Employment Court of New Zealand

McKean v Ports of Auckland Limited [2011] NZEmpC 128 (12 October 2011)

Employment Court of New Zealand

McKean v Ports of Auckland Limited [2011] NZEmpC 128 (12 October 2011)

Last Updated: 21 October 2011

IN THE EMPLOYMENT COURT AUCKLAND

[2011] NZEmpC 128

ARC 72/11

IN THE MATTER OF proceedings removed from the

Employment Relations Authority

AND IN THE MATTER OF an application for interim reinstatement

BETWEEN GRAHAM MCKEAN Plaintiff

AND PORTS OF AUCKLAND LIMITED Defendant

Hearing: 7 October 2011 (Heard at Auckland)

Counsel: Simon Mitchell, counsel for plaintiff

Richard McIlraith and Kylie Dunn, counsel for defendant

Judgment: 12 October 2011

INTERLOCUTORY JUDGMENT OF JUDGE C INGLIS

[1] Mr McKean was summarily dismissed from his employment with Ports of Auckland Limited (POAL) on 20 September 2011. This followed concerns raised by his employer about a column he had written in a publication. He applies for interim reinstatement pending determination of his claim of unjustified dismissal. That application is opposed by POAL.

[2] Mr McKean's grievance and application for interim reinstatement were removed from the Employment Relations Authority to this Court.[1] Removal was essentially on the basis that the case involved consideration of two recent amendments to the Employment Relations Act 2000 (the Act), relating to the test for

justification for dismissal under s 103A and the test for reinstatement as a remedy

under s 125. Both are relevant to the substantive claim and, more immediately, to the issue of whether interim reinstatement ought to be granted.

[3] The scope of the new provisions is yet to be determined (and is to be the subject of consideration by a full Court of the Employment Court shortly). However, it is clear that the amendments reflect a Parliamentary intention to make it easier for employers to justify dismissals and to make it more difficult for employees to be reinstated if they have been unjustifiably dismissed.[2]

[4] In determining an application for interim reinstatement the Court must have regard to: [3]

- 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 reinstatement in employment under s 125 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.

Background

[5] Mr McKean was employed by POAL as a stevedore. At the time of his dismissal he had been working for the company for nearly 18 years. He was also an executive member of the Auckland Branch of the Maritime Union of New Zealand (the union) known as "Local 13", which represents stevedores and other employees at POAL.

[6] Local 13 publishes a magazine called *Port News* on a quarterly basis. Mr McKean contributed a column to the magazine, entitled "Coach's Comments". Mr McKean was also one of the union representatives involved in the current bargaining

for a new collective agreement.

[7] Mr McKean was dismissed for serious misconduct on 20 September 2011 following publication of a column he wrote for the September 2011 edition of the *Port News*. The Chief Executive Officer of POAL, Mr Gibson, received 11 written complaints from staff members about the column. Following a disciplinary process Mr Gibson concluded that Mr McKean's column was offensive, was damaging to POAL's reputation, and that he had lost trust and confidence in Mr McKean.

[8] There is no dispute that Mr McKean was the author of the column in question. The column appears on its face to refer to both past and present employees of the company. In relation to the former the following observations were made:

I am a little on the stunned side! All the cumulative pressure that has been exerted against us, from the confrontations in the mess room, the long and varied court cases, the protests and picket lines, the plane buzzing around the bays, the sackings and redundancies, the attacks through restructuring, the threats of being sued and the defection of some members has finally drawn itself into an interim conclusion. All the managerial perpetrators of these indiscretions are now gone. We are here and they are not. It might be the same feeling that a cancer sufferer could have had when he learns that his malaise has been removed. Joy, relief, satisfaction, disbelief and uncertainty

– what a strange old world. Good riddance to the bastards I say! A lot of good people have been hurt along the way, just so that they could try to fornicate their neo-liberal philosophies upon us.

They've packed up their Nazi uniforms and Darth Vader outfits with the bumhole bits cut out of them, their cat of nine tails and their other toys for self flagellation and trundled off to their rubber walled dens where the mistresses know how to despoil, correct and require the naughtiness out of them for the time being.

