

**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 93  
3132154

BETWEEN                      RXP  
   Applicant  
  
AND                                LHI  
   Respondent

Member of Authority:      Vicki Campbell  
  
Representatives:            Kam Bailey, advocate for Applicant  
   Peter Chemis and Hana Khan, counsel for Respondent  
  
Investigation Meeting:     On the papers  
  
Submissions Received:     1 March 2021 from Applicant  
   3 March 2021 from Respondent  
  
Determination:                9 March 2021

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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- A.      An interim non-publication order is made regarding the names of the parties and any information leading to the applicant's identification.**
  
- B.      RXP's application for interim reinstatement is declined.**
  
- C.      Costs are reserved.**

## **Non-publication order**

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

- a) In the event interim and/or permanent reinstatement is granted it may cause a stigma or debate among other LHI employees; or
- b) In the event interim and/or permanent reinstatement is not granted the determination may create prejudice to his reputation or interfere with any potential future employment prospects.

[2] The respondent does not oppose or support the application. The respondent submitted that publicity associated with legal proceedings that may cause embarrassment or unwelcome attention does not meet the high threshold required. Further, the usual consequences of legal proceedings of this nature include some stigma in the workplace and potential harm to reputation.

[3] The issuing of a non-publication order is discretionary and arises under Clause 10(1) of Schedule 2 of 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*.<sup>1</sup>

[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.<sup>2</sup>

[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.<sup>3</sup> There is an increasing

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

<sup>2</sup> *Erceg v Erceg* [2016] NZSC 135 at [65] and [69].

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

awareness about the impact of publication on future employment prospects of individuals named in litigation and access to justice.<sup>4</sup>

[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.

[9] Throughout this determination the applicant shall be referred to as RXP and the respondent shall be referred to as LHI. 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] RXP was employed by LHI, a Crown research agency, in a senior research position. RXP's position was disestablished following a restructuring process and his employment ended on 28 February 2021 by reason of redundancy.

[11] RXP challenges his dismissal which he says was unjustified. RXP says the restructuring was not for genuine commercial reasons, was carried out in a procedurally unfair manner and was a sham.

[12] LHI denies RXP was unjustifiably dismissed. It maintains he was dismissed for genuine commercial reasons following a full and robust consultation process.

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

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

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

[15] 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.

[16] The Authority has received affidavits from RXP and LHI's General Manager for Research and Development Solutions (Manager R & D) and Group Manager (GM).

### **Interim application**

[17] 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:<sup>5</sup>

- a) RXP must establish there is a serious question to be tried, that LHI has unjustifiably dismissed him and that I should order LHI 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;
- c) Finally, the overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

[18] The merits of this case, insofar 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.

[19] 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.

[20] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the evidence and submissions received I have carefully considered everything.

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<sup>5</sup> 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.

## **Background**

[21] LHI is made up of a number of business units including a Research and Development Solutions business unit (R & D business unit). The Manager R & D deposed that experts within the R & D business unit collaborate with companies and industries to provide research and development services that enhance product and service development and assist in accelerating commercial outcomes.

[22] RXP was employed within the Advanced Manufacturing group led by the GM. The Advanced Manufacturing group is made up of a number of teams including the Robotics and Automation team. This team develops customised industrial robotics and automation systems for manufacturing and production processes.

[23] On 12 November 2020 the GM met with RXP. The GM is RXP's manager. During the meeting the GM outlined a proposal to disestablish the Senior Research Engineer role held by RXP. RXP was provided with a document setting out the proposal together with the rationale for the proposed change. The Senior Research Engineer role was identified because in carrying out his role RXP focussed on SIF capability projects whereas all others in the team focussed on delivery of R & D projects to New Zealand companies.

[24] RXP was invited to consider the content of the document and provide both positive and constructive feedback. LHI indicated it wished to make a final decision by 24 November 2020. RXP was offered support through the companies Employee Assistance Program.

[25] During the process of consultation RXP raised a number of concerns about the appropriateness of his manager (the GM) being the decision-maker. To alleviate RXP's concerns the GM was removed as decision-maker and was replaced by the Manager R & D.

