

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 94
3028840

BETWEEN KEN LAMBERT
 Applicant

A N D NEW ZEALAND POST
 LIMITED
 Respondent

Member of Authority: Helen Doyle

Representatives: Phil Yarrall, Advocate for Applicant
 Hamish Kynaston, Counsel for Respondent

Investigation Meeting: 19 June 2018 in Christchurch

Submissions Received: 19 June 2018 from both parties

Date of Determination: 21 June 2018

**DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A The application for interim reinstatement is declined.**
- B Costs are reserved until after determination of the substantive application.**

Employment relationship problem

[1] Ken Lambert was summarily dismissed from his role with New Zealand Post Limited (NZ Post) on 18 April 2018.

[2] The dismissal followed an incident on 6 March 2017 when two unit load devices (ULD's) containing empty mail trays fell off a fork hoist (forklift) Mr Lambert was operating at the Christchurch Mail Centre.

[3] Allegations were put to Mr Lambert following the incident as follows:

- (a) Failure to take reasonable care while operating a fork hoist.
- (b) Failure to observe safety rules (failure to report an incident, and denying an incident had occurred when questioned by leaders).
- (c) Refusing to undergo urine drug collection in line with the New Zealand Post *Alcohol and other Drugs in the workplace Policy and Programme*.

[4] After a disciplinary process NZ Post found all three allegations substantiated. There was a finding of minor misconduct for the first allegation of failing to take reasonable care while operating a fork hoist. There were findings of serious misconduct in respect of the other two allegations.

[5] An earlier disciplinary proceeding which resulted in Mr Lambert receiving a first written warning about a fork hoist incident and a failure to observe safety rules was also taken into account in reaching the disciplinary outcome of dismissal. On that occasion Mr Lambert also refused a drug and alcohol test but that was not pursued by NZ Post.

[6] Mr Lambert says that his dismissal was unjustified, and he has applied for interim reinstatement under s127 of the Employment Relations Act 2000 ("the Act").

He has provided an undertaking as to damages and an affidavit in support of his application.

[7] NZ Post opposes reinstatement and has provided five affidavits in opposition. It says that Mr Lambert's dismissal was justified because it cannot trust him to work safely.

[8] The parties attended mediation but the matter was unable to be resolved. The Authority advised the parties that it would hold dates in September for a substantive investigation.

[9] The Authority dealt with this matter on the basis of the untested affidavit evidence and submissions. The Authority cannot, and is not required to resolve any disputes that may be apparent from the untested affidavit evidence in determining the interim application.

The issues

[10] An injunction involves the exercise of a discretion. The answer to it is not in the application of rigid formula but there are some broader inquiries that the Authority should make. These are as follows:

- (a) Does Mr Lambert have an arguable case of unjustified dismissal and, if found after a substantive investigation to have been unjustifiably dismissed, an arguable case for permanent reinstatement – s 125 of the Act;
- (b) Where does the balance of convenience lie? This requires looking at the relevant detriment or injury that Mr Lambert and NZ Post will incur as a result of the interim injunction being granted or not;
- (c) Is there an adequate alternative remedy available?

- (d) Finally the Authority is required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

Arguable case for unjustified dismissal/permanent reinstatement

[11] Mr Kynaston concedes that Mr Lambert's case is arguable but says that it is a weak case particularly for reinstatement.

Unjustified dismissal

[12] Mr Yarrall submits in support of the arguable case for unjustified dismissal:

- (a) A lack of awareness by Mr Lambert of the full drug and alcohol policy and programme until asked to undertake the test.
- (b) Mr Lambert could not be required to undertake a drug and alcohol test under the provisions of the collective agreement that covered his employment – 2017 – 2020 New Zealand Post Limited and Postal Workers Union of Aotearoa (PWUA collective agreement). Distinctions were drawn between the PWUA collective agreement which is silent on drug and alcohol testing and the collective agreement between New Zealand Post and E tu that has clauses dealing with drug and alcohol testing.
- (c) That there was no reasonable cause for testing Mr Lambert under the policy and he was in a less favourable position with the definition of reasonable cause in the policy than an employee covered by the E tu collective agreement with NZ Post which had a different definition.
- (d) It was not clear to Mr Lambert what the outcome of a failed test would be.

- (e) There was disparity of treatment with the disciplinary outcome of dismissal.
- (f) Information about details of all forklift incidents over the last 12 months has not been provided when requested.
- (g) A video of the fork hoist incident was only able to be viewed at NZ Post's premises rather than at a place and time which suited Mr Lambert and his representative.
- (h) Mr Lambert provided a fit for work certificate from his general practitioner that should have satisfied NZ Post's concerns and he offered to do an oral swab test and did not simply refuse a drug test.
- (i) The incident was caused by faulty equipment.
- (j) Mr Lambert denies that he denied an incident had taken place and his response was flippant and along the lines of another employee after an incident against who no action was taken.
- (k) Dismissal for failing to undergo a drug test is not available under the collective agreement.

[13] An arguable case has been described by the full Court of the Employment Court in *X v Y Limited*¹ as below

What the Court is concerned with, so far as the evidence goes, is to see whether, assuming that the plaintiff can prove all the facts which he alleges, he then has an arguable case. That is to say, a case with some serious or arguable, but not necessarily certain prospects of success...

[14] The threshold for an arguable case for unjustified dismissal is relatively low. I find that an arguable case has been presented with respect to the justification of NZ

¹ *X v Y Limited* [1992] 1 ERNZ 863 at 872

Post's actions in dismissing Mr Lambert. The strength of the case is a consideration but can be looked at in an assessment of the overall justice of the case.

Permanent reinstatement

[15] The Authority should also have regard to an arguable case for permanent reinstatement. That falls to be considered under s 125 of the Act that provides the Authority may provide for reinstatement if it is practicable and reasonable to do so.

[16] I cannot at this stage say that Mr Lambert does not have an arguable case for permanent reinstatement. There is a concession there is an arguable case but that it is weak. The strength of an arguable case for permanent reinstatement is a consideration to return to in assessing overall justice of the case.

Balance of convenience

[17] The information in Mr Lambert's affidavit about detriment or injury he would incur if not reinstated in the interim was limited. Mr Yarrell expanded on this in submissions.

[18] The Authority is a practical body. I accept that in weighing the relevant detriment or injury that Mr Lambert will incur if he is not reinstated in the interim I can infer some financial loss. I do that on the undisputed basis that Mr Lambert is no longer in receipt of the income and benefits that he would have received from his NZ Post role he has held since November 2000. The affidavit evidence did refer to stress and humiliation and difficulty sleeping as well as a view that Mr Lambert had been discriminated against. Mr Yarrell's submission went a little further and set out Mr Lambert's age and difficulty with finding employment but there was no affidavit evidence about that.

[19] Mr Kynaston submits compensation is an adequate remedy in light of the limited evidence. Against that payment of income from NZ Post has ceased and any

resulting financial difficulties Mr Lambert is suffering can be weighed as a factor in his favour under this head of balancing convenience.

[20] I do have to weigh and balance that NZ Post says it would suffer detriment if Mr Lambert was reinstated because of concerns about safety. The place where Mr Lambert worked is a safety sensitive area. I weigh the affidavit evidence of Ross Newton who is the processing leader at NZ Post Christchurch Mail Centre. He is the senior manager on site and holds the overall responsibility for the site and employees. He refers in his affidavit to a stronger focus in June 2017 on forklift incidents and that teams were briefed again on drug and alcohol testing and incident reporting in July 2017 and November 2017. He says that it became apparent that the Christchurch mail Centre was having more potential serious harm incidents than other sites.

[21] Mr Newton says in his affidavit that Mr Lambert if reinstated would not be allowed on a forklift on the site because he could not trust him to operate one safely.

[22] Anthony Burrows who is the team leader of the team Mr Lambert worked in and the decision maker said in his affidavit that Mr Lambert's role was in the interchange which primarily involved forklift work. He said about 90% of Mr Lambert's role involved him operating the forklift.

[23] In his affidavit Mr Newton says that other work such as in Processing still has safety issues and that Mr Lambert would require re-training for eight weeks to be able to do that sort of work.

