

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 505
3235939

BETWEEN	RYAN ALDRIDGE Applicant
AND	AUCKLAND AQUARIUM LIMITED Respondent

Member of Authority:	Alex Leulu
Representatives:	Simon Greening, counsel for the Applicant Laura Scampion, counsel for the Respondent
Investigation Meeting:	On the papers
Submissions and further information received:	19 June, 27 June, 13 July and 21 July 2023 from the Applicant 6 July 2023 and 21 July 2023 from the Respondent
Determination:	7 September 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Auckland Aquarium Limited (AAL) dismissed Ryan Aldridge from his role as an Assistant Aquarist on 27 February 2023. He was dismissed for failing to attend his shift on time without prior notice. Mr Aldridge raised a personal grievance for unjustified dismissal and applied to the Authority to investigate his grievance.

[2] Mr Aldridge also asked the Authority to exercise its discretion to reinstate him to his previous role for AAL on an interim basis while his grievance is being determined.¹

[3] AAL opposes Mr Aldridge's application and said its decision to dismiss him was justified and procedurally fair. It also opposes Mr Aldridge's reinstatement on an interim basis because it would not be practical or reasonable.

The Authority's investigation

[4] This determination is in respect of Mr Aldridge's application for interim reinstatement. Mr Aldridge's application has been determined after considering Mr Aldridge's statement of problem, AAL's statement in reply, affidavit evidence and submissions lodged by both parties.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[6] Affidavits were lodged by Mr Aldridge and AAL Display Manager Kim Evans. Affidavit evidence is accepted on an untested basis but assessment of unanswered or disputed assertions in those sworn or affirmed statements may be made on a common-sense basis when considering whether to order interim reinstatement.²

Interim reinstatement principles

[7] The Authority has jurisdiction to grant interim reinstatement.³ When determining whether to order interim reinstatement, the Authority must have regard to the object of the Act to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and employment relationship.⁴

[8] When considering interim reinstatement, the following three step process applies:

¹ Employment Relations Act 2000, s 125.

² *Wellington Free Ambulance Service v Adams* [2010] NZEmpC 59 at [17]-[18].

³ Employment Relations Act 2000, s 127.

⁴ Employment Relations Act 2000, s 3.

- (a) Does Mr Aldridge have an arguable case he was unjustifiably dismissed and should be reinstated permanently.
- (b) Where does the balance of convenience lie? This includes looking at the relative detriment or injury each party would incur as a result of an interim reinstatement decision.
- (c) To ascertain where the overall justice of the case lies until the substantive matter can be determined.

AAL's decision to dismiss Mr Aldridge

[9] Mr Aldridge started his employment with AAL on 10 May 2021. AAL trades as Sealife Kelly Tarlton's Aquarium, an aquarium available to the public. Mr Aldridge's agreed hours of work were for at least eight hours work for one day a week. In practice, he was typically rostered to work one weekend every fortnight.

[10] During his employment Mr Aldridge was also studying marine science and biology. He is currently continuing his studies with the aim of attaining a career in marine science.

Mr Aldridge's first formal warning

[11] On several occasions during September 2021 to September 2022, Ms Evans had texted Mr Aldridge about his absences from work. During this period, AAL also held informal and formal meetings with Mr Aldridge about his absences and discussed options to address it. In her evidence, Ms Evans provided two examples of text communications between her and Mr Aldridge. The examples referred to instances where Mr Aldridge had failed to provide notice of his absence before the start of his rostered shift. For each example, his absences were due to medical reasons.

[12] A formal meeting took place between them on 30 September 2022. As a result of the meeting, AAL gave Mr Aldridge a final opportunity to improve his work attendance by 21 November 2022. If he didn't improve, AAL would consider more formal action to address any further absences.

[13] Less than a month later on Sunday 16 October 2022, Mr Aldridge was one hour late for his rostered shift. This led to AAL inviting him to a further formal meeting.

The meeting took place on 28 October 2022. As a result of the meeting AAL issued Mr Aldridge with a formal warning letter (first warning). AAL's first warning was because Mr Aldridge failed to meet AAL's expected standards of behaviour. AAL's letter to Mr Aldridge explained the following:

...The standards of behaviour we expect from you are that you give prior notice if you are unable to start your shift at the agreed time.

[14] Mr Aldridge acknowledged his fault in the matter and said he was late because he slept in.

