

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 412
5398862

BETWEEN

DANNY BELSHAM
Applicant

A N D

PORTS OF AUCKLAND
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Simon Mitchell, Counsel for Applicant
Kylie Dunn, Counsel for Respondent

Investigation Meeting: 14 November 2012 at Auckland

Date of Determination: 19 November 2012

DETERMINATION OF THE AUTHORITY

- A. Mr Belsham's application for interim reinstatement is granted;**
- B. The substantive claims brought by Mr Belsham against POAL will be investigated by the Authority at a meeting to be held on 26 and 27 February 2013;**
- C. Costs are reserved.**

Application for interim reinstatement

[1] The applicant, Mr Danny Belsham, was a stevedore employed by the respondent, Ports of Auckland Limited (POAL) until his summary dismissal for serious misconduct on 16 October 2012.

[2] Mr Belsham claims that his dismissal was unjustified and is seeking interim reinstatement pending determination by the Authority of his substantive claim. Mr Belsham seeks permanent reinstatement, reimbursement for lost wages and

compensation for humiliation, loss of dignity, and injury to feelings pursuant to s.123(1) of the Employment Relations Act 2000 (the Act). The substantive matter is to be heard by the Authority at an investigation meeting on 26 and 27 February 2013.

[3] POAL opposes Mr Belsham's application for interim reinstatement and his substantive claims and says Mr Belsham's summary dismissal was justified on the grounds of serious misconduct. POAL oppose Mr Belsham's interim reinstatement on the grounds it is not practicable and reasonable.

[4] As required by s127 of the Act, an undertaking has been given by Mr Belsham to abide by any order that the Authority may make in respect of damages in determining his employment relationship problem.

[5] Mediation was attended by the parties but did not result in the matter being resolved. An investigation meeting to deal exclusively with the interim reinstatement application was convened at Auckland on 14 November 2012.

The law

[6] Section 127(1) of the Act provides that:

The Authority may if it thinks fit, on the application of an employee who has raised a personal grievance with his or her employer, make an order for the interim reinstatement of the employee pending the hearing of the personal grievance.

[7] Section 127(4) provides:

When determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the object of this Act.

[8] The law relating to interim injunctions is well established and has been recently set out in a decision of the Employment Court in *McKean v. Ports of Auckland Ltd*¹. At para.[4], Judge Inglis clarified the relevant legal principles:

In determining an application for interim reinstatement the Court must have regard to:

- *whether the plaintiff has an arguable case that he was dismissed unjustifiably as defined by s.103A of the Act;*
- *whether the plaintiff has an arguable case for interim reinstatement in employment under s.125 of the Act if he is found to have been dismissed unjustifiably;*

¹ [2011] NZEmpC 128

- *where the balance of convenience lies between the parties in the period until the Court's judgment is given on those issues; and*
- *the overall justice of the case.*

Background

[9] Mr Belsham was employed by POAL as a stevedore. At the time of his dismissal he had been employed by POAL for approximately 19 years.

[10] Following a disciplinary process, Mr Raoul Borley concluded that Mr Belsham had refused a clear work instruction, this amounted to serious misconduct and he had lost trust and confidence in Mr Belsham continuing in his employment with POAL. There is no dispute that Mr Belsham was asked by the Shift Manager, Mr Ian Kitching to drive his straddle for the first shift slot on 21 August 2012 and that Mr Belsham did not drive the straddle until after a discussion with Mr Mike Kirwan, Senior Shift Manager.

[11] Mr Jonathan Hulme, Manager- Stevedoring became aware of the matter and by letter to Mr Belsham dated 24 August 2012, commenced a disciplinary investigation. Mr Hulme requested a meeting with Mr Belsham on 30 August 2012. There were difficulties in delivering the letter to Mr Belsham, which according to Mr Hulme was because Mr Belsham refused to accept the letter. On 3 September 2012, Mr Hulme requested that Mr Belsham meet with him. Mr Belsham attended the meeting with Mr Trevor Conroy. Mr Hulme was at the meeting with Mr Rod Lingard, a Human Resources Adviser to POAL. Mr Hulme gave the letter of 24 August 2012 to Mr Belsham and informed Mr Belsham he was considering suspending him. The meeting became heated.

