

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**AA 421/08
5143040**

BETWEEN TASITUMUA GEORGE MASINA
 Applicant

AND TUKAKI WAITITI on behalf of and as
 the Commissioner of Te Kura Kaupapa
 Maori o Kokiri o Te Rahuitanga o Otara
 Respondent

Member of Authority: Leon Robinson

Representatives: Joanne Watson, Counsel for Applicant
 Paul Robertson, Counsel for Respondent

Investigation Meeting: 5 December 2008

Determination: 12 December 2008

DETERMINATION OF THE AUTHORITY ON PRELIMINARY MATTER

The problem

[1] The applicant Mr Tasitumua George Masina ("Mr Masina") applies to the Authority for an interim order reinstating him to his former employment as Tumuaki (Principal) of Te Kura Kaupapa Maori o Kokiri Piripono te Kura Whakahou ki Otara ("the Kura"). The Board of the Kura has been replaced by a statutory commissioner Mr Tukaki Waititi ("Mr Waititi"). Mr Masina also asks the Authority to make an order preventing the appointment of a permanent Tumuaki. There remain to be subsequently determined substantive actions for unjustifiable dismissal, unjustifiable disadvantage and compliance order.

[2] Mr Masina was given notice of the termination of his employment on 23 June 2008. He lodged his application for interim reinstatement in the Authority on 17 November 2008. As required, he also lodged an undertaking to abide by any order made by the Authority in respect of damages that may be sustained through the

granting of an order for interim reinstatement. With my leave his undertaking was amended to comply with the regulations.

[3] In his statement in reply, the Commissioner says Mr Masina's employment was justifiably terminated because the employment relationship became frustrated as a matter of law as a consequence of the New Zealand Teachers Council's' ("the Teachers Council") refusal to grant Mr Masina a limited authority to teach ("LAT").

[4] The parties were unable to resolve the differences between them by mediation. There is to be an investigation meeting of the substantive claims on 12 and 13 February 2009.

[5] This Determination deals only with what should happen until a full investigation of the employment relationship problem can occur. It is in no way a final determination or any influence on how the problem might eventually be determined.

Interim reinstatement

[6] Applications for interim reinstatement are considered under Section 127 of the *Employment Relations Act 2000* ("the Act"). The Authority is required to apply the law relating to interim injunctions and to have regard to the objects of the Act. The Authority may provide, wherever practicable, for reinstatement where this is claimed and a personal grievance is established.

[7] An order for interim reinstatement is an interim injunctive order. The established tests for interim reinstatement are these:-

- (i) whether the applicant has an arguable case of unjustified dismissal; and
- (ii) whether the balance of convenience (including the existence of alternative remedies sometimes said to be a separate test) favours the applicant; and

- (iii) the remedy being discretionary, where the overall justice of the case lies until it can be heard (including particularly the respective strengths of the parties' cases so far as they can be ascertained at this stage).

An arguable case

[8] It is neither possible nor appropriate to make findings on any contested facts. Such contests will be determined following a full investigation.

[9] Mr Masina has been employed by the Board of the Kura since August 2004. He does not have an approved teacher education qualification but was granted consecutive LATs by the Teachers Council in respect of the period from 1 January 2006 until 7 February 2008. He has since that time had no authority to teach.

[10] Mr Masina was dismissed by a previous commissioner in 10 December 2007 but pursuant to the terms of a mediated settlement entered into on 17 March 2008, he was, amongst other things, re-employed and his employment deemed continuous from the date of dismissal on 10 December 2007 ("the mediated settlement"). Mr Masina made application for a further LAT but a letter addressed to the Commissioner from the Teachers Council dated 16 April 2008, advised that the application had been declined.

[11] By letter dated 23 June 2008 the Commissioner wrote to Mr Masina terminating his employment as from 4 July 2008. The letter stated:-

9. Based on the advice that I have received, I believe that it is unlawful for me to continue to employ you without a LAT. I agreed to your reinstatement as principal on the basis that you would immediately apply for a LAT, but unfortunately your application for a LAT has been declined. There has been no challenge to the decision of the Teachers' Council through the courts, and I have no assurance that the Teachers' Council will change its mind because of the representations made to the Teachers' Council by yourself and your solicitor. In summary, I have no assurance that a LAT will ever be granted.

