

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Teresa Wasilewska (Applicant)  
**AND** Otago District Health Board (Respondent)  
**REPRESENTATIVES** Jock Lawrie, Advocate for Applicant  
Barry Dorking, Counsel for Respondent  
**MEMBER OF AUTHORITY** Paul Montgomery  
**INVESTIGATION MEETING** 4 July 2005  
**DATE OF DETERMINATION** 15 July 2005

**DETERMINATION OF THE AUTHORITY**

***Employment relationship problem***

[1] Mrs Wasilewska, a registered nurse, claims her dismissal from her employment with the respondent was unjustifiable and seeks interim reinstatement to her employment pending the investigation of her substantive application.

[2] The respondent denies the dismissal was unjustified and opposes the present application for interim relief.

***Interim reinstatement***

[3] The Employment Relations Act 2000 at s.127 sets out the obligations on the Authority when determining an issue of interim reinstatement and places those objectives in the context of *the object* of the Act. The Act also makes it clear that the Authority is to apply the law relating to interim injunctions. The matters to be considered are set out in the High Court Rules at s.236.

[4] The Authority needs also to bear in mind the primacy of reinstatement as a remedy if such reinstatement is sought by an applicant. Finally, the Authority's jurisdiction in respect of such an application is an equitable and discretionary one and is conducted by considering affidavit evidence in the light of the three primary tests.

[5] These tests can be stated:

- (1) Does the applicant have an arguable case?
- (2) Where does the balance of possible detriment to the parties lie in the event the application is granted? In this setting the Authority is required to consider the adequacy of alternative remedies.

(3) The overall justice of the case.

### ***Arguable case***

[6] The investigation meeting at which untested affidavit evidence is presented cannot determine a final outcome of the issues in a substantive investigation. What is required of the Authority at this preliminary stage is to decide whether, if the applicant is able to prove all the facts she alleges she can prove in a substantive setting, she will likely succeed. In short, the Authority must find that on the evidence before it whether the applicant has a serious prospect of success.

[7] Having considered the affidavits and in particular the applicant's affidavit in reply, I find the applicant has met the requirements that her case is arguable. The fact of a strongly contested dismissal which was initiated by the respondent usually meets the moderate threshold of an arguable case.

[8] I acknowledge the submissions of counsel for the respondent in respect of *Cliff v. Air New Zealand Ltd* in this context, but I am unable at this stage to determine the *likelihood* of permanent reinstatement of the applicant should she be able to prove her case as that is contingent on a range of factors as yet untested.

### ***Adequacy of alternative remedies***

[9] The Authority accepts the ability of the respondent to meet any damages awarded in the event that the Authority reinstates the applicant following a substantive investigation.

[10] The Authority accepts the submission of the respondent that the applicant is a registered nurse and able to find alternative employment as a nurse pending the determination of the substantive issues. Further, counsel expressed some doubts as to the ability of the applicant to repay the respondent any sums she may have been paid in the event that I reinstate the applicant in the interim and she fails at her substantive investigation.

[11] The applicant has personally signed the undertaking as to damages and from the applicant's evidence it is clear that she and her husband have had to realign several financial commitments. That does not of itself indicate an inability to repay but rather prudent financial management which should enhance her ability to make good her undertaking should she be called upon to do so.

[12] Counsel for the respondent referred me to *Toll New Zealand Consolidated v. Te Kare* (unreported, 15 March 2005, Travis J, AC 10/05). I have studied this case as it relates to counsel's submission that in the event that the applicant is reinstated in the interim, monies due to her should be placed in an interest-bearing account pending the determination of the substantive issues. I note that this case involved the application for a stay of reinstatement ordered by the Employment Relations Authority pending the hearing of a substantive de novo challenge before the Court. The circumstances of the case strike me as being significantly different, relying as the plaintiff was on issues of health and safety. I acknowledge a similarity between the two cases involving threatened resignation by fellow staff members. However, the alleged threats of serious physical violence to a manager in the *Te Kare* case clearly distinguish it from the present matter.

[13] I would also observe that in the *Te Kare* case the quantum involved arose out of 40 hours work per week plus regular overtime and allowances whereas, in this case, the quantum is considerably lower based on 25 hours.

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***Balance of convenience***

[14] The applicant's representative has urged the Authority to consider the alternatives in the light of the relative hardships faced by either party.

