

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2021] NZERA 121
3132138

BETWEEN	NILESH PRAKASH Applicant
AND	NEW ZEALAND DEFENCE FORCE Respondent

Member of Authority:	Marija Urlich
Representatives:	Rajendra Chaudhry, for the Applicant Channy Mao, for the Respondent
Investigation Meeting:	On the papers
Submissions received:	26 March 2021 from Applicant 26 March 2021 from the Respondent
Determination:	29 March 2021

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mr Prakash's employment with the New Zealand Defence Force (NZDF) ended on 30 November 2020 by way of dismissal following a 23 July 2020 complaint made by a junior colleague (the complainant). Mr Prakash was dismissed for serious misconduct based on findings that he had bullied and harassed the complainant. There is no dispute this was the first disciplinary action NZDF had taken against Mr Prakash since his employment commenced in 2015.

[2] On 5 February 2021 Mr Prakash lodged an application for interim reinstatement along with a supporting affidavit and undertaking as to damages. NZDF opposes interim reinstatement.

[3] This determination deals only with Mr Prakash's application for interim reinstatement. The investigation of his substantive claim of unjustified dismissal will be held in due course.

Interim non-publication order

[4] NZDF seeks non-publication orders of the name and any information likely to identify the complainant. Mr Prakash does not oppose the application.

[5] The order as sought is made on an interim basis under clause 10(1) of the second schedule of the Employment Relations Act 2000.

[6] Submissions on whether the interim order should be made permanent will be heard at the conclusion of the substantive investigation.

The Authority's investigation

[7] On 15 February 2021 the Authority held a case management conference with the parties' representatives to set a timetable for Mr Prakash's interim reinstatement application. The application was granted urgency. The parties have attend mediation and complied with timetabling directions.

[8] In determining this matter affidavit evidence of Mr Prakash, Shahana Khan, Robert Gilles and Richard Schulze has been considered as have the parties' statements of problem and reply, the documents attached thereto and the parties' submissions. Evidential matters in dispute between the parties will not be resolved by this determination because the evidence is untested and in applying the relevant tests the Authority is not required to resolve any disputes.

The Law

[9] Section 127 of the Employment Relations Act 2000 (the Act) confers jurisdiction on the Authority to grant interim reinstatement. In considering Mr Prakash's application for interim reinstatement the Authority is required to consider the following:¹

¹ *Western Bay of Plenty District Council v McInness* [2016] NZEmpC 36 at [7].

- (i) Does Mr Prakash have an arguable case for unjustified dismissal and an arguable case for permanent reinstatement?
- (ii) Where does the balance of convenience lie? This requires looking at the relevant detriment or injury that Mr Prakash and NZDF will incur as a result of the interim injunction being granted (or not granted)?
- (iii) The Authority is then required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

Arguable case of unjustified dismissal

[10] The first question for consideration is whether there is an arguable case Mr Prakash was dismissed unjustifiably and that he will be permanently reinstated. An arguable case means a case with some serious or arguable, but not necessarily certain prospects of success.²

[11] Section 103A of the Act sets out the test for assessing whether a dismissal was justifiable. It requires an objective assessment of whether NZDF's actions and how it acted were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred. The Authority may take into account other factors it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in Mr Prakash being treated unfairly.³ The Authority's task is to examine objectively NZDF's decision-making process and determine whether what NZDF did and how it was done were steps open to a fair and reasonable employer.

[12] The complaint which triggered the disciplinary investigation and subsequent action against Mr Prakash concerned allegations he asked the complainant to view explicit content and repeatedly asked him questions or made remarks or comments in his presence of an explicit nature. On receiving the complaint NZDF commenced an investigation. Mr Prakash was suspended on full pay on 30 July following an opportunity to comment. An external consultant was engaged to undertake an investigation for which Mr Prakash was interviewed and provided an opportunity to

² *X v Y Ltd v New Zealand Stock Exchange* [1992] 1 ERNZ 863.