10. I am a commissioner appointed by the Secretary of Education, and I cannot employ you as a principal when it is unlawful to do so. My decision now is that you cannot continue as a principal when you do not have a LAT, and when there is no evidence that you will obtain a LAT in the near future. For these reasons I, very reluctantly, have come to the decision that your contract of

employment has come to an end. Your last day as the principal will be Friday 4 July 2008.

11. I offer you a formal farewell at the school at a time and date that would suit you.

[12] Mr Robertson would not concede that Mr Masina has an arguable case. I have determined that he does.

[13] Mr Masina's claim that his dismissal was unjustifiable or that he was unjustifiably disadvantaged will be determined according to the statutory test of justification set out in section 103A of the *Employment Relations Act 2000* ("the Act").

[14] When Mr Masina was re-employed pursuant to the mediated settlement, although his employment was deemed continuous from 10 December 2007, he was not authorised to teach as from 8 February 2008. The Commissioner was entirely aware of that situation for it was explicitly acknowledged. The Commissioner did not then regard the situation as constituting a frustration of contract as he does now. There was no question that Mr Masina remained employed. Mr Masina argues there is no issue now. Clearly the parties then regarded the employment continuing and intended it to be so notwithstanding their common knowledge that as a matter of fact Mr Masina was not authorised to hold his position as principal. It is yet to be determined whether Mr Masina's employment was frustrated as a matter of law. At this stage, it is arguable for Mr Masina that he can remain employed although he is not authorised to teach.

[15] It is arguable for Mr Masina that a fair and reasonable employer would not have reached the decision that Mr Masina's employment contract was frustrated without first seeking Mr Masina's direct input as to that decision but also as to alternatives to dismissal.

[16] I drew to the parties attention that the Commissioner's letter to the Teachers Council can reasonably be perceived as inaccurate insofar as it refers to the acting principal's employment subsisting "*until such time as the outcome of Mr Masina's*

LAT application is determined or a suitably qualified person is appointed". That statement of fact appeared immediately inaccurate to me. I suggested to the parties that the present acting principal's employment was not, as a matter of fact, actually limited in tenure on those particular grounds. Mr Masina argues now that the Commissioner misled the Teachers Council and that its refusal was consequently erroneous. Accordingly, I consider it arguable that the Commissioner's actions in terms of his correspondence with the Teachers Council were contrary to his duty of good faith owed to Mr Masina and thereby not the actions of a fair and reasonable employer with respect to the decision to terminate the employment.

[17] I find it is arguable too that such actions by the Commissioner in terms of his correspondence with the Teachers Council constituted an unjustifiable disadvantage for Mr Masina in his employment.

[18] I also consider it is arguable for Mr Masina that the Commissioner did not comply with the terms of the mediated settlement in respect of supporting Mr Masina's application for a LAT.

[19] I consider the above matters the most salient arguable grounds for Mr Masina. I am satisfied that there is a tenable arguable case and I find accordingly.

Balance of convenience

[20] In the exercise of the Authority's discretion I weigh up the inconvenience to the Commissioner of having to bear the burden of interim relief before the substantive case is dealt with at investigation meeting against the inconvenience to Mr Masina who may have a just case of having to bear the detriment of wrongful or unjustifiable action until the case has been fully investigated. It is also considered in terms of how best to regulate the positions of the parties until, after a full investigation meeting by the Authority has been able to take place, the employment relationship problem is finally determined.

[21] The Authority must apply the law relating to interim injunctions. The primacy of reinstatement is crucial and there must be regard for it.

[22] This employment relationship problem will proceed to full investigation meeting in February 2009. At this time of year and the approaching vacation period, I consider that intervening time period relatively short. That fact is particularly persuasive in the exercise of my discretion.

[23] Mr Masina says that he is concerned that if he does not succeed in preventing the Commissioner from employing a permanent principal that he will have no real ability to fight for his job. The Commissioner has been put on notice that Mr Masina ultimately seeks reinstatement. Mr Masina says that he has now been dismissed twice in seven months. He has had to pay legal costs. He says he has suffered humiliation and feels he has been set up and misled.

[24] Mr Masina deposes that he has no job or income. He tells the Authority he provides for a large family and his wife is not employed. The Kura whānau have permitted Mr Masina and his family to reside in a Kura dwelling rent free. Mr Masina says that the whānau and the kōkiri have repeatedly demonstrated to him and the Commissioner that he is the preferred Principal.

