

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

[2013] NZERA Christchurch 168
5425102

BETWEEN NGAPARE JAY
 Applicant

AND MANUKA COMMUNITY HOUSE
 INCORPORATED
 Respondent

Member of Authority: Helen Doyle

Representatives: Luke Acland, Counsel for Applicant
 Kay Chapman, Advocate for Respondent

Investigation Meeting: 13 August 2013 at Nelson

Submissions received: One the day of the investigation meeting

Determination: 16 August 2013

DETERMINATION OF THE AUTHORITY

- **The application for interim reinstatement is declined.**

Employment relationship problem

[1] Ngapare Jay was employed by the Manuka Community House Incorporated which operates the Manuka Early Learning Centre in Nelson as Head Teacher/Centre Manager from 14 June 2010 until her dismissal on 5 July 2013 for serious misconduct. She was party to a written individual employment agreement with the Centre.

[2] Mrs Jay says that her dismissal was unjustified and she has made an application for interim reinstatement to her position of Head Teacher/Centre Manager. Mrs Jay has provided to the Authority an undertaking as to damages together with an

affidavit in support of the application lodged and an affidavit in reply to the five affidavits' provided in opposition to the application.

[3] Interim reinstatement is opposed by Manuka Community House Incorporated. Manuka Community House Incorporated, which I shall refer to from hereon as the Centre, is a duly incorporated Society under the Incorporated Societies Act 1908. It is a licensed service provider of early childhood education and care centre under the Education Act 1989 and its regulations. The Centre is governed by a body of elected members known as the Collective. The Collective in accordance with requirements under the Education Act 1989 and the Education (Early Childhood Centres) Regulations 1998 elected a licensee, Nadia Packer, to respond to issues relating to the licensing of the service. Ms Packer commenced in the licensee role on 28 March 2013 and thereafter initiated the disciplinary investigation into Mrs Jay's actions on behalf of the Collective and made a decision about the disciplinary outcome.

[4] The parties attended mediation but were not able to resolve the matter and it was therefore set down for an investigation meeting to deal with the application for interim reinstatement on the basis of the affidavit evidence and submissions.

Issues

[5] An injunction involves the exercise of discretion. Mr Acland and Ms Chapman were in agreement about the inquiry that the Authority is required to make in the exercise of its discretion. I set that out as follows:

- (a) Whether there is an arguable case of unjustified dismissal and an arguable case that Mrs Jay would be, following the hearing of the substantive matter, permanently reinstated rather than simply awarded monetary compensation;
- (b) An inquiry where the balance of convenience lies including whether there is an alternative adequate remedy available. This requires looking at the relevant detriment or injury that Mrs Jay or the Centre will incur as a result of the interim injunction being granted or not ;
- (c) Finally the Authority is required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

Background

[6] I shall set out the relevant background facts from the untested affidavit evidence and documents to provide the necessary background against which the Authority is required to exercise its discretion whether or not to grant an interim injunction.

[7] Prior to Ms Packer commencing as licensee at the Centre the previous licensee was advised by a teacher at the Centre, Nicola Gardiner, about some concerns she had about Mrs Jay. Some were about managing children but one concern was about the amount of time that Mrs Jay spent on *the floor* of the Centre. That is, as I understand it, supervising and interacting with the children as opposed to office/administration work. As a result of that concern being raised Ms Gardiner was asked to keep a record of the times when Mrs Jay was not on the floor in accordance with the roster.

[8] After some further complaints were raised Ms Packer commenced a disciplinary investigation and advised Mrs Jay of three allegations in a letter dated 5 April 2012. The first allegation was that a child had been left in solitary confinement on two separate occasions on 21 and 25 March 2012. The second was that Mrs Jay had interacted on a particular day with another teacher Jordan Christian resulting in her feeling bullied and unwanted, and that third was that there were discrepancies between times Mrs Jay was rostered to be on the floor and when she was actually present on the floor noted over a period of weeks during February and March 2013. Mrs Jay was advised of suggested meeting dates and that she may bring a representative with her to the meeting. She was also advised in the letter that if the allegation were made out and constituted misconduct or serious misconduct then disciplinary steps may be taken.

[9] Mrs Jay was then on sick leave from 9 April to 6 May 2013. On her return she was given a copy of Ms Christian's complaint and the roster details.

