

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2018] NZERA Auckland 403
3043615

BETWEEN XUG
 Applicant

A N D DJV
 Respondent

Member of Authority: Rachel Larmer

Representatives: Don Mackinnon and Tim Oldfield, Counsel for
 Applicant
 Susan Hornsby-Geluk and Alastair Espie, Counsel for
 Respondent

Investigation Meeting: On the papers

Submissions Received: 12 December 2018 from Applicant
 12 December 2018 from Respondent

Date of Determination: 17 December 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

Interim non-publication order

[1] The Authority addressed the applicant's application for a non-publication order during a telephone conference the parties. The respondent agreed that an interim non-publication order should be issued.

[2] The Authority is satisfied from the information provided by the parties that it is necessary and appropriate to exercise its discretion to issue an interim non-publication order pending resolution of the substantive issues between the parties.

[3] By agreement of the parties and pursuant to clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) the Authority has exercised its discretion to make an interim non-publication order prohibiting the publication of the names of the parties, and any information leading to either party's identification, until further order of the Authority.

[4] To preserve the confidentiality of the parties, a randomised letter selection tool has been used to signify each party's name, so the letters used do not bear any relation to the parties' names.

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

Employment relationship problem

[6] The applicant is a Chief Executive who is currently suspended while the respondent investigates complaints about him. This determination only addresses the applicant's application for interim reinstatement to the workplace, which the respondent had resisted.

The complaints

[7] The respondent has formally raised a number of complaints it received about the applicant with him. The respondent categorised the various complaints into four heads of behaviour:

- (a) Undermining behaviours;
- (b) Stakeholder engagement;
- (c) Termination of a contractor relationship;
- (d) Criticising/diminishing staff.

[8] A fifth category of behaviour was also evident from the complaints, but the respondent has stated it did not intend to investigate that fifth category of conduct at this stage, but would do so depending on the outcome of the current complaints, because there was some overlap between the four categories identified above and the fifth category of complaints.

[9] The respondent considered the complaints, if proven, could give rise to trust and confidence issues. The applicant disputed that. He categorised the complaints against him as relating to “*style*” and “*tone*” issues only, that he said could and should have been informally discussed with him.

[10] The applicant claimed that the respondent’s decision to suspend him while it investigated the complaints was destroying his reputation and career.

Proposed suspension

[11] After receiving a number of complaints about the applicant the respondent proposed suspending him. However instead of suspension the parties agreed that the applicant would work from home until the parties met in person to discuss the complaints.

[12] The respondent instructed the applicant not to attend external meetings and to keep the communications the parties had regarding the complaints confidential. It also advised that the issue of suspension would be considered again when they met, so the applicant was invited to address the respondent at their in person meeting, as well as the substance of the complaints.

Actual suspension

[13] Prior to the parties meeting in person the applicant provided a substantive written response that denied any wrongdoing. The applicant also reiterated his view that suspension was unnecessary and damaging to his brand and reputation.

[14] After receiving the applicant’s responses to the complaints, and hearing from him in person, the respondent did not consider the complaints about the applicant had been resolved.

[15] The respondent considered further investigation was required before it could form a conclusion about the complaints because there were significant evidential conflicts between the applicant’s version of events and the written complaints.

[16] The respondent proposed suspending the applicant while it conducted further investigation, which included speaking to staff about discrepancies between their statements and the applicant’s responses. The applicant strongly objected to

suspension. He did not believe the working from home arrangement was sustainable or that suspension was warranted.

[17] The applicant wanted to return to the workplace. He was very concerned that he had been fielding calls which he could not respond to, asking why he was not at work. His silence had led to gossip, rumour and speculation about his absence that had damaged his reputation. The applicant believed the longer he was away the worse the damage would be. He considered the only way to prevent that was for him to be seen to be back in the workplace as he believed suspension could destroy his career.

Applicant's claim

[18] The applicant asked the Authority to interim reinstate him to the workplace. He was very concerned his reputation was being adversely impacted, which once tarnished, would be very hard to put right.

[19] The applicant believed that if the complaints against him did not ultimately warrant disciplinary action his reputation would still have been irreparably damaged by his suspension. The applicant submitted that his continued suspension negatively impacted on:

- (a) his ability to continue to lead the organisation in future;
- (b) any future employment prospects;
- (c) media attention and coverage about him;
- (d) information put out on the internet about him that created a public record that could not easily be corrected;
- (e) the respondent's desire to have him back at work;
- (f) his ability to return to work;
- (g) gossip, rumours and speculation about him;
- (h) his ability to re-establish working relationships if the complaints were found to not warrant disciplinary action;
- (i) his credibility with others he had to work with including stakeholders.

