IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 341/09
5278468

	BETWEEN	RAY CLAYTON Applicant
	AND	PORTS OF AUCKLAND LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Simon Mitchell for Applicant Kylie Dunn for Respondent
Investigation Meeting:	18 September 2009
Determination:	22 September 2009

DETERMINATION OF THE AUTHORITY

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[1] This determination concerns an application for interim reinstatement under s127 of the Employment Relations Act 2000 ("the Act").

[2] Ports of Auckland Limited (POAL) dismissed Ray Clayton from his job as a stevedore on 10 August 2009. POAL managers decided Mr Clayton's explanations about two workplace incidents – one on 9 June and one on 26 July – were unacceptable.

[3] On both occasions he was driving a 'straddle', a large machine which lifts up to three containers at a time to move them around the wharves. Sitting in the straddle cab, about three stories high, Mr Clayton had switched his radio to a different channel than the one on which instructions to straddle drivers were usually transmitted by the dispatch control centre. He had done so because he had formed the view it was safer to hear the information transmitted on channel 1B to other employees working in the area rather than the transmissions to straddle drivers on channel 1C.

[4] The managers investigating these incidents found that he failed to follow standard operating procedures and subsequently refused to follow instructions to keep his radio on channel 1C. They decided Mr Clayton's actions were serious safety hazards and amounted to serious misconduct in breach of his terms of employment.

[5] Mr Clayton claims his dismissal was unjustified and seeks orders for permanent reinstatement, lost wages, distress compensation and his costs.

[6] He has also lodged an application for interim reinstatement pending hearing of his personal grievance claim. He provided the required undertaking to abide by any order for damages sustained by POAL if interim reinstatement was ordered.

[7] The Authority made arrangements for POAL to lodge its statement in reply and affidavits regarding the interim reinstatement application, and for a hearing of submissions on that application. Mediation on an urgent basis was meanwhile directed but did not resolve the matter.

[8] Submissions were heard on 18 September 2009. The factual background was set out in affidavits lodged by:

(i) Mr Clayton; and

(ii) Maritime Union secretary Russell Mayn who attended three disciplinary meetings with Mr Clayton; and

(iii) POAL senior shift manager for stevedoring, Mike Kirwan, and stevedoring manager, Jonathan Hulme, who both met with Mr Clayton in four disciplinary meetings about these incidents and made the decision to dismiss him; and

(iv) POAL dispatch controller Stefan Reynolds; and

(v) POAL human resources manager Jon Baxter; and

(vi) POAL shift manager Ian Kitching; and

(vii) POAL operational performance coach Eddie Haretuku.

Principles on interim reinstatement

[9] Under s127 of the Act the Authority must apply the law relating to interim

injunctions while also having regard to the objects of the Act when considering an interim reinstatement application. This requires Mr Clayton to have an arguable case to be considered through subsequent investigation. An assessment is to be made of how best to regulate the positions of the parties until that investigation and determination of the substantive issues is made. That assessment is referred to as the balance of convenience. Whether effective remedies other than interim reinstatement are available to Mr Clayton must be considered as a factor in that balance. Finally the Authority is to take a global view of the justice of the case and decide what should be done to attain that. Throughout the objects of the Act are considered, including under s3 for employment relationships to be built on good faith behaviour and under s101 to recognise the importance of reinstatement as a remedy.

[10] As noted by the learned authors of *Personal Grievances*, Wellington, Brookers, 2002 at 11.3.06:

> *the Court ha[s] drawn attention from time to time to the importance of not seeking the answer to an interlocutory injunction application in the rigid application of a formula. In reality the considerations of whether there is an adequate alternative remedy, where the balance of convenience lies, and the overall justice of the case will often overlap.*

[11] Investigation on the interim reinstatement application is confined to the untested evidence contained in the affidavits of various witnesses, considering the parties' submissions and reaching a determination after weighing the available information and applying the relevant principles.

[12] If an order for interim reinstatement is to be made, it may be subject to any conditions the Authority thinks fit.

