

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 548
3156722

BETWEEN GNE
 Applicant

AND JWT
 Respondent

Member of Authority: Helen Doyle

Representatives: Andrew Marsh, counsel for the Applicant
 Hugh Matthews, counsel for the Respondent

Investigation Meeting: 7 December 2021 at Christchurch

Submissions Received: On the day from the Applicant
 On the day from the Respondent

Date of Determination: 9 December 2021

DETERMINATION OF THE AUTHORITY

Non-Publication Order

[1] Both parties have make an application for non-publication and do not oppose the other's application.

[2] The Authority has a discretion to grant non-publication orders in clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act).

[3] The District Court has made an order for name suppression of the applicant. The Authority is advised that is subject to a High Court appeal. Mr Marsh has advised it may not be heard until next year.

[4] Justice should usually be administered openly. Taking into account the District Court order I am satisfied it is in the interests of justice to prohibit from publication the names of the applicant and the respondent in this proceeding.

[5] Until further order of the Authority the names of the applicant and the respondent and any details that may identify them are the subject of interim non-publication orders.

[6] The applicant and the respondent will be known by random computer generated letter strings as GNE and JWT. These letters do not bear any relation to the parties' real names

Employment relationship problem

[7] GNE has lodged a statement of problem with the Authority in which he says that his dismissal from his employment with JWT was unjustified and he seeks an order for interim reinstatement to his position pending the substantive determination of his claim. JWT says that GNE's dismissal was justified, and it opposes his interim reinstatement.

The approach with an application for interim reinstatement

[8] Section 127(1) and (4) of the Act provides as follows:

(1) The Authority may if it thinks fit, on the application of an employee who has raised a personal grievance with his or her employer, make an order for the interim reinstatement of the employee pending the hearing of a personal grievance.

...

(4) When determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the object of this Act.

[9] The object of the Act is found in s 3 and is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship.

[10] Under s 125 of the Act reinstatement is to be a primary remedy. Section 125(2) provides that the Authority must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy as specified in s 123.

[11] The Employment Court referred to the approach to an interim injunction in *Western Bay of Plenty District Council v Jarron McInnes*.¹ It was stated that the approach to the application for an interim injunction is well established. The applicant needs to establish a serious question to be tried, or in other words, the claim is not vexatious or frivolous. The balance of convenience needs to be considered with the impact on the parties of granting or refusing to grant an order. Finally, an assessment of the overall justice by standing back is required as a check.

[12] While the power to make an order for interim reinstatement is a discretionary one, the assessment of whether there is a serious issue to be tried is not and requires judicial evaluation.² The question of whether there is a serious question to be tried needs to be considered as two issues:

- (a) Whether there is a serious issue to be tried in relation to the claim of unjustified dismissal; and if so,
- (b) Whether there is a serious question to be tried in relation to the claim of permanent reinstatement.

The background against which these issues are to be assessed

[13] In order to assess the application for interim reinstatement it is necessary to set out the relevant background from the affidavit evidence of GNE and that from a director of JWT and the documents. The Authority is not required at this stage to determine any disputes or any issues about the justification of dismissal. I will indicate any areas of dispute between the parties as they arise.

[14] GNE commenced his employment in June 2020 with JWT as a manufacturing operator.

¹ *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36 with reference to the Court of Appeal in *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90.

² Above n1 at [8].

[15] An issue arose in September 2020 with GNE in respect of inappropriate text messages to a female employee. The matter was dealt with by an informal process and a letter of expectation was provided to GNE. The affidavit evidence did not refer to any repeat of the conduct since that time.

[16] In July 2021 GNE was arrested and charged with offences.

[17] On 20 July 2021 GNE met with the company director and the operations manager at JWT and told them that he had been charged and the general nature of the charges. Given the state of the criminal proceedings I have exercised a degree of caution in setting out what was said. In line with Mr Marsh's submission I limit this to GNE saying:

- (a) He had set up a false Facebook account and had been using that;
- (b) The police had charged him with possessing objectionable material;
- (c) He was not allowed access to the internet.

[18] Later that day a director of JWT states she was contacted by a detective who wanted to see if GNE had spoken to his employer. He referred to some particular interaction that GNE had and said that it was a serious matter.

[19] On 21 July 2021 JWT received a call from a woman who identified herself as the mother of a boy who the applicant was alleged to have contacted through the false Facebook account. She alleged amongst other matters that the applicant had used JWT's name and stated that he had a senior role at the company on his posts.

[20] GNE was on leave from 22 July until 28 July 2021. A director of JWT states that she took some steps to commence an investigation and potential disciplinary process around the allegations raised by the woman on the phone.

[21] When GNE returned from his leave on 28 July 2021 his wellbeing was checked and there was a meeting held with him on 30 July 2021. Notes were taken of that meeting. GNE advised amongst other matters when the court date was and that there could be some more charges. He also advised that he had name suppression.

[22] A director of JWT said in her affidavit that she decided to wait until GNE was in a better state of mind before addressing disciplinary matters and GNE returned to his usual work duties. She stated in her affidavit to the changes “not outwardly impacting on GNE’s work.”

Developments in October

[23] GNE continued at work until 8 October 2021 when following questioning by the police he was arrested on additional charges.

[24] A detective contacted a director of JTW over the weekend to say that on 9 October 2021 GNE had been arrested on additional charges.

[25] On 13 October 2021 the director was asked to come to the Police station and was advised that GNE continued to have name suppression. There was advice that the police were still investigating but the charges were more serious. The director in her affidavit stated she was told by police that GNE may be a risk to female staff.

[26] A letter was provided to GNE dated 15 October 2021 by JTW. It was written with knowledge that GNE was currently remanded in custody. It advised amongst other matters that:

Due to the uncertain nature of your return and the Businesses operational requirements the Business is now proposing that you are summarily terminated.

[27] The letter set out that prior to any decision being made, there would be an opportunity to respond to the proposal in writing by 19 October 2021.

[28] On 19 October 2021 GNE’s criminal lawyer advised that it was highly likely that GNE would be returning to work on 21 October 2021 and that an employment lawyer would be instructed for GNE. The company was advised that GNE had been denied bail and had another Court appearance on 22 October 2021.

[29] The director sent a further letter dated 21 October 2021 to GNE that stated amongst other matters that if he was granted bail there would need to be consideration of continued employment in light of the new charges which were understood to be “extremely serious.” There was reference to continuing the formal investigation relating to the criminal charges

against GNE in July 2021. It was set out in the letter that an investigation would cover allegations, the charges and the wider implications of GNE's arrest including:

- (a) Whether your new charges amount to serious misconduct.
- (b) Whether the new charges would bring the company into disrepute (serious misconduct).
- (c) Whether the conduct surrounding any of the charges amount to serious misconduct.
- (d) Whether you have misled us as to the nature of your offending.
- (e) Whether there are health and safety implications that we have to consider for our other employees.
- (f) In light of the above, whether we, as your employer have lost trust and confidence in you.

[30] The letter proposed suspending GNE whilst the investigation was undertaken. A meeting time and date was given for 26 October 2021 in the event that GNE was released on bail before any firm decision on the suspension was made.

[31] GNE was released on bail.

[32] On 25 October 2021 Mr Marsh wrote to the director and advised that he had been instructed and the meeting would need to be rescheduled to suit his availability. He asked for some information and set out that he did not consider there to be a basis for suspension. He set out that his client would stay away from work on 26 October on special paid leave and return on 27 October 2021.

[33] By letter dated 26 October 2021 an associate at Mr Matthews's firm, Mr Nick McKessar, provided Mr Marsh with the information he had requested and advised that GNE was not to attend work until there had been the opportunity to discuss the proposed suspension with him. Two dates were proposed to do so on 27 or 29 October 2021.

Meeting on 29 October 2021

[34] The meeting took place on Friday 29 October 2021. GNE and the director of JTW were present at this meeting with their legal representatives.

[35] A number of matters were discussed.

[36] At a point in the meeting Mr Marsh indicated that further questions would not be answered in relation to criminal charges at that time due to the prejudice that may have to the defence.

[37] GNE denied allegations of using or referencing the name of JTW or his position in relation to the charges he was facing.

[38] A concern was raised that GNE was a risk to other employees and that would need to be investigated further before deciding if he could safely return to work. GNE and his counsel were concerned that the police were making these comments and there was an indication that the fact police had would be taken further.

[39] There was some discussion about the ability to suspend.

[40] GNE was advised that something further from the police was expected the following week. GNE agreed to remain on paid special leave on Monday and Tuesday.

[41] At some point in the meeting it is likely that Mr Marsh advised that JTW could not proceed with its investigation until the criminal matters were at a stage where the defence would not be prejudiced.

Special leave is extended beyond 3 November 2021

[42] On Tuesday 2 November Mr McKessar wrote to Mr Marsh and advised that information was not going to be received from the police until possibly later that week. The special leave was extended to 8 November 2021.

[43] By email dated 3 November 2021 Mr Marsh responded and raised issues about a possible breach of his client's privacy with respect to police communications. He also stated there was no basis for GNE to be prevented from returning to work and that there were no valid health and safety concerns that could be referred to. He concluded by stating that GNE intended to return to work the next morning.