[24] I also weigh that Mr Lambert had an earlier warning which was still in force dated 12 June 2017 for failure to observe safety rules and that warning was to remain in force for a period of 12 months from 26 May 2017. It was therefore still in force at the time of dismissal. I weigh that Mr Lambert knew to report an incident because he did so on that occasion. There are also house rules requiring the report of incidents including near misses/hazards immediately to the Team/Operations Leader with

paperwork to be completed within 24 hours. Although there is a dispute about whether the circumstances met reasonable cause requirements for testing in the drug and alcohol policy the ULD containers weigh about 89kgs each and there was a potential for harm if one fell and hurt someone who may happen to be in the area.

[25] There are matters that support there is some basis to issues of trust about safety matters from the untested affidavit evidence.

[26] I weigh that the Authority is not able to offer an investigation meeting until early September. This may be a factor in favour of interim relief. I advised earlier dates would be offered if the opportunity to do so arose. Mr Kynaston in his submission said that NZ Post will co-operate with the Authority and Mr Lambert to have the substantive investigation determined urgently. I consider the date for an investigation meeting to be a neutral factor in the balance.

[27] Finally therefore in balancing the convenience the main consideration is between the financial hardships that Mr Lambert will suffer if he is not reinstated on an interim basis and the concern from NZ Post that Mr Lambert cannot be trusted for safety reasons to work in a safety sensitive area operating a forklift. This would necessitate a period of retraining which would incur cost including to resourcing.

[28] In balancing those matters the safety concerns may not be able to be compensated for if there is another incident or unreported incident and I do accept Mr Kynaston's submission that there is limited assurance in Mr Lambert's affidavit about the safety concerns in particular to report incidents. I do weigh that Mr Lambert acknowledges in his affidavit that what he said when asked about the incident in hindsight was not the best response. The affidavit evidence does not go further. The financial hardship however on the other hand to Mr Lambert is capable of being compensated for by way of damages.

[29] On that basis I find that the balance of convenience favours NZ Post.

Overall Justice

[30] I now stand back and consider the overall justice of the case.

[31] There is a concession that there is an arguable case for both unjustified dismissal and permanent reinstatement. I have not undertaken any assessment of the relative strengths and weaknesses of the case and overall justice presents an opportunity to do so. I adopt a cautious approach in doing so as the matter is yet to proceed to a substantive investigation meeting when the matters in dispute will be fully investigated. I only intend to refer to some limited aspects that seem to indicate the case for unjustified dismissal may be stronger than for permanent reinstatement.

[32] There appears on the untested affidavit evidence a strong argument that the incident on 6 March 2018 was not reported as it was required to be. There is a strong argument that Mr Lambert and another employee instead “righted the ULD’s” or tidied up after the incident. Even if Mr Lambert establishes he did not deny the incident when asked about it on two occasions that same day by his leaders or that they did or should have known about it there is a strong argument he was not forthcoming about the incident in his responses.

[33] Although the drug and alcohol policy which has been in place since mid-2011 is not referred to in the PWUA collective agreement neither are other policies that apply to employees at NZ Post. The PWUA collective agreement under conduct and performance expectations provides that employee must accept direction from the company and act in accordance with company policies and procedure. In terms of the broad argument as to the lawfulness of drug testing in principle there is a reasonably strong argument that appropriate testing in terms of a drug and alcohol policy can be lawful in safety sensitive workplaces.

[34] The disparity arguments are yet to be fully developed and tested. It is arguable though that all circumstances have to be considered and although there is no

requirement of proximity when assessing disparity between the comparator conduct and the dismissal all circumstances need to be considered and timing may be one of these – *Nel v ASB Bank Limited*.² It is arguable from the untested affidavit evidence that there was an expectation from the leadership team of a more consistent application of post-incident drug/alcohol testing in the year or so before Mr Lambert’s dismissal.

[35] The arguable case for permanent reinstatement is not so strong so as to support Mr Lambert is reinstated in the interim.

[36] I have also found that the balance of convenience favours NZ Post.

[37] I am satisfied that the overall justice in this case requires that the application for interim reinstatement be declined.

Further steps

[38] An Authority Officer will contact the parties and arrange a telephone conference to make arrangements for a substantive investigation meeting.

Costs

[39] I reserve the issue of costs and these can be dealt with following determination of the substantive matter.

Helen Doyle
Member of the Employment Relations Authority

² *Nel v ASB Bank* [2017] NZEmpC 97