

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

[2013] NZERA Christchurch 227  
5435980

BETWEEN                      BARBARA PERRY  
   Applicant  
  
AND                                THE COMMISSIONER OF OUR  
   LADY OF VICTORIES SCHOOL  
   Respondent

Member of Authority:    Helen Doyle  
  
Representatives:            Fiona McMillan, Counsel for Applicant  
   Peter Zwart, Advocate for Respondent  
  
Investigation Meeting:    29 October 2013  
  
Submissions received:    On the day  
  
Determination:             1 November 2013

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**DETERMINATION OF THE AUTHORITY**

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- A    On the basis of the signed written undertaking as to damages provided by Barbara Perry and pending the determination of this proceeding or earlier order of the Authority, I order that Barbara Perry be reinstated to her duties as Principal of Our Lady of Victories School from Monday 11 November 2013.**
- B    The parties are directed to attend mediation as soon as possible.**
- C    A telephone conference is to be arranged to discuss a substantive investigation.**
- D    Costs are reserved until after the substantive investigation.**

**Employment relationship problem**

[1] Barbara Perry is the Principal of Our Lady of Victories School (OLV) in Sockburn Christchurch. Ms Perry was appointed to that position at the commencement of the first term in 2010.

[2] On 13 January 2012 pursuant to section 78N(1) of the Education Act 1989 the Minister of Education dissolved the Board of Trustees of OLV.

[3] On 17 January 2012 Murray Strong was appointed as Commissioner of OLV by the Minister of Education pursuant to section 78N (2) of the Education Act 1989. Mr Strong has all the functions, powers and duties of the Board which includes employment of staff. I shall refer to him in this determination as the Commissioner.

[4] The Commissioner suspended Ms Perry on 11 October 2013 for serious misconduct and says it was justified in doing so.

[5] Ms Perry says that her suspension is the culmination of a course of conduct designed to remove her as principal of the OLV and is not justified in all the circumstances.

[6] Ms Perry seeks an order to be immediately reinstated to her duties as principal of OLV pending the resolution of her personal grievance. She has provided a signed undertaking as to damages with the application for interim reinstatement.

[7] The Commissioner says that the application should not be granted and raises a preliminary issue that no employment relationship problem has been lodged with the Authority and therefore no interim injunction should be granted. Further the Commissioner says that the tests for granting interim relief are not met in this case.

[8] The application was assigned urgency by the Authority and the investigation meeting proceeded on the basis of the affidavit evidence provided and submissions. There is a considerable amount of documentation lodged with the affidavits. The Authority has had careful regard to all the documentation although the interim application before the Authority does not require extensive reference to much of it.

[9] The parties have not yet attended mediation but as discussed at the investigation meeting with Ms McMillan and Mr Zwart that the parties will be directed to attend mediation in this determination.

## **The Issues**

[10] The Authority will need to initially consider the preliminary matter raised by Mr Zwart. I have concluded from his submissions that there are in fact two separate preliminary issues. The first is a jurisdictional issue as to whether the Authority can grant interim reinstatement where there is no substantive claim for permanent relief in a similar form. The second, which I conclude is different from the first, is whether the proceedings lodged by the applicant are in the proper form as required by the Employment Relations Authority Regulations 2000.

[11] If the Authority proceeds notwithstanding these preliminary issues to consider the application for an interim injunction it will involve the exercise of a discretion. It is recognised that the answer to an interim injunction is not in the rigid application of a formula but there are two broad questions of whether there is an arguable case and where the balance of convenience lies. The final question requires the Authority to stand back and ascertain where the overall justice lies – *Klisser Farmhouse Bakeries Ltd v. Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA).

[12] The Authority needs to in the exercise of its discretion consider the following issues in this case:

- (a) Whether there is an arguable case that Ms Perry's suspension is unjustified;
- (b) Where the balance of convenience lies;
- (c) If it favours Ms Perry, whether there is an adequate alternative remedy of damages available to her; and
- (d) What is the overall justice of the case?

## **Jurisdictional Issue**

[13] Mr Zwart referred the Authority to the case of *NZPFU v NZ Fire Service* [2008] ERNZ 196 in which it was held that:

*It is a fundamental principle applicable to applications for interim injunctions that the Court will not grant an interim injunction where the substantive claim cannot justify permanent relief in a similar form*

[14] There is no claim for a permanent injunction for the reinstatement of Ms Perry before the Authority. I conclude though, as Mr Appleton did in *Dr X v A District Health Board* [2012] NZERA Christchurch 130 which was a case involving an interim injunction application for a return to duties from suspension that *NZPFU* did not necessarily require the pleading of a permanent injunction but the need for there to be justification for such an injunction. In *NZPFU* it was held it was too late for either the Authority or the Court to issue an injunction preventing appointments as the process was complete and therefore would not support the grant of an interim injunction.

[15] I do not find in this matter that permanent relief in a similar form to that claimed by way of interim relief is not possible. The employment relationship is an on-going one and Ms Perry has been suspended from undertaking her duties as Principal. She has raised a personal grievance as to the justification for her suspension the substance of which is yet to be investigated. The interim issue is whether until that substantive matter can be determined she should be permitted to return to her duties.

[16] I find in conclusion the Authority has jurisdiction to determine the interim application.

### **Proper commencement of proceedings**

[17] The second issue for the Authority to determine is whether there was compliance with the requirements in section 5 of the Employment Relations Authority Regulations 2000. An application that complies with form 1 as required by section 5 has been lodged and served by the applicant but is expressed to be an application for interim reinstatement only. Once however the application is read it is clear that the employment relationship problem is that the suspension was not justified. The facts are clearly set out and at some length. There is enough information for the Authority to understand what the substantive employment relationship problem is. Some amendment may be necessary to form but I do not find this technical issue prevents the Authority proceeding to consider the application for interim reinstatement. The Authority will as it does in any interim application make directions as to the setting down of the substantive matter.

**Background facts**

[18] I shall set out the relevant background facts from the affidavits and documentation available and shall indicate where there is a dispute. The Authority is not required to resolve disputes at this time.

[19] Ms Perry deposes in her original affidavit that Mr Strong made it clear to her from October 2012 verbally and in correspondence that the only workable solution to the situation at OLV was for her to resign. Ms Perry raised a personal grievance on 23 October 2012 about this. Ms Perry deposes to doing her best to manage the school and that there have been improvements in a number of areas of performance in the school.

[20] Mr Strong in his affidavit denies that it was he who proposed this termination and says that it was first raised by Ms Perry's support person. Mr Strong deposes that he had repeatedly denied proposing termination and has continued to pursue and adopt alternative courses of action for Ms Perry within the school.

[21] In or about mid June 2013 Mr Strong received two letters which raised issues about the potential for children and staff to leave the school. It led to an investigation being carried out and a report known as the *Cocks' report* being prepared. The final Cocks' report was released on or about 26 September 2013. A further personal grievance was raised about the investigation by Ms Perry.

[22] There was also an issue in or about September about the resignation of a teacher's aide.

[23] An email dated 10 September 2013 was sent by Mr Zwart on behalf of the Commissioner to Ms McMillan with a number of questions about the resignation of a teacher's aide as follows:

*Has B resigned, if so when did she resign and when is her last day of work?*

*If the resignation has occurred was she advised not to tell other staff and parents? If so by whom and why?*

*Has B advised of her reason/s for resignation? If so what are they?*

*Why was the Commissioner not advised of the resignation?*

[24] Ms McMillan responded on behalf of Ms Perry by email dated 11 September 2013 and advised Mr Zwart that *If [the teacher aide] intends to resign she has not spoken to Barbara about her intentions or tendered a resignation.*

[25] The following day on 12 September 2013 Ms Perry emailed Mr Strong and advised him that a resignation letter from the teacher aide who I shall call B had arrived in her pigeon hole that day. Ms Perry advised that she would make a time to discuss the resignation with B. She attached a copy of the resignation to her email to Mr Strong.

