ORDER PROHIBITING PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF THE PLAINTIFF

IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2021] NZEmpC 153
EMPC 308/2021

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	WN Plaintiff
AND	AUCKLAND INTERNATIONAL AIRPORT LIMITED Defendant

Hearing: 13 September 2021
(Heard by telephone)

Appearances: A Fechney, advocate for plaintiff
K Dunn, counsel for defendant

Judgment: 15 September 2021

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] The plaintiff has worked for Auckland International Airport Limited for 15 years. The company considers him to be a worker covered by the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Order) and that, to continue in his role, he must be vaccinated. The plaintiff has decided not to be vaccinated. The company has given him notice of termination of his employment and has not allowed him to return to the workplace. He is effectively on paid suspension pending termination. Termination takes effect on 30 September 2021, the date specified by the

Order for certain workers to have their first vaccination.[1] The plaintiff considers that the company's decision to terminate his employment is flawed and he wants to halt the process and have the lawfulness of the company's actions assessed before, rather than after, the decision takes effect.

[2] The plaintiff filed a statement of problem in the Employment Relations Authority seeking, amongst other things, "an order prohibiting the termination of [his] employment, either by way of interim order relating to the personal grievance, or compliance order relating to the anticipatory breach of contract."

[3] The matter came before the Authority by way of telephone conference and the Authority Member subsequently issued a minute. The minute stated that:

> [1] During the case management conference by telephone with the representatives today it was discussed that the Authority has no statutory basis for granting the orders sought in the statement of problem given their anticipatory nature.
>
> [2] Should the applicant be dismissed as anticipated then an amended statement of problem may be filed seeking interim reinstatement at that point…

[4] The plaintiff has filed a de novo challenge, coupled with an application for urgency. The application for urgency was not opposed by the company and I have dealt with the challenge on that basis. In addition to the challenge, the plaintiff seeks permanent orders preventing publication of his name and identifying details, which I deal with below.

[5] This judgment does not decide whether the company acted fairly and reasonably in terminating the plaintiff's employment. It decides whether the Court has jurisdiction to hear the plaintiff's challenge and, if so, whether the Authority was right to decline to deal with the plaintiff's application for interim orders restraining the company from bringing his employment to an end.

[6] The company opposes the challenge. First, it says that the Court has no jurisdiction to deal with the challenge because the Authority's minute does not contain

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[1] Schedule 1 cl 3.

a determination as required by s 179 of the Employment Relations Act 2000. Second, even if the Court does have jurisdiction to deal with the challenge, it ought to be dismissed because the Authority does not have the power to make the orders sought in the statement of problem. Third, even if there is power to make interim orders restraining the company from terminating the plaintiff's employment, the Court should not make the declarations sought.

A determination?

[7] The company's argument is squarely focussed on the fact that the minute does not contain the features of a determination required by the Act.

[8] Section 179(1) provides that a party to a matter before the Authority who is dissatisfied with a written determination of the Authority may elect to have the matter heard by the Court. Section 174E provides that a written determination provided by the Authority must state relevant findings of fact; state and explain its findings on relevant issues of law; express its conclusions on the matters or issues it considers require determination in order to dispose of the matter; and specify what orders (if any) it is making.

[9] The defendant says that the minute does not contain any of these features – all it records is what was discussed at the telephone conference. It is not, accordingly, a determination which can give rise to a challenge.

[10] It is well accepted that, in deciding whether the Authority has made a determination susceptible to challenge, the Court must have regard to substance over form.[2] And, as Ms Dunn, counsel for the company accepted, the applied descriptor (minute rather than determination) is not determinative.

[11] The contents of the Authority's minute are brief but, as s 174E makes clear, in determining a matter or part of a matter the Authority need not set out a record of the

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2 *WN v Auckland International Airport Ltd* [2021] NZEmpC 45; *Morgan v Whanganui College Board of Trustees* [2013] NZEmpC 55, [2013] ERNZ 460.

evidence or submissions it has heard; nor need it record the process followed in investigating and determining the matter. What emerges from the minute is a clear decision, which followed discussion with the representatives at the conference, that the Authority did not have jurisdiction to make the orders sought in the statement of problem because they were anticipatory. The point is reinforced by the Authority's statement in [2] of the minute, which records that it would deal with an application for interim reinstatement, but only after dismissal had taken effect and once an amended statement of problem was filed.

