

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2012] NZERA Christchurch 249
5398115

BETWEEN WENDY VOLLMER
 Applicant

A N D THE WOOD LIFE CARE (2007)
 LIMITED
 Respondent

Member of Authority: Christine Hickey

Representatives: Nicole Ironside, Counsel for the Applicant
 Linda Ryder & Jeff Goldstein, Counsel for Respondent

Investigation meeting: 31 October 2012 at Nelson

Date of Determination: 13 November 2012

INTERIM DETERMINATION OF THE AUTHORITY

A. In reliance on Wendy Vollmer’s undertaking as to damages under section 127 (2) of the Employment Relations Act 2000 as of Monday 19 November 2012 Wendy Vollmer is reinstated, in the interim, to her former position as the charge nurse of The Wood’s rest home and as the Infection Control Co-ordinator for the rest home and hospital. However, The Wood Life Care (2007) Limited may exercise the option of not requiring Ms Vollmer to perform her duties and may, while reinstating her to her former role, place her on ‘garden leave’ until the substantive matters are resolved.

Employment relationship problem

[1] Ms Vollmer has made an application for interim reinstatement under section 127 of the Employment Relations Act 2000 (the Act).

[2] Ms Vollmer was dismissed from her job as Charge Nurse of the rest home at The Wood Life Care (2007) Limited (The Wood) aged care facility on 4 October 2012.

[3] Ms Vollmer claims that she was unjustifiably dismissed and has applied to the Authority for interim reinstatement pending determination of the substantive matters. Ms Vollmer claims substantive relief including unjustified disadvantage relating to her suspension on 14 August 2012, permanent reinstatement to her previous role or a role no less advantageous to her, reimbursement of lost earnings, reimbursement of lost benefits, an order that the respondent has breached its obligation of good faith and a penalty for that breach and compensation for humiliation, loss of dignity and injury to her feelings caused by the dismissal.

[4] The Wood resists interim reinstatement and the substantive claims.

[5] As required by section 127(2) of the Act Ms Vollmer has given an undertaking to abide by any order the Authority may make in respect of damages in determining her employment relationship problem.

[6] As usual in cases on interim reinstatement I have investigated the application by considering the affidavits lodged by both parties, considerable documents and by hearing submissions from both parties. I held the investigation meeting in Nelson on 31 October 2012.

[7] While some of the facts have been canvassed in the process, the findings I express in this determination are solely in relation to the claim for interim reinstatement. Final findings of fact and law will only be made once I have had an opportunity to fully test all of the relevant evidence.

[8] I note that the parties have been able to agree to attend mediation on 21 November 2012 and I am able to hold the substantive investigation meeting on 27 to 29 November 2012 in Nelson.

Background Facts

[9] Ms Vollmer began working for The Wood on 3 July 2007 as a registered nurse. She was a part of the senior staff at The Wood. The facility has a rest home and a hospital. The general manager of The Wood is Andrena Williams who is based

in Christchurch. Correne Berryman is the facility manager and based in Nelson. Ms Vollmer and Shirley-Ann Langford were charge nurses of the rest home and the hospital wing respectively. Ms Vollmer was appointed as the Infection Control Co-ordinator for the rest home and hospital during 2011.

[10] On 6 August 2012 Ms Vollmer was given written notice that The Wood invited her to attend a disciplinary hearing on 8 August 2012 in relation to three allegations against her of serious misconduct being:

- *abusive, intimidating and unprofessional behaviour towards Correne Berryman, Facility Manager on Friday 3rd August 2012*
- *failure to read/follow policy and lawful instructions regarding recording all infections as reported in the Surveillance audit*
- *an ongoing recent history of inappropriate communication and unprofessional behaviour towards the Facility Manager, the ATR Charge Nurse Lisa Turner and the Ebos Representative Michelle Campbell.*

[11] Ms Vollmer was advised that the outcome of the allegations, if substantiated, could lead to her dismissal.

[12] Ms Vollmer worked on 6 and 7 August 2012. However, she was ill from 8 August 2012 and was not at work. She was well enough to return to work on 14 August 2012.

