**IN THE EMPLOYMENT COURT**
**AUCKLAND**

**[2011] NZEmpC 125**
**ARC 69/11**

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| IN THE MATTER OF | proceedings removed from the Employment Relations Authority |
| AND IN THE MATTER OF | an application for interim reinstatement |
| BETWEEN | ANDREW ANGUS<br>Plaintiff |
| AND | PORTS OF AUCKLAND LIMITED<br>Defendant |

Hearing: 4 October 2011
(Heard at Auckland)

Appearances: Simon Mitchell, counsel for plaintiff
Richard McIlraith and Kylie Dunn, counsel for defendant

Judgment: 5 October 2011

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**INTERLOCUTORY JUDGMENT OF CHIEF JUDGE G L COLGAN**

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[1] The issue for determination now is whether Andrew Angus should be reinstated in employment with Ports of Auckland Limited (POAL) until his personal grievance (unjustified dismissal) is decided by this Court.

[2] Mr Angus's grievance and his application for interim reinstatement have been removed to the Court for hearing at first instance by the Employment Relations Authority[1] at its own instigation as it is now entitled to do. That was not only because this is one of the first cases in which the new test of justification for dismissal under s 103A of the Employment Relations Act 2000 (the Act) has arisen for consideration in the Authority but, more immediately, because this is one of the

[1] [2011] NZERA Auckland 401.

first cases in which the new test for reinstatement in employment is for consideration under s 125.

[3] The issues for decision are, therefore:

- whether the plaintiff has an arguable case that he was dismissed unjustifiably as that is now defined by new s 103A of the Act;

- whether the plaintiff has an arguable case for reinstatement in employment (applying the new test for reinstatement under s 125 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

- whether the overall justice of the case dictates that interim reinstatement in employment is appropriate.

[4] This interlocutory judgment cannot and does not determine (and certainly not authoritatively) what these new sections mean. That is because of the tests (set out above) applicable to an application for interim reinstatement which are the same as the tests for interlocutory injunctive relief in other proceedings. Mr Angus's application for interim reinstatement has been brought on, heard, and decided at short notice. The only evidence before the Court is on affidavits filed by each of the parties. There has been no cross-examination of witnesses (as may be a particularly important feature of this case) and the parties have not had the usual opportunity to present detailed submissions about the law and the new law in particular.

[5] Nevertheless, even at this stage, the Court must take account of the new state of the law. Parliament has changed the previous position and, in very general terms, has both sought to make it easier for employers to justify dismissals and to make it more difficult for employees to be reinstated if they have been unjustifiably dismissed. That much can be said uncontroversially. Precisely how the Court (and the Authority) are to go about applying the new rules in particular cases will have to wait until this case is decided substantively.

[6] I start with the defendant's stated grounds for Mr Angus's dismissal. These were set out in a letter to him dated 8 September 2011 as follows:

> **RE: OUTCOME OF DISCIPLINARY INVESTIGATION**
>
> 1. The purpose of this letter is to confirm my final decision in terms of an appropriate disciplinary outcome following my finding that you committed serious misconduct.
>
> 2. In response to my letter of 7 September 2011 (which set out the finding of the disciplinary investigation and my preliminary view in terms of an appropriate disciplinary outcome), your representative, Simon Mitchell requested that I take a series of additional points into account before reaching a final decision.
>
> **THE NATURE OF THE NOTES**
>
> 3. It was submitted that you wrote the note out of silliness, it was a joke that went wrong and you did not consider it would cause offence. You also confirm your willingness to attend an anti-racism workshop in order to assist you in the future.
>
> 4. As previously stated PoAL regards the document as a written application, not a note. Your explanation is consistent with your earlier written statement of 5 September 2011. In that document you described the document as flippant and foolish.
>
> 5. My view remains that your conduct was inappropriate and unprofessional, and [breached] your obligations to PoAL. You breached PoAL's values, PoAL's Sexual Harassment and Bullying in the Workplace policy, and clause 4.2.7(i) of your CA by behaving in [an] offensive manner.
>
> 6. The damage from your action at PoAL has already been done, attending an anti-racism workshop for your future personal development should be something you undertake regardless of the outcome of this process.
>
> **SERVICE RECORD**
>
> 7. At paragraph 35 of my 7 September 2011 letter to you I confirm that I had taken your service with the company into account in arriving at this preliminary view.
>
> **DEPRESSION**
>
> 8. In this section you state that during a previous investigation into allegations of sexual harassment made against you by another employee in November 2010, you began treatment for depression that included sleeping medication.
>
> 9. This situation was never raised at that time or subsequently when following another disciplinary investigation you were placed on a

Performance Improvement Plan. The process continued until March 2011.

10. Further you did not provide this as an explanation or mitigating factor at any of the first three meetings held to investigate this current situation or the two written statements you provided to PoAL during this process.

11. The first occasion the issue of your depression has been raised with PoAL is following the letter of 7 September that confirmed my preliminary view that you be summarily dismissed for serious misconduct.

12. Thus while I am genuinely concerned to hear of this condition, I find it difficult to accept that it contributed to or explains your actions in this case. [Your] decision to write the anonymous application form was well thought out and deliberate, not a spontaneous, spur of the moment action.

