IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CIV-2021-085-000781
[2022] NZDC 4436

UNDER THE MATTER OF	SECTION 106 (1)(d) of the HEALTH PRACTITIONERS COMPETENCE ASSURANCE ACT 2003
IN THE MATTER OF	an appeal against a decision of the Respondent to interim suspend the appellant's practising certificate
BETWEEN	PETER GREGSON CANADAY of New Plymouth, Registered Medical Practitioner Appellant
AND	THE MEDICAL COUNCIL OF NEW ZEALAND, an authority appointed in respect of the practice of medicine under Schedule 2 of the Health Practitioners Competence Assurance Act 2003 Respondent

Hearing: 24 and 25 February 2022

Further evidence and/or submissions: 14, 28 and 29 March 2022

Appearances: Mr A Holloway for the Appellant
Mr S Mount QC and Mr S Waalkens for the Respondent

Judgment: 31 March 2022

RESERVED JUDGMENT OF JUDGE S M HARROP
ON APPEAL AGAINST INTERIM SUSPENSION OF PRACTISING CERTIFICATE

Introduction

[1] Dr Peter Canaday is a medical practitioner who practised as a radiologist in Taranaki until his retirement in March 2021.

[2] Dr Canaday has taken a vocal public stance against the Covid-19 vaccination programme and the public health measures taken in response in New Zealand. As a result of complaints from the public about Dr Canaday's conduct the Medical Council (the Council) referred that conduct to a Professional Conduct Committee (PCC) for investigation on 29 October 2021. The Council also proposed to suspend Dr Canaday on an interim basis pending conclusion of that investigation and gave him an opportunity to respond. After receipt of submissions from him, the Council decided on 10 November 2021 to interim suspend him from practice under s 69 of the Health Practitioners Competence Assurance Act 2003 ("the Act").

[3] Dr Canaday appeals against the interim suspension decision. He submits there is little or no risk to the health and safety of the community arising from his statements, that he has the right to freedom of expression under s 14 of the New Zealand Bill of Rights Act (NZBORA) and that suspension is not a fair, reasonable or proportionate response to any objectively identifiable risk. Nor is the suspension a limit on his right of freedom of expression which can be demonstrably justified in a free and democratic society.

What this appeal is about

[4] In brief, the issues I need to determine on this appeal are whether or not Dr Canaday has satisfied me that the Council was wrong to conclude there was doubt about the appropriateness of Dr Canaday's conduct in his professional capacity and, if he cannot do so, whether he has satisfied me that the Council was wrong to find that suspension was a fair, reasonable and proportionate interim response pending completion of the PCC investigation and any subsequent disciplinary action.

What this appeal is not about

[5] Dr Canaday currently faces allegations which will be assessed by the PCC in the course of its investigation. This judgment will not assess those allegations or Dr Canaday's response to them. This judgment will also not assess the correctness or otherwise of the New Zealand Government's response to the Covid-19 pandemic and in particular its roll-out of the Pfizer vaccine as a primary response, nor will it assess the validity of Dr Canaday's views about the efficacy of that vaccine.

Section 69 of the Health Practitioners Competence Assurance Act 2003

[6] The Council's discretion to suspend Dr Canaday's practising certificate, which it has exercised here, arises only if the criteria in s 69(1) of the Act are established. This provides:

> **69 Inclusion of conditions in health practitioner's scope of practice or interim suspension of practising certificate pending prosecution or investigation if appropriateness of practitioner's conduct in doubt**
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> (1) This section applies if a practitioner is alleged to have engaged in conduct that—
>
> (a) is relevant to—
>
> (i) a criminal proceeding that is pending against the practitioner; or
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> (ii) an investigation about the practitioner that is pending under the Health and Disability Commissioner Act 1994 or under this Act; and
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> (b) in the opinion of the responsible authority held on reasonable grounds, casts doubt on the appropriateness of the practitioner's conduct in his or her professional capacity.

[7] There is no dispute that Dr Canaday is alleged to have engaged in conduct that is relevant to an investigation under the Act ("this Act") because that conduct is the current focus of the investigation of a PCC, to which information about Dr Canaday's conduct was referred under s 68(1) of the Act, on 29 October 2021.

[8] Dr Canaday however disputes that s 69(1)(b) is satisfied, that the Council was justified in concluding that his conduct casts doubt on the appropriateness of his conduct in his professional capacity. This is first of the two issues I will need to determine in this judgment: Is the threshold for consideration of interim suspension met?

Statutory context

[9] Section 69 does not exist in a vacuum. The principal purpose of the Act is:

> "… to protect the health and safety of members of the public by providing mechanisms to ensure that health practitioners are competent and fit to practise their professions".[1]

[10] The Act endeavours to achieve that purpose by providing, among other things, for a "consistent accountability regime" for all health professions.[2]

[11] The Council is the statutory authority responsible for the registration and oversight of medical practitioners in New Zealand. Its functions include receiving "information from any person about the practice, conduct or competence of health practitioners, and, if it is appropriate to do so, act on that information".[3]

[12] The requirements and process for registration are set out in ss 11 to 25 of the Act. Once a doctor is registered, that registration continues until it is cancelled, although a doctor's practising certificate may be suspended on various grounds.

[13] Part 4 of the Act deals with complaints about, and the discipline of, health practitioners, with particular reference to PCCs and the Health Practitioners Disciplinary Tribunal (the Tribunal).

[14] PCCs are the investigative bodies established to gather information and make recommendations and/or determinations under s 80. As has occurred here, under s 68(1) of the Act, if the Council considers that information in its possession "raises one or more questions about the appropriateness of the conduct or the safety

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1 Section 3(1).
2 Section 3(2)(a).
3 Section 118(f).

of the health practitioner", it may refer the information and any or all of those questions to a PCC. The Tribunal determines charges brought against practitioners by either a PCC or by the Director of Proceedings under the Health and Disability Commissioner Act ("the HDC Act").

[15] Part 5 of the Act deals with appeals from specified adverse decisions of the relevant authority such as the Council's interim suspension decision in this case.

[16] Section 109 provides that an appeal is by way of rehearing with the courthaving the power to confirm, reverse, or modify the decision or order appealed against and the ability to make any other decision or order that the Council could have made. Under s 111, instead of determining an appeal, the court may direct reconsideration by the Council of the whole or any part of the decision or order under appeal.

[17] Section 108 of the Act provides that a "decision or order against which an appeal is lodged under this Part continues in force unless the District Court or the High Court orders otherwise".

[18] I accept Mr Mount's submission, with which I did not understand Mr Holloway to disagree, that the relevant factors in exercising the s 69 discretion whether or not to suspend a practising certificate on an interim basis include the need for public protection, maintaining public confidence in the medical system by the maintenance of professional standards and the need for proportionality.[4] Of course the decision to suspend must also be reached fairly and taking into account any submissions made by the health practitioner. Section 69(3) of the Act provides:

> (3) The authority may not make an order under subsection (2) unless it has first—
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> (a) informed the health practitioner concerned why it may make an order under that subsection in respect of the health practitioner; and
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> (b) given the health practitioner a reasonable opportunity to make written submissions and be heard on the question, either personally or by his or her representative.

