

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2022] NZERA 423  
3179319

BETWEEN BRENT CONNER O'BELL  
Applicant

AND PAUL SMITH EARTHMOVING 2002  
LIMITED  
Respondent

Member of Authority: Philip Cheyne

Representatives: James Hobcraft, advocate for the Applicant  
Sophie Logie and Kendal Cosgrove, counsel for the  
Respondent

Investigation Meeting: 17 August 2022 at Christchurch

Determination: 26 August 2022

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Brent O'Bell was employed by Paul Smith Earthmoving 2002 Limited as its Health and Safety Officer under a fixed term employment agreement to cover the incumbent's parental leave until 1 September 2023. Mr O'Bell started work on 9 May 2022. There is a signed employment agreement dated then.

[2] Mr O'Bell was dismissed immediately for serious misconduct on 15 July 2022.

[3] In correspondence dated 18 July 2022, Mr O’Bell raised a personal grievance regarding the dismissal. Action was commenced in the Authority on 19 July 2022. Mr O’Bell is claiming reinstatement, compensation and reimbursement as remedies for the dismissal personal grievance. Other grievances (unjustified disadvantage) were raised regarding the employer’s actions just before the dismissal. Remedies are also claimed for those personal grievances.

[4] Paul Smith Earthmoving 2022 Limited (PSE) says it justifiably dismissed Mr O’Bell and disputes that he was unjustifiably disadvantaged during the employment. PSE says it is not liable to Mr O’Bell for any remedies he has claimed.

[5] Mr O’Bell also seeks interim reinstatement. There is an undertaking and affidavits in support. PSE opposes interim reinstatement and there are affidavits in opposition.

[6] This determination resolves the application for interim reinstatement. Findings based on the untested affidavits in support and in opposition, attached documents and the counsels’ submissions are solely for that purpose. Finding findings must await a substantive investigation meeting.

[7] I will outline the context in which the problems arose.

### **Context for the employment relationship problems.**

[8] Mr O’Bell applied in March 2022. Ellen Taylor is PSE’s business compliance manager. Ms Taylor invited Mr O’Bell to an interview and sent him the position description. Stephen Todd is PSE’s general manager. Ms Taylor and Mr Todd interviewed Mr O’Bell.

[9] Following the interview, Ms Taylor sent Mr O’Bell an email, inviting him to a second interview, with an attached letter with the subject line “REFERENCE AND BACKGROUND CHECK”. The email described it as a consent form for your background and referee check. The letter stated:

... that as part of our recruitment process, prior to confirming an employment offer to any successful job applicant, Paul Smith Earthmoving requires the need to run a background check and referee check on yourself as a potential candidate for the purpose of employment asking him to authorise PSE to undertake a “background check and referee check” on him as a potential candidate for employment.

[10] Mr O’Bell was asked to return the letter to Ms Taylor by 21 April 2022. Mr O’Bell completed, signed and returned the authority as prepared by PSE:

*I Brent O’Bell* acknowledge and agree to Paul Smith Earthmoving 2002 Limited recruiter to run a background check and referee check on me, prior to any offer of employment being issued.

Signed: *Mr O’Bell’s signature*

Dated: 20 – 4 - 2022

[11] The second interview was on 27 April 2022.

[12] Abbe Tinnelly is PSE’s human resources manager. On 29 April Ms Tinnelly sent Mr O’Bell an email with several attachments. There was an employment agreement, a letter of offer, an employee handbook, a NZTA TORO form and a job description. The email said that PSE was thrilled to offer Mr O’Bell the position, referred to the attachments and asked Mr O’Bell to complete and return the TORO form and the link for a pre-employment ACC check. Mr O’Bell accepted the offer and signed and returned the handbook, letter of offer and job description.

[13] Mr O’Bell’s evidence is that during the interviews there was no discussion about background checks and what they might entail. The correspondence, including the authority form, do not describe what the background check would involve, except the reference to TORO and ACC checks. There is no evidence that PSE told Mr O’Bell about what its background check would involve or how the checks would be performed.

[14] On 2 May 2022 Mr O’Bell completed a pre-employment drug and alcohol test.

[15] Mr O’Bell reported at work on 9 May 2022. Ms Tinnelly dealt with Mr O’Bell’s induction. Ms Tinnelly took a copy of Mr O’Bell’s driver’s licence and noticed it was a zero-alcohol licence. Ms Tinnelly asked about it, Mr O’Bell described the circumstances and PSE took no further issue with this. Ms Tinnelly and Mr O’Bell signed the employment agreement on 9 May 2022.

[16] PSE uses a service called MyChecks to perform background checks. Ms Taylor noticed on 12 May 2022 that Mr O’Bell’s pre-employment drug test and his background check had not been stored in PSE’s on-line platform. Ms Taylor was told by Ms Tinnelly that

a pre-employment drug test had been completed but background checks had not. Ms Taylor's evidence is that she went into MyChecks and sent the request for Mr O'Bell to complete. A MyChecks form says a request for Mr O'Bell was "submitted" on 12 May 2022 with the status of "Waiting for candidate, form opened but not completed". Ms Taylor received a MyChecks email on 16 May 2022 that Mr O'Bell "has still not completed the background check request for".

[17] Ms Taylor received a further MyChecks email on 4 July 2022 with the message that Mr O'Bell had still not completed the background request check form. Ms Taylor forwarded the message to Mr O'Bell saying "I see your checks are still outstanding in MyChecks from your onboarding" and asked him to complete as soon as possible. Mr O'Bell replied "Yes, I will". A short time later he messaged Ms Taylor that he had not received anything from "my checks". Ms Taylor replied that she had updated the email address from his personal account to his PSE account.

[18] There is a 5 July 2022 email from MyChecks to Mr O'Bell inviting him to complete the requested checks of "Identity" and "Criminal Conviction History". Later that morning, Mr O'Bell phoned Mr Todd. A meeting was arranged for 8 July 2022. Mr Todd in his affidavit sets out his account of what Mr O'Bell said during their call. After the call, Mr Todd and Ms Taylor spoke. Ms Taylor then phoned Mr O'Bell in the morning on 6 July 2022. Ms Taylor told Mr O'Bell that the background check needed to be completed and asked if he could send it away that morning. Ms Taylor's evidence is that Mr O'Bell said "yes". Her evidence is that she told Mr O'Bell if he sent it away that morning, it should be back in time for them to discuss it at the meeting on 8 July and Mr O'Bell agreed.

[19] Later on 6 July 2022, Mr O'Bell sent an email to Ms Taylor and Mr Todd. He asked for "a few days breathing space" and stated that they could have a chat on Friday. Mr O'Bell wrote that he had put a lot of things behind him and "bringing them up again just needs a few days to process". Mr Todd replied and confirmed that "we still require the check to be completed, as per discussions with Ellen and signed employment condition".

[20] Mr O’Bell says about these interactions that he was “pressured” to consent to the background check. However, he did not complete an on-line consent for the MyCheck request.

[21] There was a meeting on 8 July 2022. Mr O’Bell travelled from Christchurch to Timaru for the meeting. He was accompanied by the incumbent health and safety officer. There is an affidavit from that person giving an account of the conversation. Ms Taylor in her affidavit also gives an account of interactions with Mr O’Bell before the meeting. It is not necessary to set out these accounts.

[22] The meeting was attended by Mr O’Bell, Mr Todd, Ms Taylor and Ms Tinnelly. Mr O’Bell’s evidence is that he said he did not have a criminal record for serious offending. Mr Todd and others say that Mr O’Bell said he had a criminal past but had never been convicted of a “capital crime”, giving examples. Mr Todd says that Mr O’Bell said he had agreed to a pre-employment check, not a post-employment check. Mr O’Bell did not consent to the MyCheck background check. Instead, Mr O’Bell offered to provide a statement and some other information. Mr Todd adjourned the meeting.

[23] When the meeting resumed, Mr Todd suspended Mr O’Bell while PSE investigated its concerns. There are differing accounts of what preceded the suspension. It is not necessary to outline the differing accounts for current purposes. Some issue is also taken with what followed the suspension. All that needs to be said currently is that Mr O’Bell was driven back to Christchurch, as he had to relinquish his work vehicle.