[12] Following a break to enable Mr Belsham to consider the letter and the proposed suspension, Mr Hulme suspended Mr Belsham. A disciplinary meeting was held on 5 September 2012. Mr Hulme and Pat Naden, a Human Resources Advisor from POAL attended along with POAL's legal representative Ms Kylie Dunn. Mr Belsham was represented by Maritime Union of New Zealand's (MUNZ) lawyer, Mr Simon Mitchell. Mr Dave Phillips, the MUNZ delegate also attended. Mr Belsham provided POAL with a written statement responding to the concerns raised in Mr Hulme's letter of 24 August 2012 together with a hazard reporting form and a copy of the dangerous goods protocol.

[13] Mr Belsham gave as his reasons for not driving his straddle, health and safety concerns following a spillage on a ship on which he had been rostered as ship foreman. Mr Belsham claimed he had been re-rostered as a straddle driver instead of ship foreman because POAL had decided not to follow proper procedures with regard to dangerous goods and knew that he would ensure procedures for addressing spillages were complied with.

[14] The disciplinary investigation continued and on 7 September 2012, Mr Hulme sent a letter to Mr Belsham refuting Mr Belsham's claims and recording his initial findings that he did not accept Mr Belsham's explanation for refusing to drive his straddle on 21 August 2012. Mr Mitchell replied on behalf of Mr Belsham in a letter dated 12 September 2012 and also challenged Mr Hulme's role as decision maker, claiming his letter of 7 September 2012 suggested he had lost objectivity. Mr Borley was substituted as decision maker and continued with the investigation. Further letters were exchanged between Mr Borley and Mr Mitchell on 24 and 26 September 2012 respectively. By letter to Mr Mitchell dated 2 October 2012, Mr Borley stated that he was of the view that Mr Belsham failed to follow a lawful and reasonable instruction and such failure constituted serious misconduct. Mr Mitchell was invited to respond before Mr Borley made a final decision. Mr Mitchell replied on 4 October 2012. A meeting was held on 15 October 2012 at which Mr Mitchell and Mr Belsham were present along with Mr Borley and Ms Dunn. Mr Borley's finding of serious misconduct was discussed along with appropriate sanction.

[15] By letter to Mr Mitchell from Mr Borley dated 16 October 2012, Mr Belsham was summarily dismissed. Mr Borley in determining summary dismissal was the appropriate sanction says he took into account Mr Belsham's lengthy 19 year service for POAL along with the fact he was on a recent oral warning for a similar offence.

Is there an arguable case that Mr Belsham was unjustifiably dismissed?

[16] Mr Belsham's employment is subject to a collective agreement between POAL and MUNZ dated 1 July 2009 to 30 September 2011 (the collective agreement).

[17] Clause 4.2.7(a) of the collective agreement provides:

The following are examples of conduct that may constitute serious misconduct and may warrant instant dismissal:

(a) *Refusal to carry out proper work instructions.*

[18] Ms Dunn for POAL submitted that a failure to follow a lawful and reasonable direction can give rise to a finding of serious misconduct justifying dismissal. Ms Dunn further submitted that this was not a case where Mr Belsham denied the misconduct. Mr Belsham's evidence is that he did not drive his first slot because he was concerned by POAL's actions regarding the chemical spill on a vessel coming in to port.

[19] Mr Mitchell submitted that Mr Kitching did not direct or instruct Mr Belsham to drive the straddle rather Mr Kitching asked Mr Belsham to "*man the straddle*" and suggested Mr Belsham could discuss the matter with Mr Kirwan when he arrived.