[13] On 13 August 2012 Mrs Williams e-mailed Ms Vollmer that The Wood had rescheduled the disciplinary meeting to 21 August 2012 and that it would continue to pay for Ms Vollmer to remain on paid leave until then.

[14] Later that same day Ms Vollmer's lawyer, Ms Ironside, sent Mrs Williams an e-mail which amongst other things advised that Ms Vollmer did not agree to be on paid leave and intended to attend work as usual the next morning.

[15] On the morning of 14 August 2012 upon attending work Ms Vollmer was suspended by Mrs Williams and asked to leave the premises by Ms Berryman. The events culminated in Ms Berryman calling the police to ask for their assistance to get Ms Vollmer to leave the premises. Whether or not the Police were needed to facilitate her leaving is disputed.

[16] Ms Vollmer did leave the premises and later that morning the police visited her at her home and at the respondent's request served a trespass notice on her preventing her from going to The Wood for a period of 2 years.

[17] On the same day Ms Ironside raised a personal grievance of unjustified disadvantage on Ms Vollmer's behalf in relation to the suspension and asked to have the suspension lifted.

[18] The disciplinary hearing was unable to proceed until 3 September 2012 for a number of reasons including a period of paid annual leave already planned by Ms Vollmer. By that stage The Wood had notified Ms Vollmer that it was not proceeding with the original third allegation relating to her alleged history of inappropriate communication and unprofessional behaviour. However, it added an allegation of failing to follow a lawful instruction on 14 August 2012 in that Ms Vollmer failed to leave the premises as directed after she was suspended.

[19] The disciplinary hearing took place on 3 September 2012 between Ms Vollmer, Ms Ironside, Ms Berryman, The Wood's lawyer, Linda Ryder, and The Wood's representative Shirley McKenzie who was acting on Mrs Williams' behalf as the employer's decision maker. Mrs Williams was overseas at the time.

[20] After the meeting there were further investigations undertaken by the employer and correspondence between the parties' lawyers. Mrs Williams returned from overseas and on 25 September 2012 The Wood advised that Mrs Williams would now resume the role of decision maker.

[21] On 30 September 2012 Mrs Williams advised of her findings that each of the three allegations were proved and amounted to serious misconduct. It proposed that Ms Vollmer would be summarily dismissed. Ms Vollmer was asked for her feedback on the proposed outcome. Ms Ironside continued to correspond with Ms Ryder after that.

[22] On 4 October 2012 Mrs Williams wrote to Ms Vollmer conveying her decision to summarily dismiss her.

[23] Ms Vollmer subsequently raised her personal grievance of unjustified dismissal. She argues that the three grounds for dismissal are not substantively

justifiable and that there were numerous procedural defects in the process of suspension and leading up to her dismissal.

The law

[24] Section 127 of the Employment Relations Act 2000 (the Act) gives me the power to order interim reinstatement pending substantive hearing of a personal grievance.

[25] The general principles by which applications for interim reinstatement are decided require me to consider three enquiries. Is there an arguable case? Where does the balance of convenience lie? What does the overall justice of the case require?

Is there an arguable case of unjustified dismissal and for interim reinstatement?

[26] The Employment Court in *Angus v Ports of Auckland Limited*¹ said:

The issues for decision are, therefore:

- *Whether the plaintiff has an arguable case that he was dismissed unjustifiably as that is now defined by new s 103A of the Act;*
- *Whether the plaintiff has an arguable case for reinstatement in employment (applying the new test for reinstatement under s 125 of the Act) if he is found to have been dismissed unjustifiably;*
- *Where the balance of convenience lies between the parties in the period until the Court's judgment is given on those issues; and*
- *Whether the overall justice of the case dictates that interim reinstatement in employment is appropriate.*

[27] To support an application for interim reinstatement Ms Vollmer must not only establish that she has an arguable case that she was unjustifiably dismissed but must also establish that it is arguable that she will be permanently reinstated in addition to, or instead of, being compensated monetarily².

