

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2022] NZERA 138
3147581

BETWEEN	BERNARD COMPTON Applicant
AND	WHANGANUI DISTRICT COUNCIL Respondent

Member of Authority:	Sarah Kennedy
Representatives:	Russell Du Fall, advocate for the Applicant Alastair Hall, counsel for the Respondent
Investigation Meeting:	7/8 December 2021 by Zoom
Submissions received:	21 December 2021 from Applicant 21 December 2021 from Respondent
Determination:	11 April 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Bernard Compton was a Dog Control Officer employed by Wanganui District Council (“the Council”) for 28 years until 24 June 2021 when his employment ended by way of dismissal for serious misconduct.

[2] After termination of his employment, Mr Compton raised a personal grievance with the Council and filed a statement of problem in the Employment Relations Authority challenging his dismissal and makes applications seeking interim reinstatement and compliance orders.

[3] The compliance orders are sought to address multiple alleged failings and breaches of the Council that he wishes to raise as problems with his employer. These include problems with rest periods and meal intervals, wage and time records, payments for overtime, standby and callout, payment for public holidays and alternative holidays and unlawful deductions in wages. Breaches of good faith are also claimed. Supporting his application for interim reinstatement was an undertaking as to damages.

[4] This determination deals only with Mr Compton's application for interim reinstatement. The investigation into his substantive claims will be held in due course. The Council has advised it is undertaking a review of its systems and payroll.

The Authority's investigation

[5] Case management calls were held on three occasions leading up to the investigation meeting. The Authority requested an amended statement of problem and then further particulars from the applicant. The respondent provided a statement in reply once the pleadings were amended and expanded on.

[6] The investigation meeting was held on 7 and 8 December 2021 by Zoom. Affidavit evidence provided from Mr Compton and Mitchell Malouf, Mr Compton's partner. From the Council, affidavits were received from Hamish Lampp, Jason Shailer, Jo Anne Micklejohn, Kimberly Troughton, Kirsty Milham, Lance Kennedy and Warrick Zander.

[7] Written and oral submissions were made by both parties and further submissions and correspondence were received after the investigation meeting in relation to the Council delegations with regard to dog control officers, and Mr Du Fall's concerns about the various minimum standards breaches set out above.

The law relating to interim injunctions

[8] The Authority's jurisdiction to order interim reinstatement pending its investigation of the personal grievance(s) is set out at section 127 of the Employment Relations Act 2000 (the Act). In determining whether to make an order or interim reinstatement, the Authority must apply the law relation to interim injunctions having regard to the object of the Employment Relations Act 2000 (the Act).

[9] The principles relating to interim injunctions were set out by the Court of Appeal in *NZ Tax Refunds Ltd v Brooks Homes Ltd*:¹

The applicant must first establish that there is a serious question to be tried or, put another way, that the claim is not vexatious or frivolous. Next, the balance of convenience must be considered. This requires consideration of the impact on the parties of the granting of, and the refusal to grant, an order. Finally, an assessment of the overall justice of the position is required as a check.

[10] The Employment Court recently observed in *Savage v Wai Shing Ltd* ²

An interim injunction is fundamentally different to a permanent injunction. Under the general law, at the interim stage the parties legal or equitable rights are uncertain. At that time, the object is to preserve the Court's ability to give effect to the parties substantive legal or equitable rights at trial. It has been described as a 'holding remedy' to address a present position until the merits of the case can be fully adjudicated; or as a process to 'hold the ring' pending final determination of the merits or other disposal of the dispute. It does so by maintaining the status quo, which is the last settled position between the parties.

[11] In considering Mr Compton's application for interim reinstatement the Authority is required to consider the following:

- (i) Whether there is an arguable case to be tried in relation to the claim of unjustified dismissal and in relation to the claim for permanent reinstatement?
- (ii) Where does the balance of convenience lie pending the substantive investigation and final determination of Mr Compton's claim?
- (iii) Is there an adequate alternative remedy available, such as damages?

¹ *NZ Tax Refunds Ltd v Brook Homes Ltd* [2013] NZCA 90 at [12] – [13].

² *Savage v Wai Shing Ltd* [2019] NZEmpC 141 at [32]

- (iv) Where does the overall justice of this case lie until the substantive matter can be determined?

Background

[12] For many years Mr Compton was a Dog Control Officer at the Council before stepping up to the role of Senior Compliance Officer – Animal Management in February 2020 following a restructure. Also in 2020, conduct concerns about decision making and judgement were raised with Mr Compton. Five allegations were investigated formally and ultimately Mr Compton was dismissed for serious misconduct at the conclusion of that investigation.