³ Section 103A Employment Relations Act 2000.

comment on the draft report. After receipt of the final report on 7 October, on 16 October NZDF notified Mr Prakash of the outcome of the investigation which “was that all of the allegations in the complaint were able to be sustained”, included a copy of the final report, and notified him a formal disciplinary process was to commence “to determine whether the incident amounts to misconduct or serious misconduct under the Civil Staff Code of Conduct, and if so, what further action needs to be taken.”⁴ Mr Prakash provided comment on the investigation findings and disciplinary investigation. On 20 November a preliminary decision was put to Mr Prakash to comment which he provided on 25 November and on 30 November NZDF communicated to Mr Prakash its decision that he was summarily dismissed.

[13] Mr Prakash says his dismissal was unjustified because:

- (i) NZDF failed to follow its own processes for dealing with such matters by way of informal resolution including counselling, training or performance management;
- (ii) the evidence against Mr Prakash was not to the requisite threshold to justify dismissal including the complaint did not see the subject content and there were inconsistencies in witness evidence; and
- (iv) a culture of tolerating the complained of conduct existed in the workplace which NZDF was aware of and took no reasonable steps to manage. In such circumstances the disciplinary action against Mr Prakash was unfair and unreasonable.

[14] NZDF does not accept Mr Prakash has an arguable case including:

- (i) Mr Prakash’s accepted conduct fell within the definition of serious misconduct contained in the employment agreement and the Code of Conduct; and
- (ii) the pedantic scrutiny of witness evidence and workplace culture invited by Mr Prakash falls outside the s 103A test to be applied and ignores his admissions of serious misconduct.

⁴ Letter Lt Col Gillies to Mr Prakash 16 October 2020.

[15] Mr Prakash's case turns in large part on the Authority accepting NZDF failed to fairly contextualise his conduct within the workplace culture and that seen in the appropriate context the behaviour could not reasonably amount to serious misconduct. How NZDF considered and weighed the reasonableness of Mr Prakash's view that the complained of conduct was normalised in the workplace and therefore mitigate the seriousness of his actions is central to the issues to be investigated and determined. The Authority will also need to be satisfied the decision-making process undertaken by NZDF was one a fair and reasonable employer could have undertaken given the findings of the external investigator appear to have been accepted in total including what appear to be findings beyond bare factual matters and more than one decision maker appears to have been involved the disciplinary findings.

[16] The Authority is satisfied there is an arguable case Mr Prakash was unjustifiably dismissed.

Arguable case for permanent reinstatement

[17] Where it is practical and reasonable to do so and sought, the Authority must provide for reinstatement as a primary remedy⁵. Delay may not be fatal to such a claim but it is a factor to consider⁶.

[18] NZDF submits permanent reinstatement is not practicable or reasonable because if Mr Prakash is reinstated:

- (i) there is a real risk of reversion to dysfunctional relationships;⁷
- (ii) reinstatement would have the effect of "undoing" the reasonable steps NZDF has taken to ensure the workplace meets health and safety obligations subsequent to Mr Prakash's dismissal;
- (iii) reinstatement is inconsistent with Mr Prakash's position that his accepted behaviour is a product of NZDF workplace environment; and
- (v) Mr Prakash would be required to obtain a security clearance to return to any position within NZDF.

⁵ Section 125(2) of the Employment Relations Act 2000.

⁶ See *Clarke v Norske Skog Tasman Ltd* [2003] 2 ERNZ 213 and *Johnston v Air New Zealand Ltd (No 3)* [1989] 3 NZILR 338 (LC).

⁷ *Edwards v Board of Trustees of Bay of Islands College* [2015] NZEmpC at [288].

[19] Mr Prakash submits he is able to go back into the workplace and is prepared to be reinstated to any role anywhere in New Zealand. The evidence suggests it would be disruptive to his family circumstances to relocate to another part of the country.

