

**NOTE: This determination contains an order at [17] prohibiting publication of certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2025] NZERA 151  
3348500

BETWEEN FJS  
Applicant

AND TE WHATU ORA (HEALTH  
NEW ZEALAND)  
Respondent

Member of Authority: Lucia Vincent

Representatives: Katherine McDonald, counsel for the Applicant  
Peter Chemis and Hanna Tevita, counsel for the Respondent

Investigation Meeting: 14 February 2025 by AVL

Submissions Received: 14 February 2025 from the Applicant  
14 February 2025 from the Respondent

Determination: 12 March 2025

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**DETERMINATION OF THE AUTHORITY**

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**What is the Employment Relationship Problem?**

[1] FJS says Te Whatu Ora unjustifiably dismissed them when it relied on the expiry of a faulty fixed term in December 2024 to end their employment. Te Whatu Ora says it reasonably relied on the expiry of FJS' valid fixed term and no unjustified dismissal occurred.

[2] FJS asks to be reinstated on an interim basis until the Authority can deal with the substantive matter in an investigation meeting to be scheduled later in the year. This

determination deals solely with FJS' application for interim reinstatement, relying on untested affidavit evidence, documents and submissions.

### **How did the Authority investigate?**

[3] FJS lodged their application for interim reinstatement on 20 December 2024. They provided an affidavit in support of the application, as well as an undertaking for damages.

[4] Given the time of year and availability of the parties, the Authority scheduled a case management conference for 17 January 2025, during which the matter was set down for an investigation meeting on 4 February 2025. An urgent direction was made to attend mediation.

[5] Te Whatu Ora lodged a statement in reply on 24 January 2025. FJS lodged an application for a non-publication order with further information too.

[6] An interim non-publication order was granted on 29 January 2025 until a determination was made on the interim reinstatement application.

[7] Further information was provided by FJS including on 27 January 2025 as to earnings during their suspension.

[8] Mediation on 4 February 2025 did not resolve matters.

[9] Te Whatu Ora lodged affidavits in opposition on 7 February 2025.

[10] Te Whatu Ora provided a supplementary affidavit on 12 February 2025 responding to further information that had been provided.

[11] By agreement, the parties agreed to reschedule the investigation meeting to 14 February 2025 when representatives spoke to written submissions lodged the day before.

[12] The Authority has considered all the information contained in the documents, affidavits and submissions. This determination draws conclusions that are provisional, given the nature of an interim matter. As permitted by s 174E of the Employment Relations Act 2000 (Act) it has not recorded all evidence and submissions received.

### **Should the Authority make an order for non-publication?**

[13] FJS and Te Whatu Ora have agreed to an order for non-publication on an interim basis in relation to the names of FJS and Te Whatu Ora's employees referred to in the pleadings and evidence.

[14] FJS is involved in an ongoing process with Te Whatu Ora arising out of an investigation into allegations about their conduct at work. FJS says publishing their name and any details identifying them, would detrimentally affect their privacy, right to a fair process and cause further harm (including to reputation and prospect of future employment opportunities) because adverse, premature conclusions could be reached.

[15] The Employment Court has described a two-step approach to take to non-publication orders.<sup>1</sup> First, there must be a good reason for believing specific adverse consequences could result from publication. Second, the Authority must consider whether those consequences justify departing from open justice in the circumstances of the case. This weighing exercise looks at relevant factors that include the interests of the person applying for the order (and of others, including the public).

[16] There is good reason to expect a risk of adverse consequences for FJS if their name was published while a process remains ongoing. Identifying other employees could identify FJS. The interim nature of this matter also supports an order being made. I am satisfied that it is appropriate to make an order for non-publication.

[17] I order the following be subject to an order for non-publication on an interim basis:

- (a) FJS' name and any details that would identify them; and
- (b) The names of any of Te Whatu Ora's employees referred to in pleadings and evidence.

### **What are the relevant legal principles for interim reinstatement?**

[18] Reinstatement is a primary remedy. If the Authority determines an employee has a personal grievance and they have sought reinstatement, then it must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy.<sup>2</sup> If the Authority ultimately determines FJS has a personal

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<sup>1</sup> At [87] to [89], *MW v Spiga Ltd* [2024] NZEmpC 147.

<sup>2</sup> Act, s 125.

grievance, and reinstatement is practicable and reasonable, then it must reinstate them to their former position or place them in a position no less advantageous.<sup>3</sup>

[19] In the meantime, the Authority may use its discretion to order FJS' interim reinstatement.<sup>4</sup> Any order may be subject to appropriate conditions. Once made, either party may apply to rescind or vary the order. In determining whether to make an order for interim reinstatement the Authority must apply the law relating to interim injunctions, having regard to the object of the Act.