[13] Prior to the formal investigation of the specific allegations, several concerns had been raised with Mr Compton by Warrick Zander, his manager at the time. They were general concerns were about Mr Compton's approach to compliance and how he was performing the technical and leadership aspects of his role. Mr Zander wanted to address these matters in an informal way.

[14] They met and a letter of expectation was issued setting out what was discussed, Mr Compton's explanations and the expectations of Mr Compton for the future. It was also stated that should similar concerns occur in the future, it may be considered to be a breach of the Code of Conduct. The letter had a space at the bottom for signatures to record that each party confirmed they understood and accepted the expectations set out in the letter. Mr Compton declined to sign the letter.

[15] Then in 2020, further issues arose and the five specific allegations were investigated formally. After Mr Compton's responses were sought with regard to the five allegations, Mr Zander created a report recommending further formal action be taken and escalated the matter to the Chief Operating Officer.

[16] Mr Lampp, Group Manager, Regulatory and Planning, became involved as the decision maker. After considering the report from Mr Zander, Mr Lampp decided further investigation was required and advised Mr Compton of this. This was in October 2020.

[17] Around the same time Mr Compton raised issues with his manager about work stress and whether he was being paid correctly by the Council and Mr Compton had several periods of leave during the conduct investigation and leading up to it.

[18] Between June 2020 and 1 February 2021 Mr Compton was on extended sick leave. On his return Jason Shailer had taken over the Compliance Operations Manager role from Warrick Zander.

[19] On 15 February 2021, Mr Compton sent Mr Shailer an email setting out a number of concerns about his return to work. They met the next day and discussed Mr Compton's concerns, that included health concerns, the Promapp system and working alone and remotely as well as expectations to do with decision making in that the compliance decisions needed to be legal, fair and reasonable. On 23 February they met again and went through a performance review that focussed on Mr Compton's return to work.

[20] Mr Shailer said he had become increasingly concerned about the way Mr Compton was operating in that he thought Mr Compton was experiencing some confidence issues and struggling with decision making because among other things, Mr Compton was deferring to the other Animal Management Officers to take the lead.

[21] Mr Shailer says he spoke to Mr Compton about his concerns on two more occasions. On one of these occasions he took him out for coffee and explained that he needed him to be operating at a more senior level. On the other occasion they met in a meeting room at the Council.

[22] On 1 April Mr Compton sent Mr Shailer an email updating him on his currently state. Mr Shailer took advice from HR about how to respond because of the mental health concerns raised. He followed up with an email on 6 April but Mr Compton was by then on leave from 2 April to 3 May 2021.

[23] On his return Mr Shailer paired Mr Compton up with another Animal Management Officer because he was also concerned about the amount of time he had to spend with Mr Compton, who he says were asking him questions that a junior officer could have managed. He also became aware that other members of the team were reluctant to engage with Mr Compton or seek advice or support from him.

[24] In mid June, Mr Compton raised concerns with Mr Shailer about how the Council was paying him and said he was not prepared to work over-time because he did not consider he was being paid properly for it. By this stage, Mr Shailer had reached the conclusion that Mr Compton was operating well below that expected of a Senior Animal Management Officer. He took steps to commence a formal improvement process, but Mr Compton's employment was terminated before he was able to commence these.

[25] In April 2021, Mr Lampp says he received extensive responses to the investigation material he had provided to Mr Compton. It took Mr Lampp some time to work through it and as a result of the feedback he sought further information from two employees and additional information from Mr Compton. He also had to work around Mr Compton's leave.

[26] On 30 April 2020, a provisional decision was issued and Mr Compton provided a lengthy response. Mr Lampp says he worked through all the material before forming a final view that Mr Compton's actions amounted to serious misconduct and that dismissal was the appropriate outcome.

[27] Mr Lampp met with Mr Compton on 25 June 2021 so the final decision could be communicated in person.

[28] Mr Compton says he was never consulted on any alternatives to dismissal and submissions were made on his behalf that his long service and good conduct cannot have been taken into account in reaching the dismissal decision.

[29] After Mr Compton's employment was terminated, additional concerns came to light in relation to a number of files found in his locker. Of particular concern to the Council is a file relating to a dog that Mr Compton was instructed to have classified after a biting incident. The classification was not completed and subsequently the dog was involved in another biting incident.

