

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 314
3039491

BETWEEN SANDEEP JOSHI
 Applicant

A N D SOUTHGATE LEGEND
 LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: Matt McCarten for the Applicant
 Vivian Zhang and Jason Monigatti for the Respondent

Investigation Meeting: 10 October 2018

Submissions Received: At the investigation meeting

Date of Determination: 11 October 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. Sandeep Joshi is to be reinstated on an interim basis to his former position at Southgate Legend Limited’s Takanini store pursuant to s 127 of the Employment Relations Act 2000.**
- B. Interim reinstatement is to restore Mr Joshi to his former position with Southgate Legend Ltd on the same terms and conditions of employment, pending the hearing of his personal grievance.**
- C. The order for interim reinstatement is suspended for five days from the date of this determination to enable arrangements to be made for Mr Joshi to return.**

D. Mr Joshi is to fully co-operate with any reasonable requirements of Southgate Legend Limited necessary to facilitate his return to work.

E. Costs are reserved.

Employment Relationship Problem

[1] Sandeep Joshi claims that he was unjustifiably dismissed from his position at the Southgate Takanini liquor store. That store is owned and operated by Southgate Legend Limited (Southgate Legend or the Company). Southgate Legend claims that Mr Joshi was justifiably dismissed.

[2] Mr Joshi filed a claim in the Authority seeking interim reinstatement.

[3] Southgate did not initially respond to Mr Joshi's representative's or the Authority's attempts to contact it regarding this claim. The company did not participate in the case management conference. However it did subsequently instruct a representative who then made contact with the Authority.

[4] The parties attended urgent mediation but were unable to resolve the matter.

[5] An investigation meeting was held on 10 October 2018 to consider Mr Joshi's interim reinstatement application. I dealt with this case on the basis of untested affidavit evidence and submissions. Affidavits were received from Mr Joshi and from Chanjiao Yin, known as Joanna, sole director and shareholder of Southgate Legend Ltd.

[6] In the context of an interim reinstatement application relying on affidavit evidence, the Authority cannot, and is not required at this stage, to resolve any dispute that may be apparent from the untested affidavit evidence. Some common sense assessment of unanswered or disputed allegations in the sworn statements may be made for the purposes of considering an interim reinstatement application.¹

[7] During the investigation meeting both parties referred in submissions to documents and witness evidence which had not been filed in the Authority. Those matters are left for the substantive investigation.

¹ *Wellington Free Ambulance Service v Adams* [2010] NZEmpC 59 at [17] – [18].

[8] Mr Joshi also claims that he was required to work a number of hours which he was not paid for. This is disputed by Southgate Legend. That claim was not investigated at the meeting on 10 October 2018.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has expressed conclusions necessary to resolve the interim reinstatement application but has not recorded all the evidence and submissions received from the parties.

What are the issues?

[10] The questions which I must consider at this point are:

- (a) Does Mr Joshi have an arguable case of an unjustified dismissal and if after a substantive investigation he is found to be unjustifiably dismissed, does he have an arguable case for permanent reinstatement?
- (b) Where does the balance of convenience lie? I must look at detriment and injury which Mr Joshi and Southgate will incur as a result of the interim reinstatement being granted or not, as well as whether there is an adequate alternative remedy.
- (c) Where, standing back and considering the case, where does the overall justice lie, until the substantial matter is determined?

What is the employment history?

[11] Mr Joshi worked at the Takanini store since late 2016, although the store has only been owned and operated by Southgate Legend since January 2018. Mr Joshi started working for Southgate Legend on 27 January 2018. His employment agreement provided for a minimum of 30 hours work per week. Southgate assisted Mr Joshi with obtaining his two-year work visa, which was approved on 9 March 2018. His visa was conditional on him working for Southgate Legend Limited.

