New Zealand Employment Relations Authority Decisions

A v Auckland District Health Board (Auckland) [2018] NZERA 160; [2018] NZERA Auckland 160 (14 May 2018)

Last Updated: 4 July 2018

Attention is drawn to the order prohibiting publication of certain information in this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY

AUCKLAND

[2018] NZERA Auckland 160
3027936

BETWEEN A Applicant

A N D AUCKLAND DISTRICT HEALTH BOARD Respondent

Member of Authority: T G Tetitaha

Representatives: P F Wicks/T L Clark for the Applicant

P Muir/C Blake, for the Respondent

Investigation Meeting: 4 May 2018 at Auckland

Submissions Received: 4 May 2018 from Applicant

4 May 2018 from Respondent

Date of Determination: 14 May 2018

DETERMINATION OF THE AUTHORITY

A. The application for interim reinstatement is dismissed. B. Costs reserved.

Employment relationship problem

[1]

Dr A was dismissed by the Auckland District Health Board (ADHB) following

allegations of sexual harassment of Dr B and inappropriate unethical behaviour as a supervisor. Dr A denies any sexual harassment or that he acted inappropriately towards Dr B. He seeks reinstatement and compensation.

Non publication order

[2]

By consent until further order of the Authority there is a non-publication order

suppressing the applicants name (herein referred to as Dr A) and his occupation (herein referred to as a senior clinician); the name of the complainant (herein referred to as Dr B) and her occupation (herein referred to as a junior doctor); and the names and any identifying details of patients of Dr A and the respondent.

Urgency

[3]

Urgency has been granted for an interim application for reinstatement. The

interim hearing has proceeded upon a large volume of sworn but untested evidence filed by both parties. Any conflicts of evidence cannot be resolved at this stage of the proceeding. That can only occur at substantive hearing to be set down in July 2018 before another Member.

Approach to interim reinstatement

[4]

There are well established legal tests to be met before interim reinstatement

may occur. An applicant must prove:1

(a) There is a serious question to be tried. This raises two sub-issues:

(i) Is a serious question to be tried about the unjustified dismissal?

(ii) Is there a serious question to be tried in relation to the claim for permanent reinstatement?

(b) The balance of convenience favours the applicant until the substantive hearing may occur. This requires the consideration of the impact on both parties of the granting or refusal to grant the reinstatement order.

(c) The overall interests of justice favour reinstatement, standing back from the detail required by the earlier steps.

Relevant Facts

[5]

Dr A is a senior clinician employed by the ADHB. He has substantial

expertise in his field of medicine. In addition to full time employment with the

ADHB, Dr A undertook private work.

[6]

Dr B is a junior doctor looking to specialise in the same field of medicine as

Dr A. She joined Dr A's unit at Auckland Hospital in late June 2017. Dr A was responsible for overseeing Dr B's clinical training.

[7]

Dr A met with Dr B then took leave from 22 June until 17 July 2017. While

overseas Dr A emailed Dr B on 30 June 2017 at 11.38 am about a private work brief regarding a patient C. He asked her to email him a copy of Cs ADHB medical records below:2

... I would be grateful if you could consider having a quick look at the full EMR and tell me how many pages there are in total? I and my deputies (that would include you) have [C's] consent to access the file. It would be helpful if you could copy the full EMR, paste it into a Word document, and send it to me as an attachment. Only consider doing it if you have time, as this is a private matter although, judging by what I have read so far, this could be a matter

with rich learning possibilities. ...

[8]

Upon his return from leave Dr A took Dr B to lunch at a local café in the week

of 17 July 2017. During lunch he spoke to Dr B about establishing rapport. He then opened a smart phone application and asked Dr B a series of questions. He later told her the questions were based upon a New York Times article "36 Questions that lead

to love".

[9]

At various times it is accepted Dr A lent Dr B various medical and non-

medical books one entitled "The Technology of the Female Orgasm" and a DVD

entitled *Hysteria* a film about the history of the invention of the vibrator.

[10]

Dr A then asked Dr B to accompany him to visit a private work patient AS in

Christchurch on 3 August 2017. He was to interview the patient for the purpose of compiling a specialist report. The visit involved an overnight trip from 19 to 20

August 2017. Dr A did not advise the ADHB of Dr B accompanying him on the

overnight trip.

2 Email Dr A to Dr B dated 30 June 2017 p215 Applicants Affidavit Bundle of Documents

(BOD).

[11]

That same day there are series of emails between Dr A and the Director of

Training. Dr A requested Dr B miss a scheduled academic class on 10 August 2017 to attend another work engagement with him. The Director refused to release Dr B.

[12]

On 8 August 2017 Dr A emailed requesting a photo of Dr B to accompany a

letter regarding the visit to AS in Christchurch. Dr B emailed that she was “not terribly photogenic”. Dr A’s response was “of course you are – you’ve got eyes like the skies”. She supplied a photograph later that evening. Dr A replied “Beautiful.

Definitely works for me”.[3]

[13]

Dr B emailed Dr A at 5.54 pm on 10 August stating she had been up until 1am

with a patient. Dr A sent a reply email on 11 August at 12.29 am saying:

I would have sent a lullaby if I had known. If you are still up, it’s 12.28am now try Eva

Cassidy - Time after Time, or if you need serious chilling, Pale Blue Eyes by Lou Reed.

[14]

Dr A books and pays for two airfares to Christchurch for Dr B and himself.

He then confirms by email later on 11 August that he had also booked and paid for accommodation at “The George” a boutique hotel in Christchurch and booked dinner for two at the hotel’s fish/fine dining restaurant Pescatore. He asks her to wear a

black dress for dinner.

[15]

asking:

Dr A later emailed Dr B about the trip to Christchurch on 17 August 2017

We need music for getting out to the airport, which we’ll do in my black car, music for cruising around ChCh (its about 30 mins from the airport to Princess Margs) in a rental car, and music for hotel rooms. There is an MP3 connection in the black car, but I prefer CD. You look like someone with empathy for magic – weave a spell.

Christchurch Incident

[16]

On 19 August Dr A and Dr B travelled to Christchurch. After interviewing

AS they travelled to the hotel around 5.15 pm.

[17]

Upon arrival Dr A was given keys to one room. When they entered the room

it only had one bed. Dr B went into the bathroom and changed into her gym gear then left the room.

[18]

Dr A remained in the room for approximately an hour waiting for Dr B to return. At no stage prior to her return did he seek to change the room.

[19]

When Dr B returned to the room he offered her a glass of champagne. Dr B then told him she was returning home that evening. She took a taxi to the airport around 6.30 pm and caught the 8 pm flight to Auckland.

Complaint and Investigation

[20]

On 5 September 2017 Dr B provided the ADHB with a formal written complaint against Dr A.

[21]

An independent barrister was engaged by the ADHB on 7 September 2017 to undertake a preliminary investigation.

[22]

On 12 September 2017 Karen Vernon from HR, met with Dr A to advise him of the complaint and the appointment of a barrister to investigate the allegations.

[23]

A draft investigation report was provided to Ms Vernon and Drs A and B on 14 November 2017. The final investigation report was completed on 28 November 2017. It recommended commencing disciplinary action against Dr A.

[24]

The report was referred to Dr Allen Fraser. Dr Fraser determined on 6 December 2017 the ADHB would commence disciplinary action. Dr A was advised on 7 December 2017. He subsequently engaged a Union representative and a lawyer.

[25]

On 15 December Dr Fraser and Ms Vernon proposed suspension of Dr A. Dr A's Union representative provided feedback that he should not be suspended. Dr A was suspended later that day.

[26]

On 20 December 2017 Dr A was invited to a disciplinary meeting on 8 February 2018. Allegations of sexual harassment and unacceptable practice as a supervisor were raised.

[27]

On 2 February 2018 Dr A's lawyer sent a lengthy reply letter.

[28]

The parties met on 8 February 2018. A transcript of the interview was provided to Dr A.

