

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 524
5362894

BETWEEN RAEWYN JARVIS-HALL
Applicant

AND WAIKATO COMMUNITY
HOSPICE TRUST t/a
HOSPICE WAIKATO
Respondent

Member of Authority: James Crichton

Representatives: Dave White, Advocate for Applicant
Melanie O'Neill, Counsel for Respondent

Investigation Meeting: 8 December 2011 at Hamilton

Determination: 9 December 2011

INTERIM DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Jarvis-Hall) alleges that she was unjustifiably dismissed from her employment as a clinical nurse manager with the respondent (Hospice Waikato) and she seeks urgent interim reinstatement together with substantive remedies such as compensation, lost salary and costs.

[2] Hospice Waikato denies that Ms Jarvis-Hall ought to be reinstated on an interim basis and resists her claims for substantive relief as well.

[3] Ms Jarvis-Hall commenced employment with Hospice Waikato as a registered nurse on 29 November 2004 and became clinical nurse manager in July 2007. The affidavit evidence before the Authority discloses that in early 2010, issues began to be raised about Ms Jarvis-Hall's performance and according to Hospice Waikato, a pattern began to emerge towards the end of that calendar year which required intervention by the chief executive. Accordingly, in December 2010, the chief executive of Hospice Waikato (Mrs Bang) began weekly mentoring/coaching sessions with Ms Jarvis-Hall.

[4] In May 2011, there were further complaints about Ms Jarvis-Hall and these were crystallised for Mrs Bang in a meeting she held with representatives of the New Zealand Nurses Organisation (the Union) in June 2011. Later that month, Mrs Bang became aware that Ms Jarvis-Hall had hired a staff member without Mrs Bang's knowledge or indeed any authority. Another issue troubling Mrs Bang was Ms Jarvis-Hall's management of a uniform project which, according to Hospice Waikato's affidavit evidence, was effectively derailed as a consequence of Ms Jarvis-Hall's mismanagement of it.

[5] Taken together, these matters were sufficiently serious to encourage Mrs Bang to brief the chair of her board with whom she subsequently agreed to engage specialist human resources expertise to manage the ongoing process with Ms Jarvis-Hall.

[6] A performance management process was then undertaken with Ms Jarvis-Hall and a corrective coaching plan developed for presentation to Ms Jarvis-Hall. Concurrently, the issue of the hiring of the staff member without authority was also considered by Hospice Waikato and it determined that that was a disciplinary matter which it needed to investigate in terms of its disciplinary process. Ms Jarvis-Hall refused to embrace the corrective coaching plan and refused to participate in Hospice Waikato's disciplinary process.

[7] Hospice Waikato then engaged legal counsel to assist it and urgent mediation assistance was sought and obtained from the Department of Labour. A first mediation took place on 25 October 2011 but was unable to resolve the employment relationship problem and Ms Jarvis-Hall was then dismissed from her employment that day, on four weeks' notice.

[8] Ms Jarvis-Hall has provided the customary undertaking as to damages but interestingly, the substantive relief that she seeks does not at present include an application for permanent reinstatement. This is a matter the Authority inquired of Ms Jarvis-Hall's advocate about during the investigation meeting relating to the interim reinstatement application, as a consequence of which it became clear that the failure to seek permanent reinstatement was an inadvertent omission rather than a deliberate act. The Authority indicated to Ms Jarvis-Hall's advocate that he could file an amended statement of problem seeking permanent reinstatement but that permanent reinstatement would not be part of the matrix being considered by the Authority in the interim reinstatement application. Leave was reserved, in the usual

way, for Hospice Waikato to file an amended statement in reply in response to the amended statement of problem, but both parties were advised by the Authority that the normal rules about the time for filing pleadings in the Authority would be vacated because of the time of year and the fact that the substantive investigation meeting would not be set down until either February or March 2012.

Issues

[9] It is trite law that in order to succeed in an application for interim reinstatement, the Authority must apply the law relating to interim injunctions but also have regard to the object of the Employment Relations Act 2000 (the Act): s.127(4).

[10] The law on interim injunctions is typically reduced to three or four questions or propositions and it is a consideration of those matters which forms the basis of this determination. These issues are:

- (a) Is there an arguable case;
- (b) Where does the balance of convenience lie;
- (c) Are there other remedies available to Ms Jarvis-Hall; and
- (d) Where does the overall justice of the case lie?

[11] Section 127(4) of the Act also requires the Authority to have “*regard to the object of this Act*”. Before the law change effected on 1 April 2011, it was clear law that the reference to “*the object of this Act*” was properly interpreted as including a reference to the primacy of reinstatement as that remedy was referred to in s.125 of the Act. However, with the change in the law effected by s.16 of the Employment Relations Amendment Act 2010, reinstatement is no longer a remedy of primacy but only one of the toolbox of remedies which the Authority or the Court can apply, if the circumstances dictate it and the applicant party seeks it. Indeed, it is fair to observe that, during the passage of the Employment Relations Amendment Bill (as it then was) into law, the Bill’s sponsor made it clear that the government’s intention was to make it more difficult for employees to obtain reinstatement and easier for employers to dismiss without the prospects of an employee being reinstated.

