

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 464
3146822

BETWEEN UKO
Applicant

AND WAITEMATA DISTRICT
HEALTH BOARD
Respondent

Member of Authority: Peter Fuiava

Representatives: Arsalan Abdollahi, advocate for the Applicant
Anthony Russell, counsel for the Respondent

Investigation Meeting: By case management conference

Submission received: 4 August and 2 September 2021, from the Applicant
9 September 2021, from the Respondent

Determination: 20 October 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

A. UKO's application for interim reinstatement and non-publication are declined.

B. Costs are reserved.

Employment Relationship Problem

[1] UKO is a specialist physician with over 45 years' experience. On 1 July 2005, he was employed by the Waitemata District Health Board (the DHB) as a Senior Medical Officer (SMO). On 16 July 2021, UKO's employment ended by way of redundancy.

[2] On 4 August 2021, an amended statement of problem was lodged with the Authority in which it was alleged that UKO was unjustifiably disadvantaged by the

DHB arising from a breach of good faith and an unfair and unreasonable redundancy process. In his amended statement of problem, UKO applied for interim reinstatement and for non-publication of his and the DHB's names and details. Supporting the application for interim reinstatement was an undertaking as to damages.

[3] This determination deals only with UKO's applications for interim reinstatement and non-publication. The investigation of his substantive claims will be held in due course.

Application for non-publication is declined

[4] UKO seeks a non-publication order for two reasons. First, he does not wish to bring the DHB into disrepute by seeking an order for reinstatement. Second, he is concerned that the publication of his and the DHB's names would have a negative impact on any prospect of reconciliation between them. At the case management conference, the DHB opposed UKO's application for non-publication.

[5] In determining whether UKO's particular circumstances justify the grant of a non-publication order, I adopt as my starting point the principle of open justice which is fundamental to our common law system of civil and criminal justice.¹ The principle can be displaced by sound reasons. For the following reasons, I am not satisfied that there are sound reasons for displacing the presumption of open justice.

[6] The first ground relied upon for a non-publication order was to protect the DHB's reputation from falling into disrepute. I fail to see how applying for interim reinstatement would have an adverse effect on the DHB's reputation. Such applications are commonly made in the Authority and the Employment Court and I note that the DHB has not consented to UKO's application for non-publication.

[7] As for preserving any prospect of reconciliation between the parties, both parties have attended mediation but were not able to reach a resolution there. The DHB has consistently opposed UKO's application for interim reinstatement and a non-publication order is unlikely to change what is a well-entrenched position.

¹ Erceg v Erceg [2016] NZSC 135.

[8] I therefore decline UKO's application for non-publication. However, given that UKO has a right to challenge this decision, an interim non-publication order is made so as to preserve the benefits of any subsequent challenge to this decision.

[9] Accordingly, pursuant to clause 10 of schedule 2 of the Employment Relations Act 2000 (the Act), I grant an interim non-publication order prohibiting the publication of UKO's name and identity. This order will stay in place for 28 days commencing from the date of this determination which will enable UKO to file his appeal, if any. If no appeal is filed, my interim non-publication order will naturally lapse.

[10] I now turn to UKO's application for interim reinstatement.

The law relating to interim injunctions

[11] The law relating to interim injunctions is to be applied in determining whether to order interim reinstatement having regard to the object of the Act.² In essence, the object of the Act is to build productive employment relationships through the promotion of good faith.³

[12] The principles relating to interim injunctions were set out by the Court of Appeal in *NZ Tax Refunds Ltd v Brooks Homes Ltd*:⁴

The applicant must first establish that there is a serious question to be tried or, put another way, that the claim is not vexatious or frivolous. Next, the balance of convenience must be considered. This requires consideration of the impact on the parties of the granting of, and the refusal to grant, an order. Finally, an assessment of the overall justice of the position is required as a check.

The grant of an interim injunction involves, of course, the exercise of a discretion ... This is subject to the qualification, however, that whether there is a serious question to be tried is an issue which calls for judicial evaluation rather than the exercise of a discretion.

[13] In considering UKO's application for interim reinstatement the Authority is required to consider the following:

- (i) Does UKO have an arguable case for unjustified dismissal and an arguable case for permanent reinstatement?

