

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 385  
3145543

BETWEEN TRACEY DUDER  
Applicant

AND PSM HEALTHCARE LIMITED  
(t/a API CONSUMER BRANDS)  
Respondent

Member of Authority: Rachel Larmer

Representatives: Simon Greening, counsel for the Applicant  
Rachael Judge and Matthew Austin, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and Further Information Received: 10 August 2021 from the Applicant  
20 August 2021 from the Respondent  
23 August 2021 from the Applicant

Date of Determination: 3 September 2021

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**DETERMINATION OF THE AUTHORITY**

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**Non-publication order**

[1] On 26 July 2021 the respondent sought permanent non-publication orders regarding nine pieces and/or categories of information, as identified in its memoranda of that date.

[2] Ms Duder's position on the non-publication order application was that she "*consents to the non-publication orders sought in relation to the commercially sensitive information*".

However Ms Duder did not identify what information she considered fell within that category.

[3] In an email dated 9 August 2021 the Authority provided the parties with its preliminary views on the non-publication orders application, which it considered was too widely drafted. The Authority identified the specific items and areas of concern and set out the information that the respondent had wanted covered but which the Authority did not consider should be the subject of a non-publication order, based on the information it had available at that time.

[4] Both parties were given an opportunity to respond to the Authority's preliminary views about that. Ms Duder did not, but the respondent mainly accepted the Authority's indication and where it did not do so it provided further information/clarification.

[5] The Authority has power under clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act) to make a non-publication order regarding some or all of the evidence, pleadings filed, names of parties or witnesses or other person, subject to such conditions as the Authority thinks fit.

[6] This power is discretionary and is to be exercised on a principled basis, in accordance with established case law. The presumption of open justice is a fundamental one, so limitations on it will necessarily be rare.

[7] The respondent bears the onus of establishing on the balance of probabilities that failing to issue a non-publication order will defeat the interests of justice. That is a high standard to meet. Mere embarrassment or a desire to avoid unfavourable publicity will not be sufficient to justify a non-publication order.

[8] The Authority was satisfied that a non-publication order should be made to protect some limited commercially sensitive information. It was not in the overall interests of justice for such material to be made publicly available and there was no legitimate public interest associated with having commercially sensitive information put into the public domain.

[9] The Authority therefore makes a non-publication order preventing the publication, with the condition that it does not apply to proceedings involving the employment institutions, of any/all of the following information:

- (a) The last sentence of paragraph 12 of Mr Gyde's affidavit dated 26 July 2021, and/or the information it contains;
- (b) The EBIT figure in line 8 of paragraph 45 of Mr Gyde's affidavit dated 26 July 2021;
- (c) The client names, names of products, the number of units, write-offs and specific figures used in paragraph 59 of Mr Gyde's affidavit dated 26 July 2021;
- (d) The names of the respondent's customers and references to the specific figures (such as EBIT) within exhibit B of Ms Duder's affidavit dated 9 July 2021;
- (e) The names of the respondent's customers and their personal information that is contained within the one page table, at page 64 of Ms Duder's affidavit of 9 July 2021, listing 'customer courier details' that was attached to the disciplinary letter dated 27 May 2021. This includes both Trademe customers and possible e-commerce customers of the respondent's business;
- (f) The names of the respondent's current and prospective customers and the respondent's pricing/budget plans and sales/marketing strategies.

[10] Either party has leave to apply to the Authority to vary the terms of this non-publication order, if that becomes necessary.

[11] For the avoidance of doubt, it will not be a breach of this non-publication order for the parties, their representatives, witnesses or the employment institutions to refer to any of the information that is the subject of this non-publication order in the course of dealing with any claims and/or counterclaims and/or challenges/appeals arising between the parties.

### **Employment relationship problem**

[12] Ms Tracey Duder worked for the respondent as its Head of Sales and Marketing Personal Care ANZ from 12 August 2019 until she was dismissed for serious misconduct on 25 June 2021, relating to misuse of the respondent's courier tickets.

