

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 435/08
5145018

BETWEEN DIANE DALY
 Applicant

AND NORTHERN AUCKLAND
 KINDERGARTEN ASSN.
 Respondent

Member of Authority: James Wilson

Representatives: Garry Pollak fro the applicant
 Susan-Jane Davies for the respondent

Investigation Meeting: 17 December 2008 at Auckland

Determination: 22 December 2008

DETERMINATION OF THE AUTHORITY

[1] Diane Daly was employed as Senior Teacher by the Northern Auckland Kindergarten Association (NAKA/the Association) for 13 years. On 12 November 2008 she was requested, by the General Manager of the Association Ms Paula Kearns, to attend a *disciplinary and performance management meeting* to be held on 17 November 2008. The purpose of this meeting was *to discuss allegations arising out of your behaviour observed in the Special General Meeting of members last night*. The letter went on to set out the behaviour Ms Kearns was concerned about and finished with the statement:

This is a serious matter and I have to tell you that a possible outcome of this disciplinary and performance management investigation is that you may be dismissed. Accordingly you are advised to bring a support person to this meeting.

[2] Ms Daly attended the meeting as requested and was accompanied by Mr Pollak as her representative and her husband. NAKA was represented at the meeting by Ms Kearns and the Association's legal representative Ms Susan-Jane Davies.

[3] Near the end of this meeting Ms Daly was suspended. Shortly after the meeting Ms Kearns wrote to Ms Daly confirming that she was *suspended on full pay for a week* and that the meeting would be adjourned for approximately a week to allow Ms Kearns *to make further investigations into Ms Daly's conduct at the SGM*.

[4] On 27 November 2008 a further meeting was held. Ms Kearns put a number of concerns to Ms Daly and the meeting lasted several hours. Following a lengthy adjournment the parties reconvened and Ms Kearns advised Ms Daly that she was *not convinced that she could trust (Ms Daly) to behave appropriately and professionally in difficult circumstances*. She said she *needed to know that she had Ms Daly support* and that she *was not convinced that she had that support*. Ms Kearns concluded her remarks by saying (according to her handwritten notes made at the time):

So from where I stand I am your GM and I don't have sufficient trust or confidence in you continuing with the Association. So I am considering dismissal but before I make a final decision I want to hear you on what I have said and what you think about dismissal.

[5] Following further comments from Mr Pollak the meeting was adjourned to allow Ms Kearns to *sleep on it*. The next morning Ms Kearns says she made a final decision to terminate Ms Daly. She conveyed this decision by writing to Miss Daly dismissing her from her employment with immediate effect.

[6] Ms Daly says that both her suspension and subsequent dismissal were unjustified and she is seeking both interim and permanent reinstatement to her position. Her application for reinstatement is accompanied by the appropriate undertaking as to damages.

Application for interim reinstatement: The legal considerations

[7] The tests for determining an application for interim reinstatement are well established:

- a. Does the applicant have an arguable case?
- b. Where does the balance of convenience lie (including consideration of the availability and adequacy of remedies should interim reinstatement not be granted)? and
- c. where does the overall justice of the case lie?

The tests applied to Ms Daly's application

Is there an arguable case?

[8] On behalf of her client Ms Davies appropriately conceded that Ms Daly does have an arguable case.

Where does the balance of convenience lie

[9] Both Counsel have put forward arguments that the balance of convenience lies with their respective clients. Mr Pollak has argued that there is no *downside* to the Association if they reinstate Miss Daly on an interim basis, either fully restoring her to her position on her usual salary or, alternatively on garden leave until her substantive grievance is determined. He points out that the Authority has set down this matter for a meeting, to consider the substantive application, on 22 and 23 January 2009 and that Ms Daly would in any event have been on annual leave for some of the intervening time. He also points out that the kindergarten's will be closed for the Christmas break until Tuesday 27 January 2009. Mr Pollak also argues that Ms Daly *has been employed for a very long time, has considerable support and there is no significant reason, other than two individuals' personal hostility towards her that would preclude her from returning to employment.* Mr Pollak says that, should an order for interim reinstatement be made, Ms Daly would remain an employee and her career and livelihood would be preserved until the matter is finally resolved. He also points out that Ms Daly is now completely without an income.