[28] The Wood must ultimately justify its decisions to suspend and dismiss Ms Vollmer under section 103A of the Act with the test being whether those decisions were ones a fair and reasonable employer could have made in all the circumstances.

¹ [2011] NZEmpC 128

² *Cliff v. Air New Zealand Limited* [2005] ERNZ 1

In addition, subject to section 103A(5) the general requirements of procedural fairness must have been met.

[29] For Ms Vollmer Ms Ironside submitted that she has a strongly arguable case not only that the suspension and the dismissal were unjustified but that it is likely that the ultimate remedy will be reinstatement.

[30] For The Wood it is argued that if there is an arguable case that Ms Vollmer would succeed at the substantive hearing in proving the suspension and dismissal unjustified it must be only a weak arguable case.

[31] In addition, The Wood opposes reinstatement on the basis that Mrs Williams and Ms Berryman have lost confidence and trust in Ms Vollmer. Mrs Williams also considers that her reinstatement would compromise The Wood's ability to properly manage its other staff.

[32] Both practicability and reasonableness are issues in the consideration of reinstatement under s.125 of the Act. They include an assessment of whether or not workplace relationships can be restored.

[33] I consider that Ms Vollmer has an arguable case that the suspension was unjustified on the basis that she was not adequately consulted before the decision to suspend her was made. I also consider that there is arguable case that the issuing of a two-year trespass notice preventing Ms Vollmer from attending her place of work determined the employment agreement, which was in itself in the nature of a dismissal which the employer is required to justify. The issuing of the trespass notice also tends to suggest some compromise to the employer's ability to fairly decide later whether the allegations against Ms Vollmer amounted to serious misconduct justifying summary dismissal.

[34] I also conclude that Ms Vollmer does have an arguable case that she may succeed in a remedy of reinstatement. I deal with the respondent's arguments against reinstatement below as a part of the next two considerations.

Where does the balance of convenience lie?

[35] Reinstatement is no longer the primary remedy for unjustified dismissal under the Act. However, it may be ordered if it is reasonable and practicable to do so.

[36] In assessing where the balance of convenience lies I need to consider the relative situations of the parties. That is, what is the potential effect on Ms Vollmer if interim reinstatement is not granted compared to the potential effect on The Wood if it is granted? In the Employment Court case of *Gazeley v Oceania Group (NZ) Limited*³ Judge Couch said that it was also important to consider the potential effects on third parties⁴. That case also involved a rest home and the Court took into account the potential effect of reinstatement on other staff and the:

*...residents of Woodlands. They are particularly vulnerable to any disturbance in the operation of the facility which is their home. It follows that I must give weight to even a slight risk of disruption or disharmony at Woodlands.*⁵

[37] Ms Vollmer submits that her age of 58 years, her senior position as a charge nurse of some years, the fact that she was dismissed for serious misconduct and that she has been reported to the Nursing Council mean that her professional reputation has suffered and she will find it very difficult to get another comparable position.

[38] Ms Vollmer also says that her health has suffered due to what she considers to have been unfair treatment by the respondent and it will improve if she is reinstated. Mr Goldstein made a submission that Ms Vollmer's health is such that she should not return to work. However, I do not consider that conclusion can be supported by the evidence. Indeed, Dr Martin Hudson, Ms Vollmer's general practitioner, in his letter annexed to her affidavit comes to the contrary conclusion. He considers that her return to work will only benefit her health which has been adversely affected by her dismissal.

[39] Ms Vollmer says that she is a single person with limited savings and was reliant on her previous income for her living expenses.

[40] The Wood argues that it is in a strong position to meet any eventual monetary orders made against it in Ms Vollmer's favour and that monetary remedies are an adequate alternative remedy to reinstatement.

