

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2011] NZERA Auckland 356
5347302**

BETWEEN GRAHAM CORNES
 Applicant

AND NEWMONT WAIHI GOLD
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Diana Christensen, Advocate for Applicant
 John Rooney and Genevieve Martin, Counsel for Respondent

Investigation Meeting: 5 July 2011 at Auckland

Submissions 27 July 2011 from the Applicant
 5 August 2011 from the Respondent

Determination: 11 August 2011

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

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

[2] Mr Cornes was dismissed from his job as a Mill Operative by the Respondent, Newmont Waihi Gold Limited (“Newmont”), on 6 May 2011. The dismissal was on the basis of serious misconduct.

[3] Mr Cornes claims that he was unjustifiably dismissed and unjustifiably disadvantaged and applies to the Authority for interim reinstatement, or as an alternative, reinstatement to the payroll, pending determination of the substantive matter. In addition Mr Cornes claims substantive relief including permanent reinstatement, lost wages, interest, penalties in respect of a breach of the employment agreement and good faith obligations under the Act, and compensation of \$25,000.00 for loss of dignity, humiliation, and stress caused by his unjustifiable disadvantage and dismissal.

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

[5] As required by s 127 of the Act, an undertaking has been given by Mr Cornes 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 5 July 2011.

[7] Following Mr Cornes having obtained alternative employment on 7 July 2011 subsequent to the Investigation Meeting, Mr Cornes filed an amended affidavit and the parties filed further submissions.

The Law

[8] 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.

[9] 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 of this year reinstatement is no longer the primary remedy following the repeal of ss 101 (c) and 125 under the Employment Relations Amendment Act 2010 (“the Amendment Act”). Under s 125 (2) as amended, reinstatement is to be provided by the Authority if it is reasonable and practicable to do so.

[10] Mr Cornes’s reinstatement remains a remedy available to the Authority, and as such, whilst too great a reliance can no longer be placed on case law determined under the old formulation, the principles derived from these remain pertinent and are usually formulated in a series of questions as:

- a. Does the applicant have an arguable case?
- b. Are other adequate remedies available?
- c. Where does the balance of convenience lie?

d. What is the overall justice of the case?

[11] The evidence before the Authority for the purpose of determining this interim reinstatement application has been presented as usual in affidavit form by Mr Cornes and several witnesses on behalf of Newmont.

[12] As the affidavit evidence must necessarily remain untested until the substantive investigation of the unjustified dismissal and unjustified disadvantage personal grievances, 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

[13] On or about 15 March 2009 Mr Cornes reported to the Processing Plant Manager, Ms Kirsty Hollis, that a fellow employee had arrived at work in an intoxicated condition.

[14] Mr Cornes claimed that following this incident, he had been subjected to bullying and harassment by fellow employees, which actions Mr Cornes said in his affidavit that he had reported on at least two occasions to either Ms Hollis or to Mr Brett Twidle, Senior Process Manager and Mr Cornes's manager. However Mr Cornes said that Newmont failed to undertake the necessary actions to rectify the situation, thus that he had been unjustifiably disadvantaged in his employment.

[15] On 4 May 2011 there was a union meeting which Mr Cornes did not attend. Mr Cornes was informed following the meeting by Mr Malcolm Phillips, Leading Hand, that Mr Rex Gilbert, Mill Operative, had been making adverse comments about Mr Cornes at the meeting.

[16] The following day, 5 May 2010, it is common ground that when Mr Gilbert arrived at work, Mr Cornes had approached him and asked him to tell him what he had said at the union meeting the previous day. By way of affidavit evidence, Newmont said that its investigation had established that, after refusing to speak to Mr Cornes, Mr Gilbert had entered the control room, with Mr Cornes entering after him. Mr Gilbert had continued to refuse to speak to Mr Cornes, and exited from the control room, Mr Cornes again followed him out of the control room.

[17] Mr Cornes claimed that the discussion between himself and Mr Gilbert had escalated, that they swore at each other and that Mr Gilbert had then punched him repeatedly and pushed him to the floor, still punching him.

[18] As a result of its investigation, which included interviews with Mr Cornes and Mr Gilbert at which both men had representation, an enactment, and the interviewing of witnesses, Newmont concluded that Mr Cornes had been the aggressor in the incident.

[19] As a result of an investigation and the resulting conclusion by Newmont, Mr Cornes was summarily dismissed on 6 May 2011.

