

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 159
5551755

BETWEEN

PAULINE PILE
Applicant

AND

RICHMOND ROAD SCHOOL
BOARD OF TRUSTEES
Respondent

Member of Authority: Robin Arthur

Representatives: Douglas Mitchell, Counsel for the Applicant
Christine Chilwell, Counsel for the Respondent

Investigation Meeting: 15 May 2015

Determination: 5 June 2015

DETERMINATION OF THE AUTHORITY

- A. The application of Pauline Pile for interim reinstatement is granted. Under s127 of the Employment Relations Act 2000, the Richmond Road School Board of Trustees must reinstate Ms Pile, on an interim basis and on the further conditions stated at paragraph [69] of this determination, to her position as a teacher pending the Authority's investigation and determination of her personal grievance.**
- B. The order for interim reinstatement is made in reliance on an undertaking as to damages given by Ms Pile.**
- C. Costs are reserved.**

Employment relationship problem

[1] Richmond Road School Board of Trustees (the Board) dismissed Pauline Pile from her role as a teacher in the school's Maori immersion unit, Te Whanau Whariki (TWW), on 16 March 2015.

[2] Ms Pile had taught at the school since May 2011. She was awarded a TeachNZ scholarship for the 2014 school year which provided 32 weeks' paid study leave. To enable her to receive full pay during the 2014 year she had made an arrangement in late 2013 with the school's principal at the time, Stephanie Anich, to teach in TWW each Monday during the school year. Over the course of a whole school year those Mondays would then, more or less, amount to the equivalent of the further eight weeks work needed for Ms Pile to get full pay for the year. Having Ms Pile teach on Mondays enabled TWW to 'release' one of its junior teachers for professional development activities.

[3] Late in 2014 Ms Pile was subject to disciplinary proceedings over Board concerns that she was absent from school for three Mondays during November because she had gone on a family group holiday to Malaysia. Those proceedings ended in December 2014 with the Board's disciplinary committee deciding to give her a warning. The committee had decided to impose a written warning but, in response to a submission from Ms Pile's representative, a verbal warning was given instead.

[4] In January 2015 the Board then began a further disciplinary process over two concerns about Ms Pile's conduct. One concern was that she may have misled the Board in her earlier explanations about leave arrangements. Ms Pile had said Ms Anich approved the leave but the Board believed further information obtained from Ms Anich showed Ms Pile's explanation was not correct.

[5] Its other concern involved an allegation that Ms Pile had "*perpetrated an attack*" on the school's present principal, Jonathan Ramsay, "*that was offensive and undermining of his authority*". Mr Ramsay had taken up the role of principal in early 2014. The allegation arose from a comment Ms Pile made on her Facebook page late on the evening of 4 December 2014 and which the Board considered referred to Mr Ramsay. The Board's impression was, in part, based on what appeared to it to be a reference by first name to Mr Ramsay's partner in a comment posted by a cousin of

Ms Pile (among comments posted by others about what Ms Pile had said on her Facebook page).

[6] The Board set out those two concerns in a letter to Ms Pile on 16 January 2015 and met with her and her representative on 10 February to hear her responses. By letter of 3 March the Board advised Ms Pile that it had not accepted her explanations and considered both matters amounted to serious misconduct by her. It met with her again on 16 March to hear what she had to say about those conclusions and what disciplinary outcome should be imposed. The meeting ended with Ms Pile being dismissed, a decision confirmed by letter the next day. The letter also referred to a concern Ms Pile had raised about the effect that the mandatory report of her dismissal to the Teachers Council might have on her professional registration as a teacher.¹ The Board's letter included this statement:

We have no criticism of your pedagogy or your ability to teach. At the heart of the concerns is a belief that you have been unable or unwilling to accept the leadership of the school. That is not to say that at another school your relationship with your employer would be different.

[7] Ms Pile, through her representative, raised a personal grievance with the Board and then lodged an application in the Authority. Her grievance claimed she was unjustifiably disadvantaged by the disciplinary action over her leave (that led to the Board's decision to issue a verbal warning on 5 December 2014) and she was unjustifiably dismissed on 16 March 2015. She sought reinstatement, lost wages and compensation for distress.