² Employment Relations Act 2000, s 127(4).

³ Above at s 3.

⁴ *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90 at [12]-[13].

- (ii) Where does the balance of convenience lie pending a substantive investigation and a final determination of UKO's claim?
- (iii) Where does the overall justice of this case lie until the substantive matter can be determined?

The Authority's investigation

[14] On 13 August 2021, the Authority held a case management conference with the representatives to set a timetable for UKO's applications for interim reinstatement and non-publication. In a minute of 16 August 2021, I signalled to the parties my intention to determine the applications 'on the papers'. There has been no objection to this course of action.

[15] In terms of the documents filed with the Authority, an affidavit from UKO was provided in support of his interim reinstatement application. Mr Abdollahi advised that he would not be filing any further affidavit evidence for UKO. I have considered Mr Abdollahi's submissions of 4 August and 2 September 2021.

[16] On behalf of the DHB, Mr Russell has lodged a statement in reply (17 August 2021), amended submissions (9 September 2021) and affidavits opposing interim reinstatement from Dr Christiansen, Chief Medical Officer for the DHB, Alexandra Boersma, General Manager, Acute and Emergency Medicine, and Fiona McCarthy, People and Culture Director.

[17] While a significant amount of evidence has been filed, it remains untested. I am not able to resolve evidential matters in dispute between the parties at this early stage of the proceedings. That is the function of the investigation meeting.

Background

[18] Before considering whether UKO has an arguable case for unjustifiable dismissal and permanent reinstatement, it is necessary to set out in some detail the relevant facts in order to put the parties' submissions in their proper context.

[19] As stated above, UKO started working for the DHB as a senior physician in July 2005. At that time, he worked full-time in General Medicine which included acute clinical work.

[20] In March 2015, UKO sustained a back injury that required him to take six months' medical leave from work. Prior to returning to work in September 2015, he underwent a physical assessment by an occupational health specialist (OHS) who found that he was fit to work reduced duties only which did not include any acute or urgent medical work. An agreement was reached between UKO and the DHB that allowed him to work 14.7 hours per week comprising two General Medicine non-acute outpatient clinics per week. These have been UKO's area and hours of work since.

[21] In about December 2019, a DHB working group was established to review the outpatient clinic model at Waitakere Hospital. A similar review had taken place earlier at North Shore Hospital which saw its outpatient clinics being changed to Resident Medical Officers (RMO)-led outpatient clinics with SMO supervision.

[22] In March 2020, New Zealand had its first Level 4 COVID-19 lockdown. In line with the Ministry of Health and Public Health guidelines, all SMOs over 70 years of age were told that they could not have direct patient contact. As UKO was over the prescribed age limit, he was not able to attend the hospital or conduct any of his outpatient clinics.

[23] In late May 2020, UKO was permitted to return to work, resuming his two General Medicine non-acute outpatient clinics per week.

[24] In October 2020, UKO made a series of complaints against some of his colleagues regarding the cancellation of his clinics and the follow-up care his patients had received in his absence. While the complaints were investigated by Ms McCarthy who found them to be largely unsubstantiated, in order to move matters forward, it was proposed that Dr De Jong of the DHB would review the patients UKO had expressed concerns about. In December 2020, subsequent complaints however were raised by UKO against Dr De Jong and Dr Christiansen. These complaints were apparently investigated and responded to by the DHB.

[25] In February 2021, the DHB completed its review of its General Medicine services at Waitakere Hospital. The underlying reasons behind the review included the need to increase training opportunities for RMOs at Waitakere Hospital and a reduction in the number of referrals to General Medicine as a result of the COVID-19 pandemic.

[26] In March 2021, a proposal document was distributed to all affected staff, including UKO. On 10 March 2021, he advised that he did not understand a graph in the proposal document which was re-done and sent out to him again.

[27] On 31 March 2021, UKO met with representatives of the DHB which included Ms Boersma and Thereza Guttenbiel, HR manager, to discuss the proposal. It appears that UKO did not raise any objection towards the proposal.