4 *Lim v Medical Council* [2016] NZHC 485 at [28] and [29].

[19] I accept Mr Mount's submission that there is an inherent tension between the public safety purpose of the power to suspend or impose conditions while an investigation is on foot, and the private rights of a health practitioner who is otherwise qualified and entitled to practise and earn a living.

[20] Parliament has, at least to an extent, addressed this tension by introducing some safeguards for practitioners within s 69. In addition to s 69(3), s 69(4) provides:

> (4) The authority must order the revocation of an order under subsection (2) as soon as practicable after—
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> (a) the authority is satisfied that the appropriateness of the practitioner's conduct in his or her professional capacity is no longer in doubt; or
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> (b) the criminal proceeding on which the practitioner's suspension is based is disposed of otherwise than by his or her conviction; or
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> (c) if the criminal proceeding on which the practitioner's suspension is based results in his or her conviction, the authority is satisfied that no disciplinary action is to be taken or continued in respect of that conviction under the Health and Disability Commissioner Act 1994 or under this Act; or
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> (d) if the investigation on which the practitioner's suspension is based has been completed, the authority is satisfied that the practitioner will not be charged as a result of the investigation.

[21] Despite that, I accept the submission of Mr Holloway, with which I did not understand Mr Mount to disagree, that if the suspension is not overturned on this appeal, Dr Canaday is in effect pre-emptively prohibited from practising his profession for at least 8 to 12 months and, if the PCC investigation leads to charges being laid before the Tribunal, then no doubt a number of further months. I also accept Mr Holloway's submission that, even if there are ultimately charges which the Tribunal finds proved, the penalty of suspension, which may be for up to three years[5] is not routine and is generally imposed in more serious cases involving criminal offending. I proceed therefore on the basis that, notwithstanding the

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5 Section 100 of the Act.

protections within s 69[6], the reality here is that Dr Canaday, who while retired is now seeking a role as a locum or part-time radiologist[7], is at risk of being unable to practise his profession for a lengthy period which may exceed any penalty ultimately imposed. Self-evidently this throws into sharp focus the need for careful assessment of whether, assuming the threshold for suspension is established, suspension for such a period is a fair, reasonable and proportionate response to the risks identified.

Approach on appeal

[22] I have already outlined the powers of the court on appeal but it is critical to assess and record what is the appropriate approach on an appeal of this kind. There is no dispute that the well-settled applicable principles are those set out by the Supreme Court in *Austin Nichols & Co Inc v Stichting Lodestar* [8]. The Supreme Court said:[9]

> "Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence**,** rather than forming its own opinion."

[23] The Supreme Court also said:[10]

> "The appeal court may or may not find the reasoning of the tribunal persuasive in its own terms. The tribunal may have had a particular advantage (such as technical expertise or the opportunity to assess the credibility of witnesses, where such assessment is important). In such a case the appeal court may rightly hesitate to conclude that findings of fact or fact and degree are wrong. It may take the view that it has no basis for rejecting the reasoning of the tribunal appealed from and that its decision should stand. But the extent of the consideration an appeal court exercising a general power of appeal gives to the decision appealed from is a matter for its judgment. An appeal court makes no error in approach simply because it pays little explicit attention to the

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6 Which arguably cast a greater burden on the Council when it has imposed a suspension at a particular stage of a fluid and dynamic public health emergency.

7 Confirmed in Dr Canaday's affidavit sworn on 4 December 2021 in support of his application for stay, subsequently withdrawn in light of an early appeal hearing being provided.

8 [2008] 2 NZLR 141.

9 At [16].

10 At [5].

> reasons of the court or tribunal appealed from, if it comes to a different reasoned result. On general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case."

[24] These general principles need to be applied to the particular circumstances of this appeal. I accept Mr Mount's submission that, albeit it was an appeal about Council decisions on misconduct and penalty, I ought to follow the approach set out by the High Court in *Vohora v The Professional Conduct Committee*:[11]

> "On that basis I will proceed by examining whether or not the Tribunal was wrong about its decisions on misconduct and on penalty based on my assessment of the merits. Nevertheless, it remains for the appellant to show why the Tribunal got those decisions wrong. **On matters pertaining to professional context and standards, I will need to be persuaded why it is I should depart from a panel including experts on the particular areas of concern.** In short, the appellant must show why those experts got their evaluation wrong." (emphasis added)

[25] In *Moncrief-Spittle v Regional Facilities Auckland Limited*[12] the Court of Appeal was dealing with a challenge to the cancellation of a public meeting at a council venue. The decision was challenged by the appellants who wanted to attend the meeting or see it go ahead despite the controversial views of the proposed speakers which were considered likely to give rise to violent protest.

[26] The Court of Appeal upheld the High Court decision that the decision by the council organisation was a justified limitation on the appellants' rights of freedom of expression and freedom of peaceful assembly under the NZBORA.

[27] In doing so the Court of Appeal referred to the respondents' submissions on the question of how the courts should response to complaints about the effect of executive decisions on human rights. It appears to have upheld those submissions.

[28] The court referred to what Lord Neuberger said in *R (Lord Carlile of Berriew) v Secretary of State for the Home Department*.[13] That case involved a challenge to the decision of the Home Secretary, on the advice of the Foreign Office, to exclude an Iranian dissident from the United Kingdom with the result

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11 [2012] 2 NZLR 668 at [33].
12 [2021] NZCA 142.
13 [2014] UKSC 60.

that she was unable to accept speaking engagements to address issues of human rights and democracy. Lord Neuberger said:[14]

> "… where human rights are adversely affected by an executive decision, the court must form its own view on the proportionality of the decision, or what is sometimes referred to as the balancing exercise involved in the decision. …
>
> … even where, as here, the relevant decision maker has carried out the balancing exercise, and has not made any errors of primary fact or principle and has not reached an irrational conclusion, so that the only issue is the proportionality of the decision, the court cannot simply frank the decision, but it must give the decision appropriate weight, and that weight may be decisive. The weight to be given to the decision must depend on the type of decision involved, and the reasons for it. There is a spectrum of types of decision, ranging from those based on factors on which judges have the evidence, the experience, the knowledge, and the institutional legitimacy to be able to form their own view with confidence, to those based on factors in respect of which judges cannot claim any such competence, and where only exceptional circumstances would justify judicial interference, in the absence of errors of fact, misunderstandings, failure to take into account relevant material, taking into account irrelevant material or irrationality."

[29] While the Supreme Court of the United Kingdom was dealing with a very different context from the present, I see myself, as a lay person in medical matters, needing to give significant respect, in coming to my own decision, to the assessment of the Council on two matters. First, as to whether or not Dr Canaday's conduct has put the health and safety of the members of the public at risk, and secondly as to whether suspension of his practising certificate is a justifiable interim measure, since that is a question of the appropriate response to the risk that the Council, with its combined expertise, has determined.[15]

[30] As I have emphasised, it is not my task in this judgment to assess the correctness of the countervailing views about the efficacy of the Covid-19 vaccine roll-out in New Zealand. I proceed on the basis that the competing views are genuinely held. In particular, I proceed on the basis that Dr Canaday puts forward

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14 At 67 and 68.

