

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 204
3359123

BETWEEN RDS
Applicant
AND BQU
Respondent

Member of Authority: Nicola Craig
Representatives: Simon Mitchell, counsel for the applicant
Jeremy Ansell and Bridget Craig, counsel for the respondent
Investigation Meeting: 19 March 2025 in Auckland
Submissions and other information received: At the investigation meeting and 24 March 2025 for the applicant
At the investigation meeting and 21 and 31 March 2025 for the respondent
Date of determination: 11 April 2025

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] RDS is a teacher and worked at a high school (the school). BQU is the school's board of trustees and RDS's employer. Randomly identified letters have been used to identify each.

[2] A disciplinary process was undertaken about RDS's conduct in the workplace, described as relating to a lack of professionalism in related conversations with students

and with staff. Several meetings were held between BQU representatives and RDS and his representative.

[3] BQU decided to dismiss RDS without notice.

[4] RDS accepts that he made mistakes but does not accept that his conduct constitutes serious misconduct. An unjustified dismissal grievance is pursued along with interim reinstatement so that he can return to the workplace until that grievance is determined.

[5] BQU does not accept that the dismissal was unjustified and is strongly opposed to interim reinstatement.

[6] Affidavit evidence was provided from RDS, his union representative, A and B, who work at the school and are partners, a board member of BQU referred to as C who was involved in the dismissal process and the school principal D.

[7] An investigation meeting to heard submissions was held 19 March 2025. The affirmed affidavit of one witness was provided after that meeting, along with further documents sought by the Authority.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

What are the issues?

[9] The issues for determination in this interim reinstatement matter are:

- (a) Should a non-publication order be granted?
- (b) Is there a serious question to be tried - does RDS have an arguable case for unjustified dismissal and also for permanent reinstatement?
- (c) Where does the balance of convenience lie?
- (d) Where, standing back and considering the case, does the overall justice lie until the substantive matter is determined?¹

¹ For example, *X v Y Ltd and the NZ Stock Exchange* [1992] 1 ERNZ 863, *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 and *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* [2021] NZEmpC 59.

[10] Where a factor is relevant under more than one head, I have focused my discussion in one part of the determination.

Should a non-publication order be granted?

[11] BQU seeks extensive interim and permanent non-publication orders regarding the names of parties, witnesses and any other person referred to in this proceeding. Also sought to be covered is any information which would result in identification of those groups. RDS's position is that certain people need protection and that is difficult to do without a wider non-publication order.

[12] The Authority has the power to make non-publication orders.²

[13] The process involves identifying specific risks of harm then weighing the reasonable likelihood of occurrence against the open justice principle.³

[14] The open justice principle is seen as having greater weight at the substantive determination stage, as the parties will have had the opportunity to give oral evidence, be subject to cross examination and the Authority will issue final findings.⁴

[15] BQU asserts there are sensitive issues involving minors who may be harmed if their identity is revealed in or through publication of this determination. That provides a solid basis for not identifying those rangatahi in this determination.

[16] Further consideration is needed of whether identification of others involved, including the school itself, would lead to identification of those young people. The school is not large and some of those involved are closely connected. The difficulty here is that the identity of some of those more integrally involved is likely to be led to the identification of those rangatahi who would usually be covered by a non-publication order.

[17] I am satisfied that there is sufficient reason to grant an interim non-publication order regarding the names of all those involved and the school itself, in order to avoid identification of the rangatahi involved. Further consideration will be needed regarding a possible permanent order. A sufficient evidential basis would need to be established.

² The Act, Sch 2, cl 10.

³ *MW v Spiga Limited* [2024] NZEmpC 147.

⁴ *JGC v MBC* [2020] NZEmpC 193.

[18] On an interim basis, until further order of the Authority, the names of RDS, the school, the witnesses in this application and others named in documents filed including the rangatahi, along with identifying details, are not to be published.

[19] In order to assist with that order, there is less detail in this determination than might otherwise have been the case, particularly regarding matters most relevant to arguable case assessment.

What is RDS's history with the school?

[20] RDS worked for BQU for more than five years. There is little or no evidence before the Authority of problematic behaviour by RDS prior to last year. In that year however there were four incidents which were investigated – two resulted in letters of expectation given to RDS, one in a final writing warning and one in dismissal for serious misconduct. I note letters of expectation are not seen by the parties as having the status of disciplinary action.

[21] About four months before the events that lead to the dismissal, the school principal D issued RDS a letter of expectation noting D's view that RDS had failed to uphold the values of the school's teaching standards and code of conduct. It related to communication/s with student/s, seemingly being, to use my words, too harsh or critical.

[22] At the time the process which lead to the dismissal was starting, RDS was the subject of another process relating to events which on their face do not seem similar although C considers them both errors of judgement. This related to consumption of some alcohol at a school event and damage to a school vehicle. A final written warning was issued regarding those earlier events. C, who was also involved in the sub-committee on that process, indicated it could have resulted in dismissal, but RDS spoke about being in a dark place, apologised to the principal and agreed to make reparations. BQU decided not to rely on this final warning in the disciplinary process under examination in this determination. That warning was not yet issued at the time the events leading to the dismissal occurred.

[23] In addition, a week or so before the events which resulted in dismissal, RDS had posted on his personal Instagram story, which was publicly available, footage of students from the school completing exams. A letter of expectation was also issued

regarding not filming students for non-work-related purposes and putting them on personal social media, without express permission.

What events lead to the dismissal?

[24] On the basis of the affidavits and documentary evidence the following events occur:

- B sends in a formal complaint letter. It focuses on to a discussion RDS had with B's partner A, about A and B's child.
- The complaint refers to unprofessional conduct. It alleges RDS had unprofessional discussion with Year 11 students in the classroom about sexuality which RDS took as impliedly connected to B's child (a student, who was not present during the conversation). RDS teaches a subject not seemingly related to discussions about sexuality but commented, when asked in front of a small group of students, about his view if his girlfriend kissed another woman. His reply included a comment that it would make him wonder about her sexuality. The complaint's main focus is that RDS then approached A in an inappropriate place (the staff room with others present) and raised a personal and sensitive matter about the sexuality of A's child. What was passed on, in relation to that person's possible sexuality, is said to be false information.
- The principal D begins a process of identifying whether there is any substance to the complaint – speaking to A and students.
- D provides RDS's union representative with the complaint letter as D was already dealing with her regarding other RDS matters.
- BQU asserts there was a delay in progressing the matter due concerns about RDS and the school holidays.
- A statement by RDS was provided, where he apologises, recognising that he should not have approached A in the staffroom and identifying that he was trying to relay to the parent that the child was the subject of discussion between students. He saw A as friend and was trying to keep things light, smiling but that may have been misinterpreted.

- Sensing some mismatches, particularly regarding RDS's level of involvement in the student conversation/s, D has concerns and speaks to RDS's representative. There appears to have been an agreement to start the process to determine whether disciplinary procedures were needed after the two-week holidays.
- The principal begins obtaining formal written statements from students about discussion including RDS and A regarding the staffroom discussion and its impact on A. A indicates thinking RDS was sharing with her in a gossipy manner and seemed to be enjoying himself, rejecting RDS's indication he was trying to be a (supportive) friend.
- About six weeks after B's complaint was received, RDS is invited to a meeting. The principal, RDS and his representative and a notetaker meet.
- Further statements are obtained at RDS's request.
- The principal D concludes the matter could not be resolved informally and matters are referred to the Board which sets up a sub-committee to deal with the allegations. C, a co-opted lawyer and another person make up the sub-committee.
- The sub-committee meets with RDS and his representative to discuss the allegations and consider RDS's responses. C's impression is RDS presented contradictory comments about whether the matter was serious and appeared to have a different view to A and B about the closeness of their connection. The sub-committee proceeds afterwards to discuss an option of RDS taking some time away from school or other alternatives to dismissal but conclude they are not viable options.
- The conclusion of the sub-committee is that the allegations are substantiated and amounted to serious misconduct – the discussion with students was highly unprofessional and a serious error of judgement (topic and lack of connection with subject matter of the class) and the discussion in the staffroom was inappropriate, conducted in highly unprofessional manner and caused significant harm to a colleague and family. The finding is communicated to RDS.

