

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 300
3214359

BETWEEN

HILARY SEYMOUR
Applicant

AND

THE CHIEF EXECUTIVE OF
ORANGA TAMARIKI –
MINISTRY FOR CHILDREN
Respondent

Member of Authority: Rowan Anderson

Representatives: Liz Lambert and Erika Whittome, advocates for the Applicant
Joe Perrot, counsel for the Respondent

Investigation Meeting: On the papers

Submissions received: 17 February 2023 from Applicant
12 May 2023 from Respondent

Determination: 9 June 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The respondent in this matter is the Chief Executive of Oranga Tamariki – Ministry for Children (Oranga Tamariki). Hilary Seymour was employed as a youth worker for Oranga Tamariki in Wairoa commencing her employment in May 2021. Ms Seymour’s last day at work was 10 January 2022 and on 25 January 2022 she was issued a letter giving one months’ notice of termination.

[2] The dismissal of Ms Seymour from her employment followed the introduction of the COVID-19 Public Health Response (vaccinations) Order 2021. Ms Seymour

chose to remain unvaccinated following a process which included notification by Oranga Tamariki that it could not legally permit Ms Seymour to perform her role.

[3] Ms Seymour has lodged a statement of problem seeking remedies in relation to various claims including that she was unjustifiably dismissed from her employment, that she was unjustifiably disadvantaged in her employment, and that she was subject to coercion and that Oranga Tamariki contravened s 92 of the Health and Safety at Work Act 2015. Ms Seymour seeks an order, on an interim basis, for reinstatement to her employment.

[4] Oranga Tamariki denies Ms Seymour's claims and opposes the application for interim reinstatement.

[5] Ms Seymour's substantive claims are to be investigated at a future date and this determination deals only with her application for interim relief until such time as the substantive matters have been determined. Ms Seymour has provided an undertaking that she will abide by any order that the Authority may make in respect of damages.¹

The Authority's investigation

[6] A case management conference was convened on 14 April 2023 to discuss the interim reinstatement application. I issued directions at the case management conference, including a timetable for the lodgement of written submissions and affidavits.

[7] The preliminary matters subject to consideration in this determination have been, with the agreement of the parties, dealt with 'on the papers' with affidavits and written submissions having been lodged. The findings in this determination are provisional in nature and all relevant evidence will be subject to further investigation at the substantive hearing to be scheduled.

[8] Affidavits were lodged from Ms Seymour and Rowena Beaton, a current employee of Oranga Tamariki, in support of Ms Seymour's application for interim reinstatement. Oranga Tamariki lodged affidavits from Karl Severinsen, Acting Regional Manager of Youth Justice Central for Oranga Tamariki and Nicole Lambe,

¹ Employment Relations Act 2000, s 127(2) and (3); Hilary Seymour - undertaking as to damages dated 16 February 2023.

Manager of Oranga Tamariki's High and Complex Needs Unit. The parties also lodged written submissions.

[9] By Minute dated 22 May 2023 the parties were invited to lodge any further submissions as to whether Ms Seymour has an arguable case in relation to her two other claimed personal grievances. No further submissions were received.

The approach to interim reinstatement

[10] The Authority may order interim reinstatement pending the hearing of a personal grievance.² In determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the objects of the Act.³

[11] To determine this matter, I must consider whether there is a serious question to be tried⁴. That requires consideration as to whether Ms Seymour has an arguable case, in other words that her claims are not vexatious or frivolous⁵, as to the claimed personal grievance, and if applicable, as to her application for permanent reinstatement.⁶

[12] If Ms Seymour has a serious case to be tried, I must then exercise my discretion by considering where the balance of convenience lies and, standing back from the case, consider what the overall justice of the case requires I do.⁷

Step 1 - Is there a serious case to be tried?

Does Ms Seymour have an arguable case as to her substantive personal grievance claims?

[13] Oranga Tamariki concedes that the threshold for whether Ms Seymour has an arguable case is low but submits that Ms Seymour's claim is not reasonably arguable and that she has a very weak case overall.

[14] In terms of the merits of Ms Seymour's claim, Oranga Tamariki submits that its actions were those of a fair and reasonable employer and that the dismissal was

² Employment Relations Act 2000, s 127(1).

³ Employment Relations Act 2000, s 127(4).

⁴ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90, at [12] and [13].

⁵ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90, at [12].

⁶ *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36, at [8].

⁷ *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.

procedurally and substantively justified. It says that its application of the COVID-19 Public Health Response (Vaccinations) Order 2021 was well considered and justified. From a procedural perspective, it says it provided Ms Seymour sufficient notice and opportunity to comply with a legislative requirement that she be vaccinated, that it accommodated work from home arrangements for Ms Seymour to the extent that was feasible, and that redeployment was not possible.

