

**NOTE: This determination contains an order prohibiting publication of certain information referred to at paragraph [12] below.**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 86  
3327580

BETWEEN	DBY Applicant
AND	SLN Respondent

Member of Authority:	Andrew Gane
Representatives:	Simon Greening, counsel for the Applicant Stephen Corlett, counsel for the Respondent
Investigation Meeting:	By submissions hearing 30 November 2024
Submissions received:	2 December 2024 from Applicant 6 December 2024 from the Respondent
Determination:	18 February 2025

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Non-publication order**

[1] SLN has, pursuant to s 10(1) Schedule 2 of the Employment Relations Act 2000 (the Act), applied for a permanent non-publication order prohibiting the publication of its name, the name of the school, and any identifying details of any of the school's former

or current staff referenced in the information filed before the Authority on the basis that publication would have the potential to prejudice and damage the reputations of those who are named.

[2] SLN submits that in addition to reputational harm, publicly naming those involved will serve to further aggravate their distress and anxiety which has resulted from DBY making serious and wide-ranging allegations against them.

[3] SLN submits, in the alternative, that if permanent non-publication orders are not granted, the school's name, and the names of its current and former employees be anonymised, and that "interim" non-publication orders be made at this preliminary stage, pending further order of the Authority (including completion of the Authority's Investigation Meeting).

[4] DBY supports the grant of non-publication orders for the parties on an interim basis, until the matter is revisited at the substantive investigation meeting.

[5] In *MW v Spiga Ltd*<sup>1</sup> the Employment Court held that the existing presumption of open justice should only be departed from where sound reasons exist. This affirms the existing leading authority of the Supreme Court in *Erceg v Erceg*<sup>2</sup>. The majority in *Spiga* set out a twofold test:

(1) Firstly, there must be "reason to believe that the specific adverse consequences could reasonably be expected to occur."

(2) Secondly, the "Authority or Court must consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case." The Court said this part is a weighing exercise and that equity and good conscience may be involved.<sup>3</sup>

[6] The Court also suggested the following "example" matters may be relevant balancing factors:

- (a) the circumstances of the case;
- (b) the interests of the person or entity applying for a non-publication order;
- (c) the interests of the other party or parties to the litigation;
- (d) the interests of any third party;

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<sup>1</sup> *MW v Spiga Ltd* [2024] NZEmpC 147

<sup>2</sup> *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [13].

<sup>3</sup> Above n 1 at [88] and [89].

- (e) the public interest, including the rights of media;
- (f) any further issues of equity and good conscience; and
- (g) tikanga and its principles, values, or concepts.<sup>4</sup>

[7] The circumstances of this case include that SLN is a relatively small employer, and DBY, the school and the school witnesses would be identifiable if SLN was named.

[8] An order of non-publication on an interim basis would likely to do the least amount of damage to the relevant relationships and provide the best basis for restoring relationships if reinstatement is ultimately ordered.

[9] The principles of equity and good conscience clearly favour the making of the orders sought, particularly given the nature of the concerns identified by SLN's witnesses, their interests and status as non-parties, the potential ongoing relationship issues involved, and the stage at which the proceedings are at.<sup>5</sup>

[10] I find that at this interim stage in proceedings based on untested evidence, that the circumstances of the breakdown of the employment relationship and allegations of mismanagement tend to favour non-publication as sought, but only on an interim basis. The Authority expects further detailed submissions should this matter proceed to an investigation meeting on a substantive basis.

[11] Pursuant to Clause 10 of schedule 2 of the Act, I grant an order prohibiting the publication of the identity of DBY, SLN, the school and its witnesses to this employment relationship problem. They will be identified only by randomised initials which have no correlation to their actual names and any information referencing them is prohibited from publication.

[12] The interim non-publication order will be reviewed at the substantive investigation meeting.

### **Employment relationship problem**

[13] On 14 April 2022 SLN employed DBY. On 19 September 2024, DBY's employment ended by way of dismissal.

