

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 348  
3143202

BETWEEN UMC  
Applicant

A N D AIR NEW ZEALAND LIMITED  
Respondent

Member of Authority: Peter van Keulen

Representatives: Adam Mapu, advocate for the applicant  
David France, counsel for the Respondent

Investigation Meeting: 30 July 2021

Submissions Received: 30 July 2021 from the Applicant  
30 July 2021 from the Respondent

Date of Determination: 6 August 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] UMC was employed as a Cargo Warehouse Agent by Air New Zealand Limited. UMC held a part time role working 30 hours per week at Christchurch Airport.

[2] UMC says he was unjustifiably dismissed by Air New Zealand when his employment came to an end on 2 July 2020, following a restructuring process in which he was not offered a full time position when his part time role was disestablished.

[3] On 15 December 2020, UMC lodged a statement of problem in the Authority claiming unjustified dismissal and seeking, amongst other things, reinstatement.

[4] On 2 March 2021, UMC lodged a second statement of problem in the Authority. UMC claimed he should have been appointed to a part time vacancy advertised by Air New Zealand in December 2020 and the failure to do so was a breach of a re-employment preference provision in the applicable collective agreement, which formed part of his individual employment agreement. He also alleged this failing was a breach of the Employment Relations Act 2000 (the Act) and constituted an unjustifiable disadvantage grievance.

[5] Then in June 2021 UMC became aware that Air New Zealand had sought expressions of interest for full time cargo agents in Christchurch. UMC enquired about these vacancies, asking why he had not been contacted and advised of the roles. Air New Zealand's response was that the roles were not being made available externally and the expressions of interest were for internal applicants i.e. current Air New Zealand employees.

[6] UMC was not satisfied with Air New Zealand's explanation and because the internal advertising evidenced that Air New Zealand had roles for full time Cargo Warehouse Agents he lodged an application in the Authority for interim reinstatement, on 2 July 2021.

[7] Between lodging his application for interim reinstatement and the investigation meeting held on 30 July 2021, UMC received an offer of employment from Air New Zealand for a part time Cargo Warehouse Agent role in Christchurch. Whilst UMC had not accepted the offer of employment as at 30 July 2021 his advocate advised that UMC would accept the role offered but, notwithstanding that, he wished to continue with his application for interim reinstatement to a full time Cargo Warehouse Agent role.

[8] Air New Zealand has lodged statements in reply to each statement of problem lodged by UMC, asserting that it did not act unjustifiably in dismissing UMC as a result of the restructure, and that the re-employment preference provision UMC seeks to rely on is either, not a term of his individual employment agreement or if it is it does not apply to the Cargo Warehouse Agent roles that became available in December 2020 and June 2021. In particular, Air New Zealand opposes UMC's application for interim reinstatement.

[9] It is UMC's application for interim reinstatement that I have investigated and this determination resolves.

[10] As permitted by s174E of the Act, my determination has not recorded all of the evidence and submissions given but has stated relevant findings of fact and law that I am required to make at this interim stage so that I can express a conclusion on whether the interim order sought should be granted or declined.

### **Non-publication**

[11] In a memorandum dated 29 July 2021, UMC requested a non-publication order in relation to his name and identity to protect him from any reputational damage arising out of this claim.

[12] In *JGD v MBC Limited* Chief Judge Inglis summarised the competing issues when applications for non-publication are considered. Chief Judge Inglis stated:<sup>1</sup>

[4] The Court has a broad power under sch 3 cl 12 of the Act to 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," subject to such conditions as the Court thinks fit. The Authority has a similarly broad discretion to make non-publication orders. While the discretion is broad it must be exercised consistently with applicable principles.

[5] The principle of open justice is of fundamental importance. It forms the starting point for determining whether the circumstances of a particular case justify an order for non-publication.<sup>2</sup> A party applying for such an order must establish that sound reasons exist for the making of an order for non-publication, displacing the presumption in favour of open justice.<sup>3</sup>

[13] So, my discretion to make the non-publication order sought is broad but I must exercise it in line with the applicable principles. The key principle is that of open justice i.e. parties being named and identified in litigation. But that principle can be displaced by sound reasons.

[14] In this case I am not satisfied that there are sound reasons for displacing the presumption of open justice. This is a claim based on a no fault termination. There are no

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<sup>1</sup> *JBC v MBC Limited* [2020] NZEmpC 193.

<sup>2</sup> *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310; *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511.

<sup>3</sup> *Erceg*, above n 2, at [13].

disputed allegations of poor performance or misconduct by UMC that would reflect badly on him, particularly at the untested interim stage, and there are not even any alleged circumstances that might give rise to inferences of poor performance or misconduct.