[26] On 17 September 2013 Mr Zwart wrote to Ms McMillan and stated that the Deputy Principal had subsequently stated that B had advised her of her intention to resign and her reasons for doing so and that the Deputy Principal on the same day advised Ms Perry of the intended resignation and the reasons for it. Mr Zwart wrote that this provides the potential that Ms Perry misled the Commissioner either directly or indirectly by the nature of her response on 11 September 2013 and/or that the Principal had failed to advise the Commissioner of the resignation and/or potential resignation of B when she was advised of the same on 6 September 2013. Mr Zwart wrote that given the heightened significance of staff resignations either of the above have the potential to be significant issues bring the issue of trust and confidence into question.

[27] By letter dated 19 September 2013 Ms McMillan responded to Mr Zwart and advised amongst other matters that whilst the Deputy Principal did mention that the teacher aide may be considering resigning Ms Perry advised that the teacher's aide would have to come and talk to her in person. Ms McMillan set out another situation where Ms Perry had undertaken the same process before advising Mr Strong of a staff resignation. Ms McMillan set out the reasons in her letter for B's resignation which were of a financial nature. Ms McMillan also stated that on 18 September 2013 a note from B was handed to her by the Deputy Principal after it was found on the floor outside the pigeon holes that provided *Sorry I found this in my bag, thought I'd given it to you. Cheers B.* Ms McMillan wrote that B confirmed when spoke to by Ms Perry that the note had originally been attached to her written resignation and she said that this seems to be the explanation for the delay in receiving the resignation. Ms McMillan stated in her letter that Ms Perry's response on 11 September 2013 that

if B intended to resign she had not told her or tendered a resignation was entirely correct.

[28] On 27 September 2013 Mr Zwart sent a further letter to Ms McMillan in which he advised amongst other matters that he wished to give Ms Perry an opportunity in light of the Cocks' report to have input into what she believes she can do to prevent departure of pupils and staff. He set out there was a genuine and real risk that a number of students will leave OLV at or before the conclusion of 2013 and further that there had been acceptance of the finding of the investigator that Ms Perry is to a large degree responsible for the departure of pupils and staff and/or has failed to take sufficient action to prevent the existing and prospective departures. Further there were issues with professional leadership and community engagement. He also referred in the letter to the resignation matter and the provisional view that Ms Perry's response was intended to either directly or indirectly mislead Mr Strong. He said that he wanted Ms Perry to provide input into that tentative view.

[29] There was further correspondence. I note as deposed by Mr Strong in his affidavit that following Ms Perry's response the position about her responsibility for the departure of pupils and staff was amended in a letter from Mr Zwart to Ms McMillan dated 30 September 2013 that she was responsible at *least in part*. In that same letter Mr Zwart also set out that the statement made to the Commissioner about B's resignation was a *literally true statement* but intentionally misleading as to the knowledge that Ms Perry had at that time.

[30] There was further correspondence between Mr Zwart and Ms McMillan about the setting up of a meeting to discuss both the Cocks' report and the alleged misconduct about the resignation. There was a threatened suspension of a concern that there would be a long delay before a meeting could take place. The threatened suspension did not occur before the meeting that took place on 11 October 2013.

[31] On 11 October 2013 a meeting was held to discuss Ms Perry's response to the final Cocks' report as well as the allegation that Ms Perry's responses about the resignation of a teacher aide to the Commissioner may have been intentionally misleading. Ms Perry attended the meeting with Ms McMillan, and Mr Zwart with Mr Strong. Ms Perry deposes to explaining at the meeting that she did not intend to mislead Mr Strong about B and that she had told the truth about her. Ms Perry deposed to telling Mr Strong that she did not operate on the basis of hearsay.

Mr Strong did not accept the explanation about B and Ms Perry was suspended. Ms Perry deposes in her affidavit to not accepting that she should be suspended and advising Mr Strong of this at the meeting.

