

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 192
3016133

BETWEEN VAL
Applicant

A N D MBU TRUST BOARD
Respondent

Member of Authority: Peter van Keulen

Representatives: Applicant in person
Scott Wilson, Counsel for Respondent

Investigation Meeting: 31 January 2018

Submissions Received: 31 January 2018 for Applicant with further submissions
and information received up until 30 November 2018
31 January 2018 for Respondent

Date of Determination: 18 December 2018

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] VAL was a teacher at MBU, a school in the South Island. She was dismissed on 1 August 2014.

[2] VAL claims the Board of Trustees of MBU (the Board) unjustifiably dismissed her. VAL seeks remedies for her unjustified dismissal including reinstatement. And she has made an application for interim reinstatement under s 127 of the Employment Relations Act 2000 (the Act).

Conduct of this matter

[3] VAL raised a personal grievance for unjustified dismissal on 7 August 2014. VAL then lodged a statement of problem with the Authority on 28 July 2017, which was 10 days within the 3 year limitation for commencing an action in the Authority¹.

[4] There were some delays in progressing the interim reinstatement application, occasioned by additional time being needed by VAL to complete the application itself, then respond to the affidavit evidence submitted on behalf of the Board and then to raise and progress a request for non-publication.

[5] The investigation meeting for the interim reinstatement application was held on 31 January 2018. VAL requested time to respond to the Board's submissions in that investigation meeting. I granted VAL time to respond in writing and subsequently extended the time for responding on three occasions. The final deadline I imposed was 28 March 2018 and I was satisfied at that time that VAL had responded adequately and denied her request to make further submissions after that date.

[6] What followed was then a period of exchanges between VAL and the Authority over the extent of the non-publication orders I had granted, which stalled my ability to write and issue my determination on the application for interim reinstatement.

[7] It was apparent to me through this exchange that VAL had some apprehension about proceeding with her application as she was concerned about adverse publicity arising from any written determination and the subsequent effects of that. Whilst I had some empathy with her position and could understand why she may have had difficulties deciding whether she would withdraw her application before my determination was issued, I felt I could not simply leave this matter on hold whilst she came to a conclusion on what she wanted.

[8] In the end, I issued a minute dated 6 June 2018, which set out the alternatives in terms of VAL's ability to: challenge my orders for non-publication; raise any concerns she had about my various directions concerning the procedure I was adopting; withdraw her application; or do none of these things so that I would issue

¹ Section 114(6) of the Employment Relations Act 2000.

my determination. I gave VAL until 6 September 2018 to decide how she wished to proceed, noting that I was bound to issue my written determination within a three month period of the last information being received from either party².

[9] For various reasons VAL was unable to respond in this period and she sought further time to make a decision on proceeding with her application. At this point I asked the Chief of the Authority to intervene and review this matter to determine if there were, perhaps, exceptional circumstances which might justify a further deferral of the time. The Chief granted VAL additional time for her to consider her position.

[10] VAL responded to this on 2 October 2018, 3 October 2018, 8 October 2018, 15 October 2018 and 30 November 2018 – her submission was that she requested me to proceed to determine her application, with various additional submissions relating to her view on timing of any interim reinstatement.

[11] I have set out this chronology to explain how it is that I come to be writing this determination on an application for interim reinstatement some four years and four months after VAL was dismissed. In doing this I am not being critical of VAL, rather I recognise that since her dismissal she has remained adamant and forthright in her view that the Board acted unjustifiably when it dismissed her and she should be reinstated. Her preference has always been to resolve this directly with the Board but this has not been possible. The delay in progressing her application for interim reinstatement reflects an ongoing hope on VAL's part that it could be resolved and then more lately a concern about how any publicity arising from a determination would impact on her reputation and career.

[12] VAL has also expressed her concerns at the way in which MBU conducted the interim reinstatement claim. In particular she is concerned about the allegations made in the case presented in the investigation meeting, including that new allegations were advanced which, given the timing of the submissions, she cannot respond to properly.