[29]

On 8 March 2018 the ADHB issued a preliminary decision terminating Dr A's employment. It found his actions towards Dr B "indicated a pattern and gradual progression of increasingly inappropriate behaviour towards her." It also found his actions on 19 August 2017 constituted sexual harassment, breached the employer's expectations of him as their employee and as Dr B's supervisor and breached his professional Code of Ethics. The behaviour was found to be serious misconduct under the ADHB policies. The preliminary decision was to summarily terminate his employment.

[30]

On 16 March 2018 Dr A's lawyer sent a further lengthy reply.

[31]

On 3 April 2018 Dr A was summarily dismissed.

Is there a serious issue to be tried?

[32]

Dr A alleges there was no justification for the finding of serious misconduct

and there were procedural flaws in the decision making.

[33]

Dr A submits he has a good arguable case because the respondent wrongly

concluded this was sexual harassment under s108 of the Employment Relations Act

2000 (Act). This argument centres on one part of the decision. From the correspondence and the disciplinary meeting, the ADHB were clearly not confining their concerns about his behaviour to sexual harassment as defined by s108 of the Act.

It was equally clear Dr A was or should have been well aware of this.

[34]

Before dismissal Dr A had been supplied with a copy of the ADHB

harassment policy. The harassment policy does not replicate s108 of the Act. It had a much broader definition of sexual harassment:

Sexual harassment is one form of unlawful harassment and it includes any unwanted or unwelcome conduct of a sexual nature that makes a person feel offended, humiliated or intimidated. As with harassment, conduct can amount to sexual harassment even if the person **did not intend** to offend, humiliate or intimidate the other person.

[Emphasis added]

[35]

The evidence of Dr A's conduct especially the Christchurch incident could be

viewed as having a sexual connotation. This is especially if his intentions are irrelevant.

[36]

There was uncontested evidence Dr A's behaviour did cause offence,

humiliation and intimidation for Dr B. Dr B told the investigator she experienced "a

sense of terror and fear because [she] felt unsure how to handle the situation" on 19

August. In the week following the incident she was very scared, wanting someone to stay with her because she was afraid Dr A would be angry and come to her house. She now feels manipulated by his behaviour including the "36 Questions that lead to love". She believes her trust has been violated. She is fearful about the complaint jeopardising her career. She does not want to go back to work with him but he is well connected within her preferred area of specialisation. She is now considering

becoming a GP instead.[4]

[37]

Dr A did in fact accept Dr B "genuinely perceives his conduct as harassment,

although that in no way was his intention."5 The evidence at this interim stage indicates there is a case Dr B was the victim of sexual harassment by Dr A.

[38]

Dr A submits there was an innocent explanation for his conduct. In respect of

the Christchurch incident he submits he made a mistake in booking the room. Although his Counsel stated he intended booking two rooms,6 it's clear in Dr As affidavit at paragraph 22 that he only intended booking one:

After the assessment we went to the Gorge Hotel and checked in. Upon entering the hotel suite around 5:15 pm, it was

immediately apparent that there had been some mistake as there was only one bed in the hotel suite. I am not sure how I made this

mistake, as I had recalled requesting two beds when making the booking.

[39]

The intended booking of one room is consistent with what he told the

investigator7 and his behaviour upon checking in and being presented with the key for one room and not making any immediate changes.

[40]

From the evidence Dr A intending booking a Park Suite at the George Hotel.

The booking forms appended to the investigators report show a Park Suite only has 1 room. There do not appear to be any two bedroom suites at this Hotel.

[41]

The cost of the Park Suite was $727 per night. The cost of this room was far

in excess of what would be reasonable to book for a business trip. It is unlikely he

4. Interview Dr A and Investigator Annexure 15 Investigators Report dated 28 November 2018 pp2354 ff.

5 Letter DD to ADHB dated 2 February 2018 para 4; p35 BOD.

6 Applicants submissions dated 4 May 2018 p7 para 23.

7 Investigation Report dated 28 November at p9 (p 84 BOD).

would book two rooms given the cost. The evidence indicates Dr A intended to share

a room with Dr B.

[42]

While sharing a room may be acceptable with the other persons express

permission, it is apparent he never told Dr B there was a single room booked before the trip. His correspondence suggests there are in fact two separate rooms when he

emails her on 17 August 2017 asking about “music for hotel rooms”.8

[43]

In the absence of express permission, his intention to share a room with a

young female doctor under his supervision was highly inappropriate. Given the recent well publicised campaigns against sexual harassment in the workplace, this behaviour

on a business trip was extraordinary.

