IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

Attention is drawn to the order prohibiting publication of certain information in this determination

CA 40/10
5295113

	BETWEEN	A Applicant
	AND	THE CANTERBURY DISTRICT HEALTH BOARD Respondent

Member of Authority:	James Crichton
Representatives:	Andrew McKenzie, Counsel for Applicant Penny Shaw, Counsel for Respondent
Investigation Meeting:	25 February 2010 at Christchurch
Determination:	26 February 2010

DETERMINATION OF THE AUTHORITY

Prohibition of publication

[1] Pursuant to the Authority's power in Schedule 2 clause 10(1) of the Employment Relations Act 2000, I order that the name of the applicant in this matter not be published. In consequence, throughout this determination, the applicant is simply referred to as A.

Employment relationship problem

[2] The applicant (A) was employed by the respondent (the Board) as a registered nurse working in the mental health service. A had been employed by the Board and its predecessors for a total of 27 years.

[3] A was dismissed from the Board's service on 5 February 2010 after a disciplinary inquiry concluded that A had committed serious misconduct in two particular respects.

[4] The Board was advised in late January 2010 that a particular patient had disclosed her friendship with A to another member of the nursing staff. The friendship was alleged to involve a texting with the patient, taking her for coffee and taking her to the movies.

[5] Once the Board became aware of the disclosure from the patient, it conducted a disciplinary inquiry, engaged with A and obtained from him a comprehensive written and oral submission. In that statement and via his Union official, A acknowledged the complained of conduct, acknowledged also that he had accessed the clinical notes of the same patient and also admitted that he had lent the patient money.

[6] The Board concluded that A was guilty of serious misconduct in respect of both the personal relationship with the patient and in accessing her medical records. A was summarily dismissed.

[7] Promptly after the dismissal was notified to A, an application for interim reinstatement was lodged in the Authority as part of a wider application for permanent reinstatement and compensation for unjustified dismissal.

Issues

[8] Section 127 of the Employment Relations Act 2000 confers power on the Authority to order interim reinstatement pending hearing of the personal grievance, where permanent reinstatement is sought. Pursuant to subsections (4) and (5) of that section, the Authority has power to grant such orders subject to any conditions the Authority thinks fit, and the Authority is required to apply the law relating to interim injunctions *having regard to the object of this Act*.

[9] Section 125 of the Employment Relations Act 2000 requires the Authority to provide for reinstatement wherever that is practical where that remedy is claimed and a personal grievance is proved. It follows that *the primacy now accorded by Parliament to the remedy of reinstatement is a relevant factor in considering interim reinstatement*: *Cliff v. Air New Zealand* [2005] ERNZ at p.1 per Judge Colgan.

[10] The law relating to interim reinstatement is usually encapsulated in three or four propositions. For the purposes of the present determination, the Authority poses the following four questions:

(a) Does A have an arguable case?;

(b) Would damages be an alternative remedy?;

(c) Where does the balance of convenience lie?; and

(d) What is the overall justice of the case?

Is there an arguable case?

[11] Not surprisingly, Mr McKenzie for A contends that there is an arguable case. Ms Shaw, for the Board, rejects that proposition entirely. Mr McKenzie's argument is based on complaints about process and the failure of the Board to take proper account of the stress that A was under at the relevant time. As to the procedural deficiencies, those are most graphically illustrated in the affidavit of Janice Gemmell, the Union official who assisted A during the disciplinary process. Ms Gemmell, while noting that A never denied the wrongdoing complained of, sought rather to contextualise the wrongdoing and contend that the damage done by the wrongdoing was not great and that the Board had failed to take into account the stress that A was under at the relevant time. Further, Ms Gemmell considers that the decision to dismiss was made very quickly and without either investigation or a measured and reflective approach to the decision to dismiss and she also alleges there was some confusion as to who the actual decision-maker was and, finally, whether A had actually been able to speak to the eventual decision-maker at all.

[12] The Board says that if there are infelicities in the process adopted, they do not go to the soundness of the decision itself and refers me in particular to *Chief Executive of Unitec Institute of Technology v. Henderson* [2007] 4 NZELR 418 as authority for

the view that since the passage into law of s.103A what is required is a balanced assessment of both procedure and substance.

[13] It seems to me clear law that what is now required by a s.103A consideration is an assessment of the whole matter in a holistic way and, as I have remarked in previous determinations, the requirements on the employer in conducting the disciplinary investigation are not so minute and detailed as to be a counsel of perfection.

[14] Notwithstanding those remarks, I am satisfied that the anxieties expressed on A's behalf about the procedure adopted by the Board does create the basis for an arguable case. As the Authority has remarked on numerous occasions in the past, the test for an arguable case in this context is of a relatively low order and I conclude an arguable case exists.

Where does the balance of convenience lie?

[15] Here, the Authority's obligation is to consider the relative inconvenience to each party of the other succeeding. I must weigh the relative hardship to the Board of A being successful against the potential hardship to A in remaining away from the employment pending resolution of the personal grievance.

[16] The Board argues that the balance of convenience favours the employer. The first argument is simply that the fact that A has admitted serious breaches of his professional obligations entitles the Board to conclude that it no longer has trust and confidence in A.

