

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**

[2024] NZERA 220
3269801

BETWEEN LHM
 Applicant

AND XPN
 Respondent

Member of Authority: Jeremy Lynch

Representatives: Simon Greening, counsel for the Applicant
 Richard Upton, counsel for the Respondent

Investigation Meeting: 3 April 2024

Submissions and other information received: At the meeting, and on 3, 4, 16 and 17 April 2024 from the Applicant
 At the meeting and on 3, 4 and 16 April 2024 from the Respondent

Determination: 17 April 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This determination deals with an application LHM brings for interim reinstatement.¹ In addition, LHM seeks a permanent non-publication order regarding his name and details.

[2] XPN opposes LHM's application for interim reinstatement, together with his application for non-publication orders.

¹ Supported by an undertaking as to damages, and affidavit in support sworn on 17 April 2024 (an unsworn copy of the affidavit was lodged in December 2023).

[3] LHM is a medical practitioner, who was employed by XPN until his dismissal in December 2023. He claims that the dismissal was unjustified, and he should be reinstated on an interim basis until the Authority can fully determine his claim.

[4] XPN submits that it followed a fair and reasonable process and has acted as a fair and reasonable employer at all times. Consequently, XPN says its decision to dismiss LHM is justifiable. It strongly opposes LHM's interim reinstatement application.

[5] Extensive affidavit evidence was lodged by LHM, including an affidavit in reply, and a supplementary affidavit. For XPN, affidavits were filed by XPN's clinical director, clinical roster manager, general manager, and external HR consultant. XPN's clinical director also lodged a supplementary affidavit.

[6] An investigation meeting to hear submissions was held on 3 April 2024. The parties' representatives filed written submissions prior to the meeting and provided oral submissions at the meeting.

[7] Further written material was provided by the parties following the meeting.

[8] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

[9] The evidential matters in dispute between the parties will not be resolved by this determination because the evidence is untested and, in applying the relevant tests, the Authority is not required to resolve any disputes.

The issues

[10] The issues for determination in this interim reinstatement matter are:

- (a) Whether a non-publication order be granted?
- (b) Is there a serious question to be tried – that is, does LHM have an arguable case for unjustified dismissal and for permanent reinstatement?
- (c) Where does the balance of convenience lie?

- (d) Where, standing back and considering the case, does the overall justice lie until a substantive matter is determined?²

Should a non-publication order be granted?

[11] The Authority has power to make non-publication orders.³

[12] Prior to the investigation meeting, LHM lodged an application seeking interim and permanent non-publication orders, prohibiting the publication of:

- (a) his name;
- (b) any details identifying him; and
- (c) the contents of pleadings, affidavits, or statements of evidence lodged before the Authority.

[13] LHM asserts that publication has the potential to impact upon his reputation, adversely affect his ability to find alternative employment, and adversely affect his career with his primary employer, by whom he is currently employed as a medical practitioner.

[14] LHM is employed on a full-time basis with another employer (primary employer or primary employment). LHM submits that there is the potential for the reputation of his primary employer to be negatively affected by being identified as a result of these proceedings.

[15] In *Chief of New Zealand Defence Force v Darnley*, Chief Judge Inglis observed that damage to future career prospects was a factor to be balanced.⁴ However, Her Honour also observed that sound reasons, “generally involving specific adverse consequences” were needed to depart from the principle of open justice.⁵

[16] LHM seeks interim non-publication orders and submits that his application for permanent orders can be determined by the Authority, together with his substantive claim.

² *XYZ vs LHM* [2017] NZEmpC 40 at [5] and [6].

³ Schedule 2, clause 10 of the Employment Relations Act 2000 (the Act).

⁴ *Chief of New Zealand Defence Force v Darnley* [2021] NZEmpC 40 at [3].

⁵ Above at [2].

[17] The open justice principle is seen as having greater weight at the substantive determination stage, as the parties will have had the opportunity to give oral evidence and be subject to cross-examination, and the Authority will make factual findings.⁶

[18] It is not clear whether LHM's primary employer has been made aware of this proceeding. No evidence or submissions were provided on behalf of primary employer.

[19] It could well be that there are persuasive reasons in favour of a permanent non-publication order. Neither party has provided affidavit evidence to address the application for non-publication orders. However, the Authority does not consider that this issue is capable of being properly explored on affidavit evidence alone. The issue is best resolved as part of the Authority's substantive investigation.

[20] Granting interim non-publication orders will preserve the status-quo until the substantive determination of the issues.

