

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 313  
5345221

BETWEEN CLINTON JOHN WRIGHT  
Applicant

AND AIR NEW ZEALAND  
LIMITED  
Respondent

Member of Authority: Robin Arthur  
Representatives: Andrew Little for the Applicant  
Kevin Thompson for the Respondent  
Investigation Meeting: 30 June 2011  
Determination: 15 July 2011

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**DETERMINATION OF THE AUTHORITY**

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- A. The application by Clint Wright for interim reinstatement pending the hearing of his personal grievance is granted on the conditions given in this determination. He has provided the necessary undertaking as to damages.**
- B. Costs are reserved.**

**Employment Relationship Problem**

[1] On 25 May 2011 Clint Wright applied to the Authority for an order for interim reinstatement to his former position as a cargo warehouse agent with Air New Zealand (ANZL). His application was accompanied by undertakings as to damages from him and his union, the Engineering Printing and Manufacturing Union.

[2] Mr Wright was dismissed on 17 March 2011 for serious misconduct. The dismissal was the conclusion of a disciplinary investigation begun by ANZL in

December 2010 and conducted by its International Cargo Imports Manager Colin Strevens. The investigation followed a complaint made by Grant Sutton, an ANZL cargo airline clerk who worked in the same warehouse as Mr Wright. Mr Wright was accused of “*menacing and threatening behaviour*” towards Mr Sutton during a conversation with him in a portacom office inside the warehouse around 11.35am on 5 December 2010.

[3] The alleged behaviour occurred when Mr Wright spoke to Mr Sutton about a General Incident Report (GIR) made by Mr Sutton earlier that day. There is a conflict in the evidence about how much Mr Wright already knew, at the time he spoke to Mr Sutton, of what was written in the GIR. Mr Sutton had reported that when he arrived at work around 8am that morning he saw Mr Wright operating a reach truck (a form of small forklift) in an unsafe manner by driving with its forks raised. Mr Sutton had not completed the GIR himself but asked a supervisor, Warren Hirawani, to do so as Mr Sutton said he did not want confrontation with the driver. Mr Hirawani later said he had told Mr Wright shortly afterwards that a GIR had been made about dangerous driving. However Mr Wright said he was not told what the report contained and he went to see Mr Sutton in the office to ask for details but had become frustrated when Mr Sutton would not tell him.

[4] In the letter initiating his investigation Mr Strevens cautioned Mr Wright that ANZL viewed “*intimidation of staff*” seriously and disciplinary action could result, including termination of employment.

[5] Mr Wright’s statement of problem alleged his dismissal was unjustified because:

- (i) ANZL reached an unreasonable conclusion after not properly weighing the evidence; and
- (ii) ANZL did not give weight to his 32 years of service; and
- (iii) A reasonable employer, acting objectively, would not have reached the same conclusion as ANZL.

[6] As well as interim reinstatement, he seeks, once the substantive matter is investigated, orders for his permanent reinstatement, lost wages, and compensation for humiliation and loss of dignity.

[7] ANZL's statement in reply, lodged on 10 June 2011, alleged the dismissal was justified because Mr Wright was involved in "*menacing and threatening behaviour*" and "*swore at and used inappropriate language*" towards Mr Sutton.

[8] The parties had attended mediation on 9 June without resolving the matter and in a case management conference by telephone the Authority then made directions for hearing submissions on the interim reinstatement application.

[9] The representatives' submissions addressed the relevant principles and their application to the evidence available to the Authority at this interim stage in the form of affidavits from Mr Wright, his union delegate Kelvin Moyes, and Mr Strevens. Relevant documents attached to those affidavits and the statement of problem and statement in reply included job descriptions; ANZL employee policies; Mr Sutton's complaints; transcripts of interviews or meetings with Mr Wright, Mr Sutton and other employees; Mr Strevens written findings from his investigation; various correspondence; and three photos from the video camera recordings of the warehouse work area outside the portacom office at the time that the 5 December conversation between Mr Wright and Mr Sutton took place.

### **Principles on interim reinstatement**

[10] The Authority determines an interim reinstatement application by applying the law relating to interim injunctions while also having regard to the object of the Employment Relations Act 2000 (the Act).<sup>1</sup> This requires Mr Wright to first establish he 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 monetarily for his grievance.<sup>2</sup>

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<sup>1</sup> Section 127(4) of the Act.

<sup>2</sup> *Cliff v Air New Zealand* [2005] ERNZ 1 at [12] (EC).