13. I believe you would have raised this matter as a mitigating factor far earlier in this disciplinary investigation and on other occasions if there was a direct link. Thus while you may indeed have symptoms of depression, they are not excuse for the deliberate and premeditated actions that you took in writing and then placing an anonymous application letter with offensive and racist comments under the office door of Ms Bush. Therefore I reject your suggestions under this heading

**VIEW OF EVENTS**

14. You state that you deeply regret any offence that has been caused and are willing to take any step to remedy the situation. Unfortunately there are some outcomes from your action that you simply cannot control or remedy.

15. Your behaviour was significant breach of PoAL's values and your obligations as an employee. This is a situation where an apology is simply not enough.

**CONCLUSION**

16. I agree with [your] comments that you "acted foolishly". I accept that you now greatly regret any offence caused. However I do not agree that given all the circumstances dismissal is too harsh a response to the serious misconduct.

17. The test of justification is "what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal"

18. Following receipt of your 7 September 2011 letter, PoAL met with your representative, Simon Mitchell and offered the following option:

- The opportunity for you to resign
- Provision of a one off payment of $5,000 under section 123 (c) (i)
- Recording this outcome in a confidential Settlement Agreement as full and [final] settlement of all matters in relation to your employment filed with the mediation Service
- Provision of a certificate of service to you
- Agreement that both parties would only make positive statements about the other, and would not make any disparaging remarks about the other to any third party.

19. Subsequently PoAL was advised that this offer was rejected prior to our meeting this morning at 8.15 am today.

20. At this meeting I again confirmed this option was available, however it was again rejected.

21. Consequently I confirmed my final decision was that in the circumstances summarily dismissed from your employment with PoAL was the most appropriate outcome. This letter serves as written confirmation of this decision.

22. As stated at the meeting, your final pay will be calculated up to the end of your shift today and will be credited into your nominated bank account in the next 24 hours along with any outstanding leave. I will arrange to obtain any other company property from you via your representative

[7] Mr Angus has worked on the Auckland waterfront for POAL and its predecessors as a stevedore for more than 19 years. He had a satisfactory work record and there is certainly no suggestion of similar conduct to that which led to his summary dismissal last month.

[8] The context of the dismissal includes the recent engagement by POAL, as part of its stevedoring workforce, of a number of employees originally from Tuvalu.[2]

[9] On Sunday 7 August 2011 Mr Angus pushed a sheet of paper under the closed office door of a POAL administrator, Karyn Bush. The content of this single handwritten sheet of paper is at the heart of the case and so I set it out in full (complete with misspellings) as follows:

[2] Many involved in the case have managed to misspell the words Tuvalu and/or Tuvaluan although I do not imagine that the employees concerned would take great offence at this.

To karyn Bush
C/- Ports of Auckland

ki ora bro,

I wish to make application for the position of ship Leading Hand. I feel too intellegant to drive straddles all my life. If it helps I can do a month or two on the sunbeds. Next week I can float to Sunday morning of you.

My great grandfather was one of the priests for the Island of Tualvau and he taught them bannans grow on trees.

Yours the Best
Billy. T. James

[10] The authorship of this 'job application' was anonymous in the sense that there is no person named Billy T James employed by POAL. Indeed, as is fairly well known to most New Zealanders, and particularly because of additional death anniversary publicity at about that time, the late Billy T James[3] was a cheeky, irreverent but reputably likeable comedian whose stock in trade was fun poked at himself, other Maori, and other racial groups based largely on stereotypical racial attributes. It is difficult, therefore, to accept POAL's case that Ms Bush and other managerial staff who subsequently saw this 'job application' believed it to be a serious and genuine job application by an existing POAL employee. They may have been driven to that disingenuous position because to have conceded that what Mr Angus described as a "note" was a joke, might have been interpreted as conceding the validity of part of his explanation for it. It was, he said, a silly, albeit misguided, attempt at humour which should neither have been taken seriously nor dealt with other than by consigning the note to the rubbish. Many would agree with that assessment of the note and its contents.

[11] Nevertheless, about three weeks later, on 29 August 2011 POAL began an investigation of Mr Angus's authorship of this note which eventually resulted in his summary dismissal on 8 September 2011 for the reasons set out in the letter at para 6.

[3] A stage or pseudonym for William James Te Wehi Taitoko.

## New legislative provisions

[12] Section 125 of the Act was amended, with effect from 1 April 2011, by s 16 of the Employment Relations Amendment Act (2010) (2010 No. 125) (the 2010 Amendment Act). The easiest way to illustrate the amendment is to set out the pre and post 1 April 2011 sections as follows:

> **(Pre) 125 Reinstatement to be primary remedy**
>
> (1) This section applies where—
>
> (a) the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in section 123(a)); and
>
> (b) it is determined that the employee did have a personal grievance.
>
> (2) If this section applies the Authority must, whether or not it provides for any of the other remedies provided for in section 123, provide, wherever practicable, for reinstatement as described in section 123(a).
>
> **(Post) 125 Remedy of reinstatement**
>
> (1) This section applies if—
>
> (a) it is determined that the employee has a personal grievance; and
>
> (b) the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in section 123(1)(a)).
>
> (2) The Authority may, whether or not it provides for any of the other remedies specified in section 123, provide for reinstatement if it is practicable and reasonable to do so.

