Employment Court of New Zealand

XYZ v ABC [2017] NZEmpC 40 (12 April 2017)

Last Updated: 20 April 2017

THERE IS AN ORDER PROHIBITING PUBLICATION OF THE NAMES OF THE PARTIES AND ANY INFORMATION LEADING TO THE PARTIES' IDENTITY

IN THE EMPLOYMENT COURT WELLINGTON

[2017] NZEmpC 40

EMPC 69/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	XYZ Plaintiff
AND	ABC Defendant

Hearing:	11 April 2017 (Heard at Wellington)
Appearances:	P McBride, counsel for plaintiff S Hornsby-Geluk and A Espie, counsel for defendant
Judgment:	12 April 2017

JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] The plaintiff holds a senior position in a public sector organisation. She has been suspended from her employment pending an investigation into concerns the Chief Executive says he has about various matters. The plaintiff has filed a personal grievance in the Employment Relations Authority claiming that her suspension is both procedurally and substantively unjustified. The grievance was coupled with an application for interim relief pending investigation of her grievance. She also sought interim non-publication orders. The Authority declined to make the orders sought, although it granted non-publication orders for a 14-day period to enable the plaintiff to pursue a challenge.

[2] A de novo challenge has been filed in respect of the Authority's determination of these issues. An application for urgency was granted and the challenge came before me yesterday for hearing. Numerous affidavits and lengthy submissions were filed both in support of, and opposition to, the challenge. While there was a significant amount of evidence filed (much of which was of limited relevance to the matters at issue at this particular stage of the employer's processes), it is important to emphasise that the evidence is untested and, while broad impressions can be drawn from it, any conflicts cannot be resolved at this juncture. That will be the function of the substantive hearing.

[3] At the outset it is helpful to identify what the case is, and is not, about. There are two issues before the Court. First, whether an interim order should be made setting aside the plaintiff's suspension. Second, whether interim non-publication orders should be made, protecting her name and identifying details from disclosure.

[4] The case is *not* about whether the Chief Executive's concerns are well- founded and nor is it about whether the plaintiff has

committed misconduct. The plaintiff's personal grievance as to the justification of the decision to suspend her pending the outcome of the investigative process remains before the Authority and has not yet been determined. The investigative process itself remains on foot. The defendant has proposed a meeting to progress matters. The plaintiff 's position appears to be that further information must be provided before that occurs.

Legal framework: interim orders

[5] The basis on which applications for interim orders are to be decided can be summarised as follows:

Step 1 - An applicant must establish that there is a serious question to be tried. In a claim such as the present one (arising out of a suspension), the question of whether there is a serious question to be tried raises two sub- issues: First, whether there is a serious question to be tried that the suspension was unjustified; second, whether there is a serious question to

be tried in relation to the claim for permanent reinstatement (namely, back to the workplace pending the outcome of the investigative process).

Step 2 - Consideration must then be given to the balance of convenience, and the impact on the parties of the granting of, and the refusal to grant, an order. The impact on third parties will also be relevant to the weighting exercise.

Step 3 - Finally, the overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

[6] While the Court has a discretion whether or not to grant interim relief, the first step in the Court's inquiry (namely whether there is a serious question to be tried, in that the claim is not frivolous or vexatious)1 requires judicial evaluation. The merits of the case, insofar as they can be discerned at an interim stage, may also be relevant in assessing the balance of convenience and the overall interests of justice.

[7] Before addressing the factors to be considered it is convenient to set out a brief summary of the background to the matter.

Background

[8] The plaintiff holds a senior position within the defendant organisation. She has significant financial delegations and responsibilities. Part of the plaintiff's role involves ensuring the protection of public funds, the public interest and the reputation of the defendant, and ensuring that the department's policies and procedures are adhered to consistent with public sector best practice.

[9] It is evident that the plaintiff has had a number of serious difficulties with her ex-partner, culminating in instructions being given to her lawyer in August last year in respect of an allegedly defamatory email he had forwarded to the defendant,

copying the plaintiff, about the plaintiff's work. One of the issues raised in this

1 See *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) TCLR 531 at [12].

correspondence related to an alleged conflict of interest, and the award of a contract to a personal friend.

[10] The Chief Executive of the defendant organisation says that similar concerns have been raised by way of disclosure under the Protected Disclosures Act 2000. The defendant organisation has a protected disclosure policy. The policy provides a mechanism by which serious wrongdoings can be reported and investigated. Only employees are covered by the Protected Disclosures Act and the defendant's policy relating to such disclosures. I pause to note that the plaintiff 's ex-partner does not fall into this category. The defendant's protected disclosure policy reflects the provisions of the Protected Disclosures Act.

