



## Prohibition on publication

[6] I order that at this interim stage, the name of the Applicant, the Respondent and that of employees involved in the complaint are not be published. The Applicant is to be referred to as Mr C, the Respondent as D, and relevant employees by either their job or personal title, or by letters bearing no relationship to their actual names. This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.

## Background Facts

[7] D is an organisation which provides support to vulnerable families. It operates a residential centre for women (the Womens' Centre) in Auckland and runs a number of other programmes and initiatives in the South Auckland area.

[8] Mr C was appointed as CEO following an extensive 3 month recruitment process which included psychometric testing. He commenced work on 1 December 2014. He is a registered nurse with a Masters degree in health policy and a Doctorate in social science, and over his career, during which he studied paediatrics, gynaecology and obstetrics, has worked extensively with women and children.

[9] Mr C was provided with an individual employment agreement which stated at clause 16: "*D has and will continue to develop general employment policies on matters such as disciplinary procedures, health and safety and the like. You must ensure that you know the policies on these matters and observe them strictly at all times. ...*"

[10] Mr C was also provided with a copy of D's Harassment Prevention Policy which stated:

*Harassment is unlawful and will not be tolerated. Harassment constitutes misconduct. Any staff member found to have harassed another staff member or a client of [D] will be liable for disciplinary action ranging from a verbal warning to instant dismissal, in cases of serious harassment.*

*4.1 Harassment in employment is language, or visual material, or physical behaviour:*

- *Of a sexual, racial, bullying or discriminatory nature (which is)*

- *Unwelcome,/offensive/hurtful (and is)*
- *Repeated or significant enough to cause detriment*

*Harassment is any unwanted comment, conduct or gesture directed toward an individual .... Which is ... either repeated or an isolated incident which is so significant that it adversely affects someone's performance, contribution or work environment.*

#### *4.2 Examples of sexual harassment could include:*

- *Uninvited kisses or embraces*

#### *The incident*

[11] During the day on Monday 8 December 2014 there had been a meeting of D's managers which Mr C and the Complainant had attended at which a disagreement and heated discussion between Mr C and the Complainant had taken place.

[12] Mr C stated in his untested affidavit evidence that it had been a reasonably stressful and difficult conversation with the Complainant regarding some funding issues, and that following the end of the discussion there had been an exchange of emails between himself and the Complainant.

[13] The email from Mr C to the Complainant, sent at 4.40 p.m. on Monday 8 December 2014, stated:

*Just wanted to thank you for your commitment and patience. Some of the biggest frustrations in life come from our work environment, generally when things are unfulfilling and unchangeable, or at least seem that way. I give you my word that I will always take your comments on board before making any significant decisions and will do all I can to accommodate them.*

*Your spirit comes from your commitment to your work and our whanau as an [D] team and as a client base, I need that here and look forward to working with you as we take this organisation to the next level.*

[14] The Complainant responded by email later that afternoon at 4.54 p.m. stating:

*Kia ora .... What a day eh!!! We will get there TOGETHER .... We have some tears along the way but we will always come back to the middle ... where god is ☺  
nga mihinui ki a koe ☺*

[15] Mr C further stated that he had been pleased that the exchange between himself and the Complainant which had taken place at the earlier meeting had resolved so well, and he had gone to the staffroom where the Complainant was talking to another employee, kissed her on the cheek, and said: “*I’m glad we got there*”, referring to the fact that they had resolved matters relating to their earlier conversation in the day.

[16] In his untested affidavit evidence he stated that the Complainant had stood up and appeared to be surprised by what had occurred, saying: “*Far out, I thought you were going to kiss me on the lips*” to which he had responded: “*I would never do such a thing*”. He had immediately apologised, and left the staffroom.

[17] No untested affidavit evidence has been provided referring to the relationship and/or any interaction between Mr C and the Complainant during the four days following the incident on 8 December 2014; however the D staff Christmas lunch had taken place on Wednesday 10 December 2014, which both Mr C and the Complainant attended.

