

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

<b>BETWEEN</b>	Tane Arataki Taylor (Applicant)
<b>AND</b>	Raukura Hauora O Tainui (Respondent)
<b>REPRESENTATIVES</b>	Penny Swarbrick, Counsel for Applicant Richard Harrison, Counsel for Respondent
<b>MEMBER OF AUTHORITY</b>	Leon Robinson
<b>INVESTIGATION MEETING</b>	14 July 2006
<b>DATE OF DETERMINATION</b>	21 July 2006

**PRELIMINARY DETERMINATION OF THE AUTHORITY**

**The problem**

[1] The applicant Dr Tane Arataki Taylor ("Dr Taylor") applies for an order for interim reinstatement to his former employment with Raukura Hauora o Tainui ("Raukura"). Dr Taylor was advised that his employment was summarily terminated by letter to his solicitor dated 29 June 2006.

[2] By a statement of problem lodged in the Authority on 5 July 2006, Dr Taylor applies for an investigation of his suspension and dismissal. He says both actions are unjustifiable. He asks the Authority to resolve the problem by orders for his reinstatement, reimbursement and compensation. This Determination deals with his application to be reinstated pending the Authority's substantive investigation.

[3] As required, Dr Taylor has given a formal undertaking to abide by any order made by the Authority in respect of damages that may be sustained through the granting of an order for interim reinstatement.

[4] The parties were unable to resolve the differences between them by the use of mediation. There is to be an investigation meeting of the substantive claims from 10-11 August 2006.

[5] I have met with the lawyers and considered affidavit evidence from Dr Taylor and Raukura's acting regional manager Mr Tukoroirangi Morgan ("Mr Morgan").

[6] This determination deals only with what should happen until a full investigation of Dr Taylor's claims. It is no more than that and is in no way a final determination or any influence on how his claims might eventually be determined.

## Interim reinstatement

[7] Section 127 of the Employment Relations Act 2000 ("the Act") requires the Authority to apply the law relating to interim injunctions and to have regard to the objects of the Act. These objects include supporting productive employment relationships founded on good faith behaviour and mutual trust and confidence and also, recognising the importance of reinstatement as a primary remedy. The Authority acts to provide a just solution to the parties' problems in the particular circumstances of each individual case. An order for interim reinstatement may be subject to any conditions that the Authority thinks fit - empowering the Authority to craft pragmatic solutions to do justice in each particular case.

[8] The remedy of reinstatement is interim injunctive relief. An injunction is only available for the protection of a legal right or to prevent the infringement of a legal right and it is a discretionary remedy. The established tests for interim reinstatement are these:-

- (i) whether the applicant has an arguable case of unjustified dismissal; and
- (ii) whether the balance of convenience (including the existence of alternative remedies sometimes said to be a separate test) favours the applicant; and
- (iii) the remedy being discretionary, where the overall justice of the case lies until it can be heard (including particularly the respective strengths of the parties' cases so far as they can be ascertained at this stage).

## An arguable case

[9] The threshold for an arguable case is not high. In an application for interim reinstatement it is neither possible nor appropriate to reach a conclusion on any contested facts.

[10] Dr Taylor was suspended on or about 12 June 2006. He says the suspension was unjustifiable because, amongst other things:-

- (a) The suspension was not warranted;
- (b) The allegations against him did not disclose possible serious misconduct;
- (c) There was no breach of his employment agreement;
- (d) Raukura failed to adequately consult with him prior to implementing its decision to suspend him;
- (e) Raukura acted in a manner designed to cause him maximum distress and humiliation; and
- (f) Raukura acted in breach of its obligations of good faith towards him.

[11] Dr Taylor was dismissed on 29 June 2006. He says his dismissal was unjustifiable because, amongst other things:-

- (a) There were no reasonable grounds on which Raukura could conclude his actions were such that-
  - (i) they amounted to serious misconduct; or
  - (ii) they amounted to a conflict of interest with Raukura in breach of his obligations it; or
  - (iii) he actively undermined Raukura.
- (b) Raukura failed to:
  - (i) provide him with all documentation or information relied upon prior to making its decision;
  - (ii) conduct a full and fair investigation into the matter;
  - (iii) properly consider his explanation before making its decision;

- (iv) Have an open mind as to the outcome of the investigation and predetermined its decision to dismiss.
- (c) Summary dismissal was not an action that a fair and reasonable employer would have taken in the circumstances.

