IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2023-485-330
[2024] NZHC 1717

UNDER	the Judicial Review Procedure Act 2016 and Part 30 of the High Court Rules
IN THE MATTER	of an application for judicial review of directions made by the Director-General of Health under section 116E(1) of the Health Act 1956
BETWEEN	NEW HEALTH NEW ZEALAND INCORPORATED Applicant
AND	DIRECTOR-GENERAL OF HEALTH First Respondent
	ATTORNEY-GENERAL Second Respondent

Hearing:	Teleconference on 26 June 2024 at 10 am
Counsel:	L M Hansen and C F J Reid for Applicant J N E Varuhas and R E R Gavey for First and Second Respondents
Judgment:	26 June 2024

JUDGMENT OF RADICH J

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[1] In my judgment on relief in this proceeding of 16 February 2024, I made an order under s 17(3) of the Judicial Review Procedure Act 2016 directing the Director-General to reconsider and determine the decision described in [1] of my first decision in the proceeding.[1]

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[1] *New Health New Zealand Inc v Director-General of Health* [2024] NZHC 196 at [31].

[2] In [33] of that decision, I observed that, in accordance with s 17(6) of the Judicial Review Procedure Act, the decision to be reconsidered continues to have effect. In that paragraph I went on to say:

> It is not in my view an appropriate case for an interim order to be made and, for the reasons given, I do not see additional relief under s 16 of the Judicial Review Procedure Act as being warranted.

[3] Despite those findings, on 4 June 2024, the applicant sought, in a memorandum, interim orders under s 15(3) of the Judicial Review Procedure Act to prevent the first respondent taking any further action in relation to the directions to the 14 local authorities to fluoridate that are in question. Interim orders were sought, also, declaring that the first respondent not to instigate or continue any proceedings in connection with any matter to which the application relates pending completion of the reconsideration I had directed.

[4] Following the respondents' response to that memorandum, the applicant adjusted its position and filed, instead, an 'interlocutory application for recall of judgment and further interim orders' on 18 June 2024. That application seeks orders:

(a) That my judgment on relief of 16 February 2024 be recalled.

(b) That paragraph [33] of that decision be amended to reserve leave to the applicant to apply for further directions and/or interim orders.

(c) That consequential on (b), the reconsideration process on the part of the first respondent be timetabled.

(d) By way of declaration, that the first respondent ought not to institute any proceedings in connection with any council that does not comply with any direction unless and until the first respondent has undertaken a reconsideration and determined that a direction is a reasonable limit on the right to refuse medical treatment.

[5] At this morning's teleconference on the applicant's application, timetabling directions were made for a hearing of the application on 9 August 2024.[2]

[6] In the meantime, the applicant seeks an interim declaration in the nature of that described in [4(d)] above pending further consideration of the issue at the 9 August hearing. That application is opposed by the respondents. In support of the application for what is essentially an interim declaration under s 15(3) of the Judicial Review Procedure Act, Ms Hansen said that it would be wrong in principle for the Director-General to take action against a council until the reconsideration process had been carried out. She said that, if the Director-General was not constrained, a risk of predetermination in the reconsideration process would arise.

[7] In circumstances in which a failure to comply with a direction of the Director-General to fluoridate is a statutory offence, giving rise to a fine of up to $200,000, it is said that the position should effectively be held at least until the 9 August hearing.[3]

[8] Mr Varuhas, for the respondents, opposed the application on the basis that it is at odds with my previous decisions, that the first respondent is actively complying with the orders that have been made, that the first respondent's directions remain valid in the meantime[4] and that there is no indication that the Director-General would take enforcement action in relation to the directions.

[9] At the conclusion of this morning's teleconference, I said that I would not be making the interim declarations sought.

[10] The starting point is that, in [33] of my 16 February 2024 decision, having considered the position, I concluded that it was not appropriate in this case for an interim order to be made. The applicant seeks, through the recall application, to have that conclusion altered. That application is yet to be considered but at this stage I do not see a basis to make such a material change to the decision on relief.

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2 Those directions are the subject of a separate minute.

3 Reference was made, by way of example, to the Waitaki District Council which, it is said, has a 28 June deadline to comply with the Director-General's directions.

4 Reference having been made by both parties to the decision of La Hood J in *Fluoride Action Network (NZ) Inc v Hastings District Council* [2024] NZHC 1313

[11] Moreover, as has been said for the respondents, there has been no indication that the Director-General would take enforcement action and the Director-General has not taken any such action. Mr Varuhas put it on the basis that at this stage the Director-General is taking an educative approach. Any decision on enforcement action would need to be informed by the Solicitor-General's guidelines. In the event that enforcement action was threatened, then the most appropriate course would be for any council affected to seek interim orders.

[12] Accordingly, I do not at this stage see a sufficient position on the part of the applicants that needs to be preserved. In addition, I do not see the applicant's case on the interim declaration sought to be sufficiently strong and, moreover, I do not see the balance of convenience or the overall justice of the current position to favour the applicant.

[13] Whether there is a basis for the 16 February 2024 decision to be recalled so that a form of interim order or declaration could be made will be the subject of the hearing on 9 August 2024.

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Radich J

Solicitors:
Maxwell Law, Wellington for Plaintiff
Crown Law, Wellington for First and Second Defendants