

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2022] NZEmpC 86
EMPC 22/2022**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER OF an application for interim reinstatement

BETWEEN TUNUHIA TUPE
 Plaintiff

AND THE BOARD OF TRUSTEES OF TE
 MANAWA O TUHOE TRUST
 Defendant

Hearing: 29 March 2022
 (Heard at Auckland)

Appearances: S Austin, advocate for plaintiff
 JA Hope, counsel for defendant

Judgment: 19 May 2022

**INTERLOCUTORY JUDGMENT OF JUDGE J C HOLDEN
(Application for interim reinstatement)**

[1] Mr Tupe seeks interim reinstatement to his former position at the Te Manawa o Tūhoe Trust (the Trust), or to a position no less advantageous to him, pending the hearing of his challenge to a determination of the Employment Relations Authority (the Authority).¹

¹ *Tupe v The Board of Trustees of Te Manawa O Tuhoe Trust* [2021] NZERA 411 (Member E Robinson) [*substantive determination*].

[2] The Authority had found that Mr Tupe was unjustifiably dismissed but did not order his reinstatement.²

The case arises in the context of a restructuring

[3] The Trust administers the assets of its approximately 6,000 beneficiaries. It is based at Ruatoki. It is an Ahu Whenua Trust under s 215 of the Te Ture Whenua Maori Act 1993, and was settled by order of the Maori Land Court pursuant to s 438 of the Maori Affairs Act 1953 in January 1985. The current Trustees (the Trustees) were appointed by the Maori Land Court pursuant to s 222 of the Te Ture Whenua Maori Act. The Trust's assets include 8702.0629 hectares of land in the Ruatoki area. It owned a logging company, Nation Logging Ltd, from October 2013 until it was liquidated in 2021.

[4] Mr Tupe was employed by the Trust from March 2016 until January 2020, most recently as its Operations Manager. In his role as Operations Manager, Mr Tupe was to provide effective and efficient operational support services to the Trust's operational business units. One of the significant business units comprised the forestry business conducted by Nation Logging Ltd. Mr Tupe reported to the Trust's Chief Executive.

[5] In 2019, the then Chief Executive of the Trust resigned. In late 2019, the Trust entered into an arrangement for Mr Peter Madden to carry out work in the Chief Executive role.

[6] In the second half of 2019 the Trust also developed a restructure proposal that involved, inter alia, a proposal to disestablish the Operations Manager role, the Health and Safety Manager role, and the vacant Chief Executive role and replace all three with a General Manager who would report directly to the Trustees. In addition, it was proposed that the roles of Office Manager, Accounts Administrator and Senior Administrator be disestablished, and new Trust Administrator and Casual Administrator roles created.³ Effectively, it was proposed that the six general management and administration roles would be replaced with three roles. The two

² At [81]–[92].

³ The Office Administrator and Accounts Administrator roles were vacant at the time.

Farm Manager roles and the Crew Supervisor position were to remain unchanged. A consultation document was sent to Mr Tupe in November 2019.

[7] Mr Tupe says the new position of General Manager was, in effect, the same as his position of Operations Manager but incorporating the duties of the Health and Safety Manager, a role then held by Mr Christini.

[8] On 29 November 2019, Mr Austin, Mr Tupe's advocate, wrote to the Trustees saying that Mr Tupe agreed with the underlying rationale for the restructure proposal. He said that the health and safety and financial components of the proposed General Manager should be contracted in, and that the proposed General Manager role was substantially the same as Mr Tupe's role as Operations Manager, even though there were moderate changes and Mr Tupe would require a modest level of further retraining. Mr Tupe's position was that he was not redundant and was entitled to be redeployed into the position of General Manager.

[9] In December 2019, the Trust adopted the restructuring proposal and advised Mr Tupe and Mr Christini that their positions were disestablished. It said they could both apply for the new General Manager role.

[10] Following that advice, Mr Christini agreed to be interviewed and was interviewed on 5 December 2019. However, Mr Tupe was not interviewed. He asked that the Trust not proceed pending resolution of the dispute between the Trust and Mr Tupe. A number of issues were raised, including about Mr Madden's authority to speak for the Trust.

[11] After several attempts to arrange an interview date for Mr Tupe, Mr Madden offered him two dates, either Monday 20 January 2020 at 10 am or Tuesday 21 January 2020 at 3 pm.

