

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2025] NZEmpC 215
EMPC 265/2025**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

AND IN THE MATTER OF an application for interim non-publication

BETWEEN FELICITY SCOTT
 Plaintiff

AND DAMAR INDUSTRIES LIMITED
 Defendant

Hearing: 11 August 2025
 Further submissions filed on 25 August 2025
 (Heard at Auckland)

Appearances: A Twaddle and A Clarke, counsel for plaintiff
 R Scott and A McGhie, counsel for defendant

Judgment: 15 September 2025

Reasons: 29 September 2025

REASONS FOR JUDGMENT OF JUDGE M S KING

[1] This judgment resolves a challenge to an Employment Relations Authority (the Authority) determination declining an application for interim reinstatement. The challenge was pursued by way of a de novo hearing and heard on a priority basis. On 15 September 2025 I issued a judgment declining the application and indicated that I would provide reasons for doing so. These are my reasons.

Background

[2] Ms Scott was employed by Damar Industries Limited (Damar) as its head of information technology (IT) from 31 August 2020 until 18 February 2025 when Damar terminated her employment for serious misconduct. Ms Scott pursued a personal grievance against Damar claiming unjustified disadvantage and dismissal. She sought an order of permanent reinstatement by way of relief and applied to the Authority for interim reinstatement pending determination of her grievance.

[3] The Authority declined Ms Scott's application for interim reinstatement in a determination dated 9 June 2025.¹ Ms Scott then filed a challenge. The challenge is solely concerned with whether Ms Scott ought to be fully reinstated on an interim basis. This judgment does not decide whether she was unjustifiably disadvantaged or dismissed. Nor does it decide whether, if she was unjustifiably dismissed, she will be reinstated on a permanent basis or what additional/or other relief she might be entitled to.

[4] What is required on the application before the Court is an assessment of whether Ms Scott has an arguable case that she was unjustifiably dismissed and an arguable case that if she was she will be permanently reinstated. The Court's assessment is based on untested evidence contained in sworn/affirmed affidavits.

Interim non-publication orders

[5] Interim non-publication orders were made in the Authority over the names and identifying details of Damar's employees involved in the complaint and investigation process or otherwise named in the evidence by another employee of Damar. The Authority assigned initials bearing no relationship to the actual names of persons protected by the order.² Damar sought a continuation of that non-publication order.

[6] Ms Scott did not oppose the application for non-publication orders. During the hearing I granted the application and said that my reasons would follow. These are my reasons.

¹ *Scott v Damar Industries Ltd* [2025] NZERA 320.

² *Scott*, above n 1, at [14].

[7] The correct approach to non-publication in the Authority and the Court is set out in the full court judgment in *MW v Spiga Ltd*.³ It involves a two-step assessment. First, assessing whether there is reason to believe that specific adverse consequences could reasonably be expected to occur. Second, undertaking a weighing exercise in which the Court must consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case.

[8] Having heard from the parties' representatives, and having considered the material before the Court, I was satisfied that it was appropriate to make the interim orders sought. In terms of the first step of the *Spiga* test, I am satisfied that there is reason to believe that specific adverse consequences could reasonably be expected to occur if the name or identifying details of the complainant were published. This is due to the nature of the complaint and the evidence of the impact the conduct has had on the complainant's health and wellbeing.

[9] In terms of the second step of the test, there is a risk that naming the other employees involved in the complaint or investigation, or otherwise named in the investigation, could lead to the identification of the complainant. I acknowledge that while none of the applicants for non-publication orders are parties to the litigation, they have a legitimate interest in preserving their privacy. They have an interest in ensuring their wellbeing is not unduly compromised. Further, the proceedings are at an interim stage. Reinstatement is being sought and the individuals involved are employed by Damar and would have varying degrees of contact with Ms Scott if reinstatement were ordered. I considered that an order of non-publication on an interim basis was likely to do the least amount of damage to the relevant relationships and provide the best basis for restoring relationships if reinstatement was ultimately ordered.

