

**Attention is drawn to the order for
non-publication at paragraph [35]
of this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI A TARA ROHE**

[2025] NZERA 284
3266200 & 3371523

BETWEEN	TE WHATU ORA – HEALTH NEW ZEALAND Applicant
AND	BARRY YOUNG First Respondent in 3266200 & Respondent in 3371523
AND	SIP Second Respondent in 3266200
AND	SXY Third Respondent in 3266200
AND	Unknown Respondents Fourth Respondents in 3266200

Member of Authority: Shane Kinley

Representatives: Rebecca Rendle, counsel for the applicant
Barry Young, in person

Investigation Meeting: On the papers

Submissions: Up to 15 May 2025

Determination: 20 May 2025

DETERMINATION OF THE AUTHORITY

Background

[1] Four determinations have previously been issued in relation to matter 3266200:

- (i) *ISV v ZCM and Ors* [2023] NZERA 718 (First Preliminary Determination of the Authority);

- (ii) *Te Whatu Ora – Health New Zealand v ZCM and Ors* [2023] NZERA 719 (Second Preliminary Determination of the Authority);
- (iii) *Te Whatu Ora – Health New Zealand v ZCM and Ors* [2023] NZERA 728 (Third Preliminary Determination of the Authority); and
- (iv) *Te Whatu Ora – Health New Zealand v Barry Young and Ors* [2023] NZERA 767 (Fourth Preliminary Determination of the Authority).

[2] Matter 3266200 was administratively closed in August 2024 as counsel, including counsel then representing Mr Young, had been advised it would be unless there were any issues outstanding which the parties wished be addressed.

[3] Matter 3371523 was a reopening application for matter 3266200 as Health New Zealand – Te Whatu Ora (HNZ) were seeking further compliance orders against Mr Young for allegedly breaching orders at paragraph [14](a) and (f) of the First Preliminary Determination of the Authority. Those orders were an urgent interim injunction and an order Mr Young comply with a clause of his employment agreement.

[4] HNZ subsequently advised it was happy to withdraw the reopening application with no issues as to costs, subject to non-publication orders being made in relation to the application for further compliance orders and supporting documents.

[5] In Directions dated 16 April 2025 I recorded the reopening application in matter 3371523 was withdrawn with no issues as to costs. The application was to be administratively associated with matter 3266200, with HNZ's application for further compliance orders against Mr Young and supporting memorandums and affidavit evidence to be placed on the Authority's file for both matters 3266200 and 3371523.

Orders under matter 3266200 remain in force

[6] During a conference on 16 April 2025, I advised the parties the following orders remain in force and will remain in force until further order of the Authority:

- (i) The Authority's orders made at paragraphs [14](a) to (f) of the First Preliminary Determination of the Authority;
- (ii) The interim non-publication order made at paragraph [18] of the First Preliminary Determination of the Authority, except as amended to permit HNZ and Mr Young to be named (as discussed at paragraph [32]) below;
- (iii) The compliance order made at paragraphs [13] and [14] of the Fourth Preliminary Determination of the Authority;

- (iv) The Authority's orders made at paragraphs [24](a) and (b) of the Third Preliminary Determination of the Authority;
- (v) The interim non-publication order made at paragraph [28] of the Third Preliminary Determination of the Authority; and
- (vi) The compliance order made at paragraph [41] of the Fourth Preliminary Determination of the Authority.

Mr Young's counter-claim

[7] In Mr Young's statement in reply to matter 3371523 he included a number of counter-claims.¹ Clarification has been sought from Mr Young of whether he wished those counter-claims to proceed in light of the withdrawal of matter 3371523 and also as a number of his counter-claims appeared to replicate claims which are being considered in separate proceedings he has brought against HNZ and the Ministry of Health in matter 3315120, which is being investigated by another Member of the Authority.

[8] The residual issue I identified from Mr Young's counter-claim, which I considered was not already covered by matter 3315120, was his request for a declaration that the First Preliminary Determination of the Authority was "tainted by apparent bias, warranting revocation" (the residual issue). Mr Young was asked to advise if he wished the residual issue to be investigated.

[9] Mr Young subsequently requested I be recused from this matter and another Member assigned to consider it. His recusal application is the subject of this determination.

