

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 210  
3102412

BETWEEN                      BRETT JORDAN  
   Applicant  
  
AND                                BULLETIN.NET (NZ) LIMITED  
   Respondent

Member of Authority:        Jenni-Maree Trotman

Representatives:              Jeremy Ansell, Counsel on behalf of the Applicant  
   David France, Counsel on behalf of the Respondent

Investigation Meeting:        On the papers and by telephone 25 May 2020

Submissions and further    15 May 2020, 18 May 2020 and 21 May 2020 from the  
Information Received:       Applicant  
   11 May 2020, 18 May 2020, 19 May 2020 and 22 May  
   2020 from the Respondent

Date of Determination:       25 May 2020

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1]     Bulletin.Net (NZ) Limited provides products and services that enable businesses to send text messages for a wide range of their needs including one time passwords, appointment reminders, emergency alerts, delivery notifications, medical reminders, travel alerts, and so forth.

[2]     Brett Jordan was employed by Bulletin as its New Zealand Support and Solutions Delivery Manager from 25 June 2019 until his dismissal on 17 May 2020. His role was to assist Bulletin in delivering mass messaging products to clients in the New Zealand market and also assisting with the resolution of technical support issues for customers in both the New Zealand and Australia markets.

[3] Mr Jordan claims that his dismissal was unjustified. This determination addresses his application to the Authority for interim reinstatement to his previous position pending the Authority's investigation and determination of his substantive application.

[4] Bulletin denies Mr Jordan was unjustifiably dismissed. It maintains that he was dismissed for redundancy following a thorough consultation process and for genuine reason. The genuine reason for Mr Jordan's redundancy was, it submits, that there was no longer any delivery work for Mr Jordan to perform and the support work he performed could be done more efficiently and effectively by Bulletin's global support team based in Melbourne, Australia.

### **The process**

[5] Mr Jordan applied for, and was granted, urgency on his application for interim reinstatement. As part of his application for interim reinstatement Mr Jordan provided an undertaking as to damages.

[6] The parties agreed to the Authority determining the preliminary issue of interim reinstatement on the papers. These papers included the contents of the statements of problem and reply, affidavit evidence from the parties, relevant background documents lodged with those affidavits, and submissions made by the parties' representatives.

[7] In terms of affidavits, the Authority received an affidavit from Mr Jordan in support of his application and two affidavits lodged by way of reply. From Bulletin, the Authority received three affidavits from Bruce Herbert who is Bulletin's Managing Director, responsible for the day to day running of the New Zealand business unit. It also received two affidavits from Julian Smith who is the Head of Customer, MessageMedia (Technical Support, Customer Success and Customer Experience). Mr Smith was, at material times, the person to whom Mr Jordan reported to.

[8] Mr Jordan's affidavits in reply, and the affidavits from Mr Herbert and Mr Smith, were unsworn. This was due to COVID-19 restrictions and/or difficulties. As such, each witness was contacted by the Authority by telephone on 25 May 2020 and confirmed before me by way of affirmation the content and truthfulness of each of their affidavits. Thereafter, the parties were provided with an oral indication of my preliminary findings. This preliminary indication mirrors the outcome recorded in this determination.

[9] As permitted by s 174E 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 but has not recorded all evidence and submissions received.

### **Applicable legal principles**

[10] In determining whether to order interim reinstatement, s 127(4) of the Act requires the Authority to apply the law relating to interim injunctions having regard to the object of the Act.

[11] The principles to be applied when considering whether to grant an interim injunction are well established. In *NZ Tax Refunds Ltd v Brooks Homes Ltd*, the Court of Appeal confirmed interim injunction principles as follows:<sup>1</sup>

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.

[12] In *Western Bay of Plenty District Council v McInnes*, the Court emphasised that in a claim for reinstatement the question of whether there is a serious question to be tried raises two sub-issues:<sup>2</sup>

- 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.

### **Background**

[13] In February 2020, Mr Smith said he conducted an audit of technical support cases completed by global team members including Mr Jordan. Based on this audit he

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<sup>1</sup> *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90.

<sup>2</sup> *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [8].

considered there was a possibility that Mr Jordan's support work could be absorbed by the technical support team in Australia and considered his delivery work was diminishing. In consultation with Mr Herbert he said he decided to commence a "review process" with Mr Jordan.

