

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 151/10
5311667

BETWEEN

KARL PETER BROWNE
Applicant

A N D

TALLEY'S GROUP LIMITED
Respondent

Member of Authority: James Crichton

Representatives: Anjela Sharma , Counsel for Applicant
Graeme Malone , Counsel for Respondent

Investigation Meeting: 23 July 2010 at Nelson

Determination: 26 July 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Browne) alleges he was unjustifiably dismissed from his employment and suffered disadvantage as a consequence of the unjustified actions of his employer, the respondent (Talley's). He seeks substantive remedies and interim reinstatement.

[2] Talley's deny wrongdoing and resist interim reinstatement.

[3] Mr Browne joined the Nelson fishing vessel MVF *Enterprise* on 8 June 2009 as a factory hand. His most recent employment agreement is that dated 2 December 2009.

[4] Mr Browne was part of the crew of the *Enterprise* readying her for sea when a drug search was undertaken on 12 May 2010. The drug dog indicated interest in Mr Browne's luggage.

[5] Talley's proceeded to interview Mr Browne and, amongst other things, asked him if he *did drugs*. Mr Browne indicated that he had done so up until a year previously but was now clean. He denied knowledge of anybody else on the vessel taking narcotics.

[6] Talley's formed the view that it was appropriate to suspend Mr Browne to enable it to conduct further investigations and eventually Mr Browne received a letter from Talley's inviting him to attend a disciplinary meeting on 18 June. Mr Browne lived in Auckland and travelled down to Nelson specifically for the purpose of the meeting. While Mr Browne was actually in transit to Nelson, Talley's postponed the meeting. Mr Browne had no money to enable him to remain in Nelson which would have necessitated changing his return airline ticket. He sought assistance from Talley's and was refused. Accordingly, Mr Browne determined to proceed with the meeting with Talley's notwithstanding that his lawyer was not available.

[7] Talley's told Mr Browne it had statements from crew members who had seen him *do drugs*. Mr Browne denied the allegation. Talley's retired to consider its position and on reconvening Mr Browne was given the opportunity of resigning. It became clear to Mr Browne that if he did not resign he would be dismissed. Accordingly, Mr Browne resigned his employment on 18 June 2010. His proceedings seeking substantive relief and interim reinstatement were filed in the Authority on 12 June 2010 and a statement in reply from Talley's resisting Mr Browne's claims in their entirety was filed on 20 July 2010.

Issues

[8] Section 127 of the Employment Relations Act 2000 confers power on the Authority to order interim reinstatement pending the hearing of the substantive grievance. The Authority has power to grant interim reinstatement orders on such bases as it thinks fit and in forming its judgment on the matter, the Authority is required to apply the law relating to interim injunctions *having regard to the object of this Act*.

[9] That last phrase has been helpfully commented on by the Chief Judge in *Cliff v. Air New Zealand* [2005] ERNZ p.1 where His Honour makes clear that because s.125 of the Act introduced a requirement that the Authority must provide for reinstatement wherever that was practicable and where that remedy was claimed, and

the personal grievance proved, it followed that *the primacy now accorded by Parliament to the remedy of reinstatement is a relevant factor in considering interim reinstatement.*

[10] The law relating to interim injunctions is well settled and is often summarised in three propositions:

- (a) Does the applicant have an arguable case?
- (b) If so, where does the balance of convenience lie?
- (c) What does the overall justice of the case require?

[11] A related issue, sometimes expressed as a separate proposition on its own, is the question of whether remedies short of interim reinstatement would meet the case. In particular, the question will be whether damages are an appropriate remedy. In relation to this point, I agree with the submission of counsel for the respondent that matters to do with alternative remedies properly speaking affect the balance of convenience and accordingly it is my intention to deal with that issue under the balance of convenience head.

Does Mr Browne have an arguable case?

[12] I conclude that Mr Browne has an arguable case. He was offered the opportunity of resigning his position or taking his chances on being dismissed. Talley's deposed that it would have dismissed Mr Browne if he had not resigned but it felt he was entitled to the option of having his termination treated as a resignation so as to make it easier for him to gain alternative work.

[13] Nonetheless, the contention that Mr Browne makes is that he had no real choice but to resign his position because, in effect, it was implied to him that if he did not resign, he would be dismissed. Of itself, I am satisfied that that creates a reasonable basis for concluding that there is an arguable case.

[14] Furthermore, the four weeks odd that Mr Browne was suspended without pay in anticipation of having to reach the point at which he was offered resignation or worse, also seems to me to ground the arguable case test.

[15] Further and finally, the meeting at which Mr Browne made his decision to resign his employment was held without his lawyer present. The meeting date was changed at the last minute, after he was in transit from Auckland to Nelson, and he was unable to obtain the services of his lawyer for the changed meeting time. Mr Browne's evidence is that he was unable to afford to stay in Nelson for the time and date of the adjourned meeting suggested by the employer, and so he insisted on the meeting going ahead notwithstanding that his lawyer was not available. That factual matrix, coupled with the dispute about what actually happened in that meeting (which is difficult for the Authority to make judgments about without having heard the evidence given orally and subjected the witnesses to question), also supports the conclusion that Mr Browne has met the test of an arguable case.

Does the balance of convenience favour Mr Browne?

[16] I am satisfied that, despite my anxieties about the process issues that I have just referred to, this is a case where the balance of convenience favours the employer, Talley's. This is so primarily because of the absence of any proper explanation from Mr Browne about the very significant allegations made against him by Talley's. There was never an explanation tendered about why the drug dog should be interested in Mr Browne's luggage or why Mr Browne's co-workers would say that he had been seen doing drugs on the ship if that was untrue.

[17] Indeed, it was much more likely than not that the evidence of drug use was true, and that view of matters is supported by the nickname which Mr Browne was given in the phone contacts of his friend, Mr Burton, who was dismissed at roughly the same time by the same employer. Mr Browne's own evidence is that he had been a drug user, but was not one now, but that evidence is not consistent with the drug dog's view or with the opinion of other members of the crew.

[18] I accept Talley's submission that dealing with illicit drug use on its deep sea vessels is a major challenge and that its assessment that Mr Browne is fundamentally untrustworthy in this respect was available for it to make.

[19] For the sake of completeness, I conclude that damages would be an appropriate remedy to put right any financial consequences of the dismissal and the earlier suspension in the event that Mr Browne were to be successful in his substantive grievance.

What is the overall justice of the case?

[20] I am satisfied the overall justice of the case is to preserve the status quo until the substantive hearing has enabled the Authority to hear all of the evidence and to question the witnesses in person. It is difficult to conclude otherwise when it is apparent from the evidence submitted in affidavit form by Mr Browne in support of his friend, Mr Burton, that he has not been entirely accurate in his recollection of events. Given that he has chosen to be selective in his recollection in sworn affidavit evidence before the Authority, it is difficult for the Authority to feel it can rely on his other testimony in his own cause and accordingly the Authority is not minded to exercise its discretion in Mr Browne's favour.

Determination

[21] Mr Browne's application for interim reinstatement to his position pending the determination of his substantive grievance is refused.

Costs

[22] Costs are reserved.

James Crichton
Member of the Employment Relations Authority