THE PERMANENT NON-PUBLICATION ORDER MADE BY THE EMPLOYMENT COURT PROHIBITING PUBLICATION OF THE NAMES AND IDENTIFYING PARTICULARS OF THE APPELLANT AND THE RESPONDENT REMAINS IN FORCE: FGH V RST [2022] NZEMPC 223.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA19/2023
[2023] NZCA 204

BETWEEN	FGH Applicant
AND	RST Respondent

Court: French and Miller JJ

Counsel: S M Henderson for Applicant
M E Richards and K E Allan for Respondent

Judgment: (On the papers) 2 June 2023 at 10.30 am

JUDGMENT OF THE COURT

A The application for leave to appeal under s 214 of the Employment Relations Act 2000 is declined.

B The applicant must pay the respondent costs for a standard application with usual disbursements.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] The applicant whom we shall call H seeks leave under s 214 of the Employment Relations Act 2000 (the Act) to appeal a decision of the Employment

Court. In the decision, Judge Corkhill dismissed three unjustified disadvantage personal grievances raised by H against her employer, the respondent.[1]

[2] The application for leave to appeal is opposed.

Background

[3] H suffers from ongoing mental health problems which resulted in long absences from work in 2019 and 2020. She returned to work in November 2020.

[4] In March 2021, the respondent's attention was drawn to certain posts which it appeared H had placed on a social media page. The respondent considered the posts maligned H's work colleagues as well as a lawyer it had retained in previous litigation involving H.

[5] On 8 April 2021, the respondent emailed H inviting her and a support person or representative to meet with management the following day to advise her of concerns about the posts. It appears it was intended to provide H with an allegations letter at the meeting.

[6] H's father then contacted the respondent to request a deferral of the proposed meeting until after H had seen her GP. H's father alluded to health issues.

[7] Management contacted H's father, explained the purpose of the meeting and confirmed that H would not be expected to provide an immediate response. It was also suggested that if H was willing to provide medical information regarding the health-related matters referenced by him, then that should be provided as soon as possible.

[8] The respondent subsequently instructed its lawyers to send H's lawyers a letter detailing the allegations, advising that a disciplinary investigation would be undertaken and, that if it was established that H was responsible for the posts then that could be conduct amounting to serious misconduct warranting dismissal.

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1 *FGH v RST* [2022] NZEmpC 223 [Employment Court decision].

[9] The allegations letter dated 15 April 2021 outlined the intended process and went on to state that the respondent was considering whether it was appropriate to suspend H on pay for the duration of the disciplinary process. H's lawyers were invited to respond to the issue of suspension by 21 April 2021.

[10] Then followed an exchange of correspondence between the lawyers and an informal approach made by management to H's father. The latter shared information about H's mental health including a serious relapse in 2020 that was unknown to the respondent. H's father, who advised the respondent of the serious effects disciplinary proceedings would have on H, said the information could be corroborated by medical experts in due course.

[11] As a result of its meeting with H's father, the respondent decided in May 2021 to withdraw the proposed suspension and to pause disciplinary investigation while H obtained medical information. In the meantime, H would work restricted hours on a temporary basis and would take paid special leave for the balance of the hours not worked. She was also asked to accept certain requirements regarding her conduct in the workplace.

[12] In mid-June 2021, an incident occurred at work involving an allegation that H had physically barged one of her team members.

[13] On 17 June 2021 management contacted H's parents regarding the incident. The medical information requested in mid-May 2021 had not been provided and, through its lawyers, the respondent advised that an independent medical assessment would need to be obtained.

[14] H then initiated proceedings in the Employment Relations Authority asserting that the initiation of disciplinary proceedings against her was unjustified.[2] The proceedings were removed to the Employment Court because of its familiarity with the previous litigation between the parties.[3]

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2 *FGH v RST* [2021] NZERA 377.

3 *FGH v RST* [2018] NZEmpC 60, (2018) 15 NZELR 944.

[15] Before a proposed judicial settlement conference could take place, there was a third incident in mid-August 2021. H had allegedly implied to a colleague that she was having suicidal thoughts because of her work role,[4] and had also disclosed that she had been self-harming. On learning of the conversation, the respondent required H to take paid sick leave with immediate effect against her wishes.

[16] As the requested medical information had still not been provided, the respondent arranged an appointment for H to see a psychiatrist, Dr Brown, for the purposes of an independent medical assessment.

[17] On 16 September 2021, H provided medical records relating to the 2018 and 2019 years. A second set of more recent medical records was provided in October 2021. Dr Brown's assessment took place in December 2021, his report being finalised on 15 December 2021. In his opinion, H was fit to work and participate in a disciplinary process.