#### *The Complaint*

[18] In his untested affidavit evidence, the Chairperson stated that on Friday 12 December 2014 the Operations Manager advised him in a telephone conversation that the Complainant had made a verbal complaint against Mr C. The Chairperson states that a written complaint was received on Saturday 13 December 2014.

[19] The Operations Manager had recorded the complaint on D’s Harassment Enquiries/Complaints Form which stated at paragraph 4: “*Summary of allegations*”:

*[The Complainant] informed me that she was in the staff room leaning against the bench. [Mr C] entered the staff room. He raised his hands in front of him and walked towards her and placed his hands around her face, leaned in and kissed her on her cheek. She immediately said to him “Far out I thought you were going to kiss me on my lips.” [The Complainant] remembers referring to the incident in Christchurch where the CEO resigned and [Mr C] asked what his name was. She couldn’t remember.*

[20] On Sunday 14 December 2014 the Chairperson of D telephoned Mr C at his home and informed him that a complaint had been made against him. The Chairperson told Mr C that he was not to attend work whilst the complaint was being investigated.

[21] Mr C had been due to attend a welcome visit at the Womens' Centre on Monday 15 December 2014. The Chairperson stated in his untested affidavit evidence that he and the Operations Manager had made a decision that it would not be appropriate to proceed with the welcome visit given the nature of the complaint and the function of the Womens' Centre.

[22] Mr C stated in his untested affidavit evidence that the Chairperson had advised him when he raised the issue of his welcome visit at the Womens' Centre that since he was suspended, that would need to be postponed.

[23] D conducted an investigation into what had occurred, receiving statements from the Complainant and the staff member to whom she had been speaking at the time of the incident.

[24] The Chairperson and a sole trader Human Resources Consultant who had been providing D with consultancy services for 7 years and had been requested to assist D in the matter, met with the Complainant and her support person on Monday 15 December 2014, both stated in their untested affidavit evidence that the Complainant was tearful and upset when interviewed.

[25] On the evening of Monday 15 December 2014 they had met with Mr C and his support person to: "*hear his account of events*".

[26] In his untested affidavit evidence Mr C confirmed that he met with the Chairperson and the Human Resources Consultant on Monday 15 December 2014 and outlined what had occurred during the incident on 8 December 2014, and he had apologised.

[27] On 17 December 2014, the Chairperson again met with Mr C and advised him that the Board had taken the view that what had occurred between Mr C and the Complainant had not been sexual harassment, however he read a hand written statement to him stating:

*With regard to the incident with [the Complainant] we feel you acted with poor judgment and what you did constituted a serious breach of our harassment policy.*

[28] Mr C said he had again apologised to the Chairperson. During the meeting, the Chairperson had continued reading the written statement to advise:

*We are prepared to consider your continued employment if a suitable mediated agreement between you and [the Complainant] can be put in place that will allow for professional work conduct and high levels of performance by both parties.*

*Are you willing to consider such an agreement with [the Complainant]?*

*I will ask Ms S to contact [the Complainant] and see if she is also willing.*

[29] Mr C said in his untested affidavit evidence that he was very keen to attend mediation with the Complainant; however he was subsequently informed that she was not willing to attend mediation.

[30] On 19 December 2014 the Chairperson wrote to Mr C confirming that the Board was terminating his employment on the grounds of serious misconduct with immediate effect. The letter further stated: “*After careful consideration the Board believes that the high level of trust and confidence required in this role of CEO of [D] has broken down.*”

### **An Arguable Case for Unjustifiable Dismissal and for interim reinstatement**

[31] I granted Mr C’s application for this matter to be dealt with on an urgent basis because this is the usual procedure for dealing with an application for an interim reinstatement

[32] At the Investigation Meeting on 25 March 2015, I heard submissions from counsel in relation to the interim reinstatement application and tested these by questioning how the available untested evidence related to the relevant principles for determining an interim injunction application<sup>1</sup>. Those principles fall to be addressed by the answers to the following questions:

- Whether Mr C has an arguable case for unjustifiable dismissal as defined by s 103A of the Act
- Whether Mr C has an arguable case for interim reinstatement in employment under s 125 of the Act if he is found to have been dismissed unjustifiably
- Where does the balance of convenience lie between the parties

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<sup>1</sup> *Cliff v Air New Zealand* CA6A/05, per Colgan J at para [12]

- What is the overall justice of the case

[33] As a matter of principle, Mr C must not only establish an arguable case for his unjustifiable dismissal, but must also establish that if he is successful in such a claim he will be reinstated in addition to, or instead of, being compensated monetarily, such as to support an application for interim reinstatement.

[34] My findings expressed in this determination are solely for the purposes of resolving Mr C's application for interim reinstatement. At the substantive hearing there will be opportunity to fully test the relevant evidence and disputed questions of fact and law.

#### *Arguable case for Unjustifiable Dismissal*

[35] Mr C submits he has an arguable case that he was unjustifiably dismissed and that the untested affidavit evidence surpasses the threshold of a *prima facie* case.

[36] In *X v Y Ltd and the NZ Stock Exchange*<sup>2</sup> the relevant principles of an arguable case were stated to be:<sup>3</sup>

*What the Court is concerned with, so far as the evidence goes, is to see whether, assuming that the plaintiff can prove all the facts which he alleges, he then has an arguable case. That is to say, a case with some serious or arguable, but not necessarily certain, prospects of success.*

[37] D dismissed Mr C on the basis of serious misconduct. The decision to dismiss Mr C on the basis of serious misconduct must be a justifiable decision in accordance with the Test of Justification as set out in s 103A of the Employment Relations Act 2000 (the Act) which states:

#### ***S103A Test of Justification***

- i. For the purposes of section 103(1) (a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
- ii. The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*

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<sup>2</sup> [1992] 1 ERNZ 863

<sup>3</sup> Ibid at pg 872-873

[38] The Test of Justification requires that the employer acted in a manner that was substantively and procedurally fair. D must therefore establish that the dismissal was a decision that a fair and reasonable employer could have made in all the circumstances at the relevant time.

[39] In the letter dated 19 December 2014 addressed to Mr C the Chairperson stated: “... *we believe the formal complaint received from [the Complainant] with respect to harassment in employment is deemed serious misconduct*”. The finding by D that Mr C was guilty of committing serious misconduct was founded upon the definition of harassment in D’s Harassment Prevention Policy. In *Harris v The Warehouse Limited*<sup>4</sup> the Chief Judge stated:<sup>5</sup>

*... In any event, any definitions of misconduct or serious misconduct contained in house rules or policy manuals, or unilaterally promulgated codes of that sort, are always subject to scrutiny by the Authority or the Court as to their fairness and reasonableness. They will only be enforceable to the extent that they are lawful, fair and reasonable in all the circumstances. .... And ... whether the employer could reasonably have concluded that Ms Harris was guilty of such misconduct or serious misconduct as so defined.*

[40] D’s Harassment Prevention Policy states that harassment constitutes misconduct, and that disciplinary action may take a number of forms ranging from a verbal warning to instant dismissal in the case of serious misconduct. Mr C’s actions in relation to the incident were considered by D to be serious misconduct meriting summary dismissal.

[41] In accordance with D’s Harassment Prevention Policy, harassment is stated to be: “*either repeated or an isolated incident which is so significant that it adversely affects someone’s performance, contribution or work environment.*” There is no suggestion that the incident on 8 December 2014 was part of a pattern of behaviour, it was an isolated incident.

[42] On this basis, since it was an isolated incident, the incident on 8 December 2014 needed to be significant enough to affect the Complainant’s performance, contribution or work environment to come within the ambits of D’s Harassment Prevention Policy, and to be regarded as serious misconduct.