[26] RXP, through his representative communicated extensively with LHI during the consultation process including a face to face meeting on 14 January 2021.

[27] The Manager R & D deposed that during the 14 January 2021 meeting he listened carefully to RXP's feedback and was prepared not to proceed with the

restructuring. After the meeting he reviewed all of the documentation including the correspondence received from RXP during the consultation process, and determined to proceed with the restructuring on the basis that the rationale made sense and the Senior Research Engineer's role was the obvious position to be disestablished.

[28] The decision to disestablish RXP's role was set out in a letter dated 27 January 2021. RXP was given notice of the termination of his employment with effect from 28 February 2021. RXP was advised that during his notice period opportunities for redeployment would be considered.

[29] In line with the promise of possible redeployment RXP applied for an advertised role of Senior Data Scientist. After RXP expressed an interest in this position the external recruitment process was put on hold and an internal process was initiated to determine whether this would be a suitable redeployment option for RXP.

[30] A panel of three employees from the relevant business unit and the People and Capability Talent and Sourcing team was established for the purpose of interviewing RXP. None of the panel members worked with RXP. The Manager R & D deposed that the questions asked of RXP during the interview were the same as those asked of eight others who had already been interviewed by one of the panel members. Ultimately the panel determined RXP did not have sufficient experience or technical skills for the role. The panel estimated it would take a concentrated effort of up to a year for RXP to develop the specific technical expertise in circumstances where the skills were needed urgently.

[31] The Manager R & D received the report from the interview panel and agreed with its conclusions that RXP did not have the experience, skills and competency levels to meet the minimum requirements for the position. This was set out in a letter to RXP dated 4 February 2021.

### **Serious question to be tried**

[32] The threshold for a serious question is that the claim is not frivolous or vexatious.<sup>6</sup> 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.

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<sup>6</sup> Above n 5.

[33] 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 RXP was unjustifiably dismissed?

and

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

***Arguable case for unjustified dismissal***

[34] An arguable case means a case with some serious or arguable, but not necessarily certain, prospects of success.<sup>7</sup> 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 LHI'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.

[35] 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 RXP being treated unfairly.

[36] 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.<sup>8</sup>

[37] 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.<sup>9</sup> This includes consideration of the genuineness of the employer's decision based on business requirements.

[38] RXP submits the decision to terminate his employment by reason of redundancy was flawed because LHI:

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

<sup>8</sup> *A Ltd v H* [2016] NZCA 419 at [46].

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

- a) Failed to provide RXP with access to information relevant to the continuation of his employment in respect of feedback received from RXP's Team Leader;
- b) Failed to be active and constructive in maintaining an employment relationship when it declined invitations to attend mediation to resolve issues during the consultation process;
- c) Did not involve the entire team in the restructuring process making the selection pool too narrow;
- d) Had an ulterior motive to remove RXP because he had raised concerns about being excluded from projects, was unhappy that a promised salary review had not been acted upon, and promises of career development within LHI had not been met;
- e) Relied on a letter dated March 2020 to support its decision to disestablish RXP's role and that letter had no relevance to the removal of any roles;
- f) Failed to explore redeployment.

[39] LHI submitted:

- a) The evidence before the Authority supports strongly that the restructuring was straightforward based upon its direction and focus;
- b) The Manager R & D came to the matter afresh, reviewed all that had occurred and made the ultimate decision;
- c) The decision was based upon genuine commercial needs:
  - i. RXP's role was focussed primarily on researching and developing technical capabilities as opposed to delivering commercial outcomes;
  - ii. Similar restructuring processes are taking place in LHI's other business units;
  - iii. The consultation process occurred over a two month period and consisted of a significant exchange of views and information, face to

face meetings and a change in decision maker in response to concerns raised by RXP.

***Is there an arguable case for permanent reinstatement?***

[40] 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.

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

[42] RXP deposed that interim reinstatement is important because he was involved as the only robotics and artificial intelligence (AI) consultant for a new project. He deposed that the project relies on his skills to establish a robotics and AI roadmap to service the development and delivery of new technologies for greenhouse businesses and associations (FTEK project).

