

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2016] NZERA Auckland 92
5613182**

BETWEEN JARRON McINNES
Applicant

AND WESTERN BAY OF PLENTY
DISTRICT COUNCIL Respondent

Member of Authority: Eleanor Robinson

Representatives: Shima Grice, Counsel for Applicant
Mark Beech & Tim Condor, Counsel for Respondent

Investigation Meeting: 18 March 2016 at Tauranga

Determination: 22 March 2016

DETERMINATION OF THE AUTHORITY

Application for interim reinstatement

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

[2] Mr McInnes claims that he was unjustifiably dismissed by the Respondent, Western Bay of Plenty District Council, (the Council), on 3 February 2016.

[3] Mr McInnes further claims that he was unjustifiably disadvantaged by actions of the Council failing to ensure his safety at work and suspending his employment from work on 13 January 2016.

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

[5] As required by s 127 of the Act, a signed undertaking has been given by Mr McInnes 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 Tauranga on 18 March 2016.

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. With effect from 1 April 2011 reinstatement is no longer the primary remedy. Under s 125 (2) of the Act as amended, reinstatement may be provided by the Authority if it is reasonable and practicable to do so.

[9] Mr McInnes’ reinstatement remains a remedy available to the Authority. The principles relevant to interim reinstatement applications as determined under the old formulation remain relevant¹. In a decision of the Employment Court, *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 Mr McInnes and by witnesses on behalf of the Council.

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

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

² [2011] NZEmpC 128

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] The Council operates TECT All Terrain Park (the Park), a 1,650 hectares area of pine forest and native bush situated in a remote rural location in the Western Bay of Plenty region which is described on the Council website as an adventure playground.

[13] Mr McInnes was appointed as the Park Ranger in 2009 and lives with his wife and two children in the Park Ranger's House which is situated near to the gates of the Park. Also situated at the entrance to the Park is an Arrival Centre with public toilets, a fireplace, kitchenette and a large deck and outdoor seating area.

[14] Mr McInnes was the sole ranger at the Park, with no immediate recourse to support or back-up personnel in the event of an incident. He had access to cell phone coverage although coverage was limited to small areas of the Park, and a satellite phone system, although this was subject to interference from atmospheric conditions.

[15] In his untested affidavit evidence Mr McInnes stated that the Park Ranger's House is physically accessible to anyone entering the Park, and on many occasions members of the public had knocked on the door for assistance at night.

[16] In his untested affidavit evidence, Mr James Wheeler, Operations Manager and the person to whom Mr McInnes reported, stated that he had a radio set at his home which enabled him to listen to radio messages from the Park.

[17] Mr McInnes stated in his untested affidavit evidence that with effect from December 2015 he had noticed a marked increase in the number of people freedom camping in the Park from approximately 6 per night up to 40 per night on busy nights. These visitors often used the Arrivals Centre because there were no camp facilities, requiring more frequent cleaning of the toilets and creating a noticeable increase in litter.

[18] He had commenced keeping a log on the basis that he believed the infrastructure at the Park would need to be reviewed by the Council in order to support the increased number of freedom campers.

[19] Mr McInnes was provided with an individual employment agreement which he signed on 13 July 2009 and which was signed on behalf of the Council on 15 July 2019 (the Employment Agreement)

[20] The Employment Agreement stated at:

Clause 3: Conditions of employment are governed by the WBOPDC Employees Association Collective Agreement and as provided herein.

Clause 4: The Employer agrees to pay the costs of a cell phone, the landline telephone rental and all business related toll calls. These costs do not form part of the remuneration and it is agreed that the Employer can withdraw the benefit at any time without the agreement of the Employee.

Clause 6: The Employee shall be required to live in the onsite residential accommodation. With effect from Monday 5 July 1020 the accommodation rental of \$150.00 per week shall be waived as compensation for any additional hours of work required to be carried out, over and above the normal 40 hours per week. The rental of \$150 per week does not form any part of the total remuneration.

