

**Attention Is Drawn To The Order
Prohibiting Publication Of Certain
Information Referred To In This
Determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 496
3307900

BETWEEN NHL
Applicant

AND ZNO
Respondent

Member of Authority: Philip Cheyne

Representatives: Ashleigh Fechney, counsel for the Applicant
Susan Hornsby-Geluk and Anna Stesia Long-McLean,
counsel for the Respondent

Investigation Meeting: 5 August 2024 in Christchurch and by AVL

Date of Determination: 19 August 2024

PRELIMINARY DETERMINATION OF THE AUTHORITY

Non-Publication Order

[1] I earlier ordered non-publication of the applicant's identity, certain personal information regarding the applicant and the respondent's identity. Each party was assigned a randomly generated three-letter identifier, unrelated to their names.

[2] NHL seeks a continuation of the order. ZNO opposes the continuation, except with respect to the personal information referenced above.

[3] The Employment Court very recently released the judgment in *MW v SPIGA Limited*.¹ It was not necessary to seek any further submissions in light of the judgment. I take the judgment as in effect continuing the status quo in this jurisdiction: open justice is of fundamental importance; it may be departed from but only to serve the ends of justice; sound reasons are required to depart from open justice. The same principle applies at an interim stage and at a permanent stage, but the weight given to different factors may differ at different stages. There must be reason to believe that specific adverse consequences could be reasonably expected, based on evidence and/or reasonable inference. I must then assess whether such adverse consequences justify a departure from open justice.

[4] Here, NHL sets out the basis for his application in his affidavit. In part he relies on concerns that are reasonably commonly expressed by employees in his situation who advance legal claims against their employer. I take from *SPIGA Limited* that those general concerns, without more, are insufficient to support a departure from the principle of open justice.

[5] The more persuasive ground for a non-publication order is based on what I have called “certain personal information”. NHL is entitled to maintain privacy about that information and there is little public interest in it being available for publication. NHL’s right to privacy can be protected by a permanent order prohibiting the publication of that certain personal information. I prohibit the publication of the personal information set out at paragraph 24 of NHL’s affidavit dated 1 April 2024, except with NHL’s express permission.

[6] It is not necessary to continue the non-publication order covering the names of NHL and ZNO as part of the foregoing order. However, there are two further considerations. First, NHL should have an opportunity to challenge the decision not to continue the non-publication order with respect to his name. NHL and ZNO should also have a further opportunity to resolve their employment relationship problem confidentially through mediation. To allow for both those possibilities, I prohibit the publication of the name of the applicant and the name of the respondent, pending further order or 1 October 2024 (whichever is earlier).

¹ *MW v SPIGA Limited* [2024] NZEmpC 147.

Employment relationship problem

[7] NHL was employed by the ZNO fulltime from October 2022 as an operations manager with responsibility for a number of other employees of a shift.

[8] On 3 July 2024, a district operations manager (DOM) provided an “Outcome Letter” to NHL. The letter set out ZNO’s view that NHL’s conduct amounted to serious misconduct and that it was appropriate to terminate his employment as of 7 July 2024 with four weeks’ pay in lieu of notice. The letter ended a disciplinary process that had been initiated sometime earlier and conducted by an area operations manager (AOM).

[9] NHL raised a personal grievance with ZNO and has now applied to the Authority to investigate and determine his personal grievance claim. NHL seeks reinstatement as one of the remedies to settle his grievance. NHL also seeks interim reinstatement.

[10] ZNO says its decision to dismiss NHL was one a fair and reasonable employer could take in all the circumstances, following a fair and reasonable process. ZNO also opposes interim reinstatement.

The Authority’s investigation – Interim Reinstatement

[11] NHL supports his application for interim reinstatement with an undertaking as to damages and an affidavit with annexures. NHL also lodged a second affidavit, replying to ZNO’s affidavits.

[12] ZNO opposes interim reinstatement. There are affidavits from the DOM who finalised the decision to dismiss NHL and the AOM who had been involved in the disciplinary process and other matters with NHL beforehand.

[13] As is usual, urgency was assigned to consideration of the interim reinstatement application. Matters were not resolved, despite mediation.

[14] At the investigation meeting counsel both made submissions in support of the respective positions.

[15] The approach to interim reinstatement claims is well established. An applicant must first show that there is a serious question to be tried. There must be a serious question as to justification for the dismissal and in relation to the remedy of reinstatement. Next, I must consider where the balance of convenience lies by assessing the impact on the parties of granting or refusing the order. I should then consider the overall interest of justice.²

[16] This determination resolves the application for interim reinstatement. Findings are only for that purpose, based on the documents produced, the untested affidavit evidence and the submissions made by counsel.

[17] It is useful first to outline events to give more context. The outline is largely drawn from the documents before the Authority.

An outline of events

[18] NHL was employed fulltime on a salary and a shift pattern allowance to cover rostered hours of work. The agreement provided that remuneration was set to take account of all hours NHL was required to work.

[19] NHL took six weeks leave without pay approved by ZNO, starting in November 2023 until 20 December 2023. NHL then returned to work.

[20] On 12 December 2023, ZNO had written to NHL offering to vary terms in the employment agreement by way of a pay offer. NHL responded on 27 December 2023 and requested a meeting to discuss the offer, which he considered was insufficient to maintain market alignment and to recognise the value he brought to the organisation.

[21] A meeting was held on 18 January 2024. Present were NHL, his acting AOM and another AOM from a different area. The other AOM took the lead. NHL understood the meeting was to discuss his remuneration. There is nothing to suggest that ZNO foreshadowed other topics for the discussion.

[22] There is some conflict in the evidence about what was said. However, it is common ground that the AOM mentioned performance concerns. NHL also says that he was asked in

² *Alastair Humphrey v Canterbury District Health Board* [2021] NZEmpC 59 at [6] and [7].

general terms whether he had ever received an overpayment to which he replied that he had not, but would be happy to repay it if he had. The AOM's evidence by contrast is more specific about what was asked and said in response. It was left for the AOM to revert.

[23] On 20 February 2024 the AOM sent a letter to NHL. The letter referred to the remuneration review and performance concerns. It also mentioned that NHL had taken leave without pay from 11 November to 20 December 2023 but had been paid his normal salary because timesheets had not been submitted. The AOM said he was concerned that NHL had not brought up this overpayment with him. Records and policy were attached and a meeting was scheduled for 1 March 2024 for the AOM to understand what had happened and to discuss a plan for the recovery of the overpayments. The meeting was expressed not to be a disciplinary meeting but outcomes could include unspecified "disciplinary action".

[24] NHL's evidence is that in a subsequent discussion with ZNO's HR Advisor on an unrelated matter he told her he now realised he had been overpaid and would pay back the salary. The HR Advisor acknowledged the offer but said that the matter would be dealt with by the AOM.

[25] The AOM had to postpone the planned meeting for unrelated reasons and NHL was then on annual leave. During his annual leave, NHL sought advice about health concerns. That led to NHL being certified medically unfit for work until 4 May 2024. Thereafter, he resumed work but on a graduated return to work plan on alternative duties.

[26] Meantime, the AOM followed up by email. NHL responded on 12 April 2024. The response included an explanation about circumstances for the overpayment and confirmation that it would be repaid on mutually agreeable terms. The AOM acknowledged the response, which he said he was checking and would be in touch shortly.

[27] By letter dated 1 May 2024, the AOM scheduled a "formal meeting" for NHL to respond to allegations that he had breached ZNO's conduct and performance policy with regard to the salary overpayment, time record discrepancies (sick leave and annual leave) and his engagement with his staff and unauthorised tardiness. Some documents were enclosed.

[28] On 3 May 2024, NHL sent an email to ZNO's payroll office to ask if ZNO would agree to repayment by instalments.

[29] The formal meeting was held on 10 May 2024. NHL was represented. Matters were discussed. NHL was to provide some further information. Following the meeting, NHL's representative sent an email requesting further information, including payment instructions to repay the overpayment.

[30] The AOM emailed NHL and the representative on 17 May 2024 to follow up on NHL's further information. It became apparent that the AOM had not received the representative's 10 May 2024 email. NHL later repaid the overpayment and provided some further information, while the AOM responded to the representative's information request.

[31] On 29 May 2024 the AOM requested NHL to attend a further "formal meeting". The AOM provided some EROAD and ID card records to support his concern that there was no evidence to support NHL's earlier explanation regarding the time record discrepancies. Other documents were also provided.

