Attention is drawn to the order preventing the publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 130
5383293

	BETWEEN	DR X Applicant
	A N D	A DISTRICT HEALTH BOARD Respondent

Member of Authority:	David Appleton
Representatives:	Anjela Sharma, Counsel for Applicant Paul McBride, Counsel for Respondent
Investigation meeting:	26 June 2012
Submissions Received	26 June 2012 from Applicant 26 June from Respondent
Date of Determination:	29 June 2012

DETERMINATION OF THE AUTHORITY

A. **The application by the applicant for prohibition of the publication of the parties' names and identifying evidence is granted.**

B. **The application by the applicant for an interim injunction prohibiting the respondent from continuing to suspend her from her work is declined.**

C. **The application by the applicant for an interim injunction prohibiting the respondent from preventing her taking leave to visit her daughter in Australia is declined.**

D. **The costs of this application may be the subject of submissions as a self contained matter.**

Prohibition from publication

[1] This determination addresses two applications, the principal one of which is for an interim injunction requiring the respondent to lift the suspension of the applicant, a doctor, to enable her to resume her clinical practice until the resolution of an outstanding disciplinary investigation. The Authority explored with the parties at the outset of the investigation meeting the appropriateness of an order under clause 10 of Schedule 2 of the Employment Relations Act 2000 for the prohibition of the publication of the parties' names and identifying evidence. The applicant argued for such an order, whilst the respondent strongly opposed it.

[2] In determining whether to grant the principal injunction sought, the Authority must take into account allegations about the applicant's clinical practice and her conduct in the workplace which the respondent says are so serious as to prevent the lifting of her suspension at the present time. As at the date of the investigation meeting, no final decision had been made by the respondent on either set of allegations, as it needs to take into account the applicant's representations and no final disciplinary meeting has taken place.

[3] Although the respondent asserts that *findings* have already been made, both in respect of the applicant's clinical practice and her alleged workplace behaviour (respectively in two reports by an independent medical reviewer – called in this determination *the clinical reports* - and in a report prepared by a member of the respondent's senior management – called in this determination *the workplace report*), no decision in respect of the appropriate actions to be taken in response to the reports has been made. The applicant argues that it would be highly prejudicial to her standing as a doctor to have the allegations published prior to the final decision having been made.

[4] The respondent states in its submissions that there is public interest in the findings of the respondent, and that if the applicant were to be allowed back to work, and to resume her clinical practice, the public should know that the clinical reports have identified *unsafe clinical practice*. The respondent referred the Authority to the Health and Disability Commissioner Code of Health and Disability Services Consumers' Rights Regulations 1996 (*the Code)*, which sets out the right of

consumers of health services to be fully informed. These rights extend to the right of the consumer to certain information about the provider of the health services. The Code also sets out the right for consumers to make an informed choice, including the right to express a preference as to who will provide services.

[5] It is beyond the scope of the Authority's current investigation to examine the extent of the legal rights of consumers of health services and how those rights interplay with the rights of the applicant, who remains an employee of the respondent. However, it seems plain that, whilst consumers of the respondent's health services have rights under the Code which may extend to being informed about concerns about the applicant's clinical practice, the proper forum for disseminating that information is not the Authority by way of a determination which the applicant will have no right to see and comment upon before its publication. I am therefore not convinced by this argument in opposition by the respondent.

[6] The respondent also referred me to *Anderson v Employment Tribunal* [1992] 1 ERNZ 500. That case held that, except where and to the extent that an Act of Parliament expressly provides otherwise, Courts and tribunals in New Zealand are required to dispense justice in public. The judgement, which set out a number of principles to be applied, was based on an interpretation of a section of the now repealed Employment Contracts Act 1991. These principles included the following:

a. The discretion should be exercised in favour of making the order only if the interests of justice require such an order to be made and then only to the extent required by the interests of justice; and

b. In most cases the Tribunal will find it safe to use as a test the question posed by Penlington J in *R v Patterson* [[1992] 1 NZLR 45] at p 50: *Are there exceptional circumstances which reveal a real risk that the administration of justice would be frustrated or rendered impracticable if the evidence is published?* The exceptional circumstances must amount to *reasons of compelling principle consonant with the interests of justice* and *plainly cogent ground* for making the order.

[7] However, in *Davis v BNZ* [2004] 2 ERNZ 511, the Court considered that the formal principles in *Anderson* were less applicable in Authority cases than they had been in cases before the Employment Tribunal. The Court said, at [16]:

> *The presumption that all evidence should be given in public and freely reportable may therefore not have the force that it had in relation to the Employment Tribunal.*

[8] Counsel for the respondent also refers me to *White v Auckland District Health Board* [2007] ERNZ 574 (SC) but I believe that this case can be distinguished, both because the applicant had been reinstated after dismissal, and also because the applicant had *brought any such publicity upon himself by "his bizarre and inappropriate behaviour"*.

[9] I note also the 2004 Authority case of *Annan v Finn* 13/9/04, AA290/04, which involved proceedings for the interim reinstatement of a school principal pending an investigation by the Authority into a personal grievance. In opposing interim reinstatement, the respondent relied on two reports that dealt, inter alia, with the applicant's performance in her role as principal. In support of her application for a non-publication order, the applicant argued that the reports were of a preliminary nature only and that she had not had an opportunity to respond to them. The Authority made a consent order under clause 10(1) of Schedule 2 of the Act suppressing publication of any quotation or summary of the contents of an unconfirmed report.

[10] These facts are similar to those of the present case, albeit involving a different profession, although it is not possible, in my view, to suppress certain key findings of the clinical reports, as they are central to the opposition of the respondent to the applicant's application for her suspension to be lifted. To suppress those key findings would obfuscate the reasoning of the Authority. Taking into account the opposing views of the parties, I am satisfied on balance that, in circumstances where the applicant's reputation and standing as a doctor could be seriously damaged before she has had an opportunity to address fully the respondent's concerns, the interests of justice require her identity to be withheld from this determination.

[11] I therefore order prohibition from publication of the identities of the applicant, the respondent and its key managers, together with the applicant's area of clinical practice. For this reason, the applicant will be referred to in this determination as

Dr X, the respondent as *A District Health Board*, and the key managers as *Mr Y* and *Ms Z*. In addition, the specific area of practice of the applicant will not be identified.

Employment relationship problem

[12] Dr X seeks an injunction in the following terms:

(a) The removal of her suspension from clinical practice with immediate effect; and

(b) The removal of an alleged constraint preventing her from going on leave to visit her daughter who resides in Australia.

[13] Affidavit evidence in support was lodged by Dr X, her partner (also a doctor in Dr X's practice) and another doctor in support of her return from suspension. Affidavits in opposition were lodged by the senior manager investigating the workplace concerns (Mr Y), the Chief Medical Officer and Clinical Director of the relevant service, and the Service Director of the relevant service (Ms Z) who, it is understood, will chair the final disciplinary meeting. A substantial amount of documentation was also put before the Authority, some as exhibits to the affidavits, other documents separately from the affidavits.

Brief account of the events leading to the investigation meeting

[14] Dr X has worked for the respondent since 2007. She was the subject of a complaint signed by 16 of her colleagues in August 2011, which accused her of behaviours that were *impacting on her ability both to manage clients and to manage workplace relationships*. She was accused in this complaint of creating *an atmosphere of blame within our team which results in staff feeling uncomfortable and unsafe talking about their clinical practice*. She was also accused of circumventing clinical processes and not utilising quality assurance procedures.

[15] In October 2011, Dr X was the subject of written complaints from the manager of the service in which Dr X worked and from a specialist nurse, the subject of which was an allegation that Dr X burst into the manager's office during a meeting between her and the specialist nurse, demanding to know what they were talking about, and refusing to leave.

