

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2015] NZERA Christchurch 88
5560004

BETWEEN PATRICK MAURICE O’SULLIVAN
Applicant

A N D SOUTHLAND YMCA EDUCATION
LIMITED
Respondent

Member of Authority: Helen Doyle

Representatives: Applicant in person
Helen Young, Counsel for the Respondent

Investigation Meeting: 30 June 2015 at Invercargill

Submissions Received: On the day of the investigation meeting

Date of Determination: 2 July 2015

DETERMINATION OF THE AUTHORITY

A The application for interim reinstatement is declined.

B Costs are reserved.

Employment relationship problem

[1] This is an application by Patrick O’Sullivan to the Authority for interim reinstatement to the position of Internal Moderator/Literacy Specialist with the Southland YMCA Education Limited (Southland YMCA).

[2] Mr O’Sullivan was employed by Southland YMCA on a permanent part-time basis from 1 July 2008 as Literacy Tutor.

[3] By way of variation to his employment agreement dated 1 July 2010 he was promoted to the position of Literacy Specialist and Internal Moderator. Mr O'Sullivan's role also had a training element. His hourly rate increased as did the hours he worked from 20 to 24 hour per week. Mr O'Sullivan would under the variation work five days a fortnight at the YMCA offices at Leven Street and one day from home on a flexible basis.

[4] In January 2015 Ivan Hodgetts was contracted by YMCA Charitable Trust (the Trust) to act as interim Chief Executive Officer after the previous Executive Officer, Isabel Murray, became the National Education Manager for National YMCA.

[5] The Trust operates in three main areas through wholly owned subsidiaries:

- (a) Southland YMCA Education Limited, which operates out of the training centre on Leven Street, Invercargill – Youth Justice and Education;
- (b) Southland YMCA Recreation Limited, which operates out of premises on Tay Street, Invercargill –Recreation Services; and
- (c) YMCA Education Limited – YMCA Early Learning Centre, which operates out of premises situated on Kevin Street, Invercargill.

[6] On 10 March 2015 Mr Hodgetts was permanently appointed to the position of Chief Executive Officer.

[7] Following an organisational review and financial considerations a proposal was announced to restructure the organisation on 27 March 2015. The proposal was embargoed until 30 March so that Mr Hodgetts could inform all staff as some, including Mr O'Sullivan, could not be present at the earlier meeting.

[8] After a period of consultation during which Mr O'Sullivan provided feedback to the proposal and attended meetings he was advised in a letter dated 24 April 2015 that his position was being disestablished and his employment terminated by way of redundancy.

[9] Mr O'Sullivan says that he was unjustifiably disadvantaged and unjustifiably dismissed. He says that the disestablishment of his position was not genuine and his role is substantively reflected in the new job description which retains literacy. He

does not take issues with the reason for the restructure but says that his redundancy was not genuine and the process leading to it was unfair.

[10] Mr O'Sullivan seeks permanent reinstatement to his former position, compensation and lost wages but also seeks interim reinstatement which this determination addresses. He has provided a signed undertaking as to damages.

[11] Southland YMCA does not accept that Mr O'Sullivan was unjustifiably disadvantaged or unjustifiably dismissed. It opposes the application for interim reinstatement.

[12] The parties have attended mediation but the issues were not resolved. The application for interim reinstatement which had been foreshadowed by Mr O'Sullivan was subsequently lodged.

[13] The application for interim reinstatement proceeded on the basis of the affidavit evidence and submissions.

[14] The Authority was assisted in this matter by the thorough and careful submissions advanced on behalf of the applicant and respondent.

The issues

[15] An injunction involves the exercise of a discretion. The answer to it is not in the application of rigid formula but there are some broad inquiries that the Authority should make. These are as follows:

- (a) Does Mr O'Sullivan have an arguable case of unjustified dismissal and, if found after a substantive investigation to have been unjustifiably dismissed, an arguable case for permanent reinstatement – 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 Mr O'Sullivan and Southland YMCA will incur as a result of the interim injunction being granted or not;
- (c) Is there an adequate alternative remedy available?

- (d) Finally, the Authority is required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

Arguable case for unjustified dismissal

[16] An arguable case was described in *X v. Y Ltd*¹ as

... a case, with some serious or arguable, but not necessarily certain, prospects of success.