[17] Furthermore, the Board maintains that the patient involved in this matter is seriously unwell and the contention made on A's behalf that he did no real damage is hotly contested. The Board's affidavit advice from its various clinical leaders is that the effect of the breach of professional boundaries by A has had a significant and damaging effect on the patient. It seems from the affidavit evidence filed for the Board, that the patient is less well now than she was before the incidents complained of, and that that may be attributable to the breaches of professional boundaries, at least in part.

[18] The Board also contends that, particularly because of the potential risk to the patient, reinstatement ought not to be contemplated. It is said that even if A was not

reinstated to the particular facility, or even the particular hospital, where the patient is being treated, the real issue for the patient's ongoing health is the need for her to re-establish her trust in the Board after what has happened and it is suggested that even if A were to be reinstated to another institution run by the Board, there would still be potential for that to impact negatively on this patient, especially as it would be impossible for A to be precluded from having access to the Board's computer system and thus impossible for the Board to guarantee that A could no longer have access to the patient's notes.

[19] In that general connection, the Board argues strongly that if A has a personal grievance by reason of the dismissal being found to be unjustified (which of course the Board denies), that is a matter which can readily be remedied by way of compensation rather than by way of reinstatement, interim or permanent. The Board strongly contends that A must be seen as having contributed to the circumstances giving rise to his personal grievance if he were to be successful, and accordingly it would be necessary to consider contribution as part of the *mix* in the determination of remedies.

[20] Those last submissions do, I think, rather put the cart before the horse; the issue for present purposes is whether A should be granted the discretionary remedy of interim reinstatement and there can be no finding, interim or otherwise, about the strength of his personal grievance at this point. I do accept the Board's submission that if A were successful in his personal grievance application, compensation might be an appropriate remedy and compensation is better able to be adjusted to reflect contribution, unlike the position with reinstatement.

[21] Indeed, on this point, I prefer the submissions of counsel for A whose view it is that compensation could not properly provide an alternative remedy to the interim reinstatement remedy that is sought. A wishes to maintain his skills, wishes to return to his profession, and ultimately be given the opportunity of proving himself worthy of the Board's trust and confidence.

[22] However, it is accepted by A that the primary motivator in the balancing of convenience between the parties is the economic reality that he is not presently able to meet his financial obligations to his family as a consequence of the dismissal. It follows that while he would prefer to be reinstated to his position, reinstatement to the payroll would be a good second-best. Even so, in the memorable phrase of

Mr McKenzie, counsel for A, the relief sought is interim reinstatement, not interim reimbursement.

[23] I have reached the conclusion that the balance of convenience favours the Board. This is a situation where a senior and experienced nurse of long service has committed two significant breaches of professional nursing practice and has admitted that. It is difficult to see how, in those circumstances, the Board can do other than express real reservations about any reinstatement of A to the workforce. This is particularly so in respect of the interests of the most vulnerable individual in this whole story, namely the patient who, by virtue of being the least able to protect herself, is entitled to have her needs considered by the Authority as a vulnerable and affected third party.

[24] Furthermore, I am not persuaded that permanent reinstatement is a likely remedial outcome of a successful substantive personal grievance hearing and it follows that if that is the position, granting of interim reinstatement now would not be in accord with principle. If A is successful with his substantive personal grievance application, then the Authority would certainly turn its mind to compensation but of course tempered by any contributory considerations that might need to be taken into account in terms of s.124 of the Act.

Where does the overall justice lie?

[25] Standing back and evaluating the case on the currently untested affidavit evidence before the Authority and the able submissions of both counsel, the Authority must look at the overall justice of the case as between the parties.

[26] The untested affidavit evidence and the frank admissions by A disclose fundamental and significant breaches of the professional code applicable to nursing and the very gravity of the breaches of those professional ethics in the context of a professional career makes reinstatement frankly difficult to contemplate. The particular circumstances of the case and the involvement of a vulnerable patient who, on the best evidence available to the Authority at this point, was materially affected by the breaches, is a strongly contributing factor. The Authority has an obligation to consider third parties, particularly those who are unable to speak for themselves.

[27] I accept the Board's view that it is unable to contemplate any re-engagement with A in any circumstance where he could potentially access patient notes again and

there is no position in the organisation where access to patient notes would not be possible.

[28] I am not attracted by A's argument that he was stressed at the time he committed the breaches in question and that somehow excuses or mitigates it. His argument that he was stressed is not assisted greatly by his apparent failure to engage any of the support mechanisms which the Board has in place, including professional supervision.

[29] I do not consider this is a suitable case for what is usually referred to as *garden leave*. The implication from that decision of the Authority would be that A was entitled to the grant of this discretionary remedy but for practical reasons was not able to be accommodated in the workplace. That is not the position in the present case. In the present case, I am not persuaded that the interests of justice require the interim reinstatement of A to the Board's service on any basis. I determine that the overall justice of the case favours the Board. It follows that the application brought by A must fail.

Determination

[30] The application is declined for the reasons enunciated in the foregoing sections of this determination.

Costs

[31] Costs are reserved.

James Crichton
Member of the Employment Relations Authority