[16] In November 2011, a junior nurse alerted her supervisor to concerns over Dr X's approach to prescribing certain medication to a potentially vulnerable patient without following accepted protocols.

[17] In late November 2011, the relevant service director wrote to Dr X alerting her to the complaints that had been raised in October and November.

[18] On 7 December 2011, Mr Y, who had been appointed to investigate the concerns raised, wrote to Dr X proposing that she be stood down on pay pending the outcome of the investigation process. Mr Y invited Dr X's comments. Later on in December, on the basis of Dr X's submissions, Mr Y agreed that Dr X would not be stood down at that point. Mr Y attempted to arrange to meet with Dr X and her representative to discuss the issues, but encountered difficulties because of the unavailability of Dr X's chosen representatives (from the Association of Salaried Medical Specialists (the ASMS) and the Medical Protection Society).

[19] On 21 December 2011, Mr Y wrote to Dr X proposing, in the light of *further information that has come to light which only serves to increase* [Mr Y's] *concerns*, to stand Dr X down from her clinical duties on full pay. He invited Dr X's views on that proposal. Dr X accepted being stood down on full pay until she could meet Mr Y with suitable support and having had sufficient time to prepare her responses.

[20] Mr Y wrote to Dr X on 22 December 2011, in a letter headed up *Decision on suspension*, noting her agreement that she would stand down from duties on full pay. Dr X's counsel, Ms Sharma, wrote to Mr Y on 30 December 2011 making an objection to (amongst other things) the characterisation of the special leave as *suspension*.

[21] Correspondence between Mr Y and Ms Sharma continued during January 2012 and, during a meeting on 25 January 2012, Dr X was told that a further stand down period may occur because of concerns in relation to the allegations relating to Dr X's conduct in the workplace.

[22] It is germane to mention at this point that Dr X had, up to that point, considered herself to be stood down in accordance with clause 42 of the collective agreement between the New Zealand District Health Boards and Senior Medical and Dental Officers (the current edition of which runs from 20 December 2011 until 28 February 2013). Section 42 relates to investigations into clinical practice and its

impact on patient safety and gives the employer both the right and obligation to *"investigate fairly, thoroughly and as quickly as reasonably possible any complaints it receives or concerns it may have that raise serious questions about the employee's standards of clinical practice"*.

[23] Clause 42.7 of the collective agreement provides as follows:

> *42.7 Pending the results of the investigation, if the employer believes on reasonable grounds that the nature of the complaint or concern raises a serious and ongoing risk of harm to a third party should the employee continue to practice* [sic] *without restriction, after consulting the employee, it may impose restrictions on the employee's clinical practice, provided that:*
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> *(a) Such restrictions shall be kept to the absolute minimum consistent with the need to avoid risk or harm to a third party. During the period of the restrictions, the employee shall continue with their other duties and receive full pay for all duties they would otherwise have undertaken.*
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> *(b) The restrictions shall automatically lapse after three weeks, at which time the employee shall resume normal duties, unless in the meantime, a panel of up to three senior medical or dental practitioners, at least one of who* [sic] *was nominated by the affected employee, has reviewed the need for the restrictions and recommended they be maintained. The panel may recommend that the restrictions be varied.*
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> *42.8 An employee's practice may not be restricted for longer than three months unless a second panel of up to three senior medical or dental practitioners, none of whom shall be employees of the employer, has reviewed and endorsed in writing the need for such restrictions. The employee whose practice is under investigation has a right to nominate at least two members of the second panel, which shall have the authority to lift, maintain or vary the restrictions.*
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> *:*
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> *:*
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> *42.10 The parties acknowledge that for the purposes of employment law any decision to impose, extend or vary restrictions on an employee's practice is ultimately a decision of the employer.*
>
> *42.11 The employer and the affected employee may agree to vary any of these provisions.*

[24] In accordance with clause 42.7(b), Dr X regarded herself as entitled to return to her clinical practice on 7 February 2012, at the expiry of the three week period. On this date, Ms Sharma wrote to Mr Y on behalf of Dr X proposing that Dr X could work for two of the outlying clinics in her specialism rather than the main clinic

where most of the workplace concerns had arisen. It is these two outlying clinics that Dr X wishes to be allowed to work at now, pending the finalising of the disciplinary process.