[24] PSE sent a letter dated 11 July 2022 to Mr O’Bell. The letter sets out background and PSE’s concern that Mr O’Bell had not and was refusing to complete the necessary background checks “that were made clear to you must be completed as part of your employment and the onboarding process”. PSE was concerned that Mr O’Bell had “actively and deliberately delayed and avoided completing the necessary checks”. PSE was concerned that Mr O’Bell had said different things about his criminal history leaving it to think he might not have been honest about that. The failure to complete checks was a breach of Mr O’Bell’s conditions of employment, his employment agreement and PSE’s company handbook. It was required for health and safety and as PSE’s contractual obligation to some clients. PSE was

concerned it might not have offered Mr O’Bell employment if he had “completed the checks as and when requested”. A meeting to hear Mr O’Bell’s response was set for Thursday 14 July 2022. Disciplinary outcomes could include dismissal. Mr O’Bell was entitled to legal advice or representation.

[25] Mr O’Bell responded through his representative on 11 July 2022. The suspension was described as a “unilateral unjustified suspension. Mr O’Bell rejected the content of PSE’s letter. The proposed disciplinary meeting might not proceed until Mr O’Bell was satisfied with the basis of the suspension.

[26] PSE responded on 11 July 2022 through its lawyer. PSE repeated its view that the suspension had been properly handled, but said in any event it did not prevent the meeting proceeding. PSE was entitled to raise its concerns. Mr O’Bell had a duty to be responsive and communicative. Confirmation of his attendance then or a proposed alternative date was sought.

[27] Mr O’Bell’s representative replied on 12 July 2022. A personal grievance was raised with respect to the suspension. Mr O’Bell was not contractually required to complete a background check. The employment agreement and handbook provisions did not apply to pre-employment convictions. Specific responses were provided to various points. Mr O’Bell considered he had done everything that was lawfully required of him. He sought to resume work without further delay.

[28] Mr Todd was not satisfied with the response for Mr O’Bell and wrote a letter dated 15 July 2022, setting out “Findings” and a “Preliminary decision”. Mr Todd acknowledged an “oversight” on PSE’s part in offering employment without completing “checks”, but considered this did not remove Mr O’Bell’s obligation to complete the checks. Mr Todd referred to the 20 April 2022 letter of offer, the employment agreement and the company handbook. Mr Todd considered that Mr O’Bell had at least twice confirmed that he would complete the checks. Mr Todd considered that Mr O’Bell’s failure to complete the checks was a failure to follow a lawful and reasonable instruction and a failure to comply with the signed agreement of 20 April 2022, the employment agreement and the handbook. He also considered that Mr O’Bell had not been honest with PSE regarding what he had said about his

criminal convictions. Mr Todd referred to a new client contract that requires background checking of PSE staff who attend the site. Mr O’Bell’s role would require him to visit the site. Mr Todd did not accept Mr O’Bell’s explanation that he had not received “MyChecks” request and that he had not known what was involved.

[29] Mr Todd concluded that if Mr O’Bell completed the background checks now and if that verified what Mr O’Bell was noted as having said and that no charges older than 25 years were material to PSE’s client obligations, Mr O’Bell would be able to return to work. If MrOBell declined to complete the checks, his employment would be terminated immediately for serious misconduct. Mr O’Bell was asked to respond by 18 July 2022.

[30] Mr O’Bell responded through his representative by letter dated 15 July 2022. MrOBell sought to be returned to his role without delay. Mr OBell rejected the “assumptions communicated” about his past convictions. Mr OBell also rejected the “findings”. A further unjustified disadvantage personal grievance was raised regarding the investigation process.

[31] There followed a further letter from Mr Todd. Mr Todd paraphrased Mr O’Bell’s last reply. Mr Todd then summarised his earlier findings, which remained unchanged. Given that Mr O’Bell’s representative had confirmed that Mr O’Bell would not agree to the background checks, Mr Todd terminated Mr O’Bell’s employment immediately for serious misconduct. Mr Todd considered that Mr O’Bell’s action had been destructive of trust and confidence. He considered that Mr O’Bell had been deceptive and dishonest, so that PSE no longer had trust in him. Mr Todd also considered that PSE could not “take the risk” having Mr O’Bell working for it without completing the background checks. The employment ended that day.

[32] A personal grievance of unjustified dismissal was raised on Mr O’Bell’s behalf on 18 July 2022.

### **Interim reinstatement - principles**

[33] I am referred to *NZ Tax Refunds Limited v Brook Homes Limited* for the applicable principles by both parties.<sup>1</sup> Mr O’Bell must establish that there is a serious question to be

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<sup>1</sup> *NZ Tax Refunds Limited v Brook Homes Limited* [2013] NZCA 90.

tried, in that the claim is not vexatious or frivolous. Next, the balance of convenience must be considered. I need to assess the impact on the parties of granting or declining interim reinstatement. Finally, I need to assess the overall justice of the case as a check.

[34] Whether there is a serious issue can be broken into two parts: whether there is an arguable case for unjustifiable dismissal; and if so, whether there is an arguable case for permanent reinstatement.<sup>2</sup>

[35] I turn to these issues now.

### **Is an arguable case for unjustifiable dismissal?**

[36] For current purposes, I disregard the claims of grievances based on s 103(1)(b) of the Employment Relations Act 2000 (the Act). They add nothing to the present issue.

[37] An “arguable case” is the same as a “serious question”, when considering interim relief.

[38] PSE summarily dismissed Mr O’Bell. Mr O’Bell promptly raised a personal grievance about the dismissal. The Authority will need to determine whether PSE’s actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time. That must be determined on an objective basis. In applying that test, there are four factors that the Authority must consider. The Authority may also consider other factors it thinks appropriate. Minor defects in an employer’s process that did not result in the employee being treated unfairly cannot solely cause a dismissal to be unjustified.<sup>3</sup>

[39] Taken broadly, there is evidence to indicate that PSE investigated the allegations to a reasonable standard, it raised its concerns before the dismissal and it gave Mr O’Bell an opportunity to respond before the dismissal. There is evidence to indicate that Mr Todd considered Mr O’Bell’s responses. At this point, there is no substantial reason to doubt that Mr Todd acted genuinely. Mr Todd appears to have acted with advice, so would probably have been alert to the factors set out at s 103A(3) of the Act.

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<sup>2</sup> *Christieson v Fonterra Co-operative Group Ltd* [2021] NZEmpC 142 at [8].

<sup>3</sup> Employment Relations Act 2000 s 103A.

[40] Although issue was taken with PSE's process at various points, I put those points to one side. For current purposes, I could assume there might be some merit in the process points raised in the correspondence and broadly referred to in Mr O'Bell's affidavit. However, the points are not strong. PSE would point to s 103A(5) of the Act to protect it from a finding of unjustified dismissal.

[41] Counsel for PSE submits that Mr O'Bell does not have an arguable case that he was unjustifiably dismissed. The submission is that PSE conducted a procedurally robust disciplinary process and its decision to terminate was ultimately one that a fair and reasonable employer could have made in the circumstances. The case will turn on what a fair and reasonable employer could have done in all the circumstances. Mr O'Bell has an arguable case that a fair and reasonable employer could not have dismissed him.

[42] PSE sought a form of consent, "prior to any offer of employment being issued".<sup>4</sup> There is no evidence that the nature of the "background check" was discussed during the interviews. Mr O'Bell signed and returned the consent to a background check and a referee check, as requested. PSE took some steps and then on 29 April 2022, Mr O'Bell received an unconditional offer of employment. Mr O'Bell accepted the unconditional offer. Mr O'Bell and PSE signed the fixed term employment agreement on 9 May 2022, the day he started work.

[43] The case for Mr O'Bell is that he had by then completed everything that he had agreed to do, so was unconditionally employed by PSE. Mr O'Bell's case that the recruitment process had ended by then is strongly arguable. However, PSE acted on the basis that Mr O'Bell "knew" he needed "to complete the background checks and ... deliberately avoided doing so".<sup>5</sup> Objectively, a fair and reasonable employer could not have reached that conclusion in circumstances where the employee had done everything that had been agreed to by way of formation of the employment relationship.