[21] However, it should not be assumed that a permanent non-publication order will automatically follow. An evidential basis would need to be established for such an order to be made.

[22] I am satisfied that there is sufficient reason to grant an interim non-publication order regarding LHM's name and identifying details. However, the application for blanket non-publication of the contents of pleadings, affidavits, or statements of evidence lodged in this matter is too broad and is declined.

[23] On an interim basis, until further order of the Authority, the names and identifying details of LHM and XPN are not to be published.

[24] A computer generated string of three letters has been used in this preliminary determination to refer to the applicant and the respondent. These letters have no resemblance to the parties' actual names.

[25] Although not a party to this proceeding, so as to avoid unnecessary speculation, and minimise the risk to it (if any) that this proceeding could negatively impact upon its reputation, the determination deliberately avoids naming or describing LHM's primary employer.

⁶ *JGD v MBC* [2020] NZEmpC 193.

What is the employment relationship problem?

[26] LHM was employed on a permanent part-time basis as a medical practitioner by XPN in 2015.

[27] XPN operates a roster system for its staff, which it says it tries to finalise approximately three months in advance.

[28] In 2019 LHM commenced a full-time role with primary employer, in addition to his part-time employment with XPN.

[29] At the time of his employment with his primary employer, LHM and XPN discussed the potential impact the primary employment could have on his employment with XPN. The parties' understanding was recorded in a letter dated 20 August 2019. Notably, the letter records that due to the nature of his employment with the primary employer, he may be deployed for two to three days within New Zealand or overseas, and that although he may be deployed at short notice, such deployments would be "an unusual occurrence".

Roster issues

[30] In February 2022 XPN's Clinical Director raised with LHM a concern that the amount of leave he was having due to his commitments to his primary employment was more than had been anticipated by XPN.

[31] Following this discussion, in March 2022 LHM wrote to XPN advising that "I don't expect any further seclusions from clinical work imposed by [my primary employer] due to COVID-19, which has accounted for vast majority of absences".

[32] In June 2022 the parties met again. XPN's Clinical Director raised with LHM, concern that XPN's obligations to his primary employer were impacting on his employment with XPN. LHM provided a further assurance to XPN that the restrictions that his primary employer had been imposing should not happen again, and said that his primary employer had employed another medical practitioner which meant that the pressures he was facing in his primary employment would be reduced.

[33] Following this meeting, XPN provided LHM with a letter dated 28 June 2022. In this letter, XPN confirmed it would continue to support LHM's position with his

primary employer, but recorded that “We hope there will be less disruption from absences going forward”.

[34] XPN says that on 4 October 2022 LHM gave two weeks’ notice that he would be absent between 19 October – November 2022.

[35] XPN says that on 10 October 2022, LHM returned to work for two shifts, and then gave one week’s notice of a further period of absence from 17 November 2022–14 December 2022.

[36] In January 2023 XPN met with LHM, and again set out its concerns about his continued absences, and the ongoing impact this was having on XPN’s operations. XPN’s Clinical Director says that at this meeting, he told XPN “how serious the situation was becoming and how it was not sustainable”. XPN says that at this meeting, LHM outlined his primary employment commitments for the remainder of the year. LHM indicated that his absences from XPN for primary employer reasons would comprise one week in February, one week in October, and the possibility of a week in March, and a further week in September.

[37] XPN says that at this meeting the parties agreed on some guidelines under which LHM was to provide XPN with a minimum of three weeks’ notice of any overseas deployments, and six weeks’ notice if attending training activities for his primary employer within New Zealand.

[38] XPN’s Clinical Director says that at this meeting “We also told LHM that if things did not improve then we would need to consider whether he could continue in his role with XPN. LHM took no issue with that.”

[39] XPN asked LHM to sign a copy of a letter confirming his understanding of the arrangement, which included LHM acknowledging that if things did not improve, then his permanent employment could be brought to an end. LHM signed a copy of the letter as requested.

[40] XPN says that the parties agreed to meet at the end of 2023 to review the situation.

The increasing impact on XPN's business

[41] XPN says that despite the assurances provided, and the expectations set out (and agreed to by LHM) in its letter following the January 2023 meeting, LHM did not meet the guidelines for notice on which the parties had agreed.

[42] XPN says that on 21 February 2023, LHM advised that his March 2023 absence would not be proceeding, and he would need to be put back on the roster.

[43] On 28 February 2023, LHM advised XPN that his April dates would not be proceeding. He also advised that whereas he had previously indicated he would be absent from 15 to 25 May 2023, it was now “highly likely” he would be absent from 13 May–10 June 2023.

