

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2011] NZERA Wellington 186  
5360324

BETWEEN	ANDREW COLEY Applicant
AND	VA ELECTRICAL LIMITED First Respondent
AND	ANDREW LORY Second Respondent

Member of Authority:	P R Stapp
Representatives:	Jills Angus Burney, Counsel for the Applicant Andrew Lory, Company director for the First Respondent and in person acting for himself
Investigation Meeting:	By telephone 11 November 2011
Further submissions and information:	By 16 November 2011
Determination:	22 November 2011

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**INTERIM APPLICATION – DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Mr Coley has applied for interim reinstatement to his employment with VA Electrical Limited. The application has been opposed by the respondents.

[2] By consent the application has been heard by telephone to assist both parties, considering the urgency in the matter and the location of the parties. Mr Coley is located in Masterton where he worked for VA Electrical Limited, as is Ms Jills Angus Burney. Mr Coley's place of work was in Masterton. Mr Lory is located and works from Tauranga.

[3] For the avoidance of any doubt, this part of the Authority's investigation involves the consideration of interim reinstatement only. A hearing date for the substantive claims in the employment relationship problem has been arranged for 20 December 2011 at Masterton. That will be the opportunity when the full issues will be heard and determined.

[4] In the meantime, there is no intention to make findings of fact on the disputed substantive matters before the hearing in December takes place.

[5] Mr Coley has filed an undertaking as to damages and at the point of filing submissions no objection from the respondents has been taken to this.

[6] There are reasons why the parties have not used mediation yet, but now that the determination on the interim matter has been made the parties are expected to use mediation before the substantive hearing. In the meantime the parties are to comply with the direction to attend mediation urgently to be provided by the Department of Labour and to comply and try and settle their differences in the employment relationship problem.

### **Issues**

[7] The issues for determination are whether Mr Coley should be reinstated in the interim. This involves an assessment of whether Mr Coley has an arguable case, where the balance of convenience lies and consideration of the overall justice of the case. If there is any issue on costs, that will be a matter to determine which party is entitled to costs and how much. Mr Lory is unrepresented by any professional representative, although he has referred to obtaining legal advice.

### **The law**

[8] The legal principles that apply to an application for interim reinstatement involve the following three tests:

- (a) Whether the applicant (Mr Coley) has an arguable case of unjustified dismissal;
- (b) Whether the balance of convenience, including the existence of alternative remedies, favours Mr Coley (or not); and

- (c) Where the overall justice of the case lies until all matters can be heard and determined.

It is trite, but important to note that any test for reinstatement must at the full hearing, include an assessment of the evidence as to whether or not it is practicable to reinstate Mr Coley. Some of the deposed evidence highlighting that this will be an issue is relevant to the determination of this interim matter.

### **The facts**

[9] VA Electrical Limited is a small scrap metal business.

[10] Mr Coley was employed by VA Electrical Limited, initially as a labourer and at the time of the employment relationship ending as a foreman being “*second in charge*”.

[11] Mr Coley’s duties included quotes for steel and other materials, complaints and police issues, stripping cars, sorting out different types of steel and metal for resale and maintaining machines. Mr Coley had been employed for six years, until 9 September 2011. An employment agreement exists and Mr Coley’s rate of pay when he left was \$17 per hour.

[12] There is an issue between Mr Coley and Mr Lory, a director of the first respondent, about how Mr Coley’s employment ended. Mr Coley says that Mr Lory terminated his employment following his absence on Friday 9 September 2011 when he was informed by another worker on 12 September that Mr Lory required him to leave the work place. Mr Lory denied terminating the employment and claimed that Mr Coley walked off the job and resigned as he did not turn up for work on Friday 9 September. Mr Lory deposes that it was Mr Coley’s intention to resign by submitting his keys, the keys to the truck and the truck itself to a co-worker on 8 September 2011.

