

**IN THE EMPLOYMENT COURT
WELLINGTON**

**WC 22/06
WRC 24/06**

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

BETWEEN SOUTH TARANAKI FREE
KINDERGARTEN ASSOCIATION
Plaintiff

AND LYNNE MCLENNAN
Defendant

Hearing: 1, 2, and 4 August 2006
(Heard at New Plymouth)

Appearances: C A McLorinan, Counsel for the Plaintiff
S W Hughes, Counsel for the Defendant

Judgment: 1 December 2006

JUDGMENT OF JUDGE C M SHAW

[1] On 25 October 2005 Ms McLennan was dismissed by South Taranaki Kindergarten Association (STKA) from her position as head teacher at Avon Kindergarten.

[2] In May 2006 the Employment Relations Authority determined that her dismissal was unjustified and ordered that, along with other remedies reduced by one-third for her contribution, she should be reinstated to her former position although not before the parties had time to implement the determination and to undertake further mediation in respect of employment relationship problems. The award for lost wages was from the date of dismissal until the date of reinstatement.

[3] Both parties accept the substantive determination of the Authority, however STKA has appealed against the remedies and in particular the order for reinstatement. The non-de novo hearing was restricted to those two matters.

[4] Although it was argued for STKA that the Employment Relations Authority did not correctly decide the question of reinstatement, as this issue was reheard fully the only question is whether the Court should order reinstatement.

[5] Counsel agreed that the factual findings of the Employment Relations Authority on the substantive determination are accepted for the purpose of this challenge and I have relied on those for this judgment. Evidence was led both for and against the proposition that reinstatement was a practicable option. This evidence was more focused and extensive than the Authority had the opportunity to consider.

The law

[6] Reinstatement is statutorily recognised as the primary remedy for an unjustified dismissal¹. It must be provided to a successful grievant wherever practicable.

[7] The test for practicability set out by the Employment Court was endorsed by the Court of Appeal in *NZEI v Auckland Normal Intermediate Trustees*². The elements of the test are:

- The onus is on the employer to establish that reinstatement is not practicable.
- Practicability is not the same as possibility. What is possible is not necessarily practicable.
- The interests of the parties and the justice of their cases are to be balanced with regard not only to the past but particularly to the future.

¹ S125 Employment Relations Act 2000

² [1994] 2 ERNZ 414

- Practicability involves considering whether the employment relationship can be successfully reimposed on the parties.
- The Court takes a broad approach in assessing whether the employment relationship can be renewed and may consider matters which may not have formed reasons for the dismissal but which are nonetheless germane.

[8] Central to the issue of reinstatement is the employment relationship. In considering what is germane to a consideration of the practicability of reinstatement, I turn to what constitutes a successful employment relationship. In s4 of the Employment Relations Act 2000 under the heading “Parties to employment relationship to deal with each other in good faith” the duty of good faith requires the parties to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative.

[9] I hold that these requirements underpin a successful employment relationship and are germane to the test for practicability. If it is probable that the parties can reasonably resume a relationship which is in accord with the requirements of good faith, then reinstatement should normally be practicable.

Background facts

[10] Ms McLennan embarked on her training and employment as a kindergarten teacher after years of raising her children on her own. She is a devoted teacher, proud of her achievements, and passionately dedicated to the Avon Kindergarten in Hawera where she was employed as head teacher since 1994.

[11] STKA is a non-profit organisation licensed to provide early childhood education. It is governed by a board of seven elected governors. A teacher’s representative, the executive officer, and a senior teacher also attend the meetings to advise and give guidance to the board.

[12] The board has the power to employ staff but delegates the daily management of the organisation to the executive officer and senior teacher who comprise the board’s management team. The chief executive officer is Karen Nicholas who is

responsible for administration and, as she also personally holds the licence from the Minister of Education, is responsible for ensuring that the kindergartens in the STKA region comply with early childhood and other regulations.

[13] The senior teacher is Dawn Osman who is responsible for curriculum and acts as senior teacher for all of the seven kindergartens in the STKA region covering Stratford, Eltham, Hawera, and Patea. She is a travelling teacher who gives help and guidance to teachers.

[14] Each kindergarten has its own head teacher and one or two staff teachers. It also has a local committee which raises funds and supports the kindergarten but has no power to employ or otherwise manage it.

