

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

WA 81/10
5302515

BETWEEN

ALANA ADAMS
Applicant

AND

WELLINGTON FREE
AMBULANCE SERVICE
INCORPORATED
Respondent

Member of Authority: G J Wood

Representatives: Tim Blake for the Applicant
Murray French for the Respondent

Investigation Meeting: 26 April 2010 at Wellington

Determination: 28 April 2010

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Adams claims she was unjustifiably dismissed by the respondent, the Wellington Free Ambulance Service Incorporated (WFAS) and in this application seeks interim reinstatement. WFAS claims that Ms Adams was justifiably dismissed, following a full and fair investigation that led it to a conclusion that she should be summarily dismissed for serious misconduct, following an incident with a co-worker on shift and subsequently on the Facebook social networking site. It also opposes interim reinstatement on the basis that a large number of co-workers do not want her back working at WFAS and because the pressure of the job requires a stable and focused work environment.

[2] The issues for determination are:

- Whether there is an arguable case of unjustified dismissal;
- Whether the balance of convenience favours Ms Adams; and
- Where the overall justice of the case lies.

This analysis will need to be determined on the assumption that the claims made out in Ms Adams' affidavit and subsequent evidence in reply can be upheld in a subsequent investigation meeting on the substantive issues to be held on 15 June 2010. Because the evidence has been untested at this point her claims must be accepted unless clearly untenable.

The Facts

[3] Ms Adams was an employee of WFAS from April 2007 in its emergency ambulance communications centre in Wellington, catering for around 1,000,000 potential clients through the 111 emergency system. Ms Adams was employed as an emergency medical dispatcher (EMD). She also operated, from 12 November 2008, as a volunteer ambulance paramedic to support professional paramedics in the ambulances run by WFAS. Furthermore, she is studying at Whitirea Polytechnic towards a degree in Health Science as a paramedic, where she is required as part of the course to undertake outside activity as a paramedic.

[4] Ms Adams also has a close link with WFAS sports teams, which take up about two hours of her week. It is therefore fair to say that Ms Adams' work, social and educational lives has been intimately involved with WFAS.

[5] Ms Adams was dismissed following a complaint by a co-worker that he had been spoken to and treated in an inappropriate way during his shift on 31 January 2010 by Ms Adams, because she was said to have been extremely rude, made smart comments under her breath and spoke down to him. The co-worker also complained that Ms Adams had been abusive to him during a Facebook exchange the next day.

[6] Over the next five weeks the complaint was investigated by the Communications Centre Manager, and after two meetings with Ms Adams she was dismissed, despite her accepting that she had not behaved professionally (but believing the complainant gave as good as he got) and advising that her behaviour

would not be repeated. The Communications Centre Manager considered that the complainant *could reasonably have felt unsafe in the workplace as a result of [Ms Adams'] behaviour towards him, which I think can be described as a form of workplace bullying*. Ms Adams denied being aggressive or rude to the complainant except for one sarcastic comment and that the Facebook discussion was one between friends and was merely a minor spat.

[7] The Communications Centre Manager was also concerned about Ms Adams previously causing another operator to becoming upset and stressed, again which would compromise the safe management of operations. She was not satisfied that similar issues would not arise again and that summary dismissal was justified because of serious misconduct.

[8] In coming to this conclusion, and despite considering that it was careful to focus on the complaint received from the complainant, it interviewed a number of other staff employed on the same shift as Ms Adams, or who were otherwise able to assist WFAS's investigations, which showed up a number of other concerns about Ms Adams. In fact in opposition to the claim for interim reinstatement 11 of the communications staff of around 45 provided affidavits about problems they had with Ms Adams, with many saying they would prefer her not to return to work. Of these people, only one currently worked on the same shift as her, although there is an overlap and swapping of shifts between employees that would mean that some would have working contact with her from time to time. Ms Adams was never told of the concerns of co-workers until presented with the affidavits just prior to this investigation meeting.

