

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 64/09
5150961**

BETWEEN RAY WHITU MCCAULEY
 Applicant

AND SCA HYGIENE AUSTRALASIA
 LIMITED
 Respondent

Member of Authority: Leon Robinson

Representatives: Richard Upton, Counsel for Applicant
 David France and Gemma Mayes, Counsel for Respondent

Investigation Meeting: 23 February 2009

Further Information: 24 February 2009

Determination: 26 February 2009

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

[1] The applicant Mr Ray Whitu McCauley (“Mr McCauley”) applies for interim reinstatement to his former employment as Product Operator at SCA Hygiene Australasia Limited's ("SCA") Kawerau operation. Mr McCauley had worked for SCA and its predecessors for 27 years when he was summarily dismissed on 16 January 2009.

[2] Mr McCauley lodged his application in the Authority on 4 February 2009 claiming he was unjustifiably dismissed and seeking remedies including interim reinstatement. As required, he also lodged an undertaking to abide by any order made by the Authority in respect of damages that may be sustained through the granting of an order for interim reinstatement.

[3] In its statement of reply, SCA says Mr McCauley was justifiably dismissed, at the conclusion of a full and fair disciplinary investigation, for failing and/or refusing to follow a lawful and reasonable instruction.

[4] The parties were unable to resolve the differences between them by mediation. There is to be an investigation meeting of the substantive claim on 31 March 2009 and 1 April 2009.

[5] I have met with the lawyers and considered affidavit evidence from Mr McCauley, Mr Maurice Reid SCA's RST Manager, Ms Susan Gibbs SCA's Employee Relations Manager, and Mr Stephen Jones, a health a safety co-ordinator at SCA's Kawerau operation.

[6] This Determination is in no way a final determination or any influence on how Mr McCauley's 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 applications 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

[8] It is neither possible nor appropriate to reach a conclusion on any disputed facts. Such conflicts can only be determined following a full investigation.

[9] Mr McCauley was advised he was dismissed at a meeting held with him on 16 January 2009. The dismissal was confirmed by the acting site manager in a letter dated 19 January 2009 materially as follows:-

Dear Ray

Following the investigation meeting held on the 12th January 2009 with regard to the recent events of 1 January 2009, and the subsequent meeting held on 16th January 2009, this letter is to confirm that your employment with SCA Hygiene Australasia has been terminated as at 16th January 2009.

The investigation was into an incident involving a refusal by you to follow an instruction from your supervisor to attend the Medical Centre following you suffering an injury at work. The instruction was given in accordance with the Site Rules for Health, Safety & Environment. Your refusal to comply with the instruction from your authorised supervisor mirrored incidents in the past when you have refused to follow instructions and which have resulted in disciplinary action including two final written warnings.

Following the conclusion of the disciplinary investigation, we concluded you had failed to follow your supervisors instructions and that you had no reasonable explanation as to why you refused to comply with that lawful and reasonable instruction.

This misconduct is another example of what has been frequent and repetitive actions by you in which you have refused to carry out the lawful and reasonable instruction of an authorised supervisor as outlined in the Company Disciplinary Policy and Procedure. As a result of your disciplinary record, including the current final written warning, the decision was made to dismiss you.

WorkAon will continue to manage your injury and will notify us when you have been given a medical clearance. At that time, we will pay your final monies into the bank account currently held on file unless notified otherwise by yourself.

...

Yours sincerely,

Roy Ormiston

Acting Site Manager - Kawerau

[10] Mr McCauley'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] It was not conceded that Mr McCauley has an arguable case. Having read the affidavit evidence and heard from the representatives, I have reached the conclusion that Mr McCauley does have an arguable case of unjustifiable dismissal.

[12] SCA concluded that Mr McCauley had failed to follow his supervisors' instructions and that he had no reasonable explanation as to why he refused to comply with the instruction.

[13] Mr McCauley deposes that he was told "you should get your foot checked" and *something like* "you should go to Security". Mr McCauley says he did not apprehend or appreciate from such statements by his supervisors that they were giving him an actual instruction. He says he never believed he was given an actual instruction that

he go to the doctor. I consider it arguable for Mr McCauley that he was not, as a matter of fact, given any instruction.

[14] Mr McAuley also says that he wished to see his own family doctor rather than the company doctor and it is argued for Mr McCauley that there are issues concerning the lawfulness of any instruction given in this respect. I consider it is arguable for Mr McCauley that any instruction he was given was not lawful or reasonable in this regard.