[20] When dealing with applications for interim reinstatement, the Employment Court has referred to the restorative nature of the Act's aims for employment relationships and a well established approach to interim injunctions:<sup>5</sup>

... 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 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.

... An applicant must establish that there is a serious question to be tried. Consideration must be given to the balance of convenience, and the impact on the parties of the granting of, and the refusal to grant, an order. The impact on third parties will also be relevant to the weighting exercise. Finally, the overall interests of justice are considered, standing back from the detail required by the earlier steps. While the power to make an order for interim reinstatement is a discretionary one, the assessment of whether there is a serious question to be tried is not. It requires judicial evaluation.

In a claim for interim reinstatement, the question of whether there is a serious question to be tried raises two sub-issues:

- (a) Whether there is a serious question to be tried in relation to the claim of unjustified dismissal; and, if so,
- (b) Whether there is a serious question to be tried in relation to the claim of permanent reinstatement.

As the Court of Appeal made clear in *Brooks Homes Limited*, a serious question to be tried is one that is not vexatious and frivolous. Once that (relatively low) threshold is overcome, the merits of the case (in so far as they can be ascertained at an interim stage) may be relevant in assessing the balance of convenience and the overall interests of justice.

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<sup>3</sup> Act, ss 123(1)(a) and 125.

<sup>4</sup> Act, s 127.

<sup>5</sup> *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* [2021] NZEmpC 59 at [5] to [8], footnotes omitted, referring to *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90.

## **What are the issues?**

[21] With these principles in mind, the Authority investigated the following issues:

- (a) Is there a serious question to be tried in relation to FJS' claims of:
  - (i) Unjustified dismissal; and
  - (ii) Permanent reinstatement?
- (b) Where does the balance of convenience lie?
- (c) Do the overall interests of justice support an order being made?

[22] All of these issues must necessarily be determined on the untested affidavit evidence, submissions and documents provided.

## **Is there a serious question to be tried in relation to FJS' claim of unjustified dismissal?**

### *Requirements of s 66*

[23] To rely on the expiry of a fixed term with FJS to end their employment, Te Whatu Ora must show it met the requirements of s 66 of the Act:

#### **66 Fixed term employment**

- (1) An employee and an employer may agree that the employment of the employee will end—
  - (a) at the close of a specified date or period; or
  - (b) on the occurrence of a specified event; or
  - (c) at the conclusion of a specified project.
- (2) Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must—
  - (a) have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and
  - (b) advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.
- (3) The following reasons are not genuine reasons for the purposes of subsection (2)(a):
  - (a) to exclude or limit the rights of the employee under this Act;
  - (b) to establish the suitability of the employee for permanent employment;
  - (c) to exclude or limit the rights of an employee under the Holidays Act 2003.
- (4) If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing—
  - (a) the way in which the employment will end; and
  - (b) the reasons for ending the employment in that way.

- (5) Failure to comply with subsection (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.
- (6) However, if the employer does not comply with subsection (4), the employer may not rely on any term agreed under subsection (1)—
  - (a) to end the employee’s employment if the employee elects, at any time, to treat that term as ineffective; or
  - (b) as having been effective to end the employee’s employment, if the former employee elects to treat that term as ineffective.

[24] If Te Whatu Ora has not complied with the requirements of s 66, then it cannot rely on the expiry of the fixed term to end FJS’ employment, because they elected to treat the fixed term as ineffective both during and after its expiry. If that were the case, then Te Whatu Ora would need to show it had a good reason for dismissing FJS (beyond the fixed term expiry), and that it followed a fair process, complying with obligations under s 103A of the Act and the duty of good faith.<sup>6</sup>

[25] Has Te Whatu Ora complied with the requirements of s 66? To answer this question, it has been helpful to understand how the parties agreed on the fixed term nature of their employment and how Te Whatu Ora came to rely on the expiry of the fixed term to end FJS’ employment.

*Series of fixed terms*

[26] FJS is a capable and experienced General Surgeon who until their employment ended at Te Whatu Ora in December 2024, worked in its Surgical Services department at one of its regional hospitals (Hospital A).

[27] FJS had initially immigrated to New Zealand after working as a General Surgeon in the United States. They arrived in New Zealand during February 2021 after securing a locum employment contract with Te Whatu Ora at another hospital in a different region (Hospital B). Because Hospital B was located in a community smaller than where FJS had lived in the United States, FJS says their daughter struggled with the change, and so they looked with their spouse to find work elsewhere.

