

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Anthony Gregory Housham (Applicant)
AND Juken New Zealand Limited (Respondent)
REPRESENTATIVES Gregory Lloyd, Counsel for Applicant
Penny Swarbrick, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 20 June 2006
DATE OF DETERMINATION 21 June 2006

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

[1] The applicant Mr Anthony Gregory Housham ("Mr Housham") applies for an order for interim reinstatement to his former employment as Lathe Operator with Juken New Zealand Limited ("Juken"). He was dismissed from the employment on 26 April 2006. That dismissal was confirmed in writing by letter of the same date which materially stated:-

...

Confirmation of Instant Dismissal

This letter is to confirm that on 26 April 2006 I informed you that your employment with this Company would cease on the above date as a result of dismissal following a Disciplinary Meeting on 26 April.

On Saturday 22 April 2006 while working at the Northland Mill Site you engaged in a situation of physical violence by pushing/striking another person on Company premises. The matter was thoroughly investigated on 24 April.

The results of this investigation were outlined at the Disciplinary Meeting at which the conclusion was reached, after taking into account your explanation, that your actions amounted to serious misconduct under the Company's Code Of Conduct. In particular you were considered to have breached that part of the Code which states that the following is prohibited:

Arranging for or engaging in acts of physical violence against any person on the company's premises or at company arranged or sponsored events (Note: Includes fighting even if provoked).

Your final pay will be calculated and forwarded to your bank account on the 27 April following the return of company property as advised.

*Yours sincerely
Vince Burgess
Assistant Mill Manager*

[2] Mr Housham, through his union, lodged an application in the Authority on 14 June 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 Juken through the granting of an order for interim reinstatement.

[3] There is to be an investigation meeting of the substantive claim on 24 July 2006.

[4] I have met with the parties and the representatives and considered affidavit evidence from Mr Housham, the assistant mill manager Mr Vincent Burgess ("Mr Burgess"), line manager Mr Melvin Adams ("Mr Adams"), team leader Mr Brian Cosford ("Mr Cosford"), and contractor Mr Anaru Nathan ("Mr Nathan"), .

[5] This determination deals only with what should happen until a full investigation of Mr Housham'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

[6] Applications for interim reinstatement are considered under Section 127 of the Employment Relations Act 2000 ("the Act"). That section requires the Authority to apply the law relating to interim injunctions and to have regard to the objects of the Act. These objects include supporting productive employment relationships founded on good faith behaviour and mutual trust and confidence and, recognising the importance of reinstatement as a primary remedy.

[7] The Authority provides, wherever practicable, for reinstatement where this is claimed and a personal grievance is established. The Authority acts to provide a just solution to the parties' problems in the particular circumstances of each individual case. 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.

[8] The remedy of reinstatement is interim injunctive relief. An injunction is only available for the protection of a legal right or to prevent the infringement of a legal right and it is a discretionary remedy. 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).

An arguable case

[9] Ms Swarbrick agrees that the threshold is low. However, she submits that Mr Housham's conduct falls so clearly within Juken's prescribed definition of serious misconduct that this may well be a case where even the low threshold has not been reached.

[10] At this interim phase, it is neither possible nor appropriate to reach a conclusion on any contested facts. My views hereafter are provisional only in order to decide if Mr Housham should be reinstated pending the substantive investigation.

[11] Mr Housham'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.

[12] Mr Lloyd says that Mr Housham maintains he was the victim of an unprovoked assault, he was an unwilling participant and did not initiate the fight. He says Mr Housham merely protected himself.

[13] In support of this position, Mr Lloyd refers the Authority to evidence at the disciplinary meeting that Mr Burgess stated:-

Not accusing Anthony of assault just trying to understand the situation and assess any breach of the code of conduct.

[14] As well, Mr Lloyd suggests that Mr Housham was dismissed because of his failure to walk away from an assault.

[15] As I understand it, the essence of Mr Housham's arguable case challenging his dismissal, is that he was the victim of an assault and did not willingly engage in an act of physical violence. That is how Mr Lloyd presents the position in his submissions. He cites authority in submitting that it is not open to an employer to dismiss an employee for fighting where that employee acts in self-defence.