[12] The Authority determined that it did not have jurisdiction to deal with the matter before it. That, in my view, was a determination for the purposes of s 179. I accordingly accept that the challenge is properly before the Court.

Jurisdiction to make orders sought?

[13] The company essentially says that the plaintiff failed to seek orders that were within the Authority's power to make; and that, while he could have sought an interim injunction focussed on alleged breaches of the employment agreement, he did not do so in his statement of problem and cannot recast his claim on a challenge to the Court.

[14] The Authority is an investigative body which is designed (by Parliament) to be low level, non-technical and expeditious.[3] It is common in this jurisdiction for litigants to appear on their own behalf or to be represented (as they are entitled to do) by a person with no legal training.[4] It is the Authority which drives the process and is expected to do the heavy lifting, in terms of identifying the nub of the issue and what may or may not be relevant in deciding the real controversy between the parties. In this sense, and as the Act makes clear, the Authority is focussed on problem solving, not requiring perfection in pleadings or technical legal expertise in bringing a claim to it for determination. In other words, the legal label put on a perceived problem, and the remedy sought, does not have the same impact as Court pleadings. All of this is made clear in, for example, the objects of the Act; the way in which the statutory powers of the Authority are expressed; s 122 (which provides that the nature of a

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3 *FMV v TZB* [2021] NZSC 102 at [53]-[59].
4 Employment Relations Act 2000, sch 2 cl 2 and sch 3 cl 2.

personal grievance may be found to be of a different type from that alleged); s 174E (which I have already referred to); and the form prescribed for an application to the Authority in Schedule 1 to the Employment Relations Authority Regulations 2000.

[15] The statement of problem asserts that the company's proposed termination of the plaintiff's employment constituted an anticipatory breach of his employment contract; that he had been unjustifiably disadvantaged by the notified termination because there had been a failure to follow a fair and reasonable process (as required by s 103A of the Act); and that he had been unjustifiably disadvantaged by being suspended in circumstances that were neither fair nor reasonable. The alleged failures are set out in some detail within the statement of problem, and include a failure to consult about whether the plaintiff was an affected person for the purposes of the Order; that the plaintiff was suspended without consultation; that there was a failure to consider reasonable alternatives to termination; and that the company misapprehended the legal impact of the Order, including the date on which it might otherwise have applied to the plaintiff. The statement of problem said, under the heading "I would like the problem or matter resolved in the following way", that the plaintiff sought an order prohibiting the termination of his employment, either by way of interim order relating to the personal grievance or compliance order relating to the anticipatory breach of contract.

[16] The company accepts that its jurisdictional concerns would have fallen away if the statement of problem had stated that the plaintiff was asserting a breach of the employment agreement by failing to comply with relevant procedural and good faith obligations, coupled with an application for an interim injunction. I see this as an exercise in semantics and formality which sits uncomfortably with the statutory scheme, particularly given the Authority's investigative role and ability to repair pleadings issues. And, as the cases make clear, the Court ought not to be rigid and inflexible in terms of considering what matters are at issue on a de novo challenge.[5] If it were otherwise pleadings precision would be required to bring a matter in the Authority, something at odds with the Parliamentary intention for that body, as a readily accessible, low level forum for dispute resolution.

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5 *Udovenko v Offshore Marine Services (NZ) Ltd* [2013] NZEmpC 174 at [11].

[17] In any event, I would not characterise this case as requiring a stretch in assessing the matter before the Authority as opposed to the matter identified in the statement of claim in the challenge. It is quite clear from the statement of problem, when read as a whole, that the plaintiff was contending that his employer was in breach of its obligations to him and that he wanted to preserve his position by way of interim orders, restraining the company from putting his notified termination into effect on 30 September 2021. And, while not expressed in precisely the same way, it is the nub of the issue repeated in the claim in this Court.

[18] Nor do I accept the alternative argument advanced by the company that the Court should not make the declaration sought as the Authority does not have the statutory power to make interim orders other than to restrain a breach of an employment agreement.

[19] The plaintiff had been given notice of termination of his employment, due to take effect approximately two weeks from now. He is currently suspended. The Authority has the power to make interim orders of reinstatement under s 127. In this regard s 127 states that:

> (1) The Authority may if it thinks fit, on the application of an employee who has raised a personal grievance with his or her employer, make an order for the interim reinstatement of the employee pending the hearing of the personal grievance.
>
> (2) …
>
> (3) …
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> (4) When determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the objects of this Act.
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> (5) The order for interim reinstatement may be subject to any conditions that the Authority thinks fit.
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> (6) …
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> (7) Nothing in this section prevents the court from granting an interim injunction reinstating an employee if the court is seized of the proceedings dealing with the personal grievance.

