

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2026] NZERA 358  
3455744

BETWEEN EQX  
Applicant

AND KIWIRAIL LIMITED  
Respondent

Member of Authority: Philip Cheyne

Representatives: Ben Thompson, counsel for the Applicant  
Anthony Russell and Ella Coggan, counsel for the Respondent

Investigation Meeting: 22 May 2026 in Christchurch and by AVL

Date of Determination: 8 June 2026

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] EQX worked for KiwiRail as a container terminal operator (CTO) from 2002 until his employment was terminated in January 2026 on medical grounds.

[2] EQX raised his personal grievance of unjustified dismissal on 17 February 2026. On 2 April 2026 he applied to the Authority to investigate and determine his personal grievance claim. EQX seeks reinstatement, reimbursement and compensation to settle his personal grievance. He also seeks interim reinstatement.

[3] KiwiRail says that EQX's employment was justifiably terminated for medical incapacity, after a process involving him and his representative between October 2025 and January 2026. It also says that permanent reinstatement is impractical and unreasonable, and interim reinstatement is not appropriate.

### **Non-publication**

[4] EQX seeks non-publication of his name. A significant amount of EQX's otherwise private medical information has been produced in evidence and will need to be canvassed in this determination. Associating those details with EQX by name is likely to cause him adverse consequences. There is little inherent public interest in publication of EQX's name.

[5] KiwiRail did not oppose non-publication.

[6] There are grounds to justify a temporary non-publication order at this stage of the Authority's investigation. Accordingly, pending further order of the Authority, I prohibit the publication of EQX's name or identifying details.

### **The Authority's Investigation – Interim Reinstatement**

[7] This determination resolves only the application for interim reinstatement. Findings based on the untested affidavits in support and in opposition, attached documents and counsels' submissions are solely for that purpose. Final findings must await a substantive investigation meeting.

[8] EQX lodged affidavits in support of interim reinstatement together with his undertaking for damages when he commenced this action.

[9] A case management conference was arranged. KiwiRail opposed urgency being accorded to the application. KiwiRail said that EQX was currently unfit for duty and he had been paid a medical retirement entitlement. It would cooperate with an early substantive investigation and the matter did not appear to be urgent. KiwiRail also noted that there was no memorandum seeking urgency.

[10] In response, counsel for EQX said that supporting information had only been disclosed by KiwiRail in March, and this application was made shortly after. Counsel offered to lodge a memorandum if necessary.

[11] I directed that the application for interim reinstatement would be accorded urgency, as is the Authority's standard approach, there being no sufficient reason to depart from that. Arrangements were agreed for KiwiRail to lodge its statement in reply and affidavits in opposition. A date was set to hear submissions from the parties.

[12] The parties were also directed to mediation but matters were not resolved.

[13] Helpfully, the parties lodged their submissions in advance and spoke to them at the investigation meeting.

### **Interim Reinstatement - Legal principles**

[14] The Authority must apply the law relating to interim injunctions, having regard to the object of the Employment Relations Act 2000.<sup>1</sup> I must consider whether EQX has established that there is a serious question to be tried in relation to his claim of unjustifiable dismissal; where the balance of convenience lies; and what is required in the overall interests of justice. I must be satisfied that there is serious question with respect to both the unjustified dismissal claim and the permanent reinstatement claim.

[15] A serious question is one that is not vexatious or frivolous. It is a relatively low threshold.

### **Summary of events**

[16] It is useful first to outline what happened and refer to the context, based on the statement of problem, documents and affidavits and the parties' submissions.

[17] EQX is covered by the collective agreement between KiwiRail and Rail and Maritime Transport Union.

[18] KiwiRail is licensed to operate a rail network. It must comply with applicable legislation and standards. A standard with which KiwiRail must comply is the National Standards for Health Assessment of Rail Safety Workers (the Standards). Under the Standards, EQX's role as a CTO is designated as a category 2 safety critical position. CTOs must undergo health assessments by a KiwiRail registered medical officer (RMO) as set out in the Standards. RMOs assess a person's health, but do not treat them.

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<sup>1</sup> Employment Relations Act 2000 s 127(4).

[19] An RMO will assess the employee against criteria in the Standards. Under the Standards, the classifications are: Fit for Duty Unconditional; Temporarily Unfit for Duty; Fit for Duty Conditional; Fit for Duty Subject to Review; Fit for Duty Subject to Job Modification; or Permanently Unfit for Duty. The Standards define each classification.