[43] I accept that D had the right to expect high standards of appropriate behaviour of its CEO, especially within its specialised area of work with vulnerable women and families, however I note the context of the incident on 8 December 2014. It:

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<sup>4</sup> [2014] NZEmpC 188

<sup>5</sup> Ibid at para [73]

- a. took place in a public area, D's staffroom,
  - b. took place in front of another manager;
  - c. was a kiss to the Complainant's cheek as an expression of relief that she and Mr C had resolved their differences which had arisen after that day; and
- (iv) the email exchange between Mr C and the Complainant was very positive in tone with the Complainant writing: "...we will get there together".

[44] I further note that there is some discrepancy about the timing of events which will need to be explored at a substantive meeting by sworn evidence and in cross examination. In particular:

- i. The Statement in Reply states at paragraph 2.4 that the Complainant: "... immediately raised a complaint ..." which is at variance with the affidavit evidence submitted by D; and
- ii. The Complainant states in the email format statement provided in evidence that the incident in the staffroom on 8 December 2014 took place between 4.00 and 4.30 pm and that: "*I am not sure if anything else was said. I was numb and in shock*". However the email she sent to Mr C stating: "*What a day eh! We will get there TOGETHER...*" is timed at 4.54 p.m. which is after the time when she stated the incident had taken place.

[45] The untested affidavit evidence of the Chairperson and Human Resources Consultant is that the Complainant was upset when interviewed and was affected by the incident following the making of the complaint in that she was unable to work apart from attending to an urgent administration matter.

[46] Whilst accepting that the Complainant may have suffered from delayed shock as a result of the incident on 8 December 2014, I take into consideration that fact that the Complainant continued to attend work during the succeeding four days following the incident, and attended the staff Christmas lunch, also attended by Mr C, on 10 December 2014.

[47] The Board posited its decision to terminate Mr C's employment on a loss of trust and confidence in him following the complaint made about the incident on 8 December 2014.

[48] It is apparent that Mr C was remorseful about the incident, the untested affidavit evidence is that he had apologised to the Complainant immediately after the incident and to the Chairperson and the Board on several occasions during the investigation process. I consider that this would have been taken into consideration by a fair and reasonable employer when considering the outcome, particularly given the range of possible disciplinary outcomes in the Harassment Prevention Policy.

[49] Whilst D claims it lost all trust and confidence in Mr C as a result of the incident, I note the comment by the Chairperson during the meeting held on 17 December 2014 that: *“We are prepared to consider your continued employment if a suitable mediated agreement between you and [the Complainant] can be put in place”*.

[50] I consider this statement to clearly indicate that D had not lost all trust and confidence in Mr C by 17 December 2014 since it was prepared to allow him to continue in employment provided he and the Complainant attended mediation and try to resolve the situation which had arisen between them.

[51] Mr C agreed to this proposal and indeed stated in his untested affidavit evidence that he was keen to agree to attend mediation. I consider that had the Complainant agreed to attend mediation at that point, it is likely that Mr C’s employment may have continued.

[52] However it was only following the Complainant’s refusal to attend mediation that D confirmed its decision to dismiss Mr C based on a loss of trust and confidence in him.

[53] I also note that in the event that Mr C is found to have been unjustifiably dismissed, there is a likelihood that he will be found to have contributed to the circumstances giving rise to his dismissal.

[54] In these circumstances I find that Mr C has an arguable case for unjustifiable dismissal based on s 103A of the Act.

#### **Arguable case for interim reinstatement**

[55] Mr C must not only establish an arguable case for unjustifiable dismissal but must also establish that he would be reinstated if successful in such a claim.

[56] Section 125 (2) of the Act states the Authority may provide for reinstatement if it is practicable and reasonable.

