

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 479
5348814

BETWEEN VIVIENNE KEITHA WYLIE
Applicant

AND LAKES DISTRICT HEALTH
BOARD
Respondent

Member of Authority: Rachel Larmer

Representatives: Fraser Wood, Counsel for Applicant
Gregory Peplow, Advocate for Respondent

Investigation Meeting: 31 October 2011 at

Submissions (in advance of Investigation Meeting): 12 October 2011 from Applicant
21 October 2011 from Respondent

Determination: 4 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Vivienne Wylie, has applied for interim reinstatement to her position as a dental therapist employed by Lakes District Health Board (“LDHB”) pending the substantive determination of her personal grievance claim for unjustified dismissal.

[2] On 20 April 2011, LDHB received a written complaint from Ms Chantall Batt about Ms Wylie’s treatment of a seven year old child (“the child”) on 13 and 14 April 2011 (“the complaint”). Ms Batt is an unqualified dental assistant, also employed by LDHB, and she had been assisting Ms Wylie whilst the child was treated. No complaint was received from the child or its parents.

[3] After investigating the complaint LDHB concluded Ms Wylie's behaviour had eroded its trust and confidence in her and she was summarily dismissed on 19 May 2011 for serious misconduct. Written reasons for the dismissal were provided by letter dated 7 June 2011.

[4] The parties helpfully provided written submissions in advance of the investigation meeting and then during the 31 October 2011 investigation meeting addressed in person issues that arose from those submissions.

[5] This interim reinstatement application has been determined based on affidavit evidence only. The witnesses have not been examined so all evidence remains untested and it was clear to me that, at least in some respects, the evidence before me was incomplete. There are a number of material conflicts in the evidence which cannot be resolved from the affidavit evidence only. The resolution of these conflicts is likely to affect the Authority's substantive determination of Ms Wylie's dismissal grievance and, should her dismissal be held to be unjustified, the assessment of remedies.

[6] In these circumstances, it is important to keep in mind that any findings of or discussions about the facts at this interim stage are provisional only and the Authority's view on these matters may change after the claims have been fully investigated and the witnesses examined during the course of the substantive investigation.

Relevant legislation

[7] This application for interim reinstatement falls to be determined in light of the recent amendments made to the Employment Relations Act 2000 ("the Act"), namely the changes that came into effect from 1 April 2011 to the s.103A justification test and to the s.125 remedy of reinstatement.

[8] The new s103A justification test changed "*would*" to "*could*" and sets out in s103A(3) specific factors which the employment institutions must consider (in addition to other appropriate factors¹) when assessing justification. Section 103A(5) prevents the employment institutions finding that a dismissal or action is unjustified

¹ S.103A(4)

solely because of minor defects which did not result in the employee being treated unfairly.

[9] These legislative changes were intended by Parliament to make it easier for an employer to justify a dismissal (or action) and more difficult for an employee who has been unjustifiably dismissed to obtain reinstatement.² These amendments have recently been considered by the Employment Court in *Angus v Ports of Auckland*³ and *McKean v Ports of Auckland*⁴, both of which were interim reinstatement applications which had been removed to the Court.

[10] The investigation of Ms Wylie's interim reinstatement application was originally set down for 29 September 2011 but by agreement of the parties was rescheduled to 31 October 2011 to allow time to consider the Court's decisions in the *Angus* and *McKean* matters.

[11] Although the Employment Court has not yet had an opportunity to issue any substantive decisions involving the new s.103A and s.125, it has set down a preliminary hearing before the Full Employment Court on 7 November 2011 which will consider the interpretation and application of the new s.103A and s.125 provisions.

Issues to be determined

[12] The issues to be determined are:

- (a) Does Ms Wylie have an arguable case that she was unjustifiably dismissed as defined by the new s.103A justification test in the Act?
- (b) Does Ms Wylie have an arguable case for reinstatement in employment under s.125 of the Act, should the Authority determine that Ms Wylie's dismissal was unjustified?
- (c) Where does the balance of convenience lie until the substantive matter has been determined?

² *Angus v Ports of Auckland Limited* [2011] NZEmpC 125

³ *Supra*

⁴ *McKean v. Ports of Auckland Ltd* [2011] NZEmpC 128

- (d) Where does the overall justice of the case lie until the substantive matter has been determined?

Arguable case – unjustified dismissal

[13] Mr Peplow in his submissions acknowledged that if the applicant's affidavits were correct then she had an arguable case.