[17] I shall set out the background against which the assessment for an arguable case for unjustified dismissal is to be made.

[18] Mr O'Sullivan was advised by Mr Hodgetts in a letter dated 26 March 2015 attaching the proposal dated 26 March 2015 that the main reason for the proposed changes is that the YMCA is facing a significant financial deficit. Mr O'Sullivan was advised that should the proposal be implemented his role as part-time Literacy Aid Tutor would be disestablished, and a new role created for a Literacy Aid Tutor/Student Support role (LAT/SS). It was proposed that other roles would be disestablished including the two managerial roles in Education and Youth Services.

[19] Mr Hodgetts advised Mr O'Sullivan in the letter that affected staff would be able to apply for the new roles and would be considered on an equal footing with other affected staff. Feedback was invited to the proposal.

[20] Mr O'Sullivan provided feedback by submission dated 10 April 2015 which included advice that his role had been misidentified and *my roles as Internal Moderator, Literacy Specialist and Staff Trainer do not appear in the proposal. Those roles are not merely labelling – they reflect the actual dynamics.* Mr O'Sullivan noted in his feedback that his role was senior to Literacy Aid Tutor. He also sought information around the basis of the selection, criteria for contestability and some financial information.

[21] By email dated 10 April 2015 Mr Hodgetts acknowledged receipt of the proposed feedback. He advised that he would respond to the feedback by early the following week and that the YMCA had approached the restructuring in good faith and had tried to do in an open and transparent manner. Mr Hodgetts further advised

¹ [1992] 1 ERNZ 863 at 872

that where there is a likelihood of contestability, further information would definitely be made available to the affected staff members including job descriptions and proposed selection processes. Mr O'Sullivan provided further feedback.

[22] On 14 April 2015 Mr Hodgetts responded to Mr O'Sullivan's written feedback. Within his letter he rejected the inference that the restructuring was a charade or a vindictive response to previous events. He confirmed that Mr O'Sullivan's role was Internal Moderator, Literacy Specialist and Staff Training and that was senior to a Literacy Aid Tutor and raised some issues about those matters. He said out again the rationale for the restructuring and provided some financial information as requested.

[23] Information was also provided about the number of contracted equivalent full-time students (EFTS) as requested. Mr Hodgetts set out that the Southland YMCA was contracted for 86.11 EFTS but only achieved 56.32. This resulted in a refund being required of \$307,567 to Tertiary Education Commission (TEC).

[24] Mr Hodgetts advised that given Mr O'Sullivan considered his role to not be that of Literacy Aid Tutor (LAT), it would not be appropriate to look at redeploying him to the proposed LAT/SS role, regardless of whether it includes a student support component. Mr Hodgetts did include the job description for the proposed new Youth Justice and Education Manager which it was anticipated would be publicly advertised. A further meeting was proposed for 17 April to have a face to face discussion rather than lengthy email communications. Mr Hodgetts offered a contribution to Mr O'Sullivan towards vehicle running costs as he lived some distance from Invercargill.

[25] Mr O'Sullivan provided a written response to an issue that was concurrent with the restructuring which was the undertaking of his appraisal. In a letter dated 16 April 2015. Mr O'Sullivan wanted to meet for a performance appraisal. In a further letter to Mr Hodgetts of the same date, Mr O'Sullivan comprehensively responded to Mr Hodgetts' letter of 14 April 2015.

[26] Further feedback was provided by Mr O'Sullivan to Mr Hodgetts on 19 April 2015.

[27] Mr Hodgetts advised Mr O'Sullivan that he was intending to announce the restructuring to all education staff on Friday 24 April at 3pm. He advised that he

would like to meet with Mr O'Sullivan that day at 2.30pm so that he could advise him of the decisions taken.

[28] Following the meeting, Mr O'Sullivan provided further responses and set out areas of concern. It was then confirmed as set out above in the letter dated that Mr O'Sullivan's role had been disestablished and that a tutor, Kathy Bethune, had been offered redeployment into the new LAT/SS position. Mr O'Sullivan had not been supplied with a copy of the job description for that position.