Does Ms Jarvis-Hall have an arguable case?

[12] I am satisfied on the untested affidavit evidence before the Authority that Ms Jarvis-Hall meets the relatively low threshold of an arguable case, but no more than that. In reaching that conclusion, I rely particularly on Ms Jarvis-Hall's allegations of procedural infelicities in respect of the various meetings that she had with Hospice Waikato and in particular the following three claims which are pleaded in her statement of problem and reiterated in her affidavit evidence and advanced again by way of submissions by her advocate:

- (a) That Ms Jarvis-Hall was never given notice of the specific allegation of misconduct;
- (b) That Ms Jarvis-Hall was, as a consequence, unable to explain or refute the allegation; and
- (c) That Ms Jarvis-Hall was never told that dismissal could be a potential outcome of the disciplinary process.

[13] Hospice Waikato, of course, firmly resists all of these contentions and refer to a long, measured process by which the chief executive came to conclude that there was a performance and a disciplinary problem in relation to Ms Jarvis-Hall and that each of those problems required to be addressed. Hospice Waikato says that the process by which it addressed those matters was, in respect of each of them, the action that a fair and reasonable employer could have taken in all the circumstances of the case and thus the contention that there is an arguable case is fiercely resisted.

[14] The test of justification by which the Authority must make a determination about whether there is a viable grievance or not is the new test which came into effect after the law change on 1 April 2011. But of course, as Hospice Waikato points out, the effect of the law in relation to an application for interim reinstatement requires that Ms Jarvis-Hall must also demonstrate that if she were successful in her substantive claim, the Authority would reinstate her permanently to the employment: *Cliff v. Air New Zealand Ltd* CA6A/05 per Colgan J. Given that in the present case there has not yet been an application for permanent reinstatement (apparently an inadvertent error), it would seem inappropriate for the Authority to consider permanent reinstatement unless and until that application is made. Considering only interim reinstatement (which is all that is pleaded so far), Ms Jarvis-Hall's claim does

not seem, on its face, to be a strong one. Reinstatement is no longer the primary remedy. The test is now whether reinstatement is both “practicable” and “reasonable”. Because the test is conjunctive rather than disjunctive, the provision at s.125(2) of the Act requires that reinstatement must be both reasonable and practicable in order for it to be contemplated.

[15] In the present case, it is difficult to see how reinstatement could be either reasonable or practicable. Ms Jarvis-Hall has attracted to herself a group of supporters in a small workplace. Similarly, another group of employees is dismissive of her claims and support the position of the employer. Mrs Bang’s affidavit evidence is that she would have real difficulty in even being cordial to Ms Jarvis-Hall and Ms Jarvis-Hall’s suggestion that an independent mediator might be able to assist the protagonists to engage may make sense in an abstract way, but it is difficult to see how, in practical terms, the day-to-day interactions that would be required by two senior managers working together for the good of patients, literally in extremis, could continue.

[16] It seems to the Authority that there is a real sense in which the close working relationships between the parties have been damaged beyond repair. Part of that damage appears, on the affidavit evidence the Authority has before it, to have been created by Ms Jarvis-Hall herself in uncharitable observations about the chief executive which appear to have been widely reported.

[17] There is another practical issue which impacts on the discretion the Authority has to consider reinstatement. Hospice Waikato alleges that Ms Jarvis-Hall has taken a great deal more annual leave than she is entitled to (something like twice her entitlement), and if she were reinstated, a disciplinary investigation would immediately be required in order to investigate that allegation and give her an opportunity to respond. While that unproven allegation is not a major factor in the Authority’s consideration, it does rather suggest that were reinstatement to be contemplated (and of course only on an interim basis because that is all that has been sought at this point), then the period between now and the substantive determination of matters by the Authority would be almost exclusively taken up with an investigatory process around this allegation.

[18] The Authority considers that Ms Jarvis-Hall has met the relatively low threshold to ground an arguable case but for reasons just advanced, thinks the

likelihood of reinstatement being a practicable and reasonable remedy on an interim basis is weak indeed.

Where does the balance of convenience lie?

[19] The essence of the Authority's obligation in this regard is to consider the relative inconvenience to each party of the other succeeding. In a practical sense, the Authority must weigh the relative hardship to Hospice Waikato of having Ms Jarvis-Hall returned to the employment against the hardship potentially suffered by Ms Jarvis-Hall in remaining away from the employment for a further period until the substantive determination decides the matter one way or the other.

