

Attention is drawn to orders made on 21 July 2021 at [2021] NZERA 312 prohibiting publication of certain information in this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2020] NZERA 74
3080412

BETWEEN MIJ
 Applicant

AND KZT
 Respondent

Member of Authority: Helen Doyle

Representatives: Anna Oberndorfer, advocate for the Applicant
 Penny Shaw, counsel for the Respondent

Investigation Meeting: 7 February 2020

Submissions Received: On the day

Date of Determination: 20 February 2020

DETERMINATION OF THE AUTHORITY

A On the basis of the signed undertaking as to damages provided by MIJ, and pending the determination of this proceeding or earlier order of the Authority, the Authority orders:

MIJ is reinstated to her former position in accordance with the hours of work set out in her employment agreement or, if agreed between herself and KZT, to her former position and different hours of work to those set out in her employment agreement from 6 March 2020.

B The order for interim reinstatement is subject to MIJ lodging a substantive application with the Authority by 6 March 2020.

C Costs are reserved until after the substantive investigation.

Employment Relationship Problem

[1] MIJ was employed as a general practitioner at KZT in North Canterbury from 24 October 2018.

[2] KZT is an integrated Health Centre providing care to local residents. It is owned by a not for profit organisation. KZT provides the full range of primary health care services as required under the agreement it has with the Waitaha Primary Health Organisation and the Canterbury District Health Board.

[3] MIJ applies to the Authority for interim reinstatement to her position with KZT under s 127 of the Employment Relations Act 2000 (the Act), following the termination of her position for reason of redundancy on 14 October 2019, on the basis that her dismissal was unjustified.

[4] KZT opposes the application for interim reinstatement. It says that the dismissal for redundancy was substantively and procedurally justified. It further says that MIJ's application has a "*serious deficiency*" in that the application was for interim relief only and there was no application to the Authority for substantive relief.

[5] As part of her application MIJ has provided an undertaking as to damages together with an affidavit in support of her application and a second affidavit lodged by way of reply. The Authority has received an affidavit in opposition to the application for interim reinstatement from the practice manager at KZT who has held that position since February 2018.

[6] The parties have attended mediation but the matter was unable to be resolved.

[7] I took a brief adjournment so that Ms Oberndorfer and Ms Shaw could discuss with their clients whether any non-publication orders were required. There were no orders of that nature sought by either party¹.

¹ This determination has been redacted subject to a retroactive non-publication order made on 21 July 2021 at [2021] NZERA 312

Issues

[8] The Authority has been referred by Ms Oberndorfer and Ms Shaw to the well-established approach for interim injunctions. Whilst the answer to an interim injunction is not in the rigid application of a formula there are broad inquiries that the Authority should undertake in determining an application for an interim injunction. These are as follows:

- (a) Does MIJ have an arguable case for unjustified dismissal and an arguable case for permanent reinstatement with regard to s 125 of the Employment Relations Act 2000 (the Act)?
- (b) Where does the balance of convenience lie? This requires looking at the relevant detriment or injury that MIJ and KZT will incur as a result of the interim injunction being granted or not being granted.
- (c) The Authority is then required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.
- (d) The Authority will need to address at the outset whether the form of the application prevents the Authority from determining the interim application including the question of whether or not there is an arguable case for permanent reinstatement.

Background against which the broad inquiries are to be undertaken

[9] The Authority dealt with this matter on the basis of untested affidavit evidence and submissions. There was therefore no questioning and examining of those who provided affidavit evidence. In the application of the tests set out above the Authority cannot, and is not required to, resolve any disputes that may exist. What I have set out by background is from the documents and affidavits provided. Disputes are identified in the factual matrix when they arise.

Hours of work in the employment agreement

[10] MIJ is the primary caregiver of four children aged 12 years and younger.

[11] Her individual employment agreement (the agreement) with KZT provides that her starting hours of work would fall within the hours commencing at 9am and ending at 3pm which correspond with school hours. Schedule 2 of the agreement provides that the hours may be extended by mutual agreement in the future.

[12] At the material time MIJ was the only employed doctor at the practice.

Dispute about conversations at interview about availability for full time work

[13] There is a dispute in the affidavit evidence regarding conversations about hours of work which took place at the time of an offer of employment to MIJ.