[20] While the power to order interim reinstatement is generally applied in cases where dismissal has taken effect, the wording of s 127 is not limited in this way – it is

predicated on the existence of "a personal grievance", notably not "a personal grievance for unjustifiable dismissal". Unjustifiable disadvantage is, of course, a personal grievance and is specifically pleaded by the plaintiff in both the statement of problem and the statement of claim, focussed on alleged errors by his employer in reaching the decision to terminate his employment. Relevantly, in *New Zealand Automobile Association Inc v McKay*, Chief Judge Colgan found that while an employee cannot technically raise a grievance for unjustifiable dismissal during the period of notice (because the dismissal has not yet taken effect), they can raise a personal grievance for unjustifiable disadvantage and have the matter dealt with "substantively and realistically as an unjustified dismissal grievance."[6] His Honour concluded that this approach accorded with common sense – I agree.

[21] More generally there have been a number of cases in which the Court has recognised the ability to make interim orders in the absence of a dismissal. In *Burgess v Wairarapa Community Law Centre Inc* the Court ordered interim reinstatement in circumstances where the employee had been suspended on full pay pending an investigation into poor performance but without the opportunity to be heard on the question of suspension.[7] In *Richardson v Board of Governors of Wesley College* the Court ordered interim reinstatement in circumstances where the employee had been suspended from duties without notice.[8] There are other examples of the Court recognising the Authority's jurisdiction to make interim orders restraining an employer from completing a disciplinary process pending, for example, the outcome of a Police investigation (generally by way of a stay but also by way of interim injunction).[9]

[22] I do not accept that the Authority lacked jurisdiction to make interim orders with the effect of restraining the company from terminating the plaintiff's employment

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6 At 633.

7 *New Zealand Automobile Assoc Inc v McKay* [1996] ERNZ 622 (EmpC) at 633. See also *Karena v Recreational Holdings T/A Fish City Hamilton* [2018] NZERA Auckland 249 for a recent application in the context of the Employment Relations Act 2000.

8 *Richardson v The Board of Governors of Wesley College* EmpC Auckland AEC 54/02, 19 March 2003.

9 See, by way of example, *Savage v Wai Shing Ltd* [2019] NZEmpC 141, [2019] ERNZ 370 at [6]. See also *BEO v Vice-Chancellor of the University of Auckland* [2019] NZERA 616 and *BEO v The Vice-Chancellor of the University of Auckland* [2020] NZEmpC 84.

on 30 September 2021. Whether there would be an appropriate basis for the making of such orders is a different matter.

[23] An employee who alleges that they have been affected by their employer's non-observance of, or non-compliance with, a term of their employment agreement or the requirements of Part 9 may apply for a compliance order, and the Authority has the necessary jurisdiction to make such an order.[10] Part 9 includes the statutory provisions relating to personal grievances, and the standards applying to a fair and reasonable employer's actions. Those standards include whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; whether the employer raised the concerns that the employer had with the employee before dismissing or taking actions against the employee; whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and whether the employer genuinely considered anything the employee had to say by way of explanation.[11] The Authority/Court may consider any other factors it thinks appropriate to the decision-making. In this case, and as Ms Dunn accepted, those factors likely include regard to the underlying principles in the New Zealand Bill of Rights Act 1990.[12]

[24] Where the Authority is satisfied that non-observation or non-compliance has occurred it "may, in addition to any other power it may exercise, by order require, in or in conjunction with any matter before the Authority under this Act to which that person is a party … that person to do any specified thing or cease any specified activity, for the purpose of preventing further non-observation of or non-compliance with that provision…"[13]

[25] The Authority had jurisdiction to make a compliance order against the company in respect of alleged breaches of the employment agreement and Part 9 of

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10 Section 137.
11 Section 103A.
12 See, in particular, New Zealand Bill of Rights Act 1990, s 11.
13 Section 137(2).

the Act, and I did not understand the company to be suggesting otherwise. Rather, the company's position was that the Authority lacked jurisdiction to make *interim* compliance orders and compliance orders against an *anticipatory breach*. I agree with counsel for the company that the Authority may not have jurisdiction to grant an interim compliance order,[14] but a compliance order application can be coupled with an application for urgency or, alternatively, a compliance order can be sought together with an application for interim injunction.[15]

