

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2015] NZERA Wellington 79  
5567179

BETWEEN	HAYDEN GRAEME AUSTING First Applicant
AND	NICOLA MAREE GIBSON- HORNE Second Applicant
AND	WELLINGTON FREE AMBULANCE SERVICE TRUST Respondent

Member of Authority:	Trish MacKinnon
Representatives:	Johanna Drayton & Amy Webster, Counsel for Applicants Paul McBride & Guido Ballara, Counsel for Respondent
Investigation Meeting:	30 July 2015 at Wellington
Submissions Received:	On the day, orally and in writing from the Applicants On the day, orally and in writing, from the Respondent
Determination:	20 August 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] This is an application by Hayden Austing and Nicola Gibson-Horne for reinstatement to their positions as Paramedics with the Wellington Free Ambulance Service Trust (WFA). Both applicants were dismissed from their employment on 29 June 2015. A substantive investigation of their claims to have been unjustifiably dismissed has been scheduled for 15 February to 4 March 2016. In the meantime Mr Austing and Ms Gibson-Horne seek interim reinstatement to their employment.

[2] Both applicants have given undertakings, as required by s.127 of the Employment Relations Act 2000 (the Act), to abide by any order the Authority may make in respect of damages sustained by WFA if interim reinstatement is granted and they are ultimately successful with their claims.

[3] Mr Austing had been employed for approximately 16 years with WFA at the time of his dismissal. Ms Gibson-Horne had been employed for 8 years. Both applicants have given evidence they had clear disciplinary and clinical records with WFA up to the time of their dismissal and both are very concerned about the loss of their employment.

[4] WFA is a charitable trust which operates a 24 hour paramedic service in the Greater Wellington and Wairarapa region. It depends to a large extent on donations for its existence. Its Chief Executive is Diana Crossan who has been in that role since February 2013. It was Ms Crossan who made the decision to dismiss Mr Austing and Ms Gibson-Horne. Her decision came approximately two months after an investigation into aspects of their conduct had been completed by a Wellington barrister. The barrister, who specialises in employment law, had been engaged by WFA to undertake the investigation on its behalf.

[5] WFA is opposed to reinstatement of either applicant and maintains their dismissal was appropriate in all the circumstances. Its opposition is based in part on a concern that patient safety could be affected by the conduct and behaviour of the applicants and its effect on other WFA personnel.

[6] The parties were directed to mediation during a telephone conference with the Authority on 14 July 2015 but were unable to resolve the matter. An investigation meeting was convened under urgency solely to deal with the application for interim reinstatement.

### **The Authority's investigation**

[7] The Authority dealt with the matter by way of untested affidavit evidence and submissions from counsel on the day. Four affidavits were filed in support of the application for interim reinstatement, including two from the applicants themselves. Thirty affidavits were received in opposition to the application and thirty-five affidavits in reply were filed by the applicants. Several hundred pages of documents accompanied the Statement of Problem.

[8] A number of factors made it impracticable for an oral determination or oral indication to be given at the conclusion of the investigation meeting. These included the late hour of finishing (approximately 8.30 pm), the number of affidavits (69 in total), the proximity to the investigation meeting in which they were filed, and the 679 pages of documentation accompanying the application.

### **Key legal principles**

[9] Section 127(4) of the Act requires the Authority, when determining whether to make an order for interim reinstatement, to apply the law relating to interim injunctions having regard to the object of the Act. Section 3(a) states the object of the Act as:

*... To build employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship –*

- (i) by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour.*

[10] The following tests are relevant to an application for interim reinstatement<sup>1</sup>:

- (a) Whether the plaintiff has an arguable case that he was dismissed unjustifiably as defined by s.103A of the Act;
- (b) Whether the plaintiff has an arguable case for reinstatement in employment under s.125 of the Act if he is found to have been dismissed unjustifiably;
- (c) Where the balance of convenience lies between the parties in the period until the Court's judgment is given on those issues; and
- (d) The overall justice of the case.

### **Relevant background**

[11] On 21 October 2014, the applicants were invited to a meeting by Andrew Long, Executive Manager, Service Delivery for WFA. Mr Long told the applicants allegations had been made against them and WFA intended to conduct an

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<sup>1</sup> *McKean v. Ports of Auckland Ltd* [2011] NZEmpC 128 at [4]

investigation. Each applicant was given a letter dated 20 October 2014 informing them their employer had been made aware of allegations against each of them “*in relation to inappropriate behaviour and/or bullying*”. Ms Gibson-Horne was invited to a meeting at 2.00 pm on 22 October 2014 and Mr Austing was invited to a meeting at 2.30 pm. The purpose of the meetings, as stated, was to outline the process for investigation and provide in more detail the nature of the allegations.

[12] Each applicant was subsequently given a letter dated 21 October 2014. The letters contained the same content other than their names. The letters informed Mr Austing and Ms Gibson-Horne that their behaviour was at times aggressive and intimidating to other staff members, that their communication with a number of staff members and management was inappropriate and not consistent with the organisation’s values, that they had failed to follow lawful instructions on a number of occasions and that their behaviour towards some staff members constituted bullying. The letters noted that, if substantiated, the allegations would constitute serious misconduct and could result in summary dismissal. No details of the alleged behaviour or conduct were provided in either letter.

[13] The letters of 21 October also informed each applicant that, because of the widespread nature of the allegations and their seriousness, WFA had decided against adhering to its usual practice of meeting with the applicants to discuss the allegations before deciding whether or not to commence an investigation. Instead it had decided to go straight to the commencement of an investigation, which it had appointed Karen Radich to undertake. Attached to the letter were WFA’s Investigations Guideline for Staff, WFA’s Policy on Preventing and Responding to Workplace Harassment/Bullying, and the Terms of Reference for the investigation that it had provided to Ms Radich. The latter document was dated 20 October 2014.

[14] The four and a half page terms of reference document was headed “*Allegation of Inappropriate Behaviour and Bullying*” and contained a background section referring to the allegations of such behaviour by Mr Austing and Ms Gibson-Horne. These were described under four separate heading, the first of which was “*aggressive and/or intimidating behaviour*”. Four examples of behaviour by the applicants that was “*viewed by a number of staff as threatening and intimidating*” were given.

[15] The first example related to a meeting which had taken place on 6 June 2014 in which the applicants had acted as support persons for a colleague in a meeting she

had with her employer. After the meeting the applicants had allegedly been overheard by a Field Operations Manager (FOM), Steve Marshall, making comments to their colleague about her choice of person to chair the meeting. It was alleged the applicants spoke of the Chair's inability to be intimidated and of how this had foiled their usual tactic in such meetings of being aggressive.

[16] The second example was that they had threatened to "*clinically take down Helen Berry*", who had been their manager.

[17] The third example was a generalised allegation that, when management attempted to have normal everyday conversations about work issues, Mr Austing and/or Ms Gibson-Horne became argumentative, threatening to escalate situations to formal processes, and quoting "*case law*".

[18] The fourth example was that "*both Ms Gibson-Horne and Mr Austing become aggressive, raise their voices and managers feel intimidated by their behaviour*".

[19] The second category of alleged inappropriate behaviour and/or bullying was described as "*inappropriate communication*". It alleged that the applicants' communication with a number of staff and management was inappropriate and not consistent with the organisation's values. Four examples of such alleged inappropriate communication were provided, one of which related to a specific cardiac arrest incident in June 2014 in the course of which Ms Gibson-Horne's communication to Mr Marshall was alleged to be "*aggressive and accusatory*". This will later be referred to as the "*Tawa*" incident.

[20] Two other allegations under this category of behaviour related to communications by Ms Gibson-Horne on specified dates. The fourth example related to Mr Austing's alleged use of "*Vibre*"<sup>2</sup> on a specified date to post comments "*that could potentially bring Wellington Free Ambulance into disrepute*".

[21] The third category of inappropriate behaviour was "*Failing to follow instructions*" and contained four examples of the applicants allegedly failing to follow lawful instructions. One example referred to a specific instruction given to all duty staff on 31 July 2014 (later amended by Ms Radich to have been 28 July 2014) to confirm their "*Paralytics*" were stored correctly. Another example was the alleged

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<sup>2</sup> Also referred to as Viber which I understand to be a closed group, instant social messaging service.

failure of the applicants to comply with an instruction to complete a "*compulsory privacy module*" and not to have responded to "*multiple follow ups*".

[22] A third example was a general allegation that "*you do not clear some jobs immediately once completed. Ms Berry was advised that (the applicants) take "phantom breaks" at NAS (i.e. they do not clear until they have both sat down and had a cup of tea*". The fourth example related to a specific incident on 12 July 2014 in which it was alleged the applicants' radio communication was inappropriate in response to being given a "*green job*"<sup>3</sup>; they had "*attempted to manipulate COMMS for a shift change and delay a response time*". They had also allegedly queried the job over the radio twice, and responded "*well below appropriate speed to delay*". This incident will later be referred to as the "*Johnsonville*" incident.