[14] It was not disputed that there was an agreed commitment on an informal basis by both KZT and MIJ to a long term employment relationship with a period of 12 years referred to.

[15] With reference to the long term commitment at the outset of the employment relationship, MIJ put some emphasis in her second affidavit to a reference by the practice manager to temporary financial assistance from the CDHB that ended on 30 June 2019. This funding was for an amount of \$120,000 per annum paid in four equal quarterly instalments.²

[16] What is apparent from the affidavit evidence is a dispute about understandings reached with respect to the hours which MIJ was available for work. The practice manager stated in his affidavit that when specifically asked at interview MIJ said she would be available for full-time work once she had employed a new nanny as her existing nanny had recently returned to her home country.³

[17] MIJ in her second affidavit did not agree with that and states that she had not worked more than 36 hours per week on average since having her children in 2007 and that she made her wishes about her working within school hours clear. Further she deposed to not having employed an international nanny since 2013.⁴

² Affidavit of the practice manager at [22]

³ Affidavit of the practice manager sworn 24 January 2020 at [6]

⁴ Second affidavit of MIJ in reply to affidavit of the practice manager sworn 5 February 202

[18] The practice manager attached an email from MIJ dated 11 October 2018 to his affidavit⁵, in which she advised amongst other matters after thanking him for his flexibility:

I'm really looking forward to joining the team as stated and I expect it will all sort itself out for the full time permanent plan by the end of the locum period.

[19] MIJ attached an email she had received from the practice manager dated 28 September 2018 to her second affidavit confirming the offer of employment⁶. It provided amongst other matters:

Please be assured that while your need to work school hours would normally restrict your employment opportunities it is an advantage in our case. Our enrolled population numbers warrant more than one doctor but less than two. The hours that you wish to work will complement those of our other permanent reduced hours doctor.

[20] MIJ stated in her second affidavit that the reference to “full time” in her email dated 11 October 2018 to the practice manager was because she had some initial difficulty relocating due to family court restrictions and was open about this giving the practice manager permission to talk to her family court lawyer.

[21] A short term lead in locum period was agreed as a result of the interim difficulties during which time MIJ commuted to the practice from Christchurch. For that locum period she worked 10.30 am to 1.30 pm for 15 hours per week at KZT. MIJ stated that in the email to the practice manager she was referring to the full agreed 30 hours in the employment agreement compared with the 15 hours in the locum period.⁷

[22] The practice manager stated in his affidavit that it only became clear during the locum period that MIJ's personal problems were an obstacle to full-time permanent employment in the immediate term. The practice manager said that the 9am to 3pm hours were agreed to at the time as it was believed to be a workable solution but not ideal. It was then he states that the individual employment agreement was drawn up with MIJ becoming eligible for the “full quantum of the significant fringe benefits designed for a permanent full-time employee.” He

⁵ Affidavit of the practice manager Exhibit A

⁶ Second affidavit of MIJ Exhibit S

⁷ Second affidavit of MIJ at [6]

deposes that the base salary component was pro-rated to match MIJ's starting 9am to 3pm hours of work.⁸

Accommodation

[23] As part of her employment MIJ was provided with a four-bedroom house in the area for her use. Since termination MIJ has remained in the accommodation with her four children.

[24] I was advised by Ms Shaw that following the application for a possession order of the house an order had been obtained from the Tenancy Tribunal. I understand it is effective from 7 February 2020 although Ms Shaw advised there was no intention to enforce that for one month.

Vehicle

[25] There is a claim of unjustified disadvantage about the provision by the practice of a vehicle to MIJ. That matter sits outside of the considerations for this current application. I want to refer to some aspects of the provision of the vehicle because of importance to the factual background. In doing so I will not refer to the clauses and written correspondence that is in dispute between the parties.

[26] As a result of discussions between the practice manager and MIJ in March 2019 it was agreed that a solution for a vehicle would be for KZT to buy MIJ's 2013 Ford Mondeo and allow her to use it subject to a fleet/private salary sacrifice. Up to that point MIJ had kept her own car and a mileage allowance was paid to her.

[27] On 4 April 2019 MIJ crashed and wrote off the Ford Mondeo. This had two consequences. MIJ was injured and was off on ACC after the accident although she returned to work on reduced hours from mid to late June 2019. Further the vehicle was not replaced. MIJ deposed that she had no financial means or insurance to purchase another vehicle and at the time of the investigation meeting was without a vehicle.⁹

⁸ Affidavit of the practice manager at [9] and [10]

⁹ First affidavit of MIJ affirmed on 5 November 2019 at [10] and second affidavit of MIJ at [9]

[28] There was reference in the affidavit evidence of a suggestion by the practice manager that MIJ approach the NZMA Benevolent Fund about a car. MIJ deposed she did make an approach and whilst she was assisted for other payments there was not enough to fund a car taking into account other payments made.¹⁰

9 April 2019 meeting

[29] There was a dispute in the affidavit evidence about whether MIJ was well enough to meet on this day with the practice manager and a Board member. Text messages attached to MIJ's first affidavit support an initial reluctance by her to meet however there was eventual agreement to the meeting.¹¹

[30] The practice manager attached notes to his affidavit that he stated were subsequently typed up after the meeting.¹² The notes support a discussion about the present situation with MIJ on ACC, no car and being in advance of her entitlements for leave with the ongoing need to attend the Family Court. The disruption caused by MIJ's uncertain situation was recorded, and the notes reflect, that KZT had considered its position and could only see two realistic options. The first was a parting of the ways with a \$10,000 pay out. On the face of the affidavit evidence there appeared a dispute as to whether this and the second option were responded to or not. The second option was continued employment subject to conditions including not replacing the car and restrictions on social media.

[31] MIJ stated that she declined the first option. Her view was that many of the conditions were sensible and she agreed to those in principle but not to others such as the refusal to replace the vehicle.¹³ The practice manager attached an email from MIJ dated 9 April and sent after the meeting. Amongst other matters she advised that she felt much more secure after the discussion.¹⁴

¹⁰ Second affidavit of MIJ at [12]

¹¹ First affidavit of MIJ Exhibit B

¹² Affidavit of the practice manager Exhibit F

¹³ Second affidavit of MIJ at [21]

¹⁴ Affidavit of the practice manager Exhibit G

21 May 2019

[32] On 21 May 2019 following advice about a return to work the practice manager sent an email to MIJ. It proposed a different roster with MIJ working towards at least three full time 8 hour days a week with the rationale for that contained in the email.

[33] There was some further communication between MIJ and the practice manager confirming a start date back from ACC for MIJ with a gradual return to work from 17 June 2018.

Concerns about MIJ's availability for work

[34] The practice manager in his affidavit stated that during the first six months of MIJ's employment between October 2018 and March 2019 she was frequently absent due to domestic responsibilities. He stated that in every fortnight after the first fortnight worked MIJ's hours were less than 60 hours per fortnight and the continued absences created significant problems for the general practice.¹⁵

[35] MIJ stated in her reply affidavit that this statement was "*negatively misleading*" and that the absences related to approved leave, public holidays and infrequent sick leave.¹⁶

Advice about financial difficulties and the need for cost recovery plan

[36] There were negotiations with the CDHB in April and May 2019 about financial assistance. KZT was orally informed on 13 June 2019 that the supplementary "temporary financial assistance" would not be renewed. The CDHB then met with the KZT on 20 June 2019 and an extension of assistance was offered for three months subject to conditions. One was to provide a formal recovery plan to the CDHB that would enable KZT to rely on its own resources and financial reserves and defer all non-essential capital expenditure. The practice manager stated that as part of the recovery plan it was proposed to reduce the doctor's roster from 1.5/6 FTE to 1.2 FTE with a resulting reduction of operating costs. This would involve

¹⁵ Affidavit of the practice manager at [22]

¹⁶ Second affidavit of MIJ at [14]

a preferred roster to have two doctors on a Monday for full eight hour shifts and one doctor on a full eight hour shift for each of the remaining weekdays.¹⁷

Advice to MIJ about the financial situation

20 June 2019 meeting

[37] MIJ in her affidavit said that she understood the meeting on this day was to discuss her rehabilitation and a return to work plan and that advice about the financial difficulties and the need to put in place a cost recovery plan was “out of the blue.”¹⁸ An ACC staff member was also present at the meeting with the practice manager and MIJ.

[38] The practice manager stated in his affidavit that the meeting was to discuss recovery and return to work for MIJ and then there was an invitation to update MIJ on the need for change with the financial situation and recovery plan.