[15] Since 1999 at least, there have been ongoing difficulties between Ms McLennan, STKA's board, and its executive officer about a number of issues about their relationship, her working practices, her views about other staff practices, and her relationships with other staff. By 2003 there were a number of problems between STKA and Ms McLennan about their objectives, practices, and her work responsibilities but especially about her relationship with Ms Osman. In August 2003 a framework of requirements was formulated to try and resolve and govern this relationship. It required Ms McLennan and Ms Osman to be professionally courteous in the way that they spoke and dealt with each other, gave them options if the plan was not working, and required that a third person be present at any meeting between them. In December 2003, a dispute about the operation of the framework was resolved by agreement following mediation.

[16] In November 2004, Ms McLennan was disciplined over three matters: breach of STKA's media policy by talking to a newspaper without the association's authority; using threatening language and/or behaviour towards another head teacher; and breaching the framework agreement. The third matter was dropped but, having found that the other two had occurred, the association issued Ms McLennan with a final warning on 9 December 2004. She raised a personal grievance about that.

[17] When Ms McLennan's practising certificate came up for renewal, without notice to her, STKA advised the New Zealand Teachers' Council that it was unable to endorse her registration because of the final warning. In spite of that her registration was renewed.

[18] In September 2005 STKA received complaints from a relieving teacher and support worker at Avon about Ms McLennan's behaviour and practices. She was suspended pending an investigation into two allegations:

- (a) That she had forcibly and inappropriately handled a child.
- (b) That she regularly allowed her dog to be at the kindergarten in breach of regulations.

[19] Following investigation, she was dismissed and she then raised an unjustified dismissal grievance.

The Employment Relations Authority determination

[20] The Authority held that the written warning on 9 December 2004 was justified as was the suspension in September 2005 but the dismissal was unjustified. The Authority found that underpinning the employer's decision was an increasing problem in the relationship between Ms McLennan and Ms Osman over Ms McLennan's performance. Although her performance had nothing directly to do with the dismissal, it had influenced the decision because of the wider deteriorating relationship between the association and Ms McLennan. The Authority identified a number of procedural flaws in the investigation:

- No performance management process had been put in place.
- The interview notes were not accurate.
- The association's analysis of what happened in relation to the child was not that of a fair and reasonable employer considering the differences on application of professional standards and acceptable performance.

- The matter should have been dealt with as issues of performance rather than treating it as serious misconduct on two selective matters.

[21] As to remedies, the Authority found that Ms McLennan might find it difficult to find another similar senior position, that the relationship with her employer had been fraught for some time over disciplinary and performance management, and that she was on a final warning for personal dealings with some people and compliance with the association's policy, causing conflict in the employment relationship.

[22] Ms McLennan was found to have contributed one-third to her grievance but the Authority said that was not enough to prevent reinstatement. It noted ongoing difficulties between her and Ms Osman and that the situation had become worse since one of the teachers at Avon had given evidence about Ms McLennan. Although this raised problems about their relationship, the Association as an employer would have to manage that.

[23] The Authority directed that she be reinstated. It recommended to the parties that reinstatement be delayed for 4 weeks to enable the parties to cooperate on arrangements to implement the determination and to undertake further mediation in respect of their broader employment relationship problem.

The challenge

[24] STKA presented additional evidence to support its conclusion that reinstatement would be impracticable. In summary, it says:

1. A plan to reintegrate Ms McLennan would need to be implemented.
2. The cost of such a plan could be as high as \$162,000 but \$50,000 at a minimum.
3. Other teachers would resign.
4. Members of the board would resign.

1. The return to work plan

[25] The association says that if Ms McLennan is to be reinstated there would have to be a plan to reintegrate her back into the association's employment and to oversee her ongoing employment. It proposes that a part time additional employee

be engaged specifically to oversee this plan. He or she would be a senior teacher at the same level as Ms Osman. Ms Osman would not be able to supervise Ms McLennan back into her position because of past conflicts between the two of them and the failure of all steps to date to bring their relationship back onto a proper footing. As it is necessary to ensure that this supervisor is neutral, the association had in mind a teacher from Napier who would travel regularly to Taranaki.

[26] Ms McLennan accepted that there are issues to be worked through including her absence from the kindergarten for a number of months and her ongoing relationships with Ms Osman, Ms Nicholas, the board, and other staff members. She accepted that she needs to do things better to improve her practice and says she is totally committed to doing that. She welcomed the placement of a person to act in a senior teacher's role to be a bridge between her and her employers.

[27] Ms Osman said that because of the past relationship between her and Ms McLennan it was preferable that she not be involved further with her. She frankly admitted professional responsibility for her part in the breakdown of the working relationship but said she had worked actively to make changes to their interaction which had not worked in spite of the mediation.