The issue

[10] The issue requiring investigation and determination is whether I should recuse myself in relation to Mr Young's application.

The Authority's investigation

[11] I directed the Authority Officer advise Mr Young and HNZ this matter would be determined on the papers, based on submissions and any supporting information.

¹ Mr Young presented his claims as counter-claims. For consistency I have adopted the same phrase when referring to his claims, notwithstanding HNZ having withdrawn the matters Mr Young raised the counter-claims in response to.

Memorandum were lodged by Mr Young, accompanied by supporting documents, and HNZ.

[12] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Relevant law

[13] The guiding principle is that I should recuse myself if, in the circumstances, a fair-minded, objective and fully informed observer would have a reasonable apprehension that I might not be impartial in reaching a decision on the case.² As the Supreme Court has noted in *Saxmere Company Ltd v New Zealand Wool Board Disestablishment Company Ltd*, the standard for recusal is one of “real and not remote” possibility, rather than probability.³

[14] The Supreme Court went on to say:⁴

Two steps are required:

(a) First, the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and

(b) Secondly, there must be “an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits”.

[15] HNZ drew my attention to the Authority’s determination in *Marx v Southern Cross Campus Board of Trustees*⁵, which summarised the Supreme Court’s judgment in *Saxmere* and referred also to the High Court’s judgment in *Stiassny v Siemer*. *Stiassny* included the following observations in summarising *Saxmere*:⁶

[3] ... the test for disqualification of a Judge on the grounds of apparent bias was whether a fair-minded lay observer might reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the question the Judge is required to decide. As Blanchard J noted in that case, that “principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the ... [Court] be independent and impartial”.

² *Saxmere Company Ltd v New Zealand Wool Board Disestablishment Company Ltd* [2009] NZSC 72 at [3].

³ *Ibid* at [4].

⁴ *Ibid*.

⁵ *Marx v Southern Cross Campus Board of Trustees* [2017] NZERA Auckland 99.

⁶ *Stiassny v Siemer* [2013] NZHC 154 at [3] to [5], citations omitted.

[4] Importantly, Blanchard J said that the lay observer must also be taken to understand three matters relating to the conduct of Judges. Two of them are relevant here. The first is that a Judge is expected to be independent in decision-making and has taken the Judicial Oath to “do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will”. Second, a Judge has an obligation to sit on any case allocated to the Judge unless grounds for disqualification exist. Judges are not entitled to pick and choose their cases, which are randomly allocated.

[5] The other Judges in *Saxmere* agreed with this analysis. Tipping J said, that in considering the appearance of justice being done, “the question is not how the matter appears to a professional Judge, but how it would appear to an ordinary sensible member of the public with appropriate knowledge of all the relevant circumstances including the general workings of the legal system”.

Submissions of the parties

[16] Mr Young’s application seeking I recuse myself cites the following reasons:

Prior involvement in crafting COVID-19 vaccine mandate policies while at MBIE (2021–2022), which are directly at issue in this case.

Demonstrated pre-judgment in *Twose v KiwiRail* [2023] NZERA 662, where he ruled in favor of an employer’s vaccine mandate under nearly identical circumstances.

Reasonable apprehension of bias, given his advocacy for workplace mandates as MBIE Policy Director and subsequent rulings validating those policies.

[17] HNZ advised it would abide by the Authority’s decision. While not making substantive submissions HNZ said:

This proceeding did not concern issues of the legality of an employer’s vaccination mandate or any dismissals in reliance on this. Health NZ’s application on 1 December 2023 related to whether urgent injunctive relief should be granted to prevent the unauthorised disclosure and public release of information obtained by Mr Young from Health NZ’s database in the course of his employment. ...

Additionally, there are no outstanding matters in respect of this proceeding for Member Kinley to determine, noting that the separate claims pursued by Mr Young against Health NZ (which are opposed) and Health NZ’s counterclaims have been assigned to [another Member in matter] 3315120.

Analysis

[18] The appropriate approach for a recusal application is the Member involved should consider whether there is any basis for recusal.

[19] In doing so I have considered the Supreme Court’s judgment in *Saxmere* and the High Court’s judgment in *Stiassny*. I have also considered other Authority

determinations, including *Marx, Osborne v Callaghan Innovation*⁷, *Newall v Air New Zealand Limited*⁸ and *McDermott v Employsure Limited*.⁹

[20] I do not consider there is any basis for recusal.

