

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 19
3084636

BETWEEN	LEILA MCLEOD Applicant
AND	TOKAANU-TURANGI & DISTRICTS MEMORIAL RSA INCORPORATED Respondent

Member of Authority:	Marija Urlich
Representatives:	Nadia Tu'itahi, for the Applicant David McLeod, for the Respondent
Investigation Meeting:	On the papers
Submissions received:	13 January 2021 from Applicant 13 January 2021 from the Respondent
Determination:	21 January 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms McLeod's employment with the Tokaanu-Turangi & Districts Memorial RSA Incorporated (the RSA) ended in October 2019. In mid-December 2019 she filed in the Authority an application for unjustified dismissal and unjustified disadvantage. On 21 December 2020 Ms McLeod filed an application for interim reinstatement along with a supporting affidavit and undertaking as to damages. The RSA opposes interim reinstatement.

[2] The application for interim reinstatement is made during the Authority's investigation of Ms McLeod's substantive application which was adjourned part heard

in July 2020. The adjournment was necessary when the Authority became aware related criminal proceedings were afoot. Those charges were withdrawn in November 2020 a development of which the Authority was promptly advised and the resumption of the investigation meeting has been scheduled for early-March 2021.

[3] For completeness, in addition to applying for interim reinstatement in December 2020 Ms McLeod amended her substantive claim to seek permanent reinstatement, compliance orders relating to communications the RSA has had with its membership concerning the criminal matters and her personal grievance and penalty for breach of statutory and contractual provisions. The RSA opposes these additional claims.

[4] This determination deals only with Ms McLeod's application for interim reinstatement. The other new claims will be dealt with at the substantive investigation meeting.

The Authority's investigation

[5] On 22 December 2020 the Authority held a case management conference with the parties' representatives to set a timetable to deal with Ms McLeod's amended application and the interim reinstatement application. The parties were directed to attend mediation by 8 January 202 and have complied with the timetabling directions.

[6] In determining this matter affidavit evidence of Ms McLeod, information attached to the statements of problem and reply and the parties' submissions have been considered. 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.

Issues

[7] In considering Ms McLeod's application for interim reinstatement the Authority is required to consider the following:

- (i) Does Ms McLeod have an arguable case for unjustified dismissal and an arguable case for permanent reinstatement with regard to s 125 of the Employment Relations Act 2000?
- (ii) Where does the balance of convenience lie? This requires looking at the relevant detriment or injury that Ms McLeod and the RSA 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 dismissal

[8] Ms McLeod was employed for three years by the RSA as the Secretary/Manager until her employment ended in October 2019. There are a number of disputed matters between the parties including and significantly whether the RSA ended Ms McLeod's employment after disestablishing her position, if its actions were fair and reasonable, whether she was authorised to calculate and process her final pay and that when this payment came to light whether she was unjustifiably dismissed.

[9] Ms McLeod says the actions of the RSA towards her were unreasonable and unjustified, that she suffered unjustifiable disadvantage in her employment and was unjustifiably constructively dismissed.

[10] The RSA does not accept this but does accept Ms McLeod has an arguable case her dismissal was unjustified.

[11] The Authority is satisfied there is an arguable case Ms McLeod was unjustifiably dismissed.

Arguable case for permanent reinstatement

[12] Where it is practical and reasonable to do so and sought, the Authority must provide for reinstatement as a primary remedy¹: Delay may not be fatal to such a

¹ Section 125(2) of the Employment Relations Act 2000.

claim but it is a factor to consider². In the circumstances of this matter part of the consideration of delay is the late stage in which reinstatement was sought – this is not a situation where the RSA has been on notice since the end of employment that Ms McLeod intended to seek reinstatement.

[13] The RSA submits reinstatement is not practicable because the workplace has been reorganised since Ms McLeod's employment ended and her conduct has resulted in a loss of trust and confidence. It submits the small size of the RSA and its limited funds means permanent reinstatement would have a disproportionately detrimental effect on the organisation.

