

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 39
5614208

BETWEEN ADRIAN MEALING
Applicant

A N D DB BREWERIES LIMITED
Respondent

Member of Authority: Christine Hickey

Representatives: Peter Cranney, Counsel for Applicant
Carl Blake, Counsel for Respondent

Date of Investigation Meeting: 31 March 2016

Submissions Received: At the Investigation Meeting

Date of Determination: 4 April 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Adrian Mealing worked for DB Breweries Limited (“DB”) in its Timaru brewing plant. Mr Mealing was a packaging operator and a qualified forklift operator.

[2] DB dismissed Mr Mealing on 1 March 2016 for serious misconduct. DB decided that he had seriously breached its health and safety policy, and as a result, it had lost trust and confidence in him.

[3] Mr Mealing says his dismissal was unjustified. He claims remedies of reinstatement, lost wages and compensation. Mr Mealing has made an application for interim reinstatement under s 127 of the Employment Relations Act 2000 (the Act). In this determination, my focus is on his claim for unjustified dismissal.

[4] Mr Mealing has provided the Authority with an undertaking as to damages and three affidavits in support of his application.

[5] DB opposes interim reinstatement. It says that Mr Mealing's dismissal was justified. DB has provided two affidavits in support of its opposition to the application for interim injunction.

[6] The parties attended mediation but the matter was not resolved.

Relevant law

[7] Section 127 of the Act allows the Authority to exercise its discretion to order interim reinstatement of an employee before the substantive determination of the employee's unjustified dismissal grievance claim.

[8] When determining whether to exercise my discretion to order interim reinstatement, I am required to act judicially by applying the law relating to interim injunctions, also having regard to the objects of the Act. The principles relating to interim injunction proceedings before the Authority are well established.

[9] I have determined this interim reinstatement application based on legal submissions supported by untested affidavit evidence. Because there was no questioning or examining of the witnesses who provided the affidavit evidence, no conflicts in the evidence were able to be resolved.

[10] Therefore, any findings of, or discussions about, the facts at this interim stage are provisional only and my view on these matters may change after the claims have been fully investigated and the witnesses properly examined during the substantive investigation meeting.

[11] I have offered the parties the dates of 26 and 27 July 2016 for the substantive investigation meeting.

Issues

[12] There is no rigid formula to be applied in determining an interim injunction. However, I need to make the following inquiries:

- (a) Does Mr Mealing have an arguable case that his dismissal was unjustified;

- (b) If so, does he have an arguable case for permanent reinstatement;
- (c) Where does the balance of convenience lie until the substantive matter can be determined? As a part of this consideration, I will look at the adequacy of an alternate remedy;
- (d) Where does the overall justice of the case lie until the substantive matter can be determined?

What happened before Mr Mealing was dismissed?

The incident

[13] On 10 February 2016, Mr Mealing was working at the DB plant with a temporary agency worker, Rachel Brownlee. Mr Mealing's supervisor, Ray Malcolm, saw Ms Brownlee sitting on a stationary forklift. Mr Mealing was showing Ms Brownlee the controls and explaining how a forklift worked. Mr Malcolm approached Mr Mealing and Ms Brownlee.

[14] Mr Mealing explained to Mr Malcolm that Ms Brownlee was interested in becoming qualified to operate a forklift. Mr Mealing explained that he had offered to help Ms Brownlee become familiar with using a forklift.

[15] There is an unresolved conflict about what Mr Malcolm said next. Mr Malcolm either said that Mr Mealing must train Ms Brownlee outside and away from the glass in the depal area where they were or, he said something like "*alright but be very careful in this area and outside because if anything goes wrong it will be me who gets into trouble*".

[16] About 20 minutes later, Mr Malcolm came back down to the depal area. Mr Malcolm asked Mr Mealing and Ms Brownlee if they had finished. When he returned to the area, Ms Brownlee was operating the forklift with a pallet on it, either picking it up or putting it down.

The investigation

[17] Nothing further was said or done about this incident until 12 February 2016 when Melissa Muirhead, DB's Human Resources Business Partner – Supply Chain, visited the Timaru brewery. During a conversation about health and safety, Mr Malcolm told Ms Muirhead that he had seen Mr Mealing showing Ms Brownlee

how to operate a forklift. He told Ms Muirhead that he had told Mr Mealing if he was going to show Ms Brownlee how to drive, she should not drive in the depal area but outside, away from glass. However, when he came back about 20 minutes later, he saw Ms Brownlee driving in the depal area with a pallet of glass.