- RDS's representative provides written submissions about the appropriate outcome, acknowledging that RDS had good intentions but made mistakes. Other options than dismissal are proposed, including a period of leave to receive support. The representative requests a meeting to discuss the matter further.
- The sub-committee discusses the responses. Later it meets by audio visual link with RDS, their representative and a support person. The sub-committee then has further discussion, concerned that RDS was trying to diminish what had occurred.
- A sub-committee member phones RDS's representative, mentioning dismissal. There seems to be a dispute about whether the representative said she would inform RDS and/or that she would await the written letter. The next day an email confirms the decision to dismiss, identifying as requested sections of the (Teaching Council) Code relate to the disciplinary issues. Before RDS is aware of the decision to dismiss he attends a pōwhiri at the school. A and B are not aware RDS will be present and decide to leave the event, A saying she was too anxious to stay.
- A letter setting out the reasons for dismissal is also sent a few weeks later, after mediation had occurred. Serious misconduct is described as including the conversation about sexual matters raised by students was inappropriate and potentially harmful to those students, and the conversation with A was highly unprofessional and cause significant distress to her and her family. The Teaching Council's Code of Professional Responsibility/Standards is mentioned.
- Since then, the school has been covering the role with various others including more senior staff, undertaking teaching responsibilities but describes continuation of this approach as unsustainable. A recruitment process begins.

[25] Over this time there were several contacts made on behalf of the school with A and B to check if they were prepared to be involved in a restorative process with RDS. Initially they declined, saying they were too angry or raw. Over several months they remained unwilling, feeling uncomfortable and not believing RDS had genuine insight

into his own behaviour. There had been a couple of informal attempts by RDS to apologise to A.

Is there an arguable case regarding unjustified dismissal?

[26] This is a relatively low threshold⁵. BQU does not see RDS as having a strong case for unjustified dismissal.

[27] RDS has expressed some acceptance of having made mistakes, acting unwisely and apologising when meeting with the principal at an early stage of the process.

[28] The primary question is whether RDS's conduct was sufficient to be characterised as serious misconduct. As the school decided not to consider the final writing warning given shortly after the events with A occurred, RDS's conduct in the discussions with the students and A to of itself be serious misconduct enough to justify summary dismissal. Submissions for RDs refer to other teachers' cases which concern situations assessed as more serious than what is involved here.⁶

[29] Criticism for RDS of the process focuses on:

- a failure to clearly identify what RDS's actions were and what was wrong with them
- options other than dismissal not being adequately considered
- the school not doing enough to encourage A and B to be involved in a restorative process. RDS expressed an interest in that early on but the school seemingly simply mentioned it to A and B without particular detail or encouragement.

[30] With an interim application reliance must be placed on untested affidavit evidence and that makes it difficult to appraise the genuineness of assessment when there is a questioning of interpretation, recollection and context.

[31] I am satisfied that there is an arguable case that RDS was unjustifiably dismissed, including whether RDS's actions were sufficiently serious to be categorised

⁵ *Humphrey* at n 1.

⁶ *Board of Trustees of Marlborough Girls College v Sutherland* CA 149/99, 16 December 1999, *Edwards v Board of Trustees of Bay of Islands College* [2015] NZEmpC 6 and *Campbell v Commissioner of Salford School*[2015] NZEmpC 122.

as serious misconduct warranting summary dismissal rather than misconduct or poor performance.

Is there an arguable case for permanent reinstatement?