[9] Mr McKean went on to "muse whimsically and hypothetically" that the

retirement of a number of people could:

"...present a prime opportunity to seed in a quieter more subservient workforce. No complaints, no questioning of the ruling class, just job done, rail [sic] hail or sunshine and then the ability to insidiously wind down the work practices, dismantle the costs of doing business, push the health and safety envelope and give no thought to their work life balances. If at all possible one of the island nations would serve admirably. A steady selection process until we'd hit critical mass and then the assimilation. It would be important to have a Pacifica manager in a position of influence for harmonisation and the ability to collect where necessary affidavits to collar the odd malcontent. Introduce company sports teams that pitch to the interest of the worker demographic and have an attractive and intelligent female

organiser and preferably make her a blonde. We would the [sic] need an insider who had a close working relationship with the fellows and who wouldn't mind stealing collective agreement benefits. Allow him to slither amongst the flock and sow seeds of dissent and promise him all the earthly riches for himself and his family for his unbridled treason. Remind me again

– how did old Judas Iscariot end up?

And to run all of this it would be preferable to have some chap who had in the past been a representative of the old school but had forsook that moral path and delved down into the aisles of the dark side, and allow him to construct his own little dominion. We could even cast a life-size bronze statue of his image. That would be a particularly nice touch though I suppose it'd need a bloody lot of bronze.

But of course such things don't happen. Those workplaces are a thing of myth. I wouldn't slander the bosses off and our mixed culture membership is wise to the toffee offered that leads to the traps and bondage of a non- collective agreement employment relationship. And since this is just whimsical musing and has no intention, whatsoever, of flipping the middle finger at any mid-management morons, I do kind of hope my wee diatribe shan't stifle my future career prospects.

[10] The article was brought to Mr Gibson's attention. He commenced a

disciplinary investigation on the basis set out in a letter to Mr McKean dated 12

September 2011, and required him to attend a meeting on 16 September. Mr McKean was supported at that meeting and provided a written response to the concerns that had been raised and also a set of submissions prepared by his lawyer. Mr Gibson says that he considered the matters raised by and on Mr McKean's behalf. This included an argument that Mr McKean could not be held personally liable for the content of the column as he had prepared it in his capacity as a union official. Mr Gibson did not accept this argument, determined that Mr McKean's actions amounted to serious misconduct, and decided to dismiss him. That decision was confirmed by way of letter dated 20 September 2011.

Is there an arguable case that Mr McKean was unjustifiably dismissed?

[11] Clause 4.2.7 of the collective agreement sets out a number of examples of conduct that may constitute serious misconduct warranting instant dismissal. These include "behaving in an offensive manner". What amounts to offensive behaviour is not specified.

[12] The scope of the term was recently considered by this Court (in the context of an application for interim reinstatement) in *Angus.* That case involved the dismissal of a POAL employee for allegedly offensive behaviour under the same collective agreement. The Chief Judge concluded that:[4]

It is arguable, in an employment law context, that not every behaviour that may offend others (other employees, managers, the employer, customers, or even the general public) will justify the ultimate employment sanction of summary dismissal. In employment law, as in criminal law, context is paramount. The number and sorts of persons to whom offensive behaviour is exhibited will be important. Offending a significant customer to put in jeopardy a business's custom may be more significant than offending a single, highly sensitive employee within the business. Conduct that is condemned universally as offensive may more easily warrant a sanction in employment than conduct about which there are different views of its offensiveness.

[13] In *Morse v Police*,[5] the Supreme Court referred to offensive behaviour under the Summary Offences Act 1981 as being behaviour "... capable of wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind subjected to it in the circumstances in which it occurs."[6] While the Supreme Court was concerned with alleged criminal behaviour, rather than behaviour in the employment context, its approach is instructive.

[14] Mr McKean accepts that the column raised concerns about previous managers and current concerns about the employment of workers from Tuvalu. He says that many union members consider that recent immigrant workers being employed are intended to create a group of compliant workers and that this is part of a broader company strategy. A number of people who had read the column wrote to Mr Gibson raising significant concerns about it, variously describing it as "offensive", "disgusting", "racially divisive", "insulting", and complaining that it contained sexist innuendo and was damaging to POAL's reputation.

