

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2013] NZERA Auckland 23  
5404373**

BETWEEN                      ALAN SAUNDERS  
   Applicant  
  
AND                                MULFORD ENGINEERING  
   PLASTICS  
   Respondent

Member of Authority:        Eleanor Robinson  
  
Representatives:              Anne-Marie McNally, Counsel for Applicant  
   Angela Hansen, Counsel for Respondent  
  
Investigation Meeting:        15 January 2013 at Auckland  
  
Determination:                24 January 2013

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**DETERMINATION OF THE AUTHORITY**

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**Application for interim reinstatement**

[1] Before the Authority is an application for interim reinstatement brought by the Applicant, Mr Alan Saunders, under s 127 of the Employment Relations Act 2000 (the Act).

[2] Mr Saunders was dismissed from his job as a Fitter Turner by the Respondent, Mulford Engineering Plastics (Mulford), on 3 December 2012. The dismissal was on the basis of medical incapacity.

[3] Mr Saunders claims that he was unjustifiably dismissed and applies to the Authority for interim reinstatement pending determination of the substantive matter. In addition Mr Saunders claims substantive relief including permanent reinstatement, lost wages, other benefits being employer contributions to the superannuation scheme and payment of medical insurance premiums, and compensation for loss of dignity, humiliation, and stress caused by his unjustifiable dismissal.

[4] Interim reinstatement and the substantive claims are all resisted by Mulford.

[5] As required by s 127 of the Act, an undertaking has been given by Mr Saunders to abide by any order that the Authority may make in respect of damages in determining his employment relationship problem.

[6] Mediation was attended by the parties but did not result in the matter being resolved. An Investigation Meeting to deal exclusively with the interim reinstatement application was convened at Auckland on 15 January 2013.

### **The Law**

[7] In considering interim reinstatement applications the Authority is required to apply the law relating to interim injunctions “*having regard to the object of this Act*” pursuant to s. 127 (4) of the Act.

[8] In respect of the object of the Act, the Authority is to have regard to the principle that productive employment relationships are founded on good faith behaviour and on mutual trust and confidence. With effect from 1 April 2011 reinstatement is no longer the primary remedy. Under s 125 (2) of the Act as amended, reinstatement is to be provided by the Authority if it is reasonable and practicable to do so.

[9] Mr Saunders’s reinstatement remains a remedy available to the Authority. The principles relevant to interim reinstatement applications as determined under the old formulation remain relevant<sup>1</sup>. In a recent decision of the Employment Court, *McKean v Ports of Auckland Limited*<sup>2</sup>, the Court clarified the relevant principles at para [4]:

*In determining an application for interim reinstatement the court must have regard to:*

- *Whether the plaintiff has an arguable case that he was dismissed unjustifiably as defined by s 103A of the Act;*
- *Whether the plaintiff has an arguable case for interim reinstatement in employment under s125 of the Act if he is found to have been dismissed unjustifiably;*
- *Where the balance of convenience lies between the parties in the period until the Court’s judgment is given on those issues; and*
- *The overall justice of the case.*

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<sup>1</sup> *Cliff v Air New Zealand* [2005] ERNZ 1

<sup>2</sup> [2011] NZEmpC 128

[10] The evidence before the Authority for the purpose of determining this interim reinstatement application has been presented as usual in such applications in affidavit form by witnesses on behalf of both Mr Saunders and Mulford.

[11] As the affidavit evidence presented must necessarily remain untested until the substantive investigation of the unjustified dismissal personal grievance, any findings of fact by the Authority in this determination are provisional only and may change later once the claims have been fully investigated and all witnesses have been examined on their evidence.

### **Background Facts**

[12] Mulford is a division of Mulford Plastics Limited, a multi-national plastics company operating in Australasia and Asia. Mulford is a manufacturer, importer and distributor of industrial plastics.

[13] In 2007 Mulford acquired the business at which Mr Saunders had been employed as a Fitter Turner for 18.5 years. Mr Saunders worked as part of a small team of seven employees. The parties agreed that during the period of his employment there had been no issues raised in relation to Mr Saunders's performance or the standard of his work.

[14] In 2010 Mr Saunders had a right knee replacement operation which had required six weeks absence from work. In March 2011 Mr Saunders's affidavit evidence was that he had been placed on the New Zealand public health system hospital waiting list for a total left knee replacement, and in early 2012 he had informed his manager, Mr Steve Foley, that he was waiting for surgery. Mr Saunders stated that he had also informed Mr Roger Dodgen, his supervisor, at that time, and that Mr Dodgen had made a note on the calendar in the workshop.

[15] In May 2012 Mr Saunders had applied for, and been granted, four weeks' leave from the end of June until the end of July 2012. Mr Pericleous, CFO of Mulford, stated in his affidavit that because Mr Saunders did not have sufficient annual leave at that time, two of the four weeks had been taken as authorised unpaid leave.

[16] In July 2012 Mr Saunders stated that he had reminded Mr Dodgen about the pending surgery and Mr Dodgen had asked him to complete a leave form. Mr Saunders stated he had done so, and the leave form had been passed to Mr Foley. At this time Mr Saunders had no annual or sick leave entitlement remaining and therefore any leave would be discretionary.

[17] Mr Pericleous affidavit evidence stated that, having been made aware of Mr Saunders' discretionary leave request, he had called a meeting on 13 August 2012 involving Mr Saunders, his support person, Mr Foley and the Branch Manager. Mr Pericleous had attended by telephone since he was based in Australia.

[18] During the meeting Mr Pericleous stated that he had wanted to understand why Mr Saunders, who had recently had four weeks leave, required a further six weeks leave. Mr Pericleous stated that if Mr Saunders required the time off work for medical reasons, Mulford would require information about the nature of the medical reasons, and requested, with Mr Saunders' agreement, that at Mulford's cost a second opinion be obtained about his ability to return to work.

[19] Mr Pericleous stated that Mr Saunders had refused to give Mulford a letter authorising the requested medical information from his doctor, and had also refused the request that he see a doctor of Mulford's choosing.

[20] Mr Saunders' evidence was that he had explained at the meeting on 13 August 2012 that he was on a public health system waiting list and consequently he did not know the exact timing when the operation would occur. Based on his experience of the first knee operation, Mr Saunders had told Mr Pericleous that he expected the period of absence would be approximately six weeks.

[21] Mr Saunders stated that he had not agreed to the request to see a doctor appointed by Mulford as he had considered this pointless since his own doctor could supply the required information.

[22] On 15 August 2012 Mr Pericleous had written to Mr Saunders confirming that Mulford had requested information from Mr Saunders's own doctor and also a second opinion. In the letter Mr Pericleous had written:

*... We asked you for verification of this from your doctor and also said we'd like to get a second opinion. You have advised me that you do not consent to providing that information to us, nor do you consent to us obtaining a second opinion.*

[23] Mr Saunders replied on 16 August 2012 stating:

*... I personally do not know how long things will take as I myself have not been told and I find it unlikely that any doctor would give a guarantee that the operation would take a specified time, would you? Hence I have given you a time based on the last operation. I don't*

*wish to argue the point, what is the purpose of seeing your doctor. It seems like going over the same process again and again. If you could help me to understand what you are trying to request it may give me a reason to change my mind, however, My Doctor is registered as no doubt is yours, so there should be no difference in opinions. ...*

[24] Mr Pericleous responded by letter the same day, 16 August 2012, stating that since Mr Saunders appeared to be agreeing to provide information from his doctor, he do so in order to assist Mulford in making a decision.

