IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 123/10
5305025

	BETWEEN	RICKY MORRISON Applicant
	A N D	WESTLAND CO-OPERATIVE DAIRY COMPANY LIMITED Respondent

Member of Authority:	James Crichton
Representatives:	Andrew McKenzie, Counsel for Applicant Garry Pollak, Counsel for Respondent
Investigation Meeting:	12 May 2010 at Christchurch
Determination:	14 May 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Mr Morrison) was employed by the respondent (Westland) as a storeman/forklift driver at its Christchurch facility.

[2] On 13 April 2010, Mr Morrison was observed (in Westland's terms) driving his forklift negligently and/or recklessly such that Westland's product was damaged. There was an investigation by Westland in which, among other things, it established the extent of the damage to its product. On 30 April 2010, there was a disciplinary meeting between Westland and Mr Morrison. Prior to that meeting, Mr Morrison had been provided with witness statements relevant to the matter and been warned that the matter was potentially serious and could result in dismissal.

[3] At the end of the disciplinary meeting, the applicant was dismissed, Westland deciding that the conduct complained of was, in truth, serious misconduct and that dismissal was the only appropriate sanction. In its consideration of the sanction to be

applied, Westland took into account that Mr Morrison was still on a current final written warning.

[4] Mr Morrison promptly filed his application in the Authority seeking interim reinstatement to his position pending an investigation of the substantive matters which is likely to be dealt with by the Authority in mid-July 2010.

[5] Mr Morrison has provided the required undertaking as to damages, although the efficacy of that undertaking has been put into question by Westland which effectively doubts Mr Morrison's ability to repay *the costs that would have been incurred and his undertaking to the Court* [sic] *is in all likelihood unlikely to be able to be complied with, in the event his grievance is unsuccessful ultimately*.

[6] Moreover, Westland says that the application for interim relief is misconceived because Westland promptly responded to the interim application, prepared its whole case for the substantive matter and confirmed to the Authority that it was ready, willing and able to accept any date which the Authority had available to deal with the substantive application and the application for interim relief in one discrete hearing.

Issues

[7] Section 127 of the Employment Relations Act 2000 confers power on the Authority to order interim reinstatement pending hearing of the personal grievance. Pursuant to subsections (4) and (5) of that section, the Authority has power to grant such orders, subject to any condition the Authority thinks fit, and the Authority is required to apply the law relating to interim injunctions *having regard to the object of this Act*.

[8] In relation to the meaning of the phrase *having regard to the object of this Act*, the dicta of Judge Colgan in *Cliff v. Air New Zealand* [2005] ERNZ at p.1 is of assistance. His Honour makes clear that because s.125 of the Act introduced a requirement that the Authority must provide for reinstatement where that was practicable, where that remedy is claimed and a personal grievance is proved, it followed that *the primacy now accorded by Parliament to the remedy of reinstatement is a relevant factor in considering* ***interim*** *reinstatement* (emphasis added).

[9] The law relating to interim injunctions is usually encapsulated in three or four discrete issues or questions. For the purposes of the present determination, the Authority poses the following three questions, although I note that the question of whether damages might be an alternative remedy will be considered as part of the *overall justice* test:

(a) Does Mr Morrison have an arguable case?

(b) Where does the balance of convenience lie?

(c) What is the overall justice of the case?

Does Mr Morrison have an arguable case?

[10] I am satisfied that Mr Morrison does have an arguable case. This is so despite the failure of Westland to concede that point. Westland's position is simply that there is nothing unique or special about the particular circumstances of the case and there is no suggestion from Mr Morrison that the investigatory process was anything other than fair. Actually that submission goes a little far as Mr Morrison raises issues around the appropriate weight to be given to his existing final written warning and his contention that one of the decision-makers was also the prime witness against him from Westland. However, despite those qualifications, Westland is right to contend that in general no objection is taken to the investigatory process that it engaged in.

[11] Further, Westland contends that Mr Morrison did not come to the most recent disciplinary event *with clean hands* because he was already in receipt of a final written warning. Westland contends that in the particular circumstances of this application, Mr Morrison is seeking an equitable remedy and thus, whether he comes before the tribunal with clean hands or not, is relevant.

