New Zealand Employment Relations Authority Decisions

A v B CA 120/07 (Christchurch) [2007] NZERA 742 (15 October 2007)

Last Updated: 22 November 2021

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

CA 120/07 5096890

BETWEEN A

Applicant

AND B

Respondent

Member of Authority: Philip Cheyne

Representatives: Greg Lloyd, Counsel for Applicant

Scott Wilson, Counsel for Respondent Investigation Meeting: 11 October 2007 at Christchurch Determination: 15 October 2007

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant is employed full time by the respondent and is a long serving employee. The respondent is a large organisation with comprehensive human resources policies and procedures, including a detailed code of conduct. That code requires employees to inform their manager immediately of any criminal charges laid against them in a criminal Court. The code also says it is serious misconduct if an employee admits to or is convicted by a Court of law of an offence which would give reasonable doubt as to their suitability for continued employment. Illegal possession or consumption of drugs might also be serious misconduct. The code further contains restraints on relationships between employees and those in the employer's control.

[2] On 20 June 2007, the applicant was arrested by Police in the respondent's car park just before she was due to start work. She was taken to Christchurch Central Police Station where she was interviewed and searched. The applicant was also examined at Christchurch hospital. Later that day, the applicant was charged with offences under the Misuse of Drugs Act and given Police bail. The next day, the applicant appeared in the Christchurch District Court, entering no pleas to the charges. Bail was granted.

[3] The respondent set up an employment investigation under its procedures for managing misconduct. That included placing the applicant on special leave then suspending her. A report has been produced and provided to the applicant for any response before the respondent decides if misconduct has been established and whether a disciplinary interview should now be convened. The applicant's position is that any employment investigation into matters which are subject to the criminal charges should be deferred pending disposition of the criminal charges. The respondent declined to defer its employment investigation and is giving the applicant an opportunity to respond to the report. The applicant now seeks an interim injunction preventing the continuation of that employment investigation.

[4] Following the application to the Authority, the parties agreed to mediation and the respondent further agreed not to proceed with the employment investigation until this determination. Mediation did not resolve the problem. There has now been an investigation meeting to deal with the interim injunction application. As is usual, the evidence is by way of affidavit not tested by questioning. The findings expressed in this determination are for the purposes solely of determining whether there should be an interim injunction.

[5] The applicant has been granted interim name and occupation suppression by the District Court in respect of the criminal proceedings. Given that order, Counsel for the Authority proceedings agreed that the Authority should prohibit publication of the name and any identifying details of both the applicant and the respondent. An order was made at the commencement of the investigation meeting and is now continued.

[6] To resolve the problems, more must be said about the circumstances of the applicant's arrest and the criminal charges before turning to a consideration of the tests applicable to an interim injunction.

The respondent's investigation

[7] The Police apparently told the respondent on 20 June 2007 of the applicant's arrest, charges and appearance details. A senior manager for the respondent wrote to the applicant advising her that if the charges were proven or admitted, there would be a breach of the code of conduct which might result in dismissal. The letter advised that there would be an employment investigation, that the applicant would be on two days' special leave initially and, subject to any submissions, suspended on full pay thereafter. That letter was entrusted to another manager to deliver to the applicant while a third manager was asked to attend the Court hearing on 21 June 2007. As it happened, these last two mentioned managers both went to the Court together. They appear to have

missed whatever happened during the applicant's presumably brief appearance. However, there is no dispute that there was no plea by the applicant to the charges of possession of a Class C controlled drug and of instruments for drug use.

[8] Outside the Courtroom there were exchanges between the applicant and these two managers. Present also were the applicant's daughter and a friend. There is some dispute about how the exchanges were initiated and when or what was said to the applicant about the commencement of an employment investigation. It is common ground that the two men later delivered the letter to the applicant's home rather than giving it to her at Court.

[9] By memo dated 22 June 2007, the senior manager mentioned above appointed one of the other two managers to conduct an employment investigation. On the same day, the senior manager wrote to the applicant with details of the terms of reference for this investigation. Those terms included a requirement for the investigator to report on the facts and assess whether the allegations, if proven, would be a breach of the code of conduct amounting to serious misconduct. However, by 26 June 2007 the senior manager had decided to appoint another investigator, presumably having realised that the first investigator was a witness to things allegedly said by the applicant outside Court on 21 June 2007.

