Attention Is Drawn To The Order Prohibiting Publication Of Certain Information Referred To In This Determination

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE

[2025] NZERA 345
3375923

	BETWEEN	TNZ Applicant
	AND	JQB Respondent

Member of Authority:	Philip Cheyne
Representatives:	Naoimh McAllister, counsel for the Applicant Tim Mackenzie, counsel for the Respondent
Investigation Meeting:	6 June 2025 by AVL
Date of Determination:	17 June 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] TNZ worked for JQB from March 2023 but was dismissed without notice on 23 April 2025.

[2] TNZ raised personal grievances about the dismissal with JQB on 30 April 2025. By this application, TNZ seeks orders for interim reinstatement and non-publication of their name. Permanent reinstatement and other personal grievance remedies are also sought.

The Authority's investigation

[3] The matter was accorded urgency and during the case management conference arrangements were made for JQB to lodge a statement in reply and supporting affidavits and for TNZ to lodge affidavits strictly in reply.

[4] JQB in its reply set out intended counterclaims against TNZ for special damages and a penalty for breach of duties of confidence, fidelity and good faith.

[5] An investigation meeting was set for both parties to make submissions, as is the Authority's standard approach to investigating and determining a claim for interim reinstatement claim.

[6] Findings in this determination are based on the untested affidavits in support and in opposition, attached documents and counsels' submissions and are solely for the purpose of resolving the applications for interim reinstatement and for non-publication. Final findings must await a substantive investigation meeting.

What happened

[7] JQB is a law firm. TNZ's employment agreement is for a "Trust Account Administrator', reporting to one of the firm's partners. The job description lists "Administration/Reception Duties" and "Trust Account Duties".

[8] TNZ's employment agreement permitted JQB to summarily dismiss them following a fair process if JQB concluded that the employee had engaged in serious misconduct. That was behaviour that fundamentally compromised the employer's trust and confidence in the employee, such as (without limitation) disclosure of confidential information or a serious breach of the implied duty of fidelity.

[9] TNZ worked for JQB for about 2 years and had worked for another local law firm ("the other firm") as a receptionist beforehand. What follows was the only problem in the employment relationship between TNZ and JQB.

[10] On 24 February 2025 and 18 March 2025,[1] JQB met with a solicitor who was employed by the other firm to discuss recruiting her. The meetings were at a local café. They were diaried in the Outlook calendar of one of the partners. Her calendar is available for several JQB staff members (including TNZ) to view.

[11] On about 21 March JQB's partners were told by their practice manager that there was some chat amongst JQB's staff about the solicitor from the other firm potentially being employed by JQB. JQB sent an email to all staff headed "CONFIDENTIALTY REMINDER". Staff were asked to keep confidential any information regarding employment.

[12] One of JQB's partners contacted the solicitor to let her know about the discussion in JQB's office. The solicitor told the partner that she had not mentioned the matter to anyone, but had received an email from one of her firm's partners who wanted to speak with her, which she thought was out of the blue.

[13] JQB's partners investigated but were not able to determine precisely how information about their interest in employing the solicitor became known within JQB. A staff member (not TNZ) who had participated in discussing the information with others within JQB was "reminded of expectations around discretion".

[14] On 27 March 2025, the solicitor while still employed by the other firm was told by the firm's practice manager that TNZ had left an anonymous note in the practice manager's home letter box. The solicitor then spoke to one of JQB's partners and told her that a note had been received by the practice manager, who thought the note was from TNZ.

[15] On 1 April 2025, the solicitor received a copy of the note from the practice manager. The practice manager also told the solicitor that TNZ knew the practice manager's home address.

[16] The same day, the solicitor gave a copy of the note to one of JQB's partners and told her that she and the practice manager both thought it looked like TNZ's handwriting. The JQB partners say that they too considered the note looked like TNZ's handwriting.

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[1] The date for the second meeting is given as 21 March in one of JQB's affidavits.

[17] JQB wrote to TNZ on 2 April 2025. The letter raised allegations of serious misconduct and set a meeting to discuss the matter. It included a copy of the note and stated:

> …
> As you know from an email sent to all staff by the Directors on 21 March 2025, it has come to light that employee(s) may have directly or indirectly disclosed and/or shared confidential information. That disclosure of confidential information relates to an offer of employment that we have recently made to a new solicitor.
> Under our employment agreements this constitutes serious misconduct in two ways. …
> You are a person in our firm who we believe maintains close links with previous colleagues at [the other firm]. As evidence of our suspicions, we attach a copy of a handwritten note [the solicitor] has provided to us, which was sent to [name], [the practice manager] of [the other firm]. This appears to be very similar to your handwriting.
> …

[18] The hand-written note said:

> [Solicitor's name] has been meeting [JQB Partner's name] at the [café's name] for job discussions
> Shes been seen twice in the last 3 weeks.