[13] As can be seen, the heading to the section has removed the previous reference to reinstatement being a primary remedy. Subs (1) has been reordered which is probably more a matter of logical sequence than of substantive change. The significant change occurs in subs (2) so that, in effect and reflecting the heading to the section, reinstatement is no longer a primary remedy in the sense that the Authority is no longer required to order reinstatement wherever practicable.

[14] That changes the previous position under which reinstatement was meant to be a default remedy for a dismissal or disadvantage personal grievance, to the current position where it is a remedy to be awarded (if practicable and reasonable) as a just remedy for a wrong amounting to a personal grievance. I simply note here that the

former s 125 never operated in practice as a default remedy. Indeed it was granted relatively rarely. The other difference is that not only must reinstatement now be practicable but it must also be "reasonable". There is well and long established authority on what practicability means in such cases and these will continue to apply to the new s 125 test.[4]

[15] What the requirement of reasonableness adds to the requirement of practicability is not clarified by the legislation and will have to be determined by the Court and the Authority as appropriate cases arise. It is likely to mean that the decision to reinstate must be supportable objectively by reasons as opposed to being an arbitrary decision. That would be consistent with the change to the section removing the requirement of reinstatement (subject to practicability) which may arguably not have required reasons or at least the higher standards of reasoning now required. That is in spite of the practice of the Court and the Authority before 1 April 2011 of giving reasons supporting orders of reinstatement where these were made. So in this sense the new s 125 may stipulate expressly the previous practice of the Court and the Authority. If that is so, s 125 joins a number of other new or amended sections that affirm practice rather than effect change.

[16] I turn next to the other relevant legislative amendment, the new test of justification under s 103A that was likewise introduced with effect from 1 April 2011 by s 15 of the 2010 Amendment Act.

[17] New s 103A differs from its predecessor in a number of respects. First, in subs (2) the word "could" has been substituted for the former "would" in an otherwise materially identical subsection.

[18] Next, subs (3) is new. It provides for a number of specific considerations to be addressed by the Authority or the Court in applying the subs (2) test of justification. Those considerations in subs (3) are non-exhaustive because of

[4] See, for example, *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 243 (Labour Court) affirmed by the Court of Appeal in *New Zealand Educational Institute v The Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414; *Lewis v Howick College Board of Trustees* [2010] NZEmpC 4, [2010] ERNZ 1; *Jinkinson v Oceana Gold (NZ) Ltd* [2010] NZEmpC 102; *Sefu v Sealord Shellfish Ltd* [2008] ERNZ 178.

subs (4) which provides that in addition to them, the Authority or the Court may consider any other factors it thinks appropriate.

[19] Next, there is a new subs (5) which prohibits the Authority or the Court from determining a dismissal or other action to be unjustified solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly. Although that is a new subsection, it (like s 125) reiterates in statutory form the approach long taken by this Court and as is illustrated by a number of judgments over the years.[5] So, in this sense, subs (5) records expressly, rather than changes, the previous practice of the court and the Authority.

[20] So, too, do the considerations in subs (3) reflect and express the longstanding approach to such matters taken by the Authority and the Court in judge-made law, developed and applied over the last 30 years or so.

[21] It is notable, also, that the four considerations under subs (3)(a) to (d) relate to only part of the test under subs (2), that is "how the employer acted". This has sometimes been referred to as the procedure of dismissal although it is well established that there are no bright line distinctions between procedure and substance in this field. Nevertheless, the four subs (3) factors are only, potentially, some of those which need to be considered in respect of only one of two tests for justification set out in subs (2). The other subs (2) test (sometimes described as the "what" of dismissal) is not similarly governed by specific statutory considerations and in the circumstances it appears that Parliament has intended the existing practices of the Authority and the Court to continue subject, of course, to the alteration of "would" to "could" that applies to both the substance and procedure of a dismissal.

[5] Some examples include: *Tauhore v Farmers Trading Co Ltd* (2008) 5 NZELR 278; *Chief Executive of Unitec Institute of Technology v Henderson* (2007) 4 NZELR 418; *Clarke v AFFCO NZ Ltd* [2011] NZEmpC 17.

**Arguable case of unjustified dismissal and for reinstatement?**

[22] POAL had three identified grounds for dismissing Mr Angus. First, it said that his conduct offended against its Values set out in the company's Code of Ethics. Second, it said that Mr Angus's conduct breached its employee behavioural code which prohibits sexual harassment and bullying. Third, it said that by behaving offensively, Mr Angus breached the collective agreement's categorisation of such conduct as serious misconduct for which an employee might be dismissed.

[23] When it came to submissions, however, Mr McIlraith for POAL conflated the first and third grounds in the sense of saying that the breach of the company's Code of Ethics or Values constituted the offensive behaviour of which Mr Angus was guilty and which made him liable to dismissal.

[24] Mr Angus has an arguable case that each of these three identified grounds for dismissal may not amount to a justification for it. First, the company's Values encapsulated in its Code of Conduct are a very general aspirational statement about POAL's ideals of doing business including how persons within the company should relate to each other and to others outside it. It is said that the Code of Ethics is published on the company's website and was developed after consultation with staff across POAL. It is not, however, as Mr McIlraith accepted, referred to in the collective agreement and there is no evidence that Mr Angus bound himself to comply with it in his individual employment agreement, if one exists. I do not doubt the good intentions of the company in creating such a mission statement or the inherent admirability of the Values there set out. However, it is arguable for the plaintiff that an employee who does not value individuals' rights and differences, and treat people with respect in accordance with POAL's equal opportunity and anti-sexual harassment policies and otherwise contrary to the aspirational Values set out, is not thereby liable to dismissal.

[25] Next, Mr Angus has a very strong argument that POAL was simply wrong to have determined that he breached its sexual harassment and bullying policy which requires repetitious relevant behaviours to amount to such prohibited conduct. In respect of this incident, there is really no question that it was a one-off. When this

was put to POAL managerial representatives in the course of a meeting about these matters on 5 September, its Manager of Stevedoring, Jonathan Hulme said:

> … while I accept that your anonymous application to Ms Bush was a one off event, it was however definitely "unwanted and unwarranted behaviour" that Ms Bush found offensive.
>
> … Thus my view is that your action did in part breach this policy.

[26] At its best, the employer's position could only have been that if the conduct had been repeated it may have breached the policy but the policy does not allow for a partial breach.

[27] As to whether Mr Angus behaved offensively and so misconducted himself in employment in breach of the collective agreement's prohibition on offensive behaviour, it is arguable for the plaintiff that not every behaviour, which may be considered by the employer to be offensive, will per se justify dismissal.

[28] Because of the strong arguability for the plaintiff that the sexual harassment and bullying policy was not breached by him, I will examine in more detail only the other two conclusions that Mr Angus's dismissal may not have been justifiable.

[29] Clause 4.2 of the Ports of Auckland Limited and Maritime Union of New Zealand – Local 13 collective agreement provided, as part of its "CODE OF EMPLOYMENT":

> Issues of employee misconduct will be dealt with in a fair manner. This will include a warning system. The Company will only give a warning after a full investigation and a finding that the warning is justified and necessary.
> …
> In most instances, other than cases of gross misconduct, managers/supervisors should initially make a real attempt to change the behaviour of the employee. Use of the procedures as detailed in the Improving Employee Performance Module or Improving Work Habits Module are designed for this purpose.

[30] Clause 4.2.7 of the collective agreement specifies "examples of conduct that may constitute serious misconduct and may warrant instant dismissal." These include: "(i) Behaving in an offensive manner."

[31] What amounts to 'offensive behaviour' is not specified as are other acts or omissions and although this must be determined on a case by case basis in the particular circumstances of stevedoring employment on the waterfront, some guidance can usefully be had from how this term is otherwise regarded in law.

[32] The phrase "offensive behaviour" is not, of course, unknown in law. Behaving in an offensive manner constitutes a summary offence under the Summary Offences Act 1981 if conducted in or in view of a public place. I must, of course, be careful not to draw too many analogies between criminal law and employment law. But, nevertheless, some general principles may apply to such conduct in the sense that it attracts sanctions, in criminal law modest penalties, and in employment law potential dismissal from employment. The Supreme Court has very recently reviewed the criminal law in relation to offensive behaviour in *Morse v Police.*[6]

[33] Blanchard J in *Morse* at [64] endorsed what might be described as the "reasonably affected" test that he also propounded in *Brooker v The Police*[7] as follows:

> [For behaviour to be offensive it must be] … capable of wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind subjected to it in the circumstances in which it occurs.

[34] Tipping J in *Morse* emphasised that the test of what is offensive cannot be simply subjective:

> It cannot, however, be right that the unreasonable reactions of those who are affected by the behaviour can be invoked as indicative of a threat to public order. Hence those affected by the behaviour must be prepared to tolerate some degree of offence on account of the rights and freedoms being exercised by those responsible for the behaviour. It is only when the behaviour of those charged under s 4(1)(a) causes greater offence than those affected can be expected to tolerate that an offence under s 4(1)(a) will have been committed.

[35] Likewise, McGrath J in *Morse* wrote:

> The need to recognise the nature and characteristics of those who are affected by the behaviour in question is important. But it is in applying the

[6] [2011] NZSC 45.
[7] [2007] NZSC 30, [2007] 3 NZLR 91 at [55].

> standard to ascertain whether behaviour is offensive that all relevant matters of time, place and circumstance are to be taken into account. The characteristics of those actually subjected to the behaviour in issue are part of those circumstances. As Blanchard J points out, taking the nature of those present and their actual reactions into account in applying the standard is necessary if the assessment of the behaviour is to be realistic. This accommodation of the subjective element in applying the standard does not detract from its objective nature as a means of evaluating the person's behaviour.

[36] Even allowing for the very significantly different considerations applying to offensive behaviour in a criminal law context, I consider that the foregoing remarks of the Judges of the Supreme Court confirm what may arguably be the correct approach to determining the meaning of offensive behaviour in this collective agreement's list of acts or omissions that might constitute grounds for summary dismissal of an employee.

[37] It is arguable, in an employment law context, that not every behaviour that may offend others (other employees, managers, the employer, customers, or even the general public) will justify the ultimate employment sanction of summary dismissal. In employment law, as in criminal law, context is paramount. The number and sorts of persons to whom offensive behaviour is exhibited will be important. Offending a significant customer to put in jeopardy a business's custom may be more significant than offending a single, highly sensitive employee within the business. Conduct that is condemned universally as offensive may more easily warrant a sanction in employment than conduct about which there are different views of its offensiveness.