[13] Ms Duder's daughter, Demelza Duder, also works for the respondent in an administrative role in the sales and marketing department, with Ms Duder being her daughter Demelza's manager in the respondent's workplace.

[14] Ms Duder and her daughter Demelza also run a business together as vintage resellers via a Trademe account. Approximately half of the items that are purchased from their Trademe business are sent out to the purchasers via courier.

[15] Ms Duder said that up until February 2021 another one of her daughters, Scarlett Duder, would take packages that the Trademe business needed send to buyers to the Post Office to send. However, Scarlett was unable to do that from February 2021.

[16] Ms Duder said that from February 2021 she and Demelza used the respondent's courier tickets to send items from their Trademe business to purchasers, via couriers uplifting these items from the respondent's business premises.

[17] Ms Duder said Demelza handled the courier administration and that when Demelza was not at work Ms Duder would have left the money for the couriers on Demelza's desk. Ms Duder said she did not know that Demelza had not reimbursed the respondent for the courier tickets. Ms Duder also disputed that using the respondent's courier tickets to send out packages on behalf of the Trademe business was, or had been, excessive.

[18] Demelza admitted that she had not reimbursed the respondent for its courier tickets that she and her mother used for their Trademe business, because she did not know what the reimbursement process was. Ms Duder did not recall Demelza telling her (Ms Duder) that she (Demelza) did not know how to reimburse the respondent for the courier tickets they had used.

[19] Ms Duder blamed the respondent for not having updated reimbursement processes in place after the Office Manager (who was the person previously collecting the courier reimbursement money) had left. Ms Duder also blamed Human Resources for poor communication, and for not training Demelza about how to reimburse the courier costs, or for ensuring that she had reimbursed the courier costs directly.

[20] Ms Duder said that, although she was Demelza's manager, she did not consider herself responsible for ensuring that Demelza was reimbursing the respondent for the courier tickets they had used for their Trademe business. Nor did Ms Duder consider she was responsible for ensuring that Demelza knew how to reimburse the courier tickets correctly. Ms Duder said that was not within the scope of the work related activities she had management responsibility for.

[21] Demelza claimed that she kept the money her mother gave her for the courier tickets in a bag on her desk. However, that explanation was deemed not credible, so was rejected by the respondent because;

- (a) It was not plausible that the \$284 that was apparently kept in a bag covered the full amount of all of the courier tickets they had used;
- (b) Ms Duder could not even guess whether she had sent 20 or 500 couriers, so had no idea on how much her Trademe business had spent on couriers using the respondent's courier tickets;
- (c) No records had been kept of how much each courier that the Duders had sent on behalf of their Trademe business had actually cost;
- (d) There was no accounting of the money paid compared to the actual courier costs the respondent had incurred for these Trademe related couriers; and
- (e) The explanation about the 'bag of money' was not raised until the disciplinary meeting, eight or nine days after the courier concern was raised with the Duders;
- (f) It was not plausible that Ms Duder and her daughter worked so closely together in their Trademe business, and were in reporting lines in their work for the respondent, without having any awareness of the number of courier tickets they were using and how those were being accounted for and/or paid for.

[22] On 27 May 2021 the respondent raised four disciplinary allegations issues with Ms Duder, two of which were not upheld.

[23] The other two allegations resulted in summary dismissal for serious misconduct. The respondent concluded that Ms Duder "*removed, took possession of, or deliberately misused company property without permission*" and that her "*use of company resources had been excessive, at additional cost to [the respondent]*".

[24] The respondent did not accept Ms Duder's explanations that:

- (a) She had assumed that the couriers were being paid for and "*did not give it much thought*";

- (b) She did not have any responsibility as Demelza's manager to ensure that the courier reimbursement was being done properly;
- (c) The use of courier tickets for their Trademe business was permitted and was not excessive;
- (d) It was unfair for Human Resources to have monitored her courier use over 2-3 months without raising concerns about it with her.

[25] The respondent concluded that Ms Duder had not taken sufficient responsibility to ensure that the cost of couriers she had used for her Trademe business had been appropriately recorded and/or reimbursed to the respondent.

[26] Ms Duder admitted there was no manifest information for the company courier tickets she was using and without an accurate reconciliation, it would not be possible to know the cost of each package that had been sent, because the cost varied depending on weight. Ms Duder was unable to explain how she had reconciled the money she said she had left for her daughter to reimburse the courier costs used by their Trademe business.

[27] The respondent considered that Ms Duder as a senior employee had responsibility for ensuring that the correct processes were followed to ensure that had properly reimbursed the respondent for the courier tickets she had used.

### **Issues**

[28] The issues to be determined by the Authority include:

- (i) Does the applicant have an arguable case?
- (ii) Where does the balance of convenience lie?
- (iii) What does the overall justice require?
- (iv) What, if any, costs should be awarded?

### **Does the applicant have an arguable case?**

[29] The arguable case test applies to both Ms Duder's unjustified dismissal claim and her claim for permanent reinstatement. The Authority recognises that the threshold for establishing an arguable case is a low one.

*Does the applicant have an arguable case for unjustified dismissal?*

[30] The respondent's Performance, Coaching and Management Policy (the Policy) sets out examples of serious misconduct, that included "*removing, taking possession of, or deliberate misuse of company property without the permission of the employee's executive manager*". It also provides that personal use of company resources "*must not be excessive*" and that "*no additional cost is to be incurred by [the company]*".

[31] Clause 20 of Ms Duder's individual employment agreement required her to know the company policies and to strictly observe them at all times.

[32] Ms Duder's position was that she had not engaged in serious misconduct. Ms Duder said that:

- (a) After the Office Manager left the respondent's process for reimbursing couriers was unclear;
- (b) She did not know that her daughter had not reimbursed the respondent for the courier tickets they had used;
- (c) The respondent had failed to quantify the value of the courier tickets she had used, so it had inadequate evidence to conclude that her courier use was excessive; and
- (d) She believed her use of couriers was permitted and appropriate.

[33] Ms Duder further alleged that the dismissal process was unfair to her because the respondent covertly investigated her courier use for a number of months which she says was a breach of good faith. Ms Duder also claimed that the decision maker (Mr Gyde) was biased against her, her explanations were not considered, and staff should have been interviewed in person instead of being permitted to provide written statements.

[34] Ms Duder's bias allegation arose from a comment that Mr Gyde said she has taken out of context. However Mr Gyde's acceptance of Ms Duder's explanation for two of the four disciplinary allegations tends to undermine her claim of bias.

[35] The respondent's Head of People and People Engagement Adviser had been looking into Ms Duder and her daughter's personal use of the respondent's courier tickets over the

period March-May 2021. There had been an unexplained jump in the respondent's courier costs.

[36] The Head of People raised these concerns with the respondent's General Manager, Mr Gyde, on 21 May 2021 and he wrote to Ms Duder raising allegations of serious misconduct on 27 May 2021.

[37] The respondent put its disciplinary concerns to Ms Duder in a letter dated 27 May 2021 that contained as attachments the relevant information the respondent was relying on. A disciplinary meeting was held on 4 June 2021 at which both parties were legally represented.

[38] Prior to the disciplinary meeting with Ms Duder, a disciplinary meeting was held with her daughter, Demelza, with each party having their lawyers present. Demelza and Ms Duder had the same lawyer representing them and the allegations related to the same subject matter.

[39] By agreement, the responses given by Demelza were also taken into account regarding the allegations made against Ms Duder. Notes of these disciplinary meetings were taken and shared with all parties.

[40] After the disciplinary meetings the respondent made further enquiries with three of its employees, which resulted in written statements being obtained from them. These were provided to Ms Duder and her daughter to comment on, along with a number of emails from the Head of People and the People Engagement Adviser.