[44] The case for Mr O'Bell is that the employment agreement and the employee handbook obliged him to disclose criminal convictions and offences with which he might be charged during his employment, but not beforehand. The handbook appears to be expressly forward

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<sup>4</sup> Letter of 20 April 2022

<sup>5</sup> Letter of 15 July 2022.

looking and the employment agreement is phrased in the current tense. It is not necessary to set out the provisions. However, PSE acted on the basis that Mr O’Bell’s failure after he was employed to complete the requested historical criminal records check was a failure to follow “a reasonable instruction”. Refusing to comply with a “reasonable instruction” is included in the agreement as a reason for termination of employment without notice. Whether the instruction was reasonable, so that a failure to comply might justify dismissal by a fair and reasonable employer, substantially turns on whether the employment agreement and the handbook only address offending or convictions during the employment. Objectively, a fair and reasonable employer could not have acted on the basis that the agreement and handbook entitled it to instruct Mr O’Bell to disclose historical criminal records, if those provisions did not require that. Mr O’Bell’s case is strongly arguable.

[45] The other reasons for the dismissal, said to have been “highly destructive” of the relationship of trust and confidence, arose directly from PSE dealing with Mr O’Bell as if he had failed to complete an agreed step and as if it had a contractual right to require Mr O’Bell to disclose his criminal record. There are evidential disputes about what was said. Even if those disputes are resolved in PSE’s favour, whether an employee’s responses in such circumstances could cause a fair and reasonable employer to lose trust and confidence is far from certain. Again, Mr O’Bell has a strongly arguable case that PSE could not justify his dismissal by pointing to the differing comments he is reported as making at differing times after PSE initiated a disciplinary process.

[46] For the foregoing reasons, I find that Mr O’Bell has a strongly arguable case that he was unjustifiably dismissed by PSE. The substantive case is unlikely to be affected by s 103A(5) of the Act.

### **Is there an arguable case for permanent reinstatement?**

[47] Section 125 of the Act provides that if the remedies sought by an employee include reinstatement and it is determined that the employee did have a personal grievance, the Authority must provide for reinstatement wherever practicable and reasonable. Mr O’Bell seeks reinstatement so s 125 will apply if he was unjustifiably dismissed.

[48] Submissions are made for PSE on the effect of s 125 of the Act.

[49] It is submitted that Mr O’Bell destroyed the relationship of trust and confidence, so that it would be “unreasonable” to impose an employment relationship. If Mr O’Bell’s claim is made out, a fair and reasonable employer could not have concluded that the relationship of trust and confidence had been impaired sufficiently to entitle it to dismiss. The submission is not persuasive.

[50] There is evidence that several PSE employees had interactions with Mr O’Bell that made them feel uncomfortable. The context for the interactions was PSE’s efforts to get Mr O’Bell to agree to the criminal record check. PSE could take steps to resolve the discomfort and avoid its recurrence if Mr O’Bell was reinstated. This evidence on its own would not significantly affect whether reinstatement is practicable and reasonable.

[51] Mr O’Bell was employed on a fixed term to September 2023. It is submitted that there would be little of that term remaining by the time the Authority investigated and determined the substantive claim. I accept that it is not likely at this point that the matter could be determined sooner than the first quarter of 2023, at the earliest. I return to the point later. However, it is submitted that it is not reasonable to expect an employer to create a new role for an employee for the purpose of providing employment in such circumstances. I am referred to an earlier Authority determination.<sup>6</sup> *Atlas* was a case where interim reinstatement was sought, based on an argument that an apparent fixed term employment agreement was not legitimate or had been overtaken by on-going employment. The Authority considered that the evidence supported a genuine fixed term agreement. Interim reinstatement, after the end of the fixed term agreement, would have required the employer to create a new role for the employee to fill. The present case would not require that. The fixed term nature of the employment would not affect whether reinstatement is practicable and reasonable.

[52] It is submitted that Mr O’Bell cannot practicably perform the role’s full duties as he could not attend some sites. There are sites where the client requires PSE employees who attend to have been background checked. If Mr O’Bell’s case was upheld, the limit to him being able to attend those sites would have resulted from PSE’s actions or omission. I should be cautious about treating an employer’s actions or omissions as a block to interim

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<sup>6</sup> *McVey v Atlas Securities Limited* CA 66/07 at [25].

reinstatement. Significantly here, attendance at such sites represents a limited part of the role. Given that, there is not a strong argument against reinstatement.

