

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 64  
3157982

BETWEEN	MONICA GELISSEN Applicant
AND	CLINICAL HORIZONS (PUKAKI) LIMITED Respondent

Member of Authority:	Pam Nuttall
Representatives:	Russell Du Fall, advocate for the Applicant Jessie Laphorne, counsel for the Respondent
Investigation Meeting:	14 February 2022
Submissions received	At the investigation meeting and 15 February 2022 for the applicant At the investigation meeting and 16 February 2022 for the applicant
Determination:	2 March 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Monica Gelissen worked at the Rotorua dental practice operated by Clinical Horizons (Pukaki) Limited (Clinical Horizons). She was dismissed on 9 November 2021 because Clinical Horizons decided that her work role had been disestablished as part of a business restructure.

[2] Ms Gelissen claims she was unjustifiably dismissed. She seeks reinstatement to her role on an interim basis until this claim and other matters can be fully considered. Her claim is founded on the contention that the reorganisation of the way the practise

operated was a pretext to dismiss her for other reasons. She also claims to have been unjustifiably disadvantaged by the actions of the respondent.

### **The Authority's investigation**

[3] Affidavits were provided from Ms Gelissen, Henrick Arlund (dentist), Adam Durning (director and dentist), George Hermans (external management consultant), Jacintha Bryant (receptionist), Chee Hoe Lee (dentist), Shu Jin Ee (dentist), Sophie Martin (dental assistant), Monica Stevenson (dental assistant), Reokore Apitai (dental assistant), Kelsi Charles (patient service provider), Charlotte Leabourn (associate dentist) and Arjuna Rajasingham (director and dentist)

[4] An investigation meeting was held on 14 February 2022 to hear submissions. These were filed and served in writing on 15 February 2022 by the applicant and 16 February 2022 by the respondent.

[5] As is usual, I have dealt with this application for interim reinstatement on the basis of untested evidence and submissions. Disputed matters cannot be decided on the basis of such evidence.

[6] 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 everything received from the parties.

### **The issues**

[7] The relevant tests for an application for interim reinstatement are well established and require the following issues to be determined:

- (a) Is there a serious question to be tried?
  - (i) Does the applicant have an arguable case that her dismissal was unjustified?
  - (ii) Does the applicant have an arguable case that if her dismissal was unjustified then she would be granted permanent reinstatement?
  
- (b) Where does the balance of convenience lie regarding the impact on the parties of granting or refusing interim reinstatement?

(c) What does the overall justice of the case require?

### **Ms Gelissen's work history with Clinical Horizons**

[8] Ms Gelissen was employed by Clinical Horizons in the Rotorua operation of a group of six dental practices in different regional centres trading collectively as "the Dentists".

[9] Two practising dentists, Arjuna Nishan Rajasingham and Adam Luke Durning were the shareholders and directors of both Clinical Horizons (Pukaki) Limited and the other corporate entities operating the remaining practices.

[10] Mr Rajasingham was the Head of Practice for the Rotorua dental practice but managed the operation from Taupo where he was also Head of Practice for the clinic there.

[11] Ms Gelissen was employed on or about 12 February 2021, though the written employment agreement was apparently signed later and dated 15 February 2021.

[12] The written document in Schedule 1 describes Ms Gelissen's position as Office Manager/ Receptionist. Ms Gelissen contests this job description claiming not to have been supplied with the executed agreement or a copy of the job description in an email where this was said to be attached.

[13] Ms Gelissen insists she was employed as Practice Manager/ Receptionist. She relies on assurances she says were given by the Head of Practice that this was her position, on the interchangeable use of the terms Office Manager/ Practice Manager in the job advertisement and the way she was addressed by members of the team and the signature to her correspondence.

[14] Ms Gelissen's representative submitted on her behalf that Ms Gelissen was misled as to the scope of her employment position, that she was not adequately informed of her duties or inducted into her role. When Clinical Horizons became aware of confusion as to the scope of Ms Gelissen's role and responsibilities, the submission is that Ms Gelissen was still not provided with an outline of duties as required by clause 6 of her employment agreement and that failure to clarify this situation shaped the on-going course of the employment relationship.

[15] The distinction was important to Ms Gelissen because it shaped the way she regarded her role in the practice. Later, the documents provided to support a proposed restructure of the practice in October 2021 also distinguished between the Office Manager position and a Practice Manager role.

