

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

<b>BETWEEN</b>	Damon Heath (Applicant)
<b>AND</b>	Auckland City Council (Respondent)
<b>REPRESENTATIVES</b>	Richard Harrison, Counsel for Applicant Shan Wilson, Counsel for Respondent
<b>MEMBER OF AUTHORITY</b>	Leon Robinson
<b>INVESTIGATION MEETING</b>	21 November 2006
<b>DATE OF DETERMINATION</b>	24 November 2006

**DETERMINATION OF THE AUTHORITY**

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The Authority determines that this employment relationship problem shall be resolved as follows:-

- (i) On the basis of the undertaking Damon Heath has provided, it is ordered that he be reinstated;
  - (ii) Damon Heath will not be required to perform his work duties and nor shall Auckland City Council be required to allow him to perform those duties;
  - (iii) These orders are deemed to have effect from the date of termination;
  - (iv) These orders will continue in effect until the Authority's Determination on the substantive matter is issued.
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## Application for interim reinstatement

[1] The applicant Mr Damon Heath ("Mr Heath") applies for an order for interim reinstatement to his former employment as Marina Manager at the respondent Auckland City Council's ("the Council") Viaduct Harbour Marine Village. He was dismissed from the employment on 25 October 2006. That dismissal was confirmed by the Council's Group Manager Recreation and Community Services Mr Cameron Parr ("Mr Parr") by letter dated 27 October that materially stated: -

*After hearing your explanation, considering your lawyer's submissions, and carefully considering all the factors, I concluded that:*

*You should be given the benefit of the doubt, in terms of accepting that you believed the cradles had been left at VHMV as a personal gift to you (despite a number of clients saying that they had left the cradles for VHMV to use or dispose of, and despite clients having been charged for their removal). However, you should not, in light of this, have been charging Auckland City clients for the removal of the cradles.*

*Given you believed the cradles were a gift to you, you did misuse Counsel resources by:*

*Arranging for AIMECS to dismantle the cradles under an Auckland City purchase order, so that Auckland City was invoiced for this work.*

*Using an Auckland City purchase order to hire the truck and trailer, which were used to dispose of the cradles, once they had been dismantled, again at Auckland City's expense.*

*I note that I did consider your responses on these issues before I made this decision, and in relation to your responses:*

*You said that you always intended to pay for the work AIMECS did. However, I had to take into account that you had received the invoice from AIMECS in July and took no steps to ask AIMECS to change the invoice into your name, even when you had approached AIMECS to dispute the hours that they had charged. Even allowing for the fact that you said you approached AIMECS after the initial audit/fact-finding meeting in September, to seek that the invoice be changed into your name, I could not accept that you intended the invoice to be charged to you. Further, to date the invoice has not been changed, and you had not paid it.*

*You said that you had hired the trailer to go and visit ACROW Ltd on the off chance they had made the tripods VHMV had ordered. However, you never rang ACROW to confirm that the tripods were ready, and you knew they were behind time with this project. Your explanation about hiring the truck was to clear the boat cradles from the yard. You said you did this on a Saturday, and that this was the only purpose for hiring the truck. In any event, no matter what other jobs you may have been intending to undertake using the truck or trailer, I still found it to be unacceptable that you would then use them for your own personal business.*

*I was also concerned that, during the disciplinary process, you attempted to minimise the issues that Auckland City was concerned about; saying, in relation to the \$300 you received from the scrap metal sale, that it was "only" \$300, and attempting to justify your use of Council property by saying, in effect, that Auckland City owed you something for your hard work and long hours. This kind of attitude was of serious concern and is unacceptable to Auckland City.*

*At our meeting on 25 October I summarised our findings for you, which amounted to serious misconduct by you. I told you that I was considering summary dismissal in the circumstances, and invited your comments on penalty. You chose not to comment.*

*After an adjournment, I advised you that I had concluded that the appropriate penalty was summary dismissal, as your actions had seriously breached Auckland City's trust and confidence in you.*

*I also asked you to pay the AIMECS invoice, and for the hireage of the truck and trailer.*

*I confirm my decision that you have been summarily dismissed effective 25 October 2006. Your final pay will be deposited into your bank account as soon as possible. Please make sure that you return all Auckland City property to Craig Furlong immediately.*

[2] Mr Heath lodged an application in the Authority on 8 November 2006 claiming he was unjustifiably dismissed and seeking remedies including interim reinstatement. As required, he has given a formal undertaking to abide by any order made by the Authority in respect of damages that may be sustained by the Council through the granting of an order for interim reinstatement.

[3] The parties were unable to resolve this application by mediation.

[4] At the commencement of the meeting on 21 November 2006, an investigation meeting for the substantive claim was arranged for 19 - 20 December 2006.

[5] I have met with the parties and the representatives and considered affidavit evidence from Mr Heath, Mr Parr, Manager of the Marine Harbour Viaduct Village Mr Craig Furlong ("Mr Furlong"), HR Advisor Ms Nina Ebbeling ("Ms Ebbeling"), ER Manager Ms Katherine Burson ("Ms Burson"), former Manager of the Marine Harbour Viaduct Village Ms Virginia Terpstra ("Ms Terpstra"), and assistant Marina Manager Mr Paul Jeffrey ("Mr Jeffrey"). I have also questioned Mr Jeffrey.

[6] This determination deals only with what should happen until a full investigation of Mr Heath's claim that he was unjustifiably dismissed. It is no more than that and is in no way a final determination or any influence on how his claim of unjustifiable dismissal might eventually be determined.

### **Interim reinstatement**

[7] Applications for interim reinstatement are considered under Section 127 of the Employment Relations Act 2000 ("the Act"). The established tests for interim reinstatement are these:-

- (i) whether the applicant has an arguable case of unjustified dismissal; and
- (ii) whether the balance of convenience (including the existence of alternative remedies sometimes said to be a separate test) favours the applicant; and

- (iii) the remedy being discretionary, where the overall justice of the case lies until it can be heard (including particularly the respective strengths of the parties' cases so far as they can be ascertained at this stage).

[8] The Authority is obliged to give consideration to conditional reinstatement as provided by section 127(5) of the Act. An order for interim reinstatement may be subject to any conditions that the Authority thinks fit - empowering the Authority to craft pragmatic solutions to do justice in each particular case.

### *An arguable case*

[9] Ms Wilson for the Council would not concede Mr Heath has an arguable case. Alternatively, counsel says Mr Heath has only a barely arguable case. The threshold is not high. I accept that Mr Heath need merely establish an arguable case.

[10] Mr Heath's claim that his dismissal was unjustifiable will be determined according to the statutory test of justification set out in section 103A of the Act.

[11] Having considered the allegations in the statement of problem and the reply, read the affidavit evidence and reflected on counsels' respective submissions, I find that it is arguable for Mr Heath, as Mr Harrison very helpfully summarises, that: -

- (i) It was neither feasible nor open to the Council to make a finding that Mr Heath believed the cradles in question had been gifted to him personally (and were therefore his property);
- (ii) The cost of removing the cradles in question was properly charged to the Council and the invoices of clients within his responsibilities at the time;
- (iii) The inquiry was unreasonably cut short when the council was on notice that there was further information to present and issues to consider such as statements from brokers, one Mr Art Irvine, other staff and past practice;
- (iv) The auditor's inquiry formed part of the process (but Mr Parr was not present) and while Mr Heath was told the process was not disciplinary, the auditor appeared to be investigating specific concerns;

- (v) The submissions made on Mr Heath's behalf at the two disciplinary meetings were simply not taken into account and this is demonstrated by the findings delivered by the council at the dismissal meeting;
- (vi) The denial of taking further statements and allowing further inquiry which may well have been relevant to the decision making process.

[12] I particularly note issues Mr Harrison points to arising out of apparent inaccuracies in the transcriptions of notes taken at meetings with Mr Heath. Once such instance by way of illustration is this record: -

*Handwritten notes:*

*TS: Coincides with rental of a double axle trailer.*

*DH: AIMECS – my bill – for Damon to pay. Not been on their goods receipt. They were going to (write) me another bill. Their mistake.*

*Typed transcript:*

*TS: Coincides with rental of a double axle trailer from Hire Equip.*

*DH: AIMECS is my bill, Damon Heath, I should have paid that invoice but I didn't see it, I haven't goods receipted it. It was their mistake to put a VHMV on it, it should have been my name on it.*

[13] These alleged inaccuracies certainly raise issues about the quality and integrity of the council's inquiry and I find this aspect of matters particularly persuasive of an arguable case going to the justification for the dismissal.

[14] I am satisfied that there is a tenable arguable case. I answer the first test in Mr Heath's favour.

### ***Balance of convenience***

[15] In the exercise of the Authority's discretion I weigh up the inconvenience to the Council of having to bear the burden of interim relief before the substantive case is dealt with, against the inconvenience to Mr Heath who may have a just case, of having to bear the detriment of wrongful or unjustifiable action until the problem has been investigated and determined. In this context inconvenience means detriment or injury.

[16] Mr Heath has not secured alternative employment since his dismissal. He is the sole income earner and supports his family, his wife and two children. He is particularly concerned about his inability now to service his mortgage. Although the Council argues that Mr Heath

produces no evidence of real financial hardship I am satisfied on his evidence that the detriment for him is principally financial. The Council further criticises him for having no evidence of efforts to mitigate his loss. I accept that Mr Heath has held himself in readiness for reinstatement which I further accept he is entitled to do.

[17] The Council argues the balance of convenience lies with it. It says Mr Heath will be able to find alternative work, at least on a temporary basis, given that the busy summer period is approaching. It says too that Mr Heath has transferable skills and sufficient networks in the industry to call on in his search for work. Next it says that there is ultimately a likelihood of a finding of significant contribution by Mr Heath which an order for his reinstatement in the interim would fail to have regard for. The first two matters are insignificant in the balance. The matter of contribution is by no means clear, for it remains to be seen whether his admitted conduct is in all the circumstances, ultimately to be regarded as blameworthy. I am not prepared to characterise it as such at this interim phase.