[32] As agreed, the meeting was held by AVL on 6 June 2024. Following the meeting, NHL provided some further information on 6 June 2024 and additional material on 10 June 2024.

[33] The AOM wrote to NHL on 13 June 2024. The AOM set out the "Preliminary outcome" that NHL's conduct amounted to serious misconduct and that termination of his employment was warranted. NHL was invited to comment on the preliminary decision by email by 26 June 2024.

[34] NHL through his representative responded on 26 June 2024. The response included mention for the first time of personal information about NHL.

[35] The HR advisor acknowledged NHL's response and advised that the AOM was now absent from work, likely for a prolonged period. Responsibility for the final decision would be transferred to the DOM, who would review the feedback, consider all the information and who expected to reach a final decision by 3 July 2024.

[36] The DOM sent NHL an “Outcome Letter” on 3 July 2024. NHL’s employment was terminated as of 7 July 2024 for serious misconduct.

[37] NHL lodged this application on 4 July 2024.

There is a serious question to be tried as to justification for the dismissal

[38] The test for justification is whether ZNO’s actions and how it acted were what a fair and reasonable employer could have done in all the circumstances at the time, considered on an objective basis. That assessment includes whether ZNO sufficiently investigated the allegations before the dismissal, whether it raised its concerns before the dismissal, whether it gave NHL a reasonable opportunity to respond before the dismissal and whether it genuinely considered the response before the dismissal.

[39] At this point, I need to consider whether there is an arguable case that the dismissal was unjustified. ZNO says that it is not arguable, or only weakly arguable.

[40] ZNO concluded that NHL’s conduct amounted to serious misconduct. Its policy includes a non-exhaustive list of conduct amounting to serious misconduct. To paraphrase for current purposes: falsification of records, dishonesty and serious breach of policies or procedures that can have the effect of destroying or undermining trust and confidence would amount to serious misconduct. By comparison, misconduct is unacceptable or improper conduct such as failing to comply with rules, policies and procedures.

First Allegation – Salary overpayment

[41] ZNO determined that NHL had not been “proactive, or solution orientated in relation to the overpayment”. This followed from the preliminary decision, that had ZNO not raised it two months after the leave, NHL would not have made ZNO aware of the overpayment. The AOM considered that NHL had shown “no concern” and “took no accountability” for the timesheet failures that caused the overpayment. His view was that NHL had not shown he would “do the right thing”.

[42] NHL’s evidence is that he discussed with his manager prior to the leave the electronic system’s inability to let him submit timesheets for the entire duration of the intended leave.

NHL says that the manager did not tell him about any other process at the time. The manager left ZNO's employment during NHL's leave, but appears to have been spoken to during the disciplinary investigation. The reported response from the manager does not directly address NHL's point. I proceed on the basis that NHL may be able to prove this in due course. If so, it would undermine ZNO's conclusion that NHL's conduct involved falsification, dishonesty or a serious breach of policy amounting to serious misconduct.

[43] NHL's evidence is that he did not notice the overpayment in his bank account because it is a revolving credit facility covering a mortgage and with automatic payments to other accounts. ZNO regarded this as implausible, but at this point it is at least weakly arguable that NHL can establish that banking arrangements meant he did not notice the overpayment at the time.

[44] The gist of NHL's explanation was that he was not able to provide the missing timesheets beforehand or while on leave, then overlooked rectifying that failure on his return. It is arguable that a fair and reasonable employer could not have concluded that such conduct was so serious as to breach or undermine trust and confidence such as to justify dismissal.

[45] ZNO's view about NHL's actions after the timesheet failure was raised supported its serious misconduct conclusion.

[46] I proceed on the basis that NHL may be able to prove in due course that the specific overpayment was first raised with him on 20 February 2024. There is evidence to indicate that NHL then spoke about the overpayment with the HR advisor before the meeting scheduled for 1 March 2024, but she deferred discussion about repayment pending the meeting. The scheduled meeting was deferred because of the AOM's unavailability, then by NHL's prearranged leave and sick leave. Meantime, in his 12 April 2024 statement, NHL offered to repay on mutually agreed terms. ZNO did not propose terms for repayment then or in the 26 April 2014 email exchange.

