

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE**

**CIV-2021-485-529
[2021] NZHC 3168**

UNDER the Health Practitioners Competence Assurance Act 2003, the Declaratory Judgments Act 1908, the Judicial Review Procedure Act 2016, Part 30 of the High Court Rules 2016, and the New Zealand Bill of Rights Act 1990

IN THE MATTER OF an application for judicial review and/or extraordinary remedies and/or declaratory relief in respect of various disciplinary actions taken or proposed against the applicant by the respondent

BETWEEN SAMANTHA ANNABEL HOPE BAILEY
Applicant

AND THE MEDICAL COUNCIL OF
NEW ZEALAND
First Respondent

A PROFESSIONAL CONDUCT
COMMITTEE
Second Respondent

Hearing: 17 November 2021

Counsel: R E Harrison QC for the applicant
S J M Mount QC and H K Goodhew for the first respondent

Judgment: 24 November 2021

**JUDGMENT OF PALMER J
(Interim Orders)**

Solicitors:
Mr Wood, Auckland
Dentons Kensington Swan, Wellington

What happened?

Dr Bailey

[1] Dr Samantha Bailey is a registered medical practitioner in Christchurch. She has not held a practising certificate since May 2021. She does not currently practice as a General Practitioner. But she does regularly post videos online. That includes posting videos on her YouTube channel which has over 300,000 subscribers, as a “Medical doctor, author” and a “Family Doctor based in New Zealand”. Of the YouTube videos currently at issue, four or five are still available. Dr Bailey’s evidence, which I find helpful and I rule admissible, is that five videos were removed by YouTube for breaching its medical misinformation policy and Dr Bailey removed nine other videos herself, in case they led to a “strike” or closedown of her channel. YouTube also removed a sixth video which Dr Bailey uploaded to promote a video on another platform. All of the videos at issue on the other platform are still available. The posts have included statements raising doubts about polymerase chain reaction testing, and the safety of vaccines, for COVID-19.

The Medical Council

[2] The Medical Council of New Zealand (the Council) received 15 notifications or complaints about Dr Bailey’s videos from: eight members of the public; four registered medical practitioners in New Zealand; one retired New Zealand doctor in the United Kingdom; and two medical practitioners in the United Kingdom. In October 2020, the Council referred Dr Bailey’s conduct to a Professional Conduct Committee (the Committee) for investigation under the Health Practitioners Competence Assurance Act 2003 (the Act). A committee is composed of two health practitioners and one lay person. Further referrals by the Council to the Committee followed, in March, April, and June 2021, as Dr Bailey continued posting videos. The four issues referred to the Committee, as communicated to Dr Bailey in letters dated 16 June and 14 July 2021, are:

- 1 The circumstances around you presenting videos online, about Covid-19 and related topics, in which you identify yourself as a doctor and promulgate information to the public.
- 2 Whether you are practising outside your scope of practice when presenting your videos online about Covid-19.

- 3 Your adherence to *Good medical practice* and any other applicable Council statements.
- 4 Whether, in relation to videos posted online including you in those videos, you are practising medicine or have practised medicine without a practising certificate as per the Council's definition of the practice of medicine.

[3] The Committee has invited Dr Bailey to comment about all of the material it has provided to her. It has not indicated its specific concerns. Mr Mount QC advises that the Committee appears to be towards the end of its investigation and it could be concluded within a month or two, after Dr Bailey has had a reasonable opportunity to respond. In response to my questions about what it is she is supposed to respond to, Mr Mount advises the Council may well put more specific questions to her.

The judicial review proceedings

[4] Dr Bailey has had limited engagement with the Committee and has not participated in their investigation. In September 2021, she applied for judicial review in these proceedings. She will argue that posting videos is not the practice of medicine for which she can be subject to disciplinary action and that such action would infringe her right to freedom of speech. Further, she will argue that if the Council's definition of the practice of medicine is broad enough to capture her online COVID-19 content, it is invalid as beyond the Council's statutory powers. She argues such a definition is invalid to the extent it unjustifiably limits her right to freedom of speech under s 14 of the New Zealand Bill of Rights Act 1990 (Bill of Rights). In her Amended Statement of Claim of 15 November 2021, Dr Bailey seeks, by way of judicial review and under the Declaratory Judgments Act 1908:

- (a) declarations that Dr Bailey's creation and publication of videos online relating to COVID-19 is not captured under the Act or the Council's definitions;
- (b) if these actions are captured, declarations that the Council's definitions are beyond the Council's statutory powers, unreasonable, and in breach of Dr Bailey's rights under s 14 of the Bill of Rights;

- (c) declarations that the Council's decisions to refer questions to the Committee are accordingly invalid under the Act and for the Court to quash those decisions; and
- (d) declarations that the Committee's investigation and recommendations breach are vitiated by the Council's breach of obligations and are in breach of natural justice, and an injunction restraining further investigation.

[5] The proceedings are currently set down for hearing on 8 and 9 February 2022. Pending their determination, Dr Bailey applies for interim orders (as amended on 11 October 2021):

- (a) prohibiting the Council and/or Committee from taking any further action that is or would be consequential on the Council's challenged decisions to refer specified COVID-19 videos by Dr Bailey to the Committee for investigation; and
- (b) prohibiting or staying all proceedings, in particular any investigative or other proceedings currently pending before the Committee, in connection with those challenged decisions of the Council.

[6] Mr Mount advises that the Committee has undertaken not to conclude its investigation pending the outcome of the interim orders application. It does not wish to be heard orally on the Court's decision on interim orders. The Council opposes the application for interim orders.

Submissions

[7] Dr Harrison QC, for Dr Bailey, submits Dr Bailey's case is strong and is not premature because an error has occurred which is likely to have a material influence on the final decision. He submits preservation of Dr Bailey's current position is reasonably necessary because if the Committee completes its investigation, it must make recommendations under s 80 of the Act which may be, in effect, final decisions. The Committee may recommend a review of Dr Bailey's competence or fitness to

practice, which is a decision she cannot appeal. It is unworkable for Dr Bailey to even begin to respond to the material the Council has provided unless it identifies its concerns consistently with the principle of natural justice. He submits all four questions are either directly underpinned or significantly influenced by whether Dr Bailey is practicing medicine in posting her videos. It is not lawful for the Committee to embark on its investigation or to breach Dr Bailey's freedom of speech. Permitting it to continue in parallel to these proceedings has the potential to produce inconsistent findings between the Committee and the Court on central issues.

[8] Mr Mount, for the Council, submits the Council's decisions to refer notifications to the Committee were at the most preliminary stage in the disciplinary process. It is too soon to say natural justice has been breached or for the Court to intervene. At their highest, Dr Bailey's arguments apply only to some aspects of the investigation. The fact-specific questions which arise from Dr Bailey's arguments are best assessed after the Committee's investigation. Delaying the investigation would be contrary to the public interest. He relies on a series of court decisions regarding the undesirability of courts interfering prematurely in disciplinary proceedings against law practitioners.¹ He submits it is difficult to identify illegitimate prejudice to Dr Bailey that would arise from the investigation proceeding. He submits that interim orders are not necessary to protect Dr Bailey's position but, rather, she is seeking to improve it.

Should interim orders be granted?

[9] Section 15 of the Judicial Review Procedure Act 2016 empowers the Court to make an interim order, including to prohibit a respondent from taking any further action consequential upon the exercise of a statutory power. The Court must consider "it is necessary to do so for the purpose of preserving the position of the applicant".² As Mr Mount submits, the test is similar to that for an interim order under r 30.4(1) of the High Court Rules 2016.

