

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 Ms Kurene and the Union Peter Elder for the Company
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 24 & 25 July 2007
SUBMISSIONS RECEIVED	by 3 August 2007
DATE OF DETERMINATION	10 August 2007

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In a statement of problem filed on 3 January 2007 Ms Kasia (Sia) Kurene sought interim reinstatement as well as permanent reinstatement, compensation for all lost salary, compensation for humiliation, etc of \$20,000, a penalty for breach of the parties' collective employment agreement including its health and safety provisions and costs.

2. My interim determination dated 5 February 2007 (WA 21/07) records amongst other things the Company's concession that the applicant would be reinstated on an interim basis, i.e. I was not obliged to determine the application for interim reinstatement.
3. While entirely legitimate developments caused some delay in bringing this matter on to a substantive investigation, the parties did agree to a two-day hearing in Wellington, commencing on Tuesday 24 July and to making use again of the extensive evidence provided for the purposes of the earlier interim investigation nearly 6-months before.

Fresh Developments

4. At the outset of the investigation on 24 July counsel for the applicants, Mr Geoff Davenport, advised that his clients were no longer pursuing at this investigation meeting the alleged breach of the parties' collective agreement in respect of health and safety matters and the related claim for a penalty. Mr Davenport also confirmed Ms Kurene had not lost any remuneration, and no compensation under that heading was sought.

Contempt of Court Allegation

5. On the morning of the second day of the investigation, 25 July, the applicants made a fresh allegation that the Company had breached Ms Kurene's implied terms and conditions of employment by intimidating and/or threatening and/or harassing a witness and/or undertaking conduct that could have those results. In particular, the applicants alleged that the respondent failed to ensure its locomotive supervisor, Mr Michael Sarich, did not engage in conduct that involved or could involve the intimidation and/or harassment and/or threatening of a witness.
6. The complaint relied on evidence produced to that effect by Mr James Somerville. Mr Somerville is a team leader who reports to Mr Sarich: Ms Kurene reports to Mr Somerville.
7. As is made clear in the interim determination, Ms Kurene was summarily dismissed on 20 December 2006 for "*refusal to carry out a reasonable instruction from the Locomotive Supervisor Mike Sarich and your Team Leader James Somerville ...*" (page 041 in the agreed bundle).
8. Mr Somerville had provided a written affidavit at the time of the interim investigation; he also confirmed that evidence at the substantive investigation (on 24 July).

9. On the morning of 25 July Mr Somerville gave oral evidence to the Authority, along with a copy of notes (refer to pages 265-267 of the agreed bundle), of a meeting with Mr Sarich on 3 February 2007, i.e. the Saturday following the Authority's interim investigation on Friday 2 February.
10. The thrust of Mr Somerville's evidence to the Authority, both at the interim investigation, and on the first day of the substantive, was that the applicant had complied with the instruction **as** he had conveyed it to her, on behalf of Mr Sarich and that he had, several times, attempted to communicate that fact to his management in face of their continued claim Ms Kurene had not complied with an instruction from him.
11. My interim decision included the following:

*Ms Kurene seemingly has good reason to deny the (respondent's) 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 Somerville – 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.*

(emphasis added, par 6 of WA 21/07, 5 February 2007)

12. As set out in his record of their conversation (pages 265-267 of the agreed bundle), Mr Somerville alleges Mr Sarich said, amongst other verbatim comments, the following:

Can I come and talk with you as a friend ... I want to tell you a bit about what happened yesterday ... Now James I'm here as a friend you can tell me to piss off if you want but I'm warning you that there is going to be pressure coming down. Your statement tipped the scales yesterday. Sia has been given temporary reinstatement ... I believe what you say on how you received the information I gave you on the phone ... I'm sure I mentioned numbers and how important it was. But no problem I believe what you said now I'm telling you as a friend and I don't want your cards marked on your decision but you have to think did Sia carry out your instruction ... (O)ne lawyer is claiming \$25000.00 we are talking all up in the 100,000 plus here this is bigger than anything I have ever seen ... Now I'm sure you have a bright future here if you want it. ... Mike said think about it in the weekend as this is bigger than (the managers). After this the union and employee relationship with United will change. I got you this job I am not using that against you it was my say so you became a team leader I('m) not saying I am calling that in but think very carefully did Sia carry out your instruction. ...