[25] Dr X also agreed on 7 February 2012 to a further stand down period of three weeks. This was later further extended by agreement with Dr X until 12 March 2012.

[26] On 6 March 2012, Mr Y wrote to Dr X's representative at the ASMS referring to several workplace concerns that had arisen from his investigations, some of which, he stated, could amount to serious misconduct. He also stated that he did not regard it as appropriate for Dr X to return to work, regardless of the outcome of the separate ongoing clinical investigation that was being undertaken by an independent specialist at another District Health Board (the eventual author of the two clinical reports). Mr Y invited Dr X and her representative to a meeting and stated that he would like to discuss the possibility of suspending her (or agreeing on a stand down) until all issues were resolved. In this letter, Mr Y also stated that he was *open to discuss the possibility of Dr X being able to visit her daughter whilst being stood down*.

[27] On 21 March another meeting took place in which Mr Y agreed to consider Dr X's submissions and her proposal to *transition back to the work place*. On 23 March 2012, Mr Y wrote to Dr X stating that he had concluded that her return to work would be *"most unwise"*. He stated that neither the workplace nor the clinical investigations had finished and that Dr X would remain formally suspended on pay until his investigation had been completed. Dr X's representative on the ASMS raised concerns about the legality of this continued suspension and, in reply, Mr Y wrote on 30 March 2012 that Dr X's return to the workplace on 26 March 2012:

> *... would have caused significant disruption to the service, including the potential resignation of key members of the team and impacts for Dr X. Maintaining the ability of the service to meet patient needs and the terms of our service agreement is of paramount importance to* [the DHB]. *We believe Dr X's return at this point in time would compromise those requirements.*

[28] At some point in April 2012, the first clinical report had been made available in draft form and Dr X was given the opportunity to comment upon it. However, a further concern in respect of the prescription of medication to a second patient (SB) had by now arisen, referred to briefly in the first clinical report, which needed further investigation.

[29] By mid-April, Mr Y's investigation into the workplace concerns had been completed, which found several concerns about Dr X's conduct towards her colleagues. The report prepared by Mr Y characterised some of these issues as serious misconduct. This report was not made available to Dr X until 31 May 2012, however, when it was sent to Dr X by Ms Z. Ms Z characterised the contents of the report as *"disturbing reading"* in her letter to Dr X stating that dismissal was a potential outcome. In her letter, Ms Z stated that she wished to await the final report of the independent clinical reviewer and that all matters would be considered together. Ms Z proposed that Dr X give her views on a continuation of her suspension.

[30] A meeting between the parties to discuss the continued suspension took place on 13 June 2012 and on 15 June 2012 Ms Z wrote to Dr X in the following terms:

> *In terms of the issue of suspension, I have carefully considered the matter since we met. In the light of the facts as those have been established to date, I consider that the matter is very serious. There are also significant clinical concerns which overlay that. Given the combination of those circumstances, the relatively brief period we hope before the disciplinary matter can be concluded, and the other matters that have been raised, I have decided that in the interests of patient safety and staff safety (including your own safety – both clinically and otherwise) you should be suspended from employment on full pay pending finalisation of the disciplinary process. An important factor in my consideration is that if, after conclusion of the disciplinary process, you are to return to work, that will need to be carefully managed and structured. An immediate ad hoc return to different duties in different places is not, in my view, appropriate.*

[31] Ms Z's letter also stated that the DHB was very happy for Dr X to travel to Australia during the period of suspension *provided that leave is arranged in advance and that it does not further (unreasonably) delay the process*.

