

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Anne Lynch (Initiating party)
AND Tawa Community Childcare Centre (Responding party)
REPRESENTATIVES Fraser Wood, Counsel for Initiating party
Glenys Steele for Responding party
MEMBER OF AUTHORITY Janet Scott
INVESTIGATION MEETING 23 June 2005
DATE OF DETERMINATION 28 June 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

Mrs Lynch was summarily dismissed from her employment with the respondent on 5 May 2005. She has filed a personal grievance claiming her dismissal was unjustified.

Mrs Lynch has also made application pursuant to s.127 (1) of the Act for interim reinstatement and has provided the Authority with a signed undertaking that she will abide by any order the Authority may make in respect of damages that are sustained through the granting of the reinstatement that Authority decides she should pay.

This determination deals with the application for interim reinstatement.

Background

The respondent is a community based childcare centre (the Centre). Its governing committee (the Committee) is comprised of parents whose children attend the Centre.

At the time of her dismissal Mrs Lynch had been Manager of the Centre for 12 years. Otherwise the Centre comprised a relatively small number of employees - two Supervisors and four childcare staff.

In October 2004 the four childcare staff presented the Committee with a list of concerns relating to the conduct of Mrs Lynch and the two supervisors and the management of the Centre.

Initial attempts made by the Committee to address and resolve the issues between staff and management of the Centre were unsuccessful. Over the months leading to Christmas 2004 the concerns raised by staff were consolidated and took the form of specific allegations against Mrs

Lynch relating to the management of child sleeping arrangements, harassment and bullying of staff and failure to deal with certain health and safety issues at the Centre.

A mediation arranged for 13 December did not proceed because the four Centre staff that had initiated the complaints declined to attend.

On 16 December Mrs Lynch was stood down from her position as Manager of the Centre. The stand down was to continue until 24 December. Mrs Lynch then took a period of approved sick leave until 21 January and thereafter she was again stood down from her position to allow the Committee's investigation into the allegations against her to be completed. Mrs Lynch was on full pay during the stand down from her employment.

The evidence discloses that the investigation continued in parallel with discussions between the parties in relation to a negotiated exit by Mrs Lynch from her role as Centre Manager. No agreement was reached between the parties.

On 11 April Mrs Lynch through her advisor applied to the Mediation Service of the Employment Relations Service for assistance to facilitate a conclusion to all outstanding issues between her and the respondent.

On 15 April the respondent wrote to Mrs Lynch (through her advisor) requesting her to attend a disciplinary meeting to discuss a number of detailed allegations. They were (summarised):

- Failure to adequately investigate serious allegations of children being smothered in the sleeping room, and failure to inform the Committee of these allegations. (The smothering issue).
- Harassment/bullying of staff (allegations previously advised and independently investigated) and a new allegation that she had told a staff member no one wanted to work with her. (The bullying allegations).
- Poor management practices in relation to staffing/employment/office management.

In addition to these specific allegations, Mrs Lynch was advised the Committee wished to discuss with her their very serious concerns that the Centre would not be financially viable if she were to return because parents were indicating to the Committee that they would remove their children from the Centre if she returned. The Committee also wished to discuss the conflict/incompatibility between Mrs Lynch and Centre staff and the fact that four staff had confirmed their intention to resign if she returned.

The disciplinary meeting was held on 27 April.

On 5 April advisor to the Committee informed Mrs Lynch's advisor that she had been summarily dismissed effective that day. This advice was confirmed in writing on 9 May by the Chairperson of the Committee (Lucy Playne). The reason given for the dismissal was "*That as a result of very significant issues at the Centre, the Committee lost trust and confidence in Anne Lynch's ability to continue managing the Centre and the staff currently employed.*"

A personal grievance was submitted to the Committee on behalf of Mrs Lynch and a request was made for detailed reasons for her dismissal. The Committee replied to this request as follows (in summary):

- Mrs Lynch had failed to adequately investigate the smothering issue and had failed to inform the Committee of the issue. The practice (allowed by her) of “placing” blankets over the head of children was unacceptable.
- Bullying/harassment of staff (impliedly found) and Mrs Lynch’s complete rejection of any wrongdoing highlighted her lack of self-awareness of the impact of her inappropriate management style.
- Mrs Lynch’s failure to competently manage operational issues
- Mrs Lynch’s lack of oversight and control of the OSCAR programme, which resulted in a special needs assistant being given responsibility for groups of children.