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<sup>4</sup> *MW v Spiga Ltd* [2024] NZEmpC 147 at [94].

<sup>5</sup> *DQJ v commissioner of Inland Revenue* 481 [2024] NZEmpC 178 at [25];

[14] On 26 September 2024 DBY lodged a statement of problem with the Authority in which DBY alleged that DBY was unjustifiably dismissed. In DBY's statement of problem, DBY applied for interim reinstatement, supported by an affidavit and an undertaking as to damages.<sup>6</sup>

[15] SLN states that DBY was justifiably dismissed for serious misconduct and incompatibility, and opposes DBY's application for interim reinstatement.

[16] This determination deals only with DBY's application for interim reinstatement. The investigation of DBY's substantive claims will be held in due course.

### **The Authority's Investigation**

[17] On 31 October 2024, I held a case management conference with the representatives to set a timetable for DBY's application for interim reinstatement. I advised the parties of the Authority's intention to determine the application on the papers with the parties' representatives speaking to submissions.

[18] In terms of the documents lodged with the Authority, an affidavit from DBY was provided in support of their interim reinstatement application and a further affidavit in reply. On behalf of SLN a statement in reply and affidavits of six witnesses and supporting documents were lodged in the Authority.

[19] During the preliminary investigation meeting on 30 November 2024 submissions were heard from the parties' representatives.

[20] As permitted by s 174E of the Act, I have not recorded all of the affidavit evidence provided and submissions given, but I have stated relevant findings of fact and law that I am required to assess at this interim stage to allow me to express a conclusion on whether the interim reinstatement order sought should be granted or declined

[21] While a significant amount of evidence has been filed, it remains untested. I am not able to resolve evidential matters in dispute between the parties at this early stage of the proceedings. That is the function of the substantive investigation meeting.

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<sup>6</sup> Employment Relations Act 2000, s127.

## **The law relating to interim injunctions applications**

[22] The Authority is a creature of statute and under s 127 of the Act it may, if it thinks fit, order interim reinstatement for an employee pending the hearing of their personal grievance. In considering such applications, the Authority must apply the law relating to interim injunctions and having regard to the object of the Act which is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship.

[23] The issues to be determined at this interim stage are:<sup>7</sup>

- (a) Is there a serious question to be tried in respect of DBY's claim and the relief sought by DBY?
- (b) Where does the balance of convenience lie pending a substantive investigation and a final determination of DBY's claim?
- (c) Where does the overall justice of this case lie from now until the completion of the substantive investigation and issuing of a final determination?

### **A serious question to be tried**

[24] The threshold for a serious question is that the claim is not frivolous or vexatious. In deciding if DBY's claim is not frivolous or vexatious I must assess the evidence and the submissions from the parties.<sup>8</sup>

[25] This assessment must be applied to both DBY's claim, and the relief sought. I must assess whether there is a serious question to be tried that:

- (a) DBY was unjustifiably dismissed.
- (b) DBY should be permanently reinstated.

### **Background**

[26] Before considering whether DBY has a serious question to be tried for unjustifiable dismissal and permanent reinstatement, it is necessary to set out in some detail the relevant facts in order to put the parties' submissions in their proper context.

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<sup>7</sup> *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59; and *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36

<sup>8</sup> *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

[27] As stated above, DBY started working at SLN's school on 14 April 2022 in a full-time senior role. DBY was a member of the executive leadership team (ELT). DBY was employed pursuant to an individual employment agreement that was based on terms as set out in the Support Staff and Schools Collective Agreement (SCA).

[28] DBY reported to DHW. DBY's team and various managers reported to DBY.

[29] Between November 2022 and June 2023 DBY had proposed changes to address issues that DBY perceived within the team. The school put in place additional support staff to assist DBY, made changes to the scope of DBY's role upon request and removed some duties on a temporary basis.