[23] The fourth category was "*bullying behaviour*" for which three examples of alleged behaviour were given. All related to the applicants' behaviour towards their manager, Ms Berry. All the examples were general, rather than relating to specified incidents. They included the applicants' alleged ignoring of Ms Berry when she arrived on station, spreading rumours about her, and undermining her authority.

[24] The terms of reference outlined the objective of the investigation, its scope and approach, and referred to some of the key witnesses to be interviewed. The timeframe was expected to be between six to eight weeks depending on the availability of the interviewees. It was anticipated that a draft investigation report would be completed by 8 December 2014.

[25] The investigation took significantly longer than anticipated and the final report was dated 2 April 2015. Ms Radich upheld the allegation that both Mr Austing and Ms Gibson-Horne were viewed by a number of staff as intimidating. She did not uphold the allegation that their behaviour was viewed as threatening. She upheld some allegations of inappropriate communication by each of the applicants. She also upheld the allegation regarding failure to follow instructions in respect of two particular incidents.

[26] Ms Radich did not find that bullying behaviour had occurred. However, she found that Ms Berry's feelings of intimidation, being undermined and upset were reasonable and justified as a reaction to Mr Austing's and Ms Gibson-Horne's

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<sup>3</sup> A non-urgent job.

conduct towards her. She also found Mr Marshall's feelings of being undermined and upset were justified in relation to the conduct of Mr Austing and Ms Gibson-Horne towards him in the Tawa incident. Ms Radich was not required to, and nor did she, provide recommendations as to actions WFA should take in relation to either Mr Austing or Ms Gibson-Horne. She did, however, provide an affidavit in opposition to their reinstatement.

[27] On 7 May 2015 Ms Crossan wrote separately to Mr Austing and Ms Gibson-Horne to inform them of the approach she intended to take to Ms Radich's investigation report. The content of the letters was the same: only the name of the addressee differed. The letters advised that Ms Crossan considered the report provided ample basis for considering whether to take disciplinary action against each of the employees.

[28] The letters identified four specific points which Ms Crossan considered to warrant consideration of disciplinary action. Two of those related to specific operational incidents (the Tawa and the Johnsonville incidents); one related to actions and statements found by Ms Radich to have been made by the two employees (which will be referred to as the "*Wairarapa*" incident; and the fourth was a generalised reference to other events identified by witnesses and collated in the investigation report. Ms Crossan described those other events as "*calling into question your working relationship with Wellington Free Ambulance and its management, which potentially adversely affects the care to patients which is what our job is all about*".

[29] Ms Crossan noted that the investigation report substantiated three of the four allegations against Mr Austing and Ms Gibson-Horne and that each of the allegations potentially constituted serious misconduct. She sought a meeting with them to hear from them in relation to those matters, and advised she would then consider appropriate further steps. The letter included notification that disciplinary action, if that were to be considered appropriate, could be up to and including dismissal.

[30] Two meetings and considerable correspondence ensued throughout May and June between the parties and their legal representatives. On 12 June 2015 Ms Crossan wrote to Mr Austing informing him of the conclusions she had reached in relation to the four points. She acknowledged the Tawa incident took place in a difficult environment but found his behaviour to have been less than professional in that he had made "*pointed comment... adverse to other Wellington Free personnel...*". The

comment was unprofessional because it occurred in the presence of a patient, family and other staff.

[31] In relation to the Johnsonville incident, Ms Crossan found Mr Austing exercised "*highly questionable judgements*" in which his questioning of Communication Centre staff about the job was "*for non-patient centred reasons and not for good reason*". She found he had made statements adverse to WFA and its management in the Wairarapa incident and commented that this seemed to reflect the same lack of a patient-centred approach. His relationship with "*a number of other staff (was), at its most charitable, very strained.*" For those reasons Ms Crossan was considering termination of his employment but would consider other possible outcomes. His response was sought by 4pm on 17 June 2015

[32] Ms Crossan also wrote to Ms Gibson-Horne on 12 June 2015. The letter replicated that which she had sent to Mr Austing, other than the name and address in the addressee panel.

[33] Further correspondence followed between the parties in which the possibility of a warning and demotion as an alternative to dismissal were raised and rejected. Mr Austing and Ms Gibson-Horne were dismissed from their employment on 29 June 2015. Each of their letters of dismissal noted that Ms Crossan had reached the view that employment could have been terminated with immediate effect. However, in recognition of all the circumstances, Ms Crossan said she was prepared to make a payment in lieu of notice to each. Accordingly, each received one month's pay in lieu of notice.

