

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 448  
3181700

BETWEEN            JOHN McKENZIE  
                                 Applicant

AND                    TRANZURBAN WELLINGTON  
                                 LIMITED  
                                 Respondent

Member of Authority:      Michael Loftus

Representatives:            Alexandra Miller, counsel for the Applicant  
                                 Mike Gould, counsel for the Respondent

Investigation Meeting:      7 September 2022 at Wellington

Submissions Received:      At the investigation meeting

Date of Determination:      8 September 2022

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1]      The applicant, John McKenzie, was dismissed by the respondent, Tranzurban Wellington Limited (Tranzurban) on 8 July 2022. He challenges that decision, as well as lodging multiple claims of unjustified disadvantage and an allegation Tranzurban has breached the duty of good faith.

[2]      Along with other remedies, Mr McKenzie seeks reinstatement, and asks that it be granted on an interim basis pending a substantive consideration of his claims.

[3]      Tranzurban contends its actions were justified and opposes the application for interim reinstatement.

## Background

[4] Mr McKenzie was engaged as a bus driver in June 2019. Contained in his employment agreement is a provision that reads:

“If the Company has reasonable grounds for concerns about the employee’s ability to ensure their safety and/or the safety of any other person... the Company may require the employee to consent to undergo a medical examination by a medical practitioner... This may be required as a “second opinion” should the Company continue to have safety concerns after the employee has provided a report from another medical practitioner.” and,

“If the employee refuses to undergo a medical examination in accordance with the above... the Company may suspend the employee on pay for up to 5 days”

“If at the end of the Suspension Period the employee continues to refuse to undergo a medical examination and the Company still has concerns held on reasonable grounds about the employee’s ability to ensure their safety or the safety of others while performing their duties, then the Company may continue the suspension but without pay until the employee completes the medical examination. If the employee’s refusal continues for 4 weeks or longer, the employee’s employment may be terminated”.

[5] In 2020 covid struck and it is Mr McKenzie’s position that he was at an above average risk due to various health conditions. This ultimately led to the provision of medical certificates provided with the last stating he was unable to work at covid level 2 or higher. He also raised associated health and safety concerns and complained about excessive stress generated as a result of his belief no one was taking his concerns seriously.

[6] These interactions gave Tranzurban cause for concern as to whether or not Mr McKenzie could safely perform his role and it sought to require he undergo a medical assessment. Tranzurban’s initial approach was to require an extensive analysis to which Mr McKenzie objected but ultimately it conceded a satisfactory DL9 assessment would suffice. DL9 is the medical assessment required for the maintenance of a passenger endorsement on a drivers license.

[7] Unfortunately, and while Mr McKenzie successfully obtained that, issues arose which reignited Tranzurban’s concerns. These resulted in Tranzurban again seeking a more comprehensive assessment and Mr McKenzie’s continuing reluctance to comply.

[8] These events culminated in an assessment prepared by an Occupational Physician on 9 June 2022. While that report concludes there was no underlying health condition that might affect Mr McKenzie attending work or performing his job, it was Tranzurban's view it also contained some concerning caveats and various questions remained unanswered. These issues are, in Tranzurban's submission, enunciated in the following passages:

*Mr McKenzie was mostly pleasant in manner, but very firm in his opinion that the assessment was a waste of time, both mine and his. He handed me a letter from his lawyer to accompany the information from Tranzurban, encouraging me to assess the information provided by Tranzurban cautiously.*

*The referral from Tranzurban highlighted the concerns over Mr McKenzie's behaviour, stating that they have observed escalating stress and anxiety in Mr McKenzie over the last few months and have queried whether he is fit to work as a bus driver.*

*I am sorry to report that I do not feel the consultation has been overall helpful for either party. I was unable to explore the issues raised by Tranzurban in their referral because Mr McKenzie answered most questions by saying that my question was not relevant. I was therefore not able to explore the background to the referral and the issues raised, beyond the specific questions asked, despite reassurance that only relevant information would be included in my report. I was not able to gain sufficient rapport with him to gently explore whether there were any particular issues, either medical or psychological, that may be impacting on his fitness to work.*

[9] Essentially Tranzurban gave up at this point and dismissed Mr McKenzie on the basis he had been unable to satisfy it that he could safely return and that, as a result, termination was permissible under the employment agreement.

### **Analysis**

[10] Applications for interim relief involve the exercise of a discretion. The answer comes not from the rigid application of a formula but from a consideration of various questions which culminate with a conclusion about what the overall justice requires.<sup>1</sup>

[11] There are four broad areas of inquiry which are considered on the basis of untested affidavit evidence. They are:

- a. Is there an arguable case for both a finding of unjustified dismissal and permanent reinstatement?

---

<sup>1</sup> *Klissner Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA)

- b. Is there an adequate alternative remedy available, such as damages?
- c. Where does the balance of convenience lie?
- d. What does the overall justice of the case require?

*A Serious Question to be Tried*

[12] The threshold for a serious question with respect to both establishing an unjustified dismissal and a case for permanent reinstatement is relatively low with the requirement being that the claim is not frivolous or vexatious.

[13] It is Mr McKenzie's view that he is in a strong position with a seriously arguable case, especially with respect to what is submitted to be serious procedural flaws which will inevitably see him successfully pursue his personal grievance claim. Similarly, he says the likelihood of permanent reinstatement is high given reinstatement's status as a primary remedy.