[20] On 7 July 2011 Mr Cornes commenced new employment. The position is a temporary full-time position with the understanding that it will become permanent. The position is based outside Waihi, and the salary level is below that which Mr Cornes earned in his position with Newmont. In his new employment Mr Cornes does not enjoy terms comparable to the sick leave, pay progression and redundancy provisions available to him under the Newmont Collective Agreement, and further his new employment is subject to a 90 day trial period.

An Arguable Case

[21] As a matter of principle, Mr Cornes 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.

[22] This principle was articulated by the Employment Court in *Cliff v Air New Zealand Ltd*¹:

So whilst plaintiffs must establish an arguable case of personal grievance (unjustified dismissal), they must also establish an arguable case that they will thereafter be reinstated in employment and not simply compensated monetarily for their grievance.

[23] Mr Cornes was dismissed as a result of an investigation carried out into the verbal and physical altercation between himself and another employee.

[24] Mr Cornes submits that the facts in the case have been misrepresented by Newmont, specifically that on a correct interpretation of the facts, he was the victim and not the

¹ CA6A/05, per Judge Colgan at para [12]

aggressor in the incident. Mr Cornes further submits that the procedure followed by Newmont was seriously flawed.

[25] Newmont submits that its decision to dismiss Mr Cornes was substantively justified in that Mr Cornes's conduct in the incident on 5 May 2011 was capable of being regarded as serious misconduct, and that dismissal was an appropriate outcome in all the circumstances at the time.

[26] In considering the matter, I have regard to the relevant circumstances in which the incident took place; including the nature of the employer's business and working conditions. Newmont is a mining company engaged in metallurgical and maintenance operations which involve the use of heavy and dangerous equipment, and operates an extremely safety-sensitive site.

[27] The nature of the incident between Mr Cornes and Mr Gilbert involved a physical altercation. The Newmont Code of Conduct lists 'fighting' as gross misconduct, and as such, a dismissible offence. During the investigation carried out by Newmont, it was determined by Newmont that Mr Cornes had been the aggressor in the incident.

[28] In such circumstances I find that in light of the safety concerns and the Code of Conduct provisions that Newmont had substantive grounds for a dismissal decision on the basis of serious misconduct in an incident which involved fighting.

[29] Mr Cornes claims that the fact that he was interviewed shortly following the incident in which he had been hurt, was evidence of an unfair process. Newmont claim that Mr Cornes was interviewed only after he had received medical treatment and it had been ascertained that he was in a fit state to be interviewed.

[30] Mr Cornes further claims that he suspended without consultation and due process. I observe that this had been a situation of a physical altercation on a safety-sensitive site. In *Graham v Airways Corporation of New Zealand*² the Employment Court cited "*imminent danger to the employee or others and an inability to perform safety-sensitive work*" as two examples of circumstances in which the employer might be justified in proceeding to suspend without prior consultation. Both Mr Cornes and Mr Gilbert were suspended in accordance with the Code of Conduct provisions.

² [2005] ERNZ 587 at para [104]

[31] Mr Cornes in respect of the procedural defects claims that he was unfairly treated in that his representative Mr Jock Fleming, a union delegate, also represented Mr Gilbert, and that he should have been accorded a free choice of representation.

[32] I find that it was open to Mr Cornes to have protested Mr Fleming's representation and to have requested alternative representation in the event that he felt Mr Fleming's representation was not appropriate. Further in the untested affidavit evidence it is submitted that this part of Mr Cornes's claim is incorrect, in that Mr Fleming did not represent Mr Gilbert.

[33] On the untested affidavit evidence it appears that Newmont adhered to the basic requirements of a fair procedure as set out in s 103A (3) of the Act: specifically I find that Newmont sufficiently investigated the allegations against Mr Cornes, including interviewing witnesses and carrying out an enactment; raised the concerns with Mr Cornes providing him with an opportunity to provide an explanation; and took into account Mr Cornes's explanation prior to reaching the decision to dismiss him.

[34] On the basis of the affidavit evidence as presented to the Authority, I find that Mr Cornes has an arguable case that he will be reinstated if he establishes his unjustifiable dismissal and unjustifiable disadvantage claims, but I am unable to conclude that Mr Cornes has a strongly arguable case. This is particularly the case if it is established that there was any unfairness or unreasonableness but these were of a procedural nature only.

Trust and Confidence

[35] It is relevant to the issue of practicability of reinstatement which Mr Cornes has submitted by way of his affidavit that Newmont have, in relation to his unjustifiable disadvantage claim, failed to adhere to the Collective Agreement's Health and Safety objectives, to the Newmont Code of Conduct, and that it has failed in its obligations under the Act to take all practicable steps to ensure the safety of employees at work, and in particular that of Mr Cornes himself.