[12] After not hearing from Mr Tupe in relation to those dates, and following an attempt to engage with him, Mr Madden formed the view that Mr Tupe did not intend to communicate with him regarding interview dates and did not intend to take part in

an interview. He decided to terminate Mr Tupe's employment and did so by email on 20 January 2020.

[13] Mr Tupe was immediately employed by the subsidiary company, Nation Logging Ltd. He also raised a personal grievance against the Trust for unjustifiable dismissal and applied for and was granted interim reinstatement by the Authority.⁴

[14] There was an issue with the Trust's actioning of the order for interim reinstatement as, although Mr Tupe resumed his duties as Operations Manager of the Trust, his salary initially continued to be paid by National Logging Ltd rather than the Trust. That error was rectified going forward after Mr Tupe applied for a compliance order in the Authority.⁵

[15] As a result of the interim reinstatement determination, Mr Tupe was working for the Trust from 1 April 2020 until after the issuing of the substantive determination on 22 September 2021.

[16] After the substantive determination was issued, the Trust moved to fill the General Manager role. Mr Tupe was invited to attend an interview to take place sometime in February 2022. Despite being offered several opportunities to interview, Mr Tupe did not do so. He says he had prior commitments at the times offered.

[17] Mr Christini was appointed to the position.

The legal framework is well settled

[18] The framework within which an application for interim reinstatement is considered is well settled.

⁴ *Tupe v The Board of Trustees of Te Manawa O Tuhoe Trust* [2020] NZERA 132 (Member E Robinson) [*Interim reinstatement determination*].

⁵ *Tupe v The Board of Trustees of Te Manawa O Tuhoe Trust* [2020] NZERA 348 (Member E Robinson) [*Compliance determination*].

[19] In such applications, the Court is to apply the law relating to interim injunctions, having regard to the object of the Employment Relations Act 2000 (the Act). The Court must consider:⁶

- (a) whether there is an arguable case; or put another way, whether there is a serious question to be tried such that the claim is not vexatious or frivolous;
- (b) where the balance of convenience lies; and
- (c) what is required in the overall interests of justice.

[20] The first question has a relatively low threshold.⁷ Establishing if there is a serious question to be tried has two parts:⁸

- (a) whether there is a serious question to be tried in relation to the claim of unjustifiable dismissal; and, if so,
- (b) whether there is a serious question to be tried in relation to the claim for permanent reinstatement.

[21] The merits of the case, so far as they are able to be ascertained at an interim stage, may be relevant in assessing the balance of convenience and the overall interests of justice.⁹

The Trust concedes that the dismissal was unjustifiable

[22] The defendant concedes that Mr Tupe's dismissal was unjustifiable. That concession removes the need to consider whether there is a serious question to be tried in relation to the claim of unjustifiable dismissal.

⁶ *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12]–[13].

⁷ *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59, [2021] ERNZ 153 at [8].

⁸ *Humphrey*, above n 7, at [7]; *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [8].

⁹ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

[23] Nevertheless, the Trust maintains that the real issue for the Court is whether there is a serious question to be tried in relation to the decision to disestablish Mr Tupe's role and require him to apply for the General Manager role, rather than to appoint him to that role. The Trust says it was the timing of the dismissal, coming before the proposed interview time of 21 January 2020 at 3 pm, that led the Authority to find that Mr Tupe had been unjustifiably dismissed. The Trust says that this amounted to a minor technical issue.

The low threshold in relation to the case for permanent reinstatement is met

[24] Reinstatement is the primary remedy under the Act. If a successful applicant seeks reinstatement it must be ordered wherever it is practicable and reasonable.¹⁰

[25] As noted, even though Mr Tupe was successful in his substantive claim before the Authority, and sought reinstatement, it was not granted. The Authority took into account the liquidation of National Logging Ltd, for which Mr Tupe, as Operations Manager, had provided a substantial amount of work. The Authority accepted that the change process was necessary and found that the decision to institute a selection process for the General Manager role was one that was open to the Trust.¹¹

[26] Mr Tupe also accepts the change process was necessary. His claim for permanent reinstatement will turn on whether the General Manager role was, in substance, his role and whether it is practicable and reasonable for him now to be reinstated into it.

