

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

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

[2025] NZERA 202
3361903

BETWEEN HAZ
 Applicant

AND McNEILL DISTRIBUTION
 LIMITED
 Respondent

Member of Authority: Philip Cheyne

Representatives: David Buckingham, advocate for Applicant
 Janet Copeland, counsel for the Respondent

Investigation Meeting: 28 March 2025 by AVL

Further information and 28 March 2025 and 4 April 2025 from the respondent
submissions:

Date of Determination: 10 April 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Non-publication Order

[1] HAZ seeks a non-publication order. McNeill Distribution Limited (MDL) opposes an order, saying that the requirements in *MW v Spiga* have not been met.¹ MDL did not seek non-publication of its name.

[2] HAZ says he is concerned about stigma and misunderstanding about sleep apnoea. He says that MDL was “demonstrably inept” in handling medical information. HAZ is concerned that public knowledge about his condition would affect his prospects

¹ *MW v Spiga* [2024] NZEmpC 147.

for being sponsored or finding future employment. He refers to a concern about his reputation within the Filipino community.

[3] In support of the non-publication application, there is some evidence which is critical of MDL and submissions critical about its motivation. It is not necessary to comment on the evidence or submissions, except to say that I disregard them for current purposes.

[4] Open justice is important, including with respect to interim reinstatement applications. However, at this stage, nothing suggests a specific third-party interest would be affected by non-publication of applicant's identity. It will be necessary to canvass the applicant's health information, details of which would normally be confidential. The evidence weakly indicates the prospect of some stigma for the applicant if his name was published.

[5] Balancing these factors, I make an order that the applicant's name not be published, pending further order of the Authority. Whether grounds exist to continue the non-publication order will be part of the Authority's investigation and determination of the applicant's substantive claims.

Employment relationship problem

[6] HAZ worked as a driver for McNeill Distribution Limited (MDL) from January 2024 until he was dismissed by notice given on 24 February 2025. McNeill Distribution terminated HAZ's employment on the grounds of medical incapacity.

[7] HAZ raised a personal grievance about the dismissal in correspondence dated 28 February 2025. Separate grievances were also raised about MDL's actions before the dismissal. It is not necessary at present to consider whether those separate grievances have merit. However, the actions form part of the context for the dismissal.

[8] In this application, HAZ seeks interim reinstatement pending the hearing and determination of his personal grievance of unjustified dismissal.

[9] In its statement in reply MDL says it does not oppose the application for interim reinstatement, based on assurances about HAZ's fitness for work and subject to safeguards, set by conditions.

The Authority's investigation

[10] HAZ lodged his application, an undertaking as to damages, his affidavit and the affidavit of a consultant occupational physician.

[11] MDL lodged its statement in reply and the affidavit of Kat Paterson, the ultimate holding group's HR manager.

[12] Both representatives provided written submissions and had the opportunity to present and respond to the submissions, as usual.

[13] After the investigation meeting, counsel confirmed that the respondent did not object to the Authority receiving a copy of the NZ Transport Authority (NZTA) information proffered by the applicant. The applicant later sought to lodge further submissions and information. Counsel submitted that the further submissions and information should be disregarded. Issues about timeliness of disclosure and prejudice to the respondent are raised. Those points have merit. The present application will be determined based on the NZTA material, submissions made during the meeting and the affidavits and material lodged beforehand.

[14] This determination resolves the application for interim reinstatement. Findings based on the untested affidavits, attached documents and submissions are solely for that purpose. Final findings of fact must await a substantive investigation meeting

[15] It is first helpful to outline the events that led to dismissal, by way of context, before I apply the law regarding interim reinstatement.

Context for the dismissal

[16] HAZ was employed by MDL from January 2014. He is a migrant worker and holds a New Zealand accredited employer work visa under which he could only work for MDL as a truck driver based in Southland.

