

**NOTE: This determination
contains an order at paragraph
[1] prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 491
3255419

BETWEEN	YFR Applicant
AND	TE PŪTEA MATUA/RESERVE BANK OF NEW ZEALAND Respondent

Member of Authority:	Robin Arthur
Representatives:	David Fleming, counsel for the Applicant Jessica Taylor and Emma von Veh, counsel for the Respondent
Investigation Meeting:	24 May 2024 in Auckland
Submissions:	From both parties on 31 May 2024 and, in reply, on 17 June 2024
Determination:	16 August 2024

DETERMINATION OF THE AUTHORITY

Order prohibiting publication of some names

[1] The names of the applicant, of her partner, of a former colleague who the applicant had asked to provide a reference, and of a prospective employer where the applicant had applied for a new job, are each prohibited from publication. This order is made under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act).

[2] In this determination the applicant is referred to as YFR, her partner as GVA, the colleague as OZE and the prospective employer as PGX. The letters used were generated randomly and are unrelated to their actual names.

[3] The order in respect of YFR was appropriate as a recent assessment by a clinical psychologist had advised of a likely specific adverse effect of the publication of her name in relation to this matter.¹ GVA's name is anonymised as he shared a surname with YFR so the use of his name and reference to their relationship could identify her. The names of OZE and PGX are anonymised as they were not involved in the Authority investigation and did not have the opportunity to respond to allegations or negative comments made about them in the evidence given.

Employment relationship problem

[4] YFR was employed as a payments and clearance officer at Te Pūtea Matua/The Reserve Bank of New Zealand (RBNZ) under a fixed term employment agreement from 26 October 2022 to 31 August 2023. Her work was based in RBNZ's Auckland office. The 10-month fixed term was to cover the position while a staff member was on paid parental leave.

[5] By late July 2023 YFR was searching for her next job. She received a conditional offer of employment from PGX. The offer was subject to satisfactory reference checks. YFR nominated her Wellington-based RBNZ team leader Renee Comis and an Auckland-base colleague, OZE, as her referees.

[6] PGX withdrew its job offer to YFR in early August. After talking with PGX representatives YFR believed the offer was withdrawn because Ms Comis and OZE made negative comments about her during the reference checks.

[7] Acting on that understanding YFR sent messages to Ms Comis and OZE on 2 August 2023 which they found concerning and referred to their managers. YFR's messages included repeatedly describing Ms Comis as "backstabbing" her. When Ms Comis messaged YFR to arrange to talk to her, YFR responded: "Why would I talk to the person that stabbed me in the back? You stabbed me in the back and you know that".

[8] Ms Comis postponed a work trip to Auckland she had planned for the next day because she was concerned about the confrontational tone of YFR's messages. In the early evening of 2 August Ms Comis sent YFR a message offering her leave for the

¹ *Erceg v Erceg* [2016] NZSC 135 at [2], [13] and [14].

next day to “reset” or to carry on with her job searching activities. YFR declined the offer.

[9] Later that evening Ms Comis heard from OZE that YFR was planning a ‘surprise’ visit to the Wellington office the next day. YFR ordinarily worked in Auckland and had made no arrangement with Ms Comis to work in the Wellington office instead. Unknown to Ms Comis YFR had booked airline tickets some weeks earlier to be in Wellington that day in order to attend a personal event after her work day was finished.

[10] Ms Comis chose to work from home on the next day (Thursday, 3 August) as she was concerned about YFR’s messages and the news of her unexpected visit to the Wellington office.

[11] YFR did arrive at RBNZ’s offices in Wellington that morning.

[12] During the morning Ms Comis spoke with her department manager, Jamie Taylor-Burt, and a senior human resources advisor, Erana Tamapeau, about her concerns over YFR’s behaviour. Ms Tamapeau had previously been involved in assisting Ms Comis in dealing with earlier concerns over YFR’s well-being and work.

[13] In their discussion with Ms Comis that morning Ms Taylor-Burt and Ms Tamapeau agreed to manage the matter with YFR from then on. They said they did so because they were concerned that Ms Comis was “visibly shaken” and did not feel safe coming into the office.

[14] In a message on Teams to Ms Comis during the morning YFR apologised for how she had acted the previous day. YFR’s message said she wanted to know the content of PGX’s reference checks and to “go after [PGX] in the MBIE or ERA. I won 5x at MBIE \$”.

[15] This was a reference to one or other of two previous proceedings YFR had lodged in the Authority, under a different name she used at that time, against earlier employers. Those proceedings were resolved and withdrawn before any public investigation occurred. There was no evidence Ms Comis or any RBNZ managers had any knowledge of those earlier matters.

[16] Later in the morning of 3 August Ms Taylor-Burt and Ms Tamapeau met with YFR by audio-visual link. They described her as being agitated, apologetic about her comments to Ms Comis and talking at length about what had happened with the PGX job offer. In the course of that conversation they asked YFR how she felt about “finishing up” her role with RBNZ earlier but remaining on full pay for the remainder of the term in order “to support her job search and focus on her well-being”. They also said the other option was to arrange a further meeting to discuss her behaviour towards Ms Comis. YFR responded by saying she was being given the choice of leaving or getting fired. Ms Taylor-Burt and Ms Tamapeau disagreed with that description. YFR said she wanted to get union advice and they encouraged her to do so. YFR then ended the call.

[17] Later that afternoon, having spoken to a union representative, YFR called Ms Tamapeau. YFR asked about applying for a secondment opportunity elsewhere in RBNZ and Ms Tamapeau said they would still need to address concerns Ms Comis had raised.

[18] Ms Tamapeau said the call ended with YFR agreeing to take the remainder of that day and the next day (Friday, 4 August) off on paid leave. Ms Tamapeau said they would meet again on the coming Monday, unless YFR needed more time to seek advice. Ms Tamapeau said she told YFR that it was best she remain on paid leave as she was upset and the relationship had broken down with Ms Comis. She said YFR agreed to that plan and to log off until their “scheduled catch up 1pm Monday”.

[19] YFR did not agree with the account Ms Taylor-Burt and Ms Tamapeau gave of their conversations on Thursday. This was apparent from a message she posted on her work team’s group chat the next morning after Ms Comis sent a message saying YFR would be on leave on the Friday and the Monday. YFR’s message read:

Because RBNZ wants to constructively dismiss me, I stopped giving a f**k after how callously [Ms Tamapeau] and [Ms Taylor-Burt] treated me yesterday. Nobody thought about my mental health. I don’t care anymore I will take RBNZ to the cleaners. Constructive dismissal = bullying an individual into resigning with harassment and intimidation tactics. That’s how [Ms Taylor-Burt] and [Ms Tamapeau] treated me. I’m disgusted. I’m applying for legal aid and I will absolutely take RBNZ to the cleaners at the MBIE or Employment Relations Authority or even as high as the damn Employment Court.

[20] Following that message Ms Taylor-Burt and Ms Tamapeau took steps to remove YFR's electronic access to RBNZ email, remote working systems and buildings. YFR was told of those steps in an email to her personal email address and told she would be sent an MS Teams link for "an agreed 1pm catch up" on Monday, 7 August. The message ended with the following paragraph:

To ensure the safety and security of staff at RBNZ and to protect the confidential nature of this situation and mitigate risk of inappropriate emails being sent from your work accounts by you we have made the decision to temporarily suspend your systems access. We have also suspended your swipe card access for now. At the catch up we would like to discuss our preference that you remain offsite and without access to RBNZ systems. While we will take into account your feedback before making a final decision, we consider that your behaviour, our duty to protect other employees, and our earlier unsuccessful attempts to resolve this with you in good faith, give us little room for any other option.

[21] YFR responded that she would not be attending any meetings until she talked with her lawyer. She did not attend the planned Monday meeting. Through counsel, YFR instead raised a personal grievance for unjustified disadvantage. By email on Monday 7 August her counsel said RBNZ had effectively suspended YFR for the remainder of her fixed-term employment and:

even if RBNZ were willing to reconsider her position, it would not be tenable for [YFR] to return to her role at this point in time, given the employer's recent actions.

[22] The following week, again through counsel, YFR then sought to return to work. By email on 14 August YFR's counsel said she had reconsidered her position and wanted confirmation that RBNZ would not prevent her accessing the workplace to resume her duties until the expiry of her fixed term.

[23] Two minutes later her counsel also sent an email on a 'without prejudice' basis. RBNZ then engaged in further confidential discussions with YFR's counsel but did not formally respond to the 'on the record' request for YFR to return to work.

[24] YFR remained on paid leave until the expiry of her fixed term of employment.