[26] Chief Judge Colgan's judgment in *Pact Group v Service and Food Workers Union* was cited as authority for the second proposition, namely that there was no power to order compliance where the breach had yet to occur.[16] I do not read his Honour's observations in this way. He referred to counsel's submission that a compliance order could only be made in the face of a breach or an "imminent breach" and noted that in the case he was dealing with there was an ongoing breach.[17] In any event, in this case notice of dismissal has been given; the notice is, on the plaintiff's case, unlawful and arguably (the employment agreement was not before the Court) in breach of both the express and implied terms of employment; and the employer's breach continues and will continue until his departure on 30 September 2021, including by keeping him on suspension.

[27] I do not accept that the Authority lacked jurisdiction to issue a compliance order. Again, whether a compliance order ought to be made or whether the plaintiff's problem is more appropriately dealt with via other means is a different issue.

[28] I conclude that the Authority does have jurisdiction, contrary to its determination otherwise. It follows that the challenge succeeds.

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14 See *AFFCO New Zealand Ltd v NZ Meat Workers & Related Trades Union Inc* [2016] NZEmpC 154, [2016] ERNZ 410, which also doubted the Court's ability to source jurisdiction from s 157 (equity and good conscience).

15 See Stephen Langton and Laura Briffett "When money won't cut it: non-financial remedies and access to justice" [2021] ELB 11.

16 *Pact Group (A Charitable Trust) v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZEmpC 119, [2014] ERNZ 247.

17 At [89]-[90].

Relief

[29] The plaintiff seeks a number of declarations, including that the Authority be directed "to hear, and determine, the interim injunction or substantive compliance order prior to 30 September 2021."

[30] The defendant says that this aspect of the challenge falls foul of s 179(5), as it relates to the Authority's procedure. I agree that there are difficulties with directing the Authority to do certain things as a result of the challenge being upheld, although I would not have regarded s 179(5) as the primary impediment.

[31] Section 183 provides that the Court must make its own decision on the matter heard by the Court, and, once it has made a decision, the Authority's determination on the matter is set aside and the Court's judgment on the matter stands in its place. It follows that the Court's judgment, including any relief, can only relate to the matter before it.

[32] The matter before me is the challenge to the Authority's determination that it had no jurisdiction to entertain the plaintiff's statement of problem as drafted. I have reached a different view and found that there is jurisdiction. The substantive matter (namely whether interim relief ought to be granted restraining the company from putting the plaintiff's dismissal into effect) is not part of the matter before the Court. Indeed Ms Dunn described it as still before the Authority.

[33] Ms Dunn submitted that if the Court upheld the challenge it should not make the declarations sought in its discretion, having regard to what were described as concessions that the plaintiff would be unlikely to succeed on his substantive claim. I accept that these observations reflect Ms Fechney's perception of the likely way in which the Authority would deal with the matter, rather than conceding that her client's case lacked strength.

[34] There is a further impediment to the declarations sought by the plaintiff, and that is the statutory restriction on the Court telling the Authority what to do and how

to do it.[18] Directing the Authority to deal with a matter within a particular timeframe would likely fall foul of that prohibition.

[35] I have considered whether the nature of the matter before the Court is such that the whole matter now comes before it for decision, following *Abernethy v Dynea New Zealand Ltd*, but have concluded that it does not.[19] This case differs in that at least part of the matter is still clearly before the Authority, and it is appropriate that it return there in its entirety.

[36] I have also considered Ms Fechney's suggestion that the Court may be able to entertain an application for special leave to remove the substantive matter to the Court. I have concluded that that is not an available option. That is because it first requires an application for removal having been dealt with in the Authority. That does not appear (on the information before me) to have occurred.

Summary

[37] It follows that the plaintiff is entitled to pursue an application for interim orders in respect of the looming termination of his employment with the company.

[38] The challenge is upheld; this judgment stands in its place. The plaintiff may now return to the Authority for orders seeking to restrain his employer from putting his termination into effect on 30 September 2021.

