

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 423/08  
5138988

BETWEEN                      DAVID ALBERT MERCER  
   Applicant  
  
AND                                MAORI TELEVISION  
   SERVICE  
   Respondent

Member of Authority:        Robin Arthur  
  
Representatives:              Marcus Mitchell Paewai for Applicant  
   Blair Edwards for Respondent  
  
Investigation Meeting:        12 December 2008  
  
Determination:                12 December 2008

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**DETERMINATION OF THE AUTHORITY**

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[1]     David Mercer seeks interim reinstatement until the Authority determines his personal grievance application following an investigation meeting to be held on 17 February 2009. He has lodged the required undertaking as to damages.

[2]     Mr Mercer was dismissed on 30 June 2008 from his position as a camera operator with the Maori Television Service (“MTS”). He lodged a personal grievance application in the Authority on 7 October 2008 seeking reinstatement, reimbursement of lost wages, compensation for hurt and humiliation, interest and costs.

[3]     Mr Mercer raised a personal grievance with MTS by letter on 8 July 2008 and the parties met in mediation on 4 September 2008 without settling their differences.

[4]     Oral submissions on the interim reinstatement application were heard on 12 December 2008. Mr Mercer and his advocate did not attend an earlier hearing scheduled for 11 November 2008 due to some confusion over the meeting date.

## Principles on interim reinstatement

[5] When determining whether to order interim reinstatement the Authority must apply the law relating to interim injunctions having regard to the object of the Act: s127(4).

[6] This requires, firstly, that the Applicant has an arguable case to be determined through subsequent investigation.

[7] Secondly, an assessment is to be made of how best to regulate the positions of the parties until that subsequent investigation and determination of the substantive issues is made. That assessment is referred to as the balance of convenience. Whether effective remedies other than interim reinstatement are available to the Applicant is part of that assessment.

[8] Finally, the Authority is to take a global view of the case and decide what should be done to attain overall justice. Throughout the objects of the Act are considered, including under s3 for employment relationships to be built on good faith behaviour and under s101 to recognise the importance of reinstatement as a remedy.

[9] As noted by the learned authors of *Personal Grievances*, Wellington, Brookers, 2002 at 11.3.06:

*the Court ha[s] drawn attention from time to time to the importance of not seeking the answer to an interlocutory injunction application in the rigid application of a formula. In reality the considerations of whether there is an adequate alternative remedy, where the balance of convenience lies, and the overall justice of the case will often overlap.*

[10] The investigation is confined to the untested evidence contained in the affidavits of witnesses, considering the parties' submissions and reaching a determination after weighing the available information and applying the relevant principles.

[11] If an order for interim reinstatement is to be made, it may be subject to any conditions the Authority thinks fit.

## **Determination**

[12] In determining this application I have considered evidence available through affidavits lodged by Mr Mercer and the MTS operations manager Jason Shazell and the written and oral submissions of the parties' representatives.

[13] MTS also lodged statements from a kaumatua, a general manager, two producers, a camera operator, a team leader, a receptionist and a facilities manager. Those statements support aspects of the arguments of MTS. Mr Paewai submitted that no weight should be placed on those untested statements. I have decided to give them no weight at this interim stage because (i) only one of the eight statements was in the proper form of a sworn or affirmed affidavit as required for consideration on an interim application and (ii) even if taken into account, they would not have changed my decision on the interim reinstatement application. The content of those statements may however be relevant in determining aspects of the substantive issues, where if taken as witness statements they will need to be affirmed or sworn and their contents would be open to testing and challenging through questions.

### *Arguable case*

[14] Mr Mercer worked as a camera operator for MTS from February 2004. Between March 2004 and December 2007 he was formally disciplined on a number of occasions for repeated lateness and an incident involving misuse of an MTS vehicle. He received a final written warning in September 2007.

[15] In December 2007 Mr Mercer and MTS representatives attended mediation with a Department of Labour mediator. They settled issues on the basis recorded in a certified, written agreement. The agreement confirmed his final written warning and provided for six-weekly performance review assessments for the following eight months. Mr Mercer was required to advise his managers of any absence or lateness by one hour before his shift was due to start. Dismissal was identified as an outcome if he did not comply with the obligations of the agreement.

[16] Performance review expectations were set by MTS managers and Mr Mercer was told what was expected of him. Review meetings held in February and April identified that Mr Mercer had, for the most part, met those expectations.

[17] A third review meeting, on 16 June 2008, identified a number of “*not achieved*” or “*unsatisfactory*” aspects of Mr Mercer’s work.

[18] On 27 June Mr Mercer, accompanied by his representative, attended a disciplinary meeting to respond to four allegations regarding lateness or absence at work. His responses were:

- (i) he was late to work by 30 minutes on 26 May 2008 because he was delayed by an accident on the motorway; and
- (ii) he was late to work by 1 hour and 45 minutes on 27 May 2008 because he made a mistake reading his roster; and
- (iii) he called in sick only a few minutes before his shift was due to start on 13 June 2008 because he had a “guts ache” and had been unsure earlier that morning whether he might be well enough to get to work; and
- (iv) he was not late to work by 15 minutes on 16 June 2008, and later produced a car park receipt showing he was there earlier than MTS managers believed.

