

**Note: This determination  
includes an order prohibiting  
publication of some evidence**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2017] NZERA Auckland 80  
3001459

BETWEEN CARL FINDLAY  
Applicant

AND PORTS OF AUCKLAND  
LIMITED  
Respondent

Member of Authority: Robin Arthur

Representatives: Simon Mitchell and Jeremy Lynch, Counsel for the  
Applicant  
Jennifer Mills and Kevin Patterson, Counsel for the  
Respondent

Investigation Meeting: 13 March 2017 and further submissions

Further submissions: On 15 March from the Applicant and on 16 March 2017  
from the Respondent

Determination: 23 March 2017

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**DETERMINATION OF THE AUTHORITY**

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**A. Ports of Auckland Limited must take no further steps in its disciplinary inquiry into the conduct of Carl Findlay on 30 July 2016 until the Authority has investigated and determined Mr Findlay's personal grievance application regarding the justifiability of its actions in carrying out that inquiry. This order is made in reliance on an undertaking as to damages lodged by Mr Findlay.**

**B. Costs are reserved.**

## **Employment Relationship Problem**

[1] This determination concerns the circumstances in which the Authority may take the very unusual course of making an order to postpone an employer's disciplinary inquiry until the Authority can investigate and determine whether a worker has been unjustifiably disadvantaged by allegations the employer has made and how its inquiry is being carried out.

[2] On 23 December 2016 Carl Findlay, a stevedore employed by Ports of Auckland Limited (POAL), lodged an application seeking an interim order that would require his employer to postpone a disciplinary inquiry until after the Authority could fully investigate his personal grievance. The grievance alleged POAL acted unjustifiably in seeking to continue with a disciplinary inquiry. The Authority has scheduled an investigation meeting about that grievance to be held in late May.

[3] POAL strenuously opposed Mr Findlay's application. It described the request for an interim order as premature and as intended to frustrate, to delay and to bring an early and unreasonable end to a disciplinary inquiry it was obliged to undertake. POAL said it intended, subject to any contrary direction by the Authority, "to continue the disciplinary inquiry to a natural conclusion". POAL had plans to continue that process from February 2017, after the summer break, but put those plans on hold while the Authority considered whether any interim order should be made.

### **How the application arose?**

[4] On 12 December 2016 POAL Chief Executive Officer Tony Gibson put Mr Findlay on notice of a disciplinary inquiry into his conduct. The inquiry concerned an exchange of words between Mr Findlay and another port worker, Jake Rua, in the workers' mess between 7.01 am and 7.04 am on Saturday, 30 July 2016.

[5] Mr Findlay has worked at the port since 2001. He is the president of the Maritime Union of New Zealand and a member of the union's local branch executive at the port. He was involved in the negotiations for the collective agreement concluded between POAL and MUNZ in early 2015. The agreement was reached after lengthy disagreements over what provisions it should contain for rosters and working hours. Mr Rua is a member of PortPro, a union of port workers which did

not support MUNZ's opposition to the roster changes that POAL ultimately succeeded in having included in its collective agreement with MUNZ.

[6] There is ongoing tension between the two groups of workers. Members of each union routinely sit at different tables in the workers' mess.

[7] The exchange of words between Mr Findlay and Mr Rua on 30 July, in the presence of other members of the two unions, began over a comment Mr Findlay made about the safety of the roster system. In the course of their exchange Mr Findlay suggested the demands of the roster contributed to the causes of the deaths of two POAL workers, away from the workplace, during the past fortnight. One of those workers was a PortPro member. The other, who died of a heart attack, was a MUNZ member. The discussion became heated after Mr Rua asked Mr Findlay whether he had evidence for his comment about the effect of the roster changes and when Mr Findlay suggested Mr Rua's support for the roster changes made him, in part, responsible for the workers' deaths.

[8] The following day Mr Rua made a written complaint about what he described as "intimidation, hatred and bullying" from "fellow work colleagues" on 30 July. His complaint referred to comments from Mr Findlay and two other workers. He said one of those other workers called him "a fucken scab" while another told him to "shut the fuck up" and said they could "settle this outside".

