

ATTENTION IS DRAWN TO THE ORDER  
PROHIBITING PUBLICATION OF CERTAIN  
INFORMATION

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2021] NZERA 225  
3135881

BETWEEN	LMS Applicant
AND	UZD Respondent

Member of Authority: Philip Cheyne

Representatives: Tim McGinn, counsel for the Applicant  
David Traylor, counsel for the Respondent

Investigation Meeting: 14 May 2021 at Christchurch

Date of Determination: 25 May 2021

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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- A. The claim for interim orders is dismissed.**
- B. Costs are reserved.**
- C. Pursuant to the Second Schedule clause 10 of the Employment Relations Act 2000, I prohibit from publication the identity of the parties to this employment relationship, the statement of problem, the statement in reply and the evidence**

**produced in the Authority, pending further order of the Authority. This order does not prevent the use of the pleadings and evidence in the independent investigation, subsequent processes or proceedings.**

### **Non Publication**

[1] LMS seeks the continuation of the order made earlier and UZD will abide the Authority's decision on the point.

[2] LMS and UZD remain in an employment relationship. Publication now of the identities of the parties involved in this matter is likely to negatively affect the outcome of the current employment relationship problem. Publication would significantly impede the likelihood of a fair and reasonable outcome for the investigation into the anonymous complaint.

[3] I will continue a non-publication order. The precise form of an order was not expressly discussed. The intention of the above order is not to restrict LMS and UZD in the use they make of the pleadings and evidence in bringing the employment investigation to a conclusion and in any subsequent proceedings. The precise form of the non-publication order can be amended if required.

### **Employment relationship problem**

[4] LMS is employed by UZD. UZD engaged an external investigator to investigate a complaint naming LMS, made anonymously to WorkSafe New Zealand who then referred it to UZD.

[5] LMS says that UZD breached good faith. He says that UZD was not active and constructive in establishing and maintaining a productive employment relationship with him, in that two of its managers did not raise with him at the time alleged concerns they have now disclosed to the investigator. LMS also says that UZD acted in a misleading and deceptive manner, when it consulted with him about terms of reference for the investigator without disclosing the existence of the managers' concerns. LMS says that if he had known of these

concerns, he would have taken a different position when consulted about the terms of reference.

[6] LMS says that UZD breached its applicable policy. It did not have a complaint from an employee that was capable of investigation and the two managers had not complied with the policy in respect of the concerns they reported to the investigator.

[7] LMS says that UZD would breach its duty to him of fair and reasonable treatment if it proceeds with the investigation.

[8] By counsel's 3 March 2021 letter, LMS raised a personal grievance with UZD. LMS says his employment is affected to his disadvantage by UZD's unjustifiable actions: accepting an un-particularised, anonymous complaint as meriting a formal investigation to seek further complaints; seeking to include in the external investigation the concerns mentioned by the two managers; finalising the investigation terms of reference while withholding those concerns from LMS; including for investigation those concerns but excluding for investigation the managers' failure to act at the time; allowing the external investigator to continue despite the apparent pre-determination of bias; not including for investigation whether the two managers sought and acted on advice in not raising those concerns earlier, but authorising the investigator to interview employees named by the two managers; and wrongly treating the complaint by one of the managers as within the terms of reference.

[9] The statement of problem indicates that compensation, penalties and costs are claimed in respect of the personal grievance and breaches. However, the only matters currently for determination are LMS's claim for interim orders. LMS seeks an interim compliance order prohibiting UZD from proceeding with the investigation under the terms of reference, pending substantive determination of the grievance and breach claims. There is a claim for costs. LMS has provided an undertaking as to damages. The application is based on the affidavits of LMS and the National Secretary of his union.

[10] UZD says it has acted in good faith, has treated LMS fairly and reasonably and has not breached any terms of his employment. UZD says that the Authority lacks jurisdiction to grant an interim compliance order and that grounds for an interim injunction are not made out. It says that LMS has not been disadvantaged by any unjustified action by LMS.

[11] The following issues arise:

- (a) Is an interim compliance order available?
- (b) Or has LMS established an arguable case for an interim injunction?
- (c) Does the balance of convenience favour an interim injunction?
- (d) What is the overall justice of the case?
- (e) If grounds are made out, what interim order should be made?

