

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 200A/07
5087854

Attention is drawn to para[63]
which contains an Interim
Suppression Order

BETWEEN

RAYMOND PATRICK
WYNNE
Applicant

AND

THE ORDER OF ST JOHN
MIDLAND REGIONAL
TRUST BOARD
Respondent

Member of Authority: Dzintra King

Representatives: Mark Beech, Counsel for Applicant
Mark Hammond, Counsel for Respondent

Investigation Meeting: 27 August 2007

Determination: 10 September 2007

DETERMINATION OF THE AUTHORITY

[1] The applicant, Mr Patrick Wynne, says he has been unjustifiably dismissed by the respondent, The Order of St John Midland Regional Trust Board. The respondent is a charitable organisation and operates with about 80% volunteers and 20% paid staff. Mr Wynne seeks interim reinstatement. The respondent denies that the dismissal was unjustifiable and opposes the interim reinstatement application.

[2] Mr Wynne was an Advanced Paramedic and had worked for the respondent for 31 years. In October 2006 he was suspended on pay from his position as Eastern Bay of Plenty Area Manager while a lengthy investigation was carried out. He was dismissed on 8 June 2007.

[3] In 2006 and 2007 the respondent carried out a reorganisation of ambulance and event services. My Wynne was consulted about the changes. His position has been disestablished. This was a position which oversaw six ambulance stations in the eastern Bay of Plenty and focussed on management of members and resources. Mr Beech informed me that for the purposes of the interim matter only Mr Wynne was prepared to withdraw from his management role and consider a clinical position. The respondent says that the position which is the most similar to his disestablished position was that of District Operations Manager, for which Mr Wynne unsuccessfully applied. Mr Wynne's Authority to Practice ("ATP") has lapsed due to the length of time he has been away from his employment.

[4] **Allegations**

- The allegations against the applicant were serious. They included:
- allegations of sexual harassment;
- bullying, intimidation and threatening behaviour;
- unprofessional and unauthorised disclosure of sexual orientation;
- bringing personal matters into the workplace with detrimental effect upon other employees;
- misleading the respondent about his relationship with another staff member;
- attempting to discredit the integrity of other employees;
- Inappropriate, uncaring and insensitive behaviour as a clinical leader causing disharmony and resentment.

[5] The respondent made the following decisions about the allegations:

- 5 findings of serious misconduct justifying summary dismissal;

- 1 finding of serious misconduct justifying a final warning;
- 2 findings of misconduct justifying a final warning;
- 5 findings of misconduct justifying a warning;
- 1 finding of misconduct justifying a demotion.

[6] The allegations were made by staff and volunteers from the Opotiki and Whakatane stations.

[7] Part of the background to the matter is Mr Wynne's marriage breakup (his wife also worked for the respondent) and his subsequent relationship with another staff member who also works for the respondent as does her husband.

[8] Mr Wynne is of the view that the allegations stem from polarised reactions to his personal situation and that this fact has not been adequately taken into account by the respondent.

[9] The applicant says:

- he has not been supplied with all relevant information which may have assisted him in answering the allegations against him;
- complaints were inadequately particularised;
- that allegations were not properly investigated;
- that the allegations vacillated and changed;
- there has been predetermination and bias;

- the respondent refused to investigate hate mail he received and media leaks;
- the respondent failed to adhere to its policies and guidelines;
- there is a lack of substantive justification; and
- the respondent made decisions with little or no supporting evidence.

The Law

[12] The law regarding interim reinstatement injunctions was well settled by the Full Court in X v Y Ltd and NZ Stock Exchange [1992] 1 ERNZ 863 and confirmed by the Court of Appeal in Hobday v Timaru Girls High School Board of Trustees [1993] 2 ERNZ 146. In X v Y the Court treated three matters as requiring consideration: whether there was a serious issue to be tried; the balance of convenience; and the overall justice of the case.

[13] The question of whether there is an adequate alternative remedy available to the applicant is also to be considered.

Arguable Case/Serious Issue

[14] The respondent says there is not an arguable case because the applicant cannot prove all the facts he alleges.

[15] In Counties Manukau v Trembath [2001] ERNZ 847 at p.856 the Court said that where there was no real prospect of permanent reinstatement, it could not be said there was an arguable case for interim reinstatement.

[16] The respondent says there would be no prospect of permanent reinstatement because of the applicant's behaviour.

[17] If the applicant can prove all the facts which he alleges, he then has an arguable case, that is, a case with some serious or arguable, but not necessarily certain, prospects of success.

[18] All that is needed to establish an arguable case is a minimal lack of justification for the dismissal. In Ford v Hutt Valley Health [1994] 1 ERNZ 563 at p.572 Goddard CJ said that where the application was for interim relief pending a personal grievance the threshold was low and all that was needed was an arguable minimal lack of justification.

[19] Despite my concerns about the issue of permanent reinstatement I am prepared to find that the applicant has an arguable case.

Balance of Convenience

[20] In X v Y (supra) at p.872 the Court said that because an injunction was a discretionary remedy it had to weigh the inconvenience to a defendant of having to bear the burden of an injunction against the inconvenience to a plaintiff of having to bear the detriment of an unjustifiable action until the case was heard. The Court said that inconvenience meant “detriment or injury”.

