

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN David Crawford (Applicant)

AND Recall New Zealand, a division of Brambles New Zealand Limited
(Respondent)

REPRESENTATIVES Robert Thompson, Advocate for applicant
Tim Oldfield, Advocate for respondent

MEMBER OF AUTHORITY Helen Doyle

INVESTIGATION MEETING 28 February 2005

DATE OF DETERMINATION 2 March 2005

DETERMINATION OF THE AUTHORITY

[1] The applicant, David Crawford, was dismissed from his employment with the respondent on 3 December 2004. In his statement of problem Mr Crawford says that he was unjustifiably dismissed and he seeks an interim injunction reinstating him to his previous position with the respondent as a Security Service Representative. Mr Crawford supplied an undertaking to abide by any order in respect of damages that may be sustained by the respondent through the granting of an order for interim reinstatement.

[2] The respondent, Recall New Zealand a division of Brambles New Zealand Limited, (“Recall”) says that Mr Crawford was justifiably dismissed after testing positive for cannabis use and the application for reinstatement is opposed.

[3] The parties attended mediation before the application for interim reinstatement was heard but were unable to resolve the employment relationship problem.

[4] The evidence was provided by way of affidavit and I heard submissions from Mr Thompson and Mr Oldfield.

Background

[5] I set out by way of background the essential facts in this case which are supported by the documentation. I do not make any findings of fact but am required to apply to these facts the tests Mr Thompson and Mr Oldfield referred me to for an interim injunction.

[6] Mr Crawford commenced employment with Recall on 26 October 2004 as a Security Service Representative. Part of his role involved driving trucks. There is a dispute apparent from the

affidavits which I am not required to resolve at this stage as to whether Mr Crawford was also required to operate shredders and forklifts.

[7] Mr Crawford was party to an individual employment agreement which he signed on 29 October 2004.

[8] Clause 1.3 of the agreement provided that the agreement was to be read in conjunction with the employee's letter of appointment and the Australasian Employee Handbook, all of which constitute the employee's individual contractual terms and conditions of employment with Recall NZ.

[9] The Australasian Employee handbook contains an alcohol and drugs policy which provides amongst other matters that:

... all employees, casual and contracted have a responsibility to present for and remain at work in a condition that does not exceed legal standards, as far as drugs and alcohol is concerned.

[10] Mr Crawford undertook a pre-employment medical examination on 21 October 2004. A urine sample he provided was analysed for drugs by the ESR including cannabinoids. The test result confirmed the presence of THC – acid at a level greater than 15 nanograms per millimetre which as defined by the Australian/New Zealand Standard 4308: 2001 is a positive result.

[11] Mr Crawford was asked to attend a meeting conducted by telephone conference on 11 November 2004 by his employer. He was told that his test was positive. Mr Crawford gave an explanation for the failed test and explained that his use of cannabis was out of character.

[12] Following the telephone discussion a document was prepared and signed by Mr Crawford and Peter Lord, Senior Operations Manager NZ on behalf of Recall on 11 November 2004. It was recorded that there had been a discussion about the medical test results. It also provided

As discussed and agreed at the teleconference 11/11/04 at 2pm:

- *you will be suspended on full pay until a second test is completed and results have been received.*
- *Your continued employment with Recall SDS will depend on the tests confirming that this was a one off incident (as you suggested by way of your explanation) by showing the levels of THC have dramatically declined or are zero.*
- *Further to that you agree to take weekly tests for a further 3 weeks and agree to random testings we see fit going forward.*
- *The results from these on going tests will need to be clean to reinforce your explanation that you had done a silly thing and it was a one off occurrence.*
- *If any illegal substances are identified by subsequent tests, Recall will have no alternative but to enforce your employment being terminated.*

[13] Another drug test was arranged for 15 November 2004 for Mr Crawford. The result came back negative but it was noted that the sample of urine taken was dilute with a Creatinine level of 149.

[14] Mr Crawford was permitted to return to work and did so on 17 November 2004.

[15] On 24 November 2004 Mr Crawford was requested to undertake a further drug test. The result came back positive.

[16] Mr Crawford was advised of the positive result when he attended a meeting by way of teleconference on 2 December 2004. Mr Crawford denied using drugs and said that the result must be incorrect.

[17] On 3 December 2004 Mr Crawford was requested to attend a further meeting by way of telephone conference and he was advised that his employment was terminated.

[18] On 9 December Mr Crawford passed a drug test that he had carried out in a private capacity.

[19] The Authority has discretion whether or not to grant an interim injunction. There are principles that the discretion may be exercised in accordance with. It is recognised that the answer to an interim injunction is not in the rigid application of a formula but there are two broad enquiries; first whether there is a serious issue to be tried and secondly, where the balance of convenience lies. The final question requires the Authority to stand back and ascertain where the overall justice lies - *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA).