[16] Clinical Horizons denies that Ms Gelissen was appointed as a Practice Manager. Henrik Arlund, an external management consultant to Clinical Horizons, describes personally clarifying this matter on multiple occasions and going through a role description line by line with her. Mr Rajasingham also attests that it was a constant struggle to get Monica to understand that she was not employed as the Practice Manager but rather, as the Office Manager. “I told her time and time again that her job description was on the HUB and to just follow that, but she insisted she was the Practice Manager.”

[17] Despite these conflicting perceptions of her role, it appeared initially that Ms Gelissen was regarded positively by many of her work colleagues. Some of the affidavits filed by the respondent with its submissions comment constructively on personal interactions with Ms Gelissen or acknowledge achievements during her work with the clinic.

[18] It seems that Ms Gelissen focussed successfully on upgrading the physical environment of the practice and also in overhauling administrative systems for handling ACC and MoH patents and in improving debt collection systems and outcomes.

[19] However, Ms Gelissen was not regarded in this positive light by all her colleagues and even those initially well-disposed towards her comment on workplace performance issues.

[20] The crux of many of these appear to be a lack of confidence and competence with the computer management tools required for patient management in the practice. Many of the affidavits describe considerable difficulties and confusion arising from failure to deal with scheduling patient appointments, inaccuracies and errors, lack of priority for reception duties dealing with patients and attempts to offload these responsibilities on to clinical staff.

[21] But Ms Gelissen also appears to reject this aspect of the role completely in her affidavit in reply. She states that she was not appointed as a receptionist/scheduler and describes being “severely impacted over a long period of time” by the perception of others that this was her role. “I was employed to manage and provide leadership, and

to support and assist staff in achieving their own roles, and I cannot interpret that as doing their roles because there is not enough time for them to do what is required of them,” her affidavit states.

[22] Ms Gelissen appears to have believed that she was inadequately supported in addressing some of the dissension arising from these issues and that some of these duties were not consistent with the management role she perceived herself as engaged in. However, although no definitive conclusions can be drawn on the basis of untested evidence and submissions, almost all the commentary provided from workplace colleagues suggest that Ms Gelissen gradually developed a volatile and defensive approach to her workplace interactions. It may be that the insecurity of not being adequately competent with the necessary technology contributed to this

[23] Subsequent documentation relates to management direction to prioritise rescheduling (of patients). In a communication with the subject line Letter of Concern, dated 2 July 2021, Jenni Gibson, COO for all six dental practise operations, refers back to an informal discussion held on 29 May 2021. In this letter she addresses Ms Gelissen’s attitude and her refusal to follow reasonable management instructions.

[24] This letter confirms that Ms Gelissen had not considered rescheduling patient appointments to be within her work role and not regarded it as an administrative task she should be undertaking. Instead, she seems to have believed this should have been done by the clinical staff. The requirement to follow management direction to undertake and prioritise this work was restated. Though the letter says it is not a formal warning, it sets out that “[i]t is essential that your conduct improves to the required standard”.

[25] Clinical Horizons also responded to this performance issue by requiring Ms Gelissen to attend weekly board meetings with the directors, Ms Gibbs as COO and Mr Arlund, the external management consultant.

[26] The minutes of the board meeting on 6 July 2021 show Ms Gelissen explaining her approach as focussing on a “backlog of work”. She identifies this backlog as dealing with ACC and ministry of health claims and recovering unpaid debt from 2017. She regards rectifying this backlog as a reason to have Ms Bryant work in the board room dealing with these administrative tasks rather than being stationed at the front desk in reception as directed. There is concern that Ms Gelissen is not recognising supporting clinical staff and patient requirements as the priority over administrative activities.

[27] A further letter, oddly dated 8 July 2021 but referring to a meeting on 13 July 2021, extends a three month probationary period for Ms Gelissen on the basis of similar concerns about the level of service provided to clinical staff and patients, the management of appointments, unanswered phone calls and low levels of general staff satisfaction.

[28] The minutes of the Board meetings for 27 July, 6 October, 12 October 2021 record increasing concerns as to the way in which Ms Gelissen is managing the practice team and disharmony with the clinical practise nurses. Again this seems to have related to a basic difference of view as to who should be providing patient support in reception.

[29] One specific incident involved an altercation with Ms Sophie Martin, one of the practice nurses, who reacted angrily when Ms Gelissen apparently touched her ponytail during a morning briefing meeting. Following investigation of the incident it was decided that both parties had contributed to the situation and a mediated conversation was held. Ms Gelissen, in a subsequent Board minute, is recorded as saying that she had not been supported in this situation. She uses the analogy of parents supporting a common decision whether or not the other parent was wrong.

