

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 381
5590098

BETWEEN KEVIN CLEAVER
 Applicant

A N D PAVLOVICH COACHLINES
 LIMITED
 Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Applicant in person
 Matthew Dearing, Counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 30 November 2015 on behalf of the Applicant
 26 November 2015 on behalf of the Respondent

Date of Determination: 7 December 2015

**DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY
ON A PRELIMINARY MATTER**

- A. The application for interim reinstatement is declined.**

- B. Costs are reserved until after the substantive investigation and
 final determination.**

Employment relationship problem

[1] The applicant, Mr Kevin Cleaver was employed as a bus driver by the respondent, Pavlovich Coachlines Limited (Pavlovich). Mr Cleaver claims that the warning issued to him by Pavlovich on 23 July 2015 constituted an unjustified disadvantage. Mr Cleaver also claims that Pavlovich has failed to make payment to him of wages and entitlements owing, and finally claims his dismissal by Pavlovich on 23 September 2015 was unjustified.

[2] Mr Cleaver seeks to have the warning retracted, seeks compensation in respect of the alleged failure to pay wages and entitlements, and finally seeks interim reinstatement of his employment pending a substantive investigation and final determination by the Authority of his claim of unjustified dismissal.

[3] Pavlovich denies Mr Cleaver's claims stating that the warning was justified, that Mr Cleaver has been paid all entitlements and wages owing to him and that his employment was terminated justifiably following an investigation by it into a complaint by a member of the public, Mr Joseph Snook concerning Mr Cleaver's alleged ongoing refusal to allow him to travel on any bus that he was driving.

Investigation

[4] Mr Cleaver has requested that his application for interim reinstatement be dealt with on an urgent basis on the papers, even though the Authority was able to accommodate an early investigation of his substantive claims. Therefore this preliminary determination deals solely with Mr Cleaver's application for interim reinstatement pending a substantive investigation and determination of his claims of unjustified dismissal, unjustified disadvantage and wage arrears.

[5] Mr Cleaver filed two affidavits in support of his application for interim reinstatement. Pavlovich has filed affidavits in opposition by Ms Skye Lee-Ann Naismith, Group Operations Manager, and Mr John Hamilton, a principal of Health 4 Work.

[6] As permitted by s.174E of the Employment Relations Act 2000 (the Act), this determination has not recorded all the evidence and submissions received from Mr Cleaver and Pavlovich, but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Relevant facts

[7] Pavlovich provides both public and private bus transportation services across New Zealand. Pavlovich provides bus transportation services in Hamilton city pursuant to a contract with the Hamilton City Council.

[8] Mr Cleaver was employed by Pavlovich as a bus driver to drive buses throughout Hamilton city from 9 July 2012 until his dismissal on 23 September 2015.

[9] Mr Cleaver's employment was subject to an individual employment agreement dated 5 July 2012. Clause 55 of the employment agreement provides that Pavlovich may terminate the employment of an employee summarily if in its opinion the employee is guilty of serious misconduct. Clause 56 defines serious misconduct as including *serious or repeated failure to follow a reasonable instruction*.

[10] Pavlovich says Mr Cleaver refused to allow a member of the public, Mr Joseph Snook, to travel on the bus he was driving. Pavlovich says this behaviour amounted to a failure to follow a reasonable instruction and amounted to serious misconduct for which dismissal was fair and reasonable in the circumstances.

The incident which led to dismissal

[11] On 30 June 2015, Mr Snook telephoned Ms Naismith to complain that Mr Cleaver was continually refusing to allow him to travel on any bus that he was driving.

[12] After receiving the complaint, Ms Naismith wrote to Mr Cleaver setting out the details of the complaint from Mr Snook and asking for a response. Mr Cleaver responded on 2 July 2015 by filing an internal incident report stating that in July 2011 he had been assaulted by Mr Snook at the Transport Centre, Hamilton. Mr Cleaver complained that he was at a "*continued risk of physical and mental assault*" by Mr Snook. This was the reason for Mr Cleaver refusing to allow Mr Snook as a passenger on buses he was driving.

Investigation into the matter

[13] On 13 July 2015, Ms Naismith wrote to Mr Cleaver acknowledging receipt of his incident report and informing him that Pavlovich was going to engage an independent health and safety consultant to investigate the matter. Pavlovich engaged Mr John Hamilton from Health 4 Work Limited to conduct interviews with both Mr Snook and Mr Cleaver.

[14] Mr Hamilton interviewed Mr Snook on 15 July and Mr Cleaver on 17 July.

[15] The outcome of Mr Hamilton's assessment was that there had been an altercation between Mr Cleaver and Mr Snook approximately four years earlier (in

2011) when Mr Cleaver was employed by another company, prior to his employment by Pavlovich. In his report to Pavlovich, Mr Hamilton stated:

I found Joe to be a person who had multiple health and possibly personality challenges who had a need to use the available public transport on a daily basis. He would like to settle this long standing issue and move on.