[9] Mr Findlay made a written complaint of his own after he was told POAL had commissioned an external consultant to investigate Mr Rua's complaint. Mr Findlay wrote that Mr Rua had asked him and his friends "if they wanted a go" and had called him a "cunt".

[10] On 18 August POAL's appointed investigator Tony McKone began his inquiry into the allegations of both Mr Rua and Mr Findlay. His inquiry included interviews of Mr Rua, Mr Findlay, one of the other workers Mr Rua had complained about, and of two other workers who gave accounts supporting Mr Rua's complaint. Mr Findlay supplied written statements from five workers supporting his account of events (which included the two other workers about whom Mr Rua had also complained). Mr McKone also viewed CCTV footage of the mess room from the morning of 30 July.

[11] In early November Mr Findlay was given a draft of Mr McKone's investigation report so Mr Findlay could make submissions about adverse findings made against him in the draft report. Mr Findlay's submissions included comments about what conclusions could be drawn from what the CCTV footage showed. Mr McKone's final report, released later that month, made no changes to its findings or conclusions as a result of those submissions. Mr McKone recommended POAL agree with his findings that Mr Rua's complaints about the two other workers were not substantiated but "that the way Mr Findlay confronted Mr Rua is not consistent with [POAL] values and is an incident of one-off bullying and harassment". It also concluded Mr Findlay's allegations about Mr Rua's conduct on 30 July were not substantiated.

[12] Mr Gibson advised Mr Findlay of his intention to conduct a disciplinary inquiry by letter dated 12 December 2016. The letter, some 16 pages in length, was plainly the result of extensive analysis and drafting by POAL's legal advisors. It reviewed the information available to Mr McKone. It evaluated statements made by Mr Findlay, Mr Rua and others. It analysed Mr McKone's conclusions. It described Mr Gibson as inquiring into an allegation that, on 30 July, Mr Findlay had "uttered words akin to that described by Mr Rua" and two supporting witnesses and, if Mr Findlay did so, "whether the words in question constituted a threat, harassment, intimidation or bullying". The letter advised Mr Findlay he could be dismissed for serious misconduct if he was "found to have used words of the type alleged by Mr Rua".

[13] At a disciplinary meeting held on 20 December Mr Gibson described the allegation Mr Findlay must answer in a way more serious in nature and degree than that described in the carefully drafted 12 December letter.

[14] Mr Gibson asked Mr Findlay whether he denied making a "death threat" to Mr Rua. Mr Findlay's counsel objected to the allegation as being new and inconsistent with Mr Rua's evidence about what was said to him by Mr Findlay on 30 July.

[15] This more serious and, according to Mr Findlay's counsel, new characterisation of the allegation appeared to have prompted the application for the Authority to take the unusual step of intervening in an employer's disciplinary inquiry. Mr Findlay's statement of problem, lodged on 23 December, raised a

personal grievance claiming POAL's continuation of its disciplinary process was an unjustified action in the circumstances. He sought an order that POAL not be permitted to continue its inquiry. Until the Authority could investigate and determine his grievance, he sought an interim order preventing POAL continuing its inquiry meanwhile. His request for his application to be dealt with on an urgent basis was declined. The parties were referred to mediation which they attended on 7 February without resolving the matter.

### **The Authority's investigation of the interim application**

[16] Mr Findlay's application for an interim order has been investigated and determined on the basis of his statement of problem, POAL's statement in reply, and the evidence lodged in the form of an affidavit from him and an affidavit from Mr Gibson. Relevant documents, including copies of correspondence, Mr McKone's report and transcripts of interviews, were provided with the affidavits.

[17] Counsel for both parties lodged thorough written submissions addressing the factors relevant for determination of an interim application of this type. At the investigation meeting counsel also made oral submissions, summarising their argument and replying to the other party's argument on the principles and factors applicable to whether or not an interim order should be made.

[18] While I have closely considered what was said in the affidavits, relevant documents and counsels' submissions, this determination has not recorded all the information given and arguments made. Rather, as permitted by 174E of the Employment Relations Act 2000 (the Act), findings of fact and law have been stated briefly along with conclusions reached. Orders specified have been made in reliance on an undertaking as to damages lodged by Mr Findlay. He had not provided an undertaking with his initial application but this was lodged, by arrangement, soon after the investigation meeting.

### **Order prohibiting publication of some evidence**

[19] At the investigation meeting POAL was directed to provide a copy of a letter said to have been sent to Mr Rua initiating a disciplinary inquiry into his conduct on 30 July 2016. Mr Gibson's affidavit had not referred to any further inquiry into Mr Rua's conduct but this, and the letter to Mr Rua about it, was disclosed in an answer

given by counsel to a question asked about POAL's submissions. The Authority's direction to provide the letter was subject to an order that its contents not be published. Apart from any discussion Mr Findlay and his counsel needed to have about it with one another, what POAL's letter to Mr Rua said was prohibited from any further publication, that is by discussion or in writing, to anyone else. POAL subsequently provided a copy of the letter, some 17 pages long and dated 19 December 2016. Other than what is revealed of its existence and contents in this determination, the order made orally at the Authority investigation meeting, prohibiting publication of POAL's letter of 19 December 2016 to Mr Rua is confirmed.<sup>1</sup>

### **The issues**

[20] The issues for determination were:

- (i) Did Mr Findlay have an arguable case POAL had acted unjustifiably in seeking to continue its inquiry; and
- (ii) Where did the balance of convenience (which includes the issue of the adequacy of other potential remedies) lie between the issuing of this determination and when the Authority could investigate and determine Mr Findlay's substantive grievance; and
- (iii) Where did the overall justice lie between now and then?

### **Arguable case?**

[21] The first stage of considering whether the requested interim order should be made required an evaluation of whether Mr Findlay had an arguable case that POAL acted unjustifiably in initiating and continuing with a disciplinary inquiry into his conduct on 30 July 2016. The standard of evaluation was whether Mr Findlay had established there was a sufficiently serious and arguable question to be investigated – that is there was some reasonable, but not necessarily certain, prospect that such an argument could succeed.

[22] Mr Findlay's submissions conceded it was "generally" the best course to let an employer's disciplinary process run its course before raising a personal grievance about how such a process was conducted or what was decided as a result of it.

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<sup>1</sup> Employment Relations Act 2000, Schedule 2 clause 10.

However, in this case, he submitted POAL's actions of continuing a disciplinary inquiry into his conduct were so unreasonable, they could not be justified.

[23] POAL's submissions, broadly paraphrased, accepted it was possible in some circumstances for the Authority to make an interim order intervening in an employer's ordinary right and obligation to carry out a disciplinary process but submitted there was no known authority for making the permanent order sought by Mr Findlay once the Authority had investigated his substantive disadvantage grievance. In either the interim or permanent scenario, POAL submitted the Authority should be loath to interfere in an employer's prerogative to complete a legitimate disciplinary process and the Authority could only appropriately do so where an employee produced strong evidence of a severe injustice or breach and showed an injunction was necessary to protect a legal right or prevent infringement of such a right. POAL submitted Mr Findlay failed to meet this high evidential threshold as it had only recently commenced a legitimate disciplinary inquiry that was being conducted fairly and in good faith.

[24] Mr Findlay identified five factors he submitted established POAL's actions were arguably so unreasonable as to be unjustified:

- (i) the delay in progressing the matter;
- (ii) the death threat allegation;
- (iii) a reliance on earlier warnings;
- (iv) doubts about the impartiality of investigation by Mr Gibson; and
- (v) doubt about what reliance POAL placed on Mr McKone's report.

#### *Delay*

[25] Mr McKone was commissioned to conduct an investigation on 8 August but did not provide his final report to POAL until after mid-November. Mr Findlay was given the final version of that report with the 12 December letter that told him Mr Gibson was initiating a disciplinary inquiry. The letter was sent to him 19 weeks after the 30 July exchange and Mr Rua's written complaint of 1 August.