[53] I am referred to *Smith v Fletcher Concrete and Infrastructure Limited* in support of the submission that Mr O’Bell’s contribution to the situation that gave rise to the personal grievance may require reinstatement to be declined.<sup>7</sup> The extent to which Mr O’Bell contributed to the situation giving rise to his personal grievance of unjustified dismissal (if upheld) would have to be assessed and the effect of s 124 on the operation of s 125 of the Act may then need to be considered. At this point, however, I could not say that there would be a strong argument against reinstatement.

[54] Overall, I consider that Mr O’Bell has a strongly arguable case for permanent reinstatement.

**The balance of convenience favours interim reinstatement.**

[55] Counsel submits that compensation could “replicate the value to him of lost employment”. There is no reason to doubt that PSE would be able to meet an award of compensation, should Mr O’Bell succeed. However, the fostering of skills and relationships from performing work from now until a substantive outcome would be difficult to replicate by an award of compensation. The availability of compensation would not be a sufficient remedy for Mr O’Bell if he succeeds. The factor favours interim reinstatement.

[56] Not ordering reinstatement now would also undermine the chance of successfully restoring the relationship for the balance of the fixed term, following a substantive investigation. Again, the factor favours interim reinstatement.

[57] I accept that PSE would be restricted in the work it could assign to Mr O’Bell given its contractual arrangements with some clients that its staff have been background checked. PSE would have to make other arrangements to ensure it complied with such obligations to clients and met obligations under the Health and Safety At Work Act 2015. This is a factor that counts against interim reinstatement.

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<sup>7</sup> *Smith v Fletcher Concrete and Infrastructure Limited* [2020] NZEmpC 125.

[58] There is a submission that this situation is analogous to that of *IOX v QEB*.<sup>8</sup> I disagree. In that case, the Authority concluded that it would be irresponsible to order the interim reinstatement of two employees when the law, the employer's obligations to other employees and to its client arguably prevented the two employees from working in the roles. In the present case, PSE has some clients who require PSE staff to have been background checked. As above, I accept that PSE would have to make other arrangements to some extent. However, that is quite different to the circumstances in *IOX*.

[59] There is a submission that the Authority should err on the side of caution where health and safety issues are concerned.<sup>9</sup> In *Brunton*, the air traffic controller failed to create a complete record of an agreed height alteration for a commercial flight at the time. It was common ground that there was no actual danger as a result of the failure. Before an inquiry into the failure, the employee added to the manual record the height alteration that had been agreed. The employee was dismissed on the basis that he had sought to mislead the inquiry. The Employment Tribunal upheld a personal grievance and reinstated the employee, then declined the employer's stay application. That was the context in which the Court said that in the area of safety it should err on the side of caution. Nonetheless, the Court modified the reinstatement order so that the return to duties as an air traffic controller would follow retraining and recertification.

[60] I am referred to *Brunton* for the following reason. PSE says it carries out staff background checks to ensure it meets health and safety obligations to staff and others. PSE now knows that Mr O'Bell has some criminal history, not any detail of that but says it has reason to think it may involve convictions of a serious nature. PSE says there this creates an unknown health and safety risk for others to whom it owes obligations. However, nothing suggests that there might be offending (serious or otherwise) in the recent history. There was apparently one recent conviction, but PSE learnt something about that on the first day of Mr O'Bell's employment. It could not reasonably be characterised as creating a health and safety risk for PSE's other employees.

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<sup>8</sup> *IOX v QEB* [2022] NZERA 77.

<sup>9</sup> *Airways Corporation of New Zealand Limited v Brunton* [1994] 1 ERNZ 352.

[61] I do not accept that the submission based on *Brunton* about health and safety risks from unknown historical convictions adds anything of substance to the present assessment of the balance of convenience.

[62] PSE repeats the basis on which it concluded that Mr O’Bell had destroyed the relationship of trust and confidence. That is supplemented by reference to “Other questions around Mr O’Bell’s trustworthiness”. I have already assessed the trust and confidence points in considering whether there is an arguable case for reinstatement. Overall, there is a strongly arguable case. They add nothing further for present purposes.