*Practicable*

[57] As stated by the Court of Appeal in *Lewis v Howick College Board of Trustees*<sup>6</sup>:

*[2] In dealing with the reinstatement remedy, Judge Colgan considered and applied the correct statutory test.<sup>2</sup> He also applied the test of practicability endorsed by this Court in New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School (NZEI).<sup>3</sup> The Court there affirmed a legal test for practicability articulated in the Employment Court<sup>4</sup> as follows:<sup>5</sup>*

*Whether it would not be practicable to reinstate Mr Bell involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.*

[58] Practicability involves considering whether a successful employment relationship can be successfully re-established.

[59] It was noted by the Employment Court in *Angus v Ports of Auckland (No 2)* that<sup>7</sup>

*The reasonableness referred to in the statute means that the Court or the Authority will need to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer or perhaps even in some cases, others, for example affected health care patients in institutions.*

[60] It has been stated in untested affidavit evidence that there is a real and genuine threat of resignations from the management team should Mr C be reinstated, although there is no evidence submitted to substantiate this statement.

[61] It has been submitted, and not disputed, that employees have been told that Mr C's employment has ended, but not why it has done so.

[62] There is disputed evidence over what a third party, the Womens' Centre had initially been told, Mr C stating in his untested affidavit evidence that he had been told his welcome visit had been postponed due to his suspension, the Chairperson stating in his untested

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<sup>6</sup> [2010] NZCA 320 at paras [2]

<sup>7</sup> [2011] NZEmpC 160 at para [68]

affidavit evidence that the welcome to Mr C had been withdrawn because he and the Operations Manager had decided it should be in the circumstances of the complaint.

[63] I find it is by no means clear, but I consider unlikely on the basis that the employees other than the management team have not been fully informed of the reason, that the Womens' Centre is unaware of the reason, for Mr C's dismissal such as to influence its future relationship with him if he were to be reinstated.

[64] I accept that there is likely to be a challenging relationship between Mr C and the Complainant were he to be reinstated. However he has been more than willing to attend mediation, including a culturally appropriate mediation if the Complainant would prefer that, in an effort to rebuild their relationship on to a professional basis, and on that basis I consider that he will strenuously endeavour to build the relationship onto a positive footing between them should he be reinstated.

[65] There is no evidence that there were any issues between Mr C and the rest of the management team, either prior to the incident on 8 December 2014, or during the week following which included the staff Christmas lunch, such as to indicate insurmountable difficulties in regrouping the management team.

[66] Further I note that Mr C's position as CEO has not been replaced since the termination of his employment, such that it is still available if he were to be reinstated.

[67] As regards the submission that there is a total lack of trust and confidence in Mr C by the Board and vulnerable clients, I regard that in the light of the willingness of the Board to continue an employment relationship should he and the Complainant be able to reconcile their working relationship, such that I do not find the submission credible.

[68] In the circumstances I find that the interim reinstatement of Mr C is practicable and capable of being carried out in action, it is feasible and there is potential for the employment relationship to be re-imposed successfully.

*Reasonable*

[69] The Employment Court in *De Bruin v CDHB*<sup>8</sup>, took into account when considering reinstatement:<sup>9</sup> “*an assessment of the likelihood that (the employee) would commit a serious breach of his employment obligations in the future*”.

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<sup>8</sup> [2012] NZEmpC 110

<sup>9</sup> *Ibid* at para [73]

[70] I observe that in this case Mr C has shown remorse, he instantly apologised to the Complainant following the incident, and has apologised on more than one occasion to the Board. There is no suggestion in the Chairperson's untested affidavit evidence that D believes there is a likelihood that Mr C will commit further serious breaches of similar nature.

[71] On this basis I do not consider there is a strong likelihood of Mr C committing a serious breach of his employment obligations in the future.

[72] In addition I note that Mr C has had a long and distinguished career in the health sector and extensive experience working with women, both as team members in the provision of care, and to women and children as part of providing care in sensitive health areas to them.