[25] Mr Saunders's affidavit evidence stated that he had seen a doctor from his normal practice on 14 September 2012, although not his regular GP, and had asked for a medical certificate for his employer. The medical certificate provided stated that surgery would occur within two months, and that in the opinion of the doctor, Mr Saunders would be absent from work for 4-6 weeks, barring complications.

[26] Upon receipt of the medical certificate, Mr Pericleous stated that he had written to Mr Saunders asking if he could clarify what type of complications were expected and whether he would be able to return to work on full duties. Mr Pericleous also asked Mr Saunders how much notice Mulford would receive before the surgery took place.

[27] On 27 September 2012 Mr Saunders' regular doctor issued a medical certificate which confirmed that no date for surgery had been confirmed, and a full list of complications would be provided by the orthopaedic surgeon at the time of the surgery.

[28] Mr Pericleous' evidence was that he had found this information essentially unhelpful, and he had written to Mr Saunders on 12 October 2012 requesting more information and noting that it was likely Mr Saunders' orthopaedic surgeon could assist with information as to how much time off Mr Saunders would need, an approximate date for the surgery, and whether he could return to full duties after the surgery.

[29] Mr Saunders replied by letter dated 16 October 2012 explaining that he could not: *“give you any indication to timeframes without my Doctors/Surgeons first giving me this information also. .... As I mentioned when I find out you will be the first to know.”*.

[30] Mr Pericleous stated that Mr Saunders had also pointed out in this letter that he was not applying for discretionary leave, but that the surgery was necessitated by a work related injury.

[31] Mr Pericleous stated that Mulford had been unaware of a work related injury and it had therefore investigated the matter, however it could find no record of any claim being made to ACC. Mr Pericleous stated that this had undermined Mulford's confidence in Mr Saunders and the information he had been providing.

[32] Mr Pericleous stated that Mulford had concluded from the context of Mr Saunders' letter of 16 October 2012 that further information from Mr Saunders was unlikely to be received and therefore, based on the information available to it, it had decided to decline Mr Saunders' request for leave, confirming this in a letter dated 25 October 2012. Mr Pericleous had concluded the letter with the statement: "*If further information is available in the future, we may reconsider our decision*".:

[33] Mr Saunders had received this letter on 29 October 2012 and had replied that same day explaining again that he did not know when the leave would be required and that: "*no doctor or surgeon involved will give me this information that I have asked for until the date is confirmed ..*".

[34] Mr Saunders' affidavit evidence stated that on 8 November 2012 he had received notification from the Hospital scheduling his surgery for 14 November 2012, and he had notified Mulford of this on his arrival at work on 9 November 2012. At this time Mr Saunders had also filled out a leave application form, estimating that he would require 4-6 weeks leave from work.

[35] Mr Pericleous stated that the Hospital notification had attached an extensive list of possible complications. As Mr Saunders, a member of the NZ Engineering Printing & Manufacturing Union Inc (EPMU), had informed Mulford that he intended to involve the EPMU, Mr Pericleous stated that he had arranged for a conference telephone call with Mr Saunders and EPMU delegate Mr Blair Murray, on 12 November 2012.

[36] At the meeting on 12 November 2012 Mr Pericleous stated he had informed Mr Saunders that due to his failure to provide Mulford with clear information, it would not agree to his taking time off from his employment for the surgery.

[37] Mr Pericleous' evidence was that he had spoken to Mr Murray on 13 November 2012, the day prior to Mr Saunders' surgery, who had informed him that Mr Saunders would be taking the leave regardless of Mulford's decision.

[38] Mr Pericleous stated that in view of the fact that Mulford had no reason to believe that Mr Saunders was in pain or unable to do his job without surgery, this information caused Mulford much anxiety, especially as his absence would put the company under operational pressure just prior to Christmas.

[39] Accordingly Mr Pericleous had written to Mr Saunders that same day, 13 November 2012, stating:

*... I understand that you have said that you intend to take leave regardless of our decision, although as we understand it, the surgery you are undertaking is elective.*

...

