IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 109/09
5153149

	BETWEEN	TODD CURTIS Applicant
	AND	AIRWORK (NZ) LIMITED Respondent

Member of Authority:	Robin Arthur
Representatives:	Anne-Marie McInally for Applicant Kerry Amodeo for Respondent
Investigation Meeting:	28 March 2009
Determination:	6 April 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] Airwork (NZ) Limited dismissed Todd Curtis from his employment as an aeronautical electrician on 19 February 2009. Airwork general manager Richard Pitt believed Mr Curtis had broken an agreement made the previous day for Mr Curtis to wear trousers issued to him as part of the Airwork staff uniform. Mr Pitt described this as a serious breach of trust and confidence.

[3] Mr Curtis claims the dismissal was unjustified and seeks orders for permanent reinstatement, lost wages, compensation for hurt and humiliation and his costs.

[4] He has also lodged an application for interim reinstatement pending hearing of his personal grievance claim. Both Mr Curtis and his union – the Engineering, Printing and Manufacturing Union (EPMU) – have lodged undertakings to abide by

any order for damages sustained by Airwork through the granting of the interim reinstatement application.

[5] The Authority made directions for mediation on an urgent basis, lodging of Airwork's statement in reply and affidavits regarding the interim reinstatement application, and for a hearing of submissions on that application.

[6] Affidavits were lodged by Mr Curtis, his EPMU organiser Mike Loughran, Mr Pitt, Airwork workshop manager John Simcox and Airwork quality safety manager Derek McDonald.

[7] The parties met with the assistance of a Department of Labour mediator on 13 March 2009 but were not able to resolve matters between them.

[8] I heard submissions from the parties' representatives on the application for interim reinstatement on Saturday, 28 March 2009.

Principles on interim reinstatement

[9] Section 127 of the Act requires the Authority to apply the law relating to interim injunctions having regard to the object of the Act. This requires Mr Curtis to have an arguable case to be determined through subsequent investigation. An assessment is to be made of how best to regulate the positions of the parties until that subsequent investigation and determination of the substantive issues is made. That assessment is referred to as the balance of convenience. Whether effective remedies other then interim reinstatement are available to Mr Curtis must be considered as part of that assessment. 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] This investigation 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 Curtis began working for Airwork around five years ago. He started as an apprentice and is now an electrician with a supervisory role in its electrical workshop. He has no history of any previous disciplinary action. He is 24 years old.

[14] Throughout his employment Mr Curtis has worn his own work shorts to work during the summer months. He only wore trousers in the cooler winter months.

[15] In late December 2008 Airwork issued each employee with a new uniform. Its employment agreement requires employees to wear a uniform provided by the employer. The uniform issued included 5 'polo' shirts bearing the Airwork logo and two pairs of long trousers.

[16] Hangar staff were also provided with two pairs of shorts. Mr Curtis was not given shorts because his primary work areas were in other parts of the Airwork premises. Some areas in which he works are temperature controlled, others are not.

[17] In January 2009 an Airwork foreman let Mr Pitt know that Mr Curtis had asked if he could be supplied with cotton shirts as the polycotton material was aggravating his eczema condition. The following week Mr Pitt had an informal

meeting with Mr Curtis where Mr Pitt expressed concerns about Mr Curtis' attitude to management. During that conversation Mr Pitt agreed to supply cotton shirts for Mr Curtis and asked why he was not wearing the uniform trousers. Mr Curtis replied that he only wore shorts in summer and wanted to keep doing so. Mr Pitt said he would organise the shirts and get back to Mr Curtis about his request to continue to wear shorts.

[18] Around a fortnight later the ordered cotton shirts arrived and Mr Pitt arranged for Mr Simcox – as Mr Curtis' workshop manager – to pass the shirts on to Mr Curtis. Meanwhile Mr Pitt had considered the question of whether Mr Curtis should be provided with shorts but decided he could see no reason for an exception for one person. He had Mr Simcox also pass on news of that decision to Mr Curtis.