[25] In her application to the Authority YFR said she was deprived of the opportunity to continue to explore alternative roles while still in active employment with RBNZ and was distressed and humiliated by being placed on paid suspension and not being

allowed to work to the end of her fixed term. YFR sought an order for \$30,000 compensation.

[26] RBNZ, in reply to her application, said YFR was not suspended. It said she agreed to a period of paid leave and subsequently refused to return to work. RBNZ said its decision to disable YFR's access to its systems on 4 August was a fair and reasonable response to the messages she was sending colleagues. RBNZ said it had subsequently tried to resolve matters with YFR, through her representative, but was unable to do so.

The Authority's investigation

[27] For the Authority's investigation written witness statements were lodged from YFR, GVA, Ms Comis, Ms Taylor-Burt and Ms Tamapeau.

[28] All witnesses answered questions under affirmation from me and the parties' representatives. The representatives also provided written submissions on 31 May 2024 and further submissions in reply on 17 June.

[29] 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.

The issues

- [30] Following the investigation meeting the issues requiring determination were:
- (a) Did RBNZ act as a fair and reasonable employer could have done in all the circumstances at the time in dealing with concerns about YFR's conduct on 2 and 3 August 2023?
 - (b) Did RBNZ act as a fair and reasonable employer could have done in all the circumstances at the time of declining her request of 14 August 2023 to return to the workplace?
 - (c) Should either party contribute to the costs of representation of the other party?

[31] For reasons given later in this determination, it was not necessary to consider other issues that might have arisen regarding remedies and contributory conduct.

Context

[32] Further useful context for considering YFR's employment relationship problem came from a clinical psychologist's assessment, provided in support of her application for orders prohibiting publication, and from some more information about how YFR was employed and had worked prior to the August events that led to her personal grievance.

[33] The psychologist's assessment noted that YFR described herself as autistic, being formally diagnosed in childhood when the condition was known as Asperger's Syndrome. YFR also referred to herself as having attention deficit hyperactivity disorder (ADHD), describing this as an informal diagnosis made by a medically qualified family member.

[34] The psychologist said YFR reported an unstable employment history, with impulsive behaviour and "sending ill-advised emails on multiple occasions". Results of diagnostic tests conducted as part of the psychologist's assessment indicated YFR was highly sensitive and might struggle with impulsivity leading to behaviour she later regretted. This was, however, contradicted by other results in that assessment indicating "her ability to think before acting and level of cautiousness was similar to other women".

[35] YFR had disclosed her neurodiverse history when being interviewed by Ms Comis in early October 2022 for the fixed term position with RBNZ. In her evidence Ms Comis confirmed that she had carried out reference checks with three former employers of YFR. Two of those previous employers provided positive reports. One previous employer gave low scores for YFR's ability to adapt to change and ability to handle stress. That employer said she would not re-employ YFR and described her as needing to improve on "how overwhelmed she can get with her neurodiversity".

[36] Ms Comis said she had discussed those references with Ms Taylor-Burt. Because YFR had interviewed well, they decided RBNZ could provide YFR with a chance they felt she needed.

[37] As the start of YFR's employment Ms Comis talked with her about how she worked and what additional support she might need. YFR, working in Auckland, had frequent contact with Ms Comis in Wellington. This included exchanging messages

and calls through the MS Teams application. Other colleagues in the Auckland office were also assigned to assist YFR. Ms Comis described YFR as picking up the analytical aspects of her role well and developing good technical knowledge. In December 2022, however, Ms Comis found it necessary to caution YFR about some concerns about her communication with other staff. This included referring at work to prior use of illegal drugs and criticising office seating arrangements that were necessary to separate different work teams who had regulatory functions requiring them to be clearly independent from other teams.

[38] In April 2023 Ms Comis held a formal meeting with YFR to discuss some concerns about her communication and interactions with some other RBNZ staff. The outcomes of that meeting, which YFR attended with GVA as her support person, included YFR being encouraged to use Wellbeing leave to attend medical appointments and to ask for further days off if needed. Ms Comis provided YFR with information about external support agencies but also confirmed YFR could continue a previous arrangement to contact Ms Comis outside of work hours in emergency situations if she felt unsafe.

A fair and reasonable response to events of 2 and 3 August

[39] YFR submitted she was unjustifiably disadvantaged by the decisions to:

- (i) place her on paid leave on the afternoon of 3 August; and
- (ii) suspend her from access to workplace and work electronic systems on 4 August; and
- (iii) continue those measures from 7 August until the expiry of the term of her employment agreement.