[44]

His explanation he intended changing rooms after dinner is not consistent with

his admitted behaviour whilst in the room. His actions described in his earlier statement to the investigator were: 9

[Dr B] then appeared wearing gym clothes and said that she was going to the gym to do a workout. I thought that she had decided that dinner would just have to wait a little, and I accepted this as I really wanted to have a shower and a rest before going downstairs. She left the room. I really felt the need to have a shower without further delay. I unpacked some toiletries and had a quick shower, and then lay down on the bed briefly. I was going to have a short nap but then I decided not to wait for [Dr B], got up, proceeded to have a glass of champagne, and then opened a can of Red Bull (a caffeinated energy drink) from the minibar with the plan being to wake myself up to get through dinner. I poured the Red Bull into a glass on the table, but then changed my mind as I didn’t want to be up too late. I didn’t drink any. I then sank down into a chair in the lounge for a rest. Looking back, I consider it quite

likely that I had a nap in the chair.

[45]

The above behaviour is not consistent with someone whom intends changing

rooms. He unpacks. He uses the shower, a glass for champagne and takes a drink from the mini bar. He also lay down on the bed. These actions indicate he intends remaining in the room, not seeking another room with two beds or two rooms. This is also the scene that confronts Dr B when she returns to the room. He then offers her a

glass of champagne.

[46]

A copy of the New York Times article “36 questions that lead to love” was

appended to the investigation report. It referred to a study by psychologist Arthur

8 See above para [13].

9 Applicants response to Complaint 9/10/17 p303 BOD.

Aron “that explores whether intimacy between two strangers can be accelerated by having them ask each other a specific series of personal questions.” The questions range from the innocuous “given the choice of anyone in the world, whom would you want as a dinner guest?” to the intimate “what roles do love and affection play in your

life?”

[47]

The inappropriateness of these questions being asked by a supervising senior

clinician of a junior female doctor should be self-evident. There is little evidence of any relevance of this type of questioning to Dr B’s clinical practice.

[48]

Dr A accepted comments about Dr B’s physical appearance were “non-

professional communication” but alleges they were meant to be “supportive and positive” not sexual. His stated intention is not obvious from his communications

with Dr B at that time.

[49]

Dr A accepts he requested Dr B access ADHB records for a private client but

was not aware of privacy concerns or ADHB policies. Given Dr A deals with highly sensitive files in his employment, pleading ignorance of the procedures for requesting this information would be surprising and concerning for his employer. There would be an expectation senior clinicians would be aware of the requirements for accessing ADHB patient information for their private work. Co-opting an ADHB employee

under his supervision to provide that information was highly inappropriate.

[50]

Dr A accepts he requested Dr B miss an ethics course, but this was done in

ignorance of her training requirements. His purported lack of knowledge of his role as a supervisor would not have reassured his employer there was no need for concern

about this conduct.

[51]

There are a number of procedural flaws alleged. All focus upon the credibility

of Dr B alleging sexual harassment by Dr A. There are also issues around who was the decision maker and the standard of proof applied.

[52]

The Court of Appeal have stated in a case involving dismissal for sexual

harassment that the “requirement is for an assessment of substantive fairness and

reasonableness rather than “minute and pedantic scrutiny” to identify any failings.”10

As noted by the Court what is fair and reasonable must be assessed “in all the

circumstances” and the requirement in the Act is “to consider whether the employer's

actions were what a fair and reasonable employer “could”, not “would”, have done.”[11]

[53]

Dr A had engaged experienced specialist employment counsel. None of the

above concerns about the process were raised prior to dismissal. He did not request the employer re-interview Dr B to assess the credibility of her sexual harassment complaint. At no stage does he raise doubt about her credibility. The employer was therefore entitled to structure its process around the plausibility of Dr As innocent explanation in these circumstances.