[11] Serious wrongdoing is defined in the Protected Disclosures Act as including the unlawful, corrupt or irregular use of public funds or public resources. The Act contains a number of protections for staff who make a protected disclosure, including that the person receiving the disclosure must use their best endeavours to keep confidential the identity of the disclosing party unless one of the exceptions set out in the legislation applies. This includes where it is essential to allow the person to respond to the allegations in accordance with the principles of natural justice.

[12] The Chief Executive says that the protected disclosure complaint raised a number of allegations of wrongdoing against the plaintiff, including in respect of her dealings with one of the defendant's providers and the award of a not insignificant piece of work to it. It was alleged that the plaintiff had been materially influenced by a personal relationship with the Chief Executive of the provider; that there had been a failure to follow the correct procurement process; a failure to ensure that a contract was put in place with the provider; a failure to prepare a risk assessment and manage security; a failure to declare a conflict of interest; and that the plaintiff had altered meeting minutes and departed from an agreed course of action without authorisation at a meeting. The last concern has now been withdrawn.

[13] Some preliminary inquiries were conducted into the allegations and the Chief Executive decided that further investigation was warranted. He sent an email to the plaintiff, requesting her attendance at a meeting. The plaintiff asked for information

as to what it was that the Chief Executive wished to discuss, to enable her to undertake any necessary preparation. He responded by advising that, as the meeting was preliminary only, she did not need to prepare anything.

[14] The meeting proceeded as scheduled on 6 March 2017. At the meeting the Chief Executive gave the plaintiff a six-page letter advising that a protected disclosure had been received, and setting out the concerns which he wished her to address (which are summarised above). The letter noted that, if established, the concerns could result in a finding of serious misconduct and, potentially,

dismissal. The letter made it clear that the allegations were just that, and would be investigated. The Chief Executive said that, given the serious nature of the allegations, consideration was being given to suspending the plaintiff from work under her employment agreement for the duration of the investigation. The proposal was that the suspension would be on pay.

[15] The reasons for the suspension proposal were articulated as follows:

- The seriousness of the allegations (which, if substantiated may amount to serious misconduct and/or have damaged or destroyed trust and confidence in the plaintiff);

- The nature of the allegations, particularly suggestions of a senior employee not acting in the organisation's best interests in relation to financial matters;

- The need for a thorough investigation to be conducted free of influence or interference in the process by the plaintiff as the subject of the allegations. The reason for including this ground was said to be that the investigation would likely involve staff who reported to the plaintiff.

[16] The Chief Executive also offered paid special leave as an alternative to the suspension proposal, although making it clear that this too would involve the cessation of duties and no access to the workplace.

[17] The letter included a clear request that the plaintiff keep the matters raised confidential to herself, her immediate family and any representative or support person. The Chief Executive instructed that if the plaintiff needed to discuss matters with anyone else, particularly another employee, she needed to seek his prior approval.

[18] The Chief Executive made it plain that while he had reached a preliminary view that suspension was appropriate, no final decision had been made. He invited the plaintiff's response to the proposal and suggested a further meeting on 8 March

2017.

[19] On 8 March 2017 the plaintiff advised the Chief Executive that she needed more time to prepare for the meeting. This was accommodated.

[20] The plaintiff (through her lawyer, Mr McBride) provided a response to the suspension proposal by way of letter dated 10 March 2017. Part of the letter was directed at the substantive basis for the concerns which had been raised, and information said to be necessary to respond to them. It was asserted that there was no valid basis to suspend and that:

... Doing so would damage our client, predetermine issues, and prevent our client from access to material to respond to you. Further, none of the matters that you raise have any merit. ...

[21] In the latter regard it was said that the first five allegations were a repeat of what had previously been the subject of a full audit; the sixth was simply inaccurate; and the seventh was historic (having arisen in October 2016). This, it was said, raised concerns about predetermination.

[22] On 13 March 2017 the Chief Executive wrote to the plaintiff again, advising that he had considered her feedback in respect of the suspension proposal and that he had decided to suspend her on full pay for the duration of the investigative process. He also advised that he was concerned that she appeared to have been contacting staff to gather information relating to the matters arising in the context of the investigation. He said that he was concerned that this type of activity could compromise the integrity of the investigation and/or place staff in an uncomfortable

and/or unreasonable position. He stressed the prohibition on accessing any organisational systems or property, or attendance at any meetings, during the suspension without his prior approval.

[23] There then appear to have been some issues with delivery of the suspension letter, Mr McBride advising that he had no instructions to accept it although he had been involved in earlier communications on the suspension issue.

[24] The Chief Executive emailed the plaintiff on 14 March 2017, noting her suspension the previous day; reiterating that she was not to attend any internal or external meetings for on or behalf of the organisation; declining a request for the name of the person who had made the protected disclosure; and advising that if she required access to any further information to enable her to respond to the allegations she should contact the defendant to arrange a suitable time to attend the offices to access the systems and files under supervision. He also reiterated his earlier advice as to the need for confidentiality, and said that if there was any information that the plaintiff believed may be relevant to the investigation she should identify it for investigative purposes.