[18] Ms Muirhead was shocked to hear Mr Malcolm's report and asked him to complete a near-miss incident report. She then went to speak to Kim Haack, the Timaru Brewery Manager.

[19] Ms Muirhead and Mr Haack decided that Mr Mealing's alleged conduct was very serious and needed to be investigated. Ms Muirhead interviewed Mr Malcolm and took a statement from him that she typed. I have not seen any original handwritten notes. The statement is not signed:

... I observed Rachel Brownlee sitting on the forklift in the infeed depal area. The forklift was stationary at this time. I approached them both and I asked Adrian Mealing something along the lines of "she's not driving this is she? She doesn't have a forklift licence". He said something about showing her. I replied "no, not here in this area, if that does happen it needs to be outside where there is nowhere near anything could get damaged and nowhere near glass". Adrian agreed to this.

Later I was coming down from the filler to the depal and came around the corner and saw Rachel in the forklift with the forks in the pallet either picking it up or putting it down and the forklift was moving. Adrian Mealing was standing next to the forklift, close and possibly within the metre.

I shook my head and Adrian said "I'm the best trainer in this place".

[20] That same day Mr Haack and Ms Muirhead spoke to Ms Brownlee on the telephone and Ms Muirhead typed a file note:

- *On Wednesday morning I mentioned that I was keen to get my forkhoist licence and AD offered to teach me how to drive.*
- *I didn't ask to have a go. AD offered.*
- *I know that you are not meant to drive a forkhoist without a licence and reading the book.*
- *At the start he just showed me the pedals and that is when Ray saw it and spoke to us.*
- *I drove it for at least 20 minutes and carried full pallets of glass bottles on it and drove to the shed and back.*
- *It was my first time on a forkhoist.*

- *AD stood right next to me when I was driving slow, he would have been closer than a metre.*

[21] On 15 February 2016, DB wrote a letter to Mr Mealing inviting him to a disciplinary meeting. It made a number of allegations of serious misconduct:

- 1) *That on Wednesday 10 February 2016, you offered to teach Rachel Brownlee how to drive a forkhoist, knowing that she had never driven a forkhoist before and did not have a forkhoist licence. That you offered to teach her, using a DB forkhoist on DB premises, in an area that contains a significant amount of glass.*
- 2) *That you instructed Rachel Brownlee to drive a forkhoist on DB premises, knowing that she was unlicensed and knowing that she had not undertaken the DB mandatory e-learning required before anyone can drive a forkhoist onsite.*
- 3) *That you instructed Rachel Brownlee to drive a forkhoist for at least 20 minutes in the Depal area and that she carried full pallets of glass during this time. This is a task that requires experience, specific training and skill due to the high pallet loads and restricted area.*
- 4) *That Ray Malcolm approached you and clarified that Rachel Brownlee was not licensed and that if you were going to show her how to drive, it needed to be outside and away from glass. That following this instruction, you continued to allow Rachel to drive the forkhoist in the Depal area and instructed her to carry full pallets of glass thus deliberately failing to follow the direct instruction of your immediate supervisor.*
- 5) *That you are aware that no one is allowed to drive a forkhoist unless they are licenced, inducted into DB and trained in the specific area. That you knowingly breached the safety procedures and rules around this.*
- 6) *That the above actions are a serious breach of Health & Safety procedures and there was a significant risk that this behaviour could have caused death or serious injury if a person had been hit by an untrained and unlicensed forkhoist operator who was driving a forkhoist on DB premises under your direct instructions. There was also a significant risk of losses to the company had there been damage to product or property.*

...

You should be aware that DB views these matters very seriously and should serious misconduct be found to have occurred, disciplinary action, up to and including dismissal without notice could occur.

[22] DB enclosed Mr Malcolm's near-miss report, Ms Muirhead's notes of what Mr Malcolm said and the file note of the telephone conversation with Ms Brownlee.

[23] On 17 February 2016, Mr Haack went to see Mr Mealing because he was concerned that Mr Mealing was still operating a forklift while there were serious allegations against him in relation to the breach of the forklift health and safety procedures. Mr Haack told Mr Mealing that he was suspending his forklift PIN number and access and that he should not operate any forklifts during the investigation. Mr Haack told Mr Mealing that he was happy for him to keep operating a hand-held electric hoist.

