

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 334/10
5310474

BETWEEN DENEPIYAGE SRIYANI
 STELLA RATHNAYAKA
 Applicant

AND LAB TESTS AUCKLAND
 LTD
 Respondent

Member of Authority: Mike Loftus

Representatives: Lois Black, Counsel for Applicant
 Katherine Burson, Counsel for Respondent

Investigation Meeting: 19 July 2010 at Auckland

Submissions received: On the day of the meeting

Determination: 26 July 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. In April 2010, the applicant, Ms Rathnayaka, was dismissed from her employ with the respondent, Lab Tests Auckland Limited (referred to herein as Labtests).
2. At the time of cessation she was engaged as a Work Room Assistant at the Massey Collection Centre but she had been initially engaged as a Medical Laboratory Technician at another location.
3. It is to her original position that she now seeks interim reinstatement pending determination of her substantive grievance.

Background

4. Evidence was, as is normally the case in an interim hearing, presented through untested written affidavits. That said, a number of key witnesses were present at the meeting and while every attempt was made to avoid delving into the detail of

the substantive grievance, some comments did provide further insight into the issues between the parties.

5. In May 2009 Ms Rathnayaka was offered, and accepted, a Medical Laboratory Technician's position in the Biochemistry Department of Labtests' facility in Carbine Road, Auckland. She did not, however, start until 10 August 2009 though in the interim she attended an induction day and underwent two days training on the Advia 2400, a machine she would be using in the performance of her duties.
6. Ms Rathnayaka has in excess of twenty years relevant experience in her native Sri Lanka. In November 2007 she obtained New Zealand registration as a Medical Laboratory Technician. That registration came with a requirement that within the following two years she complete six months supervised work in a laboratory and obtain a satisfactory report from her supervisor. Ms Rathnayaka is also seeking New Zealand residency and that process continues.
7. Unfortunately not all went well and there were four incidents that either resulted in Ms Rathnayaka's removal from her position as a Medical Laboratory Technician and/or illustrate why Labtests now considers it inappropriate, indeed unsafe, to reinstate her to that position as sought.
8. The first incident occurred on 15 September. It involved an alleged failure to follow the small sample standard operating procedure. Ms Rathnayaka was performing a Bilirubin test on two samples and is said to have switched the outcomes as a result of not having followed labelling protocols.
9. Labtests accepts that this incident did not result in a formal disciplinary outcome and states that there are no notes of the resulting discussion. Ms Rathnayaka recalls a discussion over the incident but it is unclear as to whether or not she understood it to be as serious as Labtests now appears to assert.
10. The second incident occurred on 3 November. It again involved a failure to follow the small sample standard operating procedure and again involved Bilirubin testing. The incident resulted in a written warning, which Ms Rathnayaka accepts she received, and a requirement that she and her manager meet weekly until 4 December.
11. The weekly meetings did not occur but Labtests state that Ms Aspin, the head of its Biochemistry Department, provided extra training and supervision after this incident. Ms Rathnayaka disputes that claim, or at least whether the increased interaction with her manager could be considered training or simply more stringent oversight.
12. The next incident is said to have occurred on 12 November. It is alleged that Ms Rathnayaka again failed to follow a standard operating procedure, though this time it involved one relating to quality control. Labtests say that the problem was quickly identified and then dealt with informally by the section head, Mr Lee. Ms Aspin did not become aware of it until well after the event and states that if she had earlier knowledge, more formal action may have resulted.