15 The Council is constituted under the Act and currently consists of 11 members who are a mix of doctors and lay people.

his views on a genuine basis and believing that he is properly contributing to what he sees as a legitimate debate, in the exercise of his right of freedom of expression.

[31] That said, the assessment of the issues in this case cannot depend on the genuineness or correctness of the motives of the medical practitioner whose conduct has allegedly put public health at risk.

[32] As Lord Neuberger put it in *R v Secretary of State for the Home Department*:[16]

> "… I find it very hard to envisage any circumstances where a judge's decision to quash executive decision to restrict a Convention right because its exercise might endanger the national interest, could turn on an assessment of the motives of the person responsible for the danger to the national interest … the issue in this case concerns the nature, likelihood and impact of the reaction of the Iranian authorities and people to the admission of Mrs Rajavi into this country, not the legitimacy or defensibility of the reasons for that reaction."

[33] Applying that principle to the present case, the question I have to assess is not whether or not Dr Canaday may be genuine and correct in his statements, or otherwise generally entitled to make them, but whether the Council was right in its assessment of the consequences for public health in New Zealand of his making those statements.

[34] Mr Mount submitted that I should also apply what is known as the precautionary principle i.e. a decision-maker may err on the side of caution when dealing with a public health measure to address Covid 19, even in the face of scientific uncertainty. A measure may be justified even if there is uncertain evidence about how effective it will be; the Council he submitted was entitled to apply a "benefit of the doubt" principle in favour of precautionary steps to protect public health. In support Mr Mount referred me to the recent judgment of Cooke J in *Yardley v Minister for Workplace Relations and Safety*[17]. I accept this submission.

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16 [2014] UKSC 60, at 77.
17 [2022] NZHC 291 at this [94]-[95].

Dr Canaday and his alleged conduct

[35] Against that background, and prior to considering the issues I need to determine, I set out Dr Canaday's history as a doctor and his alleged conduct which led the Council to take the steps it did.

[36] Dr Canaday graduated as a doctor of Medicine at the University of Massachusetts in 1976. According to the biography attached to his affidavit of 4 December 2021, he took up training as an internal medicine specialist at the University of Michigan before undergoing further sub-specialist training in respiratory and intensive care at the University of North Carolina. He began his medical career in a busy trauma hospital in Denver, Colorado in 1991 and practised for 12 years. During his time there he managed many of the types of patients now seen with severe Covid-19 and co-founded a sleep disorder laboratory and a hyperbaric medicine department. He says he participated in a dozen committee assignments and rose to Chairman of the Department of Internal Medicine.

[37] In 1993 Dr Canaday changed career and in 1997 completed training as a radiologist at the University of Wisconsin. During an eight-year period at Creighton University Medical School in Nebraska he became tenured as an assistant professor of Radiology and head of the section of Pulmonary Radiology.

[38] Dr Canaday says he has published papers extensively, in applied physiology, respiratory medicine and diagnostic radiology.

[39] After spending time from 2007 in community radiology practises he moved to New Zealand and in 2012 obtained provisional vocational registration in the scope of Diagnostic and Interventional Radiology. In New Zealand, Dr Canaday has not held vocational registration in either intensive care medicine or internal medicine.

[40] Between 13 July and 24 August 2021 the Council became aware, and received notification/complaints from members of the public, that Dr Canaday had:[18]

(a) Participated in Voices for Freedom (VFF)[19] public presentations in Thames and Tairua titled "Covid-19 and the Pfizer vaccine: Fact or Fiction?" The promotional material for these presentations stated that Dr Canaday was going to address questions on:

(i) What was going on with New Zealand's Covid-19 response;

(ii) Why the vaccine was heralded as "the" solution;

(iii) Whether the public needed "this jab";

(iv) Whether the public was truly informed on the vaccine; and

(v) Why there was no discussion from government of alternative therapeutics and ways to strengthen immune systems.

(b) Participated in a further VFF public presentation in Tauranga titled: "The medical truth about how to really protect yourself, your family and your community". The promotional material for this presentation invited members of the public who had "concerns about misleading government and media campaigns, side effects of Covid-19 vaccine [sic], enforced medication of certain members of our community" to attend the hearing.

(c) Described himself as a "recently retired Pulmonary and Intensive Care Physician" on the promotional material for the above presentations when he did not hold that qualification in New Zealand and had not

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18 I take this summary from the report of the decision maker filed pursuant to rule 18.16 of the District Court Rules 2014, paragraph 38 onwards.

19 This is an organisation known for its stance against the Covid-19 vaccine.

practised as a physician in either of those areas of medicine since at least 1997.

(d) In July 2021, participated in a radio interview on the Raglan Community Radio Station where he expressed messaging against the Covid-19 vaccine. In this interview, Dr Canaday stated among other things that:

(i) He had 12 years' experience as a respiratory specialist and intensive care specialist in the United States before retraining as a radiologist in 1997;

(ii) New Zealand Doctors Speaking Out with Science (NZDSOS) is a "good source and support" for the "actual science between some of the issues" raised in relation to the Covid-19 vaccine;

(iii) He was not anti-vaccine. However there had been a significant shortening of the timeframe between clinical trials and the Pfizer vaccine's rollout for general use. The clinical trials were not due to be completed until at least January 2023;

(iv) The Food and Drug Administration, which manages vaccine approvals in the United States, had approved the use of the Pfizer vaccine only for emergency use authorisation. This occurred when there was no reliable treatment otherwise available. There was increasing evidence that there were other available treatments, which raised questions about why the vaccine has been rolled out in the manner that it had been;

(v) There had been a significant number of recorded adverse events or side-effects following the rollout of the Covid-19 vaccines in the United States, including a record of 6000 deaths in 2021;

(vi) In New Zealand, there had been between eight to ten deaths following vaccination;

(vii) He hoped that he could give legitimacy to the concerns with the public relating to the vaccine because "I'm a physician. I've done this for years. I've published in the medical literature. I've presented at international meetings. I've been an academic of a medical school programme. I kind of know the background."; and

(viii) Hydroxychloroquine and Ivermectin had proven to be effective treatments for Covid-19.

[41] A transcript of this radio interview was provided to me.

The Council's steps

[42] Dr Canaday provided written responses to the Council on 7 September and 1 October 2021. He maintained that his actions did not constitute the practise of medicine or providing medical advice. No doctor/patient relationship existed. He said his intention was to provide his own opinions based solely on information that was publicly available. He had always made it known that these were his personal views and it was up to the public to make their own informed decisions. Although he was not vocationally registered in internal medicine and pulmonary care in New Zealand, he had practised in that specialty for 12 years in the United States from 1981 to 1993.

[43] Dr Canaday said that the Council had not pointed to any particular obligations or parts of obligations that he had potentially failed to comply with. In his further response he submitted that he was exercising his right to freedom of speech in participating in the public presentations.