[14] On 26 February 2020 Mr Smith and Mr Jordan had their regular one on one catch up. Some of the matters discussed during this meeting are in dispute. Based on contemporaneous documentary evidence, it is arguable that Mr Smith advised Mr Jordan during this meeting that he was not seeing the progress in the tech support role that he wanted, that he may be able to meet that capability in a different way, and that one of the options on the table was to make his position redundant.

[15] Mr Smith asked Mr Jordan to prepare a spreadsheet of his activity so as to provide more detail about how his role was supporting the wider tech support team and the New Zealand team. Mr Jordan provided this information on 10 March.

[16] On 11 March Mr Smith and Mr Jordan met for their regular fortnightly one on one meeting. During this meeting they discussed Mr Jordan's role in depth. While Mr Smith says that redundancy was discussed during this meeting, Mr Jordan denies this. Having reviewed the notes Mr Smith took of this meeting, I find it is arguable that there was no mention during this meeting of a possible redundancy.

[17] On 12 March Mr Smith corresponded with Mr Herbert about his desire to make Mr Jordan's position redundant. He advised that he wanted to redeploy the tech support aspect of parts of Mr Jordan's role to someone in the Melbourne tech support team who would "own" the portfolio. He went on to discuss two concerns that he had. The first concern was whether there would be sufficient resources in Auckland to progress projects without a dedicated tech support person in the office. Mr Herbert responded "We will need a level 1 support guy to support all carriers and direct, this has always been the case, Brett is not that person." Second, Mr Smith mentioned a number of files that Mr Jordan provided support to and advised that they needed to be "OK that this can either be done with other people in Auckland office, or by the dedicated MultiTXT/Voda resource in AU team". Mr Herbert responded naming staff who were able to fill the gaps, noting that it was "not ideal but we will manage".

[18] On 16 March, Mr Smith emailed Mr Jordan scheduling a meeting for the following day.

I'm following up from our meeting last Wednesday, where you provided feedback on the potential redundancy of your role.

I have now been able to consider all feedback and would like to have a conversation with you regarding the outcome of this.

[19] On 17 March Mr Smith emailed Mr Jordan advising him that there would be no operational changes for two weeks, but that he would revisit this in the following fortnight. As a result, no restructure decision would be made for two weeks.

[20] On 7 April 2020, Mr Herbert phoned Mr Jordan. What was discussed during that conversation is in dispute. I find it arguable that during this conversation Mr Herbert told Mr Jordan that his position had been made redundant. This is supported by an email that Mr Jordan received, shortly after that conversation, from Bulletin's HR advisor. This advised:

I understand you have had a conversation about your role with Bruce this morning.

I have attached a letter that documents what you discussed and draft calculations below. Note the letter is unsigned, we are entering a consultation period now for you to consider the decision that has been made and raise anything you think we may have missed. A signed letter will be issued once all confirmed and any necessary changes made.

[21] The letter accompanying this email was unsigned. The material parts advised:

Following the discussion today, this letter provides you with formal notice of the termination of your employment by redundancy with Bulletin.net Pty Ltd. As mentioned, we have considered all redeployment options across the business however there are no suitable opportunities available.

Your last day of employment will be Friday 17 April, 2020 and in accordance with your employment agreement dated 24 June 2019, your notice period is 1 month. This will be paid in lieu as you are not required to work your notice.

Finally, you will be paid any accrued employment entitlements and any outstanding salary up to and including your last day of employment.

[22] That same day Bulletin sent an email to its staff that advised, inter alia:

Today has been a difficult day for MessageMedia. As I mentioned at MMTV a couple of weeks ago, we had hoped we could get through the COVID-19 crisis with minimal role impact.

Since the start of the crisis the Board and ELT have together been reviewing immediate impacts on our business and forecasting likely longer term impacts. In addition to analysis of the trends in our different segments and geographies, we have been staying close to trends in the broader industry. As a result of this we have reached the conclusion that we will almost certainly be impacted and that we have to reduce our costs further than we have already.

