

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE**

[2023] NZERA 246
3219899

BETWEEN

NICHOLAS CLARKE
Applicant

AND

HABITAT FOR HUMANITY
(NELSON) LIMITED
Respondent

Member of Authority: Antoinette Baker

Representatives: Luke Acland, counsel for the Applicant
Peter Chemis, counsel for the Respondent

Investigation Meeting: 27 April 2023 at Christchurch

Determination: 17 May 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Nicholas Clarke was employed by the respondent (HFHN) through its Board. The chair of the Board is Mr Andrew Riordan.

[2] On 16 March 2023 HFHN dismissed Mr Clarke due to its finding of serious misconduct based on losing trust and confidence in him. This was based on Mr Clarke signing a conditional contract on behalf of HFHN to purchase land without first seeking the Authority from the Board. The Board decided that it could not trust Mr Clarke to continue in his role because it found that Mr Clarke did not acknowledge the seriousness of the action through his explanations, forming the view that his action was “reckless.”

[3] In communicating its decision to end Mr Clarke’s employment, the Board gave Mr Clarke an option to resign. Mr Clarke did not resign. He raised a personal grievance for

unjustified dismissal through his lawyer challenging both the dismissal for serious misconduct and the fairness of the disciplinary process. Later that day HFHN communicated further to Mr Clarke that as he had not resigned by the time given to decide to do so, he was dismissed but that he would be paid out a notice period. Some further opportunity was left open for him to reconsider resigning. Mr Clarke did not resign.

[4] This determination resolves Mr Clarke's application for interim reinstatement only. Findings on the untested affidavits in support and opposition, attached documents and counsels' submissions are solely for that purpose. Final findings will not happen until after a substantive investigation meeting.

[5] I will first outline the background identifying as I do where there are unresolved disputes about facts including disputes about the understanding each party took from communications with each other.

Background

[6] HFHN is a not-for-profit, charitable organisation at a regional level with affiliates elsewhere. Mr Clarke commenced his employment with HFHN on 29 October 2019 as General Manager. Mr Clarke's position was accountable to the Board of HFHN (the Board).

[7] Mr Clarke's job description (JD)¹ includes:

... the position is pivotal in [HFHN's] ability to deliver on our vision: A world where everyone has a decent place to live.

...responsible for planning and administering a programme of works that achieves our key strategic goals of:

- Building community impact to improve housing conditions;
- Building sector impact by partnering to increase shelter access;
- Building societal impact to inspire action to end housing poverty; and
- Building a sustainable organisation by mobilising resources and stewarding them faithfully.

¹ Affidavit of David Thomas Riordan, sworn 20 April 2023, annexure "B".

[8] Mr Clarke had a small senior leadership team (SLT) reporting to him and was responsible according to the JD for 'all HFHN's workstreams'. The JD sets out a broad range of relationship engagement responsibilities external to HFHN, relationships in the wider community. Mr Clarke's role is described as establishing and maintaining these relationships to achieve HFHN's goals.

[9] The sale of a property [property A] came to the attention of Mr Clarke. The property was discussed in house including a site visit that included Mr Riordan. The meeting minutes for a Board meeting on 20 February 2023 include: 'an initial discussion about the potential purchase of [property A]', there is reference to Mr Clarke's estimate of cost and that he 'is liaising with funders, the Council and the realtor and will keep the Board informed as conversations progress.'

[10] Mr Clarke and some of the SLT continued to investigate property A.

[11] Mr Clarke emailed the Board on 27 February 2023:

I am writing to let you know that I have submitted a Conditional Offer to [estate agent] for the purchase of [property A].

and that the following clause was included:

The Vendor agrees to:

- (a) Allow the Purchaser together with consultants employed by the Purchaser full access to the property for the purposes of the due diligence investigation: and
- (b) Provide to the Purchaser any information held relating to the property relevant to the due diligence investigation.

This agreement is subject and conditional upon the purchaser concluding due diligence to the purchaser's satisfaction in all respects by 27 April 2023.

This clause is inserted for the sole benefit of the purchaser who shall not be required to assign a reason for non-confirmation of this Agreement.

