

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2013] NZERA Christchurch 260  
5428102

BETWEEN WILLIAM McLAUHLAN  
Applicant

A N D SILVER FERN FARMS  
LIMITED  
Respondent

Member of Authority: David Appleton

Representatives: Peter Churchman QC and Lauren Castle, Counsel for Applicant  
Tim Cleary, Counsel for Respondent

Investigation meeting: 16 December 2013 by telephone conference

Submissions Received: 9 and 16 December 2013 from Applicant  
16 December 2013 from Respondent

Date of Determination: 19 December 2013

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**DETERMINATION OF THE AUTHORITY**

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- A. The application by Mr William McLauchlan for interim reinstatement to his former position is granted, subject to the conditions set out in this determination.**
- B. Costs are reserved.**

**Employment relationship problem**

[1] Mr McLauchlan originally sought interim reinstatement to his position of *day shift sawman in the lambcuts room* at the respondent's Finegand meat processing plant in Balclutha, following his dismissal by the respondent on 11 June 2013. When written submissions from Mr McLauchlan's counsel were received two days prior to

the original date for the interim reinstatement investigation meeting, it was stated that Mr McLauchlan would be willing to take a day job boning, and not on the saw, upon his reinstatement. As the respondent had resisted reinstatement largely due to Mr McLauchlan's conduct on the saw, the Authority required Mr McLauchlan to swear a second affidavit to confirm this change, and to explain it. This affidavit was received on 11 December 2013. A supplemental affidavit from one of the respondent's witnesses was received on 16 December.

[2] The respondent opposes the application and asserts that it was justified in its actions to dismiss Mr McLauchlan.

[3] As this determination deals with an application for interim relief, no oral evidence was heard by the Authority. Sworn affidavits were lodged by Mr McLauchlan (first and second affidavits), and Mr John Casey (President of the Finegand sub-branch of the New Zealand Meat Workers Union) in his support of Mr McLauchlan. The respondent's position was supported by affidavit evidence from Mr Philip Shuker (Finegand Plant Manager), Mr Dion Marie (Finegand Senior Departmental Supervisor for Lamb Cuts) and Ms Mihi Stevens (Finegand Human Resources Manager, first and second affidavits). As well as documentary evidence exhibited to the affidavits, a video clip of the CCTV camera showing the area where Mr McLauchlan was working at the time of the first incident leading to disciplinary action was made available to, and viewed by the Authority.

[4] Mr McLauchlan has provided an undertaking as required by s.127(2) of the Employment Relations Act 2000 (the Act).

### **The key events leading to the dismissal**

#### *Mr McLauchlan's affidavit evidence*

[5] Mr McLauchlan deposes that he was first employed by the respondent in 2000 to work in the lambcuts room as a boner/sawman and that he has worked for them every season since then apart from one. He has worked only as a day shift sawman in the lambcuts room for the last three and a half years.

[6] Mr McLauchlan acknowledges in his affidavit that he has been given some warnings in the past for what he calls *some pretty silly behaviour*. Most of these incidents appear to have occurred before the end of 2010 although his work record

shows that he was caught throwing meat on 14 March 2013 and that he was given a verbal warning on 8 April 2013 because his clean-up was not up to standard.

[7] Mr McLauchlan deposes that, on 6 June 2013, he was working at the saw and was *mucking around* with a colleague by throwing lamb knuckles into an empty bin. Mr McLauchlan accepts that that was not appropriate behaviour. Mr Hall, the lambcuts room day shift supervisor, came up to him and said that he was *off the saws*. When asked why, Mr Hall told him that it was the instructions of Mr Shuker, the shed manager.

[8] Mr McLauchlan deposes that Mr Shuker came up to him as he was walking out and Mr McLauchlan asked him what was going on and why he was kicking him out. Mr McLauchlan deposes that Mr Shuker grabbed him *really hard by the shoulders with both hands to the point where it was hurting*. Mr McLauchlan deposes that Mr Shuker yelled at him that it was his *f\*\*\*en shed, his f\*\*\*en rules* and that Mr McLauchlan was *off the saw for good*. Mr McLauchlan deposes that he grabbed Mr Shuker's arms off him, telling him at the same time to get his *f\*\*\* en hands off me*. Mr McLauchlan deposes that he went to leave the room but Mr Shuker told him to get his *arse into the f\*\*\* en office*.

[9] Mr McLauchlan went into the office of the lambcuts main supervisor, Mr Marie, and saw Mr Marie watching a video of him and the other worker on the saw. Mr McLauchlan deposes that he could see the saw incident on the footage but not what had happened between him and Mr Shuker. Also, there was no sound audible. Mr McLauchlan says that Mr Marie did not really say much to him, so he just left.

[10] Mr McLauchlan deposes that the following day, Friday 7 June 2013, he turned up for work at the normal start time of 7am and was told to wait in a smoko room. He waited there for an hour and a half and then went up to Mr Marie's office with his colleague from the day before. Mr Marie told him that he would be getting a final warning for *mucking around on the saw* and that he would be getting drug tested. Mr McLauchlan did not object to doing a drugs test, which he took and passed. Mr Marie then took him into his office along with Ms Law, whom Mr McLauchlan describes as the union spokesperson, and typed up a final warning on his computer. He said the warning was for his conduct on the saw and for swearing at Mr Shuker. Mr McLauchlan said this was unfair but Mr Marie refused to change it.

[11] Mr McLauchlan deposes that, according to his understanding, the Union sub-branch Secretary or President is required to be at meetings where final written warnings are going to be issued and that Ms Law was not even the union delegate. Although the Secretary of the Union (Mr Carruthers) was absent from the plant that day, the President of the local branch (Mr Casey) was in the steel room working. Mr McLauchlan says that the company knew how to get hold of him but had decided not to bring him down.

[12] At around 9.15am Mr Marie told Mr McLauchlan to see Mr Hall, who in turn told Mr McLauchlan that he was to be working on the bulk pack. When asked, Mr Hall said he did not know why but those were his instructions. Mr McLauchlan said that he then went back to the office with Ms Law and asked Mr Marie why he was getting penalised even more but did not receive an answer.

[13] Mr McLauchlan deposes that he did not leave Mr Marie's office until around 9.30am, at which time he went for his smoko break and then tried to ring Mr Casey at the Union office on his way back to the room. When he returned to the packing room, the supervisor, Ms Deeana Carson, *started laying into* Mr McLauchlan about why he was late back. Mr McLauchlan said that there was no product waiting to be packed when he had returned, so he could not understand what she was talking about. He believes that he returned to the packing room at around 9.45–9.50am.