[44] After its meeting on 20 October 2021 the Council wrote to Dr Canaday advising that it was referring the information in its possession to a PCC, that it proposed to suspend his practising certificate under s 69(2)(a) of the Act and that it

was going to issue a notice under s 35 of the Act, a risk of harm notification, to the Accident Compensation Corporation, the Director General of Health and Senior Advisor Enforcement at the Ministry of Health and the Health and Disability Commissioner.[20]

[45] The Council's reasons for taking the interim suspension step were:

(e) Dr Canaday was likely to have prompted, on a regular basis, anti-vaccination statements or health advice that contradict the best available scientific evidence and may seek to actively undermine the national immunisation campaign. This would be a breach of his ethical and professional obligation to protect and promote the health of patients and the public, and to participate in broader based community health efforts and poses a risk to public health safety.

(f) Dr Canaday's actions were likely to increase vaccine hesitancy or scepticism which had far-reaching consequences for the health of the public in the midst of a public health emergency by increasing the risk of persons contracting Covid-19, increasing the risk of persons suffering more serious symptoms that they otherwise would have had they been vaccinated and increasing the risk of spreading Covid-19 within the community by reducing the uptake of the vaccine.

(g) Dr Canaday's responses did not provide assurance that a Voluntary Undertaking or interim conditions would appropriately deal with the risk of harm that his conduct posed to the public.

(h) Accordingly, there was a risk to the health and safety of the public that should be addressed by an interim measure while the PPC investigation was ongoing.

[20] The Council's decision to issue that notice is not able to be appealed.

(i) In light of Dr Canaday's ongoing conduct and views it was necessary to suspend Dr Canaday's practising certificate while his conduct was under investigation and consideration of a PCC.

[46] Dr Canaday was given the opportunity to make further submissions and did so through his solicitors on 8 November 2021. He submitted it was not necessary to interim suspend his practising certificate. As a radiologist, he did not consult or advise patients and was not currently practising at all but wished to practise as a locum or in a contract position if such a role became available.

[47] Dr Canaday was willing to enter into a Voluntary Undertaking (VU) which included the term that if he commented on or shared opinions on Covid-19 or vaccination against it publicly he must advise that it is a minority view and may be contrary to Ministry of Health guidance, that it does not constitute medical advice and that he is currently registered as a radiologist but has overseas training and experience as a respiratory critical care physician.

[48] Dr Canaday further submitted that he had the right of freedom of expression under s 14 of the NZBORA to impart information and opinions of any kind and in any form; the Council had the obligation to interpret and apply the provisions of the Act in a manner that was consistent with that right.

[49] Dr Canaday said that his ethical obligations to promote public safety were the motivation for his comments and the information he was providing. There was "simply no way" that the Council could substantiate its claim that his actions were likely to increase vaccine hesitancy or scepticism.

[50] Notwithstanding those submissions, at its meeting on 10 November 2021, the Council resolved to interim suspend Dr Canaday's practising certificate with effect from 26 November 2021.

[51] The reasons given for the Council's decision were:

(j) The information referred to the PCC cast doubt on the appropriateness of Dr Canaday's conduct in his professional capacity and the safety of his practice.

(k) In opining on clinical matters relating to Covid-19, there was sufficient information before the Council to consider Dr Canaday was practising medicine in that he was giving advice in a medical capacity, on an issue of public safety, using knowledge, skills, attitudes and competence initially obtained for the MB ChB degree (or equivalent) and built upon in post-graduate and continuing education.

(l) Dr Canaday was a practising doctor of long standing in the community. Although he submitted he was not speaking as a doctor, the Council believed the public might, from his status as a practising doctor, reasonably believe they could rely and give weight in his view, as being provided to a medical capacity.

(m) The Council considered the likelihood of the conduct recurring, and the impact of the conduct should it recur. The concerns about Dr Canaday's professional conduct was serious in the current environment, and the Council had to consider the potential impact of Dr Canaday's conduct on the public.

(n) Dr Canaday's statements on Covid-19 matters carried a significant likelihood of undermining the public trust and confidence in both the public health response to the Covid-19 pandemic as a national health emergency and the medical profession.

(o) Although Dr Canaday proposed a voluntary undertaking, this still allowed him to publicly share his opinions which the Council reasonably believed would remain consistent with the comments he had made previously, and which the Council found concerning.

(p) The concerns were not limited to direct patient interaction. The suspension of Dr Canaday's practising certificate was necessary to ensure the public, in considering his comments, were aware that he may not practise medicine.

[52] Since the suspension Dr Canaday has continued to make public statements against the use of the Covid-19 vaccine in public platforms. The information available to the Council indicated that as at 19 December 2021 Dr Canaday had carried out at least 10 online presentations, in collaboration with the VFF organisation, on this topic and the response to Covid-19. New videos were livestreamed to the public every second Sunday and subsequently published on Odysee, an online video platform. The presentations were usually accompanied by a PowerPoint slideshow and other forms of media. Viewers were able to ask Dr Canaday questions at the end of each presentation.

[53] One of these videos, a "fireside chat" on 10 October 2021, was transcribed and provided to me. It is not necessary to go through it in detail; it will no doubt be considered carefully by the PCC. However, in summary, Dr Canaday made the following statements, among others:

(q) Data showed that, in a fairly large series of countries, there was actually a significant increase in the number of Covid-19 deaths after the vaccination programme started.

(r) There were 30 times more reports of various serious conditions for Covid-19 vaccines compared to influenza vaccine in the current reporting system.

(s) In respect to the vaccine rollout for teenagers and kids, the myopericarditis combination of the heart muscle and the heart sac inflammation after Covid-19 vaccinations increased 1200 times more in the reports, in comparison to that from ordinary influenza vaccinations.

(t) The Pfizer vaccine suppresses immune surveillance. Viral illnesses and cancers are emerging in much greater numbers.

[54] Dr Canaday also played in the course of the interview an excerpt of a video by a medical practitioner in the United States in which he stated that he had seen a 20-times increase in endometrial cancers, as well as increases in melanomas and autoimmune diseases, post-vaccination. Dr Canaday also played a series of excerpts from covertly recorded interviews with Pfizer scientists who were said to "admit that natural immunity [was] better than the "vaccine"."

[55] The Council's assessment, as conveyed by the report writer, its chairperson Dr Curtis Walker, was that the statements cast doubt on the appropriateness of Dr Canaday's professional conduct under the Act for essentially the same reasons as his earlier statements, including that they lacked balance, contradicted the best available scientific evidence and appeared to be calculated to undermine the national immunisation campaign.

[56] On 10 February 2022 Dr Walker, on behalf of the Council, filed the decision maker's report in accordance with rule 18.16 of the District Court Rules 2014. This included considerations not set out in the decision to interim suspend Dr Canaday on 19 November 2021 but to which the Council had had regard in making the decision appealed against, together with other new information which the Council considered should be drawn to the attention of the court. Also, on 21 February 2022 the Council filed an affidavit from Katrina Dolden, a Senior Professional Standard Advisor employed by the Council. This provided updating information in relation to Dr Canaday and some other information including in relation to Dr Shelton.[21]

[57] I decided to accept this further information subject to submissions about it being considered and to the possibility of reply evidence and further submissions being filed by Dr Canaday. Dr Canaday duly filed a detailed affidavit dated 14 March 2022 and Mr Holloway filed reply submissions.[22] As those submissions

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21 Issued at the same time as this judgment will be my judgment on the appeal mounted by Dr Shelton against the decision to interim suspend his practising certificate, for broadly similar reasons to those applicable to Dr Canaday.

