

ATTENTION IS DRAWN TO  
THE ORDER PROHIBITING  
PUBLICATION OF CERTAIN  
INFORMATION REFERRED  
TO IN THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 185  
3133077

BETWEEN                      JOHN NYIKA  
   Applicant  
  
A N D                              WANAKA PHARMACY  
   LIMITED  
   Respondent

Member of Authority:        Peter van Keulen  
  
Representatives:              Applicant in person  
   Kieran Tohill and Jacinta Grant, counsel for the  
   Respondent  
  
Investigation Meeting:        29 April 2021  
  
Submissions Received:        29 April 2021 from the Applicant  
   29 April 2021 from the Respondent  
  
Date of Determination:        5 May 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     John Nyika worked for Wanaka Pharmacy Limited as a Pharmacist from June 2013.

[2]     In April 2020, Wanaka Pharmacy raised concerns with dispensing and stock recording errors that it believed Mr Nyika was responsible for. Wanaka Pharmacy categorised these

performance issues as potential serious misconduct and on that basis it suspended Mr Nyika and commenced a formal investigation.

[3] Wanaka Pharmacy's investigation became protracted and despite input from Mr Nyika the investigation was never finalised; a conclusion on the investigation was not reached and consequential action was not undertaken, such as a disciplinary process or Mr Nyika returning to work. Mr Nyika raised personal grievances for unjustified action causing disadvantage in relation to his suspension and the flawed process but these were not resolved. Mr Nyika also raised concerns over how much he was paid during his suspension.

[4] Mr Nyika remained on paid suspension for over nine months until 21 January 2021, when Wanaka Pharmacy stopped paying Mr Nyika. Mr Nyika treated this non-payment as termination of his employment and raised a personal grievance for unjustified dismissal on 10 February 2021.

[5] Wanaka Pharmacy denies unjustifiably dismissing Mr Nyika. It has, however, been equivocal about how or why Mr Nyika's employment came to an end.

[6] Wanaka Pharmacy says it stopped paying Mr Nyika because it discovered he had been working for another pharmacy in Wanaka. It is not clear if it stopped paying Mr Nyika because it terminated his employment for working for a competitor or because it treated Mr Nyika as having resigned because he was working elsewhere. Wanaka Pharmacy's evidence seemed to suggest both conclusions were available to it and both were contemplated by it.

[7] What is clear is that Wanaka Pharmacy did not give Mr Nyika any written or verbal notice of termination; nor did Mr Nyika give any written or verbal notice of resignation. And both parties treated Mr Nyika's employment as having come to an end in January 2021.

[8] Mr Nyika was unable to resolve his personal grievances with Wanaka Pharmacy and he subsequently lodged a statement of problem in the Authority based on unjustified dismissal, unjustified disadvantage and wage arrears. Mr Nyika then lodged an application in the Authority for interim reinstatement.

[9] Wanaka Pharmacy opposes Mr Nyika's application for interim reinstatement.

[10] It is Mr Nyika's application for interim reinstatement that I have investigated and this determination resolves.

[11] As permitted by s174E of the Employment Relations Act 2000 (the Act), my determination has not recorded all of the evidence and submissions given but has stated relevant findings of fact and law that I am required to make at this interim stage so that I can express a conclusion on whether the interim order sought should be granted or declined.

### **Preliminary matter**

[12] As part of my investigation I received and reviewed a significant amount of financial information from Mr Nyika. This information is personal and wider publication of it has potential to cause harm and/or embarrassment to Mr Nyika so I am satisfied that it is appropriate to prohibit from publication this information.

[13] Pursuant to clause 10 of the Second Schedule of the Act I prohibit from publication the details of Mr Nyika's financial information provided as evidence except for anything that I specifically set out in this determination and of course anything Mr Nyika chooses to disclose to third parties for matters not associated with this claim.

### **The law**

[14] The law relating to interim applications is set out in *Western Bay of Plenty District Council v Jarron McInnes*.<sup>1</sup> The issues to be determined at this interim stage are:

- (a) Is there a serious question to be tried, that Wanaka Pharmacy has unjustifiably dismissed Mr Nyika and that I should order Wanaka Pharmacy to reinstate him?
- (b) Where does the balance of convenience lie pending a substantive investigation and a final determination of Mr Nyika's claim?
- (c) Where does the overall justice of this case lie from now until the completion of the substantive investigation and issuing of a final determination?

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<sup>1</sup> *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36.