[13] I do not share these concerns. Counsel for the Board has conducted the interim reinstatement application in the normal manner and there is nothing untoward at all about how the claim progressed. I do not accept that new allegations were raised. The submissions followed what I see as being the Board's case throughout and there is sufficient affidavit and documentary evidence to support those

² Section 174C of the Employment Relations Act 2000.

submissions, which VAL had in advance of the investigation meeting and was able to respond to in terms of her own affidavit evidence.

Non-publication

[14] In a minute dated 25 October 2017, I made orders for non-publication of any information that could lead to the identity of VAL or any non-witness third party. These orders were made to protect the children who have been and currently are students at MBU. In order to achieve this protection I considered it appropriate to ensure that VAL was not identified, MBU was not identified and any of the non-witness third parties were not identified.

[15] Pursuant to clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) I prohibit from publication:

- (a) The names of, and any information that may identify, any students at the respondent's school and any non-witness third party involved with MBU or VAL in connection with this claim;
- (b) The name of the applicant in this matter – she will be referred to as VAL in this determination;
- (c) The name of the respondent's school, which shall be referred to as MBU in this determination, and the name of the respondent, which shall be referred to as MBU Trust Board or the Board.

The law

[16] The law relating to interim reinstatement applications is settled, being those applied to all interim injunctions. This was recently summarised by Judge Inglis (as she was then) in *Western Bay of Plenty District Council v Jarron McInnes*³, with Her Honour referring to the Court of Appeal decision in *NZ Tax Refunds v Brooks Homes Ltd*⁴ and summarising the law as:

[7] ... An applicant must establish that there is a serious question to be tried. Consideration must be given to the balance of convenience, and the impact on the parties of the granting of, and the refusal to grant, an order. The impact on third parties will also be relevant to the weighting exercise. Finally, the overall interests of

³ *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36.

⁴ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

justice are considered, standing back from the detail required by the earlier steps. While the power to make an order for interim reinstatement is a discretionary one, the assessment of whether there is a serious question to be tried is not. It requires judicial evaluation.

[8] In a claim for interim reinstatement, the questions of whether there is a serious question to be tried raises two sub-issues:⁵

- (a) Whether there is a serious questions to be tried in relation to the claim for unjustified dismissal; and if so,
- (b) Whether there is a serious question to be tried in relation to the claim of permanent reinstatement.

[9] Counsel for the plaintiff submitted that it was necessary for a party seeking interim relief to adduce sufficiently precise factual evidence to satisfy the Court that he/she had a real prospect of succeeding in their claim.⁶ However, as *Brooks Homes Ltd* makes clear, an applicant must establish that there is a serious question to be tried, in that the claim is not vexatious or frivolous.⁷ The merits of the case (insofar as they can be ascertained at an interim stage) maybe relevant in assessing the balance of convenience and overall interests of justice⁸.

[17] VAL must prove that there is a serious question to be tried in respect of her unjustified dismissal claim and for permanent reinstatement. A serious question to be tried has been described as an arguable case⁹, and the threshold for establishing this is not high. Based on *Western Bay of Plenty District Council* and *Brooks Homes*, the threshold for a serious question or arguable case is that the claim is not frivolous or vexatious. A decision on this aspect is not an exercise of discretion rather it must be based on a judicial assessment of the evidence, albeit untested, and the submissions advanced.

[18] I must then consider the balance of convenience and the overall interests of justice when assessing whether to exercise my discretion to grant interim reinstatement.

[19] An assessment of the balance of convenience requires consideration of the impact on each party if interim reinstatement is granted or not. The same consideration also applies in respect of third parties, if relevant.

⁵ See *McKean v Ports of Auckland Ltd* [2011] NZEmpC 128.

⁶ Citing *Re Lord Cable (deceased) v Waters* [1976] 3 All ER 417 (Ch) at 431 in support.

⁷ At [12].

⁸ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

⁹ *Cliff v Air New Zealand* [2005] ERNZ 1.