[39] There was discussion that the preferred roster would have two doctors on each Monday for full eight-hour shifts with one doctor on full eight-hour shifts for each of the other four week days. The practice manager stated that he took away from the meeting a clear view that MIJ was adamant she would only be able to work the school hours arrangement previously agreed although she was advised that she would have the first option on the full time doctor position.¹⁹

[40] The practice manager attached meeting notes from his meeting with MIJ.²⁰ These contain with reference to the proposed roster:

I told [MIJ] that the old arrangement that had her working school hours only was not able to be continued in a 1.2 FTE roster. The preferred roster was one that had a doctor on for eight hours each weekday with two employed on Mondays which was our busiest day.

¹⁷ Affidavit of the practice manager at [34] to [39]

¹⁸ First affidavit of MIJ at [18]

¹⁹ Affidavit of the practice manager at [41] and [42]

²⁰ Affidavit of the practice manager Exhibit H

Formal advice in email to MIJ dated 2 July 2019 of proposed recovery plan

[41] There was advice sent to MIJ from the practice manager in an email about the proposed plan to reduce the doctors FTE from 1.5 to 1.2 per week and the background that had led to that proposal. The email provided that as MIJ had refused the offer to take up the new hours the other provisions of the employment agreement became relevant and clause 10.5 of the employment agreement about consultation was referred to. The email provided that it was the commencement of the process under the employment agreement.²¹

Approach by MIJ to the Board and the two non-employee doctors at KZT

[42] MIJ wrote to the Board and made some suggestions and spoke to the two non-employee regular locum doctors who worked at KZT about the proposed change.

15 July 2019 meeting

[43] MIJ was represented by employment advocate Ashley Fechney from Ms Oberndorfer's firm at this meeting with the practice manager.

[44] An alternative roster was put forward by MIJ as agreed with the two regular locum doctors. It proposed MIJ would work 28 hours per week, another doctor would work 16 hours per week and a third doctor would work 8 hours per week. That was a drop on MIJ's hours by 2. The 28 hours proposed for the roster had MIJ working 8 hours on Monday and Wednesday and 6 hours on Tuesday and Thursday.

16 July 2019 email from the practice manager and the 24 hours roster proposed

[45] The practice manager emailed Ms Fechney on 16 July 2019.²² He set out in the email MIJ's proposed roster and noted that it equated to 52 hours per week or 1.3 FTE and exceeded the preferred baseline roster by 4 hours. It was set out that this remained a problem and that there was a preference to address the surplus by reducing the two days MIJ worked 6 hours to 4 hours per day by having her work a morning shift only.

²¹ First affidavit of MIJ Exhibit F

²² Affidavit of the practice manager Exhibit K

[46] The practice manager set out that MIJ should consider the 24 hours per week arrangement as a trial subject to conditions and that if not acceptable, then there would be a trial of the 28 hours a week.

[47] Twelve conditions were set out in the practice manager's email with the 24 hours per week arrangement. These included that the trial was at KZT's discretion and new rosters may be proposed. There were other conditions relating to MIJ's childcare responsibilities, capacity for cover, leave matters and that the trial was also contingent on ACC being able to assure KZT that she was fit to undertake duties. Further that there needed to be a commitment to work constructively and positively with all members of the KZT team and that MIJ must raise concerns about any aspect of the operations as a general practice directly with the practice manager.

[48] It was noted that any increase in hours would be at the absolute discretion of KZT. A decision was asked for that day from MIJ.

MIJ considers that she had extended time to respond to the offer

[49] MIJ attached an email from Ms Fechney dated 19 July 2019.²³ That email provides that Ms Fechney would be available on Monday morning for a call with MIJ and "*their decision is not yet final.*"

[50] There was then a further text dated 22 July at 9:32 a.m. to MIJ that provided that Ms Fechney had spoken that day with the practice manager and that MIJ had additional time to accept the new roster.²⁴

The practice manager does not agree that there was an extended time frame

[51] The practice manager states that MIJ and her representatives were aware that KZT was holding a board meeting the following day on 18 July 2019 and a final position from them was

²³ Second affidavit of MIJ Exhibit ee

²⁴ Second affidavit of MIJ Exhibit ff

required by that day. If an alternative roster was not able to be agreed then MIJ's position would have to be disestablished and there were no alternative options.²⁵

[52] The practice manager received an email dated 17 July 2019 which was sent at 9.10am from Ms Fechny that the offer as emailed was not accepted.²⁶ The email sets out that MIJ would accept the firm 24 hour roster over the trial of 28 hours. It was further set out that KZT would need to abide by the commitment in her employment agreement to provide her with a company car. The email provided that MIJ refuses to communicate only with the practice manager and will continue to bring her concerns to the Board if need be. She asked that the offer be presented to the Board.

[53] A further email was sent by Ms Fechny on 17 July 2019 at 12.01pm stating amongst other matters that if MIJ's offer is not accepted by the Board then she has instructions to have a without prejudice conversation regarding a possible early exit.²⁷

[54] The practice manager interpreted this as a firm and final statement of MIJ's position.

The Board meeting

[55] The practice manager was present at the Board meeting on 18 July 2019. There was a decision not to accept the final counter-offer as it offered part-time services permanently and carried conditions unacceptable to KZT.²⁸

[56] The practice manager stated that the Board considered it had exhausted the possibility of any workable alternatives and decided that MIJ's part-time school hour position would become redundant.

[57] On 19 July 2019 he telephoned Ms Fechny and conveyed the decision that had been made. He communicated that he was authorised to immediately commence discussion about an early exit as requested by MIJ. The practice manager advised that he would write formally to Ms Fechny on the next working day which was Monday 22 July and would set out the

²⁵ Affidavit of the practice manager [58]

²⁶ Affidavit of the practice manager Exhibit L

²⁷ Affidavit of the practice manager Exhibit M

²⁸ Affidavit of the practice manager [62] and [63]

details of how the notice would be worked out which he understood through Ms Fechney was what MIJ wanted. He also agreed that formal notice would include an offer for MIJ to stay in the accommodation rent free until the end of October 2019.

22 July 2019

MIJ agrees to the 24 hour roster

[58] On the morning of 22 July 2019 the practice manager telephoned Ms Fechney. MIJ had contacted the Board Chair directly about the decision of 18 July over the weekend and the Board wanted all communication now through the practice manager.

[59] The practice manager understood from Ms Fechney that MIJ would now work some type of 24 hour roster. He understood that she was still wanting a car and other conditions as part of an agreement.

[60] The practice manager said that he told Ms Fechney that KZT was unlikely to accept that approach and the decision had been made. He suggested that if she wished to pursue such an approach she should put it in writing.

[61] Soon after this call Ms Fechney sent an email to the practice manager²⁹ that provided as follows:

Good morning [Practice Manager].

As discussed in our phone call this morning, as a result of this restructure process, [MIJ] will accept the 24- hour per week roster.

I understand that both parties have raised concerns relating to other matters during this process. As these matters are not related to the purpose of the restructure, they ought to be dealt with outside of the restructure process.

Please let me know when the 24-hour roster will commence.

The practice manager responds 22 July 2019 with notice of termination

[62] On 22 July 2019 the practice manager sent an email to Ms Fechney and advised that the terms for a new position are not acceptable and that KZT did not believe the other claims could be set aside from the hours of work. The email confirmed that the process in clause 10.5 in the

²⁹ First affidavit of MIJ Exhibit L

individual employment agreement had been completed and the only option is to declare MIJ's position redundant and terminate her employment. The email contained the notice of termination commencing from Tuesday 23 July 2019 and completed on 14 October 2019 being 12 weeks' notice.

[63] MIJ worked out her notice period. The two regular locums resigned from their position with KZT and there was an advertisement for a full time doctor. At the time of MIJ's termination there was no employed doctor at the practice.

[64] A personal grievance was raised for unjustified dismissal was 23 October 2019.

Preliminary issue

[65] Ms Shaw submits that s 127 of the Act relating to interim injunctions must be complied with and that there is no application for permanent reinstatement. She submits that presents a fundamental bar to interim reinstatement. In making that submission Ms Shaw refers to High Court Rule 7.53 that an application for an interim injunction cannot be made with the commencement of the proceeding except in the case of emergency.

[66] Section 127 (1) of the Act provides:

The Authority may if it thinks fit, on the application of an employee who has raised a personal grievance with his or her employer, make an order for the interim reinstatement of the employee pending the hearing of the personal grievance.

