

Attention is drawn to  
a non-publication  
order contained in  
paragraph 19 of this  
determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 102  
3160141

BETWEEN	CSN Applicant
AND	ROYAL DISTRICT NURSING SERVICE NEW ZEALAND LIMITED Respondent
AND	ACCIDENT COMPENSATION CORPORATION Proposed Third Party

Member of Authority:	Nicola Craig
Representatives:	Ashleigh Fechney, advocate for the applicant Anthony Drake and Rosie Judd, counsel for the respondent Hamish Kynaston and Rohan Waingasekera, counsel for the proposed third party
Investigation Meeting:	21 February 2022
Submissions (and further information received):	At the investigation meeting from the applicant At the investigation meeting and 21 February 2022 from the respondent At the investigation meeting from the proposed third party
Date of determination:	21 March 2022

---

**DETERMINATION OF THE AUTHORITY**

---

**A. CSN's application for interim reinstatement is declined.**

**B. A non-publication order is made.**

**C. Costs are reserved.**

**What is the employment relationship problem?**

[1] The Royal District Nursing Service Limited (RDNS of the Service) is funded by various state agencies to provide care and support services. A caregiver referred to as CSN worked for RDNS, providing care for her son in their home. This was funded by the Accident Compensation Corporation (ACC).

[2] CSN was given notice of dismissal as she is not vaccinated and a vaccination mandate was in place. Since that notice expired she has not been paid by RDNS.

[3] CSN challenges her dismissal and seeks interim reinstatement. She also brings disadvantage and good faith claims. RDNS's position is that CSN was justifiably dismissed and should not be reinstated.

**What was the Authority's process?**

[4] CSN's interim reinstatement application, without accompanying affidavit, was lodged on 6 January 2022. The statement of problem included an application for non-publication of CSN's identity. Later an application for urgency was lodged.

[5] A case management conference was held. The parties were directed to lodge memoranda on the non-publication application and attend urgent mediation. Mediation was held on 3 February 2022.

[6] On 7 February 2022 the applicant lodged an application for removal of this matter to the Employment Court. A draft affidavit of the applicant in support of her interim reinstatement application was also lodged.

[7] On 8 February 2022 the applicant lodged an application seeking to join ACC as a controlling third party.

[8] CSN has also filed in the Employment Court a status application under s 6 of the Employment Relations Act 2000 (the Act) arguing that she remains an employee of the respondent, essentially on the basis that she is still undertaking care for her son despite not being paid. She still wished to proceed with her interim reinstatement claim.

[9] The respondent filed a stay application in the Court seeking to stay the status application. The stay application was to be heard on 16 February 2022. In the meantime the Authority arranged for the hearing of the interim reinstatement application on 21 February 2022. The parties agreed to await the interim reinstatement determination rather than deal with the stay application.

[10] The investigation meeting was held on 21 February 2022. CSN attended only some of the meeting by telephone as she was supporting an extended family member in hospital. Her representative and ACC's representatives attended by audio-visual link. RDNS's representatives attended in person. CSN's unsworn affidavit was affirmed at the meeting. No affidavit in reply was received. Affidavits were also received from RDNS's Complex Needs Manager Rachelle Atherton, Human Resources Manager Dhivinya Naicker, CEO Carmel Conaghan and ACC's Principal Advisor Cheryl Gall.

[11] As is usual, I have dealt with this application for interim reinstatement on the basis of untested evidence and submissions. Disputed matters cannot be decided on the basis of such evidence.

[12] As permitted by s 174E of 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.

[13] Personal events outside my control have led to this determination being issued later than I would have liked.

### **Non-publication order**

[14] CSN seeks a non-publication order for her identity.

[15] Counsel for RDNS had wanted to take a neutral stance to that application however, having read the application concludes that there is no basis for it. ACC is respectful of its client's privacy and does not oppose a non-publication order in this case.

[16] The starting point is the principle of open justice requiring tribunal proceedings and decisions to be open and available to the public. However, there are situations justifying exceptions being made.<sup>1</sup>

[17] As has been pointed out, applicants in cases regarding vaccinations are often granted suppression orders.<sup>2</sup> At least some do not wish to be a poster-child for anti-vaccination or anti-mandate groups and are concerned about public criticism if their position is made public. I accept the Service's point that every case must be decided on its own merits.

[18] A strong factor here is the situation of CSN's brain injured son. While it would be possible to make an order regarding him alone, he and CSN share the same surname and it is not especially common. Disclosure of CSN's identity would inevitably disclose her son's identity which would be unfair and unreasonable given his vulnerable status.

