

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA6/10
5290474

BETWEEN

ROZ SERVICE
Applicant

AND

YOUNG MEN'S CHRISTIAN
ASSOCIATION OF
CHRISTCHURCH INC
Respondent

Member of Authority: James Crichton
Representatives: Jeff Goldstein, Counsel for Applicant
Peter Zwart, Counsel for Respondent
Investigation Meeting: 23 December 2009 at Christchurch
Determination: 18 January 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Service) was employed by the respondent (YMCA) as Education Director, a role that she had occupied since 2 December 2002. Prior to that, for the period from 1986 down to 1998, Ms Service had also worked for the YMCA in a variety of senior management positions.

[2] Ms Service was summarily dismissed from her position on 7 December 2009 after an inquiry by YMCA found that she had failed to disclose to the then Chief Executive Officer of YMCA about an alleged rape of a client during one of YMCA's programmes but even if she had, the programme ought not to have proceeded and the fact it did disclosed poor judgement on the part of Ms Service. YMCA concluded that it had lost trust and confidence in her in consequence.

[3] The course that led to Ms Service's dismissal was arranged to run from 13 February to 14 April 2008, some 20 odd months prior to the dismissal. The course in question was a *mechanic's taster* course. The tutor for this course had a friend who

worked on cars at his home and who it was suggested could appropriately provide a venue for the course. That individual was serving a term of home detention for criminal offending.

[4] In order to risk manage that situation, Ms Service's affidavit says that she took appropriate steps such as applying for and receiving the offender's criminal history, speaking to the offender's probation officer, obtaining the consent of the parents of the students who were participating in the course and ensuring that the offender was supervised at all times by a tutor.

[5] On 28 March 2008, the affidavit of Ms Service discloses that she was visited by two Police officers who indicated that a particular student (who I will refer to throughout this determination by the letter A), had made a complaint of rape. The circumstances of the complaint were that A had visited the premises where the *mechanic's taster* course had been held late one night, while heavily intoxicated, and was there raped by two men, one of whom was the offender on home detention whose premises they were. The events complained of happened on the evening of Friday, 29 February 2008.

[6] Then it seems that A spoke with the tutor in charge of the *mechanic's taster* course who had personally supervised the course and while confirming that she had had sex with two men, one of whom was the offender on home detention whose premises they were, indicated that the sex was consensual. This conversation apparently happened on 3 March 2008. Despite his knowledge of the incident, the tutor had not told Ms Service but immediately she became aware of the situation, she says she took steps to cancel the course, require the tutor to give a statement to Police and, critically, Ms Service says that she then reported the incident to the then Chief Executive, Mr Peter Tindall. Ms Service says that she gave Mr Tindall proper information on the events and that, in effect, he left her to manage the downstream consequences of the incident which she proceeded to do. A remained part of the programme and although issues apparently developed between A and the tutor (apparently an outcome of the incident), A remained in the same programme under the general guidance of the tutor despite Ms Service's offers to A to place her in another programme if she chose. Ms Service's affidavit evidence suggests that she did no more and no less than A wanted in the matter.

[7] The current Chief Executive of YMCA is Ms Josie Ogden Schroeder (Ms Schroder).

[8] On 16 November 2009, Ms Schroeder received an anonymous telephone call alerting her to the incident involving student A. Ms Schroeder spoke initially to a tutor (because Ms Service was unavailable when she called), and that tutor, Ms Ward, clearly spoke to Ms Schroeder at length about what she knew of the incident. In essence, Ms Ward had a jaundiced view of Ms Service's handling of the matter, had a less than satisfactory relationship with Ms Service anyway, and based on her own affidavit evidence before me, clearly made no secret of her views to Ms Schroeder.

[9] When Ms Schroeder was able to interview Ms Service shortly after that, the two women's accounts of the exchange are, not surprisingly, somewhat different. There are discrepancies in the dates that the two women refer to, but nothing turns on that. The short point is there were a number of exchanges between the principal protagonists during the time that the YMCA was conducting its investigation, which in itself comprised interviews with a number of other parties including various colleagues of Ms Service at YMCA and the former Chief Executive who now lives overseas. The final stages of the disciplinary process was assisted by the involvement of able representatives on both sides but, in the result, YMCA reached the decision to summarily dismiss Ms Service and an application to the Authority was promptly filed on 14 December 2009 seeking substantive relief (including permanent reinstatement) but for present purposes, seeking interim reinstatement as well.

