

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 450
3381143

BETWEEN

JANET DU FALL
Applicant

AND

THE MOKOIA
INTERMEDIATE SCHOOL
BOARD
Respondent

Member of Authority: Eleanor Robinson

Representatives: Russell Du Fall, representing the Applicant?
Joseph Williams and John Gray-Smith, counsel for the
Respondent

Investigation Meeting: 18 July by AVL

Determination: 25 July 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Before the Authority is an application for interim reinstatement brought by the Applicant, Janet Du Fall, under s 127 of the Employment Relations Act 2000 (the Act).

[2] Ms Du Fall was dismissed by the Respondent, Mokoia Intermediate School Board (MISB), on 30 April 2025 on the basis of incompatibility and the irreconcilable breakdown in the employment relationship.

[3] Ms Du Fall claims that she was unjustifiably dismissed from her position as Executive Officer in the Executive Management Group and is seeking reinstatement on both an interim and a permanent basis.

[4] MISB claims that Ms Du Fall's dismissal was warranted, and this decision was open to it as a fair and reasonable employer in all the circumstances at the relevant time. MISB opposes the claim for interim reinstatement and the substantive claim.

[5] This determination addresses the issue of interim reinstatement.

The Authority's Investigation

[6] Following the initial application by Ms Du Fall, the parties attended mediation, but this did not resolve the issue.

[7] The application for an interim injunction was accompanied by an undertaking as to damages and an affidavit by Ms Du Fall.

[8] A case management conference was held on 19 June 2025. The parties were directed to file submissions on 15 July 2025.

[9] The parties agreed to the Authority determining this preliminary issue of the interim reinstatement application based on the Statement of Problem and the Statement in Reply, documents submitted by the parties, on affidavit evidence, and on submissions from the parties.

[10] The evidence before the Authority for the purpose of determining this interim reinstatement application has been presented as is usual in such applications in affidavit form by Ms Du Fall and her husband, Russell Du Fall.

[11] Affidavits were lodged on behalf of MISB by:

Rawiri Wihapi: Principal of Mokoia Intermediate School (the School)

Kathryn McMurdo: Deputy Principal

Bruce Davidson: Presiding Member MISB

Glen Law: A teacher at the School and the Staff Representative to MISB

Alicia Bell-Murray: Parent representative to MISB and on the MISB's finance committee

Irene Walden: Parent representative to MISB and part of the Complaints Sub-Committee set up to address the complaints raised by Ms Du Fall.

[12] As the affidavit evidence presented must necessarily remain untested until the substantive investigation of the unjustified dismissal personal grievance, any findings of fact by the Authority in this determination are provisional only and may change later once the claims have been fully investigated and all witnesses have been examined on their evidence.

[13] 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 all evidence and submissions received.

Principles

[14] I granted Ms Du Fall's application for this matter to be dealt with on an urgent basis because this is the usual procedure for dealing with an application for an interim reinstatement. In determining this matter, I must apply the law relating to interim reinstatement as set out in s 12(1) and s 12(4) of the Act which include recognising that employment relationships are built on the legislative requirement for good faith behaviour and addressing the inherent inequality of power in employment relationships.¹

[15] At the Investigation Meeting held by AVL on 18 July 2025, I heard submissions from the parties' representatives in relation to the interim reinstatement application and tested these by questioning how the available untested affidavit evidence related to the relevant principles for determining an interim injunction application.² Those principles fall to be addressed by the answers to the following questions:

- (a) whether or not Ms Du Fall has established that there is a serious case to be tried in relation to the claim for unjustifiable dismissal; and if so:
- (b) Is there a serious case in relation to the claim for permanent reinstatement?

[16] Also noted as needing consideration are the balance of convenience and the impact on the parties, including any third parties of granting, or not granting, an order for interim reinstatement, and the overall justice of the matter.

