IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2021] NZEmpC 59
EMPC 39/2021

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	an application for interim reinstatement
BETWEEN	ALISTAIR ROSS GORDON HUMPHREY Plaintiff
AND	CANTERBURY DISTRICT HEALTH BOARD, TE POARI HAUORA O WAITAHA Defendant

Hearing: 23 April 2021

Appearances: C Heaton, counsel for plaintiff
A Shaw and A Beal, counsel for defendant

Judgment: 30 April 2021

INTERLOCUTORY JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS
(Application for interim reinstatement)

Introduction

[1] Dr Humphrey is a public health physician and was employed by the Canterbury District Health Board (and its predecessors) within its Community and Public Health Division from 2000 until October 2020. For much of that time he was a Medical Officer of Health, an appointment made by the Director-General of Health under s 7A of the Health Act 1956. A number of issues arose towards the end of 2019 which ultimately led to Dr Humphrey's dismissal for incompatibility.

[2] Dr Humphrey filed proceedings in the Employment Relations Authority challenging his dismissal, which he says was unjustified. He seeks reinstatement, lost wages and compensation. The matter was removed to the Court for hearing at first instance.[1] Dr Humphrey's substantive claim was coupled with an application for interim reinstatement and urgency. It is the application for interim reinstatement that is now before the Court, essentially deciding whether Dr Humphrey should be reinstated to his position within the DHB pending a hearing and determination of his substantive claim.

[3] This judgment does not decide whether Dr Humphrey was unjustifiably dismissed. Nor does it decide whether, if he was unjustifiably dismissed, he will be reinstated on a permanent basis; or what additional/or other relief he might be entitled to.

[4] It is convenient to note at the outset that an employer may dismiss an employee on the basis of incompatibility. Whether the dismissal will be justified depends on whether what the employer did and how they did it was what a fair and reasonable employer could have done in all of the circumstances. The Court of Appeal has made it clear that a dismissal for incompatibility will only rarely be available.[2] It is also worth noting at this point that Parliament has expressly provided that reinstatement is the primary remedy in circumstances where an employee has been unjustifiably dismissed.

Approach

[5] The law relating to interim injunctions is to be applied in determining whether to order interim reinstatement having regard to the object of the Employment Relations Act 2000 (the Act).[3] In essence, the object of the Act is to build productive employment relationships through the promotion of good faith.[4] One of the central features of the Act is its recognition of the importance of the employment relationship,

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1 *Humphrey v Chief Executive of the Ministry of Health* [2021] NZERA 43 (Member Cheyne).
2 *Reid v New Zealand Fire Service Commission* [1998] 2 ERNZ 250 at 280 (EC); *Reid v New Zealand Fire Service Commission* [1999] 1 ERNZ 104 (CA).
3 Section 127(4).
4 Section 3.

the obligations both parties have to be responsive and communicative, and that issues ought to be dealt with promptly and between the parties if possible - in other words, supporting constructive employment relationships and repairing them where feasible. All of this has significance for the lens through which applications for reinstatement are to be dealt with, particularly in cases involving an alleged irreconcilable breakdown justifying dismissal.

[6] The approach to interim injunctions is well established and can be summarised as follows.[5] An applicant must establish that there is a serious question to be tried. Consideration must be given to the balance of convenience, and the impact on the parties of the granting of, and the refusal to grant, an order. The impact on third parties will also be relevant to the weighting exercise. Finally, the overall interests of justice are considered, standing back from the detail required by the earlier steps. While the power to make an order for interim reinstatement is a discretionary one, the assessment of whether there is a serious question to be tried is not. It requires judicial evaluation.

[7] In a claim for interim reinstatement, the question of whether there is a serious question to be tried raises two sub-issues:[6]

(a) whether there is a serious question to be tried in relation to the claim of unjustified dismissal; and, if so,

(b) whether there is a serious question to be tried in relation to the claim of permanent reinstatement.

