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ELS v Entelar Limited [2022] NZERA 148 (20 April 2022)

Last Updated: 29 April 2022

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

I TE RATONGA AHUMANA TAIMAHI

TĀMAKI MAKĀURAU ROHE

[2022] NZERA148

3165244

BETWEEN	CRAIG WARREN ELS Applicant
AND	ENTELAR LIMITED Respondent

Member of Authority: Eleanor Robinson

Representatives: Liz Lambert, advocate for the Applicant Emma Butcher, counsel for the Respondent

Investigation Meeting: 14 April 2022

Determination: 20 April 2022

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Before the Authority is an application for interim reinstatement brought by the Applicant, Mr Craig Els, under [s 127](#) of the [Employment Relations Act 2000](#) (the Act).

[2] Entelar Limited (Entelar) implemented mandatory vaccination mandate requiring certain roles to be vaccinated against COVID-19 on health and safety grounds. The roles included that of Mr Els who worked as a Business Development Manager.

[3] Alternatives to termination were considered however were not successful, and Mr Els' employment was terminated on 16 February 2022.

[4] Mr Els claims that he was unjustifiably dismissed, and is seeking reinstatement on both an interim and permanent basis. This determination addresses the issue of interim reinstatement.

The Authority's Process

[5] Following the initial application by Mr Els the parties were directed to urgent mediation but this did not resolve the issue.

[6] An Amended Statement of Problem with a supporting affidavit from Mr Els and undertaking as to damages was filed by the Applicant on 24 March 2022, and a Statement in Reply was filed by the Respondent on 30 March 2022.

[7] A case management conference was held on 8 April 2022. The parties were directed to file submissions, and in the case of the Respondent, supporting affidavits on 13 April 2022.

[8] The parties agreed to the Authority determining this preliminary issue of the interim reinstatement application based on the Statement of Problem and the Statement in Reply, documents submitted by the parties, on affidavit evidence, and on submissions from the parties.

[9] The evidence before the Authority for the purpose of determining this interim reinstatement application has been presented as usual in such applications in affidavit form by Mr Els and by Ms Victoria Mahan, CEO, and Mr Ruairi Francis, General Manager Sales and Marketing, witnesses on behalf of both and Entelar.

[10] As the affidavit evidence presented must necessarily remain untested until the substantive investigation of the unjustified dismissal personal grievance, any findings of fact by the Authority in this determination are provisional only and may change later once the claims have been fully investigated and all witnesses have been examined on their evidence.

[11] As permitted by [s174E](#) 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.

Principles

[12] Mr Els' application for this matter to be dealt with on an urgent basis was granted because this is the usual procedure for dealing with an application for an interim reinstatement. In determining this matter, I must apply the law relating to interim reinstatement as set out in [s 12](#) (1) and (4) of the [Employment Relations Act 2000](#) (the Act) which include recognising that employment relationships are built on the legislative requirement for good faith behaviour and addressing the inherent inequality of power in employment relationships.¹

[13] At the Investigation Meeting held on 8 April 2022, I heard submissions from the parties' representatives in relation to the interim reinstatement application and tested these by questioning how the available untested evidence related to the relevant principles for

1 [Employment Relations Act 2000 s 3](#)

determining an interim injunction application.² Those principles fall to be addressed by the answers to the following questions:

(a) whether or not Mr Els has established that there is a serious case to be tried in relation to the claim for unjustifiable dismissal; and if so:

(b) Is there a serious case in relation to the claim for permanent reinstatement?

[14] Also noted as needing consideration are the balance of convenience and the impact on the parties, including any third parties, of granting, or not granting, an order for interim reinstatement.

Brief Background Facts

[15] Entelar specialises in distribution and providing services within the ICT/IT industry. It is wholly owned by Spark New Zealand Trading Limited (Spark) who is also Entelar's key client.

[16] Mr Els Manager commencing employment with Entelar on 14 May 2018 and was employed as Business Development Manager. His duties included engagement with, and the fostering of, relationships with the local partner and reseller ecosystem, whilst also providing support and advice to Entelar's sales team and their customers.

[17] His duties included customer presentations, IT solution design and technical support. A key component of Mr

Els' role was cross team collaboration and building positive relationships with both internal team members and external customers.

[18] Entelar's senior executive team developed its draft HSRA to present to staff for consultation. This had been prepared taking into consideration WorkSafe New Zealand's guidance and Ministry of Health information. Also discussed and considered were the position of Spark and other customers, suppliers and industry partners. Entelar also liaised with Spark's Health and Safety Partner who reviewed the basis behind Entelar's HSRA.

