

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 175
5415897

BETWEEN

GUILHERME PRUX
ATHANAZIO
Applicant

A N D

BOSSANOVA ENTERPRISES
LIMITED
Respondent

Member of Authority: T G Tetitaha
Representatives: M B Beech, Counsel for Applicant
K Hymers, Counsel for Respondent
Investigation Meeting: Hearing on the papers
Submissions Received: 26 April from Applicant
26 April from Respondent
Date of Determination: 9 May 2013

DETERMINATION OF THE AUTHORITY

- A. Pursuant to an undertaking as to damages, an order for the interim reinstatement of Mr Athanazio to his job with Bossanova until hearing of his personal grievances.**
- B. A direction for a teleconference to be convened for timetabling evidence and setting down a fixture date.**
- C. Costs are reserved.**

Employment relationship problem

[1] Guilherme Prux Athanazio began working for Bossanova Enterprises Limited as a casual worker in November 2009. He was employed as the Supply Distribution Manager for a 30 month fixed term agreement starting 9 July 2012. The employment

relationship problem arises from allegedly aggressive behaviour between the parties resulting in Mr Athanazio's dismissal on or about 15 March 2013. He seeks reinstatement pending the substantive hearing.

[2] Performance issues regarding paperwork were raised with Mr Athanazio on 11 March 2013. Bossanova alleges he was given a verbal warning which Mr Athanazio denies receiving. At a meeting on 12 March 2013 with Bossanova's Director, Ms Claudine Garcia De Paiva, raised performance issues again with Mr Athanazio. An altercation occurred and Mr Athanazio was asked to leave.

[3] Ms De Paiva followed him to the carpark where a further altercation occurred. She then alleges Mr Athanazio walked away calling her, amongst other things, a 'crazy bitch' and a 'junkie' who consumed drugs daily at work. Ms De Pavia accepts she has a past drug history but otherwise denies there was any basis for these allegations. Mr Athanazio denies saying those words to Ms De Pavia at all.

[4] On 13 March 2013 Mr Athanazio received emails from Ms De Paiva attaching a first written warning (subsequently amended) regarding the performance issues. The warning did not refer to the above alleged behaviour.

[5] Ms De Paiva alleges she organised a meeting to discuss his behaviour on 13 March and give him the chance to rectify the incident by apologising which he failed to do. Mr Athanazio alleges a meeting was called about the written warning only where Ms De Paiva called him a 'poor wretch'. He denies any investigation occurred regarding his alleged behaviour on 12 March. He gave Ms De Pavia the second amended written warning with notes he had written regarding training to address performance issues and holiday leave matters.

[6] Mr Athanazio was handed a third amended written warning later in the day. He signed the written warning and left it for Ms De Paiva on 14 March 2013. Ms De Paiva alleges she was too upset to return to work that day because of Mr Athanazio's conduct.

[7] On 15 March 2013 Ms De Paiva returned to work. She advised Mr Athanazio he was summarily dismissed for serious misconduct.

Issues

[8] In determining interim reinstatement, the Authority must apply the law relating to interim injunctions.¹

[9] The following issues arise:

- (a) Does Mr Athanazio have an arguable case that he was unjustifiably dismissed?
- (b) Does Mr Athanazio have an arguable case for reinstatement?
- (c) Where does the balance of convenience lie between the parties in the period until the Authority's determination is given?
- (d) Does the overall justice of the case dictate interim reinstatement of employment is appropriate?

Does Mr Athanazio have an arguable case that he was unjustifiably dismissed?

[10] Bossanova submits Mr Athanazio's aggressive behaviour and swearing on 12 March 2013 amounted to serious misconduct justifying dismissal. They refer to clause 29.8(e) of his employment agreement which describes conduct which may justify summary dismissal including "*fighting or assaulting another person during work hours ... on the employer's ... premises ...*"

[11] Bossanova submits Mr Athanazio's conduct went beyond swearing or bad language. It was deliberate and used towards Ms De Paiva personally and professionally. This was evidenced in the name calling and accusations of Ms De Paiva coming to work under the influence of drugs.