Mrs Lynch was also advised that the viability of the Centre was at “extreme risk” if she returned because parents were advising they would remove their children and that her return would lead to an unacceptable level of tension between herself and staff affecting the safety of children. The alternative – that staff had confirmed their intention to leave if Mrs Lynch returned - was equally unacceptable to the Committee.

Authority’s Investigation

The parties have been unable to resolve the problem between themselves despite their best efforts including meeting with a mediator from the Employment Relations Service.

The Authority met with the parties on 23 June to consider and question the parties and advisors on their affidavit evidence and their submissions. I have committed to issuing this determination early in the week following the investigation meeting.

Interim Reinstatement

The purpose of applications such as the one before me is limited being “*to preserve the position of the party claiming to have been injured by incorrect action towards him or her and only until such time as that party’s challenge to that action can be the subject of a full and proper investigation*” Waugh v Commissioner of Police WC 12/03 unreported.

I note too the primacy now afforded by Parliament through the 2000 Act to the remedy of reinstatement where it is claimed and a personal grievance is established. This is a relevant factor in considering interim reinstatement (Cliff & Groom v Air New Zealand AC 6A/05 unreported).

The established tests for interim reinstatement are:

1. Whether the applicant has an arguable case of unjustified dismissal; and
2. Whether the balance of convenience including the existence of adequate alternative remedies (sometimes said to be a separate test) favours the applicant; and

3. 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 be ascertained at this stage).

Is there an arguable case?

The respondent does not concede the applicant has an arguable case and confirms its belief that Mrs Lynch's dismissal was substantively and procedurally justified.

The applicant raises numerous and serious challenges to the dismissal - both as to the substantive reasons for the dismissal and the procedure adopted. I note among other things there is a challenge the quality of the respondent's investigation into the allegations against her and the findings based on that investigation. There is also a question raised as to whether the decision made by the respondent has been attended by predetermination, in that the statements of parents and staff that they will withdraw their children from the centre/resign their employment if the applicant is reinstated, has influenced the respondent's decision making.

I have noted that the threshold for establishing that there is an arguable case is a low one and indeed where facts are in dispute (as they are here) this in itself may tend to show there is an arguable case. (*Waugh* cited above). Further, where there is a dispute, Mrs Lynch is entitled to the benefit of an assumption that he will be able to prove her case when the substantive matter is investigated *NZ Stevedoring Co Ltd & Ors v NZ Waterfront Workers Union* [1990] 3 NZILR 308.

Among other challenges, the quality of the employer's investigation into the allegations against Mrs Lynch is a critical question to be explored in arriving at a determination as to whether her dismissal was justified or not, as is the question of predetermination and whether it has influenced the respondent's decision making.

I am satisfied that Mrs Lynch as an arguable case.

Whether the balance of convenience (including the existence of adequate alternative remedies sometimes said to be a separate test) favours the applicant.

In *X v Y Ltd and NZ Stock Exchange* [1992] 1 ERNZ 863 at pp.872-3 the Court said:

"If the plaintiff satisfies the Court that he has an arguable case, or in other words that there is a serious issue between himself and one or both of the defendants ... that is not by itself the end of the enquiry. This is because the remedy of injunction is discretionary. The Court, in the exercise of its discretion to grant or withhold that remedy, had to weigh up the inconvenience to a defendant of having to bear the burden of an injunction before the substantive case is heard when the defendant may well win that case, and against the inconvenience to a plaintiff who may have a just case, of having to bear the detriment of wrongful or unjustifiable action until the case has been heard. Inconvenience in this context has a stronger meaning than colloquially; it means detriment or injury".

On the one hand I am faced with an applicant who has been dismissed after 12 years of otherwise unblemished service. She is the sole breadwinner in her family – her husband having been made redundant earlier this year. They have had to apply for income assistance.

