IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2021] NZERA 383
3141161

BETWEEN	STEPHEN MCPHERSON Applicant
AND	OJI FIBRE SOLUTIONS (NZ) LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Lou Yukich, advocate for the Applicant David France, counsel for the Respondent
Investigation Meeting:	24 August 2021 by Zoom
Determination:	01 September 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

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

[2] Mr McPherson was dismissed for serious misconduct by the Respondent, Oji Fibre Solutions (NZ) Limited (Oji). Mr McPherson claims that he was unjustifiably dismissed from his role as #2 Pulp Dryer Dry End Operator, and is seeking reinstatement on both an interim and a permanent basis.

[3] Oji claims that Mr McPherson's dismissal for actions that amounted to serious misconduct was justifiable and followed a fair and reasonable process. Oji 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 two affidavits by the Applicant. Affidavits were also filed in opposition by Oji.

[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 Zoom.

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 McPherson and Oji.

[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 McPherson'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 12 (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 Zoom on 24 August 2021, 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

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[1] Employment Relations Act 2000 s 3.

determining an interim injunction application.[2] Those principles fall to be addressed by the answers to the following questions:

(a) whether or not Mr McPherson 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] Oji manufactures kraft pulps, packaging papers and a range of packaging materials for local and global markets in New Zealand. Mr McPherson worked as a #2 Pulp Dryer Dry End Operator at Oji's Kinleith Mill (the Mill).

[14] The terms and conditions of employment in Mr McPherson's individual employment agreement (the Employment Agreement) were based upon the expired 2013-2015 Kinleith Mill Collective Agreement 2013 between Oji and three union parties, the NZ Amalgamated Engineering Prints and Manufacturing Union (the EPMU, now E Tū), First Union and AMU (the 2013-2015 Collective Agreement).

[15] Mr McPherson was a member of the EPMU during the term of the 2013-2015 Collective Agreement. In 2015, before the expiry of the 2013-2015 Collective Agreement, Mr McPherson resigned from the EPMU and became a member of the Central North Island Pulp and Paper Workers Union Inc ("CNIPPWU"). Upon resigning from the EPMU, Mr McPherson became employed on an individual employment agreement based on the terms and conditions of the 2013-2015 Collective Agreement by which he had been covered (the Employment Agreement).

[16] As set out in the Employment Agreement, Mr McPherson's hours of work were a four on, four off, 12 hour shift roster together with an additional 175 hours being extra or unrostered hours which required Mr McPherson to work as required in situations such as to perform work on start-ups or shuts, or as cover when an employee was on unplanned sick leave.

[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.

[17] The Employment Agreement contained the following clauses:

> 11.1. The Kinleith Mill operates on 365 days a year. The employee shall ensure he is available to meet the requirements of his roster and any extra hours that may be required under the provisions of clauses 12.7 – Extra / Unrostered Hours for Shift Work. The employer shall ensure that staffing is sufficient to enable employees to meet the provisions of this clause.
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> 12.7 Extra / Unrostered Hours for Shift Work: The salaries provided in C15.2 – Remuneration incorporate 175 extra un-rostered hours (this is 8% of rostered hours). These hours may arise from but are not limited to: day shut start-ups or any other start-up or shut; unplanned absence from the workplace such as sickness or bereavement; off-job training; meetings; projects"

[18] Clause 12.7 mirrored clause 13.7 of the 2013-2015 Collective Agreement. Mr McPherson's annual salary guaranteed payment for the 175 extra hours set out in clause 12.7 of the Employment Agreement whether he worked the 175 hours per annum or not.

[19] The #2 Pulp Dryer operators had a shift and on call roster process which was agreed between the operators and applied in cases where an operator who was rostered on under their four on four off shift was unable to work and a Pulp Dryer employee on a rostered day off was needed to work as short notice cover. Mr McPherson was part of the roster and had previously covered shifts in accordance with the roster.

[20] In his untested affidavit and evidence Mr Charl Badenhorst, Business Unit Manager, stated that the #2 Pulp Dryer has had an on-call roster in place for many years providing cover for employees who are rostered to work on a shift but are unable to work. The Plant requires a minimum of five people to operate and the on-call is only called in if the manpower will be below five. If the number falls below five a decision may need to be made to close down the dryer for health and safety reasons.