Non-publication order

[39] The plaintiff seeks a permanent non-publication order. Non-publication is sought on the basis that the vaccination of workers is a contentious issue in the public domain and there is significant risk of harm in disclosing his name, including in terms of attracting public opprobrium on social media. He suffers from a number of pre-existing diagnosed conditions which gives rise to concerns, from his perspective, about taking the vaccine; he does not wish details of his personal circumstances to

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18 Employment Relations Act 2000, s 188(4).
19 *Abernethy v Dynea New Zealand Ltd* [2007] ERNZ 271 (EmpC).

become public and nor does he want to become a lightning rod for anti-vaxxers. The plaintiff is concerned that if he is named it may detrimentally impact on his ability to find alternative work.

[40] The company does not oppose non-publication orders being made in light of the material now before the Court and abides the decision of the Court.[20]

[41] The Court has a broad power under sch 3 cl 12 of the Act to order that "all or any part of any evidence given or pleadings filed or the name of any party or witness or other person not be published," subject to such conditions as the Court thinks fit. While the discretion is broad it must be exercised consistently with applicable principles. The principle of open justice is an applicable principle of fundamental importance.[21]

[42] A party applying for an order of non-publication in this jurisdiction must establish that sound reasons exist for the making of such an order, displacing the presumption in favour of open justice.[22] I pause to note that it is not uncommon for the burden to be discharged by filing affidavit evidence detailing the specific reasons relied on. Evidence is not, however, a prerequisite to an order being made. There will be situations where judicial notice can be taken of circumstances which are relevant to the weighing exercise.[23]

[43] The discretion to grant non-publication orders must also, of course, be exercised consistently with the objectives of the legislative framework applying in this specialist Court. These objectives include the need to support successful employment relationships and to address the inherent inequality of bargaining power between employers and employees. There is increasing recognition of the potential detrimental impact publication of the names of parties can have on their ongoing prospects of

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20 Reserving its position on costs.

21 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310; *Crimson Consulting Ltd v Berry* [2017] NZEmpC 94, [2017] ERNZ 511.

22 *Erceg*, above n 21, at [13].

23 For a recent example see *GF v Minister of COVID-19 Response* [2021] NZHC 2337 at [38]-[39].

employment, regardless of the outcome of the case.[24] In this regard Ms Fechney referred to the observations in *JGD v MBC Ltd* where it was said that:[25]

> It does not sit comfortably within the legislative framework that a party may approach the Authority or the Court for vindication of their employment rights and, at the same time, attract publicity which has a likelihood of inflicting further damage on their employment relationship or creating a barrier to future employment.

[44] I consider it appropriate to take judicial notice of the potential impact of publication on the plaintiff's future job prospects in considering whether the principles of open justice ought to be departed from in this case. I also accept that publicity of his name would likely expose him to intense public scrutiny, and comment, in light of the high level of interest in the vaccination of workers, and strongly held views in relation to those who choose not to be vaccinated.

[45] For the foregoing reasons I am satisfied that the interests of justice require that a permanent non-publication order be made. There is accordingly an order permanently prohibiting publication of the plaintiff's name and identifying details.

Summary of orders

[46] The plaintiff's challenge to the Authority's determination that it did not have jurisdiction to deal with his claim succeeds; the Authority's determination is set aside, and this judgment stands in its place.

[47] I decline to make a declaration directing the Authority to deal with the substantive matters before it urgently. While reference was made to an application for removal of the matter to the Court having been informally advanced and declined, I am not satisfied on the information before me that the Authority has dealt with an

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[24] See the discussion in *JGD v MBC Limited* [2020] NZEmpC 193, [2020] ERNZ 447; *FVB v XEY* [2020] NZEmpC 182, [2020] ERNZ 441 at [12]. See also James Crichton "Employment Institutions – an argument for reform" (Paper presented to the Marlborough Colloquium of the Society of Local Government Managers, Blenheim, January 2019), where he observed that: "As Chief of the Authority, I regularly get letters from employee parties who appeared in the Authority in earlier years, [had] been successful in claims against their former employer, and then not worked again because potential employers have been able to access the information, which of course is public, about the individual's previous success against another employer."

[25] At [9].

application for removal, and accordingly there is no ability to entertain an application for special leave to remove. Nor do I consider that the substantive matter is now before the Court in the sense described in *Abernethy*. That means that the plaintiff must return to the Authority.

[48] There is a permanent order prohibiting publication of the plaintiff's name and identifying details.

[49] Costs are reserved.

Christina Inglis
Chief Judge

Judgment signed at 3.15 pm on 15 September 2021