[30] On 26 June 2023, SLN agreed with DBY that these temporary measures would remain in place to support DBY through the following school term.

[31] On 15 August 2023, DHW met with DBY and advised that due to the issues within the team, and the recent significant growth of the school roll, it had engaged Resolve Consulting (Resolve) to review its operations and to provide it with advice about what changes could assist moving forward.

[32] DHW advised DBY that SLN would not be looking to reduce the number of roles overall and would engage in a feedback process with staff prior to making any decisions about next steps.

[33] In August 2023, DBY met with Resolve and provided their views on the issues arising in the team. DBY's feedback was incorporated into the report.

[34] On 6 September 2023, Resolve submitted its report to the school. Its primary recommendation was that the senior role be split into two positions. Its recommendation was based on its view that because of the size of the school the current span of the senior role was unsustainable for a single person.

[35] On 14 September 2023, SLN wrote to DBY, providing a copy of the Resolve report and advising that it intended to initiate a restructuring process in consultation with DBY. SLN advised that the Resolve report included a number of recommendations, including to change the structure of some roles, a potential outcome of this may be a change to DBY's tasks and responsibilities, and that it was going to follow the process set out in Part 10 of the SCA (relating to restructuring, and surplus staffing).

- [36] On 18 September 2023, DBY provided feedback on the Resolve report.
- [37] On 20 October 2023, SLN met with DBY setting out its proposal in detail. This included that it was proposing that the senior role be disestablished and two new positions created.
- [38] On 8 November 2023, DBY's representative raised a personal grievance regarding the restructure.
- [39] On 17 November 2023, SLN issued its outcome letter, proceeding with its proposal, offering DBY redeployment into a new role, and offering to make payment of redundancy compensation.
- [40] DBY withdrew the personal grievance on 22 November 2023.
- [41] On 24 November 2023, DBY accepted a new role and commenced working in the role on 28 January 2024.
- [42] On 4 March 2024, DBY's new representatives raised a further personal grievance on DBY's behalf. In the letter DBY also raised a bullying complaint against DHW and BCA.
- [43] Between 6 March and 16 April 2024, the parties through their legal representatives unsuccessfully attempted to resolve outstanding employment issues between them.
- [44] On 29 April 2024, SLN received a letter from members of the ELT making complaints against DBY..
- [45] The ELT alleged that they considered they no longer had a compatible working relationship with DBY and had serious concerns about DBY's conduct.
- [46] On 8 May 2024, DBY's representative was provided with a copy of SLN's investigation report into DBY's bullying allegations. After speaking with relevant witnesses, and consulting DBY regarding DBY's complaints, the report concluded that there was no evidence of bullying and therefore no further investigation or action was required.
- [47] In June 2024 SLN carried out an investigation into DBY's conduct. Interviews were conducted with members of the ELT and employees.

[48] On 21 June 2024, DBY raised a further personal grievance raising allegations of bias in the internal investigation.

[49] On 8 July 2024 DBY made further submissions and provided further evidence to refute the allegations against them.

[50] On 13 August 2024, the investigators issued their final report, in which they made findings that DBY had engaged in serious misconduct and that DBY's behaviour had resulted in incompatibility with the ELT. SLN reviewed and approved the report on 19 August 2024. The findings were then sent to DBY through DBY's third representative on 22 August 2024.

[51] On 9 September 2002, SLN met with DBY and their representative and heard DBY's further feedback on potential outcomes. DBY proposed that DBY would accept a lesser role, not report to the ELT or DHW, but rather report to an assistant director.

[52] On 10 September 2024, DBY sent a proposal directly to all members of SLN.

[53] On 12 September 2024, SLN met to discuss the appropriate possible disciplinary outcome, and came to a preliminary decision to dismiss DBY as a result of the established serious misconduct, and due to the resulting severe incompatibility. SLN stated that they had considered alternatives to dismissal, including each of DBY's proposals, but ultimately did not consider any of them workable or appropriate, including because of the ELT's and a senior staff member's stated positions should DBY return to work.