[20] In 2014, EQX had been diagnosed with type 2 diabetes and prescribed non-insulin medication. Diabetes is a condition covered by the Standards.

[21] In 2018 EQX's classification changed to Fit for Duty Subject to Review (Review). Under that classification, more frequent assessments were required but EQX was permitted to perform current rail safety duties.

[22] A number of assessments followed and the Review classification continued, based on EQX's diabetes. One of the 2018 assessments also stipulated that a sleep study was required. That reported Mild Disordered Breathing in October 2018.

[23] In either September or November 2021, EQX was assessed as Fit for Duty Unconditional (Unconditional).<sup>2</sup>

[24] In September 2023 EQX received a Review assessment and a sleep study was required. That reported severe obstructive sleep apnoea (OSA). Soon after, EQX was assessed as Temporarily Unfit for Duty, pending a referral to a sleep physician. EQX was put on paid leave until that review. In January 2024 EQX was assessed as Review and returned to work.

[25] After his return to work in January 2024, EQX had some time off work on ACC and also some time off work on sick leave. However, there is no evidence to connect these absences with the reasons relied on by KiwiRail for the dismissal.

[26] Under the Review classification, EQX was able to perform his normal work until 30 October 2025 when he was assessed by the RMO as Temporarily Unfit for Duty. The assessment notes that EQX was unfit due to poor diabetes control and untreated sleep apnoea. The RMO noted he would discuss with Deb Cartwright and the Chief Medical Officer

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<sup>2</sup> See Bundle of Documents p 105 which shows that assessment as at 22-09-2021, but KiwiRail says that EQX was assessed as Unconditional in November 2021.

(CMO). Ms Cartwright is KiwiRail's rehabilitation manager. Her duties include working with the RMOs and CMO and KiwiRail managers around issues arising under the Standards.

[27] The RMO's evidence is that he phoned EQX on 6 November 2025 and told him that he had assessed him as "Permanently Unfit for Duty" as he was not likely to meet the medical standards for the foreseeable future.

[28] Tharien Fryer was KiwiRail's regional manager of container terminals at the time. Ms Fryer wrote to EQX on 7 November 2025. She advised EQX that the RMO had referred his notes to KiwiRail's CMO who had reviewed the notes and concluded that EQX's condition was such that it prevents him from undertaking his normal duties with any improvement in condition unlikely. The CMO's opinion was that medical retirement may be appropriate. Ms Fryer scheduled a meeting to discuss whether any alternative arrangements were possible.

[29] Included with the letter was information held by KiwiRail on its "Predict" file. The last note dated 6 November 2025 recorded EQX as "Permanently Unfit for Duty".

[30] EQX was represented by his union at the meeting on 12 November 2025.

[31] KiwiRail made a file note of the meeting. Only several points need be mentioned. EQX was told that the RMO and the CMO had reviewed his medical information. Advice confirmed that further testing was not expected to change the medical recommendation. EQX was also told that the only alternative vacancy required medical assessment that EQX would not meet, based on current medical advice. KiwiRail gave EQX an estimate of the medical retirement payment he would receive under the collective agreement.

[32] EQX obtained some blood tests later in November and a Sleep Test in early December 2025. The results were sent to the RMO.

[33] Ms Fryer wrote again to EQX on 4 December 2025 to schedule a further meeting. Ms Fryer said that the medical advice from the RMO and the CMO was that improvement in EQX's condition was "unlikely". On review of the recent blood tests, EQX's timeframe for recovery remained "undetermined". Ms Fryer included a timeline of assessments since September 2023.

[34] The proposed meeting was eventually scheduled for 12 January 2026 to accommodate attendees' availability. Before then, EQX received or arranged for reports of a trial he had arranged with another kind of CPAP mask through a business called EdenSleep. KiwiRail sought and received comment from the RMO and the CMO about the information.

[35] Notes of the meeting indicate that KiwiRail told EQX that the CMO had reviewed the updated information. While acknowledging improvements, the CMO's advice remained that EQX was not medically fit to return to work with no clear or foreseeable timeframe for full medical clearance. For EQX, RMTU sought further specialist review in light of his recent improved conditions.