[15] Mr Tasi (Manager Resource Allocations) was one of the complainants. He says that he identified himself as being the Pacifica manager referred to by Mr

McKean, and advised Mr Gibson that he was "deeply offended by the degrading

content of the article" and its negative references to groups of people and individuals at POAL. He concluded by saying that he was writing not only for himself, but for "the deep offense that the article presents to others in this work place, their families and friends who may not feel they have a voice."

[16] Another complainant, Mr Kirwan, observed that the availability of it in the common use work areas of the canteen was concerning because "[n]ormal procedure in dairy's and shops these types of articles have warnings on the covers and are sealed in plastic." Mr Hulme, Manager Stevedoring, advised Mr Gibson that he was "disgusted" by the column and that he found it "truly offensive" and "obviously targeted at a number of people that are currently working in the Stevedoring Leadership teams along with a particular group of stevedores that have been employed."

[17] The apparent impact of the column may be readily understandable given the way in which Mr McKean chose to express himself. Indeed Mr McKean accepts that what he had to say may have caused offence. In his written statement to Mr Gibson he conceded that with the benefit of hindsight he could see content that he would not repeat.

[18] While the target audience for the column appears to have been union members, its circulation was not limited in that way. Twelve hundred copies of the publication were made available. The column was available in the messroom and was found there by non-union employees. The likely breadth of circulation and readership is also reflected in the fact that a number of companies advertise in the publication, and editors of other trade union magazines and newspapers are invited to reproduce material appearing in it.

[19] An argument that the material in the column was not offensive appears weak. It was drafted by Mr McKean in objectionable terms, and contained sexually deviant innuendo, racist and sexist slurs, and appears to be directed at identifiable past and current POAL managers and employees (including those of a particular race and sex). That is reinforced by the context in which the column was written and the admitted concerns that Mr McKean had about the employment of workers from

Tuvalu. It seems likely that the reference in the column to a "quieter more subservient workforce" which would not complain, would be "subservient", and would not question the "ruling class" was aimed squarely at his co-workers from Tuvalu and this appears to be supported by the stated importance of having a Pacifica manager in a position "of influence for harmonisation and the ability to collect where necessary affidavits to collar the odd malcontent." Mr Tasi says that he identified himself as being the object of this comment. Mr Kirwan says in his letter to Mr Gibson that he identified himself as being the "chap who had in the past been a representative of the old school but had forsook that moral path and delved down into the aisles of the dark side, ... to construct his own little dominion." Both Mr Tasi and Mr Kirwan appear to have been sufficiently aggrieved by what Mr McKean had to say that they wrote to Mr Gibson setting out their concerns. They were not alone in doing so.

[20] The column appears to have been largely motivated by concerns about the company employing people from Tuvalu (as Mr McKean states in his affidavit) but it is strongly arguable that those concerns were expressed in such an unpleasant and personalised manner that they were bound to cause significant offence to those referred to in it and to other readers. While there is a dispute as to the extent to which the comments might be understood by those from outside the company, it is strongly arguable (given the wording of the column and its nature) that a reader would have little difficulty discerning that it was about past and present managers and employees, and that it was highly critical of the company.

Union official/employee

[21] The principal submission advanced on behalf of Mr McKean in support of his application for interim reinstatement was that he was acting in his capacity as a union official when writing the column and that this is relevant to an assessment of whether or not he could justifiably be dismissed. Counsel submitted that if action was to be taken in relation to the column then it was strongly arguable that such action was properly pursued against the union, rather than Mr McKean.

[22] It is incontrovertible that a union is entitled to hold and express views that are at odds with the employer. This is underpinned by the importance of the right to freedom of speech, endorsed by the full Court in *Lowe v Tararua District Council.*[7]

It is also clear than an employer's feelings of displeasure at what an employee has to say will not suffice to convert an employee's lawful actions into misconduct.[8]

[23] However, what limited authority there is on the union/employee status issue is weighted against the appellant's submission. In *Game v Northland Co-operative Dairy Company Ltd*[9] Judge Travis rejected an argument that because the appellant was carrying out his duties as a union delegate and exercising a right to protest his actions this did not amount to serious misconduct justifying dismissal. Judge Travis made the point that while these factors might explain the appellant's motivation they did not "excuse actions that constituted serious breaches of the duties he owed to the respondent."[10]

[24] Counsel for the plaintiff sought to distinguish *Game* on the basis that it involved the employee taking action that was designed to cause economic damage to the employer rather than, as here, simply raise justified concerns. Further, it was submitted that *Game* arose for determination under the Employment Contracts Act

1991 and that the duties owed between unions and employers, and enforcement provisions relating to them, had since been statutorily provided for in the Employment Relations Act.