[40] Mr Saunders said that as he would be absent from the workplace due to having the surgery the following day, 14 November 2012, he had left the matter to be dealt with in his absence by the EPMU.

[41] In the letter Mr Pericleous sought the answer to three questions, these being whether:

- i. Mr Saunders intended to take the leave despite Mulford's decision to decline it;
- ii. the surgery was elective or essential; and
- iii. Mr Saunders had any suggestions on how Mulford's could manage his role in his absence in order to keep it open. The letter concluded: "*We need to meet with you and your union rep to discuss these issues today. I am available to phone to talk now.*"

[42] Mr Pericleous stated that Mr Saunders had responded to the letter, declining to participate in a meeting that day, and told Mulford that his lawyer would be in touch. Mr Pericleous wrote to Mr Saunders again that day emphasising the need for feedback from him and requesting a response from his lawyer by Friday 16 November 2012: "*so we can consider that feedback prior to making a decision*".

[43] On 16 November 2012 Ms McNally, counsel for the EPMU wrote to Mulford. In the letter to Mulford, Ms McNally explained that:

- i. Mr Saunders had degeneration and arthritis in his knee, causing him substantial and continual pain, and if left untreated, he would become severely incapacitated;

- ii. New Zealand had a severely stretched public health system and Mr Saunders had no control over the timing of the surgery, further if he had turned it down when offered, it would mean he might have to wait a considerable time for it to be rescheduled; and
- iii. Ms McNally suggested how Mr Saunders's absence could be accommodated by engaging a temporary employee.

[44] Mr Pericleous responded to this letter on Monday 19 November 2012, pointing out that this was the first occasion on which Mulford had been informed that Mr Saunders suffered from degeneration and arthritis in the knee which if left untreated could result in severe incapacity.

[45] The lengthy and detailed letter dated 19 November 2012 traversed in detail the history regarding Mr Saunders's leave application and request for discretionary leave, and responded to the EPMU's suggestion on how Mr Saunders absence could be accommodated, stating:

*Your letter says that we have made arrangements to cover his position in his absence. That is not correct. Rob is not performing Alan's role. In fact, because Alan has left us in this situation, we have no-one to cover his work. We now have 4 people when 6 people are required. Our team is under immense pressure because of this. We simply do not have the existing capacity to cover Alan's role.*

*We have considered your suggestion about employing a temp. We do not see that a temp is realistic. Alan's role is specialised and requires an experienced person.*

[46] On 22 November 2012 the EPMU replied to the letter from Mulford dated 19 November 2012 confirming receipt of the post-surgery medical certificate from the hospital which detailed that Mr Saunders would be unfit for work for 42 days. The letter from the EPMU also stated that it had seen the discharge letter from the hospital which contained no notice of any complications arising out of the surgery.

[47] Mulford replied by letter dated 30 November 2012 which concluded with the company decision to terminate Mr Saunders' employment on the basis of medical incapacity.

[48] Mr Saunders's affidavit evidence was that on 7 December 2012 he had visited his GP who had certified him as fit to return to work.

## **An Arguable Case for Unjustifiable Dismissal and for interim reinstatement**

[49] As a matter of principle, Mr Saunders must not only establish an arguable case for his unjustifiable dismissal, but must also establish that if he is successful in such a claim he will be reinstated in addition to, or instead of, being compensated monetarily such as to support an application for interim reinstatement.

[50] Mr Saunders submits he has an arguable case that he was unjustifiably dismissed and that the affidavit evidence surpasses the threshold of a *prima facie* case.

### *Arguable case for Unjustifiable Dismissal*

[51] Mulford dismissed Mr Saunders on the basis of medical incapacity.