[32] The second and final clinical report was made available on 19 June 2012. This dealt with Dr X's treatment of a patient, SB, and concluded that the treatment plan devised by Dr X for SB had not been safe and protocols to minimise risk inherent in the plan had not been followed.

[33] The second clinical report stated that it was to be read in conjunction with the previous findings in the first report, which were published on 9 April 2012, and which dealt mainly with Dr X's treatment of a patient called KB. Taken together, the two reports appear quite thorough. The first report contained a number of recommendations as to how Dr X might return to the workplace pending the

completion of the second clinical report. These recommendations included the following:

1. Dr X attends all multi disciplinary team meetings;

2. Dr X sees no patient without another member of the relevant team present;

3. Dr X (and perhaps all members of staff) accepts no referral directly;

4. Dr X completes clinical notes contemporaneously;

5. Dr X undertakes no work that is a disputed area of practice, until the dispute is resolved to the satisfaction of all parties;

6. Dr X undertakes to seek agreement for all proposed clinical decisions with the relevant team members;

7. Agreement is reached between Dr X and the manager who has responsibility for various roles within the function of the working day;

8. Dr X has an identified, agreed line of management to address any unresolved concern;

9. Dr X agrees with the service manager where she will see patients;

10. Dr X and the DHB will need to consider the best avenue for Dr X to receive individual collegial supervision and Medical Council oversight;

11. The Chief Medical Officer will need to consider with Dr X, the manager and Mr Y how best to address Dr X's annual performance appraisal.

The issues

[34] In considering this application for an interim injunction, the Authority must take into account the following:

(a) Whether there is an arguable case that Dr X's suspension is unlawful;

(b) where the balance of convenience lies;

(c) if it favours Dr X, whether there is an adequate alternative remedy available to her; and

(d) what is the overall justice of the case?

Whether the suspension should be lifted?

Two preliminary issues

[35] The respondent raises a fundamental issue in opposition to the application; namely, that no relevant claim for permanent relief is made in the proceedings, and that interim relief cannot, therefore, properly lie. The respondent's counsel refers me to the case of *NZPFU v NZ Fire Service* [2008] ERNZ 198 which held that:

> *It is a fundamental principle applicable to applications for interim injunction generally that the Court will not grant an interim injunction where the substantive claim cannot justify permanent relief in a similar form.*

[36] Dr X's applications for interim relief were amended twice, but the final iteration requests, inter alia, *a permanent injunction restraining the respondent from unlawfully dismissing the applicant from her employment in respect of the issues outlined.* The Authority declined to consider such an application, because it was too early to decide such an application when the respondent has confirmed through its counsel that it would take into account Dr X's comments prior to any final decision being reached. In addition, I refer to the Employment Court decision of CJ Goddard in *Burgess v Wairarapa Community Law Centre Inc.* WEC 54/96, in which the Chief Judge stated that *there could be no question, in the present circumstances, of the Court restraining a dismissal that had not occurred.* The Chief Judge continued;

> *It is against the law to dismiss employees unjustifiably and therefore it is unnecessary for the Court to issue an injunction against that happening.*

[37] No permanent injunction is requested by Dr X restraining the respondent from suspending Dr X. However, the absence of an express pleading in that regard does not prelude the possibility of such an injunction being possible, and I do not read *NZPFU v NZ Fire Service* to require the pleading of a permanent injunction; only for the need for there to be justification for such an injunction. I do not believe, therefore, that this argument is an impediment in itself to the granting of the relief sought.

[38] The respondent has also argued that Dr X's suspension is now of a different nature from the one that was operative when Dr X's complaint was first put to the Authority. I understand that this is because the suspension decision, as communicated by Ms Z in her letter dated 15 June 2012, is now based on firm *findings*, arising out of Mr Y's investigation, that a number of workplace conduct issues arose prior to Dr X's suspension which amount to serious misconduct. These findings were not available when the compulsory suspension was first imposed by Mr Y in March.