Issues

[10] Section 127 of the Employment Relations Act 2000 confers power on the Authority to order interim reinstatement pending hearing of the personal grievance. Pursuant to subsections 4 and 5 of that section, the Authority has power to grant such orders subject to any conditions the Authority thinks fit, and the Authority is required to apply the law relating to interim injunctions *having regard to the object of this Act*.

[11] In relation to the meaning of the phrase *having regard to the object of this Act*, Mr Goldstein has helpfully directed me to dicta of Judge Colgan in *Cliff v. Air New Zealand* [2005] ERNZ at p.1 where His Honour makes clear that because s.125 of the Employment Relations Act 2000 introduced a requirement that the Authority must provide for reinstatement wherever that was practicable where that remedy is claimed

and a personal grievance is proved, it followed that *the primacy now accorded by Parliament to the remedy of reinstatement is a relevant factor in considering interim reinstatement.*

[12] The law relating to interim injunctions is usually encapsulated in three or four discrete issues or questions. For the purposes of the present determination, the Authority poses the following four questions:

- (a) Does Ms Service have an arguable case?
- (b) Would damages be an alternative remedy?
- (c) Where does the balance of convenience lie?
- (d) What is the overall justice of the case?

Does Ms Service have an arguable case?

[13] Ms Service says in her defence that some 20 months after the incident complained of, she was confronted by a disciplinary investigation led by the new Chief Executive Officer of YMCA who concluded that Ms Service had made significant failures of judgement in organising the subject course and had failed to disclose the subsequent problems of the course to the then Chief Executive of YMCA. Ms Service's position is that the matter was historical and was dealt with at the time. She maintained that she had briefed the then Chief Executive about the episode and that he had left it with her to manage, which she did. Ms Service claimed to have taken proper steps to validate the course before it started and as soon as she became aware of the incident, she immediately cancelled the balance of the course and acted subsequently in accordance with the wishes of student A, the complainant in the alleged rape allegation.

[14] Ms Service complains about alleged inadequacies in the YMCA investigation process as well as arguing that she was dismissed for conduct which had happened 20 months previously and which, on her affidavit evidence, was dealt with at the time by the then Chief Executive Officer. The evidence in reply on that very point is equivocal. Mr Tindall, the former Chief Executive Officer, filed an affidavit which I am satisfied does not confirm the issue one way or the other. Certainly, reliance upon it to form a particular view of matters would, in my judgement, be unfair and

unreasonable, particularly as the affidavit is even more equivocal than the earlier statements made by Mr Tindall to Ms Schroeder via telephone and subsequently recorded by Ms Schroeder and sent back to Mr Tindall by email.

[15] Ms Service's complaints about the unfair process adopted by YMCA also have some force. Amongst other things, Ms Service quite correctly draws attention to the fact that Ms Schroeder, once seized of the information by the anonymous telephone call, spoke first of all to one of Ms Service's direct reports who had an uncertain relationship with Ms Service and some genuinely held doubts about the way Ms Service had dealt with the incident involving student A. Needless to say, that staff member readily shared her views with Ms Schroeder so by the time Ms Schroeder got to see Ms Service the following day, there was a sense in which her view of matters had already been irrevocably influenced.

[16] For its part, YMCA says that Ms Service's errors were palpable, her lack of judgement in progressing the course at all self-evident and a conclusion of a complete failure of trust and confidence unassailable. YMCA criticises the risk management process adopted by Ms Service, noting amongst other things the impressive list of convictions of the offender on home detention who provided his premises for the relevant course. But Ms Service's affidavit says that she spoke to the offender's probation officer and received comfort that the course could proceed without undue risk. YMCA complains further that Ms Service did not obtain the appropriate parental consents in a timely fashion, yet student A's mother's affidavit acknowledges that she gave written permission for her daughter to attend the relevant course.