[10] One of the terms of reference was to report on any significant matters arising from the investigation. Apparently on 11 July 2007 an officer of the respondent received an inquiry from a person in respect of another person who was under the respondent's control. The person inquiring gave their contact details. On 18 July 2007, it appears that the respondent realised, or it was brought to the respondent's attention, that the applicant and the inquirer lived at the same address. The respondent then interviewed the person under its control who apparently said things giving rise to a concern that the applicant may have breached the relationship constraints referred to above. I will refer to this issue as the *relationship allegations*.

[11] The respondent made various attempts to have the applicant engage in the employment investigation. There are also some complaints by the applicant or her Union about a failure or refusal to provide information, but it is not necessary to deal with these matters for the minute. They might be relevant to a potential personal grievance rather than the present application.

[12] The investigator interviewed a number of people and compiled a report that was sent to the applicant on 13 September 2007, giving her until 19 September 2007 to comment. The response timeframe was later extended, but the applicant has still not provided a substantive response. For current purposes, the key findings are summarised in paras.43, 44 and 45 of the report. It

recommends that if the report's findings are accepted, a determination should be made about whether the applicant should face disciplinary action.

Interim injunction considerations

[13] There is no dispute about the relevant law. Both counsel referred me *Russell v. Wanganui City College* [1998] NZEmpC 254; [1998] 3 ERNZ 1076; *Southeran v. Ansett NZ Ltd* [1999] NZEmpC 58; [1999] 1 ERNZ 548; *Wackrow v. Fonterra Cooperative Group Ltd* [2004] NZEmpC 50; [2004] 1 ERNZ 350; and *Sing v Chief Executive Officer of the Department of Labour* [2005] NZEmpC 68; [2005] ERNZ 569. In *Russell*, the Court referred to *McMahon v. Gould* (1982) 1 ACLC 98 and made some observations about principles which have been adopted and applied in subsequent cases. In particular in the present case, I note that an employer is entitled, and even bound, to investigate conduct of concern; that it is a grave matter to interfere with those rights; that the Authority's task is one of balancing justice between the parties taking account of all relevant factors; and that the Authority must consider whether there is a real and not merely a theoretical danger of injustice in criminal proceedings.

[14] Wackrow is a helpful example of the appropriate approach. It is first necessary to consider whether there is a strongly arguable case of a real and not merely a theoretical danger of injustice to the applicant in the criminal proceedings should she be required to participate in the employment investigation.

[15] Criminal charges have been laid and the applicant has pleaded not guilty. A status hearing is presently scheduled for mid-November 2007. There is some indication in the evidence that the applicant made a statement to Police at the time of her arrest but it is not known what the statement contains or its form, if it exists. Evidence on behalf of the respondent is to the effect that the applicant admitted to the charges and a measure of cooperation with the Police during the exchanges outside the Court on 21 June 2007. However, in her affidavit, the applicant says:

I cannot comment on that because it directly relates to the criminal charges I am facing. I can assure you that as soon as the criminal matter is resolved I will provide a full detailed and accurate account of what was actually said.

[16] I infer that at least some of what the respondent's managers claim was said will be disputed. While the respondent gives assurances about confidentiality of anything said by the applicant in response during the employment investigation, it is likely that such statements would come to the attention of or be discoverable by the Police in connection with the criminal proceedings. The significant overlap between the employment investigation and the criminal charges is readily apparent from the list of questions that the respondent wanted to ask the applicant, as annexed to the

report. From that, I find that it is strongly arguable that there is a real danger of injustice arising in the criminal proceedings if the applicant can be called upon to answer these questions.

[17] There are two other aspects to the current employment investigation that should be mentioned. First, there is the complaint about the applicant's failure to report the arrest to her manager in a timely manner. However, the respondent's letter of 13 September 2007 accompanying the report stated that the decision maker would disregard this part of the report and no response from the applicant was required. Nothing more needs to be said about this.

