

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 388
3141861

BETWEEN TANIA MCDONNELL
Applicant

AND THE BOARD OF TRUSTEES
OF TE MANAWA O TUHOE
TRUST
Respondent

Member of Authority: Eleanor Robinson

Representatives: Stan Austin, advocate for Applicant
Scott McKenna & Alex Greaves, counsel for Respondent

Investigation Meeting: 24 August 2021 by Zoom

Determination: 06 September 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Before the Authority is an application for interim reinstatement brought by the Applicant, Ms Tania McDonnell, under s 127 of the Employment Relations Act 2000 (the Act).

[2] Ms McDonnell was dismissed by the Respondent, The Board of Trustees of Te Manawa O Tuhoe Trust (TMOT), on the basis of redundancy following a restructure. Ms McDonnell claims that she was unjustifiably dismissed from her role as Board Administrator, and is seeking reinstatement on both an interim and a permanent basis.

[3] TMOT claims that Ms McDonnell's dismissal by reason of redundancy was justifiable and followed a fair and reasonable process. TMOT resists both the claim for interim reinstatement and the substantive claim.

[4] The application for an interim injunction was accompanied by an undertaking as to damages and an affidavit by Ms McDonnell. An affidavit was also filed in opposition by TMOT.

[5] The parties agreed to the Authority determining this preliminary issue of the interim reinstatement application based on the Statement of Problem and the Statement in Reply, documents submitted by the parties, and on submissions from the parties which were presented by Zoom.

Note

[6] Interim reinstatement applications are determined on the basis of the statement of problem, statement in reply, affidavit evidence from the parties, relevant documentation lodged and submissions from the parties.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Principles

[8] I granted Ms McDonnell's application for this matter to be dealt with on an urgent basis because this is the usual procedure for dealing with an application for an interim reinstatement. In determining this matter, I must apply the law relating to interim reinstatement as set out in s 127 (1) and (4) of the Employment Relations Act 2000 (the Act) which include recognising that employment relationships are built on the legislative requirement for good faith behaviour and addressing the inherent inequality of power in employment relationships.¹

[9] At the Investigation Meeting held by Zoom on 24 August 2021, I heard submissions from the parties' representatives in relation to the interim reinstatement application and tested these by questioning how the available untested evidence related to the relevant principles for determining an interim injunction application.² Those principles fall to be addressed by the answers to the following questions:

(a) whether or not Ms McDonnell has established that there is a serious case to be tried in relation to the claim for unjustifiable dismissal; and if so:

(b) Is there a serious case in relation to the claim for permanent reinstatement?

¹ Employment Relations Act 2000 s 3.

² *McInnes v Western Bay of Plenty District Council* [2016] NZEmpC 36 at [8] ERA Auckland 92 in which Judge Inglis (as she then was) referred to the court of Appeal decision in *NZ Tax Refunds v Brooks Homes Ltd* [2013] NZCA 90.

[10] Also noted as needing consideration are the balance of convenience and the impact on the parties, including any third parties, of granting, or not granting an order for interim reinstatement, and the overall justice of the matter.

Background

Brief Background Facts

[11] TMOT administers the assets of approximately 6,000 beneficiaries. TMOT's principle assets and trading function comprise a dairy farm (approximately 700 head of cattle), a grazing block, and a pine forest in the Whakatane river valley Ruatoki.

[12] Ms McDonnell was employed on March 2019 by TMOT as Board Administrator.

[13] In his untested affidavit evidence Mr Ngatai Rangihau, Chairperson of TMOT, stated that in the eighteen months prior to April 2021, TMOT had been focusing on steps including restructures to decrease its operating costs and thereby increase revenue. This was with the aim of making TMOT's business units the right size, resulting in a more affordable structure.

[14] As a result of the steps taken Mr Rangihau stated that there had not been a significant change in the amount of total income, however there had been a significant decrease in the costs of running TMOT's business units. Attached to his affidavit was a copy of TMOT's accountants report.

Restructure proposal 8 April 2021

[15] TMOT wrote to Ms McDonnell on 8 April 2021 in connection with a restructure proposal. The letter stated that the reason for the restructure was financially based with the aim of reducing operating costs. The proposal was set out as being:

The Proposal

4. Currently your role comprises two broad categories of tasks:

4.1 There is board support which includes preparing board materials in advance of board meetings, taking minutes of board meetings and communicating board resolutions and directives to management as required; and

4.2 Supporting the Chairman in monitoring the performance of the board and the trusts various business interests.

5. In an effort to reduce overheads TMOT is considering outsourcing the board secretarial work to a contract based secretarial service. They are exploring two options in this respect:

5.1 The trusts accountant is able to provide these services, including preparing board information, taking minutes and distributing those as necessary. It is estimated (by the accountant) that this monthly increase would be between \$500 and \$1,000 depending on work load; or

5.2 Engaging a remote secretary service on a contract basis. Based on our research the usual hourly rate for a service of this nature is in the range of \$30 to \$45 plus GST.