[36] The untested affidavit evidence of Newmont employees point to Newmont having lost all trust and confidence in Mr Cornes, both as an employee and as a colleague. In such a safety-sensitive environment full trust and confidence between employer and employee, and between fellow employees, is essential. Newmont submit that the reinstatement of Mr Cornes, whether on an interim or a permanent basis, would have a negative effect upon the workplace.

[37] The Act requires as a principle that the parties to an employment relationship demonstrate good faith behaviour and have mutual trust and confidence in order to build and maintain a productive employment relationship.

[38] Although Mr Cornes submits that he believes Newmont will in future adhere to the company procedural and the legislative requirements, I am not convinced that Mr Cornes has the requisite trust and confidence, given his claim that Newmont did not show proper adherence in the past, such as to support his belief that Newmont will show future adherence to the requirements. I further find that Newmont lacks the requisite trust and confidence in Mr Cornes essential to an employment relationship. In conclusion, I find that trust and confidence on the part of the parties is not established such as to support a claim seeking reinstatement.

Adequacy of damages

[39] Mr Cornes claims that, despite his affidavit evidence that he is experiencing severe financial difficulties, he has the financial support of his family which, together with the income from his new employment, is assisting him to meet his financial commitments. Mr Cornes also claims that he would be in a situation to repay any salary he received up to a substantial hearing.

[40] Newmont submits that it has concern that Mr Cornes may not be able to satisfy his undertaking as to damages, in support pointing to Mr Cornes submission that he is, even with some income and family support, facing irreparable financial damage

[41] Newmont submits that Mr Cornes would be adequately compensated by an award of damages for any loss he may have suffered should he succeed at the substantive hearing. Newmont submits that it is in a position to pay such damages if subsequently awarded.

[42] I find that given these circumstances, and notwithstanding Mr Cornes's family support, the remedies of reimbursement of lost wages and compensation under s123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings will adequately recompense Mr Cornes should he be found to have been unjustifiably dismissed or unjustifiably disadvantaged at the substantive hearing.

Balance of convenience

[43] 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. Newmont submit that it is not reasonable and practicable to do so in light of the trust and confidence issues.

[44] Mr Cornes states in his supplementary affidavit that he is no longer seeking physical interim reinstatement, but rather partial reinstatement to the payroll. Without this urgent interim relief, and despite the support of his family and the partial income from his new employment, Mr Cornes claims that he and his family face genuine irreparable damage by way of financial hardship and stress and humiliation. Mr Cornes submits that not only is he experiencing severe financial problems but that his reputation is suffering in what is a tight-knit community.

[45] Newmont submits that having gained employment, albeit with a reduced salary level and terms and conditions to those he enjoyed whilst employed by Newmont, Mr Cornes will not be facing continued humiliation, or loss of dignity and reputation.

[46] Mr Cornes states that the reason for seeking reinstatement to the payroll pending determination of the substantive matter is made on the basis that he does not “*wish to give up my new job in case I do not win permanent reinstatement when the Authority hears my Personal Grievance*”.

[47] An employee seeking interim reinstatement is usually expected to be in a position to perform his or her duties under the contract of employment. Judge Couch in *Pacific Blue Employment & Crewing Ltd v B*³ remarked of this expectation:⁴ “*To my mind, successful reimposition of the employment relationship requires the parties to be able to fully discharge their responsibilities in that relationship*”. This requirement may be set aside by one party in the situation in which the reinstatement is only interim, however Newmont submit that it regards Mr Cornes interim reinstatement to the payroll as being in the nature of a substantial loan, and oppose it

[48] In considering this issue, I find it significant that Mr Cornes did not file his urgent claim application for interim reinstatement until some five weeks after he was dismissed. I also note that Mr Cornes was offered an early substantive hearing, which was declined.

³ [2010] NZEMPC 112

⁴ Ibid at para [22]

Further, Mr Cornes in light of his new employment is seeking partial reinstatement to the payroll only.

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

Overall Justice

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

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

[52] I observe that whilst I have found an arguable case in support of permanent reinstatement, it is not a strongly arguable case. Moreover I have found the balance of convenience to lie in favour of Newmont, and that monetary remedies are adequate.

Determination

[53] For the above reasons the Authority exercises its discretion in relation to interim reinstatement and/or reinstatement to the payroll by not making the orders sought.

[54] The Authority will shortly consult Ms Christensen and Ms Martin 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

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

Eleanor Robinson
Member of the Employment Relations Authority