[17] Terms of the employment are set out in MDL's standard terms and in a second document entitled "Personal Terms". There is also a comprehensive job description and MDL's Rules and Policies Handbook .

[18] MDL's trucks include technology to monitor driver distraction and fatigue, as well as vehicle actions (Guardian). MDL has also implemented a driving standard. The

standard and Guardian are part of how MDL manages risk under the Health and Safety at Work Act 2015 (HSWA).

[19] HAZ was on leave at the end of 2024. Following his return to work in 2025, he was subject to four Guardian “Fatigue – drowsiness reports” - 30 January 2025, 3 February 2025, 10 February 2025 and 12 February 2025. HAZ was required to take breaks following the first two and MDL took further steps with respect to the last two.

[20] There had also been earlier Guardian reports during 2024, dealt with in accordance with standard protocols.

[21] After the 12 February 2025 report, MDL suspended HAZ and an appointment was made for him to see a general practitioner. MDL required a doctor’s report and a medical clearance as part of its investigation.

[22] HAZ says that he has personal grievances about the suspension, use of his sick leave to pay him during the suspension and arrangements regarding him seeing the medical practitioner. However, HAZ did see the doctor on 12 February 2025.

[23] MDL received a Sleep Study Report based on information gathered by a device that MDL had provided to HAZ for him to use after the 10 February 2025 incident. HAZ used it that evening. MDL received the Report on 17 February 2025. It stated that the data demonstrated severe sleep disordered breathing, recommended a trial of treatment with CPAP/APAP and advised that the patient should not drive if tired or sleepy.

[24] There was an email exchange between Ms Paterson and the general practitioner from 17 February about HAZ’s diagnosis and prognosis. The general practitioner considered that the Report indicated significant sleep apnoea which necessitated use of a CPAP machine. HAZ could not be cleared to drive meantime.

[25] HAZ was scheduled to see the general practitioner at 11.00 am on 24 February 2025. Before he went to the appointment, HAZ went into his workplace.

[26] Ms Paterson’s evidence is that HAZ had been kept up to date with and made aware of the information provided to MDL by the general practitioner. HAZ’s evidence is that he received the information only after his dismissal. I proceed on the basis that HAZ will be able to establish that in due course.

[27] HAZ's evidence is that when he attended the workplace he was handed the 24 February 2025 letter, terminating his employment. Ms Paterson's evidence is that HAZ did not object to the proposal to terminate his employment and that his comments with respect to notice were considered before his employment was terminated. However, I proceed on the basis that HAZ will be able to establish in due course that MDL did not properly comply with the consultation aspects of the test for justification of its decision to dismiss HAZ.²

[28] The letter referred to clause 7.5 of the employment agreement. That clause permitted the employer to terminate the employment if, as a result of illness, the employee was rendered incapable of the full ongoing performance of their employment duties. Before acting under the clause, the employer could require the employee to undergo an examination by a medical practitioner or similar professional.

[29] MDL referred to the Report and information from the medical practitioner and said it could not sustain HAZ's absence without a clear recovery plan or return to work date. The practitioner could not provide medical clearance for HAZ to be able to drive until any treatment plans were working. MDL was not able to sustain HAZ's absence meantime and did not have other duties. Accordingly, MDL had decided to terminate HAZ's employment on one week's notice due to medical incapacity.

[30] HAZ did not return to work and later received his final pay.

[31] HAZ raised personal grievance claims with MDL on 28 February 2025. This application was lodged in the Authority on 7 March 2025. Parties were directed to mediation, but the matter was not resolved. On 19 March 2025, MDL openly offered interim reinstatement and some reimbursement to HAZ, subject to several conditions. However, the matter remained unresolved.

Interim Reinstatement

[32] The Authority has power to order interim reinstatement, subject to any conditions considered appropriate. In exercising the power, the Authority must apply the law relating to interim injunctions, having regard to the objects of the Employment Relations Act 2000.³

² Employment Relations Act 2000 s 103A(3).

