Attention is drawn to the order prohibiting publication of certain information in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 148/10
5308885

	BETWEEN	A Applicant
	A N D	B Respondent

Member of Authority:	James Crichton
Representatives:	Tim McGinn, Counsel for Applicant John Rooney, Counsel for Respondent
Investigation Meeting:	20 July 2010 at Christchurch
Determination:	26 July 2010

DETERMINATION OF THE AUTHORITY

Prohibition on publication

[1] At the commencement of this investigation meeting to consider A's application for interim reinstatement, pending the disposal of his substantive application alleging personal grievance, counsel for A sought an order prohibiting publication of A's name. After a brief adjournment, B acceded to that application on the footing that it too would have the benefit of name protection subject only to the right of either party to revert to the Authority in relation to non-publication matters, should that be necessary.

[2] I indicated at the commencement of the hearing that I would make those orders and that they would be reflected in the decision which subsequently issued.

Employment relationship problem

[3] The applicant (A) was employed by the respondent (B) on and from 20 August 2008. A was dismissed summarily from his position on 25 May 2010. The dismissal, which was documented in a letter of even date, is expressed to concern the events and the *apparent consequences* of an occurrence on 10 June 2009 which had been the subject of lengthy investigation. That event, which the Authority will refer to in more detail shortly, was essentially a social event at A's home which involved, inter alia, the consumption of alcohol by all of the participants and the provision by A to all of the participants of a product called *Red Alert* which apparently is a natural herbal product and not illegal. One of the guests, also employed by B, allegedly did not leave A's home for some hours, having slept at A's home on a couch. Subsequent to her leaving A's premises, this individual was admitted to hospital and A was suspended from duty.

[4] B then undertook a significant inquiry into the events of 10 June 2009. On 17 June 2009, B indicated that its concerns were:

(a) That A had supplied his guests each with a pill which led to the hospitalisation of one of those guests; and

(b) That A was in breach of the strict rules around alcohol consumption while on duty, this allegation referring to the fact that A was on standby from 1330 hours on 11 June 2009;

(c) That B had concerns about the wellbeing of A as a consequence of the past concerns about A's drug and alcohol abuse.

[5] A medical examination was required by B and submitted to by A and the process for attending to that was quite lengthy. Eventually, the parties commenced engaging face-to-face again and by letter dated 1 October 2009, B issued A with a final written warning. The letter is a carefully crafted explanation of the basis for the employer's decision, together with a long list of requirements for A's future behaviour. A accepted the final written warning.

[6] On 19 October 2009, B advised A that it had become aware that A was suspected by Police of supplying a Class C controlled drug and that it was considering suspending A from duty pending the outcome of the Police investigation. That is in

fact what happened. On 16 February 2010, B was advised that the Police investigation had ended without any charge being made against A.

[7] Contemporaneously, B gave A a copy of the toxicology report prepared on the guest at A's party together with the transcript of an interview with the guest. The toxicology report was dated 15 September 2009 (that is, it predated the final written warning administered by B), although B had not obtained a copy of the report it seems until around November 2009.

[8] B sought further explanations from A as to how the party guest could have Benzylpiperazine (BZP) in her system, according to the toxicology report, if all she had taken was a herbal pill. There were numerous other meetings between the parties and exchanges of relevant particulars before the decision was taken by B to dismiss A summarily.

[9] An application to the Authority was promptly filed on 14 June 2010 seeking substantive relief (including permanent reinstatement), but for present purposes seeking interim reinstatement as well.

Issues

[10] Section 127 of the Employment Relations Act 2000 confers power on the Authority to order interim reinstatement pending hearing of a personal grievance. Pursuant to subsections (4) and (5) of that section, the Authority has power to grant such orders subject to any conditions the Authority thinks fit, and the Authority is required to apply the law relating to interim injunctions *having regard to the object of this Act*.

[11] In relation to that last mentioned phrase, Judge Colgan in *Cliff v. Air New Zealand* [2005] ERNZ at p.1 makes clear that because s.125 of the Employment Relations Act 2000 (the Act) introduced a requirement that the Authority must provide reinstatement wherever that was practicable, where that remedy was claimed and a personal grievance was proved, it followed that *the primacy now accorded by Parliament to the remedy of reinstatement is a relevant factor in considering interim reinstatement*.

[12] The law relating to interim injunctions is usually encapsulated in three or four discrete issues or questions. For the purposes of the present determination, the Authority poses the following four questions:

(a) Does A have an arguable case?

(b) Would damages be an alternative remedy?

(c) Where does the balance of convenience lie?

(d) What is the overall justice of the case?

Does A have an arguable case?

