

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 420
5353509

BETWEEN

VIRAN SINGH
Applicant

AND

INFINITY AUTOMOTIVE
LIMITED t/a CITY NISSAN
TAKAPUNA
Respondent

Member of Authority: Dzintra King

Representatives: S H Barter, Counsel for Applicant
R Towner, Counsel for Respondent

Investigation Meeting: 8 September 2011

Determination: 26 September 2011

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Viran Singh, says he has been unjustifiably dismissed by the respondent, Infinity Automotive Limited t/a City Nissan Takapuna (“Nissan” or “the company”).

[2] Mr Singh seeks interim reinstatement which is opposed by the respondent.

[3] Section 127 Employment Relations Act 2000 governs interim reinstatement. Reinstatement is no longer the primary remedy. Section 125 (2) now provides that the Authority may provide for reinstatement if it is practicable and reasonable to do so.

[4] Mr Singh has filed an undertaking that he will abide by any order that the Authority may make in respect of damages.

Background

[5] Mr Singh was employed as a car groomer until 28 July 2011 when he was summarily dismissed for allegedly taking bribes.

[6] These allegations were made by Mr Nathan Cole, the new owner of a panel beating company, Coles Panel and Paint Ltd (“Coles”), which supplied panel beating services to the respondent.

[7] The allegations were made in a letter dated 25 July 2011 and related to events which purportedly occurred a year earlier, on 13 July 2010.

[8] In the letter Mr Cole said that the day after he purchased the business, Leon’s Auto Body Repairs Ltd (“Leon’s”), he was being shown the ropes by Mr Eason Yuang, the manager. At that point Mr Yuang said Leon’s gave a person at Nissan cash so that Nissan would give them work. Mr Cole said he did not have the financial resources to do that. Mr Yuang said that they put extra work onto the invoices to cover the payments. Mr Cole said he would not do that. Mr Yuang said he should discuss it with his wife, to whom he had also mentioned the matter.

[9] On either the 14 or 15 July 2010 Mr Yuang took Mr Cole to meet Mr Singh at Nissan. Mr Yuang told Mr Cole to wait while he told Mr Singh Mr Cole did not want to make payments. He then brought Mr Singh over and introduced him. Mr Singh deposed that Mr Cole did not wait in the car but that both Messrs Cole and Yuang came over to him.

[10] Mr Cole said the matter was never mentioned again. However, the workload from Nissan went down very rapidly even though the pricing structure remained the same as it had been with the previous owner.

[11] In his affidavit Mr Cole stated that Mr Yuang never told him the name of the employee at Nissan with whom he had the arrangement. Mr Cole deposed that when

Mr Yuang brought Mr Singh over to meet him neither he nor Mr Yuang said anything to Mr Singh about the arrangement.

[12] Mr Cole deposed that he had discussed his business situation with Mr Steve Ward from Selected Autos Ltd. Mr Ward was a friend of Mr Mackinlay, the General Manager of Infinity Automotive Ltd (“Infinity”).

[13] Mr Mackinlay first heard of the matter when he overheard someone at Mr Ward’s table at a café say that someone at Nissan was taking bribes from panel beaters.

[14] He phoned Mr Ward and arranged to meet him. Mr Ward said the information had come from Mr Cole.

[15] Mr Mackinlay checked the records to ascertain if there had been a drop in any panel beaters work and found that Coles had almost no work. Mr Singh was the person responsible for allocating work to panel beaters

[16] When Mr Singh was questioned at a meeting on 28 July 2011 he denied that had taken bribes but said that Mr Yuang had given him two gifts of \$50, one around Christmas and one in July 2010 when the company was sold. The meeting was attended by Ms Catherine Husheer, the Human Resources Manager, and Mr John Mackinlay.

[17] After the meeting Ms Husheer and Mr Mackinlay discussed matters and decide that Mr Singh’s explanation did not seem credible and they doubted his honesty.

[18] Mr Singh said that after Mr Cole took over the standard of work deteriorated, that he discussed this with his manager, Mr Doug Jarvis, who signed off all invoicing, and that thereafter work was sent to other panel beaters, one company in particular obtaining a lot of business as it had consistently cheaper quotes. The following Monday a further meeting was held. Mr Mackinlay told Mr Singh his responses had been considered but they did not believe his explanation. He was told dismissal was a

possibility. Mr Singh said he had a family to support and asked to be moved elsewhere to keep his job.

[19] Ms Husheer said the decision to dismiss was made because they had lost trust and confidence in him. She deposed that he had admitted accepting bribes. What Mr Singh says he admitted, and what the notes show, is that he accepted two gifts that he believed were made out of goodwill. Ms Husheer says the fact that Mr Singh had not told anyone about the two \$50 payments suggested that he knew he was not supposed to receive payments from suppliers. This was not put to Mr Singh. She deposed that they did not believe his explanation that he had only received payments on two occasions.

[20] Mr Sudheer, the director of S & J Panelbeaters Ltd, one of the panel beating companies used by Nissan, deposed in his affidavit that no incentives were given to Mr Singh or anyone else, that whenever there was a price change to a job Mr Jarvis was spoken to before the work was undertaken and that Mr Sudheer's company obtained a significant amount of work due to low pricing.