[63] I will outline the supplementary points. Mr Todd says that Mr O’Bell never worked the 50 hours per week required under his employment agreement. An agreement with that requirement was produced. In reply, Mr O’Bell produced a copy of what he says was forwarded to him when he was offered employment – it sets 40 hours per week. There is no explanation for the difference, at this point. PSE has not established it as a reason to doubt Mr O’Bell’s trustworthiness. The second point is that Mr O’Bell disclosed a prescription medication as part of the drug screening test on 2 May 2022 but circled “No” to the question whether he took prescribed medication for any long-term medical condition when he completed that form on 9 May 2022. Mr O’Bell in reply asserts that “No” was an accurate answer, but does not explain why he was taking the prescription medication disclosed as part of the drug screen test. If taken for the reason mentioned by Mr Todd, “No” could be an accurate answer. If it was an incorrect answer, it does not necessarily raise an issue about Mr O’Bell’s trustworthiness. The supplementary points add nothing to assessing the balance of convenience.

[64] There are submissions about the effect of interim reinstatement on third parties. PSE says that it would be unfair to other staff who have had to complete background checks. Several staff say they have been made to feel uncomfortable by Mr O’Bell. Other staff would need to perform Mr O’Bell’s duties at sites he could not attend, creating a “burden” and a requirement for training or additional specialist staff. There is some evidence to support the submission. The factor counts against interim reinstatement.

[65] There is a submission that Mr O’Bell’s contribution to the circumstances was significant, disqualifying him from reinstatement. The submission is that Mr O’Bell failed to be active and constructive in maintaining the employment relationship, a breach of good faith. Had Mr O’Bell engaged in the process, it is likely the situation could have been avoided. I am referred to *McKean v Ports of Auckland Limited*.<sup>10</sup> However, whether s 124 of the Act would disqualify Mr O’Bell from reinstatement and whether he has acted in good faith both turn to a significant degree on whether Mr O’Bell was obliged, once employed, to provide his criminal record to PSE. Mr O’Bell cannot at this point be said to be the author of the situation he faces, unlike the employee in *McKean*. The submission adds nothing to assessing the balance of convenience.

[66] PSE submits that it would be difficult to reintegrate Mr O’Bell and a restorative process would be at added time and cost to PSE. Prospects for success are said to be low. On my assessment, the factor points in favour of interim reinstatement. Reintegration later would be at greater cost, take more time and have a lower prospect for success without interim reinstatement. The factor favours interim reinstatement.

[67] Overall, I consider that the balance of convenience weighs in favour of interim reinstatement, but only by a small extent.

### **Overall justice?**

[68] I need to stand back and consider the overall justice of the case.

[69] Mr O’Bell has a strongly arguable case for a personal grievance of unjustified dismissal and a strongly arguable case for permanent reinstatement. Balance of convenience favours him, but only marginally.

[70] The problem arose because it appears that PSE did not do all it would normally do for background and referee checks before it made an unconditional offer of employment to Mr O’Bell. Mr O’Bell did all that was required of him before the offer, upon its acceptance and from the commencement of his employment. PSE later dealt with its apparent omission

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<sup>10</sup> *McKean v Ports of Auckland Limited* [2011] NZEmpC 128 at [57] and [58].

by way of a disciplinary process. However, Mr O'Bell might have been entitled not to disclose his criminal record, despite the disciplinary allegations.

[71] Overall justice favours interim reinstatement.

### **Summary and Orders**

[72] Mr O'Bell has made out a case for interim reinstatement, without delay. I will allow up to two weeks however, for the parties to discuss either through mediation or directly, arrangements to facilitate Mr O'Bell's actual return to the workplace.

[73] Pending further order of the Employment Relations Authority, Paul Smith Earthmoving 2002 Limited is to reinstatement Brent Conner O'Bell to his former position. This order for interim reinstatement is on the following conditions:

- (a) It is subject to Brent Conner O'Bell's undertaking as to damages dated 18 July 2022; and
- (b) It takes effect on Monday 29 August 2022; and
- (c) Paul Smith Earthmoving 2002 Limited may decide that Mr O'Bell need not report for duty for an initial period, not exceeding the first two weeks starting 29 August 2022, to allow the parties an opportunity to consider and agree on a framework for Mr O'Bell's reintegration into the workplace.

[74] Costs are reserved.

[75] A case management conference will be arranged shortly to make arrangements for the substantive investigation meeting. Parties should also give thought to whether further mediation is appropriate.

Philip Cheyne  
Member of the Employment Relations Authority