³ Employment Relations Act 2000 s 127.

[33] In summary, HAZ must establish that there is a serious question to be tried in relation to the claim of unjustified dismissal and in relation to the claim of permanent reinstatement. Consideration must be given to the balance of convenience and the impact on the parties of granting or refusing an interim order. Finally, I must consider the overall interests of justice.

Unjustified dismissal – strongly arguable case

[34] MDL concedes that HAZ’s claim is not frivolous or vexatious. However, I should outline the case as it appears at this point. At present, it is not necessary to comment about the unjustified disadvantage grievances.

[35] It has long been accepted that there comes a time when an employer “can fairly cry halt”, when faced with a case of medical work incapacity.⁴ In the present case, MDL acted after about a fortnight of HAZ being off work. I was not referred to any case where an employer facing similar business pressures acted after such a short time. It is strongly arguable that MDL had not reached the point where it could “fairly cry halt”.

[36] In *Barry v Wilson Parking NZ (1992) Ltd*,⁵ the Employment Court held that fairness, generally speaking, includes an open-minded inquiry about whether the employee has any realistic prospect of returning to work within a reasonable time, followed by a balanced consideration of whether it would keep the employee’s position open for the indicated period of time.

[37] In evidence is an email from Ms Paterson to the general practitioner dated 20 February 2025. Use of a CPAP machine had been recommended and Ms Paterson said that MDL was keen to trial him on the device. She enquired about how quickly one could be arranged through the public health system. The practitioner was unsure but referred to several weeks, depending on availability. But there is no evidence that MDL discussed with HAZ whether he would trial use of a CPAP and whether he needed support to do so, before deciding to dismiss him. It is strongly arguable that MDL did not meet the standard of substantive fairness set out in the *Wilson Parking* case.

⁴ *Hoskin v Coastal Fish Supplies Ltd* [1985] 124 at 127.

⁵ [1998] 1 ERNZ 545 at 549.

[38] HAZ's evidence about MDL's procedure also establish a strongly arguable case of unjustified dismissal.

Permanent reinstatement – arguable case

[39] HAZ has sought reinstatement. If it is determined that he has a personal grievance of unjustified dismissal, the Authority must provide for reinstatement wherever practicable and reasonable.

[40] Permanent reinstatement appears to be practicable. It is not suggested that MDL does not require drivers with HAZ's skills. MDL impresses as a business with resources that would allow it to re-establish a good working relationship with HAZ. HAZ, as an Overseas Filipino Worker, would be well motivated to re-establish a positive working relationship. In addition, HAZ's work visa only permits him to work for MDL.

[41] MDL points to the health factors that led to its decision to dismiss HAZ and related matters that are now apparent, in support of its submission that permanent reinstatement would not be reasonable.

[42] I accept that MDL has a legal duty to provide safe systems of work and to manage and control risks in the workplace. There are potentially serious consequences if MDL breaches its legal obligations for it, its employees and third parties.

[43] MDL acted following the diagnosis of HAZ's severe sleep apnoea, and the general practitioner's conclusion that he could not clear HAZ to operate a log truck in his current condition. However, there is now evidence from a consultant occupational physician who reports that, with regards to sleep apnoea, HAZ meets the requirements of NZTA to operate the classes of his driving licence. The difference appears to be HAZ's use of a CPAP machine over five days to 11 March 2025. HAZ's sleep apnoea, if properly managed, would not count against the reasonableness of permanent reinstatement.

[44] There is information to the effect that NZTA recently imposed a condition on HAZ that he annually report to it confirming his on-going compliance with CPAP therapy. The information was not provided before the investigation meeting and the apparent delay from when it was received has not been explained. The information reinforces the need for HAZ to properly manage his sleep apnoea.