[26] In *Nee Nee v C3 Limited* the Employment Court rejected a submission that an employer's investigation and disciplinary processes carried out over a three month period amounted to unjustifiable delay. In that case the Court was satisfied that length

of time was not unreasonable as the managers were taking care to ensure a fair process was adopted and the correct factual position ascertained before they made any decisions.<sup>2</sup>

[27] Like Mr Findlay the worker in the *C3 Limited* case was not suspended while inquiries were underway so had continued to attend work and receive pay as normal. However Mr Findlay sought to distinguish that case on the grounds that the delay was shorter than he had already experienced and no prejudice had arisen from the delay for that other worker. In Mr Findlay's case the process had already taken a month longer by 12 December and yet was still only at the start of an intended disciplinary phase. POAL's next intended step after the 20 December disciplinary meeting had been to conduct further interviews in early February.

[28] As an aspect of prejudice said to be caused by that delay, Mr Findlay pointed to notes of Mr McKone's interviews on 26 August with Mr Rua and two other witnesses. Those notes recorded comments the three men made about their ability to remember accurately what happened and what was said on 30 July. The passage of time since then could further compromise what they might reliably recall if called upon to confirm or clarify earlier statements as part of the yet-to-be conducted disciplinary process.

[29] POAL submitted Mr Gibson had already turned his mind to the effect of delay on what the witnesses remembered of events. In the letter of 12 December he referred to it as something he would take into account in his disciplinary inquiry. He said it would not be fair otherwise. However he also noted Mr Findlay had proposed two further witnesses as recently as 20 December 2016, and provided statements from them then. POAL submitted that Mr Findlay's suggestion of additional witnesses showed further disciplinary inquiry was still appropriate, despite the delay.

[30] Weighing those submissions, delay was only weakly arguable as a factor that could result in a finding POAL had acted unjustifiably in initiating a disciplinary inquiry only in mid-December. The doubt or imprecision in their memories that Mr Rua and two witnesses reported in their August interviews with Mr McKone had occurred within only a few weeks of the 30 July event. It was recorded in their signed

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<sup>2</sup> [2013] NZEmpC 207 at [38].

notes of interview. That evidence was not changed by POAL only moving to the disciplinary stage of its process some months later.

*The death threat allegation*

[31] The carefully drafted letter of 12 December that announced Mr Gibson's disciplinary inquiry had not referred to a "death threat". Mr Gibson's affidavit confirmed he raised the death threat allegation at the 20 December disciplinary meeting:

In the course of the meeting, I put it to [Mr Findlay] that what he is alleged to have said to Mr Rua might be viewed as constituting a 'death threat', and asked him directly if he made such a threat.

[32] A letter from POAL's counsel dated 22 December suggested Mr McKone's report had made such a finding. However that report did not describe anything Mr Findlay was alleged to have said as a death threat. In one passage the report referred to Mr Findlay having said to Mr Rua that his "days are numbered", in the context of Mr Rua riding a motorbike. Two other witnesses also reported to Mr McKone that Mr Findlay had referred to the prospect of seeing or hearing that Mr Rua had been "splattered", again in the context of Mr Rua riding a motorbike.

[33] Mr Findlay, compellingly, submitted this new allegation was strongly arguable to be inconsistent with what Mr Rua had said in his complaint of 1 August and with what Mr Rua and two other witnesses then said in their interviews with Mr McKone on 26 August.

[34] In his written complaint Mr Rua gave this account of what Mr Findlay said on 30 July when Mr Rua had asked if Mr Findlay had any evidence for his suggestion that the rosters contributed to the deaths of two workers:

At this stage I was feeling like it had become a personal attack, that feeling was supported even more so when [Mr Findlay] proceeded with "You know I like that you ride a motorbike, I like that you turn up in your leathers". I reacted quickly by saying "why does it turn you on?" To which [Mr Findlay] insinuated "He liked that I ride motorbikes because it means sooner or later I would be the next one in a box".

[35] In his interview on 26 August Mr Rua gave a similar account but with a different description of how Mr Findlay answered his question about being ‘turned on’:

He responded, “Yes it does.” To the tune of “your days are numbered” or something along those lines.

[36] Later in the interview Mr McKone specifically asked Mr Rua if Mr Findlay made any explicit threat to him:

McKone: OK. In your statement, you wrote that [Mr Findlay] insinuated that [Mr Findlay] liked motorbikes because sooner or later you’d be the next one in the box.

