

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2015] NZERA Wellington 97  
5579837

BETWEEN SEANN PAURINI  
Applicant

AND WELLINGTON INSTITUTE OF  
TECHNOLOGY  
Respondent

Member of Authority: Michele Ryan

Representatives: Tim Sissons, Counsel for Applicant  
Tanya Kennedy, Counsel for Respondent

Investigation Meeting: 24 September 2015 at Wellington

Submissions Received: 22 September from the Applicant  
23 September from the Respondent

Further information 25 September from the Respondent

Determination: 8 October 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] On 4 September 2015 Mr Sean Paurini, via his counsel, lodged an urgent application seeking an order for interim reinstatement.<sup>1</sup>

[2] His previous employer, Wellington Institute of Technology (WelTec), opposes the application.

[3] An investigation meeting, dealing solely with the issue of whether Mr Paurini should be reinstated on an interim basis, was held on 24 September 2015.

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<sup>1</sup> Pursuant to s.127(2) the application was accompanied by an undertaking to abide by any order the Authority may make with respect to damages

**Relevant background information**

[4] Mr Paurini has a Master's degree in Arts and has been involved in the tertiary education sector for over 15 years in a variety of paid and unpaid roles. In or about 2010 he was diagnosed with Adult Attention Deficit Disorder and Adjustment Disorder. He says the effect of these causes him to make impulsive decisions at times.

[5] In 2012 Mr Paurini commenced employment at WelTec as an Academic Consultant on a 2 year fixed term agreement that provided for gradually increasing hours of work. The engagement was facilitated by a trust which assists individuals with disabilities to obtain employment. Work and Income's 'Mainstream Programme' subsidized Mr Paurini's remuneration.

[6] In 2014 Mr Paurini obtained another position at WelTec on merit. This appointment was also on a part time fixed term basis but was extended twice and hours of work were increased.

[7] WelTec's main campus is located in Petone, Lower Hutt, but there is an additional campus in Wellington city.

[8] In 2015 WelTec launched a new initiative; Research and Enterprise (R & E). Mr Paurini was offered the position of 'Research Development Advisor' (RDA), based in Petone, reporting to Dr Jacquie Harper, R & E Manager. During negotiations over terms and conditions of employment he requested, amongst other things, to work 2 days a week at the Wellington city campus and flexible hours of work. The request to work part time was declined. The issue of flexible working hours does not appear to have advanced to a conclusion.

[9] Mr Paurini accepted and signed an individual employment agreement on 15 May 2015. Hours of work were recorded as "*40 per week (seven day period)*". Dr Harper says prior to accepting the position Mr Paurini did not advise of any disabilities that needed to be accommodated.

[10] Flexibility over hours of work was raised again in June and Dr Harper agreed to have Mr Paurini's core hours altered to 10am-6pm, and that he could 'hot-desk' at the Wellington campus on days when meetings occurred on that site.

[11] On Monday, 29 June 2015 Mr Paurini met with Dr Harper. He asked to reduce his hours to part-time. Dr Harper advised that her inclination was for the role to remain full-time but that she would consider his request. They agreed to discuss the matter again.

[12] Mr Paurini sent an email to Dr Harper later in the day. He proposed part time work at 20 hours over 2 to 2½ days per week, noting he was open to the possibility of full time hours following a review at the end of 2015. He said his decision was based on how he viewed he could be more productive in the role and also on a number of future career and academic related factors. The email detailed where he envisaged the emphasis of his work should lie.

[13] The parties met on at 10am on Tuesday, 30 June 2015. Mr Paurini's affidavit states that Dr Harper declined his requests without explanation. In contrast Dr Harper says she advised that she wanted the role to remain full time so as to build momentum and continuity across the institute. She says she told Mr Paurini that his suggested work programme was not what was required by R & E. At the end of the meeting she asked Mr Paurini to think about possible options around the full time role and come back and discuss these with her.