Clause 8: The hours of work are those required to properly and effectively complete the responsibilities of the position and are within 24 hours per day Monday to Sunday.

Incident on 12 January 2016

[21] On 12 January 2016 Mr McInnes was involved in an altercation with a French tourist who was part of a group of French tourists who had been freedom camping in the Park and utilising the Arrivals Centre.

[22] Mr McInnes stated in his untested affidavit evidence that Mrs McInnes, who was responsible for cleaning the facilities, had alerted him to the fact that she was concerned about the behaviour of the French freedom campers. When he had arrived at the Arrivals Centre at approximately 10.10 p.m., a group of people were drinking and listening to music.

[23] He asked them to go back to their camp site, asked if they had authorisation to drink alcohol in the Park and picked up a nearby bottle of alcohol. Most of the freedom campers complied with his request, but one French freedom camper, M. Le Prunenec, had objected to doing so and had sworn at him. When Mr McInnes challenged him on what he had said, an altercation had developed between them.

[24] Mr McInnes stated in his untested affidavit evidence that both men had grabbed each other's shirts and had fallen to the ground with M. Le Prunennec on top of him. Mr McInnes also stated that other freedom campers were holding him down.

[25] In the attempt to release M. Le Prunennec's hold on him, Mr McInnes stated that he had hit him three times before the hold was released. This had resulted in M. Le Prunennec requiring hospital treatment and stitches to his head. Mr McInnes stated he had sustained a gash to his head, and bruises on his forehead and body.

[26] Mr McInnes had radioed Mr Wheeler who arrived at the scene of the incident approximately 10 minutes later, and the Police were also called to the scene. Statements were taken by the Police from M le Prunennec by means of a French interpreter, from M le Prunennec's girlfriend, and from Mr McInnes.

13 January 2016

[27] Mr Gary Allis, Deputy Chief Executive and Group Manager Infrastructure, stated in his untested affidavit evidence that upon being notified of the incident the following morning by Mr Wheeler and Mr Peter Watson, Reserves and Facilities Manager, it was clear to him that Mr McInnes had been unable to de-escalate a serious situation and serious injury to a Park visitor had resulted. He had considered it would be necessary to suspend Mr McInnes and drafted a suspension letter.

[28] The suspension letter dated 13 January 2016 advised Mr McInnes that he was suspended on full pay and would be required to attend a disciplinary meeting to which he was encouraged to bring a representative or support person.. The letter stated: "*This is a serious incident, may be considered serious misconduct and requires formal investigation. The investigation may result in disciplinary action including dismissal.*"

[29] The letter also required Mr McInnes to provide a written statement of events by 2.00 p.m. the following day, 14 January 2016. The letter did not advise Mr McInnes to seek legal assistance prior to submitting his statement.

[30] Mr Allis stated in his untested affidavit evidence that Mr McInnes was notified by the Council that it would be coming to see him that afternoon, 13 January 2016, and would provide him with the suspension letter.

[31] He stated that when he and Mr Watson had met with him, Mr McInnes was clearly emotional about what had occurred the previous evening, and broke down. He said that the

incident had been discussed with Mr McInnes and he was presented with the suspension letter.

[32] Mr McInnes stated in his untested affidavit evidence that although still shaken by the incident on 12 January 2016, he had provided the required statement by email as requested on the following day, setting out his version of events and stating that he was: “*generally remorseful for this whole situation*”.

[33] Mr Allis stated in his untested affidavit evidence that after meeting with Mr McInnes on 13 January 2016, he and Mr Watson had visited the Arrivals Centre and spoken to some French tourists about the incident and had also seen M le Prunenec. They had visited the facilities and rubbish areas.

[34] Prior to the first disciplinary meeting with Mr McInnes the Council had also contacted Worksafe about the incident, but it had made the decision not to investigate it. Mr Watson also made a request to the Police for the Council to access the Police file.

First Three Disciplinary Meetings

[35] There were three disciplinary meetings held on 20 and 26 January 2016 and 2 February 2016.

