

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 493
3153102

BETWEEN GEORGE LYE
 Applicant

AND ISO LIMITED
 Respondent

Member of Authority: Nicola Craig

Representatives: Simon Mitchell and Jeremy Lynch, counsel for the
 applicant
 Kate Ashcroft and Charlotte Borrie, counsel for the
 respondent

Investigation Meeting: 2 November 2021 by Zoom

Submissions received: 28 October 2021, at the investigation meeting and 8
 November 2021 for the applicant
 1 November 2021, at the investigation meeting and 8
 November 2021 for the respondent

Date of determination: 8 November 2021

DETERMINATION OF THE AUTHORITY

- A. From the date of this determination until the Authority has investigated and determined his substantive claim, or otherwise varies this order, ISO Limited must take no further steps to dismiss George Lye on the grounds of serious misconduct said to have occurred on 12 August 2021.**
- B. Costs are reserved.**

What is the employment relationship problem?

[1] George Lye is a stevedore, working for ISO Limited (ISO or the company) at the Port of Tauranga. He is a member of the Maritime Union of New Zealand (MUNZ or the union) and had been involved in litigation against ISO and in bargaining to obtain a first collective agreement.

[2] ISO is an international port logistics company that provides stevedoring, marshalling, and other services at ports throughout New Zealand, including the Port of Tauranga.

[3] Mr Lye was sent home by a supervisor on 12 August 2021. An investigation and disciplinary process followed, resulting in a preliminary decision being notified by ISO to Mr Lye that it intended to dismiss him for failure to follow a lawful and reasonable instruction.

[4] An application for an interim order preventing Mr Lye's dismissal was lodged, along with an undertaking from Mr Lye as to damages. The union has also provided an undertaking as to damages supporting the application. ISO opposed the application. Urgency was granted to the application.

[5] Affidavits were provided from Mr Lye, the union's Auckland Branch Secretary Russell Mayn, and ISO's Pamela Hayes (Human Resources Manager), Rex Chaffey (Area Manager - Tauranga) and Ricky Child (Port Operations Manager).

[6] ISO held off making any final decision on the disciplinary outcome for a short time to allow this matter to go to urgent mediation and be heard and determined by the Authority on an interim basis.

[7] An investigation meeting was held by Zoom link on 2 November 2021. Mr Lye and Mr Mayn's affidavits were not sworn before filing due to a Covid-19 lockdown. Their affidavits were affirmed at the investigation meeting. Both parties had filed written submissions prior to the meeting and spoke to them at the meeting. As referred to below, an Employment Court decision involving the same parties was issued after the Authority's investigation meeting and the parties were given the opportunity to provide additional comment.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

What are the issues?

[9] Both parties agree that the focus of this part of the process is whether the Authority should exercise its discretion to make an order preventing ISO from dismissing Mr Lye regarding events on 12 August 2021. At this stage the Authority is not in a position to determine whether Mr Lye committed serious misconduct or not, nor whether ISO has carried out a fair and reasonable inquiry or not.

[10] As is usual in such cases, I have dealt with this interim application on the basis of untested evidence and submissions. Disputed matters cannot be decided on the basis of such evidence.

[11] The issues for determination in this interim matter are:

- (a) Is there a serious question to be tried, so does Mr Lye have an arguable case that he would be entitled to a permanent order restraining ISO from dismissing him?
- (b) Where does the balance of convenience lie?
- (c) Where, standing back and considering the case, does the overall justice lie until the substantive matter is determined?¹

What is Mr Lye's history with ISO?

[12] Mr Lye works under an individual employment agreement (IEA) dated 24 December 2010. He had no disciplinary action taken against him previously.

[13] Mr Lye is amongst a very small number of MUNZ members employed by ISO working at the Port of Tauranga.

[14] Since 2018 MUNZ has been involved in bargaining with ISO for a first, or greenfields, collective agreement. Mr Lye is a member of the bargaining team and has been since the start of bargaining. The Authority has recently accepted a referral to

¹ For example, *X v Y Ltd and the NZ Stock Exchange* [1992] 1 ERNZ 863 and *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36.

facilitation brought by MUNZ against ISO.² This was on the basis that bargaining over a three year period was protracted. Facilitation is to take place on 23 and 24 November 2021. Mr Mayn describes the bargaining as being at a critical point.

[15] A major issue at bargaining has been disagreement about an availability provision, with MUNZ arguing that ISO's IEAs contain unlawful availability provisions, with the company seeking a similar provision in the collective agreement.

[16] Since 2018 the availability issue has been the subject of proceedings between the union and its members and ISO.³ Mr Lye is the plaintiff in the most recent proceedings in the Employment Court regarding his IEA with ISO. There is some interconnection between the proceedings and the bargaining. Mr Lye's personal grievance claim regarding the availability provision is with the Authority although an application to remove it to the Court has been lodged.

[17] At the time of the investigation meeting the parties were awaiting an Employment Court decision involving a compliance order sought with Mr Lye as the only plaintiff. That judgment has now been released.⁴ The Court, having earlier concluded that ISO's availability provision did not comply with s 67D of the Act, has now ordered that ISO cease offering proposed terms and conditions of employment that apply to Mr Lye containing, in summary, a non-compliant availability provision.

[18] The Court notes that ISO consistently pursued its availability provision, now held to be non-compliant, through the litigation and into the collective bargaining.⁵

[19] Although Mr Lye's case in the Court has now been decided, as least as far as the compliance order goes, it does form part of a broader context of him needing to litigate to enforce his rights.

What lead to the disciplinary process?

[20] On 12 August 2021 Mr Lye worked at Port of Tauranga, loading logs into a vessel. An incident occurred between himself and the responsible shift manager that day, Kel Travers, which concluded with him being sent home.

² *Maritime Union of New Zealand v ISO Limited* [2021] NZERA 465.

³ *Seymore v ISO Limited* [2019] NZERA 704, *Lye v ISO Limited* [2020] NZEmpC 231, and *Lye v ISO Limited* [2021] NZEmpC 120.

⁴ *Lye v ISO Limited* [2021] NZEmpC 189.

⁵ As above, at [19] - [20].

[21] Mr Lye's version of events is that he had been told by Julian Sylvester, trainee shift manager, to drop the logs to the level of a "No Smoking" sign on the vessel, as they were too high. He did so before getting out of the digger. He says Mr Travers and Mr Sylvester arrived, with Mr Travers becoming abusive and argumentative. He denies being told to return to the digger.

[22] Mr Travers told Mr Lye to leave the ship and go home. Mr Lye complied.

What process did ISO follow?

[23] Mr Lye made a written complaint about Mr Travers swearing at him two on 12 August 2021. This was passed on to Mr Child. Mr Lye is not aware of any steps being taken regarding his complaint.

[24] Mr Child commenced what is described as a fact-finding investigation, with support from Ms Hayes.

[25] Mr Travers and Mr Sylvester provided initial statements to Mr Child outlining their version of events of 12 August 2021.

[26] On 27 August 2021, ISO wrote asking Mr Lye to attend a meeting on 2 September 2021 to respond to the information that had been collected by Mr Child. Mr Mitchell was instructed to represent Mr Lye and wrote to ISO requesting relevant information. Documents including written statements from Mr Travers and Mr Sylvester were provided.

[27] Prior to the meeting Mr Lye and his partner also provided written statements. His partner, also an ISO employee, was working as a crane operator on the day in question. A meeting was held on 2 September 2021 between ISO representatives and Mr Lye and his representatives. Mr Child later interviewed Mr Lye's partner, concluding the fact-finding investigation.

[28] By letter of 23 September 2021 ISO invited Mr Lye to a disciplinary meeting about an allegation that he had failed to follow a reasonable and lawful instruction to undertake work, which was an example of serious misconduct in the company's disciplinary policy. The meeting was held on 6 October 2021. Mr Chaffey and Ms Hayes attended, along with Mr Lye and his representatives. Mr Chaffey was identified as the decision maker.

[29] On 7 October 2021, ISO issued its preliminary decision to dismiss Mr Lye pursuant to clause 14.3 of his IEA, on the basis of failure to follow a reasonable and lawful instruction. The decision letter identified that:

- (i) Mr Travers and Mr Sylvester provided consistent statements;
- (ii) the exact wording was not identified but Mr Lye refused to follow an instruction to return to the digger and fill the hold to the required level;
- (iii) failure to follow rules is not common place; and
- (iv) the assertion of targeting as a result of the Employment Court proceedings is denied.

[30] Mr Lye was offered an opportunity to provide a response. These proceedings were then commenced. Mr Lye's representative sought an extension to the time for providing feedback to the preliminary decision. ISO confirmed an extension.

What evidence did ISO have regarding any instruction?

[31] A critical argument for Mr Lye is that ISO did not have sufficient evidence to conclude that Mr Lye had not complied with a lawful and reasonable instruction.

[32] Mr Lye told ISO that Mr Travers approached him about loading of the vessel, becoming argumentative and abusive after Mr Lye mentioned that Mr Travers did not come up on the ships (to check). Mr Lye reports Mr Travers swearing at him and telling him to get off the ship. He denies having been given an instruction to return to the digger, saying that he would have done so if asked.

[33] Mr Sylvester's initial statement from the day of the incident largely confirms Mr Lye's view however concludes that after an argument Mr Lye "refused to hop back in to finish off loading".

[34] Mr Sylvester was interviewed by Mr Child and Ms Hayes. He recalled Mr Travers asking what was happening with the digger coming out of the hold, with Mr Lye saying he had loaded to that level. Then "pretty much straight away at that point Kel asked him to leave the ship and there was a little backwards and forwards I guess, call it an argument...".

[35] Mr Sylvester went on to say that:

... as soon as George spoke back to the shift manager ... I recall him saying "get off my ship, I'm calling the van you're going home"... there wasn't much or any room given to George for any further explanation or may be to gather a bit more information before making that call to just send him straight home.

[36] Mr Sylvester was then asked whether Mr Lye was asked to return to the hold and continue the loading. Evidence from Mr Lye is that in the audio recording taken of Mr Sylvester's interview there was then a long pause, with Mr Sylvester then indicating yes, later going on to say that he could see both sides. Mr Travers' initial statement refers to telling Mr Lye to get back in his digger. He also states "[t]his day I called his bluff and sent him home".

[37] During his interview with Mr Child and Ms Hayes, Mr Travers referred to saying "...we need to get you back into the digger to finish the hold... and he refused". Mr Travers continued that he had:

... options to be able to drop a gang cause we had the possibility that we would run out of cargo so I took that opportunity and that's something we have discussed in the past Ricky, that you know when these guys really play up we will send them home and hopefully teach them a lesson so that's exactly what I did...

... [Mr Lye] told me he wasn't going back into the digger and do anymore. Typical issues we battle with these guys quite a lot.

... the conversation was pretty much like you have got to get back into that digger there's more cargo in there and George being George argued about it saying no there's not and I said yes it is, no its not, right see you later off the ship not arguing about it, it was pretty much cut and dried really

[38] Mr Child then said "[a]t that point George out right basically said to you he's not getting back in the hold?" to which Mr Travers said "[c]orrect".

[39] When asked about how the message was portrayed Mr Travers acknowledged that there could have been foul language but he was telling Mr Lye what to do. Mr Child's replies "doing your job", leading Mr Travers to comment:

That's exactly right and that's what we've been trying to figure out how to do it best,...I've talked to Ricky about this lots, we are really battling with these guys to get them to do their jobs and do various things, a lot of the time you don't have the opportunity to be able to do something about it because you know we are pushed for staff we don't have enough staff, or we are under the pump trying to get things done and this was probably the perfect opportunity on the day because I had the ability to

remove someone from the operation because of them being this way without it affecting the loading operation on the ship so I would of loved to do this a dozen times already with different staff in the past, um PPE, wrong helmet, just doing what they like essentially, so this was just a good opportunity that day to take action. .

[40] Mr Travers then indicates in response to a question that Mr Lye would have been asked three to four times.

What is the basis for such an order?

[41] Before I move on to consider the issues I look at the availability of an order preventing dismissal. It is a serious matter to intervene in an employer's conduct of a disciplinary investigation.⁶

[42] In *Ports of Auckland Limited v Findlay*, Chief Judge Inglis observed:

... There is an interest in progressing employment processes in a timely manner without unnecessary interruption and legal wrangling, until final decisions and outcomes with substantive impact are known. Halting the employer's inquiry at this stage, to carry out a warrant of fitness check in respect of various aspects of it which may or may not be remedied prior to any decision ultimately being made, is a significant step which should not be lightly taken. It runs the risk of derailing a process which an employer is obliged to undertake, and of fixing a problem that may not exist, or which may not ultimately need fixing, or which may have no substantive impact.

