

Attention is drawn to the order prohibiting publication of certain information in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 140
3096692

BETWEEN P
 Applicant

AND Q
 First Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Maria Dew QC, counsel for the Applicant
 Andrew Schirnack and Emma Crowley, counsel for the
 Respondent

Investigation Meeting: 27 March 2020 by telephone conference

Submissions [and further 16, 25 and 27 March 2020 from Applicant
Information] Received: 23 and 27 March 2020 from Respondent

Date of Determination: 03 April 2020

DETERMINATION OF THE AUTHORITY

- A. The application by the applicant for interim reinstatement pending the Authority's investigation and determination of his personal grievance of unjustified suspension is declined.**
- B. Costs are reserved.**

Employment Relationship Problem

[1] The applicant is a senior consultant who is currently suspended from his employment while the respondent investigates complaints about him. The applicant's employment with the respondent is lengthy and his work record unblemished.

[2] The respondent is a large company providing various consultancy services both within New Zealand and internationally.

The Complaints

[3] The respondent has raised a number of issues with the applicant arising out of a serious complaint made about him by the Personal Assistant (the complainant) in his team. The complainant alleges serious sexual misconduct by the applicant following a work event, in circumstances in which she was vulnerable.

[4] The respondent says a number of issues have arisen as a result of the complaint, including allegations that the applicant has breached a number of its work policies concerning work relationships, functions and entertainment, drugs and alcohol and sexual harassment.

[5] The respondent considers the complaints to be very serious, and is concerned about the complainant's wellbeing. It wishes to provide the applicant with an opportunity to respond to the allegations, as part of its investigation, before reaching any conclusions. During the investigation the respondent considers it best in the interests of all concerned, that the applicant remain at home on pay.

[6] The applicant vehemently denies the details of the complainant's complaint against him. He says a consensual intimate event between him and the complainant occurred following a work event. It was a "one-off" and he denies any sexual harassment, misuse of alcohol, or abuse of position by him that would justify his dismissal.¹

Claim of unjustified disadvantage by the applicant

[7] The applicant claims that the respondent's decision to suspend him was unjustified and has resulted in damage to his career and reputation. He has raised an unjustifiable disadvantage claim under the Employment Relations Act 2000 (the Act) over the reason for his suspension from work, and how the respondent went about suspending him while it investigates the complaint made against him.

¹ Applicant's affidavit of 16 March 2020

Remedies sought

[8] The applicant has sought remedies including a substantive determination that he was unjustifiably disadvantaged by the unjustified suspension action of the respondent, together with compensation under the Act and costs.

[9] The applicant seeks urgent interim reinstatement to his position with the respondent, until the substantive claim for unjustified suspension is investigated and determined by the Authority. The applicant says this is necessary to ensure there is no further damage to his reputation and career.

[10] The respondent opposes the applicant's application for reinstatement. It says the interests of justice favour the rejection of the application.

Interim non-publication order

[11] During the course of the Authority's investigation meeting, conducted by telephone conference, the parties sought an order of the Authority, by consent, prohibiting the publication of the names and any identifying features of the parties to this proceeding and the complainant.

[12] I am satisfied from the information provided by the parties that it is necessary and appropriate to exercise my discretion to issue an interim non-publication order pending resolution of the substantive personal grievance claim by the applicant.

[13] Accordingly, I exercise my discretion and make an interim non-publication order prohibiting the publication of the names and any identifying features of the parties to this proceeding and the complainant, until further order of the Authority.²

[14] An order is also made preventing the Authority's file from being accessed without the prior written permission of the Authority.

Application for urgent interim reinstatement order

[15] The applicant's application for an interim reinstatement order has been determined on the basis of evidence given by affidavit and following consideration of submissions provided in writing and orally by counsel for both the applicant and the respondent. Each party filed 3 affidavits. The applicant filed an affidavit in support of his application for interim

² Employment Relations Act 2000, Schedule 2, clause 10.

reinstatement, an affidavit in reply to an affidavit filed by the respondent and a further affidavit addressing his ability to work from home while the respondent completes its investigation.