[25] The plaintiff responded by advising that she was unsure of the basis for the statement that she would have known that her suspension had taken effect the previous day and advising that she was extremely aggrieved and distressed by the defendant's action.

[26] The defendant wrote to the plaintiff again on 16 March recording, amongst other things, that the plaintiff had not taken up the offer to arrange for a time to attend the defendant's offices to access any information that she may require. In these circumstances the defendant advised that it intended to proceed with the investigative process. A meeting was proposed for 23 March to enable the plaintiff to provide her explanation to the allegations. Mr McBride responded on 17 March stating that it was not up to the plaintiff to identify relevant information and that the defendant's obligation to do so remained (although without identifying what information was being referred to). Counsel for the defendant, Ms Hornsby-Geluk, replied advising that the defendant accepted that it had an obligation to provide the

plaintiff with all relevant information relating to the allegations and considered that it had done so. She made the point that the invitation to request access to the defendant's systems to identify anything further she might require did not represent an acceptance that she did not already have all of the information she needed in order to provide a response.

[27] As will be apparent from the foregoing, the key focus of the chronology of events terminates on the date on which the plaintiff's suspension took effect. That is because it is the defendant's actions in suspending the plaintiff which are the sole matter at issue at this stage. I return to the issue of the adequacy or otherwise of the information provided to the plaintiff in advance of the suspension below. Suffice to note at this point that the plaintiff is adamant that "the who, why, where and how" (as Mr McBride characterised it) of the protected disclosure complaint ought to have been provided and the failure to do so fatally undermines the justification for the defendant's actions. I do not regard that argument as a strong one, for reasons which will become apparent.

Step 1 – serious question to be tried?

[28] The thrust of the plaintiff's submissions in respect of step 1 is on alleged deficiencies in the defendant's process leading to her suspension, and the substantive basis for it. A particular point of focus is the plaintiff's contention that she has a strongly arguable case that the process has misfired because she has been denied access to relevant information and this has cut across the rights enshrined in s 4 of the Employment Relations Act 2000, most notably s 4(1A)(c).

[29] There is generally no right to suspend an employee absent a statutory or express contractual right to do so. The plaintiff's employment agreement contains a broadly expressed power to suspend. It provides, under cl 17, that:

17.1 The Employer reserves the right to suspend the Employee, either on pay or without pay, at its discretion:

a while investigating serious misconduct, negligence in the performance of the Employee's duties, or any other misconduct or repeated breach of this agreement; ...

[30] The agreement also provides that the defendant's policies and procedures, including its standards of Integrity and Conduct, are binding and must be fully observed and complied with (clause 30). The defendant's standards of Integrity and Conduct emphasise the high expectations of professional behaviour and accountability which apply given the nature of the organisation. The defendant has a number of policy documents which lie in behind these expectations, including policies relating to procurement and conflicts of interest. As I have said, part of the plaintiff's role is ensuring compliance with the defendant's policies.

[31] The defendant's policies set out the process to be followed in undertaking an investigation into allegations of misconduct, including the option to suspend an employee on full pay pending the outcome of the disciplinary process. The policy provides that employees are to be given advice of the intention to suspend and the opportunity to make representations before a decision is made. Suspension may be appropriate where, amongst other things, there is a risk to other employees or to the effective and efficient operation of the organisation or its reputation.

[32] It is well established that an employee is generally entitled to be heard on a proposal to suspend,2 as is reflected in the defendant's policy. I agree with Mr McBride that the fact that the employment agreement provides (as here) for suspension does not confer on an employer an unfettered ability to take that step. It is also correct that suspension from employment is a serious step.3 However, the rules of natural justice are not set in stone and flexibly apply depending on the particular circumstances of the case.

[33] Section 4(1A)(c) of the Act is said to be pivotal. It requires an employer who is proposing to make a decision which will, or is likely to, have an adverse effect on "the continuation of employment" to provide the affected employee with "access to information, relevant to the continuation of the employee's employment, about the

decision" and must provide an opportunity to comment on that information.

2 See, for example, *Sefo v Sealord Shellfish Ltd* [2008] ERNZ 178, (2008) 5 NZELR 407 (EmpC)

at [37]-[38].

3 See, for example, *Tawhiwhirangi v Attorney-General* [1993] NZEmpC 136; [1993] 2 ERNZ 546 (EmpC).

[34] Whether the obligation set out in s 4(1A)(c) extends, as Mr McBride contends it does, to a decision to suspend is arguable (although I did not understand Ms Hornsby-Geluk to be taking issue with the point). But even if it does, the extent of the obligations under s 4(1A)(c), and more generally, must be read with relevant provisions of the Protected Disclosures Act (most notably s 19, which specifically applies in circumstances involving an employee making a protected disclosure). As s 19 makes clear, best endeavours must be used *not* to disclose the identity of the person who has made the protected disclosure unless an exception applies. Exceptions include where the person who acquires knowledge of the protected disclosure reasonably believes that disclosure of identifying information is essential to the effective investigation of the allegations in the protected disclosure or is essential having regard to the principles of natural justice. The 'essentiality' threshold requirement is self-evidently a high one.

