

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 350
5466956**

BETWEEN

TERE LAWSON
Applicant

AND

NEW ZEALAND TRANSPORT
AGENCY
Respondent

Member of Authority: Eleanor Robinson

Representatives: Paul Barrowclough, Counsel for Applicant
Rachel Burt, Counsel for Respondent

Investigation Meeting: 21 August 2014 at Auckland

Determination: 28 August 2014

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

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

[2] Mr Lawson was dismissed from his job as a Principal Transport Officer by the Respondent, the New Zealand Transport Agency (NZTA), on 15 May 2014. The summary dismissal was on the basis of serious misconduct.

[3] Mr Lawson claims that he was unjustifiably dismissed and applies to the Authority for interim reinstatement pending determination of the substantive matter. In addition Mr Lawson claims substantive relief including permanent reinstatement, lost wages, loss of benefit pursuant to s 123(2)(ii) of the Act and compensation for loss of dignity, humiliation, and stress caused by his unjustifiable dismissal.

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

[5] As required by s 127 of the Act, an undertaking has been given by Mr Lawson 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 21 August 2014.

The Law

[7] 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.

[8] 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. Reinstatement is no longer the primary remedy under the Act. Under s 125 (2) of the Act as amended, reinstatement is to be provided by the Authority if it is reasonable and practicable to do so.

[9] Mr Lawson’s reinstatement remains a remedy available to the Authority. The principles relevant to interim reinstatement applications as determined under the old formulation remain relevant¹. In the Employment Court judgment, *McKean v Ports of Auckland Limited*², the Court clarified the relevant principles at para [4]:

In determining an application for interim reinstatement the court must have regard to:

- *Whether the plaintiff has an arguable case that he was dismissed unjustifiably as defined by s 103A of the Act;*
- *Whether the plaintiff has an arguable case for interim reinstatement in employment under s125 of the Act if he is found to have been dismissed unjustifiably;*
- *Where the balance of convenience lies between the parties in the period until the Court’s judgment is given on those issues; and*
- *The overall justice of the case.*

[10] The evidence before the Authority for the purpose of determining this interim reinstatement application has been presented as is usual in such applications in affidavit form by witnesses on behalf of both Mr Lawson and NZTA.

¹ *Cliff v Air New Zealand* [2005] ERNZ 1

² [2011] NZEmpC 128

[11] As the affidavit evidence presented must necessarily remain untested until the substantive investigation of the unjustified dismissal personal grievance, 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

[12] NZTA is a Crown entity established to contribute to an affordable, integrated, safe, responsive and sustainable land transport system for New Zealand.

[13] Mr Lawson, a former sworn police officer, commenced employment with NZTA in 2007, and was initially employed as a Senior Taxi Enforcement Officer until it was disestablished in 2009. Thereafter Mr Lawson was employed in the position of Principal Transport Officer (PTO).

[14] As the result of a restructure in 2011, Mr Lawson was appointed as Manager Transport Officer (MTO). In this role he was responsible for managing compliance with the legislative requirements of the Land Transport Act 1998 of approved Taxi Organisations and taxi operators which involved ensuring the taxi organisations and operators worked within the rules set out in the Land Transport Act 1998 and operational policy.

[15] In the position of MTO Mr Lawson had responsibility for a team of four Transport Officers and was responsible for co-ordinating the delivery of regulatory services in the region, specifically in relation to passenger services including taxi services.

[16] On 24 March 2013 a disaffected previous taxi driver, Mr Hendry, complained to Mr Michael Collie, a Transport Officer in Mr Lawson's team about unlicensed passenger services within Auckland Maxi Taxi Company and Alert Group, owned by Mr Robert Van Heiningen.

[17] In his untested affidavit evidence Mr Lawson stated that upon Mr Collie informing him of the complaint, he had advised Mr Collie that NZTA should not become involved in what appeared to be an historic civil matter and that he should advise Mr Hendry that he should instead seek legal advice.

[18] He stated that he had instructed Mr Collie to refer the vehicle usage as a taxi issue to Mr David Mabey, Manager Transport Officers. Mr Collie had subsequently advised him that Mr Hendry had not been happy with his decision, and that the matter had become a Disputes Tribunal matter.