### **Application of the tests**

[34] In applying the tests relevant to interim reinstatement I will consider each applicant separately. However, I preface my findings with some comments relevant to both Mr Austing and Ms Gibson-Horne. These relate to the timing of the investigation in relation to the events leading to their dismissal.

[35] The Tawa cardiac arrest incident occurred almost four months before Mr Austing and Ms Gibson-Horne were informed an investigation into their conduct and behaviour would take place. The investigator's notes of her interview with Mr Marshall observe he had discussed the incident with Ms Berry shortly after it had

occurred and had been asked by a senior manager, Robert Ives, if he wished to make a complaint about it. Mr Marshall had made it clear that he did not.

[36] Ms Berry met with each of the applicants about the incident. While it appears the meetings did not go well, neither Mr Austing nor Ms Gibson-Horne had any knowledge that their employer intended to pursue the matter. Mr Austing had telephoned Mr Marshall after the meeting with Ms Berry to address any concerns he had about the incident and to apologise if Mr Marshall had been upset. He had reason to believe the matter was resolved and all concerned had moved on.

[37] The Johnsonville incident took place more than three months before the applicants were informed of the investigation into their conduct and behaviour. There was no indication in the intervening period that the matter would be pursued by WFA.

[38] The Wairarapa incident had not been included in the terms of reference for the independent investigation. Ms Radich noted in her report she was advised by a WFA FOM during his interview that it might be helpful for her to speak to Cheryl Watson, a staff member in the Wairarapa, who had worked with Mr Austing and Ms Gibson-Horne for one day. They were alleged to have made derogatory comments about WFA management to Ms Watson in the course of that day.

[39] Ms Radich interviewed Ms Watson who spoke of having met Mr Austing and Ms Gibson-Horne on one occasion only, sometime in the months before July 2014, when they spent a day in the Wairarapa to backfill resources. She referred to their negativity and to derogatory comments they had made about WFA senior managers including Mr Ives, Ms Crossan and Ms Berry.

[40] Ms Radich's notes of her separate meetings with Mr Austing and Ms Gibson-Horne record they each had different recollections about what had been said that day. Mr Austing recalled that Ms Watson spent much of the time they were together complaining about Mr Ives and about an HR proposal to change shifts. Both applicants were clear they had said nothing derogatory about either the Chief Executive or Mr Ives, both of whom they respected. In relation to Ms Berry, Mr Austing recalled it was Ms Watson who complained that, when she came over to the Wairarapa, Ms Berry "*sat on the phone and barely talked to them*".

[41] There was no evidence before me to indicate that Ms Watson made any complaint about Mr Austing and Ms Gibson-Horne's comments or conduct that day.

The applicants were unaware of her allegations about them until the investigation conducted by Ms Radich was well underway. They were interviewed by Ms Radich in February 2015, by which time the incident had occurred at least eight months earlier, and potentially several months earlier than that.

[42] The delay between events occurring and Mr Austing and Ms Gibson-Horne being informed they were matters their employer wished to investigate creates difficulties. It is very likely to affect the ability of interviewees to recall conversations over the course of several hours which, it is presumed, were interspersed between the duties they were all undertaking that day.

### **Is there an arguable case for unjustifiable dismissal?**

[43] The question of whether a dismissal is justifiable is to be objectively determined by applying the test set out in s.103A(2) of the Act which is:

*Whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[44] In the substantive investigation of Mr Austing and Ms Gibson-Horne's personal grievances WFA will be required to establish that each of their dismissals was a decision that a fair and reasonable employer could have come to in all the circumstances at the time.

[45] For present purposes Mr Austing and Ms Gibson-Horne must establish they have an arguable case their dismissals were unjustifiable. In *X v Y Ltd & NZ Stock Exchange*<sup>4</sup> an arguable case was described as one "...with some serious or arguable, but not necessarily certain, prospects of success".

[46] Ms Drayton and Mr McBride, counsel for the applicants and the respondent respectively, provided comprehensive and helpful submissions, both orally and in writing. I have read and considered those submissions in detail although I may not refer to them extensively in this determination.

[47] Taking the applicants individually, I find Ms Gibson-Horne has a strongly arguable case for unjustifiable dismissal. This is primarily because of four matters referred to in her letter of dismissal which in Ms Crossan's view all gave rise to "very

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<sup>4</sup> [1992] 1 ERNZ 863 at 872.