[25] There is no suggestion on the evidence as it currently stands that Mr McKean was actively seeking to cause POAL economic loss. There may be instances, as counsel suggests, where it will be appropriate for an employer to take action against a union itself, rather than a union representative. The context and surrounding circumstances will be pivotal. However, it is strongly arguable that the key issue is whether Mr McKean's actions constituted a breach of the duties he personally owed to POAL as an employee. While the union has said that it assumes responsibility for the column, and Mr McKean was a union official and wrote his column in a union

magazine, it is doubtful that this alters the position in the circumstances on this case. Taken to its logical conclusion the argument advanced on behalf of Mr McKean would mean that an employee could effectively clothe themselves with immunity from disciplinary action, no matter how offensive their conduct and damaging to their own relationship with their employer, by asserting that they were acting in a union capacity at the time.

[26] Analogies can usefully be drawn to the cases relating to disciplinary proceedings for conduct outside of working hours. In *Smith v Christchurch Press Company Ltd*[11] the Court of Appeal declined to categorise conduct outside of work that might lead to disciplinary proceedings (noting that situations are variable) but held that there must be "a clear relationship between the conduct and the employment". The Court observed that:[12]

It is not so much a question of where the conduct occurs but rather its impact or potential impact on the employer's business, whether that is because the business may be damaged in some way; because the conduct is incompatible with the proper discharge of the employees' duties; because it impacts upon the employer's obligations to other employees or for any other reason it undermines the trust and confidence necessary between employer and employee.

[27] In *Mussen v New Zealand Clerical Workers Union*[13] the Court accepted that a union organiser's actions in spray painting anti-Employment Contract Act slogans on a retailer's wall outside of her normal work hours were "highly inherently relevant" to the employment relationship she had with the union. They were held to have seriously impacted on and undermined that relationship and to amount to serious misconduct.[14]

[28] The right of union delegates to advocate, including strongly, for and on behalf of their members is to be jealously guarded. No bright line can be drawn. Every case must be considered in its own context and having regard to its individual circumstances. Central to any assessment is likely to be the extent to which there is a connection between the conduct complained of and the employment relationship.

[29] In my view it is strongly arguable based on the evidence currently before the Court that Mr McKean's admitted actions detrimentally impacted on the relationship he had as an employee with his employer, given the nature (and tenor) of the allegations he levelled against POAL and its employees. It is strongly arguable that the column caused significant offence and upset to a number of people, particularly those referred to in highly critical terms within it. It is very strongly arguable that Mr McKean's actions were inherently relevant to the employment relationship, called into question his ability to discharge his duties to POAL, and were properly the subject of disciplinary action leading to dismissal. My assessment at this stage, and without the benefit of full submissions on the point, is that the argument that Mr McKean cannot be disciplined in relation to the column he wrote because he was acting as a union official at the time is weak.

[30] It is strongly arguable based on the evidence currently before the Court that Mr McKean was, in fact, acting in a personal capacity at the time. It is noteworthy that the publication contains a disclaimer on page one to the effect that the opinions expressed in the articles contained within it "are the opinions of the writers and are not to be taken as the opinions of the Maritime Union of New Zealand." In contrast to other contributors to the magazine (including Mr Parsloe – National President, Mr Mayn – Secretary/Treasurer, Mr Harrison – Local 13 Vice President, and Mr Phillips

– Maritime Walking Delegate) Mr McKean's article is signed off personally, "Graham McKean". It is expressed throughout in the personal tense ("my wee diatribe", "my whimsical musings"). It is titled by way of reference to the nickname Mr McKean is known by in the workplace, "Coach's Comments".

[31] *Port News* is a union magazine that is primarily directed at its members. It appears that the union exercised a degree of editorial control over its content, and at times made alterations to the articles submitted for publication. Mr Mayn (the Secretary/Treasurer of the Auckland branch of the union) says that the union was responsible for missing the editing window. Further, as counsel for Mr McKean noted, Mr Gibson drew the matter to the attention of the union. This, it is said, supports a submission that it is the union, rather than Mr McKean, that is responsible for the situation that arose. While Mr Gibson did write to the union expressing his

concerns he also made it clear that he considered it to be a disciplinary matter involving Mr McKean personally.