[19] On 23 November 2021 Entelar met with all staff via video conferencing and proposed introducing a vaccination mandate requiring certain roles to be vaccinated against COVID-19. These roles were those deemed to be 'high risk' and 'extreme' in both customer facing and essential services teams.

2 McInnes v Western Bay of Plenty District Council [2016] NZEmpC 36 at [8] ERA Auckland 92 in which Judge Inglis (as she then was) referred to the court of Appeal decision in *NZ Tax Refunds v Brooks Homes Ltd* [2013] NZCA 90.

[20] Feedback and questions were invited from all employees and Entelar confirmed that if the proposal was to be implemented, any employees who did not wish to be vaccinated would be consulted with individually to discuss alternative arrangements.

[21] Mr Els submitted written feedback to the proposal on 29 November 2021. In his feedback Mr Els stated that he: (i) disagreed with the basis and rationale for the proposal; (ii) believed the Pfizer COVID-19 vaccine to be unsafe; and (iii) would not receive it should the proposed mandate for his role be implemented.

[22] Entelar responded to Mr Els on 2 December 2021 acknowledging the medical information Mr Els had supplied, but confirming it would trust public health information regarding the safety of vaccinations. Entelar also proposed meeting with Mr Els to discuss his decision regarding vaccination, and any alternatives that would allow him to remain employed safely in his current role.

[23] Entelar's decision to implement its proposal was communicated to all staff on 3 December 2021 and a paper was provided to employees to discuss its decision. Mr Els went on annual leave to reflect on the situation.

[24] On 7 December 2021 Mr Els provided revised feedback to Entelar in which he stated that he was open to receiving the Novavax vaccination once it was approved in New Zealand, and noted his view that the Pfizer vaccine was a hazard in the workplace.

[25] Entelar sent a letter to Mr Els that same day asking to meet to discuss the impact on his role of the implemented vaccination mandate. This was followed up by the CEO on 8 December 2021 to set up a meeting.

[26] On 16 December 2021 Entelar responded to Mr Els' feedback by letter in which it outlined its view that the Pfizer vaccine was safe, explained why Mr Els role was considered to be at high risk of contracting COVID-19, and proposed alternative safety measures for Mr Els to follow in order that he could conduct his role safely.

[27] The parties subsequently met on 22 December 2021. Present at the meeting were Mr Els and his support person, and Entelar's CEO, COO and Mr Els direct manager. During the meeting Mr Els provided his view that the vaccination mandate was illegal, but the proposed control measures were not discussed.

[28] On 23 December 2023 Mr Els raised further concerns about Entelar's vaccination mandate, the consultation process and alleged breaches of the law. Mr Els stated that he must refuse to work onsite at Entelar's premises because it was not safe for him to do so. The reason

for this was that others at the worksite would be vaccinated, and this would be a hazard to him because they would be shedding the vaccine.

[29] On 14 January 2022 after the annual closedown period, Mr Els' Manager gave him some specific tasks he could do from home.

[30] In a letter dated 21 January 2022 Entelar acknowledged Mr Els' views, and stated that it was crucial for it to know whether or not he agreed to the proposed control measures. It was noted that if he did not do so, it would have an impact on the continuation of his employment unless an alternative was found.

[31] Entelar also indicated that if no feedback from Mr Els was received, it would have to make a decision based on

the information available. It provided an extension to 24 January 2022 for Mr Els to provide his feedback and directed him to the control measures provided in December 2021.

[32] Mr Els responded on 28 January 2021 disagreeing that any control measures had been provided. In response Entelar referred him to its letter dated 16 December 2021.

[33] Having considered the information it had, Entelar advised Mr Els that it considered it would need to give notice of termination on the basis that:

- a. There were no roles available that would allow Mr Els to work from home;
- b. Mr Els could only perform limited tasks remotely once the tasks which required attendance at customer at third-party premises were removed; and
- c. Mr Els did not consider it safe for him to attend work with vaccinated staff.

[34] Entelar provided Mr Els with options in respect of his notice period and that it would give him an additional week's pay.

[35] Mr Els was directed again by Entelar to consider whether he could identify any alternative roles, including any vacant Spark roles.

[36] On 11 February 2022 Mr Els confirmed that he considered his dismissal was unlawful, but provided no feedback about the proposed control measures or alternative roles.