*serious and ongoing issues*" in relation to her. The tenor of the letter suggests Ms Crossan relied significantly, although not exclusively, on these matters in deciding to dismiss Ms Gibson-Horne. There is a difficulty for WFA in relying on two of those matters, the first of which concerns the cardiac arrest incident in Tawa in June 2014.

[48] The investigation report found Mr Austing in particular, and Ms Gibson-Horne had, during the event, spoken to a colleague using a "*snappy tone*". After meetings and correspondence with the applicants and their counsel, the Chief Executive wrote separately to Mr Austing and Ms Gibson-Horne on 12 June 2015 stating her conclusion that "*..there was pointed comment made by you adverse to other Wellington Free personnel, and further, that comment was unprofessional in the context in which it occurred...*".

[49] In the letter of 29 June 2015 notifying the second applicant of her dismissal, the Chief Executive stated that she accepted Ms Gibson-Horne was not the person using the words complained of. Logically then, Ms Crossan should not have found that event gave rise to any serious and ongoing issues with Ms Gibson-Horne. Nor should she have relied on it as part of her decision to dismiss. However, the letter of dismissal for Ms Gibson-Horne, while acknowledging she was not the perpetrator in that event, nonetheless cited it as a serious issue with respect to her.

[50] The second incident cited in the dismissal letter occurred on 12 July 2014. Ms Crossan's letter of dismissal to Ms Gibson-Horne referred to the events "*..in which you travelled from Johnsonville to Porirua at less than normal speed, and interacted with the Communications Centre in (what I then described as) a questionable way.*"

[51] Ms Crossan's letter did not acknowledge that Ms Gibson-Horne was neither the driver of the ambulance nor the person who had interactions with the Communications Centre in the course of that incident. The investigation report had acknowledged both of those matters, although the investigator appeared to apportion the blame for the slow speed of the trip (approximately 80km per hour) equally to Mr Austing and Ms Gibson-Horne on the questionable basis that "*...it was likely to have been an agreed action*".

[52] While I have further concerns over the other two matters cited in Ms Gibson-Horne's dismissal letter, I find it unnecessary to detail them here. This is because I find it sufficient that two of the four matters cited by Ms Crossan as giving rise to

very serious and ongoing issues, which she took into account in arriving at her decision to dismiss Ms Gibson-Horne, were matters concerning actions of Mr Austing.

[53] The conduct of Mr Austing and Ms Gibson-Horne was investigated together. However, it cannot be the action of a fair and reasonable employer to attribute culpability to one employee for the actions of another because they were working together at the time.

[54] I also find Mr Austing to have an arguable case to have been unjustifiably dismissed. As with Ms Gibson-Horne, the first of the matters cited by Ms Crossan as giving rise to very serious and ongoing issues was the Tawa incident. In her letter to counsel for the applicants of 22 June 2015, Ms Crossan set out her views "*that the event at Tawa comprised at the very least snappy adverse comment about an item of kit and criticism of the systems and/or people responsible for that.*"

[55] I have already set out above comments relating to the timing of this matter. I have also noted that Mr Austing had apologised to Mr Marshall after being informed by Ms Berry he was upset about the comment Mr Austing made regarding the state of the equipment Mr Marshall had brought to an emergency situation. I do not have to make a final determination about this matter as that will be a matter for the substantive investigation. However, I find it at least arguable that this incident had been appropriately dealt with and had been concluded by Mr Marshall's reluctance to make a complaint, and by Mr Austing's apology.

[56] The Johnsonville incident occurred towards the end of a 12 hour shift at a time Mr Austing, by his account, was feeling unwell. Ms Crossan, in her letter of 12 June to Mr Austing, did not dispute that he was suffering from a headache, but found the judgements he exercised on the day to be for "*non-patient centred reasons and not for good reason*". Those judgements related to "*the repeated questioning of the job*", stopping for petrol on the way, and driving "*at less than normal speed*". I find it arguable that matters relating to the exercise of judgement in such circumstances, when an employee is feeling below par, should not be deemed appropriate matters for dismissal.

[57] With regard to the Wairarapa incident, I have already noted the time lag between the comments found to have been made by Mr Austing (and Ms Gibson-

Horne) and the investigation into those comments. I find the delay of at least eight months, and potentially several more, combined with the different recollections of those involved make it problematic for WFA to rely on that event as one of the reasons for dismissal.

