

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2013] NZERA Christchurch 111
5419852

BETWEEN TRACY LANDON-LANE
Applicant
A N D ANNIES MARLBOROUGH
LIMITED
Respondent

Member of Authority: Christine Hickey
Representatives: Peter Radich and Luke Radich, Counsel for Applicant
Mike Hardy-Jones, Counsel for Respondent
Investigation meeting: 11 June 2013
Submissions Received At the hearing
Date of Determination: 14 June 2013

INTERIM REINSTATEMENT DETERMINATION OF THE AUTHORITY

- A. Pursuant to the undertaking as to damages under s.127(2) of the Employment Relations Act Tracy Darlene Landon-Lane is reinstated in the interim pending the hearing of her personal grievance under the conditions set out in this determination.**
- B. I direct the parties to mediation as soon as possible to establish a safety plan for Ms Landon-Lane's return to work.**
- C. Costs are reserved.**

Employment relationship problem

[1] Tracy Landon-Lane has made an application for interim reinstatement under section 127 of the Employment Relations Act 2000.

[2] Ms Landon-Lane was dismissed from her job as a general duties hand on 14 May 2013. Annies is a food manufacturing company that makes fruit leather.

[3] Ms Landon-Lane claims that she was unjustifiably dismissed and has applied to the Authority for interim reinstatement pending determination of the substantive matters. Ms Landon-Lane claims permanent reinstatement to her previous role or a role no less advantageous to her, compensation for humiliation, loss of dignity and injury to her feelings and legal costs.

[4] Annies resists the interim reinstatement and the substantive claims.

[5] As required by section 127(2) of the Act Ms Landon-Lane has given an undertaking to abide by any order the Authority may make in respect of damages in determining her employment relationship problem.

[6] As usual in cases on interim reinstatement I have investigated the application by considering the affidavits lodged by both parties, relevant documents, and by hearing submissions from both parties. I held the investigation meeting in Blenheim on 11 June 2013.

[7] While some of the facts have been canvassed in the process the findings I express in this determination are solely in relation to the claim for interim reinstatement. Final findings of fact and law will only be made once I have had an opportunity to fully test all of the relevant evidence at the substantive hearing.

[8] The parties attended mediation on 30 May 2013.

Background Facts

[9] Ms Landon-Lane suffered a serious brain injury in a car accident as a child. She has permanent effects of that injury. One of the effects of her brain injury is a reduction in her intellectual capacity and an increase in her emotional lability, meaning her emotional state is more changeable than that of others.

[10] Ms Landon-Lane has been employed by Annies for about 25 years. Annies was aware of her brain injury and its effects when it employed her.

[11] Ms Landon-Lane has undertaken a number of roles in the factory. When she was working on night-shift in 2009 she was sexually assaulted by her supervisor. He

was dismissed and a criminal case ensued. The supervisor was not convicted. After that assault Ms Landon-Lane's emotional lability increased. In 2010 Ms Landon-Lane was taken off duties in the factory and has become Annies' cleaner with some laundry responsibility working 20 hours per week.

[12] At a Union meeting in early March Ms Landon-Lane wrote a note to the Union employee conducting the meeting. It expressed her sadness at some matters to do with her work. After that meeting on 7 March 2013 Nicola Martin, Annies' General Manager, called a meeting to address Ms Landon-Lane's concerns. Ms Landon-Lane was allegedly supported at the meeting by Joyce Marshall, a fellow employee and Union representative. Sheryl Blick, Ms Landon-Lane's manager attended the meeting along with Mandy Mitchell, Annies' human resources manager.

[13] At that meeting Ms Martin asked Ms Landon-Lane what her concerns were and reiterated that although the cleaning role was important Ms Landon-Lane was not in a bonus scheme and it was unlikely that her role would change.

[14] Ms Blick said that Ms Landon-Lane had had five sick days leave in the past six weeks. Ms Blick said that she considered that to be *extreme absenteeism*. Ms Blick said that she was concerned about Ms Landon-Lane's migraines and thought that Ms Landon-Lane may need to visit her doctor. She asked Ms Landon-Lane if her headaches were a symptom of her unhappiness at Annies. Ms Landon-Lane said they were not and that she was not unhappy at Annies.

[15] Ms Martin suggested that Ms Landon-Lane's health needed to be reassessed. She said that she was concerned about Ms Landon-Lane's emotional health and suggested she may want to have some counselling which would be paid for by the company.

[16] Mandy Mitchell, Annies Human Resources Manager, raised her concern that Ms Landon-Lane was going to several different people when she had concerns. She said that she would meet with Ms Landon-Lane the following Monday to discuss Ms Landon-Lane's concerns about the PPP bonus system.

