

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 204/09  
5165039

BETWEEN                      HAYDN CAMERON  
   NICHOLS  
   Applicant

AND                              IAG NEW ZEALAND  
   LIMITED  
   Respondent

Member of Authority:      Philip Cheyne

Representatives:            Haydn Nichols, the Applicant in person  
   Gillian Service, Counsel for Respondent

Investigation Meeting:     27 November 2009 at Christchurch

Determination:              30 November 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Haydn Nichols worked for IAG New Zealand Limited as a broker claims consultant until 29 July 2009 when he was summarily dismissed for serious misconduct. Mr Nichols lodged these proceedings on 27 October claiming interim and permanent reinstatement to his previous position. During a phone conference on 2 November arrangements were agreed to investigate the claim for interim reinstatement. Mr Nichols lodged and served an affidavit in support of his application on 4 November and IAG lodged and served a statement in reply and affidavits in opposition on 20 November.

[2] The following findings are solely for the purpose of determining the claim for interim reinstatement. Final findings of fact will have to wait the opportunity to test the evidence. I will outline the basis of Mr Nichols grievances before applying the

law on interim reinstatement. While Mr Nichols is a litigant in person, the Authority's communications to him have included reference to the relevant legal principles.

### **Mr Nichols' grievances – an arguable case?**

[3] Mr Nichols received a written warning on 31 March 2009 for inappropriate tone, language and acting in an intimidating manner towards customers and colleagues. By letter dated 11 May Mr Nichols through his union raised a personal grievance.

[4] IAG received complaints about Mr Nichols from a significant client who demanded that he be removed from their account. A meeting was foreshadowed with Mr Nichols to discuss this, but meantime he was deployed on other duties that removed him from contact with the client. Mr Nichols raised a grievance about this action on 2 July.

[5] Mediation on 3 July did not resolve these grievances. Subsequently arrangements were made for a disciplinary meeting for 20 July to consider the client complaints. Before that meeting, on 17 July, Mr Nichols distributed to his work colleagues a questionnaire seeking those colleagues' views about their dealings with the client and asking them for their personal support in his personal grievances. IAG heard of this so the disciplinary meeting intended for 20 July was escalated to deal with the new matter as alleged serious misconduct and rescheduled for 28 July. Mr Nichols was then dismissed on 29 July. There is a letter dated 30 July 2009 setting out the reasons for the dismissal. Mr Nichols' representative by letter dated 4 August 2009 raised a personal grievance concerning the dismissal.

[6] Regarding the first and third grievances, it is difficult to discern the details of Mr Nichols' challenges other than his statement that he was dismissed for serious misconduct *when the true reason was that I was a strong PSA Union Workplace Delegate*. The second grievance concerning being redeployed, even if successful, does not bear on whether IAG justifiably dismissed Mr Nichols so I do not need to consider it further at present.

[7] IAG seems to have given Mr Nichols all relevant material, explained to him what its concerns were, given him a reasonable opportunity to respond and be represented and given consideration to his responses. The disciplinary exchanges are

in writing or were tape recorded (with one exception) in accordance with policy so there is little opportunity for dispute about the disciplinary process followed by IAG. There has been no obvious departure by IAG from its disciplinary policy. At this point there seems to be little room for a valid complaint about the *How* aspects of the warning or the dismissal: see *Air New Zealand v V* (2009) 9 NZELC 93,209; (2009) 6 NZELR 582.

[8] Mr Nichols points out that complaint has been found about his conduct only since he became a union delegate. However the documents show that Mr Nichols' managers have reacted to issues presented to them by others for the most part. His assertion that the true reason for his dismissal is other than that expressed may eventually finds some support in the evidence but at present there is nothing of any substance. It is also possible that the warning will eventually be found to be unjustified so as to alter the circumstances faced by IAG at the time of its decision to dismiss Mr Nichols. These points are weakly arguable at best. Finally, justification for the dismissal will depend on IAG being able to establish that Mr Nichols' conduct was sufficiently serious so as to deeply impair trust and confidence. The conduct that changed the picture was Mr Nichols' attempt to recruit other staff to support him over his existing grievances. IAG says that he undermined his manager, brought IAG into disrepute and abused his position as a union delegate and it points to the *Code of Conduct* expectations. Whether Mr Nichols' conduct ruptured trust and confidence sufficiently is very much a question of fact and degree. I find that there is an arguable basis for a challenge to the *What* aspects of the dismissal but it is certainly not at this stage a strong case.

### **Balance of convenience**

[9] Here I must assess the effects on Mr Nichols of being kept out of his employment when he might eventually be reinstated against the effects on IAG of having to take Mr Nichols back now, when the dismissal might eventually be upheld. These assessments should be based on the affidavit evidence before the Authority but, in view of Mr Nichols' lack of familiarity with this process, I will also consider other documentation provided by him.

[10] Mr Nichols makes the point that he has suffered severe financial loss because of his dismissal and that he has had to cash up his retirement savings so as to meet the weekly shortfall of his family expenses. From other materials it seems that Mr

Nichols' weekly family expenses are \$350.00 greater than income. That is being funded at present from retirement savings. On the figures given by Mr Nichols that shortfall can be sustained for more than a year from the date of dismissal. In my discussion with Mr Nichols he explained that some of his capital has been spent on establishing a business venture so the time period might be somewhat less than a year. A substantive investigation can be held in late April 2010. I could have scheduled the matter in March but Mr Nichols will be overseas. Regardless, the substantive matter can be investigated and determined before Mr Nichol's savings are exhausted. For that reason, this is not a case where the financial circumstances support interim relief.

[11] Mr Nichols provided some information about his and his wife's mental health. However there is no evidence to support a contention that their health will worsen if Mr Nichols is not reinstated pending disposition of his personal grievance.

[12] I accept counsel's submission that there would be a measure of disruption for IAG managers and at least some of Mr Nichols' colleagues if he was reinstated in the meantime. The client complaint matter means that IAG would have to deploy him to other work for 5 months or more. I also agree that Mr Nichols might not eventually win reinstatement so there would be inconvenience to IAG and some potential distress to Mr Nichols to be sent away from his employment a second time.

[13] I agree with counsel's submission that the prospects for permanent reinstatement are not diminished if Mr Nichols is not reinstated in the meantime. IAG's will be able to pay any compensation if Mr Nichols eventually succeeds and is entitled to an award for lost remuneration, lost benefits and distress. This is not a case where harm or loss that cannot eventually be compensated will be suffered by Mr Nichols if he is not reinstated in the meantime. All this leads to the conclusion that there are adequate remedies apart from interim reinstatement available to Mr Nichols should he eventually establish a personal grievance of unjustified dismissal.

[14] There are several other points mentioned by counsel but I do not need to canvass those. The factors mentioned above demonstrate that the balance of convenience favours IAG.

### **Overall justice**

[15] There is some suggestion in the evidence that Mr Nichols wanted to set up a personal grievance claim against IAG, win compensation and move to Australia. That

is all strongly denied by Mr Nichols. For the time being he is entitled to the assumption that his denial can be established as true. I approach this matter on the basis that Mr Nichols is genuinely aggrieved and seeking permanent reinstatement. Mr Nichols cannot be validly criticised for not coming to the Authority with *clean hands*.

[16] There was a substantial delay from Mr Nichols' dismissal until the application was lodged in the Authority. Mr Nichols was keen to progress his application but his union was apparently tardy and eventually Mr Nichols made this application himself. I accept counsel's submission that the delay does count against realigning the status quo.

### **Conclusion**

[17] Neither the balance of convenience nor the overall justice of this case as presently apparent support interim reinstatement so Mr Nichols' application is denied.

[18] A further phone conference will be arranged shortly to discuss whether there should be further mediation or to make arrangements for the substantive investigation meeting.

[19] Costs are reserved.

Philip Cheyne  
Member of the Employment Relations Authority