

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2020] NZERA 190
3099512

BETWEEN	RAY SMITH Applicant
AND	FLETCHER CONCRETE AND INFRASTRUCTURE LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Simon Mitchell, counsel for the Applicant Susan Hornsby-Geluk, counsel for the Respondent
Investigation Meeting:	On the Papers and by telephone
Determination:	08 May 2020

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Before the Authority is an application for interim reinstatement brought by the Applicant, Mr Ray Smith, under s 127 of the Employment Relations Act 2000 (the Act).

[2] Mr Smith was dismissed for serious misconduct by the Respondent, Fletcher Concrete and Infrastructure Limited (FCIL). Mr Smith claims that he was unjustifiably dismissed from his role as Site Engineer/Supervisor, and is seeking reinstatement on both an interim and a permanent basis.

[3] FCIL claims that Mr Smith's dismissal for serious misconduct was justifiable and followed a fair and reasonable process. FCIL resists the claim for interim reinstatement and the substantive claim.

[4] The application for an interim injunction was accompanied by an undertaking as to damages and an affidavit by Mr Smith. Affidavits were also filed in opposition by FCIL.

[5] The parties agreed to the Authority determining this preliminary issue of the interim reinstatement application based on the Statement of Problem and the Statement in Reply,

documents submitted by the parties, on affidavit evidence, and on submissions from the parties which were presented by telephone.

Note

[6] Interim reinstatement applications are determined on the basis of the statement of problem, statement in reply, affidavit evidence from the parties, relevant documentation lodged and submissions from the parties.

[7] As permitted by s.174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[8] The evidence before the Authority for the purpose of determining this interim reinstatement application has been presented as usual in such applications in affidavit form by witnesses on behalf of both Mr Smith and FCIL.

[9] As the affidavit evidence presented must necessarily remain untested until the substantive investigation of the unjustified dismissal personal grievance, any findings of fact by the Authority in this determination are provisional only and may change later once the claims have been fully investigated and all witnesses have been examined on their evidence.

Principles

[10] I granted Mr Smith's application for this matter to be dealt with on an urgent basis because this is the usual procedure for dealing with an application for an interim reinstatement. In determining this matter, I must apply the law relating to interim reinstatement as set out in s 127 (1) and (4) of the Employment Relations Act 2000 (the Act) which include recognising that employment relationships are built on the legislative requirement for good faith behaviour and addressing the inherent inequality of power in employment relationships.¹

[11] At the Investigation Meeting held by telephone conference on 30 April 2020, I heard submissions from the parties' representatives in relation to the interim reinstatement application and tested these by questioning how the available untested evidence related to the relevant principles for determining an interim injunction application.² Those principles fall to be addressed by the answers to the following questions:

¹ Employment Relations Act 2000 s 3.

² *McInnes v Western Bay of Plenty District Council* [2016] NZEmpC 36 at [8] ERA Auckland 92 in which Judge Inglis (as she then was) referred to the court of Appeal decision in *NZ Tax Refunds v Brooks Homes Ltd* [2013] NZCA 90.

(a) whether or not Mr Smith has established that there is a serious case to be tried in relation to the claim for unjustifiable dismissal; and if so:

(b) Is there a serious case in relation to the claim for permanent reinstatement?

[12] Also noted as needing consideration are the balance of convenience and the impact on the parties, including any third parties, of granting, or not granting an order for interim reinstatement, and the overall justice of the matter.

Background

Brief Background Facts

[13] FCIL has four quarries employing approximately 85 employees. One of the quarries is the Pukekawa Plant (the Plant).

[14] Mr Smith commenced employment with FCIL in July 2002 as a Site Engineer and was also appointed as Site Supervisor for the Plant. In that capacity he was responsible for managing employees in addition to managing the plant equipment to meet production targets. He was responsible for any maintenance required at the Plant, including routine maintenance, shutdown checks, and the investigation of faults following a breakdown at the Plant.

[15] The Plant comprises a series of crushers, conveyors and screens that progressively reduce the rock into various sizes approximate for sale. Large areas of the processing plant are enclosed in perimeter distance guarding, designed to prevent access to moving machinery that could cause significant injury on contact, or possibly fatal injury. There are currently ten employees working at the Plant.