[32] While there is some dispute about the nature of Mr McKean's role in writing the column which cannot be fully resolved at an interlocutory stage given the untested nature of the evidence, the strong indicators are that the views expressed in the column were Mr McKean's personal views and that he was writing in an individual, rather than a union, capacity.

[33] The present case differs from the circumstances in *Angus.* There a note had been written by the plaintiff, apparently intended to be read by one person only. In this case the breadth of distribution of the magazine in which the column appeared was significant. In addition, whereas it is arguable that the note in question in *Angus* was written as a joke after a "brain explosion" (to borrow a term used by the Chief Judge in *White (then X) v Auckland District Health Board*),[15] the column in this case is a relatively lengthy one and appears to have been carefully crafted, deliberately targeting certain past and present managers and employees, and with sufficient

particularity to enable them to be identified.

Procedural issues?

[34] Counsel for Mr McKean submitted that there may be some issues relating to the procedure that was followed by Mr Gibson in terms of the disciplinary process, although he contended that these might best be reserved for the substantive hearing. In particular he focussed on the strong wording of Mr Gibson's correspondence, and a concern that this might reflect a degree of predetermination.

[35] Section 103A(3) sets out the procedural steps that must be taken in a disciplinary context. There must be a sufficient investigation; the employer's concerns must have been raised with the employee; the employee must be given a reasonable time to respond to the concerns; and his/her explanation must be given genuine consideration. Section 103A(5) now provides that the Court must not determine a dismissal to be unjustifiable solely because of defects in the process

followed by the employer if the defects were minor and did not result in the employee being treated unfairly.

[36] Mr Gibson wrote to Mr McKean on 12 September 2011 clearly setting out his concerns about the column. He stated that he was not initiating an investigation into what had occurred (which he regarded as self evident) but rather an inquiry into why Mr McKean considered it acceptable to behave "so offensively and gratuitously" towards his colleagues and the company. Two meetings were subsequently held. Mr McKean provided a response to the concerns, including in writing. Mr Gibson's evidence is that he considered all matters raised, including by way of mitigation, by and on Mr McKean's behalf. His

evidence is that he advised Mr McKean of his preliminary views and gave him an opportunity to comment prior to reaching his decision to dismiss Mr McKean for serious misconduct. While Mr Gibson's concerns were strongly expressed in correspondence to Mr McKean the argument that there were defects in the process appears, on the evidence currently before the Court, to be weak.

Decision to dismiss

[37] The question under s 103A, as amended, is whether the decision to dismiss was one that a reasonable and fair employer could have taken in the particular circumstances. It is apparent that Parliament intended to widen the circumstances in which an employer can justify a dismissal. This is reflected in the substitution of the word "could" for "would".[16] It is tolerably clear that, as amended, s 103A reflects a statutory acknowledgement that there is likely to be a range of responses open to a fair and reasonable employer in any particular case. The question of whether a

dismissal is justifiable is to be determined on an objective basis. Mr McKean must establish an arguable case that his dismissal was not within the range of responses available to a fair and reasonable employer in all of the circumstances at the time.

[38] Serious misconduct will usually be "conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment

relationship."[17] At this stage it appears to be strongly arguable that Mr McKean's conduct had the effect of significantly undermining his relationship with his employer. The column was contained in a magazine with a print run of 1200 and was available to non union members. It appears that Mr McKean himself appreciated that he was stepping a perilous path in expressing the hope in the column that his "diatribe" would not damage his career path and in his observation at the first disciplinary meeting where he responded to Mr Gibson's concern that he had lost trust and confidence in him by stating that "[i]t is of very real concern to me that I have breached this aspect of our relationship."

[39] While there is an argument that Mr McKean was acting as a union official when writing the article, and that this effectively renders him immune from disciplinary action, that argument appears to be weak, is not supported by what limited authority there is on the point, and does not accord with well accepted principles relating to the enduring nature of the mutual obligations owed by employees and employers.