[21] Mr Singh had an employment agreement dated 1 May 2006 with Perry's Automotive Group (North Shore) Ltd ("Perry's") which expressly permitted gifts of up to \$50. Mr Singh's employer changed from Perry's to Infinity when he moved from Albany to Glenfield and went to work for Nissan and there was a company merger. Mr Singh's second employment agreement, signed in February 2009, requires him to comply with company policies and states that it is his responsibility to acquaint himself with the policies.

[22] The respondent relies on company policy which was updated on June 2008. Mr Singh denies knowledge of the policy. The company says the relevant policy was available on the intranet.

Arguable case

[23] The respondent says there is no arguable case.

[24] The applicant says the company did not adequately investigate the allegations or genuinely consider his explanation.

[25] Mr Barter referred to *Manoharan v Waiariki Institute of Technology* [2011] NZERA 352. The Authority stated at paras [22] and [23] that dismissals for deceit or dishonesty were among the most serious forms of misconduct and that mere suspicion would not satisfy the requisite standard of proof before dismissal would be justified. A serious issue in that case was whether the employer had reasonable and sufficient grounds for believing the employee had been dishonest and deceptive.

[26] That is an issue in this case as well. A concern is that the evidence upon which the respondent relied in effecting the dismissal is hearsay. The Authority can take account of any evidence and Mr Towner referred to s18 (1) Evidence Act 2006.

[27] Section 18 (1) provides that hearsay is admissible if the circumstances relating the matter provide reasonable assurance that the statement is reliable; and that either the maker of the statement is unavailable as a witness or the Court considers that undue expense or delay would ensue if the statement maker were required to be present.

[28] In *R v Gwaze* [2010] NZSC 52 [32] the Supreme Court at para [45] said that the definition of ‘circumstances’ for the purpose of hearsay evidence made it clear that the inquiry into reliability must include not only accuracy of the record of what is said and the veracity of the person making the statement, but also the nature and contents of the statement, and the circumstances relating to its making.

[29] The Coles had no personal knowledge of the alleged dealings with Mr Singh.

[30] This is a serious matter involving allegations that require a high standard of proof.

[31] Ms Husheer stated she had tried to contact Mr Yuang who had returned to China and that she understood that Mr and Mrs Cole have also endeavoured to contact him. I was not provided with any evidence of their attempts to contact Mr Yuang.

[32] The company did not consider that the statement may have been inaccurate and that there may have been other reasons for the decline in trade.

[33] Mr Singh must not only establish an arguable case for his unjustifiable dismissal, but must also establish that, if successful in such a claim he will be reinstated, not just compensated monetarily.

[34] I find it established to the relatively low level of an arguable case that Mr Singh will be reinstated if he is successful in his personal grievance.

Balance of Convenience

[35] An element of the arguable case question relates to the practicability of the reinstatement itself. In *Burton v Talleys Group Ltd* [2010] NZEMP 123 the Chief Judge stated at para [40] that the strength of the arguable case for reinstatement would be a factor going to the Court's assessment of where the balance of convenience might lie.

[36] The substantive hearing will not be until December 13 2011. The delay until the substantive hearing is a factor favouring interim reinstatement.

[37] The Authority must weigh the relative hardship to the respondent of having the applicant return to work against potential hardship suffered by the applicant.

[38] The respondent submitted that there was no evidence of Mr Singh's ability to meet the undertaking. While I accept that, the fact that he has given the undertaking is material.

[39] It is easy to assert that there has been a loss of trust and confidence issue. If the conduct alleged had in fact taken place then there would be a loss of trust and confidence.

[40] However, this is not a clear case of an act amounting to dishonesty, which would also disentitle the applicant to reinstatement.

[41] The respondent says that reinstatement would create perception that respondent endorses the behaviour. I do not accept this.

[42] The seriousness of the allegations means that damages would not be an adequate remedy for Mr Singh.

[43] Mr Singh has tried and failed to secure full time work and has been successful only in obtaining a two week period of employment at a lesser salary.

[44] Mr Singh's position has not been filled. He asked the company to comment within three days of the dismissal and filed an urgent application two weeks after his dismissal.

[45] Mr Mackinlay deposed that while he had not told staff about the matter, Mr Jarvis (Mr Singh's support person) was aware and that people in the industry were aware of rumours that someone at Nissan had been receiving kickbacks and it would be distasteful to staff to have to work alongside Mr Singh. There is no evidence to support these assertions.

[46] The company would be able to meet any compensation for lost remuneration should Mr Singh succeed.

[47] Mr Barter submitted that placing Mr Singh on garden leave would minimise any company concerns. The respondent also made reference to leave.

[48] The balance of convenience favours the applicant.

Overall Justice

[49] Standing back and looking at the matter overall, the overall justice of the case favours the applicant. There are serious issues regarding the material upon which the dismissal was based.

[50] Section 127 (5) provides that the order for interim reinstatement may be subject to any conditions the Authority thinks fit. The interim reinstatement is to be to the payroll only, that is, the applicant is to be placed on garden leave.

[51] The applicant is to be reinstated on an interim basis. The respondent shall forthwith reinstate the applicant to his previous position on the same terms and conditions as applied down to the date of his dismissal, pending determination of the applicant's personal grievance proceedings or earlier order of the Authority.

[52] Costs are reserved and will be determined after the substantive hearing.

Dzintra King

Member of the Employment Relations Authority