[10] A disciplinary meeting was then held on 14 May 2013. Mrs Jay was represented at that meeting by Mr Acland. Ms Packer attended with Glenda Haren. Mrs Jay denied that she left a child in solitary confinement. She denied bullying Ms Christian and using the words complained of and improper absence from the floor. In her affidavit of 9 July 2013 in para. 15(b) she deposed to saying that she had used constructive words as a manager with Ms Christian and concerned person at that

meeting. Mrs Jay deposed further in her affidavit in para. 15(c) that this was the first meeting in which she understood that because she had not been on the floor at all times this meant potentially there was a funding discrepancy with the Ministry.

[11] After the meeting Mrs Jay returned back to work at the Centre.

[12] By letter dated 4 June 2013 Ms Packer wrote to Mr Acland and said that in relation to the allegation that a child may have been left in solitary confinement there would now be a performance management process and that that allegation would not be continued as a disciplinary matter. Ms Packer asked that Mrs Jay provide any further responses to the remaining two allegations and to the supporting information provided. It was confirmed that those allegations could constitute serious misconduct and if substantiated could result in termination of employment. Ms Packer asked that any final responses be received in writing by 4 p.m. 12 June 2013 and then a preliminary decision would be made on that same day and that there was a wish to meet at 3.30 p.m. on that date to discuss the matter. The letter then raised a new allegation that Mrs Jay had appointed a staff member without authorisation and agreed to terms and conditions inconsistent with those of other staff. It suggested a meeting date of 17 June 2013 to discuss that matter. Mr Acland had made it clear that he considered there was an issue with Ms Packer investigating the issues and Ms Packer asked for clarification about that.

[13] A further letter was also written by Ms Packer on 4 June 2013 asking if Mrs Jay had in her possession a pen drive containing information that was confidential about the children and whether she had topped up her phone whilst on sick leave. That letter provided that whilst the questions did not form the basis of any current disciplinary investigation allegations they may depending on the responses be raised in the future.

[14] Mr Acland responded by letter dated 10 June 2013 to Ms Packer. He expressed some surprise that Ms Haren was not carrying out the investigation. He advised that Mrs Jay needed an opportunity to take legal advice on the preliminary decision before she meets with Ms Packer. Mr Acland did say that Mrs Jay thought a meeting about the preliminary decision would be a good meeting to given her final response.

[15] The untested affidavit evidence and documents support that Mr Acland's concerns about Ms Packer undertaking the disciplinary investigation were about her impartiality and independence as well as a concern that Mrs Jay's employer is the Collective and not the licensee. I am strengthened in my view about the first matter being of importance on reading of exhibit A to the second affidavit of Mrs Jay. Exhibit A is a letter dated 18 April 2013 from a union official at New Zealand Educational Institute, Te Riu Roa originally instructed by Mrs Jay to represent her in the disciplinary matters. The concern in exhibit A is about appointing an impartial investigator.

[16] Ms Packer responded to Mr Acland by further letter dated 11 June 2013. In her letter she did not accept that the process was unfair or that she should not be the investigator and decision maker. Ms Packer wrote that nothing in the regulations precludes a licensee from being able to make management decisions. Although there had been a previous suggestion of a meeting to discuss the preliminary finding Ms Packer advised in her letter that was no longer required and Mr Acland on behalf of Mrs Jay would have two further days for any response about the preliminary decision as required to be provided in writing.

[17] On 21 June Ms Packer wrote to Mr Acland and advised that the second and third allegations were substantiated and that the proposal or preliminary decision was to dismiss Mrs Jay. Mr Acland was asked to respond.

[18] Mr Acland responded by letter dated 3 July 2013 and wrote that the two allegations are denied and unsubstantiated. He wrote that the disciplinary process and investigation had been unfair and prejudicial to Mrs Jay and that even if the allegations were true, which he denied, then they are not so serious to justify termination.

Mr Acland asked for a review of the preliminary decision by Manuka Community House Incorporated.

[19] Ms Packer confirmed the outcome of the disciplinary investigation and that Mrs Jay would be dismissed in a letter dated 5 July 2013.

Arguable case

[20] Ms Chapman submitted that Mrs Jay does not have an arguable case for unjustified dismissal or for permanent reinstatement. Ms Chapman submitted

correctly that an arguable case means a case where there are some serious or arguable issues but not necessarily certain prospects of success – *X v Y and The New Zealand Stock Exchange* [1992] 1 ERNZ 863.

[21] At the start of the disciplinary process Ms Packer in her letter of 5 April 2013 stated that she was going to have a representative of the Collective, Wendy Logan, attend the disciplinary meeting but this did not occur. It is arguable, I find as submitted by Mr Acland, that it was procedurally unfair for Ms Packer to have made the decision to dismiss rather than the Collective who are described in Mrs Jay's employment agreement as representing the employer Manuka Community House Incorporated. It is also arguable whether Ms Packer has statutory/regulatory power to act on the Collective's behalf to investigate disciplinary allegations and make a decision about Mrs Jay's employment.

[22] Ms Chapman submitted that the disciplinary process met the requirements as set out in s 103A(3) of the Employment Relations Act 2000. I agree concerns were raised with Mrs Jay and she had an opportunity to respond to them. It is arguable though that as at the time of the meeting on 14 May 2013 Mrs Jay did not understand the concern/allegation about the *on the floor* issue to be that she had made wrongful claims for funding. The allegation was not put in that manner in the letter of 5 April 2013 and that could be arguably unfair. For completeness there was no issue as to staff/child ratio it was solely a funding concern.

[23] It is arguably unfair and not in good faith that the Collective did not, when Ms Gardiner first made the complaint about Mrs Jay about *on the floor* time, bring the issues to Mrs Jay's attention then. Rather the approach was to leave it to Ms Gardiner to record discrepancies for several weeks and then raise the issue based on those records. Arguably that could go to the seriousness of any allegations and arguably even to motive.

[24] It was unclear from the documents and affidavit evidence whether there was any subsequent investigation undertaken by way for example of further questioning of Ms Christian in light of Mrs Jay's responses after 14 May 2013. There was no further information of any such discussions further investigations provided to Mr Acland. I find that it is arguable that the investigation was insufficient and/or that information obtained after Mrs Jay's response was not provided.

[25] It is arguably unfair that although a meeting was to be held to discuss the preliminary outcome that was then changed by Ms Packer to a written response only. With respect to the substance of the allegations it is arguable as submitted by Mr Acland whether dismissal was a decision that a fair and reasonable employer could have made in response to the two allegations that were found to be substantiated.

[26] I find that there is an arguable case about the justification of the dismissal.

Permanent reinstatement

[27] Ms Chapman submits that there is no likelihood of permanent reinstatement. Reinstatement is no longer a primary remedy and simply falls to be considered alongside other remedies available under the Employment Relations Act 2000. Practicability and reasonableness are issues that will need to be considered. The Court of Appeal judgment in *Madar v. P & O Services NZ Ltd* [1999] 2 ERNZ 174 effectively approved a statement in the Employment Court at first instance that:

Overall justice required the Court to decline interim reinstatement where it was foreseeable that permanent reinstatement would be refused.

[28] Ms Chapman relies on a number of matters including workplace relationships. There are matters in Ms Christian's affidavit that raise issues as to how she was treated by Mrs Jay after she made her complaint and before Mrs Jay was dismissed. Ms Christian deposes that Mrs Jay was no longer prepared to assist her with her studies by allowing her to spend additional time at the Centre. She deposed that Mrs Jay incorrectly completed relevant forms and hours that were required for study purposes. Ms Christian deposes that the form recording hours had been incorrectly filled out by Mrs Jay and that if it was left that way Ms Christian would fail her semester.

Ms Packer deposed to Ms Christina raising this with her and that she spoke to Mrs Jay. She understood Mrs Jay would confirm with Ms Christian that she could spend additional time at the Centre. She later found out that the approach had not changed. Ms Christian has deposed that she will immediately resign if Mrs Jay is reinstated.

[29] Ms Packer also deposed in her affidavit that she would immediately resign if Mrs Jay was reinstated and deposes to being undermined in her role as licensee by

Mrs Jay. Heidi Tapper is a member of the Collective and she deposes in an affidavit that she will resign from her role as a Collective member if Mrs Jay is reinstated. Wendy Logan is the Chief Executive of the Nelson Tasman Kindergartens of Nelson and is also a member of the Collective if Mrs Jay was reinstated. She has deposed in her affidavit that she would resign her role as a Collective member. She deposes that she is aware other Collective members would resign meaning the Centre would not have bank signatories to authorise payments. She deposes that she does not believe there is another eligible person that would be willing to become the Licensee and to a belief that if Mrs Jay returned to the Centre it will close. Ms Gardiner, the teacher who raised concerns about Mrs Jay also provided an affidavit. She deposed that if Mrs Jay was reinstated she will *quit on the spot* and do anything to not work out her months' notice including taking sick leave.