[15] UMC's position is there is unspecified reputational damage that will arise for him. In a no fault termination claim that reputational damage can only be his fear that simply bringing a claim may cause some damage to his reputation. In my view this is insufficient to displace the presumption of open justice, even at an interim stage. The simple point is this potential reputational damage could apply to all litigants and despite this the principle of open justice has always been held to be paramount.

[16] I decline to order non-publication as requested by UMC. However, given that UMC has a right to challenge this decision I must necessarily order interim non-publication of his name and identity; not doing so would render any challenge moot.

[17] So pursuant to Clause 10 of schedule 2 of the Act, I grant an interim non-publication order prohibiting the publication of UMC's name and identity. The terms of the interim order are:

- (a) This interim order is to stay in place for 28 days commencing from the day after the date of this determination, to allow UMC to file a challenge to this aspect of my determination if he wishes.
- (b) If UMC files a challenge, this interim non-publication order will be extended to remain in place until the Employment Court makes any order that renders it unnecessary.
- (c) If UMC does not file a challenge to the non-publication order in this determination then the interim order will lapse.

### **The law relating to interim injunction applications**

[18] The law relating to interim applications is set out in *Western Bay of Plenty District Council v Jarron McInnes*.<sup>4</sup> The issues to be determined at this interim stage are:

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<sup>4</sup> *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36.

- (a) Is there a serious question to be tried, that Air New Zealand has unjustifiably dismissed UMC and that I should order Air New Zealand to reinstate him?
- (b) Where does the balance of convenience lie pending a substantive investigation and a final determination of UMC's claim?
- (c) Where does the overall justice of this case lie from now until the completion of the substantive investigation and issuing of a final determination?

**A serious question to be tried**

[19] The threshold for a serious question is that the claim is not frivolous or vexatious. In analysing this I am not exercising a discretion rather I must make a judicial assessment of the evidence and the submissions advanced.<sup>5</sup>

[20] The serious question to be tried issue covers two aspects, that there is a serious question to be tried that:

- (a) UMC was unjustifiably dismissed; and
- (b) As a consequence of any unjustified dismissal I should reinstate UMC.

*Unjustified dismissal*

[21] Before I turn to consider UMC's unjustified dismissal claim I note that UMC's various claims also include claims for breach of contract, breach of the Act and unjustifiable action causing disadvantage based on an alleged contractual entitlement to preference for re-employment. I am not required to analyse the merits of these claims at this interim stage as they do not form part of the interim reinstatement claim. The circumstances of other Cargo Warehouse Agent roles being advertised, at least internally in Air New Zealand, are relevant insofar as that led UMC to conclude that Air New Zealand has a full time role he could fill on a reinstatement basis and this informed his decision to lodge his claim for interim reinstatement. To be clear, UMC does not seek compliance in respect of the alleged contractual rights in his interim application.

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<sup>5</sup> *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

[22] So, turning to UMC's unjustified dismissal claim, it arises out of the restructure of Air New Zealand's cargo operations in Auckland, Wellington and Christchurch, for which Air New Zealand commenced consultation over a proposal for restructuring in April 2020.

[23] The restructure proposal for Christchurch Airport included a reduction in the number of Cargo Warehouse Agents from 13.75 full time equivalent employees, made up of 13 full time employees and UMC's 30 hour per week role, to nine full time equivalent roles, made up of seven full time roles and four part time roles of 20 hours per week.

[24] To effect this new structure Air New Zealand's proposal was that UMC's part time role would be disestablished, the 13 full time Cargo Warehouse Agent roles would be reduced to seven roles and four part time Cargo Warehouse Agent roles of 20 hours per week would be created. Of the 13 full time employees, seven would retain their full time roles and the remaining six – or less if some took voluntary exit - would be considered along with UMC for the four part time roles on the basis of the selection criteria set out.

[25] In the course of consulting with UMC over the proposed restructure and the outcome Air New Zealand explained the role reduction and selection of employees for remaining part time roles. There are two pieces of correspondence that are indicative of the communications. First in an email of 29 April 2020 a Senior Manager for Cargo Operations with Air New Zealand stated:

... Part of the proposal involves a reduction in the number of Warehouse Agent roles due to the significant reduction in work, a result of COVID-19. As discussed in the presentation, our proposal is for full time and part time Warehouse Agents in each Cargo Terminal to be assessed together using the proposed selection criteria. Regardless of full time or part time status, all Warehouse Agents perform the same role and we feel that the fairest way to carry out the role reduction exercise (if the proposal is adopted) is to include all Warehouse Agents in each Cargo terminal in the same pool. ....

[26] Then second, in an email of 6 May 2020 that same Senior Manager for Cargo Operations stated:

Where the number of full time roles are being reduced, some full time employees may be offered part time roles (depending on their ranking order). Part time roles will be allocated to both part time and full time employees equally based on the criteria with those having the highest skill levels on the matrix having the first opportunities and then if all things are equal tenure will be the next criteria.

