

**This determination contains an
order prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 170
3133444

BETWEEN DPR
 Applicant

AND WVK
 Respondent

Member of Authority: Vicki Campbell

Representatives: David Fleming, counsel for Applicant
 Peter Cranney, counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 1 and 21 April 2021 from Applicant
 16 April 2021 from Respondent

Determination: 28 April 2021

DETERMINATION OF THE AUTHORITY

- A. DPR’s application for interim reinstatement is declined.**
- B. Costs are reserved.**

Non-publication order

[1] The applicant seeks interim non-publication orders for his own name and details that would identify him, his family circumstances and other personal information. He is concerned:

- a) His identity be protected until such time as the Authority has the opportunity to hear full evidence from all those involved and it can be properly tested in a substantive investigation meeting; and
- b) There has been wide media interest in the applicant's situation and further interest may cause further harm to his reputation.

[2] The respondent does not oppose the application.

[3] The issuing of a non-publication order is discretionary and arises under with Clause 10(1) of Schedule 2 to the Employment Relations Act 2000 (the Act).

[4] In weighing up the exercise of the Authority's discretion I have had regard to the Employment Court decisions in *H v A Ltd*, *XYZ v ABC*, *Crimson Consulting Ltd v Berry*, and the Supreme Court decision in *Erceg v Erceg*.¹

[5] In *Erceg*, the Supreme Court emphasised that the starting point is the principle of open justice, and that a high standard must be met before that principle can appropriately be departed from.²

[6] There is a need to strike a balance between open justice considerations and the interests of justice that are served by the exercising of the Authority's discretion to suppress specified information in any particular case.³ There is an increasing awareness about the impact of publication on future employment prospects of individuals named in litigation and access to justice.⁴

[7] Having considered the applicant's application carefully I am satisfied it is in the interests of justice to grant the application on an interim basis until a full and informed consideration of the merits of the applicant's application can be undertaken.

[8] Until further order of the Authority the names of the parties and any information leading to the applicant's identification is prohibited from publication.

¹ *H v A Ltd* [2014] ERNZ 38 at [78]; *XYZ v ABC* [2017] NZEmpC 40; *Erceg v Erceg* [2016] NZSC 135.

² *Erceg v Erceg* [2016] NZSC 135 at [65] and [69].

³ *Crimson Consulting Ltd v Berry* [2017] ERNZ 511 at [92] footnotes excluded.

⁴ *Elisara v Allianz New Zealand Limited* [2019] NZEmpC 123 at [63].

[9] Throughout this determination the applicant shall be referred to as DPR and the respondent shall be referred to as WVK. A random online letter selection tool has been used to select these letters which do not bear any relation to the parties' real names.

Employment relationship problem

[10] DPR was dismissed for serious misconduct on 30 July 2020. He challenges his dismissal which he says was unjustified and seeks reinstatement on an interim basis. WVK denies DPR was unjustifiably dismissed. It maintains he was dismissed following a full and fair investigation process after it received a complaint about DPR's conduct.

[11] This determination addresses DPR's application to the Authority for interim reinstatement to his previous position pending the Authority's investigation and determination of his substantive application.

[12] DPR applied for, and was granted, urgency on his application for interim reinstatement. In support of his application DPR has provided an undertaking as to damages together with an affidavit.

[13] The parties agreed to the Authority determining the preliminary issue of interim reinstatement on the papers. These papers included the contents of the statements of problem and reply, affidavits and submissions made by the parties.

[14] The Authority has received affidavits from DPR and a WVK Manager.

Interim application

[15] An application for interim reinstatement involves the exercise of discretion. The basis on which applications for interim orders are to be decided can be summarised as follows:⁵

- a) DPR must establish there is a serious question to be tried, that WVK has unjustifiably dismissed him and that I should order WVK to reinstate him;
- b) Consideration must then be given to the balance of convenience, and the impact on the parties of granting, or the refusal to grant, an order;

⁵ See, *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36 at [7] referring to the Court of Appeal in *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

- c) Finally, the overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

[16] The merits of this case, in so far as they can be ascertained at the interim stage, are relevant in the assessment of the balance of convenience and the overall justice of the case. The assessment relies on the as-yet-untested evidence in the affidavits and what can be discerned from the pleadings and documents provided by the parties.

[17] 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.

[18] As permitted by s 174E of the Act this determination has expressed conclusions on issues necessary to dispose of the matter. While I have not referred in this determination to all the evidence and submissions received I have carefully considered everything.

Background

[19] DPR worked for WVK in the Auckland region as an advocate for employee rights. He was provided with access to a company vehicle, mobile phone and a business email address to assist him in undertaking his duties.

[20] Before and during his employment DPR was actively involved in assisting minority workers who may be subject to exploitation. This was in addition to his paid employment. DPR was associated with community organisations which provided advice and assistance to such workers.

[21] In August 2018 DPR befriended a young female employer (referred to as MFM) whose business was not in the Auckland region. The friendship developed through Facebook. In September 2018 DPR was invited to meet with MFM.