[16] Entrance to the perimeter distance guarding at the Plant is controlled by a 'distance guard' or 'Isolation gate' which can only be unlocked using a specific tool located in the Plant Control Room. There is a specific procedure associated with unlocking the distance guard gate, known as the 'Distance Guard Tool Procedure'. This requires a permit to be completed by any employees accessing the Plant during isolation.

[17] There is also a sign at the entry point to the distance guard gate which states: "Danger, isolate before entry".

[18] There are Site-Specific policies known as Safe Operating Procedures (SOPs) which apply to certain of the FCIL quarries. In respect of the Plant one such policy is a Distance Guarding Tool SOP which provides:

15.1 If any work is identified to be done behind any distance guarding, a Permit to Work must be completed for all hazards identified in completing the task safely and controls for each hazard.

15.2 The Plant Operator is the person in charge of the permit and the lock out and distance guard tool.

[19] Mr Smith had signed the Distance Guarding Tool SOP on 27 March 2017.

[20] There is a Permit to Work SOP which Mr Hazell stated is a vital part of FCIL's health and safety and hazard management. It provides that:

13.1 Any time hazardous work is to be undertaken, a "Permit to Work" is completed by the relevant employees undertaking that work. This includes the location of the work, the start time, and the identification of hazards including "equipment failure".

13.2 All equipment relevant to the hazardous work is locked out/isolated prior to the work being undertaken and recorded under Section 7 of the "Permit to Work" and that personal locks are available for all workers undertaking the work.

13.3 All workers undertaking such work are to sign on to the Permit to Work in section 8.

[21] Mr Hazell stated in his untested affidavit evidence that the Site Specific SOPs do not take precedence over FCIL's other policies, especially those not considered to be Golden Rules.

[22] In June 2019 there was a serious incident involving a contractor at the Plant and as a result WorkSafe conducted an announced inspection of the Plant. WorkSafe concluded following an assessment of the distance guard at the Plant: "the guarding system relies solely on workers following written procedures."

[23] FCIL has an Isolation Systems Policy and Procedure (the Isolation Policy) which outlines employees' health and safety responsibilities when carrying out preventative maintenance checks, routine maintenance, installation of new equipment, breakdown repairs and during plant shutdowns.

[24] Mr Timothy Hazell, Central Operations Manager, stated in his untested affidavit evidence that the purpose of the Isolation Policy is to ensure that, where access to the Plant is required, any equipment being inspected is de-energised to prevent the accidental restarting of machinery while it is being inspected.

[25] The Isolation Policy outlines the specific isolation procedure for differing types of isolation which can occur, including routine isolation, non-routine isolations, single isolations and moving and testing equipment.

[26] In the case of Routine Operational Access, the Isolation Policy provides that personal isolation is not required where there is an interlocking guard and gate that automatically isolate equipment when opened or removed. Mr Hazell stated that this is because, when the gate is opened, it prevents the system from being energised.

[27] Non-routine operational access is set out in the Isolation Policy as including:

8.1 Stopping and cleaning equipment;

8.2 Conducting maintenance and repair work of equipment;

8.3 Before adjusting or altering machinery or equipment where body parts can become trapped or entangled in moving pieces of equipment.

[28] In the event that non-routine access is required at the Plant, the Isolation Policy requires the identification of any equipment or machinery that needs to be isolated, and that equipment to be shutdown. Each employee at the plant has his or her own personal padlock for ensuring the levers controlling the power to particular equipment cannot be reset whilst they are inside the plant.

[29] The Isolation Policy is known within FCIL as one of its ten 'Golden Rules'. Golden Rules are those policies which FCIL considers life-saving rules for employees working on sites owned by FCIL throughout New Zealand.

[30] The Isolation policy sets out that failure to adhere to the requirements set out in it: "will be considered to be serious misconduct" and disciplinary action is likely to be taken.

[31] On or about June 2019 Mr Hazell stated in his affidavit that employees were trained on the operation of the Isolation Policy and Distance Guarding Tool SOP at the Plant. This included:

- a) Updating the isolation Policy in June 2019, and communicating the updated policy to all current employees, including Mr Smith; and
- b) Undertaking 'Site Supervisor Induction Training' on 28 June 2019 which specifically referred to the isolation systems procedure, also attended by Mr Smith.

[32] During June 2019 FCIL also engaged Dupont Sustainable Solutions to partner with it in reviewing safety, with a specific focus on the company's safety culture. As part of this process a series of workshops were held with employees. Mr Smith was involved in a National Health and Safety Supervisor workshop to review the findings of the Dupont programme.

