

[5] In a telephone conference between the Authority and the representatives arrangements were made for mediation on an urgent basis, lodging of the Board's statement in reply and affidavits regarding the interim reinstatement application, and for an investigation meeting to hear submissions on that application. Mediation did not resolve matters between the parties and I have now heard submissions from their representatives on the application for interim reinstatement.

[6] Affidavits were lodged by Ms Craig, Chapel Downs school principal June McMillan, Board chairperson Malcolm Holdaway, Board member Shirley Chapman and two other RTLBs, Sonia Tembe-Ogilvie and Patricia O'Brien.

[7] While the Board was her direct employer Ms Craig's job involved working at four schools referred to as the South Otago School Cluster – Chapel Downs, Redoubt North, Dawson and Mayfield. Consequently affidavits were also provided by Redoubt North school principal Jane Milner, Dawson school principal Angela Funaki and Mayfield school principal Colleen Gray. A further affidavit was lodged from John McGowan, a North Shore school principal, who served on a sub-committee investigating the Board's concerns about Ms Craig's performance.

Principles of interim reinstatement

[8] Section 127 of the Act requires the Authority to apply the law relating to interim injunctions having regard to the object of the Act. This requires Ms Craig to have an arguable case to be determined through subsequent investigation. An assessment is to be made of how best to regulate the positions of the parties until that subsequent investigation and determination of the substantive issues is made. That assessment is referred to as the balance of convenience. Whether effective remedies other than interim reinstatement are available to Ms Craig must be considered as part of that assessment. Finally the Authority takes a global view of the justice of the case and decides what should be done to attain that. Throughout the objects of the Act are considered, including under s3 for employment relationships to be built on good faith behaviour and under s101 to recognise the importance of reinstatement as a remedy.

[9] As noted by the learned authors of *Personal Grievances*, Wellington,

Brookers, 2002 at 11.3.06:

the Court ha[s] drawn attention from time to time to the importance of not seeking the answer to an interlocutory injunction application in the rigid application of a formula. In reality the considerations of whether there is an adequate alternative remedy, where the balance of convenience lies, and the overall justice of the case will often overlap.

[10] The investigation is confined to the untested evidence contained in the affidavits of various witnesses, considering the parties' submissions, and reaching a determination after weighing available information and applying relevant principles.

[11] If an order for interim reinstatement is to be made, it may be subject to any conditions the Authority thinks fit.

The background

[12] Ms Craig came to New Zealand in mid-2008 from England. She entered the country with a work visa to work at Chapel Downs Primary School. Ms McMillan had neither met nor interviewed Ms Craig but says she was offered a job as an RTLB on the strength of a recommendation from Mayfield's principal Ms Gray. Ms Gray had interviewed Ms Craig while on a recruiting trip to London in 2007.

[13] Ms Craig was due to take up her role early in 2008 but delays in immigration arrangements resulted in her starting work in July that year.

[14] Over the following months a number of difficulties arose between Ms Craig, Ms McMillan, the other principals, some other RTLBs and some classroom teachers. Ms Craig developed trenchant views over whether RTLB practice in the South Otago cluster met the requirements of Ministry of Education policy and guidelines. She and Ms McMillan clashed over various requirements by the principal that did not match Ms Craig's view of how her role should be carried out.

[15] On 23 June 2009 the Board notified Ms Craig that it had set up a sub-committee to investigate a "*schedule of serious concerns*" about her employment as an RTLB. She was cautioned that if, following the sub-committee's inquiry and report, the Board decided the matters of concern constituted misconduct or serious

misconduct, it might issue a final warning or dismiss her.