[12] This determination is based on the untested evidence of the affidavits (including annexures). Final findings of fact must await the examination and cross-examination of relevant witnesses in the course of an investigation meeting, as would be usual.<sup>1</sup> It is also important to determine the present issues promptly. I will endeavour to state and explain findings and express conclusions and orders succinctly.

### **Is an interim compliance order available?**

[13] In *Affco New Zealand Limited v New Zealand Meat Workers & Related Trades Union Inc*<sup>2</sup> the Employment Court considered whether it was able to make an interim compliance order. The Court was exercising the Authority's powers on a matter removed to the Court. The Court held at [49] that "Parliament did not intend to provide for interim compliance orders."

[14] There is no proper basis here to distinguish the finding in *Affco*. I find that an interim compliance order under s 137 of the Act is not available.

### **Has LMS established an arguable case for an interim injunction?**

[15] It is common ground that an interim injunction is potentially available as a remedy. During the case management conference, Mr McGinn observed that the application for an interim compliance order could be read as extending to an interim injunction but said he would lodge an amended application if necessary. I did not require an amended application.

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<sup>1</sup> Employment Relations Act 2000, s 160(1)(d) and s 160(2A).

<sup>2</sup> *Affco New Zealand Limited v New Zealand Meat Workers & Related Trades Union Inc* [2016] NZEmpC 154.

It was clear to UZD that the present investigation would include consideration of whether there were grounds for an interim injunction.

[16] LMS must first establish that there is a serious question to be tried. I find that LMS has established that. The issue is the strength of that case, as is apparent at present.

[17] UZD's relevant policy indicates that a WorkSafe NZ complaint is open to a complainant if dissatisfied with the outcome of UZD's investigation into a complaint. That does not apply here. The policy also states that UZD can only investigate anonymous complaints if doing so without naming the complainant would be fair to all involved. The WorkSafe NZ complaint form is anonymous, with broadly cast allegations of bullying by LMS, lacking in detail as to dates, circumstances and people subject to this (except one named person). The author(s) of the complaint form included some workplace detail. Aside from that, there is no indication whether the complaint was authored by a UZD employee(s). The picture painted by the form is inconsistent with LMS's lengthy acknowledged service for UZD and as a representative of UZD's employees through his union involvement.

[18] Mr McGinn's submission is that the complaint form does not reasonably establish a threshold to continue an investigation. I accept that it is arguable that LMS might establish a grievance on this basis, but I do not consider it is strongly arguable at this stage. The strength of the point would be more apparent, depending on whether the investigation yields anything that substantiates or undermines the complaint.

[19] There was contact between UZD and the union secretary, from which LMS learnt that there was a complaint to WorkSafe NZ naming him. WorkSafe NZ forwarded the complaint to UZD soon after, but it was not disclosed to LMS or the union secretary (despite requests) for some weeks. Meantime, UZD decided to appoint an independent investigator. Terms of reference for the investigator were drafted and a senior UZD manager without any line management responsibility for LMS or others potentially involved was appointed as the decision maker. The terms of reference explicitly excluded re-investigation of "previous matters". LMS did not know of any "previous matters", so the union secretary sought details. That resulted in the explicit exclusion being left out of the January 2021 final terms of reference.

[20] Later, the union secretary and LMS became aware of an email exchange between LMS's two line managers from August 2020 under the subject line "Verbal complaints about the behaviour of [LMS]". A number of file notes were also disclosed. There is a submission that UZD breached statutory and contractual obligations by not following up on concerns referenced in the email and file notes at the time. I accept that there is a strongly arguable case on that point, absent a reasonable explanation for the passage of time.

