

**Attention is drawn to the order
prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 153
5424219

BETWEEN MRS X
 Applicant

A N D AN EMPLOYER
 Respondent

Member of Authority: David Appleton

Representatives: Anjela Sharma, Counsel for Applicant
 Sarah O'Brien, Counsel for Respondent

Investigation meeting: 23 July 2013

Submissions Received: 23 and 31 July 2013 from Applicant
 23 and 31 July 2013 from Respondent

Date of Determination: 5 August 2013

DETERMINATION OF THE AUTHORITY

- A. The application by Mrs X for interim reinstatement pending the hearing of her personal grievance is granted on the conditions set out in this determination.**
- B. Costs are reserved.**

Prohibition from publication

[1] The applicant was a kindergarten teacher. The applicant and the respondent have adduced evidence of the applicant's mental health issues in relation to her personal grievances. In light of that evidence the Authority is mindful of the

potentially serious adverse impact that publication of the identity of the applicant could have on her career as a kindergarten teacher in view of possible unfair inferences that could be drawn from the medical evidence.

[2] Accordingly, I prohibit from publication any information that is likely to lead to the identity of the applicant being made known. This will necessitate the applicant being known as *Mrs X* throughout this determination and the respondent as *an employer*. Other details such as the names of other personnel employed by the respondent and the locations of the respondent's kindergartens have also been suppressed in this determination but are given designations so that the sense of the rationale for the determination is preserved. Finally, the specific details of the actions of the applicant that led to her dismissal have been omitted.

Employment relationship problem

[3] This is an application for interim reinstatement. Mrs X was a fulltime kindergarten teacher employed by the respondent on a fixed term contract at B kindergarten which was due to expire in April 2014, when she was to return to a permanent position at G kindergarten where she had originally worked.

[4] Mrs X claims that she was unjustifiably dismissed on 24 June 2013 and that she also suffered unjustified disadvantage in her employment and unlawful discrimination by reason of disability. She seeks urgent interim reinstatement, as well as permanent reinstatement and the usual remedies, including penalties, interest and legal costs.

[5] The respondent resists the application for interim reinstatement and denies that Mrs X was unjustifiably dismissed, disadvantaged in her employment or unlawfully discriminated against.

[6] This determination is limited to the issue of whether Mrs X should be reinstated to her employment on an interim basis. Mrs X has provided to the Authority an undertaking pursuant to s127(2) of the Employment Relations Act 2000 ("the Act").

[7] As is usual in the case of interim reinstatement applications, no oral testimony was heard at the investigation meeting but substantial affidavit evidence by Mrs X, supported by a number of exhibits, was lodged. Affidavit evidence was lodged on

behalf of the respondent by the respondent's Chief Executive Officer (the CEO), its Operations Manager, the head teacher of B kindergarten, the head teacher of G kindergarten, an Employment Relations and Human Resource Consultant who advised the respondent at the time and from Dr Barry-Walsh, a consultant forensic psychiatrist and specialist assessor.

Brief account of the events leading to the dismissal

[8] Mrs X started working with the respondent in 2005. As part of her duties, Mrs X would carry out relieving duties. Mrs X suffered various stresses associated with the relieving teaching role and the respondent coordinated and funded counselling sessions for Mrs X, which took place in 2008 and 2009.

[9] In June 2012 Mrs X was appointed to a permanent fulltime teaching position at G kindergarten. Mrs X maintains that another teacher at G kindergarten (called Ms Z in this determination) had a problem with Mrs X's appointment to a fulltime position and caused *misinformation* to be passed to the head teacher of G kindergarten about Mrs X.

[10] In late November 2012, the head teacher of G kindergarten took stress leave absence from work and the respondent undertook a preliminary investigation into the reasons behind this and into a complaint received from a student teacher about Mrs X. On 10 December 2012, Mrs X was told that the allegations of the student teacher could not be taken further but that other members of the team at G kindergarten were to be interviewed. At the suggestion of the respondent, Mrs X agreed to take special leave while the interviews took place.

[11] Mrs X's colleagues, including Ms Z, were interviewed and a number of generalised allegations and complaints recorded about Mrs X. Mrs X states that, when she asked through her New Zealand Educational Institute (NZEI) representative for further questions to be asked of each team member, this did not happen, and that there was no correspondence entered into with Mrs X about the respondent's findings or a preliminary view expressed following its investigation. Mrs X says that *it was simply left hanging in the air*.

[12] Mrs X says she suffered what she calls *an emotional breakdown* on 24 December 2012, as a direct result of being unfairly implicated by staff members who were aggrieved over her permanent appointment at G kindergarten.

[13] On 17 January 2013, it was suggested by the respondent to Mrs X that she take one year's leave of absence from G kindergarten, and she was assured that her position would remain safe and that she would return to G kindergarten in 2014. She was asked to identify out of four other kindergartens the order of preference in which she would consider working in them. A few days later she was asked if she would become a reliever for the 2013 teaching year and she refused, and was then told that the only kindergarten willing to place her was one referred to in this determination as V kindergarten, the one she says she had placed last on her list. A form of record of settlement was signed by the parties recording her change of location. Mrs X commenced working at V kindergarten in around February 2013. Shortly after commencing work at V kindergarten Mrs X inadvertently shut a child in an equipment shed for a brief period of time. The CEO of the respondent indicated her intention to place Mrs X on a competency process as a result, although no formal programme or other correspondence proceeded from that point.

[14] In late March 2013, Mrs X successfully applied to take up a fulltime teaching position at another kindergarten, referred to in this determination as B kindergarten. Mrs X commenced her new teaching appointment at B kindergarten in mid April 2013. A short time after this appointment, Mrs X learnt that Ms Z had been offered a permanent position at G kindergarten on a one year fixed term contract. Mrs X regarded this as her position.

[15] On 30 April 2013, Mrs X undertook an action involving a third party which appeared to falsely implicate Ms Z in an act of dishonesty. This action did not directly impact on any children under the care of the respondent. Mrs X attempted to reverse the effects of her action around 30 minutes later but the matter eventually came to the attention of the respondent. Mrs X admits that she did the act in question, and that she had intentionally given her first name as that of Ms Z. It is Mrs X's position that, while she did as was alleged, her actions were not deliberate or intended to deceive, but that they were *inconsistent with the person she is* due to significant stress that she had been suffering at the time.

[16] The operations manager of the respondent wrote a letter to Mrs X dated 16 May 2013 advising that he had become aware of the issue and that he was initiating a disciplinary investigation to look into it. The rest of his letter states as follows:

I would like to meet with you to discuss the issue and to give you an opportunity to respond in full. I would like to meet on Tuesday 21 May at 10am at the offices of [deliberately omitted]. I will have [name omitted], Employment Relations Consultant with me. I encourage you to bring a representative (for example, your union) or support person to this meeting. If you are unable to meet at this time, please contact me as soon as possible to arrange an alternative date or time.

The allegations are:

(a) On 30 April 2013, at 17:28 hours, you [details omitted] giving your name as [Ms Z's first name]. [Details omitted]

(b) Your actions were deliberate and were intended to deceive.

You need to be aware that the allegations could constitute serious misconduct, and therefore a potential outcome of this investigation could be instant dismissal.

In considering any possible outcome, I will be taking into account the following:

The [respondent's] Staff Policy states:

“Usually a finding of serious misconduct will occur where the conduct is destructive of the essential relationship of trust and confidence between the employer and the employee”.

If this allegation is substantiated I am likely to conclude the conduct has destroyed the trust and confidence.

I will not be in a position to decide on the outcome until I have had the opportunity to hear, consider fully and investigate your explanations, but it is important that you know from the outset that dismissal is a possible outcome so that you can prepare for the meeting accordingly.

