

**NOTE: This determination  
contains an order prohibiting  
publication of certain  
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2023] NZERA 529  
3246079

BETWEEN                      SFC  
   Applicant  
  
AND                                YKQ  
   Respondent

Member of Authority:        Helen Doyle

Representatives:             James Pullar and Madeline Thomas, counsel for the  
   Applicant  
   Sarah Townsend, counsel for the Respondent

Investigation Meeting:       11 September 2023 at Christchurch

Submissions Received:       11 September from both parties.

Date of Determination:       15 September 2023

---

**PRELIMINARY DETERMINATION OF THE AUTHORITY**

---

**Non-publication**

[1]     An interim order for non-publication of the parties' names was made by the Authority in a notice of direction dated 25 August 2023. The continuation of the interim order was addressed by counsel at the start of the investigation meeting.

[2] Mr Pullar submitted that the interim order should continue because of the sensitive nature of the medical evidence pertaining to the employee's employment and her vulnerable position as a trainee teacher. He submitted that there was the potential for serious damage to her professional reputation and job prospects if her name and identifying details were published.

[3] There was no opposition to the application on the basis that disclosure of the name of the employer school would likely identify the employee.

[4] The Authority's discretion to grant non-publication orders is contained in clause 10 of the second schedule of the Employment Relations Act 2000 (the Act). The discretion must be exercised on a principled basis with the onus on the applicant to show that a non-publication order should be made.

[5] There is a general principle that justice should be administered openly. If there is to be departure from the general principle specific adverse consequences should be identified.

[6] I am satisfied that there is good reason in this case to depart from the usual principle of open justice.

[7] Until further order of the Authority, the names and any identifying details of both parties and the medical evidence that is pertaining to the applicant is prohibited from publication.

[8] The parties shall be referred to by random three-letter strings which bear no resemblance to their names as SFC and YKQ.

### **Employment relationship problem**

[9] SFC was employed by YKQ on a two-year fixed term agreement from 28 January 2022 to 27 January 2024 as an employee-based trainee teacher of Te Reo at a Christchurch secondary school. She participated in the Ako Mātātupu Teach First NZ Education programme (Ako Mātātupu) which provides candidates with the opportunity to teach whilst completing a post-graduate diploma in secondary teaching. There is a partnership between YKQ and Ako Mātātupu. The programme requires a partnership school's involvement.

[10] SFC's work was covered by the offer of employment and the Secondary Teachers' Collective Agreement (the collective agreement).

[11] Whilst in the programme the trainee teacher has limited authority to teach and has reduced teaching with the remaining time spent studying with the Teach First NZ programme. There is also a requirement for mentoring of the trainee teacher.

[12] The Board of Trustees was notified of employment concerns by the Principal who had met with SFC on 30 March 2023. The Board arranged a hui and a subcommittee of three was established to investigate the employment issues.

[13] SFC was dismissed from her employment on 28 July 2023. The reasons for dismissal are contained both in a letter dated 2 June 2023 and in a letter of dismissal dated 28 July 2023. There was notification of new allegations between these two letters.

[14] The combined reasons for dismissal are a finding that SFC elected not to teach a class on 24 March 2023, told students she was going home referencing her mental health and did not give notice of her intention to leave to enable relief or cover. There was a finding that SFC undermined collegial relations and her Head of Department (HOD). There were findings that SFC attended a public event Manu Kōrero whilst suspended which had an unsettling effect on students and staff and held fundraising money in a manner not in accordance with the fundraising policy. Further findings were made that she communicated with students whilst suspended by messaging in a manner that was inappropriate and potentially harmful because of defiance towards and/or undermining of the school and management whilst other messages were capable of being harmful to students.