[12] There is some issue regarding Mr Joshi's role. His employment agreement from January 2018 states that he is the assistant manager. Southgate says that Mr Joshi became store manager in March 2018 when the previous manager left. There is no evidence before me indicating that Mr Joshi received any pay rise at that point or that a new written employment agreement was entered into. Mr Joshi's representative

accepts that Mr Joshi may have been referred to by the title of manager, but says that he did not have the responsibilities or pay of a manager.

[13] The parties agree that Mr Joshi was issued with a written warning on 17 July 2018. The letter refers to issues about the store not being properly managed, Mr Joshi being late for work, his “behaviour and performance... causing poor customer service, inaccurate records and poor business performance”. No particular instances are specified. There is no evidence filed of any disciplinary meeting occurring with Mr Joshi prior to the warning being issued. At Mr Joshi’s request there was a meeting between himself and Ms Yin on 19 July 2018 to discuss the warning letter.

What happened in August 2018?

[14] On Monday 13 August 2018 Mr Joshi received a text message from Ms Yin, who was in China at this stage, which said:

You do not have any shift this week. Please return all keys of the store to T...
by this Tuesday before 3pm (14/8/18).

[15] There was no evidence filed of any discussion occurring between Ms Yin and Mr Joshi just prior to that. Ms Yin says in her affidavit that she wanted to speak to Mr Joshi urgently but was still in China until the following weekend.

[16] Mr Joshi responded that he did not understand what was happening. He then texted back:

without any notice you dismissed me I can’t survive pls pls take me back
thank you everything is going well but pls tell me what’s wrong?

[17] After not receiving a reply Mr Joshi texted again the following day asking why he is not working this week and whether he would get paid. Ms Yin replied that he will get 30 hours pay for the week and he does not need to come to the store.

[18] Ms Yin says that the “safest option to avoid issues between staff and mismanagement of the business” was not to roster Mr Joshi on. Ms Yin’s explanation regarding the request to return keys is that the locks on the store were changed due to security breaches over the weekend. She says that it was not related to his dismissal or performance matters.

[19] On 14 August 2018 Southgate Legend sent Mr Joshi a letter by email giving him a final employment performance warning and making arrangements for a meeting on 20 August 2018 to review any improvements which he has made in response to that warning. The description of the performance issues is as follows:

As previously advised, your performance at work is not presently meeting the requirements of your position and your obligations set out in your employment agreement. Specifically you have continued to be late for work, mismanage the store, no teamwork and fail to comply with reasonable instructions from your employer.

[20] Again no particular instances are provided. Mr Joshi is encouraged to bring a support person.

[21] Mr Joshi made contact by email with Ms Yin however that email was not filed. Such evidence as there is indicates that the email made some comment regarding Mr Joshi's attendance at the disciplinary meeting. No meeting occurred on 20 August 2018.

[22] On 22 August 2018 Southgate Legend emailed Mr Joshi a letter advising him of the termination of his employment. The letter contains no indication of a notice period being worked out or paid and so the dismissal appears to be summary.

[23] Southgate Legend subsequently notified Immigration New Zealand that Mr Joshi no longer worked for the company. Mr Joshi was then given a deportation liability notice from Immigration New Zealand because he was no longer employed by Southgate Legend as required by his visa. His immigration adviser has subsequently challenged the deportation notice and Mr Joshi remains in the country.

[24] Subsequently there has been an issue between the parties about the provision or otherwise by Southgate to Mr Joshi or his representative of his manager's certificate. The implication I take from Ms Yin's affidavit is that Southgate Legend has not handed the certificate to Mr Joshi or his representative. It is submitted on Mr Joshi's behalf that this limits his ability to find work in a similar position.

Does Mr Joshi have an arguable case?

[25] I must consider whether there is an arguable case both for justified dismissal and for permanent reinstatement should Mr Joshi's claim proceed to that point. In *X v Y Limited*² described an arguable case as:

What the Court is concerned with, so far as the evidence goes, is to see whether assuming that the plaintiff can prove all the facts which he alleges, he then has an arguable case. That is to say, a case with some serious or arguable, but not necessarily certain prospects of success.