### **A serious question to be tried**

[15] The threshold for a serious question is that the claim is not frivolous or vexatious; analysing this is not an exercise of discretion rather it must be based on a judicial assessment of the evidence and the submissions advanced.<sup>2</sup>

[16] There are two parts to the issue of whether there is a serious question to be tried:

(a) Is there a serious question to be tried that Mr Nyika was unjustifiably dismissed?

(b) Is there a serious question to be tried that as a consequence of any unjustified dismissal I should reinstate Mr Nyika?

### *Unjustified dismissal*

[17] The first consideration for an unjustified dismissal claim is, was there a dismissal. The fact of dismissal is not normally in issue but in this case it is; whilst I am not required to resolve this issue at this interim stage I must consider whether it is arguable that Mr Nyika was dismissed.

[18] I conclude it is arguable that Mr Nyika was dismissed. Whilst it is possible to infer that he resigned, in the circumstances this is not a particularly strong argument.

[19] The stronger position is that Wanaka Pharmacy dismissed Mr Nyika.

[20] The first point is that in January 2021 Wanaka Pharmacy decided Mr Nyika had worked for a competitor. It did not know the circumstances of this work or if the work was ongoing. The second point is Wanaka Pharmacy stopped paying Mr Nyika in response to that.

[21] If the decision to stop paying Mr Nyika cannot be justified on the basis that Mr Nyika had resigned then there are two possibilities:

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<sup>2</sup> *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

- (a) Actual dismissal - Wanaka Pharmacy decided that Mr Nyika working for a competitor was a breach of his employment obligations and that breach justified termination, which it effected by stopping his pay.
- (b) Constructive dismissal - Wanaka Pharmacy decided that Mr Nyika had resigned because he was working for a competitor and it stopped paying him. If Mr Nyika had not resigned then not paying him was a breach by Wanaka Pharmacy which indicated it would not honour its ongoing obligations and Mr Nyika's raising of a personal grievance for unjustified dismissal was, in effect, his resignation in response to that breach.

[22] In both of these circumstances Mr Nyika's dismissal arose out of Wanaka Pharmacy's view that Mr Nyika was working for a competitor. Its action of stopping his wages as a result was a decision made without any investigation or consultation so it is likely to amount to an unjustified dismissal.

[23] It is clear to me there is a serious question to be tried regarding possible unjustified dismissal based on Wanaka Pharmacy stopping Mr Nyika's pay. On my initial assessment I would categorise the claim for unjustified dismissal as a strong one.

#### *Reinstatement*

[24] Pursuant to s 125 of the Act, if an applicant seeks reinstatement and it is determined that they have a personal grievance then the Authority must order reinstatement if it is reasonable and practicable to do so.

[25] So, in order to establish that there is serious question to be tried in respect of the claim for reinstatement, I need to be satisfied that there is an arguable case, one that is not frivolous or vexatious, that permanent reinstatement is both reasonable and practicable.

[26] The test for practicable and reasonable has been discussed and analysed by the Court of Appeal and the Employment Court.<sup>3</sup>

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<sup>3</sup> *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School (NZEI)* [1994] 2 ERNZ 414 (CA); *Lewis v Howick College Board of Trustees* [2010] NZCA 320; and *Angus v Ports of Auckland Limited* [2011] NZEmpC 125.

[27] Practicable means assessing whether reinstatement can be achieved successfully, noting that this it is not as simple as assessing if it can happen. Reasonable is an assessment of what is fair and right in terms of the parties' cases and an assessment of the effects of an order on the parties and others.

[28] Wanaka Pharmacy says it is neither practicable nor reasonable to reinstate Mr Nyika if he is successful with his unjustified dismissal claim; it says reinstatement will not be successful nor is it fair or right in all of the circumstances.

[29] Wanaka Pharmacy says it has concerns about reinstatement in terms of Mr Nyika's ability to work competently. The misconduct issues it raised in April 2020 include performance issues in terms of Mr Nyika allegedly dispensing incorrect drugs or incorrect amounts of drugs and misconduct issues as Mr Nyika allegedly tried to remedy the consequent stock discrepancies in a way which suggests he tried to hide at least one of his dispensing errors. Wanaka Pharmacy's concern has always been that these performance or conduct issues could occur again if Mr Nyika continued to work as a Pharmacist. It was these serious concerns over how Mr Nyika might perform at work that led it to conclude that suspension was appropriate. It now says any reinstatement will effectively unwind the suspension and leave it exposed to potential harm.