[24] On 26 February 2016, Mr Haack received an email from Wendy Robertson about Rachel Brownlee. Ms Robertson is the director of the agency that employed Ms Brownlee. The email said that Ms Brownlee was uncomfortable with Mr Mealing contacting her in relation to the disciplinary process and asking her to attend the disciplinary meeting with him. Ms Robertson wrote:

I am bringing this to your attention, as I feel his behaviour is bordering on harassment of one of our staff members, and would ask you to speak to your employee about this matter to ensure he stops contacting Rachel with immediate effect.

Should DB Breweries require Rachel to attend any such meeting, I would request the standard protocol is adhered to, i.e. in the first instance I am contacted by yourself to discuss any matter that may require a Temporary Employee to attend a meeting with your Company.

The disciplinary meeting

[25] The disciplinary meeting was held on 1 March 2016. Mr Mealing was accompanied by Chas Muir of Mr Mealing's union, E Tu and Ian Dippie, an E Tu delegate. DB was represented by Mr Haack and Ms Muirhead. Both parties took notes.

[26] Mr Mealing provided a signed statement from Ms Brownlee which read:

On the morning of Wednesday 10th of February I was helping AD in the Depal area. It was a clean up morning and not rushed like usual, we had the opportunity to chat. I told AD that my mother suggested it might be a good idea to sit my forklift licence, to get more work. AD agreed that this was a good idea and said that there will be more opportunities for work at DB if I had one. He said that's how other people had got more work. AD told me that during the test there would be a driving part, like a competency test. AD said that if I was interested he would show me the basics, to help me if I wanted

to apply for forklift test. AD didn't at any time insist that I had to, or direct me as though I must. I was keen to be shown and interested to learn. We went to the forklift to look over the controls. I sat in the forklift and he showed me the levers and driving controls and explained about how they worked. The forklift was not going. That was when Ray came and asked what we were doing. AD explained to Ray the same as we discussed about the test and competency part, and wanting to help give me the opportunity. AD said to Ray he wanted to get me to bring a few pallets over to show me more and give me a feel for using it. Ray said, okay just be very careful in this area around the glass and outside if anything goes wrong it'll [be] me who gets in trouble. AD told him that we will be very careful and take it very slowly. There was no one else in that area or outside. I didn't feel like I was in any danger or going to cause any damage. AD's instructions were very clear and thorough. I didn't go any faster than 5km. AD only approached to give me instructions. When I turned and moved in any direction that wasn't straight, he moved well back. When Ray came back down he asked if we were finished. AD said yes, we only did a few pallets for me to get the basic idea. I feel like AD was only trying to be helpful and give me a chance for more work. AD didn't do anything he was told not to.

[27] Mr Mealing also supplied a statement by Peter Hefford, a staff member of the Safety Committee. Mr Hefford wrote:

Regarding the disciplinary action being taken against Adrian Mealing for training a casual on a forklift. To my knowledge there has been no policy or standard operating procedure (SOP) announced or brought before the Safety Committee at DB Draught Brewery Timaru. Mr Mealing appears to have been just following what has been standard procedure at DB Timaru for a number of years.

We have been informed that all permanent staff are now trainers and as so Mr Mealing was trying to train a well liked and capable casual worker in basic forklift operation. The training appears to have been undertaken in a safe and practical environment without any danger to the casual, Mr Mealing or any other staff.

The training was witnessed by a supervisor who did not stop it as though through no fault of his own [he] was also unsure of the forklift policy or lack of one at DB Brewery Timaru. To say we are all trainers and then punish someone for training a casual in the absence of a known training policy or SOP seems at best inept to me.

DB Timaru has been using [electric] trolley lifts to move packaging materials for the ... packing machines. These lifts

have been used by casuals without forklift certificates even though one is apparently required. This practice was only stopped by the commencement of Mr Mealing's disciplinary action as no one was aware of current DB Timaru policy.

[28] After Mr Mealing gave his oral explanation, there was an adjournment in the meeting after which Mr Haack announced that he considered all the allegations substantiated. Mr Haack denied that there had been any targeting of Mr Mealing because he was a Union official. He stated that DB Breweries had dismissed two people in the last year for incidents of serious misconduct involving forklift operation.

[29] Mr Haack said that he had seen no remorse or personal accountability from Mr Mealing which undermined the trust and confidence DB had in him. He proposed an outcome of summary dismissal. Mr Muir, Mr Mealing and Mr Dippie all made submissions against that as an outcome. The meeting was adjourned again. When the meeting was reconvened, Mr Haack confirmed that Mr Mealing was summarily dismissed.

Does Mr Mealing have an arguable case that he was unjustifiably dismissed?