Serious Issue to be Tried

[20] I am satisfied that Mr Crawford has an arguable case and that there are serious issues to be tried. The following issues are disclosed by the affidavit evidence.

[21] There are arguable issues in terms of whether the meetings on 11 November and 2 and 3 December were conducted in a fair and reasonable manner and there is an issue as to whether the process leading to Mr Crawford's suspension was fair.

[22] There is an arguable issue over the precise process agreed to by Mr Crawford on 11 November 2004 and whether the process was properly carried out prior to Mr Crawford's dismissal.

[23] There is an arguable issue as to whether the disciplinary procedures in Mr Crawford's employment agreement were followed and whether information about the drug test was deliberately withheld from Mr Crawford pending the telephone conference on 2 December 2004.

[24] There is a serious issue in respect of the result of the drug test that was relied on by Recall in terminating Mr Crawford's employment in that Mr Crawford maintains such result is incorrect and that he had not used cannabis following the first positive test.

[25] Mr Crawford I find comfortably meets the threshold in terms of serious issues to be tried.

Balance of Convenience

[26] The Authority is required to look at the relevant detriment or injury that the parties will incur as a result of the interim injunction being granted or not in terms of considering the balance of convenience.

[27] I accept that Mr Crawford will suffer detriment or inconvenience because he will have serious financial difficulties with mortgage payments and other expenses in the interim period before a final determination of this matter if he is not reinstated. Although Mr Crawford's wife is working her wages are insufficient to cover all the family expenses. Mr Crawford has managed to obtain some temporary employment but this is not regular in nature. Even if Mr Crawford is eventually

successful and there is a final determination in his favour that will not help him I accept through the current period with the financial concerns. Mr Crawford also says he has suffered embarrassment about his situation.

[28] I accept that Recall will likewise suffer in this case inconvenience or detriment if Mr Crawford is returned to his position. This is because of concerns about the safety aspects if an accident occurs when Mr Crawford is driving given Recall's knowledge of the drug test results. If an accident does occur and there is some liability for Recall as a result then I accept that harm may not be adequately compensated by payment of damages.

[29] Recall is also concerned about its reputation as a security firm and possible undermining of its drug and alcohol policy if Mr Crawford is returned. Recall say that they have lost trust and confidence in Mr Crawford. Mr Oldfield also submitted that an ongoing drug testing regime would be required for the applicant if he was reinstated and this could be costly and time consuming. Mr Oldfield submits that if after a full hearing Mr Crawford could show that the drug tests were inaccurate then the respondent would have less trouble accepting him back.

[30] Mr Thompson submitted that Mr Crawford was willing to undergo a further drug test before reinstatement. Mr Oldfield however submitted, and I do place some weight on this submission, that an ongoing drug test regime would be undesirable as it is this drug testing that the applicant is challenging. That is an issue really that goes to the practicality of interim reinstatement.

[31] I have carefully weighed up the matters that I have set out and the points made to me in helpful submissions from Mr Thompson and Mr Oldfield. I have to consider between the applicant and respondent who would suffer the most detriment as the result of an order against them. I am of the view that in light of the safety concerns following the drug tests the balance of convenience favours the respondent.

[32] I now stand back from the case to have regard to it more generally in considering the overall justice. Mr Crawford has established an arguable case which does, on the untested evidence, in terms of an assessment of procedure appear comparatively strong when evaluated with the respondent's case. In terms of an assessment of substance the question of whether there was contribution is a serious issue. I have found that the balance of convenience favours Recall in terms of the safety aspects of Mr Crawford returning to work. In this case Mr Crawford amongst other matters challenges the result of a drug test. That will require a careful assessment by the Authority of evidence of a scientific and medical nature which it is simply unable to do at this time. These are matters more appropriately determined by way of a full hearing. I have also had regard to the problematic situation of an ongoing drug test regime in the interim and the shortness of the period before a full hearing can be held in terms of Mr Crawford's financial position.

[33] I find that the balance of convenience and the overall justice in all the circumstances weigh on the side of the respondent. I am of the view that the interim application for reinstatement should be declined and that a full investigation meeting should now take place. I consider this preferable at this stage to the making of interim orders. I have offered the parties dates either in the last week of March or in April. A support officer will contact the parties shortly to set up a telephone conference to confirm the dates and parties availability.

[34] The application for interim reinstatement is dismissed.

Costs

[35] I reserve costs and will deal with the issue of costs in the final determination.

Helen Doyle
Member of Employment Relations Authority