

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 222  
5630059

BETWEEN                      ROSS VICTOR ROBERTSHAW  
Applicant

A N D                              BAY OF PLENTY DISTRICT  
HEALTH BOARD  
Respondent

Member of Authority:        Rachel Larmer

Representatives:              Applicant in person  
Gail Bingham, Advocate for Respondent

Investigation Meeting:        On the papers

Date of Determination:        04 July 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     Mr Robertshaw was employed by the Bay of Plenty District Health Board (BPDHB) as a radiology systems administrator on 25 February 2011.

[2]     Mr Robertshaw says that he has suffered serious health issues as a result of stress due to what he considers to be the BPDHB's "*hostile work environment*". Mr Robertshaw says that on two occasions (November 2013 and September 2014) his health suffered to the extent that he was unfit to work, which he attributes to unresolved workplace issues.

[3]     Mr Robertshaw says he has experienced hostility from a co-worker who I shall refer to as A who was subsequently put in a position of responsibility over Mr Robertshaw.

[4] Mr Robertshaw made a complaint on 17 August 2015 that he was being adversely affected by workplace hazards and an unsafe work environment and that his concerns about this had not been appropriately addressed by Ms Gill Wright.

[5] BPDHB investigated this complaint and determined that Mr Robertshaw's concerns were not upheld. BPDHB issued Mr Robertshaw with a letter dated 16 September 2015 ("the outcome letter") which stated that although he had apparently advised his employer that he did not intend for an email he had sent dated 11 August 2015 to serve as a complaint, his employer was treating it as such due to the seriousness of the allegations he had raised.

[6] BPDHB's outcome letter recorded that Ms Wright had advised the investigator that Mr Robertshaw had made allegations of bullying about A but had not provided information to support that claim. BPDHB concluded that Ms Wright had appropriately addressed Mr Robertshaw's concerns and that she had repeatedly requested further information relating to his complaints about A, so those could be investigated.

[7] The outcome letter also identified that in the absence of information regarding an alleged workplace hazard, Mr Robertshaw's complaints about that were unable to be substantiated at that time. The conclusion reached by BPDHB, as recorded in the letter of 16 September 2015, was that breaches of the shared expectations or the employee health and safety policies could not be substantiated and that if Mr Robertshaw had any new concerns these should be reported via the REF process.

[8] BPDHB recorded in the outcome letter that it considered the matter closed. Mr Robertshaw was also reminded that allegations of workplace hazards and unsafe work environments were considered serious and would be treated as such and so if he had any further concerns about such matters, then he was required to raise those in an REF.

[9] In May 2015, Mr Robertshaw was advised by BPDHB that he was required to undertake a performance development plan (PDP). Mr Robertshaw says that although he initially objected to the plan he cooperated in doing what was required of him and that Ms Wright portrayed to him that she was happy that her expectations were being met.

[10] In November 2015, BPDHB decided to terminate the informal PDP and to undertake a formal performance management plan (performance management) for Mr Robertshaw. Mr Robertshaw claims that that decision unjustifiably disadvantaged him and was a breach of contract.

[11] On 05 April 2016, Mr Robertshaw left work with the permission of his manager because he appeared tearful and said he was in no fit state to continue at work that day. Ms Wright emailed Mr Robertshaw that day expressing concern about his statement that he felt unsafe in the work environment and asking him to explain what he felt was unsafe. Mr Robertshaw was also offered the use of EAP services if he required it.

[12] Mr Robertshaw says that he left work because of what he says was the “*immense pressure that had been building up*” over the past few months which he attributes to the way he had been treated by Ms Wright. Mr Robertshaw says he believed he was on the edge of having another significant psychological episode which caused him to believe that he needed to cease work immediately to prevent a serious risk to his health and safety.

[13] The lead up to this situation was that Mr Robertshaw strongly objected to the formal performance management of him. He tabled written objections to this on 25 January and 23 February 2016.

[14] Mr Robertshaw believed that a response from Ms Wright on 29 February 2016 to the concerns he had raised about the formal performance management process was “*wholly dismissive*” of his objections. Mr Robertshaw believes that the formal performance management process was “*very unsafe and unhealthy*” for him and that he needed to go home to avoid having a nervous breakdown.

[15] Mr Robertshaw responded by email the next day alleging “*serious wrongdoings*” by Ms Wright, A, and Ms Bingham. Mr Robertshaw said he wished to make a protected disclosure in accordance with the Protected Disclosures Act 2000 and that he was in the process of seeking advice and guidance from the Ombudsman about that. Mr Robertshaw advised he would not be available for work on 06 April 2016 due to being engaged in preparing this protected disclosure but that he considered he had sufficient time in lieu and/or annual holiday left to cover the six

hours of work he had missed on 05 April and the eight hours he intended to take off work that day (being 06 April 2016).