[45] MDL draws attention to HAZ's non-disclosure of pre-existing medical conditions at the time of his employment and at several later points. I accept this might support a finding that HAZ contributed to the circumstances of his dismissal, as well as pointing away from the reasonableness of permanent reinstatement. However, on balance, it does not persuade me that permanent reinstatement would not be reasonable.

[46] HAZ has an arguable case for permanent reinstatement.

Balance of Convenience

[47] Helpfully, parties have agreed to late May dates for an investigation meeting. But taking account of time if required for a reserved determination, an outcome might still be up to five months away. I accept this factor is neutral.

[48] HAZ is likely to suffer significant financial effects from now until the final resolution of his personal grievance if he is not reinstated in the meantime. He describes his situation as "dire" and says he will be "destitute" within a few weeks. It is unclear how HAZ would be able to meet the cost of CPAP treatment which he has started, without income from employment. Context includes his inability to work in New Zealand, except for MDL.

[49] I accept that MDL would probably be able to meet awards of compensation and reimbursement in due course if HAZ was unjustifiably dismissed. Damages would be an adequate remedy for pure financial loss. However, the context mentioned above is a distinguishing feature, the full effects of which might not be covered by damages. In addition, HAZ would have lost the opportunity to maintain his work skills and status. This factor favours HAZ's claim for interim reinstatement.

[50] I accept that there is evidence that HAZ might not have fully met his disclosure obligations as to his health status, as mentioned above. It could give rise to trust and confidence considerations. This factor resulted in the foregoing finding that HAZ has an arguable case of permanent reinstatement, rather than a strongly arguable case. It should not be brought to account again at this point.

[51] If HAZ's sleep apnoea was not treated, there would be some risk to third parties arising from fatigue. MDL's use of Guardian might not be sufficient to mitigate the risk. On its own, the factor counts against interim reinstatement.

[52] There is no evidence that HAZ might be able to meet his undertaking for damages. For example, if HAZ was reinstated to the payroll rather than to work pending determination of his claims but was eventually unsuccessful, the undertaking might be of little value to MDL to offset any losses. This factor too counts against interim reinstatement.

[53] Overall, the balance of convenience favours HAZ, but not strongly.

Overall justice

[54] Standing back, the feature that emerges is the very short timeframe within which MDL terminated HAZ's employment in reliance on his medical incapacity, when treatment was likely to have restored his capacity to work quite promptly. The very short timeframe would set a low bar for an employer to justify dismissal on the grounds of medical incapacity, compared to other decided cases.

[55] Factors that count against HAZ can be mitigated by conditions.

[56] I am satisfied that the overall justice of the case favours HAZ.

5 March 2025 grievance

[57] A discrimination grievance was raised in this correspondence, based on an email Ms Paterson sent the general practitioner on 20 February 2025. It is not necessary to set out any details at present as, even if made out, it adds nothing to consideration of the claim for interim reinstatement.

Conditions

[58] HAZ submits that interim reinstatement to the payroll only should be ordered. I disagree.

[59] HAZ points to the mental toll of on-going litigation and the "intense surveillance" he would be subjected to under MDL's proposals. However, the medical evidence brought by HAZ is that he meets the requirements of NZTA to operate the classes as per his driving licence. It does not support the submission.

[60] I am asked to backdate pay to the date of dismissal and restore sick leave entitlements. No authority was provided to support the submission. Ordering backpay

would give retrospective effect to an order for interim reinstatement. Restoration of sick leave entitlements would give a substantive remedy for one of the disadvantage grievances. Neither course is appropriate, at this point.

[61] HAZ seeks other directions against non-parties to the application as well as against MDL. MDL raises procedural and jurisdictional objections. I agree with both points and no directions will be made.

[62] MDL seeks conditions if HAZ is reinstated in the interim. MDL amended some conditions, in light of evidence and information.