[44] On 22 March 2023 LHM advised that he now expected to be absent from XPN for one week only during the period 13–22 May 2023.

[45] On 29 March LHM advised that his absence from XPN would be 13–23 May 2023, and then a further period of absence from 2–10 June 2023. In addition, LHM advised that he would be absent from 1–29 October 2023.

[46] On 12 April 2023 LHM advised XPN that the above October dates would now be 23 September–1 October 2023.

[47] On 27 April 2023 LHM confirmed that he would be away from XPN due to primary employer deployments from 13–23 May 2023, 2–10 June 2023, 27 July–6 August 2023, and 16–24 September 2023.

[48] On 15 August 2023 LHM wrote to XPN advising that it was his intention to resign from his current role with his primary employer at the end of 2023, and take up a full-time Auckland based role with primary employer from 2024. In his email, he also expressed an interest in full-time employment with XPN from the end of 2024.

[49] On 17 August 2023 LHM advised XPN that he would be absent 16–24 September 2023, and that he would now be available 27–29 September and 1 October 2023. He also advised that he would be absent 9–20 October 2023, and also absent 30 October–30 November 2023.

[50] XPN says that despite advising of an anticipated four weeks of leave in January 2023, LHM had had at least one week per month off since May 2023.

[51] On 21 August 2023 XPN wrote to LHM inviting him to attend a meeting to discuss its ongoing concerns over his continued absences due to his primary employer commitments, and the effect this was having on his employment with XPN. In this letter, XPN noted that:

It is not only the amount of time off but also that the dates change that is causing problems for the business. It is difficult to set the roster when you send proposed dates then these get changed at the last minute.

[52] XPN's letter also notes that when the parties met to discuss the issue of LHM's primary employer related leave in January 2023, he advised he expected to be absent for approximately four weeks in 2023, but was now scheduled to have 14 weeks of absence for primary employer purposes in 2023. XPN's letter sets out:

It is now at the point where it does not work for XPN for you to continue in this role as you are not able to perform your role as set out in your employment agreement.

[53] The parties met in September 2023. XPN says that at this meeting, LHM accepted that the time he had had off was unsustainable and unreasonable for XPN to continue to accept.

[54] At the meeting LHM advised that he intended to resign from his current role and obtain a new Auckland based role with his primary employer, and that he intended to work for the primary employer on a full-time basis and continue his part-time hours with XPN. XPN says that it stressed that they could only accept such an arrangement if LHM could guarantee that there would be no further deployments associated with LHM's new role with his primary employer. XPN says that LHM was unable to provide such an assurance.

[55] Following this meeting, XPN offered LHM full-time employment on the basis that he would resign from his current role with his primary employer.

[56] On 30 September 2023, LHM declined XPN's offer of employment. Instead, LHM expressed interest in performing a relieving role for XPN, but only on elevated terms, including remuneration at a higher rate than his colleagues, as well as preferential shifts.

XPN gives notice of termination

[57] XPN says it considered LHM's proposal, including his advice that he intended to move to a new role with his primary employer. However, given that LHM could not guarantee he would not continue to be subject to further deployments (resulting in continued absences from his role at XPN), XPN confirmed by letter dated 3 October 2023 that it was terminating LHM's employment.

[58] XPN says it was unable to agree to the elevated terms and conditions sought by LHM in relation to the relieving role. It says that to agree to such elevated terms would have been unfair on LHM's colleagues. However, together with the advice that his permanent role with XPN was being terminated, XPN repeated its offer of relieving work, on its standard terms and conditions.

[59] LHM further declined this offer.

[60] On 27 November 2023 XPN's external HR consultant wrote to LHM's representative, advising that unless the parties could come to a mutually agreeable solution by the end of the week, LHM's employment with XPN would end on 5 December 2023. This date had previously been advised in XPN's letter of 3 October 2023. The external HR advisor's letter again repeated XPN's offer of relieving work.

[61] XPN says that no further information was received from LHM within its advised timeframe, so on 5 December 2023 it wrote to LHM confirming that this was his last day of employment.

[62] It is not disputed that LHM remains in permanent full-time paid employment with his primary employer.