[16] The respondent filed an affidavit by its head of human resources (HR), a senior IT consultant and the person in a senior role to whom the applicant reports. This determination only addresses the applicant's application for interim reinstatement to the workplace, which is opposed by the respondent. It is important to emphasise that the evidence before the Authority at present is untested. Therefore, conflicts in the evidence cannot be resolved at this interim stage.

[17] As permitted by s 174E of the Act, this written determination has expressed conclusions necessary to resolve the interim reinstatement application but has not recorded all the evidence and submissions received.

Suspension

[18] After becoming aware of the incident between the applicant and the complainant following a work function, a meeting was held with the applicant.

[19] The head of HR, the respondent's CEO, and the respondent's lawyer attended the meeting. A handwritten record of the meeting was taken by the head of HR and a written transcript was subsequently prepared.

[20] The applicant says he was not aware of the nature of the suspension meeting, nor was he given any notice of it. At the meeting, the applicant was told of the concerns raised by the complainant. The applicant was told it was a serious allegation that he had "taken advantage" of the complainant while she was drunk.

[21] The applicant was shocked and denied the allegation. He was also concerned that he had not been asked for his explanation of what had occurred. The meeting notes record that the respondent informed the applicant that it wished to investigate the matter to understand what had occurred and that the "current thinking was to stand [the applicant] down on full pay, give you the opportunity to seek advice while we proceed with caution to investigate this matter".

[22] The applicant was requested for his views on suspension. From the notes taken at the meeting it is apparent this was not an option favoured by the applicant. He stated "...If being stood down impacts my integrity then I would rather not be stood down but understand there is a process

that you need to go through.”. There was some further discussion before the respondent asked for some time to consider the applicant’s views concerning suspension. The applicant left the room and after approximately 5 minutes was called back in. The applicant was informed that the respondent had considered his views but that it was in the interests of all that he be stood down on full pay and that no conclusions had been reached.

Confirmation of suspension

[23] A matter of hours following the suspension meeting, an email was sent by the respondent’s head of HR to the applicant confirming that it had:

... decided to stand you down from your duties on full pay until further notice while we investigate concerns raised by [the complainant] in relation to alleged events occurring on the evening of [date] February. As we assured you, we have not reached any conclusions about the concerns raised by [the complainant]. We are committed to fairness in this process. We will move as swiftly as reasonably possible.

[24] A number of instructions were given to the applicant regarding the respondent’s expectations about his behaviour while on suspension. The applicant was informed that his emails would be monitored, he would have access to his emails but was not to respond to work-related ones and that he may activate an appropriate “out of office” response message for his emails. EAP services were offered and the applicant was encouraged to engage a specialist employment lawyer.

[25] Following his suspension, the applicant, through counsel, raised his grievance that the suspension was unjustified and that he should be permitted to return to work on suitable conditions. The applicant has offered various options for his return to work following his suspension including:

- (a) Working from another company office location;
- (b) Not having any contact with the complainant;
- (c) Not discussing any matters relating to the complaint with any potential witnesses;
- (d) Not attending any work function involving alcohol; and
- (e) Any other work condition considered reasonable.

[26] The respondent has not been prepared to lift the suspension. It is of the view that the applicant's alleged behaviour is serious and if substantiated may justify dismissal. The complainant alleges serious harm and maintains the applicant's return to work would be difficult for her. The respondent says the investigation is proceeding as swiftly as possible and a prolonged investigation is not anticipated.

[27] The respondent says it is maintaining utmost discretion in order to protect the applicant's reputation.³

[28] The applicant wants to return to work and with the current lockdown in New Zealand as a result of Covid-19, believes he can work from home. The applicant says prior to the lockdown, his absence from work had led to gossip, rumour and speculation which he is concerned has damaged his reputation and his career. The applicant considers the longer he is unable to work for the respondent, the damage to his reputation and career will continue. This damage to his career and reputation would be significantly reduced if he was able to work from home.

Relevant law

[29] The Authority has discretion to order interim reinstatement pending an investigation and determination of the substantive matter.

[30] Section 127(4) of the Act requires the Authority to assess the interim reinstatement application having regard to the objects of the Act.

[31] The objects of the Act include "to build productive employment relationships through the promotion of good faith", by "acknowledging and addressing the inherent inequality of power in the employment relationship". Accordingly, interim reinstatement must be viewed and applied through that lens.

