

**Attention is drawn to the order prohibiting publication of certain information in this determination.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2019] NZERA 564  
3067975

BETWEEN	DKR Applicant
AND	WAIKATO DISTRICT HEALTH BOARD Respondent

Member of Authority: Rachel Larmer

Representatives: Blair Edwards and Kate Wilson, counsel for the Applicant  
Anthony Russell, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: 13 September 2019 from the Applicant  
20 September 2019 from the Respondent

Date of Determination: 2 October 2019

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**DETERMINATION OF THE AUTHORITY**

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**Applicant's name**

[1] A random online letter selection tool has been used to select the letters “DKR” that are used in this determination in place of the applicant’s name. These three letters do not bear any relation to the applicant’s real name.

## **Employment Relationship Problem**

[2] DKR is a medical professional who was dismissed by the Waikato District Health Board (WDHB). DKR claims his dismissal was substantively and procedurally unjustified. WDHB says dismissal was justified to protect patient safety.

[3] DKR also claims that WDHB unjustifiably disadvantaged him because of the manner in which it investigated concerns it had about his practice. WDHB denies that.

[4] A substantive investigation meeting into DKR's personal grievance claims has been set down for early 2020.

[5] DKR has also sought interim reinstatement, which is opposed by WDHB. That claim will be determined on the papers, after the parties have had an opportunity to file submissions on the interim reinstatement issue.

[6] This determination therefore only addresses DKR's application:

- (a) For non-publication orders; and
- (b) That the substantive investigation meeting be conducted in private.

## **DKR's applications**

[7] DKR submits that the following matters should be subject to interim non-publication orders issued by the Authority:

- (a) Names of the parties to these proceedings;
- (b) Any information that may identify the names of the parties to these proceedings;
- (c) Names of the patients and any information that may identify the names of the patients;
- (d) The patients' care and treatment; and
- (e) The contents of three reports, which for the purposes of confidentiality shall be referred to at this stage of these proceedings as "*the P & M Report*", "*the*

*TS Audit Report*” and “*the FF Report*”. The first two reports were prepared on instructions of the WDHB, while the third report was obtained by DKR.

[8] DKR also sought an order from the Authority that its substantive investigation meeting into his claims would be conducted in private.

[9] DKR’s reasons for seeking non-publication orders and a private investigation meeting were set out in his affidavits dated 22 July and 10 August 2019.

### **Other third party investigations**

[10] DKR’s clinical practice is currently the subject of as yet unresolved investigations by the Health and Disability Commission (HDC), the Coroner, and the Medical Council of New Zealand (MCNZ).

[11] The Authority has been advised that none of these other investigations into issues involving DKR’s practice are likely to be completed prior to the Authority’s substantive determination. There is, as yet, no indicative timeframe available for resolution of any of these other investigations.

### **WDHB’s position**

[12] WDHB agrees that a non-publication order is appropriate in order to protect the privacy of any patients that may be referred to in the course of these Authority proceedings. Much of the information produced to the Authority to date has already protected patient confidentiality by using numbers instead of names.

[13] WDHB strongly opposed all of the other applications DKR has made for non-publication orders, on the basis that the high standard of evidence required to depart from the usual principle of open justice was not met.

### **DKR’s current situation**

[14] DKR has a current MCNZ practising certificate that is due for annual renewal early next year.

[15] WDHB became aware of potential issues with DKR’s practice in 2016, which led to it placing some limitations on DKR’s clinical practice, pending an investigation under clause

42 of the Senior Medical and Dental Officers Collective Agreement (“the collective agreement”).

[16] In 2018 other concerns involving DKR arose. WDHB then stood DKR down from all clinical services while an audit of his practice was undertaken.

[17] Over the period September 2018 to April 2019 WDHB formally raised a number of concerns with DKR, all of which he denied and/or disputed.

[18] In May 2019 WBHD dismissed DKR on notice for “*grossly negligent practice that was a danger to patients.*”

[19] DKR strenuously denied WDHB’s conclusion that he had engaged in “*grossly negligent practice was a danger to patients*”. DKR said that WDHB’s findings relied on fundamentally flawed investigations, that “*were conducted in an entirely unfair and prejudicial manner*”. DKR claimed that he had been left to defend himself in the face of a lack of information from WDHB.

[20] DKR alleges that the investigation process WDHB used to dismiss him was unfair and predetermined. DKR also claims that WDHB had no objective information to support its finding that he was unsafe to practice.

