

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 338
3220719

BETWEEN	LEI YANG, Applicant
AND	TE WHATU ORA – HEALTH NEW ZEALAND, TE TAI TOKERAU (NORTHLAND) Respondent

Member of Authority:	Andrew Gane
Representatives:	James Cartwright, counsel for the Applicant David Griddle, counsel for the Respondent
Investigation Meeting:	By submissions hearing 24 May 2023 (by audio-visual link)
Other: material received:	16 June 2023
Determination:	27 June 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 15 November 2006 Lei Yang was employed by the Northland District Health Board, now called Te Whatu Ora-Te Tai Tokerau (Te Whatu Ora). On 14 March 2023, Ms Yang's employment ended by way of dismissal.

[2] On 29 March 2023 she lodged a statement of problem with the Authority in which she alleged that Ms Yang was unjustifiably disadvantaged by Te Whatu Ora arising from a breach of good faith in implementing an unreasonable training/performance management process and unjustifiably suspending her. She also alleged that she was unjustifiably dismissed. In her statement of problem, Ms Yang

applied for interim reinstatement, supported by an affidavit and an undertaking as to damages.

[3] Te Whatu Ora does not agree that Ms Yang suffered an unjustified disadvantage by implementing a training programme, and says that she was justifiably stood down due to safety concerns regarding her level of competency. Te Whatu Ora denies Ms Yang was unjustifiably dismissed and opposes her application for interim reinstatement.

[4] This determination deals only with Ms Yang's applications for interim reinstatement. The investigation of her substantive claims will be held in due course.

The Authority's Investigation

[5] On 30 March 2023, the Authority held a case management conference with the representatives to set a timetable for Ms Yang's applications for interim reinstatement. It advised the parties of the Authority's intention to determine the application on the papers with the parties' representatives speaking to submissions.

[6] In terms of the documents lodged with the Authority, an affidavit from Ms Yang was provided in support of her interim reinstatement application. A further affidavit in reply from Ms Yang was lodged with the Authority on 28 April 2023. On behalf of Te Whatu Ora a statement in reply, an affidavit from Steven McCollough, service manager of pathology, and supporting documents were lodged in the Authority.

[7] During the preliminary investigation meeting on 24 May 2023 submissions were heard from the parties' representatives.

[8] While a significant amount of evidence has been filed, it remains untested. I am not able to resolve evidential matters in dispute between the parties at this early stage of the proceedings. That is the function of the substantive investigation meeting.

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this preliminary determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the preliminary matter and specified orders made. It has not recorded all evidence and submissions received. In determining this matter, I have carefully considered all the material before it, including all the evidence provided by the parties and their submissions.

The law relating to interim injunctions.

[10] The law relating to interim injunctions is to be applied in determining whether to order interim reinstatement having regard to the object of the Act.¹ In essence, the object of the Act is to build productive employment relationships through the promotion of good faith.²

[11] The principles relating to interim reinstatement when considering Ms Yang's application are:

- (i) Does Ms Yang have an arguable case for unjustified dismissal and an arguable case for permanent reinstatement?
- (ii) Where does the balance of convenience lie pending a substantive investigation and a final determination of Ms Yang's claim?
- (iii) Where does the overall justice of this case lie until the substantive matter can be determined?³

Analysis

Background

[12] Before considering whether Ms Yang has an arguable case for unjustifiable dismissal and permanent reinstatement, it is necessary to set out in some detail the relevant facts in order to put the parties' submissions in their proper context.

[13] As stated above, Ms Yang started working for Te Whatu Ora in November 2006, working full-time in the Whangarei Hospital Medical Laboratory (the laboratory).

[14] In January 2020 following the identification of a number of issues within the Whangarei hospital laboratory services, Te Whatu Ora undertook a review of the laboratory operations. Following the review, the laboratory services was restructured. As a result of the organisational restructure there was a change in reporting structures and team frameworks. After the restructure Ms Yang commenced work as a Medical Laboratory Scientist (MLS) working within the microbiology department.

¹ Employment Relations Act 2000, s127(4.)

² Employment Relations Act , s3.

³ *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90 at [12]-[13]

[15] On 15 November 2021 Richard Tuff the new head of the department of microbiology, had an informal meeting with Ms Yang. In the meeting Mr Tuff proposed to offer Ms Yang additional training. Ms Yang declined to undertake any additional training.

[16] After the meeting Ms Yang made a formal complaint about Mr Tuff on 16 November 2021. She stated she felt Mr Tuff's demeanour at the meeting had been threatening and intimidating.

[17] On 1 April 2022 Ms Yang was invited to a meeting with Steven McCullough the pathology service manager. At the meeting a discussion was held about Ms Yang undertaking further training. On 5 April 2022, Ms Yang was informed via email that a training plan would be established. It was Ms Yang's understanding that the training plan was not punitive.