[58] The fourth area giving rise to "*very serious and ongoing issues*" cited by Ms Crossan in her letters of dismissal to both Mr Austing and Ms Gibson-Horne was their relationship with WFA and management potentially adversely affecting patient care. Ms Crossan referred to findings made by Ms Radich in respect of both applicants' behaviour, communications and failure to follow instructions.

[59] None of the examples referred to in Ms Radich's investigation had previously been brought to the attention of the applicants. Neither had been informed their employer had issues with their manner of relating to colleagues or managers and neither had been given the opportunity to improve in those areas. This makes it questionable whether these matters should have been taken into account as part of the decision to dismiss.

[60] I am not presently required to make findings over any of these matters which will be investigated at the substantive hearing of the first and second applicants' grievances. However, on the basis of the information before me, I find an arguable case has been established by both Mr Austing and Ms Gibson-Horne that they were unjustifiably dismissed as defined by s103A of the Act.

**Is there an arguable case for permanent reinstatement if Mr Austing and Ms Gibson-Horne are found to have been dismissed unjustifiably?**

[61] Reinstatement is no longer the primary remedy for a personal grievance for unjustifiable dismissal, but it remains a discretionary remedy that is available where it is found to be practicable and reasonable<sup>5</sup>. When an application for interim reinstatement is under consideration, the Authority must, in addition to being satisfied the applicant has an arguable case for unjustifiable dismissal, "*also assess the prospects of an order for reinstatement in employment when considering that first test.*"<sup>6</sup>

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<sup>5</sup> Section 125 of the Act

<sup>6</sup> Wellington Free Ambulance v Adams [2010] NZEmpC 59 at [5]

[62] Counsel for the two applicants and for WFA have made equally emphatic submissions on the matter. For the applicants, Ms Drayton submitted the reinstatement of the applicants was both practicable and reasonable and highlighted the following factors in support:

- a. Mr Austing and Ms Gibson-Horne had continued to work without incident or any other new concern being raised for some 11 months while the Radich investigation, and then the disciplinary investigation, took place. They were not suspended, and no specific new matters of concern, let alone serious concern, arose during this time.
- b. No clinical incident arose during this time and no concerns arose regarding their behaviour which caused or had the potential to cause an adverse effect on safety;
- c. The longevity of service of each applicant, and their ongoing commitment to WFA.
- d. The previously unblemished clinical, performance and disciplinary records of Mr Austing and Ms Gibson-Horne.
- e. The affidavit evidence of WFA's Medical Director, Dr Andrew Swain, that there was no clinical safety reason to prevent reinstatement.
- f. The affidavit evidence of Wayne McLaughlin, Union Official of Central Amalgamated Workers Union (CAWU), which covers approximately 96% of WFA employees. Mr McLaughlin's evidence included (and I paraphrase) statements to the effect that, if there were any serious concerns about either applicant, they would have been brought to his attention. Other than one issue raised by a manager involving Mr Austing, no such concerns had been raised with him.
- g. The affidavit evidence of Damian McGlinchey, Head Delegate for CAWU, which included the statement that he did not recall any staff member approaching him directly with allegations of bullying by either Mr Austing or Ms Gibson-Horne.

[63] Ms Drayton further referred to the support from large numbers of the applicants' colleagues at WFA for their reinstatement. She submitted that particular attention should be paid to support from the colleagues who worked with and/or saw Mr Austing and Ms Gibson-Horne regularly. Ms Drayton noted that a number of those who submitted affidavits in opposition to their reinstatement had less frequent contact with them.

[64] In her submission there was a lack of evidence that any working relationships had broken down irreparably, again noting the fact that Mr Austing and Ms Gibson-Horne had continued in their normal roles at WFA throughout the investigations into their conduct and behaviour. She referred to the evidence of the applicants that they were willing to attend workplace facilitation and any other mechanism to improve those few relationships that might require it, most notably the relationship with Ms Berry.

[65] Mr McBride submitted there was no tenable, let alone strongly arguable, case for permanent reinstatement. He recommended I review carefully the affidavits of a number of WFA employees in which allegations made against the applicants included comments relating to:

- a. their persistent bullying of staff;
- b. their negatively affecting how staff treat patients and thereby affecting patient safety;
- c. the negative comments they made at shift handovers;
- d. staff and students not wishing to work on or with Green Shift because of their negative behaviour;
- e. Whitireia lecturers' concerns about their negative impact on students and the toxic and negative environment they created;
- f. their "*toxic*" and "*disgusting*" behaviour referred to in one affidavit;
- g. their perpetuation of cliques, and their "*them and us*" approach to management;
- h. the concerns of some Communications Centre staff about them;

- i. their bad influence on junior staff; and
- j. their lack of insight into their own behaviour.