[38] It is arguable for Mr Angus that, in context, his conduct did not constitute the "offensive behaviour" prohibited by the collective agreement and for which the sanction of dismissal was open to the employer.

[39] Arguably, Mr Angus's conduct was not offensive when viewed objectively and in the context of a waterfront stevedoring environment. While what Mr Angus did may have been unwise, even foolish, not humorous and may have offended Ms Bush and others, he has an arguable case that these analyses and conclusions could not have justified a fair and reasonable employer in all the circumstances to terminate his employment summarily.

[40] Next, as admirable as they may be collectively and individually, the company's "Values" said to have been offended against by Mr Angus may or may not define conduct for the breach of which summary dismissal may be justified. Unlike the collective agreement, it is unclear to what extent, if any, employees of POAL have bound themselves to comply with its "Values". It seems clear that these will be unlikely to be found to be the equivalent of professional ethical obligations to which members of a profession bind themselves consciously and deliberately by membership of a professional body. The "Values" may be aspirational and may indeed be the sorts of standards referred to at cl 4.2.1 of the collective agreement where the company "should initially make a real attempt to change the behaviour of the employee." I note, in this regard, that POAL has a set of procedures called "Improving Employee Performance Module or Improving Work Habits Module".

[41] So it is arguable that conduct which is inimical to POAL's Values may nevertheless not warrant summary dismissal.

[42] Next, in assessing the existence and strength of an arguable case of unjustified dismissal, POAL's letter to Mr Angus set out in [6] of this judgment contains what is arguably a remarkable acknowledgement of self-doubt on behalf of POAL. It confirms, at para 18 of the letter, that before Mr Angus was dismissed he was given the option of resigning from his job and being paid $5,000 by the company. Its proposal was that such a payment would be made under s 123(c)(1) which I assume is meant to refer to s 123(1)(c)(i) of the Act. That is a remedial compensatory provision which allows the Authority or the Court to order monetary compensation for unjustified dismissal. It is at least surprising, especially in view of its confident assertions of justified dismissal, that POAL was nevertheless prepared to both accept Mr Angus's resignation and to pay him a not insignificant sum classified as compensation for unjustified dismissal.

[43] Further, the evidence shows that the company proposed that this payment would be made as part of a confidential settlement agreement in full and final settlement of all matters relating to his employment "filed with the Mediation Service". Such agreements are covered by s 149 of the Act and commonly settle personal grievances including claims for unjustified dismissal. Added to that, POAL

proposed to provide Mr Angus with a certificate of service and, remarkably, offered to agree that it would only make "positive statements" about him and would not make any disparaging remarks about him to any third party.

[44] Although such terms of settlement are not uncommonly reached in confidential settlements following a dismissal and a claim that this was unjustified, these proposals emanated from POAL even before it dismissed Mr Angus and, as it now asserts strongly, was completely justified in doing.

[45] Although not a factor that addresses directly the justification for dismissal, what might be construed as an express acknowledgement of the frailty of its justification for summary dismissal assists Mr Angus's arguable case at this point.

[46] Next, it is arguable for the plaintiff that POAL did not take into account, or at least take into account properly or sufficiently, Mr Angus's psychological condition that was brought to its notice by his representative before dismissal. Mr Angus had recently been the subject of two serious allegations in employment. First it appears that he was accused unjustifiably of sexual harassment of another employee. Subsequently, POAL had taken issue with Mr Angus's straddle carrier driving alleging that he had been driving too slowly. It appears that this latter allegation may also have possibly escalated to a disciplinary inquiry. As a result of these two events, Mr Angus's case was that he was under stress at work, which helped to explain why he wrote the bizarre note that he did, intending it to be a joke. Finally, in this regard, Mr Angus had taken long-term leave due to him in an attempt in part to alleviate these work stressors and had in fact commenced this leave by the time he was first involved in the employer's investigation that led to his dismissal.

[47] Correctly, POAL noted that Mr Angus's health issues were brought to its attention relatively late in the investigative process. It was suspicious about their significance in these circumstances. As importantly, however, was the way in which POAL appears to have treated what it accepted was the stress from which Mr Angus was suffering. It concluded that he acted "deliberately" in sending the note to Ms Bush. If, by that, it meant that he did so knowing what he was doing and not as an automaton or otherwise without the requisite intention, then this is very arguably an

unduly narrow assessment of the significance of Mr Angus's stress. It is elementary that one can do such things deliberately and voluntarily but that such actions may nevertheless be both uncharacteristic and attributable to a psychological condition which would both affect the culpability for the action and the probability of redemption and non-repetition. In this sense, also therefore, it is arguable for the plaintiff that the defendant took insufficient and/or improper account of Mr Angus's personal circumstances, irrespective of however belatedly he brought these to its attention.

[48] If these matters are correct, a fair and reasonable employer in these circumstances should have given them very serious consideration before determining to dismiss Mr Angus summarily. Put in the context of s 103A, it is arguable for Mr Angus that no fair and reasonable employer could have dismissed him summarily, as POAL did, without a serious investigation and a conclusion discounting the significance of these factors in his aberrant behaviour. On the evidence before the Court, it is arguable for Mr Angus that insufficient and/or erroneous consideration was given by POAL to these important factors.