[18] Secondly, there are the relationship allegations. The applicant does not address this point in her affidavit. However, counsel referred to the language used (*illegal activities)* in the list of prepared questions on these allegations. That, the reported reason for the Police interest initially in the applicant and an assumption that the Police have shared otherwise undisclosed intelligence with the respondent combine (it is submitted) to suggest that the applicant risks criminal charges arising from the relationship allegations; or that the applicant may have to say something relevant to the existing criminal charges to properly answer the respondent's concerns on the relationship allegations. However, I find that the relationship allegations are essentially unconnected with the existing criminal charges. The criminal charges and ensuing employment investigation merely provide some background to how the relationship allegations arose.

[19] It is unclear what the phrase *illegal activities* in the questions list refers to, but it seems unlikely, on the available evidence, to be linked to the existing criminal charges. There are also questions about the applicant's knowledge and use of a computer apparently found by the respondent. The evidence does not establish any connection between that topic and the criminal charges. It follows that any risk of injustice arising from the applicant answering questions on the relationship allegation topic must be in respect of possible future criminal

proceedings of an unspecified nature. Aside from the considerable uncertainty about what those possible criminal charges might be, I note that a breach of the code of conduct in respect of the relationship allegations is not necessarily, or even probably, associated with criminal offending or liability. Accordingly, I find that the case on this aspect falls well short of there being a strongly arguable case of any real danger of injustice to the applicant in any criminal proceedings.

Are there adequate alternative remedies?

[20] If the applicant must answer the respondent's questions on the topic connected to the current criminal charges, creating a real risk of injustice to her defence of those charges, damages would not be an adequate remedy for any injustice that does arise.

Balance of convenience

[21] The applicant points to the nature of the respondent employer and its resources saying that preventing the disciplinary process would be of little consequence. I do not accept that point. A significant harm potentially arising for the respondent is a restriction on it dealing with what might be a significant breach of its code of conduct, assuming no satisfactory answer is given on the criminal charges issue. The monetary implications for the respondent are also not unimportant.

[22] These points must be weighed against the risk of creating an injustice in the criminal proceedings. I accept that the applicant is in a difficult position. If she gives an answer on the questions connected to the criminal charges she may compromise her rights in respect of defending the criminal charges. The alternative is to say nothing. The respondent has said that it will not draw any adverse inference if the applicant does say nothing. However, that does not resolve the problem. Without the applicant's denial or explanation of what, if anything, was said by her outside Court, the respondent could easily conclude that the managers' accounts are good evidence of an admission for the purposes of the code of conduct.

[23] Balancing these matters I conclude that the balance of convenience favours the applicant. The applicant is currently suspended from her employment and the respondent is able to continue that suspension meantime under the applicable disciplinary procedures. The applicant has given an undertaking as to damages. Even though the applicant's overall financial picture is unclear, the duration of her full time employment suggests that she should be good for that undertaking if necessary. The evidence certainly does not allow me to conclude that she could not meet any undertaking. These factors partly answer some of the potential damage to the respondent if an interim injunction is granted. However, there is no other way of protecting the applicant's position to any meaningful degree.

Overall justice

[24] The respondent has detailed procedures that apply when investigating alleged misconduct. One of the key principles is that the employee has access to advice, support and Union or legal representation and that a manager must inform the employee of this entitlement and refrain from interviewing them until they have had an opportunity for advice, support or representation. The respondent decided to investigate the criminal matter on 20 June 2007 after hearing from the Police. On the respondent's evidence, the applicant was not told of her entitlement to advice, support and representation until after the exchanges with the managers that the respondent seeks to rely on as an

admission. That makes it more important for the applicant to have a proper opportunity to explain or deny those exchanges.

[25] A second factor supporting the applicant's claim for an interim injunction is the severability of the relationship allegations. At this point, it appears that an order can be made leaving it open for the respondent to question the applicant about those allegations.

[26] The applicant being favoured by both the balance of convenience and the overall justice, she is entitled to an order.

Conclusion

[27] Pending further order of the Authority, the respondent is restrained from continuing with its employment investigation into the allegations directly related to the criminal charges currently pending against the applicant.

[28] The need for this order to continue will be reviewed promptly following the applicant's next appearance in the District Court.

[29] Costs are reserved.

Philip Cheyne

Member of the Employment Relations Authority