[33] Mr Hazell stated in his untested affidavit that Mr Smith as a Site Supervisor he had been asked to provide ideas about how FCIL could improve its safety culture and show leadership in encouraging and improving the overall safety culture around health and safety.

Incident on 12 February 2020

[34] On 12 February 2020 smoke was identified as coming out of the Plant. Mr Smith and Mr John Tomlinson, Acting Quarry Manager at the Plant, both arrived at the Plant.

[35] Mr Smith identified that there had been a fault with a drive belt and that the plant had automatically shut down. Mr Smith also identified that the Plant had 'E-stopped' meaning that there was no live control power to the Plant.

[36] Mr Smith asked Mr Luke Brice, one of the Plant Operators, to access the gate key and unlock the distance guard in order that he and Mr Brice could access the Plant. Mr Smith in his untested affidavit evidence stated that this was to allow them to do the visual inspection of the Crusher One drive belts and the CV4 conveyor scraper belts.

[37] Mr Tomlinson stated in his untested affidavit evidence that he was delayed in arriving at the crusher, by which time Mr Smith and Mr Brice were already unlocking the distance guard. He had assumed that Mr Smith and Mr Brice had complied with the lockout procedure and applied their own personal locks as required in the isolation policy.

[38] Mr Tomlinson stated that putting a personal padlock on the isolation point can isolate a cluster of components which make up the different pieces of equipment in the Plant, or alternatively will isolate different individual items. Regardless of who opens the distance guarding gate, every person who enters a restricted area is required to put their personal padlock on the isolation point. He did not therefore proceed beyond the distance guarding because he did not have his personal padlock on him at that time.

[39] Mr Tomlinson stated that he observed Mr Smith and Mr Brice enter the distance guarding underneath the crusher, and Mr Smith identified that the belts had burnt out. At that point he had taken control and assessed what had gone wrong with the drive belt. After

inspecting the drive belt Mr Smith and Mr Brice had exited the distance guard perimeter and locked the gate.

[40] Mr Tomlinson stated that they had then looked on top of the crusher to check if there was any rock inside the crusher which action could be carried out without going through the distance guarding, meaning that isolation was not required.

[41] Upon returning to the ground level of the Plant Mr Tomlinson stated that a scraper blade had been discovered sitting by the steps by the crusher which meant it was possible it was missing from somewhere in the Plant. Mr Smith had asked Mr Brice to unlock the distance guarding closer to the feeder and investigate whether or not the scraper blade had come from the conveyor.

[42] Mr Tomlinson stated in his affidavit that Mr Smith had gone to the Plant Control Room and he had followed Mr Brice to the distance guarding by the feeder. Mr Brice had only had undone the lock on the gate when Mr Smith had asked if he was clear via the RT. Mr Brice had responded that all was clear and locked the gate without checking for missing scrapers.

[43] Mr Tomlinson stated that it was at that point when Mr Smith started the Plant up again that he realised Mr Brice had not returned to the isolation point to take his padlock off, and that therefore neither Mr Brice nor Mr Smith had isolated because he had not seen Mr Smith remove his padlock either.

[44] He had referred to the sign on the gate which stated: "isolate before entry" and asked Mr Brice what it meant. He also asked Mr Brice whether or not he and Mr Smith had isolated. Mr Brice confirmed that they had not done so.

[45] Mr Tomlinson stated that he had telephoned Mr Hazell who confirmed that the Plant needed to be shut down and asked him to obtain statements from those employees who had been present.

[46] Mr Hazell stated in his untested affidavit evidence that he had contacted the National Safety Manager to inform her there had been a potential breach of the Isolation Policy at the plant. He had also contacted the National Human Resources Manager and met with the National Quarries Manager.

[47] Mr Hazell wrote to Mr Smith on 17 February 2020 inviting him to attend a disciplinary meeting on 19 February 2020. The letter set out that FCIL had concerns that there had been a breach of a 'Golden Rule', and that if substantiated this would be regarded as a serious breach of the Code of Conduct which, if substantiated, could result in the termination of his employment. The specific allegations were that:

- On 12th February, following an unplanned plant shut down, you accessed an area by unlocking a distance guard without following the company Isolation Systems Policy and Procedure.
- When asked about this, you replied that ‘E-stopped’ out meant no live control power and that nothing would start without being reset.

