

**IN THE EMPLOYMENT COURT
CHRISTCHURCH**

**[2010] NZEMPC 123
CRC 36/10
CRC 37/10**

IN THE MATTER OF challenges to determinations of the
Employment Relations Authority

CRC 36/10

BETWEEN

DAMIEN MICHAEL BURTTON
Plaintiff

AND

TALLEY'S GROUP LIMITED
Defendant

CRC 37/10

BETWEEN

KARL PETER BROWNE
Plaintiff

AND

TALLEY'S GROUP LIMITED
Defendant

Hearing: 9 September 2010
(Heard at Nelson)

Appearances: Steven Zindel, Counsel for Plaintiffs
Garry Barkle, Counsel for Defendant

Judgment: 14 September 2010

JUDGMENT OF CHIEF JUDGE GL COLGAN

[1] The plaintiffs challenge the determinations¹ of the Employment Relations Authority refusing to grant them interim reinstatement in employment pending the investigation and determination of their personal grievances that they were dismissed unjustifiably by Talley's Group Limited (Talley's). The Authority issued separate determinations for each plaintiff although their contents are largely but not completely identical at least so far as the results and essential reasoning are

¹ CA 150/10, 26 July 2010; CA 151/10, 26 July 2010.

concerned. I have dealt with the challenges together, both at the hearing and in this judgment, although the circumstances of each are distinct and will be so addressed.

[2] Damien Burtton and Karl Browne were crew members on one of Talley's ocean going fishing vessels who were dismissed summarily in May 2010 for illegal drug possession, illegal drug use, and illegal drug supply and for reasons of loss of trust and confidence. There is extensive affidavit evidence in support of and in opposition to, the plaintiffs' applications for interim reinstatement in employment. They say that they were disadvantaged unjustifiably in their employment and, subsequently, dismissed unjustifiably in breach of both of the statutory tests under s 103A of the Employment Relations Act 2000 (the Act). They must establish, and say that their cases do establish, that not only do they have arguable cases of unjustified dismissal but that they also have strong cases for reinstatement in employment and not merely monetary compensation for its unjustified loss.

[3] On 12 May 2010 the crew of the defendant's fishing vessel, "Enterprise" were preparing to sail from Nelson on the following day. The defendant arranged for a search of the vessel, and the crew's possessions on it, by a drug detection dog. The dog indicated an interest in the luggage of several crew members including Mr Burtton and Mr Browne and, although there were comprehensive searches of their possessions as well as of the vessel, no illegal drugs were found, either linked to Messrs Burtton and Browne, or more generally.

[4] Each plaintiff was, however, interviewed by company representatives including a private investigator who was formerly an experienced police detective. Mr Browne denied possessing or using narcotics on board the vessel although admitted that he once "did drugs" but had ceased involvement with them a year previously. Mr Browne was suspended from his employment, that is he was stood down from the vessel's crew for the imminent voyage and was required subsequently to attend a further interview with company representatives. His suspension was without pay.

[5] At his separate initial interview, Mr Burtton also denied any knowledge of unlawful drugs on the vessel and any personal involvement in unlawful drug use. At

a subsequent interview after he too had been suspended or stood down without pay from vessel's crew, Mr Burtton was asked whether he had made a telephone call to Mr Browne on the day of the search. He replied that he had not. When pressed on the matter, he eventually conceded that he had telephoned Mr Browne.

[6] A representative of the employer searched Mr Burtton's mobile phone and located Mr Browne's name and number in the telephone's memory. Although Mr Burtton explained this by saying that he had these details for the purposes of maintaining contact with shipmates, Talley's did not accept this innocent explanation and formed the view that Mr Burtton had had a longstanding friendship with Mr Browne but had lied about the nature of their relationship during his interview. The defendant says that Mr Browne's details were stored in Mr Burtton's phone's directory in a way that suggested that their acquaintance included a common interest in unlawful drugs.