[35] And notably while natural justice is referred to twice in the Protected Disclosures Act (first in s 11(2)(a) – where the internal procedures of an organisation must comply with the principles of natural justice; and second in s 19(1)(b)(iii) – where best endeavours not to disclose information which may identify the person must be made), neither reference is directed at the benefit of the person complained about.

[36] The plaintiff submits that, as the enactment of s 4(1A)(c) of the Employment Relations Act came after the Protected Disclosures Act, it must be taken as having qualified the earlier provisions (the later qualifying the earlier; the specific overriding the general). I doubt the strength of this argument. Rather the two provisions can likely be read together – s 4(1A)(c) reinforcing the general rule relating to

access to information and the principles of natural justice, and s 19 addressing the particular circumstances of a protected disclosure. It is not without significance that s 19 makes it clear that such information must be made available where it is necessary, for reasons of natural justice, to do so. It would appear to defeat the purpose of s 19 to read it in the way contended for on behalf of the plaintiff.

[37] The plaintiff refers to the approach adopted in *Meaden v Chief Executive of the New Zealand Fire Service Commission* in support of the proposition that natural justice requires the provision of the complaint itself.4 The case is distinguishable. There an employer, while summarising a complaint which had been made against the employee, refused to provide the written complaint itself. Judge Palmer reinstated the employee. The issues for the Court did not arise at the suspension stage of the process; the case did not involve a disclosure under the Protected Disclosure Act; and it appears that the employer had not fully articulated the "multi-faceted" aspects

of the complaint that had been made. In this case the allegations which the plaintiff was being invited to respond to (although not, importantly, at the stage her response to the suspension proposal was sought – the point in time currently at issue) were traversed in a six page letter accompanied by a considerable quantity of documentation.

[38] The plaintiff raises a concern that there is nothing to suggest that the defendant investigated whether the threshold requirements of the Protected Disclosures Act were met. I do not regard this argument as a strong one, particularly at this stage. Further, the evidence before the Court as to the nature of the disclosure is as described by the Chief Executive. Ms Hornsby-Geluk makes the additional point that this aspect of the plaintiff's concerns are effectively addressed by s 6(3). It provides that if an employee of an organisation believes on reasonable grounds that the information he or she discloses is about serious wrong-doing in or by that organisation but the belief is mistaken, the information *must* be treated as complying with s 6(1) for the purposes of the protections conferred by the Act.

[39] More fundamentally, it remains unclear how and why the identity of the discloser, or the absence of unidentified additional information, would have assisted the plaintiff in providing a response to the suspension proposal. The 6 March letter set out the nature of the concerns that had been raised and it is difficult to see how the identity of the discloser undermined the ability of the plaintiff to comment on the proposal to suspend. Nor is it easy to see how the failure to provide a copy of the complaint, in circumstances where the Chief Executive's letter purported to detail it

at length, undermined her ability to respond. And she did provide a response

4 *Meaden v Chief Executive of the New Zealand Fire Service* CC26/98, 30 July 1998 (EmpC).

through her lawyer on 10 March 2017, following an extension of time having been granted to do so.

[40] I understood Mr McBride to be saying that the identity of the discloser and a copy of the complaint was relevant because the Chief Executive's proposal to suspend was said to be founded on the strength of the information he had available. However, the 6 March letter proposing suspension did not state that the allegations appeared to be well supported. Rather it referred to the seriousness of the concerns that had been raised, made it clear that matters were at an early stage but required further investigation, and also made it clear that there were other factors at play in concluding that suspension was appropriate (including the involvement of staff reporting to the plaintiff). That appears, on its face, to be an unsurprising response. Plainly the allegations were serious. Indeed Mr McBride said that, if established, they would be tantamount to corruption.

[41] The general thrust of the plaintiff's submission is that there was no reasonable basis for the Chief Executive's concerns and they ought not to have been raised. This, it is said, can be readily discerned from the evidence provided by the plaintiff in support of her current application as well as close scrutiny of the plethora of documents filed in support of it. The substance of the allegations and the justification or otherwise for the defendant to investigate them has yet to be determined. It is too early to assess the merits of the allegations which the defendant wishes to investigate, and I do not (in any event) consider that to be a necessary or helpful exercise to undertake when the sole issue before the Court relates to the plaintiff's suspension. What can be said, however, is that it does not appear to be seriously arguable, based on the material before the Court (which I have read and considered), that the defendant's concerns which gave rise to the suspension are demonstrably baseless or ought not to have been raised as issues reasonably requiring a response.