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<sup>6</sup> Particularly s 4(1A)(c) of the Act which requires an employer to give an employee access to information relevant to their employment potentially ending, and an opportunity to comment on it, before the decision is made.

[28] In December 2021, FJS communicated with the Head of Department for Surgery and a Consultant Surgeon at Hospital A (HOD). As the HOD was preparing to go on parental leave, they wanted to offer FJS a four-month contract. FJS moved with their family to live and work in the city in which Hospital A is based.

[29] What followed were five fixed term employment agreements between FJS and Hospital A from 17 December 2021 through to the final fixed term employment agreement offered in writing on 10 May 2023 (final fixed term). Relevant parts of the offer for the final fixed term said:<sup>7</sup>

I am pleased to confirm our verbal offer of employment to the fixed term full-time (1.0 FTE) position of General Surgeon, Surgical Services, [*Hospital A*], Te Whatu Ora – Health New Zealand [*details of Hospital A's region*], starting 1 July 2023. The reason for the fixed term period of employment is to provide cover whilst we recruit to the role on a permanent basis following the resignation of the current incumbent Colorectal Surgeon.

The fixed term period of employment will commence on 1 July 2023 and will end on 27 December 2024. During this period of recruitment for a Colorectal Surgeon, you will act as a backfill resource for the General Surgery lists to enable the remaining dual trained General Surgeons to cover the Colorectal Surgery lists. Once the recruitment process for the permanent Colorectal Surgeon position has been finalised and an incumbent has been appointed to this permanent role, there will be no further work available in this fixed term position, and this fixed term position will end.

Should this fixed term agreement end before 27 December 2024, due to a successful candidate commencing in the permanent role, there will be no further work in this fixed term available for you to undertake and therefore your fixed term will end. Should this fixed term position finish before 27 December 2024 you will be given 12 weeks' notice of the termination of this fixed term agreement. If you wish to resign before the end of the fixed term period, you must also provide 12 weeks' notice. You should have no expectation of ongoing employment beyond the expiry of this fixed term period of employment.

This fixed term engagement is a separate and specific engagement related to the specific need, which we have identified. The termination of this agreement does not amount to a redundancy situation, and you should have no expectation of ongoing employment beyond the expiry of this fixed period of employment.

[30] Other terms and conditions for the final fixed term were outlined in the expired New Zealand District Health Boards Senior Medical and Dental Officers Collective Agreement 1 April 2022 to 31 March 2023 (collective agreement). Clause 52.4 of the collective agreement said in relation to fixed term appointments:

An employee may be engaged for a fixed term provided there are genuine reasons based on reasonable grounds for the particular fixed term appointment. The employer shall advise the employee of those reasons at the time of the appointment and record them in the letter of appointment or job description.

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<sup>7</sup> Details identifying the location of the hospital have been anonymised in [*bracketed italics*].

### *Colorectal Surgeon appointed*

[31] Hospital A's previous Colorectal Surgeon had resigned on 14 May 2023, leaving a significant gap in the surgical roster. Although FJS did not have the skillset required for the role of Colorectal Surgeon, they could provide cover for other surgery while Te Whatu Ora recruited for the role.

[32] In about November 2023, Te Whatu Ora began discussions with an external candidate about the Colorectal Surgeon role. On 20 December 2023, this candidate accepted the role. The surgeon started work in May 2024. Te Whatu Ora says that once the surgeon started work, there was no work available for FJS because the rosters were full and the hospital resources were at capacity.

[33] Te Whatu Ora did not attempt to end FJS' fixed term after appointing the Colorectal Surgeon and they started work. Te Whatu Ora says it did not do so because it wanted FJS to remain engaged in a process it had started in April 2024. Out of fairness to the doctors who had made complaints, Te Whatu Ora wished to ensure they were fully and fairly investigated. No changes were proposed or negotiated to the final fixed term reflecting this.

### *Independent Investigation*

[34] As referred to above, Te Whatu Ora started a process with FJS that it wanted them to remain engaged with. This was to investigate bullying allegations about FJS made in complaint from a doctor. Two other written complaints were included in the investigation at a later stage.

[35] Following receipt of the first written complaint, Te Whatu Ora wrote to FJS on 24 April 2024 proposing to suspend them. The parties met on 29 April 2024 to discuss the proposed suspension. Te Whatu Ora decided to suspend FJS on pay.

[36] Concerns were raised about the suspension by counsel for FJS in a letter dated 2 May 2024. Among other things it was said that the suspension was both substantively unjustified and carried out in a procedurally flawed manner, and was having catastrophic effects upon their career and income. In addition, it was said that the process was damaging to FJS' career, prevented them from receiving their vocational

licence, financially damaging and resulted in a surgeon sitting at home when they should be serving the people in the local community.