[19] When Mr Simcox spoke with Mr Curtis, he told him to wear trousers the next day. Mr Curtis said he did not want to and did not attend work the next day.

[20] In the following week Mr Curtis wore shorts to work on Monday. On the Tuesday he was called to a meeting with Mr Pitt and Mr Simcox and asked to explain why he was not wearing the uniform trousers as directed. Mr Curtis insisted he wanted to wear shorts because trousers were not comfortable and would affect his eczema. Later that day he was advised of a formal disciplinary meeting for the next day.

[21] This meeting was held on 18 February 2009 and Mr Curtis was accompanied by his EPMU organiser Mike Loughran.

[22] In the meeting Mr Curtis presented a survey of some staff he had carried out the previous day. The survey sheet, bearing names and signatures from 22 staff, showed no opposition to wearing a uniform but a majority not satisfied with its level of comfort. Six employees specifically asked for shorts.

[23] Mr Pitt was not happy with what he saw as Mr Curtis canvassing colleagues to "*support his defiance*".

[24] Mr Loughran repeated Mr Curtis' earlier explanation for wanting to wear shorts – his eczema condition. Mr Curtis suggested that Mr Pitt and Mr Simcox could contact a medical specialist he had seen about his eczema. Mr Curtis had seen an immunologist in the previous week.

[25] After an adjournment in the meeting Mr Loughran proposed a resolution to the issue. Both Mr Pitt and Mr Loughran, who both made notes during the meeting, recorded the resulting agreed outcome in slightly different ways.

[26] Mr Pitt's note said:

> *So what you are saying is that you will wear long trousers from today, and should in the future you develop excima (sic), then you will as normal practice as an employee contact your doctor for advice and make us (Airwork) aware of his recommendations.*
>
> *Todd agreed after discussing this twice.*

[27] Mr Loughran's note said:

> *Todd agrees to wear uniform on the premis that any future occurrence of eczema is reported. A specialist will then be contacted re treatment and prognosis. At that time company will again assess the situation. Todd needs to wash trousers first.*

[28] The meeting closed with Mr Pitt saying Mr Curtis would receive no warning relating to the matter and that he was pleased to be able to "*put this matter behind us and move forward*".

[29] However the following day Mr Pitt was upset to find that Mr Curtis came to work wearing shorts. Mr Curtis was immediately called to a meeting with Mr Pitt and Mr Simcox. When asked to explain why he was not wearing the uniform trousers as agreed the previous day, Mr Curtis said he had left his trousers in the laundry bin at work to be washed.

[30] Mr Curtis insisted that he had said in the previous day's meeting that he wanted the trousers washed before he wore them.

[31] Mr Pitt believed Mr Curtis was well aware that employees had to wash their own uniforms, except for lab coats and overalls which were washed by a laundry service provide by Airwork.

[32] Mr Pitt told Mr Curtis that the situation had become "*loss of trust confidence issue*", that his explanation was unacceptable given what was agreed the previous day, and that his employment was terminated.

[33] Mr Curtis demanded to see his union representative first but Mr Pitt said that was not going to make any difference.

[34] Mr Simcox then escorted Mr Curtis back to the electrical workshop to collect his personal belongings before leaving the premises. Mr Simcox avers that Mr Curtis pulled out a number of car parts from under benches and in drawers and packed those items with his gear to take home.

[35] Later that day Mr Loughran contacted Mr Pitt and asked him to reinstate Mr Curtis. Mr Pitt refused and the union shortly after lodged a personal grievance on behalf of Mr Curtis.

[36] Eight days later, on 27 February 2009 at around 12 noon, Mr Pitt saw a car doing a 'doughnut' – a manoeuvre to turn a car repeatedly in a tight circle – outside the entrance to the Airwork premises. Mr Pitt was told by another staff member that the driver was Mr Curtis. Mr Pitt's affidavit describes this as evidence of Mr Curtis having an angry and defiant mind-set. Mr Curtis did not comment on this alleged conduct in a reply affidavit.

Does Mr Curtis have an arguable case?

[37] The question of an arguable case requires considering whether, assuming Mr Curtis 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 Airwork 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.

[38] I accept and prefer Ms McInally's submissions that Mr Curtis has an arguable case of unjustified dismissal.

[39] It is arguable that a fair and reasonable employer would not have dismissed an employee, with no previous disciplinary issues, in circumstances where:

a. there was disagreement on the terms of the agreement made on the previous day; and
b. there was no formal disciplinary meeting, with a right of representation, to hear and consider Mr Curtis' explanation of the alleged breach before deciding to dismiss him; and
c. other options were available to the employer, including issuing a warning, or directing Mr Curtis to launder and wear his trousers the next day, or using a provision of the employment agreement to suspend him while the situation was investigated.

[40] I accept Ms McInally's submission that the facts are arguably similar to the scenario considered by the Court of Appeal in *Sky Network v Duncan* [1998] 3 ERNZ 917, 923. As in that case Airwork is seeking to exercise a contractual right (here to wear a uniform) but it is arguable that his dismissal for acting on a sincerely held belief (including concerns about aggravating his eczema) is not necessarily justified even if his conduct was a nuisance to Airwork and legally in the wrong.

[41] As in the *Sky Network* case (at 924) it is arguable that Airwork could have done more to resolve the matter. And on the present facts, it is arguable that the issue

[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.

of who would launder the trousers could have been quickly resolved on 19 February with Mr Curtis directed to wear them on the following day. That would have resulted in him complying with the 17 February agreement within two days rather than the one day anticipated by Airwork.

[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] Permanent reinstatement is plainly arguable on the basis of the lack of any previous disciplinary issues, no complaints about the performance of his work, and whether the actual circumstances of an argument about wearing shorts – as done without complaint from Airwork for five years – is proportionate with the company's subsequent assertion of a serious loss of trust and confidence over the issue.

Where does the balance of convenience lie?

[44] I consider the balance of convenience – in the sense of detriment or injury – lies with Mr Curtis for the following reasons.

[45] Mr Curtis, through his union, promptly lodged his interim reinstatement application.

[46] An investigation meeting on the substantive issues has been notified for 25 June – 11 weeks away – and, with the demands of other cases in the Authority, no determination is likely to be issued for a further six to eight weeks.

[47] Meanwhile Mr Curtis has a recognised right to work and exercise his skills: *Auckland District Health Board v X (No 1)* ERNZ 487 at [33]-[36] (EC, Travis J). I do not accept that damages would be sufficient to compensate him for loss of that opportunity This is particularly so in the present recessionary economic climate where the opportunities – particularly in such a specialised field as servicing

helicopters – for Mr Curtis to seek other work and income meanwhile are most likely very limited.

[48] I am not persuaded that there is a 'paramount' safety issue preventing interim reinstatement of Mr Curtis.

[49] Mr Simcox's affidavit sets out three instances of unsatisfactory work practices by Mr Curtis not identified until after his dismissal. These practices are said to have comprised:

a. having car parts in the workshop area, in breach of rules about items allowed in an aviation controlled environment; and
b. having raw materials on an open shelf in the workshop, in breach of Civil Aviation Rules requiring such material to be locked in a bonded store; and
c. not invoicing jobs completed as long ago as 2007, compromising Airwork's ability to trace components in event of an update or recall.

[50] Mr Simcox avers that those instances – combined with what he calls the "*present mind-set*" of Mr Curtis – lead him to believe that the reinstatement of Mr Curtis would "*pose a present safety risk to the company's operations*". On that basis Mr Simcox says he is not prepared to confirm Mr Curtis is competent to perform assigned tasks.

[51] In turn Airwork quality safety manager Derek McDonald – relying solely on the affidavits of Mr Pitt and Mr Simcox – avers that he has concerns about "*apparent security lapses*" by Mr Curtis and the lack of confidence in him from those two managers.

[52] In a reply affidavit Mr Curtis has provided evidence about Airwork's internal audit process. He also avers that he does not know about the invoices referred to and has provided accurate feedback on regular job lists. He accepts he had some non-aircraft parts in the workshop. He refers to a cylinder head sitting on a bench in the workshop for more than four months without comment from a manager. He says that

Mr Simcox was aware that Mr Curtis did some "*homers*" during work breaks. He had done so from the time he began employment and was not secretive about it. He averred that he would have no difficulty complying with any policy introduced by the company stopping staff doing "*homers*".

[53] The *bona fides* of what is said in affidavits lodged about interim reinstatement applications cannot be tested in the same way that occurs through full investigation. However some assessment may still be made of the credibility of their contents, including material which appears self-serving or contrived. As a general rule, the benefit of any real doubt would go to the applicant.

[54] In the present case I do not accept that the allegations of Mr Simcox and Mr McDonald regarding safety "trump" the totality of factors considered in the balance of convenience. Expressing post facto concerns about allegedly unsatisfactory workshop practices by Mr Curtis logically raises questions about why Mr Simcox and Mr McDonald had not previously identified those issues if they are truly so significant.

[55] However taking those concerns as expressed, it is clear that any potential detriment could be addressed, if Mr Curtis were granted interim reinstatement, by the appropriate manager reinforcing relevant rules on what is allowed in the workshop and checking this. The relative detriment to Airwork is minor and, if the rules are to be as strictly observed as Mr Simcox and Mr McDonald suggest, is something it should be doing in any event. It is not impracticable.

[56] Neither do I accept Airwork's assertion of a loss of trust and confidence in Mr Curtis is a factor favouring the company in the balance of convenience. As Mr Amodeo correctly submitted, mere assertion is not enough.

[57] 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.[3] Airwork must be able to

[3] *Auckland District Health Board v X* [2005] 1 ERNZ 487 at [38] (EC, Travis J).

point to some established conduct by Mr Curtis that is incompatible with continued faithful discharge of his duties.[4]

[58] Airwork points to his conduct of a survey of opinion of other workers about their uniform on 17 February and his "*defiant display*" of doing a "*doughnut*" in his car outside the company premises eight days after his dismissal. It says both activities demonstrate that Mr Curtis is a disruptive influence on the company's operation.

[59] Assuming the contents of the survey to be genuine, with responses from 22 workers, it is clear that Mr Curtis is not alone in having reservations about aspects of the uniform that Airwork was contractually entitled to introduce. Airwork cannot hold Mr Curtis solely responsible for that diversity of opinion.

[60] In relation to the single, unexplained 'doughnut' incident, there is nothing to suggest such conduct by Mr Curtis would be repeated. His union has provided its own undertaking as to damages if he is not subsequently reinstated on a permanent basis. It is reasonable to assume his union, with that interest in mind, will also counsel him about appropriate behaviour until his claim is finally determined.

[61] While I have considered Airwork's concerns regarding safety and Mr Curtis' recent mind-set, the dispute between the parties is confined to a narrow issue about wearing an item of clothing. That dispute does not prevent Mr Curtis from faithfully discharging his work duties. His otherwise satisfactory work record suggests he would able to do so if reinstated on an interim basis. Airwork has not compellingly established that it would not be practicable for Mr Curtis to be reinstated on that basis.

Overall Justice

[62] I consider the overall justice of this case, as best as can be gauged on an interim basis, lies with Mr Curtis. This conclusion relies on an assessment of the strength of Mr Curtis' case, including for permanent reinstatement, and Airwork's answer to that case.

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[4] *Orme v Eagle Technology Group Limited* (unreported, EC Wellington, WEC 40/95, 15 June 1995, Goddard CJ) at 10.

[63] Mr Curtis has a strong case that he has suffered a disproportionately severe sanction for a relatively minor uniform issue. While Mr Pitt was concerned enough about Mr Curtis "attitude" to have an informal talk in January, it was not enough to warrant a formal performance management or disciplinary process. Otherwise Mr Curtis had a satisfactory work record and an apparently real concern about the possible effect on his eczema of not being about to wear shorts during the hot summer months (after five years of having done so at Airwork).