[8] As the Court of Appeal made clear in *Brooks Homes Ltd*, a serious question to be tried is one that is not vexatious and frivolous.[7] Once that (relatively low) threshold is overcome, the merits of the case (insofar as they can be ascertained at an interim stage) may be relevant in assessing the balance of convenience and the overall interests of justice.[8]

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5 *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12]-[13].
6 See *McKean v Ports of Auckland Ltd* [2011] NZEmpC 128, [2011] ERNZ 312 at [4].
7 At [12].
8 *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

[9] As is usual in applications of this sort, evidence was produced by way of affidavits. That means that the Court proceeds on the basis of untested evidence. The evidence will be tested at the substantive hearing.

Background

[10] In November 2019, a number of managers and clinicians from the DHB wrote to the then Chief Executive, Mr David Meates. They raised concerns about various public statements made by Dr Humphrey and working relationship issues. Mr Meates decided that the concerns should be investigated, and an external investigator was appointed. An inquiry was conducted by Hon Kit Toogood QC. The allegations set out in the terms of reference focused on public statements and actions by Dr Humphrey, work relationships with Dr Humphrey and the safety of the work environment.

[11] Dr Humphrey requested two weeks' leave to enable him to respond to the allegations. The request was granted but a subsequent request to return to work was declined. This is now subject to a disadvantage grievance, which the DHB objects to on the basis that it was raised out of time.

[12] The independent investigator's report (the Toogood report) was delivered on 24 August 2020. The report writer concluded that some of the allegations had been established; others had not. He was critical of the DHB's inaction in addressing the relationship issues earlier. Relevantly, Mr Toogood concluded that the relationship between Dr Humphrey and a number of colleagues had become untenable but that he could not fairly or reasonably conclude that the breakdown was irremediable. He went on to say that:

> My reservations about finding that the situation is irremediably untenable is that **no attempt has been made by the senior management of the Canterbury DHB, since 2017, to pro-actively and effectively address what are seen by others to be Dr Humphrey's shortcomings**…
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> …
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> While genuine efforts to restore Dr Humphrey to a position of confidence among his colleagues may not succeed, given the longstanding nature of the problems and the depth of feeling on all sides, **it would be unreasonable and**

> **unfair in making these findings for me to conclude there is no prospect of a satisfactory resolution if appropriate measures are undertaken to address the problems that have been identified. I consider professional intervention to be necessary if there is to be any prospect of a successful reconciliation** between Dr Humphrey and the other members of the divisional leadership team.
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> (Emphasis added)

[13] By this stage Mr Meates had left the organisation and an acting Chief Executive, Dr Peter Bramley, had been appointed. Dr Bramley says that he read the Toogood report and decided that further investigation was required into the extent to which the DHB had known about the relationship issues with Dr Humphrey and what, if anything, it had done about them. Ms Marianne Dutkiewicz, Employment Relationship Specialist, conducted this investigation and identified instances during the period 2014 to 2019 when issues appear to have arisen in relation to Dr Humphrey's behaviour. It is notable that a number of these background events were referred to in the Toogood report.

[14] Against this backdrop, Dr Bramley decided to commence a disciplinary process based on concerns with incompatibility and bringing the DHB into disrepute.

[15] Dr Bramley met with Dr Humphrey and his representatives on 30 September 2020. Dr Humphrey advised that he wanted to look at ways in which relationships between himself and his colleagues could be improved and set out a range of options that he considered might assist. One of the options he identified was the one identified in the Toogood report, namely seeking professional support and assistance to rehabilitate the workplace relationships.

[16] Two days later (on 2 October 2020) Dr Bramley sent Dr Humphrey a letter advising that he had reached a "tentative decision" that Dr Humphrey had brought the DHB into disrepute and that the relationship was "untenable". It was said that the next step was for Dr Bramley to decide whether the relationship had "irretrievably broken down and/or your relationship with the [DHB] is irremediably untenable and (if so) the appropriate disciplinary action".