### **The suspension**

[12] By letter dated 6 June 2006, Dr Taylor's solicitors wrote to Raukura advising:-

*We have just received instructions to act for Dr Taylor in relation to your letter to him dated 6 June 2006. We have yet to take full instructions, and write this letter as an interim measure, being cognisant of your request for a response by 3pm today.*

*As you will be aware from the Medical Certificate provided to you on Friday morning 2 June, Dr Taylor is presently unfit for work. The Medical Certificate states that he will be fit to return to work on 12 June.*

*In the circumstances we are unable to provide the comments requested, and will do so as soon as possible. In the meantime, we understand that a staff meeting is scheduled for this afternoon. We confirm that you are not authorised to make any disclosures about Dr Taylor to third parties, including the staff of the organisation.*

[13] Raukura's solicitor replied by letter dated 9 June 2006:-

*I act for Raukura Hauoroa O Tainui and refer to the previous correspondence between yourself and Mr Morgan.*

*It is understood from your facsimile of 6 June 2006 that Dr Taylor will be fit to return to work on Monday 12 June 2006. If this is still the case, following on from Mr Morgan's letter and in the absence of any response on the issues of suspension, I am instructed to advise that Dr Taylor is suspended as from 12 June 2006. I will return to you on Monday with a proposed meeting time.*

[14] It is arguably unfair that Dr Taylor was suspended before his solicitors had taken his full instructions. It is arguable that Raukura acted hastily and having regard to Dr Taylor's incapacity, unfairly because it failed to allow him the opportunity to have input into the decision about whether he should have been suspended. I conclude that Dr Taylor has an arguable case that the suspension was unjustifiable.

### **The dismissal**

[15] Raukura's decision to dismiss Dr Taylor will be assessed according to whether it was a decision which a fair and reasonable employer would have taken in all the circumstances.

[16] I find that it is arguable for Dr Taylor that that his statement to Mr Wayne McLean, Raukura's Chief Executive ("Mr McLean"), of likely staff resignations was not a "threat" or intended as a "threat", contrary to his duty of fidelity owed to Raukura. It is arguable that Raukura had no grounds to conclude that Dr Taylor intended or actually made the statement as a "threat".

[17] I find too that it is arguable for Dr Taylor that he was not actively involved in taking steps to establish a competing clinic that would harm Raukura's interests and seriously undermine its health clinic. It is arguable for Dr Taylor that the steps he took related to the offer of purchase by the Community Wellness Foundation charitable trust. I find it arguable too, that Dr Taylor's proposed activity was not in competition with or contrary to Raukura's interests, but rather, directed at enhancing its operation.

[18] It is also arguable for Dr Taylor that he was not given an opportunity to respond or be heard in relation to Raukura's assessment that he was antagonistic and hostile towards it.

[19] Dr Taylor also criticises the process by which he was dismissed. It appears that his request for certain information on which Raukura relied, was not acceded to and that he had an expectation of receiving that information before a decision was to be made.

[20] For the above reasons, I find that Dr Taylor has an arguable case for present purposes.

### **Balance of convenience**

[21] In the exercise of the Authority's discretion I weigh up the inconvenience to Raukura of having to bear the burden of interim relief before the substantive case is dealt with, against the inconvenience to Dr Taylor who may have a just case of having to bear the detriment of wrongful or unjustifiable action until the problem has been investigated and determined.

[22] It is relevant too that I have arranged to have an investigation meeting with the parties on 10 - 11 August 2006.

[23] It is said that Dr Taylor is a highly regarded medical practitioner who has a passion for his work in south Auckland. It is further said that if he is not reinstated he will suffer not only financially but also, in terms of his reputation. He requires reinstatement to repair the damage to his reputation and counter the public statements that have been made about his situation. Counsel says there will be no hardship to Raukura if Dr Taylor is reinstated because it will be convenient to have Dr Taylor working again in light of recent resignations.

[24] Dr Taylor deposes that he is devastated by his dismissal. He says his work is critically important to him not only financially, but also because of his standing in the community and the health sector as a whole. He says his mana has been damaged by the fact of his dismissal and the manner in which it was effected. He deposes that if he is not reinstated he believes the damage to his reputation will be irreparable. It is important to him to "clear his name". He is concerned too about his future employment opportunities.