13. Mr Somerville says that, some time afterward, he advised the applicant of Mr Sarich's approach and comments but asked that she keep the matter confidential. He says he told one other work colleague of the same, also on a confidential basis, but otherwise kept the approach to himself. Mr Somerville says he only disclosed details of the approach, 6-months after the event, to the applicant's counsel as he was concerned by how, on the day he first gave evidence to the Authority's substantive investigation (24 July), it had been dismissed by the Company as if he were "*a liar*" (oval evidence).
14. Ms Kurene confirmed she had been advised, shortly after the event, of Mr Sarich's approach and his comments following the interim investigation but could not place a date on Mr Somerville's disclosure: at his request she agreed to keep it confidential. She says that, around the same time, Mr Sarich also approached her and, in addition to offering to pray for her, asked if there was a way they could settle the matter. She replied that she did not believe there was.
15. Mr Sarich agrees he approached Mr Somerville on 3 February: he accepts some of the words and comments attributed to him but denies others including, "*your statement tipped the scales*", and "*I don't want your cards marked*" (above). He says his approach was in a personal capacity, not at the behest of management, as he had a genuine concern about the impact of Mr Somerville's evidence, was sure he had conveyed a clear instruction to the witness and asked that he forward it to Ms Kurene, and – in respect of his approach to the applicant – that he was concerned as to the effect the ongoing employment relationship problem was having on the workplace. He denies attempting or intending to intimidate Mr Somerville or Ms Kurene, or to influence the former to change his evidence.

Amended Remedies Claimed

16. Because of these fresh allegations, and by way of an amended statement of problem filed mid-afternoon on that last day, Ms Kurene sought increased compensation for humiliation, etc of \$25,000 and a new claim of \$20,000 damages in relation to the allegations of contempt and intimidation.
17. The parties did not believe it would be helpful to undertake further mediation in light of this allegation. Whilst in agreement that the allegations were serious, the parties were also initially uncertain as to the steps they believed it was appropriate for the Authority to take in respect of the allegations of contempt and intimidation.

Permanent Reinstatement Conceded

18. Consistent with the fast-moving developments of the day, and at around the same time in the investigation but not because of the various claims arising out of the alleged contempt of court, the Company agreed it had unjustifiably dismissed Ms Kurene and accepted her permanent reinstatement.

Matters Remaining to be Determined

19. Because of the adjournment of the health and safety claim, the fact that no lost wages had been incurred, and in light of the fresh allegation and the Company's agreement to permanently reinstate Ms Kurene, the parties agreed that the issues that remained for the Authority to determine were the amounts of compensation for humiliation, etc to be paid to Ms Kurene arising out of her unjustified dismissal and – in respect of the contempt/intimidation issue – what if any damages she should receive in respect of the various claims arising out of the alleged contempt of court, and whether the Authority should refer the allegation to the Employment Court and/or the Solicitor-General.

Parties' Positions

Applicants' Position

20. The applicants agree with the Authority's preliminary view that s. 196 of the Act arguably does not apply to the alleged contempt and intimidation, as it did not happen within 'the face of the Authority' as required by that section.
21. They also say that Mr Sarich's intentions in approaching Mr Somerville are irrelevant per the finding in *Talbot v Air New Zealand* [1995] 1 ERNZ 609 at 618, and – in light of Mr Somerville's feelings arising out of the approach – it is for the Solicitor-General to reach a conclusion on whether there has been contempt or intimidation (*Ho v Chief of Defence Force* [2005] 1 ERNZ 93, Appendix B, par 10, above). This is because the matter raises extremely important issues of administration of justice and the right of all witnesses to be free from express and implied intimidation. Issues of possible contempt are matters of important public interest: *NZ Railways v NZ Seaman's Union* [1989] 2 NZILR 613. The Authority should refer the issue of possible intimidation and contempt to the Solicitor-General via a report that is provided also to the parties.
22. The Solicitor-General should consider also the issue of mediation. Support for this approach can be found in *Designlink Ltd t/a Rodney Wayne Hairdressing Whangaparaoa*

and Ors v Raymond unreported, Colgan J, 1 May 2006, AC 24/06, pars 62.64, where the Court referred the matter to the Solicitor-General despite the parties having resolved their employment relationship problem.

23. In the meantime the Authority should determine the remedies sought including damages for breach of implied contractual terms. In all the circumstances, and consistent with *Ho* (above) and unlike the 'disconnection' applying in *Designlink* (above), an award of \$20,000 is justified.
24. In respect of Ms Kurene's claim for compensation for humiliation, etc and damages, and amongst other argument, the applicant's say that significant payments are warranted because the applicant was particularly, and deeply, distressed by the Company's "blinkered" approach to the allegations against her ((par 12, applicant's' closing submissions). For example, it knew from the outset that Mr Somerville did not support its claim Ms Kurene had refused his reasonable instruction but nonetheless persisted with its claim. Ms Kurene was made to feel powerless by the Company's refusal to provide her with important information for much of its investigation and its unilateral 'u-turn', in breach of its own policy, when it changed its meetings to a disciplinary focus. The applicant's evidence as to the effect of her dismissal is clear and powerful. The dismissal itself had an immediate physical impact: she could neither drive her car safely nor even get its key into the lock.
25. The issues of distress remained unresolved until the employer's concession, more than 7 months after Ms Kurene's dismissal, and after an interim injunction, two mediations, significant correspondence and one and three quarters of the two day substantive investigation.