[48] The letter invited Mr Smith to bring a support person or representative to the meeting.

Disciplinary Meeting 17 February 2020

[49] Mr Smith attended the disciplinary meeting held on 19 February 2020 at which Mr Hazell and an HR Advisor were present. During the meeting Mr Smith did not deny the allegations but advised that he had assessed the risk and did not consider that a lock-out was required given the system had been stopped by the ‘E-Stop’.

[50] Mr Smith was provided with a preliminary decision on 21 February 2020. Mr Hazell advised that that it was his preliminary view that the substantiated conduct amounted to a breach of FCIL’s Code of Conduct, namely the failure to follow the safety requirements. He believed the allegations as set out in the letter dated 17 February 2020 had been substantiated and the appropriate outcome was dismissal on notice.

[51] Mr Smith responded during a meeting held on 9 March 2020 at which he was accompanied by a union representative, at which it was submitted that:

- a) It was unclear what policy was appropriate as there were multiple policies in place, including a policy from 2014 that did not specify rules regarding isolation gates;
- b) There should be clearly established guidelines on when people are allowed to enter the Plant, and it was unclear which policy was relevant in this regard;
- c) There should be refresher courses on the policies, and practical training on new processes; and
- d) It would be unreasonable to terminate Mr Smith’s employment based on a breach of the policy, as the policy was not clear what the expected action would be considering the circumstances.

[52] Mr Hazell wrote to Mr Smith on 26 March 2020 advising that he had considered Mr Smith’s responses and his view was that:

- a) Mr Smith's view of the risk did not excuse the fact that he was in breach of the Isolation Policy, requiring personal isolation for all non-routine operational access;
- b) The isolation procedures were well introduced on site, and all staff members trained on their application;
- c) As Site Supervisor, it was reasonable for FCIL to expect Mr Smith to comply with the Isolation Policy, and ensure the safety of himself and his colleagues, and
- d) Mr Smith had accepted that he had not complied with the relevant policies, and this meant that FCIL no longer had a sufficient level of trust and confidence in his commitment to adhering to those policies.

[53] Mr Hazell confirmed his preliminary view and Mr Smith was dismissed for serious misconduct effective 27 March 2020.

Is there a serious question to be tried in relation to the claim of unjustifiable dismissal?

[54] As a matter of principle, Mr Smith must establish that there is a serious question to be tried in respect of his claim of unjustifiable dismissal and for permanent reinstatement. A serious question was described in *Brooks Homes Ltd v NZ Tax Refunds Ltd* as an arguable case.³

[55] The threshold for a serious question or arguable case as stated in *Brooks Homes* and *Western Bay of Plenty District Council v Jarron McInnes* is that the claim is not frivolous or vexatious. As stated in *Western Bay of Plenty*:

[9] ... However, as *Brooks Homes Ltd* makes clear, an applicant must establish that there is a serious question to be tried, in that the claim is not vexatious or frivolous. The merits of the case (insofar as they can be ascertained at an interim stage) maybe relevant in assessing the balance of convenience and overall interests of justice ...⁴

[56] My findings expressed in this determination are solely for the purposes of resolving Mr Smith's application for interim reinstatement. At the substantive hearing there will be opportunity to fully test the relevant evidence and disputed questions of fact and law.

[57] Mr Smith submits he has an arguable case that he was unjustifiably dismissed and that the untested affidavit evidence surpasses the threshold of a *prima facie* case.

³ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

⁴ See n2 and n3 above.

[58] FCIL regarded that Mr Smith's actions as serious misconduct. Serious misconduct is conduct that: "deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship."⁵

[59] Having found serious misconduct following investigation, a fair and reasonable employer in considering what action to take, may do so in accordance with s 103A of the Act, that is, he or she may take action that is within a range of reasonable responses. This action may include dismissal.

[60] In this case Mr Smith held a position of responsibility as the Site Supervisor for the Plant and was employed in a safety sensitive area. It is clear that FCIL took the safety of its employees seriously, as exemplified by the engagement of Dupont Sustainable Solutions to partner with it in reviewing safety.

[61] Mr Smith took part in the employee training which took place when the Isolation Policy was introduced in June 2019, he was involved in a national Health and Safety Supervisor Workshop which covered the Isolation Policy and he, as a Site Supervisor, was asked to provide ideas to improve the safety culture at FCIL.