[21] Mr McPherson was rostered on short cover notice for 24 and 25 April 2021.

22 April 2021

[22] On 22 April 2021, Mr McPherson was contacted and advised by his Shift Manager, Mr Chad Hulme, that he was rostered to work on day shift on Sunday 25 April 2021, which was otherwise a rostered day off for him.

[23] The Pulp Dryer Operator who was originally rostered to work on 25 April 2021 provided a medical certificate on 22 April 2021, which stated he was medically unfit to work for the next four days. The B Shift Manager had asked the D Shift Manager, Mr Hulme, to inform the rostered people to provide cover on 24 and 25 April 2021.

[24] Mr Bartleman stated in his untested affidavit evidence that up until 22 April 2021, Mr McPherson had not worked any of the 175 extra hours he was required to work pursuant to clause 11.1 & 12.7 of the Employment Agreement, to cover as required throughout a year.

[25] In accordance with the request to contact the rostered people, of whom Mr McPherson was one, Mr Hulme instructed Mr McPherson to work on 22 April 2021, Mr McPherson said he was unavailable, but he did not provide any reasons for his unavailability.

23 April 2021

[26] On 23 April 2021 Mr Hulme contacted Mr McPherson again, advising him that he was required to work on 25 April. Mr Hulme also advised Mr McPherson that if he refused to come to work, this might need to be escalated as a potential disciplinary issue.

[27] Mr McPherson responded that he was unavailable and provided the contact details of Mr Yukich, his CNIPPWU advocate.

24 April 2021

[28] On 24 April 2021, Mr McPherson was contacted by Mr Philip Neil, Acting Shift Manager, who also told him he was required to work on 25 April 2021. Mr McPherson repeated that he was unavailable but did not provide any reasons for his unavailability to Mr Neil.

[29] In his untested affidavit evidence Mr McPherson stated that he had not been asked why he had been unavailable, other than being requested to supply a written request, which he agreed to do.

[30] Mr Bartleman stated in his affidavit that Mr McPherson had been advised by Mr Hulme that his refusal to work could result in disciplinary action and by Mr Neil that the issue would be escalated if he did not attend work. In addition, Mr Bartleman stated that Mr McPherson was advised that the plant may have to be shut down if he did not attend work.

[31] Mr Bartleman stated in his untested affidavit evidence that as a result of Mr McPherson's failure to attend work, there was a staff shortage for operating the #2 Pulp Dryer. He stated that the #2 Pulp Dryer requires at least five operators working at any time for it to be able to operate safely. As a result of Mr McPherson refusing to work, the machine was short staffed and was shut down for safety reasons.

[32] The #2 Pulp Dryer was stopped for a period of just over seven hours which Mr Bartleman stated caused a loss of production that day.

Disciplinary Process

[33] Oji, by letter dated 29 April 2021 invited Mr McPherson to attend an investigation meeting relating to allegations that he refused to come to work on Sunday 25 April 2021 when he was rostered to work. The letter advised Mr McPherson that it was a serious matter due to the stoppage of the plant, and that it impacted upon the trust and confidence necessary to the employment relationship.

Disciplinary meeting 7 May 2021

[34] At the meeting held on 7 May 2021, Mr McPherson was accompanied by Mr Yukich, and a CNIPPWU union member, James Hastie. Mr Bartleman, and the HR Advisor, Di Brough, attended on behalf of Oji.

[35] Before the meeting commenced, Mr McPherson was advised that following a full investigation into the incident, he could be liable for disciplinary action.

[36] The Oji Disciplinary Policy provides that serious misconduct includes:

a) Refusal to perform normal duties;

b) Refusal to comply with a lawful and reasonable instruction; and

c) Acts of disobedience, negligence or incompetence which affects safety, quality, security, company property or the good conduct of the business.

[37] Mr Bartleman stated in his affidavit that Mr McPherson had been given an opportunity to provide an explanation to the allegations. Mr McPherson acknowledged that he said ‘no’ to the instruction and that he did not provide a reason to his shift managers as to why he had not been available.

[38] When questioned about his reason for the refusal, Mr McPherson said he had two operations on his back previously and wanted to rest it over the weekend. He provided a medical certificate dated 27 April 2021 which covered him for sick leave for the dates 25, 26 and 27 April 2021.

