

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2020] NZERA 294
3105636

BETWEEN	IAE First Applicant
AND	ECI Second Applicant
AND	RMW Third Applicant
AND	TCA Fourth Applicant
AND	WAIRARAPA DISTRICT HEALTH BOARD Respondent

Member of Authority: Michael Loftus

Representatives: Jills Angus Burney and Aleisha McNatty, counsel, and
Alec Nash, advocate for the Applicants
Hamish Kynaston and Emma von Veh, counsel, and
Phina Conroy, advocate for the Respondent

Investigation Meeting: 10 July 2020 at Wellington
with further information on 13 July 2020

Date of Determination: 30 July 2020

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] All four applicants were dismissed by the respondent, Wairarapa District Health Board (the DHB), on 9 June 2020. Amidst other claims (unjustified disadvantage and breach of the duty of good faith) each says their dismissal is unjustified. Along with other remedies, all four seek reinstatement.

[2] They also ask reinstatement be granted on an interim basis pending a substantive consideration of their claims which is scheduled for the week commencing 31 August 2020 and it is that this determination addresses.

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

Background

[4] The applicants were engaged in WDHB's Clinical Sterile Services Department (CSSD). The evidence of both the applicants and WDHB would lead to a conclusion the department could be considered dysfunctional due to a series of problems that started to emerge during 2018.

[5] As time then passed staff made numerous complaints about the behaviour of their team leader. There were also one or two complaints about colleagues and an allegation by the team leader that one of the staff had assaulted her.

[6] While investigations followed, few of the allegations were found to have merit and the DHB addressed those that were at the time. The DHB also initiated an external review of its CSSD which resulted in various initiatives designed to improve team processes and interactions, both internal and external. Unfortunately the results were less than hoped for and complaints continued to come with their frequency appearing to have escalated.

[7] On 16 March 2020 the DHB received a letter Ms Angus Burnie sent on the applicants behalf. It complained of a crisis in the CSSD team and voiced a lack of confidence in the team leader's competency. The DHB responded on 19 March and having agreed the issues had been long running and difficult asked there be a meeting to discuss them.

[8] The meeting, which occurred the following day by conference call, saw agreement the DHB would propose a facilitative process but that was quickly superseded by the Covid lockdown which occurred days later.

[9] On 3 April the DHB received a letter from Ms Angus Burney raising disadvantage grievances on behalf of each applicant. It responded on 8 April essentially trying to advance the facilitation solution discussed on 20 March. The applicants rejected the DHB's proposal which led to mediation on 20 April. It failed

to resolve the issues and the following day the DHB wrote to the applicants again urging they try a facilitated restorative process. They refused, citing issues with the proposed facilitator. That led to the DHB suggesting an alternate which the applicants accepted.

[10] On 30 April the DHB wrote to the proposed facilitator outlining the issues and requesting her assistance. The letter was copied to the applicants who, the following day, sent the DHB a list of further complaints and asked the DHB commence a formal investigation. That this might occur had been heralded at the time of the mediation.

[11] The DHB responded on 5 May expressing disappointment. It said while it appreciated the issues had to be worked through the tone taken was inconsistent with the agreed approach. The DHB suggested an investigation await the outcome of facilitation and stated the facilitator was of the same view. The DHB stated that if the applicants felt otherwise the facilitation would have to be set aside while the investigation proceeded. The letter then advised its Chief Operating Officer, Mr McCann, would conduct the investigation if it were to proceed.

[12] Further correspondence followed which led to the DHB abandoning the facilitation and, on 14 May, Mr McCann wrote advising he was launching a formal investigation into the applicants' complaints. He also stated:

It appears to us from the history, and in particular from the events of this year, that the four of you will not be able to work together with [the team leader]. I have explained this in more detail below. For present purposes, we have reached the point as a result where we are considering the termination of your employment for 'incompatibility'.

[13] Essentially the two investigations, that into the applicants' complaints and the DHB's concerns about incompatibility, ran simultaneously. Notwithstanding the applicants' demand the investigation be conducted by an external and independent investigator *who has no predetermined view*, Mr McCann proceeded with the applicants participating under protest.

[14] On 28 May Mr McCann provided his preliminary conclusion. While the document is a detailed one of some 20 pages the ultimate conclusion was the bulk of allegations against the team leader were unsustainable. With respect to the relationship issues Mr McCann concluded there was no evidence the applicants could continue to work with the team leader. He stated the situation was no longer

sustainable or salvageable and for various reasons reached a preliminary conclusion it was best addressed by dismissing the applicants for incompatibility.

[15] After further correspondence and input from those concerned Mr McCann's preliminary conclusion was confirmed on 9 June and the applicants were each dismissed.

[16] The dismissals were challenged the following day and the press also became involved.

Discussion

[17] 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 about the overarching question of what does the overall justice require?¹

[18] 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?

