IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA652/2023
[2024] NZCA 203

BETWEEN	AMANDA JEAN TURNER Applicant
AND	TE WHATU ORA – HEALTH NEW ZEALAND,WAIRARAPA (FORMERLY WAIRARAPA DISTRICT HEALTH BOARD) Respondent

Court:	Cooper P and Wylie J
Counsel:	E Lambert for Applicant H P Kynaston and E M von Veh counsel for Respondent
Judgment: (On the papers)	31 May 2024 at 11.00 am

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B For the reasons we have given, we are satisfied that leave to appeal should not be granted and the application is declined.

C The respondent is entitled to costs calculated on Band A basis for a standard application together with usual disbursements.

REASONS OF THE COURT

(Given by Cooper P)

Introduction

[1] Amanda Turner was employed by the Wairarapa District Health Board (the DHB) as a registered palliative care nurse working in the community from May 2015 until her summary dismissal on 23 April 2021. The dismissal followed an investigation by the DHB into various Facebook posts made by Ms Turner that had come to its attention. After a process in which Ms Turner was represented and made submissions with the assistance of an advocate, the DHB dismissed Ms Turner for serious misconduct. The DHB concluded Ms Turner had breached the DHB's expectations of her, the DHB's Code of Conduct, and the Nursing Council of New Zealand's Code of Conduct.

[2] Ms Turner pursued a personal grievance (unsuccessfully) in the Employment Relations Authority.[1] Ms Turner then challenged the determination of the Authority in the Employment Court, claiming that her summary dismissal was unjustified and that the DHB had acted in a discriminatory manner and ignored her rights to privacy and to freedom of expression.

[3] The Employment Court rejected her challenge.[2] Ms Turner now seeks leave to appeal. Her application is opposed by the respondent on the basis that the proposed appeal does not involve questions of law that by reason of their general or public importance or for any other reason ought to be submitted to this Court for decision.

[4] Ms Turner needs an extension of the time to bring the leave application. That application is also opposed. The only explanation Ms Turner has given for the delay appears to relate to indecision on her part and the fear of incurring further costs. However, the application was filed only five days late and no prejudice will arise from extending the time. In the circumstances, the appropriate course is to extend the time for bringing the application and we proceed on that basis.

---

1 *Turner v Wairarapa District Health Board* [2022] NZERA 259.

2 *Amanda Turner v Te Whatu Ora – Health New Zealand, in respect of the former Wairarapa District Health Board* [2023] NZEmpC 158, (2023) 19 NZELR 974 [Employment Court decision].

[5] We mention also at the outset that we allowed Ms Turner's application to be supported by written material from Ms Lambert, an advocate who assisted her in the Employment Court. The fact we have done so on this occasion should not be taken as an indication that the Court would normally take that approach. We derive most assistance from submissions of counsel familiar with the jurisprudence concerning this Court's role in the employment field where our jurisdiction is limited to questions of law. The implications of that limitation can be elusive for practising lawyers, let alone non-lawyers.

The facts

[6] In March 2021 the DHB became aware that Ms Turner had been posting content on her personal Facebook page complaining that the COVID-19 vaccine was unsafe. That came to the attention of the DHB after an associate charge nurse, who was visiting an aged residential care facility in South Wairarapa, was advised by one of the nurse managers at the facility that Ms Turner had been posting anti-vaccine information on Facebook. Ms Turner was a well-respected nurse looked up to by other staff members, and concerns were expressed that the posts had caused staff at the care facility to question whether they should be vaccinated against COVID-19. The charge nurse raised the issue with a manager at the DHB. In response to an enquiry, a different nurse provided the DHB with copies of various Facebook posts made by Ms Turner.

[7] The Employment Court found that there were many posts expressing concern about the COVID-19 vaccine.[3] The Court considered the discussion in the posts was not balanced but involved memes and strongly worded statements or allegations against individuals and groups. Posts questioned whether the vaccine was safe, and said the vaccine was not "free" but paid for by the taxpayer. Ms Turner was also critical of a Māori-specific COVID-19 vaccine plan writing:

> Don't do it people, this vaccine is unsafe.
>
> They talk as if we're all living 200 years ago when Maori were susceptible to all the diseases the pakeha brought into NZ

[3] At [10].

> Anyone with underlying health issues can get this Chinese flu and have a reaction to the vaccine! You's are not special! They're lying to you!

[8] The Court also found that there were a "substantial number" of posts expressing concern about Muslim immigration into New Zealand, which were expressed in terms derogatory of Muslims generally as well as individual Muslims.[4]

[9] Ms Turner did not dispute that she had made the posts in issue. However, she referred to the fact that they were private, and only accessible to people who were her friends on Facebook. In addition, she asserted that she was entitled to express her opinion and she said that her comment that Māori were not "special" was merely attempting to tell Māori that they were no more susceptible to viruses than others in the community. She claimed the posts regarding Muslims were not anti-Muslim, but directed to immigration policy and that her views on immigration were reasonable.

[10] The Court found that the process followed by the DHB was fair.[5] The issues raised were serious and an investigation was required which would involve other people including other members of staff.[6] The decision initially made to suspend her while the investigation was conducted was justifiable in the circumstances.[7]

[11] The Court held that the DHB was understandably concerned once issues were raised by the aged residential care facility. At the time, COVID-19 was particularly dangerous for elderly people living in such facilities. It was "reasonable and understandable" that the DHB should investigate the care facility's concerns about Ms Turner's postings and their potential influence on staff at the facility.[8] The Court further held that the DHB was entitled to seek information about the posts on Ms Turner's Facebook page and ask a colleague to provide them.[9]

[12] Ms Turner asserted she was entitled to record her opposition to the immigration of Muslim people and claimed that she was discriminated against on the basis of her

---

4 At [12].
5 At [55].
6 At [56].
7 At [57].
8 At [58].
9 At [59].

political beliefs and Christian faith. The Court rejected the claim that her Christianity had any bearing on the decisions made by the DHB. Further, the anti-Muslim comments needed to be weighed against relevant staff policies and codes of conduct to which she was expected to adhere.[10] Her right to religious or political beliefs could not prevent the DHB from taking disciplinary action in respect of the posts criticising Muslims, including attacking individual Muslim New Zealanders.[11]

[13] Further, the Court held the posts regarding the vaccine were directly contrary to the position being taken by the Ministry of Health and the DHB at the relevant time. Although the vaccine programme was in the course of development, vaccination against COVID-19 was being promoted by health agencies. In the circumstances, Ms Turner's posts:[12]

> …had the potential to undermine the trust and confidence of the public in the DHB, which is inconsistent with the social media policy and with Ms Turner's obligations to her employer.

[14] The Court observed that Ms Turner's 86 Facebook friends were sufficiently numerous to mean that comments made could not be regarded as truly private. On the contrary, the posts were accessible to other employees of the DHB and employees of the aged residential care facility.[13] The relevant employment documents governing Ms Turner's relationship with the DHB, including its Code of Conduct and social media policy, referred to risks inherent in social media posts. Ms Turner should have been aware that the posts could be the subjects of an employment investigation and potential disciplinary action, even if made to a closed group.[14]

[15] The statements made on the Facebook page both in respect of Muslims and concerning the issue of vaccination "ran directly contrary to the interests of the DHB".[15] The DHB understandably had policies in place to ensure its staff respected the "rights, interests and diversity of their colleagues and health consumers" and

---

10 At [65].
11 At [66].
12 At [67].
13 At [74].
14 At [74].
15 At [80].

avoided activities (work or non-work related) that might harm the reputation of the DHB.[16]

[16] At the time there were genuine fears that COVID-19 would again enter the community. Although it was thought that New Zealand was COVID-19 free, there was concern about the vulnerability of residential care facilities. Given Ms Turner was a respected medical professional, whose views would have been influential on fellow employees and others with whom she interacted, the anti-vaccination posts were contrary to the interests of the DHB.[17]

[17] Further, the anti-Muslim posts were "offensive and ran counter to the principles and requirements of the DHB as contained in the DHB's Code of Conduct"[18] They also were contrary to the Nursing Council of New Zealand's Code of Conduct, under which:[19]

> (a) Registered nurses are not to impose their political, religious and cultural beliefs on consumers, and that they should intervene if they see other health team members doing this.
>
> (b) Registered nurses are to reflect on and address their own practice and values that impact on nursing care in relation to the health consumer's age, ethnicity, culture, beliefs, gender, sexual orientation and/or disability.
>
> (c) Registered nurses must maintain a high standard of professional and personal behaviour, including when they use social media and electronic forms of communication.

[18] In the circumstances, the Court concluded that Ms Turner's conduct was "serious misconduct" and given Ms Turner's attitude the DHB had no reason to be confident that she would not repeat her behaviour in the future. There was no basis for the DHB to find any mitigation as a result of the comments made at the meetings held during the investigation process.[20]

---

16 At [80].
17 At [81].
18 At [83].
19 At [25].
20 At [84]–[85].

[19] Consequently, the decision to dismiss Ms Turner was justifiable, and one open to the DHB as a fair and reasonable employer.[21]

The application for leave to appeal

[20] There are differences between the application for leave to appeal and the submissions that Ms Lambert filed as to the questions of law sought to be raised on the appeal. However, we think the issues sought to be pursued can be distilled into questions asking whether the Employment Court erred by:

(a) denying Ms Turner the protection of ss 13 and 14 of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act) by holding that the DHB was entitled to limit her political speech (including speech outside of the workplace);

(b) denying her the protection of s 21(1)(c) and (j) of the Human Rights Act 1993; or

(c) finding that she was not discriminated against for the purposes of s 105(1)(c) and (j) of the Employment Relations Act 2000.

[21] Before turning to the substantive issues, it is appropriate to emphasise that under s 214 of the Employment Relations Act, appeals to this Court may only be brought with the leave of this Court and are confined to appeals on questions of law. This Court may only grant leave if, in the opinion of the Court, the question of law involved in the appeal is one that by reason of its general or public importance, or for any other reason, ought to be submitted to this Court for decision.[22] It is axiomatic that the question sought to be pursued must be one that is capable of serious and bona fide argument.[23]

---

21 At [86].
22 Employment Relations Act 2000, s 214(3).
23 *FGH v RST* [2023] NZCA 204, [2023] ERNZ 321 at [53].

Analysis

Bill of Rights Act

[22] Sections 13 and 14 of the Bill of Rights Act confirm the rights of freedom of thought (including the right to hold opinions without interference) and freedom of expression. Section 3(b) of the Bill of Rights Act states that the Act applies to acts done "by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law".

[23] There is no doubt that the DHB performs public functions, and in carrying out those functions, exercising its powers, and carrying out its duties it must act in accordance with the Bill of Rights Act. The Employment Court rejected Ms Turner's argument that her Facebook page comments could not be the subject of disciplinary action because of ss 13 and 14 of the Bill of Rights Act. It held that employment does not involve the performance of any public function, power or duty. Employment matters were ancillary to the DHB's public functions, and in the Judge's view "more properly governed by the principles of general private law".[24]

[24] The Judge took an orthodox approach, referring to the judgment of the High Court in *Butler v Shepherd*, which adopted what was said by Rishworth and others in *The New Zealand Bill of Rights*:[25]

> The intent of s 3(b) is to apply the Bill of Rights to acts done in the performance of the public function, rather than to all acts done by a body that happens to perform a public function. Actions ancillary to the performance of a function, such as procuring of premises and supplies, and the employment and dismissal of staff, are more properly governed by the principles of general private law.

[25] We do not consider there is a plausible argument that the Employment Court's approach was wrong. The relevant actions of the DHB in this case were not subject to s 3(b) of the Bill of Rights Act. They were ancillary to its functions, duties and powers. Accepting Ms Turner's argument would mean a public service employer

---

24 Employment Court decision, above n 2, at [76].

25 *Butler v Shepherd* HC Auckland CIV-2011-404-923, 18 August 2011 at [58], citing Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 96.

could not discipline members of staff claiming the right to express opinions directly contrary to the employer's policies and critical of racial or ethnic groups. We do not consider the question raised is seriously arguable and we will not grant leave to pursue this question on appeal.

Human Rights Act and Employment Relations Act.

[26] The issues set out at [20(b)–(c)] above essentially turn on the same issue derived from the Human Rights Act. The Human Rights Act relevantly provides that it is unlawful for an employer to "terminate the employment of an employee … in circumstances in which the employment of other employees employed on work of that description would not be terminated" by reason of any of the "prohibited grounds of discrimination."[26] The prohibited grounds of discrimination are set out in s 21(1) of the Human Rights Act. Subsections (c) and (j) refer, respectively, to religious belief and political opinions.

[27] Those grounds are mirrored in s 105(1)(c) and (j) of the Employment Relations Act. Under s 103(1)(c), a party may allege a personal grievance on the basis of discrimination in that person's employment. The expression "discriminated against in that employee's employment" is defined in s 104(1) by reference to the prohibited grounds of discrimination specified in s 105.

[28] As to the question based on s 21(1)(c) and (j) of the Human Rights Act, it is clear that it would have been unlawful for the DHB to terminate Ms Turner's employment on the basis that she was a Christian (or held any other religious belief) or on the basis of that she held or expressed political opinions.

[29] However, the Employment Court rejected Ms Turner's claim that she had been dismissed because of her religious beliefs as a matter of fact. The Judge wrote:[27]

> [65] Ms Turner claims that she was discriminated against because she is Christian. She also maintains that her comments were about allowing the immigration of Muslim people, which was a policy position to which she was entitled. She says she was discriminated against on the basis of her political beliefs. I do not accept these contentions. There is nothing to suggest

---

26 Human Rights Act 1993, s 22(1)(c).
27 Employment Court decision, above n 2, at [67].

> Ms Turner's Christianity had any bearing on the DHB's decision-making. Her anti-Muslim comments had to be weighed against the relevant staff policies and codes of conduct she was expected to adhere to, they cannot be immune from that scrutiny on the basis they are allegedly on a matter of policy.
>
> [66] Further, as the DHB submits, freedom of religion cannot be taken to include the freedom to discriminate against other religions or to make derogatory comment about those other religions and the people who practise them without consequences. Ms Turner's right to hold religious or political beliefs did not prevent the DHB from taking disciplinary action in respect of her posts criticising Muslims, including attacking individual Muslim New Zealanders.

[30] As far as the argument based on political opinion is concerned, the Employment Court also rejected the claim on the facts. Thus, Ms Turner's employment was not terminated because of any "political opinions", but because her posts were directly contrary to the position being taken by the DHB at the time. The Judge said:[28]

> …vaccination against COVID-19 was being promoted by health agencies. The posts had the potential to undermine the trust and confidence of the public in the DHB, which is inconsistent with the social media policy and with Ms Turner's obligations to her employer.

[31] Consequently, the issues sought to be raised under this ground are issues that were determined by the Employment Court as matters of fact. They cannot be pursued as questions of law under s 214 of the Employment Relations Act unless the findings of fact were insupportable or untenable.[29] There is no possibility that any such argument could succeed in this case.

[32] The same applies with respect to the issues Ms Turner seeks to raise asserting she was discriminated against on the basis of her religious belief and political opinions for the purposes of the Employment Relations Act provisions. The same issues arise as with the questions based directly on the Human Rights Act: the relevant Employment Court conclusions were based on fact, and no questions of law arise.

---

28 At [67].

29 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [26].

Other issues

[33] Two other issues were raised in the application for leave which can be dealt with briefly. First, the application for leave asked whether the DHB was entitled to pursue a policy in breach of s 22 of the Public Service Act 2020. That section contains an acknowledgment that public service employees have all the rights and freedoms affirmed in the Bill of Rights Act "in accordance with the provisions of that Act". We have already discussed the relevant provisions of the Bill of Rights Act, and the reference to it in s 22 of the Public Service Act does not alter the position.

[34] Secondly, Ms Turner raised a question about the place of the Treaty of Waitangi and its application to public service employees. She referred in this respect to her comments about Māori not being more prone to COVID-19 infection than other persons. She suggested this Court could make some general observations about the role of art 3 of the Treaty in employment law. This misconceives this Court's role in a case of this kind, which must necessarily be focused on questions of legal error in the decision of the Employment Court.

Result

[35] The application for an extension of time is granted.

[36] For the reasons we have given, we are satisfied that leave to appeal should not be granted and the application is declined.

[37] The respondent is entitled to costs calculated on a Band A basis for a standard application together with usual disbursements.

Solicitors:
Buddle Findlay, Wellington for Respondent