Brief Background Facts

[17] The School is a small intermediate school based in Rotorua. Ms Du Fall was employed as Executive Officer in July 1999 on a part-time basis and was responsible for a broad range of financial and administrative duties. In 2014 she was appointed to the Executive Management Group.

[18] Ms Du Fall and the Board have experienced employment relationship problems over a period of approximately two years. Ms Du Fall initially raised a personal grievance claim in 2022 which was concerned with her remuneration, specifically pay progression. The parties attempted to resolve this issue by discussion and mediation, however it became contentious.

¹ Employment Relations Act 2000 s 3.

² *McInnes v Western Bay of Plenty District Council* [2016] NZEmpC 36 at [8] ERA Auckland 92 in which Judge Inglis (as she then was) referred to the court of Appeal decision in *NZ Tax Refunds v Brooks Homes Ltd* [2013] NZCA 90.

There was an Authority investigation meeting held in September 2024.

[19] In July 2023 Ms Du Fall's claim extended into an allegation that she had been a full-time employee since 2014 and was owed a significant amount of back-pay. To this allegation were added additional personal grievances which included allegations of an unsafe working environment and repeated and persistent breaches of good faith by MISB.

[20] The matter progressed to the Authority with a four-day investigation meeting being held in September 2024. A determination was issued on 1 July 2025 ([2025] NZERA 381).

[21] Following the Authority hearing in September 2024, Ms Du Fall remained in her role but there were ongoing difficulties in the relationship between Ms Du Fall and various members of MISB and the School staff including Presiding Member, the School Principal and Deputy Principal. Ms Du Fall raised a significant number of number of personal grievances claims and complaints about members of the School staff during October and November 2024, including six personal grievances in October 2024.

[22] Ms Du Fall continued to assert that the workplace was an unsafe and toxic environment and that MISB and the Principal were acting in bad faith towards her.

[23] Ms Du Fall raised a further number of alleged personal grievances on 15 February 2025 totalling approximately 16. Ms Du Fall also made a complaint to the Ministry of Education, copied to the Minister of Education, the Minister of Internal Affairs, the local Member of Parliament and the Parliamentary Ombudsman.

[24] In late March 2025 Ms Du Fall, who had continued to assert that the School was an unsafe working environment and that MISB and the Principal were acting in bad faith towards her, refused to attend work on the basis that, pursuant to s 83 of the Health and Safety at Work Act 2025, the School was an unsafe working environment.

[25] MISB considered at that point that the relationship had reached a point of irreconcilable breakdown, the primary cause of which was Ms Du Fall.

[26] Ms Du Fall was consulted on MISB's preliminary view and provided with an opportunity to respond.

[27] MISB became aware in the consultation period that The Principal intended to resign if Ms Du Fall remained employed, and it also became aware of an unrelated formal complaint from the Deputy Principal about Ms Du Fall's conduct.

[28] On 20 April 2025, after having considered the extensive feedback provided by Ms Du Fall, MISB terminated her employment on the grounds of incompatibility.

[29] Following the termination of her employment, Ms Du Fall refused to return some school property, notably a laptop. Eventually, after engagement on the issue with Ms Du Fall proved unproductive, MISB reported the matter to the New Zealand Police (the Police). The Police engaged with Ms Du Fall but following her continued refusal to return the School property, executed a search warrant and seized the laptop and other property belonging to MISB.

Is there a serious question to be tried in relation to the claim of unjustifiable dismissal?

A Serious Question?