[66] As I have earlier noted, 69 affidavits in total were received in this matter, representing 64 individuals (5 having submitted 2 affidavits). Of those, 34 individuals were in support of Mr Austing and Ms Gibson-Horne's reinstatement and 30 were opposed. I have taken Mr McBride's advice and carefully considered each affidavit. As a result I decided to place little weight on 3 affidavits in support of the applicants' reinstatement, and 14 affidavits opposing reinstatement.

[67] The reason for placing little weight on the affidavits in support of reinstatement from 3 individuals is the minimal amount of contact those individuals have had with Mr Austing and Ms Gibson-Horne in recent years. The most common reason for placing little weight on the affidavits in opposition to reinstatement of 17 individuals is the significant amount of hearsay comment they contain about the applicants. One affidavit from a FOM, for example, consisted primarily of opinions formed from the comments and statements of others, some of whom were named, but most of whom were not. The second most common reason for according limited weight to those affidavits is the minimal amount of contact the individuals have had in the workplace in recent years.

[68] As a result I am left with 31 affidavits in support of the applicants' reinstatement and 16 in opposition to their reinstatement, all of which equal merit consideration. Common themes running through the affidavits of those who support reinstatement of the applicants are:

- a. the clinical competence and high professional standards of the applicants;
- b. the respect in which they are held;
- c. their experience and knowledge;
- d. their supportiveness and approachability as colleagues;
- e. their professionalism and focus on patient welfare;
- f. their encouragement of other staff;
- g. Mr Austing's effectiveness as a union delegate;
- h. the willingness of the individual to be "*backed up*" by the applicants

- i. none of the 31 had experienced or witnessed any bullying or intimidating behaviour by either of the applicants.

[69] Some themes in the affidavits of the 16 individuals to whose affidavits in opposition to reinstatement I have accorded weight are:

- a. the negativity of the applicants towards management;
- b. their abrasiveness, and inappropriate and disrespectful conduct towards colleagues;
- c. the escalation of their behaviour when together;
- d. the "*loudness*" of Ms Gibson-Horne;
- e. their tendency to shout and intimidate;
- f. the reluctance of the individual to be "*backed up*" by the applicants
- g. Mr Austing's inappropriate use of his union role to advance his own issues.

[70] The affidavits in reply of Mr Austing and Ms Gibson-Horne reflect their concern and sadness at reading the views and perceptions of them by some of their colleagues. Both have stated their wish to be assisted by WFA to work through any relationship issues with those colleagues and both have stated their willingness to make changes to their approach and behaviour where necessary.

[71] From the evidence before me I consider the applicants to have an arguable case for reinstatement in the event they are found to have been unjustifiably dismissed. In coming to this conclusion I have considered the relationship issues that concern WFA. While that may present some challenge to the organisation I consider the reintegration of Mr Austing and Ms Gibson-Horne into the workplace to be eminently achievable through a managed process.

**Who does the balance of convenience favour?**

[72] This requires a consideration, and balancing, of the detriment Mr Austing and Ms Gibson-Horne and WFA may incur as a result of interim reinstatement being granted or not. It also entails an inquiry into whether adequate alternative remedies are available to Mr Austing and Ms Gibson-Horne if they are not reinstated but are ultimately successful in their claims.

[73] The applicants were paid one month's pay in lieu of notice which carried them through to the end of July 2015. Each gave evidence of the adverse financial effect the loss of their salaries would have on their households. While that evidence is untested as yet, it is clear from their evidence that each of them, and their families, would suffer financially if they were not to be reinstated.

[74] Mr Austing and Ms Gibson-Horne have also provided affidavit evidence of the emotional impacts on them and the impacts on their careers. Both have been distraught by the termination of their employment. Each has testified to the expectation that, as career paramedics, they will utilise and maintain their high level of technical expertise. This will not be possible, and they are unlikely to maintain their Authority to Practice, unless they are granted interim reinstatement.

[75] Ms Crossan acknowledged in her evidence that there had been no adverse effect on patients caused by the actions of Mr Austing and Ms Gibson-Horne at the time she terminated their employment, or at the date of affirming her affidavit. However, it was her view the environment created by them unnecessarily increased the risk of that. She expressed her strong opposition to reinstatement, stating her conclusion that the applicants had put their own interests above those of patients and were therefore not safe in a team at WFA.