Yours sincerely

[17] Mrs X contacted the NZEI but they were unable to attend the meeting on 21 May and suggested instead that Mrs X take stress leave from work. Accordingly, Mrs X obtained a medical certificate signing her off from work. Mrs X deposes in her affidavit that, during her time away from work on stress leave, she received mental health support and consulted with her medical practitioner about the *extreme distress* she felt over the allegations raised against her. She says she received support from the home treatment team to ensure her mental stability and wellbeing.

[18] On 31 May 2013, Ms Sharma informed the respondent that Mrs X was able to return to her teaching duties, and forwarded a medical clearance to that effect.

[19] On 5 June 2013, Mrs X attended the disciplinary meeting and tabled a detailed response in the form of a letter from Ms Sharma (consisting of 16 pages) setting out historical events preceding the letter of allegation and mitigating factors giving rise to the events outlined under the letter of allegation. In respect of the events that took place on 30 April, Mrs X deposes as follows:

I had consulted with my medical advisers about the allegations, and my actions for which I felt devastated by, and deeply remorseful about. I also had to deal with feelings of deep shame over the incident, which did not reflect normal behaviour on my part.

My doctors assured me that my medical issues were a likely contributing factor of the situation, and that I should not punish myself further over an event that was symptomatic of the significant stress I had been under in my employment.

[20] Mrs X expressed some concern over the fact that the CEO of the respondent was the decision maker as she was concerned that the CEO did not like her and had tried on a number of occasions to move Mrs X on.

[21] On 7 June 2013, the respondent advised Mrs X that it was going to seek some information from the head teacher of B kindergarten and on 10 June 2013 the respondent asked Mrs X to provide some answers to some questions.

[22] On 11 June 2013, Mrs X, via Ms Sharma, reported that she had been told by the head teacher of B kindergarten that she (the head teacher) had written more responses than had been disclosed to Mrs X and this information was eventually provided to Mrs X on 14 June. It also emerged that the respondent had spoken to Ms Z and the head teacher of G kindergarten about the allegations against Mrs X.

[23] As part of her answers, Mrs X had told the respondent through Ms Sharma that she had carried out the actions on 30 April 2013 after she had attended a health and safety course at which Ms Z had been present and at which Ms Z had *openly flaunted* the fact that Ms Z had been appointed to a fulltime position at G kindergarten. Mrs X told the respondent that she had been affected by this and then went on to carry out the action. However, it turned out that Mrs X was incorrect in this and that she had actually attended the health and safety course with Ms Z present the day immediately following 30 April, after she had carried out the actions. Mrs X deals with this in her affidavit and states:

It came as a real surprise to me that I have confused the events surrounding 30 April. I honestly and truly believed that the situation had happened as I had instructed Ms Sharma to relay to [the respondent].

[24] As part of the information given by Mrs X to the respondent, she enclosed correspondence from her consultant psychiatrist (referred to as Dr K in this determination). Mrs X deposes that, on the morning of 20 June 2013, while Mrs X was working alone at B kindergarten, the CEO *confronted* Mrs X. Mrs X deposes that the CEO told her that she needed to talk to her about her statement and that Mrs X replied that she was not going to talk to the CEO without her lawyer being present. Mrs X deposes that the CEO physically blocked her from getting past her (which is denied by the CEO) but that Mrs X managed to slip by her and go into the kindergarten office to ring Ms Sharma. The CEO followed her into the office and said words to the effect that she had read Mrs X's statement which said that she was *mentally sick* and that the CEO needed to read her own statement to her. The CEO then proceeded to read the statement to Mrs X which stated the following:

The medical information provided to us states "it is clear you have been suffering from depression; related impairments to memory and concentration, compounded by sleep deprivation and the effects of medication may well have contributed to your getting muddled over the exact timing/details of events".

As such we are under a regulatory obligation to take the step of "excluding you from coming into contact with the children" as per section 57(2)(a) of the Education (Early Childhood Services) Regulations 2008 in that we must exclude an employee who "is in a state of physical or mental health that presents any risks of danger to children".

Therefore, you are not to come into the kindergarten until further notice, as we investigate the risk to the children and mitigate risk. You may either choose to stay from work entirely or you may wish us to consider work options that don't involve contact with children.

I suggest you discuss this with your solicitor and she contact us through [the respondent's representative] with your preference.

[25] Mrs X left the kindergarten but deposes that, by this time, other teachers had been arriving and were wondering why the CEO was present as it was a rare occurrence for her to attend the B kindergarten. Mrs X deposes that she went home *greatly distressed, and humiliated*. She states that she notified the Human Rights Commission over the fact *that she had been discriminated against unfairly on medical grounds*.

[26] The following day, Mrs X was informed via Ms Sharma that she was permitted to return to B kindergarten but that she was not allowed to have any contact with the children or their parents. She deposes that the conditions that she was then required to work under following her return were *harsh and oppressive*. She states that it would have been one of the coldest weeks she had experienced in the local area and that she was *relegated to an area which once served as a storage room*. She deposes that the conditions became very cold and when she asked if she could move to the main office which was adjacent to the back room and was warmer, the head teacher told her that the CEO would not allow it. Mrs X deposes that she found it very humiliating being relegated to an insubordinate role in front of her colleagues.

[27] On 21 June 2013, Ms Sharma received a letter from the respondent's representative stating the following:

Disciplinary investigation

My client has completed the disciplinary investigation. The allegations put to [Mrs X] were:

- (a) On 30 April 2013, at 1728 hours, you [details omitted] giving your name as [Ms Z's first name]. [Details omitted]*
- (b) Your actions were deliberate and were intended to deceive.*

It has been concluded that allegation a. is substantiated.

In considering the allegation and potential outcome, of potential concern to my client is:

- 1. Mrs X's conduct implicated others;*
- 2. despite claiming remorse Mrs X did not advise my client of her conduct at the time, despite considerable time to do so;*
- 3. the explanation initially provided in terms of the context of attending the first aid course was untrue;*
- 4. the loss of trust and confidence in Mrs X due to her conduct;.*

As such my client is proposing to dismiss Mrs X for serious misconduct.

Any submissions on the proposed dismissal are to be provided to me in writing no later than 12 noon, Monday 24 June. My client will consider those submissions before reaching a final decision, which is likely to be on Monday afternoon.

[28] Ms Sharma replied to that letter on behalf of Mrs X pointing out, inter alia, that the proposed outcome letter did not address the fact that Mrs X was suffering

from a medical disability at the time, which had been properly documented by her medical advisers. On this basis, Ms Sharma argued against dismissal.

[29] On 24 June 2013, the respondent's representative sent a letter to Ms Sharma in the following terms:

DISCIPLINARY INVESTIGATION OUTCOME

My client has considered your submissions (version 2) on Mrs X's behalf on the proposal to dismiss her for serious misconduct.

Prior to reaching the conclusion that Mrs X's actions were a serious breach of the trust and confidence required in the employment relationship, [the CEO] had considered the information provided from the medical specialist, along with all the other information gathered, including that Mrs X [tried to reverse the action – actual detail omitted].

[The CEO] has spent a great deal of time considering the question of whether Mrs X's actions, when taking into account all the circumstances, has [sic] broken the trust and confidence in the relationship, and whether this could be repaired.

The matter did implicate others. [Details omitted, but reference made to staff at G kindergarten becoming aware of the result of Mrs X's action]

Mrs X carried out a significantly dishonest act.

The references to Mrs X's work location and the events of 21 June do not contribute to the decision of whether to dismiss and therefore will not be responded to.

While [the head of B kindergarten's] view of [Mrs X] has been considered, the employer is the [CEO] on behalf of [the respondent] and the employment relationship has been considered in the context of the organisation as a whole.