[36] Following an adjournment, KiwiRail confirmed that it would proceed with medical retirement, with two weeks' notice and final pay. It would provide a confirmation letter.

[37] Ms Fryer wrote to EQX on 13 January 2026. The letter stated that the CMO had recommended that KiwiRail consider EQX for medical retirement, that KiwiRail was guided by that advice and the absence of a clear or foreseeable timeframe for medical clearance. There was also a reasonably comprehensive account of the two meetings, but it is not necessary to set that out.

[38] EQX raised his personal grievance with KiwiRail through his solicitor's letter of 17 February 2026 to Ms Fryer. EQX sought reinstatement and other remedies. He requested copies of all information held by KiwiRail relevant to its decision to dismiss him. It is not necessary to summarise the letter further.

[39] KiwiRail responded in Ms Fryer's letter dated 25 February 2026 but sent on 16 March 2026. Attached then were copies of communications from the CMO.

[40] EQX says and I accept for current purposes that this was when he first saw what had been said between the RMO, the CMO and Ms Cartwright. That information was available to Ms Fryer.

### **Seriously arguable case – personal grievance**

[41] Whether the dismissal was justified involves assessing, objectively, whether KiwiRail's actions and how it acted were what a fair and reasonable employer could have

done in all the circumstances at the time. Consideration must be given to good faith requirements under s 4(1A)(c) of the Employment Relations Act 2000 and the factors set out at s 103(A)(3) of the Employment Relations Act 2000.

[42] KiwiRail will need to establish the grounds for the dismissal under the collective agreement and the Standards.

[43] By 1 December 2025, the RMO observed that the current trend suggested that EQX might be expected to get his diabetes within the Standards if improvement was maintained. In other emails to Ms Cartwright in December 2025 and January 2026, the CMO says that EQX would need an opinion from a sleep physician and specialist review of his diabetes under the Standards. These emails were provided to EQX in March 2026 and EQX says that the views were not shared with him before his dismissal.

[44] In the absence of the opinion and the review referred to by the CMO, it is seriously arguable that KiwiRail will not be able to establish that EQX was incapable of the proper performance of his duties as a result of his medical condition, in accordance with the collective agreement and the law about incapacity.

[45] The CMO assessment that EQX was Permanently Unfit for Duty relied on by KiwiRail, is defined in the Standards. It indicates that the worker does not meet the Unconditional or Review classification, that their condition is permanent (defined as unfit for 12 months or more) and they will not be able to perform their duties in the foreseeable future.

[46] Documents suggest that the Permanently Unfit classification was first mentioned by the RMO in an email to the CMO and Ms Cartwright on 4 November 2025, based on EQX's HbA1c reading and the need for a repeat MWT<sup>3</sup> test because of his 2023 OSA diagnosis, giving an aggregate high-risk profile. Few clinics offered the MWT test. As a result, the CMO advised that EQX was likely to be unfit for "quite some time at least – perhaps the foreseeable future???" Arguably, that suggestion was significantly influenced by the anticipated delay for a MWT test.

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<sup>3</sup> Maintenance of wakefulness test.

[47] In her email to the RMO and the CMO on 10 December 2025, Ms Cartwright said that medical retirement had been confirmed based on the further delays to obtain a review with an endocrinologist/diabetes specialist.

[48] There is no evidence that EQX was referred for the required reviews and assessments for either his diabetes or OSA. Based on these emails, released after EQX's dismissal, I find that it is seriously arguable that KiwiRail had not done enough to confirm that EQX was Permanently Unfit for Duty in accordance with the Standards as at 6 November 2025.

[49] I also find that there is at least an arguable case that the dismissal was predetermined. On 3 December 2025 Ms Cartwright confirmed in an email to the CMO that due to further delays in obtaining the "Specialist's sign-off, the business now wishes to proceed with medical retirement". She sought the CMO's confirmation that this was appropriate. That was just over a month after EQX's Review status changed, preventing him from active duty.

[50] Overall, I conclude that EQX has a seriously arguable case that he has been unjustifiably dismissed.

### **Seriously arguable case – permanent reinstatement**

[51] The remedies potentially available to EQX are those that apply at the time of the dismissal.<sup>4</sup>

[52] EQX is claiming permanent reinstatement. If it is determined that he has a personal grievance, the Authority must provide for reinstatement wherever practicable and reasonable, irrespective of any other remedies.<sup>5</sup>

[53] For reinstatement to be practicable it must be capable of being carried out in action, be feasible and have the potential for the successful reimposition of the employment relationship. Reasonableness involves consideration of the effect of the order on the parties, other affected employees and perhaps third parties who might be affected.<sup>6</sup>

[54] KiwiRail says that permanent reinstatement is not practicable as it cannot be carried out, EQX having been deemed Permanently Unfit for Duty. KiwiRail also submits that it is

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<sup>4</sup> *Allen v C3 Ltd* [2012] NZEmpC 124 at [87].

<sup>5</sup> Employment Relations Act 2000 s 125.

<sup>6</sup> *C3 Limited v O'Brien* [2024] NZEmpC 6 at [16].

completely speculative as to whether he would ever be declared fit under the Standards to resume his duties.

[55] What is speculative is whether the specialist reviews referred to by the RMO and the CMO in their emails with Ms Cartwright, if sought, would have supported EQX's classification by the RMO/CMO as Review or Unconditional.

[56] Practicability and reasonableness would largely turn on whether KiwiRail can substantively justify the dismissal. If KiwiRail lacked sufficient basis to medically retire EQX, he would have a good case for permanent reinstatement unless his health circumstances deteriorated in the meantime. However, at this point, the November and December evidence indicates that EQX's health was improving. A more recent report by his doctor suggests he would be within the Standards if reassessed now.

[57] KiwiRail says that EQX's previous lack of compliance with treatment makes it unlikely that a return to duty could be sustained for a significant period. However, evidence supports the view that EQX now has a treatment option for his OSA with which he can comply and the history of his diabetes show it was sufficiently controlled until recently.

[58] While the medical conditions which have affected EQX tend to worsen with age, the Standards cover that by increased assessment frequency. If the Standards are amended with respect to sleep apnoea, EQX will need to comply. But there is nothing to suggest his current OSA treatment would not meet any amendment.

[59] KiwiRail submits that health and safety for all those on a worksite is usually given precedence over individual rights, that there is a potentially catastrophic impact on others if an incident occurs and that it would potentially be liable if there was a serious incident. However, if EQX was reinstated, it could not cut across the application by KiwiRail of the applicable Standards. EQX could only return to active duty if classified in accordance with the Standards as Review or Unconditional.

[60] KiwiRail says that EQX's conduct would require a reduction in remedies. KiwiRail appeared to deal with this as a no-fault medical retirement under the Standards and the collective agreement. That does not sit easily with the submission that contribution would

prevent reinstatement. At this point, EQX's earlier non-compliance with OSA treatment is not a serious impediment to permanent reinstatement.

[61] I find that EQX has a seriously arguable case for permanent reinstatement.

### **Balance of convenience – favours EQX**

[62] KiwiRail says that the balance of convenience strongly favours it, based on a number of factors.

[63] First, it says that interim injunctions are primarily designed to protect the status quo, in other words EQX not performing duties for it. The status quo is more accurately described as EQX employed by KiwiRail, subject to the application of the Standards. The status quo point favours EQX, not KiwiRail.

[64] KiwiRail also relies on delay. An applicant for interim reinstatement must not delay making and progressing that application.

[65] Here, the interim reinstatement application was particularly supported by access to the communications between the RMO, the CMO and KiwiRail following the Temporarily Unfit classification. These were provided to EQX on 16 March 2026. The application for interim reinstatement was lodged on 2 April 2026. That time was not a delay that should count against interim reinstatement. The applicant has not delayed the progress of this matter since then. Delay does not weigh against EQX's application.

[66] KiwiRail says that damages would be an adequate remedy for EQX but not for it. There are several aspects to this.

[67] First, KiwiRail relies on health and safety, the safety sensitive work situation and statutory obligations and liabilities. I am referred to several judgments.<sup>7</sup>

[68] In *Smith*, the employee was dismissed after the employer found he had not followed an isolation policy. The employee disputed its application to the circumstances. In summary, the employee may have committed a very serious breach of a health and safety policy. Those facts are not analogous to the present case.

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<sup>7</sup> *Smith v Fletcher Concrete & Infrastructure Ltd* [2020] NZEmpC 125 and *C3 Limited v O'Brien* [2024] NZEmpC 6.

