

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 51
3039151

BETWEEN MICHAEL BOLTON
 Applicant

AND WELLINGTON FREE
 AMBULANCE SERVICE
 (INCORPORATED)
 Respondent

Member of Authority: Michael Loftus

Representatives: Barbara Buckett and Matt Belesky, counsel for the
 Applicant
 Paul McBride and Frances Lear, counsel for the
 Respondent

Investigation Meeting: 31 January 2019 at Wellington

Date of Determination: 1 February 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Michael Bolton, was dismissed by the respondent, Wellington Free Ambulance Service Incorporated (WFA), on 30 August 2018. He claims the dismissal is unjustified and one of the remedies sought is reinstatement.

[2] Mr Bolton also asks reinstatement be granted on an interim basis pending a substantive consideration of his claims which is scheduled for 9, 10 and 11 April 2019.

[3] WFA believes it can justify Mr Bolton's dismissal and opposes the application for interim reinstatement.

Background

[4] Mr Bolton was engaged by WFA as a patient transfer officer in 2009.

[5] Boating is one of Mr Bolton's passions and in November 2017 he was accompanied on a fishing trip by one of his colleagues. That was followed by a period of some two weeks during which the colleague was absent from work. She and WFA met to discuss the absence and during the course of that conversation it was alleged to have been at least partially attributable to the fact the colleague had been sexually harassed by Mr Bolton though it is common ground the statement was not made as a formal complaint.

[6] Notwithstanding that WFA concluded that while the alleged incident took place outside of work it was obliged to investigate. It formed the view the alleged events, if true, could impact on the employment relationship and its obligations toward both the colleague and others.

[7] The investigatory process then proceeded and resulted in Mr Bolton being advised of his dismissal on 30 August 2018.

Discussion

[8] Applications for interim relief involve the exercise of a discretion. The answer comes not from the rigid application of a formula but from a consideration of various questions which culminate with a conclusion to the overarching question of what does the overall justice require?¹

[9] There are four broad areas of inquiry which are considered on the basis of untested affidavit evidence. They are:

- a. Is there an arguable case for both a finding of unjustified dismissal and permanent reinstatement?
- b. Is there an adequate alternative remedy available, such as damages?
- c. Where does the balance of convenience lie?
- d. What does the overall justice of the case require?

¹ *Klissner Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA)

[10] With respect to the question of whether or not Mr Bolton has an arguable case I conclude the answer is yes.

[11] The relevant case law strongly suggests the threshold to be crossed when establishing whether or not an arguable case exists is, for the applicant, relatively low. In this instance both parties claim a strong position. For Mr Bolton it is argued his case is more than strong – he must succeed and WFA will be unable to defend its decision by virtue of poor process, the influence of irrelevant factors and by having given one possible indiscretion an importance it does not warrant.

[12] WFA is equally strident in asserting its position is invulnerable with its starting point, to which further assertions are added, being an assertion it is clear Mr Bolton was guilty of an inappropriate act which went to the heart of his relationship with WFA and destroys its ongoing viability.

[13] That there is ample scope for contest is confirmed by the fact both parties could refer to various aspects of the evidence, albeit contested aspects, in support of their position and both could refer to other evidence to suggest their opponents confidence was misplaced. Examples of the differences include debate about what actually occurred; whether or not an out of work event, whatever it may actually have been, can impinge upon the employment relationship to the extent it was no longer feasible; whether or not WFA investigated adequately and whether or not its decision was influenced by extraneous and irrelevant factors. These differences can only be resolved via a substantive investigation in which the evidence is properly tested.

[14] There is then the question of whether or not Mr Bolton might, if successful, attain permanent reinstatement. The differences referred to above are so stark this question becomes, in my view, unanswerable. If his assertions about WFA's failings and the overemphasising of his alleged actions are correct then reinstatement becomes a real possibility given WFA is the only employer in the region that offers the type of work Mr Bolton seeks to return to. Conversely if the evidence, once tested, means WFA prevail he would have no chance. Again which event comes to pass requires a substantive investigation but at this point it cannot be said he has no arguable case for permanent reinstatement.

[15] While out of order I consider balance of convenience next. Both parties proffered various arguments as to why convenience favours their position but I must

say I found only one to have any persuasive effect and then not too great. While not conclusive the key arguments were as follows.

[16] For Mr Bolton the key argument is WFA is the only place he can practice his skills and continued absence is placing his maintenance of those skills, and his ability to reacquire those lost, in jeopardy. It was also said he had a need to maintain currency through a recertification process and present currency would soon expire. Neither argument persuades as this issue led to some questions and it became apparent Mr Bolton's recertification is already overdue and the requirements not overly onerous. Given the proximity of a substantive hearing an absence longer than that he has already had will not, I conclude, make much difference.