[28] The plan was presented by Ms Nicholas and was divided into two parts to be undertaken by the part time contracted senior teacher from Napier. Pre-employment arrangements included professional development programmes to bring Ms McLennan up to date with practices and policies which had been implemented since her dismissal such as training in the new kindergarten online management system and new teacher techniques as well as a standard induction period. The second part of the plan comprised arrangements for up to the first 6 months of her re-employment. This included regular and routine contact for monitoring purposes, ongoing general advice, and guidance. It envisaged that for the first 6 months the contracted senior teacher would need to visit the association for a minimum of 3 days a week to work with Ms McLennan, Ms Osman, and Ms Nicholas. In addition, the senior teacher would have to make three visits a term and three annual appraisal meetings, as well as attending head teacher meetings, and assessing progress of the plan.

[29] The plan therefore contemplates that the contracted senior teacher would carry out all duties relating to Ms McLennan which would normally be undertaken by Ms Osman supplemented by additional contact to ensure that the plan is being properly implemented and supported. The concept of a suitable person being engaged by the board for this purpose was not disputed by Ms McLennan although the identity of the person was.

2. Costs of the plan

[30] The total cost of the plan is estimated to be \$162,000 but Ms Nicholas also presented an alternative budget of \$50,000 to \$60,000 which saved costs by ensuring that the contracted senior teacher would visit at a time when several of the different functions could be combined; by cutting down some of the support for Ms Osman and herself, and reducing the 6-month period of supervision and support to 3 months.

[31] Mr Wood is a current board member who has served as a president of the board. He said the association is not in a position to fund the additional costs of the plan from its budget or its accumulated reserve funds. About 90 percent of its budget is spent on salaries and it runs a deficit budget. \$162,000 would amount to about 18 percent of the board's income.

3. Resignation of other teachers

[32] Two teachers presently employed by the association gave evidence that they would be forced to resign should Ms McLennan return. Each had given evidence to the Authority which was critical of Ms McLennan and had written to the board since about their views as to her reinstatement. They are concerned that having spoken critically about Ms McLennan they would not feel comfortable or safe working with her again. One had worked closely with Ms McLennan and had felt bullied by her and unable to approach others to express her concern. She acknowledged that since the matters had been aired she has felt more comfortable about sharing her concerns.

[33] Another head teacher employed by the association noted that since Ms McLennan had ceased to be employed the whole teaching staff had visibly relaxed, teacher meetings and professional development opportunities had been conducted by

the senior teacher in a relaxed and open manner, and that a collegial relationship had been established between the kindergartens that had not been possible before.

4. Resignation of board members

[34] Mr Wood was quite certain that the financial implications as well as the personal pressures on board members which would arise if Ms McLennan were reinstated would cause the board to resign. He noted that members of the board performed their duties in a voluntary capacity. He had spent a very large amount of his personal time dealing with the issues involving Ms McLennan in the past. He described numerous lengthy meetings of the board and many attempts by him to try and resolve the issues between the staff. Mr Wood impressed as a person genuinely committed to the association but who had become completely exhausted by the difficulties which the association has encountered over Ms McLennan's employment relationship.

Ms McLennan's position

[35] Given her acceptance of the need for retraining and working on her relationship with Ms Osman and Ms Nicholas, the board, and other staff members, she would be willing to go through a professional management process supervised by a third person as suggested by the board but is sceptical of the amount of resources and money that the association says this would take.

[36] Ms McLennan sees her relationship with her former employer as purely administrative. She sees no reason why she should not be able to resume her employment without difficulty. She regards the past breakdowns as being at least partly the fault of the association although accepts some responsibility for her own behaviour. She also relies on a considerable amount of parental support as indicated by letters and messages of support from the local kindergarten committee.

[37] She called evidence from parents including the father of the allegedly abused child to support her continued employment at Avon. Her private supervisor who had assisted her through this lengthy time of difficulties explained her awareness of the need to change the way she relates to her employer and others.

[38] Ms McLennan also called Alan Taylor who outlined an alternative method of reintegrating her back into her employment. He is a qualified teacher with a lot of experience in rural primary school teaching, and has been the chairman of kindergarten committees. He has been actively involved in New Zealand Educational Institute matters and has represented Ms McLennan at a previous disciplinary matter. It was suggested that Mr Taylor would be a suitable person to undertake the intended bridge role of senior teacher and that if this was the case he would come at a much reduced cost than that proposed by the association. He was unable to quantify this cost.

Decision

[39] The fundamental difficulty with Ms McLennan's reinstatement is that the history of a dysfunctional employment relationship is unable to be ignored. Witnesses for the association acknowledged that Ms McLennan would undoubtedly try her best upon her return to work to achieve a good working relationship but all were extremely doubtful that this would be successful. The only indicator of future conduct is past conduct and I find that the patterns and longevity of the employment relationship problems between Ms McLennan and the association mean that the prospects of a successful resumption are very low indeed.

