

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 526
3133599

BETWEEN	EYLEM KAYA Applicant
AND	THE VICE CHANCELLOR UNIVERSITY OF AUCKLAND Respondent

Member of Authority:	Marija Urlich
Representatives:	Paul Blair, advocate for the Applicant Rachel Judge and Ronni Cabraal, counsel for the Respondent
Investigation Meeting:	4 November 2021 (by audio visual link)
Submissions and further information received:	28 October, 3 and 4 November 2021, from the Applicant 1 and 4 November 2021, from the Respondent
Determination:	25 November 2021

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination deals with an application Dr Kaya brings for interim reinstatement.¹ The Vice Chancellor University of Auckland (UoA) opposes Dr Kaya's interim application. In an earlier determination the Authority found it had jurisdiction to consider the interim reinstatement remedy Dr Kaya seeks which is reinstatement to a position which she does not currently hold.²

¹ Supported by an undertaking as to damages and supporting affidavit affirmed on 4 November 2021.

² *Eylem Kaya v The Vice Chancellor University of Auckland* [2021] NZERA 444.

[2] The investigation of Dr Kaya's substantive claim of unjustified disadvantage is scheduled for dates in March 2022.

The Authority's investigation

[3] Following the determination of the jurisdiction issue, on 19 October 2021 the Authority held a case management conference with the parties' representatives to set a timetable for Dr Kaya's interim reinstatement application. The parties have complied with timetabling directions.

[4] In determining this matter affidavit evidence of Dr Kaya, Professor Rosalind Archer and Eralynne Ryan has been considered as have the interim reinstatement application and notice of opposition, the statement of problem Dr Kaya lodged setting out her substantive claim and UoA's statement in reply opposing the claim, the documents attached thereto and the parties' submissions. The parties had leave to file unsworn affidavits which were affirmed by the deponents at the investigation meeting. Evidential matters in dispute between the parties will not be resolved by this determination because the evidence is untested and in applying the relevant tests the Authority is not required to resolve any disputes.

The Law

[5] As the court observed in *Humphrey*, in determining whether or not to order interim reinstatement, regard must be had to the object of the Employment Relations Act 2000 (the Act) which is to build productive employment relationships through the promotion of good faith:

One of the central features for the Act is its recognition of the importance of the employment relationship, the obligations both parties have to be responsive and communicative, and that issues ought to be dealt with promptly and between the parties if possible – in other words, supporting constructive employment relationships and repairing them where feasible.³

[6] It is with this in mind that applications for reinstatement are to be dealt.

[7] Section 127 of the Employment Relations Act 2000 (the Act) confers jurisdiction on the Authority to grant interim reinstatement. In considering Dr Kaya's

³ *Humphrey*, above n 1, at [5].

application for interim reinstatement the Authority is required to consider the following:⁴

- (i) Does Dr Kaya have an arguable case for unjustified disadvantage and an arguable case for permanent reinstatement?
- (ii) Where does the balance of convenience lie? This requires looking at the relevant detriment or injury that Dr Kaya and UoA will incur as a result of the interim injunction being granted (or not granted)?
- (iii) The Authority is then required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

Arguable case of unjustified disadvantage

[8] The first question for consideration is whether there is an arguable case Dr Kaya was unjustifiably disadvantaged and that she will be permanently reinstated to the position sought. An arguable case means a case with some serious or arguable, but not necessarily certain prospects of success.⁵ The threshold for a serious question or arguable case as stated in *McInnes* is that the claim is not frivolous or vexatious:

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

[9] The factual background to the application was canvassed in the earlier determination and does not need to be restated here. Consideration has been given the parties' submissions on arguable case including UoA's careful submissions that the arguable case threshold cannot be said to be met in this application.

[10] The Authority is satisfied Dr Kaya's claim meets the threshold of an arguable case:

⁴ *Western Bay of Plenty District Council v McInness* [2016] NZEmpC 36 at [7].

⁵ *X v Y Ltd v New Zealand Stock Exchange* [1992] 1 ERNZ 863.

⁶ *McInnes* above n 1, at [9].

- Dr Kaya says her current employment agreement contains consecutive funded periods which are in fact and law consecutive fixed term agreements;
- if Dr Kaya is correct it is arguable the employment agreement may not be compliant with the requirements for fixed term agreements;⁷
- if her challenge to the lawfulness of the employment agreement is successful a question will be raised as to what her terms of employment are given s 65 obligations including hours of work; and
- Dr Kaya also raises a procedural claim, albeit serious, that she felt undue pressure to enter the employment agreement.

Arguable case for permanent reinstatement

[11] Where it is practical and reasonable to do so and sought, the Authority must provide for reinstatement as a primary remedy⁸. Dr Kaya, through her representative, indicated at the investigation meeting that she seeks reinstatement to a range of roles/hours of work. UoA says the order sought would require fixing the terms of employment which is not within the Authority's jurisdiction. While that may well be so, and would be barred for want of jurisdiction, at this stage, given Dr Kaya's reinstatement position turns on the outcome of the challenge to her current terms of employment which contain varying periods, reinstatement within the range identified cannot be said not to be a possibility. The arguable case threshold for permanent reinstatement is met.

Balance of convenience

[12] This ground for consideration involves the relevant detriment or injury the parties will incur if interim reinstatement is granted or not. An assessment of what might happen if the interim position is reversed in any substantive determination including consideration of whether damages can adequately compensate any harm if reinstatement is not ordered is also to be made.

[13] Dr Kaya says UoA is a large organisation with sufficient funding and organisational flexibility to accommodate her reinstatement at least in the short term.

⁷ Section 66 Employment Relations Act 2000.

⁸ Section 125(2) of the Employment Relations Act 2000.

She says she has the skills and experience to successfully undertake the work for the department as she proposes and she needs the paid additional work because her current earnings from the UoA are modest.

[14] Professor Archer avers if the interim order Dr Kaya seeks is made there is no funding available, that the budget for the relevant department is on a knife edge and if reinstatement is ordered, even on an interim basis, the department budget would likely be pushed into deficit.

[15] Though Dr Kaya has been given the benefit of the doubt at the arguable case stage the range of what she seeks reinstatement to sounds in the balance of convenience. It is very likely any damages awarded would be an adequate remedy for Dr Kaya. The balance of convenience weighs in favour of UoA.

Overall justice

[16] Standing back from the detail of the claim where on balance does the overall justice lie? This has been described by the Court of Appeal as:

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.⁹

[17] Dr Kaya brings a legal argument before the Authority which turns on whether her current employment agreement meets the statutory requirement for a fixed term agreement. If it is found to then consequences will likely flow from that including the possibility of damages. In the meantime she has a funded role with UoA under terms she, arguably, freely entered. It is wholly accepted she would like more work with UoA however, the evidence in support of the reasons why in the short term do not outweigh the impact reinstatement as she seeks would have on UoA.

[18] The overall justice of this matter does not weigh in favour of interim reinstatement.

⁹ *NZ Tax Refunds Limited v Brooks Homes Limited* [2013] NZCA 90 at [47].

Outcome

[19] Dr Kaya's application for interim reinstatement is declined.

Costs

[20] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority