

**ATTENTION IS DRAWN TO THE ORDER  
PROHIBITING PUBLICATION OF CERTAIN  
INFORMATION (REFER PARAGRAPH 7)**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**[2012] NZERA Auckland 322  
5390301**

BETWEEN                      A  
   Applicant

AND                              SCHOOL BOARD OF  
   TRUSTEES  
   Respondent

Member of Authority:        Eleanor Robinson

Representatives:             Fraser Wood, Counsel for Applicant  
   Richard Harrison, Counsel for Respondent

Investigation Meeting:      3 September 2012 at Auckland

Determination:                13 September 2012

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**DETERMINATION OF THE AUTHORITY**

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**Application for interim reinstatement**

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

[2]     Mr A was dismissed from his job as a Teacher and Director of International Students by the Respondent, the School Board of Trustees (the Board), on 28 June 2012. The dismissal was on the basis of serious misconduct.

[3]     Mr A claims that he was unjustifiably dismissed and applies to the Authority for interim reinstatement pending determination of the substantive matter. In addition Mr A claims substantive relief including permanent reinstatement, lost wages, and compensation for loss of dignity, humiliation, and stress caused by his unjustifiable dismissal.

[4]     Interim reinstatement and the substantive claims are all resisted by the Board.

[5] As required by s 127 of the Act, an undertaking has been given by Mr A to abide by any order that the Authority may make in respect of damages in determining his employment relationship problem.

[6] Mediation was attended by the parties but did not result in the matter being resolved. An investigation meeting to deal exclusively with the interim reinstatement application was convened at Auckland on 3 September 2012.

### **Prohibition on publication**

[7] **I order that the name of the Applicant, the School and that of the complainants not be published. The Applicant is to be referred to as Mr A, a letter bearing no relationship to his actual name. This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.**

### **The Law**

[8] In considering interim reinstatement applications the Authority is required to apply the law relating to interim injunctions “*having regard to the object of this Act*” pursuant to s. 127 (4) of the Act.

[9] In respect of the object of the Act, the Authority is to have regard to the principle that productive employment relationships are founded on good faith behaviour and on mutual trust and confidence. With effect from 1 April 2011 reinstatement is no longer the primary remedy. Under s 125 (2) as amended, reinstatement is to be provided by the Authority if it is reasonable and practicable to do so.

[10] Mr A’s reinstatement remains a remedy available to the Authority. The principles relevant to interim reinstatement applications as determined under the old formulation remain relevant<sup>1</sup>. In *McKean v Ports of Auckland Limited*<sup>2</sup>, a recent decision of the Employment Court, the Court clarified the relevant principles at para [4]:

*In determining an application for interim reinstatement the court must have regard to:*

- *Whether the plaintiff has an arguable case that he was dismissed unjustifiably as defined by s 103A of the Act;*

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<sup>1</sup> *Cliff v Air New Zealand* [2005] ERNZ 1

<sup>2</sup> [2011] NZEmpC 128

- *Whether the plaintiff has an arguable case for interim reinstatement in employment under s125 of the Act if he is found to have been dismissed unjustifiably;*
- *Where the balance of convenience lies between the parties in the period until the Court's judgment is given on those issues; and*
- *the overall justice of the case.*

[11] The evidence before the Authority for the purpose of determining this interim reinstatement application has been presented as usual in such applications in affidavit form by Mr A and several witnesses on behalf of the Board.

[12] As the affidavit evidence must necessarily remain untested until the substantive investigation of the unjustified dismissal and unjustified disadvantage personal grievances, 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.

### **Background Facts**

[13] Mr A had been employed as a teacher at the School since 1988. In 2008 he was appointed to the position of Director of International Students, and in this role he liaised with overseas agencies to send overseas students to attend the School for a New Zealand based education experience.

[14] Mr A and his family 'hosted' some of these international students who lived at the A family home whilst attending the School, which had been the case for some years prior to his appointment as Director of International Students. In the period October 2010 to 22 April 2011 Mr A and his family had three female international students resident at their home.

[15] On 20 May 2011 the Principal of the School (the Principal), received complaints from two of these students, alleging improper conduct of a sexual nature by Mr A. The Principal wrote to Mr A asking him to formally respond to the allegations, which he did denying any wrong-doing on his part in an 18 page report dated 7 June 2011.

[16] The Principal, following an initial meeting between herself and Mr and Mrs A on 7 June 2011, decided that the matter could not be resolved informally and referred the matter to the Board. The Board decided that the allegations were of a serious nature and initiated a formal investigation procedure in accordance with the disciplinary provisions of the

Secondary Teachers Collective Agreement, which was the employment agreement covering Mr A's employment.

[17] An independent educational consultant was appointed by the Board as an independent investigator (the Independent Investigator). Terms of Reference for the investigation were provided by the Board to the Independent Investigator and also to Mr A and his representative.

[18] Mr A was suspended on full pay in June 2011 for an initial period of 5 weeks whilst an investigation into the complaints was carried out. However for reasons which have been explained to the Authority, the Board agreed to halt the investigation at the request of Mr A who remained suspended on full pay until 16 February 2012 at which time the Board re-instituted the investigation process.

[19] During the course of the investigation process, the duration of which was approximately one year (apart from the suspension of the process from 20 July 2011 until 16 February 2012 when it was halted) Mr A was interviewed on two occasions, and his family members were also interviewed at the request of Mr A.

[20] Two further issues came to light and were examined in the course of the investigative process, one of these issues concerned expenses incurred by Mr A during an overseas work trip, and the other the discovery of pornographic material which had been down-loaded and stored on a school laptop computer which had been allocated to Mr A.

[21] The investigation process was completed in June 2012 and an investigation report was provided to the Board. A copy was also provided to Mr A and his representative.

[22] On 28 June 2012 there was a meeting between the Board and Mr A, his wife and daughter, and his representative, to consider and discuss the report. At the conclusion of the meeting the Board advised Mr A that his employment was to be summarily terminated on the basis of serious misconduct in relation to the allegations made by the two students and the pornographic material which had been found to have been down-loaded and stored on the school laptop allocated to Mr A.

### **An Arguable Case for Unjustifiable Dismissal and for interim reinstatement**

[23] As a matter of principle, Mr A must not only establish an arguable case for his unjustifiable dismissal, but must also establish that if he is successful in such a claim he will

be reinstated in addition to, or instead of, being compensated monetarily such as to support an application for interim reinstatement.

[24] This principle was articulated by the Employment Court in *Cliff v Air New Zealand Ltd*<sup>3</sup>:

*So whilst plaintiffs must establish an arguable case of personal grievance (unjustified dismissal), they must also establish an arguable case that they will thereafter be reinstated in employment and not simply compensated monetarily for their grievance.*

[25] Mr A submits he has an arguable case that he was unjustifiably dismissed and that the affidavit evidence surpasses the threshold of a *prima facie* case. Mr A denies the allegations made by the students and states that these are unsupported by the evidence of other witnesses who were present when the alleged instances occurred. Mr A also denies down-loading pornographic material onto the laptop allocated to him.

[26] Mr A submits that there exist substantive and procedural grounds for challenging the decision to terminate his employment, citing as substantive reasons (i) the fact that the alleged incidents occurred in the family home environment and as such were outside his conduct as a teacher; (ii) that he had not been responsible for down-loading pornographic material onto the laptop, and additionally there was no IT policy in place in relation to the down-loading and storing of pornography and that teachers were allowed to use computers for personal use; and (iii) the obtaining of copies of text messages (obtained under the Official Information Act 1982) between Mr A and the two student complainants was a breach of privacy and in addition the text messages had been taken out of context.

[27] Mr A also submits that there were procedural flaws in the investigation process as undertaken by the Board including that the Independent Investigator approached the process unfairly and with a 'closed mind', and failed to disclose all documentation and full statements of the interviews he had with the complainants and other witnesses. Further Mr A claims that he was not given a fair and proper opportunity to explain all the text messages.

[28] The Board submits that even if it is decided that the threshold for an arguable case has been met, there will be a low likelihood of Mr A bringing a successful claim on the basis of unjustifiable dismissal.

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<sup>3</sup> CA6A/05, per Judge Colgan at para [12]

[29] Mr A contended that there was a demarcation point between his conduct as a teacher and as a 'host dad'. However I observe that conduct by an employee which takes place outside of the work environment may have an impact on the employer's reputation and damage the employer's trust and confidence in the employee and as such I do not accept that the alleged conduct is irrelevant in the context of Mr A's employment as a teacher

[30] The Board argues that the text messages referred to have been lawfully obtained and are relevant to the employer's investigation; moreover that they disclose highly inappropriate communications that were initiated by Mr A and add significant weight to the credibility of the student allegations.

[31] The allegations made by the two students against Mr A were of improper misconduct of a sexual nature. Mr A referred to the text messages sent between him and the two students in his written response dated 7 June 2011 which was sent to the Principle. The written response pre-dated the release of the text messages.