[30] To determine whether there is an arguable case I need to consider the justification test in s 103A(2) of the Act. This requires me to assess whether DB's actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time it dismissed Mr Mealing.

[31] A fair and reasonable employer must comply with its statutory obligations, those include the procedural fairness tests in s 103A(3) of the Act and the good faith obligations in s 4 of the Act. Failure to do so is likely to fundamentally undermine an employer's ability to justify its actions and/or the dismissal.

[32] In order to be considered for interim reinstatement in his role, Mr Mealing needs to also establish that it is arguable that he will be permanently reinstated either in addition to, or instead of, being compensated monetarily.¹

[33] An arguable case means a case where there are some serious or arguable, but not necessarily certain, prospects of success.

¹ *Cliff v. Air New Zealand Ltd* [2005] ERNZ 1

[34] Mr Mealing submits that for a number of reasons he has a strongly arguable case that he was unjustifiably dismissed. His reasons focus on:

- a. An inadequate investigation in breach of s 103A(3)(a) of the Act, including failing to follow up on the differences between Ms Brownlee's and Mr Malcolm's written accounts of events;
- b. DB's failure to disclose all the information it had and took into account that was relevant to the continuation of Mr Mealing's employment in breach of s 4 (1A)(c)(i) and (ii) of the Act;
- c. DB's failure to investigate and then take into account Mr Mealing's and Mr Hefford's statements that Mr Mealing was only doing what appeared to have been standard procedure for a number of years; and
- d. Disparity of treatment between Mr Mealing and Mr Malcolm and between Mr Mealing and another forklift driver from the Timaru plant.

[35] DB submits that its process was fair. It also says it had good substantive reason to dismiss Mr Mealing which include him being unremorseful about the potentially dangerous health and safety breach he participated in and his refusal to follow Mr Malcolm's instruction to only teach Ms Brownlee outside away from the depal area.

[36] I consider Mr Mealing has an arguable case that DB unjustifiably dismissed him. My reasons follow:

Inadequate investigation?

[37] One of the main allegations against Mr Mealing was that he knowingly breached health and safety procedures in relation to forklifts. At least part of that breach was to allow Ms Brownlee to drive a DB forklift on DB premises knowing that she had no licence and had not done specific induction and e-learning related to driving a forklift on DB premises. It was highly relevant to this that Mr Mealing's supervisor, Mr Malcolm, did not instruct him to stop teaching her. In effect, putting aside any conflict in the evidence, I consider Mr Malcolm condoned Mr Mealing teaching Ms Brownlee on the forklift for about 20 minutes. Mr Malcolm had the

same knowledge that Mr Mealing had about Ms Brownlee's lack of qualification and safety induction.

[38] All three people involved in the incident state that when Mr Malcolm approached the forklift it was stationary and Ms Brownlee was sitting on it. Mr Mealing explained that he intended to show her how to drive the forklift. He had not done so at that point.

[39] It is relevant to the explanation that Mr Mealing gave about that sort of informal training happening at the plant that Mr Malcolm did not consider stopping Mr Mealing and Ms Brownlee or filling in an incident report until he was instructed to do so by Ms Muirhead two days later.

[40] DB treated Mr Mealing relying on the fact that Mr Malcolm allowed the incident to happen as Mr Mealing not accepting responsibility and attempting to shift blame onto Mr Malcolm. I am not suggesting DB was not allowed to form that conclusion. However, an investigation into what had been going on informally at the plant since the onsite instructor retired should have formed part of a full and fair investigation. Mr Hefford's statement should have been taken into account instead of simply being disregarded because he was not a witness to the incident.

[41] In the disciplinary meeting, Mr Mealing disclosed that more recently than his incident a forklift operator had asked another named supervisor who told the operator to demonstrate forklift driving to someone in the slow time. That allegation was not investigated before the decision to dismiss Mr Mealing was made.

[42] Once DB received Ms Brownlee's signed statement which was more detailed than the notes recorded after Ms Muirhead and Mr Haack's telephone conversation with her further investigation should have been undertaken into the inconsistencies in the evidence between what Mr Malcolm and Ms Brownlee remembered being said. Ms Brownlee's signed statement should have been put to Mr Malcolm, and vice versa.

Taking into account information not put to Mr Mealing for a response

[43] This procedural problem is closely tied to the fact that Mr Haack and Ms Muirhead knew of the Personnel Placements email and took into account that Ms Brownlee's signed statement may have been obtained under some kind of pressure from Mr Mealing. However, that was never put to Mr Mealing. If it had been he

would have been able to describe the circumstances under which Ms Brownlee made her statement, as he has done in his second affidavit. That may have allayed DB's concerns and allowed it to accord some more weight to Ms Brownlee's statement. In addition, DB could have approached Ms Brownlee about its concern about how the statement was achieved to give her an opportunity to endorse, alter or withdraw it.