[42] Nor is it seriously arguable that the plaintiff 's response to the suspension proposal, such as it was, would have immediately dispelled the Chief Executive's concerns.

[43] I also perceive difficulties in terms of the case for permanent reinstatement. That is because of the issues that would likely arise in terms of whether reinstatement prior to the completion of the employer's process would be either reasonable or practicable.

[44] A number of factors weigh against the case for a return to work pending the outcome of the investigation. These are: the nature of the plaintiff 's position and the scope of her duties and responsibilities; the mechanisms which would reasonably need to be put in place as an interim measure (including in respect of her delegated authority to undertake her usual tasks, and ensuring that she was adequately supervised); the need to have due regard to the interests of third parties, some of whom have given evidence as to the concerns they have if the plaintiff returns to work; the reasonable needs of the defendant to manage perceived risks to its operations having regard to the nature of the concerns that have been raised; and the need to ensure that the investigation, including interviews with staff, can be undertaken in an orderly manner free from distraction and interference or influence. These matters are relevant to the extent to which suspension was a step that a fair and reasonable employer could have taken in the circumstances and the strength of the plaintiff's case for a return to the workplace pending the outcome of the investigative process.

[45] I disagree with Mr McBride's oral submission that the plaintiff's case is as close to certainty as possible given the refusal to disclose a copy of the protected disclosure complaint, for the reasons I have already given. While I do not think that the claim advanced on the

plaintiff's behalf can be characterised as either frivolous or vexatious, there are a number of significant difficulties with it. My assessment at this early stage is that the merits of the case are weak.

Step 2 - balance of convenience

[46] The essential consideration is the potential effect on the plaintiff if interim relief is granted, as opposed to the potential effect on the defendant and others if it is not.

[47] I start with the assessed merits of the plaintiff's claim. My preliminary view, based on the limited and untested evidence before the Court, is that this does not weigh in favour of the plaintiff.

[48] The plaintiff says that being out of work is significantly damaging to her. It is apparent that she is a committed, high achiever, and she describes her work as her life. She is concerned that the longer she is away from the workplace, the more people may be inclined to think she has done something untoward. She makes the additional point that many of her work colleagues are friends. I infer that this, coupled with a suspension from the workplace and an associated direction not to contact staff, is adding an additional burden in terms of access to usual support networks.

[49] I balance these factors against the likely timeframe for bringing matters to a conclusion. It appears that the Chief Executive is wishing to engage with the plaintiff to progress his investigation without delay but this has not yet occurred. In this regard it appears that the plaintiff is insisting on the provision of additional information before progressing to a meeting.

[50] It appears that the Authority's investigation into the plaintiff's current grievance will likely proceed in June, so less than two months away. It may be assumed that even if an oral determination is not possible it is likely that, given the circumstances and the fact that the Authority has taken steps to accommodate an early investigation, a prompt determination can reasonably be expected. And while I accept that the plaintiff's absence from the workplace may be generating a degree of speculation, this may have been aggravated (at least to some extent) by the plaintiff's apparent actions in contacting staff after having been requested not to do so. The key point is that the justification or otherwise for the suspension will likely be resolved promptly.

[51] The plaintiff remains on pay while on suspension, and there is no suggestion of financial prejudice to her.

[52] It is true that the terms of the suspension limit the plaintiff's ability to freely access information or talk to other employees to enable her to prepare a response to the employer's substantive concerns. The strength of this asserted concern must, however, be seen in context. First, there are the provisions of the Protected Disclosures Act which I have already referred to. Second, as is evident from correspondence from the Chief Executive sent at an early stage of the process, it has been made clear to the plaintiff that she was entitled to seek information and to identify any person she wished to speak to. The point was that this required the Chief Executive's prior approval. Further, it appears that an offer to come in to the defendant's offices to access further information under supervision has never been taken up.

[53] The defendant has what appears to be a reasonable basis for concerns about the potential impact on other employees, particularly those who report to the plaintiff and who may feel under pressure and/or conflicted. These concerns are supported by affidavit evidence. The Chief Executive has also given evidence as to particular concerns he has about the need to protect the person who made the disclosure, and the concerns that person is said to have expressed to the Chief Executive about a return to work pending the outcome of the process that is currently underway.

[54] While the plaintiff has said that she would act with the utmost professionalism if permitted to return to work, and would not oppose a temporary change in reporting lines, that would be unlikely to meet all of the concerns that have been raised, including by other staff. The defendant's concerns about a possible (intentional or unintentional) undermining of the integrity of the investigation are bolstered by her apparently intense desire to know the identity of the person who made the protected disclosure and to obtain a copy of it. The concerns are also reinforced by contact the plaintiff appears to have had with staff shortly after the initial meeting with the Chief Executive. While the plaintiff says that this was before suspension took effect, the point is that it came after she had been told not to discuss matters with anyone.