[7] At a subsequent investigation meeting, following a lengthy suspension, Mr Burtton was faced with allegations that he had been seen using the unlawful narcotic known colloquially as pure methamphetamine, or "P", whilst at sea and that he had supplied this narcotic to young female crew members. No details of these allegations or of their maker were disclosed to him. Mr Burtton denied these allegations but his denials were not accepted by the employer. Added to its rejection of his explanation of his relationship with Mr Browne, the employer concluded that Mr Burtton should be dismissed summarily as he was on 25 June 2010.

[8] Mr Browne was also told at a subsequent interview that the employer had statements from crew members alleging that they had seen him "do drugs". Mr Browne denied these allegations. He was then given an opportunity to resign and did so fearing that if he did not, he would be dismissed. He says that in these circumstances his resignation on 18 June 2010 was a constructive dismissal.

[9] The Authority found, on the defendant's own admission, that if Mr Browne had not resigned he would have been dismissed which may tend to confirm the correctness of Mr Browne's assessment that he was dismissed constructively.

[10] In the case of Mr Browne, also, the Authority found it significant that he was suspended for about 4 weeks without pay before he was dismissed constructively. The Authority concluded that Mr Browne had an arguable case that the manner of his dismissal was not how a fair and reasonable employer would have acted in all the circumstances. That related to the employer's refusal to permit Mr Browne to have the assistance of a lawyer in circumstances where, having arranged to travel from Auckland to Nelson to attend a meeting arranged by the employer, Talley's first cancelled the meeting and then declined to make alternative arrangements which would have allowed Mr Browne to be legally represented at a rearranged meeting.

[11] As to the arguable case that the Authority found for Mr Burtton, it concluded nevertheless that this was not a strong case. It conceded that there may be what it described as:

... procedural infelicities in the way in which Talley's dealt with this matter
... the substance of its decision in recognising that the evidence before the Authority is limited to sworn affidavit form, appears to be robust enough to justify the conclusion that it was available, to a fair and reasonable employer, on the balance of probabilities, to reach the conclusion that it did".

[12] However, the Authority concluded that the employer was entitled to believe what it said was the evidence that Mr Burtton had used pure methamphetamine on the voyage and had supplied it to female staff. The Authority further found that "the evidence was incontrovertible that Mr Burtton had lied about the extent of his relationship with Mr Browne." It seemed inevitable to the Authority that, Mr Browne having been caught out in one lie, the employer "would prefer the evidence of other crew and the drug dog that Mr Burtton was involved with illicit drugs."

[13] The Authority concluded that each of Messrs Burtton and Browne had "an arguable case". It did not say of what. That is not a pedantic criticism because the law on interim reinstatement clearly shows that grievants such as the plaintiffs in this case must not only have an arguable case of unjustified dismissal but also an arguable case for reinstatement in employment.

[14] Turning to the balances of convenience, the Authority found that these lay with the employer in each case. In that of Mr Browne, the Authority said that this

was because of “the absence of any proper explanation about the very significant allegations made against him by Talley’s” including the absence of any explanation “about why the drug dog should be interested in Mr Browne’s luggage or why Mr Browne’s co-workers would say that he had been seen doing drugs on the ship if that was untrue.”

[15] The Authority also found it so significant as to make it probably true that Mr Browne had used unlawful drugs, that he had what the Authority concluded was a nickname in Mr Burtton’s electronic phone contact records at about the same time as Mr Burtton was dismissed by the same employer. The Authority also found it significant Mr Browne had admitted that he had formerly been a drug user and had ceased to be so but that this was “not consistent with the drug dog’s view or with the opinion of the other members of the crew.” Quite how the Authority reached the conclusion that Mr Browne had not ceased to be a drug user in the view of the dog, is puzzling and not explained.

[16] It is difficult to agree with several elements of the Authority’s reasoning just set out. It would not have been incumbent on Mr Browne to explain to the employer why other crew members might have said that he was using and supplying unlawful drugs when he had been given no information about who had said so, when these events had taken place, and provided with other information essential to the ability to give an explanation. Nor does it follow ineluctably from Mr Burtton’s use of a nickname in his own electronic records that Mr Browne was thereby guilty of involvement with unlawful drugs.