[27] The reference to part time and full time Cargo Warehouse Agents performing the same role and therefore including all agents in the same pool for the role reduction exercise led UMC to believe that he would be treated the same as full time Cargo Warehouse Agents in Christchurch and would therefore be eligible for selection for one of the full time roles, it being clear that if the proposal was adopted his part time role would be disestablished.

[28] So when Air New Zealand proceeded to implement the proposed restructure by reducing the 13 full time Cargo Warehouse Agent roles in Christchurch to seven by reconfirming seven full time employees in their roles UMC questioned this. UMC said it was unfair to offer full time roles to employees that he ranked above when applying the selection criteria; UMC's position being that he should have been offered one of the full time roles.

[29] Air New Zealand responded to UMC telling him that full time Cargo Warehouse Agent employees had been reconfirmed to their roles ahead of other full time employees i.e. they were not selected ahead of him as he was not part of the selection for full time roles because it was a role reduction process.

[30] In line with its stated position on the role reduction process and selection for part time Cargo Warehouse Agent roles, Air New Zealand completed the restructuring by offering one of the four part time roles to UMC and the three other roles to full time Cargo Warehouse Agent employees who had not retained full time roles.

[31] After some discussion about the terms and conditions of the part time Cargo Warehouse Agent role, including issues around rosters and shift patterns, UMC decided not to accept the part time role offered and he took a voluntary exit on the basis of redundancy.

[32] Based on these events, UMC says he had reasonably reached a conclusion about how the restructure would be implemented in terms of eligibility and selection for the seven full time Cargo Warehouse Agent roles and that he had told Air New Zealand of his understanding. UMC says that Air New Zealand then knowingly went ahead and implemented a selection policy that was changed from what was "proposed and contractually agreed to" and it did this without advising UMC thereby failing to provide UMC with an opportunity to comment.

[33] In summary UMC says he was unjustifiably dismissed because Air New Zealand effected the restructure, which led to him losing his employment, in a way that was not as it said it would or as was agreed. For this to be correct I must be satisfied of one of the following:

(a) That Air New Zealand's position on implementation of the restructure, including selection for roles was in fact as asserted by UMC, despite Air New Zealand's current evidence, and Air New Zealand did not follow it.

(b) That Air New Zealand's position on implementation of the restructure including selection for roles was as it states in its evidence but it subsequently agreed to implement it, including applying any selection for roles, in the way asserted by UMC, and then despite that it did not then follow the agreed implementation.

[34] The point that I am making here is that just because UMC believed the restructure was to be implemented in a particular way does not make Air New Zealand's actions, which were contrary to that belief, unjustifiable. I need to find that Air New Zealand was obligated to implement the restructure in the way UMC asserts for its contrary action to be unjustifiable – either because its position on implementation was in fact as UMC asserts or it changed its position on implementation to the position UMC asserts. And given the affidavit evidence, including the documentation relating to the restructure, my interim assessment is that such a finding is unlikely. I cannot rule it out completely so I accept that it is at least arguable that UMC was unjustifiably dismissal but it is not a strong case but rather a weak case.

[35] So there is a serious question to be tried in respect of UMC's unjustified dismissal claim in that it is weakly arguable and not frivolous or vexatious.

#### *Reinstatement*

[36] Pursuant to s 125 of the Act, if an applicant seeks reinstatement and it is determined that they have a personal grievance then the Authority must order reinstatement if it is reasonable and practicable to do so.

[37] So, in order to establish that there is serious question to be tried in respect of the claim for reinstatement, I need to be satisfied that there is an arguable case, one that is not frivolous

or vexatious, that permanent reinstatement of UMC to a full time role Cargo Warehouse Agent role is both reasonable and practicable.

[38] The test for practicable and reasonable has been discussed and analysed by the Court of Appeal and the Employment Court.<sup>6</sup>

[39] Practicable means assessing whether reinstatement can be achieved successfully, noting that this it is not as simple as assessing if it can happen. Reasonable is an assessment of what is fair and right in terms of the parties' cases and an assessment of the effects of an order on the parties and others, i.e. whether it should be ordered.

[40] Counsel for Air New Zealand submits that the relevant considerations for my assessment of reinstatement include that UMC was never employed in a full time Cargo Warehouse Agent role, Air New Zealand does not have any available full time Cargo Warehouse Agent roles and reinstatement of UMC to a full time role could mean a current full time employee is displaced. In these circumstances counsel submits that reinstatement is not practicable or reasonable, i.e. it cannot be achieved easily and it is not fair or right to reinstate UMC to a full time role.

