

NOTE: This determination contains an order prohibiting publication of certain information at [12]

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 341
3175068

BETWEEN

KFL
Applicant

AND

CHIEF OF THE NEW
ZEALAND DEFENCE FORCE
Respondent

Member of Authority: Sarah Kennedy

Representatives: Tanya Kennedy, counsel for the Applicant
Jordan Boyle, counsel for the Respondent

Investigation Meeting: 1 July 2022

Submissions Received: 1 July 2022 from the Applicant
1 July 2022 from the Respondent

Date of Determination: 21 July 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Applicant alleges that they have been unjustifiably disadvantaged by their employer commencing an employment investigation into alleged concerns about inappropriate conduct towards others and by suspending them while these concerns were investigated.

[2] On 15 June 2022, KFL lodged with the Authority a statement of problem seeking urgent orders that pending a substantive determination of the issues by the Authority or further order of the Authority, their employer, the New Zealand Defence Force (NZDF) be restrained from

continuing with the current investigation process and suspension. Alternatively, if the suspension is to continue, NZDF be restrained from suspending the Applicant without pay.

[3] NZDF opposes the application for an interim injunction and says it is lawfully entitled as the Applicant's employer upon having concerns raised with it, to investigate the Applicant's conduct; suspending the Applicant is justified by reason of its obligations under the Health and Safety at Work Act 2015, and its actions to date are what a fair and reasonable employer could have done in all the circumstances.

[4] The parties have attended mediation but have been unable to resolve the issues.

Investigation meeting

[5] Urgency was granted, agreed timetabling orders made and the matter was heard by the Authority on 1 July 2022. The sole focus at this stage is whether the Authority should exercise its discretion to grant interim orders restraining the employer from continuing with its investigation and/or suspension, pending determination of the substantive application in the Authority.

[6] As is usual in applications for interim relief, the evidence provided to the Authority was contained in affidavits and was not able to be properly tested. Affidavits were received from the Applicant and Jason Huggins from NZDF.

[7] Oral submissions were made by the parties' representatives and both parties provided written submissions. An additional medical report relating to the Applicant was provided on the day of the hearing.

Non-publication

[8] The Applicant seeks an order for non-publication in relation to all health information and their name and identifying details, including the name of the employer. NZDF did not oppose such an order but submitted it would not be in the interests of open justice for any non-publication order to extend to NZDF. It employs over 18,000 employees and publication of the name of the employer, it says, would be unlikely to identify the Applicant and I accept that submission.

[9] The Authority has the power to prohibit publication set out in clause 10(1) of schedule 2 to the Employment Relations Act 2000 (the Act). The starting point when considering non-publication is open justice. However, it is well established that there are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice.¹

[10] Given the material before the Authority, the stage the matter is at and the parties submissions, I was satisfied that the public interest in knowing could be displaced by the health concerns that necessarily form part of the factual matrix of this matter. The exception to this, is the fact a health issue exists because that is central to the claims the Applicant makes.

[11] On 1 July 2022, I made an interim non-publication order. The parties have since filed a joint memorandum requesting that a final non-publication order be made and have advised the Authority of circumstances that would make that appropriate.

Non-publication order

[12] Under clause 10(1) of schedule 2 to the Employment Relations Act 2000 (the Act), publication of the Applicant's name, identifying details and personal health information are prohibited from publication. For completeness this order does not include the fact there is a health issue and the existence of the medical reports before the Authority.

Admissibility issue

[13] Counsel for the Applicant submitted some of the material provided to the Authority for the purposes of the investigation meeting should not be included in the Authority's investigation. It is claimed that personal information was obtained by NZDF, without the Applicant's authorisation and therefore this was information that was obtained in breach of the Privacy Act 2020.

[14] After hearing submissions from counsel, I was satisfied there was insufficient evidence at this preliminary stage to establish whether information had been obtained unlawfully on the basis of a breach of privacy. In addition, it was clear that exceptions to the privacy principles in s 22 of the Privacy Act 2020 would likely apply, given the third party's relationship with

¹ *Erceg v Erceg* [2016] NZSC 135 at [3].

NZDF and the nature of the Applicant's conduct in issue, which means it is not a foregone conclusion that the information was obtained in breach of the Applicant's privacy.

[15] Based on that assessment and because the material in issue formed the basis for one of NZDF's concerns about the Applicant, it is more likely than not that the information would be relevant. Given that the Authority is able to receive any information that is relevant to an investigation in accordance with its statutory jurisdiction, I considered it to be admissible for the purposes of hearing the application for interim orders.

[16] The only caveat was if specific documents contained information to which an obligation of confidence would apply, then those documents would be considered separately in terms of their admissibility.

Background

[17] The Applicant was employed by NZDF and these proceedings have arisen after NZDF raised concerns with the Applicant about their behaviour and conduct. There were two particular concerns at that stage, one relating to inappropriate conduct towards an employee and the other about the Applicant's behaviour outside the workplace (the third-party complaint). A further concern was raised about inappropriate conduct by the Applicant towards another employee. Then another similar concern was raised.

[18] NZDF has sought to meet with the Applicant about these issues since they arose and provided multiple dates to meet and says the Applicant has so far refused to attend a meeting.

[19] The Applicant had separately raised concerns with NZDF about their mental health on more than one occasion. Despite both parties agreeing that a medical report would be an appropriate next step, they have failed to reach agreement on the scope of such a report and no assessment has taken place.

[20] The Applicant's position is that NZDF's approach to their health issue has put additional pressure on them at the same time as the concerns about their conduct were being raised with them. Despite that, the Applicant says they are willing to undergo an assessment with a medical practitioner to obtain such a report.

[21] In summary there are five employment concerns NZDF wishes to meet with the Applicant to discuss. When a medical report was not forthcoming, and the information NZDF

had about the Applicant's health issue was scant, NZDF decided to proceed with its employment investigation. When further concerns about inappropriate conduct by the Applicant came to its attention NZDF suspended the Applicant from work. When further attempts to meet failed, and there was still disagreement about a medical report, NZDF notified the Applicant that while they were on suspension, they would be placed on leave without pay.

[22] However, NZDF then reconsidered that decision and advised the Applicant it had decided their suspension would remain on full pay, provided they attended a proposed scheduled meeting to discuss the employment concerns.

[23] At the investigation meeting it was noted NZDF had been advised recently that a report from the Applicant's general practitioner was imminent and it would likely say that the Applicant was now too unwell to attend the meeting that was scheduled.

Individual Employment Agreement

[24] The Applicant's Individual Employment Agreement (Employment Agreement) contains a clause that permits NZDF to require employees to undergo a medical examination and the ability to suspend employees pending the outcome of any investigation. If a suspension is in excess of ten days NZDF may suspend an employee on unpaid leave if the reasons for the long-term suspension are beyond the control of NZDF.

The Applicant's submissions and evidence

[25] The Applicant says there are significant procedural flaws and breaches of good faith to do with the investigation, both substantively and procedurally. The allegations are stale, there is predetermination and essentially a witch hunt; there is discrimination; the employer is seeking to meet with the Applicant before gathering and providing the Applicant all the relevant information; the Applicant does not have access to information having been locked out of the work email and systems; NZDF is refusing to follow their own processes, and there is disparity of treatment; the decision-maker is not independent and the disciplinary process seeks to rely on unlawfully obtained information which is also unfair and unjustifiably disadvantages the Applicant.

[26] The Applicant also submits it is premature for the employer to be putting some of the concerns to the Applicant because there are no formal complaints, it is not clear that the people who have provided information want it to be dealt with, nor have they chosen whether they

wish to follow a formal or informal process or consented to having the matters addressed with the Applicant.

[27] The Applicant also notes that the complaints that they made in relation to bullying and the conduct of Mr Huggins, who is to be the decision-maker in relation to the investigation about them, have not been progressed on the basis that NZDF says that it needs further specific information from the Applicant. That is the basis for the claim that there has been discrimination.

[28] The Applicant says NZDF treated them unfairly and disadvantaged them by requesting they consent to a report being provided that was too wide in scope and could be used for medical disengagement purposes. The Applicant also wanted an option to veto a medical report before it went to their employer.

[29] The health information the Applicant supplied to NZDF, and the Authority consists of a counsellor's report with a relevant entry, when an urgent follow up health referral was made.

[30] The Applicant had also provided a medical certificate to NZDF, which provides some detail about health issues. It does not appear to have been created for the purposes of informing an employer or the Applicant about what exactly the health issues were and what that might mean in the employment context. It provides no information about whether the Applicant was well enough to participate in an investigation process.