[15] SFC lodged a statement of problem on 18 August 2023 wanting the Authority to resolve unjustified disadvantage and unjustified dismissal grievances. In the statement of problem SFC seeks interim reinstatement on an urgent basis, permanent reinstatement, and other remedies. There is reference to the vulnerable position of SFC because she is completing her qualifications this year to become a qualified teacher and must remain employed to do so. There are other claims in the statement of problem of unjustified disadvantage and breaches of good faith. The

focus for current purposes is the unjustified dismissal claim although the other matters form part of the necessary background.

[16] YKQ say in its statement in reply that SFC was justifiably dismissed and that the dismissal was both substantively and procedurally fair. YKQ says that the reinstatement of SFC is neither practicable nor reasonable in the circumstances. Interim reinstatement is opposed.

[17] A case management conference was held with the Authority on 25 August 2023 and timetabling directions were made and a date assigned to deal with the application for interim reinstatement as a matter of priority.

[18] This determination determines the application for interim reinstatement.

### **The investigation meeting**

[19] The interim reinstatement application was dealt with on the affidavit evidence and submissions.

[20] The Authority received an original affidavit and an affidavit in reply from SFC. The Authority also received an affidavit in reply from a field officer employed by the New Zealand Post Primary Teachers' Association Te Wehengarua (PPTA) who assisted SFC through the disciplinary process. For YKQ, the Authority received seven affidavits. There was an affidavit from the Principal of the school, the current presiding member of the Board of Trustees who was part of the Board subcommittee for the disciplinary issues, both of the Te Reo teachers, the Deputy Principal (DP), the Head of Languages Area (HOD), and the Operations Manager.

[21] SFC provided an undertaking as to damages.

[22] Mr Pullar and Ms Townsend provided comprehensive submissions to the Authority.

### **The issues**

[23] The Authority may, on the application of an employee who has raised a personal grievance, make an order for the interim reinstatement of the employee pending the hearing of

the personal grievance.<sup>1</sup> When determining whether to make an order for interim reinstatement, the Authority is required to apply the law relating to interim injunctions with regard to the object of the Act.<sup>2</sup>

[24] The object of the Act is found in s 3 and is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship.

[25] The Act provides that reinstatement is to be the primary remedy and the Authority or Court must provide for it wherever practicable and reasonable.<sup>3</sup>

[26] Both counsel agree on the legal framework and approach to an application for an interim injunction. The applicant needs to establish a serious question to be tried, or in other words, that the claim is not vexatious or frivolous. The balance of convenience needs to be considered with the impact on the parties of granting or refusing to grant an order. Finally, there is an assessment of the overall justice by standing back having analysed the balance of convenience and serious questions to be tried.<sup>4</sup>

[27] These matters form broadly the issues for the Authority to consider. Whilst the power to make an order for reinstatement is a discretionary one, the assessment of whether there is a serious issue to be tried is not and requires judicial evaluation.<sup>5</sup> For a claim of interim reinstatement, the question of whether there is a serious question to be tried needs to be considered as two issues:

- (a) Whether there is a serious question to be tried in relation to the claim for unjustified dismissal; and if so
- (b) Whether there is a serious question to be tried in relation to the claim of permanent reinstatement.

---

<sup>1</sup> Section 127(1) of the Employment Relations Act 2000.

<sup>2</sup> Section 127(4) of the Employment Relations Act 2000.

<sup>3</sup> Section 125 of the Employment Relations Act 2000.

<sup>4</sup> *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90, (2013) TCLR 531 at [12]-[13].

<sup>5</sup> Above, n4 at [8].

**Is there a serious question to be tried for unjustified dismissal?**

[28] The evidence before the Authority was by way of affidavit. That means it is untested because there was no questioning or examination of the deponents of those affidavits. The Authority is not required at this stage to resolve any disputed aspects in the affidavits.

[29] The threshold to establishing a serious question is a low one. Ms Townsend acknowledged this and stated that YKQ accept there is an arguable case for unjustified dismissal but it is a weak one.

[30] The fact of dismissal is not in dispute. The Authority, when it carries out its substantive investigation, needs to apply the justification test in s 103A of the Act. It will be required to objectively assess whether the dismissal and the process undertaken was what a fair and reasonable employer could have done in all the circumstances.

[31] The reasons for dismissal have been set out earlier. The dismissal was for serious misconduct. Whether there is an arguable case for unjustified dismissal is to be assessed on that basis.

[32] There were some concerns raised with SFC by the Principal in September 2022 about professional relationships, communication and following school processes. A hui took place on 28 September 2022. SFC was supported at the hui by the PPTA. After the hui the Principal provided actions from the hui that formed the “partnership plan” with professional expectations set out to be addressed and “unpacked for clarity” in mentoring meetings scheduled between SFC and the DP. Whilst some dispute at this interim stage as to whether this process commenced as a disciplinary matter there is no dispute that there was no disciplinary outcome in 2022.

[33] The Principal advised SFC of the 24 March 2023 concerns about leaving the classroom and the teacher complaints. She initiated a hui under clause 3.4.1 of the collective agreement. This clause provides that initial enquiries can be made to establish whether the disciplinary process should be initiated. The Principal’s communication after the hui on 30 March 2023 was that the complaints were not resolved by way of a non-disciplinary outcome. On 4 April

2023 the Principal notified SFC of a decision to refer the 24 March 2023 complaints to the Board of Trustees under the disciplinary process in the collective agreement.

[34] SFC did not return to the school after 24 March 2023 before she was dismissed. As set out earlier any issues about the nature of the leave and its justification are not the focus at this stage.

[35] The Board subcommittee then communicated with SFC about the reasons for the initiation of the formal disciplinary processes and the concerns. A meeting was proposed on 27 April 2023 to meet with SFC and her representatives to provide responses. It did not take place until 25 May 2023. The PPTA communicated wanting some information and requested that the process be in accordance with clause 3.5 of the collective agreement Ngā kōrero mi na Tikanga (discussion in a Māori context).

[36] The untested affidavit evidence from the Board member on the subcommittee and the correspondence support some thought was given to what could be accommodated in terms of the process being in a Māori context in the rohe of Ngāi Tahu and the tikanga of Ngāi Tahu. Communication took place with the PPTA field officer who provided some information informing the clause. This was responded by the Board subcommittee Co-Chairs in a letter dated 2 May.

[37] Mr Pullar submits that YKQ proceeded with a process that did not accommodate tikanga Māori in breach of clause 3.5.1 when the Board subcommittee hui took place to hear responses from SFC on 25 May 2023.

[38] There is an arguable case whether what was done and how it was done on 25 May 2023 was what a fair and reasonable employer could have done with the request for the process to be conducted in accordance with clause 3.5.1 in all the circumstances. Ms Townsend pointed out to the Authority the provisions in 3.5(1)(d) of the collective agreement about decisions to withdraw from the process not giving rise to claims of procedural deficiency or unfairness. Arguably the considerations are broader than that. I do not conclude on the untested affidavit evidence and documentation that the arguable case in this respect is weak but neither do I conclude at this stage it is a strong argument.

[39] There is an arguable case whether the summarised interview notes provided as part of the process were adequate and in accordance with internal policies.

[40] Mr Pullar submits that the Principal's attendance at the Board meeting to hear SFC's responses as part of the disciplinary process on 25 May 2023 was inappropriate particularly given her involvement in initial enquiries.

[41] The untested affidavit evidence from the Principal is that she only stayed for the open part of the meeting on 25 May 2023 and was not involved in the Board's deliberations.

[42] There is an arguable case as to whether the attendance of the Principal at the hui on 25 May 2023 was what a fair and reasonable employer could do in all the circumstances.

[43] Mr Pullar submitted that there is unfairness in delayed advice to SFC about relationship concerns and a failure to attempt restorative processes.