[20] The point here is that this assessment requires some comparative analysis, hence the balancing. In reality, I am assessing the impact of granting interim reinstatement on the Board and any third parties and the impact of not granting interim reinstatement on VAL and any third parties. I must then weigh those opposite impacts and determine if either outweighs the other.

[21] However, there are two significant qualifications to this balancing assessment. First, this assessment is premised on the occurrence of the interim position being reversed, so the chance of the interim position being reversed is a relevant factor. Hence, why, when assessing the balance of convenience, the relative merits of each party's case are relevant. And second, if the impact on a party is harm that can be adequately compensated by damages, if the interim position is reversed, then the impact carries less weight.

[22] So I am required to assess the impact on the parties and third parties, of granting or not granting interim reinstatement, having regard to, amongst other things, the relative merits of the case and whether damages would be an adequate remedy if the interim position were reversed.

[23] The overall justice assessment is essentially a check on the position that has been reached after my analysis of the serious question to be tried and the balance of convenience¹⁰.

[24] I will proceed to apply this legal approach to the evidence in order to determine the application.

[25] As is usual in applications for interim relief of this kind, I have not heard any oral evidence as part of my investigation. The evidence I have considered was presented through sworn affidavits from VAL and a friend who assisted her as a support person, and three people on behalf of the Board.

[26] I cannot test the affidavit evidence until the substantive investigation of the unjustified dismissal personal grievance. Therefore, I cannot and am not expected to resolve any disputes in the evidence for this application.

¹⁰ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

Background

[27] VAL was employed to work at MBU from 2012.

[28] In October 2013, the Board commenced a restructuring process, which was based around a proposed reduction in teaching roles. VAL was part of the consultation as the proposal put her teaching role with MBU at risk.

[29] In the course of consultation, VAL submitted written responses to the proposal, copying in various members of the Board, the MBU management team, her colleagues and a union delegate. VAL's response included allegations of prejudice, discrimination and victimisation being levelled at her during her employment at MBU.

[30] The Board took exception to VAL's responses in terms of both the content and the widespread circulation. The Board says it instructed VAL to limit the recipients of her communications to just the Board members involved and her union delegate. Despite this instruction, it is alleged that VAL continued to circulate her responses to the proposal to the wider audience.

[31] The proposed restructure did not proceed due to the resignation of one teacher at that time. However, the Board determined that VAL's action during the consultation over the restructuring proposal warranted further enquiry. On 12 November 2013 the Board wrote to VAL advising her that it was concerned that in the course of the consultation she had refused to follow a lawful instruction to limit the recipients to her responses and she had made accusations about the management team that raised issues of trust and confidence. The Board invited VAL to meet with it to discuss these matters.

[32] From the end of November 2013, VAL was signed off work on sick leave – VAL never returned to MBU, remaining away from work on various forms of leave until her employment was terminated.

[33] On 29 November 2013, the Board raised three further concerns with VAL. These were a failure to properly advise about her sick leave, a failure to be involved in moderating student grades and seeking comments from students about her. VAL was invited to a meeting on 4 December 2013 to discuss all matters that had been raised with her. This meeting did not go ahead.

[34] During December 2013, VAL became concerned that someone within MBU had accessed her school account and had changed her overall teacher judgement (OTJ) grades that she had allocated to students in her class. VAL raised her concern with MBU. MBU responded explaining what had occurred – that grades had been moderated in VAL’s absence because VAL was unable to assist in moderating grades before she went on sick leave. MBU instructed VAL not to contact any students or parents regarding the moderation of OTJ grades or any other matter. MBU also instructed VAL not to enter, alter or circulate any information within the school database.

[35] In the course of further correspondence between VAL and MBU, including the chair of the Board, MBU requested that all communications with VAL be conducted through the representatives that had been instructed. Despite this instruction, VAL continued to send emails directly with the Board, particularly in relation to her concerns over the moderation of the OTJ grades. VAL also sent emails directly to other teachers at MBU asking questions about the moderation process.