[18] Following an unsuccessful judicial settlement conference, the employer sent H's lawyers an allegations letter on 22 April 2022 advising that an investigation would now be undertaken by an independent lawyer into the three incidents: the social media posts, the alleged barging incident, and alleged inappropriate communications with colleagues about suicide and self-harm. H was given the option of remaining on discretionary paid leave for the duration of the investigation or returning to work under certain conditions.

[19] H did not return to work and, we understand, has remained on paid sick leave ever since.

[20] By the time of the hearing before Judge Corkill, three unjustified disadvantage actions had been raised by H. They related to the following decisions taken by the respondent:

(a) commencing a disciplinary process about the social media posts in April 2021;

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4 The implication was said to arise from reference to a television programme.

(b) requiring H to take sick leave in August 2021 following communications about suicide and self-harm; and

(c) proceeding with a renewed disciplinary process in April 2022.

[21] In dismissing the personal grievances,[5] the Judge made the following key findings:

(a) The return-to-work arrangements were properly implemented by the respondent and the implementation was not causative of H's subsequent relapse.[6]

(b) The respondent did not have any detailed understanding of the medical circumstances referenced by H's father and the information it did have was not sufficient to suggest that the return-to-work arrangements needed to be re-visited or supplemented.[7]

(c) With respect to the first decision made by the respondent, H had failed to provide full disclosure of the medical problems that had arisen prior to the inception of the disciplinary process and the information that had been provided to the respondent was "insufficient to raise a red flag that could have caused a fair and reasonable employer to make inquiries before sending a disciplinary letter" in April 2021.[8]

(d) The respondent had acted at all relevant times in accordance with the employment agreement, its Code of Conduct and its disciplinary policy which set a high standard as to procedural fairness.[9]

(e) The content of the disciplinary letter including its references to serious misconduct, possible implications in the public sector, and the

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5 Employment Court decision, above n 1, at [301], [353], [394] and [403].
6 At [218]–[221].
7 At [222].
8 At [235]–[247].
9 At [263].

possibility of suspension were matters which a fair and reasonable employer could include in the letter.[10]

(f) Private social posts are not immune from disciplinary action by an employer.[11]

(g) An effort was made to establish a professional and thorough process to deal with the concerns raised by the social media posts.[12]

(h) With respect to the second decision made by the respondent, the steps taken by the respondent at the various stages of the chronology from mid-August 2021 onwards concerning H's presence at the workplace were among the options that could have been taken by a fair and reasonable employer in the complicated circumstances which developed.[13]

(i) With respect to the third decision made by the respondent, in the absence of a formal application for stay of the Court proceedings, the respondent was entitled as a matter of law to proceed with a fresh disciplinary process in 2022.[14] As a matter of process however it was potentially unfair that H, a vulnerable employee, would be required to participate in a disciplinary process while at the same time preparing for a Court hearing. However, in the end the process was not in fact advanced alongside the hearing or pending the Court's judgment. Thus, the disadvantage contemplated by the third cause of action did not eventuate.[15]

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[10] At [270], [274] and [278].
[11] At [225]–[227].
[12] At [288].
[13] At [351].
[14] At [392]
[15] At [393].

The right of appeal to this Court

[22] The right of appeal to this Court is limited to appeals on questions of law and is subject to a leave requirement.[16] Under s 214(3) of the Act, leave may be granted if, in the opinion of this Court, the proposed question of law is one that, "by reason of its general or public importance or for any other reason, ought to be submitted for determination".

[23] H advances four proposed questions of law which we now address.

First proposed question of law: did the Employment Court apply the correct test under s 103A of the Act for justification of imposition of serious misconduct disciplinary proceedings?

[24] Under s 103(1)(b) of the Act, a personal grievance arising from unjustified disadvantage is defined so as to include a claim that at least one of the employee's conditions of employment has been affected to the employee's disadvantage by some unjustifiable action on the part of the employer.

[25] The Act goes on in s 103A(1) to provide that the question of whether the action complained about was justifiable must be determined on an objective basis by applying the test set out in subs 2. The test set out in subs 2 reads:

> The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[26] Mr Henderson submits on behalf of H that the plain wording of subs 2 makes it clear that the relevant circumstances are the circumstances that exist at the time the action complained of occurred. In relation to the first personal grievance in this case, that means the time when the respondent launched its misconduct investigation. However, according to Mr Henderson, the Judge misapplied the test by applying it to circumstances *after* the event. In support of that contention, Mr Henderson points to a passage in the judgment where the Judge notes that a formal investigation has yet to

[16] Employment Relations Act 2000, s 214(3).

take place and that the "role of the Court is to determine whether the preliminary steps have been taken thus far are justified".[17]

[27] However, those comments are made in an introductory section. The rest of the 77 page judgment contains a very detailed analysis of the evidence and submissions relating to all aspects of each cause of action. It is correct that the Judge addressed the pausing of the disciplinary process under the heading of the first cause of action but that was because Mr Henderson apparently "submitted that the decision to pause, but not to withdraw, the disciplinary process was unjustified".[18]

[28] The suggestion that the Judge has erred in his interpretation of subs 2 is in our view untenable and has no prospect of success on appeal.