Mr Aldridge's second formal warning

[15] On Saturday 7 January 2023 Mr Aldridge was rostered to work. He contacted AAL to say he was feeling unwell and couldn't attend his shift. He was told to stay home which he did. He was also scheduled to work the next day on Sunday 8 January. He did not attend his next shift.

[16] The parties dispute the circumstances leading up to his non-attendance. AAL had expected Mr Aldridge to further notify AAL of his pending absence for his Sunday 8 January shift. Mr Aldridge believed he did provide notice based on his communications leading to his absence the previous day.

[17] AAL invited Mr Aldridge to a further formal meeting and, on 31 January 2023 AAL issued him with a second formal warning (second warning) by letter. The second warning letter relied on the same breach of standards as the first warning.

[18] The parties also disputed when Mr Aldridge raised his objection to this warning. Mr Aldridge said he objected to the second warning immediately upon being issued the warning. AAL disagreed and said Mr Aldridge did not dispute the second warning until his dismissal meeting on 27 February 2023.

The events leading to Mr Aldridge's dismissal

[19] On Sunday 19 February 2023 Mr Aldridge was approximately 45 minutes late for his rostered shift. He acknowledged he was late and took full responsibility for his conduct. Similar to reasons leading to his first warning, he was late because he slept in.

[20] On 27 February 2023, AAL invited Mr Aldridge to a further formal meeting. As a result of the meeting, AAL dismissed Mr Aldridge by letter explaining to him:

Failure to tell your line manager (or lead for the day) before your shift starts that you are going to be late or absent, this constitutes a third warning in which the outcome is termination.

[21] In dismissing Mr Aldridge AAL relied on its code of conduct and disciplinary policy. The disciplinary policy allows AAL to dismiss an employee after issuing a previous “formal written warning” and a “final written warning”.

The events after Mr Aldridge’s dismissal

[22] On the following day after his dismissal, Mr Aldridge wrote to AAL asking it to reconsider his dismissal. He said AAL’s decision was unfair and wished he had more time to prepare his explanation and arrange representation.

[23] On 2 March 2023 Mr Aldridge sent a letter to AAL raising a personal grievance. As part of his grievance, he believed his dismissal was procedurally flawed and sought reinstatement. AAL responded to Mr Aldridge by email confirming it would not reconsider its decision to dismiss him.

[24] On 19 June 2023 Mr Aldridge lodged his statement of problem and his application for interim reinstatement. Both parties had previously attended mediation unsuccessfully. The parties have also consented for Mr Aldridge’s interim reinstatement application to be investigated on the papers.

Arguable case of unjustified dismissal

[25] For an application for interim reinstatement, establishing an arguable case for unjustified dismissal (or a disadvantage) has a low threshold. The threshold being whether there is a serious question or arguable case to be considered and the claim is not frivolous or vexatious.⁵

[26] Mr Aldridge has autism spectrum disorder (ASD). Mr Aldridge said he has an arguable case for unjustified dismissal because AAL failed to fairly consider the impact of his ASD on his ability to attend work on time. In his affidavit he described how the

⁵ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

COVID-19 epidemic impacted his ASD. This led to effects on his health and his sleep patterns which contributed to conduct leading to his first warning and his dismissal.

[27] He also said AAL failed to properly consider his explanation for his absence on 8 January 2023. The explanation was that he had contracted COVID-19 and notified AAL of his absence the day before.

[28] Mr Aldridge challenged AAL's dismissal process on the basis:

- (a) In dismissing him, AAL relied on his medical absences which occurred prior to his warnings. He argued these absences are not of the same character as the incidents of lateness he was dismissed for;
- (b) His second warning was unjustified and disputed. AAL did not consider whether the second warning could be fairly relied upon, or if it was of a different character to the two other incidents; and
- (c) Prior to the meeting of 27 February 2023, AAL did not provide him with all relevant information before inviting him to a disciplinary meeting. He was not advised on the status of the disputed warning or the possible outcome of termination.

[29] Although AAL acknowledged the low threshold, it opposed Mr Aldridge's arguments because his employment was "marred by numerous absences". These absences started to occur relatively early in his employment.

[30] AAL argued its dismissal of Mr Aldridge were actions of a fair and reasonable employer. AAL relied on various meetings and options it had discussed with Mr Aldridge before proceeding with a disciplinary process. AAL also said its disciplinary process was in accordance with its disciplinary policy.