[40] Assessment of the competing evidence in relation to those submissions is made on the balance of probabilities, that is what is more likely than not to have happened.

Paid leave agreed on 3 August

[41] In this case the account given by Ms Taylor-Burt and Ms Tamapeau regarding the 3 August meeting was more likely to be correct. They had good reason to speak with YFR that day, given reported concerns of OZE and Ms Comis about the messages they had received from YFR on 1 and 2 August and her unexpected arrival at RBNZ's Wellington premises on 3 August.

[42] It was also clear from their evidence that Ms Taylor-Burt and Ms Tamapeau had carefully balanced YFR's interests, by both arranging to hear from her directly that day and by proposing she take some time off, with the need to consider the effects of YFR's behaviour on Ms Comis. On any measure, having YFR take paid leave was a fair and practical 'cooling off' step for all involved. It was also consistent with the previous readiness of RBNZ to provide additional well-being leave for YFR and had a 'future focus' on the issue of immediate concern to her, allowing time to continue with her job search if she wished to do so.

[43] YFR's own account confirmed Ms Taylor-Burt and Ms Tamapeau had allowed for her to seek union advice before next steps were confirmed. It was YFR who continued the conversation that day by calling Ms Tamapeau back after speaking with her union representative.

[44] It is also more likely, in that context, that YFR had agreed in that further call to Ms Tamapeau to the proposal for her to take the remainder of that day and all the next day off, with a plan to reconvene on Monday, 7 August to discuss next steps.

[45] Both Ms Tamapeau and YFR agreed in their respective evidence that YFR had said "ok" in response to the suggestion that she take special paid leave to the coming Monday. While she may, then or subsequently, have held a different view or preference, what she actually said indicated her agreement.

[46] At that time, on the afternoon of 3 August, what was proposed and agreed was clearly within the range of responses open to a fair and reasonable employer.

Reasonable to suspend on 4 August

[47] As submitted by YFR, an employer considering suspension of a worker will:

- (i) to the extent practicable in the circumstances, consult with the worker, giving them an opportunity to comment on the proposed suspension (as an instance of natural justice);
- (ii) act in accordance with contractual obligations;
- (iii) have a sound reason for suspending the worker, usually relating to prevention of harm arising from the worker's continued presence in the workplace; and
- (iv) consider alternatives.

[48] The decisions RBNZ took on 4 August to suspend YFR's access to the workplace cannot be assessed in isolation from the events and outcome of the previous day, particularly the discussion with YFR that had resulted in agreement she was to be on paid leave until the coming Monday when matters would be reassessed.

[49] Faced with YFR's unexpected communication through the work group chat and the context of intemperate comments in messages to OZE, Ms Comis and others in the previous days, RBNZ had a sound reason to remove YFR's access to its electronic systems and workplace. It was not taking a step beyond what had been agreed in discussion with her the day before. She was on paid leave on 4 August and was not supposed to be accessing work systems or coming to the workplace anyway.

[50] It was also a temporary measure at that stage, open to review at the meeting planned for the Monday, the next working day, unless YFR asked for a longer period to prepare for that meeting. Alternatives were not ruled out.

YFR's actions continued the suspension from 7 August onwards

[51] As submitted by YFR, workers should not be suspended longer than necessary and a reasonable employer will review the continuing need for it. However, in the circumstances of this case, it was the decision of YFR not to participate in the planned Monday, 7 August meeting which closed off the prospect of looking at those arrangements again. Further, it was her view, communicated through counsel, that it was "not tenable" for her to return to her position at that time anyway.

No unfairness in not responding on the record to 14 August request

[52] YFR submitted RBNZ acted unfairly by failing to formally respond to her request of 14 August, made in an email message from her counsel, to return to work for the remaining two weeks of her fixed term employment.

[53] RBNZ, in its own submissions, accepted Ms Tamapeau had mistakenly thought a further email received two minutes later, from YFR's counsel and initiating without prejudice discussions about the situation, had superseded the earlier message.