Rua: As in “my number was up”.

McKone: Did he make any explicit threat that he was going to knock you off your bike?

Rua: No, he didn’t. In respect, he didn’t say he was going to knock me off my bike. It was more to the fact that he liked that I was taking life risks I suppose. And that sooner or later that I would be out of his road. I’m trying to join the dots here Tony, it was more ... I struggled to work out ...

McKone: He saw you as, what I call, a temporary Kiwi?

Rua: Yea, and I respect that. The problem with that part of the conversation was there were other particular factions coming in along the way, in the meantime [another worker] was going “Do you want to go the fuck outside? Let’s go outside.” And so I was back to him. Someone on my left was calling me a scab. And on the right, he [Mr Findlay] was still putting it in.

McKone: Yeah, Ok. Was there any physical pushing or shoving? Or was it all verbal?

Rua: Verbal and aggressive and angry cos at one point I said to [Mr Findlay], “why are you so angry?”

McKone: So, no physical.

[37] One of the other workers, also a member of PortPro, gave Mr McKone this account of that part of the conversation:

... This is the gist of what he said ‘cos I can’t remember word for word what he said. It was around the things of saying “Yeah, one day I want to hear you’ve been splattered ... like you’ll be gone like the other two have been. And we’ll be going to your funeral.

And [Mr Rua’s] like, “Woah, what are you trying to ... what do you mean by that?”

And he [Mr Findlay] goes “Oh you know, I just can’t wait to see. One day you’re going to have an accident on your bike”. And [Mr Rua] was like “So you’re trying to blame me for what happened to the boys?” And he [Mr Findlay] stood up and had his finger out and was like “It’s because of you and your lot that this has happened. If it wasn’t for you and your lot, you know, they wouldn’t have been, you know, run down and stuff like that”.

[38] From those passages it was strongly arguable there was no reasonable basis for an allegation that Mr Findlay had made a death threat to Mr Rua. Neither Mr Rua nor the other worker purported to quote Mr Findlay’s words exactly. Their accounts of his words referred to an insinuation, ‘the gist’ and being ‘to the tune of’ of what he said. However, if their accounts were accurate, Mr Findlay’s words might be said to have hoped for Mr Rua’s death rather than suggesting Mr Findlay made a threat to cause it.

[39] To suggest Mr Findlay did threaten to cause Mr Rua’s death was a very serious allegation. It could amount to criminal behaviour. It is a crime to threaten to kill someone: Crimes Act 1961 s 306. Such a charge will be made out if a reasonable person, fully aware of the circumstances in which the words were uttered, would have perceived them to be a threat of death or bodily harm.<sup>3</sup> That became, by what Mr Gibson asked about a “death threat” in the disciplinary meeting on 20 December, an allegation he intended to investigate.

[40] Mr Gibson’s escalation of the allegation made it seriously arguable Mr Findlay was being unjustifiably disadvantaged by the disciplinary inquiry. This was arguable because, as noted above, such an allegation appeared at plain odds with the evidence available from interviews with Mr Rua and his supporters in August. In that way, the allegation arguably lacked a factual foundation. It could not be said to have arisen from what the employer (or its agent) was told had happened and which then required investigation, including by giving the person about who it was said the opportunity to comment. Neither was it an answer to that arguable concern that, if the allegation was so lacking in substance, a fair investigation, allowed to proceed, would ultimately dispose of it. Rather, it was seriously arguable that making such a grave allegation without sufficient foundation was not within the range of reasonable responses that a fair employer could have made in all the circumstances at the time. In POAL’s case

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<sup>3</sup> *Adams on Criminal Law - Offences and Defences* (online looseleaf ed, Thomson Reuters) CA306.01.

those circumstances included the results of its investigator's work, including his interviews.

[41] In that context it was arguable POAL's actions by making and seeking to investigate that allegation were so unreasonable, a finding of unjustified disadvantage could result when the Authority investigated and determined Mr Findlay's substantive grievance application. If that were so, it was also seriously arguable Mr Findlay's position should be protected meanwhile by an interim order preventing a disciplinary inquiry continuing until that prospect was resolved.

