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Oskam v Idea Services Limited WA144/10 (Wellington) [2010] NZERA 761 (10 September 2010)

Last Updated: 16 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

WA 144/10 5314482

BETWEEN LUKE OSKAM

Applicant

AND IDEA SERVICES LTD

Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

P R Stapp

John Unsworth Counsel for Applicant Paul McBride Counsel for Respondent

9 September 2010 at Wellington

10 September 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Luke Oskam (Mr Oskam) has applied for interim reinstatement. Idea Services Ltd (Idea Services) has opposed the application.

[2] The application has been heard urgently. The parties filed affidavits. These have not been tested, but Mr Oskam was questioned on his ability to meet an undertaking as to damages and reply to a couple of points deposed in affidavits filed by Idea Services. The applicant has signed and filed an undertaking as to damages. However, because of Mr Oskam's dire financial situation, his father John Oskam, has filed an undertaking as to damages to support his son in this application.

[3] The parties have been to mediation, but the Authority is still required to make a determination. Both parties are seeking costs.

Issues

[4] On the underlying presumption that Mr Oskam will be able to establish his claim, subject to what scrutiny the Authority can provide the issue in this matter is whether or not the evidence relating to his application meets the required tests for interim reinstatement?

[5] The tests I am required to apply are:

- a. Whether or not there is an arguable case?
- b. Are there alternative remedies that could apply?

- c. Where does the balance of convenience fall?
- d. Consideration of the overall justice of the matter?

The facts

[6] Mr Oskam was employed by Idea Services. Idea Service is wholly owned by INC NZ Incorporated. They are both registered charities and dependent on community support and Government funding. Mr Oskam was employed as a community services worker and was a member of the Service and Food Workers Union Nga Ringa Tota Inc. Mr Oskam and Idea Services Limited were bound by the terms and conditions of a collective employment agreement and a staff policy.

[7] Mr Oskam's role was a professional support person and had to ensure respect and safety for the service users under the law and under professional codes. Mr Oskam had training; including orientation involving the non-aversive approach to interaction with service users. This approach requires that there is no physical restraint, no physical discipline, no aggressive language and no physical and verbal abuse.

[8] Idea Services is the biggest service provider in the region.

[9] Mr Oskam started his employment with Idea Services in August 2007. During his employment there had been issues about Mr Oskam's driving and he had been issued with a first warning. There was a second issue of unsafe driving and he received a final warning.

[10] A team meeting was held on 2 June 2010 where all staff were informed, including Mr Oskam, of the need to treat and speak to clients, with respect, and that there was a zero tolerance to aversive practice and that meant any form of intimidation, hitting, slapping, pushing, kicking or using unapproved restraint.

[11] On 17 June 2010 there was an incident involving Mr Oskam putting his hands on a client's shoulders that has been described as a push. Mr Oskam and Idea Services have different views about what happened, based on Mr Oskam's own memory, the complaint from another staff member, and an incident report. There was at least one witness spoken to and reports written up, including notes kept of the meetings that were subsequently held on 22 and 25 June 2010. He chose to take Malcolm Wall, union delegate as his support person. Mr Wall works for Idea Services but the deposed evidence highlights that he and Ms Barns have differences over his role and use of the term "manager" and a "person with responsibility".

[12] After an investigation an opportunity was given to Mr Oskam to comment. Idea Services decided Mr Oskam's actions amounted to serious misconduct, and Mr Oskam was informed that he was going to be dismissed.

[13] Mr Oskam's dismissal was confirmed in writing on 25 June and although he was dismissed for serious misconduct the employer decided to pay Mr Oskam notice.

[14] Mr John Oskam, the applicant's father, took over the advocacy for the applicant in post dismissal discussions with Idea Services Ltd.

[15] It has been deposed that after Mr Oskam had been dismissed he threw eggs and toilet paper at another employee's house and car and did the same to Dallas Barns' house. In reply Mr Oskam says he did throw one egg at one employee's vehicle and another egg at another employee's property and apologised to at least one of the people.