[29] By email dated 24 April 2015 Mr O'Sullivan advised Mr Hodgetts that his contractual notice period was six weeks and not one month as set out in the 24 April 2015 letter and that he was raising a personal grievance for unjustified dismissal.

[30] On 25 April 2015 Mr O'Sullivan wrote to Mr Hodgetts raising further concerns. He asked that he be allowed to exit the organisation with dignity and that he would like to work out his notice to complete assignments *already in train*.

[31] A personal grievance was formally raised for unjustified disadvantage and unjustified dismissal on 27 April 2015.

[32] By email dated 27 April 2015 Mr Hodgetts advised Mr O'Sullivan he only required him to work for one further day (28 April) and that he would then be paid out the notice period provided in the employment agreement.

[33] Mr Hodgetts in the proposal to restructure considered Mr O'Sullivan's role as Literacy Aid Tutor. He states in his affidavit evidence at [42] that he understood that Mr O'Sullivan was a resource to the tutors and had very little direct contact with students. Mr Hodgetts was working off the description of the role before the variation agreement.

[34] Mr O'Sullivan in his feedback explained the three components of his role and the specialist nature of the role. Mr Hodgetts in his affidavit evidence said that Southland YMCA did not require the services of an in house literacy specialist resource for the tutors, having little or minimal direct student contact. He said that there was a need to develop the tutorial staff to become competent to deliver the compulsory component of literacy and numeracy and more generally assist with literacy development.

[35] In relation to the internal Moderator component he deposes to this function being covered under a revised moderation system undertaken by staff and coordinated by another tutor, Stacy Hughes, and further that there is no need for a dedicated in house staff trainer. Staff training would be overseen by the new Youth Justice and Education Manager with support from National YMCA.

[36] It is arguable the change in understanding by Mr Hodgetts of Mr O'Sullivan's role had implications for him and further consultation was required. The basis for his selection in the pool other than as tutor and, whether or not he should be considered for redeployment to the new LAT/SS role changed considerably. On the untested affidavit evidence it appeared once clarified, Mr O'Sullivan's role was one that Southland YMCA concluded it did not require. Originally it was that only one literacy role was required. Mr O'Sullivan stated in his affidavit evidence that he was the only literacy person employed at that time as the other person Kristy Scott had resigned and she had only undertaken some limited literacy work under his supervision. Her role as a tutor he deposed was more student support/pastoral care.

[37] It is arguable that there was insufficient information to Mr O'Sullivan about the basis for his selection in the pool and what would happen with the training and moderation components of his role after his role was clarified.

[38] Mr O'Sullivan says that he should have been allowed to contest the new role of LAT/SS rather than such contestability being ruled out after his role was clarified. Ms Young places weight in her submissions on the fact that Mr O'Sullivan was *at pains to point out* throughout the process that he was not a tutor. I accept the references she set out in her submission during the consultative phase do support that submission and they may have resulted in the decision made to exclude him from contesting the new role.

[39] I find there is however an arguable case that Mr O'Sullivan should have been permitted to contest the new position and/or at least been provided with the job description and consulted with about that before a decision was made. There is an arguable case whether the new position is sufficiently different from Mr O'Sullivan's role.

[40] The new role is a 1.0FTE and is both a student support and literacy aid position. Mr O'Sullivan does not suggest in his affidavit evidence that Ms Bethune is

not qualified for the student support aspect of the new role. Indeed he deposes that she is. His argument was for two discrete roles. It is not strongly arguable that Southland YMCA had to accept Mr O'Sullivan's feedback that there should be two separate roles at 0.5 FTE roles.

[41] One of Mr O'Sullivan's arguments is that his role has not in fact been disestablished in accordance with his employment agreement which defines redundancy as *being superfluous to the employer's requirement* as the new position LAT/SS reflects the same responsibility as the old one.

[42] The argument about contestability and redeployment appears stronger in my view at this stage on the untested affidavit evidence than an argument that Mr O'Sullivan's position was not superfluous to his employer's requirements. There is though I find a strong argument that without being provided with the job description Mr O'Sullivan could not give his views about that matter in a way anticipated by good faith obligations.

[43] It is not as strongly arguable on the untested affidavit evidence at this stage that Mr O'Sullivan was entitled to all the financial information he requested. I am further not satisfied that issues about the appraisal are strongly arguable.