[13] Mr Coley says that he advised Mr Lory that he would not be in to work on Friday 9 September 2011 because he needed to cool down over an abusive situation between Mr Lory and Mr Coley’s son, who was also employed by VA Electrical Limited. Mr Coley says he was upset about the abuse. Mr Coley claimed that Mr Lory declined him sick leave because he had not given adequate notice. Mr Coley disagreed with Mr Lory’s approach because he had never been asked for notice

before. Mr Coley says he asked Mr Lory why he was being refused leave and that Mr Lory's response was that "*he was the boss*" and "*he wasn't approving leave*". Mr Coley said that he did not want to be drawn into more conflict or abuse and he ended the conversation by saying that he would see Mr Lory on Monday.

[14] Mr Coley claimed that Mr Lory then replied "*I will take that as your resignation*". Mr Coley says he did not want to get into another argument so he replied "*you can take it as you like*" and that he would return to work on Monday. He then left. Leanne Cox office manager has deposed overhearing the conversation. Also she deposed that Mr Coley said that he wouldn't be in because he was going for a job interview and never mentioned earlier that he needed to cool down.

[15] Mr Coley attempted to contact Mr Lory by text on Saturday 10 September to advise Mr Lory that he was returning to work on Monday. He went into work on Monday 12 September 2011 at his usual time of 8am. He suggested to a fellow workmate to ring Mr Lory in order to find out what his duties for the day would be. Mr Coley says that the workmate advised him that he had been instructed by Mr Lory to tell him to leave the premises. In essence, this is the situation that Mr Coley is claiming disadvantaged him and was an unjustified dismissal.

[16] Mr Coley produced a letter he received that contains an explanation about the employment ending, although it is headed to outline the reasons for [Mr Coley's] dismissal, which may support his claim. This letter reads as follows (under the name of VA Electrical Limited):

*Dear Andrew,*

*This letter outlines the reason for your dismissal effective Friday 9th September 2011.*

*On Thursday the 8th September you came to the workshop and told Andrew Lory that you were no longer working Saturday mornings and wouldn't be in on Friday the 9th September. Andrew said to you that you need to give more notice if you wanted to take Annual Leave, not just the day before and told you that you were required to be at work on Friday the 9th September.*

*Again you said you would not be there on the Friday, and Andrew said he would take that as your resignation. You walked reiterating that again you would not be there on the Friday as you would be attending a job interview. We understood that to be your resignation, effective immediately as you implied to us that you no longer wanted to work for the company. This was confirmed by text messaging to Andrew on Saturday the 10th September.*

*Because you did walk out off the job and had done so about a month ago as well, we cannot run a business with this kind of unstable behaviour when we employed you to be overseeing the scrap metal side of the business and have appreciated what you have done for the company and have given you a substantial pay rise to show you that we do appreciate you and your ethics.*

*Your final pay, including holiday pay has gone into your bank account on the 14th September and pay slips (as well as Anton's pay slips) are being posted out.*

*Regards,  
pp Andrew Lory*

[17] Mr Coley raised a personal grievance regarding the termination of his employment on 15 September 2011.

[18] The remedies that Mr Coley was seeking at that time included compensation, reimbursement for lost wages and legal fees. He did not seek reinstatement then. He requested the details and particulars of a payment made to him by VA Electrical Limited on 14 September 2011. Wage and time records have been produced. The last pay day was for 9 September 2011.

[19] On 10 October 2011 Mr Coley's new representative amended the claim for remedies for the personal grievance to include reinstatement.

[20] The company received this correspondence and directed that in the future any further correspondence needed to be directed to Mr Lory in Tauranga.

[21] In the meantime, the Department of Labour was requested to arrange mediation by the applicant's representative, but Mr Lory was unavailable until after 25 October 2011, apparently due to him taking leave. There was no reply to the applicant's first counsel's original personal grievance correspondence (15 September 2011).

[22] The application was made in the Employment Relations Authority for interim reinstatement and necessary orders on 17 October 2011.