[40] It appears to be strongly arguable that the conduct in question did constitute offensive behaviour prohibited by the collective agreement and justifying instant dismissal, when viewed objectively, even having regard to the context of the stevedoring environment in which Mr McKean worked and the relatively low threshold that applies at this stage of proceedings.[18]

Does Mr McKean have an arguable case for reinstatement if found to have been dismissed unjustifiably?

[41] An assessment of the prospect of ultimate reinstatement is a proper and necessary consideration on an application for interim reinstatement.[19] Relevant to this issue are the changes that were recently made to s 125. Reinstatement is no longer the primary remedy to be provided, wherever practicable, where it is

determined that an employee has a personal grievance. Although no longer having

primacy, the section as amended still provides for reinstatement as a remedy in this

situation where it is held to be both "practicable and reasonable" to do so.

[42] Counsel for POAL contended that reinstatement on either an interim or permanent basis was neither practicable nor reasonable. It was submitted that irreparable harm had been done to the relationship and that this was supported by the affidavit evidence of Mr Gibson, the evidence of a number of POAL employees, and reflected in the 11 complaints that Mr Gibson received from staff shortly after the column appeared. It was further submitted that Mr McKean's contribution in terms of the predicament he finds himself in ought to be taken into account in assessing the extent to which he can establish an arguable case for reinstatement.

[43] As against this it is clear that Mr McKean has a number of personal commitments. He is supporting a young family and has to meet mortgage payments on the family home. He says that he is likely to have difficulty finding alternative employment. He has worked for POAL for a considerable period of time and is

51 years old. While he has funds that he can draw on in the interim (having been paid $19,187.40 gross; $12,628.72 net by POAL on his termination) he says that being without work will impact significantly on him. In addition, his wife is facing medical issues and his dismissal has added considerable stress to the family. He says that he has met with WINZ and been advised that he will be subject to a nine to ten week stand-down before becoming entitled to a benefit.

[44] It is also said that if Mr McKean cannot return to the workplace on an interim basis it will impact negatively on third parties, in particular in relation to providing effective representation for the union. The strength of that submission is weakened by the fact that Mr McKean offered to stand aside from ongoing union activities at the meeting of 20 September.

[45] It is submitted that the imposition of a condition that Mr McKean refrain from writing any further articles on an interim basis would adequately address the concerns identified by POAL. However, it seems that such a condition would not fully address the concerns POAL reasonably has about the likely negative impact of a return to work on other employees, including those who might reasonably consider

themselves to have been denigrated by Mr McKean in his column. While it appears that he may not be required to have close day-to-day contact with a number of complainants if he returned to work, as a stevedore he would be working with many Tuvaluan stevedores. Further, while Mr McKean says that he enjoys good working relationships with female staff members, some significant concerns have been identified about having to share a workplace with him in light of the views expressed in the column. Others too could reasonably be expected to come across Mr McKean in the workplace and the messroom.

[46] While Mr McKean has sought to apologise for his actions it remains far from clear that he has any real insight into his behaviour and the impact of it. He appears to seek to justify it on the basis that he was raising serious concerns in the workforce. Mr McKean's approach stands in contrast to the situation that presented itself in *Angus*, where reinstatement was found to be strongly arguable as a remedy.

[47] It was submitted on Mr McKean's behalf that this was not the first time that he had "poked the borax" at management, and that he had been able to work effectively despite that. However POAL's submission that the views expressed in the column at issue are extreme is a compelling one. While counsel sought to characterise them as "humorous" and a "light-hearted send up" they arguably fall well short of that description on an objective analysis, and appear on their face to be directed more broadly than simply at management.

[48] It is strongly arguable that the tenor of Mr McKean's comments, the scope of their publication, and the apparent impact of the comments render reinstatement unlikely, even if he is ultimately found to have been unjustifiably dismissed.

[49] This is reinforced by the extent to which Mr McKean has contributed to the situation he now finds himself in. Section 124 of the Act requires the Court, in assessing the nature and extent of any remedies on a personal grievance, to consider the extent to which the actions of the employee contributed towards the situation that gave rise to it. The degree of fault that appears to be attributable to Mr McKean, as far as can be assessed at this early stage of proceedings, suggests that, when

balanced against other relevant factors, reinstatement is unlikely to be an appropriate remedy.