[20] In Mr Kitching's affidavit of 6 November 2012, he refers to the email he sent to both Mr Kirwan and Mr Hulme at 9.59am on 21 August 2012 as a true record of his conversation with Mr Belsham.

[21] Mr Kitching's email stated:

At 0645 this morning Danny Belsham told me that he had an issue with the allocation of the job he had been given. He said that his allocated job should be on the ship as a leading hand and not in a straddle as he had been allocated to. I then asked him to man his straddle as per the roster and he could speak to Mike Kirwan when he arrived in. ... At that stage I asked again for Danny to man up his straddle and his reply was that he would not and was going to wait for Mike Kirwan to arrive. At this point our discussion was finished and Danny went into the mess room to wait for Mike to arrive at work.

[22] It is common ground that following this discussion with Mr Kitching Mr Belsham waited in the mess room for Mr Kirwan. When Mr Kirwan arrived he met with Mr Belsham and his support person, Ron Bell shortly after 8am to discuss Mr Belsham's straddle allocation. At the conclusion of the meeting, Mr Belsham left to drive the straddle.

[23] Whether or not Mr Belsham was directed or instructed by Mr Kitching to "*man up the straddle*" is at issue between the parties and can not be resolved at this preliminary stage. Determining whether or not there was an instruction to Mr Belsham which was refused by him is critical to POAL's decision to summarily dismiss him.

[24] However, even if Mr Belsham did receive and refuse the instruction and acted in breach of clause 4.2.7(a) it does not automatically follow that such misconduct justifies dismissal.

[25] In the Court of Appeal decision in *Sky Network Television Ltd v Duncan* [1998] 3 ERNZ 917 at.922, His Honour Mr Justice Blanchard stated:

Disobedience of an order which an employer has the lawful authority to give to the employee is a form of misconduct but it does not necessarily follow, at common law, that such an act of disobedience justifies dismissal. The disobedience must be wilful, a word which in this context “connote[s] some deliberate design or purpose to derogate from duty” (Adami v Maison de Luxe Ltd (1924) 35 CLR 143,152 per Isaacs ACJ). It has an overtone of the knowingly improper. There has to be something which amounts to a deliberate flouting of the terms of the employment contract (Laws v London Chronicle(Indicator Newspaper) Ltd [1959] 1 WLR 698;[1959]2 All ER285)

[26] The thrust of the evidence for POAL, in particular that of Mr Kirwan, is that Mr Belsham’s main concern was that he should be allocated to a Ship Foreman role, rather than having to drive a straddle and this was his motivation in refusing Mr Kitching’s instruction. Mr Belsham’s refusal, according to Mr Kirwan was not because of any health and safety concerns. This is a conflict in the evidence which can not be resolved at this preliminary stage.

[27] What is not in dispute is that following the discussion with Mr Kirwan, Mr Belsham did as instructed and took up his duty to drive the straddle. It is arguable that Mr Belsham, if it is found he was instructed by Mr Kitching, did not “*deliberately flout*” the terms of his employment agreement.

[28] However, the overriding test is as stated by Judge Travis in *Butcher v OCS Ltd* [2008] ERNZ 367 at 384 in reliance on *Sky Network Television* (supra):

..is not whether there was wilful disobedience to obey a lawful and reasonable instruction, but whether in all the circumstances, including the nature of the inquiry carried out, a fair and reasonable employer would have dismissed.

[29] Judge Inglis in *McKean v Ports of Auckland Ltd* (supra) at para.[37] states:.

The question under s103A, as amended, is whether the decision to dismiss was one that a reasonable and fair employer could have taken in the particular circumstances. It is apparent that Parliament intended to widen the circumstances in which an employer can justify a dismissal. This is reflected in the substitution of the word “could”

for “would”. It is tolerably clear that, as amended, s103A reflects a statutory acknowledgment that there is likely to be a range of responses open to a fair and reasonable employer in any particular case. The question is whether a dismissal is justifiable is to be determined on an objective basis. Mr McKean must establish an arguable case that his dismissal was not within the range of responses available to a fair and reasonable employer in all of the circumstances at the time. Serious misconduct will usually be “conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.

