

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2019] NZERA 451
3063054

BETWEEN ANNE-MARIE BROUGHTON
Applicant

AND TE KAAHUI O RAURU
First Respondent

AND MICHAEL NEHO
Second Respondent

Member of Authority: Michael Loftus

Representatives: Alastair Hall and Joelle Avery, counsel for the applicant
Mark Lawlor, counsel for the first respondent
No appearance required of the second respondent

Investigation Meeting: 4 July 2019 at Whanganui

Date of Determination: 31 July 2019

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Anne-Marie Broughton, was dismissed by the respondent, Te Kaahui O Rauru (the Trust), on 31 March 2019. She claims the dismissal is unjustified and one of the remedies sought is reinstatement.

[2] Ms Broughton also asks reinstatement be granted on an interim basis pending a substantive consideration of her claims which is likely to be heard in November.

[3] The Trust opposes the application for interim reinstatement.

[4] The claim in respect to Mr Noho is he *incited, instigated, aided and abetted* the Trust's alleged wrongdoing which is denied. These claims need not be considered as part of this preliminary application.

Background

[5] Ms Broughton was engaged by The Trust as the Kaiwhakahaere (General Manager) with the terms of employment being governed by a fixed term agreement. Notwithstanding Ms Broughton's protestation the fixed term was invalid, along with the fact the employment simply continued past the stated expiry, the parties subsequently entered into a second fixed term agreement. Its stated expiry was 28 September 2018 and the purported rationale, which differed from that stated in the first agreement, was that a fixed term was consistent with the employer's policy of appointing the Kaiwhakahaere for three years so that the appointment coincided with the triennial general meeting.

[6] Once again the employment continued past the stated expiry with the parties discussing what might happen next though it is the Trust's position both understood the employment would now end on 31 March 2019.

[7] In November 2018 Mr Noho was elected Tumu Whakarae (Chairman) and he took responsibility for engaging with Ms Broughton.

[8] On 25 February 2019 Ms Broughton was told she was to be offered the position of Kaiwhakahaere on a permanent basis and that was followed by the proffering of an employment agreement on 18 March. Ms Broughton says she was told she had five days to agree but demurred as she was of the view the agreement contained altered, and reduced, terms. As a result she sought legal advice but then had to advise Mr Noho there might be a delay due to her lawyer's incapacity.

[9] As it transpired Ms Broughton's lawyer wrote to Mr Noho (in his capacity of Tumu Whakarae) on 28 March expressing the view Ms Broughton was a permanent employee and could not be dismissed on 31 March as the employer had suggested would occur.

[10] 28 March was also the day upon which Ms Broughton departed on preapproved leave for five days. On 30 March and while away she received emailed advise from Mr Noho that ... *you will not be employed by Te Kaahui O Rauru as at 1 April 2019 (by reason of the expired fixed term agreement) and 1 April 2019 will not be deducted from your leave balance.*

[11] Further correspondence followed though the parties have been unable to resolve their differences and this application was filed.

Discussion

[12] 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

[13] 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?

[14] With respect to the issue of whether or not she has an arguable case Ms Broughton is of the view her position is not only arguable but very strong. She bases this view on two main points.

[15] The first is the fixed term relied upon by the Trust to justify the dismissal is unlawful with its veracity being undermined by various factors including the use of more than one rationale over a period of five years, then ignoring the expiry of the agreements before, at least temporarily, resiling and accepting the employment was permanent. She also argues, with some apparent merit, the policy said to underpin the veracity of the second fixed term does not actually exist.

[16] The second point is that having offered a permanent employment agreement the Trust then unjustifiably and unilaterally cancelled the offer for reasons that appear to be linked to Ms Broughton's refusal to accept a diminution in her terms and conditions of employment with the first respondent and that cannot be condoned.

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

[17] 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 with, for example, the Court saying:

What the Court is concerned with, so far as the evidence goes, is to see whether assuming that the plaintiff can prove all the facts which he alleges, he then has an arguable case. That is to say, a case with some serious or arguable, but not necessarily certain prospects of success.²

[18] Suffice to say that if Ms Broughton can prove the facts she alleges she will undoubtedly have an arguable case. Indeed the evidence to date, albeit yet to be tested, suggests her case could well be a strong one and that view is perhaps confirmed by the fact the Trust does not appear to seriously try and argue otherwise. The Trust's focus is on arguing the balance of convenience, and with it the overall justice, does not favour Ms Broughton as she does not have an arguable case for permanent reinstatement. This raises the next consideration.