[19] On 30 June Mr Shazell met with Mr Mercer and advised that his responses to the allegations were not accepted and that he was dismissed because (i) he had failed to meet obligations under the earlier settlement agreement and (ii) his performance as measured through the review process had “*fallen to below the satisfactory level required*”.

[20] Mr Mercer argues that his dismissal was unjustified because:

- (i) The eight-month review period contemplated in the December 2007 settlement agreement had not finished; and
- (ii) He was not given sufficient opportunity and assistance to improve his performance after the unsatisfactory 16 June performance review; and
- (iii) The dismissal decision was pre-determined as evidenced by alleged comments from a senior MTS manager that he was “*just waiting for an excuse to fire [Mr Mercer]*”; and

- (iv) There were procedural flaws in the notification and conduct of investigation and disciplinary meetings called by MTS.
- (v) The alleged instances of lateness were not serious enough to warrant dismissal.

[21] In considering whether there is an arguable case the Authority's role is to see whether, assuming Mr Mercer can prove all the facts he alleges, his case has some serious or arguable, but not necessarily certain, prospect of success. His case is not, at this stage, weighed against any defence which MTS may have except as to fundamental issues such as jurisdiction (which is not in issue here).<sup>1</sup> In a personal grievance of this type, the onus is on the employer to justify the dismissal both procedurally and substantively. The threshold of "arguable case" is usually met once a grievant disputes the basis of the purported justification and seeks to put the employer to proof of it.

[22] On that basis I am satisfied, contrary to MTS's submission, that Mr Mercer's claim is not frivolous. While neither certain nor necessarily strong, on the basis of the substantive and procedural issues raised, his case is clearly arguable.

*Balance of convenience*

[23] I consider the balance of convenience – in the sense of detriment or injury – lies with MTS for the following reasons.

[24] Mr Mercer's application for interim reinstatement was not lodged until early October, more than three months after his dismissal. The investigation meeting on his substantive case is just over nine weeks away.

[25] If he is found to have been unjustifiably dismissed and orders made for his reinstatement, then damages – by way of an award for lost wages for around five months – would be an adequate remedy.

[26] Mr Mercer has been successful since dismissal in getting work as a camera operator on a freelance basis with other employers. His affidavit says that through the

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<sup>1</sup> See *X v Y Ltd & NZ Stock Exchange* [1992] 1 ERNZ 863, 872-873

months of August, September and October he has been able to retain a level of income around seven-eighths of his previous salary at MTS. This freelance work enables him to maintain his skill level and familiarity with equipment and processes in the industry so there could be no barrier on that basis in the event that his reinstatement was later ordered.

[27] The effect on a third party – in this case a new employee – may be a factor weighed in the balance of convenience.<sup>2</sup> MTS has, since 11 August 2008, employed a replacement camera operator. The hours and income of that operator would most likely reduce or end if interim reinstatement of Mr Mercer were ordered.

[28] I note that Mr Mercer put MTS on notice that he would be seeking reinstatement when he raised his personal grievance by letter on 8 July 2008, some weeks before MTS employed a replacement operator. However that letter also referred to lodging an application with the Authority which was not done for another three months. In that time MTS took steps to meet its operational needs by appointing a replacement operator who would now be negatively affected by any interim reinstatement of Mr Mercer.

[29] Given the established history of lateness in Mr Mercer's employment record, there is also the factor of further (potential) disruption to MTS shooting schedules if Mr Mercer were reinstated on an interim basis. I accept the submission of MTS that the television industry works to tight production schedules and high standards of timeliness and performance are required by MTS as a taxpayer-funded service. I weigh that as a factor in the balance of convenience against Mr Mercer at this stage.

#### *Overall justice*

[30] Standing back I consider the overall justice of this matter supports refusing the interim reinstatement application. I reach that conclusion for these reasons.

[31] Firstly, Mr Mercer's case – assessed at a preliminary stage and on the basis of affidavit evidence only – is not strong. There is a clear pattern of repeated lateness which was subject to stringent management under an agreement made in mediation

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<sup>2</sup> *Taylor v Air New Zealand Ltd* (EC Auckland, A122/94, 28 September 1994, Colgan CJ)

around this time last year. While Mr Mercer may be able to cast doubt on the accuracy of some of the evidence against him – particularly around whether he was late on 16 June 2008 – there are earlier incidents in May and June where his own admitted conduct make his case difficult.

[32] Secondly, because Mr Mercer can continue to use his skills as a freelance operator elsewhere, the availability of reinstatement as a primary remedy (if he were found to have been unjustifiably dismissed) is not undermined by any argument that he had become ‘rusty’ by being away from the MTS post for five months or so. Neither does the appointment of a replacement operator prevent a later order for his permanent reinstatement, if that proved practicable. While that might affect that operator’s employment, that is a matter for MTS to deal with if an order of the Authority makes it necessary to do so.

[33] Thirdly, there is now a relatively short period to the Authority investigation meeting to consider the substantive issues during which I do not consider Mr Mercer will suffer any disadvantage to his case or position.

[34] For the reasons given I decline Mr Mercer’s application for interim reinstatement.

### **Next steps**

[35] A timetable is in place for the lodging of witness statements prior to the investigation meeting notified for Tuesday, 17 February 2008.

### **Costs**

[36] Costs are reserved for consideration after the substantive application has been determined.

Robin Arthur  
Member of the Employment Relations Authority