[19] The Authority has the power to grant non-publication orders under the Act.<sup>3</sup> At this stage these are sufficient grounds to warrant an interim order. An interim non-publication order regarding CSN's name is made which is to remain in place, unless varied or revoked by further order of the Authority, until the Authority has concluded its substantive investigation meeting.

### **What are the issues?**

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

- (a) Is there a serious question to be tried, so does CSN have an arguable case for unjustified dismissal and for permanent reinstatement?
- (b) Where does the balance of convenience lie?
- (c) Where, standing back and considering the case, does the overall justice lie until the substantive matter is determined?<sup>4</sup>

---

<sup>1</sup> *Erceg v Erceg* [2016] NZSC 135.

<sup>2</sup> For example, *Four Aviation Security Service Employees v Minister of COVID-19 Response* [2021] NZHC 3012.

<sup>3</sup> The Act, Sch 2, cl 10.

<sup>4</sup> For example, *Brooks Homes Limited v New Tax Refunds Limited* [2013] NZSC 60, *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 and *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* [2021] NZEmpC 59.

[21] ACC takes a relatively neutral position to the interim reinstatement claim, with its priority being to ensure that CSN's son gets his entitlements.

### **What were the care arrangements?**

[22] CSN's son has ACC entitlements as a result of an accident, with ACC describing his care and support needs as high. ACC funds care provider entities, such as RDNS, under its Integrated Home and Community Support Services (IHCS) to manage and provide care.

[23] According to Ms Gall, ACC does not direct or otherwise control how IHCS providers engage or select their workforce, except providers must meet New Zealand health sector standards and legislation and have the necessary mix of appropriate professionals to provide the full range of care safely.

[24] The lead IHCS provider for the care of CSN's son is not involved in this proceeding. That organisation sub-contracts to RDNS, which employs or engages workers to provide care.

[25] The Service employed CSN as a Family/Whānau Carer, also known as nominated support worker, from 13 January 2020 onwards. CSN and her brother were providing care to CSN's son. This includes showering, feeding and exercising him. CSN refers to her son needing a lot of care but being very glad that he is home where his family is able to care for him. In her view no one can care for him like she does.

### **What happened with CSN's work?**

[26] On 11 October 2021 the Minister for COVID-19 Response announced that the COVID-19 Public Health Response (Vaccinations) Order 2021 (the Vaccinations Order or the Order) would be amended to require workers conducting high-risk work in the health and disability sectors to be fully vaccinated by 1 December 2021.

[27] On around 13 October 2021 the CEO Ms Conaghan rang CSN, telling her that that the government had announced that care and support workers would need to be vaccinated. Further, the Service took this to include nominated support workers such as CSN and was going to be required to comply with the Vaccinations Order in respect of its employees.

[28] CSN became upset, saying she was not going to get vaccinated as a result of her previous bad vaccine experience. Ms Conaghan discussed with CSN the possibility of her getting a medical exemption from vaccination. She also offered counselling through the employee assistance programme (EAP).

[29] On 25 October 2021 amendments were made to the Vaccinations Order to include care and support workers. Further amendments were made on 6 November 2021. These are set out below.

[30] Ms Conaghan arranged for Ms Atherton to contact CNS, as Ms Atherton knew CSN and was well placed to support her.

[31] RDNS contacted CSN and on 9 November sent her information about the Vaccinations Order. The Service's email included the following statement:

This means that paid family/whānau support workers are required to be vaccinated in accordance with the Order, irrespective of whether the support worker is providing services within their normal place of residence, or at another residence occupied by a family member.

[32] On 11 November 2021 Ms Atherton went to the house and met outside with CNS and her brother, the other caregiver. She sought and received confirmation that CNS had read the material sent.

[33] Ms Atherton describes CSN as tearful and appearing stressed. CSN referred to her influenza vaccine experience and what she saw as her parents' complications from the Covid vaccine. CSN indicated her view that the vaccine would kill her. Ms Atherton was worried about CSN's mental health, suggesting she speak to her doctor about how she was feeling and offering CSN a lift to the doctor. Ms Atherton suggested sick leave which CSN agreed to. CSN's brother announced he was going to move in to assist. CSN agreed to Ms Atherton making an EAP referral.

[34] Ms Atherton describes CNS as not ruling out getting vaccinated. Ms Atherton offered to drive CSN to get a vaccine and stay with her for the whole process. Her brother agreed to stay with CNS for two days afterwards.

[35] CSN said she would like to use her sick leave to get her head around what was happening. Ms Atherton assisted with the form.