[44] SFC had agreed to attend a restorative meeting with the HOD in September 2022 following the hui that month but that did not proceed from the affidavit evidence because the HOD was undecided and then the relationship improved for a period. HOD had asked SFC for a restorative hui in an email dated 23 March 2023 with the school's Kaumātua. She had also in the same email reminded SFC to arrive on time for the ELA meetings and requested unit plans so that she knew there was a "coherent programme" in place for all the classes. She offered help with that or help from one of the mentors.

[45] The reasons provided by SFC in the email sent on 24 March 2023 for going home was her mental wellbeing needing to take priority because of the email received from HOD.

[46] From the untested affidavit evidence I am not satisfied that there is a strong arguable case that the complaints from the new teachers were known about before they were received on 24 March 2023 by the Principal.

[47] For a variety of reasons, a restorative process was not seen by the Board subcommittee as a viable one however it is strongly arguable on the untested affidavit evidence that the Principal following the hui on 30 March 2023 and the Board subcommittee investigated

whether this process was possible. The reasons that it was not considered appropriate were set out in the investigation findings and proposed outcome letter sent to the PPTA field officer from the Board Co-Chairs on 2 June 2023.

[48] There is an arguable case whether it was appropriate to treat the breakdown in the relationships as serious misconduct in all the circumstances.

[49] Mr Pullar and Ms Thomas advised the Board subcommittee on 12 June 2023 that they were acting for SFC and raised concerns about the findings and proposed outcome. Richard Harrison Barrister was then instructed by YKQ. He stated in a letter dated 20 June 2023 to Mr Pullar and Ms Thomas that YKQ was open to supporting SFC before making a final decision to transition to another school to complete her Teach First programme. It was proposed that a school be identified. Further that YKQ keep SFC employed on her current arrangements through to the completion of the school term and for her to start at a new school from the beginning of the next term. Finally, it was proposed that YKQ would discontinue the current disciplinary process including determining a final outcome.

[50] After a period Mr Harrison wrote to Mr Pullar and Ms Thomas in a letter dated 21 July 2023 that “we have not been able to agree an alternative outcome...”. The three further concerns were then set out that also formed the reasons for dismissal.

[51] There is an arguable case that the investigation of the subsequent allegations was limited and insufficient information was provided. There was no further meeting, and the final decision to dismiss was made quite quickly. Mr Pullar submitted this could suggest pre-determination and this is arguable.

[52] Mr Pullar submits that the original conduct complained of could not be found to have amounted to serious misconduct and that the subsequent conduct complained of could not either. There is an arguable case that not all the conduct is of the same level of seriousness.

[53] I conclude that there is an arguable case that SFC was unjustifiably dismissed. I do not categorise it as a weak case at this stage. Some aspects are stronger than others. Some of the conduct relied on for dismissal may arguably not be serious misconduct but other conduct

arguably is. This aspect is not straightforward and needs to be considered in all the circumstances which include professional obligations of a teacher. There are aspects of the process that are arguably unfair but establishing unfairness for other aspects may be more difficult. These are matter for a substantive investigation.

**Is there a serious question to be tried in relation to the claim of permanent reinstatement?**

[54] Section 125(1) of the Act provides that reinstatement is the primary remedy and the Authority must provide for reinstatement wherever practicable and reasonable irrespective of whether it provides for any other remedy under s 123 of the Act.

[55] Both counsel referred to the Employment Court's statement in *Christieson v Fonterra Co-operative Group Limited* about the meaning of practicable and reasonable:<sup>6</sup>

Practicability and reasonableness are two separate considerations.<sup>7</sup> For reinstatement to be practicable, it must be capable of being carried out in action, be feasible and have the potential for the re-imposition of the employment relationship to be achieved successfully. There may be considerations separate from the reasons for the dismissal that are germane to this question.<sup>8</sup> In looking at reasonableness the Court needs to consider the respective effects of an order, not only on the individual employer and employee in the case but also on other affected employees of the same employer and, in some cases, perhaps third parties who would be affected by the reinstatement.<sup>9</sup>

[56] The fixed term employment agreement between SFC and YKQ has a limited time to run until 27 January 2024. Any reinstatement for teaching purposes would only be for the fourth term of the 2023 school year until mid December 2023 when the school year finishes.