[8] Ms Pile also sought interim reinstatement until the Authority investigated and determined her personal grievance application. The Authority has issued a Notice for its investigation meeting to be held on 7, 8 and 9 September 2015. Therefore Ms Pile's application for interim reinstatement concerned the period from the date of this determination until early September (some 13 weeks) and from then for however long it might take the Authority to issue its written determination on her substantive claim (possibly a further four to eight weeks, depending on the demands of other Authority matters). As required by the Act Ms Pile provided a signed undertaking that, if her interim reinstatement application were granted, she would abide by any order the

¹ Section 139AK of the Education Act 1989.

Authority might make about damages sustained by her employer as a result of her interim reinstatement.

[9] The Board's statement in reply to Ms Pile's claim said its actions of issuing her with a verbal warning and dismissing her met the statutory test of justification for what a fair and reasonable employer could have done in all the circumstances at the time.² It also opposed Ms Pile's interim reinstatement.

[10] The parties were promptly referred to mediation but reached no resolution. Ms Pile's request for an interim reinstatement order was determined after considering written and oral submissions from counsel about relevant legal principles and the evidence given in affidavits from Ms Pile (sworn on 14 April and 11 May 2015); Christopher Lowman, a resource teacher (sworn 11 May 2015); Monica Pile-Marsters, Ms Pile's sister (sworn 11 May 2015); Cindy Pile-Wetere, who is presently on study leave from a role as a TWW teacher and who is also Ms Pile's sister (sworn 11 May 2015); and Board chairperson Akenese Loheni (sworn on 5 May 2015). While the Authority's determination on an interim reinstatement application relies on untested affidavit evidence, some common sense assessment of unanswered or disputed assertions in those sworn statements may be made in considering the respective justices of the situation in the interim period.³

[11] Determination of whether to order interim reinstatement is made by applying the law relating to interim injunctions having regard to the object of the Employment Relations Act 2000 (the Act).⁴ The object refers to building productive employment relationships through the promotion of good faith behaviour.⁵ The necessary analysis has three steps.

[12] Firstly, Ms Pile must have established both that she had an arguable case that her dismissal was unjustified and that she had an arguable case that – if the Authority did find she was unjustifiably dismissed – she would then be reinstated on an ongoing basis rather than receive only money remedies.

² Section 103A of the Employment Relations Act 2000 (the Act).

³ *Wellington Free Ambulance Service v Adams* [2010] NZEmpC 59 at [17]-[18].

⁴ Section 127(4) of the Act.

⁵ Section 127(4) of the Act.

[13] Secondly, the Authority must have assessed how best to regulate the positions of the parties until that subsequent investigation and determination of the substantive issues was completed. That assessment is referred to as the balance of convenience. Factors for assessment included whether effective remedies (other than interim reinstatement) were available to Ms Pile, and possible effects on third parties (in this case including children and other staff at the school).

[14] Thirdly, the Authority must take an overall or global view of the justice of the case and decide what should be done to attain that in the interim period.

[15] An order for interim reinstatement may be subject to any conditions the Authority thinks fit.⁶

Arguable case?

[16] The test for an arguable case concerns whether the applicant has some tenable (but not necessarily certain) prospect of success. The relatively low threshold is usually met where the applicant disputes the purported justification for the employer's actions because, in a personal grievance application, the statutory onus is on the employer to justify what it did and how it did so.

[17] Ms Pile had to establish an arguable case that the Board's actions resulting in the verbal warning were unjustified, that its subsequent inquiry and decision to dismiss her was unjustified and that it would be reasonable and practicable to reinstate her employment rather than solely provide monetary compensation for her grievance. I have accepted her application for interim reinstatement crossed the threshold of arguability for each element – but to different degrees of strength.

Weakly arguable case of unjustified disadvantage

[18] Ms Pile had a weak argument about the disadvantage said to have been suffered by her as a result the first disciplinary inquiry (about her absence from expected teaching days on three Mondays in November 2014) and the disciplinary sanction of a verbal warning that was imposed at the end of that inquiry.

⁶ Section 127(5).

[19] Her explanation for her absence on the three Mondays in November was that she had covered those days by working on three Tuesdays (in addition to her usual Mondays) during October. She said the arrangement to do so was agreed between her and her sister and “*immediate senior*” Cindy Wetere. Ms Wetere was the ropu leader or head of TWW at the time.