[12] Mr Clarke continued to say in this email that the above condition allowed HFHN to withdraw from the purchase at any time before completing due diligence but that taking this

step was necessary to enable HFHN to carry out the due diligence necessary. Mr Clarke further included that,

Should the offer be accepted by the Vendor, a full business case will be developed to enable the Board to make a formal decision. Should things develop to this stage, it is likely that a special Board meeting will be required to discuss this opportunity.

[13] The email concludes with an invite to the Board members to attend the property site the next day to further view the site towards the end of a scheduled building assessment. Mr Riordan was one who attended property A the next day.

[14] The 'Conditional Offer' referred to by Mr Clarke was in the form of an Agreement for Sale and Purchase of Real Estate (ASP)². It was not attached to the 27 February 2023 email referred to above.

[15] The ASP was emailed to the vendor by the real estate agent and it is not in dispute that Mr Clarke signed it prior to the above email to the Board on 27 February 2023.

[16] On 3 March 2023, after a phone call discussion between Mr Riordan and Mr Clarke, Mr Clarke emailed to Mr Riordan, at his request, a copy of the ASP that he had signed. His cover email said, 'As discussed, please find attached a copy of our conditional offer to purchase [property A]. We are currently awaiting a response from the developer.'

[17] On 3 March 2023 Mr Riordan emailed Mr Clarke (and copied in the other four Board members) outlining concerns about the contents of the ASP and asked Mr Clarke to provide the terms of the contract when HFHN purchased a previous property [property B] 'as in your words you were working under similar terms for this contract.' I take this to refer to the phone conversation on 3 March 2023 referred to above at [16]. Mr Riordan further asked Mr Clarke to provide the date the ASP was signed and submitted. Mr Clarke responded by inserting his answers to the board's questions in an email the same day.

² The contract document was in the form approved by the Real Estate Institute of New Zealand Incorporated and by the Auckland District Law Society. Eleventh Edition 2022

[18] Mr Clarke's response included comment on his understanding of the terms in the ASP that Mr Riordan had questioned including that the due diligence clause was used before for property B. Mr Clarke reiterated there was no risk and accepted Mr Riordan's invitation to meet on the following Tuesday (7 March 2023) so that in Mr Riordan's words 'we can all be on the same page; ask the relevant questions and discuss how we navigate through this.'³

[19] On 6 March 2023 Mr Riordan and Mr Clarke had a further phone conversation about property A. There is a dispute about some of the things said and meanings now taken by each. It is common ground that Mr Riordan was not pleased, that Mr Clarke reiterated the due diligence clause in the ASP protected HFHN, that he offered to ring the agent selling property A to rescind the offer and that Mr Riordan did not agree to taking this step. Untested is the explanation from HFHN that it was or could reasonably have been concerned about reputational risk to HFHN if the offer was withdrawn. Also, untested is whether in allowing the offer to remain on foot Mr Clarke could reasonably have concluded, as he says, that he had the continued support of the Board despite having signed the ASP without getting its approval.

[20] On 6 March 2023 Mr Clarke emailed the Board a copy of legal advice (also dated 6 March 2023) about the due diligence clause that was inserted into the ASP. The advice included was that the ASP was 'essentially an option to purchase', that it had a 'comprehensive due diligence clause' that this enabled HFHN to carry out a 'thorough' due diligence and then if it decided not to go ahead it could do so by 27 April 2023 with 'no obligation to give reasons.' Mr Riordan also rang the same lawyer and reassured himself about this advice.⁴

[21] On 7 March 2023 Mr Toon, a newly appointed board member, emailed Mr Clarke, copying in all other Board members, setting out his understanding there may be a special out of meeting cycle meeting and proposed to Mr Clarke the things the Board would be looking for 'documentation wise [about property A]'. Included later in this email is a further question: 'Is this a major transaction? If so, we may need to have additional paperwork to have

³ Andrew Riordan to Nick Clarke email 3 March 2023 1.25:17 pm copied to the Board.