[57] SFC deposes in her affidavit that reinstatement would enable her to complete her qualification and then be able to teach as a fully qualified Te Reo Māori teacher. There is an email from the Deputy Chief Executive of Teach First NZ (Deputy Chief Executive) attached to SFC's affidavit in reply dated 6 September 2023. The Deputy Chief Executive states that

---

<sup>6</sup> *Christieson v Fonterra Co-Operative Group Ltd* [2021] NZEmpC 142 at [39].

<sup>7</sup> *Hong v Auckland Transport* [2019] ,NZEmpC 54 at [65].

<sup>8</sup> Above 7 at [66].

<sup>9</sup> *Angus v Ports of Auckland Ltd (No 2)* [2011] ERNZ 466, at [68].

SFC will not have met the requirements to complete Year 2 of the qualification by the end of 2023. The components that require completion are then set out. He states that:

Any reintegration into the programme at a future date will be subject to a review that will include consultation with the Board of Trustees and Academic Advisory Board of Ako Mātātupu.

[58] Mr Pullar submits it is not inevitable that the qualification could not be completed in 2023. The email does suggest however that is unlikely that the qualification could be completed in 2023. If it could not be completed in 2023 then that has an impact on the main basis on which interim reinstatement is sought.

[59] The email from the Deputy Chief Executive does not appear to require continued employment with YKQ for SFC to achieve the qualification. That is not inconsistent with the proposal from Mr Harrison that there be a transition to an alternative school by YKQ without the disciplinary outcome being finalised.

[60] The Principal in her untested affidavit evidence had stated that she could not support SFC's teacher registration based on the student messaging especially if the teacher concerned considered the communications to be appropriate. She states that she considers the communications with students as indicative of someone who has "crossed professional boundaries".

[61] There is an affidavit from the DP. The DP had been providing mentoring and support to SFC in 2022 and 2023 and deposes to this being because SFC did not wish to be mentored by the HOD. The DP stated that she is no longer prepared to supervise or mentor SFC in any capacity because she considers that statements made during the Board subcommittee hui on 25 May 2023 about SFC not having weekly mentoring meetings with her and not receiving meeting invites were untrue. These statements were investigated further by the Board subcommittee with the DP and documents were provided that the Board subcommittee concluded supported mentoring meetings and invites had taken place. Another mentor has also stated to the DP that he does not wish to be involved in mentoring.

[62] I understand that mentoring is a requirement of the programme and that there would be one-to-one within the school to undertake the mentoring. This would require external supervision.

[63] Mr Pullar submits that it is practicable to reinstate SFC because her reintegration could be achieved successfully on the basis that her position has not been filled and she has a strong relationship with students and is willing to repair relationship issues.

[64] SFC does not consider she had had an opportunity to resolve matters especially with the two new teachers with whom she worked together with for about eight weeks. There was the willingness by her to attend facilitation with HOD in 2022 which did not occur.

[65] From the untested affidavit evidence neither of the new teachers however wish to participate in a restorative process with SFC because they refer to some safety issues and intimidation concerns. One new teacher refers to SFC being openly defiant to the HOD and that she could see the personal toll that had taken on the HOD. Both new teachers say they could not work with SFC if she returned and one that she would discontinue her teaching.

[66] The HOD in her affidavit stated that SFC treated and spoke to her disrespectfully and that it was “constant”. She stated that it was well known throughout the department that SFC’s actions were not respectful. Further that SFC was openly defiant and refused to do what she was asked by the HOD. The HOD stated if SFC was to be reinstated she could not remain in the department. This relationship was described in the Principal’s affidavit as a key relationship.