[14] I find that Ms Wylie's affidavit evidence surpasses the threshold of a prima facie case. From the limited, incomplete, and untested evidence before me it was clearly arguable that:

- (a) LDHB may have breached its good faith obligations in relation to the manner in which it conducted its investigation into the complaint;
- (b) LDHB may not have followed a fair process and may be unable to establish that it met the factors specified in s.103A(3) of the Act;
- (c) Ms Wylie's actions may have amounted to poor performance rather than misconduct or serious misconduct;
- (d) LDHB may have predetermined the outcome of the disciplinary process;
- (e) Summary dismissal may not have been a response available to a fair and reasonable employer in all of the circumstances.

Arguable case – reinstatement

[15] It is also necessary for Ms Wylie to establish she has an arguable case that she will be reinstated if the Authority finds her dismissal was unjustified.

[16] As a result of the changes to the Act which came into effect on 1 April 2011, reinstatement is no longer the primary remedy. It is now just one of the remedies that may be awarded and under s.125 the Authority "*may provide for reinstatement if it is practical and reasonable to do so*".

[17] Notwithstanding that reinstatement has no priority in terms of remedies, I consider that if the Authority determines that Ms Wylie was unjustifiably dismissed, then it is arguable she would be reinstated for the reasons discussed below.

Personal circumstances

[18] Ms Wylie's lengthy service, her age, and her likely inability to obtain alternative employment with similar remuneration in Rotorua all mean that there is significant value to her of an ongoing relationship with LDHB. Because of her particular circumstances it is very unlikely that a compensatory payment for lost remuneration could replicate the value of the loss of ongoing employment.

[19] Dental therapy is the only occupation in which Ms Wylie has skills and experience. It has been her entire working life. Because dental therapy is such a specialised occupation the skills Ms Wylie has learned over the years are not readily transferable to other occupations.

[20] LDHB is the major employer of dental therapists in the Rotorua region. Opportunities for employment other than by LDHB as a dental therapist are limited. Ms Wylie has lived in Rotorua most of her life. She owns a home in Rotorua, all her friends reside in the area and her family is from there. Ms Wylie deposed that it would be difficult at her age to relocate to another town in order to obtain employment.

[21] Prior to her dismissal, Ms Wylie had not previously been the subject of any disciplinary action during her 43 years of employment.

Contribution

[22] If after the substantive investigation Ms Wylie is found to have contributed to the situation which gave rise to her grievance then, in accordance with s.124 of the Act, any remedies awarded will have to be adjusted to reflect that contribution.

[23] However, the extent of Ms Wylie's contribution cannot be properly assessed at this early stage because of fundamental conflicts in the evidence about the alleged requirement to use topical anaesthetic; the disputed speed at which Ms Wylie injected the child with local anaesthetic; and her alleged lack of concern for the child. The substantive findings in respect of these disputed matters will affect the Authority's view of justification and (if required) its remedies discretion.

[24] In so far as it is not possible to resolve these conflicts until a substantive investigation, the applicant's sworn evidence may be accepted in the interim.⁵ I find Ms Wylie's evidence on those points is such that she has an arguable case that she would be reinstated if her dismissal was found to be unjustified. As the Chief Judge observed in *Angus*⁶, it is not uncommon for an employee to be reinstated and contribution reflected by a reduction of financial remedies.

Subsequently discovered alleged serious misconduct

[25] LDHB submitted that after it had dismissed Ms Wylie it discovered she had engaged in other alleged serious misconduct which would have justified her dismissal. This arose as a result of an interview LDHB conducted with Ms Batt on 30 May 2011, during which she:

- (a) criticised Ms Wylie's clinical practice;
- (b) provided further information about her initial April complaint;
- (c) expressed concern about Ms Wylie's extraction of a tooth from an unnamed four year old boy. This occurred in the presence of his mother who had not complained about it. There was no information as to when that incident had occurred, but it obviously predated the April incident which resulted in dismissal.

[26] LDHB submitted that this subsequently discovered alleged serious misconduct meant Ms Wylie would not be reinstated should she succeed with her dismissal grievance, so she did not have an arguable case for reinstatement.

[27] I accept that subsequently discovered misconduct of a truly significant nature can be highly relevant to what remedy should be provided.⁷ However, such truly significant misconduct must be established to the standard of the balance of probabilities before it will impact on the Authority's assessment of remedies.

