

**IN THE EMPLOYMENT COURT OF NEW ZEALAND  
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA  
TĀMAKI MAKĀURAU**

**[2020] NZEmpC 125  
EMPC 144/2020**

IN THE MATTER OF      a challenge to a determination of the  
   Employment Relations Authority

BETWEEN                      RAY SMITH  
   Plaintiff

AND                              FLETCHER CONCRETE &  
   INFRASTRUCTURE LIMITED  
   Defendant

Hearing:                      23 July 2020  
   (Heard at Auckland)

Appearances:                S R Mitchell, counsel for plaintiff  
   S Hornsby-Geluk, counsel for defendant

Judgment:                    18 August 2020

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**JUDGMENT OF JUDGE J C HOLDEN**

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[1]      The plaintiff, Mr Smith, challenges a preliminary determination of the Employment Relations Authority (the Authority) in which the Authority declined Mr Smith's application for interim reinstatement.<sup>1</sup>

[2]      For the reasons set out in this judgment, Mr Smith's challenge fails. There is no order for interim reinstatement.

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<sup>1</sup>      *Smith v Fletcher Concrete and Infrastructure Ltd* [2020] NZERA 190 (Member Robinson).

## **The applicable principles are well settled**

[3] The approach to be taken by the Court on a challenge is as set out in s 127(4) of the Employment Relations Act 2000 (the Act). It must apply the law relating to interim injunctions, having regard to the object of the Act. The object of the Act can be found in s 3, including to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship. The object recognises that employment relationships must be built on mutual obligations of trust and confidence.<sup>2</sup>

[4] The principles applicable to interim injunctions are well settled:<sup>3</sup>

- (a) Does the applicant have an arguable case?
- (b) Where does the balance of convenience lie?
- (c) What is required by the overall interests of justice?

[5] For applications for interim reinstatement, the first question can be broken down into two parts: <sup>4</sup>

- (a) whether there is an arguable case for unjustifiable dismissal; and, if so
- (b) whether there is an arguable case for permanent reinstatement.

## **Mr Smith was dismissed for failing to comply with company policy**

[6] Mr Smith was dismissed by Fletcher Concrete and Infrastructure Ltd (Fletcher Concrete) by letter dated 27 March 2020. Fletcher Concrete found that, following an unplanned plant shutdown, Mr Smith accessed an area without following Fletcher

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<sup>2</sup> Employment Relations Act 2000, s 3(a)(i).

<sup>3</sup> *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531; *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36.

<sup>4</sup> *Cliff v Air New Zealand Ltd* [2005] ERNZ 1 (EmpC) at [12].

Concrete's Isolation Systems Policy and Procedure (Isolation Policy). Fletcher Concrete says that its Isolation Policy is a health and safety "golden rule".

[7] The shutdown happened on 12 February 2020, after an issue arose with a crusher at Fletcher Concrete's plant. Mr Smith, who was employed as Site Engineer/Site Supervisor, asked the Plant Control Operator to open a distance guard to allow Mr Smith to access the plant and do a visual inspection of the crusher drive belt. He accepts he did not follow the Isolation Policy but says he did not consider the Isolation Policy was applicable to the work he was doing. Mr Smith says he believed he was properly following the Rock Plant Start Up Standard Operating Procedure (Rock Plant Start Up SOP) which, he says, allows for a visual inspection.

[8] Fletcher Concrete says that the Isolation Policy requires all employees entering a restricted area to shut down the plant and put their personal isolation padlock on the isolation point, which ensures the power cannot be reset. It says that the reason for this is so that another employee, who is not aware of who is in the plant, cannot come along and switch the power on which could result in employees becoming entrapped, risking serious injury or death.

### **There is an arguable case that Mr Smith was unjustifiably dismissed**

[9] Mr Smith raises a number of issues in relation to the dismissal. He says:

- (a) The allegation put to him initially, and which is the justification given in the letter of dismissal, was that he opened the distance guard, which could not be established.
- (b) The Isolation Policy arguably does not apply, given the routine nature of the work being completed.
- (c) It is arguable the Rock Plant Start Up SOP remains in place, and enabled the visual inspection, followed by the start up.

- (d) Even if Mr Smith was wrong as to the application of the policies, this was a genuine dispute, which should have been resolved, rather than addressed in a disciplinary way.
- (e) Other employees also failed to apply their personal locks (and the Plant Control Operator failed entirely in his responsibilities to isolate the plant).
- (f) Despite the same misconduct, Mr Smith was held responsible for these actions because he was the supervisor; he was the only person dismissed.
- (g) The same standard was not applied to the Acting Quarry Manager, who was present throughout and did not insist that personal locks were applied.

[10] Mr Smith also says that the procedure followed by the company was inadequate and contrary to s 103A(3) of the Act, including that Fletcher Concrete:

- (a) failed to put the actual concern to Mr Smith;
- (b) failed to provide him with statements of other employees that were critical to the matter;
- (c) formed a view as to Mr Smith's general approach to health and safety, without advising Mr Smith of that or giving him an opportunity to comment on it;
- (d) failed to consider the competing policies; and
- (e) failed to consider the responses provided by Mr Smith.

[11] Fletcher Concrete acknowledges that the threshold for establishing an arguable case is low, but says that the threshold is not met.

[12] Essentially it says:

- (a) Mr Smith admitted that he had failed to personally isolate before entering the plant.
- (b) The Isolation Policy is a “golden rule” and as Site Supervisor, who had undertaken training, Mr Smith knew or ought to have known it prohibited his approach.
- (c) Mr Smith was employed in a safety sensitive role which required the highest level of trust and confidence in Fletcher Concrete’s health and safety policies and procedures, especially those that are considered golden rules.
- (d) Any disparity in treatment was justified by the different position held by Mr Smith as compared to the other employees involved in the incident. Fletcher Concrete relies on *Kaipara v Carter Holt Harvey Ltd*, where the Court found the disparity in treatment between the dismissal of Mr Kaipara, a shift supervisor, and other staff involved in the same safety incident who were not dismissed, did not lead to Mr Kaipara’s dismissal being unjustifiable as he had additional supervisory responsibilities for the health and safety of other employees.<sup>5</sup>

[13] Fletcher Concrete also says that the dismissal was procedurally fair:

- (a) Mr Smith was put on notice of the allegations against him.
- (b) He was given the opportunity to obtain representation before addressing the allegations, and thereafter he was represented.
- (c) He had several opportunities to present to Fletcher Concrete his version of events, which were taken into account prior to the decision being made.

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<sup>5</sup> *Kaipara v Carter Holt Harvey Ltd* [2012] NZEmpC 40, (2012) 9 NZELR 545 at [30].

- (d) He was aware of the potential consequences of the process.
- (e) He was given the information necessary and relevant to addressing Fletcher Concrete's concerns.

[14] Fletcher Concrete accepts that it spoke to other staff members to develop a broader understanding of health and safety practices on site and did not pass the statements received on to Mr Smith. It says, in some cases this was because the statements contained facts that were not in dispute, or were not relevant. It also says a number of those spoken to expressed concerns about possible retaliation from Mr Smith, with some saying they will resign if Mr Smith returns. Fletcher Concrete's Central Operations Manager, who was the decision-maker in this process, says that he consciously did not take these statements into account in considering the 12 February incident.

[15] Whether dismissal was justified where, arguably, there were competing policies will need to be considered in Mr Smith's substantive case.

[16] The procedural issues over the provision of information and the framing of the allegation against Mr Smith, and the question of whether the disparity in treatment of the different employees involved was justified also warrant further consideration.

[17] These matters may not turn out to be determinative of Mr Smith's personal grievance, but together they present an arguable case that Mr Smith was unjustifiably dismissed.

### **Mr Smith has an arguable case for reinstatement**

[18] Where an employee who succeeds in his or her claim of unjustifiable dismissal seeks reinstatement, that must be provided for wherever practicable and reasonable.<sup>6</sup> It likely will be the most significant remedy claimed because of its importance to the grievant; it is often not enough for a monetary judgment to be substituted for the job.<sup>7</sup>

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<sup>6</sup> Employment Relations Act 2000, s 125(2).

<sup>7</sup> *Hong v Auckland Transport* [2019] NZEmpC 54 at [64].

[19] Practicality and reasonableness are two separate considerations. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible and have the potential for the reimposition of the employment relationship to be done or carried out successfully. There may be considerations separate from the reasons for the dismissal that are germane to this question. In looking at reasonableness, the Court needs to consider the respective effects of an order, not only on the individual employer and employee in the case, but also on other affected employees of the same employer and, in some cases, perhaps third parties who would be affected by the reinstatement.<sup>8</sup>

[20] Issues have been raised by Fletcher Concrete that will be relevant to the practicality and reasonableness of permanent reinstatement. In particular, issues around workplace culture and the relationships between Mr Smith and subordinate employees at the plant could go to both practicality and reasonableness. It may also be that, even if he is successful in his claim of unjustifiable dismissal, Mr Smith's contribution towards the situation that gave rise to the dismissal require reinstatement to be declined.<sup>9</sup>

[21] Mr Smith, however, needs only establish that he has an arguable case for reinstatement. He has been employed by Fletcher Concrete since July 2002. He is presently 59 years old, and expects to work for another five to ten years. He has given evidence that he has not had any disciplinary issues raised with him previously and understands that the company was happy with his work.