[16] The schedule of concerns set out 12 overlapping allegations. These were that Ms Craig had:

- (i) not adhered to timetables by arriving late at a school or not keeping appointments; and
- (ii) been absent from duties without leave or approval; and
- (iii) not provided her weekly timetables by the expected time; and
- (iv) not given cluster managers enough notice of changes to timetables; and
- (v) proceeded with a special funding (SLS) application for a pupil without the knowledge and consent of the Redoubt North principal and despite instructions not to do so; and
- (vi) refused to lodge SLS applications for two pupils at Mayfield school despite directions to do so; and
- (vii) undermined the authority of her employer by making derogatory remarks; and
- (viii) undermined the authority of her employer and other managers by challenging decisions made; and
- (ix) been untruthful about work-related matters; and
- (x) been threatening when given directions she disagreed with; and
- (xi) communicated with managers in a discourteous and unprofessional manner; and
- (xii) failed to follow protocols in the Otaru South RTLB operations handbook and the Ministry of Education's RTLB Policy and Toolkit document.

[17] The schedule included documents such as timetables, emails, file notes and minutes said to support each allegation.

[18] Some dispute followed about the composition of the Board's sub-committee. Ms Craig, accompanied by an NZEI advisor, eventually met on 21 July 2009 with a sub-committee comprising Ms Chapman, Mr McGowan and the Board's lawyer Ross Knight. The meeting lasted more than four hours. Ms Craig answered a number of questions put to her by Mr Knight in what Mr McGowan's affidavit describes as a "*probing manner*" and the sub-committee's report to the Board described as "*robust and focussed*". Ms Craig took a number of breaks during the lengthy meeting to take

telephone calls or because she had become distressed.

[19] In addition to answering questions Ms Craig provided a 14 page submission of “*notes*” which responded to each allegation.

[20] The sub-committee’s written report to the Board (4 August 2009) expressed the view that the employment relationship had “*reached a point of incompatibility sufficient to justify the termination of Ms Craig’s employment*”. It found no single event determinative but considered a “*snowballing of many incidents*” had led to “*an irreconcilable breakdown of trust and confidence*” between Ms Craig and the principals and with her co-workers. It considered the incompatibility emanated from Ms Craig “*who demonstrated an inability to accept any wrongdoing much less a willingness to change her work habits and abide lawful instructions given to her in the workplace*”.

[21] The Board adopted the sub-committee’s conclusions and communicated these to Ms Craig’s NZEI advisor in a letter dated 7 August 2009. The letter included the statement that “*the most probable outcome is likely to be a termination of Ms Craig’s employment*”. She was given an opportunity to make submissions in writing before the Board moved to determine the outcome of its investigation.

[22] In her written submissions Ms Craig then asked the Board to agree to urgent mediation with her before it took any further action.

[23] Although attempts were made by the parties to arrange and attend mediation, for various and hotly-disputed reasons, this did not occur. The Board then resolved to conclude its disciplinary process and dismissed Ms Craig on the grounds of “*serious incompatibility*”.

Does Ms Craig have an arguable case?

[24] The question of an arguable case requires considering whether Ms Craig, assuming she can prove all the facts as alleged, has some serious (but not necessarily certain) prospect of success. She must establish not only an arguable case that she was unjustifiably dismissed but also an arguable case that, if her grievance is

successful, she would be reinstated and not simply compensated monetarily.¹ Her case is not, at this stage, weighed against any defence which the Board may have except as to fundamental issues such as jurisdiction (which is not in issue here).² In a personal grievance application of this type, the onus is on the employer to justify the dismissal both procedurally and substantively. The threshold of ‘arguable case’ is usually met once a grievant disputes the basis of the purported justification for the dismissal and seeks to put the employer to the proof of it.

[25] In light of that relatively low threshold the Board conceded in its submissions that Ms Craig has an arguable case although, it argues, a weak one.

[26] I agree Ms Craig has an arguable case but do not comment on its strength or weakness at this point. Arguable elements of her case, as submitted by Ms Craig, include:

- (i) Whether, in being asked to respond to the schedule of concerns, Ms Craig was fairly on notice of the prospect of dismissal for serious incompatibility and the breakdown of trust and confidence rather than a range of more specific matters of performance; and
- (ii) Whether the Board had adequately addressed responsibility for the breakdown of relationship, including by attempting to resolve the dispute regarding the role of the RTLBs, by earlier attempts to formally raise or warn Ms Craig about its concerns, by providing counselling and other assistance, and by fairly assessing whether others, even in part, were responsible for the difficulties in relationships; and
- (iii) Whether the sub-committee and Board, before making its decision to dismiss, did enough to investigate the significant differences between the comments of the principals and other staff and the responses given by Ms Craig.