I have also considered the reasons for Mrs Lynch's dismissal. They could hardly have been more serious – that as the Manager of a childcare centre she has been neglectful of the safety of

children in her care and that she has bullied/harassed her staff. The severity of the respondent's findings against her militates against her ever obtaining another job at managerial level in her chosen profession.

No monetary remedy could adequately compensate Mrs Lynch for the loss of her job in the circumstances which attended that loss.

On the other hand the Centre submits its very survival is at stake here. Information was submitted to show that 20+ children have left the Centre over the last 6-7 months allegedly as a result of this matter that has polarised the Centre's community. The Centre submits it has advice that other parents will withdraw their children if Mrs Lynch is reinstated and I am told categorically by one staff member, who gave evidence, that she and three other staff members will resign their employment if Mrs Lynch is reinstated.

The Committee Chairperson Lucy Playne also advises she will resign if Mrs Lynch is reinstated.

The respondent advises me that it has recently made a permanent appointment to the Manager's position and its financial position will be seriously compromised if it has to carry the burden of two management salaries until such time as the substantive matter is heard and disposed of. It also points to the fact that Mrs Lynch has been away from the Centre since December 2004 and that the environment is settled and harmonious which it would not be if Mrs Lynch was reinstated on an interim basis.

The parties have addressed me on the matter of reinstating Mrs Lynch to the payroll with a direction that she not attend the workplace i.e. that she remains on garden leave until the substantive matter is determined

The respondent rejects this solution to the problem for financial reasons. Mrs Lynch accepts this is an option but would prefer full reinstatement to her position.

On the face of it the inconvenience to the parties – for Mrs Lynch not being reinstated and for the Centre in having her reinstated – is serious and finely balanced. However, a number of factors lead me to find the balance of convenience favours Mrs Lynch.

- Since Mrs Lynch was stood down in December 2004 an Acting Manager has managed the Centre. In full knowledge that Mrs Lynch was seeking interim and permanent reinstatement the Centre has chosen (in the week of the hearing on this interim application) to appoint a permanent Manager. It must have weighed in that decision, the possibility that it would have two Manager's salaries to meet should Mrs Lynch be reinstated to her position on an interim basis. The undertaking as to damages given by Mrs Lynch is important to my findings on this matter.
- The consideration that parents will remove their children if Mrs Lynch is reinstated is somewhat speculative as are the reasons that children would be removed. A number of parents have removed their children since Mrs Lynch left the Centre, it is hard to see those withdrawals can have come about because of any failing in Mrs Lynch's management.
- Staff at the Centre may or may not resign. The staff in question were at the heart of the complaints against Mrs Lynch and have a vested interest in her not being reinstated. Their ultimatums made in respect to Mrs Lynch have on the face of it have influenced

the respondent's decisions relating to her (see below- Overall Justice test) and I consider these threats should be disregarded in a principled approach to assessing the balance of convenience in this matter. Further the matter of Mrs Lynch's reintegration into the workplace can be subject to such conditions that will facilitate a respectful and productive workplace albeit I accept her reinstatement may lead to a degree of unhappiness in all the circumstances. Certainly, I have no concerns relating to the safety of children given the professional qualifications and experience of those charged with their care.

- In most cases the balance of convenience favours the worker *Melville v Chatham Islands Council* [1999] 2 ERNZ, 76 100.
- The respondent's submission that it is inappropriate that Mrs Lynch be reinstated because of the length of time she has been away from the Centre is not accepted. Mrs Lynch was not responsible for the time taken by the employer to bring the investigation to a conclusion and certainly she acted expeditiously to raise a grievance and seek interim reinstatement after the respondent's decision to dismiss her was communicated to her.
- It is estimated that the hearing of the substantive matter will require a minimum of three days to be set aside. Whilst a one day hearing could be arranged fairly promptly that is not the case where an investigation meeting is expected to take three days. The soonest date I can timetable for three consecutive days is September. Further it is likely the determination will require some six to eight weeks (if past experience of such cases is anything to go on). Effectively then, given the straightened economic circumstances faced by Mrs Lynch a September hearing and a November determination will – if she is not reinstated on an interim basis – deny her access to the primary remedy of reinstatement if she is successful in her claim. This is because she cannot delay for months the task of finding permanent employment.

