

18 July 2006. Remedies sought were reinstatement, and unspecified compensation for (presumably) humiliation, etc lost wages and costs.

- [2] Properly attached to the application was an affidavit from Mr Ripohau (and another) as well as an undertaking by the applicant in respect of damages, per ss. 127 (2) of the Employment Relations Act 2000. I record here that the applicant's long term ability to meet damages in the event of interim reinstatement but failure on his substantive application is seemingly not contested.
- [3] Prior to a telephone conference with the parties on 18 August no statement in reply had been filed by the Company.
- [4] During the 18 August telephone conference the parties agreed that the Company would file its arguments and affidavits by 21 August, they would undertake mediation on 22 August and, in the event the matter was not resolved at mediation, that the Authority would proceed to determine the application for interim reinstatement on the papers after the parties had until 25 August to file any additional arguments and/or evidence.
- [5] The employment relationship problem was not resolved at mediation.

Background

- [6] From the evidence before the Authority I am confident the following is an accurate summary of key events.
- [7] The respondent is an incorporated company carrying out business as a ready-mix concrete producer in Hawke Bay.
- [8] Mr Ripohau was employed at the Company's Hastings plant as a truck driver from 2000 until his summary dismissal on 18 July 2008. At that time he was a union delegate.
- [9] The dismissal followed a recent decision of the Authority that the Company had recently unlawfully discriminated against union members (*Central*

Amalgamated Workers Union v Bridgeman Concrete (Hawkes Bay) Ltd, unrep, G J Wood, 4 Jul 2008, WA 93/08).

[10] On 11 July Mr Ripohau was given a letter from the Company. It raised several serious allegations:

- A complaint had been received from another driver that he was being harassed by the applicant;
- The harassment was because the other driver was not a member of Mr Ripohau's union;
- A second issue concerned Mr Ripohau (not) driving safely;
- The situation was serious and there was a possibility of a finding of serious misconduct and dismissal; and
- Mr Ripohau was not required at work so as to allow him time to reflect on the complaints and respond.

[11] The complaints and other details were set out in a letter signed by the other driver, dated 11 July.

[12] Mr Ripohau met with the Company on 18 July; he was represented by a union organiser.

[13] During the meeting Mr Ripohau denied the allegations of harassing the other driver or that he had driven unsafely; he also raised health and safety concerns about the loading bay.

[14] Following the meeting, and by letter, Mr Ripohau was dismissed. The reason given for his dismissal was:

... you are found to have driven the company vehicle in a dangerous manner.

(refer to the Company's letter of 18 July 2008
attached to the statement of problem)

[15] The letter stated, amongst other things, that:

- Mr Ripohau's response was significantly different from the complainant's and that of another Company employee;
- The Company preferred the version of events provided by the other two Company employees; and
- Mr Ripohau's employment was terminated with immediate effect.

[16] I observe here that only one of the Company employees, not a union member, gave direct evidence in support of his allegations; the other employee's evidence was of a largely circumstantial nature.

[17] Mr Ripohau's final wages and holiday pay were paid out to him; as I understand it they did not include any payment in lieu of notice.

[18] During the telephone conference on 18 August counsel for Mr Ripohau, Mr Peter Cranney, said that the delay between his client's summary dismissal and his application for interim reinstatement resulted from the time it took for counsel to prepare the application (*"That's how long it took to prepare."*).

Parties' Positions

Summary of Applicant's Submissions

[19] On behalf of the applicant, and amongst other things, it is argued that the Company's action in suspending the applicant without allowing him the opportunity to respond or obtain representation was unlawful.

[20] Mr Ripohau seeks interim reinstatement on the grounds he has an arguable case, the balance of convenience favours him and the overall justice of the case favours interim reinstatement.

[21] In his first affidavit sworn on 14 August 2008 Mr Ripohau said, amongst other things, that he was the sole earner in his household, his wife was laid off from her seasonal employment at a freezing works, that he and his wife support two

grandsons aged 12 and 15 years, and jobs were hard to find at this time of the year. Mr Ripohau and his wife have a mortgage of about \$70,000 and finance over their car, with \$14,601.73 to pay.

[22] Mr Ripohau says he was completely shocked by the Company's decision to dismiss him and that he found it very difficult being suddenly removed from the workplace.

[23] In his second affidavit, dated 22 August, Mr Ripohau said he has had no paid work since his dismissal.

Summary of Respondent's Position

[24] In its statement in reply received on 22 August the Company says it takes seriously its obligations to health and safety and has a zero tolerance toward employees who behave inconsistently with their own health and safety obligations.