[47] In its 1 May 2024 disciplinary letter, the AOM said that there had been "no communication, follow-up or payments formalised... to recover this overpayment". It is arguable that a fair and reasonable employer could not have attributed responsibility for the lack of any repayment arrangement to NHL as at 1 May 2024. The further delay from 3 May

to 17 May 2024 should arguably not be held against NHL. NHL reimbursed the overpayment on 21 May 2024 in accordance with the 17 May 2024 instructions.

[48] Arguably, a fair and reasonable employer could not have concluded that NHL was not “proactive, or solution orientated in relation to the overpayment” when NHL accepted he had been overpaid when it was raised with him, ZNO then deferred discussion about repayment terms, it eventually provided instructions for the repayment on 17 May 2014 and NHL repaid the amount in full on 21 May 2024. It would then be arguable that a fair and reasonable employer could not have concluded that NHL’s conduct was so serious as to breach or undermine trust and confidence such as to justify dismissal.

[49] There is evidence to indicate that the DOM was notified by payroll about the overpayment to NHL and he then delegated the task of “addressing this” to AOM, all prior to the 18 January 2024 meeting. If so, it is arguable that not putting the concerns to NHL until 20 February 2024 was not an action open to a fair and reasonable employer.

[50] Given the foregoing, it is not necessary to directly deal with the submissions for NHL with respect to the Wages Protection Act 1983 and common law principles.

The second allegation – Discrepancies

[51] ZNO says that it became apparent to the AOM that there appeared to be “multiple discrepancies” in NHL’s time recording and inconsistencies with his explanation. At this point, it is not clear why NHL’s explanation directed at the acknowledged overpayment of salary while he was on leave without pay and his response to some performance concerns would cause the AOM to “cross check” ZNO’s time and pay records “over the last twelve months”.

[52] The AOM in his 1 May 2024 letter set out “discrepancies” identified after a review of NHL’s annual leave and sick leave requests compared with ZNO’s time records. A spreadsheet under the heading “Performance Concerns” provided at the time characterised this as “dishonesty regarding the accuracies of documenting S/L and A/L taken incurring further financial gains not entitled to”.

[53] NHL proffered explanations for the identified discrepancies at the meeting on 10 May 2024 and on 17 May 2024.

[54] There is now evidence that, at an unspecified point, ZNO was conducting a district-wide audit of timesheets and that the AOM was notified by the DOM of 29 timesheet omissions or errors by NHL.

[55] ZNO in its 29 May 2024 letter included relevant EROAD and ID card information. The additional information was inconsistent with NHL's explanations with respect to a number of dates, given without that information.

[56] At the 6 June 2024 meeting and afterwards NHL changed his explanation with respect to a number of dates, having then received the EROAD and ID information. NHL also was able to point to his personal records such as bank statements, health records and the like.

[57] In the preliminary outcome letter, the AOM said it was "concerning" that NHL's views had now changed and were not accurately recorded at the time. ZNO now had to adjust its leave balances. The AOM considered that he had no confidence that NHL could accurately complete his own time records and monitor those of staff he supervised and "would own any issues" that came up again with regard to timesheets. He was "deeply concerned" that NHL was "not entirely truthful and changed [his] responses" after ZNO referred to the EROAD and ID card information.

[58] In the "Outcome letter", the DOM concluded that if the time record discrepancies had not been raised, NHL would not have rectified them and potentially continued to submit leave inaccurately. Responding to NHL's explanation that there was no "falsification", the DOM considered there was "misrepresentation". The DOM considered that NHL had not taken "ownership" of his behaviour but sought to "blame" it on the personal information just mentioned at a late stage. The late disclosure meant that insufficient controls had been put in place to support NHL. The DOM did not consider that NHL's responses adequately resolved ZNO's concerns. The DOM also referred to NHL's reported comments following receipt of the "Preliminary outcome" letter and more recently.

[59] NHL's explanation was that he forgot to fill in timesheets at relevant times, would remind his direct reports if they had and might have expected the same courtesy from his manager. Arguably, the DOM's response to the personal information did not address whether it supported the forgetfulness explanation. It is also arguable that the later release of EROAD and ID card information meant that NHL did not have all relevant material before being required to explain. Arguably, a fair and reasonable employer could not have considered that NHL's response to the additional material meant he had been untruthful in his initial explanation.