Respondent's position

[20] The respondent resisted interim reinstatement on the basis that it was neither reasonable nor practicable. The respondent believed that reinstatement would undermine its ability to manage potential risk to its staff and organisation while it was investigating complaints that it believed could potentially, if proven, have amounted either separately or cumulatively to serious misconduct.

Relevant law

[21] The Authority has discretion to order interim reinstatement pending disposition of the substantive matter.

[22] Section 127(4) of the Employment Relations Act 2000 (the Act) required the Authority to assess this interim reinstatement application having regard to the objects of the Act.

[23] 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.

[24] It is important to recognise that the evidence is as yet untested, so conflicts in the evidence cannot be resolved at this stage. There is a presumption that the applicant will be able to prove the evidence in his affidavits, in the absence of it being demonstratively fatally flawed.¹ He is therefore entitled to the benefit of the doubt at this preliminary stage.

[25] It is also critical to recognise that the Authority's inquiry at this stage is not about whether or not the applicant has engaged in misconduct or serious misconduct, because the respondent's investigation into complaints made about the applicant is continuing. The respondent said it is not yet in a position to have made findings about the merits of the various complaints about the applicant, or how they should be addressed.

¹ *Wendco (NZ) Ltd v Unite Inc.* [2018] NZEmpC 67 at [23].

Issues to be determined

[26] The relevant tests for an application for interim reinstatement are well-established and require the following issues to be determined:

- (a) Is there a serious question to be tried?
 - (i) Does the applicant have an arguable case that his suspension was unjustified?
 - (ii) Does the applicant have an arguable case that if his suspension was unjustified then he would be granted permanent reinstatement?
- (b) Where does the balance of convenience lie regarding the impact on the parties of granting or refusing interim reinstatement?
- (c) What does the overall justice of the case require?

Is there a serious question to be tried?

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

[27] The applicant bears the onus of establishing that there is a serious question to be tried, and that his substantive claims were not frivolous or vexatious.² He has met that relatively low threshold.

[28] Whether the applicant's suspension was justified is yet to be determined in a substantive investigation scheduled for early next year. The Authority's assessment of whether or not the applicant had an arguable case focused on whether there were credible arguments to be made, but not on whether any such arguments would be likely to succeed.

[29] Justification regarding the applicant's suspension will be assessed in accordance with the s.103A justification test in the Act.

[30] The substantive determination will involve the Authority's objective assessment of whether a fair and reasonable employer could have suspended the applicant in all the circumstances as at the date he was suspended, in accordance with the justification test in s.103A(2) of the Act.

² *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90.

[31] There is generally no right to suspend an employee unless there is a statutory or express contractual right to do so.³

[32] It was arguable whether or not there was an express contractual term which allowed the respondent to suspend the applicant. While the respondent has relied on a document entitled “*Addressing Conduct and Behaviour Procedure*” as legal authority for the applicant’s suspension, the applicant disputed that on the basis it was an internal guideline for managers that he had never seen.

[33] If there was no express contractual suspension term then it was arguable whether the complaints about the applicant justified suspension. The parties have differing views of the potential seriousness, if proven, of the complaints made about the applicant that would need to be resolved at a substantive investigation.

[34] In the absence of an express contractual right to suspend, the respondent’s suspicion of misconduct or serious misconduct in itself would be insufficient to justify suspension because it would need to establish that the applicant’s continued presence in the workplace would give rise to some significant issue.⁴

[35] The applicant identified a number of factors he claimed meant suspension was not justified. These include but are not limited to good faith concerns, the possible seriousness of the complaints (if proven), the respondent’s delay in raising the complaints with him and the lack of problems during the period he worked from home.

[36] The respondent submitted that the complaints about the applicant raised risks to other staff, the organisation and external stakeholders that justified the applicant’s suspension while the respondent conducted an investigation. The respondent believed that alternative arrangements, short of suspension, would not have addressed these potential risks and/or were operationally unworkable/impractical.

[37] There are clearly a number of serious and disputed questions of fact and law that would need to be determined during a substantive investigation, so the applicant met the ‘arguable case’ case criteria regarding his unjustified suspension claim.

³ XYZ v ABC [2017] NZEMPC 40.

⁴ Singh v Sherildee Holdings Ltd EmpC Auckland AC53/05 22 September 2015.