[12] An arguable case is "*a case with some serious or arguable, but not necessarily certain, prospects of success*".² It is accepted Mr Athanazio was employed and dismissed. The burden of justifying the dismissal lies with the employer.³ It will be difficult for Bossanova at an interim stage to assert there is no arguable case.⁴

¹ Section 127(4)

² *X V Y Limited v The New Zealand Stock Exchange* [1992] 1 ERNZ 863, 872-3.

³ Section 103A

⁴ *Ansley v P & O Services (NZ) Limited* (Unreported, Employment Court, 3 June 1998, WC 34/98) at p2

[13] There is a substantial conflict of evidence in the affidavits. The Authority is not in a position to resolve this at an interim hearing on the papers.

[14] The behaviour giving rise to this application is disputed. There are concerns raised about the process followed by Bossanova leading to dismissal. The Authority cannot make any substantive finding of fact about the parties conduct without hearing from witnesses.

[15] The agreement does not necessarily support a finding swearing is serious misconduct. Clause 29.8(e) defines “fighting” or “assaulting another person” as conduct resulting in summary dismissal.

[16] “Assault” is defined in the Crimes Act 1961 as the intentional application of force or threat to do so. This did not occur here. There must be more than one participant for a matter to be considered “fighting” even if one of the other participants does no more than act in legitimate self defence, or submits.⁵ The evidence does not support Ms De Paiva having participated in a fight or acted in self-defence or submitted.

[17] Swearing or bad language is not on its own sufficient to always justify summary dismissal.⁶ The facts giving rise to the conduct will need to be determined at hearing.

[18] The Authority determines Mr Athanzio has an arguable case.

Does Mr Athanzio have an arguable case for reinstatement?

[19] Reinstatement is no longer the primary remedy for an unjustified disadvantage or dismissal,⁷ but may still be ordered where it is “*practicable and reasonable*” to do so.⁸

[20] Whether it is practicable to reinstate involves a balancing of interests of the parties and the justices of their case with regard to the past and future.⁹ Practicality is

⁵ *R v Grant* [1966] NZLR 968 (CA), 973; s7 Summary Offences Act 1981

⁶ *Davies v Cityline (NZ) Ltd t/a Stagecoach Auckland* ERA Auckland AA321/06, 17 October 2006 at [28]–[29]

⁷ *Angus & McKean v Ports of Auckland* [2011] NZEmpC 160 at [61]

⁸ Section 125(2)

⁹ *Lewis v Howick College Board of Trustees* [2010] NZCA 320, at [2]

both about whether it can occur and the consequences.¹⁰ Reinstatement may not be practicable where there are tensions between employees.¹¹

[21] Bossanova submits it is not practicable for Mr Athanazio to be reinstated because his conduct towards Ms De Paiva undermined the trust and confidence in the employment relationship. Ms De Paiva provided a medical certificate showing the effect upon her health and a statement from another employee indicating they would find it difficult to work with Mr Athanazio because his actions were inappropriate.

[22] The medical certificate indicates Ms De Paiva has two existing chronic mental health conditions which are prone to relapse under stress. It is implied Mr Athanazio's reinstatement may aggravate her condition.

[23] Ms De Paiva is Mr Athanazio's direct reporting person. If reinstated, he may be required to continue reporting with Ms De Paiva. Whether he could report to another or be redeployed to another area of the business is not addressed in evidence.

[24] It is difficult for the Authority to assess the alleged breach of trust and confidence on the papers. There is a factual dispute whether the alleged conduct occurred. If the Authority concludes the conduct did not occur, the claim of breach of trust and confidence would also fail.

[25] Mr Athanazio alleges he is at risk of deportation. Bossanova disputes this. There is correspondence with Immigration New Zealand, Ministry of Business Innovation and Employment, confirming he holds a work visa to 5 April 2014, may be deported if not reinstated and Immigration is holding off enforcement on condition the solicitor keeps them updated, presumably on the outcome of interim reinstatement.

[26] If deported, the alternative remedy of compensatory damages would be inadequate to compensate for the loss of Mr Athanazio's ability to live and find work in New Zealand.