[14] While Tranzurban disputes Mr McKenzie has a strong case and contends it has a more than viable defence, it concedes the claim is a legitimate one that cannot be considered frivolous or vexatious. His claims are at least arguable.

[15] Tranzurban does not, however, hold a similar view with respect to the quest for permanent reinstatement. It says while it is desperate to both engage and retain drivers, Mr McKenzie's repeated unwillingness to complete the medical assessments required of him means its concerns cannot be laid to rest. In turn, that means it can not be confident that he can safely fulfil the tasks required of him and this raises serious questions about whether he is capable of achieving permanent reinstatement.

[16] Having considered this submission, I conclude it falls short of establishing Mr McKenzie cannot attain reinstatement if successful with his claims. He may face a greater challenge in this regard but the claim must remain arguable, especially as the Authority has the ability to put conditions on a reinstatement order if one is granted.

[17] For the above reasons I conclude Mr McKenzie has an arguable case for both a finding of unjustified dismissal and permanent reinstatement.

### *Adequate alternate remedy*

[18] Mr McKenzie did not originally address the question of whether or not there was an adequate alternate remedy. When asked to comment on this counsel advised that it was Mr McKenzie's view that he was inevitably going to be successful with his quest for permanent reinstatement.

[19] Tranzurban, for its part, notes that as well as reinstatement the Act allows for a range of financial remedies and asserts it is in a position to provide these should it be so ordered. It also noted the arguments it proffered against permanent reinstatement and, asserting it might well be successful in this regard, noted that would only leave financial remedies meaning they are an adequate alternate.

[20] Here I note my earlier conclusion that while the case for permanent reinstatement is arguable, the evidence to date suggests there is no guarantee it will occur should Mr McKenzie successfully pursue his claim. This must especially be so where, as is presently expressed to be the case, his challenge will aim to emphasise procedural faults and avoid the substantive issues.

[21] Should Mr McKenzie fail to attain permanent reinstatement the only remedy will be financial and there is no question that Tranzurban, should it ultimately be required to do so, is in a position to pay. It follows that in this instance I conclude there is a range of viable alternate remedies.

### *Balance of Convenience*

[22] Assessing the balance of convenience requires a comparative analysis of the impact on each party and third parties if the interim orders sought are either granted or not. I then must also assess what happens if the interim position is reversed in any substantive determination.

[23] The argument tendered on Mr McKenzie's behalf in respect of balance of convenience commenced by emphasising his belief that he will be successful. It then turned to an argument that the balance must favour Mr McKenzie as should he not be reinstated on an interim basis he would "become financially destitute, and this is likely to inhibit his access to the courts". The rest of the submission repeated the financial imperative argument.

[24] For the following reasons I find this approach less than convincing. First Mr McKenzie has, quite properly, tendered an undertaking as to damages should he not be successful which raises questions about the assertion he is facing financial destitution.

[25] Perhaps more importantly I have to note the evidence that notwithstanding the fact dismissal occurred in July 2022 Mr McKenzie had, by virtue of earlier suspensions and activities, been on leave without pay since 18 October 2021. He has therefore successfully negotiated what is said to be a fraught financial position for over ten months. Not only that, there is also Ms Miller's concession that notwithstanding the fact this is an industry desperately searching for employees and despite having passed the DL9 medical assessment required to hold the requisite licences, Mr McKenzie has chosen to make no attempt to seek employment with other operators. Indeed, it is conceded he has done little to mitigate his losses.

[26] These facts tend to undermine an argument based solely on financial imperative.

[27] For Tranzurban, the submission relies upon the fact it has obligations not only to Mr McKenzie, but to his colleagues and, more importantly, its clientele to provide a safe service. It refers to the medical report of 9 June 2022 and the caveats contained therein on the value of the assessment and its completeness.

[28] This means its concerns are yet to be alleviated and in this respect I have to conclude that the final medical report does, as submitted by Tranzurban, leave questions as to its completeness and whether or not Mr McKenzie is truly capable of returning. Even if he is, it provides sufficient reason for Tranzurban's concerns to remain. Its content also means that I am less than completely satisfied an order for reinstatement would be a safe one.

[29] That, in turn means there must be a question over whether Tranzurban can safely honour its various obligations should Mr McKenzie be reinstated on an interim basis. In these circumstances I conclude the balance of convenience must, at this stage, strongly favour Tranzurban.

### ***Overall justice***

[30] As already said, Mr McKenzie has an arguable case both in respect to his substantive claim for unjustified dismissal and the possibility he might ultimately be reinstated. That said, there are viable alternate remedies and the balance of convenience strongly favours Tranzurban.

[31] In such circumstances, and especially given where the balance of convenience lies, I conclude it would be inappropriate to reinstate Mr McKenzie on an interim basis.

### **Conclusion and orders**

[32] For the above reasons I conclude Mr McKenzie's application he be reinstated on an interim basis fails.

[33] The parties will now be contacted and an investigation of Mr McKenzie's substantive claims will be scheduled.

[34] Costs are reserved<sup>2</sup> but I consider they are best left till the substantive claims have been resolved. If either party disagrees that party shall have 14 days from the date of this determination to lodge a memorandum on costs. The other party will then have a further 14 days to lodge a reply memorandum.

**Michael Loftus**  
**Member of the Employment Relations Authority**

---

<sup>2</sup> [www.era.govt.nz/assets/Uploads/practice-note-2.pdf](http://www.era.govt.nz/assets/Uploads/practice-note-2.pdf)