I found Kevin to be a person who was totally inflexible in his position and could only see that he was right and the other guy was wrong. He is not prepared to compromise. ...

[16] Mr Hamilton found that the probability of a further confrontation between Mr Snook and Mr Cleaver was low, but that the issue needed to be addressed in the interests of all parties.

[17] Following receipt of the report from Mr Hamilton, Ms Naismith wrote to Mr Cleaver on 23 July 2015 outlining Mr Hamilton's findings, noting Mr Snook's willingness to apologise and instructing Mr Cleaver to allow Mr Snook to board any public passenger service he was driving. On the same day, following an investigation meeting, Pavlovich issued Mr Cleaver with a "first and final written warning" concerning handwritten comments he had made on notices placed by Pavlovich in the driver's room. This warning is the subject of an unjustified disadvantage claim by Mr Cleaver. The warning stated that "*further incidents like this will result in possible termination of your employment*".

Further complaint by Mr Snook

[18] On 16 September 2015, Ms Naismith received a complaint from Pavlovich's Operations Supervisor that Mr Cleaver had again refused to allow Mr Snook on to the bus he was driving. Mr Cleaver was requested to complete an incident report regarding the matter, which he did.

[19] The response from Mr Cleaver was that Mr Snook "*forced his way on to the bus I was driving and was being abusive*".

[20] On 21 September, Ms Naismith wrote to Mr Cleaver asking him to attend an investigation meeting concerning an allegation that he failed to follow a lawful instruction to allow Mr Snook to be a passenger on a bus being driven by him. Mr Cleaver was invited to bring a representative to the meeting.

[21] As part of the investigation, both Mr Cleaver and Mr Snook were interviewed, as was another of Pavlovich's bus drivers, Ms Mane Stanley. Ms Stanley told Ms Naismith that she had alighted the bus behind Mr Snook on the day in question, that she did not witness any abuse by Mr Snook but did witness Mr Cleaver's refusal to carry Mr Snook on the bus.

[22] Ms Naismith's evidence is that during the investigation, she asked Mr Cleaver whether he would continue to refuse to allow Mr Snook on to a bus he was driving. Mr Cleaver replied that he would. Ms Naismith cautioned Mr Cleaver that she was considering terminating his employment for failing to follow a lawful and reasonable instruction. Mr Cleaver was asked to comment and he told Ms Naismith he thought such action would be unfair and that Pavlovich should ban Mr Snook from its buses.

[23] Ms Naismith then proceeded to terminate Mr Cleaver's employment.

[24] Mr Cleaver seeks permanent reinstatement to his former position, lost wages and compensation. He also seeks interim reinstatement, which this determination addresses. Mr Cleaver has provided a signed undertaking as to damages.

[25] Pavlovich does not accept that Mr Cleaver was unjustifiably dismissed and it strongly opposes the application for interim reinstatement.

The issue

[26] The issue for the Authority to determine in this matter is whether Mr Cleaver should be reinstated on an interim basis to his former position as a bus driver or to a position not less advantageous to him.

Interim reinstatement

[27] Mr Cleaver seeks an order for interim reinstatement until such time as his substantive claims can be heard and determined by the Authority.

[28] In accordance with the usual procedure, the evidence before the Authority for the purpose of determining the application has been presented in affidavit form by witnesses and is untested. Any findings of fact made by the Authority in this determination are provisional only and may change later once the Authority has fully investigated the claims and after all witnesses have been examined on their evidence.

Relevant legal principles

[29] The jurisdiction to order interim reinstatement is provided for in s.127 of the Act. Relevantly, that section provides:

127. Authority may order interim reinstatement –

(1) *The Authority may if it thinks fit, on the application of an employee who has raised a personal grievance with his or her employer, make an order for the interim reinstatement of the employee pending the hearing of a personal grievance.*

[30] Judge Ford stated in the recent Employment Court decision of *Wellington Free Ambulance Service Inc v. Hayden Graham Austing & Anor*¹:

[6] *When determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the object of this Act.*

[7] *When seized of the issue, this Court has the same powers. ...*

[8] *The requirement in section 127(4) to have regard to the object of the Act is a reference back to s 3 which relevantly, provides:*

3. Object of this Act

The object of this Act is -

(a) *to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship –*

(i) *by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and*

...

(v) *by promoting mediation as the primary problem-solving mechanism;*

[9] *The principles governing the grant of interim injunctions are settled and well established. In order to succeed, an applicant must show:*

(a) *There is a serious issue to be tried;*

(b) *That the balance of convenience favours the making of the order sought; and*

(c) *In considering all matters, the overall justice favours the making of the orders sought.*

¹ [2015] NZEmpC 164

[31] As observed by Judge Ford, this approach has been confirmed by the Court of Appeal in *NZ Tax Refunds Ltd v. Brooks Homes Ltd*². The Court of Appeal stated:

The approach to an application for an interim injunction is well established. The applicant must first establish that there is a serious question to be tried or, put another way, that the claim is not vexatious or frivolous. Next, the balance of convenience must be considered. This requires consideration of the impact on the parties of the granting of, and the refusal to grant, an order. Finally, an assessment of the overall justice of the position is required as a check.