Determination

[16] There is an arguable case over the extent of Mr Oskam's actions in the incident on 17 June, and whether or not his actions amounted to serious misconduct. The applicant is clearly looking to get vindication on what he considers happened on 17 June and believes there has been some injustice. To this extent there is a conflict between Mr Oskam's claims that the push was not an assault, that there was no disrespect to the client and no safety issues involved; and the evidence relied upon by Idea Services that could prove it has a case because there was a *push*. The onus is on the respondent to justify its actions. There is evidence relied upon by Idea Services that Mr Oskam admitted he pushed the client. Mr Oskam's defence in regard to this is the context in which the incident occurred, and whether or not a fair and reasonable employer would have concluded that Mr Oskam *"assaulted a person with an intellectual disability by physically manhandling a service user against his will"* and that this amounted to serious misconduct in all the circumstances.

[17] Mr Oskam has claimed that the circumstances where Idea Services did not suspend him (permitted under the employment code and employment agreement) when it could have, supports a finding that there had been an injustice. He believes that this was especially so when Dallas Barns said *"I am happy for you to be at work, working alongside other staff..."* during Idea Services' investigation of the complaint. Idea Services says that a suspension was an option but at 21 June the matter was still only an allegation to be investigated and it wanted to keep an open mind.

[18] Also, there are at least eight procedural issues that have been raised and relied upon by the applicant that his dismissal was unjustified. Both parties have different opinions about the extent of the procedural issues that will require a

determination on whether or not they have any substance and or are only technical and pedantic. For instance the first criticism is the timing of the incident report being given to the applicant. Whilst the respondent deposed that the timing of the applicant being given the incident report was not prejudicial to the applicant because he and his support person had time to consider it. The next criticism is that Idea Services did not suspend the applicant. That was an option available under the employment code and employment agreement, and it was open to the employer not to suspend while the matter was investigated with an open mind. It is a circumstance to consider in the respondent's justification rather than a procedural matter.

[19] Another procedural claim is that the applicant's support person, Malcolm Wall was his manager also, thus there was a conflict of interest. Idea Services says that Mr Oskam chose Mr Wall, as would be expected as Mr Wall was the Union delegate. However, it has been deposed by witnesses for Idea Services that Mr Wall was not the manager of the team.

[20] Next there has been a criticism that not all present at the incident were interviewed. Idea Services says that the relevant people were interviewed and it is hardly surprising that the service user was not interviewed. Ms Barns deposed that one witness had not been mentioned as a potential witness at the time. Thus that witness may not be relevant for the employer's justification of the dismissal, but time will tell if that person can add anything in regard to remedies. I can not take that any further because no evidence has been produced at this stage.

[21] There has been a criticism that Mr Oskam received the letter of allegations moments before the meeting on 22 June. This has been challenged on the basis that there was no opportunity to consider the issues facing him, and that there is a conflict with Dallas Barns' reasoning for the delay. First she deposed that the letter with the allegations was handed to him before the 22 June meeting and delayed because of mechanical issues. However, the minutes of the meeting say that it was because she could not confirm who would be meeting. Nevertheless any issue about the timing that Mr Oskam received the incident report and the letter of allegations will need to be considered as to whether or not there has been any prejudice to him.

[22] Next the note taker's role has been challenged that it involved more than taking notes but included questions and comments. Idea Services says who attends and what role they play is their business. The person concerned was not the decision maker who Mr Oskam did have access to.

[23] All these criticisms I accept are likely to be investigated, but the applicant may have difficulties proving that they are more than technical and pedantic when he was able to chose his own support person, there was a discussion between him and Ms Barns on 21 June in which she outlined the problem, gave him a copy of the incident report, told him the meeting was for him to explain his role in the incident and when she advised him to bring a support person.

[24] I accept that there is an arguable case for the respondent to justify its decision and that the process will be scrutinised. At this stage, if Mr Oskam has a personal grievance, reinstatement will be keenly argued.

[25] Lost wages and compensation are alternative remedies for Mr Oskam's financial losses and compensation for his feelings to cover the strong sense of vindication he is seeking. I accept that these remedies will not cover reinstatement.

[26] The third test to assess is the balance of convenience.

[27] For Mr Oskam he deposed that he has lost his career, is now out of a job, he has been hurt in his relationships with his team and personally, he has no other options for permanent work, he has been labelled with assault, and suffered financial repercussions. He has obtained some occasional casual paid work. Arrangements have been undertaken to meet any damages. These are all factors favouring him as a matter of convenience.

[28] Idea Services has raised some issues about the practicability of reinstatement that will relate to evidence obtained after the dismissal. There have been delays on the part of the applicant in filing the application in the Authority since the dismissal and now only 5 weeks exist before the Authority's investigation meeting. Despite the applicant's financial situation he has found some work and has been supported by his family. It has been deposed by Idea Services' managers that any reinstatement will inevitably need the applicant being supervised with clients, and that there is a financial impact around that, which was not challenged. They say such supervision is not a feature of the employment arrangement, but that given the circumstances Mr Oskam will need to be supervised if he is reinstated. There is concern about his history in the employment, his attitude and commitment to the values of the role of a community support officer. Ms Barns has deposed evidence that she has had to talk and meet with him enough times to cause real doubts that he could serve the role of community support person independently and with minimum supervision. Furthermore she is his manager, and I must give this greater weight than Mr Wall's evidence, the correctness of which has been challenged. I consider that Ms Barns is in a better position to comment on the need for supervision. Two other community support worker's involved do not want him back at work. I have balanced this with Mr Oskam's references that he produced. I find that the former two community support workers have put their opinions and information in affidavits, whereas Mr Oskam's character references are not sworn and do not relate directly to his employment at Idea Services. Also Mr Oskam has provided a signed list from 4 people who are prepared to work alongside him. Firstly other than Mr Wall there is no information as to who these people are, what they do and their areas of responsibility. Moreover without more scrutiny of this information I have no knowledge of the circumstances in which these people signed the document. Given that the people concerned have not sworn any evidence I

am not prepared to give the document more weight than the affidavits filed by Idea Services.

[29] I find that Mr Oskam's loss of his job, his dire financial circumstances and the potential impact of his dismissal on his career given that Idea Service is the biggest service provider in the city means that the balance of convenience favours him on these. I have to add that this is very finely balanced given the issues raised about supervision and funding.

[30] I now turn to the overall justice of the matter. The claim has more to do with Mr Oskam's desire to get his job back and clear his name, and there is a fundamental issue going to the substance of the employer's decision to dismiss him and reinstatement.

[31] Because Mr Oskam pushed a service user the context of that will need to be tested, and with the type of policies that exist, he may have some difficulty overcoming the hurdle that it is the employer which has to justify the dismissal based on what a fair and reasonable employer would have done in all the circumstances. This test is applied on the basis of the information available to the employer at the time. Mr Oskam also has the hurdle that the documentation as to his admission of pushing the service user has been produced, albeit he has resiled from accepting the content of the notes.

[32] New information discovered after the dismissal will not help Mr Oskam with reinstatement. For instance he has acknowledged that he egged another employee's car, but with one egg, after his dismissal. He says he is now remorseful of that action and apologised to the person and regrets it. Also he acknowledged egging yet another employee's property, albeit says he used one egg there too. He confirmed that he had seen the second person since without saying whether or not he apologised to her. These actions hardly help him in his relationships when one of the persons affected does not support him returning to the workplace.

[33] The evidence of Mr Oskam pushing a service user means that he does not have a strongly arguable case to warrant the prospect that he will obtain reinstatement in a full investigation meeting given the policies that apply. Indeed the pedantic and technical issues over procedural fairness do not assist the applicant with reinstatement.

[34] Finally, Mr McBride was able to put up strong arguments in regard to each of the procedural claims that would indicate that if there is any focus on them those procedural matters are likely to be pedantic and some of them are simply not able to succeed.

[35] The overall justice of the matter especially given that there will be a full hearing in 5 weeks time favours the respondent, I hold.

Orders of the Authority

[36] The application for interim reinstatement is dismissed. [37] Costs are reserved.

P R Stapp

Member of the Employment Relations Authority

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