[17] Dr Bramley acknowledged Dr Humphrey's proposal for improving his relationship with his colleagues and said that he would be sending a letter to the complainants and asking for their response. He did not engage with Dr Humphrey over the wording of the letter or what information or material might usefully be provided to the complainants to enable their responses to be more fully informed. In particular, Dr Bramley did not provide the complainants with a summary, or copy of the Toogood report or the findings contained within it. Rather, Dr Bramley wrote to each of the complainants on a Friday evening, advised them that he had reached the tentative view "that there is incompatibility" between Dr Humphrey and his colleagues. He set out Dr Humphrey's suggestions for how the relationship issues might be addressed, and invited their views on whether those proposals would be successful by 3pm Monday.

[18] The complainants replied to Dr Bramley; none expressed confidence that the relationship could be repaired. A number referred to the fact that they had not received copies of, or were otherwise unaware of, the documents referred to in Dr Bramley's letter (including the Toogood report). The complainants' responses were provided to Dr Humphrey's lawyer, who in turn provided a full response.

[19] In submissions before the Court, Ms Heaton, counsel for Dr Humphrey, raised a number of concerns about the way in which Dr Bramley couched his letter, describing it as "leading". She submitted that it was unsurprising that the complainants responded in the way they did – essentially they provided Dr Bramley with the response that he appeared to want to hear. She also submitted that omitting to provide background context was problematic as it did not enable the complainants to reach a fully informed view of the proposals. Specific reference was made to the failure to provide:

- a summary of the Toogood report, including findings as to the extent to which Dr Humphrey had been made aware of issues and concerns over time and how the DHB had dealt with them;

- a summary of an earlier report (the Fowler report), which had also identified concerns about the DHB's handling of concerns about interrelationship issues involving Dr Humphrey;

- a legal opinion, which described the complexity of, and potential issues relating to, the interface between the statutory role of Medical Officer of Health and employee of the DHB (problems which counsel for the DHB described as the "crux" of the difficulties experienced with Dr Humphrey over time).

[20] There is no evidence currently before the Court that the DHB took any further steps to identify for itself what, as employer, might fairly and reasonably be done, or what options might exist or the extent to which they might be viable, in terms of remediating the relationship. Rather, Dr Bramley wrote to Dr Humphrey on 14 October 2020 confirming his decision to dismiss him on notice. The dismissal was squarely focussed on the finding that the employment relationship was untenable and the situation was irretrievable. The concerns relating to public statements made by Dr Humphrey in relation to a colleague and Environment Canterbury, were found to have brought the DHB into disrepute, to amount to misconduct, and to justify a written warning.

[21] Dr Humphrey promptly raised a personal grievance for unjustified dismissal. He also raised a grievance for disadvantage. The disadvantage claim is of no significant relevance to the present application. What is relevant is that reinstatement was sought, including on an interim basis, at the earliest opportunity, coupled with an application for removal to the Court and an application for urgency.

Serious question to be tried in relation to the claim of unjustified dismissal?

[22] The DHB accepts that Dr Humphrey has an arguable case that his dismissal was unjustified. I agree, and note that in *Lewis v Howick College Board of Trustees* the Court observed that special care must be taken by a decision-maker in reaching an

adverse finding because of the potentially wide-ranging and career ending implications.[9]

[23] The extent to which the DHB took reasonable steps when it first became aware, or ought to reasonably have been aware, of relationship issues will be in focus at the substantive hearing. The Toogood report was critical of the DHB in this regard, including by observing that:

> **But the report and the meetings that followed [the release of the Fowler report] are pertinent to the allegation that Dr Humphrey has not modified his behaviour** despite the report's criticism of his conduct and the recommendations made in it, and to Dr Humphrey's complaint that agreed measures to improve communications between Dr Humphrey and Dr Williams and Ms Currie were never implemented. **It is necessary to refer to it because the failure of the Canterbury DHB's senior managers to address the recommendations adequately has resulted in this [the Toogood] investigation, with its related distress for Dr Humphrey and his colleagues**.
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> (Emphasis added)

[24] The Toogood report noted that it was surprising, given the conclusions reached in the earlier Fowler report, that the DHB had given neither Ms Currie nor Dr Williams (both of whom had ongoing difficulties in their relationships with Dr Humphrey) a copy of the report.