[49] For the foregoing reasons, I conclude that the plaintiff has an arguable case of unjustified dismissal under new s 103A.

[50] I turn next to the necessity for Mr Angus to establish an arguable case for reinstatement in employment assuming a finding of unjustified dismissal. Even allowing for the changes outlined above in s 125, which mean that there cannot be any assertion of predominance or primacy of this remedy, I have concluded nevertheless that Mr Angus will have a strong case for reinstatement in employment if he is found to have been unjustifiably dismissed. There are a number of reasons for that conclusion which I will explain.

[51] Although in her evidence Ms Bush opposes strongly Mr Angus's reinstatement because of her reaction to the note that he sent her, I note also her evidence that before this incident their dealings at work had consisted only of an exchange of greetings and pleasantries when they encountered each other occasionally. Ms Bush is an administrator. Mr Angus is a stevedore engaged

principally on wharf and ship work away from the company's administrative offices where Ms Bush works and also on shift work so that the possibilities of encounters between the two are reduced further.

[52] Next, Mr Angus's length of service, his age, his inability to obtain alternative employment with similar remuneration, all point to the significant value to him of ongoing employment with POAL. It is very unlikely that a compensatory payment for lost remuneration could replicate the value of the loss of ongoing employment. Because of his commitments to support his family and to pay for their home, Mr Angus has said that he would have to contemplate seriously migrating to Australia to obtain similarly remunerative work.

[53] No doubt with the benefit of good advice, Mr Angus has, at an early stage in this matter, accepted the error of his ways and has offered not only to not repeat these but to work towards a positive appreciation of the race relations issues that may underlie them.

[54] There is no suggestion on the defendant's case that Mr Angus is a ring leader or otherwise any more responsible for implicit criticism of the company's hiring practices than any other stevedore.

[55] In these circumstances, and despite reinstatement no longer being the "primary remedy", I conclude that it is very arguable that if he is found to have been dismissed unjustifiably, Mr Angus's reinstatement will be both practicable and reasonable as new s 125 requires.

## Balance of convenience

[56] This requires a balancing and assessment of respective injustices to the parties for the period until the merits of the case can be tried and decided. On the one hand, there is the potential injustice to Mr Angus of not being reinstated before trial but being entitled to that remedy if it is found that he was dismissed unjustifiably. On the other hand, there is potential injustice to POAL of Mr Angus's

interim reinstatement if he is either found to have been dismissed justifiably or, even if not, that reinstatement is not allowed as a remedy.

[57] As already noted, the duration of any order for reinstatement is relevant. It appears that it will be about six months before the case can be heard and judgment given.

[58] In favour of Mr Angus's position is that he would not be on gardening leave for that period but will provide POAL with value in terms of work undertaken for the payment by it of wages to him.

[59] Whatever may or may not have been the gravity of Mr Angus's conduct in writing and forwarding the note to his supervisor, my assessment is that POAL is at low risk of a repetition of that conduct from him. If nothing else, these events culminating in his summary dismissal will have warned him salutorily of doing so again.

[60] At the time of his dismissal Mr Angus was on partial long-term leave until early December, in part at least to deal with the stress and pressure of the previous allegations against him in his employment. As I understand it, Mr Angus was working part-time with the balance of his usual working week being on leave. If reinstated, he would continue in employment on that arrangement. That is, he would be on paid leave as previously planned until 1 December, both allowing him to address the stressful situation that was the reason for that leave, and allowing POAL to address its fairly held concerns about what it suspects was behind Mr Angus's note.

[61] In this regard, if POAL wished to convey a message to its workforce about their Tuvaluan colleagues (a valid wish but arguably not by dismissing Mr Angus summarily in these circumstances), that message would have been well and truly conveyed by these events, as indeed it could have been more subtly by less draconian and coercive means.

[62] There is no validated criticism of Mr Angus's work performance and there will be stevedoring duties that he can resume after December as scheduled without disruption to POAL's commercial operations.

[63] Mr McIlraith submitted that Mr Angus's undoubted contribution to the events that gave rise to his dismissal will have to be reflected significantly in remedies if he is found to have been dismissed unjustifiably. Counsel submitted that Mr Angus's contribution was so significant that it should disqualify him from the remedy of reinstatement. Whilst it is true that there are cases in which a substantial level of contributory conduct does, under s 124 of the Act, disqualify a grievant from reinstatement, there are others in which an equally substantial level of contribution has meant that the only remedy granted is reinstatement: monetary compensation is not infrequently cut or eliminated to reflect the requirements of s 124. See, for example, *X v Auckland District Health Board.*[8] I do not consider that it can be said with sufficient certainty at this point how the probable remedy reduction for contribution should be determined by the Court but this should not be a factor disqualifying Mr Angus from interim reinstatement.

