

**This determination contains an
order prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 11
3129335

BETWEEN	RSY Applicant
AND	DYO Respondent

Member of Authority:	Vicki Campbell
Representatives:	Applicant in person Jill Coyle for Respondent
Investigation Meeting:	On the papers
Submissions Received:	13 January 2021 from Applicant 13 January 2021 from Respondent
Determination:	14 January 2021

PRELIMINARY DETERMINATION OF THE AUTHORITY

- A. Until further order of the Authority the names of the parties and any information leading to either party's identification is prohibited from publication.**
- B. RSY's application for interim reinstatement is declined.**
- C. Costs are reserved.**

Non-publication order

[1] The applicant seeks non-publication orders for his own name and details that would identify him, his family circumstances and other personal information. He is concerned about the negative effect on his career prospects if he is publically identified.

[2] The respondent does not oppose the application.

[3] The issuing of a non-publication order is discretionary and arises under with Clause 10(1) of Schedule 2 to the Employment Relations Act 2000 (the Act).

[4] In weighing up the exercise of the Authority's discretion I have had regard to the Employment Court decisions in *H v A Ltd*, *XYZ v ABC*, *Crimson Consulting Ltd v Berry*, and the Supreme Court decision in *Erceg v Erceg*.¹

[5] In *Erceg*, the Supreme Court emphasised that the starting point is the principle of open justice, and that a high standard must be met before that principle can appropriately be departed from.²

[6] There is a need to strike a balance between open justice considerations and the interests of justice that are served by the exercising of the Authority's discretion to suppress specified information in any particular case.³ There is an increasing awareness about the impact of publication on future employment prospects of individuals named in litigation and access to justice.⁴

[7] Having considered RSY's application carefully I am satisfied it is in the interests of justice to grant the application on an interim basis until a full and informed consideration of the merits of RSY's application can be undertaken.

[8] Until further order of the Authority the names of the parties and any information leading to either party's identification is prohibited from publication.

[9] Throughout this determination the applicant shall be referred to as RSY and the respondent shall be referred to as DYO. A random online letter selection tool has been used to select these letters which do not bear any relation to the party's real names.

¹ *H v A Ltd* [2014] ERNZ 38 at [78]; *XYZ v ABC* [2017] NZEmpC 40; *Erceg v Erceg* [2016] NZSC 135.

² *Erceg v Erceg* [2016] NZSC 135 at [65] and [69].

³ *Crimson Consulting Ltd v Berry* [2017] ERNZ 511 at [92] footnotes excluded.

⁴ *Elisara v Allianz New Zealand Limited* [2019] NZEmpC 123 at [63].

Employment relationship problem

[10] RSY was employed by DYO as a Project Manager. In May 2020 DYO proposed to place RSY on a performance improvement plan (PIP). After discussions between his Team Leader and RSY the proposed PIP process was implemented.

[11] The PIP process started on or about 15 June 2020. It was extended following the issue of a formal written warning on 20 July 2020. The process was extended for a second time following the issue of a final written warning on 1 September 2020. On 17 November 2020 RSY's employment was terminated on the grounds of poor performance.

[12] RSY claims his dismissal was unjustified. This determination addresses his application to the Authority for interim reinstatement to his previous position pending the Authority's investigation and determination of his substantive application.

[13] DYO denies RSY was unjustifiably dismissed. It maintains he was dismissed for poor performance following a five month process where efforts were made to address identified shortcomings in his performance and to turn his performance around including the issuing of two written warnings.

[14] RSY applied for, and was granted, urgency on his application for interim reinstatement. In support of his application for interim reinstatement RSY has provided an undertaking as to damages together with an affidavit.

[15] The parties agreed to the Authority determining the preliminary issue of interim reinstatement on the papers. These papers included the contents of the statements of problem and reply, affidavits and submissions made by the parties.

[16] The Authority has received an affidavit from RSY and DYO's Business Partner People and Capability.

Background

[17] RSY was employed in the infrastructure program team for DYO as a Project Manager. The team delivers both new and renewed capital projects to ensure compliant and sustainable infrastructure in accordance with DYO's Long Term Plan. In undertaking his role and to ensure required tasks were completed on time, RSY was required to use an online project management tool.

[18] On 2 June 2020 RSY was invited to a formal meeting to discuss areas of concern with his performance and a proposed PIP process.

[19] At the scheduled meeting on 8 June 2020 RSY was provided with a draft document which proposed work related goals to address the performance concerns. RSY was represented by his union organiser at this meeting. With the exception of the four meeting held during June and the beginning of July RSY continued to be represented by his union organiser throughout the PIP process.