[19] Mr Hendry sought the support of NZTA Transport Officers at his subsequent Disputes Tribunal hearing against Alert Group; however in his untested affidavit evidence Mr Lawson confirmed that he had advised the Transport Officers that it was a civil matter and they did not have to attend unless they had been summoned to do so.

[20] Mr Lawson himself had appeared at the Disputes Tribunal hearing as a witness in support of Mr van Heiningen, stating in his untested affidavit evidence that he had been contacted by Mr van Heiningen and asked to attend the Disputes Tribunal hearing. On advising Mr van Heiningen that he would not attend unless summoned to do so, he had received a summons which had been personally served on him at NZTA's Auckland offices by Mr van Heiningen. He stated that the summons document had his name on it and summoned him to attend at the Dispute Tribunal hearing on 3 July 2013.

[21] On 26 February 2014 Mr Hendry submitted a further formal complaint to Ms Celia Patrick, NZTA Group Manager Access and Use, alleging that his first complaint had not been properly investigated and that Mr Lawson and possible other NZTA staff had acted corruptly and were engaged in an inappropriate relationship with Mr van Heiningen and the Alert Taxi Group.

[22] NZTA appointed Mr Andrew Thompson, Managing Counsel (Regulatory and Commercial) to follow up the complaint with Mr Hendry, and Mr John Henderson, Chief Risk Assurance, to conduct a process review.

[23] On 6 March 2014 Mr Rick Barber, Regional Manager Northern, said in untested affidavit evidence that he had been contacted by Mr Henderson by email and asked him to retrieve all documents and correspondence related to the issue and advised that he (Mr Henderson) wished to talk to Mr Lawson's MTO team, specifically Mr Lawson, Mr Mabey, and Mr Collie, and requested that he inform them of this.

Mr Henderson's review

[24] Mr Henderson had met with Mr Mabey, Mr Collie and Mr Lawson on 11 March 2014. In his untested affidavit evidence Mr Henderson stated that he had followed a basic question format with the three employees, including discussion about what had happened in regard to Mr Hendry's complaint.

[25] Mr Collie had informed him that:

- no file had been created in relation to Mr Hendry's complaint and Mr Hendry had not been advised of the outcome;

- he had been asked to, but did not, attend the Disputes Tribunal hearing as Mr Lawson had advised him it was a civil matter;
- he had been informed by Mr Hendry during a telephone call in early 2014 that Mr Lawson had attended the Disputes Tribunal hearing in July 2013 which was the same hearing he had declined to attend on Mr Lawson's instruction; and
- Mr Hendry had made a number of allegations about Mr Lawson's appearance at the Disputes Tribunal being detrimental to his case.

[26] Mr Henderson stated in his untested affidavit evidence that he had interviewed Mr Lawson and asked him questions regarding Mr Hendry's complaint. Mr Lawson had initially said that he had been unable to recall anything about Mr Hendry, however upon further questioning, he had admitted that he did recall telling Mr Collie that it was a civil matter and had instructed him not to take any action but to ask Mr Mabey of the status of the vehicle involved.

[27] In relation to the Disputes Tribunal hearing, Mr Lawson stated that he had attended it, and that he had to do so as he had been summoned as a witness for Alert Taxis. Mr Henderson stated he had asked for a copy of the summons, however Mr Lawson said he did not have it, and further that he had made no records of the summons or the tribunal attendance. He had not told anyone at NZTA that he was attending the Disputes Tribunal hearing, but clarified that he had received a telephone call from Mr van Heiningen just prior to the summons arriving to say he had been summoned.

[28] Mr Henderson had noted his perceptions of Mr Lawson following the meeting which were that Mr Lawson was being evasive and unforthcoming. Rather than being co-operative with the review, he did not want to answer the questions raised.

[29] He stated that Mr Lawson had lead him to believe that he had been served with an official summons, but this was a fabrication as the Disputes Tribunal register had confirmed that no official summons had been issued to Mr Lawson. He also had considered it strange that Mr Lawson had kept no copy of the summons and appeared to be evasive about answering questions concerning it.