[36] This pattern of behaviour continued for some time. By 6 March 2014, VAL had not returned to work, nor had she attended any of the requested meetings – the parties had however been involved in an unsuccessful mediation. The Board, through its advocate, then wrote summarising its position in respect of the issues it still had with VAL’s conduct.

[37] The Board had three areas of concern, which its advocate set out:

- (a) a failure to follow a lawful and reasonable instruction, regarding her email communications over the restructuring proposal and generally in relation to the issues that had arisen with her conduct and performance;
- (b) inappropriate accusations regarding the MBU management team; and
- (c) operational issues relating to her applications for sick leave, her failure to be involved in moderating students’ grades, seeking comments from students about herself for her own purposes and changing students’ moderated grades when she had no permission to do so.

[38] For each of these concerns the advocate provided specific examples of the behaviour. This included, in connection with the second area of concern, an

investigation the Board had undertaken on the working relationship between VAL and the management team. The result of this investigation had, in the Board's view, the potential to establish a level of incompatibility between VAL and the management team, which might justify the termination of VAL's employment.

[39] It is clear that by this time matters between VAL and the Board had escalated. The concerns set out by the Board were serious and went to the heart of the relationship it had with VAL and the disciplinary process dealing with the concerns had potential to result in the termination of VAL's employment.

[40] However, from this point matters did not proceed with any clarity or timeliness - proposed meetings were continually declined by VAL, VAL made comprehensive and onerous requests for disclosure of information and she made lengthy submissions.

[41] As part of the submissions made on VAL's behalf, the Board received a long letter by email from VAL's family. The Board had concerns about the validity of this communication because the language used, font and formatting all appeared to be the same as the correspondence written by VAL. The Board then raised this issue with VAL asking her to verify that the communication had come from her family.

[42] A final issue arose for the Board when it discovered that VAL had not disclosed previous employment with another school when she applied to teach at MBU.

[43] Having raised all of its concerns over a period of time with VAL, the Board finally had the requested disciplinary meeting with VAL on 6 June 2014.

[44] The Board says VAL was aggressive, belligerent and overbearing in the meeting. VAL denies this. VAL says the Board members at the meeting did not appear to be fully appraised of the issues and did not seem interested in her responses. She says they simply allowed the Board's advocate to dictate the questions and direction of the meeting.

[45] At the conclusion of the disciplinary meeting VAL requested, and the Board granted her, further time to respond to concerns she had not been able to address in that meeting. These concerns were summarised in an email from the Board's advocate on 9 June 2014.

[46] There was then a series of exchanges between the parties' advocates and VAL herself in which the various issues were addressed. This included requests for information that the Board responded to and further submissions being made by VAL on the issues.

[47] A further disciplinary meeting was held on 2 July 2014. The Board complained again that VAL was aggressive and belligerent showing contempt and rudeness to the members of the Board at the meeting.

[48] After this meeting, VAL made three further written submissions to the Board. These submissions were lengthy and comprehensive.

[49] On 10 July 2014, the Board, through its advocate, set out its preliminary decision. The Board reached the following conclusions on each issue:

- (a) Refusal to follow instructions – VAL had been advised to limit the recipients to her emails, both specifically in relation to the proposal to restructure and more generally on issues raised, and she wilfully and repeatedly ignored the instructions.
- (b) Accusations regarding the management team – whilst the Board accepted that VAL had a right to raise relevant issues when responding to the proposed restructure, the nature of her letter, the accusations contained in it and the manner of writing were destructive of the relationship between VAL and the management team and VAL and the Board.
- (c) Operational matters – whilst reflecting a general lack of co-operation by VAL these issues did not require any disciplinary sanction.
- (d) Pupil reflections – VAL had allowed or encouraged her students to prepare positive statements about her with the intention of using such statements for her own benefit.
- (e) Change of OTJ grades – VAL had entered MBU's system, most likely on 5 or 6 December 2013 and altered some of her student's grades and this amounted to serious misconduct.