[44] In an email dated 3 November Mr McKessar advised that it was for the employer to decide whether GNE could return to work and that he was not to attend work the next day and his special leave would continue to 8 November 2021.

GNE is dismissed by letter dated 8 November 2021

[45] GNE's employment was then terminated by letter dated 8 November 2021 with no further recourse to GNE or Mr Marsh. The letter stated in the first paragraph:

We write further to the meeting held on 29 October 2021. At that meeting you made it absolutely clear, in the context of the discussion around suspension or otherwise that GNE would not be providing any comment whatsoever over the allegations which are now the subject of Police charges being faced by GNE. That has left JTW in the position of having to make decisions about GNE's employment on the information available to it.

Reasons for dismissal

[46] It was set out in the letter of dismissal that JTW was satisfied on the balance of probabilities as a result of a telephone call on 21 July that GNE did contact a boy and make reference to JTW either by offering the boy work at the company or stating that he held a senior position in the company. The basis for the conclusion was set out. There was the telephone call on 21 July 2021 from the mother of the boy and what was said by GNE at a meeting on 20 July about the charges after his arrest. Further that on 30 July 2021 when the director had advised GNE that someone involved in the matter had contacted the operations manager the day after he was arrested GNE did not deny the connection.

[47] It was set out in the letter that it was considered implausible that the person contacting the company would have been fabricating the allegation.

[48] There was also reference to the advice from the detective given the nature of the alleged offending and the charges and the potential risk to female staff.

[49] It was stated that the matters amounted to either misconduct or serious misconduct as defined in JTW's handbook. A section regarding unsatisfactory conduct and misconduct

towards customers, clients, the public or colleagues, objectionable or insulting behaviour, harassment, bullying or bad language was set out.

[50] Under serious misconduct there was reference to the part of the handbook that stated it was not possible to provide an exhaustive list of example of serious misconduct. One example of serious misconduct of bringing the employer into disrepute was set out. There was also reference to a clause that committing a serious breach of the terms of the agreement may result in termination of the employment without notice. A further breach which may have occurred was a clause relating to “exhibiting a professional and courteous attitude when dealing with members of the public.”

[51] It was stated that even if the allegations do not fall into the defined examples of misconduct/serious misconduct, the conduct nevertheless amounts to serious misconduct. There is reference to the potential to bring the employer into disrepute. Finally it was stated that JTW considers that given the conduct JTW has lost trust and confidence and the employment relationship is beyond repair.

Personal grievance raised

[52] Mr Marsh raised personal grievances including for unjustified dismissal in an email to Mr Matthews dated 10 November 2021.

[53] In respect of the dismissal he stated that there was a mistake about what was said at the meeting on 29 October 2021. He referred to the advice that his client was facing criminal charges and for him to say anything would potentially prejudice his defence. He set out that JTW was advised that it could not proceed with its investigation into employment issues unless and until the criminal matters were at a point where GNE’s defence would not be prejudiced. He also set out that there was no suggestion at the 29 October meeting that matters would proceed further than the suspension and JTW did not indicate an intention to dismiss without further discussion with GNE.

Is there a serious question to be tried in relation to the claim of unjustified dismissal?

[54] The right of an employee not to answer questions in an employment disciplinary process where there are criminal proceedings or the possibility of such has been recognised in the

employment jurisdiction. I accept Mr Matthew's submission that there is no automatic right to stay an employment investigation in those circumstances and a balancing exercise required as set out in an Employment Court judgment in *Wackrow v Fonterra Co-operative Limited*.³

[55] Mr Matthews referred to an Authority determination in submissions called *A v B* where a justified dismissal was found in the face of criminal proceedings where the employee exercised the right to silence.⁴ Mr Matthews referred to that determination on the basis that the firm stance by GNE on the employer's inability to conduct any investigation was incorrect and undermines any arguable case about process.

[56] I have considered the determination in *A v B*. It was concluded in that matter that it was not sufficient for an employee charged with criminal offending to not engage to the employer about its concerns in the employment relationship in a manner which still protects those rights in the criminal jurisdiction.⁵

[57] *A v B* had some distinguishing features to this matter. *A* did not raise the fact he was facing charges. There was then an agreement reached between the employer and employee that allowed the relationship to continue with information provided by the employee about allegations faced and the progress of those in the District Court. It was concluded that agreement to provide information was breached.

[58] In contrast with that case GNE did talk to JTW about the charges in July at some length and what he was doing. There was mention of court dates and name suppression.