[30] On 18 March 2014 Mr Hendry telephoned Mr Lawson and challenged him in relation to his actions in attending the Disputes Tribunal hearing, this call being recorded in accordance with NZTA's standard practice. In that call Mr Lawson was recorded as stating a number of times that he had been 'legally summoned'.

[31] On 21 March 2014 Mr Hendry had submitted an Official Information Act 1982 (OIA) request to NZTA for information in connection with his previous complaint and information about Mr Lawson's appearance at the Disputes Tribunal hearing. In particular Mr Hendry requested a copy of Mr Lawson's summons.

[32] On 24 March 2014 Mr Collie had arrived at work and received Mr Hendry's OIA request which he had forwarded it to Mr Barber and Mr Henderson to be actioned. At Mr Barber's request he had forwarded a copy to Mr Lawson that same morning, receiving a response from Mr Lawson (who was at that time on sick leave) asking him to come to his home with his work laptop and diary and to bring a printed copy of the OIA request from Mr Hendry.

[33] Mr Henderson stated in his untested affidavit that on 21 March 2014 he had sent further questions by email to Mr Lawson by way of follow-up on the previous interview.

[34] Mr Lawson stated in his untested affidavit evidence that as he was at home sick, he had been unable to respond in writing as he was without computer access.

[35] On 24 March 2014 Mr Lawson stated that he had asked Mr Collie to visit him at home to discuss urgent work allocation matters. During that discussion they had discussed a complaint regarding an unapproved taxi organisation operating from Whangarei airport which had been received from Mr van Heiningen. In order to obtain further information on the complaint, Mr Lawson stated that he had telephoned Mr van Heiningen, and had ensured that Mr Collie could hear the conversation.

[36] At the conclusion of that call, Mr Lawson stated he had made a request to Mr van Heiningen to provide him with a copy of the summons he had served on him; however Mr van Heiningen had said that he did not have one. He said that he had then advised Mr van Heiningen that he may need to be spoken to about the summons, and if that occurred, he was to tell the truth.

[37] Mr Henderson stated in his untested affidavit that he had a telephone conversation with Mr Collie on 25 March 2014 during the course of which Mr Collie had told him about the meeting he had with Mr Lawson the previous day. Mr Collie had also discussed the telephone conversation he had overheard between Mr Lawson and Mr van Heiningen.

[38] Mr Henderson stated that Mr Collie had told him that Mr Lawson had told Mr van Heiningen what to say if he was questioned about a summons in relation to Mr Lawson's attendance at the Disputes Tribunal hearing in connection with Mr Hendry, and that he should say, if asked, that he had thrown away his service copy of the summons because it was no

longer needed. This response had been repeated. Mr Collie had noted that Mr Lawson appeared to be very jovial with Mr van Heiningen and they discussed meeting for a coffee in the near future. Mr Collie had been shocked and had made notes of the events after returning to his car.

[39] Mr Henderson said that as Mr Lawson had said he was without computer access and therefore could not respond to his questions in writing, he had telephoned him to discuss the questions he had advised in writing on the afternoon of 25 March 2014.

[40] In his untested affidavit evidence Mr Henderson claimed that during the telephone call on 25 March 2014 he and Mr Lawson had discussed the Disputes Tribunal hearing and the summons. He stated that they had also discussed the OIA request from Mr Hendry which Mr Lawson said he had not seen although he talked in an informed way about one of the items raised in it. Mr Henderson stated that he had subsequently become aware that Mr Collie had provided Mr Lawson with a copy of the OIA that day and which they had gone through together.

[41] Mr Lawson had also told him for the first time that he had told his manager and team that he had been summoned to appear at the Disputes Tribunal hearing and said he had just given his name at the hearing.

[42] Mr Lawson had also described his relationship with Mr van Heiningen as a normal business relationship and said that they would meet once or twice a year. Mr Lawson had informed him that he had not discussed his evidence with Mr van Heiningen

[43] During their conversation Mr Henderson stated that he had heard a start up sound from a computer which had surprised him given his understanding from Mr Lawson that he had no computer access.

[44] Mr Henderson stated in his untested affidavit that he had had concerns about Mr Lawson's explanations. He had noted several departures from the usual process in respect to the handling of Mr Hendry's 2013 complaint against Alert Taxis. He had also been concerned that no official summons had been recorded and that Mr Lawson had not retained a copy of the summons he claimed to have received.

[45] Taking into consideration Mr Collie's information, he had decided that further investigation was required and that an employment process should be undertaken enquiring further into Mr Lawson's actions and conduct as it appeared to him there were doubts about Mr Lawson's real motivations in attending the Disputes Tribunal hearing.

[46] On 31 March 2014 he had met with Mr Collie and taken a formal statement from him in regard to what he had seen and heard at Mr Lawson's house on 25 March 2014.

[47] Mr David Pearks, Regional Manager Midlands, was appointed by NZTA to be the decision-maker and to manage the employment investigation.

The investigation process

[48] Mr Lawson stated in his untested affidavit that on 9 April 2014 he had been served a letter from Mr Pearks which alleged that he had deliberately misled the review in relation to his attendance at the Disputes Tribunal appearing as a witness for Alert Taxis. Specifically it had alleged that he had repeatedly stated that he had been summoned, and the review had concluded that no summons was in existence.

[49] It also alleged that he had arranged with Mr Heiningen exactly what he was to say should he be questioned by anyone, and that his appearance at the Disputes Tribunal hearing, together with the allegation that he had arranged with Mr van Heiningen to support his version of events, implied a personal relationship that constituted a conflict of interest.

[50] A further allegation had been that he had allowed himself to be introduced to the Disputes Tribunal hearing without correction as an advisor to the then Minister of Transport and a significant senior manager at NZTA. In doing so, it was alleged that he had placed NZTA in a position of risk of disrepute.

[51] The letter had set out that possible consequences if the allegations were substantiated would be disciplinary action up to and including summary dismissal, and it had been suggested that he take paid leave rather than a suspension taking place. He had been invited to attend an investigation meeting to be held on 14 April 2014.

[52] On 13 April 2014 Mr Lawson stated that he had sent a written OIA request to Mr Pearks for full disclosure of the investigation file, and requested a delay in the scheduled investigation meeting until he had had time to read and review the disclosure pack.

[53] Mr Pearks stated in his untested affidavit evidence that prior to the meeting with Mr Lawson he had prepared the areas of enquiry that he had wanted to ask about at the meeting. He had been particularly interested in (i) whether or not Mr Lawson had a personal relationship with Mr van Heiningen, (ii) why there was no copy of the summons and why the Disputes Tribunal Registrar had no copy of it, (iii) why Mr Lawson had instructed Mr Collie he did not need to attend the Disputes Tribunal hearing since it was a civil matter but had attended himself. He had also been concerned that it appeared from the written information that Mr Lawson had not been open and forthcoming but defensive and vague in his answers.

[54] Mr Lawson stated in his untested affidavit that he had received the disclosure pack and had been concerned that the interviews with him, Mr Collie and Mr Mabey had been recorded in a short and selective notation format. Further that opinion introduced by Mr Henderson under that heading: “*My Thoughts*” were extremely defamatory in nature, and that these opinionated comments permeated the reports and interview notes contained in the disclosure pack. He had been particularly concerned that Mr van Heiningen had not been contacted in order to obtain his version of events.

[55] The meeting with Mr Lawson took place on 2 May 2014. Mr Lawson had been accompanied by Mr Colin Jessop, a work colleague, and Mr Pearks had been assisted by Mr Henderson and Ms Brown.

[56] Mr Pearks stated that he had advised that the meeting was an opportunity for Mr Lawson to respond and present his explanation, and that no decision would be taken at the meeting. During the meeting Mr Lawson had not wanted to set out a general response, but to answer direct questions, and that he had answered: “*I can't recall*” to many of the questions.

[57] In relation to the summons issue, Mr Pearks stated that Mr Lawson for the first time explained that Mr van Heiningen had personally served him with the summons as opposed to any Tribunal official. He said Mr van Heiningen had done so in the NZTA reception area and the summons had been on a blank piece of paper with just a scrawl for a signature. He had taken it at face value as being an official document issued by the Disputes Tribunal.

[58] Mr Lawson had also been asked about the many calls and text messages between him and Mr van Heiningen around the time of the Disputes Tribunal hearing, however he had been unable to recall most of the calls and could only show some of the text messages involved.