Ordinarily my client would advise a decision directly to an employee (with their representative present), however you have been very clear that your preference is for communication in writing and it must be through you. As such Mrs X has not been advised of this decision, and as she is currently at work please confirm you will be notifying Mrs X immediately of this decision, and that you have advised her she must leave the workplace immediately.

[30] Although this letter does not expressly say that Mrs X had been dismissed, this was a reasonable inference taken from its contents by Mrs X and Ms Sharma and the respondent has since accepted that this was the intention.

Issues

[31] In determining whether interim reinstatement should be granted to Mrs X and, if so, under what conditions, if any, the Authority must take into account the requirements of the Employment Relations Act 2000 (the Act) and the following principles:

- (a) Whether the applicant has both an arguable case of personal grievance for unjustified dismissal and an arguable case that she would thereafter be reinstated in employment rather than simply compensated financially;
- (b) Where the balance of convenience lies between the parties, including an assessment of whether other remedies would be adequate; and
- (c) Where the overall justice of the case lies until it can be heard.

[32] Section 127 of the Act provides as follows:

- (1) *The Authority may if it thinks fit, on the application of an employee who has raised a personal grievance with his or her employer, make an order for the interim reinstatement of the employee pending the hearing of the personal grievance.*
- (2) *The employee must, at the time of filing the application for an order under subsection (1), file a signed undertaking that the employee will abide by any order that the Authority may make in respect of damages:*
 - (a) *that are sustained by the other party through the granting of the order for interim reinstatement; and*
 - (b) *that the Authority decides that the employee ought to pay.*
- (3) *The undertaking must be referred to in the order for interim reinstatement and is part of it.*
- (4) *When determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the object of this Act.*
- (5) *The order for interim reinstatement may be subject to any conditions that the Authority thinks fit.*
- (6) *The Authority may at any time rescind or vary an order made under this section.*

[33] The object of the Act, referred to in s.127, is set out in s.3 of the Act and includes the following objectives:

- (a) *to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship –*
 - (i) *by recognising that employment relationships must be built not only on the implied mutual obligations of trust and confidence, but also on a legislative requirement for good faith behaviour; and*
 - (b) *by acknowledging and addressing the inherent inequality of power in the employment relationships.*

[34] Section 125 of the Act, dealing with the remedy of reinstatement, states as follows:

- (1) *This section applies if –*
 - (a) *it is determined that the employee has a personal grievance; and*
 - (b) *the remedies sought by or on behalf of an employee in respect of a personal grievance include reinstatement (as described in s.123(1)(a)).*
- (2) *The Authority may, whether or not it provides for any of the other remedies specified in s.123, provide for reinstatement if it is practicable and reasonable to do so.*

[35] Section 123(1)(a) of the Act refers to *reinstatement of the employee in the employee's former position or the placement of the employee in a position no less advantageous to the employee.*

[36] Since April 2011, reinstatement is no longer a primary remedy.

Is there an arguable case for unjustified dismissal?

[37] In determining this question, the Authority must be mindful of the test that is set out in s.103A(2) of the Act, which states as follows:

- (2) *The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

[38] Subsections 103A(3)-(5) of the Act state as follows:

- (3) *In applying the test in subsection (2), the Authority or the court must consider –*
- (a) *whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
 - (b) *whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
 - (c) *whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
 - (d) *whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*
- (4) *In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it considers appropriate.*
- (5) *The Authority or the Court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were –*
- (a) *minor; and*
 - (b) *did not result in the employee being treated unfairly.*

[39] Relevant to the question of whether there is an arguable case for unjustified dismissal is the duty of good faith contained in s.4 of the Act. Subsections 4(1) and 4(1A)(a)-(c) provide as follows:

- (1) *The parties to an employment relationship specified in subsection (2)—*
- (a) *must deal with each other in good faith; and*
 - (b) *without limiting paragraph (a), must not, whether directly or indirectly, do anything—*
 - (i) *to mislead or deceive each other; or*
 - (ii) *that is likely to mislead or deceive each other*
- (1A) *The duty of good faith in subsection (1) –*

- (a) *is wider in scope than the implied mutual obligations of trust and confidence; and*
- (b) *requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and*
- (c) *without limiting paragraph (b) requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of one or more of his or her employees to provide to the employees affected –*
 - (i) *access to information, relevant to the continuation of the employees' employment, about the decision; and*
 - (ii) *an opportunity to comment on the information to their employer before the decision is made.*

[40] An arguable case means a case where there are some serious or arguable, but not necessarily certain prospects of success *X v. Y Ltd and The New Zealand Stock Exchange* [1992] 1 ERNZ 863.

[41] I believe that there is an arguable case that Mrs X was unjustifiably dismissed. There are two main aspects of relevance to explore in coming to this conclusion.

Predetermination

[42] Ms Sharma submits that the investigation into the alleged misconduct was procedurally flawed because the decision-maker, the CEO, was biased and so the decision to dismiss was predetermined. This submission is based upon the fact that the CEO took Mrs X out of the workplace and excluded her from contact with children very shortly before she dismissed Mrs X. Additionally, the CEO was involved in the investigations into the complaints about Mrs X when she worked at G kindergarten.

[43] However, I do not agree that there is any evidence presently before me which persuades me, on the balance of probabilities, that the CEO displayed bias or that her decision to dismiss Mrs X was predetermined. It was not clear from the limited evidence available at the interim investigation meeting as to the extent to which the CEO was involved in the investigations into the complaints against Mrs X at the G kindergarten. The CEO did sign the agreement under which Mrs X was moved to the

V kindergarten but this is wholly to be expected given that the CEO represented the respondent in her capacity as chief executive officer.

[44] Furthermore, on the face of it, it does not appear that the decision by the CEO to exclude Mrs X from contact with the children following the receipt of information from Mrs X's psychiatric consultant, Dr K, was unreasonable. (As to the manner in which the exclusion was implemented, on the limited evidence currently before me, I believe that this may have amounted to an unjustified disadvantage in her employment, in that there was no consultation with Mrs X prior to the exclusion, although that aspect is not the subject of this current inquiry.)

[45] Mrs X received two letters from Dr K prior to the exclusion, both of which were copied to the respondent by her. One was dated 11 June and the second dated 12 June 2013. The letter dated 11 June stated, inter alia, the following:

What I am able to confirm is that you are currently suffering from a significant depressive episode and are under mental health service follow-up, including appointments with myself and additional input from our Home Based Treatment Team. You had an initial assessment by my colleague Dr T on 21st May, during which he noted a gradual deterioration of mood from around Christmas 2012. I saw you for review on Friday 7th June at which point, though there had been some improvement several depressive features were still present. It is clear that the events related to your employment dispute have had a major role in the development and maintenance of your depression. It is also clear that the depressive symptoms including negative/catastrophic thinking, low energy/poor motivation, poor concentration and poor memory will have affected your recent behaviour. It is my impression that a combination of your depressive symptoms and a feeling of overwhelming stress lead [sic] to a temporary and out of character action on 30th April 2013.