[43] LHI has accepted there is an arguable case for reinstatement but suggests it is not a strongly arguable case.

[44] The GM deposed that he and RXP's team leader will have difficulty re-engaging with RXP as a result of the treatment they have received from RXP during the consultation process. This includes personal allegations made about both the GM and RXP's team leader and the aggressive manner used by RXP during meetings.

[45] The Manager R & D deposed that if RXP is reinstated LHI will have to find things for him to do. He deposed that there is limited work for him in relation to the FTEK project and that what there is can be easily picked up by others.

***Conclusion***

[46] My assessment at this early stage is that RXP has an arguable case that he was unjustifiably dismissed and that he may be reinstated on a permanent basis but it is not strongly arguable. The procedural issues over the provision of information and the question about ulterior motives warrant further consideration.

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<sup>10</sup> *Hong v Auckland Transport* [2019] NZEmpC 54.

[47] Under the Act reinstatement must be to the former position or the placement of the employee in a position no less advantageous.<sup>11</sup> I cannot be satisfied that the former position still exists. If RXP is reinstated it is apparent from the untested evidence that a job would have to be created and this will impact on the work of others in the team.

### **Balance of convenience**

[48] The balance of convenience weighs the potential effect on RXP if he were declined interim reinstatement against the potential effect on LHI if interim reinstatement were granted. In addition, under this head there is also a consideration of the merits of the application. In terms of this last point, I have concluded earlier that RXP's claims in respect of his unjustified dismissal grievance, and in respect of permanent reinstatement, are arguable, albeit, not strongly arguable.

[49] RXP submitted that the balance of convenience weighs in his favour and submitted:

- a) Damages would not be an adequate remedy;
- b) RXP is capable of undertaking work currently engaged in by others in his team;
- c) RXP could establish harmonious relationships with colleagues and that it is natural for there to be some level of deterioration in relationships but the relationships are capable of being repaired; and
- d) RXP is the sole income earner for his family and he will find it difficult to obtain alternative work given the specialist nature of the work.

[50] In its submissions LHI asserts:

- a) The relationship between RXP and his managers became dysfunctional during the consultation process. This is a factor that goes to whether reinstatement is practicable.<sup>12</sup> The untested evidence of witnesses for LHI set out serious allegations against RXP's managers questioning their

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<sup>11</sup> Employment Relations Act 2000, s 123(1)(a).

<sup>12</sup> *Hong v Auckland Transport* [2019], above n 10, at [288].

motives and integrity. In the circumstances of RXP's relationship with his managers it would not be reasonable or practicable to reinstate RXP.

- b) RXP will not suffer financial hardship. Under the terms of his employment agreement RXP will receive financial benefits in excess of \$85,000 gross. The bulk of this is redundancy compensation to recognise the loss of RXP's job.
- c) Damages are an adequate remedy for RXP but not for LHI. There is no ability for RXP to compensate LHI or RXP's managers for any negative impact on them arising from his reinstatement.
- d) RXP is highly qualified and has extensive skills and experience. These factors will not be diminished if interim reinstatement is not granted. LHI is willing to provide a detailed certificate of service and notes that its employees are able to provide references and act as referees should that need arise.

[51] 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 LHI. I am satisfied if RXP is denied interim relief, and he is subsequently successful in his unjustified dismissal claim warranting permanent reinstatement, damages will be an adequate remedy.

### **Overall Justice**

[52] While RXP 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.

[53] A hearing of the substantive claims will be possible in August or September 2021, five months hence. That is not a significant delay.

[54] Standing back from the matter and considering the overall justice of the case, I am satisfied that interim reinstatement ought not be ordered.

### **Next steps**

[55] An Authority Officer will contact the parties' representatives to set up a telephone conference, where arrangements will be made to progress RXP's application to a substantive investigation meeting. This will include a discussion about the prospect of further mediation.

**Costs**

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

Vicki Campbell  
Member of the Employment Relations Authority