[44] There is an arguable case about the fairness of Mr O'Sullivan not being able to work through his notice period.

[45] I find in conclusion that Mr O'Sullivan does have an arguable case of unjustified dismissal with some elements more strongly arguable than others.

Arguable case for permanent reinstatement

[46] The Authority may provide for reinstatement if it is practicable and reasonable to do so – s 125 of the Employment Relations Act (the Act).

[47] At this stage that involves an assessment as to the likelihood of permanent reinstatement.

[48] Ms Young submits that Mr O'Sullivan's role does not exist with the functions of it either re-allocated to other staff or surplus to requirements. Mr O'Sullivan says his role continues and that Southland YMCA should have assessed the merits of

splitting the LAT/student support role in two. The role is a 1.0 role. That would obviously have an impact on the person currently in the role.

[49] Ms Young also refers to the *slurs* made on Mr Hodgetts character, honesty and integrity which impacts on the reasonableness and practicability of reinstatement. Mr O'Sullivan says that the exchanges were simply part of a robust exchange with elements of frustration. Mr O'Sullivan provided a large amount of written feedback in which he was robust and challenging. There is nothing wrong with robust exchanges although at times Mr Hodgetts felt from his untested affidavit evidence that Mr O'Sullivan questioned his honesty, integrity and competence. Objectively assessed some of the correspondence does just that.

[50] These are matters that will need to be addressed at a substantive investigation. There is a risk for Mr O'Sullivan in this case that while he may establish a personal grievance he may not obtain permanent reinstatement.

[51] Mr O'Sullivan in conclusion has an arguable but not strongly arguable case for permanent reinstatement.

Adequacy of other remedies

[52] I accept that Mr O'Sullivan wants to be reinstated. He deposes in his affidavit to his age and other factors reducing the likelihood of other employment in the literacy field. I do not find this to be the sort of case where interim reinstatement should be provided because a failure to do so may undermine the prospect of permanent reinstatement. If Mr O'Sullivan established a grievance then there was no suggestion that Southland YMCA would not be able to fully compensate him.

Balance of Convenience

[53] Mr O'Sullivan refers in his affidavit evidence to some financial hardship and I accept he will suffer in that respect. He submits that there are no performance issues. He will not report directly to Mr Hodgetts and there are no difficulties with his other relationships within Southland YMCA.

[54] Regrettably because of matter currently set down I have advised the parties that I may not be able to deal with the substantive investigation until October 2015.

[55] There is a difficulty that there is no position for Mr O’Sullivan to return to. He submits to get over that difficulty there would be a job share. That would displace another employee for 0.5 of her role. He would agree alternatively to be placed back on the pay role on garden leave until the matter can be dealt with on a substantive basis.

[56] Ms Young refers to some potential detriment if Mr O’Sullivan was reinstated for undermining of the tutor-driven moderation and Ms Bethune’s transition into the new LAT/SS role. This is because Mr O’Sullivan has referred in his affidavit evidence and correspondence to needing to ensure the safe transition of his role to a competent person. This suggests she submits that he cannot trust Mr Hodgetts.

[57] I have in this case placed more weight on the difficulty in reinstating Mr O’Sullivan to a role without displacing a full time employee or requiring Southland YMCA to pay for a role it has decided it cannot justify for financial reasons. That leaves garden leave which is not satisfactory because it requires Southland YMCA to pay Mr O’Sullivan without the benefit of having him work.

[58] Overall I find the balance of convenience favours Southland YMCA.

Overall Justice

[59] I now stand back and consider where the overall justice lies. I have found an arguable case for unjustified dismissal with some elements stronger than others particularly about the LAT/SS role. Even if a grievance is established then it may not be reasonable or practicable to reinstate Mr O’Sullivan. The arguable case for permanent reinstatement is not so strong that Mr O’Sullivan should be reinstated in the interim.

[60] I find that the overall justification of the case requires that the interim reinstatement application be declined.

Costs

[61] I reserve the issues of costs until after the substantive investigation and final determination.

Further steps

[62] An Authority Officer will now contact the parties and arrange a telephone conference to make arrangements for a substantive investigation meeting and discuss whether further mediation would be of assistance.

Helen Doyle
Member of the Employment Relations Authority