[54] On 16 September 2024, SLN wrote to DBY's representatives confirming its preliminary decision to terminate DBY's employment with immediate effect and setting out its associated supporting reasons. It requested any feedback by 17 September 2024.

[55] On 17 September 2024, DBY submitted a 32-page response to SLN's proposed disciplinary sanction, challenging the investigation itself and SLN's findings.

[56] On 19 September 2024, and after considering DBY's further feedback SLN confirmed it would proceed to terminate DBY's employment.

[57] On 26 September 2024 DBY raised a personal grievance for unjustified dismissal and lodged an application for interim reinstatement.

## **Serious question to be tried**

[58] The first question for consideration is whether there is a serious question to be tried that DBY was dismissed unjustifiably and that DBY will be permanently reinstated. In doing so I must decide whether DBY's claims are more than frivolous or vexatious.

### *Analysis for unjustifiable dismissal*

[59] Section 103A of the Act sets out the test for justification which requires an objective assessment of whether SLN's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. An employer's decision to dismiss an employee must be, when examined objectively, substantively justifiable and procedurally fair for it to survive scrutiny by the Authority or the Employment Court.

[60] DBY referred to several grounds as to why they had an arguable case for unjustified dismissal. In summary, DBY's arguments fell into the following categories:

- (a) The disciplinary investigation carried out by SLN was inadequate and procedurally unfair.
- (b) The decision to dismiss was pre-determined and the outcome of the disciplinary process was not substantively justified.

### *The disciplinary investigation carried out by SLN was inadequate and procedurally unfair?*

[61] DBY submits the complaints made against them were in response to DBY raising concerns.

[62] DBY submits the subsequent disciplinary investigation was not carried out in a fair and impartial manner, because by the time the complaints were made and the investigation commenced, DBY had already raised personal grievances and other claims against SLN, and a statement of problem had been lodged in the Employment Relations Authority.

[63] DBY claims that SLN did not engage an independent investigator despite SLN being involved in the investigation to DBY's bullying complaints and party to proceedings in the Employment Relations Authority. DBY submitted that an

independent investigation, not carried out by representatives of SLN, could be the only basis for relying on the findings made.

[64] DBY submits that the outcome of the disciplinary investigation was focussed primarily on incompatibility and “findings about the complaints” were predetermined from the outset of the investigation, with the final report going beyond making findings of fact and referring to case law concerning incompatibility.

[65] DBY submits that by April 2024, certain members of the ELT had “had enough”. This much is clear from a member’s letter of complaint, dated 11 April 2024 which stated, “I request a resolution to the dispute, that results in the following: termination of [DBY’s] employment with the school.”

[66] DBY asserts it is unreasonable to rely on the findings set out within the investigation report in light of the procedural and substantive issues arising.

[67] SLN submitted it genuinely considered whether it was necessary for an independent investigator to be appointed, but determined that it was not necessary in the circumstances. SLN submitted that as decision maker it kept an open mind throughout the investigation.

[68] SLN submits that SLN carried out a full and fair investigative process and the disciplinary investigation’s findings upheld most of the allegations of misconduct.

*The decision to dismiss was pre-determined and the outcome of the disciplinary process not substantively justified*

[69] DBY submits that summary dismissal should be reserved for the most serious kinds of misconduct within employment. DBY had been employed since April 2022 and there was no evidence of any previous formal disciplinary action having been taken against DBY.

[70] DBY submits that SLN did not genuinely consider alternatives to dismissal.

[71] SLN has argued that the dismissal was procedurally sound and substantively justified. It stated DBY’s conduct constituted serious misconduct and significantly impaired SLN’s trust and confidence in the employment relationship, so as to justify termination of DBY’s employment.