[36] Mr McInnes attended the disciplinary meetings with Mr Allis, Mr Watson and Ms Jan Pedersen, Director Organisational Development, accompanied by his brother-in-law, Mr Peter Toner.

[37] Mr Allis in his untested affidavit evidence stated that his impression had been that Mr McInnes at all the disciplinary meetings regarded himself as the victim in the incident.

[38] He stated that the main discussion had centred on the trigger point for the incident and the Council view had been that Mr McInnes, despite his training, had failed to de-escalate the situation which had developed, his approach appearing instead to aggravate the situation.

[39] During the second disciplinary meeting held on 26 January 2016, Mr McInnes stated in his untested affidavit evidence that the Council had referred to a statement made by a French tourist, but he was not provided with a copy of the statement and did not know who had made it. The only statements he had seen were those made to the Police on 12 January 2016 which had not been discussed until the third disciplinary meeting on 2 February 2016.

[40] Mr McInnes stated that Council repeatedly referred to him pouring onto the ground the alcohol from a bottle belonging to one of the French tourists and he repeatedly denied having done so.

[41] He stated that the Council would not listen to his explanation that he had been assaulted by M. le Prunennec.

Preliminary Decision to Dismiss

[42] Mr McInnes stated in his untested affidavit evidence that he had been advised by Mr Allis during the third disciplinary meeting held on 2 February 2016 that the Council CEO, Ms Miriam Taris, had been briefed and had approved the decision to dismiss him.

[43] During the early hours of the morning of 4 February 2016 he had sent an email to Council employees stating: *“I am very sorry for letting you all down. I have lost my position as the resident ranger ... I have had a wonderful time working with you all, working for the council and developing and having a major part in the TECT Park has been the highlight of my working career ...”*.

[44] Mr Allis stated in his untested affidavit evidence that he had received a copy of Mr McInnes’ email and he and Ms Pedersen made the decision to release an official statement to Council staff and user groups.

[45] Mr McInnes stated that he received a copy of the Council email stating that he had ceased employment immediately at 8.56 a.m. on 3 February 2016. He stated in his untested affidavit evidence that Mr Allis had also posted the Council’s statements on Facebook and to user groups. In the statement Mr Allis stated:

It is with regret that I announce that effective immediately Jarron McInnes has ceased employment with the Western Bay of Plenty District Council.

There was an incident at TECT All Terrain Park on 12th January 2016, which resulted in a visitor to the Park being injured and hospitalised.

A detailed investigation was undertaken in conjunction with the NZ Police and Worksafe NZ. The investigation confirmed that there were clear breaches of Council policies. As an outcome of the investigation Jarron’s employment with the Council has been terminated.

[46] Mr McInnes stated that he was made aware of the Facebook posting when he arrived at the Council offices for the disciplinary meeting on 3 February 2016.

Fourth Disciplinary Meeting 3 February 2016

[47] Mr Allis stated in his untested affidavit evidence that Mr McInnes had attended the meeting held on 3 February 2016 accompanied by four support people, including a former Tauranga City Councillor and a former Western Bay Councillor. He stated that during the meeting the support people appeared to want to revisit issues which had already been discussed.

[48] Mr McInnes stated in his untested affidavit evidence that he had asked during the meeting what he had to do to obtain a lesser disciplinary sanction than dismissal to which Mr Allis had asked him if: *“there is anything else that you want to bring into this that would alter how we are viewing the situation”*. Understanding that if he changed his story the penalty would be reduced, Mr McInnes said he had stated that he had poured out the alcohol belonging to a French freedom camper.

[49] Mr Allis stated in his untested affidavit evidence that he had clarified the point relating to the alcohol several times with Mr McInnes who had originally remained firm in his statement that he had not poured out the alcohol. Mr Allis stated that this change of statement had confirmed the Council view that the preliminary decision was the correct one.

[50] Mr Allis also stated that at the conclusion of the meeting after some consideration, the dismissal decision had been reconfirmed and was confirmed in writing in a letter dated 5 February 2016.

An Arguable Case for Unjustifiable Dismissal and for interim reinstatement

[51] As a matter of principle, Mr McInnes 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.