[14] At 1.56pm that day, Mr Paurini sent Dr Harper a letter advising as follows:

*Without Prejudice*

*Thank you for clarifying the position this morning re my proposal to amend my employment agreement to part time permanent at 20 hours per week with the possibility of proceeding to [full time permanent] at a later stage.*

*As you know, this is a decision I made based on a number of career and academic related factors.*

*While I would have welcomed the opportunity to continue our work with Research and Enterprise part time, and I indicated I was willing to compromise – I do understand your position re the requirement for a full time role.*

*I have decided to resign my position. I have two proposals:*

- *Either that my last day of work is 28 July 2015*

***Or***

- *That I assist with any provisional arrangements; for example, to ensure the seminars, profiles and the Maori network/*

*platform are established and operational to at least a basic level.*

*As you might understand the second option would be on condition that hours (and occasionally days) are flexible within reason, e.g. fixed term, part time 20 hours over three days per week, e.g. to assist with provisional arrangements as indicated above and/or for the purposes of finding a suitable replacement RDA. I am able to work for three months part time initially as from Wednesday 8 July 2015. I would prefer to work Wednesdays to Friday but I can be flexible (depending on R+Es needs).*

*Please let me know your thoughts; e.g. if you have any alternative ideas/a proposal. I am happy to meet again as soon as you are ready.*

[15] Mr Paurini says his email was written impulsively and in response to the distress that he felt following Dr Harper's unwillingness to consider his proposal or explain the reasons for her thinking.<sup>2</sup>

[16] Dr Harper met Mr Paurini in the late afternoon to acknowledge receipt of his letter of resignation and to clarify that he was not interested in a full time position.

[17] On Thursday 2 July 2015 Dr Harper emailed and hand delivered a letter to Mr Paurini advising his decision to resign was accepted. She says they agreed on what needed to be done until his final day of employment on 28 July 2015.

[18] Later that day Mr Paurini contacted Dr Harper's manager, Ms Nicola Meek. They met briefly on 3 July. Mr Paurini says he told Ms Meek that he wanted to withdraw his resignation and he raised the issue of flexibility around hours of work. He says Ms Meek supported his remaining at WelTec and said that she needed to "bring Jackie in" to the discussion.

[19] Ms Meek denies Mr Paurini's version of events and says he talked about more flexibility and his desire for further study. She says Mr Paurini was unclear about what he wanted from WelTec and she asked him to consider the matter over the weekend and to get back to her. They met inadvertently on 8 July. Ms Meek says Mr Paurini did not, on either occasion, say he wanted to withdraw his resignation.

[20] On 9 July 2015, Mr Paurini sent Ms Meek an email, as follows:

*As discussed with you 4\* and 8 July 2015, I wish to formally retract my resignation from WelTec. Please accept this letter as a*

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<sup>2</sup> affidavit dated 4 September 2015, para 27

*withdrawal of my resignation letter to Dr J Harper; dated 30 June 2015.*

...  
*Thank you for your understanding and discretion.*

\*Mr Paurini says the wrong date was inserted and should record 3 July

[21] Mr Paurini and Ms Meek exchanged email from 13-16 July. Mr Paurini wanted to know what he could do to support a retraction of the resignation. Dr Harper was away at a conference. On 16 July 2015 Ms Meek advised that she and Dr Harper would like to meet with him at 10am on Monday, 20 July to discuss his request, and asked him to confirm his availability. Mr Paurini responded on 17 July. He advised that he would “*write a context to the resignation and the decision to retract*”, and email this to Dr Harper and Ms Meek. It is unclear if this eventuated. He further noted he “*would like to confirm acceptance of the retraction and negotiate some degree of flexibility in [his] role*”.

[22] Mr Paurini was unwell on Monday 20 July, and sent an email to Dr Harper (and others) that that he would not be at work that day. At 7.11pm on 20 July, Dr Harper sent Mr Paurini an email stating (amongst other things) that:

*After careful consideration, your request to retract your resignation has been declined.*

*This letter reconfirms acceptance of both your resignation and your request to terminate your employment on 28 July 2015. ...<sup>3</sup>*

[23] Mr Paurini remained on sick leave until his termination date of 28 July 2015.