[39] Whilst I agree that this argument is technically correct, the fact remains that Dr X is still suspended, and has remained so for several weeks from before the application was lodged, and that the task of the Authority is to determine whether her suspension in the circumstances that prevail now should be lifted. I therefore regard this argument of the respondent as a technicality which does not, in itself, defeat the application.

Is there an arguable case that Dr X's suspension is unlawful?

[40] An arguable case means a case with some serious or arguable, but not necessarily certain prospects of success. *X v Y Ltd and the New Zealand Stock Exchange* [1992] 1 ERNZ 863.

[41] Dr X's counsel has argued that the suspension of Dr X is unlawful because:

a. it was not first put in place by the correct person, Mr Y being an investigator, not the decision maker and Ms Z should have approved the suspension;

b. Dr X was not afforded an opportunity to comment upon the suspension before it was imposed;

c. The respondent's own policy on suspension was breached because clear reasons were not given to Dr X for her suspension;

[42] With respect to Mr Y being the manager who first imposed the suspension, even if he was not the correct person to have decided on Dr X's suspension, it is clear that Ms Z was aware of the suspension and approved it, if only tacitly. This tacit approval became overt approval on 15 June when she wrote to Dr X confirming the continuation (in reality) of the suspension.

[43] It does not seem to be correct that Dr X was not afforded the opportunity to comment upon her suspension before it was imposed. The letter dated 6 March 2012 from Mr Y cited in part above clearly stated that he wanted to discuss the possibility of suspending her until all issues were resolved. The meeting on 21 March also appears to have given Dr X the opportunity to give her views on her continued suspension.

[44] With regard to the respondent's policy on suspension, this states as follows:

> *Suspension is not, in itself, a disciplinary action, and should continue only until management has sufficient information to make a decision on the matter.*
>
> *A District Manager may suspend an employee from duty where they consider there are clear reasons why the employee should not remain on duty. Examples of when suspension is considered include:*
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> - *where a cool-off period is considered necessary or desirable*
> - *where issues of health and safety are involved*
> - *where the alleged conduct, if proved, would mean that the employee should not have direct contact with patients/client;*
> - *the employee's presence in the workplace could hamper the completion of a full and fair investigation into the matter.*
>
> *The suspension will be confirmed in writing by the District Manager.*
>
> *Where there is no specific contractual right to suspend, the suspension during the line of investigation will be on full pay.*

[45] This does not specify that the respondent must state clear reasons to the employee why she is being suspended. However, having reviewed the letters to Dr X and her representatives, I believe that clear reasons are specified.

[46] However, with respect to Dr X's representative these arguments, along with her account of the history of Dr X's attempts to return to the workplace, miss the point. The issue for the Authority to determine is whether there is an arguable case that the suspension is unlawful in the circumstances that prevail now, not whether it was in the past. To determine this, it is necessary to consider the disciplinary policy and the circumstances that prevail now.

[47] The scope of the disciplinary policy is stated to extend to all employees of the District Health Board. The terms of the collective agreement states that the employer's policies are not incorporated into the agreement, and that the agreement prevails where there is inconsistency between it and the policies of the employer.

However, I note that Dr X does not deny that the disciplinary policy extends to her employment. I am therefore satisfied that the terms of the disciplinary policy applied to Dr X at the time when suspension was first imposed, and that it continues to apply to her. I also note the terms of clause 42 (10) of the collective agreement, cited above, which gives the right to the employer to vary the terms of any restriction imposed upon Dr X under that general clause.

[48] The reason given by the DHB for the suspension which is currently ongoing is that *issues of health and safety are involved* and that *the alleged conduct, if proved, would mean the employee should not have direct contact with patients/clients*.