[37] What followed was an extensive independent investigation by an external investigator. A final report was provided dated 11 September 2024. The report made several findings. Some findings upheld aspects of the allegations – others did not.

*Fixed term terminated*

[38] Separately, the Surgical Services Manager for Hospital A (SSM A) wrote to FJS on 11 September 2024, telling them that their fixed term position of Consultant - General Surgery, would end on 4 December 2024, due to the fixed term expiring. This was said to be because the recruitment process for the permanent Colorectal Surgeon position had been finalised and an incumbent appointed to the permanent role. This was despite that having occurred many months prior.

*Final written warning proposed and suspension lifted*

[39] Te Whatu Ora wrote to FJS saying it accepted the findings of the report in a letter dated 7 October 2024. It noted FJS had demonstrated some awareness in how their communication style may be perceived and had made efforts to improve, but there remained a need for further adjustment in their approach to ensure the behaviour of concern did not persist. FJS' positive contribution and skills as a surgeon were noted, as was their commitment to patient care and dedication to teaching consistently recognised.

[40] Te Whatu Ora found that the behaviour amounted to serious misconduct and breach of the code of conduct. It proposed a final written warning as an outcome.

[41] As the independent investigation had concluded, Te Whatu Ora said it was agreeable to lifting FJS' suspension, effective immediately. However, because the fixed term would expire, as notified on 11 September 2024, they were not required to return to work and would be paid in lieu of notice.

*Fixed term treated as ineffective*

[42] By way of letter dated 13 November 2024 counsel for FJS challenged the validity of the final fixed term and previous fixed term agreements. The letter made it clear that FJS expected Te Whatu Ora would follow a fair process and that because they

were a permanent employee, any decision to terminate them relying on the final fixed term would be challenged.

*Termination confirmed*

[43] Te Whatu Ora sent an email on 4 December 2024 confirming that Te Whatu Ora's position remained that the final fixed term was genuine and notice given appropriately. Employment ended that day.

*Personal grievance raised*

[44] Counsel for FJS raised a personal grievance for unjustified dismissal in a letter dated 9 December 2024. It was said that FJS was not a fixed term employee as purported, but a permanent employee and the decision to terminate them on the basis the final fixed term had expired was merely a pretext so they could not return to work following Te Whatu Ora's investigation into the allegations. In addition to the belief that there was ulterior motive underpinning the reliance on the expiry i.e. concerns about complaints, FJS says promises were made of permanent employment creating legitimate expectation of renewal and that the s 66 requirements were not met and had drifted on past the expiry event instead of the date, in any case.

*Arguable case?*

[45] Section 66 allows an employer and employee to agree the employment will end for three reasons:

- (a) at the close of a specified date or period (the time reason);
- (b) on the occurrence of a specified event (the event reason); or
- (c) at the conclusion of a specified project (the project reason).

[46] Before being able to agree on a time, event or project reason, the employer must have genuine reasons based on reasonable grounds for specifying the employment will end in that way, and advise the employee of when or how their employment will end and the reasons for their employment ending in that way. The written employment agreement must record the way in which the employment will end and why.

[47] The crux of the claims by FJS are that despite what the final fixed term says, Te Whatu Ora:

- (a) Created a legitimate expectation of permanent employment by FJS as their final fixed term followed a series of consecutively worked fixed term employment agreements from 10 January 2022 until 11 September 2024 (and each fixed term failed to meet the requirements of s 66 in some way);
- (b) Continually assured them that hiring a new Colorectal Surgeon would not affect their employment;
- (c) Continued to employ them beyond the appointment of and first day of work of the Colorectal Surgeon; and
- (d) Used the fixed term expiry as a means to exit FJS due to complaints (noting the report appears to have been finalised on the same day as the advice of the fixed term expiry, 11 September 2024).

[48] Looking at the documents, on the face of the final fixed term, it appears Te Whatu Ora relied on the event reason i.e. the appointment of a permanent Colorectal Surgeon which would remove the need for an additional General Surgeon to help cover. Once appointed, the final fixed term says that there would be no more work for FJS to do, and that the way in which the fixed term would end (if it ended prior to 27 December 2024) would be on 12 weeks notice. That seems to be what Te Whatu Ora attempted to do when it gave FJS 12 weeks notice on 11 September 2024.

[49] It is strongly arguable that the fixed term could not be relied upon by Te Whatu Ora when it did, because the employment relationship had continued despite the events linked to its expiry coming and going i.e. it had appointed a Colorectal Surgeon in December 2023 who started work in May 2024, dates some nine and four months earlier. Rather than give notice then, Te Whatu Ora allowed the final fixed term to continue because it wanted to progress the investigation involving FJS. Arguably, the final fixed term did not allow for that. Nor did Te Whatu Ora obtain FJS' agreement to change the reason for the fixed term. FJS has a strongly arguable case that the final fixed term did not meet the requirements of s 66.