[41] The respondent submitted that if interim reinstatement is ordered the trespass notice is a barrier. The respondent has suggested that as the Authority does not have the jurisdiction to overturn the trespass order it is not appropriate for me to make an

³ [2012] NZ EMpC 8

⁴ Ibid at paragraph 26

⁵ Ibid at paragraph 37.

order of reinstatement. I do not consider that to be a relevant consideration as it is completely within the respondent's power to lift the trespass order if I do order reinstatement. Any refusal to do so and any decision made to enforce the trespass order would be in breach of the respondent's obligation to engage with Ms Vollmer in good faith if she is reinstated and would be in breach of an Authority order.

[42] In addition, I do not consider that I can let the respondent's decision to issue a trespass notice to Ms Vollmer prejudice Ms Vollmer's case in front of me.

[43] Ms Berryman on behalf of The Wood, and with Mrs Williams' agreement, has notified the Nursing Council that Ms Vollmer was dismissed and of the reasons for her dismissal. In the notification Ms Berryman has included the allegation about alleged inappropriate communication that was withdrawn and not relied on for Ms Vollmer's dismissal as well as other allegations made since the dismissal. I note that the Nursing Council has referred the complaint to the Health and Disability Commissioner for a decision on whether it falls within his jurisdiction or if the complaint should be referred back to the Nursing Council. In any event, there are no restrictions on Ms Vollmer's practice as a registered nurse.

[44] Ms Langford's affidavit ends with her conclusion that all former trust she had in Ms Vollmer *to fulfil her role as Charge Nurse of the Rest home and ... work with me would not be possible*. However, she gives no evidence of any issues or difficulties with working with Ms Vollmer before Ms Vollmer's suspension. Rather she states that the events of 14 August 2012 had *a destructive impact on my relationship with some staff members in the Rest Home where Wendy had been the Charge Nurse*.

[45] I note that if the suspension and events subsequent to that are found to be unjustified after the substantive hearing it would be unjust to allow the events of 14 August 2012 and their impact on Ms Langford's relationship with other staff members to be held against Ms Vollmer in relation to her desire to be reinstated.

[46] Ms Langford's evidence is that since Ms Vollmer's absence she has been asked to *attend to any emergency bells that ring on Tuesdays and Thursday and any other days that there is no Registered Nurse on duty*.

[47] Chris Gaul, the Nurse Educator/Quality Facilitator, is the other member of the senior nursing staff. Her evidence is that if Ms Vollmer returns to work *it would*

create a negative atmosphere within the nursing and care staff team, and in particular amongst the senior nursing team. ...having Wendy return would require a great deal of team work in order to function effectively.

[48] Like Ms Langford Ms Gaul gave no evidence of any difficulty she had with working with Ms Vollmer prior to the suspension.

[49] It is to be expected that the suspension and ultimate dismissal of a long-serving employee would cause unrest and even division amongst the remaining staff in any workplace. I do not consider that the evidence of the division and unease is so significant to tip the balance completely in the employer's favour. Indeed, prior to the substantive determination of the justification for the suspension and dismissal it is unfair to place the burden of the outcome of those decisions wholly on the applicant by making the reaction of other staff an insurmountable barrier to her reinstatement.

[50] On The Wood's behalf it was also submitted that there are a number of jobs currently advertised in Nelson for registered nurses and that there is a shortage of registered nurses in the aged care sector. Ms Berryman suggested that Ms Vollmer is likely to find satisfactory alternative employment in Nelson because she has been given very positive written references from The Wood's former facility manager, Sharon Blackbeard and two general practitioners, whose patients reside at The Wood and have been cared for over a number of years by Ms Vollmer. Ms Berryman considers that Ms Vollmer's age is not a barrier to obtaining work in aged care but is instead in her favour.

[51] The law recognises that the ability to undertake one's employment has value over and above any monetary compensation for the loss of such an opportunity. I consider that in Ms Vollmer's case given her profession, her seniority and position of responsibility, her age, and length of service at The Wood that monetary compensation is unlikely to be sufficient to fully compensate her for the lack of her position at least in the interim until the substantive matter can be heard and resolved.