[17] The meeting concluded with Ms Martin asking Ms Landon-Lane to go to either Bread of Life or EAP Services for a course of counselling which she needed to complete. She said that she required to know that Ms Landon-Lane was fit for work and wanted a report from her doctor because she was concerned about Ms Landon-

Lane's safety. Ms Martin said that Annes would hold a review meeting once Ms Landon-Lane had been to counselling. Ms Martin also expressed her view that she didn't believe the issues that Ms Landon-Lane was upset about were work place issues.

[18] Ms Martin directed Ms Mitchell to follow up after the meeting with a letter to Ms Landon-Lane. That letter was never produced because of events on the following day.

[19] After the meeting finished Ms Landon-Lane was left alone in the board room crying for a few minutes before Ms Mitchell went back in to see how she was doing. Ms Mitchell suggested that she call Ms Landon-Lane's grandmother, who is effectively Tracy's mother, having cared for Ms Landon-Lane since she was two weeks old. She suggested that Mrs Landon-Lane take Ms Landon-Lane to see her doctor.

[20] On Friday 8 March Ms Landon-Lane started work at about 7.15 am. Ms Blick went to see Ms Landon-Lane in the laundry, after Ms Landon-Lane had been seen glaring at Ms Marshall. Ms Blick was accompanied by Ms Marshall. Ms Blick asked Ms Landon-Lane what was wrong. Ms Landon-Lane told her she wasn't happy. Then Ms Landon-Lane allegedly made a fist and approached Ms Blick. Ms Blick told her not to dare and that she would not be intimidated. Ms Landon-Lane turned away and allegedly said *f*** your job*. She left the factory.

[21] Ms Landon-Lane was taken into the smoko room and apparently took a pair of scissors from a drawer and put them against her wrist. When she was told not to be silly she put the scissors back in the drawer. Ms Martin and Ms Mitchell met with Ms Landon-Lane. They took notes of what had happened that day.

[22] Ms Mitchell arranged a session with Bread of Life which she attended with Ms Landon-Lane and her mother at 9.00 am that morning. Ms Landon-Lane was suspended on full pay and sent home.

[23] On 14 March 2013 typed notes which had been made from hand-written notes made about the incidents on 8 March 2013 were put to Ms Landon-Lane by Ms Martin and Ms Mitchell at her home and she was asked to sign them as being an accurate record of the events on 8 March 2013. Ms Landon-Lane's grandmother and father were present at that meeting. Ms Landon-Lane signed the notes.

[24] Also on 14 March 2013 Ms Landon-Lane was handed a letter written by Ms Martin which said that Annie had:

... completed our internal investigation into the incident which occurred on Friday, 8 March with Sheryl Blick and you. We would like to meet with you for a formal disciplinary meeting on Monday, 18 March 2013, at 9.00 am. ...

If we conclude following this meeting that you did act in the way outlined in the supporting documentation, then your behaviour will have breached the Code of Behaviour under Serious Misconduct¹....

[25] A short meeting between Annie, Ms Landon-Lane and Mr Luke Radich, her lawyer, took place on 20 March 2013. However, that meeting was suspended due to a misunderstanding of its purpose. There were no further disciplinary meetings although there was extensive correspondence between the parties' lawyers.

[26] On 24 April 2013 Annie's lawyer advised Mr Radich that Ms Landon-Lane was suspended without pay. By letter delivered 14 May 2013 Ms Landon-Lane was dismissed on the grounds that Annie considered the incident on 8 March 2013 amounted to serious misconduct. It concluded that Ms Landon-Lane's:

behaviour on that day was of a very serious kind and put you and others at risk.

[27] Ms Landon-Lane argues that her dismissal was unjustified. She considers that the ground for dismissal cannot be substantively justified and that there were numerous procedural defects leading up to her dismissal. She is keen to return to work.

Determination

The Law

[28] Section 127 of the Employment Relations Act 2000 (the Act) gives me the power to order interim reinstatement pending substantive hearing of a personal grievance.

[29] The general principles by which applications for interim reinstatement are decided require me to consider three enquiries:

- Is there an arguable case?

¹ Points 3,5,6,8 and 12 were referred to. However, it is clear that point 8 was not applicable.

- Where does the balance of convenience lie?
- What does the overall justice of the case require?

Is there an arguable case of unjustified dismissal and for interim reinstatement?

[30] The Employment Court in *Angus v Ports of Auckland Limited*² said:

The issues for decision are, therefore:

- *Whether the plaintiff has an arguable case that he was dismissed unjustifiably as that is now defined by new s.103A of the Act;*
- *Whether the plaintiff has an arguable case for reinstatement in employment (applying the new test for reinstatement under s 125 of the Act) if he is found to have been dismissed unjustifiably;*
- *Where the balance of convenience lies between the parties in the period until the Court's judgment is given on those issues; and*
- *Whether the overall justice of the case dictates that interim reinstatement in employment is appropriate.*

[31] To support an application for interim reinstatement Ms Landon-Lane must not only establish that she has an arguable case that she was unjustifiably dismissed but must also establish that it is arguable that she will be permanently reinstated in addition to, or instead of, being compensated monetarily³.