22 In part incorporating submissions filed by counsel for Dr Shelton on the same basis.

went beyond replying to discuss the recent High Court judgment in *Yardley v Minister for Workplace Relations and Safety*,[23] I gave Mr Mount the opportunity to reply, which he did on 28 March 2022.

[58] Despite the objections of Dr Canaday, I propose to consider all of the information before me, including of course his reply affidavit. I grant leave, if necessary, pursuant to rule 18.17 of the District Court Rules 2014. As I understood Mr Holloway to accept, although I am fundamentally called on to decide whether the Council was correct in its interim suspension decision as at the date it was made, the practical reality of this case is that, assuming the threshold for considering interim measures is met, I need to assess *at the date of the judgment* what is the appropriate interim measure pending determination of the issues referred to the PCC. In part, this is necessarily an assessment looking forward from that date to the likely time when the PCC will be considering matters. Conceptually, the appropriate response as at 24 November 2021 may not still be the appropriate response as at the date of this judgment. The other consideration bearing on my decision, not that I have comprehensive or sufficient evidence about it, is if, and if so how, the current spread of the Omicron variant within the New Zealand community in recent weeks affects the choice of interim measure.

[59] I do not propose to go through the points made by Dr Canaday in his reply affidavit; I acknowledge it is comprehensive. It is not necessary to engage with the reasons for his approach; as I have observed earlier, however genuine or well-intentioned his public expression of his views may be, what the Council needed to assess, and I need to assess, is the potential for risk to public health and safety arising from his expression of those views.

[60] However, as a matter of fairness to Dr Canaday, it is appropriate that I record his summary of the reasons why he says it is important that he should be able to express his views as he has done. I set out here paragraphs 51 to 54 of his reply affidavit in which he summarises his views succinctly:

> "51 I believe the rights articulated in the New Zealand Bill of Rights and Human Rights Acts are important.

[23] [2022] NZHC 291 (Cooke J)

52 I can't understand why my talks are treated as practising medicine and why I am held to some vague but apparently high standard of certainty when government officials, politicians, members of the media and the general public are permitted free expression on COVID-19.

53 The Medical Council seems to be relying on its position that my views are wrong, without ever giving evidence as to why that is so, and without acknowledging the countless instances whereby what is considered correct today can be proven to be false tomorrow with passage of time, and availability of new or confirmatory evidence.

54 I also find it inconsistent that other people, such as medical practitioners employed by the Ministry of Health, can give individual health advice (i.e. 'you must get vaccinated') without, for example, framing that advice with the ethically essential necessity of informed consent, acknowledgment of potential risks of a vaccine produced using novel methods, the reality that true medical contraindications to vaccine use exist in some individuals, and that such decisions have historically and of necessity must remain within the context of the individual doctor-patient relationship. In other words, those whose actions are perceived to be consistent with government policy are entitled to be one-eyed advocates, whereas the Medical Council is opposed to me even discussing the relevant scientific and medical issues involved.

Was the Medical Council correct to find that Dr Canaday's conduct cast doubt on the appropriateness of his conduct in his professional capacity (s 69(1)(b))?

[61] Mr Holloway submits that this threshold was not met on the information available to the Council. I need to assess that question based both on that information and the further information which has come to light since, to which Dr Canaday has had the opportunity to respond through counsel.

[62] The first issue is the correct interpretation of s 69(1)(b), *"... in the opinion of the responsible authority held on reasonable grounds, casts doubt on the appropriateness of the practitioner's conduct in his or her professional capacity"*.

[63] I accept Mr Holloway's submission that "on reasonable grounds" means that the Council's assessment of Dr Canaday's conduct and the risks it may present must be based on information Dr Canaday was given an opportunity to make submissions and be heard on. I also accept that the information available to the Council must provide a reasonable and logical basis for drawing the necessary conclusion of doubt being cast on the appropriateness of practitioner's conduct in his professional capacity.

[64] The first point to make is that "casts doubt" is on the face of it a very low bar. Anything which raises a question about the appropriateness of the practitioner's conduct in his or her professional capacity would qualify.

[65] Mr Holloway submitted that s 69 was forward-looking. I do not accept that that is so, or at least not necessarily so. The assessment made by the Council is at a particular point in time and the issue is whether, at that point in time, the practitioner's conduct cast doubt on the appropriateness of his conduct in his professional capacity. The risk of repetition or future similar conduct does not necessarily need to be established to meet this test. Of course, any such future risk would be highly relevant to the appropriate response but I do not see this as necessarily informing the threshold.

[66] I accept that the meaning of the appropriateness of the practitioner's conduct in his professional capacity has to be informed by the possible disciplinary consequences of the conduct being proved. But, as Mr Mount pointed out, it is a matter of professional discipline for a practitioner to do anything that is "likely to bring discredit to the profession".[24] The Court of Appeal has confirmed that this ground of professional discipline may apply to conduct whether or not the practitioner was engaged in performing the relevant profession.[25]

[67] I therefore do not accept Mr Holloway's submission that conduct which meets the s 69(1)(b) test must be serious and presenting a material risk to the health and safety of members of the public, such as substance abuse or inappropriate sexual contact. In my view, much less serious conduct may meet the test.

[68] Mr Holloway also submitted that the reference to "professional capacity", a phrase not used elsewhere in the Act, meant the impugned conduct had to be sufficiently connected with the medical practitioner's professional role in order to qualify. In this case, I am satisfied, as was the Council, that Dr Canaday's public statements were sufficiently connected to his conduct in a professional capacity to

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24 Section 100(1)(b) of the Act.

25 *IRG v A Professional Conduct Committee of the Psychologists' Board* [2009] NZCA 274; 2009 NZAR 563 at [50].

be able to be taken into account by the Council. He made public statements on medical topics, the Covid-19 pandemic and the vaccination response to it and frequently described and advertised himself as a doctor. He clearly drew on his medical credentials to lend weight to his statements. Also, as Mr Mount noted, the complaints from members of the public suggest that Dr Canaday's status as a doctor was a factor. I find that Dr Canaday was speaking on medical issues in his capacity as a medical professional. I am satisfied this meets the test of his conduct having been in his professional capacity.

Was the Medical Council justified in concluding that there were reasonable grounds for believing Dr Canaday's public statements presented a risk to the public i.e. that he engaged in "inappropriate conduct"?

[69] In summary Dr Canaday submits that there was either no or insufficient evidential basis for the Council to find that he had presented a risk to the public in making his public statements, that it made no efforts to ascertain what he had said at public meetings or whether anything said was inaccurate or whether any inaccuracy gave rise to a risk of harm.