[30] At this stage it appears clearly arguable that Mr Belsham’s conduct was not such as to deeply impair or be destructive of the confidence or trust essential to the employment relationship. It is arguable whether Mr Belsham received an instruction from Mr Kitching. It is arguable that if Mr Belsham did receive an instruction it was wilfully refused and as such amounted to the deliberate flouting of his employment with POAL. Mr Belsham informed Mr Kitching he had health and safety concerns and wished to discuss these with Mr Kirwan, he discussed these with Mr Kirwan and when instructed by Mr Kirwan returned to work. Viewing this conduct objectively, it is clearly arguable Mr Belsham’s summary dismissal was unjustified.

Does Mr Belsham have an arguable case for reinstatement if found to have been dismissed unjustifiably?

[31] Mr Belsham is required to establish not only that he has an arguable case that his dismissal was unjustified but that he would be reinstated on a permanent basis. As mentioned earlier in this determination, from 1 April 2011 reinstatement is no longer the primary remedy where a personal grievance has been established.

[32] Mr Mitchell strongly argued that in considering an application for interim reinstatement the Authority must have regard to the object of the Act (s.127(4)). The object of the Act is set out in s.3 and states:

The object of the Act is-

- a. *to build productive employment relationships through the promotion of good faith and all aspects of the employment environment and of the employment relationship*
 - (i) *By recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and*
 - (ii) *by acknowledging and addressing the inherent inequality of power in employment relationships.*

[33] Mr Mitchell contended that s.3(a)(ii) is often overlooked and that recognition of the inequality in bargaining power which arises in the circumstances of dismissal is required.

[34] The object of the Act and its individual components are addressed in the circumstances of dismissal by s 103A of the Act. Section 103A(2) states:

The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[35] Also, the object of the Act is I suggest, recognised, assessed and balanced by the Authority when considering the balance of convenience and overall justice of an application by an employee for reinstatement on an interim or permanent basis.

[36] Section 125(2) of the Act provides:

The Authority may, whether or not it provides for any of the other remedies specified in s.123, provide for reinstatement if it is practicable and reasonable to do so.

[37] Counsel for POAL submitted that reinstatement on either an interim or permanent basis was neither practicable nor reasonable. It was submitted that Mr Belsham's actions in refusing to follow a lawful instruction had caused *irreparable harm* to the employment relationship and it no longer had *trust and confidence in Mr Belsham that he will follow lawful and reasonable instructions given to him as part of his employment relationship going forward*.

[38] In support of its contention, POAL pointed to four warnings it had issued over the last seven years for similar instances of misconduct. Mr Belsham received three warnings, in 2005 and 2008. The most recent warning relates to his actions in covering up a camera in a straddle for which he was orally warned on 3 August 2012. Mr Kitching and Mr Kirwan both assert they do not have confidence that Mr Belsham will follow instructions. Mr Hulme and Mr Borley make very general statements that among other things Mr Belsham is "*a constant headache*" and "*a difficult employee to manage*".

[39] I must consider firstly the fact that none of the warnings related to a refusal by Mr Belsham to carry out particular work as alleged in this case. None of the three historical warnings related to a refusal to follow instructions and no warnings have been issued in the years 2009, 2010 and 2011. The incident for which Mr Belsham

was verbally warned in August 2012 occurred in May 2012 some three months prior and arose out of an acrimonious industrial environment.

[40] Mr Hulme also pointed to the difficulties he encountered with Mr Belsham during the disciplinary process. Mr Belsham would not accept the letter of 24 August 2012 requesting a meeting because the letter was not delivered by Mr Hulme. Mr Hulme couriered the letter to Mr Belsham which was responded to in a letter dated 28 August 2012 from a KS Belsham who Mr Hulme believed to be Mr Belsham's wife in the following terms:

As Danny was not home when I received delivery of your letter I opened it and read your correspondence and filed it in the fireplace. Any more correspondence to this address will be placed in the hands of my solicitor.

Furthermore, I am still waiting payment for my outstanding invoice which I understand you refuse to pay. Any further meetings regarding Ports of Auckland will take place during the ports time not ours.

[41] The invoice referred to in the letter from KS Belsham related to disciplinary meetings attended by Mr Belsham which resulted in the oral warning of 3 August 2012. Mr Hulme regarded this behaviour as aggravating and it does in my view support his concerns that Mr Belsham is difficult to manage. It also demonstrates a lack of insight by Mr Belsham into his conduct on 21 August 2012 and the seriousness with which it was viewed by POAL.

[42] Mr Belsham has had 19 years of service with POAL, is 61 years of age, is unlikely to obtain alternative employment with similar remuneration and his wife is on long term ACC. Mr Belsham, while not in a desperate financial position, has ongoing commitments.

[43] Both practicability and reasonableness are issues in the consideration of reinstatement. Whether or not workplace relationships can be restored must be assessed. Taking all the evidence and submissions into account, I find that on the basis of the low threshold, Mr Belsham has an arguable case that he will be reinstated if he establishes his unjustifiable dismissal claim. However, it is not a strongly arguable case, particularly in view of Mr Belsham's actions during the course of the disciplinary process.

Balance of convenience

[44] An assessment of the balance of convenience “*requires a balancing and assessment of respective injustices to the parties for the period until the merits of the case can be tried and tested*”².

[45] Mr Belsham accepts that he is in a financially secure position and will not suffer significant financial losses such as the loss of his home as a result of his dismissal. However, he and his wife will suffer financially for the period until this matter comes to a substantive hearing in late February 2013 with a decision most likely some weeks after that. Mr Belsham’s evidence is that he will use in excess of \$12,000 in savings in this interim period. It is unlikely Mr Belsham will secure alternative work in the meantime, particularly over the fast approaching holiday season.

[46] POAL contends that Mr Belsham could be compensated with other remedies, including damages, if he was not reinstated on an interim basis but was permanently reinstated following determination of his substantive claims. Mr Belsham could be returned to the financial position he enjoyed prior to dismissal if he was awarded damages. However, damages will not be sufficient to compensate Mr Belsham for the loss of a job he enjoys and gets much satisfaction out from.

[47] Other factors to consider and weigh up are the strength of Mr Belsham’s case and the period of time of more than 4 months within which Mr Belsham’s substantive claims can be determined by the Authority.

[48] I consider the balance of convenience favours Mr Belsham.

Overall justice

[49] The remedy of interim reinstatement is discretionary and requires the Authority to stand back and consider whether overall justice requires interim reinstatement.

[50] I consider the overall justice follows the balance of convenience and that there are no compelling reasons why Mr Belsham should not be reinstated in the interim until his substantive claims can be determined by the Authority.

² *McKean v. Ports of Auckland Ltd* para.[51]

Orders

- Mr Belsham has given the required undertaking as to damages pursuant to s127 of the Act agreeing to abide by any order that the Authority may make in respect of damages sustained by POAL through the grant of an order for interim reinstatement and that the Authority decides Mr Belsham ought to pay in the event his substantive claims are not successful.
- Mr Belsham is to be reinstated on an interim basis to his former position of stevedore with POAL with effect from the date of his summary dismissal.
- Costs are reserved.

[51] The Authority will shortly convene a conference call to timetable the filing of witness statements and other matters in preparation for the investigation into Mr Belsham's substantive claims at an investigation meeting on 26 and 27 February 2013.

Anna Fitzgibbon
Member of the Employment Relations Authority