[30] I am unclear as to whether it was this incident that precipitated Ms Gelissen's leaving a Board meeting and the workplace, apparently on 6 October 2021, telling other staff that she was leaving. It seems probable that this is the case. She was offered a without prejudice severance package, the details of which are apparently set out in a document dated 7 October 2021 provided in the respondent's bundle of documents. Ms Gelissen describes her reaction to this offer as being shocked and feeling intimidated and threatened. She refused to accept it.

[31] The minutes of the Board meeting Ms Gelissen attended on 12 October 2021 set out an increasingly dysfunctional situation in the practise. The perception is that Ms Gelissen has lost the trust and respect of the front office team and that the practice may lose staff. Ms Gelissen still feels that Ms Martin should have been dismissed and does not accept that the practice nurse has apologised. Ms Gelissen expresses that she feels bullied and abused because the directors have not taken her part and she does not accept she contributed to the situation in any way.

[32] The solution the directors are putting forward is to put another person in above Ms Gelissen to manage the practice. The minutes record Mr Durning as saying:

We feel we need to get somebody else into the practice to manage that role and do everything that we employed you to do. Everything that was in your role description. And we step you down or side ways to be on front desk.

Mr Rajasingham comments that “we need someone at the top that can get the team together.” The directors ask for comment.

### **Restructuring proposal**

[33] On the 15 October 2021 restructuring proposals were sent to Ms Gelissen with a letter from Ms Gibson which attributed consideration of the “restructure of the area in which you work” to “reduced staff satisfaction, patient satisfaction and management issues”. The letter confirms that “we are considering making your role as office Manager redundant.”

[34] Each director filled the role of Head of Practice (HOP) for three of the six regional dental practices. What was proposed was that for the Rotorua practice, the HOP role should be split between clinical and management functions and that Mr Rajasingham should continue as Clinical Director with a Practice Manager providing leadership and management of all non-clinical aspects of the practice.

[35] Ms Gelissen was invited to attend a meeting on 21 October to discuss this proposal. She attended with her representative Russell Du Fall. It appears from the meeting records that Mr Rajasingham and Mr Arlund were the other participants. Ms Gelissen’s representative sought further information.

[36] On 22 October 2021 a redundancy settlement was negotiated by text message between Mr Du Fall and Mr Rajasingham and accepted by Ms Gelissen involving payments of two separate amounts: one being in lieu of notice and a second amount a tax free compensation payment.

[37] Objection was raised however that the documentation of this agreement introduced new terms which had not been negotiated and agreed. Despite the signed agreement being presented in the form of a Record of Settlement and further discussion ensuing, no written agreement eventuated. Ms Gelissen returned to work on the basis that the redundancy agreement was repudiated and the redundancy process continued.

[38] A further consultation meeting was held on 9 November 2021, confirming that the Office Manager position was redundant. Ms Gelissen was paid in lieu of notice and left the practice.

### **Serious question to be tried?**

#### ***Does the applicant have an arguable case that her dismissal was unjustified?***

[39] To establish that a dismissal on the grounds of redundancy is justified, the employer has the burden of showing that its actions, and the manner in which it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[40] Since the Court of Appeal decision in *Grace Team Accounting*<sup>1</sup>, it has been clarified that in order to meet this statutory test it is not sufficient for the employer to simply say that this was a genuine business decision. The Court (or the Authority) cannot be precluded from enquiring into the merits of the substantive justification for the dismissal. The Court of Appeal also defined a genuine decision to make an employee redundant as being where “the decision is based on business requirements and not used as a pretext for dismissing a disliked employee.”<sup>2</sup>

[41] The submissions for Clinical Horizons invite me to consider that Ms Gelissen’s case that she was unjustifiably dismissed is not one that can be regarded as strong. This might have been a potential outcome where the applicant had been dismissed for incapacity or even for failure to comply with lawful and reasonable direction.

[42] However, although no definitive conclusions can be drawn on the basis of untested evidence and submissions, the burden of establishing that redundancy was not just another mechanism for resolving the problem of dealing with Ms Gelissen and the dysfunction attributed to her poses a greater hurdle for the respondent.

[43] The rationales advanced for the restructure were reduced staff satisfaction, patient satisfaction and management issues. The issues and difficulties themselves appear to be clearly genuine. It is for the respondent to establish that these are

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<sup>1</sup> *Grace Team Accounting Limited v Brake* [2014] NZCA 541 at [80].