[70] The essential basis of the Council's decision about the risk presented by Dr Canaday is set out in the decision maker's report at paragraphs 33 to 37:

> " 33. In light of the ongoing SARS-CoV-2 virus (Covid-19) pandemic and efforts to protect the New Zealand population against Covid-19, several public health measures have been adopted.
>
> 34. Individuals who contact Covid-19 are at risk of serious illness and ongoing effects, as well as death. The highly infectious nature of the disease means the potential for a rapid spread of Covid-19 and resulting significant strain on healthcare systems is high.
>
> 35. The prevailing evidence is that vaccinations assist in reducing the risk of serious illness in the event of infection and the risk of transmitting the virus to others. It is a critical aspect of the public health response of Aotearoa New Zealand.
>
> 36. On 28 April 2021, Council released a joint guidance statement with the Dental Council of New Zealand on *Covid-19 vaccine and your professional responsibility*.[26] It states, in part:

[26] This guidance made it clear that the Council expected practitioners to be vaccinated to protect patients and to participate in the broader based community health efforts. Of course, on 11 October 2021, the government announced that vaccinations were to be mandatory for health and disability sector workers.

> "As a health practitioner, you have a role in providing evidence-based advice and information about the Covid-19 vaccination to others. You should be prepared to discuss evidence-based information about vaccination and its benefits to assist informed decision making. There is information on the Ministry of Health (MOH) website to support engagement with staff or colleagues and the public who may be hesitant about getting a vaccine.
>
> As regulators we respect an individual's right to have their own opinions, but it is our view that there is no place for anti-vaccination messages in professional health practice, nor any promotion of anti-vaccination claims including on social media and advertising by health practitioners."

37. Underpinning the guidance statement is the principle that doctors have specialised knowledge and training in medicine and disease and hold a position of influence and responsibility, both in public generally and in their communities, that is heightened in the circumstances of a public health emergency. Doctors must share information that is factual, scientifically grounded, balanced and accurate for the betterment of public health. Spreading Covid-19 information that does not meet those requirements could threaten to erode public trust in the medical professional and put people's health at risk."

[71] As I noted at the outset of this judgment, the extent to which the Council is correct in taking that position and the extent to which Dr Canaday's conduct has or may have undermined it, is for the PCC, not me, to determine. However, I can say that this is an unusual case in the sense that, by contrast with many cases where interim suspension is imposed, it does appear unlikely that there will be much or any dispute about what Dr Canaday did or said. It is not a case, for example, of a strongly-denied criminal allegation needing to await trial for determination. Rather, the issue of current and possible future risks to public health can be more confidently predicted, based on Dr Canaday's various clear public statements.

[72] The case is also unusual because I expect that, typically, complaints to the Council which lead to interim suspension of a practising certificate have resulted from the medical practitioner's day-to-day practice and from a complaint from one or more of his or her patients. In that situation, the Council will be concerned about the harm which has been or may be caused to one or more patients. The ramifications of inappropriate conduct in a professional capacity are likely to be limited to a relevant small set of actual or potential patients.

[73] This case is different because Dr Canaday's statements have not been made in a clinical setting at all; as a radiologist he has not in recent years practised

medicine in the typical doctor-patient way. There is very little evidence of any adverse impact on anyone in particular. But despite being unclear, the potential harm he has caused is much more substantial. A significant number of unknown and unidentified people who have listened to his advice may have been influenced in their decisions about whether or not to get vaccinated. It is reasonable to assume that some will have been influenced by what he, as a senior and experienced doctor, has said publicly when speaking against the vaccinations and the risks associated with them. Also, by contrast with oral advice to a patient, many of Dr Canaday's public statements are accessible in perpetuity on the internet. They have a much greater potential reach and a much greater period of potential reach.

[74] To the extent that one or more people have decided not to get vaccinated when they otherwise would or may have done, then the potential effects go well beyond the effects on those people. Each such person will present a greater risk not only to themselves but to members of the community with whom they may interact. There is what I believe to be indisputable evidence that those who are not vaccinated are more likely to spread the disease and more likely to suffer more serious consequences themselves. Inevitably, directly and indirectly, any individual decision not to get vaccinated is likely to place additional and unnecessary strain on New Zealand's rather vulnerable healthcare system. This conclusion is supported by the observation of Cooke J in *Yardley*:[27]

> "I should make it clear what this case is not about. The Order being set aside in the present case was not implemented for the purposes of limiting the spread of COVID-19. Health advice was that such a further mandate was not needed for this purpose. Neither should the Court's conclusion be understood to question the effectiveness and importance of vaccination. The evidence shows that vaccination significantly improves the prospects of avoiding serious illness and death, even with the Omicron variant. It confirms the importance of a booster dose given the waning effect of the first two doses of the vaccine."

[75] I consider the Council was entitled to be significantly concerned about the public health and safety risks of Dr Canaday's statements. In effect, through his statements he has dropped numerous pebbles of scepticism into the pool of people who are considering whether or not to get vaccinated. The ripples potentially

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[27] *Yardley v Minister for Workplace Relations and Safety* [2022] NZHC 291 at [107].

extend broadly throughout the community. The fact that it is impossible to know what impact Dr Canaday's statements have had, does not mean there has been no serious risk of the kinds of adverse effects with which the Council was obviously, and in my view properly, concerned.

[76] Dr Canaday submitted that the sort of people who attended his meetings or listened to his online interviews are not likely to have got vaccinated in any event; arguably he was simply "preaching to the choir". He submits it is not credible to suggest that removing his voice from the "marketplace of ideas" would have had any impact on vaccination rates.

[77] However, I accept Mr Mount's submission and the view of the Council that Dr Canaday's views, by reason of his position as a doctor and his long experience as a medical expert will have carried significant weight with listeners and as a result posed a material risk of harm in terms of increasing vaccine hesitancy. I also accept Mr Mount's submission that there are not just two "choirs", the group who were always going to be vaccinated and the group who were never going to be vaccinated. Within our community there is a group of people who have been genuinely unsure about whether or not to get vaccinated, for a range of reasons. For people in that category who heard what Dr Canaday said, his remarks may well have been influential in their deciding not to get vaccinated.

[78] I reiterate the point made earlier that although I must come to my own view about the apparent level of risk of public harm, I nevertheless consider I must, and I do, give significant respect to the assessment of the Council, with its broad membership and expertise in matters of health. That said, I have reached my own conclusion, independently, that there was a sufficient evidential foundation for the Council to have concluded that Dr Canaday's conduct cast doubt on the appropriateness of his conduct in his professional capacity. This has given rise to a potentially significant risk of increased vaccine hesitancy and/or scepticism, which in turn has potentially far-reaching consequences for the health of the New Zealand public in the midst of a public health emergency.

[79] I am therefore satisfied that the Council was correct to find that the threshold in s 69(1)(b) was met.

Was the Council correct to conclude that interim suspension of Dr Canaday's practising certificate was a fair, reasonable and proportionate response to the identified risk?

[80] I did not understand Mr Holloway to dispute, if the threshold in s 69 were met, that interim suspension or the imposition of conditions on a doctor's practising certificate *might be* a justifiable limitation on his freedom of expression, if proportionate. I accept Mr Mount's submission that in effect Dr Canaday's extensive NZBORA freedom of expression submissions largely "fold into" the proportionality assessment I need to make, and that the Council needed to make under s 69(2). That is, even if s 14 of NZBORA did not exist, I still could not uphold the interim suspension of Dr Canaday's practising certificate unless it is a fair, reasonable and proportionate response to his conduct and the risks identified as emanating from it. Curtailing Dr Canaday's freedom of expression is serious, but no less serious than interim suspending his right to practise. If interim suspension is the fair, reasonable and proportionate response, then it is likely also to be a justified limitation on his freedom of expression.