[64] The weakness of Mr Curtis's case is the extent to which he may have contributed in a blameworthy way to the situation leading to his abrupt dismissal on 19 February. There are real questions, on a good faith basis, about (i) his earlier insistence that he would continue wearing shorts and (ii) whether he could reasonably have believed that the company was required to launder and return his trousers to him before he complied with the agreement made in the meeting on 18 February.

[65] During the hearing of submissions I canvassed in discussion with counsel whether any order for interim reinstatement of Mr Curtis should be on a garden leave basis at Airwork's discretion. Counsel had the opportunity to take instructions before making submissions on that issue. Airwork prefers that option because of what it now regards as safety issues around Mr Curtis' work practices and its present position on confidence in him. Mr Curtis regards a garden leave option as what Ms McInally submitted would be "*a poor second best*".

[66] In light of the conclusions drawn in respect of the balance of convenience regarding Airwork's position of safety and confidence, I do not consider it reasonable for any provision for interim reinstatement in this case to be on a garden leave basis. If reinstated Mr Curtis would return to being under the full range of his contractual obligations to Airwork. This includes an obligation on his part to comply with all relevant rules and policies in carrying out his work. For Airwork it includes an ability to apply its usual supervision, disciplinary and suspension rules in the event of any real and properly investigated breaches of those obligations. That provides sufficient safeguards – as least as much as the parties agreed on in entering their employment relationship – without having to go further and allow Airwork to impose garden leave

solely on its own terms. It also upholds Mr Curtis' right to work, provided he also meets his duties and obligations in that employment relationship.

[67] In reaching this conclusion I also rely on the following sworn statements in the reply affidavit of Mr Curtis:

> *I am offended by the suggestion that I would do anything irresponsible or dangerous in the course of my work. Safety is a very high priority and I take this seriously.*
>
> *I understand that the company has a view about the uniform, but I am confident that we could work together professionally while that is being resolved by the Authority.*

Determination

[68] For the reasons given above, and on the basis of the undertakings at to damages given by Mr Curtis and the EPMU, I order Airwork to reinstate Mr Curtis to his former position pending the hearing of his personal grievance.

[69] This order is made under s127 of the Act and is subject to the following conditions:

(i) Mr Curtis is to be reinstated to the Airwork pay roll from the date of his dismissal; and

(ii) Airwork, at its discretion, may arrange for Mr Curtis to return to work immediately or, in order for it to make any necessary arrangements, on a day suitable to it within the next five working days; and

(iii) Prior to his return to work Airwork is to arrange for Mr Curtis to collect two pairs of uniform trousers in sufficient time for Mr Curtis to launder them (if he wishes to do so before wearing them); and

(iv) Mr Curtis is to wear the Airwork uniform trousers when he returns to work; and

(v) Both parties are to comply in good faith with the agreement reached on 18 February – as recorded in the notes of Mr Pitt and

Mr Loughran – including reporting and acting on medical advice; and

(vi) Airwork may make arrangements for Mr Curtis to refresh his knowledge of relevant safety and policy requirements for his work; and

(vii) Airwork may make arrangements for, and Mr Curtis shall co-operate with, reasonable inspection of Mr Curtis' work area and supervision of Mr Curtis work to ensure he is complying with those requirements; and

(viii) The parties are to seek mediation assistance in the event of any significant disagreement regarding these provisions.

[70] Throughout, both parties are required to act in good faith. This includes being communicative and responsive, and behaving in the professional manner referred to in the passage cited above from Mr Curtis's reply affidavit.

Further investigation

[71] The Authority has already made timetable directions for the lodging of witness statements in advance of the investigation meeting notified for 25 June 2009 – beginning with lodging of the Applicant's witness statements on 8 May 2009.

Costs

[72] Costs on this application are reserved.

Robin Arthur
Member of the Employment Relations Authority