

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 257  
3132275

BETWEEN

CLARE SINNOTT  
Applicant

AND

MINTER ELLISON RUDD  
WATTS  
Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Applicant in person  
Rob Towner, counsel for the Respondent

Investigation Meeting: 1 June 2021 at Wellington

Submissions Received: 1 June 2021 from the Applicant  
1 June 2021 from the Respondent

Date of Determination: 16 June 2021

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] Until 17 May 2021 Ms Sinnott was employed as special counsel in Minter Ellison Rudd Watts’ Environment Law team (Minters) based in Wellington. On 17 May 2021, Ms Sinnott received a letter from Minters advising “[y]our employment ends today pursuant to clause 17.1 of your employment agreement ...”. The justification given for the dismissal was that the relationship between Ms Sinnott and Minters had irreconcilably broken down and that as a result the parties were incompatible.<sup>1</sup> The letter put it this way:

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<sup>1</sup> AJH4 – bundle of documents

there exists a fundamental and irremediable distrust between you, the firm and its two partners in your specialist subject area that have given rise to an uncooperative and hostile working relationship which puts the health, safety and wellbeing of the firm's partners and staff at risk. We cannot allow this to continue.

[2] Ms Sinnott had previously filed proceedings in the Authority alleging a breach of a settlement agreement. That matter has yet to be heard. She has now filed proceedings challenging her dismissal which she says was unjustified. She seeks reinstatement, lost wages and compensation.

[3] Ms Sinnott's substantive claim was lodged with an application for interim reinstatement and urgency. It is the application for interim reinstatement that this determination deals with, deciding whether Ms Sinnott should be reinstated to her position with Minters pending a hearing and determination of her substantive claim.

[4] It is important to note at this stage, that this determination will not decide whether Minters have breached an earlier settlement agreement or whether Ms Sinnott was unjustifiably dismissed. Nor does it decide whether, if a later determination considers Ms Sinnott was unjustifiably dismissed, she would be reinstated on a permanent basis or what other additional relief she might be entitled to.

[5] As noted recently by the Employment Court in *Alistair Ross Gordon Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha*<sup>2</sup> the Court of Appeal had made it clear in *Reid v New Zealand Fire Service Commission*<sup>3</sup>, it is open to an employer to dismiss an employee on the basis of incompatibility, as was the case here. However, a dismissal for incompatibility will only rarely be available.

[6] In its decision regarding Mr Humphrey, the Employment Court noted that parliament had expressly provided that reinstatement is the primary remedy in circumstances where an employee has been unjustifiably dismissed.

[7] Minters disputes the validity of Ms Sinnott's personal grievances, including her claim of unjustified dismissal. It strongly opposes the application for interim reinstatement which it resists on a number of grounds, but what seems to be the thrust of its opposition is:

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<sup>2</sup> [2021] NZEmpC 59

<sup>3</sup> [1998] 2 ERNZ 250 at [280]

- (a) It has made an *ex gratia* payment equivalent to a year's salary to Ms Sinnott and accordingly she would suffer no financial consequence should she not be reinstated on an interim basis;
- (b) Minters would have difficulty in supervising Ms Sinnott should she be reinstated on an interim basis;
- (c) Ms Sinnott's interim reinstatement would have a negative effect on a number of staff and partners who have filed affidavits in opposition to interim reinstatement with an indication some at least would feel uncomfortable to the point of resigning should Ms Sinnott be reinstated even on an interim basis.

### **Legal framework, interim orders**

[8] As the Court observed in *Humphrey*, in determining whether or not to order interim reinstatement, regard must be had to the object of the Employment Relations Act 2000 (the Act) which is to build productive employment relationships through the promotion of good faith. In *Humphrey*, the Court noted:

One of the central features for the Act is its recognition of the importance of the employment relationship, the obligations both parties have to be responsive and communicative, and that issues ought to be dealt with promptly and between the parties if possible – in other words, supporting constructive employment relationships and repairing them where feasible.