[28] Further feedback was received from UKO by email of 6 April 2021 in which he acknowledged that the recommended changes at North Shore Hospital had been going for a while “presumably satisfactorily.” He stated that he would be amenable to seeing patients referred from the Assessment and Diagnostic Unit (ADU) and Emergency Department but that he wished to have at least one General Practitioner (GP) referral patient a week because he believed that such referrals would “pick up” in the future.

[29] In another email to management (7 April 2021), UKO suggested that cases where a GP had not been able to diagnose a patient for a long time should be referred to an SMO.

[30] On 27 April 2021, the DHB took into account the feedback it had received and made a final decision. Among other things, it was decided that the SMO General Medicine clinics would be replaced with RMO-led clinics supervised by SMOs. Regarding GPs who had not been able to diagnose a patient for some time, UKO was advised that GPs had access to a wide range of sub-specialty clinics which were SMO-led. All General Medicine RMO clinics would be supervised by the acute physician responsible for the registrar’s supervision.

[31] On 4 May 2021, Ms Boersma wrote to UKO to invite him to a meeting to discuss the impact the decision would have on him. The letter recorded that he was not able to

move to an acute clinic role because he had not been registered as an acute physician since 2016.

[32] On 12 May 2021, Ms Boersma and Nita Brink, HR Manager, met with UKO to obtain his feedback regarding the decision document. He stated that he felt that he was being pushed out and that he could improve his acute clinical skills by attending the acute ward rounds of his peers. He expressed a desire to do at least one acute clinic a week. Ms Boersma suggested that he be referred to an OHS assessment.

[33] However, Dr Christiansen determined that in order to get UKO credentialed for acute medicine, a significant amount of time, training and resources would be required as he had not done any acute work since 2015. Further, he had previously been assessed by an OHS specialist as not being fit for acute medical work.

[34] On 21 May 2021, Ms Boersma wrote to UKO to advise him that moving him to an acute clinic role was not an option. The letter offered him the option of medical retirement from clinical practice or an honorary teaching position for which he would not be paid.

[35] In an email of 24 May 2021, UKO provided his feedback. He queried whether all SMO outpatient clinics had been disestablished. He also questioned why he had not been referred to an OHS for assessment. He stated that he was a registered neurologist and that he had not made any medical mistakes. He asked why he could not be credentialed for acute medicine and he warned that he would be contacting the New Zealand Medical Council and the Health and Disability Commissioner regarding Dr De Jong who had cancelled his outpatient clinics and had been slow to review his patients.

[36] On 9 June 2021, UKO met with Ms Boersma, Dr Christiansen and Ms McCarthy to discuss his concerns and why it was not possible to have him credentialed for acute practice. The options of retirement, redundancy or a voluntary teaching position were repeated to UKO.

[37] On 11 June 2021, Ms Boersma wrote to UKO requesting his feedback regarding the above options. He was invited to a further meeting on 21 June 2021 to discuss his

feedback. On 14 June 2021, UKO emailed Ms Boersma that he was unwilling to meet again until his complaints regarding Dr De Jong were resolved. In his email, UKO referred to a “lady doctor” who had been on maternity leave for over seven and a half months. He questioned whether she was able to work swiftly and better than he could in acute medicine given that she had a dependent infant to look after.

[38] On 25 June 2021, Ms Boersma wrote to UKO to formally advise him that his position had been disestablished and that he was to be made redundant. His last day of work was 16 July 2021.

Arguable case of unjustified dismissal

[39] The first question for consideration is whether there is an arguable case UKO was dismissed unjustifiably and that he will be permanently reinstated. An arguable case means a case with some serious or arguable, but not necessarily certain, prospects of success.⁵

[40] Although the only cause of action pleaded in UKO’s amended statement of problem was unjustified disadvantage, Mr Abdollahi’s submissions of 2 September 2021, which were filed within 90 days of UKO’s dismissal, mentions expressly the words ‘unjustified dismissal’.⁶ While a copy of UKO’s personal grievance letter of 9 July 2021 to the DHB is not before me, when all the documents are read in their totality, it appears that personal grievances for unjustified disadvantage and unjustified dismissal were raised with the DHB in time.