[27] There are real difficulties with reinstating Mr Tupe into the General Manger role. The threshold for considering whether there is a serious question to be tried in relation to the claim for permanent reinstatement is, however, low. Here Mr Tupe's dismissal was unjustifiable; he seeks permanent reinstatement, which is the primary remedy. There is a serious question to be tried.

[28] The difficulties Mr Tupe faces, however, remain relevant to the Court's consideration and are addressed below.

¹⁰ Employment Relations Act 2000, s 125.

¹¹ *Substantive determination*, above n 1, at [89].

Balance of convenience favours the Trust

[29] Mr Tupe has not claimed that interim reinstatement is required for financial hardship reasons. He is currently working on a contract basis with a local authority. No evidence was provided of his financial situation. If there is a financial loss from the time between this judgment being issued and the substantive case being heard, that can be dealt with in the context of remedies.

[30] That does not provide the complete answer, as Mr Tupe submits there is significant intrinsic benefit arising from employment. Jobs are important in themselves and money is often a poor substitute.¹² Here, Mr Tupe refers to the satisfaction of working for his wider whanau for its benefit.

[31] There are, however, other factors that go against reinstatement, either on an interim or permanent basis.

[32] The Trust has a very small number of staff. Mr Tupe accepts that, at the time the Trust commenced its restructuring proposal, there was a need to restructure. At that time, Mr Tupe and Mr Christini were employed by the Trust. Mr Tupe did not apply for the General Manager role earlier this year. Mr Christini has now been appointed into the role. There is no relevant vacant role with the Trust.

[33] Nation Logging Ltd went into liquidation in 2021, substantially reducing the work needed to be performed and supporting the view that there simply is not enough work for both Mr Christini and Mr Tupe. Ordering the Trust to employ a further person, who is not required for the operation of the Trust, is a significant financial burden on the Trust and its beneficiaries.

[34] I accept that Mr Tupe and Mr Christini have a good relationship, but placing Mr Tupe in the General Manager role clearly would negatively impact Mr Christini. This is a relevant factor both at the interim stage and in the context of Mr Tupe's substantive challenge.

¹² *Humphrey*, above n 7, at [37].

[35] If Mr Tupe were to be reinstated, including on an interim basis, he also would need to work with the Trustees. On his evidence, the Trustees have a jaundiced view of his capabilities, and believe he lacks the ability to perform the role of General Manager. Mr Tupe says the Trustees are biased against him. He says that being reinstated would allow him the opportunity to illustrate to the Trustees that their assessment of his performance is incorrect. However, Mr Tupe was in that role on an interim basis for 18 months following the interim reinstatement determination. Further, there are other significant relationship problems between Mr Tupe and the Trustees that go beyond performance issues and include a lack of trust on both sides.

[36] The balance of convenience favours the position of the Trust.

Overall interests of justice also favour the Trust

[37] As the Trust has said, the basis for the Authority's finding of unjustifiable dismissal was that the dismissal pre-dated the final date on which Mr Tupe could have attended an interview, rather than his non-appointment to the General Manager role. I consider this relevant in evaluating the interests of justice. As noted, Mr Tupe agrees that the restructuring was justifiable; the Authority found that the selection process was one that was open to the Trust. This point counts against interim reinstatement, even though the dismissal was unjustifiable.

[38] I also take into account that, as a result of the interim reinstatement determination, Mr Tupe was employed by the Trust from 1 April 2020 until around 22 September 2021. The Trust therefore has already absorbed the cost of Mr Tupe as an additional employee for around 18 months in circumstances where the Authority ultimately did not order reinstatement.¹³

[39] Standing back and looking at the position overall, I am satisfied that an order for interim reinstatement is not in the interests of justice. The application is unsuccessful.

¹³ He also was employed by Nation Logging Ltd directly for approximately 10 weeks in the preceding period.

Costs

[40] The parties are to discuss and hopefully agree on costs. If no agreement is reached, the Trust may apply for costs by memorandum filed and served within 28 days of the date of this judgment. Any response from Mr Tupe is to be filed and served within a further 21 days, with any reply from the Trust to be filed and served within seven days thereafter. Costs then will be determined on the papers.

J C Holden
Judge

Judgment signed at 4.30 pm on 19 May 2022