[14] It is accepted if Ms McLeod is permanently reinstated the relationship between the parties will need to be repaired – Ms McLeod has been out of the work place for a considerable period, she says her employment ended because of the RSA's serious breaches of obligations owed to her under the employment agreement and the RSA's communications to members after her employment ended has been damaging. Whether there is a loss of trust and confidence is a matter for objective assessment by the Authority at the substantive hearing so too, any practical barriers to Ms McLeod's reinstatement. Though there are hurdles to permanent reinstatement Ms McLeod does have an arguable case that if she is successful in her substantive claim she will be reinstated.

Balance of convenience

[15] This ground for consideration involves the relevant detriment or injury the parties will incur if interim reinstatement is granted or not.

[16] The Authority understands the key factors motivating Ms McLeod's claim for interim reinstatement are (i) the withdrawal of the criminal charges, (ii) the difficulty she has had securing employment since she left the RSA and (iii) her frustration with the RSA's communications about her with its membership which she says is damaging her reputation in the community and impeding her chances of securing alternative employment.

² See *Clarke v Norske Skog Tasman Ltd* [2003] 2 ERNZ 213 and *Johnston v Air New Zealand Ltd (No 3)* [1989] 3 NZILR 338 (LC).

[17] Given these are matters either outside the control of the RSA (the criminal charges) or for which substantive remedies have been claimed there is a question as to what detriment Ms McLeod will suffer if she is not reinstated to employment with the RSA on an interim basis. If Ms McLeod's claim is successful she will be entitled to consideration for wages lost consequent to her dismissal and compensation for humiliation, loss of dignity and injury to her feelings. Remedies may be an adequate remedy to address the concerns Ms McLeod has raised, a conclusion further supported by the proximity of the investigation meeting – scheduled in seven weeks.

[18] The RSA submits that if the purpose of interim reinstatement is to preserve the status quo pending the determination of the substantive issue then, given the effluxion of time, the status quo does not include Ms McLeod's employment by the RSA. This is accepted. Ms McLeod has not been employed by the RSA for over a year. In such circumstances it is difficult to see the injunctive relief Ms McLeod seeks "as a 'holding remedy' to address a present position until the merits of the case can be fully adjudicated"³.

[19] In contrast, the information before the Authority indicates the RSA would suffer, at least in the short term considerable detriment if Ms McLeod was reinstated on an interim basis - since her employment ended Ms McLeod's job functions have been split between a contractor and permanent staff member. It is accepted it would be a significant disruption to the operation of the RSA if Ms McLeod was reinstated on an interim basis.

[20] In summary, the criminal charges were a matter between Ms McLeod and the prosecuting agency, there is little in the affidavit evidence as to the detriment Ms McLeod has suffered as a result of not having secured alternative employment or to support her concerns that the RSA's actions have impeded her securing alternative employment. Given the substantive remedies sought it is unclear to the Authority how reinstatement will cure the significant period of time which has elapsed and is a significant factor which weighs against reinstatement on an interim basis. It is accepted Ms McLeod's interim reinstatement would be significantly disruptive to the RSA. The balance of convenience favours the RSA.

³ *Savage v Wai Shing Ltd* [2019] NZEmpC 141 at [32].

Overall justice

[21] Standing back from the detail of the claim where on balance does the overall justice lie? The Authority is sympathetic to Ms McLeod's circumstances – the investigation of her claim has been delayed by criminal charges which have now been withdrawn, the small community she lives in knows about those charges and the circumstances of the charges arise from alleged actions in her former employment which the RSA has elected to communicate to its membership in a readily accessible forum. Ms McLeod has found this hurtful and disempowering. It is understood and accepted interim reinstatement would be a vindication. However, it is over a year since Ms McLeod was last employed by the RSA, interim reinstatement would be significantly disruptive to its small operation and the substantive investigation will resume shortly. The status quo at the time Ms McLeod filed her application for interim reinstatement cannot be said to include her being employed by the RSA. The overall justice of this matter does not favour interim reinstatement.

Outcome

[22] Ms McLeod's application for interim reinstatement is declined.

Costs

[23] Costs are reserved and will be dealt after determination of the substantive investigation.

Marija Urlich
Member of the Employment Relations Authority