[81] The right to freedom of expression that Dr Canaday strongly asserts and holds dear must yield, to some extent, in the context of professional responsibility. As Mr Mount pointed out the Court of Appeal has held as much in the legal professional disciplinary case of *Orlov v New Zealand Law Society*:[28]

> "It is fundamental to the integrity of our legal system that counsel should be able to advance their client's cause in court fearlessly. However, that is not an absolute right in the sense that counsel do not have carte blanche to behave in any way they please and to make scandalous allegations against others which are without any foundation. Counsel must conduct themselves in court so as to meet their obligations as officers of the court and their ethical obligations under the *Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008*. We agree with Heath J that the provisions of the Bill of Rights must be read in light of the duties on counsel that are either articulated in the Act or implicitly recognised. Excessively aggressive or scandalous conduct that breaches those obligations will not qualify for protection under the right to freedom of expression."

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28 [2013] NZCA 230 at [77].

[82] Section 14 of the NZBORA provides: "Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form." Applied to this case, this means that, as a starting point, Dr Canaday is entitled to express the views he has and those listening to him are entitled to seek out and receive them.

[83] Of course, as s 5 provides, this freedom is subject to limitation but "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[84] The application of these high and general principles of course depends very much on the context. Dr Canaday is a medically-qualified speaker who has expressly relied on his qualifications and experience to express, indeed to emphasise, the validity of the points he makes, as being based on "the actual science", by inference in contrast with the majority view about the Covid-19 vaccine response. These statements have been made in the midst of a public health emergency in circumstances where those who are uncertain about whether to get vaccinated are likely to be especially vulnerable to being misled. As I have noted, individual decisions to not get vaccinated will have created a serious risk of harm not only to the individual in question but also to those with whom they come into contact and the wider community and its hospital and healthcare systems. This means that with Dr Canaday's freedom to speak comes a very significant associated professional responsibility for accuracy and balance. In terms of s 5, significant limitation is justified.

[85] I consider the correct approach to the issue I need to determine, with which I understand counsel to agree, is to follow the kind of analysis recently adopted by the Supreme Court in *D v New Zealand Police*.[29] That case concerned the exercise of the discretionary power under s 9 of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 to make a registration order. O'Regan J said:[30]

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29 [2021] NZSC 2.
30 At [108] and [129].

> "Once a judge has determined the nature and seriousness of the risk posed by the offender, he or she must then determine whether that risk is sufficient to warrant the making of a registration order and subjecting the offender to the requirements of the Registration Act. That assessment will involve a balancing of the protective objective of the registration order against the level of intrusion into the rights of the offender ….
>
> We now turn to the second stage: Whether the discretion to make a registration order should be exercised. The question is whether the imposition of a registration order is a proportionate response to the risk identified, having regard to the intrusion on the appellant's rights that this will involve."

[86] Having identified the risk of harm associated with Dr Canaday's public statements, the question is whether interim suspension of his practising certificate is necessary to meet that risk, or would a less intrusive interim measure adequately address that risk, pending completion of the PCC investigation?

[87] Standing back, what the Council really seeks to achieve in pursuit of its statutory obligation to protect the health and safety of members of the public is to stop Dr Canaday making any further public statements of a similar kind, pending the completion of the PCC investigation and any disciplinary action which may follow. Unless Dr Canaday stops uttering what the Council considers are dangerous messages which risk increased vaccine hesitancy and scepticism, the risk of harm will continue. Unfortunately, suspending Dr Canaday's practising certificate is a very blunt instrument to employ in an effort to achieve that goal. There is a disconnect between the perceived mischief of improper public pronouncements and the remedy of suspension. To be justified, the suspension must be rationally connected to the risk of harm and designed likely to address it.[31] But here the interim suspension and the amelioration of the risks are rather like the proverbial "ships in the night."

[88] That this is so is confirmed by the fact that suspension, it appears, has had no impact at all on Dr Canaday's public pronouncements, they have continued and the content is of continuing concern to the Council. Mr Mount acknowledged this in his submissions, in the context of submitting that the degree of impairment from the suspension on Dr Canaday's freedoms has been minimal, because it "does not and has not stopped Dr Canaday from speaking publicly. He is free to share his

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[31] See *R v Hansen* [2007] 3 NZLR 1.

views, publish opinions, speak publicly and communicate in what any manner he wishes".

[89] At least on the Council view of matters, Dr Canaday is running a serious risk in continuing to speak publicly in the way he has while his practising certificate is suspended, because he may, regardless of the content of his messages, be charged with having practised his profession while not holding a current practising certificate, a disciplinary offence under s 100(1)(d) of the Act. However, for present purposes what matters is that from the Council's perspective the risk of harm to public health has been undiminished by his suspension. All that it has really meant is that he has not been able to speak publicly while claiming to be a practising doctor. But that, it appears, has no impact at all on the content of his public statements as a senior doctor about the vaccine-related issues.

[90] Of course, I should record that Dr Canaday strongly disputes that in making his public pronouncements he is "practising medicine", any more than others publicly promoting majority vaccine-related views are doing so.

[91] The short point then is that the Council's decision to take the Draconian step of suspending Dr Canaday's practising certificate, likely to be in place for many months albeit subject to review under s 69(4), is not achieving any significant protection of the public from the risk of harm to which the Council considers that Dr Canaday's statements give rise.

[92] The Council says that suspension was the least restrictive and the proportionate response because given the level of risk, Dr Canaday, while still able to speak publicly, should not be able to do so with the undoubted status attached to being a practising doctor. Ironically, all of his relevant public speaking has been done since he retired i.e. while he had a practising certificate but was not using it. Also, a good deal of it, since 24 November 2021, has been carried out while he is also suspended from practising, or returning to practice.

[93] I readily accept the force of the distinction made by the Council between public statements made by a doctor who is able to say they are a practising doctor

and those made by a doctor whose practising certificate has been suspended. However, I consider that the risk of harm which the interim measure is designed to address, is likely to be very little different if Dr Canaday is speaking publicly as he has been since 24 November as a senior and retired doctor who is not currently practising, as opposed to a speaking as a senior and retired doctor who is not currently practising *and* is not currently allowed to.

[94] In this circumstance, while noting the point made by the Council about the ability to use the "label" of "practising doctor", ironically the much less restrictive interim measure of a suitably targeted VU is far more likely to advance the Council's goal of protecting the public from harm.

[95] In his decision maker's report Dr Walker said:[32]

> "Although Dr Canaday proposed a voluntary undertaking, this still allowed him to publicly share his opinions which Council reasonably believed would remain consistent with the comments he made previously, and which the Council found concerning."