[22] Despite his initial concerns that he could not justify the use of company petrol to travel to meet with her, DPR travelled out of Auckland using the company vehicle and during his usual working hours to meet with MFM.

[23] MFM told DPR she was concerned about pressure she was getting from one of the community organisations DPR had connections to, relating to allegations that she exploited migrant workers. DPR offered to arrange a meeting with representatives from

the community organisation. The meeting went ahead in October 2018. DPR used his employer's premises for the meeting.

[24] During the October meeting MFM believed DPR was acting on her behalf and raised concerns with him via text message about how she was being treated.

[25] During and after the meeting in October 2018 DPR played various roles including being a support person for MFM, mediator, adjudicator and ultimately, enforcer.

[26] MFM became concerned about pressure being put upon her by DPR to make payments that she did not consider she was required to make. In July 2020 MFM made a formal complaint to DPR's employer and disclosed copies of all of the text messages and emails between them relating to their relationship, the October meeting and subsequent events.

[27] Following an investigation, including meetings with DPR and exchanges of documents, WVK was satisfied that as a result of the role he held in the business he compromised himself, behaved unethically, engaged in inappropriate communications and seriously compromised WVK when information about the complaint came into the public arena.

Serious question to be tried

[28] The threshold for a serious question is that the claim is not frivolous or vexatious.⁶ The assessment of whether there is a serious question to be tried requires a judicial assessment of the evidence, albeit untested, and the submissions advanced.

[29] In a claim such as this the question of whether there is a serious question to be tried raises two sub-issues:

a) Is there an arguable case that DPR was unjustifiably dismissed?

and

b) Is there an arguable case in relation to the claim for permanent reinstatement?

⁶ Ibid.

Arguable case for unjustified dismissal

[30] An arguable case means a case with some serious or arguable, but not necessarily certain, prospects of success.⁷ The test for assessing whether a dismissal was justifiable is set out at s 103A of the Act. This section requires an objective assessment of whether WVK's actions and how it acted were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred.

[31] The Authority may take into account other factors as it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in DPR being treated unfairly.

[32] The Court of Appeal has confirmed that the effect of section 103A(3) of the Act is that there may be a variety of ways of achieving a fair and reasonable result and that the overall requirement is for an assessment of substantive fairness and reasonableness, rather than minute and pedantic scrutiny to identify failings.⁸

[33] The Authority's task is to examine objectively the employer's decision-making process and determine whether what the employer did and how it was done were steps that were open to a fair and reasonable employer.⁹ This includes consideration of the genuineness of the employer's decision based on business requirements.

[34] DPR submits the decision to dismiss him was flawed because WVK:

(a) Did not explain to him why:

- i. it would be serious misconduct for him to attempt to resolve an employment relationship issue;
- ii. his conduct was unethical;
- iii. it was unethical for him to act as both mediator and adjudicator; and
- iv. dismissal was warranted for making comments that were merely inappropriate to a personal friend who had no connection to WVK.

⁷ *X v Y Ltd and the New Zealand Stock Exchange* [1992] 1 ERNZ 863.

⁸ *A Ltd v H* [2016] NZCA 419 at [46].

⁹ *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160; [2011] ERNZ 466 at [26].

(b) Unilaterally shortened the timeframe for the disciplinary process denying him the opportunity to prepare a response to the allegations or to have his chosen representative present;

(c) Disguised the real reason for his dismissal.

[35] In reply WVK submits the argument that DPR was unjustifiably dismissed is weak. WVK had established the following grounds for dismissal:

(a) DPR had seriously compromised himself and WVK;

(b) DPR had purported to play three simultaneous roles with MFM namely her support person, a mediator and an adjudicator in an employment case;

(c) DPR had then moved into an enforcement role against MFM;

(d) DPR had behaved unethically;

(e) DPR had engaged in communications with MFM that were inappropriate; and

(f) DPR had seriously compromised WVK by his actions.

Is there an arguable case for permanent reinstatement?

[36] Under s 125(2) of the Act the Authority must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy.

[37] Practicability concerns the prospects for successfully re-establishing the employment relationship. It involves the question of whether DPR could be a sufficiently harmonious and effective member of WVK if he were ultimately reinstated to his former position or a similarly advantageous one. Practicability means more than simply being possible irrespective of consequence.¹⁰

[38] The dismissal took place in July 2020. DPR lodged his claim for interim reinstatement in the Authority in March 2021. There has been no satisfactory explanation for the delay in seeking interim reinstatement.

¹⁰ *Hong v Auckland Transport* [2019] NZEmpC 54.

[39] DPR deposed that he is passionate about his advocacy for workers' rights and believes he could step back into the job and make a positive contribution.

[40] WVK has provided no evidence to support its opposition to DPR's reinstatement. I have accepted its response that contributory conduct will be a significant factor in determining remedies, if any, following the Authority's substantive investigation.

[41] WVK submitted that interim reinstatement would play a heavy and unrecoverable burden on it and would create a strong likelihood of reputational damage as well as the risk of continued misconduct in light of DPR's repeated assertions that his conduct was blameless and appropriate. No evidence has been provided to support these assertions. Impracticability of reinstatement requires more than assertions.