[60] There is an arguable case that a fair and reasonable employer could not have concluded that the discrepancies amounted to "misrepresentation", the established conduct was not serious misconduct so as to destroy or undermine the relationship of trust and confidence.

The third allegation – Performance issues

[61] In his 1 May 2024 letter, the AOM raised issues about whether NHL had met the standard and expectations of the role. There was some discussion on point on 10 May 2024. NHL requested further information.

[62] The 29 May 2024 letter referred to the concerns and included a table attributing different concerns to different managers. Other source material was provided under subject headings. Matters were discussed on 6 June 2024 and NHL later provided further responses.

[63] In the "Preliminary outcome" letter, the AOM considered that NHL had not met expected standards of performance, based on the feedback information provided. Arguably, this contributed to his loss of trust and confidence in NHL.

[64] The DOM in his "Outcome letter" on 3 July 2024 said that the feedback information related to the performance review conducted by the AOM in response to NHL's request for a salary review. The DOM acknowledged that it had not been raised previously with NHL by his former manager. He did not refer to it to support the decision to dismiss NHL.

[65] Overall, while the AOM has arguably not acted as a fair and reasonable employer could have acted with respect to the third allegation, the DOM appears to have disregarded the concerns.

Justification for the dismissal - summary

[66] It is arguable that the AOM communications show that he predetermined that NHL's time recording omissions and errors were intentional, rather than oversight and mistake.

[67] It is arguable that substituting the AOM for the "Outcome Letter" phase did not remedy that risk, given the AOM's oversight during the process.

[68] If a fair and reasonable employer could not have concluded that NHL's omissions and errors were serious misconduct, NHL would have a personal grievance of unjustified dismissal.

There is a serious question to be tried in relation to the remedy of reinstatement

[69] NHL seeks reinstatement. If it is determined that he has a personal grievance, the Authority must provide for reinstatement wherever practicable and reasonable.³

[70] For ZNO, I am referred to *Griffith v Sunbeam Corporation Limited*.⁴ In that case, the Employment Court said it was essential to trust and confidence that an employee is honest and open in responding to an employer's concerns about possible misconduct. The employee's actions there were regarded by the employer as a deliberate and sustained attempt to deceive the employer, a conclusion that the employer was entitled to reach. In the present case, if NHL has a personal grievance, it would turn on a conclusion that ZNO was not entitled to conclude that his actions were intentional. The findings in *Griffith* would not be relevant to assessing remedies in this case.

[71] Some reliance is placed on NHL not being proactive, with respect to the overpayment. This is advanced as counting against reinstatement. The submission for ZNO that NHL did not take steps to repay the overpayment until May 2024, does take into account the evidence

³ Employment Relations Act 2000 s 125(2).

⁴ *Griffith v Sunbeam Corporation Limited* 28/7/06, EC Wellington at [149].

about steps prior to the 1 March 2024 scheduled meeting and the April contact 2024 offer. The fact that NHL did not repay the overpayment until 21 May 2024 does not undermine reinstatement as a primary remedy.

[72] There is affidavit evidence that NHL confronted staff and undermined management after receiving the 13 June 2024 “Preliminary outcome” letter. It repeats comments in the DOM’s “Outcome letter” of 3 July 2024, but the issue had not been raised with NHL for his response. The DOM did not witness the events of 13 June 2024. In his affidavit in reply, NHL sets out events in some detail. At this point, there is no compelling reason to discount NHL’s evidence. Events on 13 June 2024 do not undermine reinstatement as a primary remedy .

[73] There is a submission that ZNO now has a reasonable concern about NHL’s trust in his employer, since he did not raise the personal issue advanced to help explain the time recording omissions and errors until very late. NHL said that was out of concern that he might be discriminated against. ZNO also says it should have been raised earlier if it had an impact on his work. On my assessment, this is a minor point. Many employees would be reticent about raising the personal issue until they had to, even those in a long-standing employment relationship.

[74] If NHL has a personal grievance, there is little at present to establish that it would not be practicable and reasonable to reinstate him.

[75] I find that NHL has an arguable case for permanent reinstatement.