[50] FJS also points to a number of assurances throughout the series of their fixed term agreements by staff at Hospital A that their employment would continue beyond the expiry of their final fixed term. Although both SSM A and the former Surgical Service Manager at Hospital A (SSM B), deny giving such assurances, that conflict in evidence cannot be resolved at an interim stage. FJS has an arguable case that these

assurances undermined the final fixed term, further supporting their arguable case that it did not meet the requirements of s 66.

[51] In addition to these assurances, FJS points to Te Whatu Ora's timing of advising them of the expiry of their fixed term on the same day as receiving the report for the investigation, supporting the allegations that Te Whatu Ora had relied on the fixed term expiry because of the outcome of the investigation upholding aspects of the complaints. This too, is arguable.

[52] Te Whatu Ora raised timing issues under s 114 of the Act regarding the concerns FJS had raised about their fixed term agreements prior to their final fixed term. Timing issues cannot be resolved at an interim stage. However, there is some merit to Te Whatu Ora's submission that the validity (or not) of the final fixed term will likely determine whether it could justify ending FJS' employment on its expiry (or not). That does not mean prior fixed terms are irrelevant. These agreements may form part of the picture painted by FJS at a substantive hearing for why they say they reasonably believed they were assured of permanent employment, for example.

[53] I conclude FJS has a strongly arguable case that Te Whatu Ora could not rely on the final fixed term expiring to end their employment because it did not meet the requirements of s 66. Te Whatu Ora has not argued it followed a fair process and had a good reason to dismiss FJS beyond the final fixed term expiring. It follows FJS also has a strongly arguable case for unjustified dismissal.

**Does FJS have a serious question to be tried in relation to permanent reinstatement?**

*What is practicable and reasonable?*

[54] If the Authority determines FJS has a personal grievance it must provide for reinstatement wherever practicable and reasonable. The Employment Court has described the two concepts like this:<sup>8</sup>

Practicability and reasonableness are two separate considerations. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible and have the potential for the re-imposition of the employment relationship to be achieved successfully. There may be considerations separate from the reasons for the dismissal that are germane to this question. In looking at reasonableness, the Court needs to consider the respective effects of an order, not only on the individual employer and

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<sup>8</sup> *Christieson v Fonterra Co-operative Group* [2021] NZEmpC 142 at [39], footnotes omitted.

employee in the case, but also on other affected employees of the same employer and, in some cases, perhaps third parties who would be affected by the reinstatement.

[55] The Court has indicated an employer will need to work hard to show reinstatement is not practicable and reasonable:<sup>9</sup>

The fact that reinstatement is prescribed as the primary remedy, and that it has long been acknowledged by the Courts that money is a poor substitute for the loss of a job, means that the threshold is a high one. As has previously been observed, routinely declining orders of reinstatement in the face of unlawful action monetises the employment relationship. That, in turn, serves to undermine the dignity of workers, contrary to fundamental precepts of employment law. And it incentives unlawful behaviour.

*What do the parties say?*

[56] FJS says they will suffer devastating consequences if not reinstated back into their position of General Surgeon at Hospital A. FJS and their family have lived in the location in which Hospital A is based since 2021. Together with their spouse (who also works at Hospital A) and their daughter, FJS has established community connections through activities and work they and their spouse are eager to continue. If not reinstated, FJS and their family will feel distressed about needing to leave the lives they have created because FJS would have to find permanent work elsewhere in a different city.

[57] Unless they and their family move, FJS says at least partial employment by Te Whatu Ora is necessary for them to work as a General Surgeon locally because Hospital A is the only facility in the location in which they are based with emergency services and 24-hour admitting privileges. If they are operating and one of their patients needs a higher level of care, they need access to Hospital A to provide adequate care.

[58] FJS says that although they are currently working as a locum surgeon in New Zealand, they have no control over when and if they will get a locum job each month which also means their income is unstable. Locum work requires FJS to travel and be away from family while working. By way of example, locum work performed for Hospital B during December 2024 required FJS to take two connecting flights one way and stay away for six nights.

[59] FJS acknowledges the complaints subject of the investigation. They say they cooperated fully throughout the investigation and the outcome did not result in

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<sup>9</sup> *DQJ v The Commissioner of Inland Revenue* [2025] NZEmpC 10 at [58], footnotes omitted.

dismissal. They acknowledge they can be brisk and direct in their communication style – they work in an extremely high-pressured environment. They have learned from the process.