[27] Having accepted that the question of justification of the dismissal is arguable, I also accept that it is also arguable – on the low threshold required – that she could be reinstated and not simply compensated monetarily should her grievance subsequently be confirmed once the substantive investigation of her claim is determined.

¹ *Cliff v Air New Zealand* [2005] ERNZ 1 at [12] (EC, Colgan J).

² See *X v Y Ltd & NZ Stock Exchange* [1992] 1 ERNZ 863, 872-873.

Balance of convenience

[28] Identifying the balance of convenience – in the sense of detriment or injury – in this case requires the financial burden on Ms Craig to be weighed against potential costs and difficulties for the Board, and the extent to which such matters might be managed or minimised.

[29] I find that the balance of convenience, in the particular circumstances and timing of this matter and albeit by a narrow margin, lies with Ms Craig.

[30] Although there is a relatively short period of around ten weeks until the Authority's substantive investigation is held on 17, 18 and 19 February 2010, there will then most likely be at least another four to six further weeks until the determination is issued.

[31] Ms Craig's realistic options for securing alternative employment and income before February are very slim. Her current work permit conditions limit her to working as an RTLB employed by the Board. While I accept the Board's submission that this condition can be changed if she can get a suitable work offer from another employer, she is unlikely to get one soon. Practically, given what her resume shows her qualifications and career to be to date, her job prospects are likely to be limited to work in a school or perhaps a private training establishment. Any school job is not likely to start before term one 2010.

[32] Ms Craig avers to having no savings, no means of earning an income and being unable to meet costs of rent, food and bills for herself and her daughter. The eight weeks notice paid to her at the time of dismissal has ended.

[33] In those circumstances damages – in the potential form of an order for lost wages if she was successful in her personal grievance application some months away – are not an adequate alternative.

[34] I do not accept the Board's submission that Ms Craig's apparent lack of funds to meet immediate living costs meanwhile means that her undertaking as to damages

is inadequate. If later required to meet an order for damages in reliance on that undertaking, she might be able to do so from a charge on future earnings or by calling on other assets (such as sale of a house in Britain referred to in some of the documents lodged in this matter). To look further behind the undertaking of a worker who seeks interim reinstatement because they need the income would risk undermining the object of the Act in recognising the importance of reinstatement as a remedy (s101(c)).

[35] I have also considered the factors submitted by the Board as weighing against interim reinstatement on the balance of convenience.

[36] Its primary concern is the dysfunctional relationship between Ms Craig and the cluster principals and some other staff being such that she was unlikely to be able to co-operate with those principals and staff members. This is evidence by negative comments made by her about them in her submissions prior to dismissal. A lack of trust and confidence is said to be compounded by:

- (i) Ms Craig's refusal to accept any fault or responsibility for the concerns raised with her; and
- (ii) a deep division between her understanding of the RTLB role in New Zealand schools – after barely a year of experience in it – and that of the principals, other RTLBs and classroom teachers.

[37] The Board also contends that Ms Craig seeks interim reinstatement solely because she has no immediate alternative due to her visa issues but has no genuine wish to return to work at the four schools.

[38] While not discounting those factors, the particular timing of this matter – falling so close to the end of the 2009 school year and resuming so soon after the opening of the 2010 school year – means interim reinstatement would not put Ms Craig back into the strained workplace environment for most of that time. The Board would also have the option of Ms Craig serving the period on garden leave.

[39] The Board says it will face a significant financial burden in providing paid garden leave as the Ministry of Education withdrew funding for Ms Craig's position following her dismissal. I am not prepared to accept that as a decisive factor in the

balance. If it were, it would mean that employees of school boards would simply be ineligible for interim reinstatement because their immediate employer does not control the funds for their salaries. The legislative entitlement to interim reinstatement in certain circumstances should not be frustrated by how the state organises its affairs. The provisions of the Act mean this Board – like any other employer – must bear the risk (and, very rarely, cost) of an interim reinstatement being ordered while it awaits the testing of its justification for a decision to dismiss. Funding to meet the cost involved in the present case is a matter for the Board to resolve with the Ministry.

Overall justice

[40] Having found Ms Craig has an arguable case and the balance of convenience regarding interim reinstatement lies with her, the Authority must nevertheless stand back and consider the overall justice of this case.

[41] This includes an assessment of the relative strength and weaknesses of each party's case and the prospects of ultimate success. It is subject to the usual caveat at the interim stage that the evidence has yet to be thoroughly tested through questioning of the witnesses in the Authority investigation.

[42] Justification of its decision to dismiss Ms Craig for incompatibility will require the Board to show:³

- (i) the necessary level of incompatibility existed;
- (ii) the incompatibility was largely the employee's fault; and
- (iii) the facts are entirely convincing; and
- (iv) it acted in a procedurally fair manner.

[43] The Board's argument on meeting procedural requirements appears strong and includes:

- (i) Ms Craig had union assistance in the disciplinary process; and
- (ii) At Ms Craig's request, membership of the sub-committee was amended to exclude the cluster principals and the time and location of the meeting with the sub-committee were changed; and

³ *Hayward v Tairawhiti Polytechnic* (unreported, EC AC 43/05, 3 August 2005, Travis J) at [104].

- (iii) Ms Craig was invited to respond to allegations and make submissions regarding the outcome, which she did; and
- (iv) The Board suspended its disciplinary process to attend mediation at Ms Craig's request.

[44] On the issue of a loss of trust and confidence the Board has strong evidence. Unsurprisingly the affidavits of its witnesses are in unison. However it is Ms Craig's apparent view to the same effect that may prove decisive. For example, her submissions on the schedule of concerns, in commenting on her relationship with one classroom teacher, state "*that the bedrock of collaboration, on which RTLB depends, has been damaged beyond all reasonable expectation of repair*".

[45] The Board's case on the impracticability of reinstatement – should a grievance be established and remedies need to be assessed – is also relatively strong. Again, the Board witnesses' affidavits express a consistent view, but it is Ms Craig's own comments that seriously bring into question the prospects for her productively returning to work on a permanent basis with the principals and some of the classroom teachers and the other RTLBs. In various documents written and provided to others prior to her dismissal Ms Craig alleges Ms McMillan was abusive to staff and children, Ms Gray was deliberately negligent and deceptive, Ms Funaki was "*nit-picking*" and "*fault finding*" and Ms Milner was unprofessional. A classroom teacher is described as an "*informant*".

[46] Despite this preliminary assessment that permanent reinstatement is unlikely to be awarded as a remedy, I do not consider the overall justice of the matter requires Ms Craig to be denied reinstatement for the interim. In the circumstances of this particular case one is not contingent on the other. Some key elements are yet to be fully tested in the evidence. Until that is done, the balance of convenience favours Ms Craig not bearing the financial burden.

Determination and orders

[47] For the reasons given, and in reliance on the undertaking given by her, Ms Craig is to be reinstated on an interim basis to her position as an RTLB employed by the Board pending the Authority's investigation and determination of her personal

grievance application. In the particular circumstances the Board may elect to have Ms Craig serve that period on a garden leave basis or make alternative arrangements for her to do suitable work (such as administrative tasks or resource development) from home or have her to carry out duties at only one or some but not all the schools in the cluster.

Further investigation

[48] Notice has been issued for a three-day investigation from 17 to 19 February 2010 with a timetable for the lodging of witness statements.

Costs

[49] Costs are reserved.

Robin Arthur
Member of the Employment Relations Authority