[19] There are conflicts in the evidence about what happened when one of the JQB partners gave the letter to TNZ. In any event, TNZ left the office.

[20] TNZ instructed a lawyer as a representative. The lawyer sent an email to JQB to advise that she was instructed, to reschedule the meeting and to request that TNZ remain on discretionary paid leave meantime. JQB agreed to the requests.

[21] JQB engaged a forensic document examiner to compare the handwriting in a copy of the note with the handwriting in copies of three documents relating to JQB's administrative or trust account work. In her report dated 6 April 2025, the examiner stated that she had found similarities in the three documents and took them as the reference writing of one person. The examiner said she had found a number of similarities between the note and the reference writing. Her opinion was the writer of the reference material "most probably" completed the note. The examiner expressly noted limitations, as only copies had been provided.

[22] There was a meeting on 7 April 2025 between JQB's partners, TNZ and their representative. JQB provided a copy of the examiner's report. There are some evidential disputes about what was said.

[23] Later the same day, JQB sent the representative a timeline and file notes of JQB's exchanges with the solicitor.

[24] TNZ's representative wrote to JQB on 9 April 2025. Issues about JQB's actions to that point were raised and specific questions were asked.

[25] JQB replied on 10 April 2025. JQB set out why they considered it reasonable to conclude that TNZ was responsible for writing the note and delivering it to the other firm's practice manager and went on to say why it considered it amounted to serious misconduct. TNZ was given the opportunity to comment on the potential disciplinary outcome by 14 April 2025.

[26] The representative responded in a letter dated 15 April 2025. Issue was taken with JQB's investigation and conclusions.

[27] JQB replied on 16 April 2025. It gave an explanation on some points, commented on some and said that answers had been provided earlier on others. JQB considered that the note must have been provided sometime after the second meeting but before it was raised with the solicitor.[2] JQB said that TNZ was back at work on 20 March 2025, following some sick leave. TNZ was given an opportunity to provide further information but JQB stated it was not looking to engage in further debate on the facts and its conclusions.

[28] TNZ's representative responded comprehensively later the same day. The representative also foreshadowed a personal grievance and a claim for interim reinstatement if JQB decided that summary dismissal was the appropriate outcome.

[29] On 23 April 2025, JQB stated it had concluded that TNZ was responsible for creating and delivering the note sometime after the second meeting and before it was raised with the solicitor by the other firm (her employer). It considered this an act of disloyalty to JQB, a breach of confidence that was required for the discussions with the solicitor, it had placed the solicitor in an awkward position with the other firm and had potentially brought JQB into disrepute. TNZ was the "trust account manager" with responsibility for client money and

[2] Given as between 18 March and 21 March or perhaps 27 March at the latest.

compliance reporting, done in strictest confidence. JQB needed to have the utmost trust and confidence in TNZ.

[30] In its letter JQB said:

> We have also considered earlier responses (your letter of 15 April 2025) that questioned whether this conduct could be serious misconduct. That argument completely ignores what has actually occurred and the role that TNZ holds. For a trust account manager to engage in this sort of subterfuge and deliberate act, knowingly acting adversely toward their employer, is to us a significant situation of serious misconduct. It is the sort of conduct that might be expected to be carried out by an aggrieved former employee, not an employed trust account manager of a law firm.

Interim reinstatement – Applicable principles

[31] The Authority has power to order interim reinstatement, subject to any conditions considered appropriate. In exercising the power, the Authority must apply the law relating to interim injunctions, having regard to the objects of the Employment Relations Act 2000.[3]

[32] In summary, TNZ must show that there is a serious question to be tried in relation to the claim of unjustified dismissal and in relation to the claim of permanent reinstatement. Consideration must be given to the balance of convenience and the impact on the parties of granting or refusing an interim order. Finally, I must consider the overall interests of justice.

[33] TNZ's personal grievance claims were raised in correspondence from the representative on 30 April 2025.

TNZ has an arguable case for unjustified dismissal

[34] Whether the dismissal was justifiable must be determined objectively by determining whether JQB's actions and how it acted were what a fair and reasonable employer could have done in the circumstances at the time. The Authority must consider whether, before the decision to dismiss: did JQB sufficiently investigate its allegations; did JQB raise its concerns with TNZ; did JQB give TNZ a reasonable opportunity to respond; and did JQB genuinely consider TNZ's explanation. That also involves consideration of whether JQB provided

[3] Employment Relations Act 2000 s 127.

access to relevant information and an opportunity for TNZ to comment on it before the decision to dismiss.