⁴ Affidavit of Andrew Thomas Riordan sworn 20 April 2023, at [36].

shareholders approve.’ And then ... ‘we should agree to some standard wording that can be used in transactions you are undertaking prior to it being brought back to the board for approval. I have seen ‘subject to board approval and due diligence and the like being included.’ Mr Toon’s affidavit includes untested evidence that it was after he sent this email that he saw the ASP for the first time. He says he was dealing with a family issue out of town and had not appreciated the ASP had already been signed by that stage. Mr Clarke’s untested evidence is that Mr Toon’s email was one of the several things that occurred after he had notified that he had signed the ASP on 27 February 2023, that showed him that he had support for his actions to continue with the due diligence for property A.

[22] On 7 March 2023 there is a meeting. It is untested as to who attended or what was said or understood. Mr Clarke and Mr Riordan also had a phone conversation on that date. Mr Riordan raised concerns about the ASP being signed without Board approval in that phone conversation.

[23] On the 9 and 10 March 2023, Mr Clarke provided information about property A to the Board including a copy of the vendor’s June 2022 valuation provided to Mr Clarke by the real estate agent acting for the sale of property A.

[24] On the evening of 11 March 2023 Mr Riordan emailed Mr Clarke (copying in the Board) thanking him for the information he had provided about property A and included:

As you know from our substantial phone conversation on Monday [7 March 2023], my main concern is you signing the contract on [HFHN’s] behalf without the Board’s knowledge or authorisation.

Without wishing to appear pedantic, the contract you have committed the organisation to is not a ‘conditional offer’ as you describe but a signed agreement to purchase subject to certain conditions i.e. Habitat Nelson is contractually bound to proceed with the purchase unless it exercises its right to cancel the agreement under the due diligence provision.

I intend to discuss my concerns with the Board this coming week. If from that meeting the Board forms the view that you have acted outside your delegations, then I need to forewarn you that disciplinary proceedings are likely to follow.

While you are free to seek independent advice and representation, until further notice please do not discuss this matter with any other person or take further action in relation to the [property A].

Can you please confirm you have read and understood this email.

Regards Andrew

[25] Mr Clarke responded at length on 13 March 2023 and asked Mr Riordan in his cover email if he would like to meet for a ‘cup of coffee’ to discuss his response.

[26] Mr Clarke’s lengthy response opened with:

Clearly your concerns are significant as indicated in the gravity of your tone. As a Christian organisation firmly rooted in Christian principles – principles to which I strongly adhere, I would hope that any issues can be sorted out in a spirit of mutual goodwill, quickly and at the lowest level.

[27] Mr Clarke’s email includes his understanding that the Board’s concerns were:

1. The nature of the offer – submitted – conditional vs. contractually binding Habitat Nelson.
2. The process regarding how the offer was submitted.

[28] Mr Clarke went on to reiterate HFHN’s lawyer’s advice about the effect of the due diligence clause (as referred to above at paragraph [20]), and that ‘in submitting the conditional offer to purchase [property A] to the best of my knowledge and ability I did so following the same approach as to terms and conditions as when HFHN purchased [property B] in 2020’. Mr Clarke refers to Board meeting minutes of 22 January 2022 that describe an agreement for sale and purchase that Mr Clarke signed on 17 January 2023 for property B. Mr Clarke noted that ‘there was no query or criticism of my actions by the Board at that time.’ The reference document makes no reference as to whether Mr Clarke obtained the Board’s authority before signing.

[29] HFHN has provided an email from 7 January 2020 from Mr Clarke to the Board indicating that Mr Clarke sought a special meeting of the Board before signing the offer to purchase property B. Mr Clarke in his affidavit evidence says that he can ‘now see there is a difference for [property B]’ and that he did seek approval first. He then says, ‘if seeking approval first was the Board’s expectation I absolutely apologise, and that I will never do it again.’

[30] Mr Clarke finishes his 13 March 2023 response by saying that:

As I seek to fulfil my role, I continue to be the Board's servant. If the Board wants to introduce additional protocols regarding property purchases, I would welcome this and introduce them immediately without protest.

[31] On 14 March 2023 Mr Riordan emailed Mr Clarke at 8.33pm:

Thank you for your letter.

It raises a few questions we want to clarify. Myself, David [Mr Toon] and a representative are available to meet with you at 4.30pm tomorrow (Wednesday), we want to be in a position to make a final decision about these. Can you confirm your availability. It's important that we get these things finalised given what's happened. It remains a serious matter and you are free to bring a representative if you wish.

Regards

Andrew

[32] Mr Clarke's response was at 9.02am the next morning:

Dear Andrew

Thank you for your message and request for a meeting today. I am very happy to do so. [Includes arrangements of time and where to meet].

Kind Regards Nick.

[33] The offer to purchase as contained in the ASP was withdrawn on 14 March 2023 by the buyer's agent and before the vendor accepted it. The evidence is untested as to the instructions or decisions made that led to the withdrawal of HFHN's offer to purchase property A.

[34] Mr Riordan attended the meeting on 15 March 2023 with a support person, Mr Allpress. Mr Lingard, a representative engaged by HFHN, led the meeting and asked

questions. No contemporaneous notes of this meeting have been provided. Affidavits from attendees⁵ show a divergence in recollections of what was said or understood.

[35] It is common ground that Mr Clarke was told at the meeting that it was disciplinary, and that Mr Riordan and Mr Toon were present but said little.

[36] Mr Lingard in his affidavit says that after the meeting concluded he had a discussion with the Board and set out options, and that the Board decided it would terminate Mr Clarke's employment and that, 'Andrew and the directors were devastated as they all liked Mr Clarke at a personal level and believed he was a good person with many fine attributes.'⁶

[37] On 16 March 2023, HFHN emailed Mr Clarke a letter saying that the Board decided that Mr Clarke's action of signing the ASP without Board authorisation was serious misconduct, and that he acted recklessly in doing so. The Board said while Mr Clarke had apologised it did not accept Mr Clarke appreciated the seriousness of the situation, that he had taken 'umbrage' in the 15 March meeting to having his authority questioned and had attempted to 'blame' the lack of protocols on the Board. The letter included the Board's view that this caused it to no longer trust Mr Clarke to 'act professionally and in the company's best interests' or 'not to act unilaterally or engage in further reckless behaviour' and that 'Accordingly, the board has decided you cannot remain in the company's employment; it is however open to involving you in determining the manner of your departure.'

[38] This letter includes further that Mr Clarke was immediately suspended, that the Board's preference was for Mr Clarke to resign, not work out his notice, and to receive payment in lieu of notice. The Board gave Mr Clarke until 20 March 2023 to respond about resigning rather than be dismissed.

[39] Mr Clarke replied by email on 20 March 2023 explaining he had been away helping his elderly parents and asked for time to seek advice before replying asking for this to be until 5pm on 22 March 2023.

⁵ Attendees who have all sworn affidavits are Mr Lingard, Mr Clarke, Mr Allpress, Mr Riordan and Mr Toon.

⁶ Affidavit of Rodney James Lingard sworn 17 April 2023, paragraph 23.

[40] Mr Riordan's response was to say it was 'disappointing' that Mr Clarke went away without replying saying, 'I would have thought the choice the Board made in my letter dated 16 March was straightforward – either resign or be dismissed, both with a month's payment in lieu of notice'. Mr Riordan then finishes by saying Mr Clarke had until 5pm the next day to respond.

[41] Mr Clarke instructed Mr Acland to raise a personal grievance the next day, 21 March 2023, which was sent to Mr Riordan with a covering email asking for an urgent response and proposing a pathway forward to 'resolve this difficult time for Nick and the Board.' Mr Riordan confirms he received the personal grievance but that 'we took from this that he [Mr Clarke] did not intend to resign.'

[42] Later that day Mr Riordan emailed confirmation to Mr Clarke (attached to a cover email from Mr Lingard) that as he had not resigned, he was dismissed.

[43] The next day Mr Lingard for HFHN notified Mr Clarke's lawyer that it intended to release a statement about Mr Clarke's departure to staff. There was an offer again for Mr Clarke to consider resignation giving approximately two hours to take up this offer. Mr Clarke's lawyer emailed asking for a response to the personal grievance raised. That response came from Mr Lingard at 7.20am on 23 March 2023 listing all the reasons HFHN decided to dismiss Mr Clarke including that it had lost its trust and confidence in him because of his responses at the meeting on 15 March 2023. Mr Lingard referred to Mr Clarke blaming a lack of protocols and that when at the meeting Mr Clarke 'was advised his actions were reckless and reflected a serious error of judgment on his part' and that he took 'umbrage and blamed the situation on so called 'protocols''.

[44] Further correspondence between representatives has occurred. For present purposes I do not need to traverse it here.

[45] The parties tried to resolve the issue of interim reinstatement at urgent mediation. This was unsuccessful.

[46] Mr Clarke remains on pay until 20 July 2023.

The approach to interim reinstatement

[47] The Authority may order interim reinstatement while pending the outcome of a personal grievance.⁷ When determining interim reinstatement, the Authority must apply the law as it relates and have regard to the object of the Act.⁸ The object of the Act is to promote productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship.⁹

[48] Section 125 of the Employment Relations Act 2000 (the Act) provides that where remedies sought by an employee in respect of a personal grievance include reinstatement and it is determined the employee did have a personal grievance the Authority must provide for reinstatement ‘wherever practicable and reasonable, irrespective of any other remedy as specified in s 123’ of the Act, being remedies for grievances that include compensation and lost earnings. While this refers to the substantive outcome, in considering interim reinstatement I must also consider this stated statutory primary remedy.

[49] To determine Mr Clarke’s application, I must first decide whether he has shown there is a serious case to be tried asking whether there is an arguable case for unjustifiable dismissal and if so whether there is an arguable case for permanent reinstatement.¹⁰ If I find there is an arguable case to be tried, I need to consider where the balance of convenience lies. This involves assessing the impact on the parties of granting or declining the interim reinstatement. Finally, I need to stand back and consider the overall justice of the case.¹¹

⁷ Employment Relations Act 2000, s127(1)

⁸ Employment Relations Act 2000, s127(4)

⁹ Employment Relations Act, s3(a)

¹⁰ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90, at [12] and [13]; *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36, at [8]

¹¹ *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA); *X v Y Ltd and the New Zealand Stock Exchange* [1992] 1 ERNZ 862 (EmpC), at 872

[50] I will consider the application against these issues now.

Is there an arguable case for unjustified dismissal?

[51] Whether there is an arguable case that a dismissal is unjustified has a low threshold in that the case is not frivolous or vexatious.

[52] For Mr Clarke it is submitted there is a strongly arguable case. For HFHN it is submitted it is arguable but ‘finely balanced’.

[53] Whether Mr Clarke has an arguable case is based on the eventual assessment of whether HFHN in dismissing Mr Clarke acted in the way a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.¹²

[54] I find that Mr Clarke has a strongly arguable case for unjustified dismissal for the following reasons.

The reason for the Board’s decision to end Mr Clarke’s employment.

[55] It is submitted for HFHN that the signing of the ASP without approval was on its own a reason to find serious misconduct justifying HFHN’s decision to terminate Mr Clarke’s employment.

[56] It is submitted for Mr Clark that the reason for termination was not just the signing of the ASP but the Board’s finding that in doing this he had acted recklessly and it could not trust him not to act this way again.

[57] I find it strongly arguable that HFHN’s decision to dismiss was twofold based on the 16 March 2023 letter from Mr Riordan which is reinforced in submissions that the Board does not want Mr Clarke to return because it does not trust him not to act this way again.

¹² Employment Relations Act 2000, s103A.

Recklessness as serious misconduct as a reason for dismissal

[58] It is submitted for Mr Clarke that recklessness is not consistent with how serious misconduct is defined in Mr Clarke's IEA, recklessness being a type of negligence not usually considered to be serious misconduct.

[59] Mr Clarke's IEA does not include under the section that sets out how the employer may 'terminate without notice' any reference to recklessness.¹³ I find this point on its own weakly arguable as to Mr Clarke's claim that he was unjustifiably dismissed for serious misconduct. The list in the IEA refers to termination without notice or payment in lieu of notice and makes no mention of 'serious misconduct.'

HFHN's decision that Mr Clarke could not be trusted to continue in his role

[60] The protocols that HFHN says Mr Clarke did not follow remain untested as to their interpretation but on the face of it they refer to limitations as to Mr Clarke's delegations. However, Mr Clarke offered to work with the Board to clarify this, albeit his responses (untested as to the 15 March 2023 meeting) have been interpreted by the Board as saying he did not accept there were any protocols to cover this situation. Either way it is arguable that Mr Clarke did not get an opportunity to discuss his perceived lack of clarity about the protocols including having these to hand before or during the 15 March 2023 meeting.