[32] I consider that given the references to the text messages initially made by Mr A in his written response to the complaints, the Board was entitled to consider that the text messages were relevant to the complaints made by the two students and the investigation process.

[33] Mr A contends that the text messages have been taken out of context and that he was not allowed to adequately explain their context. Whilst accepting that there are also an extremely large number of text messages which have not been disclosed at this stage, I observe that the content of the text messages which have been included in the evidence submitted to the Authority appear to be inappropriate communications of a sexual nature and I consider it significant that these were messages between a mature teacher and caregiver, and two young students.

[34] In regard to the evidence of downloaded and stored pornographic material, the Board considered this to be relevant to the credibility of the complainants and their allegations and to have been very serious in itself on the basis of the conduct expected of a teacher.

[35] Irrespective of the fact that there was no IT policy in force, I note again that an employee's conduct in an outside of work environment may be held to be relevant to an enquiry of the nature undertaken by the Board.

[36] The Board submits that the evidence of Mr A points to alleged procedural flaws in the investigation process which are minor, and that the affidavit evidence of the Respondent

witnesses satisfies the considerations as set out in s 103A of the Act. The affidavit evidence of the Board argues in support of this submission in that it engaged an independent investigator, the investigation process canvassed all relevant witnesses and material, all information obtained was disclosed to Mr A who was interviewed on two occasions and had the opportunity to address the Board in respect of the report's findings and the possible outcome.

[37] It is submitted for Mr A that this is an arguable case for interim reinstatement on the basis that Mr A is a teacher of many years experience who had no formal disciplinary action taken against him during that period; further that Mr A has no alternative employment opportunities open to him other than teaching, and that he has a good level of support from other employees at the School. Consequently his reinstatement is both practicable and reasonable.

[38] Both practicability and reasonableness are issues in the consideration of reinstatement. These include an assessment of whether or not workplace relationships can be restored. The Board oppose reinstatement on the basis that the Principal has no trust and confidence in Mr A and there are staff members who would be very unhappy if he were reinstated given the nature of the complaints.

[39] In addition the Board considers there is a potential risk to the welfare and safety of students at the School, and further that that there could be damage to the School through adverse publicity should Mr A be reinstated. I note in respect to this last assertion that the prohibition on publication will to some extent reduce the likelihood of adverse publicity at this interim application stage.

[40] Taking all the submissions into consideration, and on the basis of the affidavit evidence as presented to the Authority, I find that, on the basis of the low threshold, Mr A has an arguable case that he will be reinstated if he establishes his unjustifiable claim, but I am unable to conclude that Mr A has a strongly arguable case. This is particularly the case if it is established that there was any unfairness or unreasonableness but these were of a procedural nature only.

### **Balance of convenience**

[41] It is relevant to this principle that reinstatement is no longer the primary remedy under the Act, but may be awarded if it is reasonable and practicable to do so.

[42] The Board submits that it is not reasonable and practicable to do so in light of the trust and confidence issues given that the nature of the allegations are very serious and affect student welfare, safety and well-being, and Mr A has never accepted any responsibility for the inappropriateness of his actions.

[43] Mr A, who denies any wrong-doing on his part, submits that the balance of convenience favours him being reinstated on the basis that there are no other employment opportunities for him as a teacher in the town where the School is located and it is impracticable for him to seek employment in another district pending the outcome of the hearing of the substantive application. In addition the issue of registration as a teacher, which I shall address separately, makes it impracticable for him to seek employment as a teacher in another location.

[44] Mr A submits that there have never been any similar complaints about him in the school context, and his work in the classroom would be open and scrutinised and could be adequately supervised. Further that he can be successfully integrated into the workforce of what is a large school and where his wife remains a teacher.

[45] Mr A submits that damages will not be an adequate remedy, as no compensatory payment for lost remuneration could replicate the value of the loss of ongoing employment given his length of service, his age and lack of ability to obtain alternative employment. In this context Mr A submits that his family and personal circumstances are relevant: his wife was intending to retire before him due to ongoing health issues and the family are extremely vulnerable financially if she is the sole breadwinner given her medical condition and the non-availability of ongoing paid sick leave.

[46] In addition to the trust and confidence issue, which is exacerbated by the fact that Mr A did not adhere to the Principle's initial instruction not to contact the student complainants or their parents, the Board submits that damages are the most likely remedy to be awarded, that it is able to meet a damages award, and damages are an adequate remedy.

[47] In support of this submission, the Board contends that Mr A's affidavit discloses that his wife continues in her role as a teacher at the School, and together they have a number of businesses which, although Mr A claims they are run at a loss is not supported by evidence supplied to the Authority, and that they have a 20 hectare blockhouse mortgage-free property.