[59] It is strongly arguable in this matter that the approach taken at the 29 October 2021 meeting for GNE to exercise his right to silence was consistent with a possibility of injustice in the criminal proceedings. Charges had been laid and there have been court appearances to deal with matters such as bail and name suppression. A possibility of a miscarriage of justice by providing an explanation about charges at the meeting on 29 October 2021 could not be ruled out. The explanation could involve a defence in the criminal proceedings.

³ *Wackrow v Fonterra Co-operative Group Ltd* [2015] ERNZ 402.

⁴ *A v B* [2014] NZERA Auckland 497 (Member Crichton).

⁵ Above n 4 at [28].

[60] Arguably it could have been difficult to have proceeded in a meaningful way with any employment investigation given the degree of overlap between the charges and employment issues. GNE did not however refuse to say anything at all. He denied the matters about disclosure of the company name and his role to the boy. He did not accept that he was a health and safety risk at the meeting on 29 October 2021 as confirmed in an email from Mr Marsh dated 3 November 2021. There was discussion about suspension.

[61] It is strongly arguable from the untested evidence that GNE was not aware at, or following the 29 October meeting that his employment may be in jeopardy due to serious misconduct. Summary dismissal had been raised initially by JTW as a possibility on 15 October in relation to GNE being in custody and operational requirements. There had been mention of some investigation into concerns and continued employment in the letter dated 21 October but the 29 October 2021 meeting was primarily to discuss suspension. Health and safety concerns were raised and JTW was to consider that further and obtain information from the police. There was no indication in the emails of 2 and 3 November following the meeting that GNE's employment was at risk.

[62] It is strongly arguable that JTW's actions in proceeding to investigate, reach findings of serious misconduct and dismiss without recourse to GNE was not what a fair and reasonable employer could have done in all the circumstances and that it was procedurally unjustified. This is notwithstanding GNE stated at the 29 October 2021 meeting that to say anything in the context of an employment investigation could prejudice his defence and that JTW should not proceed with its investigation until the criminal matters were at a point where there was no prejudice.

[63] It is strongly arguable any procedural unfairness overlaps with substantive justification.

[64] It is arguable that the investigation into the allegations that GNE used the name of JTW in relation to the charges was inadequate in light of GNE's denial and did not consider other possibilities as to where the information may have come from. It is arguable that the continued name suppression impacted on any findings of serious misconduct about bringing JTW into disrepute at that point.

[65] In respect of the additional charges, a director of JTW, stated in her affidavit to being advised by the police (a detective) on 13 October 2021 that there were still investigating and that the further charges were “far more serious” and from what was said to her she reached conclusions about what they involved.

[66] The director was advised by the police that given the seriousness of the further charges GNE may be a risk to the female staff. The police no doubt because of concerns raised on GNE’s behalf about breaches of privacy have not provided any further information to JTW or affidavit evidence to the Authority about what the concerns could be. Mr Matthews suggested the Authority may investigate this further with the police however I indicated that would not be appropriate in all the circumstances.

[67] Mr Mathews submits that in answering those concerns in his affidavit in reply GNE did not deny the nature of the charges as understood by the director. Arguably that was consistent with exercising the right to silence. GNE did confirm in his affidavit that that he has not been and will not be a risk to staff. He had worked from the untested evidence without incident between late July and 8 October 2021 during which time it was known that there may be further charges.

[68] In the absence of specific evidence beyond that of a discussion between the police and the director there is not a strongly arguable case that JTW could have concluded GNE is a health and safety risk to the staff.

[69] I conclude there is a reasonably strong arguable case about the justification of the process and substance of the dismissal and whether it was what a fair and reasonable employer could have done in all the circumstances.

Serious question to be tried in relation to a claim for permanent reinstatement?

[70] As set out earlier reinstatement is a primary remedy and under s 125 of the Act must be ordered if it is practicable and reasonable.

[71] Mr Matthews submits that there is no arguable case for permanent reinstatement. What may occur in the future is not as clear because of the exercise of the right to silence and the

criminal proceedings. It is a dynamic and changing situation. Nevertheless I do not conclude that reinstatement on a permanent basis is not practicable or reasonable at this time.

[72] I conclude at this stage on the untested affidavit evidence that there is an arguable case for permanent reinstatement that is not frivolous and vexatious.

Balance of convenience

[73] Under this head the Authority needs to consider the impact on the parties of the granting of, and refusal to grant, an order for interim reinstatement. I accept Mr Matthews's submission that the impact on third parties can be relevant to the weighing exercise to be undertaken.

[74] Mr Matthews submits that the police have expressed serious concerns for the safety of JTW's female staff. The director states in her affidavit that the majority of staff are female and employees work in close proximity to each other, the staff room is small and there are shared toilets. Having been informed by the police of concern for JTW's female staff I accept assurances from GNE do not easily alleviate that particularly when the right to silence has been exercised.