[15] In part, the balance in this case lies between the evidence for the respondent which alleges that the applicant's attitude and conduct towards her colleagues was in breach of the Code of Conduct and the further contention that the applicant refused to obey a lawful and reasonable instruction, and the contention by the applicant that significant matters relied on by the respondent in the effecting of the dismissal were never put to her prior to that dismissal. On the other hand, I need also to be mindful of the submission for the respondent in respect of the likely effect which would result should the applicant be reinstated to her previous position. Such an outcome, should it occur, has wider public interest aspects affecting the well being of women and has to weigh heavy in the balance given the respondent's contractual arrangements with the Ministry of Health/Breast Care Aotearoa.

[16] On the basis of the affidavits presented for the Authority's consideration, my considered view is that the balance of convenience slightly favours the applicant, particularly in the light of her affidavit in reply.

***Overall justice of the case***

[17] In determining this issue, the Authority needs to take a backward step and review everything before it at this preliminary stage. It needs to make a call as to where the final outcome may lie if each party is able to establish what it maintains it is able to establish at the investigation of the substantive issues.

[18] From the evidence in front of the Authority from the respondent, it is clear that the applicant's behaviours in respect to other staff suggest a *do it my way* approach. Those behaviours led to committed professional staff refusing to work with the applicant, and it is alleged, thereby put the Breast Care service at serious risk due to understaffing.

[19] The primary affidavit from the applicant cites heavy workload in her role, shortage of hours available to undertake expected tasks, including data input, and a range of other concerns.

[20] I take note of the somewhat unusual concession made by the applicant in the last section of her affidavit in reply. It reads:

*After reflection and consideration upon a number of such alleged issues, I believe that I am now better equipped to respond to ODHB staff in a more positive and open manner.*

[21] I questioned the applicant on what she meant by this statement. Her reply to my questioning was that the affidavit, the mediation and time away had given her time to consider what had given rise to the situation. The applicant stated that she thought the processes demanded by the ODHB such as the orientation package conflict with needs of acute patients and in her opinion the patient took precedent. Mrs Wasilewska said that she was prepared to go back and make it work in a collegial relationship but opined that more hours needed to be designated to the position. She further said that the form of work she had been engaged in is a most challenging area in nursing and that she was passionate about this.

[22] Such a firm purpose of amendment and commitment is certainly laudable. The pity is that the applicant was unable to come to this realisation prior to her dismissal.

**Determination**

[23] I thank both representatives for their focused submissions in this matter and for the case law to which they had guided me. I have considered that case law and the submissions as carefully as time allows. In particular, I have considered Mr Dorking's submission that should the applicant be reinstated in the interim, her earnings should be placed in an interest-bearing account pending determination of the substantive issues. Having found the applicant's undertaking to have currency I decline to make such an order as in essence her financial situation would likely continue to deteriorate.

[24] It needs to be borne in mind by both parties that the Employment Relations Act 2000 as amended in 2004 states at s.123(1A) *reinstatement of the employee in the employee's former position or the placement of the employment in a position no less advantageous to the employee.*

[25] In coming to this interim determination, I have attempted to balance the rights and concerns of each party in the light of the as yet untested evidence. The balance is relatively fine in this case. I find that, at this interim stage, justice is best done by reinstating the applicant on an interim basis on specific terms pending the determination of the substantive matters.

[26] Those terms are:

- (a) The applicant is not to be deployed in the Breast Care unit nor in radiology.
- (b) The applicant is not to enter these areas for whatever reason without the authority of the appropriate manager.
- (c) The applicant is not to discuss any matters relating to her dismissal or to the proceedings between the parties with persons other than her professional advisers and witnesses she intends to call in the substantive proceedings.
- (d) The applicant is not to accept nor seek contact from patients with whom she was associated while employed in the Breast Care unit. This includes time while employed or outside her working hours.
- (e) The respondent is, under this order, required to provide the applicant with 25 hours minimum work each week on the hourly rate at which she was previously employed.
- (f) The respondent is to place the applicant on the payroll from 9am Wednesday, 20 July 2005.

**Costs**

[27] Costs are reserved and will be addressed following the investigation of the substantive matters.

Paul Montgomery  
Member of Employment Relations Authority