[30] Ms Chapman also relies on an earlier warning and the fact that Mrs Jay would have to answer the allegation if reinstated about employing a staff member without authorisation. I accept those are matters to be considered and weighed.

[31] Mrs Jay in her affidavit in reply deposes to having strong relationships with parents, the Collective and staff. She annexed to her affidavit are letters from a number of colleagues, teachers, Collective members and parents in support of her work, teaching ability and as a colleague. Mrs Jay also deposed to a lack of understanding about why Ms Tapper would resign. She deposed to not having the opportunity to answer the issues/concerns raised by Ms Packer and Ms Gardiner and in relation to Ms Gardiner that she could not believe that the Collective did not make earlier decisions around resolving apparent staff conflict. Mrs Jay deposed that she rejected comments made by Ms Gardiner about her behaviour and professional conduct. There was nothing in Mrs Jay's affidavit in reply to Ms Christian's statements in her affidavit about conduct by Mrs Jay after the complaint was made or to Ms Packer's statement in her affidavit that she talked to Mrs Jay about changing her approach but later found out that did not happen.

[32] I conclude that there are issues that may impact on the practicability and reasonableness of permanent reinstatement. Against that there are issues as to whether Mrs Jay knew about some of the matters now relied by the Centre to oppose reinstatement so that she could respond to them. I conclude that at this stage it is

arguable, in the sense of there being a tenable arguable case, permanent reinstatement for Mrs Jay.

Balance of convenience

[33] The Authority is required to look at the relevant detriment or injury that the parties will incur as a result of the interim injunction being granted or not.

[34] Mrs Jay deposes in her first affidavit that she worked for two months while the investigation was on going and there were no safety issues. Mrs Jay deposes that she is 53 years of age and is unlikely to get the same or similar work again because of her age and the small industry in Nelson and that her reputation is critical and it is important that she keep her job. She deposes to being committed to the children at the Centre and holds her relationship with parents in high regard. It is important to her that gossip does not spread about her. She deposes to it being a small industry and a tough economic situation.

[35] Mrs Jay does not specifically refer to what financial stress she is suffering although as a matter of common sense her circumstances are such so as to entitle her to legal aid for these proceedings.

[36] I accept there will be hardship for Mrs Jay if she is not reinstated on an interim basis. Against that is the concern that if reinstatement was ordered a number of resignations was be likely including the licensee and two teachers which may affect the viability of the Centre remaining open. If the Centre does not remain open then there will be significant inconvenience to the Centre, its employees, the children and to Mrs Jay. The Centre may not close but on the untested affidavit evidence I cannot discount a risk that it may do so.

[37] The Authority is often faced with the threat of resignations in interim applications although not so often in affidavits received from individuals themselves. The resignations aside, I also find the conduct described by Ms Christian in her untested affidavit evidence after her complaint was made but before Mrs Jay was dismissed weighs against Mrs Jay. From the untested affidavit evidence the conduct appeared to have continued after Ms Packer asked Mrs Jay to change her approach.

[38] One of the matters I find weighs against Mrs Jay is that there could be very real difficulties for her in working with Ms Gardiner and Ms Christian and it is not

clear given some uncertainty about Ms Packer continuing in her role as licensee whether there would be appropriate pathways for issues to be raised and resolved quickly should conflict arise.

[39] The Authority advised the parties it could hear the substantive matter in late September with further availability in October 2013 so there would not be too significant a delay. There was nothing to support that the Centre could not meet any award for damages that could be made against it.

[40] On final analysis and weighing all matters I find that the balance of convenience tips the Centre's way.

Overall justice

[41] I now stand back and consider the overall justice of the case.

[42] There are, I have found, serious and arguable issues to be investigated. It is important for the Authority to hear evidence on all the issues in a substantive investigation meeting.

[43] It did appear at this stage on the basis of the untested affidavit evidence that Mrs Jay had a stronger arguable case for unjustified dismissal than for permanent reinstatement. I have found that the balance of convenience favours the Centre.

[44] I am satisfied that the overall justice in this case requires that the application for interim reinstatement be declined.

[45] I shall ask a support officer to arrange with Mr Acland and Ms Chapman for a telephone conference with the Authority so that a firm date can be agreed to for the substantive investigation and timetabling order for further evidence scheduled.

Costs

[46] I reserve the issue of costs and these can be dealt with following determination of the substantive matters.

Helen Doyle

Member of the Employment Relations Authority