[30] In submissions Mr Du Fall raised a number of concerns about the allegations and how they were handled as well as the concerns about Mr Compton's mental health. He says the history to this matter is important. Mr Compton's position is that he was

subject to bullying at the Council and that a previous manager had sought to terminate his employment and for various reasons Mr Zander continued to bring about an end to Mr Compton's employment.

[31] Extensive submissions were made on Mr Compton's behalf about the allegations, how they were addressed and why the responses to them should have satisfied the Council. Mr Compton says that he and Mr Zander had discussions regarding the allegations that can mostly be explained but he notes Mr Zander now denies those discussions. Mr Compton also says Mr Zander should have some responsibility in terms of what is alleged against him.

[32] It was also submitted that because Mr Compton continually worked excessive hours this caused issues with Mr Compton's ability to cope with what he says was an excessive workload after the bullying. It was for this reason he could not commit fully to the leadership position. Mr Compton had believed after the restructure when his position changed to a senior one, that that would reduce his workload but he did not find this to be case.

[33] While no medical evidence was provided, he says he believes he was suffering from some form of post-traumatic stress because even when he was on leave, he was still ill. He says Mr Zander never acknowledged his excessive workload. The relevance of this, he says, was that insufficient regard was paid to his mental state and the cause of that, and that the big picture is that his employer has not treated him reasonably and fairly given all the circumstances at play.

[34] The Council's submissions focussed on the regulatory aspect of Mr Compton's role and the risk that statutory non-compliance would have on the Council's ability to comply with its obligations and carry out its responsibilities under the relevant legislation. The point was strongly made that public safety underpins the need for regulation and the Council has wider obligations and responsibilities that are relevant to its assessment about Mr Compton's current ability to perform the role.

[35] Dog Control Officers are required to hold a warrant in order to exercise some of their powers and I am told that the warrant runs with the appointment such that Mr Compton's has now expired.

[36] It says the investigation was conducted fairly and Mr Compton's responses have been carefully considered. The file discovered after he left, showing Mr Compton was required to take steps to have a dog classified as dangerous, is a further example of why the Council can no longer have any trust in Mr Compton's ability to carry out the role.

[37] Mr Compton has not had an opportunity to have his explanations in relation to the material identified in his locker considered by the Council because they were discovered after he left.

Arguable case in relation to the claim for unjustified dismissal?

[38] The threshold for a serious question is that the claim is not frivolous or vexatious. Analysing this is not an exercise of a discretion, rather it must be based on judicial assessment of the evidence, albeit untested, and the submissions advanced.³

[39] In this case the arguable case to be tried is whether or not the termination of Mr Compton's employment was something a fair and reasonable employer could do in all the circumstances. The Council accepted that the test was a low threshold to cross but nonetheless submitted it was justified in reaching the decisions it did, given the statutory compliance aspects to the role and the nature of the conduct concerns.

[40] The Council's position was it could no longer have any trust and confidence in Mr Compton's decision making and judgement because it could not be confident that the enforcement and regulatory aspects of the Dog Control Act were being applied correctly or that Mr Compton would follow instructions from his managers.

[41] After hearing Mr Compton's submissions, I note his position that he believed people in management wanted him removed, that he did not think his health had been adequately taken into account or addressed by his employer and alternatives had not been adequately explored and nor had his long unblemished work history been taken into account.

[42] At the substantive hearing the focus of enquiry will likely be the extent to which Mr Compton could explain the concerns about his conduct and whether there was

³ *Western Bay of Plenty District Council and NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

genuine consideration of those. It is worth noting at this stage that in relation to some of the allegations that were put to him, he did not deny the facts, but had an explanation as to why he took a particular approach.

[43] It was also submitted that Mr Compton was able to use a graduated response to compliance which involves a low level and educative approach to compliance with dog owners in certain circumstances. The extent to which that approach is valid in a regulatory setting and to which Mr Compton could take that approach in exercising his powers and duties as a Dog Control Officer will also likely be relevant at the substantive hearing.

[44] At this stage the employer has not had an opportunity to justify its actions in response to the problems raised by Mr Compton. The Employment Court noted in *Lewis v Howick College Board of Trustees*,⁴ special care must be taken by the decision maker in reaching an adverse finding because of the potentially wide ranging and career ending implications. And in *Savage v Wai Shing Ltd*,⁵ the object of the exercise in considering interim reinstatement was described as one that “preserves the Court’s ability to give effect to the parties substantive legal or equitable rights at trial.”

[45] In these circumstances, noting the decision is to be made on untested evidence, I conclude that it is arguable as to whether the dismissal meets the standards of procedural fairness and justification for dismissal that an employer would be expected to meet.