[76] Ms Crossan was critical of Mr Austing and Ms Gibson-Horne's attitudes throughout the process leading to their dismissal, noting their lack of recognition that they had acted inappropriately in any way. Although they referred to facilitation, Ms Crossan said that was accompanied by a justification of their actions.

[77] Counsel for both parties have indicated their view that the substantive proceedings will require two to three weeks to be completed. Current workload commitments make it likely the Authority investigation will be scheduled from 19 February to 4 March 2016. An oral decision is unlikely given the anticipated length of the investigation, and it could be up to a further two months before a determination is delivered. By that stage the applicants would have been out of the workplace for almost a year.

[78] I consider it relevant that both applicants continued to work normally, without incident, throughout the several (five and a half) months of the Radich investigation and the subsequent three month process carried out by Ms Crossan. The clinical

competence of the applicants, which has been attested to by WFA's Medical Director, is not in doubt. While I do not discount Ms Crossan's reservations about the applicants' reinstatement, I find those reservations are to a large extent speculative.

[79] I also note Ms Crossan suggested the possibility of demotion for a finite period to the position of Emergency Medical Technician to both Mr Austing and Ms Gibson-Horne. This would have been as an alternative to dismissal. Her suggestion was made by letter dated 19 June 2015. Both applicants rejected her proposal on clinical grounds, a stance which appears to be supported by WFA's Medical Director.

[80] Ms Crossan's suggestion is relevant to the current situation as it shows that she had been prepared to entertain the possibility of their continued employment just ten days before she dismissed them. The reservations Ms Crossan expressed in her affidavit three weeks after their dismissal must be considered against her earlier, more optimistic, view.

[81] The position Ms Crossan was contemplating for Mr Austing and Ms Gibson-Horne would have entailed them remaining in front-line positions where they would have continued to work with other WFA employees. In her letters to each of the applicants raising this possibility Ms Crossan referred to implementing "*a carefully structured performance programme coupled with facilitation aiming to rehabilitate you to a fully effective and valued member of the Wellington Free Ambulance Team*". She also noted they would be placed on a different shift for a minimum period.

[82] I note that both applicants referred in their affidavits to their willingness to modify their behaviour to address any concerns of staff. Both have also expressed their willingness to attend facilitation, mediation or other means of assisting them to be, in Ms Gibson-Horne's words, "*the very best team player and employee I can be*".

[83] If interim reinstatement were not granted, and the applicants were ultimately successful in the determination of their personal grievances, it is unlikely that the remedies available would adequately compensate for their losses. Their evidence is that WFA is the only employer of paramedics in the Greater Wellington and Wairarapa regions. Finding alternative employment in positions that would keep their skills current in the intervening six months is unlikely.

[84] In light of all these factors I find the balance of convenience favours the reinstatement of Mr Austing and Ms Gibson-Horne until such time as their grievances can be determined.

### **Where does the overall justice lie?**

[85] I am required, having considered the other tests for interim reinstatement, to stand back and consider where the overall justice lies as to such time as the substantive investigation of the matter takes place. This includes reflecting on the strengths of the respective parties' cases, bearing in mind there has not yet been an opportunity for testing of the evidence.

[86] I have found both applicants to have arguable cases to have been unjustifiably dismissed and arguable cases for permanent reinstatement in the event they are successful in the substantive proceedings. I have also found the balance of convenience to favour the applicants.

[87] From the evidence before me the applicants are dedicated and skilled paramedics. Both have expressed their respect for the senior management of WFA including its Chief Executive. They have stated their willingness to take on board the adverse perceptions of them by some of their colleagues and adapt their personal behaviour and conduct.

[88] On the application of the tests and for the reasons above I find the overall justice favours their reinstatement on an interim basis to their employment with WFA.

### **Determination**

[89] Mr Austing and Ms Gibson- Horne are to be reinstated to WFA's payroll from the date of this determination. However, in view of the concerns expressed by the Chief Executive, and bearing in mind the unique environment in which WFA operates, their reinstatement is to be subject to the following conditions:

- a. the parties are directed to mediation to take place by 4 September 2015 to explore sensible and workable arrangements for Mr Austing and Ms Gibson-Horne's return to duties. Such arrangements might entail their careful and structured reintegration, and could include the applicants working in different crews and on different shifts.

- b. In the event the parties are unable to agree, the Chief Executive shall determine the most suitable arrangements provided there is no loss of remuneration or adverse effect on the Authority to Practice of either Mr Austing or Ms Gibson-Horne.

**Costs**

[90] The issue of costs is reserved.

Trish MacKinnon  
Member of the Employment Relations Authority