*Reliance on earlier warnings (from 2010 and 2012)*

[42] Mr Gibson's letter of 12 December to Mr Findlay advised he was aware of two earlier disciplinary warnings issued to Mr Findlay in what Mr Gibson called "the recent past". One was issued in 2010 after POAL found Mr Findlay had intimidated truck drivers visiting the port by asking if they were union members. The other was issued in 2012 after Mr Findlay was found to have committed serious misconduct by unauthorised removal of company property. He had used a ruler to retrieve a letter that another worker had written and slipped under the door of a manager. The author of the letter had asked Mr Findlay to get it back before the manager saw it. Mr Findlay challenged the warning he had received for that conduct but an Authority determination found POAL acted justifiably in giving the warning to Mr Findlay.<sup>4</sup>

[43] Mr Gibson's letter said both warnings, expressed to expire after six months, were "historic" and might not be directly relevant to what allegedly took place on 30 July 2016. However, as the expired warnings represented "a record of past misconduct", Mr Gibson's letter stated they might appropriately be used to assess Mr Findlay's credibility in the present disciplinary inquiry and could be relevant to the question of penalty if adverse findings were made against him in it.

[44] Mr Findlay submitted there was a "serious concern" that POAL sought to take those warnings into account. However case law clearly establishes an employer may take account of previous warnings, even when expired, provided there is a fair and clear connection to the prior conduct reasonably made in the current inquiry.<sup>5</sup> In this case POAL had simply acknowledged the existence of those expired warnings and

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<sup>4</sup> *Findlay v Ports of Auckland Limited* [2012] NZERA Auckland 361.

<sup>5</sup> *Butcher v OCS Limited* [2008] ERNZ 367 at [55].

fairly notified Mr Findlay of its view that they were potentially relevant. While a potential argument might later be made if those warnings were taken into account in an unfair manner or degree in whatever disciplinary decision was reached, it was not seriously arguable now that what had been said by POAL about those warnings was a factor making its actions so unreasonable that the interim order sought was warranted.

*Doubts about the impartiality of Mr Gibson's investigating the allegations*

[45] Mr Findlay submitted there were seriously arguable doubts Mr Gibson could conduct an impartial investigation. These doubts arose from his concerns, broadly paraphrased, that Mr Gibson had:

- (i) been involved in a discussion with Mr Rua before 30 July in which Mr Gibson encouraged PortPro members to make written complaints of the type Mr Rua had made; and
- (ii) made the allegation more serious than it was; and
- (iii) been involved in the extended collective agreement negotiations, which included controversy about the safety of the roster system about which Mr Findlay had expressed strong views on 30 July and to which Mr Gibson, as chief executive of POAL, would have a firmly contrary view.

[46] POAL strongly opposed any claim of bias or preference by Mr Gibson. It submitted that, as chief executive, he was the appropriate person to conduct the disciplinary inquiry. In his affidavit Mr Gibson said that was so “particularly given the serious nature of the allegations”. In that respect his role as inquirer and decision maker was explained on the basis of a seriousness that resulted from Mr Gibson’s own escalation of the nature of the allegations, particularly that a “death threat” had been made. For reasons already given, that escalation supported the arguability of the interim order that Mr Findlay sought.

[47] Mr Gibson’s affidavit also responded to a suggestion by Mr Findlay that Mr Gibson had encouraged Mr Rua to make a written complaint. Notes of Mr Rua’s two interviews with Mr McKone showed Mr Rua had referred to being encouraged by Mr Gibson and POAL’s stevedoring manager Jonathan Hulme to “document” instances where PortPro members felt intimidated by MUNZ members. According to Mr Rua’s account he had a discussion with Mr Gibson, sometime between one and two months before the 30 July incident, in which Mr Gibson reiterated the need to document “any

type of bullying and harassment”. Mr Gibson’s affidavit confirmed he had “told Mr Rua in no uncertain terms that POAL could not act without a complaint, for without a formal complaint there was nothing to really inquire into”.

[48] At one level Mr Gibson attending discussions with union representatives, whether MUNZ or PortPro, and encouraging them to document any concerns was unremarkable and simply part of his role. However, in the particular context of a disciplinary inquiry into Mr Findlay’s conduct, there was an arguable case of a real risk of bias or the appearance of bias in Mr Gibson carrying out what would otherwise be a normal disciplinary function in his chief executive role. He had encouraged PortPro members to make written complaints. Mr Rua, a leader in the PortPro group of members made such a complaint against Mr Findlay, a leader in the MUNZ group of members. The complaint arose directly from an argument between Mr Rua and Mr Findlay about the roster system, also a matter of dispute between MUNZ and POAL on which Mr Gibson, as chief executive, could be expected to have a resolutely different analysis from Mr Findlay on whether any criticism of it had any reasonable foundation.

[49] Mr Gibson had also already declared his conclusion on whether POAL gave preferential treatment to PortPro members with this statement made in his 19 December letter to Mr Rua:

I note that in the course of the interview on 30 September 2016 that Mr Findlay and his support persons raised complaints that POAL gave preferential treatment to members of Port Pro (including you) and discriminated against members of MUNZ (a matter raised at page 11 of the transcript of Mr Findlay of 30 September 2016). This is not a matter that is relevant, in my view, to the inquiry in hand. It may provide some context from Mr Findlay’s perspective, but is unsubstantiated and irrelevant.

[50] While unusual, there can be circumstances where a chief executive’s involvement in or knowledge of aspects of the situation under inquiry may mean she or he is not suitable as the disciplinary investigator and decision-maker. A disciplinary inquiry about other senior executives is one example.

[51] On each of the three elements of concern advanced by Mr Findlay there was a sufficiently arguable case he could be unjustifiably disadvantaged by Mr Gibson’s involvement in, and approach to, the disciplinary inquiry.

*Doubts about what reliance was to be placed on the McKone report*

[52] Mr Findlay submitted POAL appeared to consider Mr McKone's report was unreliable and seemed to be undertaking a fresh investigation. Mr Gibson's letter of 12 December stated he was not bound by the findings or assessment made in Mr McKone's report. He also acknowledged criticism by Mr Findlay's counsel about the report's use and reliance on CCTV footage. His letter also referred to, and analysed in some depth, the contents of witness statements given but noted that some relevant witnesses "did not submit to an interview".

[53] There was arguably a disadvantage to Mr Findlay arising from the lack of clarity or precision about what parts of the McKone report, and the statements gathered for it, would be taken into account in the ongoing inquiry. Part of that concern however, as arguably, favoured POAL's view that further inquiry and interviews were needed. For reasons there were not entirely clear, participation in Mr McKone's investigation appears to have been on a voluntary basis and was thereby limited to partisans from each side of the union divide. The CCTV footage and interview notes taken identified various people present in the mess room, during the relevant few minutes on 30 July, who do not have appeared to have been asked for their factual account of what was said. Both Mr McKone and, in his 12 December letter, Mr Gibson accepted that one person who was interviewed had been entitled to later withdraw notes of her interview from consideration. It was not an approach that appeared consistent with the obligation at s 4(1A)(b) of the Act for all parties to an employment relationship to be responsive and communicative, unless some special circumstance existed such as exercise of a right to silence due to pending criminal proceedings. Whether further inquiries could reasonably be made of those people now, given the extended delay, was a separate, arguable question.

*Conclusion on arguable case*

[54] Mr Findlay established he had an arguable case that he was unjustifiably disadvantaged by the continuation of a disciplinary inquiry and that an interim order was warranted until his grievance on that ground could be investigated and determined.

## **Balance of convenience**

[55] The balance of convenience considers the relative effects on the parties, and others, if the interim order sought was or was not granted. Broadly there were three considerations – the effect of delay generally; any inconvenience and prejudice to Mr Findlay, POAL and, a third party, Mr Rua from further delay of the disciplinary inquiry; and whether there were adequate alternative remedies for Mr Findlay other than the order sought.