[14] Mr McLauchlan deposes that he had never worked in that specific packing department before and had not been shown what to do. He also deposed that workers doing that packing work received less pay than a sawman. He was not told how long he would be working there or whether he would continue to be paid his normal rate as a sawman. His colleague, with whom he had been skylarking the previous day, was not sent to work in another department but went back to the saw as usual.

[15] Mr McLauchlan deposes that, after he had been doing the packing work for about an hour and half, the quality inspector (Ms Bidy Carson) approached and told him that he was not pulling the liners far enough up over the meat. She showed him what to do and he did it. In his affidavit he admits that, when she came up to talk to him, he was *pretty frustrated and riled up about what had happened that morning and about the fact that he had been put on packing*. He admits that, when Ms Bidy Carson told him that he was not doing it right, he said that he *didn't give a sh\*t*. Mr McLauchlan deposes that he had not directed the comment at her personally and

that she did not seem to take offence. She said that she would be back later and check what he was doing. He did not have any further problems in packing.

[16] Mr McLauchlan deposes that, around 3pm that day, he was told to go up to Mr Marie's office again. When he got there, he was told by Mr Marie that two other issues had since come up; these were that he had been late for work and that he had abused a quality inspector. He was told to go to the main office where he would be *dealt with*.

[17] He said that he, Ms Law and Mr Marie walked to the main office where they met with Ms Stevens, who said that he had abused the quality inspector and had been late to the packing department. Mr McLauchlan denied both these things.

[18] Mr McLauchlan deposes he has since learned that Mr Casey had been up in the steel room and that Ms Stevens could have easily rung him, but that she did not.

[19] Mr McLauchlan said that Ms Stevens asked if he wanted to wait until Monday 10 June, when Union representatives would be available, before proceeding, which he agreed to. Accordingly, he was suspended until Monday. Mr McLauchlan deposes that he was not given an opportunity to comment on the suspension but does not wish to make an issue of that as part of his claim.

[20] On Monday 10 June Mr McLauchlan went to the plant and met with Mr Marie and Ms Stevens. Ms Law, Mr Casey and Mr Carruthers also came to the meeting. Ms Law confirmed during the meeting that Mr McLauchlan had been trying to call Mr Casey on 7 June when he was back late to the packing room. Mr McLauchlan says that he was accused of having abused Bidy Carson, although that is not what her own report states, and that the respondent was not prepared to listen to his explanation for being late back to work, saying that he had no reasonable explanation.

[21] Mr McLauchlan deposes that the company also said that they would need to look into whether he could still be allowed to volunteer for the company's rescue squad (an emergency response team that deals with things like major injuries and fires).

[22] Mr McLauchlan deposes that he remained suspended after the meeting on 10 June and, on 11 June, attended another meeting where he has told that the company

had decided to terminate his employment. Mr McLauchlan asked for the plant manager to be involved in the decision, but this was refused.

[23] Written notice of the termination of his employment was sent to him and a personal grievance raised on his behalf shortly thereafter.

[24] Mr McLauchlan's second affidavit deposes that he was employed as a *sawman-boner*, or a *boner-sawman*, the terms being apparently interchangeable. He says that he has worked on the saw for the last three seasons, and is still regarded as a boner-sawman, because he does boning work at least two days a week, if not three. Rotation between boning and saw work appears to be the norm according to Mr McLauchlan. He says that boning and sawing work receive the same rate of pay.

[25] Mr McLauchlan appears to accept in his second affidavit that, if he were reinstated, he would be prepared to only do boning work, not saw work.

*Mr Casey's affidavit evidence*

[26] Mr Casey deposed that he has over 40 years' experience in the meat industry and that, during that time, and in particular in his time as President, he has acted in a support capacity for workers when they have been required to meet with the employer in relation to disciplinary issues. He deposed that the Union delegates, who were far less experienced in disciplinary matters, do sometimes attend less serious meetings as a sort of support person or presence. Delegates usually handle things like verbal warnings. He said that there were also Union spokespersons, who were even less experienced.

[27] Mr Casey deposes that it was standard practice at the time of Mr McLauchlan's dismissal that he would always be called into disciplinary meetings by the company where actions including final warnings were potentially going to be given. Mr Casey deposes that, on 7 June, he was working in the steel room and that the respondent knew how to get hold of him via the slaughter board telephone.

[28] Mr Casey deposes that it was never put to Mr McLauchlan in the meetings on 7 and 10 June that he was going to be dismissed.

**The respondent's affidavit evidence**

[29] Evidence was present in affidavit form on behalf of the respondent from Mr Philip Shuker, Mr Dion Marie and Ms Mihi Stevens.

*Mr Shuker's affidavit evidence*

[30] Mr Shuker is the Plant Manager at the Finegand Plant. Mr Shuker deposes that there are 1,000 employees at Finegand at the peak of the season. He says that there is no risk that there would be no job for Mr McLauchlan to return to at the end of the Authority's substantive investigation in February 2014 as it is a large site and a job would be found if the respondent was obliged to find one. However, he states that both he and the company strenuously oppose the application for reinstatement on an interim or permanent basis.

[31] Mr Shuker deposes that the 2012-2013 season was one of the worst for the Finegand Plant in relation to band saw accidents, ranging from serious cuts to amputations. There was an investigation by the MBIE, visiting the site and determining in all cases that the accidents were due to operator error. Their one recommendation, he says, was to install a fixed camera on each saw and, for some time, the plant has had a stationery camera pointing across all saws giving clear evidence for accident investigation.

[32] Mr Shuker deposes that, in his belief, Mr McLauchlan was well aware of the accidents, the investigations, and the focus that the company was putting on safe behaviour.

[33] Mr Shuker disputes, contrary to what Mr McLauchlan deposed, that there was nothing to do regarding workload when he was throwing lamb knuckles into an empty bin. He refers to video evidence showing that there was a steady stream of meat flowing down the belt requiring attention. The video footage exhibited to Mr Shuker's affidavit appears to support this assertion by Mr Shuker.

[34] Mr Shuker deposes that, on 6 June 2013, he walked into the lamb cuts room with Ms Ward, the lamb production manager, and could hear someone yelling out. He said the plant is noisy so that, to be heard above that noise at a distance, meant that someone was shouting at the top of their voice.

[35] Mr Shuker deposes that he walked down the back of the two rows of lambs between himself and the saws looking through the lambs to see where the noise was coming from and could see that it was Mr McLauchlan *swaying and yelling*. He said he could see Mr Hall, the Supervisor coming towards him and he asked Mr Hall to immediately remove Mr McLauchlan off the saws as his behaviour was dangerous and unacceptable. He asked Mr Hall to send Mr McLauchlan to the office to speak to Mr Marie.