[28] The evidence at this stage is nowhere near that point. LDHB has obviously not investigated Ms Batt's new allegations, it has merely recorded the information she has provided. Ms Batt referred to historical concerns, which in many respects are non

⁵ *Wellington Free Ambulance Service v Adams* [2010] NZEMPC 59

⁶ *Ibid* 2

⁷ *Salt v Fell* [2008] ERNZ 155

specific, which were not raised with either Ms Wylie or LDHB at the time. No explanation was offered for that.

[29] The notes of Ms Batt's interview on 30 May 2011 therefore record unsubstantiated allegations which have not yet been investigated and which do not persuade me that Ms Wylie does not have an arguable case for reinstatement should her dismissal be unjustified.

Conclusion

[30] In light of these circumstances, and despite reinstatement no longer being the primary remedy, I conclude it is arguable that, if Ms Wylie is found to have been dismissed unjustifiably, her reinstatement will be both practical and reasonable, as required by the new s.125 provisions.

Balance of convenience

[31] This requires a balancing and assessment of respective injustices to the parties for the period until the merits of the case can be investigated and determined. The Authority is required to weigh the potential injustice to Ms Wylie of not being reinstated before the Authority issues its substantive determination but being entitled to the remedy of reinstatement if she is found to have been dismissed unjustifiably against the potential injustice to LDHB of the burdens of having her back in the workplace on an interim basis if she is either found to have been dismissed justifiably or, even if not, if reinstatement is declined as a remedy.

Substantive investigation

[32] The timing of the substantive investigation is a significant factor. This has been timetabled and set down for 7 and 8 February 2011. Subsequent to the investigation meeting time will be needed to enable the parties to file written submissions and time will be required for the Authority⁸ to issue its determination.

[33] It is unlikely that a substantive determination will be available before April 2012. That is a significant period of delay, particularly in light of the fact that Ms Wylie has been out of work since 19 May 2010. This is a significant factor in Ms Wylie's favour.

⁸ Member Monaghan is investigating the substantive grievance.

Financial hardship

[34] Ms Wylie deposed she is experiencing significant and ongoing financial hardship. She is single and is not financially supported by anyone else. She owns her own home which has approximately \$80,000 equity in it, has a car worth approximately \$4,000, and has been in a superannuation fund for 35 years. Other than that, Ms Wylie has no other assets apart from normal household items.

[35] Ms Wylie was earning \$59,000 per annum from LDHB. Since her dismissal, she has been on the sickness benefit which, together with an accommodation supplement, means she receives of a total of \$326 per week. Ms Wylie said that her fortnightly mortgage payments are \$720, so she has not been able to afford to pay her mortgage since her dismissal.

[36] I was told that Ms Wylie has been living off the generosity of friends subsequent to her dismissal and that her ability to support herself is dependent on her obtaining reinstatement. Ms Wylie in her affidavit expressed her belief that it was not possible for her to find alternative work in Rotorua pending the substantive investigation because she was not trained for anything other than dental therapy.

[37] The significant hardship Ms Wylie is experiencing is a factor in her favour.

Adequacy of other remedies

[38] I do not consider that damages or other monetary compensation will be an adequate remedy for Ms Wylie if she was not reinstated until her personal grievance has been determined, but if she is then found to have been unjustifiably dismissed and is then reinstated in employment.

[39] Ms Wylie has not been in receipt of sufficient funds to enable her to cover her mortgage payments much less her normal living expenses. That is a situation which has continued for 5½ months already and which is likely to continue for another six months if she has to remain on a benefit that does not cover her basic outgoings. That is likely to have severe financial consequences for her.

[40] I accept it is unlikely she will be able to find alternative suitably remunerated work, so if she is not reinstated she will bear the full financial consequences of funding her grievance claim. She will also have to continue living off the generosity

of friends for the next six months. I consider the risk of injustice to Ms Wylie as a result of that outweighs such risk to LDHB.

Supervision

[41] LDHB submitted Ms Wylie would need to be supervised if she returned to work and it would be unfair for it to have to bear the cost of employing someone to be present at all times and who had the authority to oversee her clinical practice.

[42] Ms Wylie's affidavit disputed that level of supervision was necessary and said suitable supervision and oversight of her practice could be provided if she worked in a clinic alongside another dental therapist.

[43] I do not accept that LDHB would have to employ someone to supervise Ms Wylie because the specific concerns LDHB has expressed in its affidavits about Ms Wylie's clinical practice could be appropriately managed if:

- (a) She was required to work together (in the same clinic) as an experienced dental therapist;
- (b) She was issued with a clear instruction that she was to always use topical anaesthetic for every treatment that may cause pain;
- (c) If she was given additional training on the appropriate:
 - (i) amount of local anaesthetic ("LA") to use;
 - (ii) injection speed per amount of LA used;
- (d) The dental therapist colleague observed the amount of LA used and the speed of the LA injection on patients being treated by Ms Wylie.