[31] At the investigation meeting, a further medical report was provided to both NZDF and the Authority. It was created as a result of the urgent referral by the counsellor and coincided with the Applicant's suspension from work.

The Respondent's submissions and evidence

[32] NZDF submits that based on the facts, it has acted as a fair and reasonable employer in the circumstances. NZDF says, at least at this preliminary stage, one of the concerns is considered serious, and all the concerns taken together, could indicate a pattern of inappropriate conduct in different settings, by the Applicant towards other employees.

[33] NZDF has sought to meet with the Applicant on more than one occasion. It accepts that the Applicant has raised unspecified health concerns, both independently and in relation to a meeting. NZDF sought to have the Applicant consent to undergo a medical examination

with a clinical psychologist or a psychiatrist at its cost. When the Applicant attempted to place what NZDF considers to be unreasonable conditions on the information gathered and how it would be shared with NZDF, it decided to no longer require the Applicant to undergo a medical examination. NZDF says it has offered to make reasonable and practical accommodations to mitigate any health concerns.

[34] NZDF is at the very start of the process of dealing with the concerns that have come to its attention, with the Applicant, and has made no decisions either about the substance of the concerns or next steps to be taken but accepts it has set them out in writing framed as allegations.

[35] Regarding the Applicant's suspension, once further inappropriate behaviour towards other employees was alleged, the decision to propose and consider suspension was based on its duty and obligations to ensure a healthy and safe working environment for all staff. Alternatives to suspension were considered but discounted because of the type of role held by the Applicant and the nature of the concerns that had been raised. NZDF consulted on the proposal to suspend and provided extra time, which in the end amounted to six days, to respond and the submissions provided by the Applicant were fully considered before any decision was made.

[36] NZDF notes the Employment Agreement provides for suspension of employees on unpaid leave if the suspension is in excess of ten days and the reasons for the long-term suspension are beyond the control of NZDF. NZDF says this was the situation it was in when it made the decision and communicated to the Applicant that their suspension was to change from full pay to unpaid leave, but it has since reversed that decision and the Applicant remains suspended from work but on full pay. NZDF still seeks to meet with the Applicant to discuss the employment concerns as soon as possible.

[37] It was submitted on NZDF's behalf that the orders sought by the Applicant should be declined because the high threshold required to restrain an employer from pursuing its disciplinary process has not been met. In addition, the Applicant's continued suspension is justified in the circumstances given the health and safety grounds referred to.

Interim relief

[38] The legal tests to be considered by the Authority in assessing the application for interim relief are well settled.² The principles relating to interim injunctions were set out by the Court of Appeal in *New Zealand Tax Refunds Ltd v Brooks Homes Ltd*³:

The applicant must first establish that there is a serious question to be tried or, put another way, that the claim is not vexatious or frivolous. Next the balance of convenience must be considered. This requires consideration of the impact on the parties of the granting of, and the refusal to grant, an order. Finally, an assessment of the overall justice of the position is required as a check.

The grant of an interim injunction involves, of course, the exercise of a discretion ... this is subject to the qualification, however, that whether there is a serious question to be tried is an issue which calls for judicial evaluation rather than the exercise of a discretion.

[39] Therefore, in considering the application for interim orders the Authority is required to consider the following:

- (i) Whether there is a serious question to be tried'
- (ii) Where the balance of convenience lies pending the substantive investigation and final determination of the Applicant's claim;
- (iii) Whether there is an adequate alternative remedy other than injunctive relief available, such as damages;
- (iv) Where does the overall justice of this case lie until the substantive matter can be determined.

Serious question

[40] The issue for determination is whether or not there is a serious question to be tried or a seriously arguable case that the investigation to date, and the Applicant's suspension from work are significantly flawed such that the Applicant has been disadvantaged by some unjustifiable

² *American Cyanide Co v Ethicon Limited* [1975] AC 396, *Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited* [1985] 2 NZLR 129, *WN v Auckland International Airport Limited* [2021] NZEmpC 153 [15 September 2021], *NZ Tax Refunds Ltd v Brook Homes Ltd* [2013] NZCA 90 at [12] – [13] and *Savage v Wai Shing Ltd* [2019] NZEmpC 141 at [32].

³ *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90 at [12] – [13].

action by NZDF. The threshold for a serious question is that the claim is not frivolous or vexatious.

Is the employment investigation flawed?