- (f) Correspondence from VAL's family – VAL intentionally misled MBU on this matter as VAL, and not her family, wrote the correspondence.
- (g) CV – VAL intentionally omitted part of her employment history from her CV but given the circumstances, this did not negatively affect the Board's ability to trust VAL.
- (h) Medical appointment and professional development courses – VAL's explanation was accepted but the Board noted its frustration at VAL's failure to answer questions regarding these issues when first asked.

[50] VAL responded to this preliminary decision and the Board then confirmed the termination of her employment on 1 August 2014.

Serious question to be tried

Unjustified dismissal

[51] VAL's claim for unjustified dismissal is premised on allegations that:

- (a) The Board pre-determined the outcome of the disciplinary process - VAL's dismissal for serious misconduct occurred because the Board could not proceed with its failed and flawed restructuring process.
- (b) The process carried out by the Board was not fair as it involved the deliberate and retrospective raising of unsubstantiated allegations.
- (c) There was no adequate investigation by the Board shown up by a lack of impartiality and no evidence to support the various untruths and unjustified allegations.
- (d) The Board did not present the various, unsubstantiated allegations clearly, changing the nature and content of the allegations throughout, withdrawing some yet later relying on them and not providing all of the documentary evidence to support the allegations.
- (e) The Board did not consider VAL's responses to the various allegations.
- (f) A fair and reasonable employer could not have concluded that VAL acted as alleged.

- (g) The decision to dismiss was not substantively justified as the issues were trivial, did not go to the heart of her employment obligations – so for example, there were no allegations about her teaching ability - and the Board did not consider alternatives to dismissal.

[52] After an analysis of the affidavit evidence and the submissions, I conclude there is an arguable case based on the allegations made by VAL regarding the process adopted by the Board, the conclusions reached and the decision to terminate.

[53] In particular, for the issues pertaining to the refusal to follow instructions, the allegation regarding the management team and the correspondence from VAL's family, I believe it is arguable that the Board failed to investigate properly, failed to provide all of the relevant information to VAL, and failed to consider VAL's responses fully.

[54] It is also arguable, on my analysis, that MBU's conclusions that VAL acted as alleged regarding pupil evaluations and changing of OTJ grades, were not conclusions that a fair and reasonable employer could have reached, in all of the circumstances.

[55] Given that these are the five issues that the Board made adverse findings on and imposed the sanction of dismissal for, there is an arguable case for unjustified dismissal. I accept there is a serious question to be tried for unjustified dismissal based on the untested affidavit evidence submitted.

[56] Standing back, I also have a concern about the Board's handling of VAL's concerns that she raised in the restructuring consultation. It appears that the Board's response to issues raised by VAL about possible prejudice, discrimination and victimisation within MBU toward her, was inadequate. There is no affidavit evidence of any investigation into the allegations either by way of consulting with VAL and/or by way of consulting with any other staff members of MBU or the Board. Without this evidence, it appears that the Board responded to VAL's concerns about her treatment at MBU by simply moving into a process dealing with concerns about VAL's alleged failure to follow instructions and concerns that her allegations evidenced a significant breakdown between VAL and the management team.

[57] Overall, it is my view that the claim for unjustified dismissal is reasonably clear and strong.

[58] There is therefore, a serious question to be tried.

Reinstatement

[59] Pursuant to s 125(2) of the Act, the Authority may order reinstatement if it is reasonable and practicable to do so.

[60] So, in order to establish that there is serious question to be tried in respect of her claim for reinstatement, VAL must satisfy me that she has an arguable case, one that is not frivolous or vexatious, that permanent reinstatement is both reasonable and practicable.

[61] The test for practicable has been discussed and analysed by the Court of Appeal in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School (NZEI)*¹¹ and in *Lewis v Howick College Board of Trustees*¹². The Court of Appeal has endorsed the test set out by the Employment Court in *NZEI*¹³:

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. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. 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.

[62] So, at its simplest, “practicable” means assessing whether reinstatement can be achieved successfully.