[32] Whether or not to order interim reinstatement requires an analysis involving three steps. The first step is that the applicant must establish he has an arguable case for both aspects of his claim, firstly that his dismissal was unjustified, and secondly if the Authority's eventual determination substantiates his claim, that he would likely be reinstated on a permanent basis rather than receive only monetary remedies.

³ Statement of problem, para 14.

[33] In the second step the Authority must assess the balance of convenience between the parties. This is an assessment of how best to regulate the positions of the respective parties until the Authority has completed its investigation and determination of the substantive issues. Factors in assessing the balance of convenience include whether effective remedies are available to the applicant, other than interim reinstatement, and the effects the applicant's interim reinstatement might have on the respondent and any third parties.

[34] In the third step, the Authority must take an overall or global view of the justice of the case. The Authority must decide what should be done to obtain the overall justice between the parties in the interim period. The strength and weaknesses in the parties' cases are a factor to weigh in reaching that conclusion.

[35] Finally, an order for interim reinstatement may be subject to any conditions the Authority thinks fit.⁴

Issues to be determined

First question: Is there a serious question to be tried?

(a) Does the applicant have an arguable case that his suspension was unjustified?

[36] The applicant bears the onus of establishing that there is a serious question to be tried, and that his substantive claims are not frivolous or vexatious. This test has a relatively low threshold because the employer has the statutory onus to justify the suspension and how it did it.⁵ The test for an arguable case concerns whether the applicant has some tenable (but not necessarily certain) prospect of success in his claim that he has a personal grievance for unjustified disadvantage arising from his suspension. Justification regarding the applicant's suspension will be assessed in accordance with s 103A of the Act, namely whether the respondent's actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the determination.

[37] There is generally no right to suspend an employee unless there is a statutory or express contractual right to do so.⁶

⁴ Employment Relations Act 2000, s 127(5)

⁵ Employment Relations Act 2000 s 103A.

⁶ *XYZ v ABC* [2017] NZEmpC 40 at [29].

Employment agreement

[38] The parties' employment agreement contains a clause with an express contractual right to suspend in circumstances where it is necessary for the respondent's "operational and business interests" or to "investigate an allegation of misconduct or for health and safety concerns", to require an employee to remain away from work on pay during the course of an investigation.

[39] The right to suspend requires the respondent under the employment agreement to give the applicant an opportunity to present his views on the matter prior to suspension. The clause provides that suspension will be "for a period no longer than is absolutely necessary". The clause also provides that if a suspension extends for longer than two weeks "due to matters beyond the Company's control ... the suspension may continue without pay".

[40] There is clearly a right for the respondent to suspend the applicant under the provisions of the employment agreement. Where circumstances are beyond the respondent's control, this right extends to continuing any suspension without pay. The latter option, because of the current circumstances of New Zealand's lockdown due to Covid 19, is not being considered by the respondent.

[41] The question then is whether the complaint about the applicant and the issues arising concerning possible breaches of a number of work-related policies justified the applicant's suspension. The applicant says that the process undertaken which led to his suspension was done with haste. There was no notice of the meeting or its purpose and he did not have the option to fully consider his options. He says that he has a lengthy period of experience with the respondent and has never put a foot wrong. The incident in question was a one-off incident which will never reoccur. He says the decision to suspend was not one open to a fair and reasonable employer in the circumstances. Further, the applicant says he has requested the respondent on a number of occasions since his initial suspension, to revisit its decision. On each occasion the respondent has confirmed that the suspension is to remain in place. The applicant says these are not the actions of a fair and reasonable employer.