[52] Whilst the law is clear that an employer is not bound to hold a job open indefinitely in the case of an employee who is no longer able to perform the duties for which they were employed<sup>3</sup>, an employer managing a situation in which an employee is suffering from medical incapacity is required to carry out a full and fair investigation into the employee's true medical position. The investigation should encompass their present state of health, future prognosis and the expected length of time away from the workplace. The Employment Court in *Barry v Wilson Parking NZ*<sup>4</sup> stated:

*... even if genuinely relying on the incapacity, the employer had to act with justice in a way that was fair to the employee. What this amounts to, speaking generally, is that the employer has to wait a reasonable time to give the injured employee an opportunity to recover (what is reasonable being a question of fact in each case) and after it has to inquire in a fair and open-minded way whether the employee has any realistic prospects of returning to work within a further reasonable time ... Once armed with all the necessary information, the employer has to consider whether (balancing fairness to the employee and the reasonable dictates of its practical business requirements) it is prepared to keep the employee's position open for the indicated period of time.*

[53] The decision to dismiss Mr Saunders on the basis of medical incapacity must be a justifiable decision in accordance with the Test of Justification as set out in s 103A of the Employment Relations Act 2000 ("the Act"). Section 103A of the Act states:

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<sup>3</sup> *Hoskin v Coastal Fish Supplies Ltd* [1985] ACJ 124

<sup>4</sup> [1998] 1 ERNZ 545 at 549

### *S103A Test of Justification*

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. 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.*

[54] The duty of good faith as contained in s 4 of the Act is also relevant to this case, in particular s 4(1A)(b) and (c) which state:

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

*(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.*

[55] In August 2012 Mr Pericleous, having been informed that Mr Saunders was requesting discretionary leave for medical reasons, had requested medical information and for Mr Saunders to be examined by a doctor at Mulford's expense. Mr Saunders had responded to these requests by (i) explaining that due to his being having surgery via the New Zealand public health service, he did not know exactly when the surgery would take place, however he anticipated that he would require six weeks absence, and (ii) by refusing to be examined by a doctor appointed by Mulford.

[56] I consider that the events that followed in November 2012 and which resulted in the termination of Mr Saunders' employment were strongly influenced by both the lack of knowledge Mr Pericleous appeared to have in the New Zealand public health system, and by Mr Saunders's personal attitude from this point.

[57] I believe that had Mr Pericleous made enquiries as to how the New Zealand public health system operated, which was easily accessible information from Mr Foley or any other New Zealand Mulford employee, he might have appreciated that Mr Saunders was providing what information he could provide at any particular moment until 9 November 2012, rather than being deliberately obtuse.

[58] More significantly, had Mr Saunders co-operated with the request to see a doctor appointed by Mulford, I believe helpful information about his condition would have been provided to Mulford and may have resolved the situation at that point. I am of the view that the information derived from the Mulford appointed doctor would almost certainly have disclosed the information that Mr Saunders' knee condition was causing him pain and the surgery was urgently required to avoid further damage

[59] Additionally had Mr Saunders himself explained to the company at any stage that his knee condition was causing him pain and the surgery was urgently required to avoid further damage it would have been valuable in avoiding any future misunderstanding.

[60] However Mr Saunders appeared to have made an assumption that Mr Pericleous understood the public health system operation and to have been frustrated by the requests from that initial meeting on in August 2012 for information to which he had no access at that time, which is reflected in the tone of the emails which he sent to Mr Pericleous after that date.

[61] I find that Mr Saunders did provide Mulford with information as it became available to him, however I consider that Mulford's request for more information in the letter dated 12 October 2012 arose from Mr Pericleous' lack of understanding as to the information it was possible for Mr Saunders to obtain due to his situation, which Mr Saunders had not fully explained to him because of the assumption he appeared to make that Mr Pericleous understood the situation regarding the provision of information.

[62] The response by Mr Saunders on 16 October 2012 which claimed he was entitled to leave on the basis of a work related injury did not assist the situation. The subsequent investigation which found no evidence of a claim with ACC undermined the confidence Mulford had in what the responses Mr Saunders was providing.