[73] The Chairperson acknowledged in his untested affidavit evidence that the recruitment of Mr C followed an extensive recruitment process, and Mr C stated that it represented a significant amount of time, energy and commitment on the part both of D and himself. It was against this background of vigorous selection that Mr C was appointed.

[74] I consider it reasonable to conclude that Mr C's skills and abilities will not be easy for D to replace, and that D had concluded at the time of his appointment that he was the right person for the position to which he was appointed. As previously observed, the Board of D had sufficient trust and confidence in Mr C at 17 December 2014 to consider continuing his employment pending the outcome of mediation.

[75] Taking all the submissions into consideration, and on the basis of the untested affidavit evidence as presented to the Authority, I am able to conclude that Mr C has a strongly arguable case that he should be reinstated on an interim basis.

### **Balance of convenience**

[76] It is relevant to this principle that reinstatement is no longer the primary remedy under the Act, but may be awarded if it is reasonable and practicable to do so.

[77] As set out in the Employment Court case *X v Y Limited*<sup>10</sup> this principle requires that the Authority balance the relative inconvenience, in terms of detriment or injury, to D who will have to bear the burden of an order reinstating Mr C until the substantive case is heard, against the inconvenience to Mr C who may have a just case, of having to bear the detriment of unjustifiable action until the case is heard.

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<sup>10</sup>[1992] 1 ERNZ 863, at pg 10

[78] It is submitted on behalf of D that damages would be an adequate remedy.

[79] In *Davis v Ports of Auckland Limited*<sup>11</sup> Judge Travis stated:<sup>12</sup>

*Clearly other remedies are available to the first plaintiffs by way of the personal grievance procedures and I am not satisfied that those procedures do not provide an adequate remedy*

[80] It is submitted on behalf of Mr C that the balance of convenience lies with him for the following reasons:

- He underwent a very rigorous selection process to obtain the role of CEO of D. It will be very difficult and involve another rigorous and lengthy recruitment and selection process, for him to obtain another similar position;
- CEO roles are unique and not easily obtainable; and
- His financial position has been significantly and adversely impacted, he is relying on savings which are decreasing, and obtaining a CEO or alternative role at a similar level during the period until the substantive hearing is held would be very difficult if not impossible.

[81] Having considered all the circumstances and the submissions put forward by the parties, balancing the potential prejudice to Mr C of not reinstating him, against the potential prejudice to D of so doing, I find that the balance favours the interim reinstatement of Mr C.

### **Overall Justice**

[82] The Authority must assess the overall justice of the case from a global perspective.

[83] I observe that at a substantive level there is a possibility that contributory behaviour may be found on the part of Mr C as a result of the incident on 8 December 2014. I consider at this interim stage that that may impact on the remedies awarded but not to such a degree as to impact on Mr C's ability to obtain interim reinstatement on the basis of the untested affidavit evidence.

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<sup>11</sup> [1991] 3 ERNZ 475

<sup>12</sup> Ibid at pg 492

[84] I take into account the fact that Mr C had only been in the CEO position for 12 days prior to the incident, this after an extensive recruitment process, and I also note Mr C's untested affidavit evidence that he regarded his position as CEO in D as not just a job but a vocation, and he believes he has the necessary skills and ability to achieve great things for D.

[85] Having taken into consideration all the circumstances, I find that the overall justice of the case subsists in granting Mr C's application for interim reinstatement.

### **Determination**

[86] For the above reasons the Authority exercises its discretion in relation to interim reinstatement by making the orders sought.

[87] I therefore order the interim reinstatement of Mr C as CEO of D with effect from 1 April 2015 until the substantive determination of the employment relationship problem.

### **Next Steps**

[88] The Authority will shortly convene a case management conference to set timetable directions for the investigation of Mr C's substantive claims.

### **Costs**

[89] Costs are reserved for determination following the substantive investigation meeting and its outcome or until this matter otherwise ceases to be before the Authority.

**Eleanor Robinson**  
**Member of the Employment Relations Authority**