The background

[13] Mr Clayton has worked for POAL for 15 years, the last ten on a permanent basis. His duties include working as a straddle driver, yard leading hand and general duties.

[14] On 23 January 2009 Mr Clayton's supervisor took him to Mr Kirwan's office to discuss an incident earlier that shift where Mr Clayton had stopped his straddle

suddenly so that following straddles needed to take evasive action. Mr Clayton's explanation was that he did not agree with a recent change of procedure which allowed for straddles to keep driving through an area where a crane was operating to remove or replace hatch covers on a ship. He considered the procedure unsafe. Mr Kirwan reminded Mr Clayton that the new procedure had been considered by the health and safety committee. He followed this up with a memo, dated 23 January, to Mr Clayton which included the following two points of advice to him:

> *I expect that from this point onwards you will follow the procedures as required. If you do not follow the procedures then this may be seen as misconduct or serious misconduct and may need to form part of a disciplinary investigation. …*
>
> *If you identify any further hazards please follow the existing procedure and raise this in a hazard report to the duty shift manager or shift supervisor as soon as practical.*

[15] On 15 June Mr Clayton handed in two forms – one headed "*hazard reporting*" and one headed "*near miss reporting*" complaining that there had been no warning for a utility vehicle being driven onto the berth area around 8.30pm and that this "*ute*" had "*no head lights on*". He included a note reading: "*There is a brake (sic) down between 1xB and 1xC channel*".

[16] The ute was driven by the same supervisor who raised the 23 January safety concern with Mr Clayton.

[17] Mr Kirwan spoke to both that supervisor and Mr Clayton about the 15 June incident. He decided there had been a failure by the supervisor to follow procedure and all managers were to be reminded to wait for an 'all clear' after radioing Dispatch before driving onto the berth.

[18] Mr Kirwan also arranged for another supervisor and Mr Haretuku to talk with Mr Clayton about the procedure. These discussions occurred in the following weeks. Mr Haretuku recalls Mr Clayton restating concerns that using radio channel 1C was dangerous because he believed the dispatch controllers did not always pass on to 1C channel users all necessary information that was provided to and from users of channel 1B.

[19] It is not clear from the affidavit evidence if Mr Clayton was informed of what

specific action Mr Kirwan had taken in dealing with his complaint.

[20] On 9 July 2009 Mr Kirwan received a report about an incident involving Mr Clayton that day. For around 15 minutes Mr Clayton's straddle was stationary and he used his onboard computer to reject a number of instructions from the electronic dispatch system to do certain jobs. Mr Clayton had not responded to calls from the dispatch controllers who were calling him on channel 1C because, unknown to them, he had his radio switched to channel 1B.

[21] The following day Mr Kirwan wrote a letter to Mr Clayton calling him to a "*formal meeting to discuss concerns about your behaviour while driving a straddle*". It noted the issue was "*serious*" and could result in disciplinary action of a warning or in some situations dismissal.

[22] Mr Kirwan arranged for a supervisor to hand deliver this letter. Through a series of oversights it was not delivered and neither did Mr Clayton get a re-dated version couriered to him seven days later.

[23] However Mr Kirwan did see Mr Clayton in person on 20 July and found out he had not received the letters. Mr Kirwan then told Mr Clayton he was required to attend a disciplinary meeting about his 9 July conduct. That conduct was referred to as rejecting jobs and not responding to calls from dispatch.

[24] The meeting was scheduled for 27 July. On that morning Mr Kirwan received a report of a further incident involving Mr Clayton on the previous evening.

[25] The dispatch control room had reported a problem getting hold of Mr Clayton on the radio. A controller contacted shift manager Ian Kitching to complain that Mr Clayton was operating on channel 1B and had refused four requests to switch to channel 1C. Mr Kitching called Mr Clayton on channel 1B and told him to come to his office. Mr Kitching arranged for a union delegate to sit in on the meeting.