[17] In the case of Mr Burtton, the Authority concluded that monetary compensation will be an adequate remedy for him if he is able to establish that he was dismissed unjustifiably. This would be, in the Authority’s view, preferable to the imposition of an order for reinstatement on an unwilling employer in the meantime. Although acknowledging that Mr Burtton’s lengthy suspension had been without pay and that he was suffering financial stress as a consequence of the dismissal, the Authority was not satisfied that interim reinstatement would be the proper exercise of the Authority’s discretion. This was reinforced for the Authority

by its conclusion of Mr Burtton's weakly arguable case, principally on grounds of procedural irregularities. The Authority concluded:

On the basis of the affidavit evidence before the Authority, I think the substantive decision was sound in that it was available to Talley's to reach the conclusion that it did.

[18] The Authority also found that the overall justice of the cases favoured the employer in each instance. In Mr Browne's, the Authority thought it best to preserve the status quo (of dismissal) until the Authority was able to have a substantive hearing to hear and consider all the evidence. It was apparent to the Authority:

... from the evidence submitted in affidavit form by Mr Browne's supporting his friend, Mr Burtton, that he had not been entirely accurate in his recollection of events. Given that he has chosen to be selective in his recollection in sworn affidavit evidence before the Authority, it is difficult for the Authority to feel that it can rely on this other testimony in his own cause and accordingly the Authority is not minded to exercise its discretion in Mr Browne's favour.

[19] As to overall justice in Mr Burtton's case, the Authority clearly had some doubts that, after reading the affidavits of the witnesses, it would conclude that there was even procedural unfairness. It described the employer's decision as "robust", based on the affidavit evidence and, given "the evident dishonesty of Mr Burtton" it declined to exercise its discretion in his favour.

[20] Counsel for the plaintiffs has criticised some of the Authority's findings, or at least the way in which these have been expressed in its determinations, which are said to have impacted particularly adversely on the plaintiffs because of the news media publicity of them. For example, at para [12] of the Authority's determination in Mr Burtton's case, the Authority states: "There was evidence of Mr Burtton using P on the vessel and supplying P to female staff. Mr Burtton denied that evidence. Talley's chose to believe it." It is, however, more accurate to say that there were allegations from (then) anonymous sources that Mr Burtton had used pure methamphetamine and even more vague allegations that he may have supplied the same drug to female staff. That was not "evidence" before the Authority but, rather, an allegation made to the employer that it accepted but which is still untested before an independent fact finder.

[21] At para [13] the Authority wrote, again in Mr Burtton's determination:

Further, the evidence was incontrovertible that Mr Burtton had lied about the extent of his relationship with Mr Browne. Given that Mr Burtton had been caught in a lie by Talley's in relation to his friendship with Mr Browne, it seems to the Authority inevitable that, in those circumstances, Talley's would prefer the evidence of other crew and the drug dog that Mr Burtton was involved with illicit drugs.

[22] It is, however, far from incontrovertible at this stage that Mr Burtton lied about his friendship with Mr Browne. It would have been simply impossible for the Authority to have reached such a definite conclusion on a matter that was in dispute simply by reference to contrary affidavits. It was also wrong for the Authority to have apparently drawn a conclusion that "the evidence of ... the drug dog" made it inevitable that the employer would disbelieve Mr Burtton's case, even on an interlocutory hearing. Those questions are still very much alive and it is very unfortunate that the Authority has both apparently reached very firm conclusions and has expressed those so absolutely.

[23] Even more unfortunately, the Authority gave no indication in its determinations when the substantive cases of the grievance might be investigated. The delay before investigation and determination by the Authority is a very relevant consideration in the applications for interim reinstatement. That omission has now been rectified at the Court's insistence and it is now known that the Authority's investigation meeting(s) will begin in early December 2010.