[25] In terms of financial hardship, Dr Taylor deposes that he has lost his income. He was earning \$75.00 per hour and worked 48 hours per week. He is the sole income earner and supports his three children including one at university. He has a large mortgage to service.

[26] Dr Taylor says it will take him six months to re-establish his practice elsewhere. He is concerned for seriously ill patients in his care and the risk to them now his involvement has ceased. He maintains that he is still able to work with Raukura's management. Before he was dismissed, he had little day-to-day contact with management. He undertakes to work professionally if he is reinstated.

[27] Mr Morgan deposes that Dr Taylor is able to obtain alternative work immediately because there is a huge demand for doctors. He points out that Dr Taylor has taken issue with Raukura's ownership and management. He says Dr Taylor has been unhappy for some time and has motivated himself and others to leave the clinic and establish an alternative operation elsewhere in competition with Raukura. He says Dr Taylor's reinstatement would destabilise Raukura's continuing operations and would be a disaster. It could possibly plunge the clinic back into a crisis situation.

[28] Mr Morgan is adamant that Dr Taylor had taken steps to establish a competing practice without notifying Raukura, that he had conducted that exercise inside and outside of work and that he had involved other clinic doctors and staff. He is satisfied that Dr Taylor was acting against Raukura's interests causing damage to its reputation. He says Raukura has lost trust and confidence in Dr Taylor and that truth be known, Dr Taylor no longer has trust in Raukura.

[29] Further in that regard is information which Raukura has subsequently obtained from its computer systems. Dr Bruce Arroll, a colleague of Dr Taylor, emailed a solicitor on 10 & 11 May 2006. That correspondence relates to the solicitor acting for Dr Taylor and Dr Arroll and others, in relation to the establishment of a new operation. Ms Swarbrick objects to that

correspondence being produced to the Authority on the grounds that it is legally privileged. I have reached the conclusion the correspondence is not legal advice, but rather, relates to whether to instruct the solicitor. That is not a communication the law would regard as requiring protection.

[30] Raukura also produced evidence that both Dr Arroll and Dr Taylor removed Raukura patient lists to their personal email addresses. It says neither doctor had consent or authority to remove that property. Raukura has pursued this matter with Dr Arroll and says that if Dr Taylor is reinstated, it will pursue the matter with him as well.

[31] Raukura is concerned that if Dr Taylor is reinstated, he will "pick up where he left off" in terms of establishing an alternative operation. It says that there could be a devastating effect for the clinic. I consider Raukura is entitled to take this view because even at this interim phase, the evidence does establish Dr Taylor has taken steps to establish an operation of some kind, whether complementary or not, to Raukura's operation.

[32] In these circumstances, I conclude it would bear more harshly on Raukura to have to bear the burden of interim relief by being required to reinstate Dr Taylor. I consider that the detriment Dr Taylor suffers by the loss of his former income stream, will be recoverable in substantive remedies in either or both of orders for reimbursement and compensation. His concern for his reputation can be addressed at substantive hearing three weeks hence.

[33] Accordingly, I find that the balance of convenience favours Raukura.

## Overall justice

[34] Standing back from the detail of the other tests I now decide whether it will be in the interests of justice to grant interim reinstatement. I consider too, in the exercise of the Authority's equity and good conscience jurisdiction and in determining a whether to grant a discretionary remedy, what options other than those advanced by the parties that the justice of the case requires.

[35] It is relevant that Dr Taylor has removed a Raukura patient database to his personal email. The evidence at this stage is that this action was unauthorised. As such, I consider that action sufficient to disentitle Dr Taylor from the interim relief he now seeks.

[36] I conclude that the overall justice of the matter favours Raukura. I give consideration to whether there are any other options. As Raukura is now seeking various orders against Dr Taylor, I consider it appropriate the parties attempt to resolve all matters between them informally by mediation.

## Determination

[37] For all the above reasons, in considering the best way to regulate matters between now and the investigation meeting on 10 August 2006, **I decline to grant an order for Dr Taylor's interim reinstatement.** I do however consider it appropriate to direct the parties to mediation. **I direct the parties to attend mediation before 10 August 2006.**

## Costs

[38] If costs are sought they are reserved.