6 The second aspect of your role, being the support to the chairman would not be provided. The chairman would have to operate with reduced support.

[16] The letter concluded by advising Ms McDonnell that her feedback would be considered prior to a decision being confirmed, and invited her to a meeting to be held on 14 April 2021 with Mr Rangihau. Ms McDonnell was also advised to whom she should direct any requests for further information.

[17] Ms McDonnell stated in her untested affidavit evidence that she was surprised by the brevity of the TMOT's proposal. The meeting proposed to be held on 14 April 2021 she considered to be too short notice because she was on planned leave until 11 April.

[18] The meeting was subsequently postponed and took place on 19 April 2021.

Meeting 19 April 2021

[19] Ms McDonnell attended the meeting on 19 April represented by her representative Mr Austin. Mr Rangihau was accompanied by TMOT's lawyers who attended by Zoom. During the meeting Ms McDonnell provided no verbal feedback on the proposal by TMOT but Mr Austin said he had prepared a letter on Ms McDonnell's behalf which would be provided to TMOT.

[20] Mr Austin provided the letter with Ms McDonnell's feedback immediately following the meeting. The letter was dated 19 April 2021 and set out two options as an alternative to Ms McDonnell being made redundant and requested a significant amount of financial information. The letter also requested:

- h. Advice on whether as an alternative to redundancy the Trust would contract Tania McDonnell for out-sourced board secretarial work including full proposed terms of trade and specification of services required.

[21] TMOT responded in a letter dated 10 May 2021 in which it stated that Ms McDonnell's written feedback had been carefully considered by the Trustees of TMOT. TMOT stated that all the necessary information required by Ms McDonnell for an understanding of the restructuring proposal had been provided to her in the letter dated 8 April 2021. It reiterated that this research indicated that it would be more cost effective to outsource the secretarial work being undertaken by her.

[22] In regard to the information requested it stated that Ms McDonnell was not entitled to a number of the documents such as the TMOT audited accounts, whilst other requested

information related to individual employee information which was confidential. The letter stated:

It is our view that the costs/benefit analysis is covered by the details in our initial letter showing that outsourcing the secretarial work is more cost efficient given the quotes that we have been provided.

[23] The letter concluded by confirming the outcome, having considered Ms McDonnell's feedback, was to disestablish her position and outsource the work she had been undertaking, therefore her employment would terminate by reason of redundancy.

[24] Ms McDonnell's last day of work for TMOT was 14 May 2021 and she was paid two week's pay in lieu of notice.

Is there a serious question to be tried in relation to the claim of unjustifiable dismissal?

[25] As a matter of principle, Ms McDonnell must establish that there is a serious question to be tried in respect of her claim of unjustifiable dismissal and for permanent reinstatement. A serious question was described in *Brooks Homes Ltd v NZ Tax Refunds Ltd* as an arguable case.³

[26] In *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* the Chief Judge confirmed that whether there is a serious question to be tried raises two sub-issues, these being:

- a) Whether there is a serious question to be tried in relation to the claim of unjustified dismissal; and, if so,
- b) Whether there is a serious question to be tried in relation to the claim of permanent reinstatement.⁴

[27] In *Humphrey* the Employment Court noted that once the relatively low threshold as identified in *Brooks Homes Ltd* had been met:

... the merits of the case (insofar as they can be ascertained at an interim stage) may be relevant in assessing the balance of convenience and the overall interests of justice.⁵

[28] My findings expressed in this determination are solely for the purposes of resolving Ms McDonnell's application for interim reinstatement. At the substantive hearing there will be opportunity to fully test the relevant evidence and disputed questions of fact and law.

Serious Question?

³ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

⁴ *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* [2021] NZEmpC 59 at [7].

⁵ Above n 5 at [8].

[29] The threshold for a serious question or arguable case as stated in *Brooks Homes* and *Western Bay of Plenty District Council v Jarron McInnes* is that the claim is not frivolous or vexatious. As stated in *Western Bay of Plenty*:

[9] ... However, as Brooks Homes Ltd makes clear, an applicant must establish that there is a serious question to be tried, in that the claim is not vexatious or frivolous. The merits of the case (insofar as they can be ascertained at an interim stage) maybe relevant in assessing the balance of convenience and overall interests of justice ...⁶

[30] It is submitted for Ms McDonnell that the decision to make her position redundant lacks substantive justification on the basis that all not of her duties and responsibilities were contracted out by TMOT, meaning that much of these remained to be performed. This was set out in the letter dated 8 April 2021 which referred to outsourcing the board secretarial work, and support to the Chairman not being required.

[31] It is also submitted that Ms McDonnell had not been provided with specific information as requested in the letter dated 19 April 2021 regarding how the residual tasks remaining after the work had been outsourced as outlined in the proposal would be performed and by whom. It is submitted that TMOT has accepted that a significant range of Ms McDonnell's tasks were never proposed to be contracted out and therefore she cannot be said to be redundant.

[32] The Applicant further submits that TMOT failed to provide all relevant information without which there could not be genuine consultation, and failed to consider alternatives to dismissal.

[33] The Respondent submits that the dismissal of Ms McDonnell was by way of redundancy which was based on legitimate business decisions, and had been made in accordance with the requirements of s103A of the Act. The reason for the restructuring proposal had been set out in the letter dated 8 April 2021, there had been consultation with Ms McDonnell and her feedback was considered prior to a decision being made.

[34] In regard to the submission that the question of how the residual tasks would be handled had not been discussed, it submits that this had been addressed by the Respondent in paragraph [6] of the letter dated 8 April 2021 i.e. that the support provided by Ms McDonnell to the Chairman would not be provided, and he would operate without support. That is the residual tasks would be absorbed by TMOT.

[35] It is submitted by the Respondent that the request to provide the information requested by the Applicant in the letter of 19 April 2021 had been carefully considered as required of a

⁶ See n2 and n3 above.

fair and reasonable employer. The decision not to provide it had been because it was either not relevant or confidential in relation to other employees.

[36] It appears at this interim stage that TMOT made a decision to restructure Ms McDonnell's position based upon a legitimate basis, that of achieving financial savings. TMOT also consulted with Ms McDonnell and provided her with an opportunity to provide feedback before making its decision to proceed with the proposal as is required of a fair and reasonable employer.

[37] I find at this interim stage that while there appears to be substantive justification and a fair and reasonable process followed, there is an issue as to whether or not TMOT acted reasonably in not providing Ms McDonnell with the information requested; or whether she had sufficient information as to the reason for the restructure proposal and the information requested was not relevant or confidential.

[38] I accept that the threshold in respect of whether there is a serious question is relatively low. Given the low threshold requirement, I find Ms McDonnell has an arguable case for unjustifiable dismissal.

Serious issue to be tried for permanent reinstatement?

[39] Ms McDonnell must not only establish an arguable case for unjustifiable dismissal but must also establish that she would be reinstated if successful in such a claim.

[40] Reinstatement is now the primary remedy and s125 (2) of the Act states the Authority must provide for reinstatement if it is practicable and reasonable. To be practical it must be capable of being carried out in action, be feasible and have the potential for the employment relationship to be carried out successfully. To be reasonable the effects of it need to be assessed not merely on the employee and employer but on other affected third parties.⁷

[41] The onus of proof of practicability rests with the employer.⁸ In this case TMOT submits that there is no basis for permanent reinstatement given the reason for the redundancy which has achieved the financial aim intended of reducing the overheads. In support TMOT submits that this is illustrated by the fact that the work carried out by Ms McDonnell has been contracted out at a third of the cost.

[42] It is submitted by the Respondent that the steps it has taken have produced the sought outcome, being a significant reduction of the overhead expenses. In regard to any residual tasks undertaken by Ms McDonnell, these have been absorbed.

⁷ *Smith a Fletcher Concrete and Infrastructure Limited* [2020] NZ EmpC 125 at [19].

⁸ *Lewis v Howick College of Board of Trustees* [2010] NZCA 320.

[43] The Respondent further submits that the Applicant has made serious comments on the integrity of the Trustees which are accusatory and combative in nature. These have implications for the reasonableness and practicality of reinstatement.

[44] The Applicant submits that reinstatement is practical because TMOT has work previously undertaken by Ms McDonnell which it still requires to be undertaken.

[45] It is further submitted that the contract entered into by TMOT with the company to which it has outsourced the secretarial work previously carried out by Ms McDonnell should not be a bar to reinstatement on the basis that TMOT would have been the author of its own misfortune in that respect.