[69] In *O'Brien*, the employee had a relatively strong case for his personal grievance claim that drug testing had not been conducted in accordance with standards, but the balance of convenience favoured the employer. In particular, that turned on the health and safety risks which were not capable of being remedied by damages. In *O'Brien*, the employee was interim reinstated to the payroll only.

[70] Here, EQX can only return to active duty as a CTO if he is classified as Unconditional or Review under the Standards. The health and safety risks in *Smith* and *O'Brien*, for which damages would not have been adequate, would not apply in this case.

[71] The second aspect is that, while EQX has given an undertaking as to damages, KiwiRail points to the lack of evidence of his capacity to meet the undertaking. An undertaking needs to cover damages shown to be a natural and direct consequence of the granting of interim reinstatement.<sup>8</sup> The potential liability would appear to be for wages paid during the period of interim reinstatement without work. There is limited information about EQX's overall financial position, but it does not appear to be strong. EQX says he paid down debt of about \$40,000.00 to avoid the possibility of assets being repossessed if he did not obtain work. I take from this that EQX has assets to support borrowing if he is called on to meet his undertaking for damages in due course.

[72] KiwiRail could reimburse any lost wages if EQX was not reinstated meantime but later succeeded with the personal grievance claim. However, on-going stress from being out of employment and the chance that this will lead to some deterioration in EQX's health situation is unlikely to be adequately compensated in damages, if he succeeds. It may prevent permanent reinstatement.

[73] On balance, these factors about damages favour EQX, but not strongly.

[74] KiwiRail says that if EQX is returned to its payroll, he could no longer be regarded as medically retired. In that event, having already received the benefit of a payment for 261 days, on being restored to its payroll, EQX would in effect be double-dipping. KiwiRail says that EQX would have to repay the medical retirement payment, but notes that would create complexity.

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<sup>8</sup> *Vegepod v Lowe* [2025] NZEmpC 76.

[75] Interim reinstatement is not a finding that EQX was not entitled to the medical retirement payment. That will turn on the substantive outcome and the assessment of remedies, assuming a grievance is established then. The relevance of the payment at this point is that EQX cannot advance his case for interim reinstatement on a hardship basis. The fact of the medical retirement payment does not prevent interim reinstatement.

[76] KiwiRail says that interim reinstatement would have to include a series of conditions for EQX to be reinstated to active duty. That is based on the assessments and tests required under the Standards for EQX to be classified as Unconditional or Review and able to return to duty. KiwiRail says that such conditions would make the Authority's order an interim mandatory injunction. Courts have been reluctant to make such orders, except in special circumstances, but none exist here.

[77] It is not necessary to include any conditions with an interim reinstatement order at this point. Both EQX and KiwiRail can no doubt discuss and would co-operate with each other to take steps under the Standards, with a view to resolving the employment relationship problem.

[78] I find that the balance of convenience supports interim reinstatement.

### **Overall justice**

[79] KiwiRail says that overall justice favours it. For EQX to be reinstated, without evidence of having been adequately tested and assessed, would undermine its systems established to enable it to comply with its statutory obligations and responsibilities.

[80] The difficulty is that EQX can only access testing and assessment under those systems if he is an employee of KiwiRail. Interim reinstatement brings EQX within that system.

[81] Standing back, EQX has a seriously arguable case for both a personal grievance and permanent reinstatement. Reinstatement is the primary remedy. The balance of convenience favours him, but not strongly. The health and safety risks advanced by KiwiRail would be managed by the application of the Standards during the period of interim reinstatement.

### **Conclusion**

[82] EQX's claim for interim reinstatement succeeds.

[83] Pending further order of the Authority and in reliance on EQX's undertaking in relation to damages dated 2 April 2026, KiwiRail Limited is to reinstate EQX to his position as a Container Terminal Operator, by no later than Monday 15 June 2026.

[84] The foregoing order is made in reliance on s 127 of the Employment Relations Act 2000. It is not necessary to include any conditions as the National Standards for Health Assessment of Rail Safety Workers will apply.

[85] At this point a substantive investigation meeting could be scheduled for September with the prospect of a final determination before Christmas. Counsel will be contacted shortly to arrange a case management conference.

[86] Costs are reserved.

Philip Cheyne  
Member of the Employment Relations Authority