[26] Mr Kitching's evidence is that during the discussion Mr Clayton twice refused to use channel 1C, despite Mr Kitching saying Mr Clayton had to follow usual procedure for straddle drivers.

[27] Mr Kitching was aware of the disciplinary meeting scheduled for the following day (about the 9 July incident) and decided Mr Clayton was to stand down on full pay until that meeting. He told Mr Clayton that the 26 July incident would be addressed at the 27 July meeting.

[28] Shortly after Mr Clayton returned with another delegate. In that brief discussion Mr Kitching was told that Mr Clayton would now comply with the requirement to change channels. Mr Kitching responded that the stand down was to remain and Mr Clayton could discuss the issue with Mr Kirwan the next day.

[29] There is detailed evidence in the affidavits about the four disciplinary meetings which were then held – on 27 July, 31 July, 4 August and 7 August. A fifth meeting – where the POAL managers announced their decision to dismiss – was held on 10 August.

[30] There is no dispute about much of what was said in those meetings so I need not set out all details of the discussions. I need note only the following for present purposes.

[31] Firstly, in the 27 July meeting, after some argument about whether Mr Clayton's own earlier safety concerns were being addressed, Mr Clayton acknowledged that he had "*created a bigger problem doing what I have done*". His suspension on pay was continued while the company conducted further investigations.

[32] Secondly, in a letter following that meeting Mr Kirwan noted that Mr Clayton had told Mr Kitching on 26 July that he "*would now comply with the requirement to change channels*".

[33] Thirdly, the following extract from Mr Kirwan's notes of comments made by Mr Hulme in the 31 July meeting summarises POAL's concerns:

> *The problem is we are dealing with someone who has decided to put in their own procedures. As managers … [w]e cannot afford to have people making up their own rules as they rightly or wrongly don't agree with policy.*

> *On the 26th July we had all our other staff driving on 1 Charlie with no problems, with one person (a maverick as* (sic) *you will) deciding he would do what he felt like doing. The trust that an employer should have for their employees is not there in [Mr Clayton's] case at the moment and his behaviour and refusal to obey a fair and reasonable request is why we are here today. It is serious enough to result in dismissal.*

[34] Fourthly, Mr Mayn presented new information to the 7 August meeting about some factors which he said may have affected Mr Clayton's judgement and contributed to his behaviour in those incidents. They concerned some domestic relationship difficulties Mr Clayton had experienced along with working additional shifts, which combined with the relationship stresses, affected his sleep and were said to have contributed to "*out of character*" behaviour.

Does Mr Clayton have an arguable case?

[35] The question of an arguable case requires considering whether, assuming Mr Clayton can prove all the facts he alleges, he has some serious (but not necessarily certain) prospect of success. He must establish not only an arguable case that he was unjustifiably dismissed but also an arguable case that, if his grievance is successful, he would be reinstated and not simply compensated monetarily.[1] His case is not, at this stage, weighed against any defence which POAL may have except as to fundamental issues such as jurisdiction (which is not in issue here).[2] In a personal grievance application of this type, the onus is on the employer to justify the dismissal both procedurally and substantively. The threshold of 'arguable case' is usually met once a grievant disputes the basis of the purported justification for the dismissal and seeks to put the employer to the proof of it.

[36] POAL's submissions noted that Mr Clayton had admitted the misconduct that led to his dismissal – operating on the incorrect radio channel – so only the seriousness of this misconduct was in dispute. I accept this proposition succinctly identifies the essential issue in this case.

[37] While Mr Clayton may not concede his actions were misconduct, there is no dispute on the facts that he was not using the 1C radio channel as expected by the

[1] *Cliff v Air New Zealand* [2005] ERNZ 1 at [12] (EC, Colgan J).
[2] See *X v Y Ltd & NZ Stock Exchange* [1992] 1 ERNZ 863, 872-873.

dispatch controllers at the time of the two incidents. It is also a matter of fact that (i) he was asked "*several times*" on 26 July to switch from 1B to 1C and (ii) he, at least initially, told Mr Kitching he would not change to 1C because of his safety concerns.