[72] SLN submitted it had genuinely considered whether any other sanction rather than dismissal was appropriate in the circumstances, including by considering the alternative proposals submitted by DBY. Ultimately it concluded the alternatives to dismissal were not appropriate for reasons which included the seriousness of the proven allegations, impact upon staff and DBY's colleagues, and potential ramifications for the school.

[73] SLN submits that dismissal for serious misconduct was a fair and reasonable outcome in the circumstances.<sup>9</sup>

[74] Based on all the information that I have before me, I accept that DBY has a case that SLN, with respect to the disciplinary process they undertook, did not act as a fair and reasonable employer could have done and this may render DBY's dismissal unjustified. I am satisfied DBY's claims, based on the affidavit evidence, are claims that are more than just frivolous or vexatious.

*Analysis for permanent reinstatement?*

[75] In order to establish that there is a serious question to be tried in respect of the claim for reinstatement, I need to be satisfied that there is an argument, that is not frivolous or vexatious, that permanent reinstatement of DBY is practicable and reasonable.

[76] The test for practicable and reasonable has been discussed and analysed by the Court of Appeal.<sup>10</sup> Practicable means assessing whether reinstatement can be achieved successfully, noting that this it is not as simple as assessing if it can happen. Reasonable is an assessment of what is fair and right in terms of the parties' cases and an assessment of the effects of an order on the parties and others, i.e., whether it should be ordered.

[77] DBY submits that the employment relationship can be successfully reimposed. DBY accepts that the relationship with the ELT needs to be rebuilt and has made several submissions confirming DBY's desire to attend mediation with the ELT to rebuild the relationship. DBY has stated they are very keen to engage with the ELT and DHW.

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<sup>9</sup> *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60

<sup>10</sup> *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School (NZEI)* [1994] 2 ERNZ 414 (CA); and *Lewis v Howick College Board of Trustees* [2010] NZCA 320

[78] SLN submits it made the decision to terminate DBY's employment because it had lost trust and confidence in DBY, in that there was significant incompatibility between DBY and the ELT. The investigation also found that as a result of DBY's actions, including that four staff members of the ELT and another employee, confirmed that they would either tender their resignations, or seriously reconsider their employment with SLN, if DBY was to continue in employment.

[79] SLN submits that DBY failed to acknowledge or take any responsibility for DBY's conduct and contribution to the breakdown in DBY's relationships with the members of the ELT.

[80] SLN submits that the new role is a high-trust role, and without a high degree of trust, reinstatement to it is neither reasonable nor practicable.

[81] While I am yet to question DBY and SLN's witnesses regarding their evidence, based on a broad impression of what is before me, I see difficulties in DBY returning to their role.

[82] I agree it is not possible to reinstate a relationship of mutual good faith and trust and confidence in circumstances where one party steadfastly refuses to acknowledge the others point of view.

[83] DBY has a relatively weak case of permanent reinstatement. Where an employee acts against their former employer's interests, and demonstrates a high level of distrust in their former employer, it cannot be seriously arguable that they will be reinstated on a permanent basis.<sup>11</sup>

[84] There is, however, a remote possibility on the facts that it could be both practical and reasonable for DBY to be reinstated to their role with SLN. Reinstatement pending the outcome of the investigation places the parties in the position they would have been in but for the dismissal – balancing the competing tensions of complaints and an investigation in an ongoing work environment. Although DBY's case for permanent reinstatement is relatively weak, it is not frivolous or vexatious. In the circumstances I find that there is a serious question to be tried in respect of the reinstatement of DBY to their role at SLN.

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<sup>11</sup> *Kavallaris v Inframax Construction Limited* [2024] NZEmpC 212 at [89] to [94] [RBOA at 3]

*Conclusion on the question of serious question to be tried*

[85] Based on the evidence before me and considering all the relevant issues, my assessment at this early stage is that there are serious questions to be tried in respect of DBY's unjustifiable dismissal claim and for reinstatement.