[20] RSY's Team Leader identified three core areas of concern about RSY's performance:

- a) Understanding of project management principles;
- b) The risk associated with not following procedures and policies; and
- c) Overall productivity.

[21] The proposed PIP form included seven goals. Each of the goals identified the current state of performance together with suggestions on the steps RSY could take to demonstrate improvement. The form was completed at each of the formal review meetings and the steps RSY needed to take to demonstrate improvements were recorded during the meetings.

[22] Following the 8 June 2020 meeting RSY emailed his comments about the proposed PIP and sought clarification on the reasons for the PIP being proposed. DYO responded to his comments on 10 June 2020 and asked RSY if he wished to meet to discuss the responses prior to the PIP being implemented. RSY did not take up the offer of a further meeting and did not question the responses he received from his Team Leader.

[23] The first PIP meeting was held on Monday, 15 June 2020. Thereafter, meetings were held weekly when RSY met with his Team Leader to review the PIP form and discuss his actual performance against the agreed actions.

[24] The first formal review of the PIP took place on 16 July 2020. RSY was represented at this meeting by his union organiser. To bring his representative up to

date following the four previous weekly meetings, RSY's Team Leader took RSY and his representative through the meeting notes taken during the previous weekly meetings. During this formal review meeting it was suggested RSY's representative attend all meetings in future to ensure ongoing support to RSY and to ensure the time spent in the formal review meetings was used efficiently.

[25] During the first formal review meeting it was suggested a simpler format be used to document the PIP process and discussions. It was suggested that the existing goals be transferred to a new form and an opportunity would be made available for RSY to review the new document and discuss anything he might want to have included. RSY did not provide any feedback or seek to discuss anything contained in the new document.

[26] At each weekly meeting RSY was given the opportunity to discuss what he had been working on in relation to the agreed goals and he would receive feedback from his Team Leader. At the formal review meetings the Team Leader would provide her feedback and annotate the form with green (goal met), amber (some progress had been made but not enough to complete the goal) or red (goal was not met). This was referred to as the "traffic light" system.

[27] The process did not result in the desired improvement in performance. RSY was issued with written warnings on 20 July and 1 September 2020. On 6 November 2020 DYO, proposed to terminate RSY's employment on the grounds of poor performance, having become dissatisfied with the lack of any progress by RSY to improve his performance.

[28] In her letter advising RSY of the proposal to terminate his employment RSY's Team Leader advised RSY she had considered alternatives but did not consider any options to be appropriate. RSY was invited to provide his response to the preliminary views expressed in the letter and a meeting was scheduled for 12 November 2020 for that purpose.

[29] RSY was encouraged to bring a union or legal representative with him to the meeting and was advised he could raise any matters or options he believed should be considered. RSY was referred to DYO's Employee Assistance Programme for confidential support.

[30] The scheduled meeting took place on 12 November 2020. After hearing from RSY and after considering his feedback his team leader maintained the view that RSY's performance was substandard and did not meet the requirements of DY0.

[31] On 17 November 2020 RSY was given four weeks' notice of the termination of his employment. RSY was offered the option of working his notice period or being paid in lieu. RSY chose to work out his notice period.

Interim application

[32] An application for interim reinstatement involves the exercise of discretion. The basis on which applications for interim orders are to be decided can be summarised as follows:⁵

- a) RSY must establish there is a serious question to be tried, that DY0 has unjustifiably dismissed him and that I should order DY0 to reinstate him;
- b) Consideration must then be given to the balance of convenience, and the impact on the parties of granting, or the refusal to grant, an order;
- c) Finally, the overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

[33] The merits of this case, insofar as they can be ascertained at the interim stage, are relevant in the assessment of the balance of convenience and the overall justice of the case. The assessment relies on the as-yet-untested evidence in the affidavits and what can be discerned from the pleadings and documents provided by the parties.

[34] Any findings of fact made by the Authority in this determination are provisional only and may change later once the Authority has fully investigated the claims and after all witnesses have been examined about their evidence where necessary.

[35] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the evidence and submissions received I have carefully considered everything.

⁵ See, *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36 at [7] referring to the Court of Appeal in *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

Serious question to be tried

[36] The threshold for a serious question is that the claim is not frivolous or vexatious.⁶ The assessment of whether there is a serious question to be tried requires a judicial assessment of the evidence, albeit untested, and the submissions advanced.