[59] Mr Pearks stated that he had had several concerns about Mr Lawson's' explanations, in particular that he was a former police officer, used to keeping careful records, used to receiving: “*hundreds of summons*” and therefore well aware of what an official summons would look like.

[60] Mr Pearks had noted that at this stage in his investigation he had considered on the balance of probabilities that Mr Lawson was not telling the truth about his involvement in the matter. He stated that at the conclusion of the meeting it was agreed that Mr Lawson could provide further written submissions, and agreed that Mr Henderson would interview Mr van Heiningen.

[61] Mr Henderson had interviewed Mr Van Heiningen on 8 May 2014 and Mr Pearks stated that he had received a report from Mr Henderson later that same day. He understood

that Mr van Heiningen had essentially supported what Mr Lawson had said, however there were some critical differences: in particular Mr van Heiningen had said the summons had been served outside the NZTA building, it had been served on Alert Taxis distinctive yellow and red letterhead, and it had been served some days prior to the Dispute tribunal hearing. In addition Mr van Heiningen had emphasised that he and Mr Lawson were not friends without the question having been put to him.

[62] Mr Pearks stated that having considered the interview with Mr van Heiningen, it had not changed his thinking in any way.

[63] A meeting had been held with Mr Lawson on 9 May 2014 at which what Mr van Heiningen had said in his interview had been conveyed to Mr Lawson. Mr Pearks had announced his preliminary decision that Mr Lawson had committed serious misconduct and should be summarily dismissed.

[64] Mr Lawson had been asked if he had any further comments and he had produced an email which set out Mr Collie's concerns that there was no career progression for him. Mr Pearks stated in his untested affidavit that he had presumed Mr Lawson was showing him the email to try and suggest that Mr Collie had a motivation to discredit him and take over his position, however he had regarded this as far-fetched.

[65] The meeting had been adjourned to allow Mr Lawson to consult with his support person. Following the break, and as Mr Lawson had had nothing further to add, Mr Pearks had finalised his decision and Mr Lawson had been summarily terminated for serious misconduct.

An Arguable Case for Unjustifiable Dismissal and for interim reinstatement

[66] As a matter of principle, Mr Lawson 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, such as to support an application for interim reinstatement.

[67] Mr Lawson submits he has an arguable case that he was unjustifiably dismissed and that the untested affidavit evidence surpasses the threshold of a *prima facie* case.

Arguable case for Unjustifiable Dismissal

[68] NZTA dismissed Mr Lawson on the basis of serious misconduct.

[69] The decision to dismiss Mr Lawson on the basis of serious misconduct must be a justifiable decision in accordance with the Test of Justification as set out in s 103A of the Employment Relations Act 2000 (the Act) which states:

S103A Test of Justification

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[70] The duty of good faith as contained in s 4 of the Act is also relevant to this case, in particular s 4(1A)(b) and (c) which state:

(1A) The duty of good faith in subsection (1) –

(b) Requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and

(c) Without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected –

(i) Access to information, relevant to the continuation of the employees' employment, about the decision; and

(ii) An opportunity to comment on the information to their employer before the decision is made.

Arguable case for interim reinstatement

[71] Mr Lawson must not only establish an arguable case for unjustifiable dismissal but must also establish that he would be reinstated if successful in such a claim.

[72] In *X v Y Ltd*³ the Employment Court commented that an “arguable case” is: “... a case, with some serious or arguable, but not necessarily certain, prospect of success”.

³ [1992] 1 ERNZ 863 at 872

[73] Mr Lawson was dismissed on the basis of serious misconduct. It is submitted on his behalf that his alleged conduct does not constitute serious misconduct or indeed misconduct.

[74] In particular it is submitted for Mr Lawson that whilst it is accepted that the Disputes Tribunal did not issue a summons to him, Mr van Heiningen did so, which he confirmed in a statement to NZTA. As such the issue of a summons is an issue of form over substance, and Mr Lawson did not mislead the review.

[75] Despite Mr Lawson's untested evidence that he had been issued with a summons by Mr van Heiningen, and therefore properly summonsed to attend the Dispute Tribunal hearing, NZTA had adopted the position that he had not been served with an official summons and therefore concluded that Mr Lawson had mislead the review.

[76] It is further submitted that there is insufficient evidence to conclude that Mr Lawson had attended at the Disputes Tribunal hearing without a summons based upon the evidence of Mr Collie. In particular it is noted by the Applicant that in the formal statement obtained by Mr Collie on 31 March 2014 he does not repeat his statement made on 25 March 2014, but instead relays his recollection of the conversation between Mr Lawson and Mr van Heiningen about the summons and what Mr Lawson said at that time.

[77] NZTA submits that it had substantive justification for dismissing Mr Lawson citing the untested evidence as presented in the affidavits submitted by the Respondent witnesses. In particular NZTA submits that Mr Lawson:

- a. was unable to provide consistent answers when questioned about the summons and his involvement with the Disputes Tribunal hearing, instead changing his version of events during the review;
- b. was found to be telling outright lies to Mr Henderson during the review and investigation meetings in relation to his access to a computer and knowledge of Mr Henderson's OIA request;
- c. was generally obstructive and unforthcoming during the review and investigation meetings;
- d. seemed to have a very specific recall of events that were to his advantage, but no recollection of events that were not supportive;
- e. taking the summons at face value without checking it properly and not keeping a copy of it were not credible given his senior role with NZTA and

his previous experience as a police officer used to keeping meticulous records and to dealing with correctly issued summons;

- f. his evidence concerning the summons was less credible than that of Mr Collie who had no reason to lie as opposed to Mr Lawson who had a real motivation to lie;
- g. the notations made by Mr Lawson on the OIA form supported Mr Collie's version of events, and
- h. Mr van Heiningen's evidence regarding the contents and service of the summons differed significantly in its details from Mr Lawson's account.

[78] In light of these factors, NZTA submits that a fair and reasonable employer could have found that in all the circumstances, it did not believe Mr Lawson's account of events and preferred to believe Mr Collie's account and Mr Hendry's allegations.

[79] As such it was open to NZTA to find that Mr Lawson's behaviour had completely destroyed the trust and confidence essential to the employment relationship such that dismissal was justifiable.

[80] As regards procedural fairness, it is submitted for Mr Lawson that NZTA's investigation into the allegations was procedurally unfair, in particular:

- i. By the recording of "*My thoughts*" throughout the review and investigation, Mr Henderson displayed a bias against Mr Lawson and a pre-determination of the issues;
- ii. The investigation was incomplete in that:
 - With the exception of Mr Collie, NZTA did not obtain full and accurate statements from the various people interviewed;
 - NZTA relied upon a number of uncorroborated unsigned statements recorded to have been made by Mr Collie to support the conclusion that Mr Lawson was not served with a summons;
 - NZTA has not obtained a copy of the Disputes Tribunal hearing to resolve the issue as to whether or not Mr Lawson's evidence at the hearing brought NZTA into disrepute.

[81] NZTA submits that it followed a fair procedure by carrying out a thorough employment investigation over 5 weeks in respect of the allegations, free from any determination; it ensured Mr Lawson had all the relevant information and had a reasonable opportunity to comment before a decision was made. In particular it is submitted:

- a. NZTA clearly set out the nature of the allegation and concerns to Mr Lawson and provided him with all relevant supporting documentation for his review and comment;
- b. Offered him the opportunity to have a support person or representative attend with him;
- c. Provided with him with numerous opportunities to provide a full explanation;
- d. Delayed the initial investigation meeting at Mr Lawson's request;
- e. Listened to Mr Lawson's explanations;
- f. Investigated thoroughly;
- g. Specifically interviewed Mr van Heiningen at Mr Lawson's request;
- h. Issued a preliminary decision and sought Mr Lawson's comments before finalising a decision; and
- i. The decision-maker Mr Pearks retained an open mind throughout.

[82] Having considered all the circumstances, and based on the untested affidavit evidence, I find that Mr Lawson has an arguable case for unjustifiable dismissal.

[83] Moreover I find that in these circumstances that there is a possibility that contributory behaviour may be found on the part of Mr Lawson, resulting in a more than theoretical risk that he may establish a personal grievance but fail to obtain reinstatement.