[21] While I have acknowledged to Mr Young my prior role at MBIE and he has provided documents related to that role, this matter is not related to the legality of an employer's vaccination mandate, as pointed out by HNZ. HNZ's application which led to the First to Fourth Preliminary Determinations of the Authority related to whether urgent injunctive relief should be granted. The law applied to determine HNZ's application was independent of the legality of vaccination policies. I expressed no view related to the legality of vaccination policies and was not required to do so.

[22] I do not consider my prior role means I would not decide Mr Young's counter-claim other than on its legal and factual merits, nor do I consider it created a reasonable apprehension that I might not have been impartial in reaching a decision on HNZ's applications in either matters 3266200 or 3371523.

[23] I also endorse the observations of the Authority in *Marx*, where the Member involved said:¹⁰

Authority investigations are judicial proceedings so those principles apply in equal measure to Members carrying out their quasi-judicial role of investigating employment relationship problems. Members take an oath of office to faithfully and impartially perform their duties.

Conclusion

[24] I decline to recuse myself from investigating this matter and reserve costs in relation to the recusal application.

Next steps

[25] While HNZ said there were no outstanding matters, Mr Young has not advised if he wishes the residual issue from his counter-claim to be investigated.

[26] At this stage I have stayed HNZ's obligation to lodge a statement in reply to the counter-claim, pending a response from Mr Young to this point.

⁷ *Osborne v Callaghan Innovation* [2025] NZERA 150.

⁸ *Newall v Air New Zealand Limited* [2018] NZERA Auckland 412.

⁹ *McDermott v Employsure Limited* [2023] NZERA 705.

¹⁰ Above n 4 at [13], citations omitted.

[27] If Mr Young wishes the residual issue to be investigated then a case management conference will be organised to discuss next steps. Given I have declined to recuse myself, it is difficult to see how Mr Young could argue the First Preliminary Determination of the Authority should be revoked due to being “tainted by apparent bias”, however, this point has not been expressly addressed in this determination.

[28] If Mr Young does not wish for the residual issue to be investigated, then his counter-claim will be treated as having been withdrawn. For the avoidance of doubt, matter 3315120 will continue to be investigated in accordance with the directions of the Member responsible for that matter.

[29] The Authority's standard covering message which will be sent with this determination to the parties refers to the right of challenge to the Employment Court within 28 days of a determination being issued. However, in respect of this particular determination, the parties should note that a determination declining a recusal application is not ordinarily open to that sort of challenge at this stage or time in the proceeding.¹¹

[30] The issue determined here is one of procedure, not substance, so a statutory bar applies to any challenge of it under ss 179(5)(a) and (b) of the Act. A right to challenge in this matter will come into existence only once the Authority has completed any investigation of the substantive issues and provided a written determination on those issues.

Non-publication order

[31] In the First Preliminary Determination of the Authority, I prohibited under cl 10 of sch 2 of the Act, and except where necessary for enforcement purposes, publication of the names of the parties and all or any identifying information, the pleadings and all documents filed with the Authority, until further order of the Authority.¹² That order applies also to prohibit publication of the Database¹³ and the Information¹⁴ by the Respondents.

¹¹ *Owen v The Chief Executive of the Department of Corrections* [2015] NZEmpC 201 at [40] and [41].

¹² The First Preliminary Determination of the Authority at [18].

¹³ As defined at paragraph [1] of the First Preliminary Determination of the Authority.

¹⁴ As defined at paragraph [13] of the First Preliminary Determination of the Authority.

[32] In the Second Preliminary Determination of the Authority, the non-publication order was varied to allow for HNZ to be identified.¹⁵ By Directions dated 11 December 2023 I varied the non-publication order to allow for Mr Young to be identified, by consent.

[33] Further non-publication orders were made in Directions dated 16 April 2025.

[34] In this matter, I consider similar orders are necessary to preserve the original non-publication orders.

[35] Under cl 10 of sch 2 of the Act, and except where necessary for enforcement purposes, I prohibit publication of the names of the parties (other than HNZ and Mr Young) and all or any identifying information which would identify those parties.

Shane Kinley
Member of the Employment Relations Authority

¹⁵ The Second Preliminary Determination of the Authority at [5].