[13] A's claim that he has an arguable case is based first of all on his contention that there have been grave deficits in the process adopted by B in pursuing disciplinary action against him. In particular, A says that B relied on a number of earlier incidents of a disciplinary nature to build a case against A notwithstanding that those earlier disciplinary incidents had already been comprehensively disposed of. A also claims that B's reliance on a toxicology report to partially justify A's dismissal is drawing a long bow because the evidence the banned substance got into the subject's body through the agency of A is weak indeed.

[14] An incident in January 2009 involving the misuse of alcohol was investigated by B but then dropped without any disciplinary action being taken against A. Then, in April 2009, there were various complaints about A brought to the attention of B by a family with whom A had had an association. The alleged misconduct complained of again involved alcohol abuse and, this time, illicit use of prohibited drugs. In responding to those allegations, A, amongst other things, offered to submit himself to random alcohol and drug testing to satisfy B that he was a fit and proper person to perform his duties. A accepted that he had misused alcohol as part of his coping mechanism in tragic personal circumstances and that factor, together with the commitment to accept random and drug and alcohol testing, was evidently accepted by B when the latter concluded that *no further action will be taken in relation to these allegations*.

[15] It follows that on both of these incidents just referred to, B has conducted an investigation into allegations against A, not made an adverse finding, not imposed any

disciplinary sanction, and by its conduct, cannot be seen to have done anything other than recommit itself to the continuation of the employment relationship by condonation.

[16] Even if that is not enough, immediately after the receipt of the letter confirming no action would be taken in relation to the April incident, A's lawyer wrote to B on A's behalf expressing dissatisfaction with B's conclusion because it failed absolutely to clearly deal with the matter one way or the other. B is asked why it was unable to reach a definitive conclusion on the allegations and is told in the clearest terms by A's lawyer that A seeks to have his record clear and B is questioned as to why it was unable to make a definitive conclusion on the allegation.

[17] It would be plain from this communication (which remained unanswered), that A regarded his reputation as important and that B was on notice that A wished to have the matter dealt with definitively.

[18] Then there was a further incident on 10 June 2009 which again resulted in B commencing an employment investigation into A's conduct. From the first item of correspondence received from B in relation to this episode, it appeared that B's concern was that a work colleague who had attended A's home for the purposes of a party, was subsequently admitted to hospital exhibiting severe effects from either drug or alcohol consumption or both. Seven days later by correspondence from B, it became clear that B was concerned that A may have supplied guests at the party with a pill which led to one being hospitalised, with the details around that and with A's behaviour and alleged intoxication prior to being on duty on 11 June 2009. It is absolutely apparent from B's letter of 19 June 2009 that B regarded the earlier incidents as *live* and not as having been disposed of. Two references in that letter make B's position quite clear. That emphasis continued in subsequent correspondence, for instance, B's letter of 27 August 2009 where again B relies on the earlier incidents as a basis for generalised concern about A's behaviour.

[19] The same theme is picked up again in the letter from B to A administering a final written warning for the behaviour complained of relating to the events of 10 June 2009. That letter, dated 1 October 2009, contains a lengthy analysis of the circumstances and the conclusions that B has reached. Again, there is a clear rejection of submissions on A's behalf that the previous issues cannot remain open, having already been disposed of. B says in this letter:

> *I note your representative's assertions that I should not take into account the previous investigations as no disciplinary action was taken, however I do not agree. These previous matters were closed on the basis that a determination was not able to be made, rather than absolute confirmation that you had done no wrong.*

[20] The final written warning conveyed in this same letter sets a number of onerous conditions and was accepted by A without demur. The letter carefully and thoroughly traverses the subject matter of the disciplinary episode and does not leave the door open for the matter to be reopened. There is no suggestion in the letter that B will revisit its decision based on material that is not yet available to it. B's letter proceeds on the footing that it is in fact the final chapter of this episode and I accept A's affidavit evidence to the effect that he accepted the final written warning on precisely that basis.

[21] Then, on 19 November 2009, A was advised by B that the Police were investigating him for the supply of a Class C drug. In fact, B had known that the Police were investigating A at least since 19 October 2009 and had been told by Police not to disclose that information to A. B says that the investigation the Police were involved with was wider than simply the events of the 10 June 2009 incident although that was clearly a central part of the investigation. A contends that B was not able to raise the Police involvement in the way it did because the events of 10 June 2009 had already been disposed of by the final written warning.

[22] Then by letter dated 18 February 2010, B sought responses from A in respect of the toxicology report on the unwell partygoer and the notes of an interview with that person. The request for that information in the letter just referred to begins with this phrase: *I refer to B's investigation into your conduct on 10 June 2009 which resulted in a final written warning being issued …* and further on in the letter it continues: *… you need to be aware that B still has significant doubt about your suitability to perform the role ….*

A says it is not open to B to raise further issues concerning the events of 10 June 2009 (the Police investigation first then the toxicology report on the partygoer).