[31] The untested affidavit evidence shows AAL undertook an extensive process with Mr Aldridge and had met with him on numerous occasions to try and resolve his work attendance issues. However, in relying on untested affidavit evidence, it is difficult to assess a number of Mr Aldridge's claims. This includes whether AAL had properly considered the impact of his Autism on his attendance issues. For these reasons, Mr Aldridge meets the low threshold of having an arguable case for unjustified dismissal.

Arguable case for reinstatement

[32] Establishing an arguable case for permanent reinstatement also has a low threshold. Mr Aldridge said he can return to the workplace successfully because he had no relational problems with AAL co-workers, and he had addressed the sleep issues which contributed to his absences.

[33] AAL submitted it would be impractical for Mr Aldridge to return to employment because of his unreliability in attending his rostered shifts. His behaviour continued even when steps were taken to address his attendance prior to the start of the disciplinary process.

[34] A key aspect of Mr Aldridge's argument is whether he had adequately addressed the issues which contributed to his absences. It is not clear from his affidavit whether he had or to what extent he had addressed his previous attendance issues. Despite this, it appears he did not have any adverse workplace relationships with other AAL staff and so he has met the low threshold of an arguable case for reinstatement.

The balance of convenience

[35] Mr Aldridge said the balance of convenience weighs in his favour for three reasons. Firstly, reinstating him into the workplace would not be arduous for AAL because he only worked eight hours each week. Secondly his role with AAL was important to him as it was directly relevant to his current specialised field of study. He has tried to search for other work in his field but has been unsuccessful. Given the importance of the role to his studies, monetary remedies are not an adequate substitution for reinstatement.

[36] Thirdly, Mr Aldridge submitted his sleeping problems are now being successfully managed and similar attendance issues are unlikely to reoccur.

[37] AAL submitted there are no factors weighing in Mr Aldridge's' favour when assessing balance of convenience. In response to Mr Aldridge's arguments AAL said:

- Mr Aldridge's working shifts were limited and he had not expressed a significant burden such as a visa issue or dependants which would warrant his interim reinstatement into the workplace.

- There are other organisations who may provide him with work opportunities to assist his studies including the Ministry of Primary Industries, NIWA and the Department of Conservation.
- Based on his previous history, the team would be under pressure if he resumed temporary employment and his previous behaviour continues. Pressures on the team could lead to potential animal welfare issues.

[38] AAL also referred to the four-month delay from when Mr Aldridge's employment ended on 27 February 2023 to when he lodged his claim with the Authority on 19 June 2023. AAL argued this demonstrates the lack of any such pressures on Mr Aldridge.

[39] Generally, Mr Aldridge's arguments focussed on the importance of the role to his area of study and how easy it would be for AAL to reincorporate him into the workplace. His rationale for interim reinstatement did not rely on an immanent impact or hardship on him or others.

[40] AAL's concern about whether Mr Aldridge's previous conduct would continue upon reinstatement is reasonable. Although Mr Aldridge said he had addressed his sleeping issues, there was no supporting evidence to show what steps were taken to address this issue. I accept if Mr Aldridge returned to the workplace before his grievance was fully investigated and determined and his conduct continued, the pressure on AAL staff and the animal welfare risk would be significant. For this reason, the balance of convenience weighed against interim reinstatement.

Overall justice

[41] The overall justice assessment is essentially a check on the position reached following the analysis of the earlier issues of serious question to be tried and balance of convenience.

[42] Mr Aldridge said he had a strong claim for both unjustified dismissal and permanent reinstatement. He also argued the delay in lodging his claim to the Authority is not a reason for refusing interim reinstatement.

[43] Mr Aldridge's case relied on arguments of alleged failures of AAL's disciplinary process. However, he accepted his conduct leading to disciplinary action for two of his formal warnings. Mr Aldridge had not sufficiently shown he had addressed the sleeping issues which contributed to his conduct.

[44] As already set out, AAL's operational concerns and risks associated with Mr Aldridge's interim reinstatement are reasonable and significant.

[45] Based on these concerns and risks, I decline Mr Aldridge's application for interim reinstatement.

Next Steps

[46] The Authority will convene a case management conference to set timetable directions for the investigation of Mr Aldridge's claims.

Costs

[47] Costs are reserved pending the outcome of the substantive investigation of Mr Aldridge's grievance application.

Alex Leulu
Member of the Employment Relations Authority