[25] It is apparent that steps were taken to mediate issues between Dr Humphrey and Dr Williams but faltered, the mediator advising that there was a stumbling block that needed to be overcome if progress was to be made. The stumbling block was said to be the nature and scope of the Medical Officer of Health's obligations. I return to this issue later.

[26] Also in focus will be the steps the DHB could have been expected to take *after* receipt of the Toogood report in October 2020, having regard to the observations contained within it, and prior to forming the view that there had been an irretrievable breakdown justifying dismissal. It is seriously arguable that the step that was taken, seeking comment from the complainants on Dr Humphrey's proposals for a return to

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9 *Lewis v Howick College Board of Trustees* [2010] NZEmpC 4, [2010] ERNZ 1 (EC) at [4]; *Lewis v Howick College Board of Trustees* [2010] NZCA 320, (2010) 7 NZELR 539 (CA).

the workplace, fell short of the procedural fairness mark on the basis that the decision-maker (Dr Bramley) asked a leading question which he got predictable answers to, and without providing additional material to enable a fully informed response to be given.

[27] There is clearly a serious question to be tried in relation to the unjustified dismissal claim.

Serious question to be tried in relation to the claim of permanent reinstatement?

[28] The DHB's key argument was that there was no serious question to be tried in relation to permanent reinstatement and the application should be dismissed on that basis. I do not accept that the claim for permanent reinstatement is as weak as the DHB contends.

[29] Various people who worked with Dr Humphrey have expressed strong views about him and indicated that they would struggle to work with him if he was reinstated. One has indicated that they would leave; some have said they would reconsider their options. I accept that their concern as to the perceived impact of a return to work is relevant to the strength of the claim for permanent reinstatement. I accept too that there are a number of pressures on the DHB in the current COVID-19 environment (including the vaccine roll-out) and that an unwelcome return to work, and the application of resources that would need to go into supporting it, would likely place an additional pressure on the workplace.

[30] The primary difficulty for the DHB's argument (that it is not seriously arguable that Dr Humphrey would be permanently reinstated if found to have been unjustifiably dismissed) is that the option identified in the Toogood report (namely the DHB bringing in professional support and assistance to try to rebuild the damaged relationships) has yet to be explored. The view expressed by a member of the DHB's Human Resources team, that the relationship breakdown is too far gone, is based on a reading of the affidavit evidence filed by a number of colleagues who did not have the opportunity to reflect on the Toogood report's findings; and which appears to be at odds with the expert opinion evidence before the Court. The expert opinion suggests that even long-standing relationship difficulties within the workplace can be

effectively addressed with the right support and assistance. This appears to be precisely the point that the report writer was signalling to the DHB, namely that it would (in his view) be unsafe to conclude that there had been an irremediable breakdown in the employment relationship without first taking additional steps to try to repair it.

[31] Mr Shaw, counsel for the DHB, submitted that Mr Toogood was wrong to suggest that the relationship may be able to be resuscitated with appropriate support. The possibility that Mr Toogood was wrong cannot, of course, be discounted. But the point for the purposes of the interim orders application is that it is not immediately apparent from reading the 149 page report, which was based on personal interviews with a large number of people and a review of a significant number of documents, that Mr Toogood *was* wrong.

[32] And while emphasis was placed on a number of meetings and other interactions that had occurred over the years, and which were said to reflect the proactive steps that the DHB had taken to deal with relationship issues, it appears strongly arguable that they were not the sort of steps that could reasonably have been expected and actions that were agreed to by management appear not to have been followed through.