Relevant law

[63] In *Humphrey v Canterbury District Health Board, Te Poari Ora Hauroa o Waitaha* the Employment Court observed that in determining whether to order reinstatement, regard must be had to the object of the. This includes the object of building productive employment relationships through the promotion of good faith.⁷

One of the central features of the Act is its recognition of the importance of the employment relationship, the obligations both parties have to be responsive

⁷ *Humphrey v Canterbury District Health Board, Te Poari Ora Hauroa o Waitaha*, [2021] NZEmpC 59.

and communicative, and that issues ought to be dealt with promptly and between the parties if possible – in other words, supporting constructive employment relationships and repairing them where feasible.

[64] It is with this in mind that applications for reinstatement are considered.

[65] Section 127 of the Act confers jurisdiction on the Authority to grant interim reinstatement. In considering this application for interim reinstatement the Authority is required to consider the following:

- (i) does LHM have an arguable case for unjustified dismissal and an arguable case for permanent reinstatement?⁸
- (ii) Where does the balance of convenience lie? This requires a consideration of the relative detriment or injury that LHM and XPN will incur as a result of the interim injunction being granted (or declined).
- (iii) The Authority is then required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

Is there an arguable case for unjustified dismissal?

[66] The first question the Authority must consider is whether there is an arguable case LHM was unjustifiably dismissed. An arguable case means a case with some serious or arguable (but not necessarily certain) prospects of success.⁹ The threshold for a serious question or arguable case as stated in *McInnes* is that the claim is not frivolous or vexatious:¹⁰

... an applicant must establish that there is a serious question to be tried, in that the claim is not vexatious or frivolous. The merits of the case (insofar as they can be ascertained at an interim stage) may be relevant in assessing the balance of convenience and overall interests of justice ...

[67] LHM says his claim is neither vexatious nor frivolous, and is seriously arguable because XPN acted prematurely in terminating his employment, in circumstances in which he had signalled he was in the process of moving to a different role with his primary employer, in which he would be unlikely to be absent from XPN at short notice. He says that as a fair and reasonable employer, XPN could not have proceeded with its

⁸ *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [7].

⁹ *X and Y Limited v New Zealand Stock Exchange* [1992] 1 ERNZ 863.

¹⁰ *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [9].

proposal to terminate when it was highly likely that its concerns over LHM's availability to work would have been addressed by his change in roles.

[68] XPN says there is no serious question to be tried or arguable case. It submits that XPN terminated LHM's employment after following a proper process, and complying with the requirements of s 103A of the Act.

[69] XPN accepts that there is a relatively low threshold for an applicant to establish they have an arguable case.

[70] In an interim application, reliance is placed on untested affidavit evidence. This makes it difficult for the Authority to appraise the genuineness of assessments of reasonableness. In terms of LHM's actions, his rejections of both XPN's offer of full-time employment, as well as its offer of relieving work, will need to be considered.

[71] LHM's claim meets the low threshold of an arguable case for his personal grievance for unjustified dismissal. At the very least there is a dispute between the parties as to the reasonableness of the solutions proposed by LHM during the process leading to his dismissal.

[72] The Authority is satisfied that there is an arguable case that LHM was unjustifiably dismissed.

Is there an arguable case for permanent reinstatement?

[73] Again, this is a low threshold.

[74] Where it is practical and reasonable to do so, the Authority must provide for reinstatement (when sought) as the primary remedy.¹¹

[75] XPN says that LHM should not be reinstated (on a permanent or interim basis) because of the impact on XPN's business, and in particular because XPN has already filled its roster into June 2024, and to make changes to this roster to accommodate LHM would have a significant impact upon many of its employees. As such, XPN says that reinstatement is neither practical nor reasonable in the circumstances.

¹¹ Employment Relations Act 2000, s 125(2).

[76] It is not sufficient for an employer to show resistance and strained circumstances in order to avoid an order for reinstatement.¹²

[77] In addition, XPN says it has lost trust and confidence in LHM. However, this must be balanced by the fact that despite this, XPN made an offer of full-time employment to LHM, as well as repeated offers of relieving work.

[78] If LHM is able to establish his personal grievance, it cannot be said that reinstatement is impossible, particularly given that the Authority may order reinstatement subject to any conditions it thinks fit.¹³

[79] The arguable case threshold for permanent reinstatement is established.

What is the balance of convenience?

[80] The Authority now turns to weigh the interests of LHM against those of XPN.