Delay

[21] The applicant says that declining interim reinstatement may prejudice his permanent reinstatement because he would be removed from work for a further period of time. The respondent says that Mr Wynne had already been out of the workplace for a lengthy period. Mr Wynne’s ATP has already lapsed. I can hear the substantive matter in October if the parties are ready for a hearing.

[22] The respondent also says that there was a lengthy period before reinstatement was sought. There was a delay of several weeks. However, in Ford v Hutt Valley (supra) at p.574 the Court said that delay without detriment was rarely a material consideration. The respondent has not pointed to any detriment.

Position

[23] He wants to be reinstated to Team Manager Whakatane or in the alternative to an Advanced Paramedic role in the Eastern Bay of Plenty. Mr Wynne says that if the personal grievance had not arisen he would have expected to be restructured into the Team Manager's role.

[24] He says he can take the position on the three person roster in Whakatane or one of the two positions available on the two person advanced paramedic roster. He would also be willing to work outside Whakatane in a clinical role.

[25] Mr Neilsen said that as Area Manager Mr Wynne managed six stations and 46 members including volunteers and that the new Team Manager positions are for persons who are principally an ambulance officer who may be a Primary Care Officer through to an Advanced Paramedic. His role as Area Manager was car and office based. That position was paid \$71,500. The Team Manager role has clinical duties and is ambulance based and has responsibility for just one station. If occupied by an Advanced Paramedic the salary would be \$66,500.

[26] Mr Neilsen said there were two Advanced Paramedic positions, one in Whakatane and one in Gisborne but in either position Mr Wynne would be required to work with complainants.

[27] Mr Wynne lost his clinical qualification prior to his dismissal and the position to which he seeks reinstatement is a clinical position whereas his previous position involved management duties. The respondent says this is a substantially different position and reinstatement to that position would result in Mr Wynne's coming into contact with the complainants. The most similar position was that of District Operations Manager for which Mr Wynne made an unsuccessful application.

[28] The respondent says there is a leadership aspect to any position into which he would return and he would have some degree of authority over volunteers and staff and would have to work in close proximity in a crisis situation.

[29] It is apparent that there would be some difficulties with a suitable position for interim reinstatement.

[30] The respondent is a charitable organisation and relies on public support regarding funding and volunteers. It says Mr Wynne's return could jeopardise potential income streams and the number of volunteers available which would result in a concomitant reduction in the respondent's ability to provide services.

[31] Mr Wynne has been offered a position as a tour guide and he has previous tourism experience. Mr Wynne has said he would accept the offer of this position if he was unsuccessful in his reinstatement application.

Reputation

[32] The respondent says that the matter has attracted media attention and that Mr Wynne has not shown how interim reinstatement will change the views people have formed about him. It also says that Mr Wynne would not achieve any meaningful vindication by interim reinstatement because it is too soon to express findings of fact which would only be apparent after a substantive investigation.

[33] The respondent also opposes garden leave as that would create an unacceptable level of concern and discomfort to other employees. Further, it would impose a significant financial burden. This could of course ultimately be offset by Mr Wynne's undertaking to pay damages although the respondent has expressed concern about his ability to make payment if ordered to do so.

Third Party Concerns

[34] The respondent has raised concerns about the impact on other staff. I have received a number of affidavits opposing interim reinstatement and also affidavits supporting reinstatement. Those opposing indicate a fear of retribution and recrimination by Mr Wynne. Some say they would cease any association with the respondent. There is a significant level of anxiety and apprehension regarding his return.

[35] At the hearing neither the respondent nor the applicant had sworn evidence from persons supporting the reinstatement or opposing the reinstatement. I asked that the parties arrange to have the statements provided sworn. Subsequently I received some affidavits that were additional to or differed from the original statements. This was not what was agreed and it would be unfair for these to be considered now.

[36] The applicant summonsed witnesses supporting Mr Wynne's reinstatement and I heard from those witnesses at the hearing.

[37] The applicant says that some of the respondent's affidavits raise concerns about Mr Wynne's clinical deficiencies. Mr Beech asked that no weight be placed on the respondent's affidavits without their being submitted to questioning. The proper time for such questioning will be, as I informed Mr Beech at the hearing, when the substantive matter is heard.

[38] I have carefully looked at Mr Beech's assertion that the respondent's affidavits introduce issues about Mr Wynne compromising clinical management to get back at people and that there are serious allegations of clinical deficiencies. I read the affidavits more as expressing a concern about a potential abuse of power and a lack of trust. I do not understand the respondent to assert that it has an issue regarding Mr Wynne's clinical skills per se.

[39] In T v Attorney General, unreported, WEC 62/95, 13 September 1995, Goddard CJ found that the writing of obscene graffiti had caused serious concern to other employees and had regard to the interests of third parties. He said there was an unacceptable risk of a serious impact on other employees if interim reinstatement were ordered. In Clarke v Attorney-General [1997] 1 ERNZ 600 Court stated that the interests of third parties had to be taken into account.