[33] Also relevant to whether the case for permanent reinstatement is arguable are the substantive steps Dr Humphrey has taken to acknowledge and address the issues that have been raised, which are also noted in the Toogood report, and his expressed willingness to engage in a process to rebuild workplace relationships.

[34] I return to the stumbling block identified by the mediator, namely the interface between the statutory role of Medical Officer of Health and employee of the DHB. I understood the DHB's case to be that these issues lay at the heart of the difficulties in the relationship over time. The mediator had advised the DHB that it was an issue that required "clear and unequivocal resolution" in order to address the relationship issues between Dr Humphrey and Dr Williams. Issues will likely arise as to the adequacy of steps taken by the DHB to address the problem (for example by proactively obtaining legal advice) and why, if the statutory role was creating the level of ongoing dysfunctionality contended for, the DHB nevertheless continued to support Dr

Humphrey's appointment to the Medical Officer of Health role year after year until 2019,[10] when it advised the Director-General of Health (apparently without prior express notice to Dr Humphrey) that it could no longer do so. The DHB's advice prompted the Director-General to initiate an investigation, currently stalled pending the outcome of the DHB's processes.

[35] I conclude that, on the untested evidence currently before the Court, there is a clearly arguable case for permanent reinstatement.

Balance of convenience

[36] This is the most difficult part of the analysis and ultimately involves a weighing exercise in the Court's discretion.

[37] I accept that the longer Dr Humphrey is out of the workplace the more difficult it will be for him to integrate back into it. Six months has now elapsed. By the time the parties are ready for a substantive hearing (which the Court has indicated it will accommodate without delay) and a judgment has issued, several more months will likely have passed. Experience suggests that as the passage of time grows the likelihood of successful reintegration fades and with it, the strength of the case for permanent reinstatement. Jobs are important and money is often a poor substitute. I see the 2018 amendment as reinforcing this point.[11] In this regard the Act has both an educative and regulatory function, which the Court recognises when dealing with applications for reinstatement. As the Court pointed out in *Ashton v Shoreline Hotel*:[12]

> To award routinely compensation for the job loss instead of reinstating is to create a system for licensing unjustified dismissals.

[38] The likely delay in having the substantive claim finally determined weighs in favour of interim reinstatement.

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10 Counsel for the DHB confirmed in submissions that the DHB confirms the designation of a Medical Officer of Health with the Ministry of Health each year and that it was in 2019 when the DHB decided it could no longer take this step, prompting the Director-General's investigation.

11 Employment Relations Amendment Bill 2018 (13-3).

12 *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421 at 436.

[39] While Dr Humphrey is currently working, it is in general practice and not in his area of speciality. I accept that this has consequences in terms of the maintenance of his specialist skills and knowledge. The evidence is that public health is a dynamic area of practice – the longer he is out of it, the more difficult it will be for him to catch up. I did not understand any of the DHB witnesses to be suggesting otherwise. This weighs in favour of interim reinstatement.

[40] I have already touched on the likely merits of the claim for unjustified dismissal and permanent reinstatement, insofar as they can be assessed at this stage. At the substantive hearing a focus of enquiry will be the extent to which Dr Humphrey contributed to the incompatibility. As the Court made clear in *Reid v New Zealand Fire Service Commission*, an employer cannot be justified in dismissal on the basis of irreconcilable breakdown if it was itself substantially the cause of it.[13] The Court notably also referred to dismissals in such circumstances only being available in an "unusual and rare case."[14] It appears, on the untested evidence currently before the Court, that the DHB may shoulder much of the responsibility for the breakdown in the relationship.