[36] On 16 November CSN called Ms Atherton who said she would speak to RDNS and ask if there was any way CSN could work without being vaccinated. They were hoping to come up with some options and maybe a solution.

[37] On 18 November 2021 CSN called Ms Atherton, saying she had approached her doctor for an exemption from vaccination letter but the doctor would not give her an exemption.

[38] At some point the Service considered the service disruption provisions of the Vaccinations Order and concluded that an exemption for CSN would not be granted. Ms Conaghan states that this situation does not fit within the exemption criteria including because CSN's son continues to receive care and support from a vaccinated care and support worker, namely CSN's brother.

[39] On 23 November a call was held between CSN, Ms Atherton and Ms Naicker. CSN was still unvaccinated and said she did not intend to be vaccinated. Ms Atherton describes CSN as adamant. Ms Naicker indicated that CSN's job was terminated as she did not meet the Vaccinations Order requirements.

[40] On 26 November CSN received an email from Ms Naicker with a letter terminating her employment.

[41] CSN says that her opposition to the Covid vaccination relates to what she perceives to be an adverse reaction to an influenza vaccination over 20 years ago. She did not go to the doctor at that time and offers no medical evidence in support of her concern. CSN's son is also not vaccinated. She indicates that no one has pressured them about getting him vaccinated. Also, she has faith and limits their exposure to others.

### **What has happened since November 2021?**

[42] CSN says that she is still providing care for her son.

[43] CSN's brother has been the primary person providing care for his nephew since November 2021. CSN refers to her brother working Monday to Sunday, 7am to 7pm most days and doing the sleepover shift four days a week. CSN says she covered for her brother when he had some leave over Christmas and at other times when he is not working.

[44] CSN says she does not want anyone else to help with the care of her son.

[45] On the evidence before me, there are no suitable jobs with the Service which CSN could undertake without being vaccinated.

[46] CSN is her son's appointed welfare guardian, so has legal authority to make decisions regarding his care arrangements.

[47] As welfare guardian, CSN has refused an RDNS offer of other carers, except for her brother.

### **What does the Order specify?**

[48] The Vaccinations Order initially defined care and support workers as:

a person employed or engaged to carry out work that includes going to the house or place of residence of another person (not being the home or place of residence of a family member) to provide care and support services.

[49] On 6 November 2021 amendments were made to the Vaccinations Order, defining a care and support worker as:

a person employed or engaged to provide care and support services within a home or place of residence.

[50] What had effectively been an exemption for service provisions within a home or place of residence was thereby removed.

[51] Care and support services are defined to include services funded by ACC. ACC's understanding is that all care workers, whether working for a contracted or non-contracted agency, or employed privately, or a family member, are covered under the Vaccinations Order.

[52] The employer and the care worker may be subject to infringement notices and fines if they do not comply with the order.

[53] ACC regards itself as responsible for working with clients to determine next steps, but not for enforcing the Order. The Corporation does expect IHCS providers to comply with the Order.

### **What is being sought?**

[54] The application initially appeared to seek CSN's reinstatement to her role with RDNS on pay undertaking the work, in the usual manner of interim reinstatement claims. However, this is an unusual case where, after dismissal, the worker continues to have the potential to easily carry out most or all of the work the employer used to pay for. The job was based in her family home and it appears CSN can undertake the tasks largely or entirely without restriction by RDNS.

[55] At the investigation meeting the possibility of reinstating CSN to the payroll but not the work was raised. In some cases that will be the answer to an interim reinstatement claim. However, here it is problematic as CSN's position is that she will continue providing at least some care for her son. The other option suggested for CSN was that she could be reinstated without pay. I will return to these options below.

[56] In addition, there is the claim in the Court regarding whether CSN remains an employee. Regarding that, it is strongly arguable that CSN has been dismissed and so I proceed with the application on that basis.

### **Is there an arguable case regarding unjustified dismissal?**

[57] CSN's claim was focused on two grounds; the Vaccinations Order and the service disruption exemption.

#### *Application of Vaccinations Order*

[58] Submissions for CSN explicitly stated that the Authority did not have the jurisdiction to make decisions about the validity of the Vaccinations Order. This was recognised by the High Court in *GF v Minister of COVID-19 Response*.<sup>5</sup> CSN does not have a position that the Order is lawful, with reference to it possibly being lawful or unlawful. Mention was made of the prospect of CSN going to the High Court.

[59] I must proceed on the basis that the Vaccination Orders are lawful.

[60] Despite CSN seemingly being a person employed or engaged to provide care and support services as defined by the Order, submissions for CSN argue that she was not an "affected person" for the purposes of the Vaccinations Order. This is on the

---

<sup>5</sup> *GF v Minister of COVID-19 Response* [2021] NZHC 2526 at [3].

basis that an interpretation of her as an affected person would be contrary to the purpose of the Order.