[44] At paragraph 25 of Mr Haack's affidavit he refers to Mr Mealing having:

... a track record of pushing the boundaries in some respects, particularly in relation to some of the initiatives and programmes DB had introduced over the years. Mr Mealing didn't always seem to buy into the idea of safety coming before machine performance and productivity, or the importance of new safety initiatives.

[45] I am concerned that this view of Mr Mealing informed DB's approach to dealing with and ultimately dismissing Mr Mealing. This concern was not put to Mr Mealing to allow him to comment on it before the decision to dismiss was made.

Not taking into account relevant information?

[46] I am concerned that DB may not have taken into account all the things Mr Mealing said at the disciplinary meeting.

[47] DB made a significant conclusion that Mr Mealing showed no remorse. It relied on that to conclude that the relationship of trust and confidence had been destroyed by Mr Mealing.

[48] I accept that in Ms Muirhead's typed notes of the disciplinary meeting² the words "I am sorry and I won't do it again" or "I am remorseful" are not used by Mr Mealing. However, the handwritten notes attached to the Statement of Problem that were taken by Mr Dippie or Mr Muir at the meeting say that Mr Mealing said:

I have clearly understood the importance of health and safety and where you stand on this.

I would never do anything to jeopardise anyone's wellbeing or myself.

...

² In advance of the substantive investigation meeting I require all original notes, including of the interviews with Ms Brownlee and Mr Malcolm, to be disclosed.

There is remorse – there most certainly is. (Emphasis added)

[49] Those first two sentences are reflected in Ms Muirhead's typed notes but not the crucial last sentence. It may be that those words were inadvertently overlooked in Ms Muirhead's notetaking and then also in the process of decision-making.

Who was the complainant?

[50] Generally, a complainant should not be involved in the investigation and decision-making in a disciplinary process. It may be that DB considered Mr Malcolm to be the complainant.

[51] However, I consider it arguable that Ms Muirhead was the complainant given that Mr Malcolm did not recognise the incident as a health and safety breach until after Ms Muirhead was shocked about what he told her and instructed him to file an incident report.

Disparity of treatment

[52] Based on the affidavit evidence it appears that Mr Malcolm's actions in relation to the incident did not result in a formal disciplinary process where he was required to give his explanation for allegations made by DB against him. Mr Haack was entitled to make a decision to deal with Mr Malcolm less formally and did so by way of discussions with him. Mr Haack said the likelihood of repeat behaviour is what he wanted to assess and he was satisfied when he spoke to Mr Malcolm that he accepted responsibility and accepted his behaviour had been inadequate.

[53] Mr Haack decided it was unlikely that Mr Malcolm would condone informal forklift training in the future, whether inside or outside the plant. He then offered Mr Malcolm advice and support in meeting DB's expectations of him. It is not clear if Mr Malcolm was ever told that what he did could be seen as serious misconduct that could result in his dismissal. Certainly, Mr Malcolm was not dismissed.

[54] Mr Mealing was not initially approached in an informal way by Mr Haack or Ms Muirhead to assess the likelihood of him undertaking informal forklift training in the future. The first approach was by way of a letter formally raising six allegations of serious misconduct. He was invited to come to a meeting to answer those allegations in the knowledge that if proven his dismissal may be the outcome, which it ultimately was.

[55] There may be justification for disparity of treatment. It is not clear at this stage in the proceedings whether such justification existed. However, there is no evidence of justification for the difference in how the investigations and disciplinary proceedings were approached.

[56] For example, there was never an investigation into whether what Mr Malcolm said was correct or whether he was putting a gloss on his statement making his part in events appear more favourable than Mr Mealing's part in events. I am not suggesting that he was doing so but an objective assessment of the facts should have been carried out. Not only Ms Brownlee's memory of events should have been sought at an early stage but also Mr Mealing's memory of events.

[57] At this interim level it is certainly arguable that there is an unjustified disparity of treatment when a more senior person is treated more leniently.

[58] Also at this stage, in reliance on untested evidence, it appears that there has also been disparity of treatment with another forklift operator.

Does Mr Mealing have an arguable case for reinstatement?

[59] If Mr Mealing is found to have been unjustifiably dismissed his reinstatement is a discretionary remedy. It would need to be both practicable and reasonable.