[21] There is also a submission that UZD's knowledge of the undisclosed email and file notes informed the explicit exclusion of "previous matters" in the draft terms of reference. If the final terms of reference had included the explicit exclusion, the argument is that the matters in the email and file notes could not have formed part of the independent investigation. Mr McGinn submits UZD breached good faith by consulting about those terms and finalising them leaving out the exclusion, but without disclosing the existence of the email and file notes. UZD's answer is that the decision maker who handled the exchanges about the terms of reference had no knowledge about the email, the file notes or the matters referenced therein until later. In light of that, the argument would be that other lines of management involved in drafting and advising the terms of reference had knowledge of those matters or that the decision maker should be treated as having constructive knowledge of the email and file notes. I accept that it is strongly arguable that UZD breached the good faith obligations by not ensuring that LMS was aware of the email and file notes before the conclusion of the consultation with him on the terms of reference for the independent investigator.

[22] The investigator sought to speak with the person mentioned as the subject of bullying in the anonymous complaint. The investigator reported to the union secretary and the decision maker that the person did not wish to participate. As foreshowed, the investigator prepared a minute setting out steps taken and his proposed actions. The minute records that the person's representative had advised the investigator that the person did not wish to speak to the investigator because he had not seen the anonymous complaint and wanted to determine the accuracy of what it said about him before he spoke to the investigator. Later in the minute, the investigator characterised this as "[Person] declined an invitation to speak with me". Despite that, the investigator proposed he continue to investigate. The two line managers gave him names of some employees, who the investigator proposed to approach. The investigator also proposed to give LMS an opportunity to respond.

[23] LMS's union engaged counsel. In response to the minute, it was put to the investigator that he had demonstrated apparent bias, so as to disqualify him from further investigation. One of the line managers had reported to the investigator that another employee had given the manager a reason for not proceeding with a complaint about LMS. The investigator, in his minute, characterised the reason as "ostensibly for fear of retribution". The manager had not expressly characterised the employee's reason in that way. That, the investigator's willingness to proceed with an investigation without checking that the person named in the anonymous complaint regarded himself as a victim and the investigator's acceptance of the line managers' accounts, were said to show apparent bias and for it to be "grossly unfair" for the proposed investigation to proceed.

[24] The decision maker decided that the investigator should continue with the investigation. He also authorised the investigator to disclose a redacted version of the anonymous complaint to the named person. The investigator then set out his next proposed steps. That included consideration of the claimed bias. The investigator later set out a response to the claimed bias. Meantime, counsel raised a personal grievance claim on LMS's behalf, further investigation was deferred pending mediation, mediation did not resolve matters, the present application was lodged and the deferral of further investigation extended to await the present determination.

[25] I accept that there is an arguable case that LMS can show that the investigator has demonstrated apparent bias as claimed, so that any factual conclusions expressed as a result of his investigation may be impugned. However, I reinforce the point that there is no evidence from the investigator and the evidence of LMS and the union secretary has not been tested. The case of apparent bias does not impress me as strongly arguable at this point. The expressed characterisation of the reason might merely be a mistake, as suggested by the decision maker. The other points alone do not indicate bias.

[26] Overall, LMS has met the threshold, so I now turn to consideration of the balance of convenience.

**Does the balance of convenience favour an interim injunction?**

[27] It is likely that UZD and the investigator would endeavour to ensure confidentiality was maintained. There is no reason to think UZD and the investigator would not comply with

the statutory and contractual privacy and confidentiality obligations owed to LMS. Despite that, it is apparent there is a risk of LMS being publicly identified.

[28] There is evidence about the potential negative, serious effects on LMS's wife and family, especially if LMS is publicly identified as the subject of a bullying investigation. Compensation for LMS is unlikely to be an adequate remedy for the indirect harm to LMS, in the event that LMS establishes that the proposed further investigation breached his rights and/or is a personal grievance. LMS's wife and family cannot seek compensation in this jurisdiction. However, the strength of this factor is significantly reduced by the non-publication order I have made.

[29] If LMS establishes that UZD breached his rights or was unjustified in proceeding with a proposed investigation, UZD would probably be in a position to meet whatever compensation was proven to restore LMS to the position he would have been in, but for those breaches. Whatever sum was ordered however, would not truly address the harm caused if LMS was publicly identified as the subject of a bullying investigation, but UZD should not have proceeded with the investigation. Again, the strength of this factor is significantly reduced by the non-publication order.