[23] B denies that it took note of the earlier disciplinary issues in the decisions that it took and claims that it acted throughout as a fair and reasonable employer would. It points out that it gave A all the time that he needed to respond to its allegations, that it encouraged A to be represented, and notes that he was in fact represented, and that it

reached conclusions that it was able to reach on the evidence. B disputes it was not able to sheet home culpability to A for the banned substance identified in the toxicology report.

[24] B draws the Authority's attention to the various statements of the Employment Court making clear that it is not a requirement of the law that an employer's actions be subjected to *pedantic scrutiny*. Furthermore, B points out that the nature of its operations, in a safety critical environment, entitles it to weigh that safety factor as a *special consideration* in reaching a conclusion. There are a number of decisions of the Authority which are referred to in support of that proposition.

[25] Furthermore, B says that the Authority's task is not just to determine whether A has an arguable case for proving his personal grievance alleging unjustified dismissal, but also must satisfy the test that A has an arguable case for reinstatement as well. This proposition, of course, is derived from an application of the Court of Appeal decision in *Madar v. P&O Services (NZ) Ltd* [1999] 2 ERNZ at 174 where the Court made clear that, where there was no prospect of permanent reinstatement, it was difficult to conclude that an applicant had an arguable case for interim reinstatement.

[26] I conclude there is an arguable case. It seems to me axiomatic from my earlier analysis of the process adopted by B that it chose to keep referring back to earlier matters which had been disposed of one way or the other. Indeed, it seems to me the only matter which might be able to be identified as *new* and therefore capable of a substantive response after the final written warning on 1 October 2009, was the intelligence that Police were investigating A, not just apparently in respect of the events of 10 June 2009, but also more widely. If that is true, and remembering that the Authority has only untested affidavit evidence to rely on at this point, then it could be said that the Police matters are new and therefore able to be raised by B in the normal course. But that is the only new matter. The toxicology report was plainly part of the 10 June 2009 incident and it seems to me that that was disposed of, as an event, by the final written warning administered on 1 October 2009. It simply is not the action of a fair and reasonable employer for matters which have been dealt with, to be dredged up again. If the employer had wanted to reserve its position in respect of the toxicology report, then it should have said so, thus preserving the employee's rights at the time. The fact that it did not say so, in the Authority's view, entitled the employee to say, as in fact he did, that the final written warning was an end of it.

[27] The smell of double-jeopardy also lingers over B's continued reliance on the two incidents early in 2009, neither of which resulted in any finding of fault against A. But notwithstanding that, B wanted to keep bringing those matters up to shore up its position in respect of matters that were clearly current. I am satisfied that the law the Authority is required to apply is set out in the judgment of Goddard CJ in the Employment Court case of *Ashton v. Shoreline Hotel* [1994] 1 ERNZ at 421. In that judgment, His Honour refers to a succession of authorities for the proposition that where an employer discovers misconduct but continues the employment, he must be taken to have affirmed the employment relationship. In the Court's own words the following proposition is directly on point:

> *If an employer has waived the right to react to misconduct, the instance of misconduct cannot later be revived to be taken into account if further offending occurs. … A point must be reached at which the employee can safely assume that the sword of Damocles is no longer suspended overhead by a frail thread but has been taken down and returned to its sheath … disciplinary action in reliance in whole or in part on the employee's historical misconduct will not ordinarily be reasonably open to an employer who, with knowledge of that misconduct, has chosen to either overlook it or not to inquire further into it. An employer can be treated as having made that choice when it has either full knowledge of the misconduct or enough information to alert it to its likely existence and implications and to the consequent need to conduct a fair inquiry into the facts if they are ever safely to be relied upon as a ground for disciplinary action.*

[28] I confess I find it difficult to escape the conclusion that, in the present case, B has not done precisely what Chief Judge Goddard rules out, as not being the actions of a fair and just employer. I am satisfied then that at least in relation to the test of an arguable case for personal grievance, the applicant has made out his claim. I do not think it inconceivable that A could be permanently reinstated to B's service although I would not put it stronger than that given B's quite proper concern about safety matters.

Would damages be an alternative remedy?

[29] B argues that damages would be a perfectly appropriate remedy for A, given that the Authority is able to hear the substantive issues in around six weeks. B's view is simply that when the substantive matter is decided, the Authority can make an award of compensation which will adequately reimburse A for the losses of income which he will suffer between now and the substantive determination issuing.

[30] It is contended (correctly) that the Authority would have no difficulty in identifying A's monetary losses and it is suggested that because A has effectively been continuously suspended for over a year from his principal duties and has not even been in the workplace for six months or more, there is no particular purpose to be served by returning A to the workplace on an interim basis.