[67] When she raised her personal grievance by letter dated 23 October 2019 MIJ asked for reinstatement to her role. The letter further provides that if the matter cannot be resolved MIJ would file an urgent application in the Authority for interim reinstatement.

[68] An application that complied with form 1 as required by s 5 of the Employment Relations Authority Regulations 2000 was lodged by MIJ with the Authority but is expressed to be an application for interim reinstatement only. It is clear however from reading the application that one of the employment relationship problems is an unjustified dismissal and the facts are clearly set out. There is enough information for the Authority to understand what the substantive employment problem is.

[69] Whilst an application for interim relief should be made with an application for substantive reinstatement I am not satisfied that the failure to do so in this matter is fatal. MIJ has raised a personal grievance about the justification of her dismissal. The substance of that is yet to be investigated. The issue is whether until then MIJ should be reinstated on an interim basis.

[70] Permanent relief in a similar form to that claimed on an interim basis for reinstatement is possible. That was the focus was for the Employment Court in *New Zealand Professional Firefighters Union v New Zealand Fire Service Commission*³⁰ and should be the focus of any examination of an arguable case for permanent reinstatement.

[71] I am satisfied that the Authority has jurisdiction to determine the interim application for reinstatement. I accept that an amended statement of problem will need to be lodged and can timetable for that. I do not find this prevents the Authority from proceeding to consider the application for interim reinstatement.

Arguable case of unjustified dismissal

[72] Ms Shaw on behalf of KZT accepts that there is a serious issue to be tried in relation to the claim of unjustified dismissal in that it is not frivolous or vexatious but says that the merits of the claim are not strong.

[73] Ms Oberndorfer submits that MIJ has a strongly arguable case of unjustified dismissal.

[74] I accept Ms Shaw's submission that an assessment of a serious issue to be tried requires evaluation by the Authority.³¹ Ms Shaw and Ms Oberndorfer made submissions directed to the basis for MIJ's claim that her dismissal for reason of redundancy was unjustified.

Redundancy proposal put as an ultimatum

[75] Ms Shaw focusses on the email of 2 July 2019 from KZT and submits that it contains the information required for a view that it was not possible to come up with a workable roster if MIJ wished to only be available for school hours. Ms Oberndorfer also refers to the earlier

³⁰ *NZPFU v New Zealand Fire Service Commission* [2008] ERNZ 196 at [9]

³¹ *NZ Tax Refunds v Brooks Homes Limited* (2013) NZCA 90

meeting of 20 July 2019 and the extract from the meeting notes that the “old arrangement of working school hours only could not be continued.”

[76] It is arguable that there was a firm view about the continued viability of the working hours in MIJ’s employment agreement although it is also arguable that there is not an ultimatum as such put about redundancy.

No other staff affected by the proposal

[77] No other staff member has been affected by the proposal although the affidavit evidence suggested that this was in the process of being addressed. The 2 July 2019 email setting out the proposal stated the recovery plan proposes reductions in medical staffing, nursing staffing and administration staffing. The practice manager in his affidavit stated that needed to be addressed after the change to doctor FTE had been finalised.

[78] It is arguable the focus on MIJ goes to the genuineness of the proposal to restructure and the redundancy.

No consideration given to MIJ’s alternative proposals and then her agreement to alternative hours

[79] Ms Shaw submits that KZT gave full consideration to an alternative roster and agreed to adopt it. It is arguable that the new roster was considered and a further reduction of 4 hours proposed by the practice manager for MIJ.

[80] It is also arguable that concerns about MIJ’s child care responsibilities, reliability to perform work and leave amongst others were conflated with the change to the FTE for doctors at KZT. This resulted in the alternative roster being accompanied by a number of conditions that arguably could have been managed outside of the change process. It is equally arguable that MIJ conflated issues about the vehicle with the alternative roster.

[81] Standing back and objectively assessing the untested affidavit evidence and documents it is arguable there was a misunderstanding about the extension to accept or reject the offer of an alternative roster on the part of the practice manager and MIJ. Correspondence from MIJ’s

then representative arguably gave an impression of finality on her part before or at the time of the Board meeting.

[82] Ultimately however MIJ accepted the 24 hour roster stating that the conditions should be dealt with outside of the restructuring process. The other regular locum doctors had also agreed to the roster. That achieved the desired 1.2 FTE basis for the rostering although not on the basis KZT contemplated with a full time permanent doctor.

[83] MIJ's acceptance of the 24 hour roster on 22 July 2019 was declined by KZT. This was on the basis MIJ did not agree until after the Board meeting and decision and she did not agree the conditions set out by KZT. MIJ was given notice of termination. It is arguable that MIJ accepted the 24 hour roster without the conditions referred to by Ms Shaw in her submission about provision of a vehicle.

[84] There is an arguable case on the untested affidavit evidence that further consideration should have been given to MIJ's acceptance of the 24 hour roster proposed notwithstanding the Board had made an earlier decision. There is an arguable case on the untested affidavit evidence that whilst the matters that formed the conditions needed to be addressed that could have been done outside of the restructuring process.

No genuine reason for redundancy – ulterior/mixed motives

[85] Ms Shaw submits that there is no evidence of any ulterior motive and that discussions before the formal proposal on 2 July 2019 support that the motivation for the disestablishment of the school hour role were designed to have MIJ change her hours rather than disestablish her role. Further that the proposed new roster has since been adopted.

[86] There were clearly concerns that were raised with MIJ about issues before the 20 June 2019 meeting and the formal proposal on 2 July 2019. There was the 9 April 2019 meeting with two options presented including a parting of the ways with a payment. Conditions attached to MIJ working 24 hours reflected existing and historical concerns. On the untested affidavit evidence it is arguable that there were ulterior/mixed motives in the redundancy.

[87] In conclusion there is an arguable case for unjustified dismissal with some important aspects more strongly arguable on the untested affidavit evidence than others.

Arguable case for permanent reinstatement

[88] Section 125(2) of the Act provides that the Authority must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy.

[89] Ms Shaw does not accept in her submissions that reinstatement is practicable or reasonable. She submits that the doctor roster is now covered by locums and to reinstate MIJ would place a significant financial burden on KZT which needs to operate within the basic funding. The practice manager states in his affidavit that medical needs of the community would not be met if MIJ left at 3pm as the practice could only run a “nurses only” clinic for the rest of the day.³² Further he says that reinstatement on a 24 hour roster is not practicable as it increase reliance on uncertain locums.³³

[90] MIJ in her second affidavit stated that after her dismissal multiple clinic days in October – December 2019 had no doctor rostered on and when medically needed she has stayed later than 3pm. Further that she remains willing and keen to work with the practice manager to find a workable roster solution.³⁴

[91] A doctor has been employed for two days per week at KZT on a permanent basis and the balance of the cover is provided by a number of locums.

[92] I am not persuaded there is an arguable case that permanent reinstatement would be impracticable or unreasonable, particularly with an acknowledgement of willingness to find another solution. MIJ is not going to displace another employee.

[93] There was concern that MIJ was not fit to return to work however she states in her affidavit evidence that she should be fully fit by March 2020 at the latest and she is medically fit.³⁵

³² Affidavit of the practice manager at [76]

³³ Affidavit of the practice manager at [79]

³⁴ Second affidavit of MIJ at [47]

³⁵ Second affidavit of MIJ at [50]

[94] There was reference to mistrust and tension in KZT but that was not the reason for dismissal. It was a dismissal for redundancy not for relationship concerns. MIJ has stated that “collegial workplace relationships” are a genuine priority for her.³⁶ Issues can and should be raised, managed and addressed. The affidavit evidence supports a willingness to do so on MIJ’s part.

[95] Ms Shaw submits that MIJ and supporters have undertaken a series of actions that have destroyed trust between MIJ and the KZT Board and management. I understand from the practice manager’s affidavit that this was because she put her name to letters sent to parties including the CDHB, Waitaha PHO and the KZT trust.

[96] In her second affidavit MIJ accepted that she had taken concerns with the other two doctors at the material time further up the chain of command to the Trust and PHO. She said that this was after there was after concerns had been taken directly to the practice manager and the Board. I accept that concerns were raised about the direction and management of the health centre.

[97] There will need to be some rebuilding of the relationships. Most importantly, from the untested affidavit evidence, I conclude that MIJ is prepared to work with the practice manager and under his management.