13. The fourth and final incident occurred on 14 November. It concerned Ms Rathnayaka's alleged failure to perform a daily maintenance task, namely the cleaning of a dilution bowl and nozzle on one of the four Advia 2400's in her work area. It is also alleged that notwithstanding this failure, Ms Rathnayaka certified that the task had been performed when completing the daily maintenance log.
14. The failure led to a 'salt bridge build up' which affected the accuracy of subsequently performed tests. This ultimately affected some 200 results and the tests had to be repeated. Additional work ensued after the problem was identified that afternoon, as a number of clients had already been advised of the results and the errors had to be reported.
15. On 17 November Ms Aspin met with Ms Rathnayaka to discuss the issue. Ms Aspin gave oral evidence that the meeting resulted in the issuing of a formal warning, but the recorded outcome was that a formal disciplinary investigation would follow.
16. Ms Rathnayaka was notified of a further meeting the following day, November 18. The meeting was originally scheduled for 20 November but that was later amended to the 19th. There is also some dissension about the suspension of Ms Rathnayaka when she was advised of the upcoming meeting.
17. The meeting of 19 November led to Ms Rathnayaka's removal from the Medical Laboratory Technician's position and an offer of alternate employment as a work room assistant at another location, the Massey Collection Centre.
18. This outcome was recorded in a letter wrongly dated 17 November. It states, amidst other things, that:
 - a. There has been a decision to issue a written warning for failure to follow procedure;
 - b. Labtests no longer had confidence in Ms Rathnayaka ability to safely operate as a Medical Laboratory Technician; and
 - c. As a result of Ms Rathnayaka's personal circumstances and her expressed desire to remain at Labtests, "... *we have found alternate duties for you outside the biochemistry department*".
19. The letter then continues with advice that the alternate was part time and would attract a lower hourly rate, before proffering an offer of employment as a Work Room Assistant. There is advice that this was the only suitable position then available and the offer is characterised, in the letters heading, as a redeployment.
20. Ms Rathnayaka signed a new employment agreement reflecting acceptance of the new position on 24 November. She commenced that day, though the reduced hourly rate was not applied.
21. There is little doubt that the move was, at least in Ms Rathnayaka's mind, disadvantageous. The new position's ability to assist with the attainment of residency is limited vis-à-vis that of a Medical Laboratory Technician's position and it did not require the maintenance of a practising certificate as a registered technician. Indeed, her practicing certificate lapsed soon after her redeployment.

22. In February 2010 Ms Rathnayaka approached the resident union and sought their assistance in re-obtaining a Medical Laboratory Technician's position. The delegate sent an e-mail on her behalf but nothing came of it. It does not appear this was followed up, though that may be because there was a problem with Ms Rathnayaka's application for membership, which was not properly processed.
23. In March Ms Rathnayaka met with Labtests newly appointed Human Resources Manager, Ms Hart, and reiterated her request that she return to the laboratory. She states "*I said I needed to work in the laboratory for my MLS [Medical Laboratory Science] Board registration and work permit*".
24. Ms Rathnayaka states that Ms Hart advised that she would discuss the matter with Ms Aspin and respond.
25. Ms Rathnayaka states that the promised response from Ms Hart never came and that only a couple of days later she received a letter advising a proposal that her Work Room Assistant position be disestablished.
26. It appears that while she was not the only Work Room Assistant, Ms Rathnayaka was the only one affected by this proposal as she was the only one engaged on a permanent basis. Labtests is a relatively new provider in the Auckland area and the Work Room Assistants position was originally established to assist with work flows while Labtests trialed and embedded its processes. The position, and its continuation, was to be reviewed and the other incumbents were engaged on fixed term contracts. As the contracts expired, so too did the incumbent's employ.
27. Ms Rathnayaka says she again approached Ms Hart to both discuss the proposed disestablishment of her position and reiterate her request that she be returned to a Medical Laboratory Technician's position. The only response she acknowledges was advice, dated 24 March, confirming that her then current position of Work Room Assistant was to be disestablished and that she was to be made redundant.
28. That decision was subsequently implemented and Ms Rathnayaka's employ ended on 16 April.
29. Labtests says that one, but by no means the only, factor considered when confirming the disestablishment, was that Ms Rathnayaka did not proffer any submission about retention. Instead, all her comments revolved around her desire to return to the Laboratory.
30. Ms Rathnayaka, through the offices of her present solicitor, wrote to Labtests raising her grievance on 15 June 2010.
31. She has also been corresponding with the Medical Laboratory Science Board over the circumstances surrounding her removal from the Medical Laboratory Technician's position. From them she has obtained a time limited practising certificate which will allow her to complete a competence review. It expires on 30 September 2010.

32. Ms Rathnayaka's work permit has also expired and, along with it, her ability to remain in New Zealand. Discussions with the Immigration Service are ongoing, though it appears they are awaiting the outcome of this matter before concluding their processes.