[52] The law also recognises that even if there is a high degree of mobility in a particular industry:

...that is not a worthwhile point for there is all the difference in the world between elective mobility and forced migration.⁶

⁶ *Orme v Eagle Technology Group Ltd*, Employment Court, Chief Judge Goddard, WEC40/94, W54/95

[53] I consider that the balance of convenience favours Ms Vollmer being reinstated on an interim basis. However, that does not entirely resolve matters.

Overall justice

[54] I need to stand back and assess the overall justice of the case from a global perspective.

[55] Mrs Williams and Ms Berryman attest to a lack of trust in Ms Vollmer's ability to perform her duties professionally and her ability to be "managed" by them. However, in order to successfully resist interim reinstatement an employer must do more than merely assert that it has lost trust and confidence in an employee.

[56] Mrs Williams relies to a great extent on the fact that Ms Vollmer has collected evidence and support for her claims by contacting staff, past staff and the family of a resident for her conclusion that Ms Vollmer is highly untrustworthy. However, there is no rational basis to conclude that there is underhandedness or inherent untrustworthiness in a grievant seeking supporting evidence.

[57] There is evidence of a division between the staff between those who support Ms Vollmer and those that do not. However, there is no evidence before me, only speculation, that her reinstatement would worsen this division.

[58] As facility manager Ms Berryman no doubt needs to be able to manage all sorts of personalities and personality clashes between staff and between her and staff members in her role. There is no real evidence that she is incapable of managing Ms Vollmer's return to the workplace and reintegration into the team. Ms Langford and Ms Gaul's affidavit evidence, scant though it is, suggests that despite their misgivings about Ms Vollmer's return they would work to re-establish a working team that included her.

[59] I have given consideration to the residents of The Wood. I find it relevant that the allegations levelled against Ms Vollmer for serious misconduct do not involve her interactions with the residents she has worked with for over five years. Even (purportedly) failing to properly follow the infection control policy did not cause harm to any resident. There is no suggestion that treatment of a resident with an infection was lacking or sub-standard in any way. Despite the complaint to the

Nursing Council, I have no reason to consider that Ms Vollmer's professional skills or standards are such as to be unsafe for the residents.

[60] The respondent submitted that 'garden leave' would not be a realistic option as despite Ms Vollmer's undertaking as to damages her evidence discloses that she does not have a real ability to pay damages to it in the event that any are ordered. I do not consider that Ms Vollmer's evidence has proved that her undertaking as to damages cannot be relied on.

[61] The applicant submitted that the issue would not arise if Ms Vollmer was reinstated in the interim, although not ultimately reinstated permanently, because the respondent will have had the value of Ms Vollmer's nursing work over the period of her employment.

[62] One aspect of reinstatement that needs to be considered is that the parties need to be able to fully discharge their responsibilities in that relationship⁷. Therefore, I do not consider that reinstatement on 'garden leave' only would be a sufficient remedy for Ms Vollmer.

[63] Section 123(1)(a) of the Act gives the Authority the power to order an employee reinstated to their former position or a position no less advantageous to the employee. I consider that the overall justice of the case requires Ms Vollmer to be reinstated to her former position from Monday 19 November 2012 as the charge nurse of The Wood's rest home and as the Infection Control Co-ordinator for the rest home and hospital. I make this order in reliance on Ms Vollmer's undertaking as to damages under section 127 (2) of the Employment Relations Act 2000.

[64] However, in recognition of the proximity of this decision to the substantive hearing I consider that the overall justice of the case means that The Wood should have the option of deciding in the alternative that it will not require Ms Vollmer to perform her duties and, while reinstating her to her former role, may place her on 'garden leave' until the substantive matters are resolved.

[65] I consider that if necessary Ms Vollmer could meet any undertakings to pay The Wood any amount of damages required for the number of weeks that she may be

⁷ *Pacific Blue Employment & Crewing Limited* [2010] NZ EmpC 112 at paragraph 22

on 'garden leave', if that is what the respondent chooses, if reinstatement is not ordered when the substantive decision is made.

Costs

[66] Costs are reserved pending the final determination of the matter.

Christine Hickey
Member of the Employment Relations Authority