<sup>2</sup> At [78] & [85].

difficulties amenable to remedy by structural reorganisation rather than simply going to market for a more capable manager.

[44] There is clearly a serious question to be tried in relation to the unjustified dismissal case.

***Does the applicant have an arguable case for permanent reinstatement?***

[45] I am required to consider whether it is reasonable and practicable to reinstate Ms Gelissen. Reinstatement has once again become the primary statutory remedy. What would be the feasibility or practical workability of reimposing this employment relationship?

[46] Clinical Horizons argues that reinstatement would not be reasonable or practicable because the Office Manager position which Ms Gelissen held no longer exists. While this argument may pre-empt some of the findings which might need to be made in relation to whether Ms Gelissen was justifiably dismissed, it does appear that she struggled with some aspects of the management position, however it might be labelled.

[47] Clinical Horizon's also argues that the affidavit evidence shows a level of concern throughout the practice about the negative effects of Ms Gelissen's returning to her former position which cannot be ignored. This is not just a matter of personalities, but concern as to whether the basic functions of the role, on which the work of others depends, will be effectively performed.

[48] However, recent case law indicates that "claimed differences between employees, including suggestions that employees will leave if another staff member returns to work, must be treated with care."<sup>3</sup>

[49] In her decision, the Chief Judge looks to the point of re-establishing reinstatement as the primary remedy as being "to get the conversation back to being one about how we can put this relationship back together again. Rather than saying, "How big a payout is it going to take to see someone off and never darken their employer's doorstep again?", let's see if there's a possibility to restore the relationship."

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<sup>3</sup> *Christieson v Fonterra Co-operative Group Limited* [2021] NZEmpC 142 at [56].

[50] This means that it is distinctly arguable that the amendment returning reinstatement to its place as the primary remedy for dismissal “reflects a Parliamentary intention to raise the bar that employers would have to negotiate in order to prove that reinstatement was neither reasonable nor practicable.”<sup>4</sup>

[51] In light of this proposition, perhaps we need to look to good faith efforts on the part of Clinical Horizons to consider its options in terms of mediation, structured return to work and appropriate probationary period support through structured skills development before accepting its submission that the applicant does not have an arguable case that permanent reinstatement would be reasonable or practicable.

[52] I acknowledge that the success of any of these efforts would also require active and constructive participation on Ms Gelissen’s part. Indeed her own welfare, should she re-engage with this situation, would also need to be taken into consideration and would necessitate preliminary work to provide the basis for re-establishing constructive workplace relationships.

[53] As the Employment Court decision in *Christieson* comments: [w]hile no-one is of the view that this would be easy, neither is it possible to say at this stage that it is not practicable or reasonable.”<sup>5</sup>

[54] I find that there is an arguable case for permanent reinstatement.

### **Balance of convenience?**

[55] In moving on to weigh the interests of Ms Gelissen in this application against those of Clinical Horizon’s, I must also consider the extent to which the effect of her continued absence from the workplace may be adequately compensated by remedies awarded if her substantive claim succeeds.

#### *Ms Gelissen*

[56] Ms Gelissen has described the effects on her of the dismissal and her absence from the workplace in terms of the challenge to her own self-esteem and the injustice of being terminated without the opportunity to address the concerns of others as to why

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<sup>4</sup> *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitahi* [2021] NZEmpC 59 at [42].

<sup>5</sup> *Christieson* above n3 at [43].

this had happened. She sees reinstatement as a means of restoring and rebuilding self-esteem, self-respect, dignity and trust and confidence in herself and others.

[57] She also regards it as an opportunity to provide a degree of vindication in showing that she is capable of rebuilding relationships and demonstrating competence.

[58] Ms Gelissen has lost her income. Her opportunities to achieve alternative employment as an older woman are reduced with the effect of this termination on her employment record. She was dependent on the diligence and hard work she put into this position to maintain herself financially into her retirement.

[59] Any subsequent award of compensation or lost income may ease some of her immediate financial distress but will not rehabilitate her in her own eyes and in the regard of her community. Nor will it restore the potential for financial security into her retirement. “Jobs are important and money is often a poor substitute.”<sup>6</sup>

#### *Clinical Horizons*

[60] Weighing the detriment to Clinical Horizons should Ms Gelissen be reinstated overlaps to some extent with the analysis of whether it is reasonable and practicable to do so. The major considerations advanced were issues of the effect of lack of competency on the clinic’s operations and patient and staff satisfaction, and the effect of dysfunctional management on staff including the risk of staff loss.