... I do not discount the possibility that there may be cases in which an order permanently restraining an employer from taking any further steps in a disciplinary inquiry may appropriately be made...⁷

[43] Mr Findlay's action was not successful in the Court.

[44] Mr Lye's situation is somewhat different to that of Mr Findlay, in that ISO has made factual findings and has not indicated that it intends to carry out further investigation, although allowing Mr Lye a further chance to comment.

[45] Mr Mitchell acknowledged that orders such as the one sought are unusual. Ms Ashcroft for ISO submits that only extraordinary cases may justify such an order. I consider that the test is not necessarily "extraordinary" matters but accept that such orders are not commonly made.

⁶ *Russell v Wanganui City College* [1998] 3 ERNZ 1076 at p 108.

⁷ *Ports of Auckland Limited v Findlay* [2017] NZEmpC 45 at [41] - [42].

[46] I take ISO's point that involvement in litigation or bargaining should not, of itself, become a shield against any disciplinary action being taken. I do not accept however that the background here of the litigation and bargaining is irrelevant.

Is there an arguable case regarding unjustified action?

[47] ISO asserts that it has met the requirements set out in the Act and complied with its own disciplinary policy. Ms Ashcroft describes this as a garden variety process.

[48] Arguments for Mr Lye focus on a fundamental inadequacy in the investigation and disparity of treatment. Mr Mitchell stresses that ISO, in its affidavits, did very little to respond to the allegations made against it, instead outlining the process undertaken.

Evidence of the direction and the circumstances

[49] Mr Mitchell submits that, in its totality, the evidence does not establish a direction was provided by Mr Travers to return to the digger. Further, there was a failure to establish what words were used and to attempt to resolve significant inconsistencies between even Mr Sylvester and Mr Travers' versions of events.

[50] Portions of Mr Travers' and Mr Sylvester's statement support the view that any reference to getting on the digger was in the course of an argument about what the right level was and why Mr Lye had moved it to the level he had.

[51] Mr Mitchell is also critical of ISO failing to accept that the circumstances in which the alleged direction was given were highly pertinent and failed to sufficiently investigate them. A direction amidst a string of swearing and abusive language may well not be assessed in the same way as a request without such language. That may go to the reasonableness of the instruction. Mr Sylvester mentioned he and other supervisors would have conveyed a different message; a more "constructive" message.

[52] There is an arguable claim that ISO did not sufficiently establish the nature of any direction and the circumstances in which it occurred, in order to get the point of concluding (provisionally) that a lawful and reasonable instruction had been issued and ignored.

Impartiality

[53] There may also be a question about the degree of Mr Child's impartiality as according to Mr Travers, he and Mr Child had been involved in discussions about people not following instructions. During the interview Mr Child said that Mr Travers was doing his job.

[54] Although it appears Mr Child was not to be the decision maker, he was the finder of facts.

Disparity

[55] Mr Mitchell argues that Mr Lye was scapegoated. Mr Travers' comments during his interview provide evidence of problems with other workers.

[56] ISO's preliminary decision letter states that insubordination is not commonplace. However, Mr Child did not attempt to contradict Mr Travers nor question him further on this point during the interview. Although there are general denials by Mr Child and Ms Hayes in their affidavits of disparity, neither provide any specific evidence regarding Mr Travers' comments. Mr Child does not deny that he had such a discussion with Mr Travers.

[57] It is arguable that either there had been a change in approach by ISO, seemingly without any indication of staff being informed, or the opportunity was taken on this occasion to take the more serious action of sending a worker home because it was feasible at the time whereas it normally was not.

Conclusion

[58] I am satisfied that there is an arguable case that ISO's conduct of its disciplinary investigation subjected Mr Lye to an unjustifiable action to his disadvantage. I cannot conclude that the argument for an order is frivolous or vexatious.

What is the balance of convenience?

[59] I now move to weigh the impacts of granting or refusing the order sought on Mr Lye and ISO, including a consideration of the adequacy of damages.

Mr Lye

[60] Mr Lye's work is important to him. He is at risk of being dismissed, which is a serious matter.

[61] This is a job which Mr Lye has held for ten years without any previous disciplinary action. He describes himself as a hard working employee, which is not disputed by ISO.