Company's Position

26. The Company says the test for contempt is that it must be established beyond reasonable doubt (*Solicitor General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA)), and where there is serious likelihood that it has caused harm to the interest of the parties to the litigation or to public interest. In this case Mr Sarich's initiatives were made on genuine grounds in respect of what he believed then and now the facts to be, and because he anticipated Mr Somerville would come under pressure not from him but the process itself. While conceding to the Authority his actions were "stupid" (oral evidence), at no time were they intended to intimidate or threaten Mr Somerville.

27. There was no loss to Ms Kurene arising out of Mr Sarich's approach to Mr Somerville per the principles outlined in *Ho* and *Designlink* (above).
28. The Company submits that the Authority take no action in respect of this matter.
29. In respect of Ms Kurene's claim for compensation for humiliation, etc and damages, and amongst other argument, the Company says the applicants attempted to thwart its investigation process and this led to it being overly lengthy. Ms Kurene also made statements during that interview that were unhelpful and wrote a newsletter article setting out her views. The Company felt that its decision was fair and reasonable in the circumstances.
30. Ms Kurene's contributory fault was substantial because, amongst other things, it was her intention to thwart or not follow the original instruction issued by Mr Sarich: she continued to claim her work had greater priority notwithstanding the discussion in the previous day's team meeting to the contrary.
31. Alternatively, Ms Kurene decided to determine the work priorities.
32. Despite two subsequent directions by Mr Sarich himself, Ms Kurene's response was unacceptable, particularly an apparent 40-minute delay before commencing the work she was directed, along with her team, to perform. The applicant's demeanour and approach (response) to Mr Sarich clearly show she took (unreasonable) exception to his requirements.
33. Ms Kurene's reliance on health and safety issues in her defence was a smoke screen in her effort to lead management away from the fact she failed to carry out an instruction.
34. When the locomotive was finally prepared to the customer's requirements the respondent lost some \$17,000 by way of lost opportunity costs on the price subsequently charged to the customer because of the delays.
35. Ms Kurene's contribution to this matter was substantial and any remedies, if granted, should be accordingly substantially reduced.

Discussion and Findings

Humiliation, etc

36. Ms Kurene is 43 years of age and lives with her husband and three children. The evidence she gave in respect of the effect of her summary dismissal was powerful, clear, entirely credible and largely uncontested.
37. Ms Kurene said, amongst other things, that she had dedicated 7 years of her life to the job, had worked long and hard to build up loyalty and camaraderie and what is otherwise a male dominated workplace. She was and is the only woman charge hand out of a workforce of almost 200. She was especially distressed by her dismissal falling as it did 5 days before Christmas and at a time when she had arranged to travel to Australia to spend time with her pregnant sister and to help with the anticipated birth of twins shortly thereafter. She found it necessary to ask other family members not to tell her father, whose profession she had taken up and whom she had followed into the respondent's workplace, of her dismissal.
38. As Ms Kurene's diary notes, recorded at that time, make clear she was "*shattered and angry*" and, whereas the purpose of the trip had been, amongst other things, to help her sister's pregnancy the reverse occurred – her sister looked after her (pages 059-062 in the agreed bundle). Ms Kurene could not sleep and, as the primary income earner, was anxious as to her and her family's future. The dismissal impacted on her and her husband, and their children.
39. In assessing compensation for humiliation, etc I also take into account the benefit to Ms Kurene of her employer's decisions to, first, concede her interim reinstatement and, second, conceded during the investigation (i.e. publicly) without condition, to permanently reinstate her employment, and to make an offer of financial compensation for humiliation, etc and costs (an offer the applicant – as she was entitled – elected to decline). The Company's decision, albeit late, to permanently reinstate Ms Kurene goes a significant distance toward acknowledging the concerns articulated by the applicant as being at the heart of her grievance, including the significance and meaning of her loyalty to the Company and the efforts she had made during her employment with it, and to conceding – publicly – the merits of her position.
40. Having regard to the above I am satisfied the applicant is entitled to compensation for humiliation and set that figure at \$14,000: s. 123 (1) (c) (i) of the Act applied.