[62] During the disciplinary process Mr Smith accepted that he had failed to personally isolate before entering the Plant on 12 February 2020 and, as set out in Mr Hazell's untested affidavit evidence, had acknowledged that: "whether it was dead, prestart check, unplanned work, I should've locked out".

[63] Mr Smith later asserted that the work was routine work in which case the Isolation policy did not apply, and that it was unclear which policy did apply in the situation in which there were multiple policies.

[64] FCIL submits that this position is unsustainable including on the basis that the distance guarding gate contained a clear direction to isolate and the Isolation Policy was well known to Mr Smith.

[65] FCIL submits that it carried out a fair procedure at the conclusion of which its view was that Mr Smith had breached a Golden Rule relating to health and safety and had accepted he had done so. As a result it no longer had trust and confidence in him to adhere to its health and safety policies in the future.

[66] A fair and reasonable employer in reaching a decision regarding outcome will take into consideration other factors. In this case Mr Smith submits that he had many years of previously

⁵ *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483 (CA) at [487].

unblemished service, he genuinely believed he was applying the correct policies, and that FCIL took into consideration statements made by other employees which were not put to him for comment. These factors might result in a finding of unjustifiable dismissal when his claims are considered at a substantive hearing.

[67] However Mr Smith must not only establish an arguable case for unjustifiable dismissal, but must also establish that he would be reinstated if successful in such a claim.

[68] In those circumstances I find there is a serious issue to be tried in respect to whether or not the dismissal to dismiss was made without taking full account of all factors.

[69] The threshold in respect of whether there is a serious question is relatively low. I find in the circumstances of this case, Mr Smith has an arguable case for unjustifiable dismissal.

Is there a serious issue to be tried for permanent reinstatement?

[70] Mr Smith must not only establish an arguable case for unjustifiable dismissal but must also establish that he would be reinstated if successful in such a claim.

[71] Reinstatement is now the primary remedy and s125 (2) of the Act states the Authority must provide for reinstatement if it is practicable and reasonable.

[72] As stated by the Employment Court in *Angus v Ports of Auckland Limited (No 2)*⁶:

In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.

[73] The onus of proof of practicability rests with the employer.⁷ In this case FCIL submits that Mr Smith does not have an arguable case for permanent reinstatement on the basis that:

- a) Mr Smith's breach of the Isolation Policy was a deliberate act based on his own judgement of the risk, which was contrary to one the FCIL's key health and safety policies, showing a wilful disregard of FCIL's policies and procedures;

⁶ *Angus v Ports of Auckland Limited (No 2)* [2011] NZEmpC 160 at [66].

⁷ *Lewis v Howick College of Board of Trustees* [2010] NZCA 320.

- b) The change in Mr Smith's evidence between the first disciplinary meeting and the submitting of the statement of problem suggests that he is seeking to justify his failure after the fact;
- c) Mr Smith subsequently submitted that the policy was unclear despite the training he had received in the previous 12 month period; and
- d) It is impossible for FCIL to have trust and confidence in Mr Smith given his conduct and poor judgement, particularly in the safety sensitive nature of the Site Supervisor role.

[74] There is a mandatory requirement that the Authority consider an Applicant's contributory behaviour. In this case there is possibility that there was contributory behaviour on Mr Smith's part given on his acknowledgment in the disciplinary meeting held on 17 February 2020 that there was fault in his behaviour.

[75] I find that there is a possibility that contributory behaviour may be found on the part of Mr Smith, resulting in a more than theoretical outcome that he may establish a personal grievance but fail to obtain reinstatement.

[76] Taking all the submissions into consideration, and on the basis of the untested affidavit evidence as presented to the Authority, whilst I find that Mr Smith has an arguable case that he was unjustifiably dismissed, I am unable to conclude that he has a strongly arguable case that he would be reinstated permanently.

[77] Accordingly I do not find that Mr Smith has a strongly arguable case for interim reinstatement.

Balance of convenience

[78] As set out in the Employment Court case *X v Y Limited*⁸ this principle requires that the Authority balance the relative inconvenience, in terms of detriment or injury, to FCIL who will have to bear the burden of an order reinstating Mr Smith until the substantive case is heard, against the inconvenience to Mr Smith who may have a just case, of having to bear the detriment of unjustifiable action until the case is heard.