[42] Counsel for the applicant says the employment agreement requires the suspension to be for no longer "than is absolutely necessary". It is now more than a month since the applicant's suspension and New Zealand's lockdown has stalled the investigation. This is adversely impacting the applicant and the conducting of a fair investigation. Relying on *Frank v Air*

*New Zealand*⁷ Counsel submits suspension is a “drastic measure”. In *Frank*, the applicant who had been verbally abusive on an international flight was suspended following a customer complaint. The Court considered the gravity of the consequences for the applicant and the fact that suspension had already gone on too long, justified the order.⁸

[43] The respondent says the allegations facing the applicant are serious and suspension in the circumstances was necessary. Other matters relevant to its decision to suspend included the safety and wellbeing of the complainant, minimising any damage to its reputation and to ensure privacy and discretion around the applicant’s reputation. The investigation is underway and steps are being taken to interview the applicant as soon as possible. In all the circumstances, the respondent says its decision to suspend was that of a fair and reasonable employer taking into account and balancing competing concerns.

[44] The Employment Court in *Hong v Auckland Transport*⁹ stated the following about suspensions:

The rules of natural justice also mean an employee generally ought to be told a suspension is being contemplated and the reasons why and given an opportunity to be heard before a decision is made.⁵ These expectations are flexible, taking into account the surrounding circumstances. Ultimately, the test in each case is the fairness and reasonableness of the employer’s conduct.⁶ The surrounding circumstances can include immediate safety issues as well as the length of proposed suspension. But natural justice almost always requires some consultation before the decision to suspend is made.

[45] The allegations are such in my view, that suspension was an action open to a fair and reasonable employer in the circumstances. The social reality in New Zealand and internationally at present, is that incidents of the nature complained about will undoubtedly come under very close scrutiny.¹⁰ This scrutiny will not assist any of the parties involved and will distract from a fair investigation.

[46] There are clearly a number of serious and disputed questions of fact and law regarding the incident which led to the suspension. There are also issues concerning the manner in which the suspension was handled. There was some consultation with the applicant about its view he

⁷ EC, July 1995, AEC65/95, per Goddard CJ

⁸ Memorandum of Counsel for the applicant, 16 March 2020

⁹ *Hong v Auckland Transport* [2019] NZEmpC 54 at [50], [65]-[67]; (*Singh v Sherildee Holdings Ltd t/a New World Opotoki* EmpCAuckland AC53/05, 22 September 2005 at [93].⁶ *Graham v Airways Corp of New Zealand Ltd* [2005] ERNZ 587(EmpC) at [104]

¹⁰ en.wikipedia.Me_Too_Movement and Dame Margaret Bazley, Independent Review of Russell McVeagh, March-June 2018

should be suspended. Whether this was sufficient and whether the suspension itself was justified are matters to be determined during a substantive investigation.

[47] There is an arguable case that the suspension may be found to be unjustified but in my view it is not strong. This finding should not be viewed as any indication of how the Authority will ultimately decide these arguable issues after conducting its substantive investigation.

(b) Does the applicant have an arguable case that if his suspension was held to have been unjustified, he would be granted permanent reinstatement?

[48] Section 125(2) of the Act provides that reinstatement may be ordered by the Authority if it is “practicable and reasonable to do so”.

[49] The Employment Court in *Hong v Auckland Transport*¹¹ considered the meaning of “practicable and reasonable”. It stated:

[65] Nevertheless, reinstatement must be both practicable and reasonable. Those are two separate requirements.

[66] Practicability is not given a narrow meaning. It means more than simply being possible. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible, and have the potential for the re-imposition of the employment relationship to be done or carried out successfully. A wide range of considerations may be brought to bear on the question of practicability, including matters which, although they may not have formed reasons for the dismissal, are nevertheless germane to the prospects of a renewed employment relationship.¹⁰

[67] Looking at reasonableness, the Court needs to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer, and in some cases, perhaps third parties who would be affected by the reinstatement. In the context of a parking officer, those third parties conceivably could include members of the public. The Court must broadly inquire into the equities of the parties’ cases insofar as the prospective consideration of reinstatement is concerned, and balance the interests of the parties and the justice of their respective cases.¹¹

¹⁰ *Association of Marine etc Engineers v Tasman Express Line Limited* [1990] 3 NZILR 946 (LC) at 957; *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 (CA) at 416-418; *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* [1992] 3 ERNZ 243 (EmpC) at 286.

¹¹ *Angus v Ports of Auckland Ltd*, above n 8, at [68]

[50] The impact on third parties is a relevant factor, including on the complainant and others who are to be interviewed as part of the investigation. The respondent's stated reason for the suspension was to enable an investigation to be completed without the applicant present in the workplace to ensure a fair process without interference.