[20] Ms Pile also denied she had sought sick leave for one of the November Mondays while she was absent on holiday in Malaysia. She had sent the deputy principal a text on 23 November advising that she had fallen ill during the last two days of her trip but Ms Pile denied the reason for sending that text was “*to prompt the school to make sick leave arrangements*”. Ms Pile said she already had cover arranged for 24 November (approved by Ms Wetere) so did not need any such arrangement. Rather she said the text message was sent “*out of courtesy*” in case her condition deteriorated in the following week.

[21] However the Board’s decision on the issue, at the time of deciding to give Ms Pile a warning, rested on the fact that she had not followed its policy which required prior approval from the Board for leave. Although Ms Pile said neither she nor Ms Wetere were notified of what she called new leave processes, there was some evidence from items in Board Minutes that other teachers from TWW had previously followed the policy by seeking Board approval for leave. Ms Loheni deposed that the leave policy had been in place in its present form since 2003.

[22] Although, in light of subsequent events, Ms Pile now seeks to re-examine the justifiability of the Board’s decision to give her a warning in December 2014, the wording of s103A of the Act requires an assessment of the justification to be made by considering the circumstances at the time. Importantly she accepted the warning at the time it was given because the Board, on the submission of her representative, had agreed to substitute a verbal warning in place of its preliminary view that a written warning was warranted.

[23] There were however arguable points not capable of resolution at the interim stage and requiring further evidence in the Authority’s substantive investigation. It was not clear the Board had made any inquiry to check Ms Pile’s explanation that she had worked extra days in October to make up for her planned absence in November. There was also a wider issue – not solely a disciplinary matter for Ms Pile – of

whether an apparent conflict of interest was properly handled if Ms Wetere did, in fact, approve leave for her sister, Ms Pile, to go on a private whanau holiday during November without ‘sign off’ by anyone else in the school hierarchy.

Strongly arguable case of unjustified dismissal

[24] There was a more strongly arguable case that Ms Pile was unjustifiably dismissed by the Board.

[25] Ms Loheni’s affidavit and the Board’s submissions disclosed that its disciplinary investigation and dismissal of Ms Pile had occurred in the context of what the Board considered were “*dysfunctional relationships*” within the school between, on one side, TWW staff and whanau and, on the other, the principal and the trustees. Staff and parents of some children enrolled in TWW were said to have supported a different candidate for the role of school principal to which Mr Ramsay was, instead, appointed in late November 2013. He was then allegedly unable to enter the school grounds until the first day of the 2014 school year because teachers in TWW had cancelled an earlier powhiri for him. During 2014 some TWW staff and parents criticised Mr Ramsay over changes made to the TWW budget. They also held a rally at the school’s opening ceremony for 2015 protesting about one TWW teacher’s employment agreement not being renewed, for which they blamed Mr Ramsay and the Board. Ms Loheni deposed that Ms Pile’s sister, Ms Wetere, and their father, Hiri Pile, were vocal members of the TWW whanau group. She also described Ms Pile as “*a key ring leader*” in rallying opposition to Mr Ramsay and the Board.

[26] At the disciplinary meeting on 15 December 2014 – at which Ms Pile was told she would get a verbal warning – the Board representatives raised a further issue that they accepted could not be dealt with there and then. It concerned this Facebook posting made by Ms Pile on 5 December:

Grrrrr some ppl just need to get lost, no realisation of how they are affecting others. Just worried about their own kaupapa with no mind whatsoever about others! Really sux and sh@s me to no end. Imagine if that movie Purge was real. Pretty sure I know who my dad and sista would Purge! lol but not lol.

[27] Her posting drew 13 ‘likes’ and 10 comments from people that included some members of her family and staff or parents involved with TWW.

[28] One of those comments, from Ms Pile's cousin Marina Wetere, read: "*Purge purge purge!!!!*". It was followed by a comment from a nephew of Ms Pile – named Tashaun Pile – reading "*Umm what's happening??*". Marina Wetere replied to his question with this note: "*I don't know Shawn but I say purge!!!*"

[29] Ms Loheni said the film – *The Purge* – referred to by Ms Pile was a science fiction horror movie about a futuristic society where one night a year people were allowed to 'purge' their community by committing any crime, including murder, without being punished. She said the Board interpreted the use of the name 'Shawn' in the comments made by others about Ms Pile's posting as referring to Mr Ramsay's partner who is called Shaun.

