

**THIS DETERMIANTION
CONTAINS AN ORDER
PROHIBITING PUBLICATION
OF CERTAIN INFORMATION**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 282
5576198

BETWEEN

MOHAMMED IFRAZ
Applicant

A N D

THE CHIEF EXECUTIVE OF
THE DEPARTMENT OF
CORRECTIONS
Respondent

Member of Authority: Vicki Campbell

Representatives: Stephen Corlett for the Applicant
John Rooney for the Respondent

Investigation Meeting: 14 September 2015

Submissions Received: 14 September 2015

Oral Determination: 14 September 2015

Record of Oral
Determination: 17 September 2015

PRELIMINARY ORAL DETERMINATION OF THE AUTHORITY

- A. Interim non-publication orders will apply to names of those fellow employees of Mr Ifraz who are mentioned by using letters of the alphabet in this determination.**
- B. The application for interim reinstatement is declined.**
- C. Costs are reserved until after the substantive investigation and final determination.**

Employment relationship problem

[1] This determination deals with two applications. The first is an application for non-publication orders and the second an application by Mr Mohammed Ifraz for interim reinstatement to the position of Principal Corrections Officer with the Department of Corrections (DOC).

[2] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded all the evidence and submissions received from Mr Ifraz and DOC but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Facts leading to dispute

[3] Mr Ifraz commenced his employment with DOC in January 2005. At the time of his dismissal Mr Ifraz was a Principal Corrections Officer (“PCO”). PCOs hold a senior leadership role and are expected to challenge sub-standard behaviours and conduct.

[4] In July 2014, Ms X, a relatively new employee of DOC and who was supervised by Mr Ifraz, informed her Manager that she had been engaged in a sexual relationship with Mr Ifraz for approximately six months and had engaged in sexual activity while on duty and within a high security area of Auckland Regional Women’s Corrections Facility (“ARWCF”). Ms X also advised her manager that Mr Ifraz had allowed her to leave work early to enable them to meet off site.

[5] On 23 July 2014, Mr Ifraz was placed on special leave and was required to attend a meeting on 28 July 2014 to discuss his possible suspension. Mr Ifraz was suspended from his employment on 28 July 2014.

[6] From August 2014 to December 2014, the investigation was undertaken with a final report being produced in March 2015. Following receipt of the report, a formal disciplinary process was undertaken which resulted in Mr Ifraz being summarily dismissed on 4 August 2015.

[7] Mr Ifraz seeks permanent reinstatement to his former position, lost wages and compensation. Mr Ifraz also seeks interim reinstatement which this determination addresses. He has provided a signed undertaking as to damages.

[8] DOC does not accept that Mr Ifraz was unjustifiably dismissed and it opposes the application for interim reinstatement.

[9] The application for interim reinstatement has proceeded on the basis of untested affidavit evidence and submissions.

Issues

[10] The issues for the Authority to determine are:

- (a) Should non-publication orders be applied?
- (b) Should Mr Ifraz be reinstated on an interim basis to his former position or a position no less disadvantageous to him?

Non-publication orders

[11] DOC has applied to the Authority for non-publication orders in respect of the evidence that identifies or might identify two employees named in the proceeding who are neither witnesses nor parties to the proceeding.

[12] In his submissions, Mr Corlett, on behalf of Mr Ifraz, has indicated he may call those people named in the proceedings to give evidence at the substantive hearing.

[13] The Authority has a wide discretion to prohibit the publication of evidence¹. The Employment Court in *H v A Ltd*² stated:

*We agree that non-publication of names or other identifying particulars in employment cases will be “exceptional” in the sense that such orders are and will be made in a very small minority of cases. However, we do not agree that an applicant for such an order must make out, to a high standard, that there are such exceptional circumstances that a non-publication order is warranted. That is not the standard that Parliament has prescribed for such orders in this Court or the Authority.*³

...

There are, of course, other circumstances in which this Court (and the Authority and other courts) prohibit publication of information about cases. Commercially sensitive information that may be misused by a competitor, if published, is perhaps the most common example of non-publication orders in this jurisdiction. Others have included information about the security arrangements of prisons which, if publicised, might endanger prison staff; the identities of persons who

¹ Employment Relations Act 2000 (the Act) Schedule 2 clause 10(1).

² [2014] NZEmpC 92.

³ Ibid at [78] and [80].

have been subjected to criticism in evidence but have had no opportunity to challenge or refute that criticism; and the identities of hospital patients whose care and treatment are the subject of proceedings involving professional health staff. There are many other instances of ad hoc non-publication orders which are, nevertheless, very much the exception than the rule.

[14] I have considered the submissions of the parties and agree that, rather than taking the risk that people named in the proceeding who are neither witnesses nor parties in this matter are adversely affected, their names will be anonymised using letters of the alphabet.

[15] Interim non-publication orders will apply to names of those fellow employees of Mr Ifraz who are mentioned by using letters of the alphabet in this determination. Those orders will apply until the hearing of the substantive matters at which time the parties will be provided with an opportunity to make submissions on whether permanent non-publication orders should be applied.

Interim reinstatement

[16] Mr Ifraz seeks an order for interim reinstatement to his former position of PCO with DOC until such time as his substantive claims can be heard and determined by the Authority.

[17] In accordance with the usual procedure, the evidence before the Authority for the purpose of determining the application has been presented in affidavit form by witnesses and is untested. Any findings of fact made by the Authority in this determination are provisional only and may change later once the Authority has fully investigated the claims and after all witnesses have been examined about their evidence where necessary.

[18] An injunction involves the exercise of a discretion. The answer to it is not in the application of rigid formulae but there are some broad inquiries that the Authority should make. These are:

- (a) Does Mr Ifraz have an arguable case of unjustified dismissal and, if found after a substantive investigation to have been unjustifiably dismissed, an arguable case for permanent reinstatement?

- (b) Where does the balance of convenience lie? This requires looking at the relevant detriment or injury that Mr Ifraz and DOC will incur as a result of the interim injunction being granted or not.
- (c) Is there an adequate alternative remedy available?
- (d) Finally, the Authority is required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

Is there an arguable case?

[19] On 4 August 2015, Mr Ifraz was dismissed for serious misconduct as a result of findings that Mr Ifraz's actions breached the Code of Conduct in that he failed to:

- (a) Avoid situations and behaviours that may be considered a conflict of interest, or that conflicts with the Code of Conduct or with DOC's objectives and obligations, or that may be considered unethical;
- (b) Declare a conflict of interest;
- (c) Be honest and truthful and do the right thing;
- (d) Maintain and role model high standards of integrity and present himself in a way that enhances his credibility;
- (e) Behave in a way that reflects well on his position at DOC, both in and out of the workplace.

[20] In her letter confirming the dismissal Ms Cheryle Mikaera, Prison Director at ARWCF, advised Mr Ifraz that she had lost faith in his integrity as a PCO and a senior member of staff and that, given his lack of remorse or regret, failed to see how she could have trust in him if the employment relationship continued.

[21] In coming to her conclusions, Ms Mikaere relied on DOC's policy on Conflicts of Interest which states:

Some examples of situations to avoid (or ask to be removed from).

...

Having supervisory or direct management responsibility for a family member, or a person with whom you have a personal relationship.

[22] I have concluded Mr Ifraz has an arguable case of unjustified dismissal which was described in *X v Y Ltd*⁴ as:

... a case, with some serious or arguable, but not necessarily certain prospects of success.

[23] There are serious questions to be determined for example:

- (a) Whether Mr Ifraz was in a supervisory or direct management role with Ms X;
- (b) Whether the failure to provide the report to Mr Ifraz prior to the preliminary findings is a procedural deficiency that would render the dismissal unjustified taking into account the arguments on pre-determination;
- (c) Was there unjustifiable disparity between the actions taken against Mr Ifraz and the actions taken against Ms X;
- (d) Was the conclusion that Ms Mikaere had lost trust and confidence a conclusion an employer acting fairly and reasonably could reach;
- (e) Was the duration of the investigation/disciplinary process unduly protracted and did that lead to any unfairness?

[24] I must now consider whether Mr Ifraz has an arguable case for permanent reinstatement⁵. The Authority may provide for reinstatement if it is practicable and reasonable to do so⁶. At this stage that involves an assessment as to the likelihood of permanent reinstatement.

[25] Mr Ifraz has acknowledged that he cannot work with either Mr Y (who also works for DOC) or Ms X and submits that arrangements could be made for him to work at a different prison, or Ms X and Mr Y could be moved to the same prison, so that he could be reinstated at ARWCF.

[26] DOC submits reinstatement will not be practicable or reasonable due to the disruption to other employees to accommodate Mr Ifraz returning to work and the lack of trust and confidence held by DOC in Mr Ifraz to make the right choices. In his

⁴ [1992] 1 ERNZ 368 at page 872.

⁵ *Cliff v Air New Zealand* [2006] ERNZ 694.

⁶ *Supra* fn 1.

role as a PCO, Mr Ifraz is required to uphold the Code of Conduct and ensure those being supervised or managed by him do likewise. In order for him to be reinstated, Mr Ifraz must be able to demonstrate that not only is he aware of all requirements under the Code of Conduct and other policies but is able to enforce them and to model the expected behaviours.

[27] If the questions set out in paragraph [23] above lead to a conclusion that Mr Ifraz was unjustifiably dismissed, it is arguable that reinstatement may be practicable and reasonable given that there have been no identified issues with Mr Ifraz performing his role as a PCO. This, of course, will be subject to any findings on contributory conduct.

Where does the balance of convenience lie?

[28] Identifying the balance of convenience – in the sense of detriment or injury – in this case requires likely financial loss to Mr Ifraz to be weighed against potential risks to DOC and the extent to which such risks might be managed or minimised.

[29] Mr Ifraz says he has no skills or knowledge to work anywhere but as a Corrections Officer. I do not accept that. Attached to his sworn affidavit Mr Ifraz has provided copies of job applications he has made. Many of these applications involve driving roles in which he claims to have experience.

[30] In his PCO role, Mr Ifraz acted in a supervisory capacity with day-to-day management of his unit. Mr Ifraz would have a number of employment prospects in a supervisory or managerial capacity particularly suited to the security industry.

[31] Mr Ifraz accepts reinstatement to ARWCF is not practicable but submits that a transfer to another prison would alleviate any concerns DOC may have about trust and confidence.

[32] Mr Ifraz has provided the required undertaking as to damages. If Mr Ifraz is to meet that undertaking he will need to borrow funds from friends and family.

[33] Ms X is back working at ARWCF and her husband works at another DOC facility. DOC's view (which is one I share) is that it is not appropriate for Mr Ifraz to be located at either facility on an interim basis.

[34] In order to accommodate a move to the only other facility operated by DOC, Mr Ifraz would need to undergo a two week induction, would possibly have to be placed in the lower security area which will involve a number of rostering changes which would impact on other employees. The changes could cause resentment. Further, DOC says it would need to closely supervise Mr Ifraz which is not practicable as it no longer has the requisite trust in him to make the right decisions.

[35] In his sworn affidavit, Mr Abraham Bothma, Regional Manager Human Resources, says the unique and sometimes dangerous environment of a prison means that trust and integrity play a major role especially for those in leadership roles such as Mr Ifraz. Employees of DOC are expected to operate openly and honestly in all their dealings. Mr Bothma says that without disclosure, trust is compromised.

[36] In her affidavit evidence, Ms Mikaere says the high level of trust and confidence required in Mr Ifraz's role has been irrevocably broken. Ms Mikaere says Mr Ifraz's failure to disclose a sexual relationship with a direct report was a serious breach of DOC's Code of Conduct and Conflicts Policy.

[37] Ms Mikaere says Mr Ifraz has failed to show any understanding of the impact of his actions and she simply cannot trust him not to engage in the same conduct again. Ms Mikaere also questions Mr Ifraz's professional judgment and integrity given the nature of the breach.

[38] The substantive matters will be heard on 9 and 10 December 2015. This is three months from now and a decision will be issued either orally at the time (if it is practicable) or within three months from the date of the conclusion of the investigation meeting process.

[39] I find the balance of convenience lies with DOC.

Is there an adequate alternative remedy available?

[40] If Mr Ifraz subsequently succeeds at the substantive hearing in establishing a right to permanent reinstatement, he will be adequately compensated by an award of damages for any loss he may have suffered. DOC is in a position to pay any such remedies if it becomes necessary to do so.

[41] If Mr Ifraz is reinstated on an interim basis and fails to achieve permanent reinstatement, I am not satisfied he will be in a position to adequately compensate DOC for any damages associated with his interim reinstatement.

Where does the overall justice lie?

[42] I must now stand back and ascertain where the overall justice lies. I have found an arguable case for unjustified dismissal. I find the overall justice follows the balance of convenience and lies with DOC.

[43] The prison environment is not a typical working environment. This is an environment where there needs to be a high level of trust with all employees but especially those employees who are making management decisions on a day-to-day basis. Employees holding senior roles such as Mr Ifraz are required to carry out their roles in a way that does not give any cause for concern.

[44] Mr Ifraz's position will not be prejudiced at the substantive hearing if he is not reinstated in the interim. Mr Ifraz will still have the full range of remedies, including permanent reinstatement, available to him.

[45] I find that the overall justice lies with DOC. The application for interim reinstatement is declined.

Costs

[46] Costs are reserved until after the substantive investigation and final determination.

Further steps

[47] An Authority Officer will now contact the parties and arrange a telephone conference to make arrangements for a substantive investigation meeting and discuss whether further mediation might now be of assistance.

Vicki Campbell
Member of the Employment Relations Authority