¹ *Orlov v New Zealand Law Society* [2013] NZCA 230 at [50]; *Singh v Chief Executive Ministry of Business, Innovation and Employment* [2014] NZCA 220, [2014] 3 NZLR 23 at [39]–[40]; *Deliu v New Zealand Law Society* [2015] NZCA 12, [2016] NZAR 1062 at [24]–[25]; *Deliu v New Zealand Law Society* [2015] NZSC 75 at [6]; *A Lawyer v New Zealand Law Society* [2021] NZCA 47 at [83]–[84]; and *A Lawyer v New Zealand Law Society* [2021] NZSC 75 at [11].

² *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA) at 430.

[10] As Dr Harrison submits, a “position” to be preserved may be intangible and non-material. The power can extend to restoring an applicant to a position they would have been in but for the alleged unlawfulness.³ The Court has a wide discretion to consider all the circumstances of the case in deciding whether to grant interim relief. Making interim orders involves considering the seriousness of the question to be argued, the strength of the applicant’s case, the balance of convenience between the parties and the overall justice of the case.

[11] I do not assess the applicant’s case here as either strong or weak. That will depend on the substantive submissions and the evidence at the substantive hearing. The case here is clearly arguable. The questions to be litigated are clearly serious.

[12] However, I do not consider the balance of convenience favours Dr Bailey. There is a public interest in soundly based medical practitioner disciplinary processes proceeding. If this process suffers from a fundamental legal flaw, as Dr Harrison submits, that will be remedied through the substantive judicial review. In the meantime, Dr Bailey is best advised to engage with the process, as Thomas J said in *A Lawyer v New Zealand Law Society*.⁴

[13] No doubt the principles of natural justice will require the Committee to identify its concerns with sufficient clarity that Dr Bailey can respond effectively. But there is sufficient opportunity in the process for that still to be done. Ms Elkin, the Convenor of the Committee, has provided an affidavit indicating that the Committee would give Dr Bailey a reasonable time to respond to the material she has been provided. If the Court were to stop the disciplinary process through interim orders, it would suspend that opportunity too. To the extent that the disciplinary process yields findings that are inconsistent with subsequent High Court findings, it is clear the Court findings would prevail. So, in that sense, it is the Council that risks wasting its time and resources if its procedures are flawed.

³ *Whiskey Jacks Rotorua Ltd v Minister of Internal Affairs* HC Wellington CIV-2003-485-1901, 11 September 2003 at [40]; *Greer v Chief Executive, Department of Corrections* [2018] NZHC 1240, [2018] 3 NZLR 571 at [22]-[26].

⁴ *A Lawyer v New Zealand Law Society* [2019] NZHC 1961 at [108].

[14] Dr Bailey has rights of participation in the disciplinary process and, in terms of at least some outcomes, of appeal. Of the outcomes of the Committee's process that are available under s 80 of the Act, Committee recommendations to review competence, fitness, and scope of practice would all entail further procedures. Those procedures might occur through statutory processes, the bringing of charges before the Disciplinary Tribunal, or administrative procedures. If there is a flaw in those outcomes, that can be dealt with in the substantive judicial review proceedings, if necessary. The outcome of the Council counselling Dr Bailey hardly constitutes irreversible prejudice. And there is distinct public interest in not delaying an outcome of referring the subject matter of the investigation to the Police.

[15] The emphasis of the Court of Appeal and Supreme Court decisions relied upon by Mr Mount, on the value of disciplinary processes progressing, applies just as much to a medical as to a law practitioner. Here, I assess the prejudice to Dr Bailey of that occurring as less than the public interest. The disciplinary process should be allowed to proceed, in the interests of justice.

Result

[16] I decline the application. On the basis of the information before me, I would award costs on a 2B basis, and reasonable disbursements, in favour of the Council. If Unless there are circumstances of which I am not aware, and counsel cannot agree on costs, I grant leave for the Council to file submissions of up to five pages within 10 working days of this decision and Dr Bailey to file submissions of the same length within 10 working days of that.

Palmer J