Attention is drawn to the order for non-publication at paragraph [31] of this determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI Ā TARA ROHE

[2023] NZERA 761
3267759

	BETWEEN	BARRY YOUNG Applicant
	AND	TE WHATU ORA – HEALTH NEW ZEALAND Respondent

Member of Authority:	Shane Kinley
Representatives:	Matthew Hague, counsel for the Applicant Rebecca Rendle, counsel for the Respondent
Investigation Meeting:	18 December 2023 at Wellington and by AVL
Date of Determination:	19 December 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Barry Young applied to the Authority on 7 December 2023 for an interim order restraining Te Whatu Ora – Health New Zealand (TWO) (and all its contractors, employees, or agents) from continuing with an investigation and/or finalising a decision regarding potential disciplinary action against Mr Young.

[2] Following a case management conference on 11 December 2023, this matter was timetabled (by consent) for submissions to be presented on 18 December 2023. TWO lodged a Notice of Opposition to Application for Urgent Interim Order on 14 December 2023 (NoO).

The Authority's investigation

[3] For the Authority's investigation submissions were presented by counsel for Mr Young and TWO, with written submissions provided by counsel for TWO. TWO's NoO was accompanied by an affidavit from [redacted text by Direction of the Authority] its [redacted text by Direction of the Authority] decision maker for the disciplinary process that TWO has commenced against Mr Young. Counsel answered questions from me when presenting submissions. TWO provided further information by email following the presentation of submissions, which comment was made on behalf of Mr Young on 19 December 2023.

[4] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Issues

[5] The issues identified for investigation and determination are:

(i) Should Mr Young be granted the interim order he seeks against TWO?

(ii) Should any party contribute to the costs of other parties?

Background to this application and related matters

[6] In separate proceedings involving the same parties three preliminary determinations[1] have been issued relating to injunctions and compliance orders sought by TWO against Mr Young and other parties in relation to the disclosure and/or release publicly of information including but not limited to confidential personal health and other information contained on TWO's National Vaccination Database.

[7] Mr Young has been suspended from his employment by TWO pending an employment investigation [redacted text by Direction of the Authority]. Pending the provision of this determination to the parties, an employment investigation meeting has been

[1] *ISV v ZCM and Ors* [2023] NZERA 718, *Te Whatu Ora – Health New Zealand v ZCM and Ors* [2023] NZERA 719 and *Te Whatu Ora – Health New Zealand v ZCM and Ors* [2023] NZERA 728.

scheduled for 19 December 2023. Whether that employment investigation meeting will proceed is dependent on whether the order sought by Mr Young is granted or not.

[8] Mr Young has also been charged under s 249(1) of the Crimes Act 1961 with "accessing computer system for dishonest purpose" (the criminal charge), which he says is based on the same alleged facts that were the basis of his suspension and the employment investigation.

Jurisdiction

[9] The Authority is required to consider and apply the tests for an interim injunction.[2] I am satisfied the jurisdiction exists under s 161 of the Employment Relations Act 2000 (the Act) for the Authority to make the order sought.

Relevant law

[10] Counsel for Mr Young and TWO pointed me to a number of Court judgments related to a when disciplinary enquiry should be placed on hold when answers that might be sought impinge upon a person's rights in the face of potential criminal action. There is, as the Court observed in *Wackrow v Fonterra Co-operative Group Limited,*[3] a strong danger of injustice which is twofold:

a. the risk of potential self-incrimination which may arise from answering questions in a disciplinary meeting where the subject matter is also subject to the Crimes Act charge Mr Young faces; and/or

b. the injustice that may arise should Mr Young refuse to either attend the disciplinary meeting or refuse to answer specific questions so as to avoid the potential for self-incrimination.

[11] I was also referred to *Russell v Wanganui City College* where the Court found an injunction was appropriate to stop an employment investigation pending the outcome of a criminal process.[4]

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[2] See, *American Cyanamid Co v Ethicon Limited* [1975] AC 396 and *Tasman Pulp & Paper Co Ltd v NZ (with exceptions) Shipwrights Union* [1991] 1 ERNZ 886.
[3] [2004] 1 ERNZ 350 at [67].
[4] [1998] 3 ERNZ 1076.

[12] Counsel were in agreement with the principles that apply from these judgments, which were summarised in *Wackrow v Fonterra Co-operative Group Limited* as follows:[5]

> (a) The employer is entitled to conduct an investigation, and in fact is bound to do so;
> (b) It is a grave matter for the Court to interfere with this entitlement;
> (c) The burden is on the employee to show it is just and convenient that the employer's ordinary rights are interfered with or modified;
> (d) No party is entitled as of right to have a civil proceeding stayed because of a pending or possible criminal proceeding;
> (e) The Court's task is one of balancing justice between the parties taking into account all relevant factors;
> (f) Each case must be judged on its own merits;
> (g) Two factors to take account of are the right to silence and the undesirability of exposing a person to double jeopardy;
> (h) There must be a real and not merely theoretical danger of injustice in the criminal proceedings having regard to factors such as:
> (i) The possibility of publicity of the civil proceedings that might reach and influence jurors or others;
> (ii) The proximity of the criminal proceedings;
> (iii) The possibility of a miscarriage of justice by disclosure of the defence enabling fabrication of evidence or interference with a witness;
> (iv) The burden of preparing for two proceedings;
> (v) The effect on the employer when considered and weighed against the effect on the defendant; and
> (vi) Whether the proceeding can be allowed to proceed to a certain stage before being stayed.