Conclusion

[42] Apart from a change to the final meeting time, DPR has failed to demonstrate flaws in WVK's procedure. However, the alleged flaws identified by DPR warrant further consideration. There is also an unexplained gap in the information with respect to the delay between the complaint of conduct occurring in October 2018 and the complaint being made in July 2020. There is no evidence currently before the Authority to show whether this delay and the reasons for it were investigated by WVK.

[43] WVK's business is supporting and advocating for workers' rights. DPR's entanglement in MFM's issues, which included allegations of worker exploitation, was inconsistent with his role as a worker advocate.

[44] Under the Act reinstatement must be to the former position or the placement of the employee in a position no less advantageous.¹¹ While there was a delay in seeking an order for interim reinstatement, WVK was on notice in August 2020 that DPR would be seeking reinstatement in resolution of his employment relationship problem.

[45] WVK submits that DPR's contributory conduct will impact significantly on any remedies awarded including the question of permanent reinstatement. In reaching my conclusions I am mindful of the Court's approach that where a dismissal is unjustified,

¹¹ Employment Relations Act 2000, s 123(1)(a).

alleged contributory conduct by the employee does not in itself make reinstatement impracticable or unreasonable.¹²

[46] My preliminary view, based on the untested evidence, is that the claim of unjustified dismissal and for permanent reinstatement is not strong.

Balance of convenience

[47] The balance of convenience weighs the potential effect on DPR if he were declined interim reinstatement against the potential effect on WVK if interim reinstatement were granted. In addition, under this head there is also a consideration of the merits of the application.

[48] In terms of this last point, I have concluded earlier that DPR's claims in respect of his unjustified dismissal grievance, and in respect of permanent reinstatement, are arguable, albeit, not strongly arguable.

[49] I have however, adopted a cautious approach in assessing the relative strengths and weaknesses of the case at this stage. DPR has made a number of allegations with respect to the clarity of the allegations WVK made about his conduct including whether the final outcomes were properly put to him for explanation. This claim is not accepted by WVK but it will warrant further investigation by the Authority.

[50] DPR submitted that the balance of convenience weighs in his favour because:

- (a) He is unemployed and is in financial difficulties;
- (b) The Authority is experiencing delays in setting down substantive investigation meetings and so he will have a potentially lengthy wait for a final determination;
- (c) WVK is a large organisation and could allocate him work and receive the benefit of his labour;
- (d) Given the media interest in the case, the delay has made reinstatement more practicable and reasonable than immediately after his dismissal.

¹² *Lewis v Howick College Board of Trustees* [2010] NZCA 320; *X v Auckland District Health Board*, Auckland, AC 10/07; *Hong v Auckland Transport* [2019] NZEmpC 54.

[51] In its submissions WVK asserts:

- (e) There is serious and unchallenged written evidence of the misconduct complained of;
- (f) The evidence establishes DPR placed himself and WVK at very serious risk in his dealings with the employer concerned;
- (g) The unethical and inappropriate nature of DPR's behaviour is apparent in the written material and other information before the Authority.

[52] WVK submitted the balance tipped against DPR because, if he lost his substantive grievance claim, his affidavit evidence about his financial circumstances suggested he would have difficulty honouring his undertaking as to damages if called upon to pay back any portion of the wages he would be paid during the period of interim reinstatement.

[53] The validity of an undertaking given as part of an interim reinstatement application in pursuit of a personal grievance does not depend on present proof of how hypothetical future payments might be funded. As noted by the Court the lack of means to discharge the obligation imposed by the undertaking, should it be called upon, is not fatal to an application where an undertaking is required.¹³ However, DPR has not taken the opportunity to provide sufficient information to enable an informed assessment to be made as to the worth of his undertaking. This weighs against him.

[54] Weighing up the relevant detriment or injury each party will incur if an interim injunction is granted or not, I find the balance of convenience favours WVK. I am satisfied if DPR is denied interim relief, and he is subsequently successful in his unjustified dismissal claim warranting permanent reinstatement, damages will be an adequate remedy.

[55] Having regard to the foregoing considerations I conclude that the balance of convenience weighs in WVK's favour and against interim reinstatement.

¹³ *Y v Kevin Hyde Engineering Limited* [2013] NZEmpC 129; [2013] ERNZ 301..

Overall Justice

[56] DPR has an arguable case. This is not a situation where it is clear the employer has made material errors, either procedurally or in terms of its substantive decision-making.

[57] Standing back from the matter and considering the overall justice of the case, I consider the overall interests of justice follow the balance of convenience.

[58] DPR's application for interim reinstatement is declined.

Next steps

[59] An Authority Officer will contact the parties' representatives in due course to set up a telephone conference, where arrangements will be made to progress DPR's application to a substantive investigation meeting.

Costs

[60] Costs are reserved pending the substantive investigation of this matter.

Vicki Campbell
Member of the Employment Relations Authority