[19] The view reinstatement is not practicable or reasonable is summarised as follows:

It is clear from the applicant's affidavit and pleadings that she does not have trust and confidence in the Trust or in Mr Neho. That is apparent from the applicant's assertions (which are strongly disputed) that the Trust's alleged breach was intentional and from her decision to name Mr Neho personally as a party in the Authority's investigation.³

[20] It is submitted that by taking this approach the nature and extent of Ms Broughton's claims go well beyond a typical claim of unjustifiable dismissal and as a result there have been ramifications which preclude reinstatement from the respondent's perspective.

[21] One is that Mr Neho has formed the view that by having his integrity and mana questioned in such a way the element of trust and confidence required of their relationship no longer exists and he could not work constructively with Ms Broughton.⁴

[22] From the Trust's perspective the loss of trust and confidence emanates from the allegation it not only erred but that its action were intentionally wrongful. That, in

² *X v Y* [1992] 1 ERNZ 863 at 872

³ Respondent's submissions at [3]

⁴ n 2 at [4]

turn, has affected the relationship with both Mr Neho and the Trust's wider membership.⁵ This means there is a distinct possibility Mr Neho would avoid engaging with Ms Broughton meaning neither could properly perform their duties and that would be unacceptable given a period of some four months before a substantive investigation can proceed.

[23] Having considered the submission and affidavits I find in favour of Ms Broughton on this issue. The simple fact is the Trust was, at one stage, willing to offer Ms Broughton's permanent employment. The evidence strongly suggests that did not occur as the terms she was offered had changed and she then queried, indeed challenged, that. To now suggest she be penalised because she exercised a legal right has dubious validity.

[24] There is then the fact Mr Neho is an elected officer whose tenure is temporary and who will inevitably be replaced while Ms Broughton has a strong argument for permanent tenure. That, in my view, gives her position a level of paramountcy.

[25] There is also the fact Mr Neho's position is one of governance so there must be questions about the necessity of day today interaction which in turn undermines the argument the two cannot co-exist together for a temporary period pending a hearing of the substantive claim. In any event governance and the existence of other Paepae representatives implies the existence of a Board of some form and oversight of Ms Broughton can surely be delegated to another member for the intervening period. I do not accept the argument reinstatement could give rise to a situation whereby the Trust could not continue to function.

[26] Finally, and perhaps most importantly, the law has recently changed and reinstatement is now a prime remedy. That means given the apparent strength of Ms Broughton's substantive case the Trust has to come up with a strong argument against reinstatement's reasonableness and practicality. It has, in my view and given the evidence and points discussed above, failed to do so. I conclude reinstatement remains a real and viable remedy should Ms Broughton succeed, which given the apparent strength of her case appears a distinct possibility.

[27] The next issue is the availability of alternate remedies. Ultimately there are only two remedies Ms Broughton may attain should she be successful – reinstatement

⁵ n 2 at [5]

and/or monetary recompense. It is the Trust's view its position is ascendant here as it has undertaken to continue to pay Ms Broughton until November by which time it is envisaged the substantive claim will have been heard. It has therefore covered the monetary loss while reinstatement remains, in its submission and even should Ms Broughton succeed, far from guaranteed. Here, and for reasons enunciated in the paragraphs above, I have to conclude there is some weakness in the Trust's position as permanent reinstatement appears a real possibility.

[28] Ms Broughton's approach to this issue is it is about more than money. It is about reinstating her mana while ensuring she does not lose touch with a position she remains likely to be reinstated to thereby eroding her chances of reintegration and successfully undertaking her duties. Again I am not sure I am persuaded by this argument but the fact permanent reinstatement appears, at least on the basis of evidence and argument to date, to remain a real possibility I am swayed toward accepting that money alone is not adequate.

[29] As should already be clear from earlier comment the argument about balance of convenience, and with it overall justice, reiterate the points already covered. My rejection of the argument permanent reinstatement is unobtainable but instead looks a distinct possibility along with the conclusion money alone may not be an adequate remedy, especially given reinstatements ascendancy in law, sways me to a conclusion the balance of convenience and overall justice favour granting the interim relief sought.

Conclusion and orders

[30] For the above reasons I conclude it appropriate I grant Ms Broughton's application and order she be reinstated to her position of Kaiwhakahaere with Te Kaahui O Rauru on an interim basis pending resolution of her substantive claims.

[31] Costs are reserved.

Michael Loftus
Member of the Employment Relations Authority