[11] After considering whether there is an arguable case, the Authority then assesses how best to regulate the positions of the parties until the substantive issues are investigated and determined. That assessment is referred to as the balance of convenience. It includes considering whether interim reinstatement is necessary if alternative remedies would ultimately be adequate. Finally, as the remedy is discretionary, the Authority takes a global view and determines where the overall justice of the case lies until it can be heard (which includes considering the respective strengths of each parties' case as far as they can be ascertained at this stage). Throughout the object of the Act is considered, including under s3:

*(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;*

[12] The answer to the application is not reached by rigid application of a formula as the considerations often overlap.<sup>3</sup>

[13] While the evidence at the interim stage is untested and may not be complete, the Authority may make a “*commonsense determination of inherent possibilities*” about unanswered and disputed assertions in the affidavit evidence.<sup>4</sup>

[14] If an order for interim reinstatement is to be made, it may be subject to any conditions the Authority thinks fit.

### **Arguable case**

[15] On the first element of arguability – regarding the justification for the dismissal – I accept ANZL’s submission that there was no doubt from its disciplinary

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<sup>3</sup> *Brookers Personal Grievances* at 11.3.06.

<sup>4</sup> *Wellington Free Ambulance Service Inc v Adams* [2010] NZEMPC 59 at [17]-[18].

inquiry, and as acknowledged to some extent in Mr Wright's affidavit, that some degree of misconduct did occur when he confronted Mr Sutton in the portacom office on 5 December. The contest however is whether a fair and reasonable employer, in all the circumstances at the time of the dismissal, would have found the misconduct was as serious as ANZL concluded and would have dismissed Mr Wright as a consequence?

[16] In his disciplinary inquiry Mr Strevens identified initial differences in the accounts of Mr Wright, Mr Sutton and a third employee, Jason Houg-Lee, about whether or not Mr Wright swore at and threatened Mr Sutton. Mr Wright admitted he called Mr Sutton a "fuckwit" while Mr Sutton and Mr Houg-Lee said Mr Wright called Mr Sutton a "fucking cunt". Mr Strevens also noted Mr Wright had stated in a second interview that he could have actually said things he should not have in the heat of the moment. In his written report on his findings Mr Strevens told Mr Wright that:

*[W]hilst it would appear that there are one or two inconsistencies in [Mr Sutton]'s and [Mr Houg-Lee]'s statement (specifically who left the office first and [Mr Houg-Lee]'s account when he was at the window) on balance I accept the account of events as communicated by [Mr Sutton] and [Mr Houg-Lee] relating specifically to the use of the words "fucking cunt", and the threat from you, where you were reported to have said "there are places outside of work". It is my belief that you did, either through anger or frustration threaten [Mr Sutton] and call [Mr Sutton] a "fucking cunt", in an inappropriate manner and I believe that your conduct has fallen well short of the expected Air New Zealand standards of behaviour.*

[17] The inconsistencies referred to are the first basis on which I accept Mr Wright has an arguable case that ANZL's finding of serious misconduct was not fairly and reasonably reached.

[18] There were several elements in Mr Sutton's account of menacing and threatening behaviour by Mr Wright – that Mr Wright stood around an arm's length away, spoke loudly and angrily, swore at him, used the phrase "there are places outside work" which Mr Sutton took to be a threat, and that Mr Sutton felt the need to quickly leave the office and go into the warehouse area where other workers were present, and that Mr Wright followed him out and swore at him again. Mr Sutton

described the reason for leaving the office as because “*it is less likely someone is going to smack you if other people are around*”.

[19] Fleeing the office in fear of potential violence from Mr Wright, with Mr Wright following close behind, was an important part of the narrative in Mr Sutton’s complaint. It physically expresses the apprehension of real and imminent danger. But there is a major difficulty – that part of Mr Sutton’s story is entirely at odds with the video evidence available to Mr Strevens. That footage showed, 42 seconds after entering the office, Mr Wright left first, with Mr Sutton close behind him.

[20] Mr Sutton also told Mr Strevens that the window of the office was closed and no-one would have heard the conversation. The video evidence however showed Mr Houg-Lee had gone to the window, and as he said in his account to Mr Strevens, passed some warehouse work papers through the window, speaking briefly to Mr Sutton as he did so. The video showed Mr Houg-Lee was at the window around 12 seconds and Mr Strevens accepted Mr Houg-Lee’s evidence that he heard Mr Wright call Mr Sutton a “*fucking cunt*” and say to him “*we can settle this in other ways out of the office*”.