[20] Ms Jarvis-Hall, not unnaturally, claims the balance of convenience favours her. The Authority does not agree. For reasons which the Authority has already advanced, it considers the prospect of reinstatement to be remote indeed and as the only category of reinstatement sought at present is reinstatement on an interim basis, that makes the reasonableness and practicality of reinstatement even less sensible.

[21] Conversely, damages are a remedy which would readily meet the case, assuming that Ms Jarvis-Hall proves her grievance. In all the circumstances, the arguments against reinstatement on an interim basis in the present case are so weak as to make damages the only proper remedy. Amongst other things, this is a case where it is likely that contribution will be a factor that the Authority will need to give earnest consideration to. As Hospice Waikato correctly identifies, contribution is not easy to consider in circumstances where adjustment is not possible. Reinstatement is either granted or not and contribution cannot effectively be taken into account. The position is otherwise with damages where the remedy can be appropriately adjusted to meet the case.

[22] Hospice Waikato understandably refers to the effect that reinstatement might have on third parties. It is the case that the work of the Hospice is concerned with patients and families whose needs must be given priority by the organisation. Any tension, unpleasantness or imbalance within the staffing structure will impact negatively on patient care and Hospice Waikato rightly draws the Authority's attention to the impact that reinstatement (even on an interim basis) might have on the organisation and care of patients. As the Authority remarked during the course of the investigation meeting, it would need to be satisfied that reinstatement would assist in the healing process rather than the contrary before reinstatement could be considered

a practical reality. Based on the evidence and the submissions the Authority heard (and evidence in affidavit form only), the Authority is not satisfied that reinstatement would do anything other than exacerbate the present division in the staff of Hospice Waikato.

[23] Ms Jarvis-Hall refers to the fact that she is her family's principal breadwinner, that a failure to be reinstated would impact negatively on her career and that while there may be positions in nursing (in the wider sense of the profession) available within the Waikato, she did not get her various management qualifications for the purposes of going back to general nursing. She sees her career aspirations as continuing in management and she has a strong personal commitment to the hospice movement. She says in effect that she would of necessity have to leave the Waikato. Of course, this is a difficult argument to sustain in present circumstances when there is no claim before the Authority for permanent reinstatement. Even although it became clear during the investigation meeting that that was inadvertent, nonetheless it would be unfair and unjust for the Authority to consider the present application in the context of an application that is yet to be made. The Authority cannot do other than consider the application it has before it on the terms pleaded. To do otherwise is to create an unfairness to Hospice Waikato which has, quite properly, defended its decision based on the allegations made and the particular relief sought at this point by Ms Jarvis-Hall.

[24] What is more, there is a theme in the evidence before the Authority which suggests, at its most charitable, there is a personality conflict between Ms Jarvis-Hall and Mrs Bang, the chief executive of Hospice Waikato, and, however that difference is to be described, the differences between those protagonists have become more pronounced of late. The Authority accepts the categorisation in Hospice Waikato's submission of the evidence from staff supporting the employer about "*a serious lack of respect and mistrust*" by Ms Jarvis-Hall directed at Mrs Bang. Despite Ms Jarvis-Hall's own affidavit evidence saying that she could work with Mrs Bang, she herself proposes independent mediation to facilitate that, and the practicality of that suggestion has to be called into question when the affidavit evidence before the Authority suggests that the two women, as members of Hospice Waikato's senior management team, would have to have daily contact.

[25] The Authority is satisfied that the balance of convenience favours Hospice Waikato for the reasons advanced.

Where does the overall justice of the case lie?

[26] The Authority concludes that the overall justice of the case favours Hospice Waikato. In the Authority's opinion, the employer has a stronger case overall than does Ms Jarvis-Hall and accordingly it is Hospice Waikato that is entitled to receive the benefit of the Authority's discretion.

[27] It is plain that Hospice Waikato had a dysfunctional relationship with Ms Jarvis-Hall over the last year or so. The small staff has sadly become advocates for one side or the other. The Authority was not persuaded by the argument heard at the investigation meeting that those circumstances would be beneficially affected by Ms Jarvis-Hall's reinstatement on an interim basis, particularly with the practical difficulty about following her own suggestion of engaging independent mediation during that interim period only and also having regard to the fact that a further disciplinary proceeding may have to be undertaken, if Hospice Waikato's claim of excessive annual leave taken, is made out.

[28] However, fundamental to the Authority's finding about the overall justice of the case is the fact that Ms Jarvis-Hall has failed to satisfy the Authority that reinstatement is either practicable or reasonable, let alone both practicable and reasonable, and given the discretionary nature of the remedy, the Authority considers that fatal to the success of Ms Jarvis-Hall's application.

Determination

[29] Ms Jarvis-Hall's claim for interim reinstatement is declined for the reasons set out in this determination.

Costs

[30] Costs are reserved.

James Crichton
Member of the Employment Relations Authority