[55] There is also an additional complexity because around the same time that the plaintiff provided a response to the proposal to suspend, she wrote to the Chief

Executive making allegations against a subordinate employee. These allegations have not yet been dealt with but are said to raise the possibility that the plaintiff's allegations may have been a retaliatory response. The timing tends to support this. All of this serves to underscore the difficulties (including for other staff members) which would likely flow from the plaintiff's presence in the workplace.

[56] Mr McBride raises a number of concerns about the extent to which the plaintiff could be adequately compensated if the suspension is subsequently held to be unjustified. I do not find this argument compelling. The Act makes provision for remedies in the event that an action is found to be unjustified and while the quantification process is not without difficulty, it is one that both the Authority and the Court are well used to grappling with. And the Court has, as Ms Hornsby-Geluk points out, indicated that damage to reputation may be addressed by way of

compensatory award.5

[57] I find that the balance of convenience weighs heavily against the grant of the interim order sought by the plaintiff. The plaintiff's return to the workplace would likely be disruptive, with little spin-off benefit, and the potential to impact adversely on third parties (namely other employees, including those who may need to be interviewed as part of the process).

Overall justice

[58] The plaintiff advances a submission that the fact that she has invited an independent investigation, which has been declined, weighs in favour of granting the orders sought. The defendant is the employer and is entitled to investigate matters of concern. If the defendant's actions are ultimately held up to substantive scrutiny and found to be wanting, including because an independent inquiry was warranted but was not undertaken, relief will no doubt follow. I do not accept that the failure to accede to a request for an independent inquiry made at this early stage of the process

is relevant to an assessment of the overall justice of the case.

5. Referring to *George v Auckland Council* [2013] NZEmpC 179, [2013] ERNZ 675 at [131] in support of this proposition.

[59] The plaintiff's suspension is a temporary arrangement. The decision to suspend arose against the backdrop of an alternative offer of paid special leave. Had this option been taken up, it may have gone some way to addressing the concerns the plaintiff now says she has about reputational damage. It also appears from the evidence currently before the Court that, contrary to requests not to contact other staff, the plaintiff did so. While it appears that the Chief Executive has sought to progress the investigation, he is meeting with resistance from the plaintiff. A meeting has been proposed but has not yet been confirmed.

[60] Standing back and having regard to all aspects of the matter, including the particular factors I have discussed, I find that the overall interests of justice follow the balance of convenience. The plaintiff's challenge to the Authority's determination declining the interim orders sought is accordingly dismissed.

Non-publication

[61] The plaintiff challenges the Authority's determination declining her application for interim non-publication orders. She contends that such orders are necessary, particularly in order to protect her professional reputation and having regard to her personal circumstances. The defendant strongly opposes any such order.

[62] The Court may, in any proceedings, make non-publication orders. The scope of the Court's discretionary powers has been traversed by a full Court in *H v A*.6 I delivered a minority judgment in that case. The Court of Appeal subsequently declined leave to appeal on the non-publication point, following an application of the majority's judgment in the decision to make permanent non-publication orders in the case.7 The Court of Appeal observed that the position had recently been considered in *Jay v Jay*8 and that the approach adopted in *H v A* was supported by that

judgment.9

6 *H v A Ltd* [2014] NZEmpC 92, [2014] ERNZ 38 at [78].

7 *A Ltd v H* [2015] NZCA 99.

8 *Jay v Jay* [2014] NZCA 445, [2015] NZAR 861.

9 *A Ltd v H*, above n 7, at [8].

[63] Under the *H v A* test an applicant for a non-publication order does not need to make out to a high standard the existence of exceptional circumstances such that a non-publication order is warranted.10

[64] Ms Hornsby-Geluk submits that a recent judgment of the Supreme Court on non-publication in *Erceg* v *Erceg*11 has effectively overtaken the Employment Court's approach in *H v A*.

[65] 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.12 The Court was not satisfied that the respondents had demonstrated "to the requisite high standard that the interests of justice require a departure from the usual principle of open justice", including because:13

The mere fact that the proceedings deal with matters that some family members would prefer be kept private is insufficient to justify an order. ... We consider that this analysis applies even if there is a risk that relationships within the family will be strained as a result of disclosure.

...

Concerns have been raised about the safety and security of family members,

.... If sufficiently grave, concerns of this type may justify an order. But in the present case, all that has happened is that security consultants have been called in as a result of media interest in the family's affairs. That is not sufficient to displace the usual principle.

[66] To the extent that *H v A* is correctly interpreted as applying a different approach to non-publication orders in this Court I agree with Ms Hornsby-Geluk that it warrants revisiting in light of the Supreme Court's most recent observations which, while not arising directly in the employment context, nevertheless appear to me to be applicable.