[51] The situation at the time at which the applicant was suspended has changed as a result of New Zealand's lockdown due to the Covid-19 virus. The respondent says it is simply not practical for the applicant to be reinstated to the performance of duties. He can only access his emails and has no access to the respondent's other software, files and systems. This evidence was supported by the senior person to whom the applicant reports and by the respondent's IT consultant.

[52] The respondent, like most New Zealand businesses at the moment, is trying to provide its services in an environment where there is a lockdown. This is placing an undue burden on its resources and in my view it is not practical for the applicant to be reinstated in the interim.

[53] That finding should not be taken as any indication of how the potential remedy of reinstatement would be addressed by the Authority after a substantive investigation because at that stage the Authority will be better placed to assess whether or not the s 125 test for reinstatement has been met because the outcome of the respondent's investigation would likely be available by then.

Second question

Where does the balance of convenience lie pending the resolution of the unlawful suspension or unjustified disadvantage claim?

[54] This factor requires the Authority to assess the potential consequences and impact on the parties of reinstatement pending the resolution of the substantive unjustified suspension claim.

[55] I have found that the applicant has an arguable case which is not strong. The allegations against the applicant are serious and a full investigation by the respondent is well underway.

[56] The applicant is very concerned that the continuation of his suspension makes him the ongoing subject of rumour and speculation to which he is unable to respond. He is of the view that he could return to work and work remotely. This, he believes would mitigate against

speculation and rumour about why he has been away from work. The applicant is also concerned about his own reputational damage and damage to his career. The current lockdown prevents the applicant working physically at his workplace but also from being set up to work from home and to be productive. These are practical hurdles.

[57] New Zealanders not involved in essential services are currently being directed to work from home during the lockdown. The applicant is suspended on full pay. He has been able to say he is on sick leave. He can check his emails, but is not able to work. It is my view that this particular set of circumstances distracts focus from the applicant and his absence from work and would go some way to mitigating his concerns.

[58] It is my view that the applicant's concerns about his reputational and career damage can be addressed by damages if need be¹², or by the Authority's public findings in the substantive determination if the Authority accepts that the applicant's concerns have some merit. However, those concerns do not outweigh the risks the respondent identified as being associated with his interim reinstatement, including practical operational matters, distress to the complainant and ensuring a fair investigation without interference with witnesses, albeit indirectly.

[59] The respondent has already undertaken a large part of its investigation and was about to interview the applicant when the lockdown took place. There is now no ability for an interview face-to-face between the applicant and representatives of the respondent. However, the interview can be undertaken by remote means, in my view. The applicant is concerned for his privacy when being interviewed. This is a matter that with some careful logistics can be arranged by him and the respondent, in my view. The balance of convenience lies in favour of the respondent.

Third question

Overall justice

[60] The Authority's assessment of the overall interests of justice require it to stand back and review the overall position regarding interim reinstatement. Although the Authority has not assessed the complaints made against the applicant, it cannot objectively be said they were so clearly baseless that the respondent should not have asked the applicant to formally respond

¹² George v Auckland Council [2013] NZEmpC 179 at [131]

to them or should not have begun investigating them. The issues raised and the complaint from the complainant provided to the respondent put the clear onus on the respondent to investigate.

[61] The applicant's suspension is a temporary situation to allow the respondent to fully and properly investigate a number of complaints about the applicant in a way that also manages the potential risks that arose from the complaints. It is of course very important that the investigation by the respondent continues swiftly so that a conclusion can be reached by it as soon as possible.

[62] The overall justice of the matter therefore weighs in favour of allowing the respondent to continue its investigation while the applicant remains on suspension on pay. If the respondent's actions are found to have been unjustified then remedies will no doubt follow. The overall justice follows the balance of convenience and therefore favours the respondent.

Outcome

[63] The applicant's interim reinstatement application does not succeed because the Authority's assessment of the balance of convenience and the overall justice favour the respondent.

Costs

[64] The respondent, as the successful party, is entitled to costs, which are reserved pending the outcome of the substantive matter.

Anna Fitzgibbon
Member of the Employment Relations Authority