[41] Mr Shaw referred me to a number of cases where reinstatement was declined in circumstances involving a breakdown in workplace relationships. There are several points that can be made in relation to those cases. First, as they make clear, each case is fact dependent. Second, the majority of the cases referred to involved claims for permanent, rather than interim, reinstatement. The threshold in a claim for interim reinstatement is an arguable case. The merits may be taken into account in assessing the balance of convenience and overall interests of justice but are often difficult to assess in cases such as this when the evidence is untested. Such issues do not arise at a substantive hearing, at the stage permanent orders are being assessed. Third, the majority of the cases referred to pre-dated the 2018 amendment. The amendment made it crystal clear that reinstatement was to be the primary remedy in cases involving unjustified dismissal and disadvantage. The Minister of Workplace

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13 *Reid v New Zealand Fire Service Commission* [1998] 2 ERNZ 250 at 279 (EC); *Reid v New Zealand Fire Service Commission* (1999) 1 ERNZ 104 (CA).

14 At 280.

Relations and Safety described the proposed amendments contained within the Employment Relations Amendment Bill 2018 (13-3) in the following way:[15]

> I just want to clarify for members exactly what this bill does: it restores reinstatement as the primary remedy. Reinstatement is a remedy that is available right now. It is certainly an option for the Employment Relations Authority can find that someone ought to be reinstated to their role. What we're saying here is that reinstatement should be the primary remedy, and **the point of that is that is to get the conversation back to being one about how we can put this relationship back together again. Rather than saying, "How big a payout is it going to take to see someone off and never darken their employer's doorstep again?", let's see if there's a possibility to restore the relationship. … it is about changing the nature of that conversation**.
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> …
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> So, just to reiterate, this is about restoring reinstatement as the primary remedy – not as the only remedy and not as a compulsory remedy – and it's simply about changing the conversation from one of "What does it take to get out of this relationship?" to being one of "Is there any opportunity to restore the relationship?"
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> (Emphasis added)

[42] It is distinctly arguable that, properly interpreted, the amendment to s 125 reflected a Parliamentary intention to raise the bar that employers would have to negotiate in order to prove that reinstatement was neither reasonable nor practicable.

[43] I accept that the dismissal has likely impacted on Dr Humphrey's reputation but I am not persuaded that ongoing damage to reputation weighs materially in favour of the grant of interim reinstatement in the particular circumstances. The reputational argument is undermined by his recent appointment, by his peers, to the role of Chair of the New Zealand Medical Association Board.

[44] I have considered the DHB's concerns about an interim return to work placing additional pressure on an already pressured organisation. This concern, which I accept, must be weighed with other relevant factors. The DHB is an organisation with internal resources which is better placed than many to deal with such issues, including because of its human resources capability.

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[15] (4 December 2018) 735 NZPD (Employment Relations Amendment Bill - Committee of the Whole House, Iain Lees-Galloway).

[45] My concerns about ordering interim reinstatement largely centre on the potential impact on colleagues. However, I have concluded that appropriate measures can be put in place to reduce such impact, including via a supported and structured return to work. My conclusion is reinforced by the resources available to the DHB, including via its Human Resources team and the work it appears to have been doing (since 2019) to develop its restorative practices capacity. All of this will stand it in good stead to support a safe and appropriate reintegration, managed in a constructive manner. The reality is that while the DHB has a number of challenges, it is in a significantly different position to (for example) an owner-operator business responding to a claim of interim reinstatement in the context of a dismissal based on an alleged irreconcilable breakdown in the relationship with an employee.

[46] Ms Heaton pointed out that a repeated theme of complaint from Dr Humphrey's colleagues was that he was difficult to work with and so they worked around him. She observed that that was not a sustainable way for an organisation such as the DHB to work. Removing Dr Humphrey would not, she submitted, provide an answer to the more deep-routed problems that appear to exist, as they were likely to re-emerge and the cycle would continue. There is some strength in this submission.

[47] It is convenient to return to the Director-General's stalled investigation at this point, insofar as it may be said to be relevant to the balance of convenience. He has deposed that the investigation may be reactivated if Dr Humphrey is reinstated. I do not see this as having any significant weight in assessing the balance of convenience and it is unclear, on the basis of the untested evidence currently before the Court, where the merits would lie if the investigation were to proceed.[16]

[48] Dr Humphrey's expressed willingness to constructively move forward is relevant to the balance of convenience, lending weight to the prospect of a successful reintegration. Relevant too are the findings in the Toogood report that:[17]

> I am satisfied that, in regard to the aspects of Dr Humphrey's conduct that have been criticised as described above, Dr Humphrey has not acted intentionally to the detriment of his colleagues of the CPH. … He has

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16 See Kit Toogood "Investigation Report on behalf of the Canterbury Health Board Concerning Dr Alistair Humphrey" (24 August 2020) at [115] and [133]-[138].