[32] Again, this is a low threshold. Reinstatement requires an examination of whether it is reasonable and practicable to reinstate RDS, with the return of reinstatement as a primary remedy to be factored into this assessment.⁷ Another way of describing this is what is the feasibility or practical workability of re-imposing this employment relationship? It is not sufficient to show resistance and strained circumstances to avoid reinstatement.⁸

[33] In this case there is overlap between the application of the reasonable and practicable criteria.

[34] BQU is strongly opposed to reinstatement. It describes no longer retaining confidence in RDS's ability to meet basic professional standards and use good judgement when interacting with staff and students. Four situations have led to letters of expectation or disciplinary action, including dismissal, within a year.

[35] Difficulties for staff, students and the principal are emphasised, with unrest predicted.

[36] A is strongly opposed to working with RDS again. B is too, although there is likely less contact as they do not teach the same subject.

[37] At this point I note that the school has just appointed a new teacher in the same subject area as RDS. The new appointee has a fixed term arrangement and will teach a full range of classes at all year levels. At the time of advertising the role the school was aware that RDS was seeking reinstatement, albeit not necessarily on an interim basis. At the time the offer was made the interim reinstatement application had been made and the investigation meeting on that topic a week away. BQU argues that it needed to take action as the initial arrangements had been unsustainable and change was needed. However, the school was on notice and chose to proceed so I disregard any concern about it being unreasonable to reinstate RDS when there is a new appointee.

⁷ The Act, s 125.

⁸ *Angus v Ports of Auckland* [2011] NZEmpC 122 at [63] and *Air New Zealand Ltd v Hudson* (unrep) Employment Court, Auckland, AC 46/05, 17 August 2005, Judge Colgan at p 8.

[38] Some mention of difficulties with timetabling and class groups, but whether that is more than any changes required when there is a change in teaching staff is uncertain.

Conclusion of permanent reinstatement

[39] RDS worked at the school for a little over a term while the complaint was being considered and investigated. There were difficulties for A especially but all that needs to be established at this point is whether RDS has an arguable case for reasonableness and practicality of permanent reinstatement, and I conclude that he does, considering reinstatement's status as a primary remedy.

What is the balance of convenience?

[40] I now turn to weigh the interests of RDS against those of BQU.

RDS

[41] RDS describes loving his job and being active in the school community. They do not wish to work anywhere else. He has a local property intended to develop. There are limited employment options in the locale and much time and expense could be incurred in travelling elsewhere. This is however, something which others in the locale have to deal with.

[42] RDS also has family responsibilities, connected with the locale which would be negatively impacted by having to travel for work further away. RDS is worried about finding other work after being dismissed.

[43] RDS is finding his current circumstances quite challenging both financially and emotionally. A mortgage payment has been missed due to lack of income. RDS has been undertaking some manual labour but other possible jobs in the area are not nearly as well compensated as the teaching role.

[44] Others, who RDS has not told, are asking why he was dismissed. He feels like he has been dismissed from the wider community. RDS feels that he will lose that connection and relationship forever if not reinstated.

BQU

[45] I turn to weigh the detriment which BQU would or could suffer if RDS is reinstated.

[46] D the principal describes having lost trust in RDS. This is not a large school. The school has health and safety obligations to its staff, including A and B. RDS reported to A, and they would usually have had daily interactions.

[47] A describes her mental health having suffered. She found it distressing to have to interact with RDS daily, referring in one instance to breaking down and having to take a week of mental health leave. A feels no trust in RDS and thus rejected several offers of a restorative process. And does not believe RDS genuinely understood the impact of his actions. B describes the effect on partner A as profound.

[48] Others express concern about A remaining in the school if RDS is reinstated but she herself speaks specifically about resigning from her leadership function role, thus avoiding having to manage RDS, but still remaining a teacher.

[49] A refers to it being difficult to raise work related issues with RDS, including a number of concerns about RDS's work. The concern is that raising issues would look like retaliation.