[18] On 8 June 2022, Te Whatu Ora wrote to Ms Yang to confirm initiation of a training plan on 16 June 2022. Ms Yang alleges that Te Whatu Ora did not consult with her regarding the implementation of the training plan or its structure.

[19] Between 16 June 2022 and 23 December 2022 Ms Yang underwent an extensive structured training plan which involved her working her way through all of the benches in the microbiology department, to achieve competency sign off from the heads of departments in their particular discipline.

[20] At the conclusion of the training plan Ms Yang was signed off in only two of the eight sections she needed to complete. The areas of sterile fluids, urine, faeces, day one, day two and quality control were not successfully completed by Ms Yang. Ms Yang was deemed to be not competent in those practice areas.

[21] On 21 December 2022 Ms Yang was sent a letter inviting her to an investigation meeting to discuss a range of issues, including her competency levels.

[22] On 18 January 2023 a meeting was held with Te Whatu Ora Management and Ms Yang to discuss the issues identified in the letter of 21 December 2022. Te Whatu Ora alleges that at the meeting Ms Yang agreed for her training records to be reviewed by David Hammer, consultant clinical microbiologist. Ms Yang says she was instructed to stay away from work and was not consulted about being stood down. Ms Yang alleges she was unjustifiably suspended.

[23] After reviewing Ms Yang's training records, Mr Hammer stated that although the training was appropriate, Ms Yang failed to achieve competency in any of the fields that were required to work as an independent scientist in microbiology or in an unsupervised role.

[24] On 2 February 2023 Te Whatu Ora wrote to Ms Yang and communicated its preliminary decision that serious misconduct had been demonstrated in multiple areas and termination of employment was warranted in this instance.

[25] On 16 February 2023 Ms Yang submitted a letter in response to the preliminary decision. On 7 March 2023 Te Whatu Ora met with Ms Yang to hear directly from her before making a final decision.

[26] On 14 March 2023 Te Whatu Ora wrote to Ms Yang confirming the decision to terminate her employment.

[27] Ms Yang alleges the lack of communication and continued failure to warn her that punitive action may occur at the conclusion of the training plan, was a breach of Te Whatu Ora's duty of good faith to her.

Arguable case of unjustified dismissal

[28] The first question for consideration is whether there is an arguable case Ms Yang was dismissed unjustifiably and that she will be permanently reinstated. An arguable case means a case with some serious or arguable, but not necessarily certain, prospects of success.⁴

[29] Section 103A of the Act sets out the test for justification which requires an objective assessment of whether Te Whatu Ora's actions were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal or action occurred. An employer's decision to dismiss an employee must be, when examined objectively, substantively justifiable and procedurally fair for it to survive scrutiny by the Authority or the Employment Court.

[30] Ms Yang's affidavit of 28 March 2023 records that her problems started after the organisational restructure and change in reporting structures and team frameworks. She

⁴ *X v Y Ltd v NZ Stock Exchange* [1992] 1 ERNZ 863 at 872

refers to her meeting with Mr Tuff in November 2021. She laid a complaint regarding that meeting, which she alleges Te Whatu Ora ignored.

[31] Ms Yang had to complete a training plan between 16 June 2022 and 23 December 2022. The plan involved her working her way through all of the benches in the microbiology department to achieve competency from the heads of departments in their particular discipline. She alleges that the training plan was not reasonable, she was not properly consulted about it and was not warned as to the consequences of not completing the training to a required level. Instead, she says she was simply told that the matter would be reviewed at the end of the process.

[32] In response Te Whatu Ora maintains that the existence of a six-month retraining program did not exonerate Ms Yang from liability, nor protect her from adverse outcomes in the face of unsafe practices. Further to that the existence of the retraining program is an irrelevancy given Ms Yang's conduct, the complaints from her colleagues and the breaches of the organisation's code of conduct and organisational values. A termination of employment was always something that was available to Te Whatu Ora.

[33] There are two potential findings that may support the claim that Ms Yang's dismissal was not justifiable. Firstly, that Te Whatu Ora failed to provide adequate information about its decision to implement a training programme that could have an adverse effect on her employment and that the subsequent disciplinary process was procedurally unfair. Secondly, that Te Whatu Ora failed to fairly consider redeployment upon Ms Yang's unsatisfactory completion of the training programme. Either may support a finding that Ms Yang's dismissal was justified.⁵

Conclusion on arguable case of unjustified dismissal

[34] Based on all the information that I have before me, I accept that Ms Yang has an arguable case that the Te Whatu Ora did not act as a fair and reasonable employer could have done with respect to the question of redeployment and this may render her dismissal unjustified. That being said however the case is not a particularly strong one because it is not entirely clear whether Ms Yang would reach the required competency levels even with further training.