[35] TNZ says that JQB conflated its investigation process with the disciplinary process. In response, JQB refers me to *Western Bay of Plenty District Council v McInnes*.[4] In that case, the court considered that the label given to each part of a process was unlikely to be of significant moment, provided the steps summarised above had been taken.

[36] The significant point for present purposes is whether JQB pre-determined its decision or genuinely considered TNZ's explanation that they did not write the note. By 27 March 2025, the partners of JQB had been told by the solicitor that her opinion was that it appeared to be TNZ's handwriting. The solicitor said that her practice manager also considered it was TNZ's handwriting.

[37] It is at least weakly arguable that a fair and reasonable employer could have done more to investigate when the note was delivered to the other firm's practice manager. JQB considered that the window was between 18 – 21 March or 27 March at the latest. If the date had been identified as 18 or 19 March 2025, TNZ's circumstances would have supported their position that they were not responsible for the note.

[38] I note TNZ's evidence about the electronic systems used in the other firm's office and the question mark about how they could identify TNZ's handwriting two years after the employment in a "paperless" office had ended. TNZ may be able to establish in due course that JQB had not investigated that aspect of the allegation. However, as part of that, consideration will have to be given to whether it could have been reasonable in the circumstances for JQB to seek information from the other firm's practice manager.

[39] The partners too say they thought the note was "very similar" to TNZ's handwriting. There is a submission that they formed the view from the outset that TNZ wrote the note. TNZ may be able to establish in due course that they predetermined the point. Against that, one might expect partners in a law firm to be able to recognise the handwriting of staff whose handwriting they would see as part of their daily work.

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[4] *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36.

[40] The other difficulty for TNZ is the forensic document examiner's report. The report lends support to the conclusion that the note was written by TNZ. By way of challenge, there is a submission drawing attention to the limitation mentioned in the report, making it unreliable. Nonetheless the examiner still concluded that the person who wrote the reference samples probably also wrote the note. Given TNZ's unwavering denial that they wrote the note, it is weakly arguable that a fair and reasonable employer could have investigated further by providing original samples for the document examiner to compare. Similarly, it is arguable that a fair and reasonable employer could have given the examiner samples from other staff members, together with TNZ's samples.

[41] There is a submission that the examiner's report is inadmissible. That is unlikely. The report is part of the circumstances in which JQB made its decision. The questions will be whether a fair and reasonable employer could have investigated further, or what reliance a fair and reasonable employer could properly have placed on the report given the limitations.

[42] There is a dispute in evidence about whether TNZ said on 7 April 2025 that they already knew about the solicitor's job offer from office "chit chat" (JQB's evidence), or said that the 2 April 2025 letter was when they first learnt that the solicitor was being considered for employment (TNZ's evidence). If the latter, JQB has not explained why they nonetheless rejected that part of TNZ's explanation. It is arguable that TNZ's evidence will be preferred.

[43] To some extent the case for TNZ is that the conduct of writing and delivering the note could not amount to serious misconduct. However, the difficulty is that if the writer was TNZ, the source of knowledge about "job discussion" mentioned in the note could only be the partner's diary, the partner's email to the solicitor or what had been "shared and discussed amongst staff" prompting the 21 March 2025 email. JQB could reasonably say that the information was confidential to JQB, that they owed an obligation of confidentiality to the solicitor at the time and that disclosure of the information to the solicitor's employer was inconsistent with the duty of fidelity.

[44] It is arguable, at least weakly, about disparity of treatment between TNZ and the other employee found to have participated in discussing the information with others. However, it

may be that the conduct was materially different so as to justify the different decisions by JQB.

[45] On 10 April 2025, JQB said that the conduct had an "international, unusual and undermining tone". In announcing the dismissal, JQB described it as the sort of conduct that might be expected to be carried out by "an aggrieved former employee, not an employer trust account manager of a law firm". Two points emerge. JQB appears not to have put that view for TNZ's response beforehand. Secondly, the description of TNZ as "trust account manager" arguably overstates the responsibilities of TNZ's position.

[46] Overall, I conclude that TNZ has an arguable case of unjustifiable dismissal.