[32] Annies must ultimately justify its decision to dismiss Ms Landon-Lane under section 103A of the Act with the test being whether the decision was one a fair and reasonable employer could have made in all the circumstances. In addition, subject to section 103A(5), the general requirements of procedural fairness must have been met.

[33] An arguable case means a case where there are some serious or arguable, but not necessarily certain prospects of success - *X v. Y Ltd and The New Zealand Stock Exchange*⁴.

² [2011] NZEmpC 128

³ *Cliff v. Air New Zealand Limited* [2005] ERNZ 1

⁴ [1992] 1 ERNZ 863

[34] For Ms Landon-Lane Mr Radich submits that she has a strongly arguable case not only that the dismissal was substantively and procedurally unjustified but that it is likely that the ultimate remedy will be reinstatement.

[35] Annie opposes reinstatement on the basis that Ms Landon-Lane's conduct amounted to serious misconduct and that her reinstatement would compromise its ability to protect its other staff from any future emotional outbursts by Ms Landon-Lane.

[36] Both practicability and reasonableness are issues in the consideration of reinstatement under s.125 of the Act. They include an assessment of whether or not workplace relationships can be restored.

Does Ms Landon-Lane have an arguable case she was unjustifiably dismissed?

[37] I consider that Ms Landon-Lane has an arguable case that she was unjustifiably dismissed. I consider the way Ms Landon-Lane's signature was obtained on the notes about the 8 March 2013 incident was procedurally unfair. At the very least, Ms Landon-Lane should have been :

- informed that Annie alleged she was guilty of serious misconduct on 8 March 2013, and
- invited to a meeting to respond to the allegation, and
- provided with a copy of Ms Martin's notes as well as the witness statements of Ms Blick, Ms Marshall and Ms Wrighton in advance of any meeting, and
- told Annie wanted to hear from her about the allegation, and
- told her employment was potentially in jeopardy, and
- told her she was entitled to be represented at the meeting.

Is there an arguable case for reinstatement?

[38] There is strong evidence that the dismissal was procedurally unjustifiable. I consider it arguable that Ms Landon-Lane's behaviour on 8 March 2013 when confronted by Ms Blick and Ms Marshall was not sufficient to amount to serious

misconduct, particularly as the swearing was not directed personally at Ms Blick as an insult.

[39] I note too that there are no active warnings on Ms Landon-Lane's file at all, let alone for similar behaviour.

[40] Reinstatement is no longer the primary remedy for unjustified dismissal under the Act. However, it may be ordered if it is reasonable and practicable to do so.

[41] The Court of Appeal examined practicability of reinstatement in *Lewis v Howick College Board of Trustees*⁵. The Court reiterated its earlier judgment in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School*⁶ which had, in turn, affirmed the test applied by the Employment Court in that case. The Employment Court in *NZEI* said:

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..... 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.

[42] I am satisfied that arguably it would be practicable to permanently reinstate Ms Landon-Lane into her role as a cleaner. She has minimal contact with the other staff and the role has not been filled by another employee as far as I have been informed. That leads to a consideration of whether it would be reasonable to do so.

[43] The Employment Court in *Angus v Ports of Auckland Ltd*⁷ said, when considering the new requirement of reasonableness:

[65] ... reasonableness invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.

[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

⁵ [2010] NZCA 320

⁶ [1994] 2 ERNZ 414 (CA)

⁷ *Ibid* footnote 2.

when determining justification for the dismissal or disadvantage may also be relevant to the question of reinstatement.

[67] Reinstatement in employment may be a very valuable remedy for an employee, especially in tight economic and labour market times. The Authority and the Court will need to continue to consider carefully whether it will be both practicable and reasonable to reinstate what has often been a previously dysfunctional employment relationship where there are genuinely held, even if erroneous, beliefs of loss of trust and confidence.

[68] 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 ...

[44] Ms Landon-Lane's counsel submit that given her brain injury and her length of service at Annies, of about 25 years, and the fact that she was dismissed for serious misconduct it will be very difficult for her to get another job in Blenheim.

[45] Although Annies is able to meet any order for damages that may eventually be made against it monetary compensation is not likely to be a sufficient remedy for Ms Landon-Lane in her particular circumstances with her brain injury and its on-going effects and consequent difficulty in finding other work. Reinstatement in her employment is of greater significance and of more importance to her than merely earning money.

[46] I consider that it would be reasonable to reinstate Ms Landon-Lane if appropriate safeguards and conditions were put in place.

[47] I deal with the respondent's arguments against reinstatement below as a part of the next two considerations.

Where does the balance of convenience lie?