[98] I accept Ms Oberndorfer’s submission that there is no suggestion from the untested affidavit evidence of the practice manager that MIJ is not a competent general practitioner.

[99] I conclude there is an arguable case for permanent reinstatement.

Balance of convenience

[100] The Authority is required to consider the relevant detriment or injury that the parties will incur as a result of the interim order for reinstatement being granted or not.

[101] There would be detriment to MIJ if she was not reinstated on an interim basis. She has four children 12 years and younger and parents alone. She is not receiving income at the

³⁶ Second affidavit of MIJ at [54]

usual level that she was before her accident and now considers that she is fully medically fit to return to work. Both parties to the employment relationship appear to have considered the relationship with KZT would be for the long term and MIJ's children are at local schools in the area.

[102] MIJ has a parenting order that states the children must remain in the area of the practice. It could be varied but only by consent of the other parent which MIJ says is very unlikely or by formal order of the Family Court. This would require the concluded Family Court case, that took a long period of time to resolve, to be re-opened and that would be distressing.

[103] In her affidavit evidence MIJ states that the area has approximately 85 houses and there are "literally no rental properties available" since she started looking in July 2019. She says that she had previously offered to pay some interim rent until the hearing and cannot look further afield for accommodation because she has no vehicle. Retaining her home is dependent on having a position with KZT.

[104] I accept Ms Oberndorfer's submission that if MIJ is not reinstated on an interim basis she will, after the passage of a month, be without a home for her and her children and a necessary source of increased income. Further if she moves the children out of the area without a variation to the Parenting order she will be in breach of that order.

[105] There would be detriment to KZT in that it will have to change locum hours to accommodate MIJ and it has concerns about her contracted hours not meeting the needs of the community and its own needs.

[106] KZT say that MIJ has had over six months to find alternative accommodation and vary the parenting order which was entered into knowing at least that her employment was at risk.

[107] It says there are a number of options open to MIJ including a role in a nearby town which is less than a thirty minute drive away and that Christchurch would offer more locum opportunities. KZT says that it will allow MIJ a further month in the accommodation.

[108] Ms Shaw submits that there was significant delay in MIJ making the application for interim reinstatement.

[109] In respect of the last point Ms Shaw raised about delay I am not satisfied that any delay in applying for interim reinstatement was significant. MIJ's employment terminated on 14 October 2019 after a 12 week notice period that she worked out albeit on reduced hours because of ACC. An application was lodged with the Authority on 7 November 2019. The parties were directed back to mediation and then on advice that the matter remained unresolved it was set down for a telephone conference with the Authority in December and the earliest date that suited the parties was 7 February 2020.

[110] When I weigh the relevant detriment or injury each party will incur if an interim injunction is granted or not I accept that there will be some detriment and inconvenience to KZT. I find, however, that it will not be as significant as the detriment or injury MIJ would suffer if an order is not made. I find that the balance of convenience favours MIJ.

Overall Justice

[111] I now stand back and consider where the overall justice lies. I have found an arguable case for unjustified dismissal and an arguable case for permanent reinstatement. On the untested affidavit evidence important aspects of the arguable case for unjustified dismissal are more strongly arguable than others. I find that the overall justice of the case requires that an interim order for reinstatement be made.

Orders

[112] I have allowed a period of two weeks before the order for interim reinstatement is effective to enable KZT to make the necessary changes to accommodate MIJ on the roster and to enable meetings between MIJ and the practice manager to discuss hours of work that best suit the practice and the current rostering.

[113] On the basis of the signed written undertaking as to damages provided by MIJ and pending the determination of this proceeding or earlier order of the Authority I order as follows.

- (a) MIJ is to be reinstated to her former position in accordance with the hours of work set out in her employment agreement or, if agreed between herself**

and KZT, to her former position and different hours of work to those set out in her employment agreement from 6 March 2020.

- (b) The order for interim reinstatement is subject to MIJ lodging a substantive application with the Authority by 6 March 2020.**

Further steps

[114] A telephone conference will be arranged as soon as possible with Ms Oberndorfer and Ms Shaw to organise a date for a substantive investigation.

Costs

[115] I reserve the issue of costs and these will be dealt with after the substantive investigation.

Helen Doyle
Member of the Employment Relations Authority