

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 152/10
5317590

BETWEEN JASON GILBERT
Applicant

AND HASTIE SERVICES LIMITED
(TRADING AS COWLEY
REFRIGERATION)
Respondent

Member of Authority: G J Wood

Representatives: Gerard Dewar for the Applicant
Peter Macdonald for the Respondent

Investigation Meeting: 24 September 2010 at Wellington

Submissions Received: 24 September 2010

Determination: 28 September 2010

**DETERMINATION OF THE AUTHORITY
ON INTERIM REINSTATEMENT**

Employment Relationship Problem

[1] The applicant, Mr Jason Gilbert, claims that he was unjustifiably dismissed by the respondent (Cowleys) after being charged by the Police with serious drug offences. The issue for determination here is whether or not Mr Gilbert should be reinstated in the interim, before the Authority investigates and determines his substantive claim for reinstatement.

[2] The legal tests to be applied involve an assessment of whether Mr Gilbert has an arguable case for reinstatement, the adequacy of damages, the balance of convenience, and the overall justice of the case.

The Facts

[3] Mr Gilbert has been employed as a Refrigeration Technician at Cowleys for over 20 years, most latterly as a refrigeration installation foreman. There have been no significant employment problems during the course of that 20 years of employment.

[4] On 12 August 2010 Mr Gilbert was questioned by the Police over various matters, including his alleged involvement in dealing drugs such as fantasy and methamphetamine, using a company vehicle. The Police allege that illicit drugs and drug paraphernalia such as ecstasy, fantasy and methamphetamine were found in his work vehicle, but those substances have not yet been tested by the Police. He was later charged with a number of drug offences.

[5] Mr Gilbert accepts that a bag in the work van, which he says belongs to his girlfriend, did contain drug paraphernalia.

[6] The next day Mr Gilbert spoke to his brother, also an employee of Cowleys, who told him that the Police had searched his locker and that he, Mr Jason Gilbert, had been dismissed. Cowleys deny that Mr Gilbert was dismissed on that date, but do accept that he was suspended without pay.

[7] On 16 August Mr Steven Edwards, the General Manager of Cowleys, wrote to Mr Gilbert inviting him to a disciplinary meeting over allegations regarding his conduct, and specifically over recent drug related charges laid by the Police.

[8] By that time a detective of the Covert Operations Group had written to Cowleys, stating the following:

Mr Gilbert has been charged with the following offences

1. *Possession of GBL (Fantasy) for supply*
2. *Offers to supply Class A [Meth].*
3. *Offers to supply Class B [GBL].*
4. *Possession of Class B [Ecstasy].*
5. *Possession of Class C [Cannabis].*
6. *Possession of a pipe [Cannabis]*
7. *Possession of a pipe [Meth].*

During a search of your company wagon ... illicit drugs and paraphernalia were found. Although they have yet to be analysed we allege that the drugs are ecstasy, GBL (GBH) and the remnants of methamphetamine.

From the initial analysis of Mr Gilbert's cellphone records (your company's cellphone), the Police allege that he has been dealing in methamphetamine and ecstasy.

During his interview with me yesterday Mr Gilbert admitted a drug habit of three years and admitted supplying methamphetamine since the beginning of this year. He admits to travelling to supply these drugs and we allege that he was using Cowley vehicles to do so.

[9] Cowleys raised these issues with Mr Gilbert in a letter dated 16 August, noting that the allegations, if substantiated, would constitute breaches of his employment agreement and Cowley's drug and alcohol policy, its occupational health and safety policy and its code of business conduct. Mr Gilbert was left under no illusion that should Cowleys uphold the claims against him he could be dismissed.

[10] A disciplinary meeting was held on 20 August. On behalf of Mr Gilbert it was noted that he would be denying any criminal charges and that he would not be providing a statement to Cowleys, as he was not obliged to discuss the matters with it. He did, however, deny all of the claims, except that drug paraphernalia were found in his company van, which he maintained was the property of his girlfriend, and that he was not aware of the bag's contents in any event.

[11] Cowleys then adjourned the meeting so it could take legal advice.

[12] A further meeting was held on 24 August, with Cowleys claiming it had decided to reinstate Mr Gilbert's pay with effect from 23 August. Mr Gilbert denies that ever actually occurred.

[13] Following the second meeting, where the issues were discussed further, Mr Dewar wrote on behalf of Mr Gilbert in support of him keeping his job. He noted that Mr Gilbert believed that he had already been dismissed and also noted his 20 years of faithful service. Mr Dewar sought to confirm that any statements made by Mr Gilbert to his employer would be confidential, so as not to prejudice his defence to the criminal charges. Mr Dewar repeated Mr Gilbert's denial of the charges and noted that he had volunteered to submit to an immediate drug test and random tests thereafter. It was also noted that Mr Gilbert had never faced criminal charges previously.

[14] In response, taking into account information received from the Police and also from Mr Gilbert, Cowleys felt that dismissal was necessary because of the seriousness of the charges, which involved the alleged use of a company vehicle and company cellphone in drug dealing. It did not accept that drug testing would prove anything two weeks after the issues in question. In particular, it could not accept that the continued employment of someone it believed to be an acknowledged drug user would be consistent with its health and safety obligations, and that Police involvement in Cowley's business, due to Mr Gilbert, had potentially brought the company into disrepute. Cowleys therefore dismissed Mr Gilbert summarily with effect from 27 August. It again denied that there had been any dismissal beforehand.