[52] The threshold for an arguable case is relatively low being described in *X v Y Lts and the NZ Stock Exchange*³ as: *“a case with some serious or arguable, but not necessarily certain, prospects of success”*.

³ [1992] 1 ERNZ 863, 872-3

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

Arguable case for Unjustifiable Dismissal

[54] In *X v Y Ltd*⁴ the Employment Court commented that an “arguable case” is: “... a case, with some serious or arguable, but not necessarily certain, prospect of success”.

[55] Mr McInnes’ dismissal was stated in the letter dated 5 February 2016 to be in respect of misconduct which was: “a serious breach of Council’s Policies and Procedures”. The letter also stated that the decision had been made following a: “thorough investigation into the matter”.

[56] The decision to dismiss Mr McInnes 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

- 1) *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).*
- 2) *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.*

[57] In accordance with s 103A (3), and (5) of the Act the Authority must also consider whether:

- (3)
 - (a) *Whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) *Whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*

⁴ [1992] 1 ERNZ 863 at 872

(c) *Whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and..*

(d) *Whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee;*

(4)

(5) *The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were-*

(a) *Minor; and*

(b) *Did not result in the employee being treated unfairly.*

[58] Mr McInnes had been employed by the Council for 7 years at the date of his dismissal. During that time he had not been the subject of any disciplinary procedure, nor of any complaints.

[59] Mr Wheeler stated in his untested affidavit evidence that prior to the dismissal he and Mr McInnes whom he had supervised, had enjoyed a good relationship both inside, and outside of, work. Mr McInnes had developed good relationships with Park users, which I note was acknowledged by Mr Allis in the disciplinary meeting held on 2 February 2016.

[60] I find that at this interim stage the Council investigation appears to have procedural flaws which are more than minor and resulted in unfairness to Mr McInnes. These include:

- The letter dated 13 January 2016 advising Mr Innes of the suspension and requiring a written statement by 2.00 p.m. the next day, despite the fact that Mr McInnes was suspended and Mr Allis was aware on 13 January 2016 on the basis of his untested affidavit evidence that Mr McInnes was still emotional and distressed following the incident;
- The written letter did not advise Mr McInnes to seek legal or independent advice prior to his providing the written statement, and the tight timeframe would have made it difficult for him to do so in any event;

- The lack of a clear demarcation between investigation and disciplinary meetings;
- The fact that the statement allegedly provided by the French tourist and discussed at the meeting held on 26 January 2016, although discussed with Mr McInnes, was not provided to him;
- The fact that based upon the untested affidavit evidence that the Council did not appear to consider Mr McInnes version of events and view that he had been the victim in the incident on 12 January 2016, which was consistently provided at all the disciplinary meetings;
- The approval of the CEO to the preliminary decision made by Mr Allis to dismiss Mr McInnes despite her not having attended any of the meetings.
- The letter from Mr Allis dated 3 February 2016 announcing Mr McInnes termination of employment was distributed prior to the final decision being made;
- That statement referred to the Council's investigation having been made in conjunction with Worksafe NZ, although Worksafe had advised the Council in a letter dated 18 January 2016 that it had decided not to undertake an investigation; and
- No formal investigation report was provided to Mr McInnes for comment.

[61] I also observe that the Council accepted the statement by Mr McInnes that he had poured out the alcohol in the meeting of 3 February 2016 which Mr Allis stated in his untested affidavit evidence had reinforced the Council's decision to dismiss as being the correct one.

[62] I observe that admission had been made following the previous three meetings in which Mr McInnes had consistently denied pouring out the alcohol, and at the time he did make the statement during the fourth and final meeting, he had been advised of the preliminary decision to dismiss, the decision had been distributed by the Council to parties including user groups and posted on Facebook.

[63] I find that a fair and reasonable employer would have taken the circumstances in which the admission was made into consideration; including Mr McInnes' enquiry as to what he could do to obtain a lesser penalty than dismissal, and weighted it accordingly.