LHM

[81] LHM says the balance of convenience favours him for the following reasons:

- (i) He requires interim reinstatement so he can maintain his specialist skills and knowledge within his particular field of work.
- (ii) He is reliant on his position at XPN to maintain accreditation with a specialist professional body.
- (iii) Although he is permanently employed on a full-time basis by his primary employer, this type of work does not assist him in maintaining the specialist skills and knowledge requisite to maintain accreditation with his specialist professional body.
- (iv) The longer LHM is out of XPN's workplace, the longer it will take for him to successfully reintegrate back into this workplace.
- (v) The impact on XPN would be minimal, given that LHM is a competent medical practitioner with no notable relationship problems within XPN's workplace.

¹² *Angus v Ports of Auckland* [2011] NZEmpC 122 at [63].

¹³ Above n 11, s 127(5).

[82] LHM also submits that he will suffer financial detriment as a result of his dismissal, and that he is reliant on the income he receives from XPN.

XPN

[83] XPN submits that the detriment suffered by LHM if he is not reinstated (on an interim basis) can be rectified through an award of damages.

[84] XPN submits that there is no evidence that LHM must remain employed by XPN in order to maintain his specialist professional accreditation. Similarly, XPN submits that it is not a requirement of LHM's role with his primary employer that he maintains his speciality professional accreditation. XPN submits that LHM's specialist professional accreditation is a 'nice to have' rather than a 'need to have'.

[85] In addition, XPN submits that LHM's specialist professional accreditation can be achieved through means other than being employed by XPN.

[86] XPN also submits that if LHM was to be reinstated on an interim basis, this would be the cause of significant impact upon other of its employees, and it would require XPN to have to make significant changes to its existing roster.

[87] XPN also submits that in terms of the claimed financial impacts of his dismissal, LHM received eight weeks of notice when he was only entitled to six weeks under his employment agreement, and further notes that LHM remains in full-time employment with his primary employer.

Conclusion as to balance of convenience

[88] The evidence before the Authority (albeit untested), as to the requirements of, and procedure whereby LHM may maintain his specialist professional accreditation, suggests that there are a number of pathways for LHM to maintain this which do not require him to be employed by XPN.

[89] Similarly, LHM accepts that it is not a requirement of his role with his primary employer for him to maintain his specialist professional accreditation. He has not established that this is a factor that weighs in his favour.

[90] Similarly, although LHM say she is reliant on the income he receives from his employment with XPN, he did not provide any financial information in support of this. LHM provided no information to suggest that (for example) should the Authority

decline interim reinstatement, he would be unable to meet mortgage obligations and the like.

[91] At this stage, on the untested evidence, and given LHM remains in full-time permanent employment with his primary employer, this factor does not tip the balance in favour of the reinstatement LHM seeks.

[92] Any detriment to LHM in not being reinstated on an interim basis, can be remedied through an award of damages if his claim is successful at the substantive stage.

[93] Should LHM be reinstated on an interim basis, this would be disruptive for XPN's business; not just for its employees but also to its work systems such as its roster. This weighs against interim reinstatement.

[94] In addition, reinstatement must be practicable and reasonable.¹⁴ There is no evidence that LHM, despite his new role, will be able to meet the hours of work provisions of his employment agreement. This too weighs against interim reinstatement.

[95] For the above reasons, the balance of convenience weighs in favour of XPN.

Overall justice

[96] Standing back from the detail of the claim, the Authority must then consider where the overall justice lies. This has been described by the Court of Appeal as:

The overall justice assessment is essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and balance of convenience.¹⁵

[97] LHM's claim turns on whether XPN was justified in terminating his employment, in circumstances in which he had taken steps to address XPN's concerns, which formed the basis of the employment relationship problem.

[98] If LHM's dismissal is found to be unjustified, then consequences will likely flow from that, including awards of financial remedies. In the meantime, LHM

¹⁴ Above n 11, s 125(2).

¹⁵ *NZ Tax Refunds Limited v Brooks Homes Limited* [2013] NZCA 90 at [47].

continues to be employed in a full-time role as a medical professional with his primary employer.

[99] There is no evidence that LHM has tried to obtain alternative employment (either on a permanent part-time or relieving basis) elsewhere. Recent media reports suggest that there is an ongoing shortage of medical practitioners in LHM's field of work.

[100] The Authority has set down its substantive investigation for August 2024. This is not far away. LHM's evidence in support of the reasons as to why he seeks to be reinstated on an interim basis between now and August 2024 does not outweigh the impact reinstatement would have on XPN.

[101] The overall justice of this matter does not weigh in favour of interim reinstatement.

Outcome

[102] LHM's application for interim reinstatement is declined.

Costs

[103] Costs are reserved.

Jeremy Lynch
Member of the Employment Relations Authority