[21] Mr Strevens deposed that he “*had no reason to think that [Mr Sutton] was not being truthful*”. However he plainly did have at least one reason to think that – the video evidence, establishing timing and who was where and when, was the sole truly objective information available to him. That evidence contradicted Mr Sutton’s account on a key physical and observable element of what was said to be the threatening behaviour. The other sources of information – from whatever perspective – were the inherently subjective reports from Mr Wright, Mr Sutton and Mr Houg-Lee about what they recalled happening. When, according to notes of a further interview on 3 February, Mr Sutton was told his account was at odds with the video evidence on two important points, he offered, and was not pressed for, any real explanation of his inaccuracy. His response was simply to say that was what he recollected and it did not change what Mr Wright had said.

[22] In reviewing the employer’s decision, the Authority must be satisfied that the evidence in support of conclusions reached by ANZL is as convincing in its nature as

the alleged serious misconduct was grave.<sup>5</sup> Here the allegation of threatening behaviour was a serious charge and the discrepancies in Mr Sutton's evidence to his employer give rise to a tenable arguable case that a reasonable employer would have had cause for more doubt about the reliability of the remainder of what Mr Sutton said happened during the 42 second encounter with Mr Wright, and consequently whether a finding of serious misconduct could reasonably be made.

[23] Other tenable arguments relating to the justifiability of the decision to dismiss and how it was reached include:

- (i) whether the motivation and context for Mr Sutton's complaint was properly weighed; and
- (ii) whether the allegedly threatening words (reported differently by Mr Sutton and Mr Houngh-Lee) could reasonably be taken to amount to a threat as Mr Sutton asserted or whether the potentially ambiguous nature of the reported comment was fairly explored by Mr Strevens before reaching the conclusion he did; and
- (iii) whether the alternatives to dismissal were fairly considered by Mr Strevens and whether, considered in its full context, dismissal was proportionate to the actual behaviour of Mr Wright.

[24] Mr Sutton's written complaint about Mr Wright, made on 7 December, began by expressing his concern about two work accidents which had occurred on 3 and 4 December – one involved a worker hospitalised after being struck by a reach truck and the other involved a worker falling and breaking a bone. Both incidents are said to be important context to the tone of Mr Sutton's complaint about Mr Wright's driving and subsequent behaviour, as were his repeated references in his communication with Mr Strevens to an allegation made six months earlier about violence by another worker, during a lunch room argument between members of two different unions about their pay rates. Mr Sutton remained dissatisfied about the outcome of ANZL's inquiry into that earlier allegation in which his evidence was not preferred by the manager who investigated it.

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<sup>5</sup> *Honda NZ v NZ Shipwrights Union* ERNZ Sel Cas 855 at 858 (CA).

[25] From the affidavit and documentary evidence available at this interim stage, ANZL does not appear to have considered whether the words “*outside of work*” or “*out of the office*” allegedly said by Mr Wright might have referred to dealing with the safety issue outside of the formal work reporting procedures rather than being a threat to inflict some physical harm on Mr Sutton away from the workplace.

[26] Ultimately it is a matter of fact and degree to determine whether any words used were of “*such a level of contempt, abuse and threatening connotation*” that they were sufficiently serious to irreparably damage the trust and confidence ANZL could have in Mr Wright.<sup>6</sup> The principle that threatening words and behaviour may constitute serious misconduct is established not only by specific reference in ANZL’s disciplinary policy but also in case law, such as in the *Stormont Bakeries* case cited in ANZL’s submissions.<sup>7</sup> In *Stormont* the Court accepted there was an implied term “*that one employee would not intimidate and cause employees to fear violence in the workplace*”. However it also useful to consider the actual threats uttered in that particular case in respect of the assessment of degree which must be made – the dismissed worker had earlier hit a co-worker with a broom and later produced and pointed a knife at him with the words “*this is for you*”, which he admitted was intended to make the co-worker leave the room. The content of the allegedly threatening words may be important, for example how specific and likely it is – such as in another case where a worker was told “*I’ll burn your house down*”.<sup>8</sup>

#### *Arguable case for reinstatement*

[27] Following the 1 April 2011 amendments to the Act reinstatement is neither a primary nor secondary remedy but remains one measure which may be selected from the basket of remedies provided at s123 of the Act to settle a personal grievance, provided it is “*practicable and reasonable to do so*”.<sup>9</sup>

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<sup>6</sup> *Mitch Harris Contractor Limited v Donner* (unreported, EC, CEC 6/97, 14 March 1997) at 21.

<sup>7</sup> *NZ Baking Union v Stormont Bakeries Company Limited* (unreported, EC, AEC 18/94, A92/93, 5 May 1994).

<sup>8</sup> *NZ Food & Textile Workers Union v Bay Milk Products* [1991] 2 ERNZ 231, 257.

<sup>9</sup> Section 125(2) of the Act.

[28] I am satisfied that, should Mr Wright's dismissal be determined following the substantive hearing, there is an arguable case that he would be awarded the remedy of reinstatement.

[29] In the three month period over which ANZL conducted its disciplinary inquiry, Mr Strevens found no difficulty in leaving Mr Sutton and Mr Wright in the same workplace, on the same rosters and with the same level of occasional contact. He did not do so casually or idly but rather thought about it and, as he deposed, was satisfied there was adequate supervision to manage the situation, and, I hold, there is no reason to assume this would be any less practical or reasonable if Mr Wright were later to be reinstated. According to ANZL's notes of its interviews with Mr Sutton, he stated in December that Mr Wright had been "*really good*" since the complaint and "*he hasn't given me any looks or anything*". In February he said he did not want Mr Wright to lose his job and he did not hold anything against him: "*He is a pretty nice guy, seeing what he has been like since, I appreciate his behaviour*".

[30] Mr Wright's long service, with no identified previous disciplinary issues, is another factor supporting the arguability and likelihood of reinstatement as a remedy. The safety incident that sparked the GIR – driving with forks up – was dealt with separately by Mr Strevens and resulted in no disciplinary warning. There is no suggestion that Mr Wright's job and position would not be available if reinstatement was ultimately ordered.

### **Balance of convenience**

[31] I have considered the parties' submissions on factors to be addressed under this heading, which weighs the relative detriment to one or other party if interim reinstatement is or is not granted.

[32] ANZL's submissions that some factors weighed against granting the application were based on assumptions that the conclusions reached by Mr Strevens investigation were justified. These were its loss of trust and confidence in Mr Wright and what was said to be his lack of meaningful remorse or acceptance of wrongdoing. I do not accept either conclusion may be relied on at this stage of proceedings. For

example, Mr Wright admitted from 12 December that he swore at Mr Sutton although there was dispute about the exact words used, he later accepted he may have said the words claimed by Mr Sutton, and he offered an apology but ANZL considered anything other than complete acceptance of its conclusions about his culpability was insufficient. Whether that approach was reasonable and fair is yet to be determined. Until that has been properly assessed I do not accept it weighs in ANZL's favour.

*Delay and timing*

[33] ANZL submitted delay by Mr Wright in lodging proceedings should be taken into account.

[34] Mr Wright raised his grievance, through his union, on 1 April after receiving ANZL's letter of 22 March confirming his dismissal. ANZL responded to the grievance on 14 April refusing a request for reinstatement. Forty-one days then passed before his union lodged the interim reinstatement application. That can be contrasted with the 97-day period over which ANZL conducted its disciplinary inquiry (from 10 December 2010 to 17 March 2011) and the 51 days from the date that the application was lodged through to when, after scheduling and hearing submissions, the Authority was able to issue a determination (14 days after hearing the submissions, which is a little longer than desirable for an application of this type). In that context I do not accept there was a lengthy delay that should weigh against Mr Wright, particularly as there was no evidence that ANZL was in any real way prejudiced by it – it has known since 1 April that Mr Wright sought reinstatement.

[35] I do however accept that his refusal to take the opportunity of having an early substantive investigation meeting – one was offered for late July – is not a factor in his favour. This would have shortened the time until the ultimate outcome, at least at the Authority level, by around three months. In that light, whatever extra detriment might be suffered by Mr Wright in that period would have resulted from his own decision. If other factors were more finely balanced, it may have been decisive in deciding against granting interim reinstatement, particularly given that the substantive investigation meeting is now notified for early September, a relatively short period.

[36] *Adequacy of alternative remedies*

[37] I accept ANZL's submission that permanent reinstatement would not be affected should interim reinstatement not be granted as, while the company had someone else performing his work meanwhile, it did not raise that as an obstacle.