[9] It is with this in mind that applications for reinstatement are to be dealt with, particularly in cases involving an alleged irreconcilable breakdown justifying dismissal.

[10] The legal framework I must follow in respect of the application for interim orders can be summarised as follows:

- (a) The applicant must establish that there is a serious question to be tried in relation to the claim of unjustified dismissal and if so the plaintiff must establish there is a serious question to be tried in relation to the claim of permanent reinstatement; and
- (b) Consideration must then be given to the balance of convenience and the impact on the parties of granting or refusing to grant, the interim orders sought. The impact on any third parties will also be relevant to the weighting exercise; and

- (c) The overall interests of justice are to be considered, standing back from the detail required by the above steps.

[11] The parties have each provided evidence by way of affidavits and both parties have spoken to written submissions presented at the investigation meeting held on 1 June 2021 at Wellington. This means that at this interim stage, the Authority has proceeded on the basis of untested evidence, which will not be tested until the substantive hearing.

### **Background**

[12] Ms Sinnott commenced her employment with Minters in March 2017. She was employed as Special Counsel in the Environment Team. The Environment Team also comprised two partners of Minters, both based in Auckland. Ms Sinnott worked in Minters Wellington office.

[13] In 2019, Ms Sinnott made a complaint against a colleague and filed proceedings in the Authority. The matter was withdrawn and settled between the parties.

[14] More recently Ms Sinnott filed a further statement of problem alleging that Minters had not observed and had failed to comply with the settlement agreement which had arisen out of the earlier dispute, including breaching the obligations under the settlement agreement requiring:

- (a) partners at the respondent to work with me in a constructive and collaborative way; and
- (b) the respondent to deal with all issues that arose between it and me in accordance with its good faith obligations at law.

[15] On 7 February 2021 Ms Bianca Tree, a Minters partner based in Auckland, wrote a letter of complaint regarding Ms Sinnott to Mr Poole, Minters Chief Executive. It seems to be common ground that the complaints outlined in the letter were not formally investigated prior to Ms Sinnott's dismissal, although a process had started. The complaints were critical of Ms Sinnott and included allegations that she reacted in an unpredictable manner, did not respect Ms Tree, was "confrontational" and acted in a way that was not collaborative or collegial. The letter also outlined Ms Tree's concerns regarding Ms Sinnott's wellbeing.

[16] It is also common ground that following receipt of Ms Tree's correspondence, Mr Lloyd, a partner of Minters, telephoned Ms Sinnott on 17 February 2021 and advised her of Ms Tree's complaint to Mr Poole, raising concerns about the relationship. The net result was that on the basis of the letter written by Ms Tree, Ms Sinnott was suspended.

[17] Following this, Ms Sinnott amended her statement of problem previously filed in the Authority to include complaints regarding the suspension process.

[18] On 24 March 2021, Minters appointed an independent barrister, Andrew Scott-Howman, to undertake an independent review of matters raised in Ms Tree's letter.

### **The preliminary report**

[19] On 13 April 2021, Mr Scott-Howman produced what he called a preliminary assessment to be shared with the complainant and Ms Sinnott. Mr Scott-Howman set out his brief thus:

You have asked me to consider Bianca's complaint and to interview each of Bianca and Clare. I have done those things. Against this background, my first task was described in the following way: first, whether there are any findings of fact regarding the matters raised in Ms Tree's complaint that you can make having made these initial inquiries (and if not, provide us with an indication of what additional steps you would propose taking in order to do so);

[20] Mr Scott-Howman noted that the Authority was already seized with much of the same tasks and felt it inappropriate to investigate those. His preliminary assessment noted that he did not question either Ms Sinnott or Ms Tree about those matters. He then defined his second task as:

Irrespective of whether you can make findings of fact at this stage, whether there are any observations you can make about the employment relationship at this point in time that might assist us given your objective position and employment law background and expertise.