[10] It is also relevant that Ms Scott does not oppose the interim non-publication orders sought by Damar. This factor considered alongside the principles of equity and good conscience clearly favoured the making of the orders sought.

³ *MW v Spiga* [2024] NZEmpC 147, [2024] ERNZ 678.

[11] For completeness and to avoid doubt, the current interim order prohibiting publication of Damar's employees name and identifying details involved in the complaint and investigation process or named in an affidavit by another employee remain in force pending further order of the Court. The names of senior employees who are named in the Authority's determination are not subject to this order. The Court in this judgment has adopted the initials assigned by the Authority in its determination.⁴

Legal framework

[12] The law relating to interim injunctions is to be applied in determining whether to order interim reinstatement having regard to the object of the Employment Relations Act 2000 (the Act).⁵ In essence, the object of the Act is to build productive employment relationships through the promotion of good faith.⁶

[13] The approach to applications for interim reinstatement is well established and can be summarised as follows.⁷ An applicant must establish that there is a serious question to be tried. Consideration must be given to the balance of convenience, and the impact on the parties of the granting of, and the refusal to grant, an order. The impact on third parties will also be relevant to the weighing exercise. Finally, the overall interests of justice are considered, standing back from the detail required by the earlier steps. While the power to make an order for interim reinstatement is a discretionary one, the assessment of whether there is a serious question to be tried is not. It requires judicial evaluation.

[14] In a claim for interim reinstatement, the question of whether there is a serious question to be tried raises two sub-issues:⁸

- (a) whether there is a serious question to be tried in relation to the claim of unjustified dismissal; and, if so

⁴ *Scott*, above n 1, at [14]; and *Scott v Damar Industries Ltd* [2025] NZEmpC 206 at [8].

⁵ Employment Relations Act 2000, s 127(4).

⁶ Section 3.

⁷ *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59, [2021] ERNZ 153 at [6]-[9] citing *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12]-[13].

⁸ See *McKean v Ports of Auckland Ltd* [2011] NZEmpC 128, [2011] ERNZ 312 at [4].

- (b) whether there is a serious question to be tried in relation to the claim of permanent reinstatement.

[15] As the Court of Appeal made clear in *NZ Tax Refunds Ltd v Brooks Homes Ltd*, a serious question to be tried is one that is not vexatious and frivolous.⁹ Once that (relatively low) threshold is overcome, the merits of the case (insofar as they can be ascertained at an interim stage) may be relevant in assessing the balance of convenience and the overall interests of justice.¹⁰

[16] As is usual in applications of this sort, evidence was produced by way of affidavits. That means that the Court proceeds on the basis of untested evidence. The evidence will be tested at the substantive hearing.

[17] The following emerges from the evidence at this stage.

The facts giving rise to the challenge

[18] Damar operates in the dangerous goods manufacturing sector. It has approximately 180 employees in senior management, manufacturing, logistics, sales, marketing, technical support, product development, finance, administration, and IT services. Damar has factory and warehousing operations in Australia and one physical site in New Zealand, located in Rotorua.

[19] The Rotorua site houses its offices and one of its hazardous substances handling and filing facilities. Approximately 140 workers work from the Rotorua site.

[20] On 31 August 2020 Ms Scott was appointed Damar's head of IT, reporting to Mr Bradley, chief executive officer (CEO). Ms Scott managed a small IT team consisting of five team members. The IT team had their own section of Damar's offices at the Rotorua site. One IT team member lived and worked remotely from Christchurch.

⁹ *NZ Tax Refunds Ltd v Brooks Homes Ltd*, above n 7, at [12].

¹⁰ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60.

[21] Ms Scott's key responsibilities as head of IT for Damar are identified in her position description and include:

- (a) To support and implement an IT strategy for the purposes of supporting the business and introduce key technologies when required to enable the business.
- (b) To manage external contractors who supply IT and related services to the business.

[22] Her position description included a leadership component which required Ms Scott to consistently display a positive approach, listen to and respect other team members, focus on resolutions and encourage others to do the same.