Reputational damage

[44] LDHB submitted that its reputation would be damaged if Ms Wylie was reinstated. I consider that speculative and therefore a weak submission.

Ability to meet undertaking

[45] LDHB queried whether Ms Wylie could meet the terms of her undertaking if she was interim reinstated but did not obtain the final remedy of reinstatement.

Ms Wylie has sufficient assets which LDHB could pursue in the event it was entitled to enforce her undertaking. Ms Wylie confirmed she was aware of the potential consequences of her undertaking.

Damage to the team

[46] LDHB submitted that there would be damage to the team environment and the potential for other staff to leave if Ms Wylie was reinstated. LDHB did not provide credible affidavit evidence to support this speculative submission.

Impact on other staff

[47] LDHB submitted that Ms Wylie's contracted hours had been reallocated to existing staff so her reinstatement would inevitably lead to a change management process reducing existing staff's FTE or alternatively some other reduction of services. LDHB would have to justify any actions that adversely impacted on other staff which affords those individuals some protection from injustice.

[48] LDHB's was on notice from 23 June 2011 that Ms Wylie was seeking interim reinstatement so it could have arranged its business accordingly (such as by providing additional hours to staff on a temporary basis). I consider the potential injustice to Ms Wylie outweighs the potential injustice to other staff.

Impact on Ms Batt

[49] LDHB submitted that there would be an adverse impact on Ms Batt if Ms Wylie was interim reinstated. The affidavit evidence about that was speculative. I consider LDHB is large enough to arrange for Ms Batt and Ms Wylie to work at different locations for the next six months. It would be adverse to Ms Wylie's own interests if her reinstatement created difficulties for Ms Batt so there is no reason for that to happen.

Public interest

[50] There is a compelling public interest in the safe and appropriate provision of health services which is necessary not only in the interests of individual patients but also in order to preserve the integrity of the public health system.

[51] The notes of the 3 and 19 May 2011 meetings give the impression that Ms Wylie lacked empathy for the child, which is of concern. Ms Wylie says that is an unfair and untrue impression created because of the way LDHB prepared its notes, which she points out she did not see until after she had been dismissed. That is disputed by LDHB and it is a conflict that will have to be resolved at the substantive investigation.

[52] LDHB submitted that it was not in the public interest to reinstate Ms Wylie because her clinical practice was unsafe. She strongly disputes that. Such conflict cannot be resolved at this stage, so I am entitled to assume that Ms Wylie will be able to establish at the substantive investigation the matters she has deposed to in her affidavit.

[53] I consider it significant that Ms Wylie's 43 years of clinical practice (up until the time of her dismissal) had resulted in an unblemished disciplinary record. A performance review dated 17 June 2010 recorded Ms Wylie "*appears to be very committed to managing and improving her clinical skills. She is open to advice and is concerned for the well being of her patients*". Ms Wylie also recently qualified as a Best Practice Auditor which entailed evaluating dental therapists to assist them in maintaining best operating practices.

[54] After carefully reviewing LDHB's affidavit evidence I am satisfied the concerns disclosed about Ms Wylie's practice could be addressed by providing her with training, issuing clear expectations, and if necessary by also performance managing her.

[55] I have concluded, based on the affidavits, that the alleged public safety concerns do not tip the balance of convenience against Ms Wylie.

Strength of the respective cases

[56] The strength of the parties' respective cases is a relevant factor in determining where the balance of convenience lies⁹.

[57] Based on the incomplete and untested evidence before me, and proceeding on the assumption that (in so far as I am unable to form a view from the affidavit

⁹ *Port of Napier Ltd v. Maritime Union of New Zealand* [2007] ERNZ 826

evidence only) Ms Wylie is able to prove the matters that are in conflict, I consider that Ms Wylie's case (at least at this initial stage) is stronger than LDHB's.

[58] Ms Wylie alleged her dismissal was substantively unjustified and carried out in a procedurally unfair manner. On the face of the affidavits before me, such claims have some merit.

[59] It is arguable that Ms Batt's complaint disclosed poor performance rather than serious misconduct. LDHB did not provide any evidence to explain why it treated Ms Batt's complaint as serious misconduct rather than as poor performance. This case involved concern about the treatment of one child against an otherwise unblemished record of 43 years service during which Ms Wylie had treated tens of thousands of children without incident.