[21] Mr Scott-Howman then clarified the task, stating he interpreted this as giving an objective view about any steps that might be taken in relation to the employment relationship.

[22] His report also set out a useful summary as to the situation between the parties at that stage. He noted:

Clare has initiated a proceeding in which she alleges breach, by the firm, of a number of different obligations that she says that it owed her. She seeks a determination by the Authority which would serve to confirm those different

allegations. In response, the firm takes issue with the validity of Clare's claims and, in addition, invites the Authority to consider whether there is a "serious breakdown" in the relationship between Clare and the firm.

I have told each of Clare and Bianca that I cannot, and will not, express a view about those different matters – nor should anything in this report be interpreted as such.

[23] Mr Scott-Howman noted the public nature of the matter before the Authority, and the potential further impact that such publicity may have on relationships commenting:

What I suggest is simply something that I think may be tolerable (subject to negotiation), and preferable for each as an alternative to litigation.

[24] Mr Scott-Howman then suggested that the parties engage in a form of facilitation. He gave his view that the interpersonal relationship between Clare and Bianca had broken down irretrievably although he did not detail why and what steps if any had been taken along the way to remedy it. His preliminary assessment was that an attempt shouldn't be made to revive it but noted that neither should Ms Tree or Ms Sinnott be expected to accept any blame or responsibility for the breakdown but should accept that the relationship was no longer tenable.

[25] The parties agreed that facilitation did not occur because the parties had different views regarding the process. Mr Scott-Howman saw facilitation as an alternative to an investigation of the employment relationship problem through the Authority. He made no findings regarding Ms Sinnott's relationship with Minters.

### **The 7 May letter**

[26] On 7 May 2021 Andrew Horne, a Minters partner and member of its Board, wrote to Ms Sinnott heading his letter "[f]ormal meeting – feedback on proposal to end employment on the grounds of incompatibility".<sup>4</sup>

[27] The letter listed difficulties in the working relationship including earlier complaints in 2019 and 2020. It also took into account the complaints contained in Ms Tree's letter to the CEO and referenced the proceedings already filed in the Authority. The letter provided:

The incompatibility is due to the irreconcilable breakdown in the relationship between you and the firm. This is well documented in the evidence that has been filed by both parties with the Employment Relations Authority (the Authority). Interactions between you, the firm, staff and partners are described in the statements of evidence as "chaotic", "harrowing" and with people being

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<sup>4</sup> AJH1 – bundle of documents

“left shaken” and “distressed”. The health and wellbeing of your supervising partners and several staff members has suffered as a result.

[28] The letter also advised Ms Sinnott that Mr Horne would be the decision maker having been delegated the role by the Board. Mr Horne explained this further in his affidavit, stating this was because he had had no previous involvement with the matter.

### **The 17 May dismissal letter**

[29] Ms Sinnott met with Mr Horne on 12 May 2021 and following that meeting, received a letter of dismissal on 17 May 2021 advising her that her employment was to end that day with Mr Horne having concluded:<sup>5</sup>

That the relationship between you and the firm has irreconcilably broken down and that as a result the parties are incompatible. In my view there exists a fundamental and irremediable distrust between you, the firm and its two partners in your specialist subject area that has given rise to an uncooperative and hostile working relationship which puts the health, safety, and wellbeing of the firm’s partners and staff at risk. We cannot allow this to continue.

[30] Under the heading “[t]he reasons for my decision” Mr Horne advised:

In making my decision, I have not sought to resolve disputed issues of fact, and I do not consider that I need to do so. I have relied primarily upon emails and other documents together with your statements to the Authority and a note you provided at our meeting. Where I have had regard to other witnesses’ briefs of evidence, this has for the most part been for their records of events with which you have not indicated disagreement or for their personal feelings and concerns.

[31] Ms Sinnott then filed a further personal grievance for unjustified dismissal seeking reinstatement on an interim basis at the earliest opportunity. At this interim stage, there is currently no evidence before the Authority indicating what steps Minters took or what options might exist which could have been explored in terms of repairing the relationship between Ms Sinnott and Minters. As in *Humphrey*, the dismissal was focussed directly on a finding by Mr Horne that the employment relationship was untenable and the situation irretrievable.