[41] Notwithstanding these submissions, which I accept are credible, I accept that UMC's case for reinstatement to a full time Cargo Warehouse Agent role is arguable. Reinstatement is practicable given the circumstances though I accept this may not be achieved easily and therefore this is not an overly strong case; and it is reasonable, but given the circumstances it is a weak case on whether I should order reinstatement, particularly to a full time role.

[42] Overall I assess there is a serious question to be tried in regard to UMC's case for reinstatement, but as with the unjustified dismissal claim it is a weak case.

### **The balance of convenience**

[43] The balance of convenience is about assessing the impact on each party if the interim order is granted or not. Then I must assess what happens if the interim position is reversed in any substantive determination. Relevant to this assessment is the question of whether the

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<sup>6</sup> *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School (NZEI)* [1994] 2 ERNZ 414 (CA); *Lewis v Howick College Board of Trustees* [2010] NZCA 320; and *Angus v Ports of Auckland Limited* [2011] NZEmpC 125.

impact on a party of the interim order being reversed is harm that can be adequately compensated by damages.

[44] There is a particular aspect of UMC's case that I must add into the assessment of the balance of convenience. That is that he has been offered and will accept a part time Cargo Warehouse Agent role in Christchurch.

[45] So the balance of convenience is about assessing the difference between UMC's current permanent part time Cargo Warehouse Agent role, of 20 hours per week and an interim full time role of 40 hours per week. What are the consequences for the parties if the interim order is granted or not in these circumstances i.e. UMC is reinstated to a full time role or stays in a part time role? And what is the impact if the interim position is reversed i.e. UMC is not permanently reinstated to a full time role when he was on an interim basis or UMC is permanently reinstated to a full time role when he was not reinstated to a full time role on an interim basis?

[46] Starting with the consequences for UMC:

- (a) The difference between the permanent part time role and the interim full time role is a difference in wages – clearly UMC will earn more in the full time role. There was, however, no evidence that UMC would suffer any hardship if the interim order was not granted. Whilst it is clear he would earn less money in the part time role there was nothing to show that earning lower wages in the part time role would cause significant hardship.
- (b) The other difference for UMC is the current part time role is permanent but any interim reinstatement to a full time role is temporary with no guarantee of it becoming permanent by reinstatement being ordered in the substantive claim. And there is a risk that if he is reinstated to a full time role, on an interim basis, the part time role will then be filled by another employee.
- (c) If UMC is not granted interim reinstatement to the full time role but is permanently reinstated to a full time role in the determination on the substantive claim then any loss to him is simply lower wages during the interim period and this can be compensated by damages.

[47] So UMC will benefit from increased wages if interim reinstatement is granted but will have uncertainty and a risk that he may end up with no employment after the substantive claim is determined. Conversely he will have lower wages if interim reinstatement is not granted but there is nothing to show this would cause hardship for him and any loss can therefore be compensated by damages. Almost perversely, not granting interim reinstatement would provide a benefit for UMC in that there will be certainty for him having a permanent part time role until the substantive claim is determined and after that he will still have a permanent role – whether full time or part time depending on whether permanent reinstatement is ordered or not.

[48] The consequences for Air New Zealand if interim reinstatement is granted or not comes down to disruption for Air New Zealand if interim reinstatement is granted as Air New Zealand may have to displace a full time employee to accommodate UMC and it may then have to find a permanent part time employee to replace UMC. And there is likely to be some cost involved in this change of positions. In contrast there is stability in the status quo being maintained.

[49] It is likely that if interim reinstatement is granted and then reversed the disruption to Air New Zealand cannot be adequately compensated by damages. In contrast if interim reinstatement is not granted but UMC is subsequently reinstated to a full time role there is no adverse consequences for Air New Zealand other than paying the lost wages to UMC.

[50] Weighing up this assessment I conclude that the balance of convenience weighs heavily in favour of Air New Zealand and not granting the interim reinstatement that UMC seeks.

### **The overall justice**

[51] The overall justice assessment is essentially a check on the position that has been reached after my analysis of the serious question to be tried and the balance of convenience.<sup>7</sup>

[52] I am satisfied that that there is a serious question to be tried that UMC was unjustifiably dismissed and should be reinstated to a permanent full time Cargo Warehouse Agent role. However, my assessment at this interim stage is that both are weak cases. The

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<sup>7</sup> *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

balance of convenience favours not granting UMC interim reinstatement. And these two aspects lead me to conclude that not granting interim reinstatement is the right outcome.

[53] Standing back from this assessment and my conclusion I am not persuaded that the overall justice means I should change that conclusion, in fact the overall justice supports not granting interim reinstatement.

### **Conclusion**

[54] UMC's application to be reinstated on an interim basis to a full time Cargo Warehouse Agent role with Air New Zealand is declined.

### **Costs**

[55] Costs are reserved.

Peter van Keulen  
Member of the Employment Relations Authority