

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 172/10
5295545

BETWEEN QUINTIN HAPUKU
 Applicant

AND THE WAREHOUSE LIMITED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Joanne Watson, counsel for Applicant
 Penny Swarbrick, counsel for Respondent

Investigation Meeting: 24 March 2010

Determination: 15 April 2010

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

[1] Before the Authority is an application brought under s 127 of the Employment Relations Act 2000 for interim reinstatement.

[2] Before it was lodged on 2 March 2010, the parties attended mediation but were not able to resolve the claims of the applicant Mr Quintin Hapuku that he had been unjustifiably dismissed by the respondent The Warehouse Limited.

[3] As required by s 127 of the Act, an undertaking has been given on behalf of Mr Hapuku to abide by any order that the Authority may make in respect of damages in determining this employment relationship problem.

[4] Mr Hapuku seeks an order requiring The Warehouse to reinstate him pending the full investigation and determination of his claim of unjustified dismissal. The substantive remedies claimed by Mr Hapuku are permanent reinstatement as Assistant Store Manager, payment of salary lost since his dismissal, which occurred on

3 February 2010, and compensation for humiliation, loss of dignity and injury to feelings.

[5] In considering interim reinstatement applications, the Authority is required to apply the law relating to interim injunctions and also have regard to the object of the Employment Relations Act. The relevant law requires that four recognised tests or questions are to be applied to the circumstances of each 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 also 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. It has been made the primary remedy under s 125.

[7] The evidence before the Authority for the purpose of determining this application has been presented in affidavit form by the parties' witnesses. They were Mr Hapuku, Ms Susan Hatch, Regional Human Resources Manager for the Waikato Region, Mr David Eaton, the Manager of the Cambridge store at which Mr Hapuku was employed before his dismissal, and Mr Glenn Sinclair, the Regional Profit Protection Manager for The Warehouse.

[8] As the affidavit evidence must necessarily remain untested until the substantive investigation of the grievance claim, 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, including Mr Hapuku and the employer's managers involved, have been examined about their evidence.

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

- Is there an arguable case?
- Where does the balance of convenience lie?
- Are other adequate remedies available?
- Where does the overall justice of the case lie?

[10] The decision by The Warehouse to dismiss Mr Hapuku without notice was confirmed to him by letter of 4 February 2010, the day after a meeting at which he and his representative had been told of that decision.

[11] The letter, written by Mr Eaton, referred to several allegations of misconduct that had been made against Mr Hapuku and to his explanations given in response to those. Mr Eaton confirmed that The Warehouse was satisfied he had engaged in misconduct of the following kinds:

- *Using another team member's logon;*
- *Authorising your own database adjustments;*
- *Failing to verify the validity of the database adjustments;*
- *Removal/movement of property (BBQ) belonging to the company without following the correct process and making payment;*
- *Failing to follow company process relating to the use of the charitable BBQ.*

[12] In his letter Mr Eaton also advised:

Some of these actions amount to serious misconduct in terms of our policies and procedures and could by themselves warrant dismissal. Taken cumulatively, the situation is even more serious. This situation has resulted in the Company no longer having the necessary trust and confidence in you as an employee.

[13] Mr Eaton signed a form confirming the decision to dismiss Mr Hapuku and setting out his reasons for that. In relation to the allegation of removal/movement of a BBQ, Mr Eaton's reasons included:

It appears to me that you have removed the BBQ without following what you know to be the proper procedures for payment, and without paying.

[14] In relation to the use of another team member's computer logon, Mr Eaton noted that Mr Hapuku had acknowledged this must have occurred and that his failure to follow a correct process for authorising adjustments meant that he had not realised he was authorising his own adjustments, contrary to the required practice. Mr Eaton expressed his belief that Mr Hapuku would have known the adjustments he had approved, contrary to procedure, were his own. Also, Mr Eaton rejected Mr Hapuku's explanation that in making the adjustments, he had believed, although mistakenly, that he had done so under his own logon and not that of another team member.

[15] Mr Eaton concluded his reasoning in relation to this particular misconduct:

There are thus 2 serious components to this issue – first your use of someone else’s logon, when you cannot reasonably have believed [it] to have been your own logon, and second your failure to look at adjustments before authorising them, which is apparently your practice.

[16] In relation to the allegation about the use of the charity BBQ without following the correct procedure, Mr Eaton noted that Mr Hapuku had acknowledged that the required forms had not been completed prior to using the charity BBQ and therefore that correct procedure had not been followed, but he did not rate this to be as serious a matter as the other two. Those - the removal/movement of a BBQ and the adjustments authorisation - Mr Eaton said were “*sufficiently serious by themselves for me to consider dismissing you.*” He expressed his view that, cumulatively, those matters strongly suggested that Mr Hapuku was disinclined to adhere to The Warehouse procedures, including those in place to protect stock.

[17] Mr Eaton also noted:

I believe based on your explanations & in addition your seniority as an ASM [Assistant Store Manager] and length of service with The Warehouse you are fully aware of the importance of adherence to strict controls that protect the property of The Warehouse. As a senior manager in the business you have responsibility & accountability to ensure that you & others strictly adhere to this. Stock control & segregation of duty and therefore profit protection are fundamental elements of the business.

[18] Mr Eaton concluded his written reasons for the decision to dismiss by advising Mr Hapuku that it was not possible to have the necessary trust and confidence in him as Assistant Store Manager, a senior leadership role.

[19] For Mr Hapuku, counsel Ms Watson made submissions as to how the tests for interim reinstatement are satisfied in this case, where Mr Hapuku has challenged his summary dismissal on both procedural and substantive grounds.

Arguable case

[20] The employer began its inquiry after a telephone call made, apparently by a staff member, to the 0800 confidential complaint line provided by The Warehouse to employees for that purpose. It is submitted there was unfairness to Mr Hapuku because he was not told the identity of that caller. This matter is raised because of a strong suspicion Mr Hapuku has that a staff member he had not been getting along

with made the complaint or was involved in having it made against him. Mr Hapuku has suggested that employee has had an agenda in respect of him.

[21] It may be possible for a disciplinary inquiry to be misused by an employer, as a means of bringing pressure to bear on an employee and to undermine the employment relationship, perhaps with a view to obtaining a resignation. The motivation of the employer can be examined as it may call into question the fairness of the employer's inquiry and reasonableness of its conclusions.

[22] The focus of this case, as directed by s 103A of the Employment Relations Act, should be on the conduct of the employer's inquiry and the conclusions reached from that, not on the reasons it had for beginning an investigation into Mr Hapuku's conduct. It may reasonably be assumed that if The Warehouse had considered from its inquiry that the 0800 complainant had no basis for making his or her complaint and appeared to have done so for personal and improper motives, or simply to make trouble for Mr Hapuku, it would have ended its investigation and warned the complainant about his or her own conduct.

[23] I do not consider in this case that the commencement of the employer's inquiry can be viewed in isolation from what that investigation revealed, which was conduct that Mr Hapuku himself accepted was in breach of his employer's policies or procedures. From that point on the identity of the complainant became immaterial to the question of the appropriate disciplinary action to be taken. I do not find an arguable case in this regard.

[24] It was submitted that The Warehouse failed to provide Mr Hapuku with information it was relying upon, including interview notes, before requiring him to respond to the allegations of misconduct.

[25] I consider that at best the arguable case in this regard is weak. So far as I can determine from the affidavit evidence, while Mr Hapuku may not have received in its original written form all the information he was given, such as notes taken at interviews, from the evidence it seems that the content or substance of that information was nevertheless conveyed to him orally at meetings before decisions were made that adversely affected his employment.

[26] A third complaint of Mr Hapuku is that he was prejudiced by having his reputation unnecessarily called into question, because The Warehouse had begun its

inquiry without his knowledge by interviewing a number of staff who worked with him.

[27] Again, I consider the arguable case in this regard to be non-existent or at best too weak to cross the threshold required.

[28] The way that an employer conducts a disciplinary inquiry is a matter for the employer's decision, always provided it acts fairly and reasonably. On the affidavit evidence, there is nothing to show that the employer acted without justification and caused disadvantage to Mr Hapuku in this respect. As yet there is no evidence that the employer conducted its inquiries insensitively towards Mr Hapuku as an employee and one whose guilt of misconduct had not been established at that stage, and might not be at all in the result of the inquiry.

[29] A fourth submission as to the presence of an arguable case relates to the role of the Store Manager, Mr Eaton, in participating in the disciplinary inquiry. It is submitted that he was not able to be an impartial or objective decision-maker regarding the removal/movement of the BBQ, as he had had a discussion with Mr Hapuku about the way he would be permitted to acquire that property for himself. The content of that discussion was disputed between the two at the inquiry stage.

[30] I consider that the arguable case is also weak in this respect, as the misconduct was held to be in relation to the proper procedures for making payment for the property, which Mr Hapuku did not do. I do not therefore consider that Mr Eaton's role in the disciplinary inquiry, carried out as Store Manager, was necessarily prejudiced or compromised by his direct involvement at an earlier stage before Mr Hapuku removed the property. As Mr Eaton said in his advice confirming the dismissal, the issue was that Mr Hapuku had not paid for the barbeque after having taken it home.

[31] In a further submission The Warehouse is criticised for delay in raising with Mr Hapuku the allegations of misconduct. Again, I consider this is a matter within the discretion of the employer as to how it conducts an inquiry. Factors influencing this included that the 0800 complaint had been made just before Christmas when Mr Hapuku, as well as other employees, was going on leave. I do not consider it can be seen that The Warehouse viewed the allegations as trivial because it waited until Mr Hapuku had returned from his Christmas leave before raising them with him.

[32] It is submitted that there was no clear time-frame for a donation to be decided upon and made, when Mr Hapuku had agreed with Mr Eaton that he would assemble the BBQ and assess a fair amount. The submission is that the issue was not one of serious misconduct, as Mr Hapuku believed he had permission to take the BBQ and assemble it and decide what he wanted to pay for it.

[33] I agree that the arguments in support of Mr Hapuku's claim of unjustified dismissal are stronger in this respect, where issues are raised about the quality of Mr Hapuku's actions and whether he acted dishonestly or merely inadvertently without any intention to take property and not pay for it.

[34] It is submitted that Mr Hapuku can be seen from his actions to have acted honestly, as he readily admitted that he had not taken enough care when making the adjustments on the computer and consequently had failed to appreciate that it was not his own logon he was using. In this regard, it is conceded that his actions may have warranted disciplinary action but not dismissal.

[35] For The Warehouse, it is not claimed that Mr Hapuku was dismissed for dishonesty or carelessness or inadvertence but that he simply failed to follow established procedures. It is claimed that the employer's trust and confidence was dependent upon Mr Hapuku, who held a senior management position, being able to comply with procedure and practice as required by the Warehouse for the purpose of protecting its stock and avoiding loss of profits.

[36] I accept that there is an arguable case in relation to the employer's response, as a fair and reasonable employer, in dismissing Mr Hapuku for the particular misconduct found against him.

[37] This issue will raise "*circumstances*" that must be considered by the Authority under s 103A when determining the justification for Mr Hapuku's dismissal. In this regard those circumstances are the nature of the employer's business and also the role of the employee under the employment relationship.

[38] Mr Eaton referred to those matters at the end of the page on which he outlined his reasons for the dismissal. It is attached to the Manager's Decision form, filled out by him on 4 February 2010.

[39] Ms Watson placed some reliance on an Employment Relations Authority determination given in *Young v. Armourguard Security Ltd* (WA85/01, 20 November 2001). In that case, where the allegations included that an employee had taken property without permission and breaching company rules and policies, the applicant was found to have an arguable case where he had admitted taking some property but claimed he had acted with honest intent. Although he had been charged with theft, he was found to have an arguable case and ultimately was granted interim reinstatement.

[40] The determination in *Young* of course turns on its own particular facts as presented to the Authority which, inevitably, are not identical to those of Mr Hapuku's case.