[40] It is not unusual in a situation such as this for opinions to become polarised. I have noted that some of the respondent's witnesses say they have not had issues with Mr Wynne themselves. One of them said she had concerns based on what she had been told when seconded to the Area Manager's position. Another deponent

said she had nice things to say about him and that he was good clinically but did not trust him.

[41] It would be surprising if there were not differing views because people will have had a variety of experiences dealing with Mr Wynne and differing relationships with him. What is of concern is that a number of people have had negative experiences and that is something I must take into account when considering a reinstatement application.

[42] The interests of third parties in this case are a strong factor in tipping the balance of convenience against the applicant.

[43] The respondent also expressed a concern that interim reinstatement would expose it to claims of breach of duty to provide a safe and healthy workplace.

Trust and Confidence

[44] St John says that although Mr Wynne has excellent technical expertise and his skills and abilities are highly valued it no longer trusts him to deal appropriately with other employees and volunteers to whose interests there has to be due regard. The lack of trust and confidence makes it impracticable to reinstate Mr Wynne: South Taranaki Free Kindergarten Association v McLennan, unreported, WC 22/06 and WRC 24/06, 1 December 2006, Shaw J. This is a valid concern.

[45] The balance of convenience favours the respondent.

Overall Justice

[46] In X v Y (supra) at p.873 the Court said that to recognise the risk of details overwhelming considerations of substance it should stand back from the case once it has reached a decision on the balance of convenience and consider what the overall justice required it to do.

[47] This involves a consideration of the relative hardships that would arise from the grant or refusal of the injunction.

[48] The applicant has given an undertaking and that is a relevant factor although the Amended Statement of Problem also asserts that the applicant is in a precarious financial situation. There must be some doubt about his ability to pay damages and also about the degree to which damages could satisfactorily compensate third parties.

[49] The substantive matter can be heard relatively quickly.

[50] The respondent says it will suffer the greater inconvenience should Mr Wynne be reinstated. This will include damage regarding its ability to function and there will be detriment as a result of discomfort experienced by other employees and volunteers. St John says it will have to go to impossible lengths to accommodate Mr Wynne's reinstatement in order to reduce the impact on other people. Conversely, the disadvantage to the applicant of a further period out of work is insignificant.

[51] The detriment to Mr Wynne if the injunction is not granted is that he will lose income and the right to work in his chosen occupation.

[52] The detriment to the employer is that it will have to attempt to find ways of ensuring that Mr Wynne would have limited or no contact with the complainants. This would be difficult and it is coupled with the anxieties and concerns expressed by the complainants and the employer's concern about that.

[53] Mr Wynne could be adequately compensated by damages while the same could not be said of the respondent particularly given the possible impact on third parties.

[54] There is also the issue of the position into which Mr Wynne would be reinstated. I have considerable misgivings about there being a similar position. Mr Wynne has indicated that he is willing to forgo the managerial aspect of the position for the purposes of the interim application. However, I have a major concern about reinstating the applicant into a position on an interim basis without that being the same position he would be placed into if there were to be permanent reinstatement. The uncertainty regarding the position must weigh against Mr Wynne.

[55] Issues of trust and confidence are an integral part of the employment relationship. A number of employees and volunteers, not all of them complainants, say they do not trust Mr Wynne and are fearful and anxious about the possibility of his return to work. While trust and confidence are important in any employment relationship they must form a vital part in the provision of emergency health services. Staff must be able to trust each other or there is the possibility of detrimental outcomes for patients.

[56] I agree with the respondent that the issues it has identified and for which it has dismissed Mr Wynne do not primarily have to do with communication but with relationships. Mr Neilsen said that nature of the complaints militates against placement in to any position, not just a managerial one.

[57] A number of others say they have had no difficulties with Mr Wynne and support his return to the workplace. It is not clear whether they are aware of the reasons for the dismissal. The two summonsed witnesses who I questioned at the hearing were not and had had limited contact working with Mr Wynne.

[58] In Madar v P & O Services (NZ) Ltd [1999] 2 ERNZ 174 the Court of Appeal held that an assessment of the likelihood of permanent reinstatement was a proper and necessary consideration.

[59] The respondent says that Mr Wynne's behaviour was such that he is unlikely to obtain permanent reinstatement.

[60] St John says that the remedy is discretionary. Mr Wynne does come with clean hands in that he tacitly admitted some of the conduct complained of. He says others misconstrued his words and actions and that any embarrassment and fear caused were not intentional. He says that he believed the comments he made were innocuous or jovial and was surprised that they were interpreted as being offensive. Some comments were ones he felt he was entitled to make due to his position. Mr Wynne has said that St Johns has held him accountable for how others perceived or interpreted his actions.

[61] The overall justice of the case favours the respondent.

[62] I decline the application for interim reinstatement.

Interim Suppression Order

[63] The names of all complainants and any details that may identify them are suppressed. I will hear further submissions on name suppression and whether it should be permanent for all complainants when I hear the substantive matter.

Costs

[64] Costs were reserved.

Dzintra King

Member of the Employment Relations Authority