[49] On the basis of the untested affidavit evidence before me, and the contents of the three reports as they stand at present, I believe that sufficiently serious concerns exist at this stage to allow the respondent reasonably to argue that it may lawfully rely upon the terms of the disciplinary policy to justify Dr X's continued suspension.

[50] I reach this view firstly on the basis that:

a. the independent clinical reviewer's second report found that the treatment plan implemented by Dr X was not safe, that there were insufficiencies of documentation, instruction to the pharmacist, prescription completion, and liaison with the multidisciplinary team;

b. the independent clinical reviewer's first report identified clinical decisions had been made by Dr X without reference to other relevant staff and the decisions had had the potential to lead to an adverse outcome for the patient concerned; and

c. Mr Y's investigation identifies four workplace behaviours by Dr X that could amount to serious misconduct in his view.

[51] I am satisfied that there is enough material currently before the respondent to satisfy it, on reasonable grounds, that issues of health and safety are involved and that the alleged conduct, if proved, would mean the employee should not have direct contact with patients/clients.

[52] In addition, management does not yet have *sufficient information to make a decision on the matter*, as it has not yet concluded the final disciplinary investigation.

In light of this analysis, I believe that there is a strongly arguable case for the respondent that the disciplinary policy renders lawful the current suspension.

[53] As the respondent has a strongly arguable case that the suspension of Dr X is likely to be lawful, as it appears to be carried out in accordance with the terms of the disciplinary policy, the corollary of that is that Dr X has a weak arguable case at best that any disadvantage suffered by Dr X in her employment caused by the continued suspension under the terms of that Policy is unjustified. Applying the s103A test from the Employment Relations Act 2000, it appears to me to be strongly arguable that the respondent's actions, in continuing to suspend Dr X, are what a fair and reasonable employer could do in all the circumstances at the time the suspension is occurring.

[54] Having concluded that there is at best a weakly arguable case (that does not pass the threshold test) that the suspension is unlawful and that it causes an unjustified disadvantage, I am not obliged to consider the further aspects of the test set out above. However, in case I am wrong in that, I shall go on, briefly, to consider the other aspects of the test.

Is there an adequate alternative remedy available to Dr X?

[55] I am satisfied that no adequate alternative remedy is available to Dr X other than the lifting of the suspension, if the continued suspension were unlawful. Counsel for Dr X asserts (without full supporting evidence) that her enforced absence from the workplace and clinical practice is impacting her continued professional education, alienating her from her colleagues, and impeding her research. I accept that this is likely to be the case, and that monetary compensation is unlikely to be an adequate remedy.

Where does the balance of convenience lie?

[56] There is no doubt that Dr X is prejudiced by not being able to practise while she is suspended. However, in weighing the detriment she is suffering against the detriment of the respondent in allowing her to return to her practice before the resolution of the issues that have been investigated, I take note of the concerns expressed by one of the deponents on behalf of the respondent, its Chief Medical Officer. The Chief Medical Officer has stated the following in sworn affidavit form:

> *As a result, I consider that if a decision is ultimately taken that Dr X should return to work, that will need to be accompanied by a very carefully structured process that ensures that her clinical safety is restored, and her professional and personal relationships carefully managed.*

[57] Ms Z stated in her affidavit the following:

> *Notable in my mind are the findings that there were, in fact, serious conduct issues on Dr X's part. If, after the process is concluded, Dr X is to return to work, then in my view it will need to be carefully managed for the sake of all of Dr X, other staff, and patients. I would contemplate, for instance, mediation and team building if that is what transpires. That cannot feasibly occur now, in an ad hoc fashion.*

[58] I also note that the independent clinical reviewer's report states that Dr X's unsafe treatment plan for SB may have been due to the stress she was suffering after having been told of the complaints against her. If Dr X were to be reinstated to clinical practice now, with the final disciplinary hearing hanging over her, it is possible that she would suffer further significant stress which could impact upon her clinical judgement. Whilst one of the recommendations of the independent clinical reviewer that she be accompanied by an appropriate staff member would alleviate this risk, the respondent has deposed that the service does not have the resources to put in place such a regime. It would stretch beyond the powers of the Authority in my view to order the lifting of the suspension of Dr X subject to conditions (such as being accompanied when seeing patients) which the respondent deposes it does not have the resources to comply with. (Counsel for Dr X has asserted that it is national practice for practitioners in the relevant clinical area to be accompanied in consultations. However, I could not readily discern such a practice from the Practice Guidelines she provided after the investigation hearing).