### **Serious question to be tried in relation to the claim of unjustified dismissal**

[32] The threshold for a serious question is that the claim is not frivolous or vexatious. Analysing this is not an exercise of a discretion, rather it must be based on a judicial assessment of the evidence, albeit untested, and the submissions advanced.<sup>6</sup> In this case the serious

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<sup>5</sup> AJH4 bundle of documents

<sup>6</sup> *Western Bay of Plenty District Council and NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

question to be tried is whether or not the termination of Ms Sinnott's employment was something a fair and reasonable employer could do under all the circumstances. Mr Towner properly conceded that Ms Sinnott had an arguable case for unjustified dismissal and that there was a serious question to be tried. He submitted however her case was not strong.

[33] I agree that Ms Sinnott has an arguable case that her dismissal was unjustified. I would not categorise it as weak, bearing in mind the grounds relied on for the dismissal. The Court noted in *Lewis v Howick College Board of Trustees*, special care must be taken by the decision maker in reaching an adverse finding because of the potentially wide ranging and career ending implications.<sup>7</sup>

[34] Further, s 121 of the Act provides that any statements made or information given in the course of raising a personal grievance or in the course of attempting to resolve the grievance, or in the course of any matter relating to a personal grievance, are absolutely privileged. It is distinctly arguable that Mr Horne's letter of 17 May indicates there has been a breach of that section of the Act, as his letter gives the impression that he has relied on statements that were absolutely privileged to reach his conclusion Ms Sinnott's employment should end.

[35] I have previously set out material parts of Mr Scott-Howman's preliminary report. I note he did not make negative findings against Ms Sinnott, rather he focussed on the relationship between her and Ms Tree with a view to possible solutions. Minters' dismissal of Ms Sinnott however does not seem to be based on that report but rather on separate findings made by Mr Horne who in his affidavit and letter of 17 May, indicates he made his decision relying on emails and other documents together with the statements Ms Sinnott had made to the Authority when she filed her statements of problem with the Authority.

[36] It is seriously arguable as to whether the information Mr Horne relied on in justifying the dismissal, meets the standards of procedural fairness and justification for dismissal that an employer would be expected to meet. It seems the enquiry moved from an uncompleted investigation into the allegations made by Ms Tree to quite a different enquiry relating to Ms Sinnott's relationship with others in the firm and indeed the firm itself.

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<sup>7</sup> *Lewis v Howick College Board of Trustees* [2010] NZEMC 4.

**Serious question to be tried in relation to the claim of permanent reinstatement**

[37] Mr Towner acknowledged that there was an arguable case for permanent reinstatement but he qualified that by saying Ms Sinnott's claim was not strong because reinstatement would not be practicable or reasonable. In that regard, Mr Towner pointed to the evidence of third parties and the effect on other employees. He also argued that the Authority could reasonably infer that there was a mutual loss of trust and confidence by the parties. The difficulty I have with this submission is that no evidence before me has been tested. I accept there is some commonality and agreement in respect of some aspects of the dismissal. For instance, the grounds for the dismissal and to a degree the process followed, but there is no acceptance by either party of the other's view as to the state of the relationship and steps that could be taken to fix it. There is little evidence before the Authority at this interim stage in respect of any steps taken or any investigation undertaken into how the relationship might be repaired. Presumably this is because little exists. Again, it is worth noting Mr Scott-Howman's preliminary focus was on the relationship between Ms Tree and Ms Sinnott, not between Ms Sinnott and Minters.

[38] Also relevant is the fact that there is no evidence before the Authority that Ms Sinnott was unwilling or is unwilling to take steps to address the relationship. In fact, it seems her reasons for turning down facilitation as a method of fixing her relationship with Ms Tree were because she felt Ms Tree should be present. In other words, if the relationship was to be fixed, she felt that any facilitation needed to be face to face and involving both parties. Again there is no evidence that Ms Sinnott has turned down a process identified by Minters as necessary to repairing her relationship with it.