[67] The difficulties in respect of the relationship breakdown between SFC and the HOD are highlighted when SFC had left the classroom on 24 May 2023 and saw the HOD. SFC did not raise with the HOD that she had left the classroom because she needed to leave. Instead she relied on the HOD reading the email she had sent which fortunately occurred and relief was quickly found for the classroom. Arguably the HOD may not have read the email during the break.

[68] There is also a concern in the affidavit of the Principal about the response by SFC to the student messaging concerns that it does not cross professional boundaries and is evidence of a strong relationship with the students. The Principal deposes that this indicates a lack of

understanding of professional commitments and professional boundaries and that there would be risk for students if SFC was introduced even for a short period. She has stated that she does not trust SFC with students. There are also concerns in the untested affidavits about SFC not taking direction.

[69] There were concerns in 2022 but these were dealt with informally. The untested affidavit evidence is to the effect that supports were put in place for SFC in 2022 and the Principal was hopeful that the decision to employ two trained Te Reo Māori teachers would be an additional support for SFC in 2023.

[70] The untested affidavit evidence suggests significant relationships have broken down at colleague, HOD and senior leadership levels and there are concerns about professional boundaries. There is real doubt as a result at this interim stage the relationships are capable of being repaired to enable re-employment to be practicable or reasonable.

[71] Ms Townsend submits that SFC does not have an arguable case for permanent reinstatement. I do not conclude at this interim stage there is no arguable case for permanent reinstatement bearing in mind the low threshold required however it is not a strongly arguable case rather a weak one.

### **Balance of convenience**

[72] SFC wants to be reinstated to complete her qualifications. Whilst perhaps not inevitable it did seem the requirements to complete year 2 of the qualification may not be met by SFC by the end of 2023 to enable her to be a qualified teacher. This will mean that completion of the qualification will need to extend to 2024. If that is the case and SFC is successful with her personal grievance given the short period left of the fixed term agreement, then damages could be an adequate alternative remedy.

[73] I acknowledge as Mr Pullar submits that SFC is in a more vulnerable position than a qualified teacher because to become qualified under the programme she must remain employed. YKQ recognised this by at one stage supporting a transition to a new school. This for whatever reason did not eventuate. The email from the Deputy Chief Executive of Teach First did not

go so far as to suggest, as Mr Pullar submits, that if SFC is not reinstated it will end her career as a teacher before it has started. It may however delay qualification.

[74] I accept that there are financial issues for SFC although SFC has undertaken some limited work at another school in the meantime. Her teaching skills, it would appear, are in demand.

[75] Mr Pullar submits there are cases where reinstatement has been ordered even when relationships are strained or there is a threat of resignation if an employee is re-employed. In this case there are the additional interests of students to consider and manage as well as staff relationships during an important term in the school year.

[76] There are also the concerns expressed by the Principal that there is a lack of confidence that reasonable instructions would be followed by SFC if she did not agree with them. The untested affidavit evidence and an email suggest there was continued messaging with students after the Principal instructed that was not to continue.

[77] I have not concluded that the case by SFC for the unjustified dismissal is a weak one. Some aspects are more strongly argued than others. The arguable case for permanent reinstatement I have concluded is however a weak one.

[78] Taking all matters into account YKQ will suffer the greater prejudice if required to reinstate SFC. The balance of convenience favours YKQ.

### **Overall Justice**

[79] I have stood back to cross check the position reached after consideration of the serious issues to be tried, and the balance of convenience. I am not satisfied that there should be an order for interim reinstatement or reinstatement to the payroll.

[80] The application for interim reinstatement is not granted.

**Mediation**

[81] The parties have not attended mediation and are now directed to do so.

**Further steps**

[82] The Authority officer will organise a case management conference to discuss progression of the matter.

**Costs**

[83] I reserve the issue of costs and these will be dealt with after the substantive determination.

Helen Doyle  
Member of the Employment Relations Authority