[63] The Courts have considered reasonableness less often as it only became a requirement for reinstatement in an amendment to s 125(2) of the Act in April 2011 – prior to April 2011 the only requirement was that reinstatement was practicable.

[64] In *Angus v Ports of Auckland Limited*¹⁴ a Full Court of the Employment Court stated:

¹¹ [1994] 2 ERNZ 414 (CA).

¹² [2010] NZCA 320.

¹³ [1992] 3 ERNZ 243 at 286.

¹⁴ [2011] NZEmpC 125.

[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] ...

[67] ...

[68] As in other aspects of employment law, it is not a matter of laying down rules about onuses and burdens of proof but, rather, on a case by case basis, of the Court or the Authority weighing the evidence and assessing therefrom the practicability and reasonableness of making an order for reinstatement. 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.

[65] So, "reasonable" is an assessment of what is fair and right in terms of the parties' cases and an assessment of the effects of an order on the parties and others.

[66] Putting these tests together it seems to me that what I am required to consider for "practicable" is whether reinstatement *can* be done successfully and for "reasonable" is whether reinstatement *should* be ordered given what is fair and the impact of reinstating or not.

[67] The Board says it is neither practicable nor reasonable to reinstate VAL if she is successful with her unjustified dismissal claim. Its reasons for this include:

- (a) Overall, the Board has lost trust and confidence in VAL.
- (b) The misconduct complained of was not isolated but represented a pattern of behaviour over time. VAL's continued aggression and complete denial of any wrongdoing indicates a lack of self-awareness and objectivity. Both of these factors suggest there is a risk of similar misconduct if VAL is reinstated.
- (c) There were a series of dysfunctional relationships between VAL and various staff members and Board members. VAL has been widely critical of Board members and various staff members and has shown a

high level of personal animosity and hostility toward them as well as a failure to recognise their authority. Given this attitude and the history of the relationships it appears likely that it would be difficult to establish and maintain a successful employment relationship.

- (d) MBU is currently fully staffed and VAL's reinstatement means a restructuring process will need to be undertaken.

[68] Having analysed these submissions against the affidavit evidence, including the relevant documents, I accept there is evidence, albeit untested evidence, to support the Board's position that reinstatement is not reasonable or practicable:

- (a) Reinstatement is not practicable because the employment relationship cannot be restored given the loss of trust and confidence, the high possibility of further misconduct and the existing and potential relationship difficulties – i.e. reinstatement cannot be completed successfully.
- (b) Reinstatement is not reasonable because it is not fair and right given the high possibility of further misconduct, the difficult work relationships that will develop and that a third party may lose his or her employment as a result – i.e. reinstatement should not be imposed.

[69] Overall, I find the Board's case that reinstatement is not reasonable or practicable to be persuasive.

[70] However this not determinative of whether there is a serious question to be tried or an arguable case for reinstatement. I accept that when assessing permanent reinstatement the onus is on the respondent to show that reinstatement is not reasonable and practicable if that is what it is alleging. In *Angus*, the Court stated:

[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.

[71] So, as the Court notes in this paragraph, there is an onus on the applicant to show that there is evidence to support the claim for reinstatement. And, in the case of interim reinstatement the onus is on the applicant to show there is an arguable case. So my analysis of whether there is an arguable case needs to assess whether VAL has met this burden, assessing what she says against the Board's position.

[72] VAL says that there were no issues with her teaching ability during her employment at MBU and she formed positive relationships with her pupils and their parents and positive relationships with her colleagues. She also says to the extent there may have been difficulties with the management team or specifically those she complains of regarding discrimination and victimisation, there has been a change in personnel since the issues were raised and this does not remain an ongoing concern.

[73] VAL submits that the various cases that counsel for the Board has sought to rely on are not applicable to her case, primarily because she says there is not the level of dysfunction or strained relationships in her situation as there is throughout the cases relied on. This is particularly so because she is a teacher and not a principal or involved in management.