[18] The Council is particularly concerned about a real impact on its reputation and standing in the public's eyes if it Mr Heath's misuse of purchase orders and public funds. It is concerned about the public's confidence in it. Equally, it is concerned about Mr Heath's return to the workplace given what it says that he has pestered former colleagues in his challenge of his dismissal. The first concern is of course subject to the Authority's substantive findings on the matters in issue and the second I rather consider is unfair to Mr Heath. Understandably, he has sought assistance in pursuing redress for what he claims is an injustice. The alleged pestering may eventually be found to have been appropriate, and his colleagues may later re-evaluate his contact and come to a kinder view of his persistence. Neither of these matters are sufficient to sway the balance in the Council's favour.

[19] The Council also argues the balance referring to the appointment of a new marina manager. It submits that if Mr Heath is unlikely to be permanently reinstated, his interim reinstatement could be potentially detrimental to that other employee. I am not persuaded by this argument. The Council was put on notice almost immediately of Mr Heath's intention to seek interim reinstatement.

[20] As for the Council's protestations that Mr Heath's interim reinstatement will cause significant disruption and a risk that other employees may leave, some degree of disruption in the workplace is inevitable in any such application. I am unmoved by the concern that employees may resign if Mr Heath is reinstated, given any such reinstatement will be premised upon a finding that there has been unlawfulness.

[21] As for the protestations of a lack of confidence and trust in Mr Heath, at this juncture I rather regard such statements as simply bare ones, and not objectively sustainable.

[22] I have arranged with the representatives to deal with Mr Heath's substantive employment relationship problem at an investigation meeting to be held on 19 – December 2006. That is less than four weeks away now. However, those days being amongst the final last working days of the year, the then immediately intervening vacation period will inevitably mean the final resolution in the form of the Authority's substantive determination will yet be some further weeks later. This factor is particularly significant.

[23] Having regard to the above and in all the circumstances, I conclude it would bear more harshly on Mr Heath who may have a just case, of having to bear the detriment of wrongful or unjustifiable action until the problem has been investigated and determined, than it would on the council to have to bear the burden of interim relief before the substantive case is dealt with.

[24] I conclude there is no alternative remedy to that of interim reinstatement for Mr Heath. As well, he gives an undertaking which I am persuaded he has the means to satisfy. Accordingly, I find that the balance of convenience favours Mr Heath.

### *Overall justice*

[25] Standing back from the detail of the other tests I now decide whether it will be in the interests of justice to grant interim reinstatement.

[26] I must be mindful of the primacy accorded by Parliament to the remedy of reinstatement as a relevant factor in considering interim reinstatement. Final reinstatement "must" be provided wherever practicable. I am obliged too, in the exercise of the Authority's equity and good conscience jurisdiction and in determining whether to grant a discretionary remedy, what options other than those advanced by the parties that the justice of the case requires.

[27] The overall justice lies with Mr Heath. I conclude that the justice of the matter requires Mr Heath's interim reinstatement and that in my assessment is the best way to regulate the position until the substantive matter is determined.

### **Determination**

[28] I conclude that Mr Heath has satisfied the applicable tests and he is entitled to have the discretion exercised in his favour.

[29] The analysis to this point has been a technical one. I stand back now and give consideration to crafting an appropriate practical solution, other than those advanced by the parties and which, in equity and good conscience, will meet the justice of the case. I am obliged to give consideration to conditional reinstatement. It seems to me the consideration of conditions can proceed only after a case for reinstatement has been properly made out. I have concluded that that case has been made out. There are also factors at play in this instance which lead me to conclude the appropriate resolution is to grant reinstatement but on conditions. I refer in this regard to the realities that a new appointment has been made and the time to substantive meeting is not far away, although a determination may be delayed by the intervening vacation period. These matters require conditions in my view. Those conditions shall be that, Mr Heath will not be required to perform his work duties and nor shall the Auckland City Council be required to allow him to perform those duties; this order is deemed to have effect from the date of termination; and the orders will continue in effect until the Authority's Determination on the substantive matter is issued.

[30] For all the above reasons, in considering the best way to regulate matters between now and the investigation meeting on 19 December 2006, I make the following orders:-

**(i) On the basis of the undertaking Mr Heath has provided, I order that Damon Heath be reinstated.**

**(ii) Damon Heath will not be required to perform his work duties and nor shall the Auckland City Council be required to allow him to perform those duties;**

**(iii) This order is deemed to have effect from the date of termination;**

**(iv) These orders will continue in effect until the Authority's Determination on the substantive matter is issued.**

## Costs

[31] If costs are sought they are reserved.

Leon Robinson  
**Member of Employment Relations Authority**