[41] In considering the *Young* decision and any precedential value it may have, I have noted that the Authority expressed some dissatisfaction with what it called "*the lack of direct evidence provided to date by Armourguard,*" the employer. It may be that the affidavit evidence given by Mr Young simply prevailed, given the paucity of evidence from the employer, and largely determined the outcome of the application. The Warehouse in this case has so far given a very full account of how it acted and its actions.

[42] I have also noted that the Authority considered there to be three major areas where Mr Young would quite possibly face difficulties in obtaining permanent reinstatement. The Authority held:

Even if he were to be ultimately successful in his claim for unjustified dismissal, this action is potentially contributory behaviour that may very well affect his prospects of reinstatement.

[43] For The Warehouse, counsel Ms Swarbrick submitted that not only must Mr Hapuku establish an arguable case that he was unjustifiably dismissed, he must also establish that if successful with his grievance claim he will be reinstated and not just compensated monetarily. The Employment Court decision in *Cliff v. Air New Zealand Ltd* (AC6A/05, Colgan J, 24 February 2005) was cited as authority for this proposition. In its decision at para.[12] the Court held:

So whilst plaintiffs must establish an arguable case of personal grievance (unjustified dismissal), they must also establish an arguable case that they will thereafter be reinstated in employment and not simply compensated monetarily for their grievances.

[44] I am asked to apply or follow the Authority's decision given in 2001 in the *Young* case. I must, however, have regard to what the Employment Court said in 2005 about the requirement for there to be an arguable case in respect of the remedy of reinstatement, as well as the issue of lack of justification.

[45] While I consider there is an arguable case that Mr Hapuku will be reinstated if successful with his claim of unjustified dismissal, I consider it to be at best a weak arguable case.

[46] The actions of Mr Hapuku are not disputed but what he does raise is the nature and quality of them insofar as his honesty and general reliability is concerned.

[47] I consider that given the nature of the employer's business and the role of Mr Hapuku in it, there is a stronger case for the employer that Mr Hapuku's admitted actions, even if innocent and merely inadvertent, nevertheless undermined the trust and confidence The Warehouse may reasonably expect to hold in an employee at a senior level of Assistant Branch Manager. If that is ultimately the Authority's finding, an order of permanent reinstatement as a remedy may be unlikely in the outcome of the full investigation and final determination.

Balance of convenience

[48] As was found in the *Young* case by the Authority, the balance in this case is also a fine one. I accept from the affidavit evidence that Mr Hapuku is now in a serious financial situation as a result of the loss of his employment and that monetary remedies granted after a substantive investigation will not compensate him for these immediate problems which are increasing for him while he remains without employment.

[49] The full investigation is now less than two weeks away, although there will be time required for the Authority to consider its determination before issuing it in writing.

[50] Before ordering interim reinstatement the Authority must consider the high importance The Warehouse claims to have attached to trust and confidence and which, it is expected, it will demonstrate at the investigation to be held later this month. I accept that given the nature of the business of The Warehouse and Mr Hapuku's former role in it there are no realistic alternatives to reinstatement unless

to the same position. Although the balance of convenience is fine, given the present loss of trust and confidence I consider that reinstatement will be in name only and a more severe imposition on employer than employee.

[51] It is also a difficulty for Mr Hapuku that if he is reinstated to the payroll only, or put on garden leave, he may not be able to meet his undertaking as to damages later on, should that be enforced by The Warehouse against him.

[52] I therefore consider that the balance of convenience favours The Warehouse.

Overall justice

[53] Stepping back and looking at this case across the board, the Authority has found before it at best only a weakly arguable case for Mr Hapuku and that the balance of convenience favours The Warehouse.

[54] I therefore conclude that the overall justice lies in leaving the situation as it was when Mr Hapuku was dismissed until a full investigation can take place and a final determination made.

Determination

[55] For the above reasons the discretion the Authority has in relation to this interim reinstatement application is exercised by not making the order sought. The application is declined.

Costs

[56] Costs are reserved, pending the final determination of the personal grievance.