[64] Mr McIlraith has pointed correctly to the consideration under the balance of convenience whether there are adequate remedies available to Mr Angus other than reinstatement. Counsel submits that there are and these include monetary compensation instead of reinstatement if dismissal is found to have been unjustified. In particular, counsel has identified, correctly, that at the time of his dismissal Mr Angus was working part-time and using accrued holiday leave over the balance of each working week. In particular, he was working on weekend shifts at the Port and was intending to do so until, by different accounts, either mid-November or 1 December 2011 although Mr McIlraith seems to be content to accept the later date identified by Mr Angus.

[65] When Mr Angus was dismissed he was paid out accrued holiday pay, an after tax payment of some $18,000 although this will almost certainly not be sufficient income for the likely period until his personal grievance is determined by this Court in the first quarter of 2012. In addition, Mr Angus has, through counsel, told the

[8] [2007] ERNZ 66.

Court that if he is reinstated now he will repay to POAL the holiday pay received by him and I assume that POAL will, if it has already paid tax on this, be able to recover that payment as a consequence of the Court's judgment.

[66] In these circumstances, I do not accept that damages or other monetary compensation will be an adequate remedy for Mr Angus if he is not reinstated until his personal grievance is determined but that he is then found to have been unjustifiably dismissed and that he is then reinstated in employment.

[67] I do not agree with the defendant's contention that if Mr Angus is now reinstated but fails to get that as a permanent remedy, the harm to POAL is not easily quantifiable. Counsel for POAL submitted that it would be forced to accommodate the temporary reinstatement of an employee who will fail to establish an unjustified dismissal and that such accommodation would be fraught with difficulty. I consider, however, that if Mr Angus is restored temporarily to the position he would have been in had he not been dismissed on 8 September 2011, the company will continue to receive the benefit of work performed by him and, until at least 1 December 2011, he will continue to receive accrued holiday pay for those parts of each week that he is not working at POAL. There is no suggestion by the defendant that it will not get value for money for Mr Angus's work.

[68] Turning to the effect of an order for interim reinstatement on third parties, POAL expresses a concern that there may now be a risk in Mr Angus working with members of some ethnic groups on the waterfront. It says this will be exacerbated by the current pattern of weekend work performed by Mr Angus at times when there are fewer supervisors and managers at work to deal with any incidents that may arise.

[69] There is, however, contradictory evidence from other employees, including some who are in a good position to know about such possibilities. Without discounting the risk altogether, I consider that when combined with a number of other relevant factors, it is less than the defendant fears. Those other factors include the nature of stevedoring employment, the salutary lesson experienced by Mr Angus over these events, and the responsible acknowledgement by POAL (through counsel)

that racial tensions should be dealt with, in conjunction with the Maritime Union and the workforce generally, in the manner that I will recommend at the conclusion of this judgment. It is, for example, both unduly simplistic and too broad to submit, as the company does, that others who are not Pakeha should not have to work with Mr Angus even on an interim basis. There is no suggestion on the evidence that the issue is simply brown and white. Indeed, even the antipathy towards Tuvaluan employees is arguably more related to their perceived compliance and company friendliness than to their ethnicity. These are sensitive and difficult matters but, on reflection, ones that can be dealt with otherwise than by ensuring that Mr Angus does not return to waterfront work.

[70] Next, Mr McIlraith submitted that there is a substantial unlikelihood of Mr Angus's successful re-integration into the workforce. Counsel pointed out Mr Angus's extreme and volatile reaction when first taxed with the allegations of this misconduct, his statement that he has suffered from depression and insomnia for almost the last year, his questionable judgment in sending the note to Ms Bush, someone he did not know well, and, finally, his suggestions that the letter was not offensive and that similar comments have been made, including by him, in the mess room.

[71] Again without discounting the significance of these factors altogether, I do not consider that, individually or collectively, they pose such a risk to the company and other employees that they outweigh the arguments in favour of Mr Angus's interim reinstatement.

[72] I conclude that reinstatement of Mr Angus would be both practicable and reasonable. Apart from occasionally and potentially being in the same mess room at the same time (where one of Ms Bush's tasks is to refill vending machines), there is little potential for contact between Mr Angus and Ms Bush. She acknowledges that it would not be difficult for someone else to allocate safety gear to Mr Angus if he needed that. The evidence also discloses that her role in the employee upskilling process is to collate applications from stevedores and refer these to management for consideration. If Mr Angus were to apply to be upskilled in his job (and it is very unlikely that this would be before December at the earliest), Ms Bush would have

only a clerical but not a decision making role and such applications are dealt with in written form in any event. It is significant, I think, that, until early August, Ms Bush had such insignificant dealings with Mr Angus that she was able to depose: "I have not spoken to Mr Angus outside a courteous "good morning" and neither of us [knows] each other at all." There is not a substantial risk of conflict between Mr Angus and Ms Bush.

[73] For these reasons, the balance of convenience favours Mr Angus's interim reinstatement.

## Overall justice

[74] Addressing the question of the overall justice of the case, Mr McIlraith submitted that because Mr Angus was at fault, equity should disentitle him from the remedy of interim reinstatement. Counsel relied upon the judgment of this Court in *Waugh v Commissioner of Police.*[9] In that case, at para 33, Chief Judge Goddard said of the equitable and discretionary nature of the remedy of injunction:

> One of these is variously described as the doctrine of mutuality, sometimes by reference to the maxim "who seeks equity must do equity". The applicant for equitable relief must not himself be at fault in respect of the subject-matter.