Reinstatement

[54]

There are also a number of obstacles to permanent reinstatement. If the

Authority was to reinstate Dr A, the ADHB alleges it would be forced to place either

Dr A or Dr B upon special paid leave. This is because Dr B remains employed at the hospital and the ADHB would be unable to rearrange their rosters to prevent contact.

[55]

Dr A is also an unsupervised “on call” doctor. The only solution to avoid

contact would be to require Dr B to advise other employees she is to have restricted contact with Dr A. This is unsatisfactory and embarrassing for Dr B. There is also a real risk of further harm occurring for Dr B if Dr A is reinstated and she is required to moderate her working life to accommodate his return. The only alternative would be

to place Dr B on special paid leave.

[56]

The ADHB have also raised issues of concern about Dr As professional

judgment if reinstated. He would work with vulnerable female patients at the hospital. It cannot supervise Dr A because he is an on call doctor. At best they accept they could reinstate Dr A to the payroll but not to the workplace. It has also raised an issue that Dr As contributory behaviour may remove reinstatement as a remedy in

these circumstances.

[57]

I have considered whether there were conditions for reinstatement to

accommodate a return. On the evidence and submissions before me, reinstatement to the payroll is the only viable option. This does not assist any permanent reinstatement application because it can only be an interim measure at best.

[58]

Overall the evidence does not suggest there is a “good arguable case”. While

Dr As case may not be vexatious or frivolous, given the above evidence it is not strongly arguable.

Balance of convenience

[59]

The primary consideration is the potential effect on the applicant if interim

relief is granted, as opposed to the potential effect on the respondent and others if it is not.

[60]

Dr A alleges the delay between interim reinstatement and the substantive

hearing shall cause financial and reputation damage.

[61]

Parties who allege financial hardship must provide clear evidence of this. I

have little information about Dr As finances. The only financial impact is alleged to be meeting childrens’ expenses of

independent schooling and employing a nanny. There is reference to spending “hundreds of thousands of dollars” upon overseas medical treatment for his children placing him in a weaker financial position. He also refers to having to engage people to support him in various household tasks and the high costs of running his household. However he provides no detail of any of his

household income or spending.

[62]

The respondent submits that as this matter surfaced in 2017, there has been

sufficient time to rearrange his finances to lessen any direct impact upon his family. It refers to the joint income from his wife’s part time work of over $100,000. He also has a private practice of specialist report writing that I am aware can earn as much as

$8,000 per report. He has referred to at least two reports he was undertaking in 2017. There is also an undertaking as to damages he has signed – if it is assumed he can meet that undertaking, then he must have sufficient income to support himself and his

family until the final determination is issued.

[63]

Dr A has attested in his affidavit that no employees, other than the decision

maker are aware of the allegations. As indicated to the parties, Dr A’s alleged reputation damage would be reduced by granting a non-publication order. I have little

evidence to show any actual or prospective damage of this nature. The Court has held

damage to reputation is also capable of being remedied by compensation.[12]

[64]

This must be balanced against the impact for the ADHB and Dr B. The reality

is that if he is returned to the workplace, Dr B may have to be placed upon special leave or made to accommodate his return by modifications to her role and advising

other ADHB employees about their situation.

[65]

The time until substantive hearing is relatively short – 6 weeks at most. The

Member hearing the substantive matter is known to be prompt and capable of issuing her determination well within the 3 month time limitation13 if an oral determination is

not possible.

[66]

The balance of convenience favours the respondent.

Overall justice

[67]

Standing back from the detail and considering all factors, justice favours

declining the application. There is a substantive hearing in a matter of weeks. Dr A appears to have sufficient funds to support his family until hearing. There is no evidence of harm to Dr A in the intervening period that requires immediate reinstatement. There is evidence of potential harm to the respondent and Dr B if

reinstatement was to occur even upon conditions.

[68]

The application for interim reinstatement is dismissed. Costs are reserved.

T G Tetitaha

Member of the Employment Relations Authority

12 *XYZ v AB* [2017] NZEmpC 40 at [56] referring to *George v Auckland Council* [2013] NZEmpC 179, [2013] ERNZ 675 at [131]

where the Court held damage to reputation could be adequately compensated by damages.

13 Section 174C(3) of the Act.