[60] FJS points to positive feedback received about them working effectively with colleagues in a 360 Degree feedback evaluation from two practising surgeons, demonstrating professionalism and collaboration with others. FJS has also provided two referee reports from colleagues at Hospital A (both Consultant General Surgeons). Both referees marked them as excellent or good in every aspect including an ability to handle pressure and a busy workload, and interpersonal communication and relationship skills with patients and staff. One referee described FJS as an expert, highly skilled and very experienced surgeon who is a team player and patient focussed. Both referees were happy to work with FJS again.

[61] By contrast, Te Whatu Ora lists several concerns it has about any reinstatement of FJS: funding, resourcing/roster/surgeon/patient impacts, staff wellbeing and the likelihood of a further employment process. I address these concerns below.

#### *Funding*

[62] Te Whatu Ora says it has no budget to employ another full-time general surgeon at Hospital A beyond December 2024. I accept there are financial constraints that could make reinstatement difficult. However, it appears as though Te Whatu Ora had funding to continue to employ FJS during their suspension to September 2024 despite having already appointed the Colorectal Surgeon in December 2023 commencing in May 2024, then continued to pay FJS for a further 12 weeks after that to early December 2024. Although no doubt challenging, this suggests there may be scope for further funding to be found for the period of any interim reinstatement.

[63] Te Whatu Ora also says it is likely it will need to propose to disestablish the role of FJS if they were to be reinstated, leading to their dismissal and a further application for interim reinstatement, which would be unproductive and so the matter would be best dealt with at a substantive hearing. The Authority can only speculate about what (if any) restructuring Te Whatu Ora may or may not embark upon if, as it says, it decides to make a General Surgeon role redundant which may result in FJS being selected for redundancy from a selection pool of General Surgeon roles. That is a situation that may arise from actions taken by Te Whatu Ora that were arguably unjustifiable, and should

not override what might otherwise be a reasonable and practicable reinstatement should FJS succeed in their substantive claims.

### *Staff Wellbeing*

[64] Te Whatu Ora says it has serious concerns about the health and safety of staff if FJS were to be reinstated. It relies on the investigation report that upheld several of the allegations that it has assessed as amounting to serious misconduct. It says the high-pressured work environment requires cohesiveness and team work to ensure it operates effectively and efficiently to ensure the best patient outcomes. Te Whatu Ora says it would be required to address the behavioural concerns and take any remedial action before FJS could safely return to the workplace, taking time and resource. It says FJS did not take any accountability or show any remorse following the allegations being substantiated, and that FJS did not meaningfully engage so as the disciplinary process could be completed. SSM A says some staff members have advised they feel discomfort and unease about FJS returning to work and did not want to go on the record out of fear of retaliation. SSM A refers to other concerns pre-dating the investigation that were addressed with FJS at the time.

[65] There were no affidavits from staff members expressing concern directly. Although that may be for the reason mentioned, it means less weight can be given to the concerns relayed by SSM A. I treat with caution comments about staff who are uneasy and at discomfort at the prospect of a return to work by FJS. Te Whatu Ora could be expected to ease any discomfort by ensuring a planned reintegration to address any concerns and is well resourced with human resource capability to manage such a transition.

[66] After the investigation ended, Te Whatu Ora immediately lifted the suspension upon receipt of the report and proposed a final written warning. It did not say any steps needed to be taken before any return to work, although elected to pay out the 12 week notice period for FJS.

[67] In contrast to assertions about FJS not engaging or taking accountability, the evidence suggests they have. For example, the report says FJS,<sup>10</sup> "... displayed a strong willingness to address concerns that people have with their style of communication."

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<sup>10</sup> At [3.9].

The report acknowledges FJS has a significant blind spot with work for them to do to ensure their interactions with colleagues are reasonable and respectful. But it does not suggest it was not reasonable or practicable to undertake that work. The report also noted FJS is committed to training doctors. In proposing to issue a final written warning, FJS has indicated it did not see the concerns raised about FJS would be an insurmountable barrier to their return to work, and suggested FJS could adjust their approach to prevent further behaviour of concern. Although the parties have not yet met to discuss and finalise the outcome of the disciplinary process, it appears delays have been caused by the lack of availability of both parties and the Christmas/New Year break, rather than any deliberate attempts to derail the process by FJS. The willingness of FJS to engage in the process after their employment has ended reinforces that reintegration into the workplace could be successfully managed.

[68] I accept the impact of any order on third parties is a relevant factor in reinstatement. However, the staff wellbeing concerns could be addressed by Te Whatu Ora by taking the remedial action it suggests. That doing so takes time and resources does not necessarily make reinstatement impracticable or unreasonable.