[36] Mr Shuker deposes that, on the way to the office, he stopped near to the robots for a minute and, behind him, out of the corner of his eye, he saw Mr McLauchlan come to him, his knife in his hands, shouting *you made a right c\*\*\* out of me*. Mr McLauchlan was visibly shaking and clearly agitated. Mr Shuker states that he calmly put a hand on each shoulder, looked him in the eye and asked him to calm down. He states that he disagrees totally with Mr McLauchlan's version of events. He says he calmly asked him to follow him to the office and that he was reluctant at first but then followed.

[37] Mr Shuker deposes that, in the office with Mr Marie, he said that Mr McLauchlan had told him that he *had made a right c \*\*\* out of him in front of the others*. He says that he turned to Mr McLauchlan and told him that he found his actions on the saw completely unacceptable and that he would never use the saw again. He asked Mr Marie to handle it as a disciplinary matter.

[38] Mr Shuker deposes that he later viewed the video and states that it showed that Mr McLauchlan was looking around to attract attention; that his stance and ergonomics whilst using the saw were in total contravention of safe behaviour; that he was seen throwing product throughout the period at the white board with the potential of damage to product in clear disregard for his job.

[39] It is Mr Shuker's view that Mr McLauchlan's actions were far more serious than *mucking around*. Not only was it inappropriate, it was dangerous to himself and with the potential for harm to others by him clearly distracting others working with knives and machinery in the room.

[40] Mr Shuker deposes that he disagrees that Helen Law is just a spokesperson but that she was also a Union delegate and that she had presented herself at previous disciplinary meetings representing employees. He also disagrees that Mr Casey

always had to be at every possible final warning meeting and says that, if he were not available, a delegate would step in.

[41] With respect to the possible reinstatement of Mr McLauchlan, Mr Shuker deposes that that should not occur because, what he saw on 6 June was *nothing short of sheer stupidity but deliberate stupidity*. He deposes that the band saw was not something that you make a mistake on and not be hurt; it is an extremely dangerous, unforgiving piece of machinery.

[42] Mr Shuker deposes that he does not believe that he can work with Mr McLauchlan and that, if he were to be reinstated, he would only *serve to reinforce the behaviours that he had exhibited*.

[43] In addition, Mr Shuker deposes that, because of the late notice of the application for interim reinstatement, if he were successful someone else would drop off the line because they have just finished recruiting and have started processing for the season.

[44] Mr Shuker also deposes that, with the Authority's substantive investigation meeting set down in February 2014, that coincides with about the time when the company recruits for more numbers and so it would better have the ability to reinstate Mr McLauchlan without anyone else necessarily losing any work.

*Mr Marie's affidavit evidence*

[45] Mr Marie deposes that he is the senior departmental supervisor for the lamb cuts section at the Finegand Plant. He deposes that he recalls Mr Shuker and Mr McLauchlan coming into his office on 6 June and Mr Shuker explaining that Mr McLauchlan's behaviour at the saw had been unacceptable, saying that he had seen Mr McLauchlan *screaming and dancing*. He said that Mr Shuker had told him that Mr McLauchlan had marched up to him in an aggressive state accusing him of making him look like a *right c\*\*\** in front of the whole room and that Mr Shuker had told Mr McLauchlan he would not be allowed back on the saw again given what he had just seen.

[46] Mr Marie deposes that Mr McLauchlan did not seem to understand what he had done wrong and that, when he showed Mr McLauchlan the video,

Mr McLauchlan had laughed. Mr Marie told Mr McLauchlan that his behaviour was serious.

[47] Mr Marie states that the video also showed another employee throwing meat. However, he said that that conduct had been much less dangerous than the misconduct of Mr McLauchlan, in his view. He says that the other employee had been very remorseful and not agitated when he had been shown the video. Because of that initial attitude and acceptance of wrongdoing, the employee had received a written warning and been allowed to continue working on the saw.

[48] Mr Marie also states that that other employee had a good disciplinary record with only one previous minor offence. In his view, Mr McLauchlan's behaviour had been much more dangerous because, apart from throwing several pieces, he was *yahooing and swinging his arms about*. Mr Marie says that, as a senior team member, other sawmen looked to Mr McLauchlan as an example, so his behaviour was totally unacceptable. In Mr Marie's view, Mr McLauchlan was not in a suitable state of mind to be working on saws or with the knives. He said that he therefore told him that he was to be put in the packing area to work, an area he knew he was experienced in. Mr Marie says that he told Mr McLauchlan he would not lose pay and that, as it was near the end of the shift, he did not have to work anymore that day.

[49] With respect to the events of 7 June 2013, he says that he met again with Mr McLauchlan, who had brought along Ms Law as his representative. He understood Ms Law was a Union delegate and Mr McLauchlan did not tell him he wanted anyone else. He says that he told Mr McLauchlan that what he had done had been a sackable offence but he wanted to give him one last chance to redeem himself. He says that Mr McLauchlan did not accept that. Mr Marie says that it had appeared to him that Mr McLauchlan's view about doing nothing wrong had not changed and, as he had also received numerous warnings for various things, including throwing meat a few months earlier, he therefore decided to issue the final written warning.

[50] Mr Marie says that he told Mr McLauchlan that, although he could have been dismissed, he would grant him *one more life*. He says that he added that if Mr McLauchlan stepped out of line again until the end of the season it would cost him his job, regardless of the offence. Mr Marie deposes that Mr McLauchlan seemed to have understood and accepted that decision. He says that he included as part of the warning swearing at a senior member of staff because Mr McLauchlan never denied

saying the words *you made a right c\*\*\* out of me* to Mr Shuker. Mr Marie deposes that he would have issued a final written warning even if he had not said those words however.

[51] Mr Marie says that Mr McLauchlan and Ms Law both signed the warning and took no issue with it. He then told Mr McLauchlan that he could go to smoko.

[52] Mr Marie deposes that, after going back into the boning room he noticed Mr McLauchlan on the telephone and told him to hurry up as the room had already started cutting. A few minutes later, Deena Carson, the packing supervisor, came in and complained to Mr Marie that Mr McLauchlan was still on the telephone. He returned to the room where Mr McLauchlan was, finding him still on the telephone, and told him to get back into the room. Ms Law was also there and he told her she was late as well and to get back into the room. Mr Marie calculates that, by the time they actually returned to the room, they were 15 minutes late. He said that he later gave a warning to Ms Law for being late.

[53] Mr Marie deposes that, later in the same day, whilst he was in the Supervisor's office, Bidy Carson, the Quality Assurance Officer, came into the office *visibly upset*. She claimed that Mr McLauchlan had abused her on the line. He asked Ms Carson for a written statement outlining what had occurred and she provided one. In her statement she claimed that she had seen Mr McLauchlan packing cartons incorrectly so she went over and told him what he was doing was wrong and explained to him how to do the task properly and he replied to her *I don't give a sh\*\**.