[16] I find these matters arguable and having read the affidavit evidence, I am satisfied that there is a tenable arguable case. I answer the first test in Mr Housham's favour.

Balance of convenience

[17] In the exercise of the Authority's discretion I weigh up the inconvenience to Juken of having to bear the burden of interim relief before the substantive case is dealt with, against the inconvenience to Mr Housham 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.

[18] Mr Housham has not secured alternative employment since his dismissal. He tells the Authority that the superannuation he was paid out when he was dismissed will sustain him until the end of this month. He says he has no dependents and his home is unencumbered. I conclude Mr Housham requires income principally to meet his daily living expenses.

[19] Mr Burgess deposes that he has no confidence that Mr Housham will not engage in similar conduct in the future. He says he has lost trust and confidence in Mr Housham although I do not discern any objective basis on which that assessment is sustainable. Juken is concerned about the implications on site that Mr Housham's reinstatement might cause in terms of further action by Mr Nathan and any unfortunate impression its other employees might form in relation to workplace violence. Mr Burgess also deposes that presently there are no permanent vacancies suitable for Mr Housham.

[20] I have arranged with the representatives to deal with Mr Housham's substantive employment relationship problem at an investigation meeting to be held on 24 July 2006. That is some four weeks away now.

[21] That period is to be contrasted with the period from dismissal until this present relief was sought. As I indicated to Mr Lloyd, I am concerned about the period between the dismissal and the lodging of this application. Mr Housham was dismissed on 26 April 2006. His application for interim reinstatement was not lodged until 14 June 2006. That is a period of seven weeks.

[22] I do not understand this application for interim reinstatement to have been the subject of mediation previously. Ordinarily I regard mediation as a pre-requisite to injunctive relief but I proceeded to investigate the application it being convenient to do so at the investigation meeting of a further problem between the parties.

[23] Although Mr Lloyd tells me Mr Housham is not responsible for any delay, I am not persuaded that the delay is reasonably explained. In my view, it is sufficient to disentitle Mr Housham from the relief he now seeks.

[24] Mr Housham had been away from his former employment for some seven weeks before he made application to be reinstated. In four weeks, his claim that he was unjustifiably dismissed will be investigated and determined shortly thereafter.

[25] In the circumstances, it would bear more harshly on Juken to have to bear the burden of interim relief by being required to reinstate Mr Housham. I do not appreciate any material detriment, injury or hardship for Mr Housham sufficient to require Juken to bear the injunctive relief sought, for the relatively short period until substantive investigation.

[26] I consider that the detriment Mr Housham suffers by the loss of his former income stream, will be recoverable in substantive remedies in either or both of orders for reimbursement and compensation.

[27] Accordingly, I find that the balance of convenience favours Juken.

Overall justice

[28] 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.

[29] I am particularly mindful at this juncture, 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 consider too, in the exercise of the Authority's equity and good conscience jurisdiction and in determining a whether to grant a discretionary remedy, what options other than those advanced by the parties that the justice of the case requires.

[30] I repeat again that I am materially influenced by the relatively short period before the full investigation meeting on 24 July 2006 of the substantive matter. I do not consider that justice would be served by reinstating Mr Housham to his employment at Juken for a four week period, when he has been out of that employment for now eight weeks.

[31] The overall justice does not favour Mr Housham. I do not consider that any other options are required.

Determination

[32] For all the above reasons, in considering the best way to regulate matters between now and the investigation meeting on 24 July 2006, **I decline to grant an order for Mr Housham's interim reinstatement.** Nor do I consider that any other solution between the parties is required.

Costs

[33] If costs are sought they are reserved.

Investigation Meeting

[34] The substantive matter is to proceed to investigation meeting commencing on Monday 24 July 2006.

[35] Mr Housham is to lodge and serve his witness statements by 4.00 pm on Monday 10 July 2006. Juken is to lodge and serve its witness statements by 4.00 pm on Monday 17 July 2006.

[36] I intend to have a preliminary conference with the representatives shortly before the investigation meeting.

Leon Robinson
Member of Employment Relations Authority