*Resourcing / Roster / Surgeon / Patient impacts*

[69] Te Whatu Ora says reinstating FJS will require it to cater for another surgeon impacting on the limited theatre space and resources which may lead to surgeons leaving for private practice. In addition, it says surgical rosters created up to three months in advance will need to be redone which could create delays in surgery and outpatient care waiting lists, potentially by months.

[70] I accept the impact of any order on third parties such as surgeons and patients is a relevant factor in reinstatement being practicable or reasonable.

[71] SSM A says it is not uncommon for surgeons to leave the public health system when there is a shortage of theatre time and resources. This appeared to be a general observation rather than a specific concern raised by any one surgeon. There appeared to be some conflicting evidence from SSM B who says there are three full-time General Surgeons working in Hospital A currently, "... which is almost unheard of as most surgeons start fully public then drop tenths of their FTE for private practice." This tends to suggest it is not as clear cut as Hospital A risking losing surgeons from the public health system completely.

[72] A risk of potential delays to patient surgery and outpatient lists is relevant. However, rosters can be adapted, and it would be expected that the parties could discuss in good faith how to do so in a way that would minimise and ideally remove any disruption or delay. Some lead in time for any reinstatement may assist in this process.

*Further disciplinary process*

[73] Te Whatu Ora has taken exception to the extent to which FJS proactively disclosed that they worked as a Locum Surgeon during the period of their paid suspension at another hospital in a different region. It says it will likely follow a disciplinary process to address what it views as a serious issue.

[74] It would be premature to draw any conclusions about what (if any) allegations may be made and action taken, by Te Whatu Ora, if FJS were to be reinstated on an interim basis. FJS disclosed in their original affidavit they were working as a Locum Surgeon. Upon request from Te Whatu Ora, FJS provided further information about this work. Te Whatu Ora was also able to look at its own payroll system to clarify the extent of the work including earnings. The information showed FJS worked 40 days of locum work from 29 April 2024 up until January 2025. Te Whatu Ora seemed to say staff at Hospital A did not know FJS was undertaking this work. It was submitted on behalf of FJS that it did.

[75] The references provided by FJS from their colleagues in Hospital A indicate some degree of disclosure. For example, one referee noted FJS was resolving an HR issue at Hospital A but was unaware of any disciplinary actions or legal proceedings. The other referee said they were aware of and referred to a local query arising from the direct manner of FJS in pursuit of patient safety. Although Hospital B is located in a different region of New Zealand, it suggests Te Whatu Ora may have had a degree of knowledge about FJS intending to and undertaking locum work at another Te Whatu Ora hospital.

[76] The conflicts in evidence and submissions cannot be resolved at an interim stage. What is clear is that there would be more information required. I treat with caution the assertion this would mean reinstatement is not reasonable or practicable.

*Arguable case?*

[77] Although inconvenient and potentially may cause some delay and cost for Te Whatu Ora, I find FJS has an arguable case that permanent reinstatement is practicable and reasonable.

### **Where does the balance of convenience lie?**

[78] Assessing the balance of convenience requires the Authority to weigh competing considerations. How could granting or refusing an order for interim reinstatement adversely impact on the parties? What alternatives exist (such as damages), and are they adequate? Who is most inconvenienced by granting or refusing any order if it is later reversed it in a substantive determination? The relative strengths of the parties positions (so far as they can be ascertained at an interim stage) are relevant.

[79] Relevant factors may include any harm potentially caused to third parties, the length of time until the parties will have a result on the permanent reinstatement application, any significant employment relationship difficulties (and ways of resolving them), makeup of the workforce (including any internal human resource capability for supporting a return to work), and the nature of the workplace and work undertaken (including any resourcing, health and safety and skill considerations).

[80] There is a degree of cross over between factors for and against reinstatement, and considerations relevant to the balance of convenience.

[81] It is submitted for FJS that damages are not an adequate remedy because they have trained for years to be a General Surgeon, are devoted to their career in public health, and retaining their position at Te Whatu Ora as well as maintaining their clinical skills are more important than money. If FJS is not reinstated, then they will remain unemployed apart from two short term locum appointments in Hospital B, unless they secure a new permanent position outside the region and potentially New Zealand. The longer FJS is out of the workplace, the more difficult it will be for them to integrate back into it.

[82] Te Whatu Ora says that damages would be an adequate remedy for FJS. For many of the same reasons that Te Whatu Ora says permanent reinstatement is not reasonable nor practicable (such as a lack of funding and rescheduling concerns and staff wellbeing), Te Whatu Ora says the balance of convenience favours not granting interim reinstatement. Te Whatu Ora says its calculations show there will be no impact

on the earnings of FJS until at least April 2025, with FJS undertaking minimal work for much higher pay, when compared with working at Hospital A.