[61] The 16 March letter records that Mr Clarke took 'umbrage' at Mr Lingard's assertion that he had acted recklessly. The letter further records that the Board assessed that because Mr Clarke 'blamed' the board for having no protocols it showed he was 'playing the victim' rather than taking responsibility for what he had done. These things the Board described as supporting its decision not to trust Mr Clarke to continue in his role including that it could not trust him to act in the company's best interests, not to act unilaterally and not to engage in further reckless behaviour. The tone here was challenged by Mr Clarke when raising his

¹³ IEA at clause 23.

grievance. I find this tone further supports that it is strongly arguable that Mr Clarke was treated unfairly because these conclusions were at the least never put to Mr Clarke and arguably could not be sustained from a one-off situation that Mr Clarke had explained he was sorry for and would work to put right.

[62] In summary, based on the above, I find Mr Clarke has a strongly arguable case to be tried regarding his claim that he has been unjustifiably dismissed.

Timeframe between the 15 March 2023 meeting and the decision to dismiss

[63] It has been submitted that Mr Clarke was not given an opportunity to respond to the HFHN's decision to find that it could not trust him to continue in his role resulting in a decision to dismiss him.

[64] Considering the chronological time frame above, it is strongly arguable that Mr Clarke was not given an opportunity to respond to this issue before he was dismissed for this reason. There is no documentation showing that HFHN raised its concerns about a lack of trust before the meeting. There is nothing in the 3 and 11 March 2023 emails from Mr Riordan to Mr Clarke about the board considering that it was investigating whether it could not trust him to continue in his role.

[65] I find it strongly arguable that the loss of trust resulting in the decision to dismiss, as it was in the 16 March 2023 letter and reiterated in HFHN's response to the personal grievance raised, stemmed largely from Mr Clarke's responses at the 15 March 2023 meeting when Mr Lingard put to him that he had acted recklessly.

Procedural unfairness invitation to the disciplinary meeting on 15 March 2023

[66] Mr Clarke was invited to the meeting on 15 March 2023 after HFHN raised and received responses in writing from Mr Clarke about the concern it had with him signing off the ASP without its approval. The invite to the meeting from Mr Riordan referred to seriousness (previously referred to in the same general way in Mr Riordan's 13 March 2023

letter) and that Mr Clark could bring support. It further included that HFHN wanted to clarify some things from Mr Clarke's 13 March letter and to make final decisions. No other specifics were provided about the Board needing to investigate whether Mr Clarke could be trusted to continue in his role pending his responses at the 15 March 2023 meeting.

[67] Mr Clarke attended the 15 March 2023 meeting, having replied to the invite positively and having arranged the appropriate room to meet at the workplace. He brought Mr Allpress as a support person. At this stage Mr Clarke remained legally unrepresented.

[68] It is common ground that Mr Clarke was told the meeting was disciplinary, at the meeting. It remains in dispute whether this was at the commencement or part way through. Mr Clarke has the opportunity to assert the truth of this in due course and the lack of a contemporaneous record by HFHN of that meeting means that this will need testing through differing recalls of attendees if relevant. However, what is before me supports that Mr Clarke went to a meeting arguably not understanding that the employer was having a meeting with a view to testing his responses to an allegation that he could not be trusted to continue in his employment.

[69] HFHN submits that it gave Mr Clarke a further opportunity to engage on whether his employment should be terminated¹⁴ but this is inconsistent with the letter dated 16 March 2023 which only leaves open the 'manner' of termination. Mr Clarke was to decide if he wanted to resign or be dismissed. As already referred to above, this two-option choice was reiterated by Mr Riordan in his email later: Mr Clarke could resign or be dismissed.

[70] I find in these circumstances Mr Clarke has a strongly arguable case that there were defects in the disciplinary procedure that were more than minor and caused unfairness to Mr Clarke.