[37] In a claim such as this the question of whether there is a serious question to be tried raises two sub-issues:

a) Is there an arguable case that RSY was unjustifiably dismissed?

and

b) Is there an arguable case in relation to the claim for permanent reinstatement?

Arguable case for unjustified dismissal

[38] An arguable case means a case with some serious or arguable, but not necessarily certain, prospects of success.⁷ The test for assessing whether a dismissal was justifiable is set out at s 103A of the Act. This section requires an objective assessment of whether DYO's actions and how it acted were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred.

[39] The Authority may take into account other factors as it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in RSY being treated unfairly.

[40] The Court of Appeal has confirmed that the effect of section 103A(3) is that there may be a variety of ways of achieving a fair and reasonable result and that the overall requirement is for an assessment of substantive fairness and reasonableness, rather than minute and pedantic scrutiny to identify failings.⁸

⁶ Ibid.

⁷ *X v Y Ltd and the New Zealand Stock Exchange* [1992] 1 ERNZ 863.

⁸ *A Ltd v H* [2016] NZCA 419 at [46].

[41] The Authority's task is to examine objectively the employer's decision making process and determine whether what the employer did and how it was done were steps that were open to a fair and reasonable employer.⁹

[42] RSY alleges the dismissal was unfair for the following reasons:

- a) The process was run like a mechanical system to generate a desired outcome;
- b) Good faith was not observed during the assessment of the goals as the assessments were based on personal choices and wishes;
- c) Goals were interpreted and manipulated to be a failure based on personal desires;
- d) Clear matrix was not provided regarding the traffic light system. No quality matrix was provided to explain how the quality of documents would be measured and to what level. Documents continued to fail the assessment based on quality and other mysterious things;
- e) Assessment comments were contradictory to the goals revealing change of goal posts to get a desired outcome;
- f) During the assessment, the goals were often mixed with each other;
- g) The process was not followed properly and the plans were not well structured;
- h) The goals were poorly written and not well defined;
- i) The weekly one-on-one meetings with the Team Leader were not result orientated to achieve goals and the standards for achievement were not clear;
- j) The Team Leader was not professional, was unstable and toxic;
- k) Goals were impossible to be achieved;
- l) Facts were intentionally ignored;

⁹ *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160; [2011] ERNZ 466 at [26].

m) There was a lack of standard operating procedures and sound leadership in the department.

[43] DYO denies all of RSY's allegations. It says RSY's Team Leader has extensive knowledge in the area of project management, and offered RSY additional assistance and coaching in the hope that the outcome would see a sustained improvement in his performance.

[44] Having reviewed the untested evidence it is apparent that RSY was provided with multiple opportunities for additional training and personal assistance by his Team Leader. He was offered opportunities to gain further clarification about the goals to be achieved and there was robust discussion regarding the application of the traffic light system for each of the goals set out in the PIP form. RSY took up some of the training and coaching opportunities but not all.

[45] There are issues that will need to be thoroughly investigated during the Authority's investigation into RSY's substantive claim. On the basis of the untested evidence and the documents lodged with the Authority, I am satisfied RSY has an arguable case that his dismissal was unjustified albeit it is not a strongly arguable case.

Is there an arguable case for permanent reinstatement?

[46] Under s 125(2) of the Act the Authority must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy.

[47] Practicability concerns the prospects for successfully re-establishing the employment relationship. It involves the question of whether RSY could be a sufficiently harmonious and effective member of DYO if he were ultimately reinstated to his former position or a similarly advantageous one. Practicability means more than simply being possible irrespective of consequence.¹⁰ A real risk of reversion to dysfunctional relationships is a factor to weigh in considering the practicability of reinstatement.¹¹

[48] DYO advances three grounds as to why it is neither practicable nor reasonable to reinstate RSY.

¹⁰ *Hong v Auckland Transport* [2019] NZEmpC 54.

¹¹ *Edwards v Board of Trustees of Bay of Islands College* [2015] NZEmpC 6 at [288].

Poor performance

[49] DYO submits RSY's previous poor performance and his unwillingness to accept that he had been underperforming makes the likelihood of a satisfactory, functional and sustained working relationship low.

[50] DYO had identified performance issues that it needed to address. Over a period of 22 weeks it attempted to turn RSY's performance around. The process included a significant number of opportunities for RSY to receive personal one-on-one training on all aspects of his role.

[51] After reviewing the untested evidence I have concluded RSY failed to avail himself of all of the opportunities provided to him. Had he done so, he may have received further clarification on areas of his performance where he clearly did not understand what was expected of him despite the efforts of his Team Leader to provide the necessary clarity.