[83] It appears that FJS could survive financially without being reinstated on an interim basis, although that is not guaranteed, and the workflow and level of income would be inconsistent. The main concerns of FJS appear to be around being unable to work in a permanent role in their profession with patient safety a priority, and having to shift locations with their family who have established themselves in the city in which Hospital A is based. The required travel for obtaining the work that FJS would need to undertake is not insignificant. It appears they cannot work locally at all without having at least part time employment with Te Whatu Ora at Hospital A.

[84] In addition to the above, it is submitted for FJS that there are no other jobs of the highly specialised nature in the city and region, and that any private work would still require some FTE at hospital A. If not reinstated, FJS would suffer severe consequences as they will not be able to maintain their clinical and technical skills, and be forced to leave the region to find permanent work (possibly even the country) due to very few general surgeon positions being available in the public health system. This submission was emphasised in oral submissions.

[85] Counsel for Te Whatu Ora described the focus on maintaining skill as a pivot to the prior focus on FJS wishing to be reinstated for financial and other reasons. I accept FJS has expressed their concerns somewhat differently in their affidavit. However it can be reasonably inferred from the evidence that FJS is concerned about maintaining their skills as a surgeon. FJS is concerned about providing an adequate level of care to their patients. They are also concerned about being able to continue working in their profession in the place in which they and their family have established their lives, which would be difficult to maintain with the uncertainty and limited days available for locum work – the 40 days FJS has worked from April 2024 to January 2025 are significantly fewer days than what a permanent full time role would entail.

[86] FJS has limited options to work in their profession if they are not reinstated on an interim basis, particularly if they stay in the location in which they and their family are based. FJS has described why they and their family moved from the location in which Hospital B is based which appears to be where much of the locum work is.

[87] I have dealt with the arguments about staff wellbeing and further employment processes above. I consider these factors can be adequately addressed on an interim basis with the capable and well resourced Te Whatu Ora Human Resources team managing a return to work.

[88] The submission about the likelihood of further challenge from either party about any future dismissal could be said of any challenge to any interim reinstatement order. It could also be said to support such an order being made - the longer the time FJS is out of the workplace, the more challenging any reintegration is likely to be. Dates for a substantive hearing have not yet been set and are likely several months away with a decision within three months of that. Having already been suspended since April 2024, the matter has only become more urgent for FJS.

[89] Weighing all the competing factors and considering the circumstances of this case, I conclude that the balance of convenience favours FJS.

**Do the overall interests of justice support an order being made?**

[90] The Employment Court has said the following when considering the overall interests of justice:<sup>11</sup>

Jobs are important and money is often a poor substitute. In this regard the Act has both an educative and regulatory function, which the Court recognises when dealing with applications for reinstatement, both interim and permanent. The point is that, while a claim for reinstatement is to be assessed against its own factual context, attention must also be paid to the impact of such orders more generally in the overall interests of justice. As the Court pointed out in *Ashton v Shoreline Hotel*: “[To] award routinely compensation for the job loss instead of reinstating is to create a system of licensing unjustified dismissals.” Or, to put it another way, it would create perverse incentives.

[91] Having regard to the restorative aims of the Act, relevant legal principles, and all the circumstances of this case (including the respective merits of the matter, so far as they can be determined at an interim stage), overall justice favours making an order for interim reinstatement.

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<sup>11</sup> *DQJ* at [71], footnotes removed.

## **Order**

[92] In the exercise of my discretion, and in accordance with the undertaking given, I order FJS' interim reinstatement to the same position they had when Te Whatu Ora dismissed them, or a position no less advantageous, from 24 February 2025.

[93] To provide an opportunity for the parties to engage with each other in good faith about how to achieve a successful return to the workplace, I order that FJS be reinstated to the payroll for the first month, with a return to active duties after that. During the first month, Te Whatu Ora may direct FJS to undertake duties within their job description.

## **Next steps**

[94] Having granted the interim reinstatement application, an Authority Officer will contact the parties to schedule a case management call to timetable evidence and confirm an investigation meeting date later in the year.

[95] Parties have attended mediation. However, I direct further mediation to assist in managing the return to work.

## **Costs**

[96] Costs are reserved. The Authority does not typically consider an assessment of costs until after determining the substantive matter.<sup>12</sup>

Lucia Vincent  
Member of the Employment Relations Authority

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<sup>12</sup> Practice Direction of the Employment Relations Authority (era.govt.nz) at [8].