[25] The applicant was investigated for driving in a dangerous manner, was found to have done so and was justifiably dismissed.

[26] Mr Ripohau enjoyed fair opportunity to obtain legal advice and representation.

[27] Information put to the Authority by other drivers employed by the Company and who are also union members was not put to the respondent during its investigation and is any way irrelevant.

[28] In breach of sub-clauses 31.2, 3 & 4 of the applicable collective employment agreement and their good faith obligations, neither Mr Ripohau nor his union uttered one word in the 4-weeks following the applicant's dismissal. As a result, there is no position for Mr Ripohau to be reinstated to as all operating trucks have drivers assigned to them, a new driver being employed on 21 July.

[29] The applicant's decision to keep his intentions of seeking reinstatement to himself for 4-weeks is fatal to his argument as to the balance of convenience.

Discussion and Findings

- [30] As is accepted by the parties, the grounds for considering an interim reinstatement application are well settled.
- [31] Is there an arguable case? Properly, the respondent concedes in its submissions received on 22 August that the threshold test is not high but submits that the remedy sought of reinstatement is weak because of the delay in filing the proceedings and the applicant's silence during that period. I do not accept that conclusion because it would result in Mr Ripohau, having sought union/legal representation, 'wearing' the consequences of his representative's admitted responsibility for the 4-week delay between the dismissal and the application. As it happened, arrangements were made in the week starting 21 July so that the applicant could meet with his counsel and instruct him as to proceedings (par 12.13 of the applicant's submissions dated 25 August 2008).
- [32] Mr Ripohau could also reasonably have expected his representatives to meet his/their good faith and collective employment obligations to promptly communicate the applicant's intentions to the Company. However, I note here that the Company acted with considerable speed any way in filling Mr Ripohau's vacancy, apparently as soon as 3-days after his dismissal, i.e. the dismissal occurred on Friday 18 July and the new employee commenced on Monday 21 July 2008.
- [33] The balance of convenience is properly addressed, I believe, by having greater regard to the applicant's continued unemployment, his status as family breadwinner, his family's financial obligations, the delay before a substantive investigation can be scheduled (i.e. a likely late November date unless the parties are able to make themselves available sooner) over the arguable failure of the applicant and his representatives to promptly communicate his grievance and the absence of a vacancy for the applicant to be reinstated to. As already commented on, the Company acted with speed to replace Mr Ripohau: given the level of legal expertise available to the respondent, and the stance adopted by the applicant's representative in the meeting of 18 July, I am satisfied it is fair and reasonable to conclude that the Company replaced Mr Ripohau while conscious of a risk of a challenge to its summary dismissal decision. I am

satisfied the applicant should not bear the consequences of the respondent's initiative.

[34] I do not accept that other remedies are effectively available to Mr Ripohau, should his substantive application succeed, because of the delay that will inevitably result from setting down, and awaiting the outcome of, a substantive investigation.

[35] Finally, for the reasons set out above and as follows, the overall justice of the case favours the applicant: that is because there is on the evidence a background of conflict between Mr Ripohau and the complainant (at least as far as the latter is concerned); there is no evidence of intent on the applicant's part; the Company's investigation did not uphold all of the complaints against the applicant, including the serious allegation of harassment; Mr Ripohau proffering – on its face – a credible account for what might have caused one of the incidents complained of (an account supported, as it turns out, subsequently by other drivers); the questionable significance or degree of seriousness of the alleged dangerous driving; the Company appearing to have applied a 'zero tolerance' policy whereas some case law requires a cautionary approach to such a policy and consideration of alternatives to dismissal (*Housham v Juken NZ Ltd* [2007] 4 NZELR 389, par 25); and because the Company's decision was based on preferring the complainant's version to that of the applicant whereas there is no evidence of previous warnings of Mr Ripohau for dangerous driving or anything other than a good working relationship between the parties during his 8-years service with the respondent while there is evidence of a background of significant tension between union and non-union members at the worksite.

Determination

[36] For the reasons set out above, Mr Ripohau's application for interim reinstatement succeeds. On receipt of this determination the applicant is to be reinstated without loss of service or income from 18 July 2008; subject to discussions between the parties as to suitable arrangements for his return, he is to resume his driving position with the respondent from Monday 1 September 2008: s. 127 of the Act applied.

[37] The Authority will be in touch with the parties shortly to arrange a substantive investigation on an as soon as possible basis. The parties should look to undertake further mediation in the meantime in anticipation of a direction from the Authority to that end unless good reason is advanced as to why the Authority should not apply s. 159 of the Act accordingly.

[38] Costs are reserved.

Denis Asher
Member of the Employment Relations Authority