[38] ANZL was also certainly able to meet the cost of any likely award of distress compensation, lost wages and lost benefits – which, if Mr Wright was found to be unjustifiably dismissed but not permanently reinstated, could be quite significant amounts in order to take into account his ability as a 61-year-old man with one lung to again secure comparable employment elsewhere that would adequately mitigate his losses over the four or so years he would otherwise have been working at Air New Zealand.

*Financial hardship*

[39] Mr Wright deposed to finding it hard to get work after his dismissal although he had “*rung around*”. His affidavit, however, lacked any specific information about whether his means were such that he would suffer any real financial hardship while waiting for the substantive hearing. Mr Wright had received around 13 weeks pay for accrued leave and other entitlements on his dismissal and Mr Strevens deposed that, from his knowledge of the industry, there was plenty of work available for experienced workers in the cargo and freight forwarding sector. While Mr Strevens' proposition was not supported by any exhibited supporting documents such as job advertisements, I accept ANZL's submission that Mr Wright's affidavit did not have enough information to establish that he was facing real financial hardship as a factor favouring his interim reinstatement.

*Adequacy of the undertakings as to damages*

[40] ANZL submitted failure by Mr Wright to provide evidence of his ability to meet any possible obligation under his undertaking as to damages was a factor weighing against his interim reinstatement.

[41] In the absence of any actual evidence of a real difficulty rather than mere speculation, I do not accept it is necessary to put an applicant to that requirement in an interim reinstatement application under this particular statutory provision. While the Employment Court has suggested it as “*not wise*” not to establish such means,<sup>10</sup> I do not know of any specific case law or statutory requirement – in reference to this particular discretionary remedy – for the ability to subsequently pay damages (if called upon) to be conclusively established at this stage of proceedings or an application for interim reinstatement to be denied if that evidence is not given. It would be a difficult point to establish in any event as, even if an applicant did not appear to have the immediate means, a call on such an undertaking might ultimately be able to be met from a charge on future earnings, cashing up an asset, or borrowing from a friend, family or a financial institution.

[42] However if this factor was properly in issue with Mr Wright, I am satisfied that the requirement for an undertaking as to damages in his case is adequately met anyway by the parallel undertaking of his union which the Employment Court has previously found sufficient for the purposes of s127 of the Act.<sup>11</sup>

*Practicability and effect on third parties*

[43] ANZL submitted interim reinstatement was not practical or reasonable on several counts, which included effects on other workers as third parties – the prospect of high feelings between Mr Wright, Mr Sutton and other employees who are due to give evidence in the substantive investigation meeting; practical difficulties in managing those employees or redeploying them to other positions in the short term; and displacing a replacement worker presently doing the work previously done by Mr Wright.

[44] I was not persuaded this potential inconvenience is any greater than the same issue Mr Strevens deposed to adequately managing during the three month period of his disciplinary inquiry. It was something that he said he and his supervisory staff could keep “*a close eye*” at that time. I doubt they are any less able or astute now

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<sup>10</sup> *Air New Zealand v Bisson* (unreported, EC Christchurch, CC6A/05, 17 June 2005, Shaw J) at [31].

<sup>11</sup> *Bisson*, above, at [32].

than they were a few months ago. And, as Mr Strevens deposed, Mr Wright also has the benefit of likely guidance from his union representatives about the need to avoid any friction or unnecessary contact with Mr Sutton and Mr Houngh-Lee in that period.

[45] ANZL submitted Mr Wright's interim reinstatement would ignore Mr Sutton's position as the victim and cause him "*upset and disquiet*". There was no affidavit evidence from Mr Sutton to that effect and the information about what he told Mr Strevens in December 2010 and February 2011 interviews (referred to earlier in this determination) did not suggest he could not work alongside Mr Wright in a professional manner now, however strongly they disagree about what was said, done and meant in their 5 December conversation.

### *Conclusion*

[46] Weighed together, with not every factor being necessarily of equal value, I consider the balance of convenience overall tips ANZL's way. Mr Wright's affidavit confirmed no real hardship meanwhile apart from missing people at work with whom he now kept in daily telephone contact. Although it is not possible to be precise about the extent of what is absolutely necessary rather than precautionary, there is a burden for ANZL in the arrangements to make sure an interim reinstatement runs smoothly until whenever the Authority's determination is issued after its September investigation meeting. If this balance were the sole consideration I would have declined Mr Wright's interim reinstatement.