[23] A telephone conference was arranged on notice and in writing for Wednesday, 26 October at 10am because of Mr Lory's unavailability any earlier. This was held with both Mr Lory and Ms Jills Angus Burney. As a result of that telephone conference a Minute was issued by the Authority that directed the parties to attend

mediation, and that Minute clearly outlined the principles for interim relief that would be applied at any interim hearing. That Minute is on the Authority's file.

[24] For completeness, the Minute recorded the issues:

- (a) Whether or not there is an arguable case.
- (b) Are there alternative remedies available (lost wages, compensation)?
- (c) Where does the balance of convenience lie, ie with the applicant or the respondent?
- (d) The overall justice of the matter.

[25] Mr Lory responded with a statement in reply on 9 November 2011 and included sworn statutory declarations from a number of other workers. For the time being I have withheld their names.

[26] Further communications were needed with Mr Lory to ensure that his written statement in the matter had to be properly signed and properly sworn (dated 9 November 2011). This was done.

[27] Both parties have had the further opportunity to make any last submissions in reply by Wednesday 16 November 2011.

### **The Authority's determination on the matter**

[28] The first consideration is whether or not there is an arguable case. This employment relationship problem is underpinned by a number of issues and a matter relating to Mr Coley's son, who was also employed by VA Electrical in Masterton. Mr Coley and VA Electrical have provided a lot of information about the son's and Mr Coley's behaviour in the workplace, and that it apparently caused an argument between Mr Coley and Mr Lory.

[29] There is an issue about the circumstances in which Mr Coley's employment ended on Friday 9 September 2011 and Monday 12 September. This is a factual dispute between Mr Coley, Mr Lory and Ms Cox. The letter provides some explanation that alludes to the respondents' belief that Mr Coley left, but has an ambiguous heading. The detail contradicts the heading, which will need to be explained.

[30] There is another issue about Mr Lory's comment that "*he would take [Mr Coley's response] as his resignation*" during the argument. There is thus an issue as to whether or not Mr Coley left his employment voluntarily and/or abandoned his employment and whether or not he reasonably believed that it had ended. Mr Coley did not return to work, although he deposes that he tried to return and that this was thwarted by Mr Lory. Mr Lory has deposed that Mr Coley had no intention to continue his employment. Ms Cox has deposed evidence supporting Mr Lory.

[31] The allegation that Mr Coley reasonably believed that he had been dismissed is also a factual matter. If he was dismissed this will lead to other issues about the employer's and Mr Lory's process that was followed.

[32] Mr Coley's request for reinstatement will become a contested issue since VA Electrical and Mr Lory are vigorously resisting it. There is deposed evidence being relied upon by them to try and establish that it will be impracticable to reinstate Mr Coley. Mr Coley has denied various allegations against him in regard to information available at the time the employment ended and information that has become available since the employment ended.

[33] I am satisfied that there are serious arguable matters to be resolved at a full hearing into the claims. Mr Coley faces the prospect of other witness being called who support Mr Lory's version and what happened in the workplace, and that Mr Coley left his work truck and gave in his keys to the workshop. This is supported by statutory declarations signed on 28 and 31 October 2011 from witnesses.

#### **The balance of convenience**

[34] I hold that the balance of convenience favours the respondent. This is because there are alternative remedies available to Mr Coley instead of reinstatement. Reinstatement is but one in the mix of remedies available now, and without any primacy (since 1 April 2011). Any wages lost are able to be compensated. Mr Coley has claimed money for humiliation hurt etc. Since reinstatement is not a prime remedy it has to be viewed and weighed on the same level as the other remedies. Also in this case it will not be certain that Mr Coley will be fully successful because of the very way in which the employment apparently ended and the competing claims from both sides and witnesses. This is especially so where reinstatement is being resisted by the respondents. In such a situation Mr Coley cannot reasonably believe

that he will be guaranteed reinstatement even if he was dismissed. This is because of the deposed evidence about the workplace relationships including allegations about Mr Coley's behaviour and what his intention was.

