

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2023] NZERA 311  
3222419

BETWEEN

CHENGJUN HE  
Applicant

AND

KINDERCARE LEARNING  
CENTRES LIMITED  
Respondent

Member of Authority: Marija Urlich

Representatives: Simon Greening, counsel for the Applicant  
Emma Monsellier, advocate for the Respondent

Investigation Meeting: 26 May 2023 (by audio-visual link)

Determination: 13 June 2023

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This determination deals with an application Chenjun He lodged with the Authority for interim reinstatement.<sup>1</sup> Kindercare Learning Centres Limited (Kindercare) opposes the application.

[2] Mr He was employed by Kindercare as a teacher at one of its early childhood learning centres from May 2022 until his dismissal on 14 December 2022. His terms of employment are set out in a written employment agreement dated 22 April 2022.

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<sup>1</sup> Lodged on 5 April 2023 along with a signed undertaking as to damages and supporting affidavit.

## **The Authority's investigation**

[3] By consent the investigation meeting was held by audio-visual link. The parties have complied with timetabling directions for the filing of affidavit evidence and submissions. They have attended mediation.

[4] In determining this matter the following evidence has been considered:

- (i) affidavit of Mr He sworn 5 April 2023 and affidavit in reply affirmed 26 May 2023;
- (ii) affidavit of Kelly Wendelborn, Kinderbare's chief executive officer, sworn 29 May 2023;
- (iii) affidavit of Victoria Farquhar-Ayson, the area and curriculum manager, sworn 29 May 2023;
- (iv) affidavit of Rozanna Mene, the centre director, affirmed 29 May 2023; and
- (v) affidavit of Sharyn Afu, child and protection social worker/child protection advisor and family services advisor sworn 29 May 2023.

[5] The Authority has also considered Mr He's interim reinstatement application and Kindercare's notice of opposition, the statement of problem Mr He lodged setting out his substantive claim and Kindercare's statement in reply opposing the claim, the documents attached thereto and the parties' submissions.

[6] Evidential matters in dispute between the parties will not be resolved by this determination because the evidence is untested and in applying the relevant tests the Authority is not required to resolve any disputes.

## **The Law**

[7] In determining whether or not to order interim reinstatement, regard must be had to the object of the Employment Relations Act 2000 (the Act) which is to build productive employment relationships through the promotion of good faith.<sup>2</sup> It is with this in mind that applications for reinstatement are to be dealt.

[8] Section 127 of the Employment Relations Act 2000 (the Act) confers jurisdiction on the Authority to grant interim reinstatement. In considering Mr He's

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<sup>2</sup> *Humphrey*, above n 1, at [5].

application for interim reinstatement the Authority is required to consider the following:<sup>3</sup>

- (i) Does Mr He have an arguable case for unjustified disadvantage and an arguable case for permanent reinstatement?
- (ii) Where does the balance of convenience lie? This requires looking at the relevant detriment or injury that Mr He and Kindercare will incur as a result of the interim injunction being granted (or not granted)?
- (iii) The Authority is then required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

### **Arguable case of unjustified dismissal**

[9] The first question for consideration is whether there is an arguable case Mr He was unjustifiably dismissed. An arguable case means a case with some serious or arguable, but not necessarily certain prospects of success.<sup>4</sup> The threshold for a serious question or arguable case as stated in *McInnes* is that the claim is not frivolous or vexatious.<sup>5</sup>

[10] Section 103A of the Act sets out the test for assessing whether a dismissal was justifiable. It requires an objective assessment of whether Kindercare's actions and how it acted were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred. The Authority may take into account other factors it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in Mr He being treated unfairly.<sup>6</sup> The Authority's task is to examine objectively Kindercare's decision-making process and determine whether what it did and how it was done were steps open to a fair and reasonable employer.

### *Background*

[11] The context of Mr He's dismissal starts with a letter Kindercare received on 10 November 2022 from a caregiver concerning conduct they had observed on 9 November whilst their child was under Mr He's supervision. On 10 November

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<sup>3</sup> *Western Bay of Plenty District Council v McInness* [2016] NZEmpC 36 at [7].

<sup>4</sup> *X v Y Ltd v New Zealand Stock Exchange* [1992] 1 ERNZ 863.

<sup>5</sup> *McInnes* above n 1, at [9].

<sup>6</sup> Section 103A Employment Relations Act 2000.

Kindercare advised Mr He of the concerns and asked him to provide a written response which he did that same day. On 10 and 11 November Mr He attended meetings with Kindercare representatives where he answered questions about the concerns raised in the caregiver's letter. At this meeting Mr He was told he was to be placed on special leave, that he should then leave the workplace and not return the following morning.