[17] After the incident, YMCA complains that Ms Service continued to act inappropriately by failing to take disciplinary action against the tutor who clearly had persuaded her to run the course using the offender's premises and by failing to deal directly with student A's family. But again, there are differences of view advanced on Ms Service's behalf, in particular her contention that her responses after the event were based on student A's own requests.

[18] Another fundamental issue of difference between the parties is Ms Service's conviction that Ms Schroeder *had it in for her*. Certainly, the relationship between the two women was hardly warm and supportive and it seems common ground that Ms Service had made it clear when Ms Schroeder was appointed that she (Ms Service) had reservations about the appointment. That might not seem surprising

given Ms Service was also a candidate for the position and may well have felt put out at the fact that a younger woman had been appointed to the position to which she herself aspired. In those circumstances, the fact that Ms Schroeder was both the investigator and the decision-maker is, according to Ms Service, unfair because it smacks of bias and predetermination.

[19] I conclude that there is an arguable case. The basis for this conclusion is first the evident difficulties in conducting a disciplinary investigation based on events nearly two years before the investigation which, simply by the passage of time, generates its own difficulty. However, that difficulty is exacerbated by Ms Service's contention that the matter had already been dealt with in her exchanges with Mr Tindall and I am not satisfied that the responses obtained from Mr Tindall by YMCA are sufficiently clear to enable YMCA to reliably conclude that Ms Service did not tell Mr Tindall at all. I discount entirely the evidence of Board members of YMCA who say that Mr Tindall would have told them if he had himself been told, because I do not think those views have any particular probative value.

[20] I also conclude there is an arguable case because of my anxieties about the nature and quality of the relationship between Ms Service and Ms Schroeder and because Ms Schroeder must have been influenced by her first contact with one of the tutors who clearly had issues with Ms Service herself.

[21] Finally, I note that the alternative basis for the dismissal decision was the conviction that even if Ms Service had told Mr Tindall, the former Chief Executive (and that, of course, is denied by YMCA), then her judgement in setting up the course in the first place was so fatally flawed as to cause the YMCA to lose trust and confidence in her **now**. But that cannot be a fair basis for dismissal if, in truth, Ms Service did tell Mr Tindall and Mr Tindall instructed Ms Service to manage the issue as she herself claims. If the matter was disposed of in 2008 (however unsatisfactorily from the point of view of the YMCA now), it was disposed of and the critical issue is whether, in fact, Ms Service did properly engage with Mr Tindall or not. On the evidence before the Authority, I do not think the answer to that question is clear enough on which to make a decision as fundamental as the one which YMCA made in dismissing Ms Service. I think there is then a strongly arguable case.

Does the balance of convenience favour Ms Service?

[22] Here, the Authority must consider the relative inconvenience to each party of the other succeeding. Looked at practically, the Authority must weigh the relative hardship to YMCA of Ms Service being successful against the potential hardship to Ms Service in remaining away from her employment pending the resolution of her personal grievance.

[23] YMCA says the employment relationship has, in effect, irretrievably broken down because it has completely lost trust and confidence in Ms Service. This view of matters is emphasised by the affidavit evidence filed by YMCA through its Board members. In addition, YMCA contends that because two key staff members have given evidence by affidavit against Ms Service, they would be lost to the organisation if Ms Service was to be reinstated. Indeed, the affidavit evidence of those two staff members, each of whom report to Ms Service, makes clear that they would resign if Ms Service were to be reinstated.

[24] Conversely, Ms Service says that she wishes to remain in the employment. She has worked now for many years in alternative education and she says through counsel that this is a reasonably narrow field in this country and while it may be possible for her to move from Christchurch (something she does not want to do), the opportunities within this city would be strictly limited if she were deprived of her present role permanently. It is for that reason also that Ms Service argues that an award of damages would not meet the case because her real interest is in being restored to her career rather than being able to continue to have access to income or capital sums in lieu of that income. Similarly, Ms Service would prefer not to be placed on garden leave because her real enthusiasm is to be returned to the employment.