[29] Under this first proposed question of law, Mr Henderson also seeks to advance what he submits is a second fundamental flaw in the judgment, namely that the Judge failed to take into account the mandatory factors set out in s 103A(3).

[30] Subsection 3 provides that in applying the test of justification, the court must relevantly consider the following factors:

> (a) 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; and
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> (b) whether the employer raised the concerns the employer had with the employee before dismissing or taking action against the employee; and
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> (c) 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
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> (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[31] As will be immediately apparent, the wording of the mandatory factors is not particularly apt in a case where an investigation of the allegations has not yet been

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17 Employment Court decision, above n 1, at [2].

18 At [289].

undertaken, where there has been no finding of misconduct and no sanction imposed. In our view, it is clear that the section is primarily aimed at the situation where the "action taken" is some form of disciplinary action for misconduct.

[32] Significantly, the Employment Court has recognised that where a literal application of the s 103A(3) factors is inappropriate, judges should strive to give a sensible interpretation to the subsection and adapt the substance of the factors to the particular context.[19] That is an orthodox and principled approach to statutory interpretation and in our assessment is exactly what the Judge did in this case.

[33] As the respondent points out, an employer must start an investigation somewhere and to fail to alert an employee to the potential seriousness of the allegation at the outset could in itself be a breach of procedural fairness. If Mr Henderson were correct, there could be an endless series of investigations.

[34] We conclude that although this first proposed question may qualify as a question of law it is not an arguable question and therefore it does not merit submission to this Court for determination.

Second proposed question of law: did the Employment Court apply the correct principles when exercising its discretionary component for justification in relation to the three causes of action?

[35] Mr Henderson submits that a "fundamental flaw of the Judge was to exercise his discretionary power under s 103A(2) in a way unfettered by the mandatory considerations set out in [subs] 3".

[36] In our assessment, this proposed question is simply a recasting of the same argument sought to be run under the first question and we reject it for the same reasons.

[19] *Angus v Ports of Auckland* [2011] NZEmpC 160, (2011) 9 NZELR 40 at [52] citing *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (HC).

Third proposed question of law: did the Employment Court apply the correct provisions of the Health and Safety at Work Act 2015 in relation to the three causes of action?

[37] It is unclear from the written submissions what issue this proposed question is intended to raise. However, it appears from the notice of application for leave to appeal that it relates to a series of paragraphs that appear in a section of the judgment entitled "Relevant principles".[20] In this section, the Judge observed that under the Health and Safety at Work Act (the health and safety legislation), the term "hazard" is defined as including mental health.[21] The Judge also addressed what he described as the set of obligations relied on concerning the management of health and safety issues, in particular the management of the hazard posed to or by H's mental health.[22]

[38] In the particular paragraphs at issue, the Judge noted that the respondent owed a paramount duty of care under s 36 of the health and safety legislation.[23] This duty of care required it to ensure, as far as was reasonably practicable, the health and safety of its employees while at work. The Judge then went on to discuss the meaning of "reasonably practicable".[24]

[39] The term "reasonably practicable" is defined in s 22 of the health and safety legislation. The section states that "reasonably practicable" means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters including five matters which the section lists.

[40] The Judge does not quote verbatim the five specified matters but lists them.[25] According to Mr Henderson, the Judge's paraphrasing of the list contains significant misconstructions which diminish the "reasonably practicable" test. This in turn, he argues, impacted on the outcome of the case because it enabled the Judge to minimise the respondent's knowledge of the risk of harm the proposed disciplinary process posed to H's known mental health issues.

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[20] Employment Court decision, above n 1, at [43]–[69].
[21] At [63] citing Health and Safety at Work Act 2015, s 16.
[22] At [60].
[23] At [61].
[24] At [62] citing Health and Safety at Work Act 2015, s 22.
[25] At [62].

[41] We do not accept that submission is arguable.

[42] The first alleged misconstruction is that whereas s 22(c) refers to "what the person concerned knows or ought reasonably to know about the hazard or risk and ways of eliminating or minimising the risk", the Judge has replaced "ought reasonably to know" with "would reasonably know" and has omitted to refer to minimising the risk.[26]

[43] It is possible that the "would" was simply a typographical error, but regardless, it is in our view plainly immaterial for two reasons. First, it is expressed by the Judge as an alternative to something that is actually known, which is the whole point of the inclusion of "ought reasonably to know" in s 22(c). Something more than actual knowledge is required — something that would be considered objectively reasonable to know. Secondly, two paragraphs further on, it is clear the Judge has correctly directed himself on the issue because he expressly states:[27]

> … The perfection of hindsight should not be substituted for what was known, or *should* reasonably have been known at the time. …
>
> (Emphasis added)

[44] The omission of a reference to minimising the risk is similarly immaterial in our view because minimising the risk is expressly referred to elsewhere in the Judge's paraphrasing.[28]

[45] A further criticism that the Judge omitted to use the word "and" between each of the listed considerations, is also untenable.[29] The Judge prefaces his list with the words "taking into account *all* relevant matters including these five listed considerations".[30]

[46] Mr Henderson also challenges the correctness of a statement made in another paragraph where the Judge says that "in summary, liability is unlikely to arise if the

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26 At [62(iii)].
27 At [64].
28 At [62(iv)], and [62(v)].
29 At [62].
30 At [62] (emphasis added).

risk of harm is not foreseeable”.[31] However, that statement is based on dicta from the decision of this Court in *Attorney General v Gilbert* and no reason has been advanced why this Court should revisit it.[32]

[47] Finally, under this head, Mr Henderson contends that in addition to inaccurately paraphrasing the definition of reasonably practicable, the Judge erred in omitting to acknowledge the purpose of the health and safety legislation as required by s 10(1) of the Legislation Act 2019 and omitted to record the full definition of “hazard”.

[48] These criticisms border on the absurd in a situation where the Judge was simply stating well-established law and not purporting to resolve a disputed interpretation of the relevant legislation. In our view, they reflect an attempt to dress up as questions of law what are in substance challenges to the Judge’s findings of fact.

Fourth proposed question: did the Employment Court apply the correct principles governing the right to natural justice?

[49] Again, it is unclear from the written submissions what issue the proposed question is intended to raise. Under the heading “Natural Justice”, the notice of application for leave to appeal refers to two paragraphs in the judgment,[33] and says that the Judge erred in “upholding the respondent’s simple form of natural justice procedure as not violating [H]’s contractual and statutory rights under s 27 of the New Zealand Bill of Rights Act 1990”.

[50] What the Judge said in the paragraphs in question is as follows:

> [278] Given the potentially serious outcome, I find the intended disciplinary process was one a fair and reasonable employer could adopt. It was staged and deliberative. It allowed for proper input from the affected employee. The underlying policy specifically recognised the possibility that a medical condition could be raised by the employee as a contributory factor; it spelt out

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31 At [66].

32 Employment Court decision, above n 1, at [64]–[65]. The Judge cites his discussion of *Attorney-General v Gilbert* [2002] 2 NZLR 342, [2002] 1 ERNZ 31 (CA) in *FGH v RST* [2018], above n 3, at [195]–[196], stating that the themes in that judgment relate to the considerable room for differing interpretations of what is “reasonably practicable” versus “reasonably foreseeable”. The Judge also refers to *WorkSafe New Zealand v Athenberry Holdings Ltd* [2018] NZDC 9987, (2018) 16 NZELR 267 at [25].

33 Employment Court decision, above n 1, [278] and [288].

> how the employer would then need to obtain additional information about the condition, including via examination from a registered medical practitioner nominated and paid for by RST.
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> …
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> [288] Drawing the threads of these concerns together, I am not satisfied at this early stage of the proceeding that the steps taken were not those which could be expected of a fair and reasonable employer. An effort was made to establish a professional, and thorough, process to deal with the concerns which Ms F said she had.

[51] No arguable error of law is apparent in these paragraphs.

[52] Further arguments raised by Mr Henderson that natural justice required H to be able to test the evidence of potential serious misconduct by cross-examination before a "conspicuously impartial decision maker" are misconceived and contrary to the decision of this Court in *A Ltd v H*.[34] As the Judge correctly noted, the rules of natural justice are situation dependent.

Conclusion

[53] We are not persuaded that any of the proposed questions meet the test for granting leave. To a significant extent they are essentially challenges to factual findings. Not only must a proposed question be a question of law it must also be seriously arguable. In our view the questions in this application are plainly not.

[54] The application for leave to appeal under s 214 of the Employment Relations Act 2000 is accordingly declined.

[55] The application having failed, the applicant must pay the respondent costs for a standard application with usual disbursements.

Solicitors:
Henderson Reeves, Whangarei for Appellant
MinterEllisonRuddWatts, Wellington for Respondent

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[34] *A Ltd v H* [2017] 2 NZLR 295, [2016] NZCA 419 at [43]–[46].