[39] Mr Bartleman stated in his untested affidavit that this was the first time he and Ms Brough had sighted the medical certificate, and queried why Mr McPherson had not explained he was unavailable due to health reasons when he was first instructed to attend work on 25 April 2021.

[40] Mr McPherson stated in his untested affidavit that he had replied that it was a personal matter and he did not want everyone to know about it.

[41] On completion of the meeting, Mr Bartleman considered the information provided during the meeting.

[42] By letter dated 24 May 2021, Oji informed Mr McPherson the explanations he put forward during the investigation meeting were insufficient to satisfy its concerns.

[43] Mr McPherson was invited to attend a further disciplinary meeting and was informed his actions could amount to serious misconduct, pursuant to the Kinleith Mill disciplinary policy. He was provided with all relevant documentation being considered by Oji with the letter dated 24 May 2021. This included a report from Mr Hulme and a report outlining the effect on production because of his absence that day.

Disciplinary Meeting 27 May 2021

[44] Mr McPherson attended the disciplinary meeting held with Mr Bartleman and Ms Brough on 27 May 2021, accompanied again by Mr Yukich and Mr Hastie. At the meeting, Mr McPherson provided information in response to Oji's allegation of serious misconduct and answered questions.

[45] Following an adjournment Mr Bartleman advised Mr McPherson that he had determined that his actions, in not complying with a reasonable and lawful instruction which led to the #2 Pulp Dryer being closing down, amounted to serious misconduct and that the decision had been made to terminate his employment. The decision was confirmed in a letter dated 27 May 2021 which stated:

> … At our meeting on 27 May 2021 I advised you that on the basis of the facts to hand, and your explanation, I was proposing termination of your employment for a failure to comply with a lawful and reasonable instruction given by a manager, which led to a loss of production, and that you a reasonable person would have divulged that he was incapacitated rather than advise to contact his/her advocate.
> …
> As I explained, I believe that this breach is of such a serious nature that it cuts at the heart of the employment relationship. It was clear serious misconduct and a clear breach of our policy,. Whilst I considered whether a lesser sanction was appropriate I decided the only option open to me is to terminate your employment immediately as of today 27 May 2021.

[46] Mr McPherson was asked if he wished to say anything in response but he declined.

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

[47] As a matter of principle, Mr McPherson 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]

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

[48] In *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* the Chief Judge confirmed that whether there is a serious question to be tried raises two sub-issues, these being:

> a) Whether there is a serious question to be tried in relation to the claim of unjustified dismissal; and, if so,
>
> b) Whether there is a serious question to be tried in relation to the claim of permanent reinstatement.[4]

[49] In *Humphrey* the Employment Court noted that once the relatively low threshold as identified in *Brooks Homes Ltd* had been met:

> … the merits of the case (insofar as they can be ascertained at an interim stage) may be relevant in assessing the balance of convenience and the overall interests of justice.[5]

[50] My findings expressed in this determination are solely for the purposes of resolving Mr McPherson'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.

Serious Question?

[51] It is submitted on behalf of Mr McPherson that it was incumbent on the supervisors who spoke to Mr McPherson to ask him for an explanation for not being available and that there is a serious question in that Mr McPherson was entitled to refuse to work extra hours when he was not fit for work

[52] Oji submits that the explanation that Mr McPherson was not fit for work was not provided until the disciplinary meeting held on 7 May 2021. This followed conversations with Mr Hulme and Mr Neil over the preceding three days when there had been an opportunity for Mr McPherson to provide an explanation for his refusal to work, and he failed to do so.

[53] It is also submitted for Mr McPherson that he was entitled to refuse to work extra hours in the absence of reasonable availability compensation for, and/or a variation to, the agreed hours in the Employment Agreement.. As such there was no compliance with s 67D and s 67E of the Employment Relations Act 2000 (the Act).

[54] Oji submit that this explanation that Mr McPherson was refusing to work because there was a dispute about availability compensation was not provided to it at any stage of the process. It notes that the Employment Agreement made provision for an extra 175 hours to be worked for which consideration had been provided in Mr McPherson's salary.

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[4] *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* [2021] NZEmpC 59 at [7].
[5] Above n 5 at [8].