[12] For Mr Morrison, as I have already noted, objection was taken to the apparent involvement of the warehouse manager as both a witness to the alleged wrongdoing and a decision-maker. Second, Mr Morrison contended that the weight given to his earlier final written warning was inappropriate and unfair. The essence of this argument is that the final written warning was given to Mr Morrison for smoking in the warehouse. He understood that the warning (and more particularly its consequences) were specific to the smoking issue. Indeed, that is the affidavit evidence both of Mr Morrison and of Mr Kerse, the Union official who looked after

Mr Morrison. It is not the affidavit evidence of Westland which says that it has always given generic warnings which may relate to a particular subject matter but which are taken into account for all subsequent disciplinary purposes. Mr Morrison calls in aid the relevant provision in the applicable collective employment agreement which reads as follows:

> *Further occurrences of actions **falling within the scope** of the final written warning may result in either suspension or other disciplinary action including dismissal.* [emphasis added]

[13] Further, Mr Morrison says that the nature of his alleged wrongdoing properly fell within the scope of ordinary misconduct rather than serious misconduct and therefore the sanction of dismissal was not available to Westland. Mr Morrison also calls in aid of his application evidence in the form of his own affidavit alleging disparity of treatment within Westland's warehouse operation. In essence, it is said that damage in a warehouse operation is a fact of life and that dismissal for causing damage is an unrealistic over-reaction and is inconsistent with the stance taken by Westland in relation to other like incidents.

[14] I am satisfied that the relatively modest hurdle for establishing an arguable case has been met here, principally because I am concerned about the impact of the earlier final written warning on the factual matrix here. There is a straightforward dispute between the parties as to whether the earlier warning was specific to its subject matter or not and I cannot resolve that question without hearing evidence. There is the issue about the meaning of the relevant provision in the collective agreement which again I would hesitate to ascribe meaning to without further evidence and submissions on the point.

[15] Having said that, it nonetheless remains clear that Westland's decision to dismiss was driven by the issue of warehouse damage perpetrated by Mr Morrison and not by his previous final written warning for smoking. I do not see anything in the affidavit evidence before me which would suggest that Mr Morrison was *set up*, with Westland conscious of the fact that he was already on a final warning. What I see from the affidavit evidence is an employer conscientiously and methodically trying to investigate an incident which caused it loss and reaching a fundamental conclusion that Mr Morrison's actions were negligent or reckless rather than simply accidental in nature.

[16] That leads me on to the question of whether it was available to Westland to conclude that this was serious misconduct rather than simply *ordinary* misconduct and thus whether it was available to dismiss on these facts. On the reading of the disciplinary rules provided, there is an issue about that which could be resolved with the hearing of evidence. Similarly, the contention that there is disparity in treatment is also a matter which is incapable of resolution at this early stage where the Authority has not had the opportunity of hearing the witnesses give their evidence and questioning them about conflicts in that evidence.

[17] I am not much attracted by Westland's argument that Mr Morrison has not come to the Authority with clean hands. If that argument were to be accepted, it would seem to preclude any worker making an application for interim reinstatement where they were already the subject of a warning or other disciplinary sanction. Such a result would be repugnant to justice. Furthermore, there is, as Mr McKenzie correctly pointed out, case law supporting the proposition that workers on warnings may still seek interim relief, and even be successful. Going the other way, I am not attracted by Mr Morrison's contention that Mr Ogle's presence in the decision-making panel somehow invalidated the proceeding. I am satisfied with the affidavit evidence before me that Mr Lockington was the decision-maker.

Where does the balance of convenience lie?

[18] The essence of the Authority's obligation in this regard is to evaluate the relative inconvenience to each party, of the other succeeding. In a practical sense, the Authority must weigh the relative hardship to Westland of having Mr Morrison returned to the employment against the potential hardship suffered by Mr Morrison in remaining away from the employment for a further period until the substantive hearing determines the matter one way or the other.

[19] The well known dicta of Chief Judge Goddard in *Melville v. Chatham Islands Council* [1999] 2 ERNZ 70 at p.100 firmly identifies His Honour's view about where that hardship really lies:

> *Where an employee has been dismissed from gainful employment, it is not often that the employer can convincingly assert that the hardship of being required to take an unwanted employee back for a short time is greater to it than the hardship of keeping out an employee who has been unjustifiably dismissed. The hardship from the employer's point of view is simply that it has been prevented from doing what it wants. Any injunction is unwelcome and in that sense is inconvenient.*

> *However, in terms of concept, that is rarely a greater handicap than that suffered by the employee of having something done to the employee that the employee does not want because the consequences for the employee are more drastic. The balance favours the employee.*

[20] Not unnaturally, Mr Morrison grasps the former Chief Judge's dicta firmly to him and seeks to rely on that reasoning. Mr Morrison points out that he is his family's breadwinner and he supports a wife and two children. He has two more children whom he is required to provide financial support to, although they do not live with him. Apart from a stall in a market run by his wife, Mr Morrison is effectively the sole breadwinner. His affidavit details his financial obligations, including significant child support payments.