[54] Mr Marie decided that he needed to take the matter further and consulted with Ms Stevens the HR Manager. He then met with Ms Stevens, and Mr McLauchlan and Ms Law and Ms Stevens said that she would not continue without Mr Carruthers or Mr Casey present so they adjourned until the following Monday.

[55] Mr Marie deposes that there was a meeting with Mr McLauchlan, himself, Ms Stevens, Ms Law, Mr Carruthers and Mr Casey on 10 June where they discussed whether Mr McLauchlan should keep his job. At the end of the meeting Mr McLauchlan remained suspended. Mr Marie did not attend the meeting the following day.

[56] Mr Marie deposes that he does not believe that Mr McLauchlan is at all remorseful for his conduct regarding his actions in operating the band saw, being late

or his interaction with Ms Carson. Mr Marie believes that, if Mr McLauchlan were to be reinstated even on an interim basis, it would just mean that he would think his actions were vindicated. Mr Marie believes that Mr McLauchlan is a *danger to the plant*.

*Ms Steven's affidavit evidence*

[57] Ms Stevens is the Human Resources Manager at the Finegand Plant and deposes that Mr McLauchlan had been fully trained to operate the band saw and was experienced in that task. She says that she recalls a meeting with him prior to the band saw incident on 6 June and in which he had been upset in relation to the number of accidents on the band saw and had recommended paying more money to stop them. She says that she told him that he needed to stop the new guys cutting up for the old hands. She says he dropped his head and walked out at that point.

[58] With respect to the meeting on 7 June, she deposes that she had been off site with Mr Carruthers and knew that he was not coming back to work and that she knew that Mr Casey was most likely to be in the Union office. She had tried ringing the Union office but had got no answer. She therefore assumed that he, too, was off site. She said it was about 3.15pm and the slaughter board was usually finished by 2.30pm so that by 3pm all work, including the steel room, was normally finished.

[59] Ms Stevens deposes that she told Mr McLauchlan that he had just received a final warning, so that the matter was now serious. She said that she would not deal with the matter without Mr Carruthers or Mr Casey and suspended Mr McLauchlan, which was standard procedure when there was a serious allegation against an employee.

[60] Ms Stevens deposes that the following day they met and discussed the two allegations against Mr McLauchlan; namely that he had been late back to work after smoko and that he had abused Ms Carson.

[61] Ms Stevens deposes that the notes of the meeting are not accurate in two respects; first, she said *you know Phil [Mr Shuker] and he does not have an aggressive bone in his body*; and she says that she did not say *I am telling you now I have had it from the top that both of them should have gone that day*. She says that it was Mr Casey who had said that.

[62] Ms Stevens deposes that, at the end of the meeting, she adjourned to consider two things: whether Mr McLauchlan should keep his job and, if so, whether he should remain in the rescue squad given his dangerous behaviour. She deposes it was not true that she had not been prepared to listen to his explanation for both allegations.

[63] Ms Stevens deposes that, in her view, it was clear that the allegation was about the words Mr McLauchlan said (*I don't give a sh\*\**) and his attitude to work, which were directed at Ms Carson. She says that he was also aware, having been told at the beginning, that his job was on the line because of his recent conduct.

[64] Ms Stevens deposes that the notes of the meeting of the following day are accurate in her view. She deposes that she weighed everything up, including what Mr McLauchlan had said the previous day, and decided to dismiss him because he had had enough chances and was not correcting his misconduct.

[65] Ms Stevens deposes that she understood that Tina Ansley had been the Union delegate for the lamb cuts room but she had had a disciplinary meeting a few weeks before when Mr Carruthers had been there, as had Ms Law. She says that Mr Carruthers had told her that Ms Law had replaced Ms Ansley as delegate for the lamb cuts room.

[66] With respect to reinstatement, Ms Stevens deposes that, as HR Manager, she does not want Mr McLauchlan back on the plant as he is *really disruptive and dangerous*. She says that he does not seem to understand that they run an export meat process plant that requires everyone to comply with rules and regulations.

[67] Ms Stevens also disagrees with Mr Casey's comments in his affidavit about dismissals, saying that there is no new policy on discipline and that, in the last two years to her knowledge, Mr McLauchlan's is the only personal grievance that has been raised after a dismissal based on a final warning. She also disagrees that, as Mr Casey has alleged, *over 70% of employees have a worse record than Mr McLauchlan*. She says that only a very few employees have a worse record.

[68] In her second affidavit, Ms Stevens deposes that Mr McLauchlan was employed as a boner/sawman and that each job is interchangeable, depending on workflow, that boners and sawmen are paid at the same rate but that there is a perceived difference in the status between sawmen and boners, with sawmen being seen as very skilled workmen, above the skill level of a boner.

[69] Ms Stevens states that if Mr McLauchlan was reinstated as a boner, another boner would have to be dropped off the chain. She also states that she believes that Mr McLauchlan would see reinstatement as some form of vindication of his actions, and that he would repeat them; that he would disparage management and that she does not believe that Mr McLauchlan would stick to the rules about behaviour and quality control. She believes that Mr McLauchlan is very resistant to change and that he will be a negative influence on others.

### **The application for interim reinstatement**

[70] The respondent's season ended on 12 July 2013 and recommenced on Tuesday 3 December 2013. Mr McLauchlan seeks interim reinstatement so that he can work for the 2013/2014 season.

[71] The Authority has not been able to consider the application for reinstatement prior to the commencement of the 2013/2014 season because the application for interim reinstatement was not received by the Authority until Wednesday 27 November 2013 (although the statement of problem had been received on 7 August 2013). No substantive explanation has been tendered for the late lodging of the application for interim reinstatement, although it would appear to be based upon an oversight.

### **The issues to be determined**

[72] In determining whether interim reinstatement should be granted to Mr McLauchlan and, if so, under what conditions, if any, the Authority must take into account the requirements of the Act, and the following principles:

- (a) whether Mr McLauchlan has both an arguable case of personal grievance for unjustified dismissal and an arguable case that he would thereafter be reinstated in employment rather than simply compensated financially;
- (b) where the balance of convenience lies between the parties, including an assessment of whether other remedies would be adequate; and
- (c) where the overall justice of the case lies until it can be heard.