[55] It was submitted for Mr McPherson that he was dismissed in circumstances in which other employees would not have been, this being on the basis of Oji being motivated to keep Mr McPherson, a union delegate, out of the work place.

[56] In determining this issue I must have regard to the objects of Act which includes the requirement for good faith behaviour. Employees and employers are under a duty pursuant to s 4 of the Act to deal with each other in good faith. This duty as stated in s 4(1A)(b):

> requires the parties to an employment relationship to be active and communicative in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative.

[57] At this preliminary stage I find that the facts establish that Mr McPherson was provided with several opportunities to provide an explanation for his refusal to work on 25 April 2021 but failed to do so until the disciplinary meeting held on 7 May 2021. When spoken to by Mr Hulme on 23 April 2021 Mr McPherson failed to explain his reason for his refusal to his employer but referred his manager to a third party, his union representative.

[58] It is also submitted by Oji that Mr McPherson also failed to be active and communicative in respect to a dispute about the availability provision requirements at any stage of the disciplinary process. This was a claim put forward by Mr McPherson after the event, but was not provided as an explanation for his refusal during the disciplinary process.

[59] These omissions appear to be a failure to be 'responsive and communicative' as required by the Act, and to present a valid argument that Mr McPherson may have failed to act in good faith towards his employer Oji . This in turn would undermine the trust and confidence Oji needed to have in Mr McPherson as an employee and which is essential in an employment relationship.

[60] In regard to the discrimination claim based upon Mr McPherson's dismissal being motivated by a desire to keep him as a union delegate out of the workplace, I find there is no evidence provided at this preliminary stage to substantiate that submission.

[61] Employers are entitled to provide lawful and reasonable instructions to an employee. In this case I find that the requirement to work extra hours to cover extra unrostered hours was a contractual requirement arising in clause 12.7 of the Employment Agreement with which Mr McPherson had been provided, and which was stated as being included in his salary, whether or not he worked the hours.

[62] The Employment Agreement was based upon the expired 2013 – 2015 Collective Agreement by which Mr McPherson had been covered and clause 12.7 mirrored clause 13.7 of

the 2013-2015 Collective Agreement. Three days' notice was provided by Oji of the requirement to work. I find that the requirement to work appears to be a lawful and reasonable instruction based upon the contractual commitments,

[63] The Oji Disciplinary Policy set out that not obeying a lawful and reasonable instruction could result in dismissal and Mr McPherson was advised that disciplinary action might result for his refusal to work on 23 April 2021.

[64] In these circumstances at this interim stage I find there is a strong indication that the request provided by Oji was both lawful and reasonable.

[65] At this interim stage the evidence indicates that Oji followed a fair process: it advised Mr McPherson of its concerns at an early stage, provided him with an opportunity to explain, and genuinely considered his explanation prior to confirming the dismissal decision.

[66] I accept that the threshold in respect of whether there is a serious question is relatively low. Given the low threshold requirement, I find Mr McPherson has an arguable case, but not a strong one, for unjustifiable dismissal.

*Serious issue to be tried for permanent reinstatement***?**

[67] Mr McPherson 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] 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. To be practical it must be capable of being carried out in action, be feasible and have the potential for the employment relationship to be carried out successfully. To be reasonable the effects of it need to be assessed not merely on the employee and employer but on other affected third parties. [6]

[69] The onus of proof of practicability rests with the employer.[7] In this case Oji submits that if McPherson were to be granted interim reinstatement and return to the workplace there is a real risk that the Mill could suffer detriment. It submits that the perceived impact of an applicant's return to work on third parties in the work place is relevant.[8]

[70] Oji does not believe that Mr McPherson if reinstated could be trusted to operate in accordance with the requirements of his role, submitting that his reinstatement:

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[6] *Smith a Fletcher Concrete and Infrastructure Limited* [2020] NZ EmpC 125 at [19].
[7] *Lewis v Howick College of Board of Trustees* [2010] NZCA 320.
[8] *A above n 5.*

a) would cause animosity amongst the operators who work with him and will see themselves as having to provide cover when Mr McPherson would be expected to cover and this distrust or animosity has the potential to affect the output and safety of the team as whole;

b) create a lot of tension and disharmony with the #2 Pulp Dryer team;

c) some operators might decide they did not have to work extra hours if required and there is a real potential that this would mean a particular plant might be required to shut down;

d) affect mutual trust between him and management noting that the Mill is a major hazard facility and it is of the utmost importance that there is mutual trust between the Mill management and employees. Management need to have confidence that at all times, even in times of disagreement, the employees will act in the best interest of the Mill's operation;

e) could be to the detriment of other employees in his shift and to the Mill's detriment on the basis of Mr McPherson's refusal to engage with his shift manager, telling him instead to "contact his union", gives rise to a concern that Mr McPherson will follow his union advocate's directions in relation to the requirements of his role over his employer's directions.

[71] Oji provided an email from a #2 Pulp Dryer employee in support of its submission. In the email the employee notes that Mr McPherson was disruptive and since his departure the #2 Pulp Dryer team is happier and working well together.

[72] It is submitted for Mr McPherson that it is speculation there would be any disruption should he return to working with then team.

[73] 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 McPherson has an arguable case that he was unjustifiably dismissed, I am unable to conclude that he has a more than weak arguable case that he would be reinstated permanently.

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

Balance of convenience

[75] As set out in the Employment Court case *X v Y Limited*[9] this principle requires that the Authority balance the relative inconvenience, in terms of detriment or injury, to Oji who will have to bear the burden of an order reinstating Mr McPherson until the substantive case is heard, against the inconvenience to Mr McPherson who may have a just case, of having to bear the detriment of unjustifiable action until the case is heard.

[76] Mr McPherson submits that the possibility of obtaining damages would not adequately compensate him because if he has to wait a significant time for his substantive case to be heard, he will be deprived of an income and as a consequence suffer significant unwarranted financial hardship.

[77] Oji submits that the balance of convenience favours it. It submits it has provided significant evidence of why the interim reinstatement of Mr McPherson will be disruptive and could disadvantage it and the employees who would be required to work with Mr McPherson.

[78] It is submitted that the Mill is a major hazard facility and mutual trust and confidence between employer and employee is essential. However Mr McPherson's behaviour up to his dismissal and the various allegations in his proceedings, show him to have very little trust in his employer.

[79] In support of this submission Oji points to the fact that in his first affidavit Mr McPherson labels his managers and by extension his fellow operators "liars" in response to being told that the company had to shut down the plant because he refused to come to work on 25 April.[10] It observes that the decision to shut down the plant was made by a combination of managers and #2 Pulp Dryer operators who were working on 25 April. It submits that the description of employees in this manner clearly shows a degree of contempt for the managers and employees responsible for operating the Mill.

[80] Oji submits that concerns raised by it that Mr McPherson might be disruptive if reinstated to the workplace have substance. It notes that Mr McPherson defers to Mr Yukich who contacted the #2 Pulp Dryer employee, who is not a member of his union. The employee had expressed concerns about Mr McPherson returning to the workplace in an email attached to an affidavit from another employee. This was not only intimidating but in the unsolicited email Mr Yukich was encouraging the employee not to work extra hours.

[81] Having taken into consideration the submissions put forward by the parties, balancing the potential prejudice to Mr McPherson of not reinstating him, against the potential prejudice

[9] [1992] 1 ERNZ 863, at pg 10.
[10] Mr Pherson's first affidavit at [30].

to Oji of so doing, I find that the balance of convenience favours not reinstating Mr McPherson on an interim basis.

Overall Justice

[82] The Authority must assess the overall justice of the case from a global perspective. This has been described by the Court of Appeal as:[11]

> The overall justice assessment is essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and balance of convenience'

[83] It is submitted on behalf of Mr McPherson that the strength of his case based on the interpretation of s 67E of the Act, together with the rebuttable presumption of discrimination and the evidential procedural deficiencies mean that the overall justice favours the making of an interim reinstatement order.

[84] Oji submits that the overall justice of the case does not support the granting of an interim order and that any financial loss can be adequately compensated for by damages if Mr McPherson is successful.

[85] I find that the overall justice of the case subsists in declining the application for interim reinstatement.

Next Steps

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

Costs

[87] 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

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[11] *NZ Tax Refunds Ltd v Brooks Homes Limited* [2013] NZCA 90 at [47].