Contributory Fault

41. The Company's concession that Ms Kurene's dismissal was unjustified is compelling ground, I find, that there were no actions on her part that in any way contributed toward the situation giving rise to the personal grievance: s. 124 of the Act applied.
42. I am reinforced in that approach by the following: because of the significance of Mr Somerville's evidence, I am satisfied there is no evidence to support the claim set out in respondent's closing submission that Ms Kurene set out deliberately to thwart Mr Sarich's instruction. I am also satisfied from the evidence – despite what the Company's closing submission what have me find – that the applicant did not clearly know of the job priority for that day or that she decided she would set work priorities (thereby challenging Mr Sarich), or that Ms Kurene 'hid' behind non-genuine health and safety concerns or that she and her union set out to frustrate the Company' subsequent investigation.
43. At the heart of this employment relationship problem, as it emerged during the Authority's investigation, was a miscommunicated instruction by Mr Sarich followed in short order by his mistaken assumption and heated response, the effects of which were compounded by an investigatory process that – arising from the parties' combatative stance – left much to be desired.
44. No evidence was lead by the Company during the Authority's investigation in support of its claim Ms Kurene's actions cost it \$17,000 in lost opportunity, despite an invitation to do so. The evidence from Mr Peter Peteru, another team leader and responsible for the prioritised job, is that it was completed that day on schedule.

Damages

45. Ms Kurene gave oral evidence to the Authority that she had been advised by Mr Somerville of Mr Sarich's approach to him, and of their conversation, but that the former had asked her to keep it to herself: she had complied with that request. She said she was distressed by the approach and the significance she attributed to it: to Ms Kurene it was another instance of the Company acting grossly unfairly toward her and to those who could be expected to give evidence in support of her claims.
46. Case law setting out the legal basis for intimidation of witnesses as a breach of contract is well established: see *Ho* (above), pars 106-111 inclusive.

47. Put simply, it is against the law for any person who has any authority over a witness to use it for the purpose of affecting his evidence or of influencing him not to give it. That is because:

It is at the heart of the rule of law, no less in employment dispute resolution before the Employment Relations Authority, that witnesses should be free of undue influence to give accurate evidence without fear of retribution including loss of employment.

Par 62, *Designlink* (above)

48. Did Mr Sarich use his position as Mr Somerville's supervisor to that end? In my estimation Mr Sarich's actions come perilously close to a finding of deliberate threats and intimidation. I draw back from that conclusion only because Mr Sarich is clearly not an articulate man, in fact is verbally clumsy if not often unclear as to what it is he is trying to say. He also gave sincere evidence as to his intention while conceding that it was reasonable for Mr Somerville to draw an adverse conclusion from his inadvertent actions.
49. Mr Sarich's actions were at the very least ambiguous and would intimidate any reasonable person, including Mr Somerville. The latter was justifiably alarmed by what Mr Sarich might have been saying to him, particularly as the evidence he was being asked to reflect on – as Mr Sarich would have appreciated – had been forwarded to the Authority already by way of an affidavit, i.e. sworn on oath.
50. I am persuaded that Ms Kurene was damaged by Mr Sarich's "ill-advised" (Ho, above, par 120) approach and comments to Mr Somerville, that she saw it as a continuation of her employer's unfair stance and proof of their ongoing endeavours to unfairly dismiss her: on the basis of how a reasonable person would understand the words attributed to Mr Sarich, I accept it would have deepened the applicant's feelings of hurt and distress and seriously weakened her confidence and trust in her employer, particularly as – and arising out of her undertaking – Ms Kurene was obliged to keep the matter to herself.
51. However, because the evidence discloses it was not sanctioned by the Company, but was at the misguided initiative of one of its supervisors, and having regard to the evidence of Ms Kurene's humiliation, etc, putting it into the context of significant compensation already awarded her, and after taking account of the Court's approach in *Ho* (above), I set the amount of damages to be paid to the applicant at \$6,000.

Referral

52. As these events, and apparent intimidation, did not occur “*during that person’s sitting or attendance in the Authority ... or in going to or returning from the Authority ...*” (ss 196 (1) of the Act), I am not satisfied Mr Sarich’s actions amount to a contempt of the Authority and do not therefore adopt the procedure of referral to the Employment Court set out in *Sloggett v Taranaki Health Care Ltd* [1995] 1 ERNZ 553, 573. While ill-advised, and clumsily put, I am prepared to accept that Mr Sarich did not intend to persuade Mr Somerville to change his evidence.
53. Because of the seriousness attaching to Mr Sarich’s actions I am referring this determination to the Solicitor-General in respect of his actions and s. 117 of the Crimes Act 1961, along with copies of the parties’ submissions (*Designlink*, above, par 64).

Determination

54. The Company is to pay to Ms Kurene \$14,000 (fourteen thousand dollars) compensation for humiliation, etc and \$6,000 (six thousand dollars) damages for breach of her contract.
55. As requested by the parties, costs are reserved. For the benefit of the parties in their effort to settle this matter on their own terms, I repeat again my observation during the investigation that – subject to submissions if required – there is no apparent basis for seeking full solicitor/client costs.

Denis Asher

Member of Employment Relations Authority