[46] The letter of 12 June 2013 stated the following:

Thank you for your e-mailed response to my letter dated 11th June 2013. In response to your comments I can confirm the following points:

1. *Your GP Dr N referred you for PHO counselling and as a result of that you were seen by JS in January 2013. Her notes with regard to the sessions refer to your reports of "bullying and other workplace stressors". I understand that she recommended referral onto the DHB psychology service at [omitted].*
2. *You were seen for assessment by the mental health crisis team (MCT) on 17th May 2013 and as a result of that were transferred across for some more intensive input from the Home Based Treatment Team (HBTT).*

3. *During our clinical interview/review meeting on Friday 7th June 2013 I was struck by your feelings of guilt and remorse about the incident on 30th April and your distress/ frustration at not being able to understand how or why you had done this. We discussed how people under stress, particularly when depressed can do things that are out of character and I likened this to a “temporary blowing of a gasket”. Although this was our first meeting, my impression was certainly that this behaviour is unlikely to be repeated given how remorseful you are about it.*
4. *As I stated in my letter yesterday it is clear that you have been suffering from depression; related impairments to memory and concentration, compounded by sleep deprivation and the effects of medication may well have contributed to you getting muddled over the exact timing/detail of events.*

[47] Regulation 57 (1) and (2) of the Education (Early Childhood Services) Regulations 2008 provide as follows:

57 Health and safety of children

- (1) *In order to ensure that the standards set out in this Part are complied with, the service provider of a licensed service and any educator who provides education and care for a licensed home-based education and care service must comply with sub-clause (2), if the service provider or educator has reasonable grounds to believe that a person employed or engaged in the service, or any other person, -*
 - (a) *is in a state of physical or mental health that presents any risk of danger to children; or*
 - (b) *has an infectious or contagious disease or condition.*
- (2) *The service provider and educator must ensure that, -*
 - (a) *The person is excluded from coming into contact with the children participating in the service or, as the case requires, the children being educated by the educator; and*
 - (b) *If satisfied that it is necessary to do so to ensure that no child becomes ill, ensure that the person is excluded from the service and does not enter or remain in any premises where the service is provided while it is being provided or, as the case requires, is excluded from the home and does not enter it or remain in it while the educator is providing education and care.*

[48] In light of the contents of the two letters from Dr K, and especially in light of the statement that as recently as 7 June 2013, Dr K saw “*several depressive features were still present*” and that “*the depressive symptoms include negative/catastrophic thinking, low energy/poor motivation, poor concentration and poor memory*” and that “*a combination of [Mrs X’s] depressive symptoms and the feeling of overwhelming stress led to a temporary and out of character action on 30 April 2013*”, it is my view that it was reasonable for the CEO to believe on 20 June 2013 that Mrs X was in a state of mental health that presented “*risks of danger to children*”.

[49] In summary, on a balance of probabilities, I do not believe that the CEO acted in a way that shows that she was biased against Mrs X. Of course, further evidence might be disclosed during the substantive consideration of the personal grievance which changes this view, but I am restricted to the evidence presented at the interim investigation meeting.

Incorrect process followed?

[50] Ms Sharma makes another point with which I have more sympathy. She points out that the letter of dismissal stated that Mrs X carried out “*a significantly dishonest act*”. It is conceded by the respondent that Mrs X was dismissed for serious misconduct. The respondent says that Mrs X was not dismissed on the grounds of her mental health. However, the letter of 21 June 2013 giving the preliminary findings stated that allegation A was found to have been substantiated. (The details set out in allegation A had never been denied by Mrs X). The letter is notable for the absence of any conclusion with respect to allegation B (that Mrs X’s actions were deliberate and were intended to deceive).

[51] Counsel for the respondent submits that there was no positive finding that Mrs X did not intend to deceive or that her actions were not deliberate. However, a plain reading of the letter of 21 June leads me to infer that the respondent did not find that the actions were deliberate and were intended to deceive. Therefore, in the absence of such a finding, one is led to conclude that the respondent found that they were not deliberate or intended to deceive. This conclusion is supported by the affidavit evidence of the CEO in which she states:

I considered Ms Sharma's submissions on this point. When making the decision as to whether each individual allegation was made out, I found that allegation (A) was made out but not allegation (b) due to taking into account the letters from Mrs X's psychiatrist.

[52] It would appear, therefore, that the respondent concluded that Mrs X committed an act of misconduct even though it was not able to conclude that the act was deliberate or intended to deceive. I invited counsel for the respondent to direct me to any authorities which may support her submission that it is open to an employer to find serious misconduct in the absence of a deliberate act. Ms O'Brien referred me to a number of authorities, many well-known, in support of her contention that it was still open to the respondent to dismiss Mrs X even without a finding that her actions on 30 April 2013 were deliberate.

[53] The starting point could be said to be the statement of Hardie Boys J in *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483 at 487 in which he discussed the kind of conduct that will justify summary dismissal. He stated:

Usually what is needed is conduct that deeply impairs or is destructive of that basic confidence or trust that is an essential of the employment relationship.

[54] Ms O'Brien then refers me to the Employment Court case of *Click Clack International Limited v James* [1994] 1 ERNZ 15, in which the dismissal of an employee was found to be justified after he had damaged an expensive die while trying to remove a plastic moulding, and in which Palmer J states:

Mr Couch stressed - and in my view correctly so - that the Tribunal concluded that because Mr James' conduct in significantly damaging the die "was neither 'wilfully negligent' or reckless, the Adjudicator then apparently felt bound to find that the conduct could not be regarded as serious misconduct" (p 6 of counsel's typed submissions refer). Mr Couch then submitted - with compelling force as it seems to me - that: ". . . this is far too narrow an interpretation of the concept of serious misconduct.

While motive and intention on the part of the employee may be important factors in determining whether any particular actions may be regarded as serious misconduct, they are not conclusive of the matter. The essential issue is whether the actions may have undermined the necessary trust and confidence of the employer in the employee. That may occur as the result of actions which are entirely well intentioned."

[55] Ms O'Brien, to her credit, also refers me to *Makatoa v Restaurant Brands (NZ) Limited* [1999] 2 ERNZ 311 in which Goddard CJ states at 319:

The mere fact that consequences are very serious does not mean that the act which produced or contributed to those consequences necessarily amounts to serious misconduct. That kind of misconduct will generally involve deliberate action inimical to the employer's interests. It will not generally consist of mere inadvertence, oversight, or negligence however much that inadvertence, negligence, or oversight may seem an incomprehensible dereliction of duty.

[56] Ms O'Brien also refers me to the Employment Court case of *Angel v Fonterra Co-Operative* [2006] ERNZ 1080. Judge Shaw states at [78]:

The classification of serious misconduct becomes more problematic where an employee acts out of ignorance, carelessness, or accident but causes serious or potentially serious consequences for the employer or the employer's business. In evaluating whether an employer is justified in believing that such an act has caused the irreparable breakdown of the employment relationship, the Court has to objectively assess whether it was the consequences of the employee's action which have led the employer to conclude that there was serious misconduct or whether it was the actions or omission of the employee that were so serious.

[57] In *Angel* Shaw J opines that the passage cited above from *Makatoa* is probably overstated.

[58] The cases cited above deal with conduct by the employee that amounted to negligence or carelessness. There is no element of that in Mrs X's case. Her case involves what her consultant called *a temporary blowing of a gasket*. It is not possible to know exactly what went through Mrs X's mind when she carried out the actions on 30 April 2013, but it seems reasonable to infer that they did not amount to negligence.

[59] It should also be noted that the cases cited above also focus on the consequences of the actions of the respective employees. In each, there were reasonably serious consequences. However, in Mrs X's case, there were no direct consequences other than some shortlived confusion experienced by staff at G kindergarten. The matter still came to the attention of her employer, but Ms Z was not actually falsely implicated as the potential act of dishonesty in which Ms Z could have been implicated was reversed by Mrs X.

[60] Perhaps of more relevance is the Employment Court case of *X v Auckland District Health Board* [2007] ERNZ 66. This case involved a senior physician with a very high professional standing, who stored pictures of his genitalia on his work

laptop and office computers and sent one of the pictures to a female friend. He also forwarded pictures from a pornographic calendar to a colleague. Chief Judge Colgan stated at [186] that:

....as I have already found, the plaintiff's photographic conduct probably falls into that category of human behaviour that defies rational explanation, the occasional and spectacular Zidane "brain explosions" of human existence.

[61] In *X*, Colgan CJ found that the dismissal of *X* was unjustified for a number of reasons but including that the respondent in that case had failed to act in accordance with its relevant policies that were incorporated into *X*'s employment agreement. The Chief Judge also reinstated *X*, although this case was prior to the removal of reinstatement as a primary remedy.

[62] Although, objectively, Mrs *X*'s conduct on 30 April 2013 was not as serious as the physician's, as it was a one off, and the actions were reversed before any direct material consequences ensued, her action could reasonably be said to fall into the same category as a temporary *brain explosion*.

[63] I note that the collective agreement to which Mrs *X* was subject (the Kindergarten Teachers, Head Teachers and Senior Teachers Collective Agreement for the period 16 December 2011 to 16 September 2013), contains, at clause 6.3, principles to be applied where there are matters of competency which cause concern.

[64] Section 6.3 states as follows:

6.3 Competency

- (a) *Where there are matters of competency which are causing concern in respect of any teacher (for example failing to meet the appropriate professional standards), the employer shall put in place appropriate assistance and professional guidance to assist that teacher. This may include obtaining at the employer's expense, a report from a mutually agreed registered medical practitioner or other professional where appropriate.*
- (b) *When this assistance and guidance has not remedied the situation, the following provisions should govern the action to be taken:*
- (i) *The teacher must be advised in writing of:*
- *the specific matter(s) causing concern;*

- *the corrective action(s) required to address the matter(s);*
 - *the timeframe within which this action(s) must be undertaken and the competency matter(s) addressed; and*
 - *their right to seek representation at any stage.*
- (ii) *The timeframe in 6.3(b)(i) should be determined by the employer, or delegated person, and be relevant to the matter(s) causing concern. In setting this timeframe the employer may take into account previous opportunities given to the teacher to address the competency matter(s) causing concern (such as provided for under the deferred progression provisions of this Agreement).*
- (iii) *The process and results of any evaluation are to be recorded in writing, sighted and signed by the teacher.*
- (iv) *A copy of any written report made to the employer or to the New Zealand Teachers' Council Te Pouherenga Kaiako o Aotearoa made by the person or persons undertaking the evaluation shall be given to the teacher.*
- (v) *No action shall be taken on a report until the teacher has had a reasonable time to comment (in writing or orally or both).*
- (vi) *If the above steps (i-v) fail to resolve the matter of concern, the employer may, where justified, dismiss the teacher without the need to follow the provisions of 6.4*

[65] Section 6.4 of the collective agreement deals with disciplinary actions and the process to be followed.

[66] Given the reference in clause 6.3(a) of the collective agreement to the employer obtaining a report from a mutually agreed registered medical practitioner or other professional where appropriate, it appears clear that the concept of *competency* referred to in clause 6.3 is a wide one, and would encompass a lack of competency through ill health, not just poor performance. Indeed, it was submitted by counsel for the respondent that this reference might cover a situation where, for example, a teacher had a bad back and was unable to lift children. I see no difference between

that situation where a teacher is temporarily impaired through a physical health issue and a situation where a teacher is temporarily impaired through a mental health issue.

[67] In light of the terms of clause 6.3, I think it is arguable that the correct approach for the respondent to have taken was not to have treated the actions of Mrs X on 30 April 2013 as misconduct justifying dismissal, but as a competency issue triggering the process set out at clause 6.3. Whilst the principle expounded in *Northern Distribution Union v BP Oil NZ Ltd* allows, on the face of it, for an employer to treat an action such as Mrs X's on 30 April 2013 as justifying summary dismissal, I do not believe that to be the case where there is a contractual obligation on the employer to deal with the concern in a fundamentally different manner.

[68] In light of this finding, I conclude that there is an arguable case that the dismissal by the respondent of Mrs X is unjustified.

Is there an arguable case for reinstatement?

[69] Reinstatement is no longer a primary remedy but remains one measure which may be selected from the range of remedies provided at s.123 of the Act to settle a personal grievance, provided it is "*practicable and reasonable to do so*".

[70] The Court of Appeal examined practicability of reinstatement in *Lewis v Howick College Board of Trustees* [2010] NZCA 320. The Court of Appeal reiterated the Court of Appeal's judgment in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 which had, in turn, affirmed the test applied by the Employment Court in that case. The Employment Court in *NZEI* said:

Whether ... it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future..... Practicability is capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.

[71] The Employment Court in *Angus v Ports of Auckland* [2011] NZEmpC 160 held, when considering the new requirement of reasonableness, as follows:

[65] *Even although practicability so defined by the Court of Appeal very arguably includes elements of reasonableness, Parliament has now legislated for these factors in addition to practicability. In these circumstances, we consider that Mr McIlraith was correct when he submitted that the requirement for reasonableness invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.*

[66] *In practice this will mean that not only must a grievant claim the remedy of reinstatement but, if this is opposed by the employer, he or she will need to provide the Court with evidence to support that claim or, in the case of the Authority, will need to direct its attention to appropriate areas for its investigation. As now occurs, also, an employer opposing reinstatement will need to substantiate that opposition by evidence although in both cases, evidence considered when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.*

[67] *Reinstatement in employment may be a very valuable remedy for an employee, especially in tight economic and labour market times. The Authority and the Court will need to continue to consider carefully whether it will be both practicable and reasonable to reinstate what has often been a previously dysfunctional employment relationship where there are genuinely held, even if erroneous, beliefs of loss of trust and confidence.*

[68] *The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some cases, others, for example affected health care patients in institutions.*

Practicability of reinstatement

[72] Examining the issue of practicability first, and bearing in mind the Court of Appeal's definition of practicability in *New Zealand Educational Institute* as *capability of being carried out in action, feasibility or the potential for the reimposition of the employment relationship to be done or carried out successfully*, it is necessary to examine critically the impediments that the respondent asserts render reinstatement impracticable.

[73] Affidavit evidence relevant to this question was received from the Operations Manager, the CEO, the Head Teacher of B kindergarten and the Head Teacher of G kindergarten, all of whom expressed concerns about the effect of reinstating Mrs X.

[74] The affidavit from the Operations Manager deposed that the teams at B kindergarten, V kindergarten and G kindergarten had all been advised that Mrs X was no longer employed by the organisation and that a new person had been employed in a

fixed term position at B kindergarten which had been announced to all parents and other stakeholders. He deposed that having Mrs X back in the workplace “*would confuse teachers, parents and children alike, and raise more questions in the community about what has happened*”. He goes on to depose that teachers have communicated to him that they found the investigation stressful and that it was highly likely that the uncertainty of interim reinstatement would cause significant stress to the other teachers. In particular, he said, the Head Teacher of B kindergarten found the process stressful and he was very reluctant to expose his staff to more stress through interim reinstatement.

[75] He deposes that:

It is important to note in the childcare industry that tension and stress are easily picked up by the children. The tension and stress of an interim reinstatement is bound to have fall-out on the most vulnerable people in our organisation: the children. Additionally, our parents are unlikely to react well to an interim reinstatement. While we have not advised anyone that Mrs X was dismissed for serious misconduct, I am concerned that the unsettling nature of an interim reinstatement would impact on the parents.

[76] The Operations Manager finishes by saying that:

Moreover, we still do not know where Mrs X is at psychiatrically and I don't have trust and confidence in her judgment. The job of a kindergarten teacher requires a high degree of responsibility, attention and good judgment. I am not satisfied that she is able to do this job at this time. In particular, I note that the medical reports have said that her depressive symptoms (such as poor concentration, poor memory and poor judgment) were brought on by workplace stress. I am finding this process stressful myself. I imagine that for Mrs X this process would be immensely stressful. As such, I think it is fair to assume that she suffering under a similar, if not larger, degree of stress than she was in April when this event occurred.

[77] The CEO in relation to the practicability and reasonableness of reinstating Mrs X deposes as follows:

I consider that I would be failing in my duty of care if Mrs X was reinstated because I believe she poses a risk to the well-being of staff and children. I have reached that conclusion based on the following:

- (a) *I must be able to guarantee to children, parents and staff, as well as the Ministry of Education, that I am confident that, to the best of my knowledge, the children's well-being and safety is protected. I cannot provide this guarantee knowing Mrs X's behaviour has been erratic and unpredictable;*

- (b) *I do not have confidence in Mrs X to be responsible for the safety and well-being of vulnerable, impressionable young children. I am concerned she may interact with children in an inappropriate way or “blow a gasket” which would have detrimental effects on children and her colleagues;*
- (c) *I am not confident that Mrs X would be able to adequately supervise and make judgments about children’s safety and wellbeing;*
- (d) *According to the letter from Dr K dated 12 June 2013 Mrs X has been under specialist medical support since early this year, being assessed by the mental health crisis team in May 2013 and “as a result transferred across for some more intensive input from the Home Based Treatment Team”. This suggests there is an on-going issue which is yet to be resolved; and*
- (e) *The letter from Dr K dated 12 June 2013 states that the effects of medication could have contributed to memory loss and confusion over timings of events. This raises a serious issue about whether she is still under the influence of such medication and the effect it may have on her teaching.*

[78] The Head Teacher at B kindergarten, who is a friend of Mrs X, and who Mrs X has said was supportive, says the following in relation to the possibility of interim reinstatement:

The possibility of interim reinstatement while a personal grievance is being considered by the Employment Relations Authority makes me think about my team. For Mrs X to return straightaway would be confusing to the team and the families at B kindergarten.

If she returns, and is successful with her personal grievance, then there would be a brief disruption period of uncertainty and then we would continue as normal. However, I know that there will be on-going issues and I do not want to put the team or their families through that at this time.

I would feel differently if Mrs X’s personal grievance was successful, and she came back to B kindergarten as a bona fide member of the team until the end of her contract.

As Head Teacher of B kindergarten, I do not recommend that Mrs X comes back in the interim.

[79] The Head Teacher of G kindergarten makes reference to Mrs X’s right to return to her permanent position at G kindergarten for Term 2 of 2014. She deposes that she believes that the relationships have broken down to a point where she feels she would be unable to repair them. She said that she believed that two to three of the five teachers at G kindergarten would quit if Mrs X came back to work there. She

points out that relationships are key in that job, as teachers may work as a team so their relationships need to be built on trust and respect. She deposes as follows:

After the events of 2012, the staff were on edge, stressed, anxious and worn out. The [30 April] incident has added to this. I have been working on bringing morale back up and building a team again. I believe that having Mrs X back would destroy this work.

I also have to think as an advocate for the children, and after this incident, I cannot trust her with them. I do not feel that I could have faith in Mrs X to act professionally, tell the truth and be honest with me, and do not have trust and confidence in her judgment.

Having Mrs X back at G would be really disruptive and upsetting for the staff and I do not know how I would prevent that from affecting the parents and children as well.

I am extremely nervous and stressed about the idea of Mrs X being reinstated. I do not know how I would deal with her coming back to G, or how I could help my team to deal with it.

[80] These objections fall into four main categories:

- (a) Interim reinstatement would cause confusion for children, parents and teachers;
- (b) There is a lack of certainty about whether Mrs X's mental health poses a risk to the children under her care;
- (c) The relationships between her and the other staff at G kindergarten have irreparably broken down; and
- (d) The respondent has made a new appointment to replace Mrs X.

I address these concerns in turn.

Confusion

[81] With regard to the confusion that would allegedly be caused by interim reinstatement, I do not believe that this is a very persuasive argument. First, there was no actual evidence adduced as to why the adults with whom she would come in contact would be confused and, frankly, there is no difficulty that I foresee in advising such people of the truth (namely, that Mrs X has been reinstated on an interim basis upon the order of the Employment Relations Authority). Second, with regard to the confusion that the children might suffer, no evidence was adduced as to what

particular harm would be caused to the children if Mrs X were to return on an interim basis. Ms Sharma pointed out in her submissions that the children have to deal with relieving teachers from time to time. Life is inherently uncertain and changeable, including for children, and I do not believe that it is likely that any particular harm could be done to the children if Mrs X were to be reinstated on an interim basis. Any confusion would be short lived.

[82] My other reason for rejecting the confusion argument is that this could be said to apply in almost any interim reinstatement case. Whilst, of course, the range and likelihood of the potential for confusion would vary with the nature of the employment, there is always uncertainty in an interim reinstatement situation and that, in itself, therefore, cannot be used to prevent the Authority from ordering reinstatement where it is appropriate. In summary, I do not accept the confusion argument as persuasive that there is an impediment based upon practicability that prevents interim reinstatement.

The risk to the children

[83] With respect to the second argument, that there is uncertainty as to any risk presented by Mrs X's current state of mental health, is a much more valid concern in my view. I have already found that I believe it was reasonable for the CEO to have invoked Regulation 57 to exclude Mrs X when she received the letters dated 11 and 12 June 2013 from Dr K. As Mrs X was dismissed shortly after being excluded, and as the respondent had not, at the time it lodged its affidavits, had the benefit of any further considered or detailed psychiatric report into Mrs X's mental health, the concerns expressed in its affidavits are reasonable.

[84] As at the date of the investigation meeting, no affidavit evidence was presented by Mrs X from Dr K or any other psychiatric practitioner with respect to the risk identified by the CEO. The respondent adduced an affidavit from Dr Barry-Walsh but he was unable to usefully comment on the risk that Mrs X may pose in her work as a result of the mental health problems because of the lack of detail in the materials provided to him. He needed to interview Mrs X in order to fully assess the issue.

[85] Dr Barry-Walsh did, however, make some general comments, including that depression is a potentially serious mental illness and that it is usually accompanied by

deterioration in a person's functioning including their cognitive abilities such as concentration and memory, impairment of judgment, difficulty in motivation and negative thinking all of which may impact upon the capacity to work effectively and safely. He deposed that it would be reasonable for a responsible employer to have concerns in that area and therefore seek to clarify them. He also deposed that, where stresses coming out of the workplace contribute, the depression may continue until the stresses are resolved or the employee leaves that workplace.

[86] In light of those comments and the other factors identified above, I directed Ms Sharma to seek to obtain urgently a more recent and detailed psychiatric report on Mrs X from Dr K. A letter was received from Dr K dated 29 July 2013 which stated as follows:

Dear Ms Sharma

Many thanks for your letter dated 25th July 2013. In response to the questions you raise:

- 1. I last saw Mrs X for review on Wednesday 10th July.*
- 2. At that time there was still some mild lowering of mood, which I felt was probably consistent with her current situation and the uncertainty about her employment status. She no-longer presents with significant or pervasive depressive symptoms.*
- 3. As I have stated in previously letters / reports I do not have any concerns about her ability to return to work and have no concerns whatsoever that she presents any risk to the children in her care.*
- 4. Mrs X has never expressed any concerns about her ability to work with children in the kindergarten, indeed she has reported that she enjoys and values this work.*
- 5. Mrs X has now been discharged from our Home Based Treatment Team (HBTT) given her improvement. I will see her again once or twice for out-patient reviews and she has on-going psychology input from [details omitted] Clinic. She is working in psychology on skills to manage stress, anxiety and low mood.*

6 [In answer to Ms Sharma's question – "Please clarify the wording in your letter of 11 June 2013 where it says what I am able to confirm is that you are currently suffering from a significant depressive episode..... Is this still the case now? Or rather is it a situation where she has suffered a significant depressive episode, and is no longer a risk to herself or others?"]

As answer 2. Mrs X initially presented with significant symptoms of depression which have now largely resolved. She no-longer has thoughts of hurting herself. She does not pose a risk to others.

7. As is clear in the letter dated 12th June I used the term 'temporary blowing of a gasket' to Mrs X as a non-clinical sense to help her try to understand that her behaviour was likely to have been a temporary and uncharacteristic action given how depressed and stressed she was at the time. It in no way means that she has a tendency to on-going instability or is likely to have further such outbursts.

8. Whilst the so called 'situational parameters' may persist in the work environment these would no-longer be combined with Mrs X's major depression, which as I have said has now largely resolved. It is also the case that Mrs X, in addition to advice for yourself and her union, has done work in psychology to help her deal better with stressful situations. So whilst there may be some challenges and stresses involved in a return to work Mrs X is now in a much stronger position to be able to deal with them and I do not anticipate any problems. I do not feel that she presents any risk of danger to children who would be in her care and as far as I am aware she has never presented a risk to others.

9. I believe I have covered the points raised in this paragraph above. Situational has no specific medical meaning.

In summary Mrs X did present initially as quite significantly depressed with some suicidal ideation which was triggered by a number of factors, including what had become a stressful work environment. She has engaged well with treatment including medication, support and psychology input all of which will continue during her return to work. So whilst some stressors that contributed to her initial difficulties may remain in the workplace, the additional factors that combined and contributed to her difficulties, including the inappropriate purchase of goods (namely her depression and lack of support) do not. I do not feel therefore that the 'situation' i.e. the specific combination of factors that were present at the time can be said to still persist.

She has never to my knowledge presented a risk of harm to others. It is certainly my opinion that there are no grounds to suggest that as a result of mental health symptoms she is unfit to return to work and nothing at all to suggest that she represents a risk to others now, including the children who will be in her care.

[87] This letter from Mrs X's psychiatric consultant is unequivocal in its view that Mrs X does not present a danger or other risk to children in her care. In response to it, Ms O'Brien, for the respondent argues that the letter does not address the *passive* risk posed by Mrs X to the children in her care. That is, lapses in judgement, lapses in concentration and irrational thinking can impair the judgement of a teacher supervising children and inadvertently cause them harm.

[88] Dr K's letter of 29 July 2013 states that Mrs X *no-longer presents with significant or pervasive depressive symptoms* and has been discharged from our Home Based Treatment Team (HBTT) given her improvement. Mrs X's significant symptoms of depression *...have now largely resolved.* Dr K says that her use of the term *blowing a gasket.... in no way means that* [Mrs X] *has a tendency to on-going instability or is likely to have further such outbursts.* It appears from Dr K's letter that she believes that the risk of lapses in judgement, lapses in concentration and irrational thinking referred to by Ms O'Brien has diminished considerably.

[89] Ms O'Brien states that it is unclear whether Dr K has been provided with details as to Mrs X's work requirements. However, Dr K plainly knows that Mrs X is a kindergarten teacher, a role that is generally well known for its demands. I do not accept the implication that Dr K's letter has been written in ignorance of the principal requirements of a kindergarten teacher's role.

[90] In light of the fact that Dr K states that Mrs X's depression has now largely resolved, and in light of the strong level of support in Dr K's letter for Mrs X's return to working with children, and her reiteration that Mrs X's return poses no risk to herself or others, I believe that Dr K's letter can be taken as evidence that the passive risk referred to by Ms O'Brien is not materially greater than that posed by any other teacher dealing with the usual expected and unexpected daily vicissitudes of life.

Tensions at G kindergarten

[91] Turning to the third argument of the respondent against interim reinstatement, that deposed by the Head Teacher of G kindergarten, I see the force of the argument (although it is not at all clear from the evidence before me that Mrs X was solely responsible for tensions that may have arisen in 2012 between her and some of her colleagues). However, it is clear that the incident on 30 April did seek to implicate Ms Z, a teacher who is still employed at G kindergarten. The action of Mrs X on 30 April 2013 suggests a particular dislike or obsession with Ms Z which further suggests that it would not be appropriate for those two individuals to work together.

[92] However, whilst there is an agreement between Mrs X and the respondent that she could return to a full time position at G kindergarten in Term 2 of 2014, it is not, as was submitted by Ms O'Brien for the respondent, "*inevitable*" that Mrs X would return to G kindergarten. It would be incumbent upon the employer at a time closer to the start of Term 2 in 2014 to assess whether it would be appropriate in all the circumstances for Mrs X to return to G kindergarten and, I would suggest, notwithstanding any agreement, if it were clear that her return would cause disruption to the operation of G kindergarten, it would be appropriate for the respondent to seek to agree an alternative arrangement with Mrs X, or to put in place measures to ensure that the smooth running of the kindergarten was not disrupted.

[93] Therefore, although the argument in relation to the possible eventual return of Mrs X to G kindergarten carries some weight, it is not sufficiently strong in itself to persuade me that interim reinstatement is not practicable.

A new appointment has replaced Mrs X

[94] No affidavit evidence was adduced about who has replaced Mrs X, when the replacement took place, what the replacement has been told about her appointment or the terms upon which the replacement has been appointed. Mrs X was dismissed on 24 June 2013 and the application for interim reinstatement was lodged on 2 July. Therefore, the replacement cannot have been in place for very long (if at all) before the respondent became aware of the possibility of interim reinstatement. Furthermore, the respondent operates a number of kindergartens, and it may be possible to accommodate the replacement elsewhere if s/he is not able to stay at B kindergarten. As no evidence was produced about the replacement, however, this is speculation. Therefore, all in all, I do not accept that there having been appointed a replacement of some sort should be an impediment against awarding reinstatement.

Reasonableness of reinstatement

[95] The Employment Court stated in *Angus* that *the reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some cases, others.*

[96] In this case this requirement encompasses not only the effect of reinstatement on the respondent, but also the other teaching and non-teaching staff, the children, and their families.

[97] I have already examined whether it is reasonable to harbour concerns about the effect on the children in having Mrs X reinstated on an interim basis. I have not seen any objective evidence of any harmful effects that would be likely to accrue to the children from Mrs X's interim reinstatement and do not believe that any *confusion* would be anything other than very short lived. Children are, on the whole, robust and capable of coping with change. As far as the parents and the teachers are concerned, the basic facts can be explained if necessary.

[98] Affidavit evidence has been provided that asserts that the uncertainty of interim reinstatement would cause significant stress to other teachers. However, there is no specific explanation as to how interim reinstatement would cause stress to the other teachers. No medical or affidavit evidence has been adduced from any teacher (other than affidavit evidence from the two head teachers) to support this assertion. It is also not clear why the teachers at B kindergarten should be stressed by Mrs X's interim reinstatement. No evidence has been adduced that Mrs X and these teachers had any material issues with working together.

[99] Indeed, it is likely that the most stress would be felt by Mrs X herself, and not only is she willing to face that, but her consultant psychiatrist supports her return.

[100] All in all, I do not believe that it is not reasonable to contemplate the interim reinstatement of Mrs X.

Where does the balance of convenience lie?

[101] This question requires balancing the prejudice to Mrs X of not reinstating her against the prejudice to the respondent in doing so.

Factors favouring the respondent

[102] I have already examined factors favouring the respondent's opposition to reinstatement above, when considering whether reinstatement would be practicable and reasonable. In doing so I have found that there is little weight in the argument that temporary reinstatement would confuse the staff, parents or children.

[103] I have also found that Mrs X's depression has now been stated by Mrs X's consultant psychiatrist to be largely resolved, which should present comfort to a fair and reasonable employer viewing the matter objectively.

[104] I have also found that the risk of disruption to workplace harmony presented by Mrs X's return to G kindergarten in April 2014 is not insignificant but that it is not inevitable that Mrs X will return, as other options could be explored and agreed with Mrs X.