[73] Section 127 of the Act provides as follows:

**127 Authority may order interim reinstatement**

(1) *The Authority may if it thinks fit, on the application of an employee who has raised a personal grievance with his or her employer, make an order for the interim reinstatement of the employee pending the hearing of the personal grievance.*

(2) *The employee must, at the time of filing the application for an order under subsection (1), file a signed undertaking that the employee will abide by any order that the Authority may make in respect of damages—*

*(a) that are sustained by the other party through the granting of the order for interim reinstatement; and*

*(b) that the Authority decides that the employee ought to pay.*

(3) *The undertaking must be referred to in the order for interim reinstatement and is part of it.*

(4) *When determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the object of this Act.*

(5) *The order for interim reinstatement may be subject to any conditions that the Authority thinks fit.*

(6) *The Authority may at any time rescind or vary an order made under this section.*

(7) *Nothing in this section prevents the court from granting an interim injunction reinstating an employee if the court is seized of the proceedings dealing with the personal grievance.*

[74] The object of the Act, referred to in s.127, is set out in s.3 of the Act and includes the following objectives:

- (a) *to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship –*
  - (i) *by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and*
  - (ii) *by acknowledging and addressing the inherent inequality of power in employment relationships.*

[75] Section 125 of the Act, dealing with the remedy of reinstatement, states as follows:

**125 Remedy of reinstatement**

(1) *This section applies if—*

*(a) it is determined that the employee has a personal grievance; and*

*(b) the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in section 123(1)(a)).*

*(2) The Authority may, whether or not it provides for any of the other remedies specified in section 123, provide for reinstatement if it is practicable and reasonable to do so.*

[76] Section 123(1)(a) of the Act refers to *reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee.*

[77] Since April 2011, reinstatement has no longer been a primary remedy.

### **Is there an arguable case for unjustified dismissal?**

[78] In determining this question, the Authority must take account of the test set out in s.103A(2) of the Act which states as follows:

*The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[79] Section 103A(3)-(5) of the Act states as follows:

*(3) In applying the test in subsection (2), the Authority or the court must consider—*

*(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*

*(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*

*(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*

*(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*

*(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.*

*(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—*

*(a) minor; and*

*(b) did not result in the employee being treated unfairly.*

[80] Relevant to the question as to whether there is an arguable case of unjustified dismissal is the question of good faith contained in s.4 of the Act. Of particular relevance in this case is s.4(1A)(a) – (c). These sub-sections provide as follows:

*(1A) The duty of good faith in subsection (1)—*

*(a) is wider in scope than the implied mutual obligations of trust and confidence; and*

*(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*

*(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—*

*(i) access to information, relevant to the continuation of the employees' employment, about the decision; and*

*(ii) an opportunity to comment on the information to their employer before the decision is made.*

[81] An arguable case means a case where there are some serious or arguable, but not necessarily certain prospects of success *X v. Y Limited and The New Zealand Stock Exchange* [1992] 1 ERNZ 863.

[82] The letter of dismissal dated 17 June 2013 was in the following terms:

*Dear William*

*Please be advised that your employment with Silver Fern Farms Finegand has been terminated as from 11th of June 2013.*

***Reason for dismissal:***

*We had met on Friday at 3.15pm June 7th which was the morning you had received a final warning for disruptive & dangerous behaviour while operating the band saw.*

*The very next smoko, we had a written statement from the supervisor to say you were 15 minutes later back. When asked why you stated that you were making a personal call.*

*Then on the same day when the QC showed you how you should be pulling up the liners properly you told her you 'don't give a sh\*t'.*

*We again commenced an investigation into misconduct with you and your Union representatives. We met on Monday 10th June and concluded the investigation the following day. A disciplinary meeting was held on Tuesday 11th June where the conclusion of the investigation was presented to you and a likely outcome of that conclusion (i.e. termination of your employment agreement). You and your Union representatives were given an opportunity to comment on*

*the conclusion before a decision was made to terminate your employment.*

*Your employment has been terminated because you were on a final warning under the code of conduct and was subsequently found to have been in breach of the code of conduct again. Being on a final warning the employer clearly had a substantive reason for dismissal.*

*Yours sincerely*

*Mihi Stevens  
Industrial/Personnel Manager*

[83] The notes of the disciplinary investigatory meeting on 10 June appear to be very detailed and are almost verbatim. These notes show two issues that the Authority should take into account in deciding whether or not there is an arguable case of unjustified dismissal.

[84] The first issue is that Mr Casey reported that he had spoken to Ms Bidy Carson that morning, who had told him that Mr McLauchlan had not abused her in any way. Ms Law then reported that she had also spoken to Ms Carson, who had also stated that she had not been abused. Mr McLauchlan is then recorded in the notes as saying that he had also spoken to Ms Carson to ask whether he had abused her and she had said he had not.

[85] There was also in front of the Authority a note from Ms Bidy Carson in the following terms:

*To whom it may concern*

*10/06/2013*

*On Friday 7th June, A QC check of cartons and liners was done, liner placements weren't covering meat properly, some cartons with meat to lid contact. Willy was shown this and was told to cover meat with liners pulled up and folded over, he then said "I don't give a sh\*t" (this was not directed at me personally).*

*I then checked cartons on rollers and cartons after scales, some I pulled off and put them back to him again to do it properly, which he did.*

*I stayed until things came right, I then told girls at scale "if it happens again let me know". I rechecked a while later everything ok, checked with scales again ok.*

*Let Adele and Dion know.*

*B Carson QC*

[86] It is not clear whether the note dated 10 June 2013 was in front of the respondent on the day of the disciplinary investigation meeting of the same day but, clearly, three members of the meeting, one of whom was the President of the local Union, stated that Ms Carson had not felt that she had been abused. This raises the question whether the respondent should have gone back to Ms Carson and checked whether she was retracting her statement prior to determining that Mr McLauchlan had, indeed, abused her.

[87] Whilst the notes of the meeting on 10 June recalled that Mr Marie had stated *even saying I don't give a sh\*t could be construed as being abusive*, I note that similar, and arguably worse profanities (such as the *f word*) were used during this meeting by some of its participants (at least, as recorded in the notes) including by Ms Stevens (who used the phrase *piss around*) and no one appears to have made any issue with the use of such language during this meeting.

[88] I note that the letter of dismissal does not state that Mr McLauchlan abused Ms Carson; merely that he used the words *I don't give a sh\*t*. However, given that both sets of notes of the discussions on 7 and 10 June refer to Mr McLauchlan abusing Ms Carson, it is reasonable to conclude that this was an allegation that Mr McLauchlan was facing. The letter of termination does not state that there was a finding that Mr McLauchlan did not abuse Ms Carson.

[89] It would appear, therefore, that an inadequate investigation may have taken place when the respondent failed to check back with the quality inspector whether or not she actually did feel she had been abused by Mr McLauchlan's statement that he did not *give a sh\*t* after the respondent had been told that she did not feel she had been abused.