[84] To succeed on a claim for interim reinstatement Mr Lawson must also establish not only that he has an arguable case that he was unjustifiably dismissed, but that if it is determined that he was, he would be permanently reinstated to his previous position with NZTA.

[85] This principle was articulated by the Employment Court in *Cliff v Air New Zealand Ltd*⁴:

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.

[86] I note also that reinstatement is no longer the primary remedy, it is to be provided by the Authority if it is reasonable and practicable to do so pursuant to s 125 (2) of the Act as amended.

[87] Reinstatement was held in *NZ Public Association v Ministry of Agriculture & Fisheries*⁵ not to be practicable in a situation in which it was established that a relationship between the employer and employee was one of a 'particular trust and confidence' and that the employer was entitled to make the assessment that the necessary trust and confidence no longer existed.

[88] Given his position of seniority and the outcome of its review and investigation, NZTA found that it no longer had the requisite trust and confidence in Mr Lawson. If it is determined that this was a conclusion a fair and reasonable employer could have reached in all the circumstances, this would argue against permanent reinstatement.

[89] It is also submitted on behalf of NZTA that reinstatement would not be reasonable or practical in circumstances in which Mr Lawson has lost the trust and confidence of the management and his former team members.

[90] It was noted by the Employment Court in *Angus v Ports of Auckland (No 2)* that⁶

The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some cases, others, for example affected health care patients in institutions.

[91] In particular it was submitted in the untested affidavit evidence that Mr Collie has made it clear that he cannot have a viable working relationship with Mr Lawson should he be reinstated, and that his reinstatement would almost certainly result in his resignation.

⁴ CA6A/05, per Judge Colgan at para [12]

⁵ [199] 3 ERNZ 1053

⁶ [2011] NZEmpC 160 at para [68]

[92] In addition it is submitted that, given the events which have occurred, Mr Lawson would need to be closely supervised and restricted in terms of access to information which would have a major impact on the duties he could undertake.

[93] Further NZTA submit that given that Mr Lawson did not acknowledge any wrongdoing during the process or concern over his actions, but was generally unresponsive and obstructive, this contributed to the overall lack of trust and confidence in his ability to perform his job on an on-going basis.

[94] Taking all the submissions into consideration, and on the basis of the untested affidavit evidence as presented to the Authority, I am unable to conclude that Mr Lawson has a strongly arguable case that he would be reinstated permanently.

[95] Accordingly I do not find that Mr Lawson has a strongly arguable case for interim reinstatement.

Balance of convenience

[96] 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.

[97] As set out in the Employment Court case *X v Y Limited*⁷ this principle requires that the Authority balance the relative inconvenience, in terms of detriment or injury, to NZTA who will have to bear the burden of an order reinstating Mr Lawson until the substantive case is heard, against the inconvenience to Mr Lawson who may have a just case, of having to bear the detriment of unjustifiable action until the case is heard.

[98] It is submitted for Mr Lawson that he is in very real financial difficulties and is suffering financial hardship as a result of the termination of his employment with NZTA.

[99] He wishes to return to his work with NZTA and it will inconvenience him if he is not re-instated on an interim basis and then is reinstated permanently.

[100] NZTA submits that Mr Lawson's case for interim reinstatement appears from his untested affidavit evidence to rest almost entirely on the loss of income he suffered following his dismissal.

⁷[1992] 1 ERNZ 863, at pg 10

[101] NZTA submits that financial hardship is not of itself enough to justify interim reinstatement, moreover it points to the fact that Mr Lawson appears to have applied for only one position of employment in the 6 week period following the termination of his employment.

[102] Having considered all the circumstances and the submissions put forward by the parties, balancing the potential prejudice to Mr Lawson of not reinstating him, against the potential prejudice to NZTA of so, and particularly in light of the relatively short time until the substantive investigation meeting, I find that the balance favours not reinstating Mr Lawsonm.

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

Overall Justice

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

[105] I observe that I have found a possibility that contributory behaviour may be found on the part of Mr Lawson, resulting in a more than theoretical risk that he may establish a personal grievance but fail to obtain reinstatement.

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

Determination

[107] For the above reasons the Authority exercises its discretion in relation to interim reinstatement by not making the orders sought.

Costs

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

Eleanor Robinson
Member of the Employment Relations Authority