[96] The only practical difference between such a VU and a suspension is the status with which Dr Canaday is able to speak. I do not consider that the increased restriction of not being able to speak as a practising doctor is such as to warrant the much more restrictive effects of a suspension, as compared with a properly-targeted voluntary undertaking. That is particularly so when a VU, such as Dr Canaday has already offered, would impose *greater* restrictions on his ability to speak publicly, or at least qualifications on how he may do so, than a blanket interim suspension, which is not in any way targeted at his public speaking.

[97] If it is correct that in his public statements about the vaccine issues Dr Canaday has since 24 November been practising while suspended, then he may ultimately suffer disciplinary consequences, if a charge under s 100(1)(d) is preferred and proved. He might potentially be found guilty of that, yet not guilty of engaging in professional misconduct bringing discredit to the profession. In that event, continuing the suspension, assuming Dr Canaday keeps speaking along the

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[32] At paragraph 49f.

same lines, would simply add to the number of offences allegedly committed and may not add much to those consequences, especially given the phase of the public health response to the Omicron outbreak which has now been reached.

[98] In simple terms, the practical options which the Council had as a response to the significant identified risks to public health arising from Dr Canaday's statements were:

(u) To impose an interim suspension which contains no restrictions on Dr Canaday's ability to speak publicly; or

(v) To negotiate with him a targeted voluntary undertaking which does[33].

[99] Given the Council's statutory obligations under s 3 of the Act and the significant public health risks it has identified as being associated with Dr Canaday's statements, the latter option was both more likely to be effective, as well as being fairer and more reasonable to Dr Canaday, because it is much less restrictive than interim suspension.

[100] It is understandable that the Council may have considered, at least at first blush, that having identified a significant risk of harm to public health, that had to be met by the most significant interim measure available – suspension. But its obligation to adopt the least restrictive, fair, proportionate and rationally-connected response requires a more nuanced assessment.

[101] There is no reason to believe that a senior and respected doctor such as Dr Canaday would not comply with any voluntary undertaking he gave. The Council has not suggested otherwise.

[102] Mr Holloway pointed out that as a result of the risk of harm notification being issued under s 35, Dr Canaday has to complete a performance assessment

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[33] I have not overlooked the third option of including conditions on Dr Canaday's scope of practice under s 69(2)(b). However this does not appear appropriate given the nature of his practice.

under s 36 of the Act. Pending that assessment the Council asked for and Dr Canaday gave a VU which provided:

> "1. If I comment on, or share material, information, or opinions created by myself or others, publicly or in the media, on COVID-19 or vaccination against COVID-19, I must advise:
>
> - The material, information or opinion may differ from the views held by the majority of my New Zealand medical peers; and may be contrary to Ministry of Health guidance; and
> - This does not constitute medical advice; and
> - That I am currently registered a radiologist but also have overseas specialist training and prior experience as a respiratory and critical care physician.
>
> 2. I understand that the media includes any social media, news, or video streaming platforms.
>
> 3. If I obtain employment, I will immediately inform Council.
>
> 4. I will remain bound by the VU until either:
>
> a. Council releases me. I understand that Council may reconsider this VU at its discretion and will review it following the conclusion of the Professional Conduct Committee's investigation; or
>
> b. Council resolves to release me from this Undertaking after considering an application made by me or on my behalf, such application to be determined by Council within no later than 14 days of receipt of the application; or
>
> c. I withdraw this Undertaking on 14 days' written notice to the Council."

[103] Mr Holloway also noted that, in connection with Dr Shelton, the Council had accepted that where a patient does seek a doctor's views on Covid-19 or vaccination, during a consultation the doctor may inform the patient of the nature of the doctor's views of Covid-19, including treatment and vaccination provided that:

> (w) The doctor also informs the patient of the extent to which any views vary from conventional theories of medicine, including "the government's position" and "the Council's position" and guidance statement on Covid-19; and

(x) The doctor also provides the patient with the details of another doctor, nearby, who can provide them with further (conventional) advice on Covid-19 and Covid-19 vaccination.

[104] Mr Holloway criticised the Council for not explaining why these conditions should be different or more restrictive for public speech despite such conduct being removed from the doctor-patient relationship which lies at the heart of medical practice.

[105] I consider the answer to that is that the potential harm, in the sense of the number of people potentially affected, is much greater in Dr Canaday's case than in relation to a one-on-one doctor-patient exchange.

[106] I note Mr Mount's concern about the contents of a VU being mentioned dismissively at the outset of a public address or interview of potentially considerable length. I acknowledge that concern but in my view it may be addressed by monitoring of any future statements by Dr Canaday and perhaps by renegotiation of the terms of the VU. For example, the VU might refer to, and required Dr Canaday to mention on each occasion when he speaks publicly, that he is currently under a PCC investigation which may lead to disciplinary action because of his publicly expressed views are on the Covid-19 vaccine response in New Zealand.

Conclusion on appropriate interim measure

[107] I uphold Dr Canaday's appeal to the extent that I find that interim suspending has practising certificate was not a fair, reasonable and proportionate response to the risk of harm to public health identified. While I consider the latter was a significant risk and properly of concern to the Council, the remedy of interim suspension did not and has not addressed that risk in any significant way. I consider the appropriate response would have been to negotiate a suitably-worded VU with Dr Canaday. That could, if the Council wished, have been more extensive and specific than the undertaking to which I have referred, though Dr Canaday cannot be forced to agree to any terms, any more than the Council can.

[108] Any voluntary undertaking is a matter between the Council and Dr Canaday and is not for the court to give directions about its contents.

[109] Because there is no reason to think that Dr Canaday would not comply with a suitably-worded voluntary undertaking, I do not consider the other alternative under s 69(2)(b) of the including conditions in his scope of practice is appropriate.

[110] I would have reached this conclusion regardless of what is currently happening with the public health response to the Omicron outbreak in New Zealand. I have no expert evidence on the topic but anecdotally I can accept that the likely impact of repetition of the kinds of comments which Dr Canaday has made may now be somewhat reduced, ironically because of the high vaccination rates which have been achieved in New Zealand. With the Omicron variant now prevalent in our community, the likelihood of further vaccinations occurring in the relatively small proportion of the population who have decided not to get vaccinated and of this having a significant public health impact, is also likely reduced from what it was in November 2021. If so, that can only reinforce the view that I have already reached that suspension is, as at the date of this judgment if not earlier, a disproportionate response to the risk of harm identified.

[111] As to the appropriate order and/or directions, I seek brief submissions from counsel on the way forward. The options would seem to be either reversing the Council's interim suspension decision under s 109(3)(a) or, under s 111, directing the Council to reconsider its decision in light of this judgment and in particular suggesting that it consider again the possibility of a suitably-worded VU.

[112] I suggest that Mr Mount and Mr Holloway confer as to the way forward and if possible file a joint memorandum within 7 days of the date of this judgment suggesting the appropriate orders and directions or, if they cannot agree, separate brief memoranda within that time.

[113] In the interim, I reserve formal determination of the appeal and the question of costs, which is also a matter which ought to be discussed between counsel.

[114] I thank counsel for the quality of the comprehensive written and oral submissions and the preparation of the supporting bundles of authorities and documents. I have ultimately not found it necessary to engage in this judgment with all of the evidence and the submissions made but I have considered everything and appreciated the way the case was advanced on both sides.

S M Harrop
District Court Judge