[37] On 16 February 2022 Entelar confirmed its decision to terminate Mr Els' employment.

[38] During March 2022 Entelar identified one role that had become available which Mr Els could do working on a remote basis. The role of ICT Distribution Inside Sales Specialist with the addition of Mr Els former duties relating to international customers, was offered him. Terms and conditions of employment, which included a higher salary than the role had been scoped to require, and a proposed job description, were sent to Mr Els.

[39] The job was offered on the basis that in consideration of the increased salary level, Mr Els would withdraw his claim that he was unjustifiably dismissed.

[40] Mr Els rejected the position offered.

Is there a serious question to be tried in relation to the claim of unjustifiable dismissal?

A Serious Question?

[41] As a matter of principle, Mr Els must establish that there is a serious question to be tried in respect of his claim of unjustifiable dismissal and for permanent reinstatement. A serious question was described in *Brooks Homes Ltd v NZ Tax Refunds Ltd* as an arguable case.³

[42] The threshold for a serious question or arguable case as stated in *Brooks Homes* and *Western Bay of Plenty District Council v Jarron McInnes* is that the claim is not frivolous or vexatious.⁴ As stated in *Western Bay of Plenty*:

[9] ... However, as *Brooks Homes Ltd* makes clear, an applicant must establish that there is a serious question to be tried, in that the claim is not vexatious or frivolous. The merits of the case (insofar as they can be ascertained at an interim stage) maybe relevant in assessing the balance of convenience and overall interests of justice ...⁵

[43] In *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* the Chief Judge confirmed that whether there is a serious question to be tried raises two sub-issues, these being:

- a. Whether there is a serious question to be tried in relation to the claim of unjustified dismissal; and, if so,
- b. Whether there is a serious question to be tried in relation to the claim of permanent reinstatement.⁶

³ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6]

⁴ *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC36 at [6] – [9]; 4 *Brooks above n 3*

⁵ *Above n 3* at [6]

[44] In *Humphrey* the Employment Court noted that once the relatively low threshold as identified in *Brooks Homes Ltd* had been met:

... the merits of the case (insofar as they can be ascertained at an interim stage) may be relevant in assessing the balance of convenience and the overall interests of justice.⁷

[45] My findings expressed in this determination are solely for the purposes of resolving Mr Els' application for interim reinstatement. At the substantive hearing there will be opportunity to fully test the relevant evidence and disputed questions of fact and law.

An arguable case?

[46] Mr Els submits he has an arguable case that he was unjustifiably dismissed because Entelar has breached its contractual obligations to him on the basis that he was not in a role to which Schedule 3A of the Act applied because his role did not carry a perceived risk.

[47] It is further submitted for Mr Els that Entelar has, in carrying out its process, also breached the Health and Safety at Work Act 2015 and its related Regulations.

[48] On the basis that there is a low threshold for an arguable case for unjustifiable dismissal, Entelar accepts that Mr Els may be found to have an arguable case.

[49] On the basis that it is a low threshold I find that Mr Els has an arguable case that he was unjustifiably dismissed.

Reinstatement?

[50] Mr Els must not only establish an arguable case for unjustifiable dismissal but must also establish that he would be reinstated if successful in such a claim.

[51] Reinstatement is the primary remedy and s125 (2) of the Act states the Authority must provide for reinstatement if it is practicable and reasonable.

[52] The onus of proof of practicability rests with the employer.⁸ In this case Entelar submits Mr Els has not been performing his role for four months which has had a serious impact in its business.

[53] Moreover it submits that the merits of the case for an unjustifiable dismissal are weak on the basis that Entelar followed a meticulously fair process including:

- a. Developing a full and through HSRA;

⁷ Above n 5 at [8]

⁸ *Lewis v Howick College of Board of Trustees* [2010] NZCA 320

- b. Consulting with all employees about the outcome of this and the proposed safety measures, including that some roles would need to be performed by vaccinated employees only;
- c. Considering all of the information and views provided by Mr Els;
- d. Undergoing a full assessment of all relevant alternatives to dismissal, including both:
 - i. The proposal to implement safety controls to allow Mr Els to remain in his role while awaiting the Novavax vaccination; and
 - ii. Offering an alternative role to ensure his employment continued.

