

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 197/10
5299650

BETWEEN GARY TUCK
 Applicant

AND ANGLICAN CARE (WAIAPU)
 LIMITED
 Respondent

Member of Authority: R A Monaghan

Representatives: M Ryan, counsel for applicant
 E Inger, counsel for respondent

Investigation meeting: On the papers

Determination: 29 April 2010

**DETERMINATION OF THE AUTHORITY ON APPLICATION FOR
INTERIM REINSTATEMENT**

Employment relationship problem

[1] Anglican Care Waiapu Limited (ACW) employed Gary Tuck as a gardener and maintenance person at a residential aged care facility known as Carter House. It dismissed him for bullying in the workplace.

[2] Mr Tuck says the dismissal is unjustified and seeks reinstatement.

[3] Mr Tuck also seeks an order for interim reinstatement. The parties attended mediation, but were unable to resolve the substantive problem or reach an arrangement in respect of the application for an interim order. Accordingly this determination addresses the application for an order for interim reinstatement.

[4] The issues to be addressed in determining the application are:

- a. whether there is an arguable case of unjustified dismissal;

- b. whether the balance of convenience favours Mr Tuck or ACW; and
- c. where overall justice lies.

Background

[5] The following account of the facts is based on the parties' affidavits filed for the purpose of the interim application. I do not take into account additional facts contained in submissions but not in the affidavits. The facts summarised in this determination do not amount to findings for the purpose of any final determination of the substantive claim.

[6] Mr Tuck commenced full time employment with ACW on or about 6 May 2008, having already been employed there in a different capacity for some years. From time to time there were difficulties and disagreements between Mr Tuck and another employee, Jo Pryor. Several meetings were held in attempts to resolve the differences.

[7] Unfortunately the difficulties continued. After an incident on 2 February 2010, involving a discussion about cleaning a carpet which became heated, Ms Pryor became distressed. She reported to the manager of Carter House, Sharon Owen, that Mr Tuck had shouted at abused her, and that his behaviour towards her was making her reluctant to come to work. She put her concerns in a letter to Ms Owen dated 7 February 2010, in which she said the 2 February incident was the last straw. She was also worried about 'the escalating bullying that Gary Tuck is exhibiting towards me' and set out the background to that worry.

[8] According to Ms Owen, Mr Tuck approached her on 4 February saying that things were not going well and that Ms Pryor was a bully. He raised some incidents of concern to him, and Ms Owen suggested a meeting with Ms Pryor to address both parties' concerns. She also suggested that Mr Tuck put his concerns in writing.

[9] A meeting was convened on 11 February 2010. Laureen Sutherland, ACW's operations manager, Ms Owen, Ms Pryor and Mr Tuck attended. There was discussion about the matters raised in Ms Pryor's letter, which Mr Tuck said caught him by surprise. The 2 February incident was discussed in some detail, with Mr Tuck

denying any misbehaviour on his part and expressing the view that Ms Pryor was a controlling person. There was no resolution and the meeting was adjourned to allow further investigation.

[10] Ms Sutherland and Ms Owen made enquiries and as a result decided a disciplinary procedure was necessary. A disciplinary meeting was convened on 2 March 2010 to address Mr Tuck's conduct as disclosed by Ms Pryor's complaint, with particular reference to the 2 February incident. Mr Tuck provided a written response to the complaint. In effect he denied any bullying of Ms Pryor, and while not denying that incidents she recounted had occurred, he saw the incidents as amounting variously to joking, personality conflicts or disagreements between colleagues.

[11] A further meeting was convened on 8 March 2010. Ms Sutherland and Ms Owen accepted Ms Pryor's version of events - with particular reference to the 2 February incident - and were concerned about Ms Pryor's health and safety in the workplace. Their decision to accept Ms Pryor's version was influenced by their view of Mr Tuck's manner during the meetings, which they considered dismissive and lacking in empathy. Ms Sutherland said Mr Tuck came across as unwilling to be accountable or take responsibility, and he sought to blame others. Finally, it was relevant that concerns about his behaviour had been drawn to his attention in the past, and he had demonstrated an inability to change the behaviour.

[12] As a result Ms Sutherland decided to dismiss Mr Tuck with immediate effect. He was given two weeks' pay in lieu of notice.

Determination

1. Whether the applicant has an arguable case

[13] ACW has accepted for the purposes of this application that there is an arguable case for unjustified dismissal, albeit a weak one.