[32] Following the meeting Mr Zwart in a letter to Ms McMillan wrote:

*Further to our meeting of 11 October 2013.*

1. *I confirm our decision that Ms Perry answered Murray Strong's question regarding B in such a way as to intentionally mislead or deceive him. It is our view that this action amounts to serious misconduct. We confirm that no decision will be made as to the consequences of this until such time as we conclude the investigation of the issues raised regarding the D Cocks Report.*
2. *Ms Perry has asked for the opportunity to provide a further written statement regarding the Cocks' Report issues and has undertaken to attempt to do so next week.*
3. *Having considered your input on the issue we have decided to suspend Ms Perry pursuant to clause 8.5 of the employment agreement. Ms Perry will be suspended until such time as we have had the opportunity to consider her written response.*

[33] Clause 8.5 of the Primary Principals' Collective Agreement 8 March 2013 – 7 November 2015 is about suspension and provides as follows:

- a. *If the alleged conduct is deemed sufficiently serious a principal may be either suspended with or without pay or transferred temporarily to other duties.*
- b. *The Board shall not, unless there are exceptional circumstances, suspend the principal without first allowing the principal a reasonable opportunity to make submissions to the Board about the alleged misconduct and the appropriateness of suspension in all of the circumstances. The Board shall take into account any submissions made by the principal before determining the matter of suspension.*

- c. The Board shall use its best endeavours to ensure that the period of suspension is kept to the minimum possible time consistent with ensuring that the allegations of misconduct are properly investigated and that the principal is treated fairly at all times.*
- d. If the allegation that led to suspension is without substance the principal shall, unless he/she has resigned in the interim, be entitled to resume duties immediately and, if suspended without pay, to have that pay re-instated from the date of suspension.*

[34] After the meeting on 11 October 2013 Mr Strong asked the Deputy Principal of OLV to be Acting Principal and advised school staff and Michael Nolan, the Manager of the Catholic Education office, that Ms Perry had been suspended pending investigation into further matters. Mr Nolan forwarded that notification to the Chairs and Principals of the Diocese of Christchurch. A notice was sent home with all the students at OLV advising that Ms Perry had been suspended. Ms McMillan by email to Mr Zwart dated 14 October 2013 had advised her understanding that Mr Strong intended to advise members of the school community of the suspension of Ms Perry and had suggested a less intrusive announcement to be made if necessary.

[35] Ms Perry's suspension is on full pay.

### **Arguable case that suspension is not justified**

[36] In final submissions Mr Zwart said that Ms Perry was suspended as a consequence of having been found to have intentionally misled the Commissioner who determined this conduct amounted to serious misconduct. He submits that this was a decision a fair and reasonable employer could make and there is no arguable case that the suspension is unjustified. He refers to the right to suspend in the collective agreement.

[37] Mr Zwart submits that the background to the finding that Ms Perry intentionally misled the Commissioner and the finding that the conduct is serious misconduct is important. There was an instruction for Ms Perry to communicate in an open and transparent way with the Commissioner. Retention of staff was an important matter for the Commissioner and Ms Perry knew about this and Ms Perry had a duty of good faith not to directly or indirectly mislead or deceive. Those matters are apparent from the affidavit evidence and documents supplied.

[38] It is important to focus on the actual questions asked of Ms Perry in the email of 10 September 2013. They were specifically about and around whether B had resigned. Ms Perry responded that B had not spoken to her about her intentions or tendered a resignation. It was accepted by the Commissioner that Ms Perry's response was *literally true* in that she had not received notification of B's resignation at the time she gave the response but nevertheless it was concluded it was misleading conduct because Ms Perry already knew from the Deputy Principal of B's intention to resign from an earlier time and should have referred to this.

[39] I find that there is an arguable case that the reasons for Ms Perry's suspension were not limited to that matter. It is arguable that the Commissioner relied in reaching the decision to suspend on both Ms Perry's conduct in relation to the resignation and the Cocks' report. It is arguable that Ms Perry pursuant to clause 8.5 only responded to the allegation about the resignation and the appropriateness of suspension in relation to that. It is arguable if the Cocks' report had also been relied on to suspend her that she did not have the opportunity to respond about the appropriateness of suspension in relation to that matter.

[40] It is arguable I find on the untested affidavit evidence that Ms Perry's conduct in relation to B's resignation was not that which would justify a finding of misconduct and would not therefore justify suspension under the collective agreement.

[41] It is arguable that the issues from the Cocks' report whilst of significant importance are performance issues and are not the sort of issues envisaged by clause 8.5 of the collective agreement to result in suspension from duties.

[42] There were submissions about the possibility of the suspension only being for a temporary period until a further meeting could be held to discuss the outcome of the finding of serious misconduct and Ms Perry's provided responses to the Cocks' report. No meeting had at the date of the Authority investigation meeting been held. Mr Zwart accepted that an outcome from any meeting held may not simply be a lift of the suspension but that there could be other outcomes.

[43] I find on the untested affidavit evidence and the documents provided there is an arguable case that Ms Perry's suspension is unjustified and therefore the suspension disadvantages her.

**Adequate Alternative Remedies**

[44] Mr Zwart submits that Ms Perry had claimed for and quantified her level of damages (compensation) at \$25,000 and there is therefore an adequate alternative remedy.

[45] Ms McMillan does not accept that and submits that the suspension had caused distress particularly in light of the wide dissemination of the information about it. She submits that reinstating Ms Perry to her position will prevent damage to her being further exacerbated and put on hold rumour and speculation as to why she was suspended.

[46] I am not satisfied that damages would be an adequate alternative remedy to Ms Perry if the suspension was subsequently found to be unjustified.

**Balance of Convenience**

[47] The Authority is required in considering the balance of convenience to assess the relevant detriment or injury the parties will incur as a result of the interim injunction being granted or not.

[48] Ms Perry has deposed to the sooner she can get back to work as a principal the less damage there will be to her reputation. Ms Perry deposes to have no issue working with Mr Strong and that the longer she is away from the school the harder it will be for her to manage staff and students on her return. She also refers to the effect on her reputation in the school community and ability to find alternative employment with any delay in reinstatement to her duties.

[49] Ms Perry deposes to being able to work productively with most of the staff and parents and for most of the time with what she refers to as a small but vocal group of staff opposed to being managed.

[50] Mr Zwart refers to the conclusion that there has been misleading conduct which brings trust and confidence into question in the relationship between Mr Strong and Ms Perry. He refers to the practicality of reinstatement in those circumstances whilst the parties work through a difficult situation. He submits that there is a level of dysfunction between Ms Perry and the Commissioner which suggest that her statements regarding a willingness to work with him may be disingenuous. He also

relies on the process with the Cocks' report and that a return to school by the principal before that is resolved puts that process at risk and increases the risk of departures of staff and students.

[51] On the basis of the untested affidavit evidence there has been damage to Ms Perry's reputation. The school community and staff know of her suspension but not the reason why. If Ms Perry was to return to her duties as principal then she could reduce the impact of the suspension on her reputation. Ms Perry is prepared to meet and discuss the matters arising from the Cocks' report. Indeed that meeting should take place as soon as possible.

[52] From the untested affidavit evidence and the considerable correspondence there is a level of distrust between Ms Perry and Mr Strong that has impacted on communication and indeed the relationship itself. A lot of communication appears to take place in writing between Ms McMillan and Mr Zwart. Whilst an issue to weigh I am not satisfied that it is enough in the circumstances to tip the balance of convenience in favour of the Commissioner.

[53] I find that the balance of convenience favours Ms Perry.

### **Overall Justice**

[54] I now stand back and consider where the overall justice lies. I have found that there is an arguable case and that the balance of convenience favours Ms Perry. On the basis of the untested affidavit evidence it would appear that Ms Perry had a relatively strong case that her suspension is unjustified. I find that the overall justice of the case requires that an interim injunction be granted. I will make the order effective from Monday 11 November 2013 to enable a meeting to take place about the Cocks' report in light of Ms Perry's response to it and any other matters.

### **Orders**

[55] I therefore make the following orders with respect to interim relief:

**On the basis of the signed written undertaking as to damages provided by Ms Perry and pending the determination of this proceeding or earlier order of the Authority, I order that Ms Perry be reinstated to her duties**

**as Principal of Our Lady of Victories School from Monday 11 November 2013.**

**Direction to mediation**

[56] The parties are directed to attend mediation as soon as possible.

**Further Steps**

[57] A telephone conference will be arranged as soon as possible with Ms McMillan and Mr Zwart to organise a date for a substantive investigation.

**Costs**

[58] I reserve the issue of costs and these will be dealt with after the substantive investigation meeting.

Helen Doyle

Member of the Employment Relations Authority