[63] As previously observed, these interactions were unhelpful and contributed towards the later situation in November, and at that particular stage, resulted in Mulford declining Mr Saunders' application for discretionary sick leave made on 25 October 2012.

[64] On 9 November 2012 after Mr Saunders notified Mulford that the knee surgery was to take place on 14 November 2012 and the meeting with Mr Saunders and Mr Murray on 12 November 2012, Mr Pericleous informed Mr Saunders that Mulford would not agree to his taking leave on the basis that Mr Saunders had failed to provide it with clear information that had been requested.

[65] Mulford was then informed that Mr Saunders intended taking the leave irrespective of its decision not to grant it, and neither Mr Saunders nor Mr Blair cooperated with the requests from Mulford to meet on 13 November 2012 to discuss the matter.

[66] Whilst I appreciate that the surgery was imminent at this stage, I consider it may have alleviated the situation had Mr Saunders and Mr Blair met with Mulford as requested to discuss the situation and explained that if Mr Saunders turned down the surgery, he would face an indefinite wait for another date.

[67] I also note that even at this stage Mr Saunders did not provide the information that his knee condition was causing him pain and that surgery was urgently required to avoid further damage. Had he done so, that again may have alleviated the situation.

[68] It was not until the EPMU responded on 16 November 2012 to Mr Pericleous's letter dated 13 November 2012 that Mulford was provided with the significant information on the implications of Mr Saunders' knee condition if left untreated and the ramifications of his not having the surgery as scheduled.

[69] The EPMU letter also contained a suggestion that Mr Saunders' absence could be accommodated by the appointment of a temporary employee, a suggestion Mulford rejected in its response letter on 19 November 2012.

[70] I consider that the history of dealings between the parties as outlined in the Mulford letter of 19 November 2012 highlights the basic misunderstanding of the New Zealand public health system by Mr Pericleous, but also the fact that Mr Saunders had failed to provide Mulford with pertinent information at the first and subsequent opportunities which exacerbated the situation.

[71] The EPMU had made a suggestion on how Mr Saunders absence could be accommodated. Based on the untested affidavit evidence I am unable to conclude, even when taking into consideration the fact that Mr Saunders was an experienced and skilled employee, that Mulford had considered the full potential for managing Mr Saunders' absence in what

was in actuality, a relatively short period of time, and moreover adhered to the timeframe indicated by Mr Saunders at the initial meeting on 13 August 2012.

[72] I observe that the period of Mr Saunders's absence was in total no longer than that he had taken earlier that year, especially as it incorporated the two week Christmas annual shutdown.

[73] I find this significant, particularly when considered alongside Mr Saunders's length of service and the fact that there were no concerns about his performance and the standard of his work.

[74] Additionally, the decision to terminate Mr Saunders' employment was made following receipt of the information that Mr Saunders' surgery was not elective, and of the reason for the surgery having to take place when it did. I consider that the fair and reasonable employer would have given this information full weight prior to making a decision about the continuity of employment.

[75] Having considered all the circumstances, and based on the untested affidavit evidence, I find that Mr Saunders appears to have an arguable case for unjustifiable dismissal.

*Arguable case for interim reinstatement*

[76] Mr Saunders must not only establish an arguable case for unjustifiable dismissal but must also establish that he would be reinstated if successful in such a claim.

[77] Whilst I have found that Mr Saunders has an arguable case for unjustifiable dismissal, I observe that Mulford engaged at some length in trying to obtain medical information from Mr Saunders which would have assisted it in reaching a decision about whether or not to grant him discretionary leave.

