

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 157/09  
5272535

BETWEEN

PAULA MASOE  
Applicant

AND

TE ROOPU AWHINA KI  
PORIRUA TRUST  
Respondent

Member of Authority: P R Stapp

Representatives: Paul McBride for Applicant  
Alan Knowsley for Respondent

Investigation Meeting: 15 October 2009 at Wellington

Determination: 19 October 2009

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment Relationship Problem**

[1] Paula Masoe has applied for an interim injunction restraining her employer Te Roopu Awhina Ki Porirua Trust from taking any further steps in relation to its current disciplinary process, pending further determination of the matter by the Authority.

[2] It is Mrs Masoe's case that she has an arguable case on the substantive issues, that the balance of convenience and the overall justice favour her. She is also claiming costs.

[3] Te Roopu Awhina Ki Porirua has accepted that there is an arguable case. It has indicated that it is prepared to withdraw the findings that have been reached, provide Mrs Masoe with an opportunity to respond to the allegations, and put in place a new decision maker to consider all the responses and then conclusions reached be

provided to Mrs Masoe to enable her to have an opportunity to have input on any adverse findings.

### **Issues**

[4] The Authority's discretion to grant an interim injunction must involve the discretion being exercised in accordance with well settled principles. The principles are;

- (a) Is there an arguable case?
- (b) If so, where does the balance of convenience lie?
- (c) If it favours the applicant, is there an adequate alternative remedy available?
- (d) Who does the overall justice favour?

[5] The starting point is to accept the presumption that the applicant will be able to prove any facts relied on to support her case. I have heard the matter on the papers, which includes affidavits which have been filed and served. The affidavits have not been tested. It is not the role of the Authority to make decisions on the substantive matters at this stage, but the Authority is permitted to assess the strengths and weaknesses of the parties' positions.

### **The facts**

[6] The facts can be very briefly outlined from the documents produced.

[7] Mrs Masoe is employed by the Te Roopu Awhina Ki Porirua Trust (TRA). She is still at work and being paid. Mrs Masoe is employed as the leader of the Pacific Family Start Team. What is called the Family Start Programme is administered by the Ministry of Social Development (MSD) and has been managed by TRA for a number of years through a joint venture with another Trust, called the Taeomanino Trust. The Taeomanino Trust provided the service delivery to Pacific people and TRA provided the service delivery to Maori. The arrangement had the approval of the Ministry of Social Development. Mrs Masoe reports to Mr Hahi Tait the TRA general manger. Because there have been changes to the delivery arrangements involving the two trusts there has been a competitive tender process put in place by MSD for the on going delivery of the programme in Porirua. Mrs Masoe

and Mr Tait have different views about the reasons for the changes occurring. Both trusts are now involved in tendering for the programme.

[8] In July 2009 Mrs Masoe was dismissed purportedly for redundancy reasons. She raised a personal grievance and she was reinstated. There is an outstanding claim for remedies over that issue.

[9] A former employee (the complainant) made a number of complaints about Mrs Masoe. The complaints were put in writing. Mr Tait made investigations and decided to undertake a disciplinary process and to advise Mrs Masoe of the allegations. On 1 September 2009 TRA wrote a letter addressed to Mrs Masoe informing her of the allegations and that they were considered serious and which could result in Mrs Masoe's termination of employment. The allegations relate to alleged dishonesty, misappropriation of funds, failure to follow purchasing processes, falsification of records and other serious misconduct. Mrs Masoe received that letter on 8 September and she obtained legal advice. Her solicitor requested more information about the complaints, and the written statements from the complainant were provided by TRA's solicitor. Initially TRA gave Mrs Masoe until 14 September 2009 to respond, but it did decide to postpone the meeting until 18 September when Mrs Masoe requested more time.

[10] In the meantime Mr Tait advised MSD of the allegations because he believed he had to under a request from MSD contained in a letter dated 3 July 2009 that said "*...[MSD] expect that any major decisions likely to affect the delivery of the Family Start programme should be discussed with us first, as we would need to consider any potential risks to the programme and its reputation. These would include such things as; changes to employment arrangements,...*" Mrs Masoe claims that the information about the allegations against her was given to MSD by Mr Tait in an attempt to smear her and the Taeomanino Trust in the tender process. He denies that claim, and he says that he was required to comply with the requirement set out in that letter and that an officer at MSD told him that it needed to know.

[11] Mrs Masoe attended the 18 September meeting with a support person, but not her lawyer. Present for TRA were Mr Tait, Laura Bell practice manager, and Alan Knowsley, the Trust's lawyer. The parties disagree that at the meeting on 18

September it was decided Mrs Masoe was to provide a full written response to the allegations after the meeting. She did respond in writing, but called it her preliminary response and she included names of witnesses she considered needed to be interviewed by TRA.

[12] On 23 September TRA wrote to Mrs Masoe's lawyer that it had decided not to accept that her response should be treated as a preliminary one and that as her employer TRA had proceeded to consider the matter and had reached its conclusions on the allegations, a number of which it found had been proved.

[13] TRA concluded that the proved allegations involved serious misconduct and Mrs Masoe was given an opportunity to provide feedback on what action (including dismissal with or without notice) should be taken by the employer. On one outstanding matter Mrs Masoe was requested to forward her passport to reconcile any leave taken.

[14] The letter resulted in a complaint from Mrs Masoe that the findings had been made without any reference back to her. This is important because Mr Tait has deposed that he considered every thing she had included in her response and that he considered her list of witnesses. He says he went back to the complainant and that person's husband who could not be contacted. He says that he made enquiries with other unnamed staff and made further investigations. There is a very real issue about who these people are and what the information is that he has referred to generally, and including particular documents such as bank statements from the complainant and her husband.

[15] On 25 September 2009 Mrs Masoe complained in writing about the findings and the impact on her of what was happening. These proceedings were then filed and served. Both parties attended mediation and are now seeking a determination from the Authority.

### **Determination**

[16] I have no hesitation to find that there is an arguable case. First the process followed by TRA was arguably defective in regard to the time Mrs Masoe had to

reply considering she requested further information on the allegations, which she was reasonably entitled to do given the general nature of the allegations initially put to her (1-8 September). When the additional statements and information were provided on 11 September Mrs Masoe was expected to respond on 14 September. TRA reluctantly rescheduled that meeting to 18 September. There is an issue about the fairness of the timing and the adequacy of the information provided.

[17] The next point is that the meeting of 18 September does not appear to have involved a full discussion on all the allegations. Although TRA agreed Mrs Masoe could provide a written report there is a very clear disagreement over whether or not she was permitted to provide a preliminary response.

[18] TRA decided without meeting Mrs Masoe not to accept her response as a preliminary response. This raises the issue whether that was the action of a fair and reasonable employer to have proceeded with the matter solely on the documents and not to meet with the applicant again before making any findings. Two factors will impact here and they are: (1) that one of the applicant's witnesses says that Mrs Masoe said at the meeting she was not able to respond as completely as she wanted; and (2) Mrs Masoe had obtained the service of a lawyer who did not attend the meeting on 18 September and the Trust had its lawyer present. Mrs Masoe's witness deposed that she understood Mrs Masoe's written response would be a preliminary response. A witness for the Trust who was present at the meeting says that at no point during the meeting was a preliminary response discussed. The issue remains one of what a fair and reasonable employer would have done.

[19] TRA then decided to make its findings, and when it did, it did not make any reference back to Mrs Masoe on the findings. In making his findings Mr Tait says he conducted enquires with other staff and that he made further investigations. These considerations raise issues about who these people were and what the information he considered was. Furthermore, there has been no clear evidence produced of the consideration given to Mrs Masoe's request for a number of people to be interviewed, and if there was, what it involved and the detailed reasons why people were or were not interviewed. There is an issue as to whether a fair and reasonable employer would have done more to interview the complainant's husband despite trying to contact him.

[20] The applicant has alleged that the allegations made against her involve another person, a former employee (the complainant), who was allegedly disgruntled. TRA did not initially provide that person's statements until the information was requested, and the reliability of the complainant's statements has been seriously questioned by the applicant. It is unclear what consideration was given to these in TRA's investigation. Indeed the reliability of the other notes provided at the same time has been questioned including, what they are and who wrote them. The Trust accepted the complainant's information and there will be an issue about what was relied upon and the reasons for preferring that person's information to reach the findings. As much as that person stood by what she has alleged, Mrs Masoe has adamantly denied the allegations. There is a very serious issue about how any credibility was determined and whether or not documents referred to by Mr Tait in making his findings were actually put to the applicant.

[21] Another issue raised has been Mrs Masoe's allegation linking the action taken by TRA against her and the events of her prior dismissal on 1 July, the timing of the allegations being raised, Mr Tait's involvement in the matter prior to 1 September, and his contact with MSD in disclosing the allegations against Mrs Masoe. It is alleged there has been bias and predetermination of an outcome influenced by the above considerations.

[22] The second thrust of the complaint has been that Mr Masoe has been discriminated against on the basis of her raising a personal grievance in regard to the dismissal on 1 July and her reinstatement. Because there is a temporal connection between that personal grievance and Mr Tait's involvement from the time he started what he calls his "*due diligence*" into the allegations against Mrs Masoe there is an arguable issue on whether there is discrimination that will require careful consideration and assessment of the evidence, including the credibility of witnesses.

[23] The respondent accepted that with the presumption that the applicant will be able to prove her claims and where the respondent has taken issue with many of her claims that the threshold for an arguable case would be established.

[24] I conclude that there is an arguable case.

[25] I now turn to the balance of convenience and consideration of alternative remedies. I agree with Mr McBride that the Authority is required to contrast the “*detriment or injury*” that will be caused to Mrs Masoe if the interim injunction is not granted compared with the “*harm or injury*” to the respondent if the remedy is granted for the period until a full hearing. My consideration includes the relevant inconvenience to each party of the other succeeding. This involves consideration of the hardship to the respondent of Mrs Masoe succeeding with her application for an interim injunction against the hardship suffered by Mrs Masoe if her application is denied.