[39] Minters has lodged a number of third party affidavits. I do not intend referring to each of them, but note that some 11 affidavits have been lodged. However I do note that there are some common themes. One theme attempts to paint Ms Sinnott as somewhat unstable and unpredictable in the working environment. Reference was made to her being seen crying and upset in her office on some occasions including the day she was placed on suspension. That would not seem to be an unreasonable response, especially if the suspension was unexpected.

[40] There is also the suggestion that other members of the firm would need to walk on eggshells if Ms Sinnott was either interimly reinstated or indeed at some later stage, should she be successful in her claims, be permanently reinstated. I do not see that as a ground that at this early stage I could safely say negates permanent reinstatement as a remedy. Further, the

evidence provided by way of affidavits did not indicate Minters would have a great difficulty in managing the situation. Ms Sinnott works in Wellington, Ms Tree works in Auckland. Indeed the uncontested evidence by both sides was that the Environment Team only had one member in Wellington, namely Ms Sinnott.

[41] I conclude that on the untested evidence, there is a clearly arguable case for permanent reinstatement.

### **Balance of convenience**

[42] In this case, assessing the balance of convenience requires a comparative analysis of the impact on Ms Sinnott, Minters, and the identified third parties if the interim orders sought by Ms Sinnott are either granted or not. This involves a weighing exercise.

[43] I must assess what would happen if the interim position is reversed in any substantive determination. For Ms Sinnott, this means assessing the consequences to her of not reinstating her on an interim basis but then later deciding in her favour and permanently reinstating her. For Minters, this means assessing the consequences of requiring it to reinstate Ms Sinnott on a temporary basis into a position within the firm but then subsequently deciding either against Ms Sinnott or against the remedy of reinstatement.

[44] Minters submitted that Ms Sinnott's claim for permanent reinstatement was not strong. It again pointed out that it had made an ex gratia payment to her of some 12 months' salary, which it said was designed to support her in a range of ways in her future career. Minters reiterated it was not seeking repayment of the amount paid, even if it were to later successfully defend Ms Sinnott's substantive claim.

[45] I have considered the impact on third parties. I note that Ms Sinnott works in the Wellington office and Ms Tree and others in the Environment Team, work in the Auckland office. It would be difficult to imagine that Minters are not in a position where they can protect Ms Tree and Ms Sinnott and indeed other parties and staff to manage any difficulties arising out of the interim return of Ms Sinnott to the workplace. At this early stage, it looks like the impetus for the dismissal was the complaint by Ms Tree. It seems to me that Minters are in a position where they can protect her and Ms Sinnott and indeed other parties and staff from anything untoward if interim reinstatement is granted.

[46] The other main thrust of Minters objection to interim reinstatement was an inability to supervise Ms Sinnott. Ms Sinnott was employed as special counsel; she is not a junior lawyer. In any event Minters are a national firm with clear legal and human resource expertise. To the extent that Ms Sinnott requires supervision in respect of her legal work, I do not believe this presents a major obstacle for Minters and with effort, is an obstacle which could be overcome to the extent supervision is needed.

[47] Ms Sinnott argued strongly that compensation (damages) was not an adequate remedy. Her belief in this is reinforced by the fact that she declined the offers of settlement which were open offers which could be described as financially generous. Minters have not made the payment of the equivalent of a year's salary conditional and describe it as ex gratia. I am advised that it has already been paid to Ms Sinnott although she may hold it in a separate account. Minters have stressed that the amount is not repayable. Ms Sinnott says following her suspension (on the basis of Ms Tree's letter) she struggled being at home. She found it affected her mental health negatively and she made the point that the longer she was away from the workplace, the greater the negative effect on her and the more difficult it would be for her to integrate back into the workplace. As the Court noted in *Ashton v Shoreline Hotel*:<sup>8</sup>

That goal is not attained by substituting a money judgment for the job. Unless the employee has done something to merit forfeiting his or her employment, or unless reinstatement is for other good reasons unjust, to award routinely compensation for the job loss instead of reinstating is to create a system for licensing unjustifiable dismissals.