[41] Ms Duder was provided with an opportunity to respond to those statements and she did so on 10 June 2021.

[42] On 14 June 2021 further disciplinary concerns were raised with Ms Duder in writing and she responded to those on 18 June 2021.

[43] On 22 June 2021 the respondent wrote to Ms Duder informing her of its findings regarding the four disciplinary allegations that had been raised with her, namely that she had engaged in two instances of serious misconduct and that two of the allegations were not upheld on the basis that her explanations had been accepted, or mainly accepted.

[44] The respondent's letter of 22 June 2021 referred to Ms Duder's and Demelza's responses and set out the respondent's finding. The respondent explained why the responses were not satisfactory and had not alleviated the company's concerns.

[45] The letter of 22 June 2021 advised Ms Duder that the respondent had formed a preliminary view that summary dismissal would be the appropriate sanction and it set out why it considered that a final written warning would likely not be appropriate.

[46] Ms Duder was invited to provide her feedback on the appropriate sanctions. She did so in writing on 23 June 2021.

[47] Ms Duder reiterated that the courier costs were Demelza's responsibility so she (Ms Duder) had no reason to think that the courier costs were not being met. Ms Duder acknowledged she did not take sufficient steps to ensure that the courier costs were being reimbursed to the respondent. Ms Duder accepted that she and her daughter were remiss in not keeping good records.

[48] However, Ms Duder considered that training and coaching was the way the respondent should have addressed its disciplinary concerns, because they were not capable of amounting to serious misconduct.

[49] After considering this feedback, the respondent concluded that summary dismissal was appropriate, and that outcome was communicated to Ms Duder in a letter dated 25 June 2021.

[50] Mr Gyde, in his affidavit dated 23 July 2021, said that Ms Duder's actions were concerning to him as a decision maker because of the clear breaches of the company's policies, and that Ms Duder continued to deflect blame from herself on to her daughter and the company's human resources team.

[51] Mr Gyde said that while the respondent permitted staff to use its courier system so that they could take advantage of its preferential courier rates, the respondent's expectations regarding the use of this system was set out in the Use of Company Resources Policy (i.e. that such use is not excessive, does not relate to an outside business and is not to result in the company incurring additional costs).

[52] In the ten months period between September 2020 and June 2021, only eight parcels were sent and paid for by other staff employed by the company. The respondent considered that it should have been clear to Ms Duder that the courier system was not intended to be used by staff without paying for it and that using the respondent's courier tickets to run an outside business would not be acceptable.

[53] Ms Duder occupied a senior role within the respondent's business that required her to exhibit high standards of trust and integrity. As a senior employee she should have been aware of the need to fully reimburse the company for any personal expenses she incurred. The fact that no courier costs appear to have been paid for by the Duders after Demelza took over the courier system, suggested to Mr Gyde that Ms Duder had taken advantage of the company's courier tickets.

[54] The respondent did not accept that its concerns involved performance matters because it involved deliberate excessive misuse of the company's courier tickets for the benefit of Ms Duder's own Trademe business, and because it was not reimbursed for these costs that it had incurred.

[55] Given that the threshold of establishing an arguable case is such a low one, it is accepted that Ms Duder does have an arguable case. However, based on the limited and as yet untested information currently available, the Authority considers that it is a weakly arguable case.

[56] The conduct underlying the finding of serious misconduct was admitted. Ms Duder did use the respondent's courier tickets to send out couriers to customers of her Trademe business, and the respondent was not reimbursed for that.

[57] Although Ms Duder submitted that a fair and reasonable employer could not have viewed her admitted conduct as serious misconduct, or have dismissed her for it, it is not the Authority's role to substitute its own views for that of an employer. The Authority's focus is on assessing what a fair and reasonable employer could have been objectively justified in doing.

[58] How a fair and reasonable employer could respond when faced with disciplinary concerns such as these potentially runs along a continuum of possible responses, some of

which may be viewed as harsh and or lenient, but which may still fall within the range of possible reasonable responses that are available to the employer in all the circumstances.

[59] While Ms Duder has raised concerns about the process used, on the face of it the respondent appears to have complied with its statutory obligations regarding the provision of relevant information under s 4(1A) of the Act and the four procedural fairness tests in s 103A(3) of the Act.

[60] Ms Duder does not appear to be on strong ground regarding the various concerns she has raised about her dismissal. Even if some of the concerns she has identified were proved, then there would likely be a question about whether s 103A(5) of the Act would apply.

[61] While the Authority is keeping an open mind, given that the evidence has not yet been tested, for the purposes of interim reinstatement this determination has been based on the fact that Ms Duder will be able to prove all of the matters she has deposed to in her affidavit dated 9 July 2021. Even allowing for that, the Authority is left with the impression that Ms Duder has a weakly arguable case for unjustified dismissal.

*Does Ms Duder have an arguable case for permanent reinstatement?*

[62] If there is no real prospect of permanent reinstatement then there cannot be said to be an arguable case for interim reinstatement.<sup>1</sup>

[63] The strength of Ms Duder's case for reinstatement is one factor in determining whether there should be interim reinstatement. The strength of the arguable case for reinstatement is a factor that is also relevant to the Authority's assessment of where the balance of convenience may lie pending the outcome of the substantive matter.

[64] Under s 125 of the Act, if an employee establishes that they have a personal grievance, and they seek reinstatement, then the Authority must order reinstatement "*wherever practicable and reasonable*", irrespective of any other remedies that may be provided.

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<sup>1</sup> *Watson v Progressive Enterprises Limited* [2009] NZERA 105, following *Madar v P&O Services (NZ)Limited* [1999] 2 ERNZ 174 (CA).

[65] Practicability is not to be construed narrowly and what is reasonable will necessarily involve a broad inquiry, that includes an assessment of the impact of reinstatement on others, and not just the parties.

[66] There are a number of matters set out in the parties' affidavits which would call the practicability and reasonableness of reinstatement into question should Ms Duder establish her dismissal grievance. These factors are mainly set out in Mr Gyde's affidavit of 26 July 2021.

[67] While there are as yet unresolved questions about whether Ms Duder has done something to merit forfeiting the remedy of reinstatement, or whether there are other good reasons that would make reinstatement unjust, impractical or unreasonable in this particular case, it cannot be said that Ms Duder does not have an arguable case for permanent reinstatement, given the low threshold that applies.

[68] However, based on the currently available and as yet untested evidence, it appears at this preliminary stage that Ms Duder's arguable case for the remedy of permanent reinstatement is not a strong one.

**Where does the balance of convenience lie?**

[69] The balance of convenience does not weigh in favour of Ms Duder.

[70] Ms Duder's substantive claims will be heard by the Authority on 2 and 3 December 2021. Ms Duder has savings she can rely on to support herself between now and then. She can also presumably generate income via the Tradme business.

[71] Ms Duder has made seriously adverse claims, against the respondent's General Manager personally, so there will be a question about whether they can be expected to work together harmoniously in future and if so what would be required to facilitate that.

[72] Ms Duder has engaged in underhand tactics by covertly recording Mr Gyde, then asking him leading questions in what he considered was an attempt to "*set him up*". That action undermined their working relationship and would also need to be appropriately addressed if she returned to work.

[73] Mr Gyde's affidavit set out a number of performance concerns that, while strongly disputed by Ms Duder, may need to be addressed if she returned to work because that has not yet occurred.

[74] Some staff subsequent to Ms Duder's dismissal raised other 'relationship type' issues. These issues would have to be properly investigated if Ms Duder was to return to work.

[75] Mr Gyde in his affidavit said that the respondent no longer required Ms Duder's previous role in its business, so it had moved some of her previous duties to be undertaken by a third party. If Ms Duder was to be returned to work then that would necessarily impact on those arrangements with the third party, because there was no on-going role within the business for Ms Duder to currently be reinstated back into.

[76] Mr Gyde's evidence was that if Ms Duder was to be reinstated, then the respondent would have to consider embarking on a consultation process regarding a proposal to make her role redundant, on the basis that it was no longer needed within the business. It is not desirable for that exercise to have to occur between now and the disposition of Ms Duder's substantive claims.

[77] The fact that there is no longer a role available for Ms Duder to be interim reinstated into is a factor that weighs against interim reinstatement.

[78] If Ms Duder were interim reinstated then that would likely be the catalyst for a number of other investigations and/or employment processes having to be commenced prior to the substantive investigation. That is highly undesirable.

[79] Auckland is currently experiencing a Covid 19 related Level 4 lockdown, will likely be followed by time in a Level 3 lockdown. It is as yet unknown when Auckland businesses will be moving back to Level 2 restrictions.

[80] The current lockdown means that reinstating Ms Duder back into the workplace, her employer's investigation of the various other issues that would have to be addressed upon her return to work, and repairing the damage Ms Duder has done to the relationship she has with the General Manager, are likely to be more difficult to undertake during lockdown.

[81] The Authority considers that it would likely be too disruptive to the business, to Ms Duder's colleagues, to the respondent's General Manager, to the third party who is undertaking parts of Ms Duder's previous role if Ms Duder was to be interim reinstated.

[82] The balance of convenience weighs strongly against interim reinstatement.

**Where does the overall justice lie?**

[83] Having assessed that Ms Duder has weakly arguable claims for both unjustified dismissal and reinstatement as a remedy, and that the balance of convenience strongly weighs against interim reinstatement, the Authority must stand back and carefully consider where the overall justice of this case lies.

[84] If Ms Duder's dismissal grievance succeeds, then the Authority's view is that she could be adequately compensated by a monetary award for lost remuneration between the date of her dismissal and the date of a substantive determination that she has lost. However, the disadvantages that the respondent would face if Ms Duder were interim reinstated, but the not permanently reinstated, could not.

[85] If Ms Duder were interim reinstated until her substantive matter has been determined, the respondent would be subjected to likely considerable disruption, additional unexpected costs and loss of management time that it could not be compensated for. Others would also be likely adversely affected, including but not limited to other staff and the third party currently undertaking some of Ms Duder's previous sales activities.

[86] The weakness of Ms Duder's arguable claims, and the fact that the balance of convenience strongly favoured the status quo, the adequacy of monetary compensation have led the Authority to conclude that the overall justice weighs against interim reinstatement.

[87] The overall justice of this matter weighs strongly against interim reinstatement.

**What, if any, costs should be awarded?**

[88] The respondent successfully defended Ms Duder's application for interim reinstatement, so it is entitled to a reasonable contribution towards its actual costs.

[89] The parties are encouraged to resolve costs by agreement. If that does not occur, then the Authority will resolve costs on this interim reinstatement application when the substantive matter has been resolved/determined.

### **Conclusion**

[90] Ms Duder's application for interim reinstatement does not succeed, because:

- (a) The applicant has a weakly arguable case for unjustified dismissal and permanent reinstatement;
- (b) Monetary remedies, for the period between the applicant's dismissal and the Authority's substantive determination, would adequately compensate the applicant - if her dismissal grievance succeeds;
- (c) Monetary remedies could not adequately compensate the respondent if Ms Duder's personal grievance does not succeed or if she is granted interim but not permanent reinstatement;
- (d) The balance of convenience strongly favours the status quo, and therefore the respondent's position against interim reinstatement;
- (e) The overall justice of this case also strongly favours maintaining the status quo until the substantive matter can be resolved;
- (f) The applicant is required to contribute towards the actual costs the respondent has incurred for successfully defending this interim reinstatement claim.

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