Arguable cases of unjustified dismissal and for reinstatement

[24] I have reached very different conclusions from those of the Authority about the strengths of the plaintiffs' arguable cases of unjustified disadvantage and unjustified dismissals from employment. Applying, as I must, the s 103A tests, the plaintiffs impressed me as having strong arguments that the manner in which the defendant dealt with them leading to their summary dismissals was not how a fair and reasonable employer would have done that in all the circumstances. The arguable failures to meet the s 103A tests include, but are not limited to, the following.

[25] The employer provided only scant information of very serious allegations of misconduct in employment. In addition to relying on very vague allegations of serious misconduct, the employer also reached conclusions adverse to the plaintiffs in reliance on their body language and impressionistic assessments of credibility which were never put to the plaintiffs for their comment or explanation. At very important stages of its investigations, the defendant did not ensure that employees facing allegations that also amounted to serious criminal offending, were adequately represented. The suspensions of the plaintiffs were lengthy, without pay, and largely without any communications with them about their progress despite statutory obligations requiring this. Despite, in at least one case, a request for essential information about the allegations, this was refused by the defendant.

[26] There are other uncontroversial aspects of the processes that led to the plaintiffs' dismissals that also support strongly arguable cases of an absence of justification under s 103A.

[27] There is an important issue in the case that has been the subject of a recent development since the Authority's investigation and which is very relevant to interim reinstatement. The identity of one of the defendant's informants and the documentation created at the time the allegations were first made to the defendant, have now been disclosed. The circumstances in which this occurred will be important in determining the truth or otherwise of the allegations.

[28] On 6 May 2010 another employee, Luke McPadden, admitted smoking cannabis after a crew social event on the previous evening. Mr McPadden was interviewed by the defendant's deep sea division personnel manager, Rebecca Plum, who warned Mr McPadden that he could be subjected to a disciplinary inquiry which might result in his dismissal. Mr McPadden was questioned about the identities of other crew members present when he smoked cannabis and who may also have done so at the same time. Mr McPadden named a number of other employees but these did not include either of the plaintiffs. Again, when he was asked to identify regular cannabis users among the crew he did so but the names suggested did not include those of the plaintiffs. Ms Plum's questioning then turned to the use of "P" by crew members. Mr McPadden asked for an assurance that information he passed on

would be kept confidential and Ms Plum provided this assurance. Ms Plum's record of her interview with Mr McPadden continued:

So I asked him if he knew of it being used at sea. Luke told me he had witnessed P being used on the vessel. He gave me the names of Karl Browne,... Damien Burtton and ...

...

Luke told me that Karl Browne would often start shift looking very tired, then head down to the meal plant, smoke some P and 'be charging for the rest of the shift'. He said his eyeballs would often be 'popping out of his skull'.

...

He said he had never touched or consumed P. He said he had smoked marijuana occasionally, when offered it at a party, but has never brought [sic] it. He said he's very afraid of losing his job, and would be willing to do whatever it took to keep it.

[29] As may be seen, these allegations against Messers Burtton and Browne did not include any details of times, dates, places, voyages, vessels, or the like.

[30] The foregoing information has only been made known to the plaintiffs since Ms Plum swore an affidavit on 6 September 2010, a matter of only a few days before the hearing.

[31] Mr McPadden swore an affidavit in support of both plaintiffs on 27 August 2010 in this proceeding. In this affidavit he denies "rumours circulating amongst the crew that I informed Talley's, that Damien and Karl were seen taking P on the Enterprise vessel." Mr McPadden's affidavit, although giving an account of his presence on the vessel on the morning of 6 May 2010 after he had smoked cannabis, and of a search by a drug dog, does not deal with the events later that day deposed to by Ms Plum.

[32] Mr McPadden says that on 18 June 2010 he attended a meeting with his employer. He says his father was present at that meeting. He says that when Ms Plum asked whether he knew of any crew who smoked "crack" he assumed that she meant the drug "P" and answered emphatically that no one smoked P or "dope". Mr McPadden says that after an adjournment the employer's representatives told him that they believed him and, in particular, that he had not had possession of any drugs on the vessel Enterprise.