[48] At the end of the investigation meeting, the parties were canvassed regarding possible dates for the substantive claim to be heard. It was apparent that there are likely to be delays in having the matter finally disposed of. I was told there would be a number of witnesses and that the investigation meeting was likely to take at least a week. The likely delay in having the matter finally determined weighs in favour of interim reinstatement.

[49] I have already touched on some aspects of the claim for unjustified dismissal and permanent reinstatement insofar as they can be assessed at this point. Prior to her dismissal, Ms Sinnott had filed a claim that Minters had breached a previous agreement. Mr Horne has noted in his affidavit that he did not feel he was required to make rulings on who he believed. Accordingly, at the substantive hearing one focus of the enquiry will be the extent as to who should shoulder responsibility for the breakdown in the relationship, Ms Sinnott, Minters, or a

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<sup>8</sup> *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421 at 436.

mixture of both. *Reid v New Zealand Fire Service Commission* is authority for the proposition that an employer cannot be justified in dismissal on the basis of an irreconcilable breakdown if it was itself substantially the cause of it. Further, in that case the Court also noted that dismissals on the basis of irreconcilable breakdown will be justified only in unusual and rare cases.

[50] To reiterate, the submissions on behalf of Minters in respect of allegations that other staff would be adversely affected should Ms Sinnott return in the interim, are not particularly strong. It seems they were raised after the event, with the exception of Ms Tree's letter of complaint. No fault has been attached to either party in respect of causes of the breakdown of the relationship between Ms Sinnott and Ms Tree.<sup>9</sup>

[51] I conclude that the balance of the convenience weighs in favour of interim reinstatement.

### **Overall interests of justice**

[52] The overall interests of justice favour the granting of interim reinstatement in this case. There is a seriously arguable case that Ms Sinnott's dismissal was unjustified and that she would be permanently reinstated to her role should she be successful in a substantive hearing. Although it is on the basis of untested evidence, I have concluded that the merits weigh in Ms Sinnott's favour. I accept that she will suffer from a professional perspective and emotionally if she is not able to return to work in the meantime. I do not accept at this interim stage that damages would be an adequate remedy. Ms Sinnott made it clear both in words and deeds, that her professional career is more important than the money. As the Court noted in *Humphreys*:<sup>10</sup>

Our understanding of the benefits of a restorative approach in supporting successful employment relationships is developing at a pace, and is consistent with the underlying objectives of the legislation and the mutual obligations of good faith. This has implications for the steps that a fair and reasonable employer, particularly a well resourced one, can be expected to take in dealing with relationship difficulties.

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<sup>9</sup> Preliminary Report – Andrew Scott-Howman.

<sup>10</sup> At paragraph 52.

**Conclusion and orders**

[53] Ms Sinnott's application for interim reinstatement is granted. I order that Ms Sinnott be reinstated to her former position within Minters within 14 days of this determination, pending further order of the Authority. She is to be reinstated to the payroll from the date of this determination. The parties are directed to attend urgent mediation within seven working days so they can ensure there is a managed return to the workplace which recognises and deals with the interests of the parties including the interests of Ms Sinnott's colleagues (the third parties).

[54] Ms Sinnott and Minters are reminded of their obligations under s 188 of the Act. If the parties cannot agree to the necessary arrangements and the timing of them, leave is reserved to apply to the Authority for urgent orders to be made.

[55] Costs are reserved. I do note however that Ms Sinnott represented herself at the investigation meeting but if either party feels there is a need to file cost submissions, then I suggest this be left until a substantive determination in respect of this matter has occurred.

**Geoff O'Sullivan**  
**Member of the Employment Relations Authority**