[25] The Commissioner cites three issues in resisting Mr Masina's application for interim reinstatement. Firstly he is concerned that it would not be lawful for him to appoint an unregistered person as Principal. I have earlier commented on this matter and agree it is for substantive determination. But I accept the Commissioner is reasonably entitled to be properly concerned about it.

[26] Next the Commissioner refers to the continuing appointment of an acting Principal in Mr Masina's absence. The Commissioner says that if Mr Masina were reinstated on an interim basis, the Kura would have to find approximately \$90,000.00 to pay Mr Masina. That of course is a full year salary. The Authority is advised the Kura has operated with a deficit for several years already and the Commissioner does not know where the funding to pay Mr Masina would be found.

[27] Thirdly, the Commissioner is concerned that Mr Masina has been critical of the acting Principal. He is concerned that Mr Masina could not work with the present acting Principal. He says that if Mr Masina were reinstated, that appointment would undermine the present acting Principal.

[28] Finally, the Commissioner says that he considers Mr Masina's reinstatement would engender conflict and tension amongst staff. Ultimately the Commissioner says it would not be practical to have Mr Masina return as Principal.

[29] The Commissioner also remarks that Mr Masina has delayed seeking interim reinstatement. He says he was informed Mr Masina would make application in July 2008. When Mr Masina does so now, the Commissioner notes he is poised at this late stage of the year to make an appointment of Principal. He says he has suitable applicants for the position.

[30] I informed Mr Masina and his counsel I was concerned that there has been delay in making this present application. Mr Masina says he gave instructions to his then solicitors to pursue the application on his behalf immediately following his dismissal. He says the solicitors did not act on those instructions.

[31] I note that Mr Masina has previously made an application for interim reinstatement having instructed other solicitors. That application was resolved between the parties resulting in Mr Masina's reinstatement. Mr Masina was aware of the both the nature and procedures involved in such an application. I find that this application has been delayed. I am not persuaded the delay is adequately explained. This factor materially influences my discretion. So too does the arrangement I have made to deal with this matter substantively on 12 and 13 February 2009.

[32] This factor materially influences my discretion. So too does the arrangement I have made to deal with this matter substantively on 12 and 13 February 2009.

[33] Mr Masina says the Teachers Council decision to refuse him a LAT was erroneous. But Mr Masina did not appeal that decision to the District Court.

Although I heard no argument on the point, the Teachers Council decision may be reviewable. I am not persuaded that there is any good reason why Mr Masina could not have appealed the refusal to grant him a LAT.

[34] Having regard to the above I conclude the balance of convenience favours the Commissioner.

Overall justice

[35] Standing back from the detail of the other tests I now decide whether it will be in the interests of justice to grant interim reinstatement. I stand back and ask where the overall justice lies.

[36] Mr Masina says that if he had not been dismissed in the first place, his LAT would not have expired. In a similar vein he says of the Teachers Council's prerogative to authorise unqualified teachers "given the terms of settlement, I felt it was only a procedure that we had to go through and that within a short time I would be back as Principal". I remain unconvinced at this juncture whether this perception of the prerogative is justifiably held.

[37] I am particularly influenced by the delay in bringing the application and the relatively timely arrangements I have made to deal with the substantive matter early in the New Year. In all the prevailing circumstances, I consider that the overall justice of the matter favours the refusal of the order sought for interim reinstatement.

[38] I give consideration to crafting an appropriate practical solution, other than those advanced by the parties and which, in equity and good conscience, will meet the justice of the case. There were no submissions by the lawyers in this regard. I consider I am also obliged to give consideration to conditional reinstatement. I conclude that no other solutions whether conditional or otherwise are appropriate or necessary.

Determination

[39] For all the above reasons, in considering the best way to regulate matters between now and the investigation meeting on 12 and 13 February 2009 and determination, I decline to exercise my discretion to order Mr Masina be reinstated on an interim basis. I also decline to grant an order restraining the Commissioner from permanently appointing any other person as Principal pending the resolution of the employment relationship problem. I repeat again the Commissioner has been notified Mr Masina ultimately seeks permanent reinstatement.

Costs

[40] If costs are sought they are reserved.

Leon Robinson

Member of Employment Relations Authority