[33] He says that he was then required to undergo a drug test on 18 June 2010 which subsequently proved positive although he was not given by Ms Plum anything more than a verbal indication of this result. He says he was told that despite the drug test result, Talley's would permit him to return to seafaring duties if he attended a rehabilitation programme and he agreed to do so. Mr McPadden says he was stood down from his next scheduled trip on the Enterprise beginning on about 24 June 2010 and although he continued to be paid until 11 June 2010, he has not received any income from the company since then. He says that he has since begun work for another employer.

[34] Mr McPadden then deposes to receiving a telephone call from Ms Plum on 6 August 2010 in which she asked him to meet with her to discuss "how I had seen Damien Burtton and Karl Browne smoking P on the boat." He says that he could not understand why this request was made of him on 6 August 2010 because he had not at any time given Talley's any reason to believe that he had witnessed such events. The telephone call was discontinued promptly.

[35] Mr McPadden's father, Timothy McPadden, confirms on affidavit his son's evidence about the meeting on 18 June 2010 attended by the company's Mr Hazlett and Ms Plum and another, possibly the company's lawyer.

[36] It is difficult, if not impossible, to reconcile many of the discrepancies between Ms Plum's and Mr McPadden's evidence. It is also difficult not to conclude that one of these two witnesses is untruthful about very significant events affecting Messrs Burtton and Browne. Although each witness has committed himself or herself on oath, it is simply not possible at this stage of the case to determine where the truth lies.

[37] The existence of such a stark and important conflict of evidence is a relevant consideration and, on the balance of convenience test, tends to favour the maintenance of the status quo.

[38] Mr Barkle advised me that one of the other so far anonymous informants is an officer on the vessel "Enterprise" who is apparently content to disclose his or her

identity. His or her consent to disclose that information has been sought but not yet received. It seems likely that if this officer is unwilling for the defendant to make these belated disclosures, the plaintiffs will, depending on where the substantive grievances are heard, either apply to the Authority to have it direct the disclosure of this information or, alternatively, to seek it by a combination of document disclosure and interrogatories in this Court.

[39] Although having strong arguments of unjustified disadvantage in employment and unjustified dismissals from it, the cases at this stage must focus on the strength of the plaintiffs' cases for reinstatement as one factor in determining whether there should be interim reinstatement.

[40] Each of the plaintiffs has a strong case of unjustified dismissal pursuant to s 103A of the Act. But it is also necessary for each plaintiff to establish that he has at least an arguable case for reinstatement assuming a finding of unjustified dismissal. Further, the strength of the arguable case for reinstatement will be a factor going to the Court's assessment of where the balance of convenience may lie until determination of that issue by the Employment Relations Authority. Finally, the Court must also be satisfied that the interests of justice are met by an order for interim reinstatement.

Balances of convenience

[41] The defendant's cases against each plaintiff raise serious allegations of misconduct in employment which will require careful and objective investigation by the Authority. Although the defendant says now that the plaintiffs were dismissed primarily because it had lost trust and confidence in them arising from factors other than the original allegations of drug possession, drug use, and drug supply, I conclude that those original and serious allegations were the major incentive for, and the real reasons leading to, the dismissals.

[42] If those allegations of unlawful drug possession, use and supply are able to be established or if the employer is able to persuade the Authority that a fair and reasonable employer would have decided they were true, then there can be little

doubt that the plaintiffs' dismissals were justified in all the circumstances. Safety at sea is paramount and the defendant has appropriately strict rules prohibiting the consumption of drugs or alcohol on its working vessels. Mr Zindel accepted this analysis of the position.

[43] The defendant's case, on sworn affidavit evidence, is that other crew members have reported to it that the plaintiffs had possession of, had used, and had supplied to others, prohibited narcotics. The identities of some of those informants have yet to be disclosed to the plaintiffs or to the Authority or the Court. The identity of one of those informants, and what he is alleged to have said to the company's human resources manager, has now emerged. Whether the defendant must now disclose the identities of those other informants, and the veracity or reliability of the evidence of those informants, will be important questions for the Authority in determining the truthfulness or otherwise of the serious allegations made against the plaintiffs. Whether the plaintiffs did what they were alleged to have done (and as the defendant apparently accepted) will be a very important question in determining whether they were dismissed unjustifiably.