[54] Entelar submits that it regularly reviews its HSRA and vaccine policy and the role Mr Els was performing is still assessed at being at high risk of contracting and transmitting Covid- 19 due to the close level of interaction the person in it must have with a range of others who may or may not be vaccinated. Currently third-party vaccination requirements are still in place with major customers, vendors and suppliers of Entelar.

[55] It is acknowledged that the role of Business Development Manager has not yet been filled although Entelar is

at the second interview stage, and Mr Els who is unvaccinated remains unable to perform the key functions of the role due to the continuing requirements around vaccination. As a result he cannot attend at the workplace unless he agreed to a range of control measures, to which he does not agree despite Entelar seeking to engage with him about them for a number of months.

[56] In addition it is submitted that Mr Els believes he is at risk if he works with others who have been vaccinated because of the risk that they could 'shed' the vaccine on to him which means that if required to work with Entelar's other employees or customers, Mr Els would not feel safe doing so.

[57] As a result of his stance, it is submitted that Mr Els could only work remotely if reinstated. This would not allow him to perform the key functions of his role because he is unable to meet face-to-face with customers and employees, requiring Entelar to hire another full-time replacement to perform Mr Els' role with him performing few, if any, of the role's functions from his home.

[58] It is further submitted that Mr Els, who is seeking permanent reinstatement, has displayed acrimony and mistrust towards Entelar. It is noted that Mr Els has admitted in

correspondence to it that he intends to rally support from other employees to 'rise up against' Entelar and its decision to impose a vaccine mandate. This has driven a wedge of mistrust between him and Entelar which makes it impossible for the employment relationship to be a positive and productive one.

[59] Entelar submits that Mr Els has made a series of allegations against Ms Mahan alleging that she discriminated against him not only on the grounds of his vaccination status, but also his race; that she bullied him; and that he has not been paid fairly. Similar accusations of bullying and discrimination have been made by Mr Els against Mr Francis, his direct manager.

[60] It is noted that initially Mr Els joined all its directors as respondents to his claim. Moreover he refused to engage with Entelar during the consultation process, focussing initially on his view about the vaccine rather than working with it to find a viable way to preserve his employment despite the difference of views on that.

[61] Reinstatement on an interim of permanent basis must be practicable and reasonable. It is possible that Entelar's position on the vaccination mandate may alter in due course, however I am concerned that there have been interactions and comments made by Mr Els that indicate a level of distrust of Entelar which would make it difficult for him to re-establish a productive working relationship with his employer should he be reinstated.

[62] I gain support for this view from the observation that in the submissions on behalf of Mr Els it was stated that Entelar has failed entirely in terms of being a good and trustworthy employer.

[63] Trust and confidence is essential in an employment relationship, and the submission that Mr Els does not have confidence in his employer to display good faith towards him and to be trustworthy, I find argues against the reinstatement being practicable.

[64] Taking all the submissions into consideration, and on the basis of the untested affidavit evidence as presented to the Authority, whilst I find that Mr Els has an arguable case that he was unjustifiably dismissed, I am unable to conclude that he has a more than weak arguable case that he would be reinstated permanently.

[65] Accordingly at this stage I do not find that Mr Els has a strongly arguable case for interim reinstatement.

Balance of convenience

[66] As set out in the Employment Court case *X v Y Limited*⁹ this principle requires that the Authority balance the relative inconvenience, in terms of detriment or injury, to Entelar who will have to bear the burden of an order reinstating Mr Els until the substantive case is heard, against the inconvenience to Mr Els who may have a just case, of having to bear the detriment of unjustifiable action until the case is heard.

[67] Although invited, no evidence was submitted in regard to the inconvenience to Mr Els if he was not reinstated on an interim basis pending the substantive matter being heard.

[68] Entelar submits that the balance of convenience favours it, pointing to the strength of the Respondent's case being a relevant factor in determining where the balance of convenience lies.¹⁰

[69] Entelar submits that all trust between the parties has been destroyed by Mr Els' allegations against Entelar and his refusal to work in a good faith way to preserve the employment, meaning that there is no basis for a productive employment relationship to continue in good faith.

[70] In regard to the adequacy of other remedies Entelar submits that it is able to meet any future reimbursement or compensation awards if Mr Els is successful in the substantive proceedings.

[71] It is submitted that Mr Els has had considerable warning of the possibility of termination of employment, sufficient to consider an offer of employment by Entelar which would allow him to work remotely and provide a significant income in mitigation of his loss, or to look for alternative employment elsewhere.