[64] Having considered all the circumstances, the documentation supplied, and based on the untested affidavit evidence, I find that Mr McInnes appears to have an arguable case for unjustifiable dismissal.

Arguable case for interim reinstatement

[65] Mr McInnes 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.

[66] Section 125 (2) of the Act states the Authority may provide for reinstatement if it is practicable and reasonable to do so.

Practicable

[67] As stated by the Court of Appeal in *Lewis v Howick College Board of Trustees*⁵:

[2]..... Practicability is capability of being carried out in action, feasibility or the potential for the imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.

[68] Practicability involves considering whether a successful employment relationship can be successfully re-established.

[69] Mr Allis states in his untested affidavit evidence that he has lost trust and confidence in Mr McInnes. I accept that a loss of trust and confidence by the employer can present a strong barrier to reinstatement, however I note the comments of the Chief Judge in *Harris v The Warehouse Limited* that:⁶

Where, as here, an employer resists reinstatement because of a loss of trust and confidence in the former employee as a result of the circumstances of the dismissal, but a review of those circumstances discloses that, reasonably and objectively, the employer did not have such sound grounds to lose trust and confidence, the employer cannot continue to oppose reinstatement for those reasons.

⁵ [2010] NZCA 320 at paras [2]

⁶ [2014] NZEmpC 188 at [162]

[70] In this case, I note that Mr McInnes was involved in a single incident on 12 January 2016. He had worked as a lone employee in the Park for 7 years prior to the incident and there was no previous history of violence or disciplinary action. Mr McInnes had by Mr Allis's own admission, developed a good relationship with Park users.

[71] Mr McInnes had expressed remorse for his involvement in the incident on 12 January 2016 in his statement dated 13 January 2016 and in his untested affidavit evidence states that he is extremely upset by his dismissal from what he regards as his: "*dream job*".

[72] I find that these factors add weight to the finding that this was a 'one-off' incident which is unlikely to reoccur.

[73] In respect of 'reasonableness', it was noted by the Employment Court in *Angus v Ports of Auckland (No 2)* that⁷

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.

[74] It has been stated by Mr Allis in his untested affidavit evidence that he is concerned that there is a possibility of resignations from Mr Wheeler and Mr Watson should Mr McInnes be reinstated.

[75] There is no reference to his intention to resign in Mr Wheeler's affidavit should Mr McInnes be granted reinstatement, and there is no affidavit from Mr Watson.

[76] Whilst it appears there have been exchanges between Mr McInnes, his wife and Mr Wheeler since his dismissal, I note that these are described by Mr Wheeler in his untested affidavit evidence as: '*a bit minor*' and that previously he and McInnes have enjoyed a good relationship both inside and outside work.

[77] I would therefore anticipate that there would be every effort made on the part of Mr McInnes to re-establish a positive working relationship with Mr Wheeler should interim reinstatement be granted.

⁷ [2011] NZEmpC 160 at para [68]

[78] There are no allegations prior to the termination of his employment that there were any issues in the relationships that Mr McInnes had with Council colleagues such as to indicate insurmountable difficulties in re-establishing those previous relationships.

[79] There is untested affidavit evidence from a third party contractor that he would no longer work with the Council should Mr McInnes be reinstated. There is no evidence that this evidence played any part in the decision of the Council to dismiss Mr McInnes, and whilst I accept that there may be a somewhat challenging relationship between Mr McInnes and the Council contractors were he to be reinstated, I do not see this as representing a real barrier to reinstatement being practicable and reasonable..

[80] In the circumstances I find that the interim reinstatement of Mr McInnes is practicable and capable of being carried out in action, it is feasible and there is potential for the employment relationship to be re-established successfully.

Balance of convenience

[81] 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.

[82] As set out in the Employment Court case *X v Y Limited*⁸ this principle requires that the Authority balance the relative inconvenience, in terms of detriment or injury, to the Council which will have to bear the burden of an order reinstating Mr McInnes until the substantive case is heard, against the inconvenience to Mr McInnes who may have a just case, of having to bear the detriment of unjustifiable action until the case is heard.

[83] It is submitted for Mr McInnes that he has not only lost his income as a result of losing his employment with the Council, but he will also lose the home in which he, and his family, live. On that basis, damages will not be an adequate remedy.

[84] Mr McInnes wishes to return to his work at the Park. It is submitted that this would present no issue as regards re-integration to the workforce as he already lives at the Park and largely works alone.

[85] Mr McInnes submits that he has previously enjoyed a positive relationship with Park users and is not a safety risk to them, submitting that the incident on 12 January 2016 was a one-off event for which he has expressed remorse and acknowledged that he has learnt from his mistaken handling of that incident, such that there will be no repetition.

⁸[1992] 1 ERNZ 863, at pg 10

[86] The Council submit that if Mr McInnes is not granted interim reinstatement, his primary loss will be financial, being lost salary, while the loss to it if reinstatement were to be granted would involve a breakdown of its relationship with contractors and other employees who have been affected by Mr McInnes ongoing behaviour post the termination of his employment.

[87] The Council further submits that Mr McInnes' reinstatement would create an unmanageable burden for it in that it would need to suspend him as it could not effectively supervise him. Suspension would involve the hiring of a temporary replacement Ranger, who would require accommodation due to the Ranger's House being occupied by Mr McInnes and his family. This would be expensive.

[88] I observe that Mr McInnes is ready, willing and able to carry out his duties fully if reinstated to his position as Park Ranger. On that basis, suspension is a decision for the Council, but not necessitated by any unwillingness on the part of Mr McInnes to perform the duties for which he would be being paid.

[89] There is no evidence that Mr McInnes has not enjoyed a positive relationship with Park users in the past, or that he would not be able to continue to do so. I note the submission that he has acknowledged the mistake in his handling of the incident on 12 January 2016, such that there would be no repetition

[90] I would therefore anticipate that there would be every effort made on the part of Mr McInnes to re-establish a positive working relationship not only with Mr Wheeler but with all Council employees and contractors should interim reinstatement be granted. In that context I note that there were no allegations prior to the termination of his employment that there were any issues in those relationships.

[91] I also note that there is no evidence in Mr Wheeler's untested affidavit that he intends to resign should Mr McInnes be reinstated, and there is no affidavit evidence to that effect from Mr Watson.

[92] Having considered all the circumstances and the submissions put forward by the parties, balancing the potential prejudice to Mr McInnes of not reinstating him, against the potential prejudice to the Council of doing so, I find that the balance of convenience favours reinstating Mr McInnes.

[93] Taken as a whole, I find that the balance of convenience favours Mr McInnes.

Overall Justice

[94] The Authority must assess the overall justice of the case from a global perspective. This has been described by the Court of Appeal as:⁹

The overall justice assessment is essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and balance of convenience'

[95] I observe that at a substantive level there is a possibility that contributory behaviour may be found on the part of Mr McInnes as a result of the incident on 12 January 2016. I consider at this interim stage that that may impact on the remedies awarded but not to such a degree as to impact on Mr McInnes' ability to obtain interim reinstatement on the basis of the untested affidavit evidence.

[96] I take into account the remorse expressed by Mr McInnes in respect of that incident, his acknowledgment that he has learnt from his handling of that incident, and the evidence of his previous positive relationship with Park users.

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

Determination

[98] For the above reasons the Authority exercises its discretion in relation to interim reinstatement by making the orders sought pursuant to s. 127 of the Act..

[99] I therefore order the interim reinstatement of Mr McInnes as Park Ranger with effect from the date of this determination until the substantive determination of the employment relationship problem pursuant to s.126 of the Act..

Next Steps

[100] The Authority will shortly convene a case management conference to set timetable directions for the investigation of Mr McInnes' substantive claims.

⁹ *NZ Tax Refunds Ltd v Brooks Homes Limited* [2013] NZCA 90 at [47]

Costs

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

Eleanor Robinson
Member of the Employment Relations Authority