Balance of convenience

[76] It is submitted for ZNO that interim reinstatement is not appropriate in a case where the only significant factor in support was the employee’s financial circumstances. *Pacific Blue Employment & Crewing Limited v B* is relied on.⁵

[77] In that case, interim reinstatement on a garden leave basis was sought. The pilot employee’s passenger transport licence had been suspended, as a result of which he could not

⁵ *Pacific Blue Employment & Crewing Limited v B* [2010] NZEmpC 112.

perform his normal work. The Court proceeded on the basis that there was little prospect that the pilot could lawfully fly before a substantive determination of his personal grievance claim would be issued. The Court concluded that damages would be an adequate remedy in those circumstances.

[78] The only effect of interim reinstatement for the pilot would have been to provide him with money at the expense of the employer, since other benefits of interim reinstatement to the employment were not available due to the suspension of the licence. The Court held that overall justice did not favour interim reinstatement.

[79] NHL seeks interim reinstatement to work, both for financial reasons (including the support of others) and the impact of unemployment on his mental health and his reputation. I accept that damages in due course should a grievance be established may not be an adequate remedy for such harm. The present case differs from the *Pacific Blue* case.

[80] I accept that ZNO is likely to be able to pay damages if NHL is not reinstated meantime but is later found to have been unjustifiably dismissed. By comparison, it appears less likely that NHL would be later able to meet his undertaking as to damages. This comparison would be typical and on its own does not prevent interim reinstatement.

[81] ZNO largely relies on its view that NHL's conduct and explanations during its disciplinary process mean it is unable to have trust and confidence in him. However, whether ZNO's action in forming that view was something that a fair and reasonable employer could have done at the time is yet to be determined.

[82] I accept that I need to consider the potential harm to ZNO of NHL returning to the workplace with managerial responsibilities and some autonomy in circumstances where there were errors and omissions in his own time recording. There might be some basis for ZNO's concern about whether NHL would perform his supervisory responsibilities to the required standard. At the same time, there is no evidence of unchecked errors or omissions by the staff who NHL supervised. In addition, ZNO is a large, established organisation with management structures to provide appropriate oversight.

[83] ZNO points to the evidence about NHL's actions on 13 June 2024 to submit that there is evidence of wider problems with NHL's relationships with colleagues and his trust in the organisation generally. The difficulty with the submission is that it is based on the hearsay affidavit evidence. NHL in his untested affidavit sets out a different account of his actions. It describes colleagues reacting in a considerate and caring manner towards NHL, as might be expected where there were good working relationships. For present purposes, there is no reason to think that workplace relationships should count against interim reinstatement.

[84] The balance of convenience favours NHL.

Overall Justice

[85] I am referred to *Auckland DHB v X*.⁶ There, the employer challenged the Authority's interim reinstatement order. The Authority had not placed much weight on the loss of trust and confidence that was the reason for the dismissal. The Court found that the employer had not made out the contended loss of trust and confidence in X's ability to perform his work in a compelling fashion. The Court was also unconvinced that X's integrity had been undermined and noted that he had made full and frank admissions when first confronted with the disciplinary allegations. ZNO contrasts this with NHL's responses, said to be "conflicting and implausible".

[86] Some of NHL's answers to the discrepancies allegation changed when ZNO provided additional information. Whether ZNO's actions in conducting its disciplinary investigation in that manner were how a fair and reasonable employer could have acted at the time is yet to be resolved, as is whether NHL's changed explanations reasonably undermined his integrity. By comparison, X was not called on to provide a further response to additional information about reasons for attendance or non-attendance at work over a period of time.

[87] NHL lodged this application promptly. He has an arguable case that he was unjustifiably dismissed, and an arguable case for permanent reinstatement as a remedy. The balance of convenience favours NHL. Overall justice considerations do not detract from ordering interim reinstatement.

⁶ *Auckland DHB v X* [2005] ERNZ 487.

Conclusion

[88] The following order is subject to NHL's undertaking as to damages. Pending further order of the Authority, ZNO is to reinstate NHL to his former position. To give the parties an opportunity to discuss NHL's reintegration into the workplace, this order has effect from Monday 26 August 2024.

[89] Costs are reserved.

[90] A further case management conference will be convened promptly.

Philip Cheyne
Member of the Employment Relations Authority