[90] The second issue that arises from a perusal of these notes is that the meeting spent a considerable amount of time talking about Mr McLauchlan's conduct that had led to him being given a final written warning. Ms Stevens makes comments along the lines that she believed that his behaviour had been unsafe and that that called into question his ability to serve on the rescue squad. After some time, Ms Law asked the following question:

*Then why wasn't that [the rescue squad] brought up then when he was getting his written warning, why bring it up afterwards?*

[91] Ms Stevens' replies *because we weren't here at the time*. Ms Law replies *so it obviously wasn't the biggest thing on your mind then?* The conversation continues with Ms Stevens talking about Mr McLauchlan *skylarking around* and concerns about health and safety. The following exchange had also taken place right at the start of the 10 June meeting:

*Mihi* good morning do you want to look at the video?

*John* What for

*Jason* no he has been given a final warning already

*Mihi* yep he has indeed

[92] The impression I am given from these detailed notes is that Ms Stevens strongly had in the forefront of her mind the conduct of Mr McLauchlan when he had been throwing meat, which had led to his final written warning. However, as he had already been given a warning for that, there is an arguable case that the respondent was punishing him a second time, by dismissing him, for the same offence. Although the letter of dismissal dated 17 June does not refer to the conduct on the saws, the conversation that took place during the 10 June meeting does raise the possibility that it formed part of the final decision. If that was the case, then there was a significantly arguable case that the decision was unjustified on the basis that Mr McLauchlan would have been punished twice for the same offence and no fair and reasonable employer could have taken such action in all the circumstances.

[93] Connected with that issue is the further question of whether it was fair and reasonable for the respondent to have decided that, having received a final written warning for his conduct on the saws, Mr McLauchlan would be dismissed for the next instance of misconduct, no matter how small, as seems to be evident from some of the comments made by Ms Stevens in the disciplinary meeting.

[94] Mr Cleary submits that the respondent's handbook cites *A second misconduct offence* as an example of serious misconduct which may result in *instant dismissal*. First, of course, this section of the respondent's hand book only states that instant dismissal *may* result from a second misconduct offence. Secondly, there must be a threshold of misconduct below which no fair and reasonable employer could dismiss an employee in all the circumstances, even where a second misconduct offence occurs.

[95] Mr Cleary submits that it would be arbitrary to distinguish between the previous act of misconduct and the current misconduct and that dismissal took place against the background of the previous misconduct on the saw. I do not disagree with the principle propounded by Mr Cleary. However, in this particular case, there appears to be strong evidence to suggest that the misconduct on the saws was more than just background to the dismissal, but actually the key motivator. This muddies the water, and casts doubt on the ability of the respondent to rely upon the provision of the staff handbook cited above.

[96] Taking all these matters into account, I conclude that there is a reasonably strong arguable case that Mr McLauchlan's dismissal was unjustified for procedural reasons, and also possibly substantially unjustified.

### **Is there an arguable case for reinstatement?**

[97] Reinstatement is no longer a primary remedy but remains one measure which may be selected from the range of remedies provided at s123 of the Act to settle a personal grievance, provided it is *practicable and reasonable to do so*.

[98] The Court of Appeal examined practicability of reinstatement in *Lewis v Howick College Board of Trustees*. [2010] NZCA 320. The Court of Appeal reiterated the Court of Appeal's judgment in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 which had, in turn, affirmed the test applied by the Employment Court in that case. The Employment Court in *NZEI* said:

*Whether ... it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future..... Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.*

[99] The Employment Court in *Angus v Ports of Auckland* held, when considering the additional requirement of reasonableness, as follows:

*[65] Even although practicability so defined by the Court of Appeal very arguably includes elements of reasonableness, Parliament has now legislated for these factors in addition to practicability. In these circumstances, we consider that Mr McIlraith was correct when he*

*submitted that the requirement for reasonableness invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.*

[66] *In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.*

[67] *Reinstatement in employment may be a very valuable remedy for an employee, especially in tight economic and labour market times. The Authority and the Court will need to continue to consider carefully whether it will be both practicable and reasonable to reinstate what has often been a previously dysfunctional employment relationship where there are genuinely held, even if erroneous, beliefs of loss of trust and confidence.*

[68] *The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some cases, others, for example affected health care patients in institutions.*

#### *Practicability of interim reinstatement*

[100] On the evidence of the respondent itself, the respondent could accommodate Mr McLauchlan into the workplace in his former position as boner/sawman with little practical difficulty in February 2014. It could apparently do so in December 2013 if it dropped another worker from the line, although no further information is given as to the effect of such an action, such as who would be likely to be dropped from the line, what effect it would have on that worker's pay, or shifts, whether the worker would have to be dismissed.

[101] The Authority must take into account the effects on third parties of reinstatement but the Authority must also guard against employers deliberately recruiting new employees to seek to frustrate a reinstatement bid. There is no evidence that this is the case here, and the respondent cannot be criticised for recruiting a replacement without knowing that an application for interim reinstatement in December 2013 was going to be made in late November 2013. However, Mr Shuker states that the Finegand site is a large site, and that a job would be found for Mr McLauchlan if the respondent were obliged to reinstate him. I infer from that

statement that Mr Shuker could find an alternative position for the other worker instead, if necessary.

[102] On balance, it would appear that Mr McLauchlan could be accommodated back onto the day shift, lamb cuts line in December 2013, albeit with a knock on effect on another worker who would have to drop off the line, although the Authority has not been told the details of what that knock on effect would be.

[103] In conclusion, on balance I believe that it would be practicable for the respondent to reinstate Mr McLauchlan.

*Reasonableness of interim reinstatement*

[104] The affidavit evidence of the three witness for the respondent all strongly oppose reinstatement, on the basis that Mr McLauchlan is *disruptive and dangerous, a danger to the plant*, his actions were *nothing short of sheer stupidity but deliberate stupidity*, and that reinstatement *would only serve to reinforce the behaviours that he had exhibited*.

[105] Having viewed the video evidence exhibited to Mr Shuker's affidavit, Mr McLauchlan's conduct in throwing several pieces of meat, banging down hard on the worktable with his right hand, swaying backwards, pumping his right arm up and down and clapping vigorously did all appear to be hazardous, and the job itself appears to be inherently hazardous, with vertical bandsaws operating centimetres from where the workers were standing.

[106] I was unable to ask questions about the danger of the conduct because of the interim nature of the application but can infer that Mr McLauchlan's conduct, so close to his saw, was both inherently hazardous to himself, and also potentially very distracting to other workers who were using the saws or using knives. The footage I viewed had no sound, but Mr Shuker deposes that he could hear Mr McLauchlan shouting loudly.