[27] Mr Athanazio was seeking seven weeks holiday leave to travel to Brazil. Bossanova can grant his request and pay out the holiday leave owed. If he is owed no holiday leave, it will be unpaid leave. Bossanova also has the option of placing Mr Athanazio on garden leave until hearing. This would also ensure Ms De Pavia or

¹⁰ See above

¹¹ *Clark v Norske Skog Tasman Limited* [2003] 2 ERNZ 213 (EmpC) at [78]

other employees did not have to deal directly with Mr Athanazio until hearing or redeployment can occur. There is no evidence these options are not practicable or reasonable.

[28] The Authority determines there is an arguable case for reinstatement.

Where does the balance of convenience lie between the parties in the period until the Authority's determination is given?

[29] Bossanova alleges the balance of convenience favours it because Mr Athanazio is not at risk of deportation requiring interim reinstatement, does not hold the correct work visa, his own conduct has brought about termination, and interim reinstatement may not necessarily resolve his immigration issues. He is able to pursue his grievance from Brazil.

[30] The balance of convenience requires the Authority to weigh up the inconvenience to an employer of having to bear the burden of reinstatement before the substantive case is heard (which it may win) against the inconvenience to an employee (who may have a just case) of having to bear the detriment of wrongful or unjustified action until hearing. Inconvenience means detriment or injury.¹²

[31] Mr Athanazio's conduct, work visa and risk of deportation are disputed facts that can only be resolved at the substantive hearing.

[32] Although there is ability to pursue his personal grievance after deportation, this would be costly and may affect Mr Athanazio's ability to prepare and present his case, especially if he is unable to return to New Zealand.

[33] Hearing dates are available in May, June and July 2013. However the availability of parties and their witnesses is unknown.

[34] The holiday and garden leave addresses the inconvenience of Mr Athanazio's reinstatement. He has filed an undertaking as to damages. He would be required to repay any salary received if he is unsuccessful. There is no evidence he shall be unable to do so.

[35] In these circumstances the balance of convenience favours Mr Athanazio.

¹² *XVY Limited v The New Zealand Stock Exchange* [1992] 1 ERNZ 863, 872-3.

Does the overall justice of the case dictate interim reinstatement of employment is appropriate?

[36] Bossanova submits Mr Athanzio has not made his application with “clean hands” due to his own conduct. It refers to his attempts to blame Ms De Paiva for her conduct including utilising statements from former employees, previous performance issues and his inability to return immediately to the workplace given the discrepancies in evidence.

[37] The Authority must stand back from the case and consider what the overall justice of the case requires it to do.¹³ Relevant factors to the overall justice are¹⁴:

- Strength of the applicant’s case;
- Adequacy of alternative remedies;
- Admitted contributory behaviour other than that used to found the dismissal;
- Availability of an early fixture;
- Opportunity of early reinstatement by apology.

[38] There are conflicts in the evidence but overall Mr Athanzio has an arguable case.

[39] The alternative remedy of compensatory damages is inadequate.

[40] Former employees witness statements alleging inappropriate behaviour by Ms De Pavia are not contributory behaviour but may go to credibility. The previous performance issues were dealt with by way of warning. The extent they contributed to this matter given the warning requires further evidence.

[41] Fixtures are available in May, June and July 2013. The availability of the parties, witnesses and counsel is yet to be determined. The early availability of a fixture date does not favour either party.

¹³ See above

¹⁴ *Ansley v P & O Services (NZ) Limited* (Unreported, Employment Court, 3 June 1998, WC 34/98) at p7

[42] Ms De Paiva was prepared to resolve matters by an apology and/or remorse. This offer appears to have been withdrawn. An apology would not affect early reinstatement.

[43] The majority of relevant factors favour Mr Athanzio. The overall justice of the case favours interim reinstatement.

Determination

[44] The Authority determines the following orders/directions shall issue:

- (a) Pursuant to an undertaking as to damages, an order for the interim reinstatement of Mr Athanzio to his job with Bossanova until hearing of his personal grievances.
- (b) A direction for a teleconference to be convened for timetabling evidence and setting down a fixture date.
- (c) Costs are reserved.

T G Tetitaha
Member of the Employment Relations Authority