[16] Mr Robertshaw in his email to Ms Wright of 06 April stated that he did not feel safe to return to work until his protected disclosure had run its course (I note that a protected disclosure had not been made at that point), or the formal performance management of him was abandoned or suspended. Mr Robertshaw offered to work remotely but was not going to attend work as normal.

[17] Ms Wright responded to Mr Robertshaw on 06 April 2016 saying he had not been granted permission to work remotely so he needed to attend work. Ms Wright warned Mr Robertshaw that he was refusing to comply with the formal performance management which could lead to disciplinary action. Mr Robertshaw was also advised that BPDHB had a “*significant service risk at the present time*” which meant he was required to be at work.

[18] Mr Robertshaw responded to Ms Wright by email dated 07 April 2016 which advised that he considered the formal performance management of him was unjustified and incompatible with a safe and healthy work environment. Mr Robertshaw said that any disciplinary action taken in relation to his alleged failure to comply with his formal performance management plan would be substantively unfair because the performance management plan was unfair.

[19] Mr Robertshaw reiterated that he was unable to return to the office “*until it is safe for me to do so*”. He said he wanted to return to work as soon as practicably possible but believed he was “*currently prevented from doing so due to your failure to provide me with a safe and healthy work environment*”.

[20] Ms Wright responded to Mr Robertshaw by email that morning advising that:

*“Given that you have not provided me with specific evidence as to why you consider your workplace unsafe I am giving you a lawful instruction to physically attend the workplace by 2pm tomorrow. A failure to follow this instruction will lead to a formal investigation.”*

[21] Mr Robertshaw did not return to work.

[22] On 08 April 2016, BPDHB advised Mr Robertshaw that it considered he had refused to follow a lawful instruction to attend work when rostered to do so which was issued by Ms Wright so it had commenced a formal investigation into whether his

behaviour constituted serious misconduct. Mr Robertshaw was advised that he was suspended for seven working days on pay to enable an investigation to be conducted into the disciplinary concerns. BPDHB stated that:

*“Suspension is considered appropriate in this situation to ensure both your safety and the safety of others.”*

[23] On 13 April 2016, Mr Robertshaw wrote to the BPDHB investigator, Ms Bronwyn Anstis, Business Leader, Surgical, Anaesthesia & Radiology Services, BPDHB, saying he believed he had the legal right to remain away from work because he considered that Ms Wright’s instruction of 07 April 2016 to return to work contradicted provisions of the Health & Safety at Work Act 2015 and therefore was not a lawful instruction, so he denied he had engaged in serious misconduct.

[24] A disciplinary meeting was held on 14 April 2016 which was attended by Ms Anstis, Ms Roz Jackson, Mr Robertshaw and his partner who was attending as his support person. During this meeting Mr Robertshaw stated that he felt unsafe at work and believed that he was at risk to himself and believed that a serious safety risk existed according to the Health & Safety at Work Act.

[25] Mr Robertshaw’s position was that if he believed it was unsafe and he was at risk of serious harm, then he was not required to attend work and the instruction that he do so was not a lawful or reasonable instruction.

[26] Mr Robertshaw provided written feedback in response to a copy of the notes provided from the 14 April 2016 disciplinary meeting. This recorded that his position was that he had not engaged in serious misconduct because there was no lawful or reasonable instruction to him to attend work because he believed that returning to work under the current conditions would have exposed him to risk of serious harm to his health and safety.

[27] Mr Robertshaw also referred in his written feedback dated 19 April 2016 to his emails with Ms Wright on 05, 06 and 07 April which referred to his belief that his workplace was unsafe for him in light of his complaints about health and safety issues. Mr Robertshaw stated that he believed that Ms Anstis’ investigation was not fair or objective and he asked that the matter be investigated by an *“unbiased external investigator or dropped”*.

[28] Mr Robertshaw was provided with a copy of Ms Anstis' draft investigation report which was dated 21 April 2016. Mr Robertshaw provided written feedback in response to this draft report. He again reiterated that he did not believe he had engaged in serious misconduct because he believed returning to work would have exposed him to a serious risk to his health and safety which meant that Ms Wright's instruction that he return to work was not lawful or reasonable. Mr Robertshaw ended his written response by saying:

*"Since your predetermination is now blatantly evident, in the interests of good faith, equity and fair process, I would request again, that this case either be investigated de novo by an unbiased, external (MBIE) investigator, or dropped."*

[29] Mr Robertshaw also proposed that the formal performance management plan be temporarily suspended until it could be "*made safe*" for him to participate in.

[30] Ms Anstis issued her final report on 02 May 2016. This recommended that the allegation of serious misconduct arising from Mr Robertshaw's failure to follow a lawful instruction was upheld and there was a recommendation that a disciplinary process be commenced.

[31] Mr Robertshaw provided written feedback on the final investigation report on 05 May 2016. He disputed the findings that had been made against him and suggested that it was unfair and unreasonable for BPDHB to engage in a disciplinary process until the parties had attended mediation first. He again proposed that the formal performance management process be suspended until it could be made safe for him to participate in.

[32] Mr Pete Chandler, Chief Operating Officer, BPDHB, wrote to Mr Robertshaw on 9 May 2016 stating that he would like Mr Robertshaw to attend a meeting with Sherida Cooper, Business Leader for Hospital Support Services, on 9 May 2016 to discuss the recommendation that disciplinary action should be taken against him.

[33] Mr Chandler also advised Mr Robertshaw that he should be aware that "*appropriate disciplinary action may include a recommendation to the Chief Executive that you be dismissed*". The meeting with Ms Cooper was scheduled for 12 May 2016 and Mr Robertshaw was advised of the right to bring a representative and/or support person to the meeting. Mr Robertshaw's suggestion that the parties attend mediation before the disciplinary process was concluded was declined.

[34] Mr Robertshaw tabled written submissions at the disciplinary meeting on 12 May. He reiterated that he believed Ms Wright's instruction was unlawful and/or unreasonable and that he could not have engaged in serious misconduct when he believed returning to work created a serious risk of harm to him.

[35] Mr Robertshaw said that he felt he had not had his feedback about these matters appropriately considered and that he believed that Ms Anstis' investigation was predetermined and substantially and procedurally unjustified.

[36] Mr Robertshaw said that if his arguments were not accepted, then he wanted to be heard in person by the Chief Executive Officer before a final decision was made about his ongoing employment. Mr Robertshaw also again asked that the matter be re-investigated by an "*unbiased investigator*" and that the formal performance management plan be suspended.

[37] Mr Chandler wrote to Mr Robertshaw on 20 May 2016 advising him that his failure to attend work when required to do so was a breach of his contractual obligations and that Ms Wright's specific request that he attend work was a lawful instruction.

[38] Mr Chandler advised Mr Robertshaw that BPDHB did not believe he had provided substantive evidence for allegations that his work environment was unsafe. Mr Chandler advised that he supported the recommendation of Ms Cooper that Mr Robertshaw be dismissed and that Mr Chandler would be writing to the Chief Executive to advise her of those views.

[39] Mr Robertshaw is due to meet the Chief Executive about these matters tomorrow (05 July 2016).

[40] Mr Robertshaw has applied for an interim injunction restraining the Chief Executive from acting on Ms Cooper's recommendation that Mr Robertshaw be dismissed.

### **The issues**

[41] The issues to be determined are:

- (a) Does Mr Robertshaw have an arguable case that he was unjustifiably disadvantaged and/or subject to a breach of contract in relation to the current disciplinary process;
- (b) Does Mr Robertshaw have an arguable case in relation to the employment relationship problems identified in his Statement of Problem filed with the Authority on 20 June 2016;
- (c) Where does the balance of convenience lie until there can be a substantive investigation of Mr Robertshaw's unjustified disadvantage and breach of contract claims;
- (d) Where does the overall justice of the case lie until a substantive determination can be issued in relation to Mr Robertshaw's unjustified disadvantage and breach of contract claims?

**Arguable case – unjustified disadvantage and breach of contract**

[42] The Authority proceeds on the basis that Mr Robertshaw can prove all of the evidence in his affidavit. On that basis, I find that Mr Robertshaw's affidavit evidence meets the threshold of a prima facie case. However, I note that it is a view based on limited, incomplete, untested and disputed evidence which will need to be properly tested during a substantive Authority investigation meeting.

[43] I have reached this conclusion because I consider Mr Robertshaw has an arguable case that Ms Wright's instruction to him was not lawful and even if it was, dealing with the dispute about that by way of a disciplinary process may not have been justified. Whether or not it is will be the subject of a substantive investigation where all of the evidence can be properly tested.

[44] I want to make it clear that the Authority does not have an unjustified dismissal grievance in front of it and that Mr Robertshaw is unable to raise an unjustified dismissal claim at this stage because he has not been dismissed. An employee is unable to raise a personal grievance claim in anticipation of an outcome which has not yet occurred.