[67] In *H v A* the Court had drawn a distinction between the sort of litigation it was dealing with (which was characterised as being in

the nature of “combined civil and private law”) and criminal proceedings and civil public law proceedings.14 The

important distinguishing factor relied on in *H v A* as supporting a different approach

10 *H v A Ltd*, above n 6, at [78].

11 *Erceg v Erceg* [2016] NZSC 135.

12 At [2], [13], [21].

13 At [21].

14 At [74].

to the grant of non-publication orders in matters falling into a civil/private law categorization, does not emerge as a factor in the Supreme Court’s analysis in *Erceg*. I say that because the latter case involved a civil claim involving an intra-family (private) dispute.15

[68] The Supreme Court said:16

... the courts have declined to make non-publication or confidentiality orders simply because the publicity associated with particular legal proceedings may, from the perspective of one or other party, be embarrassing (because, for example, it reveals that a person is under financial pressure) or unwelcome (because, for example, it involves the public airing of what are seen as private family matters*). This has been put on the basis that the party seeking to justify a confidentiality order will have to show specific adverse consequences that are exceptional,* and effects such as those just mentioned do not meet this standard. *We prefer to say that the party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule, but agree that the standard is a high one.*

[69] While it is true, as Mr McBride points out, that this Court has a broad discretionary power conferred by statute to make non-publication orders, that does not mean it is unfettered or can be exercised at the whim of the decision-maker. As with any discretion it must be exercised according to principle and consistently with the legislative scheme (including the objective of supporting employment relationships). All of this simply emphasises that each case must be assessed having regard to its particular circumstances. It does not, however, follow that a different approach to non-publication from the one recently set out by the Supreme Court is required.

[70] As the Supreme Court made clear, a “stringent” approach to applications for non-publication orders is required because of the fundamental importance of the principle of open justice. The Court also drew a comparison to instances in which Parliament has seen the need to confer on the courts wider powers to hear evidence

in closed court,17 or to prohibit reporting of proceedings or aspects of proceedings,

generally to protect those who are seen as vulnerable. Examples cited relate to the

15 *Erceg* also post-dates the Court of Appeal’s judgment in *Jay v Jay* [2014] NZCA 445.

16 *Erceg*, above n 11, at [13] (emphasis added).

17 Criminal Procedure Act 2011, s 197.

identity of the victims of sexual offending18 and protection of children in family proceedings.19 I make the obvious point that Parliament has not imposed any express restrictions of this sort under the Employment Relations Act.

[71] As Kirby P pointed out in *John Fairfax Group v Local Court of New South*

Wales (cited with approval by the Supreme Court in *Erceg*):20

It has often been acknowledged that an unfortunate incident of the open administration of justice is that embarrassing, damaging and even dangerous facts occasionally come to light. Such considerations have never been regarded as a reason for the closure of the courts, or the issue of suppression orders in their various alternative forms: ... . *A significant reason for adhering to a stringent principle*, despite sympathy for those who suffer embarrassment, invasions of privacy or even damage by publicity of their proceedings *is that such interests must be sacrificed to the greater public interest in adhering to an open system of justice. Otherwise, powerful litigants may come to think that they can extract from courts or prosecuting authorities protection greater than that enjoyed by ordinary parties whose problems come before the courts and may be openly reported.*

[72] I consider it appropriate to apply the approach adopted by the Supreme Court in *Erceg* in determining whether a non-publication order ought to be made in this case. For completeness, I have also considered the evidence applying the *H v A* approach. As it happens, both lead to the same result.

[73] I start with the fundamental principle of open justice. That principle may be said to apply with particular force where, as here, the defendant is a public organisation, where the plaintiff holds a senior role which involves the allocation of public funds, and where the concerns that have been raised relate to probity. In such circumstances the public has a legitimate interest in knowing the identity of the parties.

[74] While the plaintiff has chosen to put herself at risk of publicity by bringing the proceedings at this stage, I do not consider that this

is a reason to decline the application. And while I accept that non-publication orders may generate a degree of

speculation as to the identity of both parties, and this may cast a question mark over

18 Criminal Procedure Act, s 203.

19 Family Courts Act 1980, s 11B(e).

20 *John Fairfax Group v Local Court of New South* Wales (1991) 26 NSWLR 131 at 143 cited in

Erceg at [14] (emphasis added).

unrelated individuals and organisations, I do not regard it as a factor having any real weight given the size of the public sector and the multiplicity of players within it.

[75] There is evidence (including by way of a recent medical report) of the potential serious impact of publication on the plaintiff's mental state, in light of the symptoms the plaintiff is currently exhibiting and for which medication has been prescribed. The reporting doctor is "strongly" supportive of non-publication orders for reasons set out in the report. While it is evident that the plaintiff had been experiencing medical and personal difficulties for some time prior to the suspension, it is also evident that publication would likely seriously exacerbate those difficulties.