[41] Section 103A of the Act sets out the test for justification which requires an objective assessment of whether the DHB’s actions, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. An employer’s decision to dismiss an employee must be, when examined objectively, substantively justifiable and procedurally fair for it to survive scrutiny by the Authority or the Employment Court.

[42] UKO’s affidavit of 30 July 2021 records that his problem started in 2016 when Dr Christiansen allegedly made several mistakes which UKO pointed out to him.

⁵ *X v Y Ltd v NZ Stock Exchange* [1992] 1 ERNZ 863 at 872.

⁶ Employment Relations Act 2000, s 114.

According to UKO, Dr Christiansen tendered his resignation as Head of Division but did not do so because UKO had written to him asking him not to resign. UKO says the whole incident had left Dr Christiansen harbouring a severe “grouse” with him.

[43] In response, Dr Christiansen says that his resignation was entirely unrelated to the issues raised by UKO and that he had already resigned before UKO had written to him. Dr Christiansen denies that he has a longstanding grudge against UKO.

[44] While I am not able to resolve this evidential dispute between UKO and Dr Christiansen, I would have expected the former to have raised this as an express objection to the DHB’s proposed changes to its model of care at Waitakere Hospital. The fact that UKO did not do so suggests that there was no ulterior motive behind the disestablishment of the SMO-led outpatient clinics at Waitakere Hospital.

[45] Further, I have considered the DHB’s proposal for change document to its General Medicine Outpatient Service. Contained within its nine pages were four key factors that underpin the case for change, including the need to amend the acute general medicine model of care at Waitakere Hospital due to the implementation of home-based wards in December 2019. While I am yet to question UKO and Dr Christiansen regarding their evidence, based on a broad impression of what is before me, I see no compelling evidence that restructuring was a furtherance of a personal grudge that Dr Christiansen allegedly has with UKO due to an incident that occurred in 2016.

[46] One area where it could be argued that UKO has an arguable case is whether he could have been credentialed to do acute medicine work, and if not, whether he could have been redeployed to some other department in the DHB such as neurology or cardiology. A failure to consider redeployment may support a finding that a redundancy was not genuine.⁷

[47] I was not assisted by not having been provided with an affidavit in reply from UKO which may have contained information regarding the possibility of his redeployment. That being said, I note that UKO has over 45 years of experience as a specialist physician and has previously worked in neurology and cardiology at other

⁷ *Simpson Farms Ltd v Aberhart* [2006] ERNZ 825.

hospitals. Dr Christiansen says that UKO has never been employed or credentialed as a neurologist since he started working for the DHB in 2005. While that may be so, I am still left with the question whether UKO could have deployed somewhere else within what is a large organisation and whether the DHB fairly considered redeployment opportunities for UKO.

Conclusion on arguable case of unjustified dismissal

[48] Based on all the information that I have before me, I accept that UKO has an arguable case that the DHB did not act as a fair and reasonable employer could have done with respect to the question of redeployment and this may render his dismissal unjustified. That being said however the case is not a particularly strong one because it is not entirely clear whether UKO could have been credentialed to do acute medicine or even neurology work. Further, I note that he had been offered the option of an honorary teaching position, albeit this was an unpaid role.

No arguable case for permanent reinstatement

[49] Section 125 of the Act states that reinstatement is the primary remedy, but it must both be practical and reasonable to do so. Here I look at the feasibility or practical workability of re-imposing this employment relationship.

[50] UKO has worked for the DHB as an SMO for 16 years. There have been no patient complaints made against him and there is nothing before me that says he is not competent to work as a senior physician in General Medicine.

[51] The DHB say that there is no position for UKO to be reinstated to because the SMO led outpatient clinics at Waitakere Hospital have been disestablished. The DHB further says that UKO has not been credentialed to do acute work and has not been since 2016. It would now take an excessive amount of time, money and resources to have him credentialed which would be incommensurate with the part time nature of his position.

[52] There has been no affidavit in reply filed by UKO filed in response to the DHB's claim that he cannot be reinstated into his former position. Further, there is nothing before me that suggests that UKO could be put into a role that is no less advantageous

to him.⁸ Based on the evidence I have before me at this early stage, I find that there is no arguable case for permanent reinstatement.