[19] The legal framework which I must follow in respect of the application for interim orders can be summarised as follows:

- a. Step One - The applicants must establish that there is a serious question to be tried;
- b. Step Two - Consideration must then be given to the balance of convenience and the impact on the parties of the granting of, or refusal to grant, the interim orders sought. The impact on any third parties will also be relevant to the weighting exercise;

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

- c. Step Three - The overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

A Serious Question to be Tried

[20] The threshold for a serious question is a relatively low with the requirement being that the claim is not frivolous or vexatious. In this instance it has not been suggested that the claim is frivolous or vexatious with the DHB conceding the applicants' claims are arguable.

[21] As to the question of whether or not permanent reinstatement is possible the answer must be yes. Reinstatement is a primary remedy and it is one each applicant seeks. If, therefore, each succeeds with her substantive claim it would be for the DHB to establish reinstatement is not practicable and reasonable and the papers would suggest that is far from guaranteed. This is because it appears a key factor in the decision to dismiss is the DHB's conclusion the applicants' complaints do not fairly reflect the situation or the team leaders behaviour and they themselves have been incapable of reflecting on the part they have played in creating the difficulties.

[22] Indeed the final observations in the letter advising the preliminary view is that whilst the team leader has acknowledged faults and expressed a willingness to address the issues the applicants have engaged in little or no self-reflection and failed to appreciate the effect of their own behaviour. The content of both the letter and Mr McCann's affidavit would suggest this was a significant factor which influenced his decision to dismiss the bulk of the team.

[23] While not the words they use, the applicants response to this is the DHB has engaged in a whitewash designed to protect a poor manager at the expense of a much larger number of her staff and a review of events will show this to be a flawed choice. The way Ms Angus Burney portrayed it was that the applicants were like a broken record continuously repeating something is wrong but the DHB simply said we don't believe you. Which way this will ultimately go is presently unknown. As Mr Kynaston put it, the picture, as currently presented, remains incomplete and will be the subject of considerably more evidence during the substantive investigation. That more will be coming was not disputed by the applicants which means the final outcome remains uncertain.

[24] I do, however, have to note one point I consider significant. Cases involving dismissal for *Dysfunctional employment relationship - Incompatibility* are rare. Four simultaneously is, as far as I can find, previously unheard of. The cases there are suggest there needs to be considerable effort put into trying to resolve the difficulties and trying to find alternatives to dismissal.² The fact only weeks passed between the DHB raising the possibility of dismissal for incapacity and dismissal would, at first blush and given the evidence furnished to date, suggest the applicants' case may not only be arguable but strongly so, although this view must be tempered by the fact the evidence is currently incomplete.

[25] This raises the issue of alternate remedies and whether or not they are adequate. In this instance the only alternate is financial recompense which I must conclude is less than adequate. That is because reinstatement is, as already said, a prime remedy and is actively sought by each applicant. In such circumstances and where, as said above, each appears to have a least a reasonable chance of success, financial recompense alone becomes less than adequate.

Balance of Convenience

[26] Assessing the balance of convenience requires a comparative analysis of the impact on each party and third parties if the interim orders sought are either granted or not. I then must also assess what happens if the interim position is reversed in any substantive determination.

[27] The applicants' argument in this respect focuses on two main points. The first is that s 125(2) of the Employment Relations Act 2000 provides reinstatement is a prime remedy and they submit it should be practical if the parties were willing to acknowledge a willingness to find solutions as, the applicants say, they were. That faces a problem, evidenced I would add, by their next submission which says that willingness was only clarified at the closure of the investigation process.³

[28] The second point is the prospect of reinstatement becomes more tenuous the longer the delay for a substantive hearing. This is, I conclude, a weak argument as if the applicants succeed with their claims, reinstatement becomes a prime remedy irrespective of how much time has passed.

² See for example *New Zealand Fire Service Commission v Reid* [1998] 2 ERNZ 250 upheld in *Reid v*

[29] The third argument is based on the financial impost each applicant faces. Unfortunately that is not a feature unique to this case – it is present in the vast majority of dismissal claims though there is also an argument it is potentially aggravated as theirs is a small occupational group and the grapevine will likely impede their ability to find alternate employment. This becomes an especial problem for the one applicant who is nearing the completion of her training.

[30] For reasons already outlined the applicants' arguments regarding balance of convenience appear weak.

[31] Opposing them are the DHB's arguments which are primarily based on clinical risk and process/patient safety. It has as its starting point the fact the fact the team was, as at the point of the applicants' dismissal, totally dysfunctional. Aside from the fact the evidence, as it currently stands, supports that submission, the applicants do not seriously dispute the assertion.

[32] There is also evidence both the applicants and the team leader feel their personal health and wellbeing has been harmed by events and they would be at further risk if they were forced together at present. It is the DHB's position, supported by the affidavits, should the applicants return the team leader would have to leave. Given the decision to dismiss the applicants, in which the DHB retains faith, that would be unfair until the substantive investigation has allowed the conclusion to be properly tested.

