

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 38/09
5153326

BETWEEN REBECCA SOLOMON
Applicant

AND CHIEF EXECUTIVE,
DEPARTMENT OF
CORRECTIONS
Respondent

Member of Authority: G J Wood

Representatives: Charles McGuinness for the Applicant
Karen Spackman for the Respondent

Investigation Meeting: 25 March 2009 at Wellington

Determination: 27 March 2009

**DETERMINATION OF THE AUTHORITY ON INTERIM
REINSTATEMENT**

Employment Relationship Problem

[1] Ms Solomon claims that she was unjustifiably constructively dismissed from her position, of approximately six months' duration, as a social worker with the Department of Corrections in its prison service, predominantly working at Arohata Women's Prison in Wellington. The essence of her claim is that, when she resigned on 8 December 2008, Corrections knew or ought to have known that she was mentally unwell at the time and therefore in no fit state to make such a decision. She claims that Corrections took advantage of this state of affairs to get her to resign with immediate effect, when she had previously given several weeks' notice. She also claims that rather than take advantage of her situation, Corrections should have insisted on a cooling off period before accepting her resignation. On the same day of

her resignation, Ms Solomon was admitted to Wellington Hospital for psychiatric assessment and treatment. She was not released until 20 December.

[2] Corrections denies that it knew Ms Solomon was mentally unwell at all (let alone to the degree that in fact she was) and considers that it supported her throughout her employment. In particular, it claims it tried to get her to revoke or defer her resignation, but she refused to do so.

[3] After Ms Solomon's release from hospital, attempts were made on her behalf to restore her employment with Corrections but for various reasons, including the time of year, it was not until early February that a personal grievance was formally raised on her behalf. Corrections' response was to formally decline to reinstate Ms Solomon.

[4] On 24 February 2009, Ms Solomon filed with the Authority for interim reinstatement. A conference call was held at the earliest opportunity, on 2 March. At that directions conference an investigation meeting on interim reinstatement was agreed upon for 25 March, and the substantive investigation meeting was set for 7 May.

[5] Mediation was undertaken before the investigation meeting. Unfortunately, it was unsuccessful in resolving the problem. The parties intend, however, to return to mediation once the interim reinstatement application has been dealt with by the Authority.

Determination

[6] The principles to be applied in a claim for interim reinstatement are set out in *Cliff v. Air New Zealand Ltd* [2005] ERNZ 1 at para.[18], namely:

- *First, whether the plaintiffs have an arguable case of unjustifiable dismissal;*
- *second, whether the balance of convenience (including the existence of alternative remedies sometimes said to be a separate test) favour the plaintiffs; and*
- *third, the remedy being discretionary, where the overall justice of the case lies until it can be heard (including particularly the respective strength of the parties' cases so far as they can be ascertained at this stage).*

[7] Nothing that follows will be determinative of any issues between the parties, as these can only be determined by the Authority following a full investigation. At this interim stage, however, I must assume that Ms Solomon will prevail in any claim she makes if there is some evidence of it, even if it is disputed by Corrections.

Arguable Case

[8] I accept that Ms Solomon has an arguable case for interim reinstatement, even though it is very unusual for reinstatement to be awarded in claims of constructive dismissal. This is for two reasons. First, Ms Solomon has given evidence that although Corrections staff must have known that she was unwell at the time, it failed to suggest that she have a support person when handing in her resignation and failed to try and get her to reconsider or defer her decision. Second, evidence was given on her behalf that Corrections knew or ought to have known that she was unwell and it therefore should have provided for a cooling off period before accepting her resignation and replacing her. Furthermore, she claims that it had opportunities to revisit the issue of her resignation very soon after it had occurred and unfairly failed to do so.

[9] It is clear that if her evidence and that of her supporters were to be accepted (which I must assume at this interim stage) then she has an arguable case for unjustified dismissal in that Corrections breached its duty of good faith to her (particularly the need to be responsive and communicative) by failing to take account of her being unwell, allowing her to resign with no notice and therefore unfairly giving her no period for reconsideration.

[10] It is Ms Solomon's claim that the above failures by Corrections led to her making the extremely unwise choice, when she was mentally unwell, to resign with immediate effect. She therefore claims reinstatement on the basis that while at that time she may have lost trust and confidence in Corrections and thus felt she had to leave her job, now that she has become well again such issues no longer exist and therefore can not form a bar to reinstatement. If the Authority were to determine the facts in this way, I therefore accept that she has an arguable case for reinstatement if unjustifiably dismissed.