[48] In assessing where the balance of convenience lies I need to consider the relative situations of the parties. That is, what is the potential effect on Ms Landon-Lane if interim reinstatement is not granted compared to the potential effect on Annies if it is granted?

[49] In the Employment Court case of *Gazeley v Oceania Group (NZ) Limited*⁸ Judge Couch said that it was also important to consider the potential effects on third

⁸ [2012] NZ EMpC 8

parties⁹. In that case the Court took into account the potential effect of reinstatement on other staff.

[50] In its statement in reply Annies says that while in the past it has supported Ms Landon-Lane in her employment now:

The relationship between management and the applicant and other staff and the applicant is so damaged that it would be impossible for an on-going relationship of confidence and trust to exist.

[51] In her affidavit evidence Ms Mitchell says that supervisors and factory workers she has spoken to *do not wish to work in close proximity to Tracy*. She says that staff patience and goodwill to Ms Landon-Lane has evaporated and that staff are vulnerable to a future outburst from Ms Landon-Lane.

[52] Ms Wrighton's affidavit says that staff:

are all now too busy to allow us to be focused on Tracy and her particular needs and I don't wish to be concerned about where she is in relation to how close she is to me when I am working.

[53] Ms Blick says she feared for her own safety and that of Ms Marshall during the 8 March incident. She says that because Ms Landon-Lane is volatile and unpredictable she:

...would have grave concerns for the safety and wellbeing of others if a similar situation was to eventuate.

[54] Ms Marshall says that as a union representative she has helped Ms Landon-Lane over a long period of time. However, she is now not happy about Ms Landon-Lane coming back to work because of her unpredictability and has no confidence that Ms Landon-Lane:

...can moderate her behaviour so as staff can regain confidence in her.

[55] Ms Marshall also recalls a statement allegedly made by Ms Landon-Lane after a previous altercation between her and another employee:

I know where that bitch lives, I'll burn her house down.

[56] Balanced against is that Ms Landon-Lane has not carried out any kind of planned or deliberate action against another employee.

⁹ Ibid at paragraph 26

[57] Ms Landon-Lane says:

The longer I am away from my job the worse it becomes and the harder it is for me to go back.

[58] Mr Hardy-Jones submits that Ms Landon-Lane's brain injury and its on-going effects make it inevitable that another unacceptable incident will occur and that Annes has a responsibility to its other staff to keep them safe.

[59] In relation to the scissors incident it appears not to have been a serious attempt at self-harm which was appropriately and simply resolved and I have seen no evidence that self-harm or threatened self-harm has been a feature of Ms Landon-Lane's employment.

[60] Balanced against that is evidence of Dr Grant Johnson, Ms Landon-Lane's general practitioner, who has advised that the effects of the assault on Ms Landon-Lane's emotional lability should decrease over time as her grief about the sexual assault decreases. He has also advised that since the incident in March Ms Landon-Lane's medication has been increased *and this seems to be helpful*.

[61] In her affidavit in reply Ms Landon-Lane says:

...Annes have said that if I go back to work that they are worried that I will be threatening or violent towards other people. I most certainly will not be. I am not a violent person. I do get upset from time to time, particularly if I think people are being unfair to me.

In the last few weeks I have spoken to some people about how to deal with things like that¹⁰. These people have included a counsellor and my doctor and my lawyers. We have talked about ways to deal with things if I feel I am getting upset and I am confident that I will deal with these things well in the future.

[62] I consider that the negative effects on Ms Landon-Lane of not reinstating her in the interim would be greater than any negative effects on the respondent if she is reinstated. The balance of convenience favours Ms Landon-Lane being reinstated on an interim basis. However, that does not entirely resolve matters.

Overall justice

[63] I need to stand back and assess the overall justice of the case from a global perspective.

¹⁰ She is referring to getting upset if she thinks people are being unfair to her.

[64] Taking into account the interests of Ms Landon-Lane, Annie and the other staff at Annie's I consider that the overall justice of the case favours reinstatement.

[65] However, in order to give the reinstatement a chance to succeed, Ms Landon-Lane should not be reinstated until Dr Johnson supplies a written report to Annie on whether he considers that Ms Landon-Lane is sufficiently well to begin work again. He should set out what treatment she has received since 8 March 2013 and what leads him to his conclusion. If Dr Johnson certifies that Ms Landon-Lane is well enough to return to work she should be able to begin work doing her usual duties the next week.

[66] The Authority is able to offer dates for a substantive hearing over two days in early August 2013 or later in August 2013. Mr Hardy-Jones is unavailable for the month of September and the Authority member will be on annual leave from the end of September until the week beginning 21 October 2013. The Authority will convene a directions conference to set dates for the substantive hearing and to timetable the exchange of further evidence.

Costs

[67] Costs are reserved pending the final determination of the matter.

Christine Hickey
Member of the Employment Relations Authority