[26] The submission that the respondent has inflicted damage on the applicant in a competitive tender process is speculative considering there has been no direct evidence involving MSD on that. There is no immediate inconvenience to the respondent on being restrained because of this. However, the allegations against the applicant are very serious. Thus, the respondent has the responsibility to require a high standard of evidence and that must involve a fair process. The applicant was not given an opportunity to consider the findings and comment further on them given that the respondent did conduct further interviews and made further enquires and has relied upon documents that Mrs Masoe may have not seen. A fair and reasonable employer would have provided that step instead of making the findings and inviting the applicant to comment on the outcome including the possibility of dismissal (with or without notice). The absence of a fair process is more than likely to impact on Mrs Masoe considering she is a JP and has an involvement in a tendering process. There is also the potential for considerable impact on Mrs Masoe’s integrity and relationships because of the seriousness of the allegations and the TRA’s contact with MSD. Her employment is certainly at risk considering TRA’s finding.

[27] Mrs Masoe is still employed and the respondent has given an undertaking not to take any further action until the Authority’s determination on the interim injunction is made. There have been no arrangements made yet for an investigation meeting to hear the full claims. The respondent has indicated it will put aside the findings and give Mrs Masoe the opportunity to reply and respond and bring in a new decision maker and that Mrs Masoe would be given an opportunity to respond to any adverse findings.

[28] TRA is entitled to investigate the very serious matters that it believes are genuine allegations involving potential serious misconduct. The purpose of the injunction is not to stop any investigation and disciplinary process taking place, but to ensure the process is fair. There is the general principle that the Courts are loath to interfere with the employer's right to conduct a disciplinary procedure. It is accepted that Mrs Masoe does not enjoy a right to perpetual employment, but that the respondent has to be fair where there is a possible impact on her employment. In this regard the applicant holds the view that the process is seriously tainted by bias, predetermination and discrimination. Ultimately the applicant has remedies to address these claims in personal grievance and damages actions. However the seriousness of the allegations and where Mrs Masoe remains employed mean that she is entitled to a fair process to enable her to vindicate herself and the best place for that to happen is with her employer especially given there is still an employment relationship. That must involve some change to the existing disciplinary procedure. The claims can be addressed with financial remedies, but I accept that there could be difficulties in assessing the emotional, public and cultural impact on her of the employer's actions. There is the real potential that without some intervention by the Authority the current disciplinary procedure will not fairly resolve the problem for either party. The balance of convenience favours the applicant, I hold.

[29] The last consideration is the overall justice of the matter. There are some seriously arguable defects in the process that impact on the applicant's right to be properly heard on the substantive allegations. For a proper investigation to be undertaken, the respondent will need to hear from relevant witnesses requested by Mrs Masoe. Also, the respondent will need to give her the opportunity to respond to relevant information gathered and any adverse findings before it considers any disciplinary action. Furthermore when it comes to a preliminary/tentative decision it should give her the opportunity to comment on it. The employer has made some suggestions and proposals in regard to how it might conduct the investigation and disciplinary process. I have been asked by the respondent to narrow the terms of any interim injunction and to essentially make some orders on the procedure to be followed. I am not prepared to do that, because the applicant has not agreed and it is for the employer to decide how to conduct its investigation. If it gets it wrong then the dispute resolution processes exist to scrutinise that further.

[30] In conclusion the applicant has raised a number of issues about the information being relied upon by the respondent, that the employer is open to making changes to the disciplinary and investigation procedure and that the applicant has not had the opportunity to comment on any adverse findings and the reasons for them.

[31] The overall justice of granting an interim injunction favours the applicant.

### **Orders of the Authority**

[32] I order Te Roopu Awhina Ki Porirua Trust to cease taking any further steps in relation to the current disciplinary process with Paula Masoe, except that the Trust may decide to commence a fresh investigation and disciplinary process on the allegations made against Mrs Masoe.

[33] Mr McBride requested the Authority to set a timetable in regard to Counsel making submissions on costs to save further costs and have some certainty on closure. Mr Knowsley requested the Authority to deal with costs at the substantive investigation. I agree with Mr McBride that if it is necessary to determine costs they should be dealt with following this determination. It is not universal practice to set a timetable and I doubt that Mr McBride's suggestion necessarily promotes saving costs, but the request is not unreasonable given that there are instances where timetables are set. Also it is in the parties' interests to have all live issues in the application for the interim injunction dealt with for certainty and closure because there is an on-going employment relationship. Costs should follow the event as the applicant has been successful. The application for an interim injunction is a separate matter to the issues involved in the employment relationship problem that will be determined in a full investigation meeting. Costs on the matter remain a live issue between the parties. Therefore, it is appropriate to reserve costs. The applicant has 14 days to file and serve any submissions on costs after the date of this determination. The respondent will then have 7 days thereafter to file and serve a memorandum in response. The applicant can have a further 7 days after that to make a final reply if it is necessary.

[34] I have requested the support officer to make arrangements for a telephone conference at an appropriate time to organise a full investigation meeting.

P R Stapp  
Member of the Authority