[23] NI was a member of the IT team that Ms Scott managed.¹¹ Ms Scott and NI had first met in 2016 when they worked together on an IT project for a different business. They maintained an ongoing professional connection. Ms Scott had reached out to NI and encouraged them to join her at Damar, which NI did in February 2021. NI was employed as Damar's IT systems architect and was treated as Ms Scott's second-in-charge.

[24] Ms Scott believed that NI conferred with her on everything, including any work a senior manager had directly approached NI to undertake. She considered that they had a supportive working relationship and were close friends. Outside of work they socialised together with their respective partners and spent many occasions at each other's houses, sometimes staying over.

[25] In 2023 Damar initiated a company-wide IT platform upgrade known as the ERP project. This was a major and lengthy project that had faced several delays and cost increases. In about March 2024 Ms Scott was appointed to the ERP project manager role. Prior to Ms Scott's appointment, two external project managers attempted to lead the project but were unsuccessful.

¹¹ The random initials assigned by the Authority to this witness. See *Scott*, above n 1, at [14].

[26] In August 2024 Ms Scott's reporting line changed from reporting directly to the CEO, to now reporting to Mr Anderson, chief financial officer (CFO). Ms Scott felt vulnerable following the change in reporting line. She considered that she had been demoted and felt that the senior managers at Damar were making decisions behind her back and that NI was facilitating this.

[27] In August 2024 Damar's CEO and CFO instructed Ms Scott to develop a plan for the IT requirements to set up a new factory site in Sydney, Australia (the Yennora site). Setting up a new factory site fell within Ms Scott's key responsibilities as head of IT.

[28] Ms Scott involved NI in discussions regarding the requirements to set up the Yennora site. NI had suggested that Damar engage its Australian printing services supplier which it used at another Sydney site (Supplier A). Ms Scott made it clear to NI that she did not want to use Supplier A. Supplier A was a print services company, not a network and IT support company which was what the site needed. She had also found them difficult to deal with in the past.

[29] On 10 September 2024 Ms Scott sent an email to the CEO setting out a "strawman plan" for stage one of the site.

[30] In October 2024 Ms Scott was called into a meeting with Damar senior management. At the meeting the CEO advised that Damar wanted to start production at the Yennora site in November 2024 and everyone present needed to produce a list of what needed to be done for their respective areas to meet this timeframe. On 14 October 2024 Ms Scott emailed the CEO a further list setting out the IT requirements for the Yennora site. She did not receive a response to her email.

[31] Given the approaching November deadline for site production, Ms Scott began the work of establishing the IT requirements for the site, this included finding a new IT supplier. She reached out to her contacts in Australia, who had provided her with recommendations, and she had engaged in multiple conversations with potential companies that she considered had the right skill level and could provide the right level of support for the Yennora site.

[32] From the 14 October 2024 Ms Scott regularly sought updates from the CFO about the Yennora site. He informed Ms Scott that a Microsoft Teams meeting was scheduled to be held at 1 pm on 31 October 2024 to discuss the setup of the Yennora site.

[33] At 8.15 am on 31 October 2024 the CEO advised NI that the managing director of Damar was going to speak to NI about the Yennora site and the IT setup for the site. At midday, the managing director spoke to NI, briefing them on what work needed to be completed and the importance of getting it done as quickly as possible. NI felt some unease about progressing the Yennora site on their own.

[34] At 12.30 pm that day, Ms Scott was informed by the CFO that there was no need for her to attend the Yennora site meeting which was scheduled for 1 pm. Ms Scott did not receive a Microsoft Teams invite link which would have allowed her to attend the meeting.

[35] At 4 pm that day, NI approached the CFO to check in on the instructions they had received from the managing director and NI expressed concerns about “stepping on toes”. The CFO advised NI that they had been given instructions and should carry them out.

[36] The following day at about 11.45 am Ms Scott approached the CFO requesting an update on the Yennora site. The CFO advised her that the managing director had provided instructions to NI and mentioned NI’s concern about stepping on toes. There is a dispute over whether or not the CFO asked Ms Scott not to take out her frustration on NI.