[24] On 30 July 2015, Mr Paurini wrote again to Dr Harper. He said “*there were several reasons why I made the hasty decision [to resign] but the driver or catalyst is to do with my mental health - in large part - related to my disabilities.*” He asked Dr Harper to reconsider her decision. WelTec says this was the first time Mr Paurini raised matters of health and/or disability as cause for his resignation.

[25] On 4 August, Mr Paurini sent WelTec an email proposing two options. The first was that he be reinstated to his position. He asked again to work two days per week in town and that his hours and days are flexible. The second proposal was to be redeployed to a suitable role (20-40 hours per week) with compensation for the loss of his salary if below that of the RDA role.

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<sup>3</sup> It appears Mr Paurini did not see the document until 22 July

[26] On 7 August 2015 Mr Paurini raised a personal grievance alleging he had been unjustifiably disadvantaged, unjustifiably dismissed and discriminated against on the basis of disability.

[27] The parties have attended mediation but their differences have not been resolved.

**Should Mr Paurini be reinstated on an interim basis?**

[28] Section 127 of the Employment Relations Act 2000 (the Act) allows the Authority to order interim reinstatement pending a substantive hearing of a personal grievance. The grant of an injunction is discretionary but not unconstrained. The Authority must apply the law relating to interim injunctions having regard to the objects of the Act<sup>4</sup>. The principles of law governing the grant of interim injunctions are well established but these should not be applied rigidly.

[29] I note briefly, with the exception of the claim for unjustified dismissal, that there is an assertion in the respondent's submissions that Mr Paurini's other claims are not relevant to an application for interim reinstatement. I do not accept the proposition. It is clear from the wording of s 127 that the power to order interim reinstatement is not limited to personal grievance claims of an unjustified dismissal, but extends to all personal grievances as defined by s 103(1), including the claim of discrimination in employment at s 103(1)(c) as is claimed by Mr Paurini.

[30] In the circumstances of this application Mr Paurini must show:

(a) that there is an arguable case that WelTec:

- dismissed him unjustifiably, and/or
- discriminated against him by reason directly or indirectly on the basis of his disability;<sup>5</sup>

(b) that there is an arguable case that reinstatement will be practical and reasonable if found to have been unjustifiably dismissed or discriminated against;

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<sup>4</sup> s 127(4) of the Act

<sup>5</sup> Pursuant to s 104(1): (b) and/or (c)

(c) that the balance of convenience, including an assessment of the adequacy of other remedies, favours an order of interim reinstatement; and

(d) the overall justice favours the making of an order for interim reinstatement.

[31] There are genuine factual disputes between the parties' affidavits which cannot be resolved until the evidence is tested at the substantive investigation meeting. Any views recorded in this determination are therefore provisional only and may change following a full investigation of Mr Paurini's claims and after witnesses have been examined.

***Does Mr Paurini have an arguable case that he was unjustifiably dismissed and/or an arguable case that he was discriminated against by reason of his disabilities?***

[32] The threshold for an arguable case is relatively low and has been described as "*a case with some serious or arguable, but not necessarily certain, prospects of success.*"<sup>6</sup>

[33] Section 104(1) defines a range of circumstances in which it may be said that an employee has been discriminated against. Mr Paurini will have been discriminated against in his employment if by reason directly or indirectly of his disabilities WelTec either: dismissed or subjected him to any detriment in circumstances in which other employees of WelTec on work of that description are not or would not be subjected to such detriment<sup>7</sup>; or it caused him to resign<sup>8</sup>.