[107] Of course, Mr McLachlan was not dismissed for his conduct on the saws; he received a final written warning for it. He was dismissed, ostensibly at least, because he was 15 minutes late back to work after smoko and because he used a swear word in the presence of the QC inspector. However, Mr Shuker's immediate reaction on seeing the conduct on the saws was that Mr McLauchlan should not work on the saws

again. It is my view that this was a fair and reasonable reaction for an experienced senior manager to have reached given the conduct that he had directly witnessed (and of which I have seen on the footage). I make no decision, at this stage, whether Mr Shuker should have first convened a disciplinary investigation before reaching that decision, so that it may have been procedurally unjustified but, given what I have seen of the video footage, I do not believe that that decision was substantially unjustified.

[108] On the basis of the affidavit evidence of Mr Shuker, Mr McLauchlan now wishes to be considered for reinstatement to his former position, but working as a boner only, which his counsel says will address Mr Shuker's concerns. For a reason that is not explained by the respondent, no second affidavit has been lodged by Mr Shuker, so it is not possible to know whether it does or does not address his concerns, so I can only take into account the objections lodged by Ms Stevens in her second affidavit. Mr Marie did depose that he did not believe that Mr McLauchlan was in a suitable state of mind to be working on saws or knives, but I believe that Mr Marie refers to 6 June 2013 only.

[109] Given his dangerous conduct at the saws, I am unable to find that there is an arguable case that if Mr McLauchlan were to prove that his dismissal was unjustified at the substantive investigation, he would be granted permanent reinstatement to his previous job as day shift sawman in the lamb cuts room.

[110] However, in the absence of any evidence from the respondent that knife work is equally as hazardous as saw work, and in the absence of Mr Shuker telling Mr McLauchlan on 6 June 2013 that he was off knife work as well as saw work, I cannot infer that Mr McLauchlan going back to his former position doing boning work only would present an equal hazard. My belief is sustained by the fact that Mr McLauchlan's pay rate was not affected when he was taken off the saw work on 6 June, which causes me to conclude that Mr Shuker had intended to let him work on the knives later.

[111] Addressing the concerns in Ms Stevens' second affidavit, these are all speculative. Namely, Ms Stevens speculates that Mr McLauchlan would see his reinstatement as a vindication, that he would disparage management, that he would not stick to the rules and that he would have a negative influence on others.

[112] In relation to the concern about Mr McLauchlan seeing his reinstatement as a vindication, it is an interim reinstatement only at this stage, and Mr McLauchlan faces the substantive investigation in February where he may not succeed and/or where permanent reinstatement is not guaranteed. Conversely, if he were to win his personal grievance, then a feeling of vindication would be justified. If Mr McLauchlan were to disparage management, that could amount to misconduct, and management would be at liberty to deal with that, if it arose.

[113] With regard to the risk of Mr McLauchlan not following the rules, he has been a boner since 2000, and although he has had a number of verbal and written warnings, including a final written warning in 2002, he has survived with the respondent until June this year. This would suggest that he is able to follow rules. Finally, there is no evidence that Mr McLauchlan would have a negative influence on others, but if he did, that is likely to lead to a disciplinary investigation by the respondent. In other words, Mr McLauchlan would be foolhardy to conduct himself anything other than in accordance with the respondent's reasonable expectations, given that he would have a final written warning extant on his file.

[114] I also take into account the fact that Mr McLauchlan has been a member of the rescue squad at the plant. Whilst no detail was given about this role, I infer that it requires a high level of responsibility and dependability. Although there was talk about removing him from that responsibility on 10 June, up until that point he had been trusted by the respondent to hold down this role, as well as the role of sawman.

[115] Mr Cleary on behalf of the respondent submits that, pursuant to s.124 of the Act, I am bound to take into account contributory conduct by Mr McLauchlan. However, s 124 provides as follows:

***124 Remedy reduced if contributing behaviour by employee***

*Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—*

- (a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and*
- (b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.*

[116] It is difficult to understand how the remedy of reinstatement under s.123(1)(a) of the Act can be *reduced*, as contemplated by s.124(b). However, I accept that it is

appropriate to take into account the conduct for which the employee was dismissed in considering an application for reinstatement. However, in this case, the contributing conduct leading to the dismissal was being 15 minutes' late and swearing in the presence of the QC inspector. I note that the inspector does not complain that Mr McLauchlan did not take note of her advice as to how to do the job. In fact, she reports that he did do the job properly thereafter. Therefore, although there was some contributory behaviour to his dismissal, in that Mr McLauchlan was not blameless, I am not convinced that it was so bad as to tip the balance against reinstatement.

[117] I do not accept, either, the submission that there is very little in the way of evidence to indicate a change of attitude by Mr McLauchlan. He deposes that he was foolish, and he acknowledges that *I will need to be really careful to make sure that I do not engage in any tomfoolery around the saw in future.*

[118] All in all, I believe that interim reinstatement to his former role, off the saw, but boning, would be both practicable and reasonable.

#### **Where does the balance of convenience lie?**

##### *Possible prejudice to Mr McLauchlan in not being reinstated*

[119] Mr McLauchlan deposes that reinstatement is hugely important to him as *work is very hard to come by where I live in Kaitangata.* He refers to the date of the substantive hearing of the matter, which had already been set down prior to the application for interim reinstatement, 4 February 2014, and states that, if he had to wait until then before an order for reinstatement were made, he would likely not have a job to go back to. This is, however, rebutted by the respondent in Mr Shuker's affidavit evidence and I accept the respondent's position on that.

[120] Mr McLauchlan deposes that he has had some casual work in order to try to make ends meet for his partner and his two young children and to pay his mortgage. He states that he has also been receiving benefits.

[121] Mr McLauchlan deposes that he understands that he was foolish in what he did on the saw on 6 June and he states that he is confident that he can return to work successfully. He deposes that he is motivated to make sure his return to work is successful because of his family. He also states that he is committed to working at the plant and refers to his volunteer involvement on the fire rescue team.

*Possible prejudice to the respondent if Mr McLauchlan were reinstated*

[122] The prejudice that the respondent faces if Mr McLauchlan were to be reinstated on an interim basis falls into two categories; the risk of a repeat of dangerous behaviour and having to move another worker off the chain to accommodate him.

[123] On the first issue, I have already concluded, in the absence of cogent evidence from the respondent to the contrary, that the respondent's concerns can be largely accommodated by reinstating Mr McLauchlan to a position away from the saws, working just as a boner. He also has a final written warning hanging over him, which would allow the respondent to dismiss him lawfully for further dangerous behaviour, provided that a fair and reasonable procedure were followed.

[124] With respect to the second issue, Mr McLauchlan deposes (which is not contradicted by the respondent) that there are around 35 to 40 boners in the plant compared to 5 or 6 sawmen. The respondent has also deposed that the plant is a large one. Furthermore, from February 2014, further workers are expected to be recruited, when the person who will be displaced by Mr McLauchlan could presumably be put back on the line.