[21] For its part, Westland says that it paid Mr Morrison one month's notice of his dismissal so, together with holiday pay, Mr Morrison received the sum of $10,699.84 in his final pay. That, it is suggested, mitigates against interim reinstatement on the basis that Mr Morrison will be able to feed his family until the matter is dealt with by way of a substantive hearing in the Authority. Mr Morrison contends that that equation is misguided; he points out that only the one month's notice payment is actually discretionary, the balance being his as of right, and that the total sum paid to him by Westland will be well and truly expended by the time the Authority delivers its substantive decision, if interim reinstatement is not granted.

[22] Furthermore, Westland says that as it was ready, willing and able to commence the substantive hearing immediately (thus avoiding the need for a separate interim hearing altogether), the whole matter could have been dealt with more expeditiously. That last submission, while properly made and reflecting the genuine commitment of Westland to deal with the matter efficiently and effectively, belies the pressure that the Authority is under. The reality is that the Authority could not offer an earlier substantive hearing date for this matter and was only able to offer time for the interim application by changing other arrangements.

[23] I conclude that the balance of convenience favours Mr Morrison. I note that even Westland has some obvious and genuine sympathy for his predicament and, while not resiling from its decision to dismiss, seem to take a proper interest in his welfare. I am satisfied that the inconvenience to Westland is greatly outweighed by the significant hardship to Mr Morrison in his not being able to continue to work and provide income for his family.

[24] Westland raises the question of whether Mr Morrison's undertaking is worth anything. In response, Mr Morrison says that if he were to return to the employment on a temporary basis he would be being paid for his labour and so Westland would incur no cost it would otherwise not incur. Furthermore, to deal with Westland's concern, counsel for Mr Morrison has indicated that the Dairy Workers' Union (of which Mr Morrison is a member) will stand behind his undertaking. I am satisfied that deals with Westland's concern in this matter.

What is the overall justice of the case?

[25] Standing back and evaluating the case on the currently untested evidence before the Authority and the helpful submissions of both counsel, the Authority must look at the overall justice of the case as between the parties.

[26] The untested affidavit evidence and the submissions before me do not suggest a dysfunctional work relationship between Mr Morrison and Westland. It is said that Mr Morrison has not smoked in the warehouse since the final written warning was administered in late 2009. Mr Morrison deposes that he holds no animosity or grudge about what has happened and seeks to prove himself able.

[27] From Westland's perspective, the affidavit evidence before the Authority does not satisfy me that Mr Morrison would be unable to reintegrate into the workplace on an interim basis. There has obviously been some tension, but the message I take from the untested evidence before me is that the tension is not particularly related to the interface between Mr Morrison and Mr Ogle, the warehouse manager.

[28] As His Honour Judge Couch said in *George v. Carter Holt Havey Wood Products Nelson* (unreported, CC6/08, 10 April 2008), the maintenance of the status quo in matters of this kind requires action to preserve the parties' positions as they were prior to the dispute arising. In my opinion, this is a case where there are serious issues to be tried and the appropriate response from the Authority is to protect the status quo by granting Mr Morrison's application for interim reinstatement pending a hearing of the substantive matter.

[29] That decision does not mean that the Authority has already determined the matter. Neither party should assume that the substantive hearing will, for instance, confirm Mr Morrison's position and permanently reinstate him to the employment. All the Authority is doing is saying there are genuine differences between the parties

as to the fairness of the dismissal which are unable to be resolved without a proper investigation which involves hearing the witnesses give their evidence and respond to questions.

[30] For the sake of completeness, I record that I have considered whether damages might be an appropriate alternative remedy to interim reinstatement. I am not satisfied that they would be. I think the emotional connection of a worker to his job is such that interim reinstatement is to be preferred if that is at all practicable and, in the present circumstances, I hold that it is. As His Honour Judge Colgan (as he then was) made clear in *Cliff* (supra), reinstatement is the primary remedy, where claimed, and that primacy flows through to applications for interim reinstatement as well.

Determination

[31] I direct that Mr Morrison is to be reinstated to his employment on an interim basis with effect from the commencement of his normal working day on Monday, 17 May 2010 and he is to remain in the employment fulfilling his normal duties or duties analogous to them until further direction of the Authority. That direction, in a practical sense, is likely to emanate as a result of the determination of the substantive matter or, if this decision is challenged by Westland, might well be the result of a direction by the Employment Court.

[32] Because of the reason for Mr Morrison's dismissal, I direct that he is to take particular care of Westland's product and machinery and is to make a particular effort to behave and work in a exemplary fashion during the period of his interim reinstatement.

Costs

[33] Costs are reserved.

James Crichton
Member of the Employment Relations Authority