Conclusion on arguable case for reinstatement

[53] Considering all the relevant issues my assessment at this early stage is that UKO has no arguable case for permanent reinstatement.

Balance of convenience

[54] In the event that I am wrong about the arguable case for permanent reinstatement, I move on to consider the balance of convenience which requires an assessment regarding the impact on each party if interim reinstatement is granted or not. My preliminary view, based on untested evidence, is that the claim of unjustified dismissal is not strong and that the claim for permanent reinstatement is weak. This weighs against interim reinstatement in assessing where the balance of convenience lies.

[55] I take into account that UKO wishes to keep on working. I accept that the longer he is not working, the harder it will be for him to stay current with the practice of General Medicine. I can indicate to the parties now that an investigation meeting for this matter can be set down in early 2022. As such, it will not be that long for UKO to wait for his matter to be heard. It has not been suggested that UKO is not able to bear the financial burden of having to wait, especially when his amended statement of problem makes clear that reinstatement is the only remedy he seeks.

[56] I take into account the disruption for the DHB if interim reinstatement is granted. It has spent considerable resources already in restructuring its SMO outpatient clinics which included sending out a proposal document and consulting and obtaining feedback from all affected staff, including UKO. As stated above, the SMO led outpatient clinics no longer exist so while UKO is on the staff payroll, it is not clear what his role might be assuming for the moment, that he is allowed to work (on account of the vulnerability of his particular age group) at COVID-19 Alert Level 3, which is currently the case for Auckland.

⁸ Employment Relations Act 2000, s 123(1)(a).

[57] In order to have UKO credentialed for acute medicine, Dr Christiansen's affidavit makes clear that the process is not only expensive but time-consuming in that it would take at least six months of full-time supervised duties. In UKO's case, the process would be even longer because he has not worked full-time for the DHB since 2015.

[58] An affidavit in reply from UKO has not been lodged with the Authority and as such there is nothing before me that suggests that the time, energy and resources that Dr Christiansen says are required to have UKO credentialed into acute medicine is inaccurate. On the face of Dr Christiansen's evidence, I find that it would not be a good use of public funds for the DHB to start the credentialing process at this point in time, especially when, in all likelihood, UKO would not have completed the process by the time of his investigation meeting date.

[59] Finally there is the submission that UKO's return would cause significant disruption among his colleagues and management. I have been provided with copies of emails from UKO which on a plain reading show a lack of collegiality on his part towards those with whom he would be working. In particular, I note that UKO has referred to one female SMO, who has recently returned from maternity leave, in a less than professional way (see [37]). While Mr Abdollahi says that the allegations of incompatibility are new, collegiality among hospital staff is vital for the organisation to function smoothly and to serve its communities effectively. I find that the disruption that would occur as a result of UKO's return to work would have been for nothing if he did not succeed with his application for permanent reinstatement.

Conclusion on balance of convenience

[60] I acknowledge that the longer UKO is not practicing General Medicine, the more difficult it will be for him to keep his skills up to date. However, the significant cost in having the DHB credential him into acute medicine, which is incommensurate to the part-time nature of his employment, and the potential disruption UKO's return would have on his colleagues and staff, weighs against interim reinstatement.

[61] Weighing up this assessment, I find that the balance of convenience weighs in favour of the DHB and against the granting of interim reinstatement.

Overall justice

[62] If I am wrong regarding the balance of convenience I go on to consider the overall justice of the case. The Court of Appeal stated that the overall justice assessment was essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and balance of convenience.⁹

[63] In terms of the merits, I do not assess UKO's grievance nor his chance of gaining permanent reinstatement as particularly strong. The overall justice of this matter does not favour interim reinstatement.

Should UKO be reinstated?

[64] As outlined above, I am satisfied that there is a serious question to be tried regarding whether UKO was unjustifiably dismissed by the DHB. However, on the evidence before me, I do not consider that UKO has established a serious question to be tried about permanent reinstatement.

[65] I decline UKO's application for interim reinstatement.

Costs

[66] Costs are reserved.

Peter Fuiava
Member of the Employment Relations Authority

⁹ *NZ Tax Refunds Ltd v Brooks Homes Ltd*, above n 1, at [47].