[12] Having made a preliminary assessment Kindercare decided to investigate the issues raised further. On 11 November Mr He was provided with a written terms of reference for an investigation and invited to attend a formal meeting on 14 November. The terms of reference made it clear the investigation was fact finding and not disciplinary in nature.

[13] The 14 November meeting did not proceed because Mr He had not yet engaged a representative and was moved to the afternoon of 15 November. He avers he had very little time to find a representative and sought the assistance of a community organisation who referred him to a representative who he engaged on 15 November. At the scheduled time for the rescheduled meeting Mr He did not attend. Kindercare's representative Ms Monsellier, telephoned Mr He who said he was with his representative. He told Ms Monsellier he would not be attending the meeting and handed the telephone to the representative. Ms Farquar-Ayson and Ms Mene were present with Ms Monsellier and overheard the subsequent conversation. They aver the representative was abrupt and abusive towards Ms Monsellier and used unprofessional and vulgar language.

[14] That same day the representative wrote to Ms Mene providing their authority to act on behalf of Mr He, indicated a request for information would be forthcoming and raised specific questions about the authorisation of Kindercare's investigator to conduct such an investigation. The correspondence also raised concerns about Mr He's suspension and that the investigation appeared to be rushed. The representative said these issues were likely to form the basis of a personal grievance.

[15] On 17 November the representative wrote to Ms Mene with feedback about the issues set out in the investigation letter. The letter starts by raising a general concern as to the reasonableness of commencing an investigation and then, as may be expected, makes detailed comments about the specific matters under investigation. The letter then takes on a somewhat aggressive tone and includes the use of offensive language.

[16] On 18 November Mr He's representative wrote to the Kindercare investigation team (Ms Mene, Ms Farqhar-Ayson, Ms Afu and Ms Monsellier) with an information request under the Privacy Act 2020.

[17] On 22 November Kindercare provided a draft investigation report to Mr He for comment by 25 November. The report found there was no inappropriate conduct by Mr He but found there was likely a lack of supervision and more generally raised concerns about Mr He's teaching and cleaning practices. Mr He was provided an opportunity to comment on the draft report. He did not, it is understood on advice, provide any comment. The report was then finalised and referred to Mr Wendelborn to determine what action was to occur next, if any.

[18] On 24 November Mr He, by arrangement collected his belongs from the workplace.

[19] On 28 November Mr He's representative wrote to Ms Mene raising a personal grievance for unjustified constructive dismissal and "...the circumstances which the employer placed Mr He in have destroyed the employment relationship, making impossible for him to return to the worksite, amounting to constructive dismissal". The letter is detailed and runs to over 5 pages. Over the next few days, the representative and Ms Monsellier exchanged correspondence regarding the personal grievance and the effect of the asserted constructive dismissal given Mr He had not provided written notice of resignation. Mr He avers his representative did not explain to him what a constructive dismissal was or ask for his approval before raising this claim and that he thought a personal grievance for unfair treatment and discrimination was being raised on his behalf.

[20] On 1 December Ms Mene called Mr He and Mr He avers they spoke for four minutes. Mr He avers during the conversation Ms Mene asked him if he was resigning and he told her he was not and that was not his intention. He told Ms Mene he recognised his representative was "impatient and rude" but was "upset that you are treating a great teacher like this" and he had asked his representative to be "nicer". Ms Mene does not comment on this conversation in her affidavit.

[21] On 2 December Kindercare applied for urgent mediation with the mediation service. A date could not be agreed between the parties. On 6 December Kindercare provided Mr He with a final investigation report and invited him to a disciplinary meeting on 8 December concerning allegations including failure to follow cleaning policy. Mr He said he tried but was unable to make contact with his representative and that he wished to have a representative present at the meeting.

[22] On 8 December Mr He emailed Kindercare that he could not attend the meeting because he could not obtain advice. Kindercare replied that they would move the meeting on 9 December or he could provide written feedback by 12 December.

[23] On 12 December Mr He advised Kindercare he had not yet had a response from his representative. On 13 December he emailed Kindercare and his representative that he would find another representative if they (the representative) had not contacted him within 48 hours. By letter dated 14 December 2022 Kindercare dismissed Mr He on the grounds he had demonstrated inappropriate cleaning practices, failed to follow Kindercare policies and procedures and failed to engage in a disciplinary process.

[24] On 20 December 2022 Kindercare made a mandatory report to Mr He's professional registration body of the grounds of dismissal. On 6 March 2023 that body advised him no further action would be taken on the matter.

