

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 584
3386404

BETWEEN ZPN
 Applicant

AND GMX
 Respondent

Member of Authority: Antoinette Baker

Representatives: Robert Bryant, counsel for the Applicant
 Kirsty McDonald, Sarah Townsend counsel for the Respondent

Investigation Meeting: 18 August 2025

Submissions: On the day

Final information: 8 September 2025

Determination: 22 September 2025

DETERMINATION OF THE AUTHORITY

Interim application

[1] This determination deals only with an interim application. Interim non-publication orders are in place for reasons set out below. The applicant has lodged the requisite undertaking for this application.

[2] The applicant is a senior (surgical) medical specialist, designated in their employment as a Senior Medical Officer (SMO). The applicant seeks 'interim reinstatement' to what they explain are their 'full duties' including a return to working out of the respondent's base metropolitan hospital (the base hospital), something the applicant has not done since mid-2024. The applicant's employment has not ended, nor have they been suspended. The Applicant has continued to undertake duties to their employed .8 FTE of their role. Broadly, it is the type of duties the applicant is not doing potentially both in quantum and type, as well as involvement in programme work and non-clinical supervision, that the applicant wants to return to. These duties are all generally connected to them staying away from the base hospital. The applicant claims they are disadvantaged as time goes on if the respondent continues to refuse to lift the 'interim arrangements' put in place in mid-2024. The applicant says as time goes on there is an adverse impact on their professional development and their personal and professional reputation.

[3] The respondent is a public health service provider with responsibility for a geographical region of service delivery. It opposes the application because it says things have changed since mid-2024 when it was the applicant that proposed changes that resulted in them not working on a 'temporary basis' at the base hospital. The respondent says that a currently live investigation underway into allegations of bullying behaviour by the applicant towards junior staff impacts on the return that the applicant seeks. The respondent points to the seriousness of the investigation. The investigation was prompted by an external agency review. The review made adverse findings about a single 'SMO' causing an unsafe 'psycho-social working environment for its trainees. The respondent says it is reasonable to conclude these findings related to the applicant's behaviour. The external agency's initiating communication included that the reason for its review was because of complaints about the applicant.

[4] The respondent says that in the event the Authority grants the application it will need to suspend the applicant due to the above live investigation.

Non-Publication

[5] The applicant seeks non-publication of their identity primarily due to their professional ongoing reputation in a relatively discreet and skilled community of medical specialists. They say that there is and will be an emotional adverse effect on them and their family if there is publicity of this matter on both an interim and permanent basis.

[6] The respondent objects to non-publication primarily on grounds that the respondent is a public health provider and that it is in the public interest that there is accountability about what it does. It further states that the applicant's conduct since the current investigation commenced is inconsistent with their desire for non-publication. The applicant does not dispute that they initiated and emailed an online survey to multiple past and current registrar trainees asking the recipients to grade their experience of interactions with the applicant from positive at one end of a scale to 'bullying' behaviour at the other.

[7] The Authority may order the non-publication of the names of the parties and any information leading to parties' identities. This may include non-publication of the location, region of the employment, and the identity of all third persons not involved in these proceedings that are named in documentation before the Authority.

[8] There is a fundamental principle that justice should be administered openly.¹ The Employment Court has observed that damage to future career prospects was a factor to be balanced but that a party seeking to depart from the principle of open justice needs to provide evidence identifying adverse consequences.²

[9] The Court has also considered that the open justice principle may have greater weight importance at the stage when evidence is properly tested, and the Authority is in a position to make findings.³

[10] I accept the applicant's untested affidavit evidence that publication of their identity could adversely affect their personal and professional reputation in the discreet senior

¹ *Erceg v Erceg* [2016] NZSC 135; *Courage v The Attorney-General* [2022] NZEmpC 27.

² *Chief of New Zealand Defence Force v Darnley* [2021] NZEmpC 27

³ *JGD v MBC* [2020] NZEmpC 193

specialised area that they work in. I accept this in the context of the live investigation by their employer that the applicant has had little input into so far. While the applicant has communicated with those that may be asked questions in the live investigation, this communication appears to remain within the workplace rather than the general public.

[11] I do not find the public interest in a public service body is compromised if I make interim orders. As will be seen below, with reasons provided, this interim application is unsuccessful. That in itself provides a level of public accountability for the respondent to preserve the 'status quo' pending the outcome of its live investigation.

[12] I consider that interim orders are appropriate because the situation shifts from the usual starting point of 'open justice' at this interim stage. The orders ensure that if the respondent's current investigation does not find bullying behaviour against the applicant, it may then be difficult to retract from public identification of the applicant with those allegations at that later date. As noted above, the substantive proceedings carry a different filing number but are sufficiently connected that I consider it appropriate that interim nonpublication orders also apply to those proceedings for the same reason.