2. Where the balance of convenience lies

[14] Mr Ryan submitted that the balance of convenience favours Mr Tuck because:

- (a) he has limited opportunities to obtain employment in Te Puke, where he lives;
- (b) he has mortgage commitments and his only source of income is from his employment;
- (c) he has a right to work which is valuable in itself; and
- (d) he requires to work to maintain his skills and status.

[15] There was no evidence in support of (a) and (d) above and limited evidence in support of (b) above.

[16] Further, while Mr Tuck filed a bank statement showing he has a mortgage, the statement also showed he receives rental income and that he has a credit facility with a reasonably significant sum available. No comment on or explanation of this information was provided. Since the investigation meeting has been set down for 5 and 6 July 2010, the bare information indicates at least that Mr Tuck will have sufficient funds pending a determination of the substantive problem.

[17] Secondly, as Mr Tuck was working as a gardener and maintenance person, even at this level in the absence of any information explaining the matter I cannot accept the bare assertion that he requires to work to maintain his skills. To the extent that the allegation regarding skills and status was based on cases such as **Auckland District Health Board v X¹**, I do not accept the circumstances are comparable.

[18] Accordingly I do not accept that these are matters which should be weighed in favour of Mr Tuck's application.

[19] I accept that the right to work is a matter to weigh in Mr Tuck's favour. Beyond that, in the circumstances disclosed by the contents of the affidavits filed in association with this application, I do not accept the assertions that Mr Tuck's reputation is being damaged by his dismissal or that any damage that may have been caused can be countered or limited by an order for interim reinstatement.

[20] Ms Inger submitted that, while Mr Tuck could recover his financial losses through an order for reinstatement in the event he is successful in the substantive matter, some of ACW's losses are less tangible and not able to be recovered by a

¹ [2005] ERNZ 487

monetary award. In particular ACW was concerned about the impact on it of the possible loss of residents, drop in morale, and potential impact on the level of care provided to residents as indicated by the contents of its affidavits.

[21] In that respect Ms Sutherland and Ms Owen referred to approaches from individuals who had previously been too nervous to raise concerns about Mr Tuck, as well as to divisions in the workplace and efforts being made to repair these. In the light of the information obtained Ms Sutherland believed it would be necessary to supervise Mr Tuck were he to be reinstated. For her part, Ms Owen deposed that information and allegations about Mr Tuck of which she is now aware would cause her to question her ability to maintain the health and safety of staff and residents as well as the continuation of her own employment were he to be reinstated.

[22] On balance overall relevant matters to be weighed are the obvious difficulty and divisiveness associated with Mr Tuck, against Mr Tuck's right to work. The effect of Mr Tuck's exercise of his right to work means I find the balance of convenience favours ACW.

3. Overall justice

[23] Both parties filed numerous affidavits from residents and staff either in support of or against Mr Tuck's reinstatement. The theme of those in favour of Mr Tuck's reinstatement was that Mr Tuck was friendly, pleasant, supportive of them, hardworking and good at his job. Of those against Mr Tuck's reinstatement, general concerns were expressed about his bullying or intimidatory conduct and some deponents including Ms Pryor indicated that they would leave the facility, or resign, were Mr Tuck reinstated.

[24] In the face of that material Mr Ryan submitted very sensibly that it may be appropriate for Mr Tuck to be reinstated on condition that he be returned to the payroll only, pending a determination of the substantive matter.

[25] However the Employment Court has said - and the Court of Appeal accepted on appeal - that it is also open as a matter of overall justice to consider the prospects

of an order for reinstatement in a determination of the substantive matter.² Here I bear in mind that reinstatement is the primary remedy for an unjustified dismissal, and where sought it must be ordered wherever practicable.

[26] The basis of the dismissal was Mr Tuck's bullying conduct towards Ms Pryor, and in particular his conduct towards her on 2 February. If ACW's view of that conduct is accepted in the substantive hearing then, even if the dismissal is otherwise found to be unjustified, an order for reinstatement would be unlikely on the ground of its impracticability. Moreover the indications in all of the affidavits as they bear on the generally divisive effect of Mr Tuck's presence in the workplace, and the effect on some residents and members of staff of his alleged conduct, mean reinstatement would in any event be unlikely.

[27] To summarise:

- i. it was conceded that Mr Tuck has arguable case, albeit weak;
- ii. the balance of convenience favours ACW; and
- iii. as a matter of overall justice, Mr Tuck's prospects of securing permanent reinstatement are low.

[28] For these reasons I decline to make any order for interim reinstatement.

Costs

[29] Costs are reserved pending the determination of the substantive matter, or until otherwise resolved by the parties.

R A Monaghan

Member of the Employment Relations Authority

² **Madar v P & O Services Limited** [1999] 2 ERNZ 174