[26] The threshold for an arguable case for unjustified dismissal is relatively low. For Southgate Legend it was not accepted that Mr Joshi had established an arguable case for unjustified dismissal.

[27] Mr Joshi raised a question about whether he was dismissed by way of Ms Yin's text message on 13 August 2018, when he was told that he was not rostered and to return his keys. However, Ms Yin subsequently advised that he would be paid and just did not need to come into work.

[28] Southgate Legend relies on having undertaken a fair performance process. However, there is no indication on the evidence filed that Mr Joshi was given any opportunity to respond to the performance concerns prior to each of the warning letters being given.

[29] In addition the letters of warning contain no particular instances of the types of behaviour alleged. So, for example, there is no indication of the dates when Mr Joshi was said to be late or how late he was. In some parts of the letters it is not clear what type of behaviour is alleged. For example, "poor customer service" could cover several types of behaviour by an employee. The dismissal letter suffers the same shortcomings.

[30] There is also another issue regarding the second warning given on 14 August 2018. Although it refers to a further period of improvement, Mr Joshi was not able to work during that period because Ms Yin had deliberately not rostered him to work. He therefore did not work from the day before the second warning was received until the date of the dismissal letter. He thus did not have an opportunity to improve after

² *X v Y* [1992] 1 ERNZ 863 at 872.

the second warning was given. It appears that the dismissal was therefore based on the same events as the second warning.

[31] I consider that Mr Joshi has established that he has an arguable case for unjustified dismissal.

[32] I also have regard to whether Mr Joshi has an arguable case for permanent reinstatement. Section 125 of the Act provides that the Authority may grant reinstatement if it is practicable and reasonable to do so. Reinstatement is no longer a primary remedy. However, it is a remedy available in reasonable and practicable circumstances. At this stage I cannot say that Mr Joshi does not have an arguable case for permanent reinstatement.

What is the balance of convenience?

[33] Mr Joshi's affidavit provides some evidence about the detriment or injury which he would incur if he is not reinstated in the interim. Submissions on his behalf expanded on those matters.

[34] Mr Joshi describes being under serious financial hardship and stress. He has a personal bank loan which he was repaying from his income (from his Southgate job). His financial situation is contributed to by his immigration situation.

[35] I accept that Mr Joshi will suffer financial loss if he is not reinstated to his position and remains unemployed. Mr Joshi says he will find it difficult to survive without his job with Southgate Legend as he must pay for rent, groceries and phone bills.

[36] There is also Mr Joshi's risk of being deported. Although Ms Yin expresses some sympathy for Mr Joshi's immigration difficulties, the fact is that the dismissal has made Mr Joshi liable for deportation. That is not something which compensation can readily be a remedy for.

[37] I need to consider and balance any detriment which Southgate Legend would suffer if Mr Joshi was reinstated. I weigh the affidavit evidence of Ms Yin.

[38] Ms Yin says she would not be able to trust Mr Joshi to perform his work in good faith. Further "this action", which I take to refer to the prospect on interim

reinstatement, would have a major detrimental impact on the performance of the business and the other staff. Ms Yin says that Mr Joshi's poor performance has had a "major personal impact" on her as a result of the "considerable business difficulties".

[39] Ms Yin makes reference to Southgate having to hire "additional staff" to replace Mr Joshi's position. The cost of hiring new staff was said to put significant strain on the business resources and day-to-day operation of the company. It is not evident how the hiring of new employee/s has caused any additional cost. There was no evidence as to how many new staff were hired or whether that occurred after the company had been advised about Mr Joshi's interim reinstatement claim.