**Balance of convenience**

[86] I move on to consider the balance of convenience, which requires an assessment regarding the impact on each party if interim reinstatement is granted or not. The Supreme Court has held that the merits of the case (in so far as they can be ascertained at the interim injunction stage) may be relevant in assessing the balance of convenience and the overall interests of justice.<sup>12</sup>

[87] There is a serious question to be tried in relation for unjustified dismissal, and for permanent reinstatement, the merits in relation to both are arguable. This weighs in favour of interim reinstatement when assessing where the balance of convenience lies.

[88] The balance of convenience weighs the potential effect on DBY if they were declined interim reinstatement against the potential effect on SLN if interim reinstatement were granted. This comparison is sometimes referred to as considering the relative hardships to the parties and any relevant third parties.<sup>13</sup> The period under assessment is from the date of this determination on the interim issue until the date of issue of the Authority's substantive determination on DBY's personal grievance claims.

[89] I take into account that DBY wishes to return to work. I accept that the longer DBY is not working, the harder it will be for DBY to reintegrate into the workforce. DBY has advised that the current proceedings have affected DBY's ability to find work in DBY's chosen field.

[90] DBY has provided details of DBY's current financial situation. DBY has stated that SLN's actions have had a severe emotional and financial impact on DBY's whole family. DBY is seeking to be reinstated into their former role or another similar role at SLN, or could be reinstated on a payroll only basis until a substantive outcome is made.

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<sup>12</sup> *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

<sup>13</sup> *Angus v Ports of Auckland Limited* [2011] NZEmpC 125 at [56].

However, DBY advises they have the ability to repay any salary claims if DBY is unsuccessful in their application for permanent reinstatement.

[91] SLN submits DBY is not in a financial position to meet undertakings as to damages and that if DBY was ordered to be reinstated to the payroll, this would have potentially devastating financial consequences for the school.

[92] I accept that the intervening period would not be without some financial pressure, but, if DBY was successful with all or some of their grievance claims, this could be adequately addressed by awards of lost wages and compensation.

[93] Finally, there is the submission that DBY's return would cause significant disruption among their colleagues and management. SLN says that there are allegations of incompatibility between DBY and school staff. SLN argued that collegiality among school staff is vital for the organisation to function smoothly and to serve its communities effectively.

[94] Weighing up the arguments of both sides I find that the disruption that would occur as a result of DBY's return to work would have been for nothing if they did not succeed with their application for permanent reinstatement.

#### *Conclusion on the balance of convenience*

[95] Weighing up this assessment, I find that the balance of convenience weighs in favour of SLN's argument against the granting of reinstatement.

#### **Overall justice**

[96] I go on to consider the overall justice of the case. The Court of Appeal stated that the overall justice assessment is essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and balance of convenience.<sup>14</sup>

[97] There are serious questions to be tried in respect of DBY's claims for unjustifiable dismissal and permanent reinstatement, however the balance of convenience does not favour granting DBY interim relief.

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<sup>14</sup> *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA at [47]

[98] Standing back and assessing all the factors, I find that due to the potential for disruption to the school, it is not in the interests of justice for DBY to be reinstated.

*Conclusion on the overall justice*

[99] The overall justice of this case does not favour reinstatement.

**Should DBY be reinstated?**

[100] As outlined above, whilst I am satisfied that there are serious questions to be tried in respect of DBY's claims for unjustifiable dismissal and permanent reinstatement, the balance of convenience weighs in favour of SLN and the overall interest of justice also favours SLN. As a result, I decline DBY's application for interim reinstatement.

[101] DBY's application for interim reinstatement is unsuccessful.

**Next steps**

[102] Having not granted the interim reinstatement application, the next step is for the Authority Officer to set down a case management conference to confirm the investigation meeting date. Parties have attended mediation, however, if further mediation would assist then a direction can be made.

**Costs**

[103] Costs are reserved pending the outcome of the substantive investigation of DBY's grievance application.

Andrew Gane  
Member of the Employment Relations Authority