[59] Taking into account the views of the Chief Medical Officer and Ms Z, what I have read of the report from Mr Y and the two reports from the independent clinical reviewer, and the inferences I draw from them of the risk of reoccurrence of further unsafe clinical practice, I am satisfied that the balance of convenience favours the continued suspension of Dr X in that the prejudice to the respondent in terms of ensuring patient and staff safety until the final outcome of the disciplinary process is known, outweighs the prejudice to Dr X of continuing to be suspended.

Overall justice of the case

[60] The respondent and Dr X tentatively agreed during the investigation meeting that the final disciplinary meeting would take place on 19 July 2012, subject to the availability of Dr X's clinical representative. The respondent was of the view that it could hold the meeting earlier, but this did not suit Dr X.

[61] Whilst it is regrettable that Dr X has been suspended for so long, in view of the fact that the disciplinary process is coming to an end, and in the expectation that the respondent will conduct that remaining part of the disciplinary process expeditiously, in a fair, reasonable and lawful manner, it is my view that the overall justice of the case favours the continued suspension of Dr X.

[62] Whilst I have not found that there is a sufficiently arguable case that the continued suspension of Dr X in the circumstances that currently prevail amounts to an unjustified disadvantage, it may be that aspects of the historical process that have kept her suspended for six months could amount to an unjustifiable disadvantage. To be clear, I am in no position to make a decision on that at this point. However, it is the Authority's role in this current application to consider whether Dr X should be allowed to come back to work in the circumstances that currently prevail, and I do not believe that the overall justice of the case requires that.

Has Dr X been unjustifiably prevented from visiting her daughter in Australia?

[63] The basis of this claim arises from an alleged agreement between Dr X and the respondent that she would accumulate time off in lieu and then use it to take extended leave to visit her daughter in Australia. The application before the Authority is for an injunction to prevent the respondent unlawfully prohibiting Dr X from visiting her daughter in Australia.

[64] There is no evidence before me that the respondent has unlawfully or unreasonably failed to allow Dr X to visit her daughter in Australia. The sworn evidence of the respondent is that, since Mr Y wrote on 6 March 2012 that he was open to discussing the possibility of Dr X being able to visit her daughter whilst being stood down, Dr X and her representatives have not formally requested that she may take leave to go to Australia. Dr X's counsel did not disagree with that proposition and, in any event, Dr X's daughter is coming to New Zealand shortly to see her mother.

[65] This appears to be a matter where the parties need simply to agree dates when Dr X can take leave in accordance with her contractual and statutory rights. I therefore decline to issue the interim injunction requested.

Summary

[66] Dr X's applications for an interim injunction lifting her suspension pending the outcome of the final disciplinary meeting is declined. Dr X's application for an interim injunction prohibiting the respondent from preventing Dr X from taking leave to visit her daughter in Australia is also declined.

Costs

[67] I am sympathetic to the application of the respondent that the costs of this application be addressed as a self contained matter, and not reserved pending conclusion of any substantive proceeding. Therefore, if the respondent wishes to claim a contribution towards its costs for opposing these applications, it should first seek to agree that with the applicant. In the absence of such an agreement, it should lodge and serve a memorandum within 28 days of the date of this determination. The applicant will then have a further 28 days within which to file a memorandum in response.

David Appleton
Member of the Employment Relations Authority