[30] As a matter of principle, Ms Du Fall must establish that there is a serious question to be tried in respect of her claim of unjustifiable dismissal and for permanent reinstatement. A serious question was described in *Brooks Homes Ltd v NZ Tax Refunds Ltd* as an arguable case.³

[31] The threshold for a serious question or arguable case as stated in *Brooks Homes* and *Western Bay of Plenty District Council v Jarron McInnes* is that the claim is not frivolous or vexatious:

... However, as *Brooks Homes Ltd* makes clear, an applicant must establish that there is a serious question to be tried, in that the claim is not vexatious or frivolous. The merits of the case (insofar as they can be ascertained at an interim stage) may be relevant in assessing the balance of convenience and overall interests of justice ...⁴

[32] In *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* the Chief Judge confirmed that whether there is a serious question to be tried raises two sub-issues, these being:

- a) Whether there is a serious question to be tried in relation to the claim of unjustified dismissal; and, if so,
- b) Whether there is a serious question to be tried in relation to the claim of permanent reinstatement.⁵

[33] In *Humphrey* the Employment Court noted that once the relatively low threshold as identified in *Brooks Homes Ltd* had been met:

... the merits of the case (insofar as they can be ascertained at an interim stage) may be relevant in assessing the balance of convenience and the overall interests of justice.⁶

³ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

⁴ *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC36 at [9].

⁵ *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* [2021] NZEmpC 59 at [7].

⁶ Above n 5 at [8].

[34] My findings expressed in this preliminary determination are solely for the purpose of resolving Ms Du Fall's application for interim reinstatement. At the substantive hearing there will be opportunity to fully test the relevant evidence and disputed questions of fact and law.

An arguable case?

[35] Ms Du Fall submits she has an arguable case that she was unjustifiably dismissed because MISB cannot justify a dismissal on the basis of irreconcilable breakdown if it was itself the cause of such a breakdown.

[36] Ms Du Fall submits that MISB did not act as a fair and reasonable employer in circumstances in which her workplace was unsafe because she was being bullied. In particular MISB failed to take appropriate steps to address her concerns raised throughout 2023 consistent with contractual policy and statutory requirements.

[37] Ms Du Fall submits that there is a strongly arguable case that the dismissal was unjustifiably because it arose as a result of retaliation by the Principal because of a Protected Disclosure that she made to Ministry of Education. She submits that the Principal organised to bring about her dismissal by raising complaints and threatening resignation if she was not dismissed.

[38] MISB submits that while it acknowledges, in light of the low threshold requirement, that there is likely a serious question to be tried in terms of unjustifiable dismissal, Ms Du Fall's claim is at best weakly arguable.

[39] MISB submits that its actions in dismissing Ms Du Fall were what a fair and reasonable employer could have done in all the circumstances at the relevant time. Those circumstances, as supported by the affidavit evidence, were that: (i) the relationship between Ms Du Fall and MISB had clearly broken down to the point that Ms Du Fall had ceased work on purported health and safety grounds; (ii) the Principal was threatening to resign; and (iii) Ms Du Fall's view of a feasible way forward was to await the election of a new school board. It is submitted that the latter circumstance indicates that Ms Du Fall accepted that the relationship with the current MISB had broken down.

[40] MISB submits that Ms Du Fall's own evidence is indicative of the corrosive and acrimonious state of the employment relationship, and her attitude towards the Presiding Member of MISB, the Principal and MISB itself. At the substantive investigation it is submitted that the evidence will show that the relationship was irrevocably broken. It will be for the Authority to assess whether or not the breakdown was attributable to Ms Du Fall.

[41] It submits that faced with an employee variously refusing to work, raising an extraordinary number of grievances and openly threatening further litigation; a Principal on the brink of resignation; and with no constructive way forward in sight, no reasonable employer could have maintained the employment relationship. That being the case MISB submits that it is highly unlikely Ms Du Fall's claim for unjustifiable dismissal will succeed.

[42] It is a low threshold, and I find that Ms Du Fall has an arguable case that she was unjustifiably dismissed.

Reinstatement?

[43] Ms Du Fall must not only establish an arguable case for unjustifiable dismissal but must also establish that she would be reinstated if successful in such a claim.

[44] Reinstatement is the primary remedy and s125 (2) of the Act states the Authority must provide for reinstatement if it is practicable and reasonable. This was commented upon by Judge Holden in *Hong v Auckland Transport* in which she set out that practicality and reasonableness are two separate requirements:

Practicability ... means more than simply being possible. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible, and have the potential for the re-imposition of the employment relationship to be done or carried out successfully. ...