[60] It is arguable that LDHB should have assisted Ms Wylie to improve her performance instead of summarily dismissing her. A note provided to LDHB (at its request) by the Professional Advisor during the disciplinary process uses language that implied the matter was viewed by her a performance issue. The Professional Advisor also recorded her belief that the incident had occurred because of Ms Wylie's lack of understanding of legislative requirements and LDHB policies.

[61] If there were deficiencies in Ms Wylie's knowledge or training then LDHB will be expected to explain what it did to support and assist her to keep up to date with changes both to legislative requirements and to its own policies and procedures. LDHB's affidavits did not address that.

[62] LDHB did not have an experienced dental therapist on the disciplinary panel so the decision makers who were considering Ms Wylie's explanation had no personal experience of the clinical practice issues discussed. That was arguably unfair to Ms Wylie.

[63] The affidavit evidence raised a number of unanswered questions about the Professional Advisor's involvement, both in terms of how and why she became involved, what she was asked to do and when, what information she was given, what information she communicated back to LDHB and when that occurred. Surprisingly the Professional Advisor did not provide an affidavit.

[64] It is arguable LDHB did not comply with its statutory good faith obligations in this relation to the Professional Advisor's involvement. The minutes of the outcome meeting on 19 May 2011 record adverse comments allegedly made by the Professional Advisor about a meeting she had with Ms Wylie on 14 April 2011 (the day the child was treated) which contradict Ms Wylie's account of their meeting. However, there was no evidence about how or when LDHB gathered that information which appeared not to have been disclosed to Ms Wylie.

[65] LDHB did not inform Ms Wylie that it would be seeking input from the Professional Advisor. It apparently just sent the Professional Advisor a copy of the notes it had taken during the meeting on 3 May 2011. The Professional Advisor then responded with an undated and unsigned note which makes no reference to having seen Ms Batt's complaint.

[66] All three copies of the Professional Advisor's note that I was provided with (one version annexed to each of the affidavits of Ms Wylie and Ms Wallis and one attached to the Statement of Problem) appear to be incomplete because they all end part way through a sentence. It is therefore arguable LDHB did not disclose the full note to Ms Wylie.

[67] Ms Wylie said she never had an opportunity to speak to the Professional Advisor about Ms Batt's complaint or to comment on LDHB's notes of 3 May 2011 before the Professional Advisor based her response on them. That was arguably unfair.

[68] It is also arguable LDHB did not properly put its concerns to Ms Wylie to respond to because it did not tell her what specific behaviour it considered amounted to potential serious misconduct or why it held that view.

[69] Ms Wylie was arguably not aware of all of LDHB's concerns. Ms Eilers (the decision maker) in her affidavit set out five concerns which she said arose from Ms Batt's complaint. Not one of these concerns was recorded in any of the correspondence with Ms Wylie and (from the notes of the disciplinary meetings) do not appear to have been put to Ms Wylie as specific disciplinary concerns. The notes of meetings disclose there was no discussion at all during the disciplinary process of one of the concerns Ms Eilers identified.

[70] It is arguable LDHB did not genuinely consider Ms Wylie's explanation and that the outcome was predetermined because she was dismissed after an adjournment of only 15 minutes.

[71] It is arguable, having regard to LDHB's resources, it did not properly investigate the allegations against Ms Wylie. There was no evidence before me to show LDHB had done anything to investigate the disputed elements of Ms Batt's complaint in circumstances where a third party (Ms Donna Mason) disputed Ms Batt's version of events as it related to her own (Ms Mason's) involvement after the child had left the clinic. The assessment of Ms Batt's credibility was a critical issue LDHB did not address in its affidavits.

[72] My assessment of the relative strengths of each case weights the balance of convenience in favour of Ms Wylie.

Ill health

[73] Ms Wylie has been medically unfit to work since her dismissal. Although prior to this investigation I had asked for full details of Ms Wylie's medical situation to be provided that did not occur. However, Mr Wood did advise during the investigation that Ms Wylie's General Practitioner had provided a medical certificate which stated she could return to work.

[74] LDHB expressed concern that returning an employee to the workplace immediately after a significant period of absence without a comprehensive rehabilitation plan may undermine not only the employee's health but also their ability to provide clinical services safely. I accept that.

[75] If Ms Wylie is fit to return to work then it is appropriate for the parties to be given time to discuss her return to work to ensure that both her health and her clinical duties are properly managed.