[34] Mr Paurini says WelTec was aware of his disabilities via communications between it and the trust that assisted him into employment, and through his conversations with various managers. He submits that even if WelTec was unaware of the nature of his disabilities, its knowledge that he was disabled obliged it to make proactive inquiry and to then reasonably accommodate requests made to assist him in his employment. Mr Paurini says WelTec omitted to do either of these activities and the effect of those failures caused him to resign. Further, its refusal to allow him to withdraw his resignation subjected him to a dismissal or detriment other employees are not or would not be subjected to.

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<sup>6</sup> *X v Y Ltd and the NZ Stock Exchange* [1992] 1 ERNZ 863, 872-3

<sup>7</sup> s 104(1)(b)

<sup>8</sup> s 104(1)(c)

[35] The success of this claim will depend firstly on whether it can be established that Mr Paurini's disabilities were known to WelTec. There are significant factual disparities between the parties' statements on this matter. Next, Mr Paurini will need to show that his disabilities were a material factor in WelTec's decision to refuse his requests. Those matters can only be determined in a substantive investigation meeting, but for the purposes of this application I accept Mr Paurini has an arguable case that he has been discriminated against pursuant to s 104 of the Act.

[36] WelTec submits that Mr Paurini cannot have a seriously arguable case of unjustified dismissal in circumstances where he was neither actually nor constructively dismissed.

[37] However, there are occasions where a purported resignation is equivocal, or given in circumstances where it is immediately apparent that the employee did not intend to resign. The law does not consider an employer could reasonably rely on such statements in these particular circumstances.<sup>9</sup>

[38] On the other hand the law recognises that employment relationships are based on contractual agreements, including agreement that notice of resignation is effective once given.

[39] Mr Paurini says his resignation occurred in circumstances where WelTec could not have reasonably relied on it. He refers to his correspondence of 30 June and says the insertion of the heading "*without prejudice*" and the various proposals within, indicated he was seeking further discussion with WelTec and did not intend to resign. Alternatively he says WelTec should have allowed him a "*cooling off*" period given the context in which his resignation was furnished. He states that WelTec's obligations of good faith obliged it to be active in maintaining a productive relationship with him and to properly consider his reasons for wishing to withdraw his resignation. He alleges that WelTec's decision not to engage with him in respect to any of these matters were not the actions of a fair and reasonable employer in all the circumstances, and amount to an unjustified dismissal.

[40] The resolution of these issues will require an assessment as to what is more likely than not to have occurred and gives rise to an arguable case.

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<sup>9</sup> *Boobyar v Good Health Wanganui Ltd* EmpC Wellington WEC3/94

*Does Mr Paurini have an arguable case for reinstatement?*

[41] In an application for interim reinstatement the Authority must assess the likelihood of permanent reinstatement should Mr Paurini's claim(s) be successful. The Authority may reinstate if it is both practicable and reasonable to do so.<sup>10</sup>

[42] WelTec points to Mr Paurini's attempts, throughout his employment and following, to renegotiate terms and conditions associated with the RDA position including the nature of his work. It submits these actions make it clear he does not want to perform the RDA role. It states it is neither reasonable nor practical to reinstate in these circumstances.

[43] In this context Dr Harper and Dr Wong each question if Mr Paurini will engage with the R & E group as a team player, follow instructions and do the work required of him. WelTec says following the conclusion of Mr Paurini's employment it has become aware that his attendance was poor on days when Dr Harper was not scheduled to be present in the workplace.

[44] Those matters have not been put to Mr Paurini previously and there is no evidence of Mr Paurini refusing to perform his role or follow instructions and I consider WelTec's concerns in this respect are speculative at best.

[45] At both the case management conference and the investigation meeting I indicated that the Authority is prohibited from altering Mr Paurini's terms and conditions of employment.<sup>11</sup> I understand Mr Paurini accepts that if reinstated he will return to the RDA position on terms agreed at the beginning of his employment.

[46] WelTec says there are current restrictions on recruitment and Mr Paurini's duties have been subsumed into the activities of various other staff. It submits there is no role for Mr Paurini to be reinstated into. I am not satisfied that WelTec's self-imposed management decision is sufficient to resist an application for interim reinstatement, particularly when it is within WelTec's power to change its policy. In any event WelTec's embargo does not appear to be absolute. WelTec's executive requires its managers to provide a business case and obtain executive approval for any future appointments. I do not consider those conditions preclude reinstatement into a

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<sup>10</sup> Section 125 Employment Relations Act

<sup>11</sup> Section 161(2)(b)

role that, but for Mr Paurini's resignation and where the work remains, continues to exist.

[47] Having assessed the above factors and in the absence of WelTec providing satisfactory reasons as to why it is not practicable and reasonable to reinstate Mr Paurini, I find that if one or both of his substantive claims find success then it is likely, as far as I can determine at this juncture, that Mr Paurini will be reinstated.

***Where does the balance of convenience lie between the parties, including whether damages are an adequate remedy?***

[48] An assessment as to where the balance of convenience lies between the parties requires an examination of the relative hardship which may arise if an order for interim reinstatement is refused compared with the detriment if an order for interim reinstatement is made but the substantive claims are not upheld. Consideration should be given to whether monetary damages would be an appropriate alternative remedy.

[49] Mr Paurini alleges that the termination of his employment has affected his mental health and that the effects of this stressor would be alleviated if he were returned to his position. Against that assertion WelTec says it is unclear whether Mr Paurini is fit to return to work in any event given the circumstances in which his claims arose. I note Mr Paurini reiterated several times within his affidavits that he was unwell in June and stressed by the working physical environment which led to his attempts to alter his working hours and location. If I accept that evidence, it is unclear if these matters have now been resolved in a way that enables Mr Paurini to return to work. I have no medical evidence which advises on Mr Paurini's current health status and am unable to give weight to either parties' argument on this matter.

[50] Emphasis was placed on Mr Paurini's fear, given his age<sup>12</sup>, work history and disabilities that he may never obtain paid employment again if not reinstated. Should Mr Paurini's substantive claims find success then it appears both reasonable and practicable to reinstate. The issue of permanent reinstatement is more appropriately determined at the substantive meeting.

[51] Mr Paurini began receiving a Work and Income benefit on 3 September and says if he does not return to work he will be under immense financial strain. I have no reason to doubt that Mr Paurini is under financial pressure but those concerns are

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<sup>12</sup> Mr Paurini is about to turn 50

capable of being compensated by an award of reimbursement of lost salary should his claims be successful.

[52] During a case management conference on 9 September 2015 I offered to investigate the substantive claims on 21 and 22 October 2015. That offer was rejected. The investigation into Mr Paurini's claims is now scheduled for 11 and 12 November. The relative proximity of the investigation meeting leads me to conclude that the potential for workplace disruption flowing from an order for interim reinstatement outweighs the inconvenience of not granting interim reinstatement, particularly where, depending on the outcome of the substantive investigation, reinstatement may be fleeting. I have considered whether Mr Paurini should be placed on garden leave. Evidence given about his financial resources leads me to conclude that if he is unsuccessful with his substantial claims and becomes liable for wages paid over the interim period, this may be too great a financial burden. While I find that the balance of convenience is very finely balanced I consider it favours WelTec.

***Where does the overall justice of the case lie?***

[53] I have found Mr Paurini has an arguable case that he was discriminated against and/or unjustifiably dismissed. It is clear there are significant differences between the parties as to how events should be properly interpreted. The onus rests with Mr Paurini to establish on the balance of probabilities that WelTec's actions or omissions amounted, in effect, to a dismissal pursuant to s 103(1)(a) or s 104(1)(b) or (c). Important evidential matters including credibility will need to be tested alongside whatever any additional evidence is given. Unfortunately Mr Paurini's claims are not well supported by the material provided thus far and in this respect he does not appear to have a strong case for reinstatement. This assessment leads me to conclude that the overall justice of the case lies with WelTec. Mr Paurini's claim for interim reinstatement is declined.

**Costs**

[54] Costs are reserved.

Michele Ryan  
Member of the Employment Relations Authority