[17] WFA also refers to the recertification requirement as assisting its position with the situation being affected by the added complication there have been changes in practice since Mr Bolton's dismissal. It is argued that in such circumstances recertifying would impose an unproductive imposition a charity without surplus funds should not shoulder especially as it will be exonerated and excused the expense in the near future. As already said recertification is a regular event the cost of which would normally be incurred anyway and evidence suggests notwithstanding the changes it is not onerous especially for someone of Mr Bolton's acknowledged skill. Furthermore I cannot, given the comments under the arguable case head, agree WFA's decision will inevitably be exonerated.

[18] WFA also argues it has potential staffing issues and may soon face a surplus. This is not a strong factor in an environment where, for example, replacing a dismissed employee has no real bearing. If a dismissed employee's situation warrants reinstatement then return it inevitably is.

[19] Finally it is argued the actions for which Mr Bolton was dismissed demonstrated unacceptable behaviours toward a vulnerable young woman. WFA says that now means it can have no confidence it can trust him, his conduct or judgement around other vulnerable people with whom he would inevitably have contact.

[20] This is the one argument that carries some persuasive weight. If WFA do justify their actions that will inevitably infer there is at least some potential the concerns have validity. It would, in my view, be imprudent to take that risk when the comprehensive evaluation can be undertaken in the not too distant future and any

question of risk removed one way or the other. This sways the balance in WFA's favour.

[21] With respect to remedies, and in the event Mr Bolton is successful, there are only two remedies the Authority is likely to grant. Reinstatement and money. The monetary remedies will always remain available and once again a substantive investigation has been scheduled in the not too distant future which raises two issues. The first is that while WFA has raised what may be valid concerns about Mr Bolton's suitability for reinstatement they can only be properly tested through the substantive investigation. The second is that investigation may be completed in the not too distant future meaning Mr Bolton is not severely disadvantaged in this respect and the full suite of remedies remains potentially attainable within a reasonable time. Here I also note the argument supporting the contention reinstatement had to occur and money alone was inadequate is that already canvassed and rejected in [16] above.

[22] Turning finally to overall justice. I have already concluded Mr Bolton has an arguable case for both unjustified dismissal and reinstatement though for reasons already expressed it is extremely difficult to make a judgement as to how arguable. That judgement requires a substantive investigation.

[23] An adequate range of remedies remain and the balance of convenience favours WFA. That leaves the final key factor which is one that has already been referred to a number of times – the proximity of the already scheduled substantive investigation.

[24] As already said an interim consideration is undertaken on the basis of untested affidavit evidence which inherently means it is less than complete. In my view that is less than desirable when a substantive investigation is imminent and what is likely to be highly contested evidence can be properly tested and considered.

[25] Mr Bolton challenged the dismissal with alacrity with an initial application being lodged on 12 September. That said, and while reinstatement was sought, interim relief was not and nor was urgency. The application for urgency was lodged later and followed by a telephone conference early December during which it became apparent the substantive investigation was not going to be scheduled until April due to its multi day nature and the parties availability. This was despite the fact the Authority could offer both January and February dates.

[26] The application for interim relief was filed on 7 December and this hearing was then scheduled after earlier dates were offered but rejected.

[27] Here I observe that while it is now being said the interim application was a reaction to Mr Bolton learning the colleague was no longer in WFA's employ and concluding that removed a significant obstacle to reinstatement that argument, while mentioned, was not proffered as the prime rationale during the call – delay was emphasised.

[28] In this respect and while both parties had some restrictions on availability it was Mr Bolton and his team who had the most constraints and to whom the bulk of delay to date must be attributable. That, along with the rationale behind the filing expressed at the time does not, in my view, confirm the urgency now implied by the interim application which, in any event, was only lodged once the process had been underway for some months. These circumstances do nothing to convince me the discretion should be exercised in Mr Bolton's favour and sways a conclusion as to the overall justice against him.

Conclusion

[29] For the above reasons I decline the application I exercise the discretion by granting interim reinstatement. I consider the overall justice and especially an imminent opportunity to do the job properly mitigate against it.

[30] With the agreement of the parties I record there is a temporary order in place prohibiting the publication of anything which might identify the colleague who accompanied Mr Bolton on the boat.² The order shall remain in place until further order of the Authority.

[31] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority

² Clause 10 of the Second Schedule to the Employment Relations Act 2000