[25] Kindercare says there is no serious question to be tried or arguable case. It submits any criticism of the process is procedural and Mr He's failure to engage actively in the process is a significant contributing factor to the circumstances of his personal grievance.

[26] It is arguable whether the disciplinary process undertaken by Kindercare and the conclusions reached justifying dismissal were the actions a fair and reasonable employer could have taken in all the circumstances. The information before the Authority indicates Kindercare did not seek or consider any comment from Mr He about the appropriateness of putting him off work before it made the decision to do so and did not consider any comment from Mr He on the disciplinary matters prior to dismissing him. Kindercare's decision to move to dismiss Mr He in the circumstances known to it at that time, including the apparent failure of his representative to engage, the concerns

Mr He raised with it about this and his request for more time are issues which will need to be assessed against the s 103A test for justification.

[27] Mr He's claim meets the low threshold of an arguable case for his personal grievance of unjustified dismissal.

*Arguable case for permanent reinstatement*

[28] Where it is practical and reasonable to do so and sought, the Authority must provide for reinstatement as a primary remedy<sup>7</sup>. The question is whether it is feasible or practical to re-impose the employment relationship. It is not sufficient to show resistance and strained circumstances to avoid reinstatement.<sup>8</sup>

[29] Mr He says reinstatement is both reasonable and practicable:

- (i) the initial investigation found there was insufficient evidence of inappropriate conduct on his behalf;
- (ii) he has no animosity or relationship difficulties with his colleagues or clients of Kindercare; and
- (iii) there is no professional barrier to his teaching again.

[30] Kindercare submits permanent reinstatement is not practicable or reasonable because there is an irretrievable breakdown in its relationship with Mr He, it would not be possible under any circumstances for the parties to work together moving forward and the operational and regulatory implications of reinstatement are onerous.

*(i) Practicability*

[31] Can the employment relationship be successfully re-imposed?<sup>9</sup> There is untested evidence Mr He's relationship with Kindercare, including with managers at the centre where he was employed is strained. There is also evidence, albeit untested, that there are third parties who might be detrimentally effected if Mr He is reinstated.

[32] On Kindercare's evidence these concerns appear to have resulted from the investigation and subsequent disciplinary process and in particular Mr He's then representative's interactions with the team undertaking the investigation including

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<sup>7</sup> Section 125(2) of the Employment Relations Act 2000.

<sup>8</sup> *Angus v Ports of Auckland* [2011] NZEmpC 122 at [63] and *Air New Zealand Limited v Hudson* (unrep) Employment Court, Auckland, AC 46/05, 17 August 2005, at p 8.

<sup>9</sup> *Smith v Fletcher Concrete & Infrastructure Ltd* [2020] NZEmpC 125 at [20].

Kindercare's representative and Mr He's failure to engage with the disciplinary investigation.

[33] On Mr He's evidence he also appears to have concerns about his relationship with Kindercare. In his letter to Kindercare dated 16 January 2023 in which he raises a personal grievance for unjustified dismissal and a claim for breach of contract he raises a number of concerns about Kindercare's conduct towards him including that it has not acted in good faith towards him in its dealing with the investigation, that he had been discriminated against and treated unfairly "the whole time" and that Kindercare refused to apologise to him when the allegations were proven "false". He also asks that Kindercare meet the costs of diagnosis and medical treatment for harm caused to him by Kindercare's treatment.

(ii) *Reasonableness*

[34] Is it reasonable to require Mr He to return?

[35] Mr He has the skills and experience to undertake a teacher role with Kindercare with it is understood some supervision. He is a New Zealand trained and registered teacher. He has a tertiary teaching qualification gained in New Zealand and experience teaching. He is committed to teaching and wishes to continue in the profession.

[36] There is a risk of detrimental effect to third parties' which Kindercare says will be engaged if Mr He is reinstated. These issues appear to be matters of regulated practice which could well be worked through given sufficient time.

*Conclusion*

[37] Given the conflicting affidavit evidence and Mr He's ability to perform the duties of the role, it is difficult to conclude it would not be practical or reasonable for Mr He to be reinstated to the role in a permanent setting notwithstanding the issues which may have to be worked through. While it is accepted the parties have engaged in attempts to remedy the relationship without success it does not follow that such attempts are exhausted or not worth continuing:

While no-one is of the view that this would be easy, neither is it possible to say at this stage that it is not practicable or reasonable.<sup>10</sup>

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<sup>10</sup> *Christieson v Fonterra Co-operative Group Limited* [2021] NZEmpC 142 at [42].

[38] Mr He has an arguable case for permanent reinstatement.

### **Balance of convenience**

[39] This ground for consideration involves the relevant detriment or injury the parties will incur if interim reinstatement is granted or not. An assessment of what might happen if the interim position is reversed in any substantive determination including consideration of whether damages can adequately compensate any harm if reinstatement is not ordered is also to be made.

[40] Mr He says the balance of convenience favours him for the following reasons:

- (i) his dismissal has left him impecunious and homeless;
- (ii) as a visa dependent migrant worker, he is category of employee who is inherently vulnerable;
- (iii) Kindercare has been on notice since 16 January 2023 that we wished to be reinstated to his role;
- (iv) he has not been able to look for another job because his circumstances are tarnished by the shadow of his dismissal from Kindercare who employed him under a work visa; and
- (v) there is no barrier to his reinstatement to Kindercare given the outcome of the mandatory reporting.

[41] Kindercare says the balance of convenience favours it:

- (i) the delay in Mr He advancing his claim means the workplace has moved on;
- (ii) his conduct during the investigation process and that of his authorised representative has shaken the confidence of Kindercare and the staff where he was employed that they will be able to re-establish a functional working relationship with him;
- (iii) Mr He's reinstatement would have a significant impact on third parties, including on operational issues at the centre at which he was employed and would likely require notification to and assessment processes by the relevant regulatory authorities;
- (iv) Mr He's ability to return to work given the serious health concerns he has raised consequent to his dismissal has not yet been assessed. This

would have to be assessed by Kindercare and potentially referred to the relevant regulatory body to make any further necessary assessment;

- (v) Kindercare has genuine concerns Mr He will be unable to comply with all policies and procedures particularly given he did not respond to the allegations raised in the disciplinary process;
- (vi) Mr He's evidence of mitigation of loss including his accommodation and access to funds is not strong. It says there is a teacher shortage and he may well be able to secure a new position; and
- (vii) damages would likely be an adequate remedy.

[42] Though Mr He has been given the benefit of the doubt at the arguable case stage the delay in bringing his claim sounds in the balance of convenience. Mr He waited over three and a half months to lodge his claim for interim reinstatement. In that period, he does not appear to have looked for alternative employment and though it is accepted he is facing financial difficulties the information he has provided in support of this is not strong. Given the delay and the paucity of information as to mitigation attempts and financial circumstances these issues do not weigh in favour of reinstatement at the interim stage.

[43] A further factor weighing against interim reinstatement are the serious concerns Mr He has raised about his wellbeing which have not yet been medically assessed. Mr He accepts such an assessment would need to be made but he says Kindercare should pay for that assessment because it is the cause of his concerns and due to his immigration status accessing healthcare is difficult. Given the lack of medical information as to Mr He's current health status and the evidence before the Authority of the strict legal framework Kindercare operates in which includes obligations relating to the health of employees, ordering reinstatement pending an appropriate assessment has the real and significant risk of imposing unnecessary complexity which may well outweigh the benefit of interim reinstatement.

[44] The balance of convenience weighs in favour of Kindercare.

### **Overall justice**

[45] Standing back from the detail of the claim where on balance does the overall justice lie? This has been described by the Court of Appeal as:

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.<sup>11</sup>

[46] The Authority understands the key motivator of Mr He's claim for interim reinstatement is his desire to return to his teaching position with Kindercare and to address the financial and emotional impact of the dismissal on him. He holds a work visa currently tied to his employment with Kindercare and he feels acutely that he was let down by his former representative which he says has resulted in his losing that employment.

[47] The information before the Authority suggests Mr He may well have found a job elsewhere had he looked for alternative employment in the months since his dismissal. It is difficult to conclude reinstatement to the role at Kindercare, given his failure to mitigate this loss is a necessary factor weighing strongly in his favour.

[48] In addition, the visa variation process Mr He faces in securing another job is a matter, on the information before the Authority, he is familiar with given he has dealt with this process twice previously. Further, Mr He has provided no independent evidence of his financial circumstances which would weigh strongly in favour of reinstatement.

[49] Given the above and the concerns raised about reinstatement in the short term on the operation of the business, including if Mr He can practically go back to work in the short term, I find the overall justice of this matter does not weigh in favour of interim reinstatement.

## **Outcome**

[50] Mr He's application for interim reinstatement is declined.

[51] A case management conference is to be convened shortly to timetable an investigation meeting of the substantive employment relationship problem.

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<sup>11</sup> *NZ Tax Refunds Limited v Brooks Homes Limited* [2013] NZCA 90 at [47].

## **Costs**

[52] Costs are reserved.

Marija Urlich  
Member of the Employment Relations Authority