⁵ Employment Relations Act, s103(5)

Weakly arguable case for permanent reinstatement

[35] Section 125 of the Act states that reinstatement is the primary remedy, but it must both be practical and reasonable to do so. Here I look at the feasibility or practical workability of re-imposing this employment relationship.

[36] Ms Yang had worked for Te Whatu Ora for 15 years. Prior to 2021 there had been no issues raised about her level of competency and she was signed off annually as being competent. There was no evidence of any previous formal disciplinary action having been taken against her.

[37] While I am yet to question Ms Yang and Mr Hammer regarding their evidence, based on a broad impression of what is before me, I see difficulties in Ms Yang returning to her role.

[38] Mr McCollough in his affidavit outlines serious safety concerns if Ms Yang was to be reinstated. He states it would also effectively result in the loss of two staff members and adversely impact upon the laboratory in a variety of ways. If Yang was reinstated Te Whatu Ora could not employ a contributing and safe scientist to replace her and the experienced scientist tasked with supervising Ms Yang would be unable to perform the majority of their normal work and this would result in a significant cost, loss of resource and capability.

[39] Te Whatu Ora say that even though there are two vacancies in the laboratory, there is no position for Ms Yang as to be reinstated to, because of her lack of competency to carry out the role and it would take an excessive amount of time, money and resources to have her reinstated.

Conclusion on arguable case for reinstatement

[40] Given the conflicting affidavit evidence and Ms Yang's ability to perform the duties of the role, it is difficult to conclude it would be practical or reasonable for Ms Yang to be reinstated to the role in a permanent setting. Based on the evidence before me and considering all the relevant issues, my assessment at this early stage is that Ms Yang has a very weak arguable case for permanent reinstatement.

Balance of convenience

[41] I move on to consider the balance of convenience, which requires an assessment regarding the impact on each party if interim reinstatement is granted or not. My preliminary view, based on untested evidence, is that the claim of unjustified dismissal is not strong but is arguable, however the claim for permanent reinstatement is weak. This weighs against interim reinstatement when assessing where the balance of convenience lies.

[42] I take into account that Ms Yang wishes to return to work. I accept that the longer she is not working, the harder it will be for her to stay current with the practice of a MLS. It was submitted that Ms Yang would face a financial hardship of having to wait. She is the sole provider for her household. However, any financial burden could be compensated for if she is successful with her substantive claim.

[43] I take into account the potential disruption for Te Whatu Ora if interim reinstatement is granted. It has spent considerable resources already in training Ms Yang. If Ms Yang is placed back on the staff payroll, it is not clear what her role might be assuming for the moment, that she was allowed to work.

[44] In order to have Ms Yang reinstated, Mr McCollough's affidavit makes clear that the process would not only be expensive, but time-consuming and a strain on limited resources.

[45] I find that it would not be a good use of public funds for Te Whatu Ora to provide further training and supervise Ms Yang at this point in time.

[46] Finally, there is the submission that Yang's return would cause significant disruption among her colleagues and management. Mr McCollough says that there are allegations of incompatibility. He states that collegiality among hospital staff is vital for the organisation to function smoothly and to serve its communities effectively. I find that the disruption that would occur as a result of Ms Yang's return to work would have been for nothing if she did not succeed with her application for permanent reinstatement.

[47] It is acknowledged that the longer Ms Yang is not practicing MLS, the more difficult it will be for her to keep her skills up to date. However, the significant cost in having her return to work and the potential disruption Ms Yang's return would have on her colleagues and staff, weighs against interim reinstatement.

[48] Weighing up this assessment, I find that the balance of convenience weighs in favour of the Te Whatu Ora and against the granting of interim reinstatement.

Overall justice

[49] I go on to consider the overall justice of the case. The Court of Appeal stated that the overall justice assessment was 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.⁶

[50] Standing back from the details considered in relation to the factors concerning an arguable case and the balance of convenience, an order for interim reinstatement is not in the interests of justice in this case

[51] The merits of Ms Yang's case were not strong enough to make her eventual prospects for permanent reinstatement sufficiently clear. Ordering her reinstatement meanwhile has operational and relationship difficulties that could not have practically and reasonably provided a workable solution in the interim period

Should Ms Yang be reinstated?

[52] As outlined above, I am satisfied that there is a serious question to be tried regarding whether Ms Yang was unjustifiably dismissed by Te Whatu Ora. However, on the evidence before me, Ms Yang has established a very weak case for permanent reinstatement.

[53] The balance of convenience and overall justice do not support Ms Yang being permanently reinstated.

[54] Ms Yang's application for interim reinstatement is not successful.

⁶ *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA at [47]

Costs

[55] Costs are reserved pending the outcome of the substantive investigation of Ms Yangs's grievance application.

Andrew Gane
Member of the Employment Relations Authority