[15] Ms Seymour submits that there is no evidence of any consideration by Oranga Tamariki as to alternatives to the termination of her employment. Ms Seymour's submissions refer to the requirement that reasonable alternatives to termination be exhausted by virtue of clause 3(4) of Schedule 3A of the Employment Relations Act 2000 (the Act) and referred to two previous determinations of the Authority.⁸

[16] Clause 3(4) of Schedule 3A does not require an employer to exhaust all alternatives to termination, and instead approaches the requirement on the basis of "reasonable alternatives". Contrary to Ms Seymour's submissions, I consider the submissions and affidavits lodged by Oranga Tamariki disclose at least some evidence that alternatives to termination were explored. However, I find that Ms Seymour, having regard to the limited and untested evidence available, has at least a weakly arguable case that the dismissal was unjustified for procedural reasons relating to the alleged failure as to the exploration of alternatives.

[17] I am satisfied that Ms Seymour has an arguable case as to her unjustified dismissal claim. I consider it unnecessary to say anything more at this juncture as to the strength of Ms Seymour's claims.

Does Ms Seymour have an arguable case for permanent reinstatement?

[18] Section 125 of the Act requires the Authority to provide for reinstatement wherever practicable and reasonable.⁹ Reinstatement is the primary remedy.

[19] Ms Seymour submits that reinstatement is practicable and reasonable and additionally her evidence referred to the employment of other persons by Oranga Tamariki in circumstances where they were not vaccinated.

⁸ [2022] NZERA 693 and [2023] NZERA 56.

⁹ Employment Relations Act 2000, s 125.

[20] Oranga Tamariki did not make submissions directly as to the issue of whether Ms Seymour has an arguable case in relation to permanent reinstatement. However, Mr Severinsen's evidence is that Ms Seymour has not been in the employ of Oranga Tamariki for at least 14 months and that there are no relevant vacant positions available.

[21] I do not consider the assertions made as to the absence of any relevant vacancy to be determinative, and, at this point having regard to the untested evidence, no issue appears to arise in relation to current vaccination status. I am satisfied that Ms Seymour has an arguable case that permanent reinstatement would be practicable and reasonable.

Step 2 - Who does the balance of convenience favour?

[22] Ms Seymour's affidavit provides some limited evidence as to her personal circumstances in the time since she was dismissed, including as to her living arrangements and income. Ms Seymour made submissions as to the balance of convenience, including as to the following matters:

- (a) The vaccine policy having been revoked as of 24 August 2022;
- (b) An attempt to mediate having been declined by Oranga Tamariki;
- (c) The advertising of a vacancy for a youth worker in November 2022; and
- (d) Ms Seymour having been in receipt of Work and Income payments since her dismissal.

[23] Oranga Tamariki submits that Ms Seymour has not been employed for a year and two months and that the reinstatement is not practical and reasonable. It says that the Authority should consider the substantial time that has passed since the dismissal. It also submits that there are no current suitable vacancies nor the budget to pay her a salary, and that the granting of interim reinstatement would require significant reallocation of resources impacting Oranga Tamariki and that given the time that has elapsed on-site relationships and practices have moved on.

[24] Considering and balancing all the relevant submissions and evidence, I find the balance of convenience favours Oranga Tamariki. Whilst a case for permanent reinstatement may yet be made out, I consider the impact on Oranga Tamariki and its operations, particularly given the significant delay in Ms Seymour's seeking of interim reinstatement, would be significant.

Step 3 - Where does the overall justice lie?

[25] I must now, standing back from the case, consider what the overall justice of the case requires I do.¹⁰

[26] A significant factor is the delay in the making of an application for interim reinstatement. Ms Seymour was given notice of the termination of her employment on 25 January 2022. The application for interim reinstatement was lodged on 16 February 2023, more than 12 months after Ms Seymour was given notice of the dismissal.

[27] I have found that the balance of convenience favours Oranga Tamariki. I also consider that the delay is both significant and unreasonable. Whilst on one view such consideration may be strictly unnecessary¹¹, I am not satisfied that making an order for interim reinstatement is appropriate having regard to the significant delay.

[28] The application is ultimately not one seeking to preserve the status quo, nor the situation that existed prior to a recent event. Instead, it seeks interim relief in the form of a change to the circumstances that have prevailed for over 12 months. The granting of the remedy sought would not amount to preserving Ms Seymour's position pending the determination of her personal grievance claim.

[29] Ms Seymour's claim for interim reinstatement is unsuccessful.

Costs

[30] At the case management conference held on 14 April 2023 I indicated, notwithstanding the usual practice of the Authority, that I might consider the issue of costs in relation to the interim reinstatement application prior to any determination in relation to Ms Seymour's claims.

[31] Costs are reserved and I consider they are best left till the substantive claims have been resolved. If either party disagrees that party shall have 14 days from the date

¹⁰ *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.

¹¹ The preservation of the 'status quo' has been considered a relevant factor in the consideration of interim injunctions where other factors are evenly balanced. See, for example, *American Cyanamid Co v Ethicon Ltd* [1983] 2 All ER 504, at 511 per Lord Diplock. See also, consideration in *New Zealand Forest Products Ltd v New Zealand Stock Exchange* (1984) 2 NZCLC 99,051.

of this determination to lodge a memorandum on costs. The other party will then have a further 14 days to lodge a reply memorandum

Case management conference

[28] A further case management conference will be scheduled in relation to the conduct of the Authority's investigation into Ms Seymour's substantive claims.

Rowan Anderson
Member of the Employment Relations Authority