[48] An Investigation Meeting on the substantive matter is scheduled for 27 – 29 November 2012. I do not consider that Mr A is in a precarious financial situation, and there is

no suggestion that the Board could not meet any compensation for lost remuneration should Mr A eventually succeed in his claim. Awards of compensation could substantially or wholly restore Mr A to his financial pre-dismissal position.

[49] The Board further submits that the teacher registration issue is fundamental to consideration of where the balance of convenience lies.

#### *Registration*

[50] Mr A does not currently hold a practising certificate and is not a registered teacher as his registration lapsed and has not been renewed. In her affidavit, the Principal states that she has no trust and confidence in Mr A as a result of the investigation and that she would not, as required to do as the School Principal, sign off his fitness for registration.

[51] Applications for registration are dealt with by the Teachers Council. In the event that a teacher is found to have committed serious misconduct, or is dismissed, there is a mandatory reporting requirement to the Teachers Council. In her affidavit the Principal postulates that given the mandatory report to the Teacher's Council, this may in itself prevent Mr A from renewing his application.

[52] The Board submits that in this situation, it would be unlawful for it to re-employ Mr A pursuant to ss 120A and 120B of the Education Act 1989. The Board further submits that even with a direction from the Authority to put Mr A on the payroll would be unlawful of them to do so as it would still be an appointment, or continuing employment, of someone who does not have a practicing certificate.

[53] Mr A submits that the argument that it would be illegal to pay him whilst he does not have a practising certificate is incorrect since the Board continued to pay him from February 2012 until the end of June 2012 even though he was unregistered at that time.

[54] As regards the Teacher's Council process, Mr A submits that he will be applying for a deferral of that decision until after the conclusion of the Authority process, and in the event that his unjustifiable dismissal claim is upheld and he is subsequently granted permanent reinstatement, the Principal should support his re-registration application.

[55] Mr A further submits that the Board could apply for an extension of his registration, or apply for a limited authority to teach; pending the outcome of the substantive hearing which could be done if the Authority grants the application for interim reinstatement.

[56] In light of the fact that Mr A is not currently registered as a teacher and the Board's affidavit evidence of its opposition to supporting Mr A's application for re-registration as a teacher, I have considered whether Mr A could be given partial reinstatement to the payroll.

[57] An employee seeking interim reinstatement is usually expected to be in a position to perform his or her duties under the contract of employment. The Board submits that this situation is akin to that in *Pacific Blue Employment & Crewing Ltd V B*<sup>4</sup>. That case concerned an employee pilot whose air passenger transport licence had been suspended by the Director of Civil Aviation and is relevant to the issue of partial reinstatement to the payroll. Judge Couch stated:<sup>5</sup>

*I have regard to the recent decision of the Court of Appeal in Lewis v Howick college Board of Trustees where the Court restated the legal test of practicability of reinstatement enunciated in NZEA v The Board of Trustees of Auckland Normal Intermediate School. That test is framed in terms of the imposition of the employment relationship being carried out successfully. To my mind, successful reimposition of the employment relationship requires the parties to be able to fully discharge their responsibilities in that relationship. In some cases one party may choose to forego the other party's performance where the reinstatement is only interim but where one party is entirely unable to perform its part of the bargain, it is difficult to say that the employment relationship can be successfully imposed.*

[58] The Board submit that Mr A is not able to fulfil his side of the employment bargain and therefore the employment relationship cannot be successfully re-imposed, which is relevant to the interim decision.

[59] Having considered all the submissions put forward, including those in relation to the registration issue, I find that the balance of convenience favours the Board.

### **Overall Justice**

[60] The Authority must assess the overall justice of the case from a global perspective.

[61] Having taken into consideration all the circumstances, I find that the overall justice of the case subsists in declining the application for interim reinstatement or interim reinstatement to the School payroll.

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<sup>4</sup> (2010) NZEmpC 112

<sup>5</sup> *Pacific Blue* at para [22]

[62] I observe that whilst I have found an arguable case in support of permanent reinstatement, it is based on the low threshold requirement and is not a strongly arguable case, especially when the registration status of the Applicant is taken into consideration. Moreover I have found the balance of convenience to lie in favour of the Board, and that monetary remedies would be adequate.

### **Determination**

[63] For the above reasons the Authority exercises its discretion in relation to interim reinstatement by not making the orders sought.

### **Costs**

[64] Costs are reserved pending the final determination of the matter.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**