[75] I do not understand, however, that this was intended to disqualify from interim reinstatement any employee who may have been at fault. Indeed such a proposition would, if it were correct, exclude almost all dismissed employees from interim reinstatement because at the time of assessing whether the remedy should be granted, there are almost inevitably unresolved allegations of fault and often, as in this case, acknowledgements of degrees of fault. As already noted, s 124 of the Act deals expressly with the significance and consequence of culpable fault in remedies for dismissal. The section does not exclude, in appropriate cases, the remedy of reinstatement and so logically neither does it preclude interim reinstatement. That is not to say that in some cases contributory fault may be so substantial and significant that in a particular employment, the Court or the Authority will not, on balance and

[9] WC 12/03, 4 April 2003.

taking into account all other relevant factors, reinstate, even on an interim basis. But this is not such a case in my assessment.

[76] The remedy of interim reinstatement being discretionary, the Court is required to stand back from the detail of the other tests and consider whether overall justice requires interim reinstatement. I consider that the overall justice follows the balance of convenience and that there are no sustainable reasons why Mr Angus should not now be reinstated in the particular circumstances that will apply between now and December.

## Orders

[77] The Court's order is that the plaintiff is to be reinstated in employment with the defendant with effect from the date of his summary dismissal but on the basis that Mr Angus will continue to take long-term leave as he had previously arranged with POAL. Mr Angus is to repay to POAL the accumulated holiday pay received by him upon his dismissal. The defendant must, in these circumstances, continue to pay to Mr Angus such remuneration as he would have received had he not been dismissed summarily and other benefits of his employment are to continue to accrue. The Court's formal order to this effect will incorporate the plaintiff's undertaking as to damages which has been given and in reliance upon which the order for interim reinstatement is made.

[78] This order will also allow an opportunity to POAL to address any issues about its Tuvaluan workforce with the assistance, if appropriate, of a body such as the Human Rights Commission. It will also allow Mr Angus to address the issues of workplace stress, and to reflect upon these events and how he will relate to his supervisors and colleagues in less pressured circumstances than he has to date.

[79] Although Mr Angus has been successful in his application for interim reinstatement, I consider that the interests of justice would be served by the parties meeting their own legal costs to date.

## Directions to trial

[80] Mr Angus is to file and serve a statement of claim by 4pm on Friday 7 October 2011 and POAL is to file and serve a statement of defence to that by 4pm on Friday 14 October 2011.

[81] I record the directions given at the end of the hearing to the substantive trial in this Court of Mr Angus's personal grievance.

[82] By consent of counsel (who are also counsel in the other case between the same parties about to be referred to), there will be a preliminary hearing before a full court on the interpretation and application of new ss 103A and 125 of the Act on Monday 7 November 2011 at 10 am in the Employment Court at Auckland. The preliminary hearing will also deal with the same issues in the associated case of McKean v Ports of Auckland Limited under ARC 72/11. Counsel will provide written synopses of their arguments on these preliminary issues together with other materials on which they intend to rely no later than seven days before the hearing.

[83] The Registrar is to bring notice of the hearing to the attention of the New Zealand Council of Trade Unions Inc and Business New Zealand Inc. If either body wishes to apply for leave to be represented and heard on this preliminary issue, any such application for leave should be made to the Court and on notice to the parties by Friday 21 October 2011. If either of the two central organisations is granted leave, any submissions it intends to make at the hearing should be filed and served in the form of a synopsis of argument (with any supporting information) no later than seven days before the hearing.

[84] In respect of Mr Angus's substantive grievance, this is set down for hearing in the Employment Court at Auckland on Monday 13, Tuesday 14 and, if necessary, Wednesday 15 February 2012 before a single judge.

[85] By consent there will be a judicial settlement conference in an attempt to resolve this litigation on 16 November 2011.

[86] The plaintiff is to file and serve briefs of the evidence of his intended witnesses no later than Monday 23 January 2012 with the defendant doing likewise no later than Friday 3 February 2012.

[87] The defendant is to compile a common bundle of documents which is to be lodged with the Registrar no later than three working days before the start of the hearing.

## Observations

[88] The circumstances of this and another which is to be heard by this Court shortly, indicate that the engagement of Tuvaluan stevedores on the Auckland waterfront has been met with a degree of hostility by some members of the existing workforce. The summary dismissal of Mr Angus and, very shortly afterwards, one of his colleagues, albeit in different circumstances, has been POAL's reaction to what it perceives to be racist elements in its workforce. The merits of the justification for the dismissals will have to be determined on their particular facts in due course.

[89] Even if those dismissals are found to have been justified, summarily dismissing employees deals more with the symptoms than any other underlying problem that I am confident both POAL management and the Maritime Union of New Zealand and other responsible employees will wish to address. I recommend strongly to the port company (because this will really need to be a managerial initiative) that it promptly engages external professional assistance to help address these issues. I am aware that the Human Rights Commission has experience with similar issues and I have no doubt that the Commission would be willing to become involved. Although the law is applicable and racial discrimination is unlawful, these are also issues of hearts and minds that, as a fair and reasonable community-owned employer, POAL will wish to address expertly, comprehensively, and sensitively.

GL Colgan
Chief Judge

Judgment signed at 4 pm on Wednesday 5 October 2011