[78] In examining Mr Saunders's responses to this enquiry on the part of Mulford, I find that there were a number of instances in which Mr Saunders failed to act in a responsive and communicative manner which had the effect of undermining Mulford's trust and confidence in him, and contributing to the decision to terminate his employment, namely:

- He refused to cooperate with a reasonable request from Mulford to see a doctor selected by it at its cost;

- He failed to provide an explanation of how the New Zealand public health system operated when it became clear that Mr Pericleous did not have this understanding;
- He failed to explain to Mulford that he was in considerable pain as a result of the knee condition and that failure to have the surgery would have serious implications; and
- He introduced information about a workplace injury about which Mulford's investigation failed to produce any evidence and which undermined its trust and confidence in the information he was providing.

[79] I find that in these circumstances that there is a possibility that contributory behaviour may be found on the part of Mr Saunders, resulting in a more than theoretical risk that he may establish a personal grievance but fail to obtain reinstatement.

[80] Accordingly I do not find that Mr Saunders has a strongly arguable case for interim reinstatement.

### **Balance of convenience**

[81] It is relevant to this principle that reinstatement is no longer the primary remedy under the Act, but may be awarded if it is reasonable and practicable to do so.

[82] As set out in the Employment Court case *X v Y Limited*<sup>5</sup> this principle requires that the Authority balance the relative inconvenience, in terms of detriment or injury, to Mulford who will have to bear the burden of an order reinstating Mr Saunders until the substantive case is heard, against the inconvenience to Mr Saunders who may have a just case, of having to bear the detriment of unjustifiable action until the case is heard.

[83] Mulford submits that Mr Saunders's position has been filled and that if he returns to work he will be surplus to requirements. Mulford further submits that due to cost cutting measures following poor financial performance by Mulford, it would be a significant financial burden to it to have to reinstate Mr Saunders.

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<sup>5</sup>[1992] 1 ERNZ 863, at pg 10

[84] I do not find the cost argument to be a persuasive one in light of the affidavit evidence for Mr Saunders that one employee in the team in which Mr Saunders was employed has left and not been replaced.

[85] However practicability includes an assessment of whether or not workplace relationships can be restored

[86] Mulford submits that it is not reasonable and practicable to reinstate Mr Saunders in light of the fact that it has lost trust and confidence in Mr Saunders as a consequence of his behaviour and attitude in the lead-up to his termination.

[87] Further that it is not reasonable or practical to reinstate Mr Saunders on the basis that he would be disruptive and/or undermine the management team after having shared his, by inference adverse, view on management following the termination of his employment with other employees.

[88] Affidavit evidence on behalf of Mulford from three of the five members of Mr Saunders' team opposes for various reasons his reinstatement.

[89] Whilst affidavit evidence on behalf of Mr Saunders refutes the view that he would be disruptive if reinstated and supports his reinstatement, it does not dispute the claim that he has shared his adverse view on management with other employees following the termination of his employment.

[90] In all the circumstances, I find that there is some doubt that workplace relationships can be successfully restored.

[91] An Investigation Meeting on the substantive matter is to be scheduled. Mr Saunders is not in a precarious financial situation, and there is no suggestion that Mulford could not meet any compensation for lost remuneration should he succeed in the substantive matter.

[92] Balancing the potential prejudice to Mr Saunders of not reinstating him, against the potential prejudice to Mulford of so doing, I find that the balance favours not reinstating him, for the reasons set out above.

[93] Taken as a whole, I find that the balance of convenience favours Mulford.

## **Overall Justice**

[94] The Authority must assess the overall justice of the case from a global perspective.

[95] I observe that I have found a possibility that contributory behaviour may be found on the part of Mr Saunders, resulting in a more than theoretical risk that he may establish a personal grievance but fail to obtain reinstatement.

[96] Having taken into consideration all the circumstances, I find that the overall justice of the case subsists in declining the application for interim reinstatement.

## **Determination**

[97] For the above reasons the Authority exercises its discretion in relation to interim reinstatement by not making the orders sought.

[98] The Authority will shortly consult Ms McNally and Ms Hansen about the parties' availability and the time table for an investigation meeting to be held at a time and date to be established at the case conference.

## **Costs**

[99] Costs are reserved pending the final determination of the matter.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**