[75] Mr Matthews submits that where there are concerns for safety the balance of convenience ought to favour JTW with its health and safety obligations to their employees. The difficulty with that submission in this case is that there is no specific evidence beyond the conversation with a detective on 13 October 2021 to support why GNE may be of risk to the female staff at JTW and a health and safety risk at work. In his affidavit in reply GNE states that what the police have said is not based on any evidence.

[76] I weigh other aspects from the employment relationship to see if they indicate a risk. From the meeting notes on 30 July 2021 GNE had some insight into the initial charges and took some steps that could be seen as positive. GNE also states in his affidavit in reply that he has insight into a condition he has and he works hard to try to stop that becoming a major issue in saying something "slightly wrong or inappropriate" from time to time. In his affidavit in reply GNE stated that he accepted that his behaviour in September 2020 with the text messages was not appropriate and agreed not to repeat it. The affidavit evidence supported that there was no repeat of the behaviour and there was no evidence of any other work related inappropriateness

or performance issues. Materially there were no issues during the period referred to in the affidavit evidence when GNE worked between late July 2021 and 8 October 2021 after the initial charges were known about.

[77] I accept and acknowledge that the conversation with the police has caused concern to the director about the safety of the female staff. There is no specific evidence about the basis for the concerns before the Authority. An assessment of the employment relationship itself does not give cause for concern in that regard. The weight that I can therefore give the general concern expressed by police before bail was granted is very limited.

[78] I weigh as GNE stated in his affidavit in reply that an argument for continued name suppression on the basis of his position and possible impact on his employer will be unavailable if he is not reinstated on an interim basis. That could be a significant matter given the findings made at the time of dismissal about bringing JTW into disrepute. That is a factor in favour of GNE.

[79] Mr Marsh also submits that if GNE is convicted of any of the charges whether he is in employment will be a factor in determining his sentence. Mr Matthews submits this means that he is guilty to some degree of what he has been charged with. That is unknown at this stage because of the exercise of the right to silence. I do though place less weight on that matter in assessing the balance of convenience because there is an aspect of the unknown both in terms of what may happen and when it may happen.

[80] I do place weight on aspects of the applicant's claim that his dismissal was unjustified having been found to be strongly arguable. GNE is currently on a sickness benefit and receives a limited income. There are financial consequences for him which I weigh.

[81] Mr Matthews submits that if GNE is ultimately found to have been unjustifiably dismissed then he could be compensated by other remedies. The value however of the remedy of reinstatement has been emphasised by the Employment Court unless there is good reason not to order reinstatement.⁶

⁶ *Angus v Ports of Auckland Ltd* (No 2) [2011] NZEmpC 160.

[82] GNE's ability to honour his undertaking was not called into question. I accept that JTW will be in a position to meet any award made against it.

[83] I weigh that the alleged offending that gave rise to the charges was outside of the work place and I also weigh the position that GNE held. There was no suggestion from the untested affidavit evidence that he was in a position of having any authority at JTW.

[84] The date on which the Authority will be able to investigate the substantive matter may depend on the progress of the criminal matters. That is a factor favouring JTW.

[85] I have carefully considered all of the above matters. I conclude that the balance of convenience weights in the favour of GNE for interim reinstatement.

Overall interests of justice

[86] I have stood back and considered where the overall justice lies. GNE has established a strong arguable case for unjustified dismissal and an arguable case for permanent reinstatement. The balance of convenience factors favour him.

[87] The overall justice requires the making of an interim order for reinstatement.

Orders

[88] I intend to order reinstatement from Monday 20 December 2021, or as agreed by counsel. I am conscious of the fact that if there is a Christmas closedown at JTW there will be a break very shortly thereafter and the parties may agree another date for reinstatement.

[89] The situation between the parties could be changeable. I record that either party may return to the Authority with notice to the other if there is a situation that requires that.

[90] On the basis of the signed written undertaking as to damages provided by GNE and pending the determination of this proceeding or earlier order of the Authority GNE is to be reinstated to his former position from 20 December 2021 or on another date that is agreed to.

[91] GNE is to keep JTW advised about the date for the appeal of name suppression.

Further steps

[92] The parties were not directed to undertake mediation before the interim reinstatement application was dealt with because of the urgency.

[93] I direct the parties to attend mediation.

[94] Following mediation a telephone conference will be arranged to discuss the progress of the matter.

Costs

[95] I reserve the issue of costs and these will be dealt with after the substantive investigation.

Helen Doyle
Member of the Employment Relations Authority