[44] Another element of the case that favours the defendant's position is that the vessel to the crew of which the plaintiffs seek to be reinstated is and will remain at sea for the next four to five weeks so that, effectively, reinstatement would be practicably impossible during that period.

[45] Another factor pointing against reinstatement involves the unique features of this case. The defendant's informants are said to be other members of the vessel's crew. The defendant is not necessarily opposed adamantly to the disclosure of these persons' identities to the plaintiffs. It wishes to discuss with them whether it will do so voluntarily but even if those informants do not agree, it is very likely that the plaintiffs will apply to the Authority or to this Court for a direction requiring those so far anonymous informants to be identified.

[46] Without deciding the question, there are strong arguments for that disclosure to occur. If it does, it raises the undesirable possibility, if the plaintiffs are reinstated, of such persons all being confined at sea on a relatively small vessel and,

at least potentially, having to work together co-operatively in these circumstances. Given the seriousness of the allegations against the plaintiffs and the natural human emotions of informants and those informed on in these circumstances, there is a real risk of conflict between them if the plaintiffs are to be reinstated to the operating crew of the vessel as they wish. Although this may still be a consideration for the Authority if and when it comes to consider an application for substantive reinstatement, that decision will at least be able to be made against a background of a determination of the truth or otherwise of those allegations.

[47] In practice, the balance of convenience is a weighing up of two potential injustices. The first is the potential injustice to the plaintiffs of their continued unemployment in the event that they are found to have been dismissed unjustifiably and are entitled to reinstatement in employment. The other potential injustice is to the defendant of having to take the plaintiffs back at work on its vessel or vessels in the event that either the drug allegations are established or that the employer's conclusion that they were established is found to be a fair and reasonable conclusion by the employer in all the circumstances. It is a fine balance but one, nevertheless, that favours the defendant's position in the period until the Authority can determine these issues.

Overall justice

[48] At the hearing on 9 September 2010 counsel advised me that the Authority Member who heard and decided the applications for interim reinstatement has said that he is able to begin his investigation of the substantive grievances on 8, 9 and 10 December 2010. Some doubts were expressed by counsel at the hearing whether this would be an adequate time for an investigation meeting but that will need to be taken up with the Authority in its pre-investigation meeting procedures.

[49] The delay from dismissal to commencement of the Authority's investigation will therefore be in the order of five months. Realistically, and consonant with the need to give these claims careful and detailed consideration, it is probably unlikely that the Authority will issue its determination until early 2011. That may, in turn, mean a potential delay of up to seven months before it is known whether the

plaintiffs may be reinstated in employment. As I understand the Authority's practice, this is somewhat longer than usual or desirable. I do not know whether the present difficulties of conducting Authority investigations in Christchurch might mean that its investigation in Nelson can be commenced sooner. There is also the issue of availability of witnesses on ocean going vessels although counsel seem to be agreed that the current anticipated delay will enable the defendant to rearrange its crewing schedules to ensure that witnesses are available to participate in the Authority's investigation meeting in early December.

[50] Such is the importance of crew compatibility and safety at sea on a working fishing vessel that I consider, although again by a close margin, that the overall justice of the case is that there should be no interim reinstatement of the plaintiffs at this time. The delay until the Authority can investigate and determine the grievances is another factor in favour of not reinstating in the interim, despite the severe economic consequences to the plaintiffs of such a delay and continued unemployment or underemployment.

Result of challenge

[51] For the foregoing reasons, the plaintiffs' challenges are dismissed. As did the Authority, although not for the same reasons or with the same degree of apparent certainty, I decline the plaintiffs' applications for interim reinstatement in employment.

[52] Costs are reserved.

GL Colgan
Chief Judge

Judgment signed at noon on Tuesday 14 September 2010