17 At [24] and [151].

> apologised for the failings he has acknowledged and undertaken not to repeat them.
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> …
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> Considering the allegations carefully … I am persuaded that Dr Humphrey never intended to humiliate or bully any of his colleagues in the CPH. … none of the incidents on which the complaints are based was objectively serious if considered on its own; significantly, none resulted in any complaint being drawn to Dr Humphrey's attention. Moreover, the evidence does not establish that Dr Humphrey always behaves in a manner that his colleagues regard as inappropriate.

[49] Finally, one of the colleagues who appears to have had particular difficulties engaging with Dr Humphrey has left the organisation. This should go some way to easing any transition.

[50] I conclude that the balance of convenience weighs in favour of interim reinstatement.

Overall interests of justice

[51] The overall interests of justice favour the grant of interim reinstatement in this case. There is clearly a seriously arguable case that Dr Humphrey's dismissal was unjustified and that he would be permanently reinstated to his role following a substantive hearing. At this stage, and on the basis of untested evidence, I have concluded that the merits weigh in Dr Humphrey's favour. He will suffer from a professional perspective if he is not able to return to work in the meantime and I do not accept that damages will be an adequate remedy. For him the value of his job in public health, to which he has devoted his professional career, is clearly more important than the money.

[52] Our understanding of the benefits of a restorative approach in supporting successful employment relationships is developing at a pace, and is consistent with the underlying objectives of the legislation and the mutual obligations of good faith. This has implications for the steps that a fair and reasonable employer, particularly a well-resourced one, can be expected to take in dealing with relationship difficulties. The conversation has, as the Minister of Workplace Relations noted when introducing

the 2018 amendment, changed. And, as was observed in *Maddigan v Director-General of Conservation*[18] (a claim for permanent reinstatement decided under the pre-2018 law):

> I do not think that it is a stretch to say that where an employer's actions have poisoned the relationship to the point of collapse, the Court can reasonably expect them to go the extra mile to mend the damage, and to work constructively with the employee (and with other affected employees as required) to re-establish a co-operative relationship. In such circumstances, restorative practices in which parties can expect to engage actively, are likely to become an increasingly helpful tool.

Conclusion

[53] The application for interim reinstatement is granted. I order that Dr Humphrey be reinstated to his former position within the DHB pending further order of the Court. He is to be reinstated to the payroll from the date of this judgment. The parties are directed to attend urgent mediation[19] to identify and implement the necessary steps to ensure a managed transition, including one which recognises and appropriately safeguards the interests of his colleagues.

[54] A copy of this judgment is to be provided to the National Manager, Mediation Services of the Ministry of Business, Innovation and Employment by counsel for Dr Humphrey. Mediation Services is requested to make the necessary arrangements for a mediator with expertise in restorative practices to assist the parties in the reinstatement process. The mediator may consider it helpful, in light of the fact that the DHB has been developing its capability for dealing with workplace disputes on a restorative basis, for the appropriate person within the Human Resources team to be involved from an early stage. As s 188 makes clear, the parties are required to attend the mediation I have directed in good faith.

[55] I anticipate that the parties will be able to agree the necessary arrangements and the timing of them. However, if that does not prove possible leave is reserved to apply to the Court on short notice for urgent orders to be made.

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[18] *Maddigan v Director-General of Conservation* [2019] NZEmpC 190, [2019] ERNZ 550 at [84].
[19] Section 188 Employment Relations Act 2000.

[56] In the circumstances costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 12.30 pm on 30 April 2021