[60] Mr Mealing had worked for DB for almost 8 years when he was dismissed. There is no evidence of him having any history of or any warnings for breaching health and safety policy and practice. That is despite Mr Haack's view expressed in paragraph 25 of his affidavit.

[61] DB submits that it has lost total trust and confidence in Mr Mealing and therefore it could not accept him driving forklifts at its plant again. In large part, the reason for this loss of trust and confidence is its view that Mr Mealing was not properly remorseful.

[62] The incident on which the substantive justification for dismissal relies was a one-off incident arguably, at least in part, sanctioned by Mr Mealing's supervisor. Mr Haack's concern is to ensure such a breach of health and safety practice and policy would not occur again. DB has demonstrated how serious a breach it considered the incident to be. There is no evidence or reason to suggest that Mr Mealing would do

anything similar in future. There is no evidence that he routinely or repeatedly flouts health and safety policy or procedure or that he fails to understand what a serious breach DB considers him to have undertaken.

[63] It is not sufficient for DB to simply assert that Mr Mealing has destroyed all trust and confidence. It would need to point to conduct of his that is incompatible with the faithful discharge of his duties. At this interim stage, I do not consider it has done so.

[64] I consider Mr Mealing has an arguable case for permanent reinstatement.

Where does the balance of convenience lie until the substantive matter can be determined?

[65] The balance of convenience requires me to balance and assess the respective injustices to DB and Mr Mealing from now until I can determine the substantive merits of the case. On part of my consideration is whether monetary damages would be an adequate remedy for any injustice that might occur.

[66] I need to assess the potential injustice to:

- Mr Mealing of not being reinstated before a substantive determination is issued, assuming he is entitled to reinstatement should his grievance succeed; and
- DB of having Mr Mealing back in the workplace on an interim basis if he is eventually found to have been justifiably dismissed or, if the dismissal is unjustified, I decline to award reinstatement as a remedy.

[67] The timing of the substantive investigation meeting in late July is a significant factor. It is unlikely a substantive determination could be available until mid- August.

[68] That delay is a factor in favour of Mr Mealing's interim reinstatement because he has been out of work now for one month. Mr Mealing is the breadwinner for his family. The potential injustice to Mr Mealing of potentially another 4½ months of no or significantly reduced income outweighs the potential injustice to DB of him being reinstated on an interim basis.

[69] As part of considering practicability and reasonableness I need to assess whether workplace relationships can be restored.

[70] I do not accept DB's submissions that Mr Mealing's return to work as a forklift driver will be dangerous.

[71] There is no suggestion that any other employees with whom Mr Mealing works closely will have any problems working with him again as a result of the incident.

[72] I have considered the idea that Mr Mealing could return on an interim basis as a packaging operator without driving a forklift. However, there is no real reason for that now that he clearly understands that he must not conduct any informal forklift training again.

[73] I do not accept DB's submission that monetary damages would be a sufficient remedy for Mr Mealing if he is reinstated after the substantive matter is determined. Loss of income is not the only loss that comes with a dismissal. There is also the loss of the intangible benefits of working which could not be compensated for by payment of money.

[74] In the event that after the substantive case is heard Mr Mealing is not permanently reinstated DB is unlikely to be out of pocket as it will have had the benefit of Mr Mealing's work in the interim.

Where does the overall justice lie until the substantive matter is determined?

[75] This test requires me to stand back and assess where the overall justice of the case lies for the interim period until the substantive claim has been determined.

[76] Taking onto account the interests of Mr Mealing and DB I consider that the overall justice of the case favours reinstatement.

[77] In order for Mr Mealing's interim reinstatement to have the best chance of succeeding for both parties I adopt Mr Cranney's suggestion that mediation will assist to reintegrate Mr Mealing back into the workplace and to resolve any lack of clarity about forklift use health and safety policies, procedures and practice at DB's Timaru site.

Orders

[78] Pursuant to the undertaking as to damages under section 127(2) of the Employment Relations Act 2000 Adrian Mealing is reinstated to his previous position in the interim pending the hearing and determination of his personal grievance under the conditions set out below.

[79] I direct the parties to mediation within the next three weeks to resolve any outstanding health and safety policy and practice issues related to forklift and any other machinery used at DB Breweries Timaru.

[80] Mr Mealing is to return to work in the same role he was working in when dismissed, which includes driving forklifts, within one week after mediation has taken place.

Costs

[81] Costs are reserved until the completion of the substantive matter.

Christine Hickey
Member of the Employment Relations Authority