[74] VAL also submits that there can be no issue with the suggestion that any misconduct will be repeated as the alleged misconduct never occurred in the first place and, in any event, the matters complained of were trivial and not misconduct. And she believes there is no basis for the alleged loss of trust and confidence, particularly as she has not had the opportunity to meet the Board, which now has many new members.

[75] VAL also says she understands MBU's role has increased over the four years and there must be a basis on which she can be reinstated without another teacher being made redundant.

[76] Given what I have already set out in terms of the Board's view I do not find VAL's submissions to be particularly persuasive. But, she only needs to show that reinstatement is not a frivolous or vexatious claim and I have to accept there is a basis on her submissions by which reinstatement might be possible.

[77] Therefore, I accept there is an arguable case for reinstatement. However, given my views on the Board's position, the case for reinstatement is not strong, rather it is quite weak.

Balance of convenience

[78] VAL says the impact of not granting interim reinstatement will be that she will be unable to teach and she has not been able to renew her teacher's practicing certificate. VAL has tried to obtain other teaching roles but has not been able to secure sufficient work to meet the requirements.

[79] I accept VAL has had difficulty finding alternative teaching work but I cannot attribute this to the Board. In addition, I accept that she has been unable to renew her teacher's practising certificate but I am not persuaded that the only way she will be able to gain this renewal is through interim reinstatement.

[80] Also, VAL says there has been and will be severe financial implications for her. I accept this on face value but note that damages can be awarded at a later date and the financial difficulties some four years after VAL's dismissal is not persuasive on interim reinstatement.

[81] The Board says any interim reinstatement will be disruptive as, amongst other things, VAL has not taught at MBU for a number of years and during this time MBU has changed with an expanded role and a different culture, it is also fully staffed. There is also the issue of dealing with establishing the employment relationship, which it says is unlikely to be productive.

[82] The Board says any loss arising for VAL if she is subsequently reinstated on a permanent basis can be compensated by damages. It then says any loss to the Board in the reverse situation is unlikely to be met by damages as that damage cannot be quantified. And, to the extent there is a quantifiable loss, there is no indication that VAL can pay any damages, notwithstanding her undertaking.

[83] Weighing these factors up I assess the balance of convenience in favour of not granting interim reinstatement:

- (a) Given the time that has passed since VAL worked at MBU and the conclusions I have reached regarding the difficulty of establishing productive working relationships between VAL and MBU staff and Board members, I believe granting interim reinstatement is likely to have a greater negative impact on the Board and MBU than not granting interim reinstatement will have on VAL.

(b) I believe damages are likely to be an adequate remedy for VAL if she is not reinstated on an interim basis but reinstated permanently after the substantive claim is determined. In contrast, I believe damages are unlikely to be adequate for the Board in the reverse situation.

(c) And, finally, VAL's case for permanent reinstatement is weak – whilst I have accepted there is an arguable case I am not satisfied at this stage that I will find that reinstatement can be achieved successfully nor should it be granted given the relationship between the parties and the impact it will have on MBU.

Overall justice

[84] I am now required to stand back and determine where the overall justice of the case lies until my substantive investigation and final determination of this matter.

[85] I am satisfied that whilst VAL has a strong case for unjustified dismissal, she has a particularly weak case for permanent reinstatement – this favours not granting interim reinstatement. I am satisfied that on the balance of convenience I should not order interim reinstatement.

[86] When I stand back from these two conclusions and review the overall position I note that in considering interim reinstatement applications I am required to apply the law relating to interim injunctions “having regard to the object of this Act”¹⁵. This means that I am to have regard to the principle that productive employment relationships are founded on good faith behaviour and on mutual trust and confidence.

[87] Applying this to my overall assessment and review, I am satisfied that the overall justice of this case means that interim reinstatement is not appropriate.

Conclusion

[88] I decline VAL's application for interim reinstatement.

¹⁵ Section 127 (4) of the Employment Relations Act 2000.

Costs

[89] Costs are reserved pending the outcome of the substantive matter.

Peter van Keulen
Member of the Employment Relations Authority