### *Delay generally*

[56] Each party criticised the other for causing delay, but each bore responsibility for some part of it. POAL's investigator took more than three months to carry out interviews and provide a report. POAL blamed Mr Findlay for part of that delay due to availability of 'his' witnesses. POAL was then prepared to start a disciplinary process in December but not continue it until February, a delay of a further two months. The Authority's investigation meeting of Mr Findlay's substantive disadvantage could have been scheduled for late April but POAL's counsel was not available then so the meeting was rescheduled to the next available dates in late May.

### *Inconvenience or prejudice to a particular party or person*

[57] If an interim order was made now but no ongoing order was made after the May investigation meeting, the delay of POAL's disciplinary inquiry until after then might affect its ability to gather reliable information from other witnesses not yet interviewed, if such further interviews were appropriate. It could not be said however that delay would create a greater prejudice to POAL's ability to better establish what had happened than already existed, due to the delay between August and December last year. In short, it was not clear it would make the situation any worse than it already was.

[58] Both Mr Findlay and Mr Rua were presumably affected by delay in resolving the situation. Both had made complaints and both were subject to disciplinary inquiries. POAL had 'put on hold' its parallel disciplinary inquiry of Mr Rua which resulted from Mr Findlay's complaint about Mr Rua's conduct on 30 July. They both might wonder and worry about what would happen eventually. However both remained at work, on pay and there was no evidence they or POAL had any real difficulty in managing those arrangements meanwhile.

### *Adequacy of other remedies*

[59] POAL submitted it faced greater relative inconvenience because Mr Findlay had the adequate remedy of raising a personal grievance if he was dissatisfied with the eventual outcome of the disciplinary process POAL wanted to complete. If he was dismissed or subject to some other outcome he considered unjustified, POAL said he was able to seek remedies, including interim reinstatement. Conversely, POAL submitted, it had no suitable alternative as it was entitled, and indeed required, to investigate serious allegations. It had obligations of fairness to Mr Rua who was entitled to have some outcome reached reasonably promptly on his complaint against Mr Findlay.

[60] However POAL was better able to bear the relative burden of the inconveniences it described. Mr Findlay, by contrast, could take cold comfort from the notion that he might ultimately seek interim reinstatement if POAL proceeded with a process that some much later Authority investigation found was unjustified. He would meanwhile be put to the expense and anxiety that would involve.

[61] The assessment of relative inconvenience, and the burdens to be borne, favoured Mr Findlay, not POAL.

### **Overall justice**

[62] As a check, and in exercise of its discretion, the Authority must consider where the overall justice between the parties lay between the date of this determination and when Mr Findlay's grievance application could be investigated and determined.

[63] There was a point of public policy to be considered. The statutory dispute resolution system, and the resources provided by the state for its operation, relies generally on the notion that a worker will raise a personal grievance after an employer has made a disciplinary decision, not during the process. There may be grievances raised about what occurred during the process but they are, in the ordinary run of events, considered later along with whatever grievance there may be about the outcome.<sup>6</sup> An employer should expect to be able to carry out its investigation and

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<sup>6</sup> See, for example, *Snowdon v Radio New Zealand* [2004] 2 ERNZ 238 at [46].

disciplinary processes and make its decision without having to justify its actions in an Authority investigation along the way. Mr Findlay's submissions conceded this was generally the best course.

[64] However the general rule must sometimes yield to exception where the circumstances make it just to do so. The exception requires a strongly arguable case and the threshold is high.

[65] For the reasons given earlier in this determination, Mr Findlay's argument crossed that threshold. Overall justice lay with him until the Authority had the opportunity to better test the evidence about whether what had been done was justified.

[66] He had a strongly arguable case that POAL's actions appeared so unreasonable, it should not be permitted to proceed as it sought to do until then.

[67] On the information available to him, Mr Gibson's allegation regarding a death threat appeared to be a bridge too far. It was a rare example where an interim order was warranted until a proper check could be made of whether an employer had gone beyond the bounds of fair and reasonable inquiry. If the interim order were not made there was a real risk of severe injustice to Mr Findlay meanwhile. Making the order was necessary to prevent infringement to his right to fair treatment in a disciplinary process until his grievance could be fully investigated and determined.

### **Costs**

[68] Costs are reserved.

Robin Arthur  
Member of the Employment Relations Authority