[50] I conclude that it is strongly arguable that if Mr McKean is found to have been unjustifiably dismissed his reinstatement would be found to be neither practicable nor reasonable.

Balance of convenience

[51] This requires a balancing and assessment of respective injustices to the parties for the period until the merits of the case can be tried and decided.

[52] There is potential injustice to Mr McKean of not being reinstated before trial but being entitled to that remedy if it is ultimately found, based on tested evidence, that he was dismissed unjustifiably. It is unlikely that the substantive claim will be heard and determined before February 2012. That is some time away. Mr McKean may not be able to find alternative work in the meantime. It is clear that being without employment will present difficulties for Mr McKean and his family in particular and may cause some difficulty to the union in terms of representation issues (it is, however, accepted that Mr McKean could continue to work as part of the negotiating team while not employed).

[53] There is potential injustice to POAL of Mr McKean's interim reinstatement if he is either found to have been dismissed justifiably or if reinstatement is not allowed as a remedy. POAL submits that it would suffer unquantifiable harm if Mr McKean returned to the workplace on an interim basis, while accepting that the company would have the benefit of his work in the intervening period. POAL refute a suggestion that the damage has already been done in relation to the column, pointing out that it remains unclear what damage may have been caused, and may continue to be caused, by the publication. It is not possible to resolve such issues at this stage.

[54] In *Port of Napier Limited v Maritime Union of New Zealand*[20] the Court confirmed that the strength of a case is a relevant factor in determining where the balance of convenience lies.[21] I have concluded that there is presently little strength in the arguments advanced on Mr McKean's behalf in relation to both justification and reinstatement. Compensation (if Mr McKean is found to have been unjustifiably dismissed) will be available to compensate for any loss suffered.

[55] In my view there is strength to POAL's concerns about the likely negative effect on others (including those who appear to have been the subject of Mr McKean's criticisms) if he were to be reinstated on an interim basis.

[56] I conclude that the balance of convenience does not favour interim reinstatement.

Overall justice

[57] Mr McKean appears to be the author of the situation he faces.

[58] He deliberately wrote a highly inflammatory column which he knew would be published in a magazine with a relatively wide audience and which is admittedly available to non union members. It is not a situation where his "musings" were unintended for public consumption, random, or spontaneous. In my view the extent of Mr McKean's contributory conduct and degree of fault attaching to his admitted actions weighs against the application.

[59] The remedy of reinstatement is discretionary. The Court is required to stand back from the detail of the other tests and consider whether overall justice requires reinstatement. I consider that the overall justice follows the balance of convenience, and that Mr McKean should not be reinstated pending determination of his

[60] The application for interim reinstatement is accordingly declined. Costs will be reserved.

Substantive Hearing

[61] A telephone conference is to be convened with counsel to determine suitable dates for hearing and associated timetabling, and other, orders.

C Inglis

Judge

Judgment signed at 4.55pm on 12 October 2011

---

[1] [2011] NZERA Auckland 422.

[2] *Angus v Ports of Auckland Limited* [2011] NZEmpC 125 at [5].

[3] *Cliff v Air New Zealand* [2005] NZEmpC 14; [2005] ERNZ 1.
[4] At [37].
[5] [2011] NZSC 45.
[6] Per Blanchard J at [67].
[7] [1994] NZEmpC 105; [1994] 1 ERNZ 887
[8] At 900
[9] AEC 134/10, 10 April 2001 at [25].
[10]

[11] [2000] NZCA 341; [2000] 1 ERNZ 624.
[12] At para [25].
[13] [1991] NZEmpC 66; [1991] 3 ERNZ 368.
[14] At p 414.

[15] [2007] ERNZ 66 at 110
[16] See too the explanatory note to the Employment Relations Amendment Bill (No 2) 2010.
[17] *Northern Distribution Union v BP Oil NZ Ltd* [1992] NZCA 228; [1992] 3 ERNZ 483 at 487.
[18] *Peterson v Board of Trustees of Buller High School* [2002] 1 ERNZ 139 at [8].
[19] *Madar v P&O Services (NZ) Ltd* [1999] 2 ERNZ 174 (CA).
[20] [2007] ERNZ 826.
[21] At 838.