[9] Ms Adams noted that she had an eye witness to the exchanges with the complainant who supported her version of events. She also notes that she continued to work with the complainant over the five weeks following the incident. WFAS claims that there was only one occasion when they worked a full shift together and that was by error.

[10] Ms Adams has filed an undertaking as to damages and has the means to meet any financial award that may be made against her.

Submissions

[11] Ms Adams claims she needs to be reinstated in the interim because that will give her the opportunity of continuing her studies, by improving her chances of getting volunteer work with another emergency services provider, who will not consider her at present. She also does not want her skills to deteriorate and believes that if she has to wait for the result of the substantive investigation before being reinstated it will be that much harder for her to return to work.

[12] WFAS claim that because of the fact that 11 of its staff of around 45 are opposed to working with Ms Adams the Authority should not require them to work in a potentially unsafe environment, particularly where there is substantial risk of something going wrong (in an already stressful environment) if further stress and pressure is brought into the workplace, providing a public interest reason for Ms Adams non-reinstatement.

[13] On behalf of Ms Adams Mr Blake submitted that Ms Adams does have the right personality set for working in stressful environments. However, as a young person of 22 years of age, she needs to get back to her work straight away, which is her life. He also submitted that she would be extremely conscious of her behaviour if reinstated and there will be no such further problems as occurred previously.

[14] Mr Blake also observed that the only other eye witness supported Ms Adams' version of events, that none of the other statements referred to by WFAS had been disclosed to her before her dismissal and that there had been no previous warnings to her.

[15] Mr French accepted that the results of other inquiries and interviews had not been disclosed to Ms Adams, but stated that that was a *catch 22* and if they had disclosed this material then Ms Adams may have also been *bullied* them. He also noted that Ms Adams had already had behavioural matters drawn to her attention in the past and had apologised once for her behaviour.

The Law

[16] The test for determining claims for interim reinstatement are three, and are set out in *Cliff v. Air New Zealand Ltd* [2005] ERNZ 1 at 9, namely:

- *first, whether the plaintiffs have an arguable case of unjustified dismissal;*
- *second, whether the balance of convenience, (including the existence of alternative remedies sometimes said to be a separate test) favours the plaintiffs; and*
- *third, the remedy being discretionary, where the overall justice of the case lies until it can be heard (including particularly the respective strengths of the parties' cases so far as they can ascertained at this stage).*

Findings

[17] Neither party considered that interim reinstatement on a garden leave basis would resolve this issue satisfactorily for them, even in the interim. I have therefore discarded this option. The matter must thus be determined by either interim reinstatement without conditions, or not.

[18] There is no doubt that Ms Adams has an arguable case. WFAS appears to have relied on information given about Ms Adams by co-workers, to at least bolster its decision that she was guilty of serious misconduct, yet did not disclose any of that material to Ms Adams. That may be a serious flaw in its approach to this matter.

[19] Second, there is arguable issue about whether a fair and reasonable employer would have summarily dismissed Ms Adams, a very young employee, on the basis of one complaint, or whether other sanctions such as counselling and/or warnings would have been applied instead.

[20] So far as the balance of convenience is concerned, the key issues are the relative hardship to the parties and moral justice (*Melville v. Chathams Islands Council* [1999] 2 ERNZ 76 at 100). There it was held that where an employee has been dismissed from gainful employment, it is not often that the employer can convincingly assert that the hardship of being required to take the unwanted employee back for a short time is greater to it than the hardship of keeping out an employee who has been unjustifiably dismissed.

[21] It was further held that the hardship from the employer's point of view is simply that it is been prevented from doing what it wants. Any injunction is unwelcome and that sense inconvenient. However, in terms of concept, it is rarely a greater hardship than that suffered by the employee of having something done to the employee that the employee does not want because the consequences for the employee are more drastic.