[61] Arguments included that:

- (a) the RDNS acts in the performance of a public duty conferred or imposed on it by the Vaccinations Order, meaning the New Zealand Bill of Rights Act 1990 (NZBORA) ought to apply. So the Order should be given an interpretation which avoids a limitation on the rights and freedoms contained in the NZBORA;
- (b) The NZBORA contains the relevant rights to refuse medical treatment and to be free from discrimination;
- (c) The Employment Relations Act should be used as an interpretative tool, with it presupposing that termination of employment is only available where no other reasonable alternative exists;
- (d) CSN was a disability care worker under the New Zealand Public Health and Disability Act 2000 (NZPHDA). Courts have held the Ministry of Health's "blanket ban" on making payments to family members providing care, discriminated against people on the basis of family status.

[62] The Vaccinations Order covers people employed or engaged to provide care and support services within a home or place of residence.

[63] It was recognised by CSN's representative how it looks, namely that CSN is covered by the Vaccinations Orders. I agree, it looks like that. The submissions above were not sufficient to persuade me that there was an arguable case that CSN was not covered.

#### *Service disruption exemption*

[64] Under clause 12A of the Vaccinations Order a person conducting a business or undertaking (PCBU) may apply to the Minister for an exemption.

[65] For CSN it was argued that there has been a disruption to her son's care and a fair and reasonable employer would have sought a service disruption exemption.

[66] RDNS says that it has considered the service disruption exemption but CSN did not approach it about that and the Service does not consider that it would get an exemption. The criteria is that the work could not reasonably be performed by other persons who have been vaccinated. The company does not consider that to be the case here. CSN's brother is vaccinated and currently providing care as its employee.

### *Conclusion*

[67] Given the difficulty of one person undertaking all the care needed and funded for CSN's son, there is an arguable case that the Service should have applied for a service disruption exemption before dismissing CSN. It did not do so. This founds an arguable case for unjustified dismissal.

### **Is there an arguable case for permanent reinstatement?**

[68] I now look at whether it is reasonable and practicable to reinstate CSN permanently.

### *Reasonableness*

[69] RDNS argues that if CSN were to be reinstated it could not put her back in her previous role without being vaccinated or being an exempt person. Otherwise, it would be in breach of the Vaccination Order. It regards this as an intolerable position.

[70] Reinstatement to the payroll would also put the Service at risk as CSN has indicated she will be doing some of the work anyway. RDNS could then potentially be breaching the Order.

[71] RDNS maintains that it would reinstate CSN without hesitation if she got vaccinated or obtained a valid medical exemption.

[72] It is not reasonable to impose a reinstatement order which places both CSN and the Service at substantial risk of being in breach of the Vaccinations Order.

### *Practicality*

[73] It may be tempting to see reinstatement as being very practicable as CSN appears to be performing at least some of the work of the job anyway and so all that would need to be set in place was payment.

[74] CSN has indicated she intends to continue to provide care. It would be impractical to reinstate her to the payroll and expect her not to continue to provide care and support services to her son.

[75] Ms Conaghan says that as a not-for-profit the Service does not have any residual funding it can draw on to restore CSN to the payroll if it is not funded for her work.

[76] ACC has indicated that its priority is ensuring CSN's son receives his care entitlements in an appropriate manner. It would continue to fund the IHCS provider if CSN is reinstated but points to the practical question of who can provide the services.

### *Conclusion*

[77] It is not reasonable or practicable to reinstate CSN to her full job nor to the payroll. She does not have an arguable case for permanent reinstatement.

### **What is the balance of convenience?**

[78] I now move on to weigh the interests of CSN against those of the company, including a consideration of the adequacy of damages. Some of the factors identified regarding permanent reinstatement also come into play here.

### *CSN*

[79] CSN is a single mother. She describes herself as being in a dark place at the moment. CSN refers to being on substantially less money from WINZ than she was paid by the Service. She is worried about how she will provide for her family. She says she will have to cut out her car insurances and possibly reduce the insurance on her son's van. CSN also refers to the prospect of reducing or cancelling her life insurance.

[80] CSN's younger son also lives in the home. He works as an apprentice. Concern is expressed about losing the home although from the affidavit it appears the amount of

rent will soon be reduced very substantially, presumably as a result of CSN's drop in income.

[81] CSN has not given evidence of what attempts she has made to obtain financial assistance which would improve her situation, other than the reference to WINZ. The Service's witnesses refer to CSN saying that she did not want to obtain other employment as she only wanted to work with her son.