[38] For POAL this constituted instances of serious misconduct as defined in the applicable collective employment agreement which include "*refusal to carry out proper work instructions*" and "*failure to observe safety rules*".

[39] However – and without, at this stage, assessing the relative strength or weakness of Mr Clayton's personal grievance claim – I accept there is an arguable case that his dismissal was unjustified when measured against the statutory standard.

[40] It is, I accept, at least arguable that:

(i) In assessing his conduct on 9 and 26 July POAL did not properly weigh the context of Mr Clayton's genuine, even if misguided, belief that POAL had not effectively addressed the safety concern he raised – in the manner directed by the 23 January memo – on 15 June (about communication of information about movements of other employees operating on 1B channel not being properly conveyed to straddle drivers and others operating on 1C); and

(ii) POAL did not appear to have considered Mr Clayton's statements on 26 and 27 July that he would follow directions to operate on 1C from then on (and taking him having made those statements to be a 'circumstance' at the time of POAL making the decision to dismiss him); and

(iii) Relying on a principle stated in *Fuiava v Air New Zealand Limited*,[3] a fair and reasonable employer would have found Mr Clayton's statement of willingness to comply, information about personal circumstances which may have affected his behaviour, his 15 year employment history and no previous disciplinary sanctions were mitigating factors so strong that it would not have dismissed.

[41] I do not accept Mr Mitchell's submission that an aspect of the arguable case was that Mr Clayton was not aware until late on 26 July that the operation of the radio

[3] [2006] ERNZ 806 (EC, Travis J) at [70].

was a live disciplinary issue. He says that because Mr Clayton had not got the letters calling him to a disciplinary meeting about the 9 July incident and that even if he had, the letter only referred to the general subject of "*behaviour while driving a straddle*" with nothing specific about the radio issue. That is not consistent with Mr Kitching's affidavit evidence that he told Mr Clayton on 20 October that one concern to be discussed would be "*failing to respond to calls from Despatch*".

[42] Having accepted that the question of justification of the dismissal is arguable, I also accept that it is also arguable that he would be reinstated and not simply compensated monetarily should his grievance subsequently be confirmed once the substantive investigation of his claim is determined.

[43] Subject to potential findings on contributory conduct, permanent reinstatement is plainly arguable on the basis of (i) no previous disciplinary issues, (ii) no other complaints about the performance of his work, and (iii) whether the actual circumstances of their respective safety concerns – his about POAL procedures and POAL's about his idiosyncratic response to them – was proportionate to POAL's subsequent assertion of a serious loss of trust and confidence over the issue.

Where does the balance of convenience lie?

[44] Identifying the balance of convenience – in the sense of detriment or injury – in this case requires likely financial loss to Mr Clayton to be weighed against potential risks to POAL and the extent to which such risks might be managed or minimised.

[45] Mr Clayton is a 46-year-old man with no qualifications and a skill set limited to the specific requirements of port work for the last 15 years. He faces real difficulties in the current tight labour market in finding alternative work that will generate enough income to meet weekly mortgage commitments of $300 and other living costs from now until this matter is heard and a determination issued.

[46] There is a significant period of delay. The investigation meeting on the substantive issues is notified for 15 December 2009 – 13 weeks hence – and, with the demands of other cases in the Authority, no determination is likely to be issued for a further six to eight weeks after that meeting.

[47] Against that 'detriment' to Mr Clayton, the following factors favour POAL:

(i) health and safety obligations

[48] POAL operates workplaces with significant identified hazards, including the use of large machinery such as the straddles. While Mr Clayton says he will now comply with radio channel requirements, real doubt exists on the basis of past actions that were outside the established procedures for working safely and for raising any concerns about safe work. There is a risk to third parties – that is other workers driving straddles, operating cranes and doing other work on the wharves.