### **Overall justice**

[47] In exercise of the discretion to grant the remedy of interim reinstatement the Authority considers where the overall justice of the case lies until it can be heard, including particularly the respective strengths of the parties' cases so far as they can be ascertained at this stage.<sup>12</sup>

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<sup>12</sup> *Cliff*, above, at [18].

[48] Mr Wright's account of events has weaknesses in consistency, just as Mr Sutton's did. There was misconduct at some level – he admitted swearing at Mr Sutton but changed his story about what he did really say or recall saying. There is also some doubt about whether he really knew what was in the GIR and was merely remonstrating with Mr Sutton rather than genuinely trying to find out what it was about.

[49] The strength of ANZL's case lies in its legitimate interest in preventing behaviour that impedes the goal of its internal reporting policy to cultivate an open environment where "*employees feel free to notify management when they see issues of concern*", such as in this case, the undisputed event of Mr Wright driving with 'forks up'. Its disciplinary policy also clearly identifies as unacceptable "*behaviour that is harmful or potentially harmful to any person*" and "*threatening the well-being of employees*". As Mr Strevens deposed, allowing workers who made safety reports to then be pressured by other workers or to be in fear of reprisals would send "*a very wrong message to the workplace*".

[50] However, in assessing the overall justice of the case in order to guide the exercise of the discretion on whether to grant the interim remedy sought, I consider Mr Wright has significantly more than an arguable case. He has a strongly arguable one. While the evidence is yet to be tested, much of its content is not controversial in the sense that it is set out in the professional and thorough notes of interviews (accepted as accurate) with Mr Wright, Mr Sutton and other employees, the correspondence between the parties, and Mr Strevens' detailed account of his findings and how he came to them in his report of his investigation delivered to Mr Wright on 17 March. I was also able to test the arguments of the parties through a reasonably lengthy discussion with their representatives while they gave their submissions on the interim application.

[51] From that material, and discussion of it, I consider it more likely than not that Mr Wright will, at the substantive hearing, succeed in challenging the reasonableness of ANZL's reliance on Mr Sutton's account after having found crucial details to be untrue on review of the video evidence. The charge of threatening behaviour was a serious one but ANZL chose to discount objective evidence which cast doubt on the

reliability of Sutton's complaint – he was not followed out and the office window was not closed – but ANZL then accepted part of Mr Houg-Lee's evidence that was inconsistent with that of Mr Sutton – about what was said and done – to reach a finding of serious misconduct on the basis of the remainder of Sutton's evidence not disproved by the video.

[52] I also consider Mr Wright stands a good chance of success on whether alternatives to dismissal were adequately explored – including the prospect of reconciliation between Mr Sutton and Mr Wright – before ending 32 years of what was otherwise said to be blameless service.

[53] Accordingly I consider the overall justice of this matter lies with Mr Wright being reinstated to his position in the workplace on an interim basis.

### **Orders**

[54] The order for interim reinstatement – summarised at the head of this determination – is as follows. Under s127 of the Act, with the necessary undertakings as to damages having been given personally by Mr Wright and, separately, by his union, the Authority orders ANZL to reinstate Mr Wright to his former position on an interim basis pending the hearing of his personal grievance application. The order is made on the condition that he is reinstated from what would have been his next ordinary working day after the date of this determination, provided that ANZL, at its discretion, may choose to direct Mr Wright not to attend the workplace and carry out work for up to 14 days after the date of the determination if it needs some time to make roster and other workplace arrangements for his return. If there are any real difficulties regarding those arrangements which cannot be resolved by the representatives, the parties should promptly arrange mediation to help them do so within that timeframe.

[55] ANZL's submissions indicated, that should Mr Wright be reinstated on an interim basis, he was likely to be "*placed on 'garden leave'*" pending the hearing and determination of his personal grievance. It did not seek such an arrangement to be made a condition of any orders made and it is not a condition included in the order

made by this determination. While, in determining discretionary remedies and exercising its equity and good conscience jurisdiction, the Authority may consider such an option even when not advanced by the parties if the justice of the case so requires, my assessment of the affidavit evidence was that no such condition was necessary.<sup>13</sup> It was reached on the same grounds as the conclusion regarding the practicability and reasonableness of the interim reinstatement – doubt about the extent of alleged animosity, sufficient supervision and guidance available, and adequate means to manage and minimise contact if necessary.

### **Costs**

[56] Costs are reserved.

Robin Arthur  
Member of the Employment Relations Authority

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<sup>13</sup> *Cliff*, above, at [24].