[76] It can also be readily inferred from the evidence before the Court that publication will add significantly to difficulties with the plaintiff's ex-partner, whose alleged actions to date are traversed in the evidence before the Court. Those alleged actions have given rise to real concerns about the plaintiff's personal safety. It is apparent that, while steps have been taken to address those concerns, the plaintiff continues to harbour high levels of anxiety. She describes her ex-partner's actions as amounting to relentless harassment and she is very concerned that any publicity will simply add fuel to the fire. Copies of text communications before the Court support this concern.

[77] The nature and extent of the plaintiff's concerns about her physical safety are reflected in the Police involvement to date (a trespass notice has been issued, although the Police have been unable to ascertain the whereabouts of the plaintiff's ex-partner); steps she has taken to beef up security in her home; concerns she has about unexplained incursions into her home; and the involvement of a defamation lawyer. It is apparent that the plaintiff's safety concerns are not historic. Rather they are ongoing. They are also linked to the matters before the Court. This emerges from the earlier correspondence to the defendant from the plaintiff's ex-partner. It appears from the untested evidence that he is obsessed with the possibility that she has breached her obligations to the defendant via a conflict of interest and is eagerly awaiting her downfall.

[78] As the Supreme Court observed in *Erceg*, there are exceptions to the principle of open justice and the administration of justice is capable of accommodating the particular circumstances of individual cases as well as considerations going to the broader public interest.21 In this regard reference was made to the following statements of Kirby P in the *John Fairfax* judgment:22

The common justification for these special exceptions is a reminder that the open administration of justice serves the interests of society and is not an absolute end in itself. *If the very openness of court proceedings would destroy the attainment of justice in the particular case (as by vindicating the activities of the blackmailer)* or discharge its attainment in cases generally (as by frightening off blackmail victims or informers) or would derogate from even more urgent considerations of public interest (as by endangering national security) *the rule of openness must be modified to meet the exigencies of the particular case*.

[79] That observation is apposite in the present case. I am satisfied that publication would inflame the serious difficulties the plaintiff is confronting on a personal front, may well pose risks for her personal safety, and will negatively impact on her fragile mental state which she is currently taking prescribed medication for. I accept too that publication of the plaintiff 's identifying details could lead to damage to her reputation, although I do not accept the proposition that her status as a regulated professional operates presumptively in favour of non- publication. That seems to me to be wrong as a matter of basic principle and to differentiate between classes of employees based on professional status.

[80] There is a high likelihood of publicity given the nature of the defendant organisation, and the matters of concern that have been raised. The matter is at an interim stage. The allegations are vehemently denied by the plaintiff and have yet to be fully investigated. The outcome of the merits or otherwise of the defendant's suspension and the serious concerns that have been raised by the Chief Executive is unsettled and will not be known until they have been substantively disposed of.

[81] In the particular circumstances, and balancing the respective considerations identified by each of the parties, I am satisfied that the plaintiff has demonstrated to

the requisite high standard that the interests of justice require a departure from the

21 At [18].

22 At [18], citing *John Fairfax* at 141 (emphasis added).

usual principle of open justice.23 Specific adverse consequences would flow, and would likely flow, from publication at this stage of the proceedings. I accordingly consider it appropriate to exercise the Court's discretion to make an interim non- publication order.

[82] It necessarily follows that I would also have found the test applying under *H*

v A to be satisfied.

[83] It is common ground that naming or identifying the defendant would likely result in the identity of the plaintiff becoming known. In these circumstances there will be an interim order prohibiting publication of the names of the parties and any information leading to either party's identification. I make a further order that no person is to access the court file without the consent of a Judge. These orders remain in place until further order of the Court.

Conclusion

[84] The plaintiff's challenge to the Authority's determination declining interim

orders in respect of the plaintiff's suspension is dismissed.

[85] The plaintiff's challenge to the Authority's determination declining interim

non-publication orders succeeds.

[86] There will be an interim order prohibiting publication of the names of the parties and any information leading to either party's identification. No person is to access the court file without the consent of a Judge. These orders remain in place until further order of the Court.

[87] By operation of s 183(2) of the Act the Authority's determination is set aside

and this judgment stands in its place.

23 See *Erceg* at [21].

Costs

[88] Costs are reserved. In the circumstances I consider it appropriate that any outstanding issue of costs be resolved following the outcome of the substantive proceeding which remains before the Authority. Once that process has been completed, the parties should seek to agree costs. It may be that given the outcome of these proceedings (namely dismissing the plaintiff's challenge in relation to orders lifting her suspension but upholding her challenge to non-publication) the parties are content to let costs lie where they fall.

[89] If costs cannot be agreed between the parties, the defendant should file a memorandum, together with any supporting material, no more than 20 working days after the Authority's substantive determination is given. The plaintiff will then have

15 working days, after service of that memorandum, in which to respond. Anything strictly in reply within a further five working days.

Christina Inglis

Judge

Judgment signed at 5.25 pm on 12 April 2017