[79] It is submitted on behalf of Mr Smith that the balance of convenience lies with him because:

⁸[1992] 1 ERNZ 863, at pg 10.

- a) The dismissal will have a serious detrimental effect on him and his family because he is a man of senior years who has reached a senior position with FCIL. It is unlikely he will remain on the same remuneration with a new employer.
- b) Mr Smith was dismissed at the commencement of the level 4 Covid-19 lock down and he will be looking for new employment at a time of high unemployment.
- c) There is no evidence that, following a period of retraining, Mr Smith could not return to a productive and meaningful relationship with FCIL.

[80] FCIL submits that interim reinstatement is not appropriate in a case in which the only significant factor advanced for Mr Smith in support of his application for interim reinstatement is his financial situation.⁹

[81] Further it is submitted that Mr Smith will not lose any skills or experience as a result of the delay in having the matter heard at a substantive investigation.

[82] It is submitted that the balance of convenience lies with FCIL which would, if Mr Smith were to be reinstated, be placed in the invidious position of having a senior employee return to the workplace in circumstances where he had shown a wilful disregard for its health and safety practices, including of a 'Golden Rule'.

[83] Safety considerations are a significant factor in this case. It is submitted that FCIL employees work in extremely safety sensitive environments and perform safety sensitive tasks. Not only does Mr Smith work in such an environment, but he is a Site Supervisor whose responsibility it is to ensure the health and safety of other employees working on the site and to lead by example.

[84] It is submitted that reinstating Mr Smith would send an unsatisfactory message to other employees of FCIL that it cannot enforce the health and safety rules and that it is possible to evade serious consequences by simply pleading ignorance of FCIL's health and safety policies.

[85] It is further submitted that damages are an adequate remedy in this case, and FCIL will be able to meet any award of damages made by the Authority as a result of the substantive hearing.

⁹ *Pacific Blue Employment & crewing Ltd v B* [2010] NZEMPC 112.

[86] Further if Mr Smith was reinstated by the Authority following a substantive investigation, Mr Smith's job is such that he would be 'able to pick up where he left off'.

[87] Conversely damages could not adequately address harm to FCIL employees if Mr Smith were reinstated on an interim basis and subsequently injured himself or another employee as a result of a further safety breach.¹⁰

[88] Having considered all the circumstances and the submissions put forward by the parties, balancing the potential prejudice to Mr Smith of not reinstating him, against the potential prejudice to FCIL of so doing, I find that the balance of convenience favours not reinstating Mr Smith.

Overall Justice

[89] The Authority must assess the overall justice of the case from a global perspective.

[90] Mr Smith submits that the overall justice favours him because he is not in a position where his grievance is based on a matter of denial, or whether his actions are flagrant or disobedient.

[91] The overall circumstances include the increased value of reinstatement given the economic difficulties in the country and the increased difficulty he will face obtaining employment.

[92] FCIL submits that the overall justice favours it. It submits that Mr Smith was clearly breaching a Golden Rule which he acknowledged. It was not a one off failure to comply with FCIL's health and safety procedures, rather it is submitted that Mr Smith appears to take a nonchalant approach to health and safety which is inconsistent with FCIL's health and safety culture in what is a highly safety sensitive environment.

[93] It is submitted that the circumstances make it impossible for FCIL to have trust and confidence in him. It is submitted that after initially admitting the breach, Mr Smith sought to claim that FCIL's policies were unclear, and also attempted to blame another employee rather than accepting responsibility for his wrongdoing. This was despite the position of leadership he held and almost 15 years' experience of working as a Site Supervisor.

[94] Having taken into consideration all the circumstances, I find that the overall justice of the case subsists in declining Mr Smith's application for interim reinstatement.

¹⁰ *Clayton v Ports of Auckland Limited* AA 341/09, 22 September 2009.

Interim Reinstatement

[95] Having taken into consideration all the circumstances, I find that the overall justice of the case subsists in declining the application for interim reinstatement.

Next Steps

[96] The Authority will convene a case management conference to set timetable directions for the investigation of Mr Smith's substantive claims.

Costs

[97] Costs are reserved for determination following the substantive investigation meeting and its outcome or until this matter otherwise ceases to be before the Authority.

Eleanor Robinson
Member of the Employment Relations Authority