[30] After the 15 December meeting Ms Loheni told Mr Ramsay about Ms Pile's responses on the leave issue and the disciplinary outcome. Mr Ramsay then made contact with Ms Anich – whom the disciplinary committee had not contacted because its members understood she was overseas at the time – and asked her what approval she had given to Ms Pile for leave. In an email reply Ms Anich wrote that she could not recall any specific conversation but said that if the leave was for later in 2014, "*it would have been obvious to us both that [Ms Pile] would need to go through the new principal*".

[31] By letter on 16 January 2015 the Board initiated the further disciplinary procedure that eventually led to its decision to dismiss Ms Pile. The letter referred to "*Facebook concerns*" having been raised with her on 15 December. It said the "*overarching concern was the trust and confidence that must reside in the employment relationship*" and the Board saw her Facebook comments as part of a continuing and unacceptable attacks on the principal. It said the Board's disciplinary committee had concluded her comments referred to Mr Ramsay because they were posted as 11.55pm on the night that a whanau hui was held off-site to discuss concerns about the principal and the Board, the reference to 'my dad and sista' was significant because Ms Pile's father was "*a vocal critic at hui and has criticised the way in which he perceives your sister [Cindy Wetere] has been treated by the principal*", and it was significant that three other TWW staff had 'liked' her posting and two parents had added comments.

[32] The letter also referred to the email from Ms Anich as having confirmed “*that she gave no permission for Ms Pile to take leave*” and said the committee “*can only conclude that you have been dishonest with us*”.

[33] In the meeting held to discuss the allegations about the leave issue and the Facebook posting Ms Pile said she may have misinterpreted what Ms Anich had told her and the Facebook comments by her and her friends were about a family matter and not about Mr Ramsay. She said her comments referred to something that the husband of one of her sisters had done.

[34] The Board’s disciplinary committee did not accept her explanations. In its decision that Ms Pile had committed serious misconduct and should be dismissed, the committee said she had “*knowingly neglected*” her professional duty to advise the Board about her leave, used language in referring to *The Purge* movie that conflicted with “*core values*” of the school and the code of ethics for teachers, and rejected her explanation that the Facebook comments did not refer to the Principal and his partner Shaun.

[35] The Board arguably had to meet a higher standard of fair inquiry and decision-making than other employers due to the potential effect of dismissal on a teacher’s registration (and the consequent ability to work again in her or his area of training and experience) which the Employment Court has described as “*double jeopardy*” to a teacher’s livelihood.⁷ On that standard there was a strongly arguable case that the Board’s decision was unjustified due to flawed or unreasonable extrapolations made in its interpretation of information available to it.

[36] At the heart of those flaws was the view that the Board reached about the use of the name Shawn in a comment by Ms Pile’s cousin. Ms Loheni deposed that she, other Board members and Mr Ramsay believed Ms Pile’s movie reference was intended to be about purging him. This view was reinforced by Ms Pile’s cousin mentioning the name Shawn in her comment. However Ms Pile’s explanation is that her cousin was responding to the immediate prior comment made by her nephew, named Tashaun and called ‘Shawn’ or ‘Shawny’ by family members.

⁷ *Lewis v Howick College Board of Trustees* [2010] NZEmpC 4 at [6].

[37] Also strongly arguable was the unreasonableness of the extent to which Ms Pile appeared, on Ms Loheni's affidavit evidence, to have been held accountable for comments or actions of Ms Pile's sister Cindy Wetere, their father Hiri Pile, and some parents involved with TWW. Ms Pile was said to have been a 'ring leader' in opposition to Mr Ramsay but no negative comments made by her about him were identified apart from her criticism in the 16 March disciplinary meeting that her livelihood was "*in jeopardy, purely because of a highly sensitive principal*".

[38] The following evidence also supported the argument that 'guilt by association' was a factor that unfairly influenced the Board's assessment of Ms Pile. Ms Loheni's affidavit referred to negative comments made about Mr Ramsay at a TWW whanau hui held on 27 November 2014. Minutes of the hui recorded various comments made by attendees about Mr Ramsay, including one saying that "*whanau should ... tell the board to sack the tumuaki*", another that he "*doesn't like anyone questioning his authority and must always have control*" and another that he was "*not the right person to lead the school*". Three other TWW kaiako and Hiri Pile were listed among the 27 attendees but not Ms Pile. Ms Pile did however, according to Ms Loheni, get a copy of those Minutes sent to her by email and she did attend a further whanau hui on 4 December at which critical comments were said to have been made about Mr Ramsay. There was no evidence, at this stage, of Ms Pile having made any of those comments herself. In her reply affidavit Ms Pile deposed that she had no say in what her sister and her father said that at those events and that at the 4 December hui she "*did not say a thing or contribute in any way, other than by being present*".

Sufficiently arguable case for reinstatement

[39] In considering the arguability of reinstatement (if Ms Pile's dismissal were found to have been unjustifiably carried out or decided by the Board), the following longstanding guidance about the exercise of the discretion to award that remedy – given by the Employment Court in *Ashton v Shoreline Hotel* – is useful:⁸

The important criterion is that employees are entitled not to be deprived of their employment unjustifiably and when they have been they ought ordinarily to be put back, if that is their wish. That would be a proper exercise of a discretion conferred on the Tribunal for the benefit of employees unless there are features in the case or indications pointing in a contrary direction that outweigh the employee's right to have his or her job back. Factors that produce that result

⁸ [1994] 1 ERNZ 421 at 436.

ought to be substantial reasons and not mere assertions by an employer that it does not want to be forced to employ the employee whom, it will be recalled, it should never have dismissed in the first place. Such an assertion, if anything, aggravates the injury and renders reinstatement an even more compelling imperative. That is so notwithstanding the alteration in emphasis on reinstatement in the current statute. While each case must be determined on its own facts, the statistics given above indicate that the Tribunal is not mindful to an adequate degree that it is called upon to be the impartial referee in a playing field dominated by the goal of job protection. That goal is not attained by substituting a money judgment for the job. Unless the employee has done something to merit forfeiting his or her employment, or unless reinstatement is for other good reasons unjust, to award routinely compensation for the job loss instead of reinstating is to create a system for licensing unjustifiable dismissals.

[40] That guidance was given at a time when the then-applicable legislation – the Employment Contracts Act 1991 – provided reinstatement as a remedy to settle a personal grievance of unjustified dismissal but did not accord that remedy any primacy over money remedies. That is, since 1 April 2012, again the statutory position under the present Act.

[41] While reinstatement has no more or less prominence than any other statutory remedy, as observed by the Court in *Angus v Ports of Auckland (No 2)*, it may still be “*the most significant remedy claimed because of its particular importance to the grievant*” in a particular case and whether an order for reinstatement should be made needed to be examined on a case by case basis.⁹

[42] Having regard to the Court’s guidance and the statutory criteria, if Ms Pile were found to be unjustifiably dismissed, she should (having sought it) be awarded reinstatement unless it was found – on the balance of probabilities – to be not practicable and not reasonable to do so or because the remedy should be denied due to factors considered under the s 124 inquiry about contributing behaviour by the employee.

[43] Assessing the reasonableness of reinstatement requires “*a broad inquiry into the equities of the parties’ cases*” and into the prospective effects of an order for reinstatement not only on Ms Pile and the Board but also any relevant third parties such as, in this case, the tamariki enrolled in TWW and other kaiako.¹⁰

⁹ *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160 at [61].

¹⁰ *Angus v Ports of Auckland Limited* [2011] NZEmpC 160 at [65] and [68].

[44] Practicability concerns the prospects for successfully re-establishing the employment relationship. It involves the question of whether Ms Pile could be a sufficiently harmonious and effective member of the school's staff if she were ultimately reinstated to her former position (or a similarly advantageous one) as a teacher.¹¹ Practicability, for this purpose, has been described in the following way:¹²

[P]racticability is not the same as possibility. ... Whether the [employer] has established on the balance of probabilities that it would not be practicable to reinstate [the dismissed employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.

[45] The Board submitted that even if the Authority eventually found Ms Pile's dismissal was unjustified, it was not arguable that reinstatement to her position as a teacher in TWW was practicable and reasonable. For that proposition it relied on her allegedly "*important role in rallying opposition to Mr Ramsay and the board*", the likelihood Mr Ramsay would be further undermined by Ms Pile's reinstatement, and the financial burden paying Ms Pile's salary would create for the school.

[46] TWW was said to have been overstaffed by around 0.8 of a full-time position at the time of her dismissal. As a result of what Ms Loheni called "*the politics*" around TWW, enrolments had fallen with a consequent effect on its funding entitlements. According to the Board, reinstatement of Ms Pile would create further debt for the school (if she was paid from the Ministry payroll) or reduce money that would otherwise be spent on meeting curriculum needs for the children (if she was paid from the school's operations grant). Ms Loheni deposed that continued employment of Ms Pile would then require a school-wide review of staffing, with the likely prospect of one staffing position being dis-established.

[47] Other likely impacts were said to be further disruption to the relationships between school managers, trustees, staff – that according to Ms Loheni had improved

¹¹ *Northern Hotel IUOW v Rotorua RSA Inc* (1989) ERNZ Sel Cas 535, 540 (LC).

¹² *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 243 at 286 (confirmed by the Court of Appeal in [1994] 2 ERNZ 414 at 416).

since Ms Pile’s dismissal – and the prospect that the acting TWW leader, Mereana Anderson, would leave if Ms Pile was reinstated. There was also said to be a risk of upsetting the now “*settled*” atmosphere for tamariki in TWW.

[48] A real risk of reversion to dysfunctional relationships is a factor to weigh in considering the practicability of reinstatement.¹³ The Board submitted this factor applied to Ms Pile’s prospects for permanent reinstatement, relying on the examples found in two Employment Court cases where a teacher and a principal, each found to have been unjustifiably dismissed, were not reinstated due to antipathy between them and people involved in school management or governance.¹⁴ In both those cases the employees were (it is fair to say) found to have been protagonists or at least active participants in what had happened to sour the relationships between them and others. In the present case that would need to be the subject of more detailed evidence about whether it was, in fact, Ms Pile’s own working relationships with Mr Ramsay and other staff and trustees at the school that had become unproductive or whether the dysfunctional relationships that had supposedly developed at the school involved others in TWW’s staff and whanau rather than her.

[49] On that basis I have concluded there was a sufficiently arguable case that Ms Pile’s eventual permanent reinstatement was possibly practicable and reasonable. She had acknowledged teaching skills and experience (with the Board noting in its disciplinary correspondence to her that it had no criticism of her ability to teach). As she submitted, the Board’s position expressed through Ms Loheni’s affidavit was speculative, lacked supporting evidence from Mr Ramsay and Ms Anderson, and included a number of allegations relying solely on hearsay. There was also some real prospect that the evidence, when tested through the Authority’s full investigation, would show Ms Pile was not involved in opposition to Mr Ramsay and would cast doubt on the funding and staffing issues.

Balance of convenience

[50] An assessment of the balance of convenience considers the respective injustices – or relative hardships – to the parties (and relevant third parties) for the

¹³ *Edwards v Board of Trustees of Bay of Islands College* [2015] NZEmpC 6 at [288].

¹⁴ *Edwards*, above; and *Lewis v Howick College Board of Trustees* [2010] NZ EmpC 4 and [2010] NZCA 320.

period until the merits of the case can be fully investigated (with the evidence of witnesses properly tested through questioning) and determined by the Authority.¹⁵

[51] The Board submitted those potential injustices or hardships were relatively greater for it due to various factors that I have summarised as follows:

- (i) Financial pressure and a possible redundancy from having to fund Ms Pile's position; and
- (ii) Disruption to the "*settled*" atmosphere of TWW classes that had been 'restructured' since Ms Pile's dismissal; and
- (iii) Disruption to improving relationships between TWW staff and the principal and the board; and
- (iv) Further demands might be made of the school by "*aggressive*" and "*vocal*" parents in the TWW whanau; and
- (v) Concern by trustees that the pressure on Mr Ramsay could become "*unbearable*"; and
- (vi) A real prospect Ms Anderson – whom the Board and Mr Ramsay considered was the only person with the appropriate experience to lead TWW – would resign.