[41] The Applicant alleges that the disciplinary process commenced by NZDF, with a further three concerns subsequently raised, is substantively and procedurally unjustified and unfair.

[42] I do not consider it necessary to address all the flaws raised about the employment investigation for several reasons. Firstly, the investigation has not yet commenced other than the concerns being provided to the Applicant in writing and requesting a meeting to discuss.

[43] In addition, the nature of the Applicant's conduct in issue is such that whether or not comments made by the Applicant, or other conduct was inappropriate, will likely be informed by the context in which they occurred. This means a response from the Applicant would be required as a starting point. Such a response has not yet been provided.

[44] Thirdly, while several issues were raised about whether the concerns are supported by formal complaints, or the complainants' consented to having them addressed formally, these appear to be matters for which it is reasonable at this early stage to leave to the discretion of the employer. Section 103A of the Act refers to concerns and allegations about and against employees. The test is whether the concerns were raised, the employee given an opportunity to respond, and those responses given genuine consideration. Whether or not the employer was correct to act on information it became aware of, falls for assessment of whether it complied with s 103A and its good faith obligations. These matters can be addressed at a substantive investigation meeting.

[45] While noting that the provision of a medical report has become contentious, the steps NZDF has taken in relation to the employment investigation itself do not appear unreasonable or inconsistent with s 103A of the Act at this stage.

[46] The Applicant's claim is they have been disadvantaged by NZDF advancing the discussions about the employment concerns at the same time as seeking a medical report about their health, becomes problematic when both parties agree that seeking a medical report was and remains a reasonable step to take.

[47] I have reached the conclusion that it is premature to consider flaws in the employment investigation other than the inability to agree on the scope and nature of any medical report. In light of the new information that was provided on the day of the investigation meeting, it would appear there is now sufficient information to indicate that proceeding with an employment investigation without a medical clearance could be an unreasonable step for an employer to take. I am satisfied that other than the Applicant's medical fitness to participate in an employment investigation, there are no other flaws in the investigation, substantively or procedurally at this stage, that reach the threshold for a seriously arguable case that the investigation should be halted.

Is the suspension seriously flawed?

[48] It is no longer necessary for the Authority to consider the claims in relation to suspension without pay because at the time of the investigation meeting, NZDF had reversed that decision.

[49] Dealing with the suspension from work, on full pay, the Applicant alleges that they have been unjustifiably disadvantaged in various ways, including not providing an opportunity to fully respond to the suspension proposal and being shut out of their employer's emails and systems impacting on their ability to respond to the employment allegations.

[50] The first point is that the Employment Agreement between the parties allows for suspension while it investigates allegations but nonetheless the employer must still comply with s103A of the Act and its good faith obligations and act as a fair and reasonable employer could in the circumstances.

[51] NZDF had several employment concerns about the Applicant that it wished to investigate, when more came to its attention. It says, collectively, these concerns show a pattern of inappropriate behaviour towards other employees and during an interaction outside of but indirectly connected with the workplace. It was at this stage the suspension was proposed for consideration.

[52] In total, the Applicant was given six days to respond to the proposal and made submissions with the assistance of their counsel. The Applicant says that an alternative was proposed, which was that they were to work from home for two weeks. This was considered but discounted for operational reasons.

[53] The Applicant was advised of the proposal to suspend them and the reasons for the proposed suspension and given an opportunity to respond. Their responses were considered before a final decision was made. None of the steps taken appear to be unreasonable on the part of the employer or unfair to the employee. This means there is not a seriously arguable case the suspension is or was substantively or procedurally flawed.

Health issue

[54] The Applicant claims that NZDF cannot proceed before further medical information is provided but at the same time, they do not provide that information or take steps to obtain it. The parties have been engaged in this process for at least three months and have not been able to agree on the scope or nature of the medical information that could be provided to the employer.

[55] NZDF says its rationale for proceeding with the investigation now is that it does not have knowledge of the health condition, so it is unable to make decisions to accommodate this. It submits that this case is distinguishable from the situation in *FGH v RST*, where the allegations against the employee arose in the context of an ongoing performance improvement process and the conduct related directly to the employee's diagnosed mental health condition.⁴ The difference in the current matter is that it has no knowledge of a diagnosed mental health condition, so the guidance in *FGH v RST* would not apply.

[56] Having reviewed the three pieces of information about the Applicant's health, and although not tailored to the employment context, interplay between the investigation process and the Applicant's health is evident. The health information taken together, but in particular, the urgent medical assessment tends to suggest it would be prudent and reasonable for the employer to have the Applicant obtain and provide a medical clearance prior to engaging in an employment investigation process.

[57] In fairness to NZDF, without the further report provided at the investigation meeting, the requirement for a medical clearance was not clearly indicated on the information previously available to it.

[58] I accept that the parties are both in a difficult situation as a result of being unable to reach agreement about the provision of the Applicant's medical information when both parties

⁴ *FGH v RST* [2018] NZEmpC 60 at 271.

agreed it was needed. However, given the Applicant notified their employer of their health issue, and the new information that came to light at the investigation meeting, I am satisfied there is an arguable case that it would be unreasonable not to seek medical clearance before proceeding with an investigation process.

Balance of convenience

[59] This part of the analysis involves a weighing exercise and requires consideration of the impact on the parties of the granting of, and the refusal to grant, an order.

[60] The Applicant says they will continue to be impacted by what they say are serious and sustained breaches of good faith and failure to take all practicable steps in terms of health and safety. It also says that there are significant effects on the Applicant's health that cannot be reversed or adequately compensated in the employment jurisdiction and that there will be significant effects of loss of pay if the employer again makes a suspension without pay decision. It is also alleged that it potentially has effects on the Applicant's reputation and employment prospects and says that the breaches of their privacy are significant. The Applicant also says that the longer they are away from work, the harder it is for them to re-integrate and the greater the speculation and inquiries about their whereabouts are, and they have to field these inquiries.

[61] NZDF takes the position that if the interim orders sought are granted, NZDF would be prevented from continuing any aspect of its inquiry pending the outcome of the Authority's substantive investigation. This is despite the seriousness of the concerns that have been raised and the interests of others, in particular, the other employees, in having matters progressed in a timely manner. NZDF says that preventing it from conducting its investigation would impact on its obligation to take appropriate steps to investigate the concerns raised with it. It further says that damages are an adequate remedy.

[62] To the extent that I have already addressed the matters raised on the Applicant's behalf about the employment investigation, these do not fall for further consideration. Others are matters that naturally arise in the course of an employment investigation or ones for which alternative remedies will be available. There are, however, no alternative remedies, such as damages, if the Applicant is unwell in a way that impacts on their ability to participate in an employment investigation about concerns to do with their conduct.

[63] The obligations on the employer to ensure a safe workplace for all weigh heavily in favour of the employer, however, the Applicant's health concerns are also a strong factor for consideration. I am satisfied, based on the affidavit evidence at this early stage in the process, and the medical report provided, it is now reasonable to ensure that the Applicant is medically fit to participate in the employment investigation and therefore I find that the balance of convenience favours the Applicant and their health by a narrow margin and with limitations.

Overall justice

[64] The overall justice assessment is a final check on the position reached following the analysis of the earlier steps. To the extent some of the concerns relate to NZDF advancing both employment and health concerns at the same time, there is no disagreement that a medical report should be provided. The obstacle has been reaching agreement as to the scope and nature of such a report, which remains an issue that the parties need to resolve.

[65] Noting the substance of the employment concerns, as much as that can be established based on untested evidence, I am satisfied that the overall interests of justice fall in favour of the employee by a narrow margin but only until a medical clearance is provided for consideration.

Interim order

[66] The following interim orders are made:

- It is ordered that a medical clearance for KLF from an appropriate medical specialist is provided to the New Zealand Defence Force before further steps are taken in the employment investigation; and
- KLF is ordered, to the best of their endeavours, to obtain and provide a medical report that gives advice to New Zealand Defence Force about whether they are medically cleared to participate in the employment investigation; and
- KLF is to provide that medical report to the New Zealand Defence Force within 28 days of this determination; and
- In the event, the medical clearance is not provided to NZDF within 28 days of this determination, either party can notify the Authority and the substantive investigation meeting will proceed; and

- If the medical assessment and report (in accordance with the requirement to undergo a medical examination in the Employment Agreement) is indicated, and the parties cannot agree, the parties are ordered to mediation to reach agreement about the scope of that assessment and report with reference to the relevant clause in the Employment Agreement.

Costs

[67] Costs are reserved pending a final determination on the substantive matters.⁵

Sarah Kennedy
Member of the Employment Relations Authority

⁵ For further information about the factors considered in assessing costs, see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1