[33] The final point is the evidence, both statistical and report based, is that the teams dysfunctionality was causing an increase in the occurrence of errors in CSSD's output during the months leading up to the dismissals. Since then and following the outsourcing of some functions to another DHB, the evidence is these have decreased significantly. The applicants try to counter this with anecdotal evidence from one of the theatre nurses but here I must prefer the evidence of the DHB's leading professional, its Chief Medical Officer.

[34] Finally there is the effect reinstatement might have on the current arrangement which, while temporary, is not one that can be turned on and off with ease. The

evidence is having had it put in place it is best to retain it until the final outcome is known and that will not occur until after the substantive investigation.

[35] Having weighed these arguments, and in particular those relating to clinical risk and the safety of team members, including the team leader, should the applicants be temporality returned especially given the proximity of the substantive investigation I conclude the balance of convenience strongly favours the DHB.

Overall justice

[36] On one side I have concluded the applicants not only have an arguable case but that it is, on the evidence to date, potentially strong. That could, in turn, mean permanent reinstatement is a distinct possibility.

[37] On the other I have concluded the balance of convenience favours the DHB and there are compelling arguments against returning the applicants to their positions on what could ultimately be a temporary basis.

[38] There is, however, one solution that recognises both of these *successes*, and that is to return the applicants to the payroll but not their positions until the final outcome is known.

[39] When I raised this possibility during the investigation Mr Kynaston submitted that could be unfair as the DHB might have prepared its approach differently had they contemplated that outcome. While noted, I disagree, and that is because s 127(5) of the Act provides an order to reinstate on a temporary basis may be under any condition and there are precedents in this regard.

[40] For the above reasons I conclude the overall justice favours reinstatement of the applicants to the payroll but not to a position within CSSD.

[41] Here I must add one additional caution for the applicants. While I encourage the parties discuss possible alternate roles the applicant might perform in the interim, I suspect the outcome will be a form of garden leave. That being the case, and in the event the applications for permanent reinstatement prove unsuccessful, the applicants may be called upon to honour their undertakings as to damages. This is something they may wish to think about and take precautionary action.

Non-publication

[42] The applicants each ask for a prohibition on the publication of anything that might identify them. They also ask the prohibition apply to *sensitive or health related information* which appears in the pleadings. The orders are sought on the grounds that:

- a. justice and the purposes of the Act are not served by identifying the applicants;
- b. publishing their names would have significant adverse consequences on their future employment and career prospects;
- c. their personal circumstances, namely their age, specialist field and residence in a small town should be taken into account. In essence this repeats (b) above with the argument being their profession is small and rumour travels fast;
- d. there is a real risk of harm to the applicants and/or their families if their names are published; and
- e. the DHB will not be prejudiced by the making of non-publication orders.

[43] The DHB opposes the orders sought by the applicants on the grounds the features they argue are present in most grievance cases and to concede would therefore seriously undermine the principle of open justice. That said, the DHB also seeks non-publication orders. It asks for one in respect to the anything which might identify the team leader given various allegation of inappropriate, indeed sometimes illegal, behaviour which are unproven. There are also applications in respect to two other people who, while criticised, are unlikely to be witnesses and therefor incapable of defending themselves.

[44] I have expressed a preliminary view the evidence I have to date, which is limited to affidavit evidence, suggests the applicants might struggle to attain permanent non-publication orders. Further issues arise from the fact the applicants are individuals whose circumstances differ so what might apply to one may not be relevant to another.

[45] It is more difficult to conclude what might happen in respect to those for whom the DHB seeks orders especially the team leader as her conduct, and the propriety of the employers decisions in respect to those, may well be an issue canvassed at some length in the substantive investigation.

[46] Having considered the evidence currently before me and given any contested assertions are as yet untested, I can only conclude a decision about whether or not to grant these requests on a permanent basis can only be properly informed by the substantive investigation. Accordingly, and using the words of Judge Holden, I believe it appropriate I preserve the position of the parties until such time as a full and informed consideration can be undertaken.⁴

[47] Therefore both requests shall be granted on a temporary basis pending further discussion at the substantive investigation and there is an order precluding the publication of anything which might identify the applicants, the team leader and the other two employees identified by the DHB.⁵ The order shall remain in place until revoked.

Conclusion and orders

[48] For the above reasons I conclude each of the four applicants request she be temporarily reinstated be granted but to the payroll and not to a position within CSSD.

[49] There is a temporary prohibition on the publication of anything which might identify the applicants, the team leader and the other two witnesses identified by the DHB.

[50] Costs are reserved but I suggest they are best left to be dealt with after the substantive investigation.

Michael Loftus
Member of the Employment Relations Authority

⁴ Refer *Kennedy v Oranga Tamariki – Ministry for Children* [2020] NZEmpC 58 at [15] and [21]

⁵ Clause 10 of schedule 2 of the Employment Relations Act 2000