

ATTENTION IS DRAWN TO THE ORDER
PROHIBITING PUBLICATION IN B
OF THIS DETERMINATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 192
3011492

BETWEEN DAH
 Applicant

AND QME
 Respondent

Member of Authority: Vicki Campbell

Representatives: Tanya Kennedy for Applicant
 Elizabeth Brown for Respondent

Investigation Meeting: On the papers

Submissions Received: 21 and 28 June 2017 from Applicant
 26 June 2017 from Respondent

Determination: 4 July 2017

**PRELIMINARY DETERMINATION OF THE
EMPLOYMENT RELATIONS AUTHORITY**

- A. The application for orders restraining the respondent from continuing the applicant’s suspension is declined.**

- B. Non-publication orders will apply to the names of the parties, the names of clients of the respondent and any information leading to their identification.**

- C. No person is to access the Authority’s file without the consent of the Authority.**

- D. Costs are reserved.**

Employment relationship problem

[1] The applicant works as a mental health nurse. She has been suspended from her employment pending an investigation into concerns about the number, frequency and escalation of incidents she has reported to her manager. The applicant has lodged a personal grievance with the Authority claiming that her suspension is unjustified.

[2] The application lodged by the applicant was accompanied by an application for interim relief pending investigation of her grievance and interim non-publication orders.

[3] By the consent of the parties this preliminary matter has been determined on the papers currently before the Authority. In accordance with the usual procedure, the evidence before the Authority for the purpose of determining this application has been presented in affidavit form by witnesses and is untested. Any findings of fact made by the Authority in this determination are provisional only and may change later once the Authority has fully investigated the claims and after all witnesses have been examined about their evidence where necessary.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from the applicant and the respondent but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Injunction

[5] An injunction involves the exercise of discretion. The answer to it is not in the application of rigid formulae but there are some broad inquiries that the Authority should make. These are:

- (a) Is there a serious question to be tried? A claim such as the present one, arising out of a suspension, raises two sub-issues. First whether there is a serious question to be tried that the suspension was justified; second, whether there is a serious question to be tried in relation to the

claim for permanent reinstatement back to the workplace pending the outcome of the investigative process.¹

- (b) Where does the balance of convenience lie? This requires consideration of the relevant detriment or injury that the parties will incur as a result of the injunction being granted or not.
- (c) Is there an adequate alternative remedy available?
- (d) Finally, the Authority is required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

Is there an arguable case?

[6] I must consider whether the applicant has an arguable case to restrain the respondent from continuing with the suspension. An arguable case means a case with some serious or arguable, but not necessarily certain prospects of success.²

[7] The applicant was advised at a meeting on 30 March 2017 that she was suspended from her employment and was handed a letter confirming the suspension.

[8] The applicant argues there is a strongly arguable case that the suspension was deficient because she was not provided with full information leading up to the decision and the decision was made before the meeting on 30 March 2017 which means she was not provided with an opportunity to respond to the proposal.

[9] There is generally no right to suspend an employee absent a statutory or express contractual right to do so. The applicant's employment is covered by a collective agreement which does not provide an express power to suspend. The respondent relies on its Human Resources (HR) policy to support its decision to suspend the applicant.

[10] The HR policy under the heading Misconduct Procedure states:

20.7.2 when it is suspected that an employee is guilty of serious misconduct he/she may be suspended if the employment agreement allows for it or if they pose a danger to themselves, other employees or the organisation.

¹ *XYZ v ABC* [2017] NZEmpC 40 at [5].

² *X v Y Ltd and the New Zealand Stock Exchange* [1992] 1 ERNZ 863.

[11] As stated the collective agreement does not allow for suspension. That means the respondent must show that the suspension was due to the applicant posing a danger to herself, other employees or the organisation.

[12] The letter confirming the reasons for the suspension does not cite concerns about the applicant posing a danger to anyone. The main reasons given for the applicant's suspension related to the working relationship between the applicant and two colleagues and the concerns about the number of incidents being raised by the applicant.