[72] Entelar submits there is no evidence submitted by Mr Els of any negative impact on third parties should he not be reinstated, however Entelar submits that there would be a significant negative impact, not only on itself, but on its customers and other employees.

[73] It was submitted that its customers are under no requirement to continue offering work to Entelar and as deposed by Ms Mahan and Mr Francis in their untested affidavit evidence, Entelar's customers currently have vaccine requirements for site access. Consequently if Mr Els was reinstated Entelar would need to choose in the current situation, between providing a vastly reduced level of service to its customers, where all interactions had to be remote, or pitch

9X v Y Limited [\[1991\] NZEmpC 48](#); [\[1992\] 1 ERNZ 863](#), at pg 10

10 Ports of Napier Limited v Maritime Union of New Zealand [\[2007\] NZCA 599](#); [\[2007\] ERNZ 862](#)

a dual service where it had a separate individual working with the customers in a face-to-face capacity.

[74] It is acknowledged that this situation may change should Entelar's and its customers' stance on vaccination change.

[75] In his untested affidavit evidence Mr Francis states that every member of the sales team is vaccinated against Covid-19 and have all returned to the office. The rest of the team are supportive of vaccination being a health and safety requirement for Entelar and its customers. It is submitted that should Mr Els return without agreeing to special health and safety controls, it would be likely to unsettle some employees who are concerned about avoiding Covid-19 for health and safety reasons.

[76] In addition other team members have received emailed copies of the Statement of Problem from Mr Els, so employees who are vaccinated are aware of his stance, and Mr Francis deposes that this has caused uncertainty and mistrust of Mr Els by other employee team members.

[77] This being a situation where Mr Els is unable to return to office working as a result of not being vaccinated, and has rejected an alternative role in which he could work remotely, interim reinstatement could only be ordered to the payroll.

[78] In this situation Entelar would bear the financial burden but without receiving any benefit for it in terms of a contribution to its operation.

[79] Having taken into consideration the submissions put forward by the parties, in particular the barriers to a successful reintegration into the workplace and his team by Mr Els, I find that the balance of convenience favours not reinstating Mr Els on an interim basis.

Overall Justice

[80] The Authority must assess the overall justice of the case from a global perspective. This has been described by the Court of Appeal as:11

The overall justice assessment is essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and balance of convenience'

[81] It is submitted on behalf of Mr Els that the strength of his case that he has been unjustifiably dismissed and Entelar acted in breach of its contractual obligations to him means that the overall justice favours the making of an

interim reinstatement order.

11 *NZ Tax Refunds Ltd v Brooks Homes Limited* [2013] NZCA 90 at [47]

[82] Entelar submits that the overall justice of the case does not support the granting of an interim order and that any financial loss can be adequately compensated for by damages if Mr Els is successful.

[83] Entelar has submitted that the trust in the employment relationship has been destroyed and putting Mr Els back into the workplace has the potential to cause serious ongoing damage to its business, its relationship with customers and suppliers, and relationships with other employees.

[84] Entelar submits that if Mr Els was reinstated he could not return to the workplace or visit customers, suppliers and other business contacts. He has rejected an offer of employment in a remote working role and not agreed to follow control measures that would have preserved his employment.

[85] If reinstatement is not awarded, it is submitted by Entelar that Mr Els stands to lose little because he has already rejected an offer of ongoing employment with it. There is no evidence submitted on his behalf of emotional or professional damage arising from the termination or if interim reinstatement is not awarded.

[86] It is further submitted that if Mr Els were to be reinstated on an interim basis, either on restricted duties or to the payroll (because he cannot currently meet customers and vendors) his remuneration would be limited, and he would not be earning commission, which is a key component of his remuneration.

[87] In addition to the submissions regarding the overall justice, in assessing the overall justice and recognising the legislative requirement for good faith behaviour, I consider of significant concern is the hurdle of reinstating Mr Els to work for an employer whom he does not trust. Further I find that as a result of his actions and communications, the bond of trust and confidence between the parties has been adversely, if not irrecoverably, affected.

[88] Consequently I find that the overall justice of the case subsists in declining the application for interim reinstatement.

Next Steps

[89] The Authority will convene a case management conference to set timetable directions for the investigation of Mr Els' substantive claims.

Costs

[90] Costs are reserved for determination following the substantive investigation meeting and its outcome or until this matter otherwise ceases to be before the Authority.

Eleanor Robinson

Member of the Employment Relations Authority

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