[61] The major competency issue is evidenced in affidavits from both the dental practitioners and other clinical staff, who found themselves required to deal with patient booking issues, and reception staff who found themselves carrying unnecessary workload.

[62] The dysfunctional management issues are expressed in affidavits from reception staff and clinical nursing staff who have had to cope with a deteriorating working environment.

[63] Affidavit evidence also points to concerns expressed by staff who feel they might have to leave their employment if Ms Gelissen were reinstated and by the directors who fear loss of staff, especially their specialist dental practitioners.

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<sup>6</sup> *Humphrey* above n4 at [37].

[64] Clinical Horizons is also in the process of making a new appointment to the practice management position and is well advanced with the recruitment process.

[65] The detrimental effects of these issues may not be readily reversible and point away from an order for reinstatement.

[66] However not all the impacts on Ms Gelissen are immediately amenable to financial amelioration either. Should she succeed on her unjustified dismissal claim, issues of incompetency and dysfunctional management (proceeded on here on the basis of untested evidence and submission) will still not have been addressed. The issues of damage to self-esteem and increased financial insecurity mean that Ms Gelissen finds herself in a difficult and uncomfortable position now just as the respondent submits its staff would be if she were reinstated.

[67] In determining whether to make an order for interim reinstatement, the legislative requirements on me include “having regard to the object of this Act”. One of the mechanisms for building productive employment relationships through the promotion of good faith is “by acknowledging and addressing the inherent inequality of power in employment relationships.”

[68] This is a pertinent consideration in a situation where the Authority, in the exercise of its discretion, must weigh up the detriment to each party of having to bear the burden of an injunction before the substantive case. In contrast to a commercial contractual situation in the general law, the requirement on the decision maker here is to carry out the balancing exercise while acknowledging a power imbalance between the parties.

[69] In this situation I find that Clinical Horizons has considerably greater resources to ameliorate the impact of the burden of an interim injunction than does Ms Gelissen and that the balance of convenience narrowly weighs in her favour.

### **Overall justice of the case?**

[70] Ms Gelissen has an arguable case. In terms of the merits, I have focussed on the unjustifiable dismissal rather than the unjustifiable disadvantage claims. At this stage, and on the basis of untested evidence, I have concluded, that the merits weigh in Ms Gelissen’s favour.

[71] However, the logistics of returning her safely and effectively to the workplace are rather more problematic. Ms Gelissen has had difficult relationships with some of the people in her working environment and is still moving towards adequate insight into her own contributions to this situation. As suggested by the Chief Judge in *Humphrey*:

Our understanding of the benefits of a restorative approach in supporting successful employment relationships is developing at a pace, and is consistent with the underlying objectives of the legislation and the mutual obligations of good faith. This has implications for the steps that a fair and reasonable employer... can be expected to take in dealing with relationship difficulties.<sup>7</sup>

While Clinical Horizons does not have the resources of the employer in *Humphrey*, there is scope for this approach to be taken towards re-integrating Ms Gelissen back into the workplace.

[72] Standing back from the matter, and considering the overall justice of the case, I am not satisfied that that an immediate full interim reinstatement to the workplace should be ordered. Instead, as in *Humphrey*, the better approach in this situation is reinstatement to the payroll. This largely avoids the immediate potentially negative effects on the other employees in the practice until a substantive determination is reached or some other outcome achieved.

[73] I recognise that for Ms Gelissen there would be value in the actual work as distinct from being paid a salary. But there is some distance to travel before Ms Gelissen could be involved in the work of the practice.

[74] Directions to immediate mediation are to be made. The parties may then be able to determine for themselves if, and if so how, the employment relationship can be re-established.

## **Conclusion**

[75] I grant Ms Gelissen's application for interim reinstatement to the extent that Clinical Horizons is ordered to reinstate her to the payroll within three working days of 10 March 2022, as an interim measure until the Authority is able to determine her substantive claim or the parties reach other agreed terms of settlement signed under s149 Employment Relations Act 2000.

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<sup>7</sup> *Humphrey* above n4 at [52].

[76] The parties are directed to mediation within 14 days from 10 March 2022 and a copy of the corrected determination is to be provided to the National Manager, Mediation Services of the Ministry of Business, Innovation and Employment by the representative for Ms Gelissen.

[77] Should the parties be unable to agree the necessary arrangements and timing, orders may be sought.

### **Costs**

[78] Costs are reserved to be determined following any substantive application.

Pam Nuttall  
Member of the Employment Relations Authority