

The Law

[5] In considering interim reinstatement applications the Authority is required to apply the law relating to interim injunctions “*having regard to the object of this Act*” pursuant to s. 127 (4) of the Employment Relations Act 2008 (“the Act”).

[6] Mr Sharp in his submissions on behalf of C3 pointed out that reinstatement is no longer the primary remedy following the Employment Relations Amendment Act 2010 (“the Amendment Act”).

[7] Accepting that this being the case, the consequence of this circumstance is such that the primacy of reinstatement can no longer inform the Authority’s consideration of the “*object*” of the Act.

[8] However, Mr Allen’s reinstatement remains a remedy available to the Authority, and as such, whilst too great a reliance can no longer be placed on case law determined under the old formulation, the principles derived from these remain pertinent and are usually formulated in a series of questions as:

- Does the applicant have an arguable case?
- Where does the balance of convenience lie?
- What is the overall justice of the case?

An Arguable Case

[9] As a matter of principle, Mr Allen 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.

[10] Thus an element of the arguable case question relates not just to the underlying substantive relief, but to the practicality of the reinstatement itself. As stated by the Chief Judge in *Burton v Talleys Group Ltd*^{1,2} “*..the strength of the arguable case for reinstatement will be a factor going to the Court’s assessment of where the balance of convenience may lie... ”*.

¹ [2010] NZEMP 123

² At para [40]

[11] Mr Allen was dismissed by C3 on the basis of serious misconduct resulting from the failure to carry out a reasonable instruction from his manager, Mr Murray Payne, C3's Manager of Stevedoring and General Cargo at the Mount Maunganui wharves, which was given at a meeting held at Mr Allen's request on 22 February 2011, and for using abusive and/or offensive language.

[12] The meeting on 22 February 2011 was held to discuss the fact that Mr Allen had not been allocated a lieu day in respect of his having attended work, as instructed by Mr Len Colbert, his Supervisor, on Auckland Anniversary Day.

[13] Mr Allen had duly attended work on that day and on arrival had been informed by Mr Jeremy Thompson, a fellow employee, that he was no longer required to work. Mr Allen in his affidavit said that Mr Thompson had claimed that he had sent Mr Allen a text message to that effect, although there was subsequently some dispute about the actual wording of such a message, with the evidence on this point being untested. Irrespective of this, Mr Allen, who claimed that his mobile telephone had been switched off, said he had not received this message before arriving at the workplace, nor had he been contacted either via his landline or by his mobile telephone by Mr Colbert. In these circumstances Mr Allen believed he was entitled to be paid for half an hour and to a lieu day, on the basis that he had attended work.

[14] Mr Allen, when he had realised that he had not been allocated a lieu day, had initially raised the matter with Mr Len Colbert, his Supervisor. The discussion with Mr Colbert had failed to resolve the matter, Mr Colbert claiming that Mr Allen was not entitled to the lieu day, and Mr Allen consequently requested a meeting with Mr Payne which took place on 22 February 2011.

[15] The meeting on 22 February 2011, which became heated when Mr Payne confirmed that Mr Allen would not receive a lieu day, ended when Mr Allen left the meeting, despite a request by Mr Payne that he return to the meeting. This refusal was accompanied by Mr Allen swearing at, and making an obscene gesture to, Mr Payne.

[16] Mr Payne said in his affidavit that Mr Allen's behaviour, which had occurred in front of Mr Colbert, and Mr Thompson, had been of serious concern to him and he had subsequently discussed the matter with Mr Pritchard, C3 Human Resource Manager.

[17] Mr Payne and Mr Pritchard held an investigation meeting on 1 March 2011 and a disciplinary meeting on 16 March 2011. At both meetings Mr Allen was accompanied by his

union representative. Mr Allen was informed at these meetings of C3's view of the incident, which was that Mr Allen's behaviour was considered to be serious misconduct in breach of the C3 Code of Conduct which cites as examples of serious misconduct:

j. Violence, whether physical or verbal, towards another person, which they find offensive. This includes the use of abusive and/or offensive language and gestures.

m. The refusal to carry out a reasonable instruction from a manager or supervisor.

[18] Mr Allen said in his affidavit that he had admitted his behaviour towards Mr Payne at the investigation meeting but that he considered it relevant that the meeting had taken place at his request.

[19] Despite a request made by C3 at both the meetings that he apologise to Mr Payne, Mr Allen had refused to do so on the basis that he was still aggrieved about the lieu day issue. Mr Allen said he believed that C3 had acted inappropriately by not allocating him a lieu day when he had attended work as instructed by Mr Colbert, and that he believed any apology he made to be dependent on a reciprocal apology from C3 being extended to him.

[20] C3 had reached the decision to dismiss following the investigation meeting and disciplinary meeting held with Mr Allen.

[21] Mr Nabney submitted on behalf of Mr Allen that a single incident of bad language on the part of an employee during a heated exchange over pay did not warrant dismissal in a situation in which Mr Allen was a long serving employee with no previous warnings. It was submitted that such a response was out of all proportion to the behaviour involved and failed the Test of Justification as laid out in section 103A of the Act.

[22] Mr Sharp submitted on behalf of C3 that Mr Allen, up to the time of his dismissal, refused to apologise for his conduct, thus reinforcing the repudiatory nature of his conduct, and that Mr Allen had been defiant of managerial authority throughout the whole process. This constituted an aggravating factor which led to C3 having no assurance that Mr Allen would not behave similarly in the future.

[23] I find that Mr Allen has an arguable case. It is relevant that Mr Allen had not been subjected to any previous disciplinary action in the preceding period of approximately 15.5 years employment. The use of bad language and refusal to return and continue with the meeting occurred at a time when Mr Allen was clearly frustrated and heated.

[24] It is submitted for Mr Allen that a fair and reasonable employer would have taken Mr Allen's emotional state into consideration at this stage and allowed for a "cooling off period":³

A fair and reasonable employer would not take at face value what was said in such circumstances. Rather, such an employer would allow a cooling down period and then discuss with the employee what had occurred.

[25] As identified in his affidavit, the subsequent refusal of Mr Allen to apologise for the behaviour during the investigation and disciplinary meetings were intrinsically related to Mr Allen's continued sense of being aggrieved over the issue of the lieu day.

[26] It is arguable that a fair and reasonable employer would have taken Mr Allen's emotional state into consideration throughout the whole process, although the length of time taken for the whole process, which with the investigation and disciplinary meetings spanned a 3 week period, is a factor to be taken into consideration of a reasonable "cooling off period". It is also a factor which may be relevant to any finding which may be made in consideration of contributory behaviour by Mr Allen, which may in turn address the practicality of reinstatement.

[27] It is submitted for Mr Allen that the fair and reasonable employer would not have dismissed him in all the circumstances at the time the dismissal occurred. In opposition, C3 submit that this was an incident involving insubordination and offensive language to a manager which differentiated it from the situation in which offensive language is used to a fellow employee⁴, thus amounting to repudiatory conduct. This was exacerbated by Mr Allen's continued refusal to apologise for his behaviour; resulting in C3 having no confidence that he would not repeat the conduct in the future.

[28] Practicability is an issue in the consideration of reinstatement. Practicability includes an assessment of whether or not workplace relationships can be restored. Mr Allen has said that he would have no difficulty in continuing to work with Mr Payne. Further that he was ready and willing to attend work.

³ Kostic v Dodd CC 14/07, CRC 4/06 at

⁴ Macadam v Port Nelson Limited (No 1) [1993] 1 ERNZ 279 at pg 289

[29] Mr Allen was dismissed on the basis that C3, in the situation in which Mr Allen refused to demonstrate remorse and apologise for his behaviour, lacked the requisite trust and confidence an employer must have in an employee. Mr Payne has said in his affidavit that he would have real difficulty in continuing to work with Mr Allen in light of what he perceives to be continued defiance to him. C3 submit that Mr Allen's reinstatement would have an adverse impact on the attitude of fellow employees towards the management team.

[30] I find that there is a possibility that contributory behaviour may be found on the part of Mr Allen, resulting in a more than theoretical risk that Mr Allen may establish a personal grievance but fail to obtain reinstatement.

The Balance of Convenience and Alternative Remedies

[31] The claim for interim reinstatement is advanced on the basis that in a total of 15.5 years of service with C3 this is the first time that there has been an incident involving Mr Allen in disciplinary action.

[32] It is submitted that Mr Allen, who denies in his affidavit that he has a continued attitude of intransigence towards his managers, has no difficulty in working with Mr Payne, and that Mr Allen's usual workplace is approximately 1 kilometre from where Mr Payne works.

[33] Mr Pritchard in his affidavit stated that although Mr Allen had no formal warnings, he had been spoken to on previous occasions about insubordination. Mr Pritchard further stated that if Mr Allen was to be granted interim reinstatement, it would be difficult for Mr Payne, who as a manager was frequently at the wharf where Mr Allen worked, to retain the respect of other employees.

[34] It was further submitted that the fact that Mr Allen has no meaningful work is causing him social isolation and loss of income. Additionally, it is advanced that Mr Allen is unlikely to find work of similar pay and conditions.

[35] An Investigation Meeting on the substantive matter is scheduled for July. Mr Allen is not in a precarious financial situation, and there is no suggestion that C3 could not meet any compensation for lost remuneration should Mr Allen eventually succeed. Awards of compensation could substantially or wholly restore Mr Allen to his pre-dismissal position.

[36] Taken as a whole, I find that the balance of convenience favours the Respondent.

Overall Justice

[37] There are some issues in this case concerning the response by C3 to a single incident of insubordination and use of offensive language to a manager by an employee of long-standing service. There is the aspect of intransigence to be taken into account of consideration of the reasonableness of the outcome. Even if a grievance is established, it may not be practicable to reinstate Mr Allen. Also relevant is that fact that a hearing on the substantive matter is scheduled to take place within a moderate time frame.

[38] Taken as a whole I find that the overall justice favours the Respondent.

Determination

[39] For the above reasons the Authority exercises its discretion in relation to interim reinstatement by not making the order sought.

Costs

[40] Costs are reserved pending the final determination of the matter.

Eleanor Robinson
Member of the Employment Relations Authority