Against this I have weighed the respondent's suggestion that I hold a number of one day meetings to hear and question the witnesses. This would be possible but it is not desirable, particularly when dealing with the multitude of issues and dynamics evident in this matter. Of course three separate days over two or three months may not mean the determination is issued any more promptly than it would be if the matter were to be heard over three consecutive days in September as currently proposed.

The balance of convenience in this case favours the applicant Mrs Lynch.

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 be ascertained at this stage.

While this can only be the most preliminary of views - open to revision following a full investigation of Mrs Lynch's claims - there do appear to be serious concerns relating to the quality of the investigation into at least some of the allegations against Mrs Lynch. For example I can find no evidence on the face of the WAVE report (the independent report commissioned into the bullying/harassment allegations against Mrs Lynch) that any attempt was made to identify and interview persons who could offer an independent perspective of the incidents which gave rise to the allegations in question.

There is also a concern that the Committee has been faced, in dealing with the issues that impacted on relationships within the Centre and which consolidated into serious allegations against Mrs Lynch. with operating in a climate of escalating tension and eventually ultimatums of an *'its her or us'* nature as staff and Centre parents have taken positions on the issues in question – interestingly enough even before the allegations of misconduct were formally put to Mrs Lynch by the respondent and certainly before any conclusions were reached based on the employer's investigations into those allegations.

While the Committee is adamant that the ultimatums offered by staff and parents have not impacted on its decision-making it is an insidious context in which to keep a clear head and an open mind. Further, while I have no doubt the parties entered into discussions in good faith on the matter of on a negotiated *exit* for Mrs Lynch, the focus was by then on an exit and not on a resolution that supported the continuation of Mrs Lynch in the workplace with appropriate support to ensure productive and successful employment relationships.

The ultimatums and the exit mindset that was well entrenched by the time Mrs Lynch was called on to answer the serious allegations against her may in fact have had an effect on the decision makers. The reason I say that is that the 15 April letter to Mrs Lynch setting out the allegations against her put the ultimatums of staff and parents squarely in the frame and the initial reason given for Mrs Lynch dismissal referred impliedly to staff tension and the threatened resignations.

“As a result of the very significant issues at the Centre, the Committee lost trust and confidence in Anne Lynch's ability to continue managing the Centre *and the staff currently employed.*”

By the time the detailed reasons for Mrs Lynch's dismissal emerged the Committee was of the view the viability of the Centre was *'at extreme risk'* if Mrs Lynch returned because parents would remove their children and that workplace tension impacting on child safety/staff resignations were outcomes unacceptable to the Committee.

If the Committee's investigation into the allegations against Mrs Lynch was fundamentally flawed in important respects and if the process was attended by bias and predetermination these issues have the potential to vitiate the dismissal.

On the admittedly preliminary view I have engaged in here I am concerned with these matters to the extent I must find the overall justice of the case favours Mrs Lynch.

Determination

The remedy sought is a discretionary one and I am satisfied that Mrs Lynch is entitled to the interim relief she seeks from the Authority.

Pursuant to s. 127 (1) and s.127 (5) Mrs Lynch is to be reinstated to her position as Manager of Tawa Community Childcare Centre subject to the following conditions:

1. Mrs Lynch is to be reinstated to the payroll immediately with effect from 5 May 2005.
2. Mrs Lynch is to take up her duties as Manager of the Centre with effect from Monday 11 July. In the intervening period (between the date of this determination and 11 July 2005) Mrs Lynch will remain on paid leave and the parties are to meet to discuss and agree on protocols for the reintegration of Mrs Lynch into the workplace, the transition of management of the Centre to her and such measures that will enable respectful and

productive workplace relationships. The Mediation Service will be available to the parties on request to assist in these discussions.

3. The parties are directed to Mediation (to take place by 31 July 2005) to attempt to resolve the substantive employment relationship problem.

Costs

Costs are reserved.

Janet Scott
Member of Employment Relations Authority