[105] Finally, I do not accept that the fact that a replacement has been appointed should present a material impediment to reinstatement.

[106] In summary, I do not dismiss the factors presented by the respondent but do not find them strongly persuasive.

Factors favouring the applicant

[107] One factor to consider under this heading is whether damages would be an adequate remedy. Mrs X deposes in her affidavit of the financial difficulties that she and her family face arising from her dismissal. She also refers to her husband's back problems and the deteriorating eyesight of her daughter, who requires medical treatment. Mrs X deposes that her daughter has to be placed on the public waiting list rather than having private treatment, which is now beyond the family's reach following the dismissal.

[108] All these arguments could be met entirely by the award of the usual monetary awards available under the Act. Insofar as there may be an element of urgency, that can be met to a degree by the Authority making available dates for the substantive hearing in the next three to four weeks. Ms Sharma stated that she would not be able to accommodate a substantive hearing in the near future because of her own commitments. However, unavailability of counsel alone should not be a sufficient reason to grant interim reinstatement.

[109] However, even with a speedy substantive investigation, any remedies awarded would not be likely to be in Mrs X's hands before a period of at least another 4 weeks, probably longer. I accept that Mrs X's family circumstances do suggest a need for a more urgent resolution.

[110] The other argument deposed by Mrs X is that the respondent has management contracts with other kindergartens and preschools and that the CEO is directly involved in the management of those contracts, and so Mrs X speculates that it would be hard for her to successfully apply for other work. This is not addressed by the respondent in its affidavits. However, no specific evidence was presented by Mrs X in respect of how well covered the local area in which Mrs X lives is by kindergartens and pre-schools falling under the influence of the CEO. It would be wrong, therefore, to allow this speculation to carry much weight.

[111] Finally, it is no longer the case that only senior employees, or those with special skills, are regarded as having to exercise those skills regularly without them beginning to atrophy. Mrs X also carries out a skilled profession for which training is

necessary and there is certainly no valid argument in my view that she could be kept out of the workplace for a significant period without it impacting upon her skill base.

[112] I also recognise the representation made by Dr K that Mrs X's mild lowering of mood was consistent with Mrs X's uncertainty about her employment status, and that she enjoys and values her work with children.

Summary

[113] When balancing the factors favouring the respondent's opposition to interim reinstatement against the factors favouring interim reinstatement, I am convinced that the balance of convenience falls in Mrs X's favour.

Where does the overall justice of the case lie?

[114] I must now stand back and examine the overall justice of the case. In doing so, I find that Mrs X was disadvantaged by not being made subject to the competency provisions of the collective agreement. If these provisions had been followed, the respondent would have been obliged to have addressed its mind to corrective actions required to address the matters causing it concern. The respondent was prepared to allow Mrs X into the workplace in a non-contact position from 21 June 2013 until her dismissal. There is no reason why, if the competency approach had been taken, this arrangement could not have continued whilst the respondent obtained Dr K's view as to how long Mrs X's *significant depressive episode* was likely to last.

[115] It is not possible to assess accurately what Dr K would have said to such a question if it had been posed on or around 21 June, but given Dr K's latest letter, it is entirely feasible that she would have predicted that the significant depressive episode would have been expected to last less than a month (because, by 10 July 2013, Dr K had assessed Mrs X as no longer presenting with significant or persuasive depressive symptoms). With such information, if it were acting in good faith, the respondent would have been in a position to continue the non-contact approach for that short period until Dr K could confirm, upon a fresh assessment, that the significant depressive episode was behind her. In my view, clause 6.3 of the collective agreement is drafted widely enough to encompass such a situation.

[116] As the CEO was willing to contemplate Mrs X in the workplace, albeit in a non-contact capacity, despite having read Dr K's previous letters and knowing what

Mrs X did on 30 April, it would not have prejudiced the respondent to have continued that non-contact employment whilst the provisions of clause 6.3 of the collective agreement were being implemented.

[117] By the respondent's failure to follow clause 6.3, Mrs X was deprived of the opportunity to be reassessed and to prove herself capable of being trusted again. She should not have been deprived of the right to be dealt with in accordance with the provisions of the collective agreement. Interim reinstatement would enable that to occur.

[118] Overall, therefore, I believe that the overall justice of the case favours interim reinstatement.

Conclusion

[119] I conclude that the requisite tests for interim reinstatement have been satisfied in this matter. However, I believe that there are conditions that should be imposed in order to give the reinstatement a chance to succeed.

[120] I am mindful that various members of the respondent have expressed concern at Mrs X being reinstated. The strongest concerns relate to the safety of the children. I therefore recognise that the respondent may wish to reassess whether, in complying with the order for reinstatement contained in this determination, it still has reasonable grounds to believe that Mrs X is in a state of mental health that presents any danger to children, and so should be excluded from coming into contact with the children. (It may wish, for example, to obtain further information as to any specific risk presented by Mrs X's medication, if she is still taking it, as this is not clear from Dr K's letter of 29 July 2013).

[121] However, the respondent must make this reassessment in good faith, and must take into account, objectively, the latest medical opinion obtained from Dr K, any further medical information it obtains and any representations made by Mrs X herself. In making any such representations, I suggest that Mrs X should speak to relevant managers at the respondent herself rather than seeking to make representations in writing and/or via Ms Sharma. No disrespect is intended to Ms Sharma, but for the relationship between Mrs X and the respondent to work, Mrs X must be able to deal directly with the operations manager, the CEO and the head teacher of B kindergarten.

[122] If the respondent, having carried out a fair, reasonable and objective assessment, decides to continue to rely on regulation 57 to exclude Mrs X from coming into contact with children, then it must also implement the provisions of clause 6.3 of the collective agreement, and keep the matter under close review, with a view to lifting the exclusion from contact order as soon as it becomes reasonable to do so.

[123] Finally, I recognise that the respondent will wish to communicate with its staff and the parents of the children at B kindergarten the effect of the interim reinstatement order and so shall allow the respondent to require Mrs X to stay away from the workplace on full pay for no more than 7 calendar days from the date of this determination.

Orders

[124] I make this order in reliance upon Mrs X's undertaking as to damages under s. 127(2) of the Act.

[125] I order that the respondent reinstate Mrs X to her position as teacher at B kindergarten on an interim basis with immediate effect, subject to the following conditions:

- (a) The respondent may, if it thinks it necessary, require Mrs X to stay away from the workplace on full pay for no more than 7 calendar days from the date of this determination;
- (b) The respondent may, if it thinks it necessary, reassess whether, in complying with the order for interim reinstatement, it still has reasonable grounds to believe that Mrs X is in a state of mental health that presents any danger to children, and so should be excluded from coming into contact with the children pursuant to regulation 57 of the Education (Early Childhood Services) Regulations 2008;
- (c) In making its reassessment the respondent must, in good faith, take into account the contents of the latest report from Dr K, any further medical information it obtains and any representations that Mrs X may wish to make on the matter;

- (d) If the respondent decides, in good faith, that regulation 57 should be invoked to exclude Mrs X from contact with children, it must still allow her to attend B kindergarten on a daily basis after the expiry of the seven day period referred to in subparagraph (a) above, and must immediately put in place steps which comply with its obligations to Mrs X under clause 6.3 of the collective agreement;
- (e) The respondent must, as part of its obligations under clause 6.3, assess regularly and frequently how long the non-contact arrangements should be in place and lift them as soon as it is reasonable to do so.

[126] I also direct the parties to take part in, on an urgent basis, (subject to the availability of a mediator) mediation with a member of the Mediation Services.

[127] A case management conference shall be arranged to fix the date of the substantive investigation of the matter.

Costs

[128] Costs are to be reserved until the conclusion of the Authority's substantive investigation of the matter.

David Appleton
Member of the Employment Relations Authority