

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 6A/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, Advocate for Respondent
Submissions Received: 22 January 2010
Determination: 26 January 2010

FURTHER DETERMINATION OF THE AUTHORITY

Introduction

[1] The Authority issued a determination dated 18 January 2010 granting interim reinstatement to Ms Service after she had been dismissed by the respondent (YMCA) on 7 December 2009. In the affidavit evidence provided to the Authority in opposition to interim reinstatement the YMCA made something of the alleged difficulties they would have in managing Ms Service's reinstatement into the workplace should the Authority be minded to grant her interim reinstatement.

[2] As a consequence of those concerns the Authority's decision of 18 January 2010 while granting interim reinstatement to Ms Service left two matters for the parties to resolve by agreement. The first of those was the operative date from which Ms Service would be returned to salary and the second was the question of whether Ms Service would come back to normal duties or be placed on garden leave during the period of interim reinstatement.

[3] As to those two issues, the parties' representatives were able to agree the operative date from which salary was to recommence but not the issue of whether Ms Service was to commence actual duties or not.

[4] Indeed, YMCA reiterated the concerns previously made by way of affidavit evidence at the interim reinstatement investigation meeting and actually filed with the Authority further particulars about the difficulties they claimed would exist if Ms Service were reinstated to her actual role.

[5] That material was provided to the Authority electronically on 22 January 2010 and was immediately the subject of a protest by counsel for Ms Service who objected to the material being put before the Authority at all or at least without the opportunity of addressing the Authority first.

[6] Because of that objection, I decided not to peruse the material filed by the YMCA at least until after a telephone conference which I had scheduled with the representatives at 4pm on 22 January last. After hearing both representatives, and allowing each to make submissions on the issue, I determined that the proper course was not to peruse the material filed by the YMCA although the effect of the YMCA's submissions was to draw to my attention (at least in a general way) the thrust of the additional material filed.

[7] The burden of Mr Goldstein's submissions in relation to the additional material was that it was grossly prejudicial, that if arguments of that class and type were to be encouraged then there was little point in having the Authority make decisions about reinstatement in any circumstances and that if the YMCA was going to make this point in relation to interim reinstatement it could be anticipated that their argument, if permanent reinstatement were to be contemplated, would be of the same character.

[8] In fact, the YMCA's submissions in the directions conference were very clear to draw a distinction between the interim reinstatement situation and the position in respect to permanent reinstatement. It was, according to the YMCA, the impermanent nature of the interim reinstatement situation which caused the degree of anxiety which existed and if the Authority were minded to grant permanent reinstatement (assuming Ms Service was successful in her substantive application) then the YMCA would be able to manage the permanent situation more satisfactorily. In the telephone

conference with the representatives, I made a specific point of noting that distinction drawn on behalf of YMCA and indicated that it would assist my consideration of the issues not only for present purposes but also in the event that permanent reinstatement were under consideration at the conclusion of the substantive hearing.

Determination

[9] In my determination of 18 January 2010, I made it clear that my strong preference was that Ms Service return to duty on her interim reinstatement. However, the continuing objections of YMCA to that course of action and the very nature of the apparently vociferous appeals for me not to insist that she return to duty at this interim stage encourages me to adopt the cautious approach of seeking to balance the respective parties interests and achieve some measure of equilibrium without unnecessarily exacerbating relationships which, based on the untested evidence before the Authority, may be quite fraught. It is a difficult balancing act and one that has exercised me greatly. My particular concern is that by the Authority effectively being swayed by untested and contested claims made by the employer, the employee may not receive the measure of justice to which she is entitled.

[10] However, I must err on the side of caution and if there is any truth to the contentions made by YMCA then an actual return to duty for Ms Service would be difficult for all parties, including Ms Service.

[11] Accordingly, I direct that Ms Service is to not return to actual duty but to have a period of garden leave from the date payment of salary recommences down to the date the final determination issues in respect to the substantive application brought by Ms Service.

[12] I want to express the matter very clearly that the fact that I have adopted a cautious approach on this narrow point is not to be taken by either party as a indication that I will not contemplate permanent reinstatement if Ms Service succeeds in her substantive application.

James Crichton
Member of the Employment Relations Authority