[30] There is a continuing stigma of being the subject of a bullying investigation. Being cleared of the allegation does not remove all that stigma. Compensation might not be a sufficient remedy. Again however, the strength of this factor is significantly reduced by the non-publication order.

[31] I am referred to *JKL v OPG*.<sup>3</sup> There is a submission that, although unlikely, a similar risk might arise here. I think the possibility is better described as most unlikely. It is not a factor that adds to considering the balance of convenience.

[32] There is a submission about disclosure obligations if LMS sought other employment. The express terms of any obligation are not in evidence. There is no evidence that LMS is seeking other employment. This matter does not add to consideration of the balance of convenience.

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<sup>3</sup> *JKL v OPG* [2017] NZERA Wellington 102.

[33] If an interim order was made, UZD itself and through the investigator would be restrained from continuing any aspect of its investigation pending final resolution of the claims. A final determination might permanently prevent any further investigation. I am referred to *Kumar v Elizabeth Memorial Home Ltd*, *Russell v Wanganui City College* and *Ports of Auckland Ltd v Findlay*.<sup>4</sup> The point made for UZD is that there is a high hurdle to overcome before an employer's entitlement to investigate concerns can be displaced, especially regarding health and safety issues. In *Findlay*, the Court noted that the parties were on common ground that such orders are rare. The Court considered that was even more so when permanent orders would restrain the employer from taking any steps at all.

[34] I accept that circumstances in *Findlay* had changed materially, so that the significant factor which had influenced the Employment Relations Authority<sup>5</sup> when making the interim order, had been abandoned by the employer when the challenge was dealt with by the Court. That does not detract from the relevance in this case of the Court's observations in *Findlay*, as quoted by counsel.

[35] If an interim order was made here, UZD would be prevented from taking steps to investigate the anonymous complaint and determine what, if any, remedial steps should be taken in response to the circumstances from which the anonymous complaint emerged. Assuming counsel and parties can proceed without any delay, the time before the substantive case could be investigated and determined by the Authority is material, so that the complaint might be a year or more old, before it could be further investigated. Any resulting harm directly to UZD or to others it employs is unlikely to be capable of remedy.

[36] Overall, the balance of convenience does not support LMS's claim for interim orders.

### **Overall Justice**

[37] Standing back, an anonymous complaint has brought to UZD's attention issues that it is entitled and probably required to take reasonable steps to investigate.

[38] Those parties involved and who are in an employment relationship must be active and constructive in establishing and maintaining productive employment relationships, including

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<sup>4</sup> *Kumar v Elizabeth Memorial Home Ltd* [1998] 2 ERNZ 61, *Russell v Wanganui City College* [1998] 3 ERNZ 1076 and *Ports of Auckland Ltd v Findlay* [2017] NZEmpC 45.

<sup>5</sup> *Findlay v Ports of Auckland Ltd* [2017] NZERA 80.

by being responsive and communicative. An order from the Authority restraining the proposed investigation would be inconsistent with the maintenance of productive employment relationships.

[39] I am referred to *Humphrey v Canterbury DHB*.<sup>6</sup> That case involved an application for interim reinstatement. The dismissal followed an allegedly irreconcilable breakdown in relationships with colleagues. The Court at [5] referred to the significance of the good faith obligation to consideration of applications for reinstatement present, particularly following alleged irreconcilable breakdown. The submission here is that line managers have badly failed LMS. I take it that counsel is drawing a parallel with the alleged failure by the Canterbury DHB to act at an early stage on concerns. There, the case is that the circumstances that resulted in the dismissal might have been avoided or ameliorated. Here, the investigation to establish circumstances, in the face of allegations at least some of which were apparently known to the line managers, has barely started. Nothing has yet been established to require UZD to consider whether a restorative approach involving LMS is a step that it as a fair and reasonable employer could take.

[40] The overall justice of the case as presently apparent counts against interim orders.

### **Summary**

[41] The claim for interim injunction will be dismissed.

[42] I will reserve costs, to be dealt with following determination of the substantive claims.

[43] An Authority Officer will be in touch with counsel to make further arrangements.

Philip Cheyne  
Member of the Employment Relations Authority

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<sup>6</sup> *Humphrey v Canterbury DHB* [2021] NZEmpC 59.