Balance of Convenience

[11] The balance of convenience simply allows the Authority to best adjust the rights of the parties in the interim in a way that accords with fairness and justice: *Congoleum Corp v. Poly-Flor Products (NZ) Ltd* [1979] 2 NZLR 560 (CA) at 571. Important here are the adequacy of alternative remedies to interim reinstatement and equitable legal considerations.

[12] I accept, by a narrow margin, that there is no completely adequate alternative remedy available to Ms Solomon. If successful in her claim for unjustified dismissal, she may be entitled to lost remuneration for the period between this determination and the substantive determination, but she will have been denied the opportunity to resume her career in the interim. Her psychiatrist, however, believes that reinstatement assist in her recovery from illness. (I note that this important evidence was not provided by affidavit as it should have been, but take it into account nonetheless. I have adopted the same approach to Corrections providing a photocopy of an affidavit, rather than the original as required).

[13] It follows that if Ms Solomon is not reinstated in the interim, this could be to the detriment of her recovery. She has no other employment to go to, particularly as she is genuinely pursuing full reinstatement. These are important factors when assessing the balance of convenience (see for example *Melville v. Chatham Islands Council* [1999] 2 ERNZ 76). It is because the benefits to Ms Solomon's rehabilitation of working, even in the interim, can not be calculated in a monetary sense, that alternative remedies such as compensation for loss remuneration would not be totally adequate.

[14] On the other hand, Ms Solomon left her job on 8 December 2008. She was released from hospital on 20 December 2008. Whatever the reasons may have been, this application was not filed until 24 February and a directions conference held on 2 March. To meet the parties' needs, mediation was held in advance of this investigation meeting on 25 March. The substantive investigation meeting will be held on 7 May 2009, less than six weeks hence.

[15] While it could not be said that the delay is so substantial that the application should not be granted, particularly as there is no obvious prejudice to Corrections, the time to a substantive investigation meeting is quite short in comparison with the

period which has elapsed since Ms Solomon left her employment. Corrections may therefore justifiably claim that it would be more disadvantaged by the granting of the application than Ms Solomon because of the extra work required in putting her back on the job, especially given her past illness and the nature of her work, and the fact that she may only be there for a matter of weeks. Furthermore, unusually in claims for interim reinstatement, Ms Solomon's position has already been filled, because Corrections was already recruiting for another social worker at the same time. On the other hand, neither interim nor full reinstatement should affect the rights of the worker or workers appointed to Ms Solomon's role. Were reinstatement to be awarded, Corrections would simply have to manage the situation. At an interim stage, however, because Ms Solomon has been replaced it does increase the inconvenience to Corrections above that normally suffered by an employer.

[16] Because Ms Solomon resigned when she was ill, it can not be held that there are any legal equitable considerations that would preclude her from interim reinstatement.

[17] On balance, I conclude, primarily because the near proximity of the substantive investigation meeting (particularly compared with the delay in bringing the application) and the inconvenience to Corrections of creating a temporary role for Ms Solomon outweigh the benefits to Ms Solomon of working in the interim, that the balance of convenience favours Corrections.

[18] I have considered whether Ms Solomon should be reinstated to the payroll, but not required to work. I have rejected this option because the benefits of reinstatement to Ms Solomon are psychological as financial and because, were she unsuccessful in her claim, she may be required to repay at least six weeks of income, which would be extremely burdensome for her. In any event, both parties rejected interim reinstatement on such terms as an option.

Overall Justice and Conclusion

[19] The only new factor to be assessed here is the relative strengths of the parties' cases. Ms Solomon's employment relationship problem is a most unusual one. To the extent that it relies on Ms Solomon's original notice by email of resignation to take effect at Christmas, it can not be said that her application is a strong one.

[20] Instead the strength of her claim centres on the extent to which Corrections should take responsibility for her resigning with immediate effect on 8 December. If she is to be reinstated fully, the Authority will have to be satisfied that either Ms Solomon was unfairly prevailed upon at the meeting on 8 December to convert her resignation on notice to one of immediate effect, or that Corrections should have provided for some cooling off period before accepting her resignation. It seems difficult in principle to otherwise find that it was under any duty, after 8 December, to somehow rescind her resignation or reinstate her voluntarily.

[21] Given the relative uniqueness of the claim, it can not therefore be said that Ms Solomon has a particularly strong claim for full reinstatement. Therefore the overall justice of the case could not lead to a different conclusion on this application than that reached on the balance of convenience.

[22] It therefore follows that Ms Solomon's application for interim reinstatement must be dismissed.

Costs

[23] Costs are reserved.

G J Wood
Member of the Employment Relations Authority