In that context I have asked the ELT to undertake a review of all roles across the business and specifically to look at roles that are either (1) short term casual/contractor arrangements or (2) have had, or are expected to have, a significant drop in workload. Incumbents in the roles identified have been advised today that unfortunately these roles are to be made redundant. Those impacted will be finishing this Thursday, April 9.

[23] Mr Jordan did not provide any feedback and the following day a signed version of the termination letter was provided to him.

[24] Mr Jordan's last day of employment was 17 May 2020 although he was not required to attend work from 17 April 2020.

### **Serious question to be tried – unjustified dismissal**

#### *The law*

[25] Whether there is a serious question to be tried in terms of Mr Jordan's claim of unjustified dismissal requires an examination of whether Bulletin has complied with the test of justification in section 103A of the Act. This section requires an objective assessment of whether Bulletin's actions, and how it acted, were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred.

[26] Part of this assessment involves a consideration of Section 4(1)(A)(c) of the Act. Under s 4(1A)(c) the law requires an employer, who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee, to provide to that employee access to information, relevant to the continuation of the employee's employment, about the decision. In addition, it is required to provide the employee with an opportunity to comment on the information to the employer before the decision is made.

[27] The key requirements of consultation were summarised in *Stormont v Peddle Thorp Aitken Limited*.<sup>3</sup>

Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what will be done. Consultation must be a reality, not a charade. Employees must know what is proposed before they can be expected to give their view on it. This requires the provision of sufficiently precise information, in a timely manner. The employer, while quite entitled to have a working plan

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<sup>3</sup> [2017] NZEmpC 71 at [54].

already in mind, must have an open mind and be ready to change and even start anew.

### *Analysis*

[28] Bulletin's witnesses say that the reason for Mr Jordan's redundancy was that Bulletin no longer had any delivery work for Mr Jordan to perform and the support work he performed could be done more efficiently and effectively by the global support team based in Melbourne, Australia. No documentary evidence was produced to support this reason.

[29] Standing back and objectively assessing the untested affidavit evidence, the limited documentation produced, and the lack of any documentary evidence supporting the reason put forward by Bulletin, I find it is arguable that the decision to make Mr Jordan's position redundant was not founded on genuine commercial reasons and that the procedure was flawed.

[30] It is arguable that Bulletin failed to comply with the requirements of s 103A in a way that was not minor and that did result in Mr Jordan being treated unfairly. While Bulletin may have raised the possibility of redundancy with Mr Jordan at the meeting on 26 February, and he subsequently provided it with information about the role he performed, it is strongly arguable that the consultation relied upon by Bulletin was inadequate.

[31] I find Mr Jordan has an arguable case that he was unjustifiably dismissed.

### **Serious question to be tried – permanent reinstatement**

[32] Section 125(2) of the Act provides that the Authority must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy.

[33] Bulletin advances two grounds as to why it is neither practicable nor reasonable to reinstate Mr Jordan. For the reasons that follow I am not persuaded that either ground operates as a barrier to permanent reinstatement.

*No available work*

Bulletin submitted Mr Jordan's role is surplus to requirements and no longer exists. This is because it has either been absorbed into the Melbourne team or is no longer needed given the completion of certain projects and the end of migration work.

[34] In response, Mr Jordon submitted that any problems Bulletin may have in this regard were because they had chosen to reallocate the tasks formerly undertaken by him to other members of its staff. He submitted:

the applicant's workload can be easily taken back off the team of seven employees in Melbourne and restored to him. There would be no adverse impact on any third parties. The applicant does not agree at all with the comments in Mr Smith's affidavit that there would be "no work" to do and has set out in his affidavit evidence the extent of the projects and work he was involved in.

[35] Having considered the parties' respective arguments, and based on the untested evidence, I find it arguable that work is available for Mr Jordan to undertake in the event he is permanently reinstated. Even if that were not the case, I agree with the comments made by the Court *Genesis Telecommunications Laboratories Limited v Brendon Scott* where the Court stated:<sup>4</sup>

[119] Genesys' submission that there is no available work for Mr Scott must be weighed against these objects of the statutory remedy. It is arguable that if the dismissal grievance is made out, Genesys will have taken a step not open to it as a fair and reasonable employer. In those circumstances it is also arguable it would have been the author of its own misfortunes, and it could not therefore assert it would be unreasonable or impracticable to reinstate Mr Scott.