[30] A further issue that Wanaka Pharmacy has is that if the concerns over Mr Nyika's work performance are proved to be correct then it will be obliged to make a report to the Pharmacy Council and the Pharmacy Council may then require Wanaka Pharmacy to supervise Mr Nyika. Wanaka Pharmacy says it cannot supervise Mr Nyika as this would require a second pharmacist to be rostered on duty at the same time as Mr Nyika, which it cannot afford to do. And there will also be the issue of it having had Mr Nyika working unsupervised for a period of time from any reinstatement order I make.

[31] If Mr Nyika returns to work then Wanaka Pharmacy says there is also the unresolved issue of him working for a competitor – Mr Nyika has now confirmed this occurred – which is a misconduct issue.

[32] Wanaka Pharmacy also says it is currently fully staffed and Mr Nyika's reinstatement means either incurring additional staffing costs or considering re-structuring.

[33] Overall Wanaka Pharmacy says it is not satisfied Mr Nyika can perform appropriately and correctly for it as a Pharmacist. It has lost trust and confidence in Mr Nyika and the relationship with him, particularly the relationship with Aaron Heath - the owner and director of Wanaka Pharmacy and general manager of the business - is beyond repair. These factors mean reinstatement will not be successful. It also says reinstatement is not fair and right given the various issues to be resolved between the parties, including any reporting to the Pharmacy Council and because any reinstatement may impact on the hours of work available to the other two pharmacists.

[34] Mr Nyika says there is no basis for Wanaka Pharmacy to be concerned about his ongoing work performance should he be reinstated. He accepts there have been dispensing errors in the past but these were minimal and resolved without any adverse consequences for customers. He points out that the process started by Wanaka Pharmacy was never resolved so there has been no conclusion that he was responsible for the errors or that his attempts to fix the stock discrepancies amounts to misconduct – he says he did nothing wrong when he adjusted the stock as this was what he believed to be the right process.

[35] Mr Nyika accepts that his relationship with Mr Heath was somewhat difficult at times – he referred to having heated discussions with him - but he believed they had a functional relationship and there had never been any suggestions previously about lack of trust in him.

[36] So, Mr Nyika is essentially saying reinstatement will be successful because the performance concerns are exaggerated and not entirely his responsibility; in short they are not as bad as Wanaka Pharmacy says they are, nor are they even all his responsibility and the concerns do not justify his exclusion from work. As for the misconduct allegations Mr Nyika says they are not founded and there should be no concern about this alleged behaviour. Mr Nyika says he can be trusted and is still a good employee; Wanaka Pharmacy can have confidence in his work and that he will build effective working relationships with others including Mr Heath.

[37] Mr Nyika also submits that reinstatement is just and fair in the circumstances as none of the alleged issues which caused him to be suspended and then the issue that caused him to be dismissed were ever resolved properly and fairly. It is not fair or just that Wanaka Pharmacy can rely on unproven issues to keep him out of the workplace, effectively getting the benefit of its own failure to deal with him fairly.

[38] I understand Wanaka Pharmacy's concerns about the risk of further performance and misconduct issues with Mr Nyika if he returns to work and I accept that reinstatement should not undermine its previous decision to suspend Mr Nyika when the justification for suspension has not been tested. However, I accept that it is not fair or just for Mr Nyika if Wanaka Pharmacy is able to use those untested and unproven allegations to keep him out of work, particularly when there is a strong case for unjustified dismissal.

[39] It seems to me that the simple answer is that if Mr Nyika returns to work then any outstanding performance or misconduct issues need to be resolved by completing the process commenced in April 2020, adding in any additional concerns if this is considered appropriate. And what Wanaka Pharmacy and Mr Nyika do about him attending work and carrying out duties as a Pharmacist is a matter for them to resolve as part of recommencing that process i.e. Mr Nyika could be reinstated but then suspended on full pay again, Mr Nyika could return to work and be supervised or Mr Nyika could return to work without any restrictions.

[40] On supervision or the impact that Mr Nyika returning to work might have on other employees, I am not satisfied that this will have the significant practical impact suggested. The reinstatement may sound in financial consequences of paying additional wages but, in my view, this is not something that will necessitate changes to Wanaka Pharmacy's operations and in particular the shifts and therefore wages paid to the other pharmacists.

[41] In addition I am not satisfied that any relationship issues between Mr Nyika and Mr Heath are sufficiently serious to impinge upon a functional working environment – but note also that if it is a real concern then suspension or supervision by another employee will address that.

[42] On this basis I conclude that reinstatement could be successfully achieved and it does appear to be just and fair in the circumstances so, therefore, I accept there is an arguable case for reinstatement.