[52] From Ms Pile's submissions on the balance of convenience, the following were relevant:

- (i) She had provided an undertaking as to damages; and
- (ii) The school and tamariki would benefit from her specialised bi-lingual teaching, about which there were no complaints; and
- (iii) She had no guarantee of finding full-time work while waiting for the Authority investigation in September, with a negative effect on her income and her exercise of her professional skills; and
- (iv) Her concern about the potential effect on her registration as a result of the Board's mandatory report of her dismissal to the Teachers' Council.

[53] Without minimising the effort that might be required, the Board appeared better placed to carry and manage the relative burden of inconvenience in the period in which Ms Pile might be reinstated on an interim basis. That period, effectively, is

¹⁵ *Angus v Ports of Auckland Limited* [2011] NZEmpC 125 at [56].

for the third term of the 2015 school year and, probably, at least part of the fourth term.

[54] The financial pressure anticipated by the Board was no different than the status quo ante (the situation prior to the dismissal) and the school can be assumed to have means to manage debt over the longer term, if necessary, or to adjust other aspects within its budget to cope with the situation in the short term.

[55] Ms Pile was also, presumably, well known to tamariki in TWW (from her previous three years teaching there) so concerns about her return being ‘unsettling’ appeared overstated. There are many reasons in a school for term by term changes in teaching arrangements – including where teachers have been absent on secondment or professional development courses – and there was nothing to suggest TWW tamariki would find Ms Pile’s return or presence any different than when she was teaching on Mondays only in 2014.

[56] Other predictions about the effects on other teachers and Mr Ramsay were, in my assessment, overly emotive or speculative (including Ms Loheni’s hearsay evidence that Ms Anderson would leave if Ms Pile was reinstated). School managers and teachers – including Mr Ramsay, Ms Pile and other kaiako – are, as the case law reminds us, registered professionals and could be expected to act in a professional and civilised manner in carrying out their duties and working with one another on an interim and good faith basis, if that was what required to comply with a lawful direction of the Authority.

[57] However there were also some factors that weighed more heavily in favour of Ms Pile bearing the burden of inconvenience meanwhile.

[58] Ms Pile’s affidavit evidence did not establish that she would be without any income or means of support if she was not reinstated on an interim basis. There was a reference in notes she used at the 16 March meeting to having only her husband’s income to rely on if she was dismissed. However her evidence also referred to the prospect of work in a temporary position at a nearby school that offered bilingual education. Ms Pile’s reo knowledge and maths teaching expertise, in both mainstream and Maori medium education, meant it could also be assumed she was

well-placed to offset some of her lost earnings during the interim period by picking up relief teaching assignments elsewhere across Auckland.

[59] Ms Pile submitted that damages (that she might ultimately receive by way of an award for lost wages and distress compensation) were not an adequate alternative remedy to interim reinstatement because such an award would not address the effects on her career and reputation. However that submission relied on the notion that her dismissal would likely result in the removal of her registration. By implication it also suggested that her prospects for retaining her registration would be improved by interim reinstatement. Neither view was correct. The issue of whether her alleged actions were below the required professional standards to retain her registration was ultimately a matter for the Teachers Council but it could fairly be assumed that the Council's processes for assessing and investigating such matters would:

- (i) not occur for some time; and
- (ii) given even the Board's view that what had happened was a relationship issue in the particular school rather than one of competence, was unlikely to result in Ms Pile's registration being removed; and
- (iii) be carried out whether or not she was employed at the time because the concerns related to the maintenance of professional standards, not whether she was working or not.

[60] In short, interim reinstatement would not reverse or remove a possible inquiry by the Teachers Council and, ultimately, was not a relevant factor.

[61] Weighing the various relevant factors I concluded – but only very narrowly – that the balance of convenience favoured Ms Pile bearing the relative inconvenience or hardship during the interim period. In the particular circumstances and on the untested evidence, the alleged school funding and relationship issues (of concern to the Board) weighed more heavily against interim reinstatement than the prospect of some financial inconvenience to Ms Ward (of reduced prospective earnings during the four or so months until the likely issue of the Authority's full determination after its September investigation).

Overall justice

[62] However, standing back from the detail of the affidavits and the parties' submissions, I concluded the overall justice of the case, for the interim period, lay with Ms Pile and favoured her reinstatement for that time.

[63] In reaching that conclusion I considered the respective strengths and weaknesses of the parties' cases on the substantive issues (as best as that could be done at this early stage).