[25] YMCA drew attention to the affidavit evidence of both its current Chief Executive and the Chair of its Board, both of whom depose that they have lost trust and confidence in the applicant; it follows, so the argument goes, that there is no one to whom the applicant, Ms Service, can report. Furthermore, YMCA points out that Ms Service is effectively on pay until around the end of January 2010. There is some dispute between the parties about what exactly date the effective salary and other entitlements expire, but it is sufficient to say that Ms Service will have income until

around the end of January 2010. Further, YMCA has committed to not replacing Ms Service until the substantive application has been heard and decided.

[26] Despite Ms Service's obvious desire to return to the employment for reasons to do with the continuation of her career, it is also a fact that the absence of income from around the end of January 2010 will impact negatively on her well being and the submission is made on her behalf that by the time the substantive decision issues, Ms Service will have been away from the employment (assuming she is not reinstated on an interim basis) for fully four months and will have been off pay for three of those months.

[27] In the well known decision of Chief Judge Goddard in the case of *Melville v. Chatham Island Council* [1999] 2 ERNZ 70 at p.100, His Honour said:

It is not often that the employer can convincingly assert that the hardship of being required to take an unwanted employee back for a short term is greater to it than the hardship of keeping out an employee who has been unjustifiably dismissed.

[28] This is a case where, in my judgement, that dictum applies. I think Ms Service has established that there are real doubts about the fairness of her dismissal, at least without the possibility of interviewing the former Chief Executive on his recollection of events at the relevant time. Certainly, the evidence from him to date seems to me both discursive and equivocal and I would want to have the opportunity of questioning him myself before affirmatively concluding that the dismissal was safe. As matters stand, that evidence (or perhaps more accurately the lack of it), is pivotal to the question of whether the dismissal is one that a fair and reasonable employer would make and because I am satisfied that Mr Tindall's evidence is so important to the outcome for Ms Service, it seems to me that fact alone tips the balance in her favour in relation to the balance of convenience test.

[29] It follows that I conclude that the balance of convenience favours Ms Service, partly because of an accumulation of the usual balancing issues which the Authority relies upon in matters of this kind, but also because of the provisional conclusion that the YMCA has unreasonably relied on the evidence currently before it as to the recollections of Mr Tindall, the previous Chief Executive.

Where does the overall justice lie?

[30] I conclude that the overall justice of the case favours Ms Service. In my opinion, she is entitled to the benefit of the doubt in respect of the issues that she has raised in this matter, particularly concerning Mr Tindall's evidence, the possibility that Ms Schroeder has been improperly influenced by the sequence in which she has interviewed witnesses, and the real difficulty that the YMCA, or indeed any employer, would have in investigating a matter in a disciplinary context after almost two years have passed. In the end though, if the matter was dealt with at the time by the employer (as Ms Service has contended), then that is an end of it and without getting to the heart of that issue first, I think Ms Service is entitled to be reinstated on an interim basis pending the disposal of the substantive matter. In that regard, I adopt Mr Goldstein's suggestion that Ms Service go back on pay with effect from the date at the end of January that the parties' representatives agree is the date that her present remuneration payments expire.

[31] In order to facilitate that computation, I direct that the parties' representatives are to engage with each other in order to agree on that date and then implement it.

[32] I also want to be clear that it is the Authority's strong preference that Ms Service not be placed on garden leave but return to the employment in an active way. However, because of the evident anxieties of the YMCA in that regard, the parties' representatives are directed to engage on that issue as well and if the matter can be agreed on the footing that Ms Service is to be returned to the employment on an interim basis on and from the date in late January to be agreed, then matters can rest there. If that is unable to be agreed between the representatives, then I would want to hear further from the representatives jointly (perhaps by telephone conference) in order that the question of whether Ms Service is to be placed on garden leave or not can be finally disposed of.

Determination

[33] Ms Service is granted interim reinstatement for the reasons advanced in this determination. The representatives are to liaise with a view to implementing this decision, both in terms of the date from which it takes effect and the status of the employment. Leave is reserved for the representatives to revert to the Authority for orders if those arrangements are problematical.

Costs

[34] Costs are reserved.

James Crichton
Member of the Employment Relations Authority