[38] That finding should not be viewed as any indication of how the Authority will ultimately decide these arguable issues after conducting its substantive investigation.

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

[39] Section 125(2) of the Act provided that reinstatement may be ordered by the Authority if it is “*practicable and reasonable to do so.*” At the time the applicant filed these proceedings, reinstatement was just one of the potential remedies available, it was not the primary remedy.⁵

[40] The parties had differing views on the reasonableness or practicality of permanent reinstatement as a remedy. If it becomes necessary then these conflicts would need to be resolved at the substantive investigation.

[41] However, should his disadvantage grievance regarding his suspension succeed, at this early stage it cannot be said that the applicant’s claim for reinstatement was frivolous or vexatious. The applicant has therefore met the second limb of the arguable case criteria.

[42] 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 would be better placed to assess whether or not the s.125 test for reinstatement had been met because the outcome of the respondent’s investigation would likely be available by then.

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

[43] This factor required the Authority to assess the potential consequences and impact on the parties of interim reinstatement pending the resolution of the substantive unjustified suspension claim. The impact on third parties was also a relevant factor for consideration.

[44] A preliminary assessment, insofar as that was possible at this early stage, of the merits of the applicant’s case could also be relevant to the Authority’s assessment of the balance of convenience and overall justice.

⁵ The Employment Relations Act Amendments 2018 changed that with effect from 12 December 2018.

[45] The Authority did not agree with the applicant's submission that he had a strongly arguable case. A preliminary assessment of the merits did not support interim reinstatement.

[46] Timing considerations also favoured the respondent. The applicant's substantive claims will be heard in January so a determination should be available by the end of January.

[47] The short time between now and then was also broken by the intervening Christmas/New Year period. Accordingly there were a more limited number of potential working days to consider than would otherwise be the case at a different time of the year.

[48] The applicant said it was unfair for him to continue to be the subject of rumour and speculation, that he could not respond to, before the respondent's investigation was completed. The applicant said his presence in the workplace would mitigate against the speculation and rumour about why he had been away from work, which he believed was the only way to address that without the parties commenting on the situation.

[49] The applicant expressed concern about the reputational damage, pre-judgment of the issues by the respondent and others, and undermining of his internal and external relationships that he believed his suspension was causing.

[50] The Authority did not accept the applicant's submission that these concerns could not be addressed by way of financial compensation, if need be, or by the Authority's public findings in a substantive determination. The extension of his suspension by another five or six weeks was unlikely to fundamentally change the current position regarding these issues.

[51] The applicant believed the longer he was suspended the harder it would be for him to reintegrate back into the workplace and therefore lead the organisation in future.

[52] The Authority considered that the intervening holiday period made that concern less significant because it was well known that in New Zealand many people take annual leave over this period.

[53] While the applicant's concerns had some merit, they were not outweighed by the risks the respondent identified as being associated with interim reinstatement. None of those could be adequately or appropriately addressed by financial compensation, which weighs in favour of the respondent.

[54] The respondent has produced a considerable amount of evidence in support of its concerns. That included four sworn affidavits from senior managers which set out in detail their complaints and concerns. These included specific allegations and alleged retaliatory conduct (which the Authority noted the applicant denied) as well as more generalised concerns about the adverse culture they alleged had developed under the applicant's leadership.

[55] The Authority noted that complaints had been received from three of the applicant's direct reports, one of his indirect reports, one external stakeholder and a senior manager in another organisation that the respondent reported to. There were five individuals involved in situations that could potentially have reflected retaliatory conduct by the applicant, which he denied.

[56] While this evidence is as yet untested and will likely be strongly challenged by the applicant, this overall factual matrix cannot be simply discounted by the Authority. It was unusual for a Chief Executive to face so many formal complaints, from named individuals, after such a short time in the position.

[57] The Authority considered that there was a reasonable evidential basis for the respondent's belief that the issues raised in the various complaints about the applicant, made by senior managers and others, appeared to go beyond merely style and tone concerns.

[58] The employees who raised concerns were experienced senior managers and include three out of seven of the applicant's senior leadership team members. That was an unusual and potentially serious situation for the respondent to have to appropriately address.

[59] Although the respondent put the complaints to the applicant, his responses raised additional specified, serious concerns, which were deposited to by the respondent's decision maker. These are currently being investigated in what appears to the Authority to be a timely manner.

[60] The Authority concluded that the matters traversed in paragraphs 7.5 – 7.8 of the respondent's decision maker's affidavit regarding the applicant's explanation to the concerns raised with him were factors that weighed against interim reinstatement. That evidence related to the way in which the applicant acknowledged to the respondent that he had engaged with others.

[61] There are a number of factors that tipped the balance of convenience in the respondent's favour. These included:

- (a) The applicant as the Chief Executive held the most senior role in the respondent's organisation. That required him to operate autonomously, so oversight of his actions and supervision of him, particularly regarding the way in which he engaged with others would be very difficult and impractical;
- (b) Even assuming all of the applicant's explanations were accepted, the sworn evidence available to the Authority established that the respondent had a sound evidential basis for its concern about the applicant's judgement in relation to a number of specified incidents set out in the affidavits;
- (c) The applicant did not demonstrate insight into why admitted behaviours or communications were inappropriate or could have resulted in complaints being made about him;
- (d) That omission left the Authority concerned that the applicant may not be able to consciously recognise and avoid behaviours that were perceived by others as negatively impacting on them because he did not view such interactions as being inappropriate;
- (e) The Authority therefore accepted the decision maker's affidavit evidence that there was an unacceptable risk to the respondent's employees and to its organisation that problems would unwittingly occur if the applicant was interim reinstated, despite him committing to conducting himself in a professional manner;
- (f) The respondent had to conduct further investigations in order to resolve credibility issues. That involved interviewing the applicant's direct reports, and other relevant witnesses, about contradictions in the

evidence in circumstances where punitive retaliatory action by the applicant had been alleged;

- (g) The respondent's employees would be required to answer what the respondent's decision maker described as "*confronting and difficult questions about their interactions*" with the applicant that included responding to statements by him that directly contradicted what they (some of whom were his direct reports) had said, while they continued to work under the applicant;
- (h) The respondent had an obligation as a good employer to take steps to protect employees who had formally complained about the applicant, while their complaints were being investigated;
- (i) Three complainants had expressed concern about being around the applicant and had expressed they felt very uncomfortable, would be constantly on edge or guard, and would be waiting for adverse repercussions from the applicant if he returned to the workplace;
- (j) Returning the applicant to the workplace on an interim basis presented some inherent risks to these complainants because of the power the applicant had over them as the most senior person in the organisation;
- (k) Continuing the applicant's suspension therefore protected all involved - the parties, other employees, external complainants, stakeholders, and contractors until the respondent was in a position to fully understand how the complaints about the applicant should be addressed;
- (l) The timeframes involved favoured continuing the applicant's suspension. The respondent anticipated its investigation into the complaints about the applicant would be completed prior to the substantive investigation meeting so allowing that to continue without the risk of it being undermined, however unwittingly, by the applicant's presence in the workplace was preferable.

[62] The Authority has concluded that the balance of convenience favoured the respondent, because it weighed against interim reinstatement.

What does the overall justice of the case require?

[63] The Authority's assessment of the overall interests of justice required it to stand back and review the overall position regarding interim reinstatement.

[64] Although the Authority did not assess the substantive merits of 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 to them or should not have investigated them.

[65] Nor was it obvious to the Authority that the applicant's response to the complaints would have dispelled any concerns the respondent may have had about the matters raised. The issues the respondent identified as having arisen from the applicant's responses clearly required further consideration and investigation.

[66] The applicant's suspension was therefore a temporary situation that allowed the respondent to fully and properly investigate a number of complaints about the applicant in a way that also managed the potential risks that arose from these complaints.

[67] The Authority has concluded that the respondent's current ongoing investigation should be allowed to continue unimpeded, free from the risk of potential distractions, interference or influence, however unwitting, by the applicant.

[68] The Authority considered that it should not usurp the respondent's assessment of risk at this early stage, particularly when the relevant evidence has not been able to be tested.

[69] While the reputational damage that the applicant's suspension may be causing him is of concern, the Employment Court in *ABC v XYZ*⁶ did not consider an argument that an employee who had been unjustifiably suspended could not be adequately compensated was compelling. The Employment Court further noted that *George v Auckland Council* established that reputational damage could attract a compensatory award.⁷

[70] When balancing the respective rights of and risk to the parties the Authority was concerned that the potential risks and associated damage to the respondent would

⁶ [2017] NZEmpC 40 at [56].

⁷ [2013] ERNZ 675 at [131].

be less easily remedied than the detriment the applicant may suffer if the applicant was subsequently held to have been unjustifiably disadvantaged by his suspension.

[71] The overall justice of the matter therefore weighs in favour of allowing the respondent to continue its investigation while the applicant remains on suspension. 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

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

Costs

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

Rachel Larmer
Member of the Employment Relations Authority