(ii) loss of trust and confidence

[49] A claim that an employer has lost trust and confidence in its former employee has, at the interim reinstatement stage, yet to be tested and should not prevent interim reinstatement unless made out in a compelling fashion.[4]

[50] POAL rightly accepts that it must do more than simply assert such loss. It must be able to point to some conduct incompatible with Mr Clayton's continued faithful discharge of his duties.[5] Here it relies on Mr Clayton's "*maverick*" actions in deliberately choosing to operate on radio channel 1 B despite requests not to do so. Mr Mitchell, answering questions on his submissions, accepted Mr Clayton conduct was not a single act but a course of conduct, albeit one which Mr Clayton can personally rationalise. However Mr Clayton's own affidavit establishes, for interim stage purposes only, that he did not faithfully discharge duties in complying with procedures and directions about radio use. That in turn supports the subsequent loss of trust and confidence averred to by Mr Kirwan and Mr Hulme as a basis of their decision to dismiss.

(iii) adequacy of alternative remedies

[51] Mr Clayton could be adequately compensated for financial losses if he were

[4] *Auckland District Health Board v X* [2005] 1 ERNZ 487 at [38] (EC, Travis J).
[5] *Orme v Eagle Technology Group Limited* (unreported, EC Wellington, WEC 40/95, 15 June 1995, Goddard CJ).

not reinstated on an interim basis but ultimately found to be unjustifiably dismissed. However damages could not adequately address harm to POAL (or its workers) if Mr Clayton were reinstated on an interim basis and subsequently injured himself or another worker by a further safety breach.

(iv) availability of permanent reinstatement as a remedy not affected

[52] In same cases declining to reinstate on an interim basis might diminish the prospects of permanent reinstatement if the worker were later determined to have been unjustifiably dismissed. Examples are where the specific job has meanwhile been permanently filled or the delay meant the worker would no longer be sufficiently skilled or qualified to return to work if reinstated. That is not at issue here as Mr Clayton's job as a stevedore is described as "*generic*" with no real risk that a position would not be available if permanent reinstatement were eventually ordered in the determination of his personal grievance application.

[53] On the basis of the identified factors I find the balance of convenience lies with POAL.

Overall justice

[54] Having found that Mr Clayton has an arguable case but the balance of convenience regarding interim reinstatement lies with POAL, the Authority must stand back and consider the overall justice of this case. I find this lies with POAL for the following reasons.

[55] Subject to the usual caveat that evidence at this stage has not yet be tested and challenged through questioning of witnesses by the Authority and representatives, POAL's case appears stronger than that of Mr Clayton.

[56] Mr Mitchell suggests it is not clear what instruction and what procedures Mr Clayton has breached. However it appears there were clear directions given to him at a number of times on which he deliberately took contrary actions – including what he was told to do about reporting hazard concerns in the 23 January memo, electronic job moves refused on 9 July, dispatch instructions to change to 1C on 26 July, and Mr

Kitching's requirement on 26 July that he follow usual procedures about radio channel use.

[57] Safety concerns are a strong factor in the particular port work environment. While I have considered whether risks could be managed by having Mr Clayton reinstated on conditions requiring that he not work on a straddle, alternative duties would likely involve working in other roles which also require compliance with safety procedures and supervisors' directions. In light of his alleged conduct to date I do not consider there is sufficient certainty he would meet those requirements.

[58] The likely detriment to Mr Clayton's income is less decisive than the potential risk of injury or death to other POAL workers.

[59] There is no irreversible effect on permanent reinstatement as a potential remedy if Mr Clayton's dismissal is later found to be unjustified. While I have accepted elements of Mr Clayton's case are weak, I do not go as far as accepting POAL's submission that the prospect of permanent reinstatement is "*remote*". Reinstatement remains the primary remedy potentially open to him, unless truly blameworthy contributory factors were established so as to require its removal.

Determination

[60] For the reasons given above, Mr Clayton's application for interim reinstatement is declined.

Costs

[61] Costs on this application are reserved.

Robin Arthur
Member of the Employment Relations Authority