[13] It is well established that an employee is generally entitled to be heard on a proposal to suspend.³ Suspension from employment is a serious step.⁴ There is a dispute between the witnesses about whether the respondent allowed the applicant the opportunity to discuss a "proposal" to suspend or whether the decision to suspend was given to the applicant as a fait accompli. What is not disputed is the lack of information provided to the applicant at the time she was advised of the suspension.

[14] The only information presented to the applicant was general in nature and lacked any specificity. The information did not include the comprehensive information now set out in the affidavits from the respondent's witnesses. This is relevant to whether the suspension on 30 March 2017 was a step an employer acting fairly and reasonably in all the circumstances could take.

[15] Based on the information available to me I consider the applicant has an arguable case she was unjustifiably suspended from her employment.

Where does the balance of convenience lie?

[16] Identifying the balance of convenience – in the sense of detriment or injury – in this case requires the likely impact on the applicant to be weighed against potential impact to the respondent and the extent to which such risks might be managed or minimised.

³ *Sefo v Sealord Shellfish Ltd* [2008] ERNZ 178, (2008) 5 NZELR 407 at [37]-[38].

⁴ *Tawhiwhirangi v Attorney-General* [1993] 2 ERNZ 546.

[17] The applicant remains an employee of the respondent and continues to be on pay. While the initial suspension was for a period of five weeks, the suspension has now been ongoing for more than three months.

[18] The respondent raises concerns about the applicant's state of mind and says this was a reason why the applicant was suspended. These concerns were expressed in the affidavits of the applicant's team leader, a trained psychologist, and the manager who is a trained nurse. Both witnesses say they had assessed the applicant during their communications with her.

[19] If the team leader and manager had concerns about the applicant's state of mind they ought to have put her on notice of this. In any event, these concerns were not the reason given to the applicant for her suspension.

[20] After the applicant was suspended the locum engaged to take over the applicant's client list identified serious concerns around the applicant's practice, including record keeping, which the respondent now wishes to address through a disciplinary process.

[21] On 22 May 2017 the respondent wrote a comprehensive 19 page letter to the applicant setting out in detail eleven allegations to which the respondent now seeks a response.

[22] The applicant contends that her health has been adversely affected by the suspension and if it continues her health will be further impacted detrimentally. I have balanced these factors against the desire of the respondent to progress its investigation noting that this has not yet occurred.

[23] The applicant submits that the concerns set out in the letter dated 22 May 2016 followed her suspension and relate to competency deficiencies. I accept that a number of the concerns relate to competency while others may fall under the respondent's definition of misconduct.

[24] Included in the eleven allegations are allegations relating to client safety especially with respect to the recording and administration of medication. According to the respondent's policy serious misconduct includes behaviour which seriously

threatens the wellbeing of the patients. The respondent's policy provides for suspension where there are allegations of serious misconduct.

[25] The substantive matters will likely be heard in September 2017. This is just over two months from now and a decision will be issued either orally at the time (if it is practicable) or within three months from the date of the conclusion of the investigation meeting process.

[26] I have also taken into account evidence that the applicant has made contact with the Acting Director of Mental Health Services expressing her concerns about cover by a Duly Authorised Officer in the region. At the time the applicant made contact with the Acting Director she was under an instruction from the respondent not to have contact with any stakeholders.

[27] Given my findings above I find the balance of convenience favours the continued suspension of the applicant. The reasons for the initial suspension have changed and the respondent has become aware of, and raised serious concerns which relate to client safety which require investigation. If I were to restrain the respondent from continuing with the suspension it is highly likely that within a very short period the applicant would be suspended to allow an investigation into the allegations raised on 22 May 2017, some of which may constitute serious misconduct.

Is there an adequate alternative remedy available?

[28] The suspension was a temporary measure which the respondent witnesses say was initially to diffuse the work situation and provide an opportunity for the team leader to understand what was happening in the workplace.