Looking at reasonableness, the Court needs to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer, and in some cases, perhaps third parties who would be affected by the reinstatement.⁷

[45] It is submitted by Ms Du Fall that although the Authority in determination [2025] NZERA 381 had not found a deliberate or sustained breach of good faith by MISB, it did not make any finding that she did not act in good faith or had contributed to the situation which arose.

[46] Ms Du Fall submits that she could perform her role remotely and without engaging physically with staff members, with a wider assessment of the safety of the work environment necessary.

[47] Ms Du Fall submits that the statements in the respondent's affidavits are a sham, and she is confident that the claims regarding the effect she has had on those making the affidavits, including causing health issues, are false.

⁷ *Hong v Auckland Transport* [2019] NZEmpC 54 at [66] and [67].

[48] Ms Du Fall also states in her affidavit that if she is reinstated it is highly likely the Principal will resign and that she would be able to work professionally with the Deputy Principal and a new School Board which would most likely be elected in August.

[49] Ms Du Fall submits that the Authority could impose conditions for the interim reinstatement, and further that she could agree not to raise any concerns; or if she did, to raise them in an agreeable manner.

[50] MISB submits that Ms Du Fall's reinstatement is neither practicable nor reasonable.

[51] In regard to practicability MISD submits that Ms Du Fall's working relationships with a number of her former colleagues, in addition to those with MISB, have been destroyed as indicated in the affidavit evidence provided. This is supported by Ms Du Falls's own affidavit evidence in which reinstatement is premised on not needing to work with the Principal because he will have resigned, and a new School Board being elected.

[52] It is submitted that her affidavit evidence makes clear that her attitude towards MISB and the School Principal remains wholly negative. These are not merely interpersonal issues that could be addressed or mitigated by MISB. It is submitted that there is no evidence to indicate that the restoration of those relationships would be feasible now if the employment relationship were to be reimposed given the positional and adversarial nature of Ms Du Fall's evidence.

[53] It is submitted that Ms Du Fall's refusal to return property following the end of her employment and continued expressions of distrust towards MISB are relevant considerations.⁸

[54] In terms of reinstatement being reasonable, MISB submits that Ms Du Fall's reinstatement would have a considerable detriment on MISB and its employees. In the affidavits provided, it notes that each of the deponents has commented on the adverse impact they would experience should Ms Du Fall be reinstated.

[55] MISB submits that it is likely special conditions, and oversight would be required to manage Ms Du Fall's interactions with key staff members.

[56] It is also submitted by MISB that since Ms Du Fall continues to lack any clear appreciation of the difficulties her conduct caused in her interpersonal relationships, and is unwilling to accept any accountability for what has eventuated, it has significant concern that she would continue to engage with members of MISB, the Principal and other key staff in the same manner as previously.

⁸ Cf *Inframax Construction Ltd* [2024] NZEmpC 212 at [93].

[57] Reinstatement on an interim or permanent basis must be practicable and reasonable. Taking all the submissions into consideration, and on the basis of the untested affidavit evidence as presented to the Authority, I find that Ms Du Fall has an arguable case that she was unjustifiably dismissed. However, based on the submissions I find that Ms Du Fall has only a weakly arguable case that she would be reinstated permanently.

[58] Accordingly, I do not find that Ms Du Fall has a strongly arguable case for interim reinstatement.