Discussion

33. Though, as permitted by s.174(b)(ii) of the Employment Relations Act 2000, counsel's submissions will not be summarised, both are thanked for their comprehensive efforts. Suffice to say Ms Rathnayaka's counsel contends both the existence of an arguable case and that the balance of convenience favours the granting of her client's application. Labtests argues the opposite. They contend the absence of an arguable case but note that if one were to exist, the substantive matter will be vigorously defended and the balance of convenience favours rejection of the interim application.
34. The above reference to arguable case and balance of convenience recognises that an injunctive application such as this involves the exercise of a discretion and not the rigid application of a formula. There are two broad inquiries. The first is whether there is a serious issue or issues to be tried and the second is where the balance of convenience lies. The final question requires the Authority to stand back and ascertain where the overall justice lies – *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA).

Arguable case

35. At the point of termination Ms Rathnayaka occupied the position of Work Room Assistant, yet that is not the position to which she seeks reinstatement. That, in itself, illustrates some of the possible complexities that reside within this case.
36. Indeed, there was little said in the affidavits, and especially those of Ms Rathnayaka, about the decision to disestablish the position of Work Room Assistant. The major effort of both parties went into the events that led to the meeting of 19 November and there is significant disagreement about those.
37. That disagreement extends to the fundamental issue of whether or not Ms Rathnayaka was redeployed as she appears to have originally understood and as stated in Labtests letter of "17" November (see 18 above) or whether she was dismissed and then re-employed as was contended in Labtests response once the grievance was formally raised.
38. Further fundamental disagreements exist, such as the question of whether or not the machine responsible for the inaccurate results on 14 November was that for which Ms Rathnayaka completed the daily maintenance log that day.
39. There are further issues concerning Labtests process and, in particular, the possibility that Ms Rathnayaka was, through the meetings of 17 and 19 November, penalised twice (and inconsistently) for the same infraction (see 15 above).
40. Labtests submits that when evaluating the question of whether or not an arguable case exists, I should consider whether or not there is a real prospect of

reinstatement. I have not done so under this heading but, instead consider the issue under the heading “balance of convenience”. That said, it should be noted that the conclusion reached is not supportive of Labtests contention that Ms Rathnayaka has absolutely no prospect of reinstatement.

41. Given the foregoing, I have no qualms in concluding that Ms Rathnayaka has an arguable case.

Balance of convenience

42. Labtests position in this respect is clear and strongly expressed. It contends that returning Ms Rathnayaka to a Medical Laboratory Technician’s position would have a detrimental effect on both its business and patient safety. It argues that it simply does not have the resources necessary to provide the oversight required by Ms Rathnayaka’s temporary practising certificate and the impositions emanating from the competency review.
43. The argument that Labtests does not have the resources to cope with the supervisory requirements imposed by Ms Rathnayaka’s current situation vis-à-vis her right to practice does not, in my view, carry much weight. The requirements result from reports Labtests gave the registration board. If Labtests can not justify the substance giving rise to those reports, it is only just it bear the consequences.
44. Labtests also contends it has lost confidence in Ms Rathnayaka’s ability to continuously perform her duties competently. It argues that while her skills are more than adequate, the problem lies in her attitude.
45. Witnesses for Labtests are adamant that their attempts to discuss their concerns were undermined by Ms Rathnayaka’s apparent inability to understand the import of those concerns. They commented on an automatic reliance on excuses that blamed others and a refusal to accept even the most infinitesimal possibility of fault on her behalf.
46. Their view was that this was about attitude, and not ability, and that they had neither the knowledge nor resources to correct such a deficiency.
47. Ms Rathnayaka’s position is not nearly as clear. Her evidence, when referring to her desire that she be reinstated to the position of Medical Laboratory Technician, was that this necessitated by a need to maintain both her registration and her work permit (see 23 above).
48. When, however, I questioned her about this, her answers contradicted the evidence cited above.
49. My suggestion that her desire for reinstatement to the Technician’s position was driven by her dealings with the Immigration Service was met with adamant denial. It was argued, quite vehemently, that her request had nothing to do with her Immigration status but was about putting right the employment wrong Labtests had visited upon her.

50. It was also stated that she did not require reinstatement to complete her competency assessment and thereby ensure renewal of her practising certificate. The process could be completed in others ways.
51. There is also a question as whether or not reinstatement is a viable option. Reinstatement, at least to the original position of Medical Laboratory Technician, is what Ms Rathnayaka seeks. Its viability should be considered in two respects. The first is whether or not it is feasible in the interim and the second is whether or not is likely to result from the substantive hearing.
52. With respect to interim viability I note that there is no guarantee that Ms Rathnayaka can actually be reinstated even if the order is made. She does not possess a current work permit and while one of the documents proffered in evidence on her behalf suggests a permit may be obtained almost instantaneously should the order be made, her Counsel concedes that all that may be instantaneous is the commencement of a process that may lead to the granting of a new permit. There is no indication as to how long that may take given that the matter is out of Ms Rathnayaka's hands – responsibility for issuing the permit lies with the Immigration Service of the Department of Labour.
53. Indeed, and in the event it was a redeployment (and not a dismissal) that resulted from the 19 November meeting there must be some doubt as to whether I can consider reinstating Ms Rathnayaka to a position she agreed, albeit reluctantly, to vacate. A ninety day issue may also arise.
54. Questions also arise about Ms Rathnayaka's ability to obtain reinstatement in the substantive hearing. There are a number of disagreements about what occurred and, depending on what is eventually concluded in respect to those, there is an extremely wide range of possible outcomes.
55. Having considered various scenarios that arise from the evidence tendered to date, I can conceive that range as extending from a finding that Ms Rathnayaka has no case, through to scenarios under which the sought reinstatement becomes a possibility. What finally comes to pass depends on what evidence survives the test of a full hearing.
56. The comments in 55 above leads to an airing of what I consider the most important aspect in this consideration. The substantive hearing has been scheduled for August 11 and 12. That is not far away! Indeed, planning is well underway with Counsel for the parties having agreeing and proposing a schedule for the exchange of evidence which has been accepted by the Authority.
57. A last point which arises from the proximity of a substantive hearing is the passage of time. Ms Rathnayaka seeks reinstatement to the position of Medical Laboratory Technician and that occurred in mid November 2009. Formal action did not occur until mid June 2010 which is some seven months later.
58. In my view the issue of whether or not Labtests dismissed or redeployed is, in this regard, irrelevant. If this is about addressing the employment wrong (see 49 above) and the wrong that seems most relevant to Ms Rathnayaka is the loss of the Technicians position, a wait of three or four weeks for the substantive

hearing seems insignificant against the seven months she allowed to pass before formally taking action. Even if the key issue is the final termination, then the delay before commencing a challenge was over two months. Again, a further month is not, in my view, inappropriate.

Overall Justice and Conclusion

59. For reasons I have already outlined, I have no qualms in concluding that Ms Rathnayaka has an arguable case.
60. That then leaves the issue of overall justice. Given the proximity of the substantive hearing and the opportunity to consider the matter in light of fully tested evidence, as opposed to untested affidavit evidence, I would need a compelling reason to grant the application.
61. I do not, given the present circumstances, consider that compulsion to exist.
62. Given the evidence outlined above, I have to conclude that should interim reinstatement be granted, there is a chance of detriment to Labtests and, possibly, its clientele.
63. I can not reach the same conclusion about Ms Rathnayaka's situation. While the events of November 2009 and, more latterly, March / April 2010, have clearly left her in a less advantageous position than that which previously applied, there is no evidence that she faces further significant detriment in the immediate future. Indeed, the arguments she originally proffered for the reinstatement sought are contradicted by statements given in the hearing (see 47 to 50 above) and there are questions about the alacrity with which she sought to have her concerns addressed (see 57 and 58 above).
64. The substantive hearing is nigh, and should she succeed, her losses can be addressed in the near future and in a manner appropriate to conclusions reached on the basis of evidence fully tendered and properly tested.
65. For these reasons I decline the application for interim reinstatement.

Costs

66. The issue of costs was not discussed. They are therefore reserved and can be dealt with following or as part of the substantive determination.

Mike Loftus
Member of the Employment Relations Authority