[22] He has an arguable case for permanent reinstatement.

### **Balance of convenience does not favour interim reinstatement**

[23] Mr Smith has given evidence of the effect on him of the dismissal. Of importance for this application is the extent to which that effect cannot be rectified if he succeeds in his substantive proceedings.

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<sup>8</sup> *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] ERNZ 466, at [68].

<sup>9</sup> Employment Relations Act, s 124.

[24] Understandably, the dismissal has had a significant financial impact on Mr Smith. He says he has had to stop all outgoing financial commitments, including mortgage payments over his property and all insurance payments. His financial position has been exacerbated by the COVID-19 situation as his wife has been unable to continue with her own small business and is uncertain whether that business will return to normal any time soon.

[25] Mr Smith also gives evidence of what he sees as his future prospects should he not be reinstated. He is concerned these prospects would be adversely affected by the COVID-19 situation, making it more difficult for him to obtain new employment, certainly at the level he was paid by Fletcher Concrete.

[26] However, Mr Smith has been able to obtain a mortgage holiday; there is no evidence that there are immediate concerns that he will lose his home. If Mr Smith succeeds in his substantive claim any shortfall in income would be considered when determining compensation for lost earnings, including for future lost earnings if Mr Smith ultimately is not reinstated.

[27] There also is no suggestion that Mr Smith would not be able to return to the work that he had previously undertaken because of the gap in employment. His situation is not like for some workers where ongoing experience is critical, either to maintain particular skills or because of external certification requirements.

[28] Accordingly, while Mr Smith's concerns are valid ones, they could be rectified in time should he succeed in his substantive claim.<sup>10</sup>

[29] Fletcher Concrete has given evidence that, given the findings in its disciplinary process, it would not have confidence in Mr Smith's commitment to health and safety. It also expresses concern that, as a supervisor, Mr Smith is responsible for setting an example for other staff members and having him reinstated would send an inappropriate message to other staff.

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<sup>10</sup> At the time of the hearing, the parties had no date for the Authority investigation meeting but hopefully one will be held soon.

[30] Fletcher Concrete also points to the concerns from other staff should Mr Smith return, including the statements that they will resign if he comes back.

[31] The Court must be cautious of statements about loss of trust and confidence from employers as a reason for not reinstating an employee, but at an interim stage the basis for that claimed loss of trust and confidence has not yet been tested. The dismissal may be found to be justifiable and the employer's claim of loss of trust and confidence may be valid.

[32] Likewise, claimed differences between employees, including suggestions that employees will leave if another staff member returns to work, must be treated with care. Even where such differences exist, once a dismissal has been found to be unjustifiable, it often is reasonable for employers to arrange for a reintegration process to smooth the employee's return to the workplace. However, at an interim stage, where the justification for the dismissal has not been properly tested, the practicality and reasonableness of such a reintegration process is considerably less.

[33] Both issues raised by Fletcher Concrete point away from an order for interim reinstatement.

[34] In short then, the detriment suffered by Mr Smith by not being reinstated pending the hearing of his claim can be substantively rectified if he succeeds; the concerns of Fletcher Concrete, if it succeeds, may not be able to be reversed. For these reasons, the balance of convenience does not support an order for interim reinstatement.

### **Overall justice does not displace the balance of convenience issues**

[35] While Mr Smith has an arguable case, this is not a situation where it is clear the employer has made material errors – either procedurally or in terms of its substantive decision-making. Mr Smith acknowledges that he did not follow the Isolation Policy. He raises issues as to whether that was the correct policy to be followed and, if it was, whether that was sufficiently clear to justify dismissal.

However, he was in a supervisory role on a worksite where health and safety is critical. These matters will go not only to justifiability, but to remedies.

[36] Standing back from the matter and considering the overall justice of the case, I am satisfied that interim reinstatement ought not be ordered.

### **Costs follow the event**

[37] Having been successful in defending this challenge, Fletcher Concrete is entitled to costs. The matter has been assigned Category 2B under the Practice Direction Costs Guideline Scale.<sup>11</sup> If there is any disagreement as to the calculation of costs to be paid by Mr Smith in respect of the challenge, then the matter can be referred back to the Court by appropriate memoranda for a decision.

J C Holden  
Judge

Judgment signed at 11 am on 18 August 2020

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<sup>11</sup> “Employment Court of New Zealand Practice Directions” <[www.employmentcourt.govt.nz](http://www.employmentcourt.govt.nz)> at No 16.