

**Note: Interim Suppression Order  
in the opening paragraph of the  
determination**

Determination Number: AA 171/05  
File Number: AEA 414/05

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Mr X (Initiating party)  
**AND** Auckland District Health Board (Responding party)  
**REPRESENTATIVES** Penny Swarbrick, Counsel for Initiating party  
Peter Kiely & Andrew Caisley, Counsel for Responding party  
**MEMBER OF AUTHORITY** Dzintra King  
**INVESTIGATION MEETING** 9 May 2005  
**DATE OF DETERMINATION** 10 May 2005

**DETERMINATION OF THE AUTHORITY**

**Application for Suppression Order**

I hereby make an interim order that the name of the applicant and any details which may tend to identify the applicant be suppressed. This does not preclude the parties talking to witnesses. It is a non-publication order. The order will remain in effect until a decision is issued in the substantive matter unless varied earlier.

**Application for Interim Reinstatement**

The applicant, Mr X, has been dismissed from his employment with the respondent, the Auckland District Health Board (“the Board”), and seeks interim reinstatement. This is opposed by the Board. Mr X was dismissed for breach of Board policy and the Board says it has lost trust and confidence in him.

The tests for interim injunctions are well-known.

Is there an arguable case?

In X v Y Ltd and NZ Stock Exchange [1992] 1 ERNZ 863 at 872 the Court said:

*What the Court is concerned with, so far as the evidence goes, is to see whether, assuming the plaintiff can prove all the facts which he alleges, he then has an arguable case.*

The Board has a disciplinary policy and it is contended by the applicant that the Board has not followed that policy. He says that it has not been applied consistently and that there has been disparity of treatment. It is claimed that the Board has not heeded the requirement to be non-punitive and that the degree of discipline is out of proportion to the nature of the offence. Further, it

is claimed that his work record, the circumstances and extenuating factors have not been properly taken into account. Mr X also says that he did not know of the policy and had not seen it.

The applicant claims that there were no reasonable grounds to conclude that his actions could impair and undermine trust and confidence. He says his actions were not of a sufficiently serious nature to warrant dismissal. How the actions in question are viewed is indubitably arguable as is their impact on Mr X's work. Whether the Board can properly be said to have lost trust and confidence is also at issue.

The applicant has clearly established an arguable case.

The respondent says the applicant must show not only an arguable case that he has been unjustifiably dismissed but also that he would be reinstated if successful. Reinstatement is the primary remedy and if the applicant is successful there would be no automatic impediment to reinstatement.

### Balance of Convenience

This requires the weighing up and balancing of the inconvenience to the respondent of having to bear the burden of an injunction before the substantive case is heard, given that the respondent may win that case, against the inconvenience to the applicant, who may have a just case, of having to bear the detriment of an unjustifiable action until the case has been heard.

There are a number of factors to be taken into account.

#### 1. Adequacy of other remedies.

Given the nature of Mr X's work and his reputation I do not think that damages would be an adequate alternative remedy to reinstatement. The right to work is a valuable one and if that is not restored to Mr X his career may suffer lasting damage. I have taken into account the submissions of the respondent that the applicant often has periods of absence from the Board. Those absences, however, relate to his work and career and temporary absences while he continued to be employed are of a quite different nature. He would be likely to suffer a loss of reputation and impediments to his work unless reinstated.

The Board says it will be inconvenient for it to have to readjust staffing arrangements it has made to cater for Mr X's absence. It is important in considering this to note that inconvenience means detriment or injury. While I do not doubt that it would be inconvenient for the Board to have to make readjustments I do not think this can properly be regarded as a detriment or an injury of such a degree that it would outweigh the detriment to the applicant of being denied the right to continue his work.

#### 2. Loss of trust and confidence.

This is the fundamental issue for the employer. It is not enough simply to assert that there has been a loss of trust and confidence. That must be shown to be on reasonable grounds. Given that this is strongly contested, and given that colleagues of Mr X, who work in the same field, have deposed that he should be reinstated I cannot place much weight on this factor.

There is no evidence that his return to work will result in any harm. The fact that the respondent waited several weeks before talking to Mr X about the matter and the fact that it was willing to consider a two week handover period is indicative of the accuracy of my view that no harm or

detriment would result if he were reinstated. Furthermore, I have no doubt that the actions that led to what the Board says is a loss of trust and confidence will not be repeated.

### 3. Impact on third parties.

His colleagues have deposed to the value of his work and adverse impact of his departure. This is a factor that weighs strongly in favour of reinstatement.

### 4. Likely duration of reinstatement

The most significant factor militating against interim reinstatement is the fact that a full hearing has been scheduled for 7 June. Furthermore, Mr X is still in receipt of his salary, having been paid three months in lieu. There is therefore no pecuniary loss. However, given that Mr X's career and reputation could suffer severe detriment and that I do not think the Board would be unduly inconvenienced in having to take him back, it is not a factor that overrides consideration of all others.

### Overall justice

The Court of Appeal in Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd [1985] 2 NZLR 129, 142 stressed the importance of not seeking the answer to an interlocutory injunction application in the rigid application of a formula and of the importance of standing back and exercising discretion.

The respondent has submitted that the applicant does not come with clean hands; he has admitted the behaviour. While that is so, one of the things at issue is the seriousness of the admitted matters and the impact of those on the employment and whether any such impact could justly occasion a loss of trust and confidence. I do not think the fact of the admission is sufficient to deny him an equitable remedy.

Overall, any detriment that might accrue to the applicant if he is not reinstated and is subsequently successful would be far greater than any detriment that would accrue to the respondent if the respondent is forced to accept a reinstatement and is later successful.

I have taken the strength of the arguable case into account in the exercise of my discretion. It seems to me that the case may well be quite strong and that permanent reinstatement would not be out of order were the applicant ultimately successful.

I therefore order that Mr X be reinstated to his position pending the substantive determination of his grievance.

### **Direction to Mediation**

The parties are directed to undertake mediation as soon as a date can be arranged with the Mediation Service. The mediation should take place before 7 June 2005.

**Costs**

Costs were reserved. The parties should first endeavour to resolve this matter themselves. If they are unable to do so the applicant should file a memorandum within 28 days of the date of this determination. The respondent should then file a memorandum in reply within 14 days of receipt of the applicant's memorandum.

Dzintra King  
Member of Employment Relations Authority