[21] MCNZ has issued an interim decision that DKR be required to sign a voluntary undertaking (VU) regarding approval and supervision of medical procedures he was involved with, pending a MCNZ “performance assessment” of his clinical practice.

[22] The MCNZ has not made any final findings in relation to the issues that are currently before it. DKR claims that the MCNZ’s interim decision to impose VU restrictions on his practice relied on unsubstantiated complaints and/or flawed reports from WDHB.

[23] DKR sought non-publication orders and a private investigation meeting to avoid unfairly prejudicing the Coroner’s, HDC’s and MCNZ’s investigations and to prevent his reputation and standing as a doctor being unfairly damaged by WDHB’s allegations.

[24] DKR said that negative publicity would be likely if non-publication orders were not made and he believed that would cause a miscarriage of justice for him personally as well as significant reputational damage that could not be adequately remedied.

[25] DKR also claimed that failure to issue non-publication orders it would cause “unnecessary panic and anxiety” amongst his patients.

[26] DKR submitted that the interim non-publication orders he had applied for would preserve the status quo until the substantive investigation meeting, enabling his reputation to be preserved while ensuring that all other independent investigation processes were not prejudiced or tainted by the Authority’s investigation.

[27] DKR said that the specialised nature of his work, the size of the team he was part of, the DHB details, patient details, and the treatment he provided to patients or any combination of those factors would enable others to identify him.

### **Authority’s power**

[28] The Authority’s discretion to grant non-publication orders is contained in clause 10 of the Second Schedule of the Employment Relations Act 2000 (the Act). Clause 10(1) of the Second Schedule of the Act states:

The Authority may, in respect of any matter, 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, and any such order may be subject to such conditions as the Authority thinks fit.

[29] This discretion must be exercised on a principled basis.

[30] The onus is on the applicant to show that a non-publication order should be made. The Employment Court in *Crimson Consulting Limited v Berry* reviewed and summarised a recent Authority’s order regarding non-publication in the employment jurisdiction<sup>1</sup>.

[31] The Court recognised that the general principle that justice should be administered openly was a strong one and that a party seeking to depart from that fundamental principle of open justice was required to provide evidence identifying specific adverse consequences that should result in a non-publication order being issued.

[32] The Employment Court recognised that every case would be very fact specific and that the employment institutions had to weigh and assess all of the competing factors carefully and in a principled manner.

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<sup>1</sup> [2017] NZEmpC 94.

[33] The employment institutions have recognised that the overall public interest regarding non-publication orders prior to the resolution of substantive claims may be different than the public interest considerations that exist after substantive claims have been determined.

### **Outcome**

[34] This matter involves an assessment of the overall interests of justice in light of the claims DKR has made. There are clearly serious reputational issues at stake, for both parties. Public safety is also an issue.

[35] This case is similar to that of *ADHB v X* in which the Employment Court held that the risk of reputational damage to a doctor outweighed the public interest in publication of his name, until the matter could be determined substantively.<sup>2</sup>

[36] However DKR has a stronger case in favour of non-publication of his name than the doctor in the *ADHB* matter, because DKR strongly disputes the alleged serious misconduct at the heart of his dismissal, while the doctor in *ADHB* had admitted the behaviour that had resulted in his dismissal.

[37] The non-publication order that is issued must be no wider than is needed to protect the interests of justice. The orders sought by DKR are too wide. Justice can be served by making a narrower interim order that prevents publication of DKR's name and areas of practice in connection with these Authority proceedings.

[38] DKR's name and area of clinical practice is already known to many in the community within which he practised, to his patients, his colleagues, to the General Practitioners who have been contacted as part of WDHB's audit of DKR's practice, to the HDC and those involved in the HDC complaints and investigation, the Coroner and those involved in that investigation and the MCNZ and those involved in complaints and issues involving DKR.

[39] DKR is also known to WDHB's employees, external reviewers, and advisors who were involved in issues associated with DKR. The Authority cannot retrospectively limit information about DKR that is already in the public domain, or that is not related to these employment proceedings.

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<sup>2</sup> 26 May 2005, Travis J, AC23B/05.

[40] There is a legitimate public interest in those other matters that is discrete from the Authority's investigation of the parties' employment related obligations.

[41] It is also important that the non-publication order does not impinge on the other investigations or on the parties' ability to prepare for the Authority's investigation. It will therefore be made subject to conditions that address those concerns.

[42] There is no need for WDHB's name or information about it to be restricted. The fact that people who already have knowledge of some or all of the matters involving or associated with DKR may be able to conclude that he is the applicant in these proceedings does not in itself justify a wider non-publication order being issued.

[43] Nor is it likely that the HDC, MCNZ or Coroner will be prejudiced in conducting their own independent investigations into (non-employment related) issues involving DKR. The Authority's focus is on WDHB's actions and how it acted in terms of the s 103A justification test in the Employment Relations Act 2000 (the Act).

[44] The focus of the other ongoing investigations is elsewhere, and does not involve employment obligations or the Act.

[45] It is clear that patients should have their privacy protected by a non-publication order that prevents them from being identified.

### **Terms of the non-publication order issued**

[46] The Authority orders that DKR's name and area of clinical practice is not to be published, in connection with these Authority proceedings only, until further order of the Authority.

[47] This non-publication order does not apply to, and therefore does not limit, publication of DKR's name and area of clinical practice by any of the following:

- (a) Witnesses, experts or professional advisors to the parties;
- (b) Patients, patients' family members, General Practitioners (GPs), WDHB employees, DKR's colleagues or others who have made formal complaints or raised written concerns about DKR and/or his practice;

- (c) People who have been involved in WDHB's audit and/or investigations relating to DKR and his practice;
- (d) Patients and the patients' GPs who have been subject to, communicated with about, or involved in, WDHB's audit of DKR's practice;
- (e) The MCNZ or those involved in its investigation;
- (f) The HDC or those involved in the HDC's investigation;
- (g) The Coroner or those involved in the Coroner's investigation;
- (h) Information that is already in the public domain, as at the date of this determination, about DKR and/or his clinical practice;
- (i) DKR's engagement or employment in clinical practice by anyone other than WDHB.

[48] This exemption condition has been considered necessary to protect those third party interests, because those listed in paragraph [47] already know DKR's name and area of clinical practice, so the Authority does not want to restrict how they may deal with this information that they already have.

[49] This condition also avoids the potential risk of inadvertent breaches occurring by those identified in paragraph [47] above, on the basis that they did not know about the content of this determination, or of restrictions being placed on information that is already in the public domain and/or that may be relevant to other non-Authority related investigations.

[50] The Authority does not consider that the limited terms of this non-publication order creates any patient safety issues, because DKR is not currently practising and even if he was to be employed elsewhere he would still be subject to limitations on, and oversight of, his clinical practice because of the MCNZ's VU.

[51] The following condition is also considered to be sufficient to adequately address any potential public safety considerations pending the outcome of DKR's substantive claims:

The non-publication order that has been issued is made subject to the specific condition that DKR must disclose that he is the applicant in these proceedings to any person, entity or employer that engages him to undertake any clinical duties, activities or practice.

[52] The terms of the non-publication order that has been issued to protect patient confidentiality states:

The name and information identifying any patient, who is referred to in the course of these Authority proceedings, is not to be published without the Authority's prior written permission, until further order of the Authority.

[53] That means that the care and treatment of a patient may not be published if to do so would lead to the identification of the particular patient involved. To the extent that patients are referred to in the course of these proceedings by a patient number, then the media may not publish any of the patient numbers that may be used, in order to preserve patient privacy.

[54] These limited interim non-publication orders should not be viewed as providing any indication of what the non-publication status may be after DKR's claims have been substantively determined.

[55] The Authority is not prepared to issue a blanket restriction on the contents of the various reports referred to in this determination, at this early stage of the proceedings.

[56] However, the parties are free to address the Authority during the substantive investigation meeting about any particular parts of any specific report that they say should be subject to a further non-publication order.

### **Private investigation meeting**

[57] The applicant's request for the substantive investigation meeting to be held in private does not succeed.

[58] The principle of open justice is an important one. There is no good reason for the legitimate public interest in the Authority's proceedings to be restricted in the way DKR has requested.

[59] Secrecy of this substantive matter is not in the public interest. Justice must be seen to be done.

### **Summary of orders**

[60] Until further order of the Authority, the following information is subject to an interim non-publication order issued under clause 10(1) of the Second Schedule of the Act:

- (a) The name of the applicant in these Authority proceedings;
- (b) The applicant's area of practice;

- (c) The name and any information that may personally identify any of the patients who are referred to during these Authority proceedings.

[61] Until further order of the Authority, the non-publication orders that have been made are subject to the following conditions:

- (a) DKR must disclose that he is the applicant in these proceedings to any person, entity or employer that engages him to undertake any clinical duties, activities or practice.
- (b) The exceptions identified in paragraph [47] of this determination apply.

**Costs**

[62] Costs are reserved pending the outcome of the substantive matter.

**Rachel Larmer**  
**Member of the Employment Relations Authority**