[22] In terms of the balance of convenience, it is unlikely to be more than 10 weeks or so before the substantive determination on reinstatement will be made by the Authority. In the meantime, 11 of WFAS's staff do not want Ms Adams back. Ms Adams has the means at her disposal to deal with any financial issues in the meantime should she later proved to be successful, at which point that situation can be redressed.

[23] While I accept that it may be difficult for Ms Adams to continue her studies without having a volunteer position with WFAS, that is outside of the Authority's jurisdiction, although it might have some linkage with remedies for the way she was treated should she ultimately be found to have been unjustifiably dismissed. It is irrelevant to her claim for interim reinstatement, however, because the Authority does not have the jurisdiction to require WFAS to allow her to continue to be a volunteer with it. The same logic applies to the sports teams that Ms Adams is closely involved with, but which are run under the auspices of WFAS.

[24] No undertakings have been made by WFAS to assist in the disposition of the case, although it is clear that there are currently a number of vacancies for EMDs. Thus there are no issues about the potential displacement of other staff should Ms Adams be reinstated either in the interim or on an ongoing basis.

[25] The balance of convenience is finely divided. In the normal course of events the applicant should be entitled to interim reinstatement (see *Melville*) but the matter will be determined finally within two and a half months and Ms Adams' behaviour will necessarily involve a finding of some culpability on her behalf over the incident, although she has already accepted that her behaviour was wrong and will not occur again. There remains an upset and aggrieved co-worker who made a complaint, and other aggrieved co-workers who have raised subsequent concerns. On the other hand, Ms Adams is a young worker whose life was very much associated with WFAS and who wishes it to continue. A break of even 10 weeks could potentially affect her to a

significant degree. Furthermore, if she obtained interim reinstatement she will have a better possibility of obtaining volunteer work with another emergency provider so that she can continue her studies.

[26] Having decided that the matter on the balance of convenience lies equally between the parties I will address the overall justice. The concerns of other staff over the possibility of reinstatement are relevant here (see for example *T v. Attorney General* unreported Goddard CJ WEC 62/95). In this case, however, the factors are somewhat different in that the workers complaining did not all regularly work directly with Ms Adams and have not made any formal complaints during the course of her employment.

[27] The key points in the overall justice points in support of WFAS are:

- That Ms Adams does not come with clean hands, in the sense that she was clearly in the wrong with some of her interactions with the complainant and that (even if unknowingly) she has greatly upset a number of her working colleagues;
- That those colleagues have filed affidavits raising concerns about other behaviours and what might happen in the future, thus not wanting her to return even in the interim.

[28] The latter point is not, however, a major issue as it was in the *T* case, because circumstances are not as serious as they were for other workers as they were in that case *T* had a long history of alcohol related misbehaviour which had serious proven consequences to other employees.

[29] I conclude that the overall justice supports Ms Adams because of the two reasons raised above under the arguable case discussion. First, this was an argument between two young workers which got out of hand. Even if Ms Adams is shown to be the one to blame, it is questionable whether a fair and reasonable employer would have dismissed her summarily for serious misconduct on the basis of this one incident. Other options such as counselling and/or warnings were available to it. Second, this point is fortified by WFAS's acceptance that it took into account; at least in determining on the balance of probabilities whether or not it believed Ms Adams over the complainant, a number of other interviews and information that it obtained

from other employees that it never disclosed to Ms Adams. It appears fundamentally unfair in the normal course of events to rely on such material without putting it to an employee, and this therefore strengthens Ms Adams' claim, particularly as it appears to have rejected the information provided by an eye witness.

[30] In making these comments I am in no way making any pre-judgment as to how the case will be determined, but am simply looking at the relative strength at this stage on the basis of affidavit evidence only.

[31] I therefore order the interim reinstatement of the applicant, Ms Alana Adams, to the employment of the respondent, the Wellington Free Ambulance Service Incorporated, to her position as an emergency medical dispatcher, to take place with effect from Monday 3 May 2010, on the first *green shift* that occurs from that date onwards.

Costs

[32] Costs are reserved.

G J Wood
Member of the Employment Relations Authority