

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Kasia Kurene (first applicant)
AND	Rail and Maritime Transport Union Inc (second applicant)
AND	United Group Rail (NZ) Limited (respondent)
REPRESENTATIVES	Geoff Davenport for the applicants Peter Elder for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 2 February 2007
DATE OF DETERMINATION	5 February 2007

DETERMINATION OF AUTHORITY: Interim Reinstatement

Employment Relationship Problem

1. Ms Kurene filed an urgent application for interim reinstatement on 3 January 2007.
2. The parties subsequently undertook mediation but the employment relationship problem remained unresolved.
3. The Company filed its statement in reply on 23 January.

4. During a telephone conference call on 17 January the parties agreed to a one-day investigation in Wellington on Friday, 2 February. They usefully provided affidavits and witness statements in advance as well as relevant documentation. The following references to document numbers are those set out, for convenience, in the applicant's bundle.

Background

5. Ms Kurene was a charge hand at the Company's Hutt Workshops until her summary dismissal on 20 December 2006 for "*refusal to carry out a reasonable instruction from the Locomotive Supervisor Mike Sarich and your Team Leader James Sommerville ...*" (document 41). The Company alleges, and Ms Kurene denies, that she refused three separate instructions to send 5 of her team to undertake a priority task.

Discussion and Findings

6. Ms Kurene seemingly has good reason to deny the findings when regard is had to the following: the evidence currently before the Authority, albeit untested, indicates the applicant undertook the work, although not immediately. Second, the source of the initial instruction – Mr Sommerville – has filed two sworn affidavits in support of Ms Kurene's version of events, in particular that she did not refuse his instruction. Finally, in respect of the last instruction, Mr Sarich appears to accept he may have given Ms Kurene the impression he was countermanding or qualifying his earlier instruction and that she enjoyed some leeway in complying with his instruction, and it did not have to be immediately undertaken.
7. Other factors to be taken into account, in the context of a substantive investigation and the application of the s. 103A test for justification, include whether Ms Kurene fairly and reasonably believed some of her team were medically not fit to undertake the work required of them by Mr Sarich, and whether – if it is found that the applicant refused to carry out a reasonable instruction – her action amounted to serious misconduct.
8. However, during these proceedings the Company advised that it accepted Ms Kurene should return on an interim basis to her position pending a substantive investigation by the Authority. It is therefore not necessary for me to make a determination on this application.

9. What remains for determination are, under s. 127 (5) of the Act, and at the parties' request, the terms of her interim reinstatement as they are unable to reach agreement on these details.

10. Having heard the parties' submission in respect of these issues I make the following findings:
 - a. Ms Kurene's interim reinstatement, as accepted by the Company, is to take effect from Thursday 21 December 2006, i.e. the day following her dismissal. There will be no interruption to the applicant's service.

 - b. Ms Kurene will return to the workplace and to her position as charge hand on Monday 12 February 2007. This is to allow for a 'cooling off' period and in particular for the parties, having had the benefit of airing their respective positions in the context of an interim investigation, to attempt to settle this matter on their own terms. Ms Kurene will undertake paid garden leave during the interim.

 - c. Between the date of this determination and Monday 12 February 2007, and unless an alternate date is agreed to by the parties, the applicants and the respondent are directed to undertake urgent mediation: s. 159 of the Act applied.

 - d. The parties are to attempt to reach agreement on the Company's concern that Ms Kurene's reinstatement from 21 December will result in an overpayment, failing which the matter is reserved for determination in the Authority's substantive investigation.

 - e. While the Authority arguably has jurisdiction under s. 127(5) of the Act to impose a publicity ban on either party I am not prepared to take that considerable and blunt step. Rather, and as advised at the conclusion of the interim investigation, and because of their powerful and mutual good faith obligations and because, also, of the reality of applying discretionary remedies, I urge both parties to make minimal comment in the meanwhile in respect of this matter. In other words, the parties should treat this employment relationship problem and its detail as *sub judice*.

 - f. Similarly, both parties will of course continue to meet the terms and conditions of their employment agreement, including the obligations on the respondent to issue reasonable instructions and on the applicant to undertake promptly and effectively those reasonable instructions while at the same time meeting her – and the Company's – health and safety obligations.

Determination

11. The Authority's determination consists of those matters set out in par 10 above.
12. As requested by the parties, costs are reserved.

Denis Asher
Member of Employment Relations Authority