[52] RSY does not have English as a first language. It is not clear on the untested evidence to what extent his lack of English comprehension impacted on his ability to understand what it was his Team Leader was seeking from him.

[53] It is apparent from the notes made from the regular meetings and RSY's comments within the PIP documentation that he was struggling to understand what he had to do in order to receive a "green" light for each of the goals. However, it is not apparent what steps he took between meetings to seek clarification from his Team Leader.

[54] In the event RSY is permanently reinstated I am satisfied on balance, that it is likely his continued lack of understanding of the expected standards of performance in his role may continue to be a barrier to him being successful.

Toxic team

[55] DYO submitted that RSY's reference to his Team Leader being unprofessional, unstable and toxic was hurtful for the Team Leader will make it difficult for him to be reinstated to the same position.

[56] In his submissions RSY asks that he be placed under a different Team Leader. DYO has not indicated whether this is possible or not at this stage of proceedings.

[57] In the absence of any evidence to the contrary I find it arguable that RSY could be accommodated if he is permanently reinstated under a different manager.

Impact on other team members

[58] DYO submits that if RSY is reinstated it will cause tension and frustration with RSY's team and some may consider leaving. This submission is not corroborated by any of the documents or untested evidence currently before the Authority.

[59] I am not persuaded by the unsubstantiated threat that some employees in RSY's team might resign if he is permanently reinstated.

Conclusion

[60] My assessment at this early stage is that RSY has an arguable case for permanent reinstatement but this is not strongly arguable. DYO has serious concerns about RSY's ongoing poor performance. It is possible that if he is permanently reinstated DYO would embark on a further PIP process and this may ultimately end in the same result. That is, the termination of RSY's employment.

Balance of convenience

[61] The balance of convenience weighs the potential effect on RSY if he were declined interim reinstatement against the potential effect on DYO if interim reinstatement were granted. In addition, under this head there is also a consideration of the merits of the application. In terms of this last point, I have concluded earlier that RSY's claims in respect of his unjustified dismissal grievance, and in respect of permanent reinstatement, are arguable, albeit, not strongly arguable.

[62] RSY submits there would be detriment to him if he is not reinstated on an interim basis. He says he has attempted to find alternative employment but without success. RSY has provided extensive evidence of the steps he has taken to secure alternative employment.

[63] RSY has a wife and a young baby. While he qualifies for state assistance the assistance is that of a sole parent benefit due to his wife being in New Zealand on a temporary visa which expires on 7 July 2021.

[64] RSY says that he has enough savings to survive for about two to three months but if the investigation and determination of his substantive claims takes longer than

that he would come under financial hardship. It is unlikely an investigation into the substantive claims will be held before June 2021.

[65] At the time of lodging his application RSY had booked flights to leave New Zealand on 14 January 2021. In an email to the Authority on 13 January 2021 he confirmed that his ticket is now open ended and he will remain in New Zealand in the interim.

[66] DYO submits that RSY's interests can be adequately protected by financial awards if he establishes an unjustified dismissal at a full investigation. I have taken from those submissions that DYO is also in a financial position to pay RSY's wages if the Authority were to reinstate him on an interim basis.

[67] DYO also raises concerns about RSY's commitment to ongoing employment. In making its submissions on this point it appears DYO is under the misapprehension that RSY is subject to a temporary work visa. That is not the case. RSY is in fact, a New Zealand citizen and holds a New Zealand passport.

[68] DYO is particularly concerned about the impact on RSY's team members who in the past have had to pick up additional work due to RSY's performance issues. For example other Project Managers manage projects valued at between \$800,000 and \$3,000,000. During 2020 RSY was managing projects valued at approximately \$140,000.

[69] DYO is also concerned about the costs associated with having to work through a further PIP process with RSY if he is reinstated. It continues to hold genuine concerns about RSY's performance which will need to be addressed.

[70] Weighing up the relevant detriment or injury each party will incur if an interim injunction is granted or not, I find the balance of convenience favours DYO. I am satisfied if RSY is denied interim relief, and he is subsequently successful in his unjustified dismissal claim warranting permanent reinstatement, damages will be an adequate remedy.

Overall Justice

[71] I now stand back and consider where the overall justice lies. I find that the overall justice of the case requires that the interim reinstatement application be declined.

Costs

[72] Costs are reserved pending the substantive investigation of this matter.

Vicki Campbell
Member of the Employment Relations Authority