Balance of convenience

[59] As set out in the Employment Court case *X v Y Limited* this principle requires that the Authority balance the relative inconvenience, in terms of detriment or injury, to MISB who will have to bear the burden of an order reinstating Ms Du Fall until the substantive case is heard, against the inconvenience to Ms Du Fall who may have a just case, of having to bear the detriment of unjustifiable action until the case is heard.⁹

[60] There is no date set for the Authority to hear the substantive matter and Ms Du Fall anticipates this may be subject to delay given the complexity of the issue and the possibility of MISB limiting information. This factor, together with the probability of her appointing a lawyer to assist with the challenge she intends bringing in respect of the Authority's determination for the matter heard in late 2024 ([2025] NZERA 381), means that she will suffer harm from a lack of income and potentially substantial legal fees she would incur. This might result in her having to sell her home and boat.

[61] Ms Du Fall submits that given the manner in which her employment ended, she is unlikely to be able to replace her position with a comparable one and her age, lack of reference and lack of experience in the marketplace over the past 20 years will be detrimental to her chances for re-employment. To this is added the lodging of a complaint of stolen property with the Police which in respect of referencing, will ensure greater difficulty in obtaining alternative employment.

[62] Ms Du Fall submits that the likely cost to MISB of alternatives to having her undertake the role will be greater than if she were reinstated. Ms Du Fall also submits that she will suffer harm in the relationships she has within the School community and the School itself as a result of the delay in the substantive matter being heard.

[63] MISB submits that the balance of convenience strongly favours it.

⁹ *X v Y Limited* [1992] 1 ERNZ 863, at pg 10.

[64] It submits that if Ms Du Fall were to be reinstated dysfunction and division are not merely prospects, they are certainties. Her reinstatement would have significant operational impact, with the School Principal stating he would resign. Further Ms Du Fall occupied a key financial position in the School, and the difficulties of other senior staff in engaging with her would create substantial issues. It does not accept as credible Ms Du Fall's evidence that she would be able to perform the role without having to engage meaningfully with key employees or MISB members.

[65] MISB submits in respect of the adverse impacts submitted by Ms Du Fall, that any financial impact would be adequately remedied by an award of compensation and reimbursement of lost wages if Ms Du Fall were to be successful in her substantive claim.

[66] MISB submits that the submission by Ms Du Fall that she could be reinstated to the payroll only is not sustainable given that MIS is a relatively small school with limited financial resources. It submits that it requires someone to perform the functions of the role previously occupied by Ms Du Fall, and to permanently fill or restructure that position.

[67] Having taken into consideration the submissions put forward by the parties, balancing the potential prejudice to Ms Du Fall of not reinstating her against the potential prejudice to MISB of so doing, I find that the balance of convenience favours not reinstating Ms Du Fall on an interim basis.

Overall Justice

[68] The Authority must assess the overall justice of the case from a global perspective. This has been described by the Court of Appeal as:¹⁰

The overall justice assessment is 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'

[69] It is submitted on behalf of Ms Du Fall that there had been a previously good relationship between the parties which can be rebuilt. This will involve a consideration of what caused the issue, noting that despite the Authority's determination to the contrary ([2025] NZERA 381), there had been shortfalls in MISB's meeting its obligations of good faith.

[70] Ms Du Fall submits that she will work with the School insurers to address the "ongoing nature" of the problems she has experienced.

[71] MISB submits that the overall justice lies in declining the application. It submits that it would be inappropriate to grant interim reinstatement given that there are clear and significant

¹⁰ *NZ Tax Refunds Ltd v Brooks Homes Limited* [2013] NZCA 90 at [47].

risks of detriment to MISB, its employees and the school community if Ms Du Fall were to be reinstated.

[72] It submits that the impact upon the Principal, the Deputy Principal, MISB and other staff far outweigh Ms Du Fall's desire to be reinstated and that the prospects of successfully imposing the relationship either on an interim basis or permanently, are remote.

[73] I find that the overall justice of the case subsists in declining the application for interim reinstatement.

Next Steps

[74] The parties will be contacted to arrange scheduling for the substantive matter.

[75] Costs are reserved for determination following the substantive investigation meeting and its outcome or until this matter otherwise ceases to be before the Authority.

Eleanor Robinson

Member of the Employment Relations Authority