The grant of an interim injunction involves, of course, the exercise of a discretion ... this is subject to the qualification, however, that whether there is a serious question to be tried is an issue which calls for judicial evaluation rather than the exercise of a discretion.

Application of the law to the facts

Arguable case

[32] From the evidence, it appears that prior to his employment by Pavlovich in approximately July 2011, Mr Snook, a member of the public who uses public transport in Hamilton, and Mr Cleaver were involved in an altercation. Mr Cleaver was employed at the time by Go Buses as a bus driver. It appears there was no physical harm. Mr Cleaver did not report the incident to the Police and the matter was not taken any further by Go Buses.

[33] Following this altercation, and after employment by Pavlovich, Mr Cleaver refused to allow Mr Snook on to any bus that he was driving.

[34] Following a complaint by Mr Snook to Pavlovich on 30 June 2015, Pavlovich undertook an investigation into the matter. The investigation included asking Mr Cleaver for his response to the complaint received, meeting with Mr Cleaver and engaging Mr Hamilton, an independent health and safety consultant to investigate the situation. Mr Hamilton's report on the matter to Pavlovich gave details of the incident in which Mr Cleaver had refused to transport Mr Snook. Mr Hamilton also gave an assessment to Pavlovich that in his view, the risk of another altercation occurring in the event Mr Cleaver was required to transport Mr Snook on any bus that he was driving, was low.

² [2013] NZCA 90 at [12]-[13]

[35] Following receipt of the report, a further meeting was held with Mr Cleaver. At that meeting Mr Cleaver stated that he would continue to refuse to transport Mr Snook despite Pavlovich's requirement that he do so.

[36] I accept the submission by counsel for Pavlovich that in these circumstances on the face of it, Mr Cleaver's claim that he was unjustifiably dismissed is not a strong claim. However, there is in my view an arguable case. Mr Cleaver had received a warning in relation to another matter, and this warning is the subject of a claim of unjustified disadvantage by Mr Cleaver. Whether that warning was justified or not may be a factor in the Authority's consideration of whether Mr Cleaver was justifiably dismissed.

Balance of convenience

Where does the balance of convenience lie?

[37] Identifying the balance of convenience includes an assessment of the likely financial impact on Mr Cleaver and the potential risks to Pavlovich if Mr Cleaver is reinstated.

[38] Mr Snook is a member of the public who requires access to public transport, mainly because of his severe health problems. The altercation that occurred between Mr Snook and Mr Cleaver occurred initially some four years ago in 2011. The most recent incident appeared to be at Mr Cleaver's instigation not Mr Snook's. An independent investigation was carried out. Mr Cleaver made it clear during the disciplinary process that he would not obey an instruction by Pavlovich to transport Mr Snook if he requires transport on one of the buses he is driving.

[39] This, in my view, is an untenable position for Pavlovich. Pavlovich provides transportation services to members of the public pursuant to a contract with the Hamilton City Council. It is my view that Mr Cleaver's refusal to comply with instructions could jeopardise Pavlovich's contract. This is a serious risk.

[40] Mr Cleaver has provided the Authority with some details of his assets, liabilities and income but the details are limited. Mr Cleaver and his son, William, live together in rented accommodation. It appears that from 28 October 2015, Mr Cleaver has obtained some ongoing financial support from WINZ and some work. William, while only on the minimum wage, contributes to the household expenses. However,

details provided to the Authority are limited. For example, no details of William's weekly wage and his contribution to the household expenses have been provided.

[41] In the event that the Authority does not reinstate Mr Cleaver and he is successful in his substantive proceeding, he will no doubt be awarded financial remedies to compensate him for hurt and humiliation suffered as a result of an unjustified dismissal. It is likely, as has been indicated to Mr Cleaver, that the Authority will be able to accommodate an early investigation meeting for the substantive claims.

[42] Taking these factors into account, it is my view that the balance of convenience favours Pavlovich.

Overall justice of the case

[43] I must now stand back and ascertain where the overall justice lies. I have found that Mr Cleaver's claim for unjustified dismissal, on the untested affidavit evidence before me, is arguable but not strong. The risk to Pavlovich, if it were ordered to reinstate Mr Cleaver especially given his continued refusal to comply with its instruction regarding Mr Snook, is serious.

[44] The overall justice favours an order by the Authority that Mr Cleaver's application for interim reinstatement to his position as bus driver at Pavlovich be declined. Accordingly, Mr Cleaver's application for interim reinstatement is declined.

Costs

[45] Costs are reserved until after the substantive investigation and final determination.

Further steps

[46] An Authority Officer will now contact the parties and arrange a telephone conference for a substantive investigation meeting and discuss whether further mediation might now be of assistance.

Anna Fitzgibbon
Member of the Employment Relations Authority