[13] Accordingly, the names of the parties and any information leading to the applicant party's identity including the location, region of the employment, as well as the identity of all third persons named in documentation before the Authority is subject to non-publication. Random letters are used for the names of the parties, or they are simply referred to as applicant and respondent. The external agency is referred to anonymously. These interim non-publication orders apply to the associated, yet to be heard, substantive proceedings (3370763) which have been administratively separated.

[14] These are interim non-publication orders only. They apply until further order of the Authority or the Employment Court. The parties should be prepared to make further submissions in the substantive proceedings as to whether permanent nonpublication should continue.

Authority Investigation process

[15] This interim application was lodged on 26 June 2025. The parties arranged mediation themselves. It was unsuccessful. This matter was heard by submissions after affidavit evidence and documents were lodged.

[16] At the end of hearing submissions, I observed that the ‘interim arrangements,’ from which a ‘lifting’ is sought were not clear to me based on the information before me. My assumption, which I considered reasonable, was that the parties must be able to provide joint agreement to what the ‘interim arrangements’ were.

[17] I provided time for the above to be provided in a joint memorandum of counsel and extended this time upon request. The exercise appeared to be more difficult for the parties than I had anticipated. Some agreement was eventually provided with helpful definitions that I had asked for. Once I received this material, I reserved this interim determination.

The approach to interim reinstatement

[18] The Authority may order interim reinstatement while pending the outcome of a personal grievance.⁴

[19] To determine this application, I must first decide whether the applicant has shown there is a serious case to be tried by asking whether there is an arguable case in the substantive matter being brought (a disadvantage grievance); and then whether there is an arguable case for permanent reinstatement to full duties once this matter is fully heard.⁵ I then ask where the balance of convenience lies. This involves assessing the impact on the parties of granting or declining the interim reinstatement to ‘full duties’. Finally, I need to consider the overall justice of the case.⁶

⁴ Employment Relations Act 20900, s127(1)

⁵ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90, at [12] and [13]; *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36, at [8]

⁶ *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA); *X v Y Ltd and the New Zealand Stock Exchange* [1992] 1 ERNZ 862 (EmpC), at 872

Is there an arguable case?

[20] Whether a case is arguable is based on asking whether the applicant has a serious or arguable case that is not based on a claim that is ‘frivolous or vexatious’.⁷ I accept both parties’ submissions that the threshold is not high.

[21] Counsel for the applicant confirmed in his submissions that it is the grievance of disadvantage: that the respondent’s actions have ‘unreasonably delayed the applicant’s return to work and ordinary duties’ that I should consider against the question of whether there is an arguable case. This, as I understand what is before me, includes the context of the applicant’s claim of delays in providing them with a ‘safe workplace’ to return to at the base hospital since they first asked for this in November 2024 through counsel. This ‘safe workplace’ relates to the applicant’s concerns about ongoing interaction with their direct manager who they have raised personal grievances about (including bullying type behaviour) and what the applicant considers are still ongoing unresolved matters to do with resourcing and alleged poor management of the same leading to an unsafe environment to deliver their specialist services. Within this context I also note before me the applicant’s direct manager’s written complaints about the applicant including that the applicant is a ‘misogynist narcissist.’ The respondent subsequently commenced an investigation about the applicant’s conduct and later withdrew this when two complainants would not participate. That withdrawal was preceded by the respondent also withdrawing a proposal to suspend the respondent as part of that investigation.

[22] I find there is sufficient before me to show there is an arguable case for the particular grievance stated. It does not present at this interim untested stage as frivolous or vexatious. I note however it does not fully relate to the wider issues that remain untested and likely impact of the overall resolution of the employment relationship problem. The respondent does not dispute the arguable case but submits it is weak. I make no finding on the strength of the case in that way. It is sufficient to say there is an arguable case which is not frivolous or vexatious within a complicated factual context yet to be tested in a substantive investigation.

⁷ *X v Y Limited v New Zealand Stock Exchange* [1992] 1 ERNZ 863; *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [9].

Arguable case for permanent reinstatement to ‘full duties’

[23] I have noted above that I asked the parties to provide agreement to what the pre and post ‘interim arrangements’ were/are. Doing my best with the information before me and noting the apparent difficulty the parties had to agree to this requested additional information, the following appears to describe what the applicant was doing before mid-2024 and what they seek to be reinstated back to:

- a. The applicant has accommodation near the base hospital to enable them to undertake ‘on call’ work at the base hospital which was rostered every fourth week for 8.00am to 5.00pm weekdays; another roster for weekend day ‘on call’; and another roster every fourth week for an all-week afterhours ‘on call’, 5.00 pm to 8.00am. This work was undertaken before the ‘interim arrangements’ and cannot be undertaken from the applicant’s home base because it requires an SMO to be within 30 minutes proximity from the base hospital when ‘on call’. The applicant has not been doing this work since mid-2024.
- b. Before the ‘interim arrangements’ the applicant had been performing all levels of elective and non-elective surgery lists and various clinics and ‘clinic sessions’ at both the base hospital as well as at their home base. The Applicant’s letter of offer of employment included that this split was anticipated. The applicant has been spending less time on some of these activities in terms of numbers. A special type of clinic can be multi days per week at the base hospital but it is only one day per week at the home base area.
- c. The applicant’s .8 FTE role is 70% clinical (patient facing including clinics and surgeries as noted above at a. and b.) and 30 % non-surgical. The non-clinical work includes both the applicant’s role as a senior trainer and supervisor with a role in education programmes, recruitment and retention. Non-clinical duties also involve administrative tasks and attendance at a set weekly clinical meeting with all clinicians in the specialist area the applicant is employed in. While the applicant’s terms and conditions of employment (the letter of offer) references

this meeting was to be in person at the base hospital, the applicant has attended at times by remote medium.

- d. The applicant references that in terms of surgical work there are particular types of surgeries they are not doing due to non-attendance at the base hospital, and they seek to be reinstated to doing this work in part due to continuing professional development.

[24] The respondent's opposition to this application connects to the current live investigation. The applicant's basis relates to their disadvantage grievance in that the ongoing refusal by the respondent to return to them to pre 'interim arrangements' is unreasonable and disadvantages them. Either way the two are linked. The applicant's substantive claims include that the respondent is retaliating against them by investigating. It would seem strongly arguable if the current live investigation results in not being substantiated and the applicant's disadvantage grievance is also proven, a return to the wider duties and at the base hospital would be practicable at the very least. This is not a situation where the applicant is away from the workplace. They continue on their full salaried pay, and they are working their employed .8 FTE role. I find based on what is before me that the 'interim reinstatement' sought could practicably occur.

[25] The above however is not the end of my inquiry. I must now consider the way that a return to the 'full duties' may benefit or be a detriment to each party.

Where does the balance of convenience lie?

[26] It is not in dispute that there is a live investigation by the respondent into the applicant's behaviour towards staff more junior to them. There is an independent investigator, and the review is stated as 'halfway through'. There are Terms of Reference. The applicant has yet to be involved in receiving outcome findings and responding to them. The respondent points to its obligations in relation to a safe working environment and the risk of not getting further trainee placements if it does not undertake an investigation to address the findings of the external agency.

[27] The applicant says the longer they remain away from the base hospital the more their professional development opportunities are affected. I have little before me to understand details of this except the statements of the applicant. The applicant is not away from practicing in their speciality area.

[28] The 'interim arrangements' have been in place for some time. I note the applicant began to ask for them to be lifted sometime from November 2024. This was at a time they understood the external agency had reviewed complaints against them.

[29] The respondent says it was the applicant that proposed and wanted the 'interim arrangements' to avoid an unsafe working environment for themselves. The claims and grievances associated with the applicant's claims are yet to be tested and they include claims that the respondent's investigation of their conduct is retaliatory. The applicant's position is that despite their issues being unresolved they are prepared to come back by taking a risk for themselves about this. The respondent submits this is contrary to the applicant's substantive claims and wanting to be 'safe in the workplace'.

[30] The applicant is concerned for their reputation and that of their family. Other than stating and that some people have told them things being said (about them), I have little to go on. However, the above interim nonpublication orders are in place to counter this. On the other hand, I accept the submission from the respondent that the applicant has taken it upon themselves to contact multiple recipients of former and potentially current trainees and its concern is the integrity of the current investigation and a return for the applicant to working with this category of trainee pending the investigation outcome.

[31] I pause to consider the detriment to the applicant in lost remuneration due to not performing 'on call' work. However, the oral submissions for the applicant included that this is 'not about the money'. I have not therefore weighed this as a detriment for the applicant.

[32] In summary, standing back from the above, I agree that the risk to the respondent having the applicant return to the base hospital duties which Based on what is before me mean interactions with trainees outweighs the concerns the applicant has about the investigation taking too long and impacting their reputation and professional development. I weigh the

balance in favour of the respondent for maintaining the status quo for the respondent's working arrangements.

Overall justice

[33] Submissions have pointed me to various case law. I am not satisfied this matter fits neatly into cases for reinstatement given that the applicant remains fully employed but seeks a return to the way they undertook the duties of their employed role before mid-2024. I have considered and found arguable the disadvantage claim and reinstatement actions. However, the balance of convenience favours the respondent for reasons above and overall, I consider leaving the working arrangements as they are satisfies the overall justice of this interim matter.

[34] I decline the application for interim reinstatement.

Next Steps

[35] The substantive matters before the Authority will be progressed. The arrangement for a phone conference call to discuss this progression will occur presently.

[36] Costs will be dealt with in the substantive proceedings.

Antoinette Baker
Member of the Employment Relations Authority