[40] I have carefully considered the indications by staff and board members that they would resign should Ms McLennan return. I am satisfied that these are not idle or lightly made threats. Each of the witnesses displayed genuinely held personal anxiety about the prospect of Ms McLennan returning to the employment based on their past experiences. This is not to absolve the board or the other staff from complete responsibility from the situation in which they found themselves. Plainly the failure to manage Ms McLennan's performance issues was an unfortunate lapse by the association but, having said that, it is also clear that it had made several though unsuccessful attempts through meetings, mediation, and the relationship framework developed in 2003 to place the employment relationship on an even keel. This is not a matter of blame but a matter of practical reality.

[41] The cost issues alone of reintegrating Ms McLennan back into the association mean that reinstatement would not be practicable. The association is a voluntary organisation which receives only 90 percent of its basic funding from government and relies on community goodwill to supplement its budget. It is run by voluntary board members. It is difficult to see how a reintegration plan could be practicable even if costs were limited to \$50,000. In the circumstances of the association, I find that any plan which required the employment of an additional staff member to oversee it is highly impracticable.

[42] While Ms McLennan said that she very much wished to return to the Avon Kindergarten, she did accept that a placement at another kindergarten might have to be accepted. Unfortunately, even this option would not be practicable in all the circumstances. The difficulties are not just between Ms McLennan and her immediate staff but between the very people who must oversee her work such as Ms Osman, as senior teacher, and the executive officer as well as with staff of other kindergartens with whom she has to regularly meet. It would not matter which kindergarten she was teaching at. If it were one run by STKA it is almost inevitable that difficulties would quickly arise again in spite of the best intentions which I find were genuinely given by both parties.

[43] On behalf of Ms McLennan, Ms Hughes was very critical of the way in which the board has conducted itself over the question of reinstatement. She submitted that the board had filed an appeal against the decision at the same time that it was supposed to be considering the way in which it should reinstate Ms McLennan. Its failure to consult with her over her reinstatement plan and its costs is evidence of the lack of good faith demonstrated by the association. She submitted however that the association's non-cooperation and obduracy should not be an effective block to Ms McLennan's reinstatement. She characterised the association's stance as an attempt to effect Ms McLennan's dismissal notwithstanding the findings of the Authority.

[44] She submitted that the Court must begin from a position whereby the association has wrongly denied Ms McLennan her rightful employment and seeks to continue to do so through reasons other than those relied upon for her dismissal.

[45] These submissions are proof positive that reinstatement is not a practicable option. They characterise Ms McLennan's distrust of STKA. She was at pains in her evidence to assure the Court of her best intentions towards her work and indeed other staff but underlying this is the irreparable damage caused to the relationship between her and her employer.

Remedies

[46] Although STKA appealed against the monetary remedies imposed, I am not prepared to interfere with the Authority's findings. They were based on an assessment of the substantive case which has not been the subject of challenge.

Conclusion

[47] I am satisfied that the employer has established that reinstatement in the present case is neither possible nor practicable. It is not possible because it is highly unlikely that these two parties can ever re-establish and maintain a productive employment relationship characterised by responsiveness and communication. It is not practicable because it would require STKA to be put to extraordinary cost and trouble that it can ill afford.

[48] It is also clear that, while the Authority found that the basis upon which the kindergarten association had dismissed Ms McLennan was unjustified, it made findings on matters which I find are germane to the question of her reinstatement which militate against it. These included the justified final warning, matters of performance, and fraught relationships with staff and the board for which she was at least one-third responsible.

[49] For these reasons, I find that it would not be practicable in all the circumstances to reinstate Ms McLennan to her former position. The plaintiff's challenge against the order for reinstatement is successful.

[50] I am conscious that Ms McLennan sees the failure to reinstate as a de facto dismissal, however the inability for the employment relationship to be maintained means that reinstatement would be doomed. Her remedies are therefore limited to

monetary compensation. The Authority's findings in this regard are confirmed including the finding of one-third contribution. The award for lost wages is to run until 4 August 2006, the last day of the hearing of this matter.

Costs

[51] Counsel are requested to confer on the question of costs. If these cannot be resolved counsel for the plaintiff is to file a memorandum of costs by 31 January 2007. The defendant will have 14 days within which to respond.

**C M Shaw
JUDGE**

Judgment signed at 11.20am on 1 December 2006

Solicitors: Employers and Manufacturers Association (Central) Inc, New Plymouth, for
 plaintiff
 Govett Quilliam, New Plymouth, for defendant