[54] While Ms Tamapeau's omission may have been a defect in RBNZ's process, it did not amount to an act of unjustified disadvantage unless it resulted in YFR being treated unfairly.²

[55] YFR's evidence did not establish it had. While YFR had a change of view between 7 and 14 August about what might suit her best, there was nothing to indicate any material change had occurred in the circumstances that resulted in RBNZ having her serve the remainder of her employment on paid leave. YFR had obtained a medical certificate on 8 August which included what she had reported to her doctor about feeling distressed by how her RBNZ managers had treated her and not having an opportunity to say goodbye to her friends in the workplace. The doctor described symptoms YFR reported as consistent with an acute stress reaction.

[56] YFR had not provided that medical certificate to RBNZ at the time. Rather the parties continued some without prejudice communications and made arrangements to attend mediation.

[57] As RBNZ submitted, YFR's counsel was in regular contact with Ms Tamapeau during that period and did not make any 'on the record' request for a response to his 14 August email or seek to engage with RBNZ about YFR returning to work.

Other criticisms did not establish a failure of fairness or reasonableness

[58] YFR's submissions raised other criticisms of RBNZ's actions for assessment against the statutory standard of fairness and reasonableness.

No unfairness in reference comment

[59] Her submissions criticised Ms Comis for agreeing to be a referee for YFR but Ms Comis not telling YFR what she would say. However YFR had not, when asking Ms Comis to be a referee, checked what she might say to PGX's reference checker.

[60] When speaking to the reference checker Ms Comis accepted an option given for her comments to be confidential. When asked at the Authority meeting Ms Comis disclosed one question put to her by the reference checker was whether she would re-employ YFR. Ms Comis said she had answered "no". She had made other positive comments about YFR's attributes in performing her role at RBNZ.

² Employment Relations Act 2000, s 103A(5).

[61] This was not a failure of any good faith obligation Ms Comis owed, on RBNZ's behalf, to YFR. She was not obliged to be a referee. She was neither asked for nor gave any undertaking to YFR about what she might say to the reference checker. She had answered honestly from her own point of view.

[62] Asked about this issue at the Authority investigation meeting YFR said she knew Ms Comis and OZE would be honest but "assumed they would give a good reference" and did not think about what they would go into.

No failure in meeting statutory obligations

[63] As submitted by YFR, RBNZ's obligations as employer were to be assessed against both the s 103A test of justification and its statutory obligations to be a good employer under the Reserve Bank of New Zealand Act 2021 (the RBNZ Act). The RBNZ Act definition of a good employer includes operation of a personnel policy providing for fair and proper treatment of employees. It includes a requirement for provisions recognising the needs of people with disabilities.³

[64] YFR's submissions accepted RBNZ had put in place measures to support her prior to August 2023. As RBNZ's submissions noted, this included access to mental health first aid providers and external agencies, encouragement to use wellbeing leave and an offer of additional leave if she exhausted her entitlements.

[65] However YFR submitted this support failed during "the critical events in August 2023" because RBNZ made no effort to be inclusive or allow for the possibility she might be able to move beyond her initial reaction. She submitted she was, instead, excluded by not being allowed to return to work.

[66] Those submissions were not persuasive because they ignored RBNZ's intended meeting in the following week, to be held on 7 August or a later date if YFR and her representative wished. It was YFR who declined to take part in the process that would have given her the opportunity to seek different arrangements. She did make a proposal on 14 August to be allowed to return, through counsel, but there was no follow up on an apparent failure to respond (for reasons discussed earlier in this determination).

³ Reserve Bank of New Zealand Act 2021, ss 177 – 179.

[67] The evidence, assessed as a whole and in the context of the full period of employment, showed RBNZ had made the efforts expected of a fair and reasonable employer to accommodate YFR's particular needs in the workplace, balancing those appropriately in responding to the concerns Ms Comis raised about the events of 2 and 3 August.

[68] Objectively assessed, having YFR serve the last four weeks of her employment on paid leave was not an unjustified disadvantage. Rather it was support for her wellbeing and job search that was within the range of responses that a fair and reasonable employer could have taken in all the circumstances at the time.

Outcome

[69] For the reasons given, YFR's application to the Authority is declined.

Costs

[70] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[71] If unable to do so, and an Authority determination on costs is needed, RBNZ may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, YFR would then have 14 days to lodge any reply memorandum. If requested by the parties, an extension of time to resolve costs between themselves may be granted.

[72] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁴

Robin Arthur
Member of the Employment Relations Authority

⁴ See www.era.govt.nz/determinations/awarding-costs-remedies.