[82] Damages could be an adequate remedy for CSN's financial loss and the affects of her dismissal in terms of injury to feelings and the like. Obviously the family having to move out of their rental property would be a substantial detriment to them but there is little evidence to support there being much likelihood of this occurring.

[83] Submissions argued that CSN was unable to pursue alternative employment as she was required to be available for her son. Whilst I accept that there will be times when CSN's brother is not providing care, there is insufficient evidence to establish that CSN could not undertake any work at times when her brother is providing care to his nephew.

[84] I take into account the likely time until this matter can be substantively heard and determined. That factor weighs in CSN's favour.

#### *RDNS*

[85] I now look at any detriment which RDNS could or would suffer if CSN is reinstated on an interim basis. Aspects of this have been mentioned above.

[86] The prospect of having to pay CSN for her work seems to be of relatively little detriment to the RDNS in one sense. If CSN is ordered to be able to work, it seems reasonable to assume that arrangements with CSN's brother could return to those before her dismissal. ACC has indicated it would pay for services. If however, the order is return to the payroll only, it seems safe to assume that ACC would fund for services provided to CSN's son but not to cover that plus CSN's wages.

[87] What is significant is that the exposure to legal risk which an order reinstating CSN would open the Service up to. The Vaccinations Order provides that breaches of certain clauses amount to an infringement offence for the purposes of the COVID-19 Public Health Response Act 2020. This includes PCBUs not allowing unvaccinated

people to carry out work.<sup>6</sup> That is categorised as a high risk offence. There are not insubstantial fines of up to \$15,000 for an organisation. For a provider of services to governmental organisations the exposure to a risk of conviction for an offence including a possible fine, is not something which I can regard as a minor matter.

[88] It is hard to see that the undertaking as to damages could adequately compensate the Service for the potential effects of prosecution under the Vaccinations Order.

#### *Conclusion on the balance*

[89] There is exposure of RDNS to an at least quasi-criminal offence if I ordered CSN to be reinstated on an interim basis. This applies if she is fully reinstated to undertake her role on pay. It also applies if she is reinstated to the payroll when RDNS is not able to practically prevent her from undertaking care to her son. She has indicated she will not stop providing care.

[90] If reinstatement is to employment but without any requirement on CSN to undertake work or on RDNS to pay, that does not alleviate the primary basis for detriment claimed by CSN, namely financial burden. I am not satisfied that this is the pragmatic resolution referred to on CSN's behalf.

[91] The balance favours RDNS.

#### **Where is the overall justice of the case?**

[92] CSN has an arguable case for unjustified dismissal however, the focus is the lack of application for a service disruption exemption. There is only modest evidence at this stage about the prospects of success for an exemption application so it is hard to say that CSN's case is strong.

[93] On the evidence I do not assess there being an arguable case for permanent reinstatement on the basis of CSN's unvaccinated status in the face of the current Vaccinations Order. The balance favours RDNS. I now step back and ask where the overall justice lies.

[94] The situation of CSN's son needs to be considered. He has a strong interest in being provided with care. He is currently receiving paid care from his uncle and some

---

<sup>6</sup> Vaccinations Order, clause 8.

care from his mother. There is no evidence of the inadequacy of the current arrangement having been raised with RDNS as service provider. In terms of financial considerations, he is not required to pay for his own care as that is ACC funded. CSN's son has his own money coming in via a benefit, which is not dependent on CSN's employment status.

[95] CSN has dual roles in this matter. She was employed by the RDNS to provide care but she is also her son's welfare guardian. In that capacity she declined the option of other carers to provide the allocated care hours as she sees no one else able to provide care for him as she does.

[96] Whilst as welfare guardian she appears to have been entitled to make what she sees as the best decision for her son, the absence of funded carers could potentially have been avoided if she had agreed to pursue that option. There are other situations, such as if CSN suffered a broken arm or leg, where she would not be able to provide much of the care needed. Others would need to step in.

[97] Finally I record the position of RDNS's CEO who indicates that if CSN were to get vaccinated and is able to comply with the requirements of the Vaccinations Order, the Service would reinstate her. Circumstances at a national or personal level may change, making CSN's return to work something which could occur by agreement.

[98] At this time however, the interests of justice do not outweigh the balance of convenience in favour of RDNS. Interim reinstatement application is declined.

### **Costs and next steps**

[99] Costs are reserved. An Authority Officer will be in touch with the parties regarding the next steps in this proceeding.

**Nicola Craig**

**Member of the Employment Relations Authority**