[29] The respondent says that if it is restrained from continuing its suspension and in the event that the applicant subsequently succeeds at the substantive hearing in establishing a disadvantage grievance, she will be adequately compensated by an award of damages for any loss she may have suffered.

[30] I am satisfied the respondent is in a position to pay any such remedies if it becomes necessary to do so.

Where does the overall justice lie?

[31] I must now stand back and ascertain where the overall justice lies. I have found the applicant has an arguable case for unjustified disadvantage. However, the

respondent is entitled to investigate matters of concern and it has specified a number of new allegations which have been set out comprehensively in its letter dated 22 May 2017.

[32] Standing back and having regard to all aspects of the matter, including the factors I have discussed, I find that the overall interests of justice follow the balance of convenience. The application for restraining orders is declined.

Non-publication

[33] The applicant seeks an order prohibiting the publication of medical and client information, her name, and any evidence and material which may identify her and that of third parties including the applicant's partner and the respondent's clients. The respondent supports orders for non-publication.

[34] The grounds upon which the application is made are:

- (a) The applicant's medical circumstances;
- (b) The applicant's professional reputation and career;
- (c) The underlying merits and nature of the allegations.

[35] The Authority has broad discretion to make non-publication orders pursuant to clause 10(1) of schedule 2 to the Act which provides:

12 Power to prohibit publication

- (1) The Authority may, in respect of any matter, order that all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.

[36] The Supreme Court has recently considered the issue of non-publication orders and identified the following principles:⁵

- (a) Open justice is a principle of constitutional importance.
- (b) Courts have routinely declined to make non-publication or confidentiality orders simply because the publicity associated with particular legal

⁵ *Erceg v Erceg* [2016] NZSC 135 at [2] and [13].

proceedings may, from the perspective of one or another party, be embarrassing ... unwelcome.

- (c) Where a party seeks a non-publication order, they must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule of open justice, and that standard is a high one.

[37] The Employment Court in *H v A Ltd* stated:⁶

We agree that non-publication of names or other identifying particulars in employment cases will be “exceptional” in the sense that such orders are and will be made in a very small minority of cases. However, we do not agree that an applicant for such an order must make out, to a high standard, that there are such exceptional circumstances that a non-publication order is warranted. That is not the standard that Parliament has prescribed for such orders in this Court or the Authority.⁷

...

There are, of course, other circumstances in which this Court (and the Authority and other courts) prohibit publication of information about cases. Commercially sensitive information that may be misused by a competitor, if published, is perhaps the most common example of non-publication orders in this jurisdiction. Others have included information about the security arrangements of prisons which, if publicised, might endanger prison staff; the identities of persons who have been subjected to criticism in evidence but have had no opportunity to challenge or refute that criticism; and the identities of hospital patients whose care and treatment are the subject of proceedings involving professional health staff. There are many other instances of ad hoc non-publication orders which are, nevertheless, very much the exception than the rule.

[38] This case involves parties and witnesses who operate in a small community where the applicant and other employees are widely known. The applicant submits that the publication of her name would result in damage to her professional reputation which would outweigh any public interest factor.

[39] I am satisfied that this case is one that falls into the exceptions to the principle of open justice. The information provided by the applicant and the respondent regarding the clients under the professional care of the applicant satisfies me that the clients are particularly vulnerable. If the names of the parties are published the identity of the clients will be ascertainable in the small community within which the applicant and respondent operate.

[40] I am satisfied that the interests of justice require a departure from the usual principle of open justice and that adverse consequences could flow from publication.

⁶ [2014] NZEmpC 92.

⁷ Ibid at [78] and [80].

Accordingly I consider it appropriate to exercise the Authority's discretion to make an interim order prohibiting publication.

[41] There will be an interim order prohibiting publication of the names of the parties, the clients of the respondent and any information leading to identification. No person is to access the Authority's file without the consent of the Authority. These orders will remain in place until further order of the Authority.

Costs

[42] Costs are reserved and will be dealt with when dealing with costs relating to the substantive matters.

Vicki Campbell
Member of the Employment Relations Authority