[62] Mr Lye has bought a house and will not be able to pay the mortgage if he is dismissed. His partner does not earn enough money to pay all their living expenses, including the mortgage repayments. Mr Lye also has a son. He is extremely concerned about not being able to support his son if he is dismissed.

[63] Mr Lye is aware of stevedoring work available elsewhere but believes that if he is dismissed, it may be difficult to find work somewhere else.

[64] For ISO these are described as "ordinary concerns" faced by those who are the subject of disciplinary action and possible dismissal.

[65] Ms Ashcroft argues that Mr Lye has the alternative remedy of waiting to see if he is dismissed, then bringing a dismissal grievance and, if he wishes, seeking interim reinstatement. That is true but places a substantial burden on him in terms of pressure and worry in the meantime.

[66] Mr Lye wants to be involved in the bargaining. According to Mr Mayn it is important to the union that he remains employed to progress the bargaining, seeing him as a crucial liaison for the union with what is happening in ISO's workplace. Mr Lye is the only ISO employee who has been involved in the bargaining and who understands the issues. Mr Mayn describes the union's ability to effectively conduct bargaining as being substantially disadvantaged if Mr Lye is dismissed.

[67] I was not persuaded by ISO's argument that Mr Lye could just as well continue to be involved in bargaining from the outside. This ignores the realities of union delegates having in-depth knowledge of the workplace, connections with workmates, and the ability to talk to one another on the job about the bargaining.

[68] I take into account the interest of the union and other members in having Mr Lye remain involved in the bargaining.

[69] Mr Lye's losses cannot be entirely recompensed by damages. His personal financial losses could well be but not his removal from an effective position in the bargaining. The third party interests of the union and, by implication, other workers are significant.

ISO

[70] I now look at any detriment ISO would or could suffer if Mr Lye's dismissal is prevented at this point. ISO is a fairly substantial organisation, operating over several sites with many employees.

[71] ISO placed little emphasis on any harm it might suffer as a result of an order being made, preferring instead to focus on the lack of extraordinary harm to Mr Lye if it was able to proceed.

[72] No evidence was provided, for example, of any difficulties with Mr Lye being in the workplace if an order was made. There were no arguments that ISO lacks work for Mr Lye. Rather it was indicated that there is a shortage of skilled port workers.

Conclusion on the balance

[73] I have taken into account that it is likely that this matter would not be heard until early next year.

[74] I conclude that the balance favours Mr Lye.

Where is the overall justice of the case?

[75] I move on to complete an assessment of where the overall justice lies between the parties.

[76] In terms of the merits, my assessment at this stage based on the untested evidence is that there is strength to Mr Lye's claim that ISO has acted unjustifiably and should be prevented from dismissing him.

[77] Mr Lye filed his application promptly after receiving the preliminary decision to dismiss.

[78] Public policy generally discourages interference in an employer's disciplinary process. However, public policy expressed in the objects of the Act also recognises the

inequality of power between employees and employers.⁸ The Act also promotes collective bargaining.⁹ The MUNZ and ISO bargaining has been sufficiently challenging to need the assistance of external facilitation and the evidence is that Ms Lye's involvement in that ongoing process is critical.

[79] The scope of the order sought would not prevent ISO from taking any further action on this matter. This differentiates the case from *Findlay* where the Authority's order required the employer to take no further steps in its disciplinary inquiry until the substantive matter could be investigated.¹⁰ ISO would be free for example, to investigate further or to take less serious disciplinary action than dismissal. I accept the order would significantly restrict ISO but its hands would not be completely tied.

[80] Standing back and looking at the overall justice of the case I find that it favours the granting of interim relief to Mr Lye. From the date of this determination until the Authority has investigated and determined his substantive claim, or unless the Authority otherwise varies this order, ISO must not take any further steps to dismiss Mr Lye on the grounds of serious misconduct said to have occurred on 12 August 2021.

Costs and further steps

[81] Costs are reserved.

[82] An Authority officer will be in contact with the parties to arrange a case management conference to progress this matter.

Nicola Craig
Member of the Employment Relations Authority

⁸ The Act, s 3(a)(i).

⁹ The Act, s 3(a)(iii).

¹⁰ *Findlay v Ports of Auckland Limited* [2017] NZERA Auckland 80.