*Loss of trust and confidence*

[36] Bulletin submits it has lost trust and confidence in Mr Jordan. In summary this is due to:

- a. Mr Jordan's post-termination conduct in filing evidence with the Authority that was "self-serving and one-sided" and that "has been contradicted by the contemporaneous documents".
- b. Mr Jordan persisting with allegations against Mr Smith in the evidence that he filed with the Authority that are untrue. For example, Mr Jordan claims that Mr Smith was using the threat of redundancy against him and accused Mr Smith of having a lack of awareness about his former role. In addition,

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<sup>4</sup> [2019] NZEmpC 113 at [119].

Mr Jordan persists in “unreasonably believing that his role will be replaced despite Mr Herbert's evidence to the contrary”.

c. Mr Jordan showing animosity towards Bulletin.

[37] I am not persuaded at this stage that the conduct put forward by Bulletin will act as a barrier to permanent reinstatement. This conduct is not necessarily a sound indicator that the degree of trust and confidence Bulletin could have in Mr Jordan has reasonably reduced to a level so low that there are no practicable prospects for successfully re-establishing the employment relationship.

[38] I find Mr Jordan has an arguable case for permanent reinstatement.

### **The balance of convenience**

[39] The balance of convenience weighs the potential effect on Mr Jordan if he were declined interim reinstatement against the potential effect on Bulletin if interim reinstatement were granted. In addition, under this head there is also a consideration of the merits of the application. In terms of this last point, I have concluded earlier that Mr Jordan’s claims in respect of his unjustified dismissal grievance, and in respect of permanent reinstatement, are arguable.

[40] There would be possible detriment to Mr Jordan if he was not reinstated on an interim basis. Mr Jordan was the main income earner for his family and his wife only works part-time. He has two school aged children to support and I am told that losing his income has impacted severely on his family responsibilities. His wife has been forced to pick up extra hours of work and losing his employment has impacted upon his relationship. A prolonged period of unemployment is likely to further increase these stressors. In light of COVID-19, and the impact on the New Zealand economy, as well as the niche/specialist nature of his experience, Mr Jordan may face difficulty finding alternative work.

[41] There would be possible detriment to Bulletin in having to pay Mr Jordan his salary for performing work if that work can be covered by its current resources across Australia and New Zealand. However, Mr Herbert’s evidence is that Bulletin has a solid financial foundation. He says that the Company could afford to pay Mr Jordan

any remedies awarded by the Authority. I take from this evidence that Bulletin is also in a financial position to pay him Mr Jordan's wages if the Authority were to reinstate him on an interim basis. There may also be some inconvenience to Bulletin in having to reassign work amongst its staff to enable it to provide work to Mr Jordan.

[42] Weighing the relevant detriment or injury each party will incur if an interim injunction is granted or not, I find the balance of convenience favours Mr Jordan. This is because if he is denied interim relief, and he is subsequently successful in his unjustified dismissal claim warranting permanent reinstatement, he will suffer greater prejudice in the interim than would be suffered by Bulletin if it is required to reinstate him for the same period. I do not accept that damages will be an adequate remedy.

### **Overall justice**

[43] I now stand back and consider where the overall justice lies. I have found an arguable case for unjustified dismissal and an arguable case for permanent reinstatement. I find that the overall justice of the case requires that an interim order for reinstatement be made.

### **Outcome**

[44] I confirm the oral preliminary indication of findings provided to the parties.

[45] Pursuant to s 127 of the Act, and in reliance on the undertaking as to damages that Mr Jordan has lodged in the Authority, I order Bulletin to reinstate Mr Jordan on an interim basis to his position as Support and Solutions Delivery Manager.

[46] As permitted by s 127(5) of the Act this order is subject to the following conditions:

- a. Mr Jordan is to be restored to Bulletin's payroll (at his usual rate of pay) from the next working day after the date of this determination.
- b. Mr Jordan is to resume work from a day suitable to Bulletin within the next ten working days after the date of this determination.

[47] Costs are reserved pending the substantive investigation of this matter.

Jenni-Maree Trotman  
Member of the Employment Relations Authority