[13] I have referred to these principles below as relevant in determining whether the order sought should be made.

Arguable case

[14] Mr Young submitted that there is a seriously arguable case that he cannot fairly participate in any employment investigation because anything he says may be used in the active criminal proceedings which relate to the same alleged facts. Requiring him to do so was submitted would not protect his right to a fair trial, and potentially to not self-incriminate himself. It was also submitted that he would not be allowed to fully participate in the employment investigation.

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[5] [2004] 1 ERNZ 350 at [51].

[15] TWO submitted that there was no arguable case that, in the absence of injunctive relief, it would require Mr Young to "disclose information during a disciplinary meeting that could incriminate or otherwise prejudice [him] in his defence against a criminal charge". TWO provided a list of questions that it proposed asking Mr Young at the employment investigation meeting scheduled for 19 December 2023, should the order sought be declined. TWO says that [redacted text by Direction of the Authority] intends to question Mr Young in a way "which will not compromise [Mr Young's] right to silence or his privilege against self-incrimination" and that Mr Young "may choose not to answer certain questions, if he has concerns about the potential for his answers to prejudice his defence in the parallel criminal proceedings."

[16] I consider that Mr Young has an arguable case that the questions that TWO wishes him to answer may stray into areas where his right to a fair trial, and potentially to not self-incriminate himself, may be engaged. While TWO say that the presence of Mr Young's counsel and opportunities to decline to answer questions will provide adequate protection, this factor would support the granting of the order sought.

Balance of convenience

[17] Both Mr Young and TWO submitted that the balance of convenience supported their positions.

[18] Mr Young says that if he is "required to participate in the employment investigation, his entitlement to fairly take part in the employment investigation, and right not to incriminate himself will be significantly and irreparably harmed. If he remains silent inferences may be drawn that will affect his employment status." Mr Young also pointed to the limited remaining duration of his employment, acknowledging he had resigned effective 5 January 2024.

[19] TWO submitted that:

> The applicant has tendered his resignation and his notice period will cease on 5 January 2024. [redacted text by Direction of the Authority].

[20] I consider that the balance of convenience favours TWO being entitled to ask Mr Young questions [redacted text by Direction of the Authority], so long as it does not cross the line into asking questions which are directly the subject of the criminal charge or draw unreasonable adverse conclusions from Mr Young exercising his right to silence on the basis he considers a question crosses that line. TWO are alert to the risks inherent in proceeding on

this basis and have indicated that they will manage those risks carefully. Whether they will do so cannot be prejudged and may, if Mr Young considers that TWO has not acted reasonably, be subject of future proceedings.

Other remedies

[21] Mr Young says that other remedies such as damages would not be adequate, given "the potential prejudice in respect of the criminal proceedings. The maximum penalty of the [criminal charge] is a term of 7 years imprisonment".

[22] TWO said that Mr Young could "seek non-publication orders in respect of the reasons for his employment ending (in the event that the respondent's process ends before his resignation takes effect on 5 January 2024)" and that this would provide an adequate protection. In response to questions from me, TWO indicated that it would keep the outcomes of the employment investigation confidential, as well as the questions asked and that it did not object to a non-publication order on that basis.

[23] TWO also said that it was in a position to pay damages if that became necessary and that damages in its favour were not an adequate remedy for it.

[24] I consider that the other remedies available to Mr Young, particularly should TWO cross the line into asking questions which are directly the subject of the criminal charge or drawing unreasonable adverse conclusions from Mr Young exercising his right to silence on the basis he considers a question crosses that line, count in favour of TWO being able to proceed with the employment investigation.

Overall justice

[25] Mr Young submitted that the overall justice in this matter favoured him "in that the interests and rights involved are of a fundamental nature."

[26] TWO also submitted that the overall justice favoured its position, saying that it should be permitted to investigate its concerns so long as it does so fairly, Mr Young would have an opportunity to be heard and reiterating that it would not seek responses from him in relation to the criminal charge. [redacted text by Direction of the Authority]

[27] Standing back and looking at the totality of the matter, including the submissions of the parties and the affidavit evidence lodged in these proceedings, I am satisfied that overall justice favours declining the request to make the order sought by Mr Young.

[28] In reaching this conclusion I note that this matter continues to evolve and should TWO hold the scheduled employment investigation with Mr Young on 19 December 2023, then it may still choose to pause the disciplinary process, should it consider that would be the actions of a fair and reasonable employer. That is a decision for TWO to make at the appropriate time.

Interim non-publication orders

[29] As discussed at paragraph [22] TWO indicated that non-publication orders may be appropriate and that it would not object to this occurring. Mr Young did not make any submissions on this point.

[30] I consider that non-publication orders are appropriate in order to further protect Mr Young's right to a fair trial, reflecting TWO's submissions that it would keep the outcomes of the employment investigation confidential, as well as the questions asked and that it did not object to a non-publication order on that basis.

[31] Under clause 10 of the second schedule of the Employment Relations Act 2000, and except where necessary for enforcement purposes, I prohibit publication of the outcomes of TWO's employment investigation into Mr Young (including the date of his employment ending if that is before 5 January 2024 and the reasons for his employment ending), the questions that TWO ask Mr Young and his responses, or any identifying information about the employment investigation, until further order of the Authority.

Costs

[32] Costs are reserved.

Shane Kinley
Member of the Employment Relations Authority