[45] There is also no evidence currently before the Authority to determine what, if any, investigation BPDHB undertook in relation to Mr Robertshaw's belief that he

was at risk of harm if he returned to work as directed by Ms Wright. It is questionable whether an employer would be justified in dismissing an employee who was refusing to return to work due to a genuinely held belief that their health was at risk if they did so without there being a full and proper investigation of the underlying alleged health and safety concerns.

### **Balance of convenience**

[46] The balance of convenience requires the Authority to balance and assess the respective injustices to the parties for the period until the merits of the case can be investigated and determined. The Authority is required to weigh the potential injustice to Mr Robertshaw of allowing BPDHB to conclude its disciplinary process before the Authority has issued a substantive determination in relation to Mr Robertshaw's unjustified disadvantage and breach of contract claims.

[47] The perceived or potential injustice to Mr Robertshaw needs to be weighed against the potential injustice to BPDHB of the burden of not being able to conclude its disciplinary process prior to a substantive investigation into Mr Robertshaw's disadvantage grievance and breach of contract claims being concluded by the Authority.

[48] The timing of a substantive investigation is a significant factor. There is information before the Authority to indicate that this matter is likely to be dealt with on an urgent basis, in which case Mr Robertshaw's substantive matters could potentially be investigated in the last week of July or in the second half of August.

[49] I accept that Mr Robertshaw needs his income and does not want to have to pursue an unjustified dismissal claim should he be dismissed at the conclusion of the current disciplinary process. However, I consider that many employees are in the same situation.

[50] Mr Robertshaw also has the ability to apply to the Authority for interim reinstatement should he be dismissed. However, such matters are speculative at this time because the disciplinary process has not yet been concluded and Mr Robertshaw has not been dismissed.

[51] I also consider that damages or monetary compensation will be an adequate remedy for Mr Robertshaw if his dismissal grievance and/or breach of contract claims succeed.

[52] I consider that there is a compelling public interest in allowing BPDHB to conclude its disciplinary process. If Mr Robertshaw is unhappy with the outcome of it, then he has the same legal rights available to him as every other employee and he can at that point pursue an employment relationship problem relating to the outcome of that process, should he wish to do so. At this point, the Authority only has the disadvantage grievance and the breach of contract claims in front of it.

[53] I consider it is necessary to make this finding to ensure that employers are not unnecessarily impeded from conducting employment investigations and to allow BPDHB to bring its current disciplinary process to a conclusion without being restrained by the Authority from doing so.

[54] It is clear that Mr Robertshaw believes that the manner in which he has been treated is unjustified and in breach of BPDHB's contractual obligations. Whether or not that is the case will need to be investigated and determined by the Authority unless Mr Robertshaw either withdraws these claims or the parties reaching an agreed settlement of them.

[55] My assessment of the balance of convenience favours BPDHB.

### **Overall justice**

[56] The remedy of an interim injunction is a discretionary one. I recognise that this discretion is to be exercised on a principled basis. The Authority is required at this stage of the exercise of its discretion to stand back and assess where the overall justice lies.

[57] In this respect, I consider that the focus is on the respective justices or injustices of the alternative scenarios for the parties until the Authority can substantively determine Mr Robertshaw's disadvantage grievance and breach of contract claim.

[58] On this basis, I find that the overall justice follows the balance of convenience in that it favours BPDHB.

## **Outcome**

[59] To issue the injunction sought by Mr Robertshaw would be to restrain BPDHB from legitimately carrying out its right as an employer to complete an ongoing disciplinary process. I do not believe that should occur without strong evidence that to do so is necessary to protect legal rights that cannot be preserved in another more appropriate manner (such as by a substantive determination on the substantive claims).

[60] I consider it inappropriate for the Authority to issue the injunction sought because to do so would effectively take over the role of an employer. It is not for the Authority to substitute its own subjective judgements as to whether or not disciplinary action should or should not be taken. If an employee believes that they have an employment relationship problem then they can apply to the Authority to determine that in the normal way.

[61] Until BPDHB has completed its disciplinary process and made a final decision, I do not consider that the Authority has any role to play in this matter. That said, Mr Robertshaw's substantive concerns about the matters currently before the Authority will be progressed to a substantive determination as soon as possible. I consider that the most appropriate way to move this matter forward.

[62] Accordingly, Mr Robertshaw's application for an interim injunction to restrain BPDHB from concluding its disciplinary process does not succeed.

## **Costs**

[63] Costs are reserved sine die.

**Rachel Larmer**  
**Member of the Employment Relations Authority**