[64] The strength of the Board's case lay primarily around the issue of the first disciplinary proceeding and the accepted warning that resulted. Significant weaknesses were apparent however in what was then done in pursuing its further concerns about the leave and the Board's interpretation of the Facebook comments. The extent to which it relied on a somewhat equivocal account from Ms Anich – which had frequent use of the word 'if' – as evidence to support a conclusion that Ms Pile had "*knowingly misled*" the Board was one such weakness. Another was the application of the ultimate disciplinary sanction of dismissal to Ms Pile, because of an apparently wider dispute between some elements of the TWW whanau and the Board and Principal. Attribution of blame to Ms Pile for the situation would require significant evidential support to withstand scrutiny in the Authority investigation. It may, of course, ultimately be provided and be found sufficient in that investigation so an assessment at the interim stage is an indication of doubt, not a definitive conclusion about it.

[65] The weakness in Ms Pile's case involved whether she had participated in the disciplinary process in the most productive way. An earlier, fuller explanation by her about the Facebook comments might have negated the interpretations taken by the Board and Mr Ramsay. The strength in her case lies in the argument about apparent punishment of her for the actions or attitudes of others with whom she was associated but for whom she was not necessarily responsible.

[66] The full evidence (from what will inevitably be a much larger cast of witnesses) will need to be thoroughly examined in the Authority's investigation scheduled for September and may significantly change initial impressions or concerns

about the justification for the Board's actions and the extent to which, if Ms Pile was awarded remedies, those remedies might need to be adjusted to account for any established blameworthy conduct by her that contributed to the situation giving rise to her grievance.

[67] However, in the interim period, I concluded the respective justices of the situation was best served by granting Ms Pile's application to return to her work as a teacher. While doing so may not be without difficulty or some awkwardness for all parties, and may not even be the ultimate outcome in the final determination, the relationship issues are essentially ones that involve adults outside the classroom and not the day-to-day work with children in the classroom. As such the professional teachers involved can be expected – in the meanwhile – to work productively, respectfully and in good faith in making whatever arrangements they need to deliver the curriculum programmes to those children in class. The conditions on which interim reinstatement is ordered – under s127(5) of the Act – should assist the parties to do so.

[68] A key point of those conditions is that, while Ms Pile is returned to the payroll forthwith, the Board may choose not to have her carry out any teaching duties with tamariki in TWW until 20 July 2015 – that is the start of term 3. In the intervening period of about three weeks of term 2 and the following two weeks of school holiday, the parties will have a reasonable opportunity to make any necessary arrangements for her return to classroom teaching duties. It also provides, as a matter of fairness, a period in which rights to challenge the Authority's interim orders in the Employment Court might be exercised.

Order for interim reinstatement (with conditions)

[69] Under s127 of the Act, and in reliance on the undertaking as to damages that she had lodged in the Authority, Ms Pile is to be reinstated to her position as a teacher at the school. As permitted by s127(5) of the Act the order has a number of conditions I thought fit to more closely match the merits of the situation between now and final determination. The conditions are:

- (i) Ms Pile is to be restored to the Board's payroll (at her usual rate of pay) as of the first week day following the date of this determination; and

- (ii) The Board, at its discretion and in consultation with the Principal, may opt to direct that Ms Pile not carry out any classroom teaching duties until the start of term 3 and may meanwhile place Ms Pile on 'garden leave' or arrange for her to carry out non-classroom duties within the usual range (including resource preparation and programme planning to assist her colleagues and prepare for her term 3 work) either at home or at the school, as the Board chooses.
- (iii) The parties must co-operate, on a good faith basis, in the operation of Ms Pile's interim reinstatement and its related conditions and must seek mediation assistance if they cannot (after making best endeavours) resolve necessary arrangements for Ms Pile's return to work and dealings with the principal and other colleagues.
- (iv) Leave is reserved for the parties to seek any necessary variations to these conditions but they should not seek such leave without first attempting to resolve any problem with mediation assistance.

[70] I did consider whether any condition might usefully or fairly be set regarding Ms Pile's attendance and participation at TWW whanau hui, in the interim period, but concluded that was too great an interference in her freedom of association, not easily amenable to supervision, and more properly a matter for her professional and personal discretion.

Robin Arthur
Member of the Employment Relations Authority