TNZ has an arguable case for permanent reinstatement

[47] TNZ seeks permanent reinstatement, so if they have a personal grievance, I must provide for reinstatement wherever practicable and reasonable.[5]

[48] Practicability and reasonableness are separate requirements. The former means it must be capable of being carried out, be feasible and have the potential for the re-imposition of the employment relationship to be done successfully. Reasonableness involves looking at the prospective effects of an order on the applicant, the employer, other employees and, if appropriate, third parties.[6]

[49] The solicitor now employed by JQB and the partners raise concerns about the prospects of a trusting working relationship being re-established.

[50] I accept that the threshold for an employer in arguing that reinstatement is not practicable or reasonable is a high one.[7] It is a small workplace and TNZ would have to work daily with the owners and the solicitor who expressed concerns. However, one can reasonably expect that lawyers would respect orders made by the Authority and look to make it work.

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[5] Employment Relations Act 2000 s 125.
[6] *Hong V Auckland Transport* [2019] NZEmpC 54 at [65] – [67].
[7] *Vegepod NZ Ltd v Lowe* [2025] NZEmpC 76 at [73].

[51] JQB submits that it is likely that TNZ's contribution will have a severe impact on remedies.[8] However, at this point, the prospects for a contribution finding cannot be expressed so strongly. A finding that TNZ did not write the note cannot be excluded, for example if there was competing forensic evidence.

[52] I conclude that TNZ has an arguable case for permanent reinstatement.

Balance of convenience

[53] TNZ says they have suffered considerable stress and related effects. The dismissal has affected their involvement in a community facility. Loss of income has a significant effect. Limited other local employment opportunities are available and TNZ probably would need to disclose the circumstances of their dismissal (if not already known), a factor that might limit other employment opportunities. There might also be negative effects for TNZ's spouse in their occupation.

[54] TNZ considers reinstatement as the only effective remedy to right the situation.

[55] Parties have agreed to a date in early October 2025 for a substantive investigation meeting, but it might take several months thereafter for a determination to issue given current commitments.

[56] Despite that timeframe, for the most part, these effects can be remedied by awards of reimbursement and compensation, assuming a personal grievance is upheld.

[57] However, I accept that interim reinstatement would add to the prospects of permanent reinstatement being a successful remedy.

[58] JQB points to the partners' and the solicitor's concerns about interim reinstatement requiring them to work with a staff member who they believe wrote and delivered the note disclosing otherwise confidential recruitment discussions.

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[8] Employment Relations Act 2000 s 124.

[59] If JQB justifiably dismissed TNZ, or if TNZ's contribution was such as to count against permanent reinstatement, they would have been required to work with TNZ despite those concerns.

[60] I find that the balance of convenience favours TNZ, but not strongly.

Overall justice

[61] TNZ denies writing the note, has an arguable case for a personal grievance and the balance of convenience weakly favours them. But in large measure, the effects between now and a final determination can be remedied by compensation and reimbursement. The vindication sought by TNZ relies on permanent reinstatement, not interim reinstatement.

[62] JQB's position is supported by the forensic examiner's report. Assuming a grievance is established, it is difficult to see how permanent reinstatement could proceed unless other expert evidence challenged that report.

[63] On balance, justice at this point does not favour interim reinstatement

[64] Accordingly, the application for interim reinstatement is declined.

Non-publication

[65] The principle of open justice can only be departed from to the extent necessary to serve the ends of justice. Non-publication should only be ordered if there is reason to believe that specific adverse consequences could reasonably be expected to result that justify a departure from open justice.

[66] The other firm, its practice manager and the solicitor are not parties and only the solicitor has given evidence at this stage. The respondent sought and the applicant did not oppose non-publication of their names at this point. The practice manager and the solicitor could be exposed to criticism without an opportunity to respond. Identifying the name of the other firm would lead to identification of the practice manager and the solicitor. At this point, it is appropriate to order non-publication of their names or identifying details.

[67] Equally, publication of the parties' names would likely lead to the identification of the names of the above non-parties. I also accept that adverse consequences would be likely for the applicant if their name was published at this point of the matter.

[68] There is limited specific general interest in the parties' and the other names being published at this point.

[69] Pending further order of the Authority, I prohibit the publication of the names and identifying details of the parties, the other firm, its practice manager and the solicitor.

Summary

[70] The application for interim reinstatement is declined.

[71] Interim non-publications orders apply.

[72] Costs are reserved. It is likely that costs will be dealt with at the same time as costs on the substantive investigation.

[73] A case management conference will be arranged shortly to agree on steps prior to the substantive investigation meeting. That will include consideration of a direction to further mediation.

Philip Cheyne
Member of the Employment Relations Authority