[46] The Applicant submits that the financial information provided by TMOT as attached to the affidavit evidence of Mr Rangihau does not show the overall financial position of TMOT because it does not include a summary of TMOT's assets and liabilities or their liquidity.

[47] I observe that TMOT is responsible for administering the assets of over 6,000 beneficiaries. I find that there is therefore a possibility that reinstating Ms McDonnell on a permanent basis would undermine the reduction in overheads achieved to the benefit of TMOT's beneficiaries and have an adverse impact on them.

[48] There is also the difficulty of Ms McDonnell successfully working alongside the Trustees as the Board Administrator given the comments which have been made in the course of this proceeding.

[49] Taking the submissions into consideration, and on the basis of the untested affidavit evidence as presented to the Authority, whilst I find that Ms McDonnell has an arguable case that she was unjustifiably dismissed, I am unable to conclude that she has an arguable case that she would be reinstated permanently.

[50] Accordingly I do not find that Ms McDonnell has a strongly arguable case for interim reinstatement.

Balance of convenience

[51] As set out in the Employment Court case *X v Y Limited*⁹ this principle requires that the Authority balance the relative inconvenience, in terms of detriment or injury, to TMOT who will have to bear the burden of an order reinstating Ms McDonnell until the substantive case is

⁹[1992] 1 ERNZ 863, at pg 10.

heard, against the inconvenience to Ms McDonnell who may have a just case, of having to bear the detriment of unjustifiable action until the case is heard.

[52] It is submitted on behalf of Ms McDonnell that the following factors weigh heavily in her favour for interim reinstatement:

- a) Interim reinstatement provides her with ongoing employment;
- b) Ms McDonnell is the sole breadwinner for her family and has sole responsibility for the care of her disabled son which mean this factor should be given greater weight than the norm;
- c) The part-time and flexible nature of her hours in her work for TMOT are a considerable advantage to her and not easily replicated in another workplace;
- d) Ms McDonnell needs to fund the cost of representation which would make the fiscal burden of losing her employment all the more significant;
- e) Delay in the substantive matter being heard should weigh in favour of Ms McDonnell being granted interim reinstatement;
- f) The Respondent will receive the benefit of Ms McDonnell's work if she is granted interim reinstatement; and
- g) Interim reinstatement will favour the Respondent which will benefit from Ms McDonnell's institutional knowledge.

[53] It is submitted on behalf of TMOT that it had sound financial reasons for the restructure process and the savings it sought to achieve through it have been accomplished.

[54] It is submitted that if Ms McDonnell were to be reinstated, this would run the risk of breaching the contract with the company to which her work has been outsourced. Moreover that contract has been achieved at a third of the cost of Ms McDonnell performing that work which was the aim the outsourcing was intended to achieve.

[55] TMOT submits that damages would be an adequate remedy in this case in which, if there was any flaw in the process which is denied, it was minor.

[56] Whilst appreciating the difficulties of Ms McDonnell's financial position given her personal circumstances, I find that the premise for the restructuring process was a genuine

reason, and the intended cost savings have been achieved, and this is also a factor to be considered at this stage of the analysis.

[57] Having taken into consideration the submissions put forward by the parties, balancing the potential prejudice to Ms McDonnell of not reinstating her, against the potential prejudice to TMOT of reinstating her, I find that the balance of convenience favours not reinstating Ms McDonnell on an interim basis.

Overall Justice

[58] The Authority must assess the overall justice of the case from a global perspective. This has been described by the Court of Appeal as:¹⁰

The overall justice assessment is essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and balance of convenience'

[59] It is submitted on behalf of Ms McDonnell that the strength of her case is such that interim reinstatement would be just and equitable.

[60] TMOT submits that the restructure was based on genuine business interests which achieved the desired aim of reducing overheads.

[61] TMOT also raises a concern about Ms McDonnell's ability to meet the undertaking given her financial circumstances should TMOT seek to recover any loss if she were to be reinstated on an interim basis but not be successful at the substantive stage.

[62] I find that the overall justice of the case subsists in declining the application for interim reinstatement.

Next Steps

[63] The Authority will convene a case management conference to set timetable directions for the investigation of Ms McDonnell's substantive claim.

[64] I note that the Applicant has signalled its willingness to return to mediation and the Respondent is encouraged to seriously consider this.

¹⁰ *NZ Tax Refunds Ltd v Brooks Homes Limited* [2013] NZCA 90 at [47].

Costs

[65] Costs are reserved for determination following the substantive investigation meeting and its outcome or until this matter otherwise ceases to be before the Authority.

Eleanor Robinson
Member of the Employment Relations Authority