

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2011] NZERA Wellington 167
5352351

BETWEEN A
 Applicant

AND B
 Respondent

Member of Authority: P R Stapp

Representatives: Mark Kelly, Counsel for the Applicant
 Iris Reuvecamp, Counsel for the Respondent

Investigation Meeting: 27 October 2011 at Wellington

Determination: 2 November 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem centres on the entitlement of the applicant to wages while he is suspended from employment.

[2] I have prohibited the publication of the names of the applicant and respondent and they are referred to as A and B respectively, because there are suppression orders in place that have been made by the District Court. The District Court orders prohibit the publication of the name of the applicant and any details likely to lead to the applicant's identification. By consent the same orders apply in the Authority, to protect both parties from prejudicial comment, discussion and publicity. This may be reviewed and or varied in due course.

Issues

[3] The issues in this matter relate to a number of problems concerning the action of the employer which will ultimately be determined by the Authority in regard to

claims of unjustified disadvantage and remedies for compensation and costs. Those matters are reserved for the future.

[4] The central issue for the Authority at this point in time is to determine the entitlement of A to be paid, including the pay that he has not received prior to this determination.

The facts

[5] The parties have reached agreement on a statement of facts which would ordinarily be reproduced in the determination. However, because there are prohibitions on publication orders and suppression orders in place, I have summarised the agreed statement of fact as follows:

[6] The applicant is employed by B in a professional role. His employment commenced on 2 January 2002 and his current salary is \$93,277 per annum.

[7] A colleague of A made a complaint on 12 May 2011 about A. This complaint was made to a professional board. There are a number of allegations regarding A's practice in his employment. A has denied the allegations. The complaint and allegations were brought to the attention of B in a letter dated 27 May 2011 from the professional board. The board believed that A's practice might pose a risk to the public. It decided to intervene.

[8] B requested A to attend a meeting to discuss a possible suspension and investigation process in regard to the allegations. On 2 June 2011 A and B met with A's representative in attendance. At the meeting there was discussion in regard to B undertaking its own investigation. A welcomed such an investigation into the issues that had been raised. A's representative made it abundantly clear to B that A intended to vigorously defend the allegations.

[9] A key point is that at that meeting, it was agreed that A would take special leave and would continue to be paid on the normal standard pay until the conclusion of the investigations by the professional board and B. Arrangements were put in place so that A would cease his work duties, but remain on full pay.

[10] Subsequently it came to the notice of B that the professional board had suspended A's annual practising certificate (APC) (30 June 2011).

[11] B followed a process to ensure that A had an opportunity to comment in regard to this development and that it proposed to stand him down on leave without pay because he did not hold an APC. B also relied on what it calls “*normal practice*” for standing down employees not holding current APCs. A’s pay stopped from 25 August 2011.

[12] The two investigations have not yet been completed. A, remains on leave without pay.

The Authority’s Determination

[13] Both parties’ representatives provided me with useful and helpful submissions in regard to their positions on this matter. It is not necessary to summarise the parties’ submissions except to say that I am persuaded by the applicant’s submissions and upon also considering the respondent’s submissions.

[14] I hold that B is required to continue to pay A. In other words, A is entitled to be paid while the investigations are taking place while he has been stood down. My reasons for this are as follows.

[15] There was an agreement reached for A to continue to be paid his normal standard pay until the conclusion of the two investigations and that he would cease his work duties. This arrangement was consistent with the parties’ terms and conditions of employment.

[16] Although the suspension of A’s APC has occurred, it has happened during his employment through no particular initiative of his. He has denied the allegations that are the subject of two investigations yet to be completed. There is no suggestion that he has deliberately, wilfully or even intentionally not ensured that he has a current APC, and he has agreed to a stand down until such matters have been dealt with. He has not been at work since 3 June 2011, but remains an employee.

[17] There are no express statutory provisions or under the terms and conditions of his employment that B relies on, to withhold paying A since he is still employed. Indeed, suspension under the disciplinary code of conduct includes a term for pay to continue. The provision for suspension reads as follows:

Suspension

An employee may be temporarily removed or suspended from the organisation on pay, where it would be improper in the circumstances to remain on duty. However, suspension should be used sparingly and only in circumstances which can be considered to justify its use.

...

[18] In the face of an agreement by A not to work and go on leave with pay, that provision appears to continue. I was referred to different legal precedents to conform with the B's decision to cease paying A, but I am satisfied that each of the precedents referred to by B's representative is distinguishable from this situation. A remains in employment, albeit he is not at work and there was an agreement for him to take leave with pay.

[19] A's suspension pending the outcome of two investigations is no different to any other disciplinary situation and the above clause does not envisage pay ceasing when someone can not work such as the current situation with A, whose APC has been suspended.

[20] B relies on what it calls normal practice to stand down and its entitlement to stand employees down when they do not have current APCs. In this situation, A's APC has been suspended and while he is still an employee and subject to the provisions of the suspension, and in the absence of any other provisions, entitlement and/or statutory provision to enable B to cease paying A, B is required to continue to pay him.

[21] Both parties have relied on what they consider are their rights under the terms of the employment agreement, code of conduct and other documents. I am satisfied that there is a plainly expressed arrangement and that B can not rely on any particular entitlement to cease paying A, i.e. there is no express power to stop the pay (other than to say that A cannot work without an APC). I accept that A's work relates to the currency of the APC, but he is currently not required to do work and not required to return to work. As this is through no fault and initiative from him to renew his APC, I hold he can not have his pay withheld.

[22] In conclusion, it is my decision that A is entitled to continue to receive his pay and that B should resume that as soon as practicably possible. The matter of arrears of pay, from August and the current time, I will leave as a matter for mutual agreement and provide leave for both parties to return to the Authority if a determination on that

is required. Leave is reserved in regard to the remaining issues in respect of the claim for unjustified disadvantage and remedies.

Order of the Authority

[23] I order B to resume paying A his regular pay, until these matters are sorted out and or by any mutual agreement in the future. This order is open to any agreed variation upon request.

Costs

[24] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority