

Note: An order prohibiting publication of the name of a party applies to this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 97
3017415

BETWEEN

X
Applicant

A N D

THE NEW ZEALAND FIRE
SERVICE COMMISSION
ALSO KNOWN AS FIRE AND
EMERGENCY NEW
ZEALAND
Respondent

Member of Authority: T G Tetitaha

Representatives: P. Chemis and J. Howes for Applicant
G. Davenport for Respondent

Investigation Meeting: 22 September 2017 at Wellington

Submissions Received: 22 September 2017 from Applicant
22 September 2017 from Respondent

Date of Determination: 29 September 2017

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] X was dismissed on 26 July 2017. He seeks reinstatement until the substantive hearing can be held and determined. He also seeks non-publication orders.

Relevant facts

[2] Mr X held various roles within the New Zealand Fire Service for many years. At the time of his dismissal he held a senior position. His role included the

requirement to give evidence about fire investigation before the District and Coroner's courts.

[3] In 2015 he was suspended following complaints he bullied a co-worker, A. A alleged amongst other things that he had bullied her to write a post incident analysis of a fire (Assignment One) submitted towards completion of a diploma from a tertiary institute. Assignment One was written by A but copied from other students assignments.

[4] A specialist investigator was appointed in 2016 to consider the allegations. She completed her report on 29 June 2016. In respect of Assignment One the investigator concluded:

Mr [X] submits it was unfair to find misconduct by him in this respect, if it was a widespread issue amongst NZFS ... students. This is a possible mitigation factor for consideration by NZFS in any possible disciplinary process. I consider the evidence of copying as established is a serious breach of the standards of conduct by Mr [X].

[5] A further report was commissioned from a different specialist investigator. He was to investigate the allegations of widespread copying by other students. He completed his report in March 2017. He concluded there was no copying or plagiarism that wasn't within acceptable boundaries.

[6] In April 2017 the respondent raised its concerns with Mr X about Assignment One. It subsequently met with him and his lawyer on 2 May 2017.

[7] The respondent also interviewed A on 22 May 2017. A is currently subject to a disciplinary investigation for dishonesty related to Mr X's matter.

[8] The respondent sent a letter on 7 June 2017 to Mr X setting out its preliminary views. In summary these were the statements in Assignment One that it was authored by Mr X were dishonest and false; his responses about the submission of Assignment One were inconsistent; his 2013 work emails submitting Assignment One as his work were dishonest and his completion of the tertiary institution's course was also dishonest in the circumstances. It also found a conversation between Mr X and JG about A on 27 August 2015 was bullying. The above conduct was serious misconduct.

[9] A further meeting was held on 4 July 2017.

[10] On 26 July 2017 he was sent a letter dismissing him. In summary it found Mr X was dishonest in his actions around the submission of Assignment One to the tertiary institute.

Interim reinstatement

[11] The tests for reinstatement are well-established. These have been recently reaffirmed by the Chief Judge of the Employment Court¹. An applicant must prove:

- (a) Is a serious question to be tried? This raises two sub-issues:
 - (i) Is a serious question to be tried about the unjustified dismissal?
 - (ii) Is there a serious question to be tried in relation to the claim for permanent reinstatement?
- (b) Who does the balance of convenience favour until the substantive hearing may occur? This requires the consideration of the impact on the parties of the granting or refusal to grant an order.
- (c) The overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

Is there a serious question to be tried?

[12] It is accepted that a dismissal has occurred. Therefore the onus is on the employer to prove that its actions were justified.

[13] Both parties have filed lengthy affidavits supporting their respective views. From the affidavits Mr X appears to accept he submitted a document he did not write. His explanation is A gave him a different document to submit from that they had originally worked upon together. He alleges A deliberately sent him a different and false assignment. A states he instructed her to do the entire assignment for him and he did not write any part of it.

[14] Given Mr X's acceptance he submitted A's document in support of his tertiary qualification, there is a reasonable basis for the respondent to be concerned about his honesty. Mr X's response, namely to blame A, could not have dispelled the

¹ XYZ v AB [2017] NZEmpC 40 at [5].

respondents concerns. While it is unhelpful at this stage to undertake any detailed assessment of the merits without testing the evidence at hearing, at best I can see the case for the applicant is not strong based upon the evidence before me.

[15] The case for reinstatement is also problematic. There are a number of issues that arise if Mr X were to be reinstated. From submissions and evidence I apprehended Mr X was unwell. A medical certificate dated 10 August 2017 stated he was at increased risk of future episodes of depression from his employment situation. I directed Mr X to file a medical certificate by 25 August 2017 confirming that he was in a position to be returned to the workforce but he failed to do so.

[16] He has now filed a medical certificate on 27 September that states he could resume employment with conditions. It was filed after the hearing and submissions had finished on 22 September. No leave to file this information out of time was sought or granted. Parties were made aware I intended issuing a decision about this by 28 September given Mr X had sought urgency.

[17] The latest medical certificate does not assist the case for permanent reinstatement. It does not state what the reinstatement conditions should be. This is especially given the alleged risk of recurring episodes of depression and a further certificate that refers to cardiac issues in July 2017. What mechanisms would be required to accommodate his successful return to the workplace are unknown at this stage.

[18] At hearing Counsel initially suggested I could reinstate to 'suspension' in the interim. I rejected that submission as being outside my jurisdiction and incompatible with Mr X's personal grievance about suspension. It was further suggested I could reinstate to the payroll only. This may resolve matters on an interim basis but it does not assist a permanent reinstatement application. The applicant must show he is in a position to be permanently reinstated upon the same terms and conditions he enjoyed prior to suspension. On the evidence before me it is unclear practically how or when permanent reinstatement could occur.

[19] Mr X's case is not vexatious or frivolous. However based upon the current evidence before me while there is an arguable case for reinstatement it is not strong.

Balance of convenience

[20] The impact for Mr X of reinstatement was initially alleged to be his inability to obtain alternative employment given his age and the publicising of these matters, the lengthy period until substantive hearing, permanent reinstatement being rendered nugatory and “financial implications” causing stress anxiety and compromising his health. At hearing this was expanded. It was submitted that reinstatement would assist his mental health. A medical certificate dated 26 September 2017 from his doctor asserts reinstatement would benefit his mental health and indirectly his physical health.

[21] The impact for the respondent of reinstatement is the inability of Mr X to meet an award of damages if they are successful and their concerns about the impact of the findings of dishonesty upon his credibility and therefore his job.

[22] The respondents concern about payment of damages has been met by the Unions undertaking filed recently.

[23] Mr X’s concerns about publication upon his ability to find alternative employment and reinstatement have been dealt with by the non-publication order below.

[24] There are no financial implications for Mr X if he is not reinstated. This is because neither the Statement of Problem nor Mr X’s first affidavit referred to the payment he received upon dismissal. The respondent raised this issue in correspondence. It is now accepted Mr X received \$19,845.87. I understand this is the equivalent of wages he would have received up and until the end of November 2017.

[25] There is no basis to allege delay. An early substantive hearing was offered to Mr X starting the week of 2 October which he declined. Instead Mr X sought a decision on the papers about interim reinstatement including a half day submissions only hearing held on 22 September.

[26] A further substantive hearing has been made available on 13-18 November 2017. It is likely an early decision either at hearing or shortly thereafter can be given. Any delay in determining his matter has not been occasioned by the Authority or respondent.

[27] Mr X's latest medical certificate indicates this should occur upon conditions but unfortunately does not state what those are. I assume it is to the payroll only. Given his current financial circumstances, there is little apparent benefit in reinstating Mr X to the payroll.

[28] However reinstatement to the workplace would create difficulties for the respondent. There are issues about the impact upon Mr X's role if reinstated given his apparent admission of submitting a false document. The misconduct may have repercussions upon his credibility as an expert witness, educator and representative for the respondent. This could prevent any return to his previous role or require modification of his role.

[29] Other respondent employee interests also need to be considered. A remains employed, is unwell and allegedly scared of Mr X. Several respondent employee witnesses make serious allegations against Mr X. One witness would be his immediate superior, the other is in human resources. Practical management of other employees' interaction with Mr X should be undertaken for both Mr X's and their wellbeing.

[30] The balance of convenience weighs against Mr X being granted the interim order sought.

Overall justice

[31] Standing back from the detail the justice of this case favours the respondent. There is an admission of misconduct. The circumstances surrounding the misconduct and the process leading to dismissal still need to be determined. There is an early substantive hearing available on 13-18 November 2017. There is little detriment to Mr X of the short delay between hearing and disposal.

[32] I decline to grant interim reinstatement. Costs are reserved.

Non-publication order

[33] The Authority has the power to make non-publication orders subject to conditions it thinks fit.² The Employment Court³ has recently reviewed non-publication orders in this jurisdiction in light of the Supreme Court decision of *Erceg*

² Clause 10 Schedule 2 Employment Relations Act 2000.

³ *XYZ v ABC* [2017] NZEmpC 40 at [66] and following.

*v Erceg*⁴. The starting point is the principle of open justice. A high standard must be met before that principle can be appropriately departed from. A “stringent” approach to applications for non-publication is required because of the fundamental importance of the principle of open justice. Parties seeking the order “*must show specific adverse consequences that are sufficient to justify an exception to their fundamental rule [of open justice] ... the standard is a high one.*”⁵

[34] Open justice is particularly important here. The respondent is a public organisation where the applicant holds a senior role that requires substantial trust and confidence from his employer and the public at large. The public has a legitimate interest in his identity as a consequence.

[35] There is a high likelihood of publication. The parties have been made aware of media enquiries about this file.

[36] The alleged specific consequences for Mr X were not evidenced at hearing on 22 September. As the respondent did not oppose nor consent to a non-publication order, I allowed time for Mr X to file further evidence in respect of non-publication only.

[37] Mr X has now filed a medical certificate on 27 September 2017. The medical certificate states publication for Mr X “could likely trigger another episode of depression.” The evidence is brief – two one page medical certificates. Neither details the basis for the doctor or clinician’s medical opinion. One certificate gives a generalised hypothesis about the effects of depression. Both largely repeat what Mr X has told them. Both medical certificates also provided evidence Mr X is resilient and able to return to the workplace if reinstated. Given there has already been publication of one aspect of his personal grievance this evidence suggests he is able to recover and return to work.

[38] There is evidence of actions by a third party employment advocate B that would in my view detrimentally affect Mr X if allowed to continue unfettered. B represents A. There are submissions by email dated 5 July 2017 from a lawyer PC acting for Mr X. This email is a submission in support of an interlocutory application for disclosure of the respondent’s correspondence with B. PC submits B has

⁴ [2016] NZSC 135.

⁵ See n 1 at [65], [68] to [70] citing with approval the approach in *Erceg*.

continued to publicise bullying allegations by Mr X towards A that were dismissed by the respondent's independent specialist investigator. B had made threats to go to the Police to lay a complaint about Mr X's daughter unless the respondent changed the reported findings of that independent specialist investigator. B's correspondence indicated he had been actively cultivating media and public opinion against Mr X. From the information on file Mr X was ostracised by his own community. The inference was B has and will use Mr X's information unfairly to leverage an advantage for his client. B is not subject to any rules of professional conduct or disciplinary body. Mr X fears this behaviour may continue unchecked. I accept the prospect of this continued behaviour including publication creates undue stress for Mr X. Publication of his name could result in further allegations and threats detrimentally affecting Mr Xs health.

[39] The personal grievances have not been determined. If Mr X is successful continued publication by B in these circumstances could have a negative effect upon his reintegration into the workplace.

[40] The applicant requested suppression of the respondents name and the details of his dismissal, but I decline to do so. Non-publication of his name and details leading to his identification are sufficient to meet the principle of open justice. Suppression of the details of his employer and reasons for dismissal do not. There is little to show the identity of his employer or reasons for dismissal would necessarily identify Mr X to the public at large.

[41] Until further order of the Authority I order non-publication of the applicants name and any details that may lead to his identification. This does not include the name of his employer and the details about the process and reasons for his dismissal.

T G Tetitaha
Member of the Employment Relations Authority