Arguable case to be tried in relation to the claim for permanent reinstatement?

[46] The Council submit there is a real risk that even if Mr Compton’s claim of unjustified dismissal was upheld, he may not be reinstated. The result it says is that the Authority is not able to conclude that Mr Compton has a strongly arguable case that he will be reinstated permanently.

[47] The Council’s view was set out in the affidavit of Lance Kennedy, Interim Chief Executive. Having considered the circumstances of Mr Compton’s employment and experience, including issues that came to light after his dismissal, he says, the Council

⁴ *Lewis v Howick College Board of Trustees* [2010] NZEmpC 4.

⁵ Above n2.

cannot be satisfied that Mr Compton is competent to perform the duties and exercise the powers of a Dog Control Officer.

[48] Of course, given that the employer has not had an opportunity to justify its actions, it would be premature for it to reach that conclusion about reinstatement.

[49] The same applies to the issues that came to light after Mr Compton's dismissal and, in particular, the file that gives rise to the concerns about a dangerous dog classification that should have been applied for in 2019 but was not.

[50] That dog has gone on to be involved in another biting incident and while I accept that this sequence of events is significant and very concerning for the Council particularly given the regulatory function it has, Mr Compton, has not had an opportunity to respond. He was dismissed before this became a concern for the Council.

[51] There is of course also the possibility of reinstatement to a position no less advantageous to the employee which gives the Council options other than the positions requiring a warrant. Given the nature of the Council, it seems obvious that there would be other roles that could be considered.

[52] I conclude that on the untested evidence, there is an arguable case albeit a marginal one, for permanent reinstatement. The statutory overlay is relevant to this conclusion and it is set out in more detail below.

Balance of convenience

[53] This part of the analysis involves a weighing exercise and requires consideration of the impact on the parties of the granting of, and the refusal to grant, an order. I accept that the longer Mr Compton is out of the work place the more difficult it will be for him to integrate back into it. Ten months has now elapsed. By the time the parties are ready for a substantive hearing, and a determination is issued, several more months will have passed. With time the likelihood of a successful reintegration diminishes however, jobs are important and money is often not an adequate substitute.⁶

⁶ *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421 at 436.

[54] Mr Compton was firmly of the view that damages were not an adequate remedy or substitute for him and I tend to agree. The impact on Mr Compton, having held this role for 28 years has been devastating. He spoke of his standing in the community and the impact on his self-worth, confidence and his health. The finality of dismissal and the likely delay in having the substantive claim finally determined weighs in favour of interim reinstatement.

[55] I have already touched on his claim for unjustified dismissal and permanent reinstatement, insofar as they can be assessed at this stage.

[56] I also note Council's concerns regarding a small team and there is at least one person who says they would not feel safe working around Mr Compton in that they could not trust that he would do the right thing, and that trust has completely broken down.

[57] There is also the issue of the role requiring a warrant and the fact that Mr Compton's has expired. The Council's view is that regardless of whether he is in a role that requires a warrant, with its regulatory function and the responsibilities that come with that, it is unable to have confidence in Mr Compton's ability to make sound decisions in any role to do with animal management.

[58] While I am cognisant of the delay and the impact on Mr Compton, I am persuaded in this case that the overlay of a regulatory statutory regime and the extent to which the Council say it has lost all trust and confidence, means that the interests of justice weigh against interim reinstatement at this preliminary stage.

Overall interests of justice

[59] The final consideration is the overall interests of justice. While there is an arguable case that Mr Compton's dismissal was unjustified and that he would be permanently reinstated to his role, should he be successful in a substantive hearing, the fact the role involves regulation, enforcement and prosecution of offences for which the Council is ultimately responsible, is also important.

[60] Section 9 of the Dog Control Act 1996 provides that the Council has to be satisfied that "having regard to the education and experience of the person to be

appointed, that that person is competent to perform the duties and exercise the powers of a dog control officer under this Act.”

[61] The Council is firmly of the view that it cannot be satisfied of that at this point in time and in the alternative if Mr Compton was to return to another role in the team, significant supervision would still be required to manage the risks it identified.

[62] In these circumstances I find that the overall interests of justice weigh against interim reinstatement.

Conclusion

[63] The application for interim reinstatement is not granted.

[64] A case management conference call will be arranged with the parties to schedule a date for the investigation meeting and timetable the evidence.

Costs

[65] In the circumstances costs are reserved.

Sarah Kennedy
Member of the Employment Relations Authority