I find that his employer could reasonably have expected him, as the senior company accountant, to have discovered these problems with it before the information was supplied to Deloitte. A critical assessment of it, bearing in mind the ultimate purpose for which the information was required, should reasonably have led Mr Arora to question its accuracy before committing it to the audit. Some degree of negligence at least by Mr Arora is shown from the evidence taken so far.

[26] Falsifying information is defined to be serious misconduct under the employment agreement between Mr Arora and Sato. I find that there is not a strong argument in favour of Mr Arora that his alleged actions could not amount to falsification of information, certainly as that word is used in the profession with regard to the obligations of chartered accountants. A false or misleading statement is, amongst other things, defined in the Code of Ethics as one made that an accountant believes or ought to know to be;

.....false, incorrect or misleading, or open to misconstruction, by reason of the misstatement, omission or suppression of a material fact or otherwise.

[27] Also suggested by the evidence is the performance by Mr Arora of his duties in a perfunctory way detached from his professional responsibilities, simply regarding himself as a conduit of information without taking any care over its accuracy. A failure to appreciate the risk of legal liability arising from his actions, or at least that they could adversely affect the company and its directors, is also indicated as a matter going to the general competence of Mr Arora. His downplaying of the crucial representation letter to Deloitte put forward for Mr Ryan to sign, is relevant in this regard.

[28] His attitude toward Mr Dick's evidence was simply disingenuous. Mr Arora accused him of twisting his words, acting from ulterior motives and of "*spinning the numbers*," a startling allegation against the Deloitte Audit & Assurance partner. Sato's concern is a very reasonable one that Mr Arora has not grasped the significance of his actions during the audit, or indeed the significance of the audit process itself.

Adequacy of alternative remedies/balance of convenience

[29] I conclude that the balance of convenience does not favour interim reinstatement. This is not a case where an order could restore the employment relationship on an interim basis very quickly after there has been a dismissal, to minimise or contain the damage to the relationship. Some three months has now gone by since dismissal, working against the practicability of interim reinstatement.

[30] Of more significance is the fact that Mr Arora's position as a senior executive of Sato required him to report to and work closely with the Managing Director Mr Ryan. Without at this preliminary stage attributing blame for the situation that has arisen, there is now clearly a great deal of antipathy between the two men which must only impede the restoration of a productive and successful working relationship. Under the Act mutual trust is recognised as being a foundation of productive employment relationships, but I find that characteristic is quite unlikely to emanate from reinstatement if granted, at least in the interim.

[31] Mr Arora has brought grievances against Mr Ryan previously and has accused him of being "*motivated by personal reasons*" in deciding to dismiss him. In this again there is an element of denial by Mr Arora that any of his actions could possibly have had led to Deloitte complaining about the time overrun with the audit, in turn

leading Mr Ryan to commence what appears to have been procedurally a fair and thorough enquiry into the allegations of misconduct.

[32] There has been almost non-existent evidence presented to the Authority of any attempts made by Mr Arora and the outcome of them, to find alternative employment. There is also minimal evidence of his personal or family circumstances, or of his financial situation, particularly whether that is at risk of becoming desperate because of the loss of his employment.

[33] Further, Sato was entitled to become and remain concerned about the dismissive attitude shown by Mr Arora towards his professional obligations as an accountant. He seemed unwilling to acknowledge those and his responsibility to meet them. It appears he regarded his role as merely being part of a process in which information was collected and passed on but without him needing to become concerned as to its accuracy.

[34] In my view the balance of convenience favours Sato not having Mr Arora return to his employment, at least in the meantime until there is a substantive determination of the grievance claim. Any prejudice to Mr Arora caused now by further delay in eventually resolving that claim, possibly in his favour, can reasonably be met with orders for compensation and reimbursement of lost wages in that event. I note there is also a claim for damages for loss of reputation which, presumably, Mr Arora will be able to support with evidence presented to the investigation meeting.

Overall justice of the case

[35] I find that the overall justice of the case favours Sato against the making of an order of interim reinstatement. Sato is opposed to interim reinstatement on a garden leave basis, which it is entitled to be on the basis that an employer may reasonably expect work in return for pay. Although Mr Arora expresses some confidence that the relationship can be resumed this optimism is not borne out by the evidence seen so far. I consider there is a real risk in returning Mr Arora on an interim basis and before the merits of his case can be fully determined, that the relationship will very shortly break down again to possibly prevent reinstatement on a permanent basis later on. Also, those who he wishes to resume working with as colleagues Mr Arora has attacked with some vehemence in his several affidavits in reply.

[36] Relevant as well to the overall justice of the case are the relatively weak substantive merits of the grievance, as I consider them to be from the affidavit evidence given to date.

Determination

[37] For the above reasons, no order is made under s 127 of the Employment Relations Act 2000 for the interim reinstatement of Mr Arora.

[38] Arrangements will be made with counsel Mr Nicolson and Ms Douglas, to enable the Authority to conduct the substantive investigation into this matter as soon as possible.

Costs

[39] Costs are reserved.

A Dumbleton
Member of the Employment Relations Authority