Topical anaesthetic

[76] Ms Wylie's evidence was that although she sometimes used the topical anaesthetic ("TA") provided by LDHB she was reluctant to do so because the smell of it made her gag. LDHB had raised concern that she may have an allergic reaction to

the TA, which it said would present a health and safety issue. Ms Wylie denies her reaction is an allergic reaction.

[77] LDHB stated it did not know if it could source an alternative TA which Ms Wylie would not have an adverse reaction to, but the affidavits did not disclose that it had actually attempted to do so.

[78] I consider Ms Wylie's reaction to the TA and the availability of an alternative TA are both issues that could be addressed by the parties over the next two weeks, so I consider these neutral factors.

Removal of consent to treat

[79] LDHB provided evidence that in 2008 a number of parents withdrew consent for Ms Wylie to treat their children, with the implication being those decisions related to Ms Wylie's clinical practice. However, the incomplete evidence and the way in which it was presented meant that was not an appropriate inference for me to draw.

[80] There are a number of reasons why a parent may withdraw consent that are unrelated to the standard of care provided by the dental therapist. A certain level of consent withdrawals is also to be expected and other dental therapist have had consents withdrawn as well.

[81] I had no information about why consent was withdrawn or how Ms Wylie's level of consent withdrawals compared with that of her colleagues. I also note that LDHB was not concerned enough in 2008 to investigate why the withdrawals had occurred. This factor does not weight the balance of convenience in LDHB's favour.

Conclusion

[82] After careful consideration of all of these circumstances, I consider that the balance of convenience clearly favours Ms Wylie.

Overall justice

[83] The remedy of interim reinstatement is a discretionary one. It is therefore important as a part of the exercise of the Authority's discretion to stand back and assess where the overall justice lies. In this respect, the focus is on the respective

justices of the alternative scenarios for the parties until the Authority's substantive determination is issued.

Delay

[84] LDHB submitted that Ms Wylie had delayed in pursuing her interim reinstatement application to the extent that it should now be declined. I do not accept that submission because I am satisfied with Ms Wylie's explanation for the delay.

Conclusion

[85] I consider that the overall justice follows the balance of convenience in that it also favours Ms Wylie.

Outcome

[86] At the investigation meeting I asked for the parties' views on whether Ms Wylie should be reinstated for remuneration purposes only, i.e. reinstated on garden leave. Both parties maintained their original positions which in Ms Wylie's case was the strong preference to be able to work and in LDHB's case was that reinstatement not occur.

[87] The right to work is an important one. Although I considered whether Ms Wylie should be reinstated subject to a condition she not attend or perform work, after reflecting on the affidavit evidence, I have concluded that restricting Ms Wylie's ability to attend or perform work is not necessary or appropriate. I have therefore decided against imposing such a condition.

Conditions

[88] Although this case was presented to me on the basis there should be reinstatement to the normal position or no reinstatement at all, the object of s.127 of the Act is for the Authority to provide a just solution to the parties' problems in the particular circumstances of each case¹⁰. This allows me to craft a solution by ordering reinstatement subject to conditions, notwithstanding that the parties have not asked me to do so.

¹⁰ *Cliff & Groom v. Air New Zealand* [2005] ERNZ 1

[89] Given the length of time Ms Wylie has been away from work, her recent ill health, and issues over the TA I consider her actual return to work should be delayed for two weeks to give the parties time to work through practical or clinical issues.

Orders

[90] In accordance with the undertaking given by Ms Wylie, there will be an order for interim reinstatement under s.127 of the Act on the following conditions:

- (a) For remuneration purposes, reinstatement will be deemed to take effect from the date of this determination;
- (b) Ms Wylie is not to attend or perform work prior to 21 November 2011;
- (c) Ms Wylie is not to work in close proximity to Ms Batt;
- (d) The parties are directed to attend mediation with a mediator from the Department of Labour in Rotorua on 16 November 2011 to discuss Ms Wylie's return to work;
- (e) Ms Wylie is required to comply with any reasonable request by LDHB to confirm that she is fit to return to her usual full time duties;
- (f) Ms Wylie is required to comply with any reasonable instructions issued by LDHB regarding the manner in which she is to undertake her clinical practice;
- (g) LDHB may take reasonable steps to monitor and manage Ms Wylie's clinical practice;
- (h) LDHB is required to take all reasonable steps to obtain an alternative flavoured TA for Ms Wylie to use;

[91] The parties have leave to apply for further directions if required.

Costs

[92] Costs are reserved.

Rachel Larmer
Member of the Employment Relations Authority