### **The balance of convenience**

[43] Assessing the balance of convenience requires a comparative analysis of the impact on each party if the interim order is granted or not. Then I must assess what happens if the interim position is reversed in any substantive determination.

[44] Relevant to this assessment is the question of whether the impact on a party is harm that can be adequately compensated by damages.

[45] I have already indicated that it is my view that any potential impact on Wanaka Pharmacy of having Mr Nyika back working can be assessed and addressed through arrangements for his actual work i.e. suspension or supervision.

[46] So, in this case the balance of convenience really turns on the financial impact for each party of granting the interim order or not:

- (a) Mr Nyika's financial position is perilous and without reinstatement he faces a very uncertain future. He has been without income for some time. He has looked for work extensively but has only managed to obtain some temporary and brief work. His options for finding alternative work in Wanaka are limited, although he did concede in the investigation meeting that there may now be possible work with another pharmacy in Wanaka.
- (b) Wanaka Pharmacy says its business has suffered from the Covid-19 lockdowns and the significant drop in tourism in Wanaka. It says its turnover and profit is reduced and reinstatement will mean it will need to pay further wages out of an already reduced turnover. However I am not persuaded that having to pay Mr Nyika would cause irreparable issues such as extensive debt leading to liquidation nor that it would even impact on Wanaka Pharmacy's ability to continue to trade at current levels.

[47] The consequent impact for each party of then reversing any interim order I make includes:

- (a) For Mr Nyika not reinstating him now but doing so subsequently or even finding that he was unjustifiably dismissed means potentially any financial impact of having no income in the interim period could be remedied by damages for lost remuneration. However, given the evidence I heard I believe the immediate financial impact on Mr Nyika of not being paid in the interim period could have an impact that damages would not fix – this includes

potential debt enforcement resulting in irreversible consequences for some of Mr Nyika assets.

(b) If I reinstate Mr Nyika now, Wanaka Pharmacy will have to pay his wages in the interim period. If I then reverse my interim order and it is owed money back from the wages paid to Mr Nyika I believe it will have less of an impact on it. The possibility of Mr Nyika having to repay any wages paid to him during an interim period of reinstatement is not likely to exceed any damages he might get for unjustified dismissal or even his unjustified disadvantage, which I have already indicated sound to me as strong possibilities. And if there is anything payable by Mr Nyika then that can be accounted for by him by some arrangement – he has after all given an undertaking as to damages so I take it he will find a means to pay any money owed.

[48] In terms of the balance of convenience, this is weighted in favour of granting interim reinstatement.

### **The overall justice**

[49] The overall justice assessment is essentially a check on the position that has been reached after my analysis of the serious question to be tried and the balance of convenience.<sup>4</sup>

[50] My starting point is that there are serious questions to be tried, with a relatively strong case for unjustified dismissal and an arguable case for permanent reinstatement, and the balance of convenience favours granting interim reinstatement, particularly given Mr Nyika's financial position.

[51] Standing back, it seems to me that the fact that the initial issues raised about Mr Nyika's performance and misconduct have never been resolved is problematic for both parties. The overall justice or fairness of this case supports reinstating Mr Nyika so these issues can be addressed – this may result in an ongoing and productive employment relationship or it may result in disciplinary sanction of some kind but if this is justified then there will be a resolution and certainty for both parties.

[52] The overall justice of this case means that interim reinstatement is appropriate.

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<sup>4</sup> *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

## **Conclusion**

[53] I am satisfied that there is a serious question to be tried in respect of the unjustified dismissal claim and reinstatement. The balance of convenience and overall justice of this case support an interim order being made and therefore Mr Nyika's application for an interim reinstatement is granted.

[54] Mr Nyika is to be reinstated to his position as a Pharmacist with Wanaka Pharmacy and paid in accordance with the rosters he would be scheduled on had he remained employed.

[55] How Mr Nyika's reinstatement is effected in terms of an actual return to work in light of the unresolved performance and misconduct issues is a matter for the parties to resolve and I believe mediation would assist them. I therefore direct them to attend urgent mediation to deal with the issues in their ongoing employment relationship.

[56] In conjunction with this, an Authority Officer will contact the representatives to arrange a Case Management Conference so that we can discuss the best way for the Authority to deal with Mr Nyika's unjustified dismissal, unjustified disadvantage and wage arrears claim.

## **Costs**

[57] Costs are reserved.

Peter van Keulen  
Member of the Employment Relations Authority