[15] Mr Gilbert promptly filed for interim reinstatement and noted that there had been other instances, without giving any details, of employee's with drug problems who had been given by counselling by Cowleys and not dismissed.

[16] The investigation meeting into the substantive issues will be conducted on 9 November 2010.

[17] The parties have attended mediation but have been unable to resolve the matter and it therefore falls to the Authority to make a determination.

Arguable case

[18] I accept that Mr Gilbert has an arguable case for unjustifiable dismissal. He has been suspended without pay, which may well constitute an unjustifiable disadvantage in itself. The evidence may also show that he was dismissed as early as he claims, and therefore before he had any opportunity to explain himself, which would clearly constitute an unjustifiable dismissal. Similarly, it has been the case since the 1980s at least that an employer can not simply rely on investigations by the Police as the sole ground for dismissal without conducting its own investigations - see for example *Hati v. Auckland Farmers Freezing Cooperative Ltd* [1988] NZILR 667. The need in law for an employer's own investigations has been reinforced again in *Moore v. Commissioner of Police* [2001] ERNZ 335.

[19] Cowley's defence would therefore need to centre on the meetings the parties had and evidence from Mr Edwards that it was a matter of comparing the detective's advice to Cowleys with Mr Gilbert's statements to it.

[20] Mr Gilbert also refers to disparity of treatment. However, the only evidence of this is his claim of un-named employees with drug issues who had previously been given counselling rather than being dismissed.

[21] Mr Gilbert also has an arguable case for reinstatement in that he may be vindicated of claims of drug use and supply, in which case there would be no bar to his reinstatement. This is particularly so given the high standard of proof required with such serious claims as brought here of drug use and supply.

[22] On the other hand, if the Detective's statement is to be believed, Mr Gilbert has admitted to drug taking and supply, which would mean that Cowleys could not be expected to reinstate him for safety reasons, his role being a particularly safety sensitive one, even if there was no involvement of Cowleys' own vehicles and cell phones.

Adequacy of Damages

[23] Cowleys is not prepared to have Mr Gilbert back, even on garden leave, partly because this could affect its reputation. Certainly if one of its vehicles and/or a cell phone are found to have been used by Mr Gilbert in the commission of drug offences then that may affect its reputation, but that assessment is a one for the criminal trial, not the Authority. Furthermore, if Mr Gilbert were to be reinstated he would be working for his money and there would be no direct financial loss to Cowleys. Although I accept that random drug testing would lessen the safety concerns for Cowleys, that would come at some cost to it.

[24] From Mr Gilbert's perspective there is benefit to him in returning to the workforce and earning an income. While he might be placed on garden leave, that would expose him to significant damages should he be unsuccessful in his substantive claim for unjustified dismissal. Mr Gilbert did not propose garden leave in any event.

[25] The period of delay before the Authority hears and determines the matter will only be in the order of 8 or 9 weeks. I therefore determine that the factors in respect of the adequacy of damages are fairly neutral.

Balance of Convenience

[26] The balance of convenience is said to favour Mr Gilbert as he is an employee facing a criminal investigation, he has significant financial commitments and a significant customer states that he can continue to work with him. Mr Gilbert is entitled to the presumption of innocence in respect of his criminal trial and that must be respected.

[27] On the other hand, as in *Hati* and *Moore*, the criminal trial does not involve the same tests as the Authority's investigation. Cowleys are concerned particularly about the health and safety risks of having what it says is an admitted drug user and supplier working for it, as well as the reputational risks associated with the publication of such information.

[28] Should Mr Gilbert be successful in his claim for reinstatement, he will be reinstated around 8 or 9 weeks from now. For the period in between he can be compensated by lost remuneration and other compensatory remedies, and not working at Cowleys will give him more time to concentrate on his defence against very serious criminal charges. Similarly, Cowleys would be able to focus more clearly on its business interests. I conclude that the balance of convenience favours Cowleys' position until the substantive determination of the Authority in November.

Overall Justice

[29] It is impossible to judge at this point whether or not, even if Mr Gilbert's dismissal is found to be unjustified, he will nevertheless be reinstated. This may well turn effectively on whether or not Mr Gilbert admitted to the detective, which he denies, that he had been a drug user for three years and that he has supplied drugs since the beginning of this year. If the detective's evidence is given to the effect of the email quoted above, and accepted by the Authority, then there is no prospect of reinstatement. Again without having any views on the outcome of the case, it is a significant factor in the overall justice of the case in terms of the discretion to reinstate in the interim or not, that this statement comes not from some person with an apparent grudge but a senior member of the Police.

[30] Furthermore, the issue of drug paraphernalia being found in Mr Gilbert's work vehicle, even if in a bag belonging to his girlfriend, together with any proven

misconduct, would also need to be adequately explained before reinstatement could be ordered.

[31] These factors support the finding under the balance of convenience that interim reinstatement ought not to be awarded. I therefore dismiss Mr Gilbert's claim for interim reinstatement.

G J Wood
Member of the Employment Relations Authority