[71] In summary, considering the above, I find that Mr Clarke has a strongly arguable case that HFHN's decision to dismiss him was not justified.

¹⁴ Submissions of Counsel for the Respondent 27 April 2023 at 10 (f).

Is there is an arguable case for permanent reinstatement

[72] It is submitted for HFHN that Mr Clarke's case is 'finely balanced' and is the sort of matter that would attract compensatory remedies only and not reinstatement. Remedies for unjustified dismissal have a starting point of reinstatement in that it must be considered wherever practicable and reasonable¹⁵. For Mr Clarke I am referred to the Employment Court's reference to the purpose behind giving primacy to reinstatement as a remedy for unjustified dismissal in that this was to remove the potential for a 'payment for dismissal' regime in New Zealand employment relationships.¹⁶ I agree with this submission. I have found that Mr Clarke has a strongly arguable case to be tried. Therefore, a first remedy to consider is whether if he were to be successful, permanent reinstatement would be a practicable or reasonable solution.

[73] It is submitted for Mr Clarke that he maintains a strong relationship with his staff and that the relationship between himself and the board has not been irreparably damaged (as is submitted for HFHN) to the point that the parties are not capable of continuing to work together.

[74] A member of the SLT is acting up in Mr Clarke's former role. The SLT support Mr Clarke's return to work as evidenced in their affidavits with reference to a letter that they collectively wrote to the Board in relation to this. On a day-to-day basis the immediate collegial support would not point to Mr Clarke's return as being impracticable. I further accept the submission that Mr Clarke has expressed his willingness to repair the relationship with the Board. Mr Clarke indicated a willingness to prevent the situation that occurred from happening again in his written responses before the 15 March 2023 meeting and the subsequent decision to dismiss him the next day.

[75] It has been submitted for HFHN that it is impracticable for there to be an interim reinstatement given that the Board must have a direct ongoing relationship with Mr Clarke and it will be difficult to prepare for any substantive hearing of this matter with Mr Clarke

¹⁵ Employment Relations Act 2000, section 125

¹⁶ *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59 at [41].

continuing in his role. I do not find this submission persuasive. The effect of interim reinstatement may be uncomfortable for the Board but any discomfort or inconvenience in preparing for a substantive matter is no different to any other person seeking to be reinstated on an interim basis.

[76] The Employment Court¹⁷ reinstated an employee on an interim basis in circumstances where there was a long-standing unresolved breakdown in the relationship between the employer and the employee, the employee and other employees. While that case involved a larger employer than HFHN, here the staff around Mr Clarke are supportive and indicating a desire for his return to continue and lead the charitable projects on foot. Similar also in that case, the employee's role was one that was senior and pivotal to the organisation's aims in terms of outward facing engagement with the wider community on an ongoing basis.

[77] I find Mr Clarke has a strongly arguable case for permanent reinstatement.

Where does the balance of convenience lie?

[78] I will assess the submissions before me under relevant submission headings to consider where the balance of convenience lies.

Emotional distress to Mr Clarke

[79] It is submitted for HFHN that there is no evidence to support Mr Clarke's emotional distress in relation to the detrimental effect on him if I did not reinstate him on an interim basis. However, I accept the submission that Mr Clarke is passionate about the role of general manager for HFHN and the sudden loss of his role has been distressing to him. As a matter of balance however I find this point is neutral.

¹⁷ *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59

Financial distress to Mr Clarke

[80] It is submitted for HFHN there is no evidence that Mr Clarke will suffer financially if I do not reinstate him pending the outcome of the substantive matter. I agree that I have no specifics before me, and that Mr Clarke remains on a salary for an extended period beyond dismissal. I find the balance is neutral in relation to financial distress.

The consequence for the Board of continuing to trust Mr Clarke to continue in his role

[81] In broad terms it is submitted that HFHN do not want Mr Clarke back because it does not trust him. To a large extent I have already considered this issue.

[82] HFHN submits that I take note of the strength of Mr Toon's affidavit in that he expresses concern about Mr Clarke's capability based on what I have already traversed above. I have already found that it was strongly arguable to be more than just the signing of the ASP that led to the decision to dismiss for serious misconduct, and that the decision not to trust Mr Clarke was never put to him to be part of that conversation before HFHN decided to dismiss on that basis. It is further submitted now for HFHN that Mr Clarke acted 'wilfully and intentionally.' This submission does not appear to be based on the reasons given by HFHN to Mr Clarke for dismissing him.