[15] Mr McCauley also argues that SCA's policy obliges attendance only "if medical assistance is required". The question raised is whether medical assistance was actually required. I agree that this is arguable for Mr McCauley.

[16] It may also be argued for Mr McCauley that, even though there might have been a delay, eventually Mr McCauley did actually seek medical attention. If that is established as correct, it is arguable that Mr McCauley did actually comply with an instruction given to him to do so.

[17] I consider the above matters the most salient arguable grounds for Mr McCauley. I am satisfied that there is a tenable arguable case and I find accordingly.

Balance of convenience

[18] Mr Upton referred me to a Court decision where this test was posed as "which party would be injured less by a decision made against it?"¹ The test is also considered in terms of how best to regulate the positions of the parties until, after a full investigation meeting by the Authority has been able to take place, the employment relationship problem is finally determined.

[19] I have arranged with the parties to hold an investigation meeting of the substantive employment relationship problem on 31 March 2009 and 1 April 2009. An early substantive investigation is always preferable and this factor is a material consideration in the exercise of my discretion.

¹ Finnigan J, *Porter -v- Rotaform Plastics Ltd*, unreported, AEC132/95, 18 December 1995

[20] Because of his injury, Mr McCauley has been unfit for work. Mr McCauley provides the Authority with a medical certificate from his doctor certifying him fit for normal work from 2 March 2009. Previously, Mr McCauley had indicated he would not be fit for work until 30 March 2009.

[21] Mr Upton argues that if he is not reinstated, Mr McCauley will lose his valuable right to work and that he particularly desires to prove himself. It is also said that Mr McCauley will suffer significant financial hardship as his family would have to survive on \$125 net per week to live on. Mr McCauley says his reputation in his small town continues to suffer injury. Finally, it is said that Mr McCauley and his family will continue to suffer ongoing stress and embarrassment. The Authority is informed Mr McCauley's partner's continuing employment is uncertain at this time.

[22] Mr France argues that SCA has lost trust and confidence in Mr McCauley due to Mr McCauley's prior misconduct. SCA points to previous warnings given to Mr McCauley for failing to comply with instructions although there is some dispute as to the validity of one such warning. It says that it simply cannot trust Mr McCauley to follow instructions and to do as he is told by his superiors. It says that in a safety sensitive and potentially hazardous environment such a situation is not acceptable. SCA says its loss of trust and confidence in Mr McCauley should weigh against the grant of interim reinstatement.

[23] SCA suggests Mr McCauley is unable to meet his undertaking. I am satisfied that Mr McCauley has considerable equity in the property he and his partner own and reside in. I am also informed that Mr McCauley has a very substantial sum due to him upon termination from a superannuation/savings scheme that SCA has contributed to. Accordingly, I am satisfied that Mr McCauley has the means to satisfy the undertaking he has given.

[24] SCA says that Mr McCauley can be ultimately compensated by an award of damages and that is an alternative remedy to interim reinstatement. Mr France also says the relatively short duration to substantive hearing weighs against interim reinstatement.

[25] I accept the submission that the time elapsed to substantive investigation/determination is relatively short.

[26] At this point in time, Mr McCauley is unfit for work. It is suggested he will be fit for work on 2 March 2009. While he continues unfit for work, he is in receipt of accident insurance payments. I expect that once he is actually deemed fit for work, Mr McCauley will have no income after 2 March 2009. In the prevailing circumstances, it cannot be said that Mr McCauley suffers financial loss.

[27] As well, there is to be a full investigation of the claim of unjustifiable dismissal on 31 March 2009 and 1 April 2009 with a determination shortly thereafter. It is because of these particular factors, I have determined that the balance of convenience does not favour Mr McCauley.

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. I stand back and ask where the overall justice lies.

[29] Having regard to all the prevailing circumstances as they stand today, I consider that the overall justice of the matter favours refusing an order for interim reinstatement.

[30] I 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. I consider that reinstatement whether conditional or otherwise is not appropriate.

Determination

For all the above reasons, in considering the best way to regulate matters between now and the investigation meeting on 31 March 2009 and 1 April 2009 and determination, **I decline to make an order for interim reinstatement.**

Other directions

[31] The applicant is to lodge and serve his witness statements by 4.00pm on Friday 6 March 2009. The respondent is to lodge and serve its witness statements by 4.00pm on Friday 20 March 2009. Any reply witness statements by either party are to be lodged and served by 4.00pm on Wednesday 25 March 2009.

Costs

[32] If costs are sought they are reserved.

Leon Robinson

Member of Employment Relations Authority