[20] NZDF says it has lost trust and confidence in Mr Prakash and that it has serious concerns as to whether it is possible to rebuild that trust and confidence. Mr Prakash says NZDF has overreacted and he can readily return to work. Given the nature of the conduct Mr Prakash has admitted to and his apparent reluctance to accept the seriousness of that conduct this indicates it would be difficult for him to go back into a workplace where NZDF has made clear such conduct is unacceptable. Considering all the relevant issues my assessment at this early stage is Mr Prakash's case for permanent reinstatement is not strong.

Balance of convenience

[21] This ground for consideration involves the relevant detriment or injury the parties will incur if interim reinstatement is granted or not.

[22] The Authority understands the key motivator of Mr Prakash's claim for interim reinstatement is the financial impact of his dismissal on himself and his family. The evidence of Mr Prakash's financial circumstances is not comprehensive. He has not, for example provided evidence of income received into his household from rental property⁸ or other family members and has provided only limited detail of outgoings and expenses for himself and his family. It is not clear from the affidavit evidence what steps Mr Prakash has taken to find other work following his dismissal. In addition, a document attached to Mr Prakash's affidavit indicates he and his wife were advanced approximately half the value of the total mortgage sum on 11 November 2020.⁹ On the evidence it is not clear why Mr Prakash appears to have doubled his mortgage commitments in the face of disciplinary action which he was aware could result in his dismissal. Such action could suggest Mr Prakash was confident he could manage his financial commitments without his NZDF salary.

[23] Mr Prakash submits reinstatement is necessary to offset the emotional harm he has suffered consequent to the dismissal including the external investigator and

⁸ Refer insurance certificates for rental property affixed to affidavit of Mr Prakash 10 February 2021.

⁹ Refer Loan details document 5 February 2021 affixed to affidavit of Mr Prakash 10 February 2021.

witnesses knowledge. The evidence filed by Mr Prakash does not disclose any specific harm suffered (either emotional or professional) or make clear how reinstatement could address such harm.

[24] Mr Prakash also submits there will be minimal disruption to the workplace because “like any workplace, there is a culture of discussion about employees and the applicant’s case is no different.” The Authority understands this submission to be Mr Prakash’s conduct, at worst, can be characterised as is workplace banter or joking. On the untested evidence before the Authority the conduct might also be open to be interpreted as bullying and harassment. For example, Mr Prakash in answer to the external investigator said he had repeated the request for the complainant to view the explicit material in order “to see his reaction.”¹⁰

[25] If Mr Prakash’s substantive claim is successful he will be entitled to consideration of wages lost consequent to his dismissal and compensation for humiliation, loss of dignity and injury to his feelings. Remedies may be an adequate remedy to address the concerns Mr Prakash has raised.

[26] In contrast, the information before the Authority indicates it would be detrimental to NZDF if Mr Prakash was reinstated on an interim basis. Mr Prakash has not been in the workplace for 9 months since his suspension in July 2020. The evidence before the Authority suggests the workplace has moved on since Mr Prakash’s dismissal.

[27] The balance of convenience favours NZDF. Mr Prakash is able to bear the burden of not being reinstated in the interim.

Overall justice

[28] Standing back from the detail of the claim where on balance does the overall justice lie? Mr Prakash has admitted to conduct which appears on its face to clearly breach the Code of Conduct. He has sought to explain the conduct as jokes or banter. NZDF is clear such conduct will not be tolerated in the workplace because it amounts to serious misconduct. The evidence of financial harm if not reinstated is not strong.

¹⁰ Section 7 investigation report 7 October 2020.

The evidence of the personal impact on Mr Prakash of not being reinstated is not strong.
The overall justice of this matter does not favour interim reinstatement.

Outcome

[29] Mr Prakash's application for interim reinstatement is declined.

Costs

[30] Costs are reserved and will be dealt after determination of the substantive investigation.

Marija Ulrich
Member of the Employment Relations Authority