[63] The consultant occupational physician's advice on 10 March 2025 to NZTA was that if HAZ consistently continues to use CPAP night after night, she did not consider any restrictions on his current capacity to drive were needed. Her affidavit dated 12 March 2025 refers to the CPAP data extracted that day to support her view that HAZ meets NZTA requirements with regard to sleep apnoea. Several weeks have passed since then, and MDL seeks some reliable assurance that HAZ "consistently continues to use CPAP night after night". It is appropriate to include a condition to that effect to mitigate the risk, especially to third parties.

[64] As part of the order for interim reinstatement, HAZ is to provide a report from an occupational physician of his choosing to confirm that he "consistently continues to use CPAP night after night". The report is to be provided to MDL, at its cost, as soon as practicable but no later than 14 days of the order for interim reinstatement.

[65] HAZ will need to provide (at his cost) an updated report as part of his evidence in support of his application for permanent reinstatement. The updated report should show that HAZ consistently continued to use CPAP through the period of interim reinstatement.

[66] MDL seeks a condition that HAZ comply with treatment of all medical conditions. I do not agree that such a condition is warranted, as the principal treatment concern has been addressed already.

[67] MDL seeks a condition that HAZ disclose all medical conditions and all prescriptions that may affect his ability to perform his role safely, including potential side effects of medication. The 2 October 2024 employment offer was conditional on MDL being satisfied with a pre-employment medical, along with other conditions. The

condition sought for interim reinstatement repeats that, to some extent. One would expect HAZ to follow medical advice with respect to prescriptions that might affect his ability to perform his role safely. Including a condition for him to report to MDL as part of interim reinstatement is not warranted.

[68] MDL seeks conditions that HAZ comply with good faith obligations especially regarding his health, fitness for work and compliance with treatment. A second condition is sought regarding compliance with health and safety obligations and rules. Except as to compliance with treatment, HAZ's obligations arise from statutory good faith, the employment agreement and MDL's rules, policies and procedures. It is not necessary to overlap those obligations with a condition relating to interim reinstatement. Issues about compliance with treatment have been canvassed above.

[69] A condition is sought that HAZ comply with recommendations set out at pages 82 and 83 of NZTA's publication *Medical aspects of fitness to drive: a guide for health practitioners*. However, it is a guide for health practitioners. No doubt the occupational physician who assesses HAZ will have regard to the guidance. A condition is not warranted.

[70] MDL seeks leave to apply urgently to rescind the order, in specified circumstances. It is not necessary to set them out, other than to say that they are connected with the occupational risk arising from sleep apnoea. MDL has leave to apply to rescind (or modify) the interim reinstatement order if those circumstances arise. An application will be accorded urgency.

[71] HAZ will be reinstated to the payroll starting 11 April 2025, but he has two weeks to obtain the report referred to at paragraph [64] above and for MDL to arrange his work schedule. Thereafter, HAZ's is entitled to payment upon the performance of his ordinary work or in accordance with leave entitlements under his employment agreement.

Summary and orders

[72] From 11 April 2025, HAZ is to be reinstated to his former position on the terms and conditions applicable at the time of his dismissal by McNeill Distribution Limited, pending further order of the Authority. This order is subject to the following conditions:

- (a) HAZ's undertaking as to damages is part of this order; and
- (b) McNeill Distribution Limited is to restore HAZ to the payroll starting on 11 April 2025, pending its receipt of the report in accordance with paragraph [64] above; and
- (c) HAZ is to provide McNeill Distribution Limited with a copy of the report referred to at paragraph [64] above as soon as practicable; and
- (d) McNeill Distribution Limited has leave to apply urgently to rescind (or modify) the order, in circumstances referred to in paragraph [70] above.

[73] Non-publication of HAZ's name is ordered, as set out at paragraph [5] above.

[74] Costs are reserved. I anticipate dealing with costs for this application along with costs on the substantive matters.

[75] A case management conference will be convened shortly to timetable steps for the investigation and determination of HAZ's substantive claims.

Philip Cheyne
Member of the Employment Relations Authority