[10] Ms Davies, on the other hand, argues that this case is about a lack of trust in Ms Daly by the Association and its General Manager. She argues that interim reinstatement is not reasonable or practical because of this lack of trust. She says that this lack of trust means that it is not foreseeable in the near future that there will be productive working relationship between Ms Daly and Ms Kearns. She also points out that the kindergarten year finishes on 19 December 2008 and the kindergartens do not reopen until 27 January 2009. This, she says, means that there is little or no work for Ms Daly to do until just prior to the reopening of the kindergartens in late January and that the substantive investigation is set to commence before that date. Finally Ms Davies argues that damages in the form of lost wages compensation would be an adequate remedy should the Authority determine that Ms Daly should be permanently reinstated.

[11] The convenience to the respective parties of interim reinstatement is, I find, finally balanced. The Authority will be in a position to determine the substantive matters relatively quickly and much of the intervening period is subsumed by the Christmas holidays. While it is true that, should Ms Daly be reinstated on a permanent basis she will be entitled to recover any lost wages, it is also true that she has signed a formal undertaking as to damages. Should I accept Mr Pollak's alternative, and reinstate Miss Daly on garden leave, this undertaking could result in the Association recovering any wages paid during the period of Ms Daly's interim reinstatement. Mr Pollak has raised the issue of whether or not the Association is obliged to report Ms Daly's dismissal to the Teachers Council. However it now seems that this is a matter which would not be affected by an order for interim reinstatement.

Where does the overall justice lie?

[12] This test requires that I stand back and assess overall justice of reinstating Ms Daly until such time as I am able to properly investigate her claims.

[13] When an employee is dismissed it is for the employer to justify that dismissal. The Employment Relations Act (the Act), at section 125, requires that where an employee is determined to have a personal grievance, and the employee seeks reinstatement, the Authority must, wherever practicable, provide for reinstatement as the primary remedy. It is for the employer in those circumstances to show that the reinstatement is not *practicable*. At this point, based on the mostly untested affidavit

evidence provided, it would be premature to make an assessment of the relative merits of the respective arguments either in respect to the justifiability of the dismissal or the practicability of permanent reinstatement. It is however clear that it is certainly arguable that Ms Daly was unjustifiably dismissed and would, consequently, as she has requested, be entitled to consideration of whether permanent reinstatement is practicable. Interim reinstatement would simply restore the status quo as it existed before Ms Daly was dismissed.

[14] The Association argues that the lack of trust they have in Ms Daly makes both interim and permanent reinstatement impracticable. Whether this purported lack of trust as a barrier to permanent reinstatement is a matter which is more appropriately left until after the substantive matters are determined. In the short term this lack of trust can be managed by the Association by the imposition of conditions on Ms Daly relating to her work activities and relationships. For example the Association may choose to require Ms Daly to take garden leave, not to attend work or visit any of the association's kindergartens and to refrain from speaking with any of the teachers or parents involved NAKA. Mr Pollak, on behalf of Ms Daly has indicated that his client would accept any reasonable restrictions and conditions imposed by the Association should she be reinstated on an interim basis.

Determination

[15] I would like to emphasise that the question of Ms Daly's interim reinstatement is finely balanced. In these circumstances, justice is best served by reinstating her to her position until the Authority has properly considered and determined whether her dismissal was *what a fair and reasonable employer would have done in all of the circumstances*. However given the Association's stated level of mistrust it may be that they wish to impose conditions on Ms Daly employment during this interim period. These conditions might include Ms Daly completing her previously arranged period of annual leave, placing her on garden leave following that leave and requiring her not to visit any of the Associations premises or to contact any other designated NAKA staff.

[16] I would also like to emphasise that this determination is made without a proper testing of the extensive affidavit evidence that has been put in front of me and is in no way indicative of what might be the final disposition of this matter.

[17] **Ms Daly is to be reinstated, on full salary, to her position as senior teacher at the Northern Auckland Kindergarten Association on an interim basis and on such conditions as the Association may wish to impose.** Should the parties not be able to agree on any conditions that should apply, leave is granted for either party to apply to me for directions in that regard.

Costs

[18] Costs are reserved pending the determination of the substantive employment relationship problem.

James Wilson

Member of the Employment Relations Authority