[83] While it remains untested, my consideration at this point is that the merits of the case weigh in favour of Mr Clarke showing that he has never had his integrity questioned in his role before and that, as submitted for Mr Clarke, what he did was at worst a single error of judgment not warranting a decision that the Board could no longer trust him. Again, as noted above Mr Clarke has consistently said he would work with the Board to ensure such an issue did not arise again.

[84] I find the above weighs in favour of Mr Clarke.

The effect of the SLT supporting Mr Clarke's return to the workplace

[85] I have already noted above that the SLT support Mr Clarke's return to the workplace. It is submitted for HFHN that this is a reason not to reinstate Mr Clarke because the Board must then work with Mr Clarke and the SLT who may not collectively be supportive of the Board. HFHN's submission is that 'there are no realistic checks and balances in place'. If that is to mean that neither Mr Clarke nor the SLT are to be trusted as a group, then I refer again to my findings above that Mr Clarke has a strongly arguable case for unjustified dismissal and for reinstatement.

[86] In reading the affidavits in support of Mr Clarke I do not accept as submitted for HFHN that they simply refer to staff missing Mr Clarke and having a concern for their workload or HFHN's external reputation. They include support for his integrity.

[87] HFHN has submitted that Mr Clarke has acted 'wilfully and intentionally' and (in oral submissions) that 'who knows what will be found out' by the time of the substantive matter. I find these submissions inconsistent with the material before me and regarding the latter, speculative at best.

[88] I find this point weighs in favour of Mr Clarke.

The longer Mr Clarke is away the harder it will be to reintegrate later if permanent reinstatement is ordered

[89] For Mr Clarke it is submitted that where there is an arguable case for permanent reinstatement an order for interim reinstatement should be made because otherwise this would jeopardise the possibility of permanent reinstatement in the future. Mr Clarke's JD shows me that he has a very senior role that is pivotal and outward facing. That seniority and nature of his job leans towards it being more difficult for him to reintegrate later, months down the track if he is reinstated on a permanent basis. To that extent HBHN's submission that this could be said of anyone arguably has less weight. I find this point favours Mr Clarke.

[90] Based on the above I find that the balance of convenience favours Mr Clarke to be reinstated on an interim basis.

Overall justice

[91] Finally, I am to stand back and consider the overall justice of this matter before deciding whether to reinstate Mr Clarke on an interim basis.

[92] In terms of the merits I have found that Mr Clarke has a strongly arguable case relating to his grievance and for gaining permanent reinstatement. I do not sense from all that is in front of me that it will be an impossible task for the Board, Mr Clarke and as necessary, the SLT to consider a way to work together for HFHN's common cause. This is a known charitable organisation with Christian principles at its core. I do not find that returning Mr Clarke to his role in the interim will create the impossible environment that HFHN submits it will create. It may be challenging but not impossible in terms of finding a workable employment relationship to go forward. It will equally avoid the injustice to Mr Clarke if the opportunity at a date months from now results in it being impracticable for him to be reinstated. Standing back, this will also be consistent with the object of the Act to promote productive employment relationships.

[93] HFHN submits that it would be 'particularly wrong' to reinstate Mr Clarke when he maintains he had done nothing wrong and has followed correct procedures when in fact he has not. I have already considered this point and found he has a strongly arguable case.

[94] I find that the overall justice supports reinstating Mr Clarke on an interim basis.

Order

[95] Based on the signed undertaking as to damages and pending further order of the Authority including any outcome in the substantive matter, I order that Habitat for Humanity (Nelson) Limited reinstate Nicholas James Clarke on an interim basis to his former position

on 31 May 2023 no later than fourteen days from the date of this determination giving the parties the opportunity to meet and or discuss details of Mr Clarke's return.

Further steps

[96] A telephone conference is to be convened as soon as practicable to organise a date for a substantive investigation meeting.

Costs

[97] Costs are reserved.

Antoinette Baker
Member of the Employment Relations Authority