[50] BQU would need to rejig its arrangements if BQU is reinstated, and this would impact on other teachers and students. Changes to teacher allocation however are something which schools have to deal with for a number of reasons.

[51] C, an experienced principal himself, describes pressures on a relatively new principal D and the leadership team if RDS is reinstated. Concerns about staff cohesion and morale are noted.

Concluding comments on the balance of convenience

[52] Both parties have some challenges here. Many of RDS's concerns are within the range of fairly typical consequences of dismissal. That does not take him outside the realm of reinstatement but there is an absence of strongly compelling factors in his favour. He also has been involved in a several incidents even if not closely themed. To his credit he has been undertaking counselling.

[53] BQU's greatest concerns seem to be those relating to A and B when no medical evidence is provided and the extent or basis for their suffering will need to be explored should permanent reinstatement be sought. BQU faces the difficulty of awkwardness resulting from reinstatement not always being seen as sufficient.

[54] The balance is fairly evenly weighed.

Where does the overall justice lie and what is the outcome?

[55] In terms of the merits, it is clear that BQU underwent a fairly extensive process with RDS which was largely documented. The details will likely need to be examined. Substantively BQU will have to establish that RDS's actions amounted to serious misconduct rather than just misconduct or poor performance and that must be done without consideration of any earlier disciplinary action, as the letters of expectation are not disciplinary, and the school did not rely on the warning regarding the van. It remains to be seen whether it can do that.

[56] Also to be considered is that the substantive matter could be heard in August 2025.

[57] I note the point made by Chief Judge Inglis in the *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* decision, that the re-introduction of reinstatement as the primary remedy “reflected a Parliamentary intention to raise the bar that employers would have to negotiate in order to provide that reinstatement was neither reasonable nor practicable”.⁹ As referred to above resistance and strained circumstances are generally not seen as sufficient basis for opposition.

[58] Also noted are comments in *Christieson v Fonterra Co-operative Group Limited* that caution must be exercised about statements that loss of trust and confidence in an employee as the basis for not reinstating on an interim basis, when the grounds for those statements have not yet been tested.¹⁰ This perhaps reflects a difference to the approach in *Western Bay of Plenty District Council v McInnes* before reinstatement returned as a primary remedy.¹¹

[59] RDS continued to work for a term after the complaint was received, seemingly without difficulty in terms of his work. Difficulties for A have been referred to above. RDS has expressed willingness to participate in restorative processes, but these have been resisted by A and B.

⁹ *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* above at n 1, at [42].

¹⁰ *Christieson v Fonterra Co-operative Group Limited* [2021] NZEmpC.

¹¹ *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36.

[60] BQU prefers, if interim reinstatement is considered, to have RDS reinstated to the payroll only. This is despite concern about the financial implications of having to pay two salaries, with a replacement appointed.

[61] The appointment of a new teacher deals with concerns about A and B's child being taught by RDS or potentially dropping the subject.

[62] Considering all of the above, I order BQU to reinstate RDS to the payroll within three working days of the date of this determination. Both parties are to co-operate with all reasonable steps necessary to allow that to happen.

[63] Unless other arrangements are agreed between the parties, RDS will on an interim basis be receiving the benefit of his salary but without providing his labour in return. If his dismissal is found to be justified or he is not entitled to any remedies, BQU may seek to rely on his undertaking to require him to pay back the salary paid under this order.

[64] It seems likely that there is work that can be undertaken by RDS without directly resuming regular teaching of classes in the subject he taught, whether that is relieving, marking or other duties. The parties are to discuss that prospect and wider resolution at mediation. Taking account the Easter break, I direct the parties to attend mediation by **16 May 2025**. The parties are free to return to the Authority if a variation to the interim order is sought.

Costs and next steps

[65] Costs are reserved.

[66] An Authority officer will contact the parties to arrange a case management conference to progress this matter.

Nicola Craig

Member of the Employment Relations Authority