[125] On balance, I believe that the prejudice to Mr McLauchlan in not being reinstated on an interim basis outweighs the prejudice to the respondent, and to third parties, if he were to be reinstated.

*Would other remedies be adequate?*

[126] Mr McLauchlan deposes that he is suffering financial hardship by being unemployed, that he has had some casual work, that he has a partner and two children, that he has a mortgage and he has been in receipt of benefits. He deposes that that does not offer the same financial security as work on the day shift in the lamb cuts room. Mr McLauchlan does not give any detail of his financial position, such as what savings, if any, he has, what income he is currently receiving and what his financial commitments are. I am unable to judge, therefore, the extent to which he would be prejudiced if he were not to be reinstated on an interim basis and whether financial remedies awarded in early 2014 would be adequate.

[127] Mr McLauchlan also deposes, however, that he has worked for the respondent since 2000, and that he has done so every season since then, bar one. Although he does not say what other skills he has, I infer from his work history at the respondent that his main skills are working in a freezing works.

[128] Given the apparent limited options of alternative employment for Mr McLauchlan outside of the respondent plant at Finegand, if he were to succeed in the substantive investigation of his personal grievances, financial remedies alone would likely not be an adequate remedy given the limited duration of such remedies, so that Mr McLauchlan would risk being without a substantive income for an unforeseeable period of time.

[129] Therefore, I believe that other remedies than reinstatement are not likely to be an adequate remedy.

### *Conclusion*

[130] Weighing up the evidence, I believe that the balance of convenience does favour Mr McLauchlan's reinstatement to his former position on the day shift in the lamb cuts room, working as a boner.

### **Where does the overall justice of the case lie?**

[131] Mr Cleary refers to the principle of *laches*, which may be otherwise referred to as the principle that undue delay in seeking relief should consequently disentitle the applicant from the relief sought. He argues that this weighs against Mr McLauchlan. However, it is my view that the delay in lodging the application for interim relief does not lie at the hands of Mr McLauchlan. It was reasonable for Mr McLauchlan to rely upon his legal advisers to do everything they reasonably could to achieve his aims.

[132] Whilst Mr McLauchlan's legal advisers did lodge an application for interim relief too late for the Authority to consider it prior to the commencement of the season, that cannot be the fault of Mr McLauchlan. Just as relying upon making reasonable arrangements to have a grievance raised on his or her behalf by an agent of an employee, and the agent unreasonably failing to ensure that the grievance was raised within the required time, can allow the Authority to accept a personal grievance raised outside of the statutory 90 day time period (s.115(b) of the Act), on a just and

equitable basis, Mr McLauchlan's advisers' delay in lodging the application for interim reinstatement cannot be permitted to disadvantage Mr McLauchlan.

[133] Clearly, the delay (which is not egregious in any event) cannot be the fault of the respondent, but I do take into account the fact that the prospect of reinstatement was raised in the statement of problem lodged on 7 August 2013. The possibility of that reinstatement was always present thereafter.

[134] Turning to other issues, I recognise that Mr McLauchlan has been left in a difficult financial position by having been dismissed. He fears that, come February, there will be no job to return to if the Authority were not to order interim reinstatement. However, Mr Shuker has deposed unequivocally that that would not be the case.

[135] Mr McLauchlan deposes that, if reinstated, he would be really careful to make sure that he would not engage in any tomfoolery around the saw in future and that senior staff members have said that they would keep an eye on him if he were to return to the saws.

[136] Having seen on the CCTV footage the set-up of the saw work in the lamb cuts room, it is clear to me that the saw work is inherently hazardous and that reliable worker conduct when working around the saws must play a very significant part in ensuring that serious injuries do not occur. A moment's inattention could clearly cause a very serious injury, and horseplay around the saws would present a serious risk of that. I am mindful of the fears that Mr Shuker, Mr Marie and Ms Stevens have expressed about the risk of a repeat of the conduct that led to the final written warning and Mr Shuker's decision not to have Mr McLauchlan working on the saws again. However, that can be addressed by reinstating Mr McLauchlan to a position doing boning work only.

[137] In weighing up the respective positions of the parties, there is a reasonably strongly arguable case that Mr McLauchlan was substantively and procedurally unjustifiably dismissed, and that he will suffer financial difficulties if he is not reinstated now, which outweigh the prejudice that the respondent would face if Mr McLauchlan were to be reinstated.

[138] On balance, Mr McLauchlan's reassurances about his future behaviour carry more weight away from the saw, in the absence of specific evidence from the

respondent that the same level of hazard remains doing boning work. The overall justice of the case, in my view, favours reinstating Mr McLauchlan to his former position on an interim basis.

### **Conclusion and directions**

[139] I conclude that the requisite tests for interim reinstatement have been satisfied in this matter. However, there are conditions that need to be complied with in order to give the reinstatement a chance to succeed.

[140] First, Mr McLauchlan's reinstatement is to take place on the first working day after the Boxing Day holiday, so as to give the respondent time to consult with the displaced worker and to decide where he or she may be placed.

[141] Second, although Mr McLauchlan is reinstated on an interim basis to a position on the day shift in the lamb cuts room as a boner/sawman, the respondent may choose to deploy Mr McLauchlan solely on boning work until, at its reasonable discretion, it believes that Mr McLauchlan is to be trusted to carry out saw work again.

[142] Third, the final written warning that was issued to Mr McLauchlan on 7 June 2013 is to stand.

[143] Finally, the substantive investigation of the personal grievance will take place on 4 February 2014. I direct the parties to take part, on an urgent basis, and in any event before 4 February 2014 (subject to the availability of a mediator) in mediation with a member of the Mediation Services with a view to resolving the matter currently before the Authority

### **Orders**

[144] I make this order in reliance on Mr McLauchlan's undertaking as to damages under section 127 (2) of the Act.

[145] I order that the respondent reinstate Mr McLauchlan to his former position as boner/sawman on the day shift in the lamb cuts room and to his position on the seniority list at number 40 from the top, on an interim basis with immediate effect, subject to the following conditions:

- (a) Mr McLauchlan is not to attend work until the first working day after the 2013 Boxing Day holiday, and
- (b) the respondent may choose to deploy Mr McLauchlan solely on boning work until, in its reasonable opinion, it believes that Mr McLauchlan is to be trusted to carry out saw work again; and
- (c) the final written warning that was issued to Mr McLauchlan on 7 June 2013 is to remain; and
- (d) the parties are to attend mediation on an urgent basis.

**Costs**

[146] Costs are to be reserved until the conclusion of the Authority's substantive investigation of the matter.

David Appleton  
Member of the Employment Relations Authority