[31] Unsurprisingly, those views are not supported by A who points out particularly that the consequence of his remaining away from the employment is the loss of continuing income and the effect that has on his ability to sustain himself. Amongst other things, I was told during the investigation meeting (and I accept) that A has placed his home on the market for sale as a consequence of ongoing mortgage stress occasioned by the dismissal.

[32] I am satisfied that an award of damages made as part of the substantive determination of A's grievance would not meet the very real immediacy of A's financial situation. It follows that I do not consider that damages are an alternative remedy in the present circumstances.

Where does the balance of convenience lie?

[33] Here, the Authority must consider the relative inconvenience to each party of the other succeeding. Looked at practically, the Authority must weigh the relative hardship to B of A being successful against the potential hardship to A in remaining away from the employment pending the resolution of his personal grievance.

[34] B says that the employment relationship has effectively irretrievably broken down and that it has neither trust nor confidence in A as a consequence of the events briefly sketched in the earlier part of this determination. Furthermore, by virtue of the safety critical nature of the industry in which the parties are engaged, it is suggested by B that it would be impossible, in all the circumstances, for A to be returned to the workforce.

[35] Furthermore, B says that, by virtue of the various employment relationship difficulties that A has been involved with recently, A has been effectively suspended from his actual duties (although remaining on the payroll) for over a year and were he to be granted interim reinstatement, that would effectively only return him to the payroll.

[36] Also, B points out that, by virtue of the corporate structure of its operations, A is actually employed by a legal entity which then on-hires his services to another limited liability company.

[37] For his part, A points out that he is suffering significant financial strain as a consequence of the dismissal and that is graphically illustrated by his decision to place his home on the market for sale. Indeed, A goes further and says that unless he can start reconnecting with his chosen employment, his career in that industry is effectively over because he has been away from his duties for so long. Of course, the Authority's powers in that regard are not unlimited; A currently does not have the necessary certification to perform his duties although a change in that status may be imminent.

[38] I am satisfied, on the balance of probabilities, that the balance of convenience favours A. The consequences to him of the loss of his contact with the employment is so grave as to militate against the important factors that B raises in defence of its position. In particular, the fact that A has been away from the workplace for over six months and not actually engaged in his duties for over 12 months, is a factor in encouraging me that the Authority's discretion ought to be exercised in favour of the applicant in relation to this particular question.

[39] I find it difficult to avoid the sense of the well known aphorism of the former Chief Judge in *Melville v. Chatham Islands Council* [1999] 2 ERNZ 70 at p.100:

> *It is not often that the employer can convincingly assert that the hardship of being required to take an unwanted employee back for a short term is greater to it than the hardship of keeping out an employee who has been unjustifiably dismissed.*

What is the overall justice of the case?

[40] I conclude that the overall justice of the case favours A. In my opinion, he is entitled to the benefit of the doubt in respect of the process-driven anxieties I have around B's conduct of the issue. As I mentioned in the earlier analysis of that matter, I am troubled by the repetitive scent of double-jeopardy throughout the employer's investigation of the several matters referred to, and that aspect alone seems to me to place a real question about whether the applicant has been treated fairly. Those double-jeopardy matters, coupled with the employer's decision to effectively sheet home to the applicant the fact that the unwell partygoer had BZP in her system, which

I must say on the affidavit evidence before the Authority, would appear to be something of a leap of faith, together place real question marks about the propriety of B's investigation and raise a pervading sense of unfairness about the way A has been treated.

[41] Quite properly, B raises issues to do with safety, but as was clear from the affidavit evidence, those safety issues are out of the hands of the employer to a real extent and in the preserve of an independent statutory authority whose obligation it is to determine questions of safety of operation.

[42] It may well be, as B contends, that its case will be stronger at the substantive investigation meeting because it will be able to bring forward all its witnesses and have them give oral evidence and be questioned on oath. B, of course, suggests that the Authority should stay its hand meantime, until the substantive investigation meeting, and then consider issues of reinstatement. I do not agree. In my opinion, the Authority has an obligation to deal with the matter on the evidence that is available now (albeit untested affidavit evidence) and on that evidence, I remain troubled by the sense that A has been treated unfairly and in a way that a fair and reasonable employer would not.

Determination

[43] It follows from the foregoing that I have decided that A is to be reinstated to the employment with B but only on a garden leave basis because of his present inability to physically fulfil his duties. If, as is indicated, the statutory authority responsible for safety matters makes a determination in relation to A's ability to perform his duties, then leave is reserved for either party to revert to the Authority to seek further orders.

James Crichton
Member of the Employment Relations Authority