[40] In considering the adequacy of other remedies, the Authority is able to offer an early substantive investigation meeting. Under other circumstances that may suggest that interim relief may be less necessary. However, Mr Joshi's immigration situation appears grim. It is not clear whether he will be permitted to stay in New Zealand even until the time of a substantive hearing, in the event that he continues to have no employment. The other complication is that Ms Yin is overseas for around a month, not returning until late November 2018 and so the substantive investigation meeting could not occur until after that time.

[41] In balancing the convenience the major consideration for Mr Joshi is financial hardship and deportation risk if he is not reinstated, whereas the concern of Southgate Legend is that Mr Joshi's performance problems could continue if he is reinstated. I find that the balance of convenience favours Mr Joshi.

Where is the overall justice of the case?

[42] I must now stand back and considers where the overall justice of the case lies.

[43] I consider the relative strengths and weaknesses of the case, recognising that caution is needed as there is yet to be a full exploration of the evidence. I have identified above what appears to be a failure to raise and provide an opportunity for response prior to giving the warnings. Although reference was made on Southgate Legend's behalf to evidence of particular instances of performance issues, that evidence is not before the Authority, either in the warning or dismissal letters or Ms Yin's affidavit. I have also identified the giving of a warning and dismissing on what I can only see to be the same events as problematic for Southgate Legend.

[44] The dismissal letter also appears to be retrospective in that it is dated and was sent on 22 August 2018 but identifies Mr Joshi's last day of work was 20 August 2018, although he was not in fact working at that time.

[45] It appears on the untested affidavit evidence that Mr Joshi has relatively strong arguments that his dismissal was unjustified. In the context of a dismissal for performance reasons, with limited indication of clear identification of the issues and real opportunities for improvement, I also consider that Mr Joshi has a reasonably strong case for permanent reinstatement.

[46] There are two other matters which I regard as significant in assessing the overall justice of the case. The first is that since Mr Joshi's dismissal, Southgate Legend has asked Mr Joshi to assist the company with a review of business records. This suggests that the company sees itself as being able to work with Mr Joshi to some extent. The nature of the proposed arrangement was not specified but it is difficult to see a review of business records being able to occur in a brief meeting. The company was critical of Mr Joshi's failure to respond thus far, although this appears to have been on the basis of advice from his representative given that litigation was on foot.

[47] Also, Ms Yin made contact with Mr Joshi directly offering to assist with his visa issues. This again suggests that the relationship between the parties had not entirely broken down and that reinstatement is practicable.

[48] I also consider whether there are third party issues which are relevant. Southgate Legend refers to the cost of hiring staff but Ms Yin's affidavit does not refer to any difficulties with retaining the new hire/s if Mr Joshi returns. The employees' hours of work appear variable with Mr Joshi for example, having a contractual minimum of 30 hours a week, but actually working 40 hours in many weeks.

[49] Ms Yin also says in her affidavit that unnamed "other staff members" had advised her that they had "considerable difficulties" working with Mr Joshi. There are no affidavits from any other employee supporting that statement.

[50] In standing back at looking at the case, I consider that the overall justice favours Mr Joshi and that his reinstatement on an interim basis is reasonable and practicable.

[51] I order that Sandeep Joshi is reinstated on an interim basis to his former position at Southgate Legend Limited's Taranaki store pursuant to s 127 of the Act. Interim reinstatement is to restore Mr Joshi to his former position at Southgate Legend on the same terms and conditions of employment, pending the hearing of his personal grievance claim.

[52] The interim reinstatement order is suspended for five days following the date of this determination to enable arrangements to be made for Mr Joshi to return. Mr Joshi is to fully co-operate with any reasonable requirements of Southgate Legend necessary to facilitate his return to work.

What is the next step?

[53] An Authority officer will contact the parties to set up a telephone conference, where arrangements will be made for a substantive investigation meeting. The parties are also able to access further mediation to assist with any prospects of resolution.

Costs

[54] I reserve costs, which can be dealt with after the determination of the substantive matter.

Nicola Craig
Member of the Employment Relations Authority