[35] Mr Coley has been deprived of his right to work and his income, but given the different facts relied upon, his side of the story is seriously being challenged by Mr Lory and Ms Cox. This seriously affects the presumption that Mr Coley will be able to prove his case.

[36] Further, Mr Coley has not explained in sufficient detail his difficulties in getting another job and has not explained what he has been doing to mitigate his losses, except to tell me about handing in his CV for the only job that he has sought, although he did refer to "*other places*" without providing details. That simply is not sufficient. He has not given any evidence of any other attempts to get other work and/or any assistance, and if there have been any difficulties what these may have been. I have considered his deposed evidence that he has literacy and writing disabilities, but he has given no evidence of what he has done to get help and assistance to get work.

[37] Also, Mr Lory has deposed that Mr Coley would require supervision at work if he was reinstated and that given the fact that Mr Lory is located in Tauranga this will create difficulties managing the situation from a distance. Also Mr Lory deposes there is nobody available to supervise Mr Coley immediately. The need for supervision is supported by deposed evidence about the workplace and Mr Coley's behaviour, notwithstanding he says that he had a good working relationship with Mr Lory and the other workers. Mr Coley's claim is contradicted by other witnesses in their deposed evidence. Whether or not that is the situation now is gravely affected by the evidence deposed by Mr Lory, Ms Cox and the other witnesses for the company.

[38] Next, VA Electrical is a small business with few employees and reinstatement in the short term before a hearing scheduled in December may be problematic and likely to give rise to issues of reintegration given that it is a supervisory role, Mr Lory resides elsewhere and there are all sorts of allegations swirling around.

[39] Since Mr Lory is dealing with the employment relationship claims on his own he has to take some of the responsibility for the delays he has caused because he has

been away and is difficult to arrange schedules with because of his availability. However both parties have properly attended to the matters with me that require attention, at least for this part of the investigation.

[40] I accept that Mr Coley's loss of his job of 6 years has meant his income has ceased, there has been a financial impact on him and he has deposed finding it hard to get another job. He has been off work now since 9 September 2011 (last pay day). He filed his application in the Authority on 17 October 2011. Mr Lory has to take some responsibility for the delays because he says he has been away and/or indisposed and elected to represent the respondents without professional help or any one else to help. Mr Coley delayed his application for about a month, which has not been adequately explained. There have been delays by both parties attending to this matter, but a full investigation meeting has been scheduled for 20 December 2011, and this is 4 weeks away. Given that it took Mr Coley a month to file his application I am satisfied that another 4 weeks can be managed by him given the passage of time, especially since the parties still have to go to mediation. Despite the factors favouring Mr Coley the balance of convenience favours VA Electrical Limited, I hold, for the reasons above.

#### **The overall justice of the matter**

[41] The overall justice of the case will be determined on matters of fact given the disputes that exist. The witnesses seem to favour the respondents at least in regard to the parties' alleged behaviour, just on numbers alone and the claims each of them make. However, Mr Lory's statement that "*he would take [Mr Coley's response] as his resignation*" during the argument will need to be interpreted and in context of what Mr Coley allegedly said, and the risk Mr Lory has is that in making such a statement he has left it open for Mr Coley to conclude that he was being dismissed. Ms Cox has deposed that Mr Lory did make the statement.

[42] Also, it seems that the respondents have got evidence that will challenge Mr Coley's claim to reinstatement, and even if he is successful in bringing a personal grievance there are other remedies that may apply. The timing of a full investigation on 20 December will not mean any continuation of the claim for reinstatement will become meaningless if the respondent's evidence does not stack up. However, reinstatement was not Mr Coley's first option when he first raised his grievance. I accept that he has amended his claim and I presume that this is genuine probably

because he is finding it hard to get another job. However the deposed evidence suggests that there are very real issues about how practicable reinstatement will be given the deposed evidence from Mr Lory and others. I conclude that the overall justice favours the respondent.

[43] The application for interim reinstatement is dismissed.

[44] Costs are reserved.

**P R Stapp**  
**Member of the Employment Relations Authority**