[37] Ms Scott then tried to get in touch with NI but was unable to reach them. Ms Scott asked the CEO for information about what was being done by NI to progress the Yennora IT site setup and was told to speak to NI and the managing director. She was directed to send the list of actions she had developed earlier for the Yennora site to the managing director’s personal assistant.

[38] At about 12.48 pm that day, Ms Scott called NI. She questioned NI about the work that NI had been asked to complete regarding the Yennora site. NI advised her that they had been in touch with Supplier A and had arranged for them to meet the managing director on site. Ms Scott was disappointed that NI had not spoken to her first about the Yennora site. She felt that NI was acting evasively and out of character. Ms Scott questioned why NI had contacted Supplier A about the Yennora site against her express wishes and knowing that she had been working on obtaining an alternative IT supplier for the site. NI felt that the call was tense. Ms Scott had used an accusatory tone and questioned the work NI was doing regarding the Yennora site and demanded NI send her all email communications with Supplier A.

[39] At about 1.20 pm Ms Scott called NI again. Unbeknownst to Ms Scott, part way through this call NI decided to record the call. The recording lasted less than 10 minutes. During the call Ms Scott made it clear that NI did not have authority to enter contracts with suppliers or incur expense on behalf of Damar and that NI should not have proceeded to contact Supplier A against her wishes. She reinforced that NI worked for her. She was frustrated during the call and considered that NI was being evasive. An extract of the transcript from the recording of this call is set out below:

NI: Yeah I just, look, Flick¹² I know you've got a lot on your plate with the data migration so I, I was given, you know, instructions to, to just do this so that's, that's what I was doing and, you now, is, is, is it not helping... obviously it's not helping by the way you're reacting so ... look it doesn't make me feel that great now actually, you know seeing how upset you are. And that was never the intention and you know...

FS: Well put yourself in my shoes then. Let me explain just this. How do you think it makes me feel when I walk into the office and I enquire about something and everybody says, oh just go and talk to [NI], [NI] knows all about it. How much of a stupid idiot does that make me look?

NI: Right, but how is that my fault though?

...

FS: Because I'm your fucken boss and you should have spoken to me about it. You, you call me about the most ridiculous things. You call me consistently. You send the most ridiculous updates constantly on teams. Every single second of the activities you get up to. It's over the top but this...you don't even include me in...

...

¹² The nickname NI used for Ms Scott.

FS: You do not report to [the CFO]. [The CFO] doesn't know sweet fuck all about what we spoke about previously, so why the fuck you went so alone... you think that's okay, I don't know. But just mark this down on the future [NI]. This has broken some trust.

[40] Ms Scott concluded the call by setting the expectation that NI would include her in every conversation with Supplier A and that she did not want any decisions made about the Yennora site without her being included. NI's evidence was that Ms Scott repeatedly accused NI of acting without proper authority, insinuating that NI had gone behind her back. NI described Ms Scott's tone, language, and approach as aggressive and intimidating. After getting off the call NI felt distressed and physically sick.

[41] NI called Mr Hill, Damar's chief operating officer (COO) for advice on whether NI was overreacting to Ms Scott's call. NI and the COO have a good relationship, with the COO taking on a mentor-like role for NI. The COO confirmed to NI that their response was appropriate. The COO then called the CFO to raise his concerns about what had happened. The CFO was similarly concerned by Ms Scott's behaviour towards NI.

[42] On Sunday 3 November 2024 the COO called NI to check in on how they were feeling and to see whether Ms Scott had contacted them further during the weekend. NI confirmed that they had not heard anything further from Ms Scott and NI was feeling extremely anxious about going into work the next day and facing the prospect of further verbal attacks. NI agreed to send the COO a copy of the audio recording.

[43] On the morning of Monday 4 November 2024 the CFO called NI. NI told the CFO that the call with Ms Scott had made them feel very upset and uneasy. Later that morning the COO played the audio recording of the call to Damar's human resources manager (HR manager), Ms Turner, and left her to handle the situation. Despite Damar's senior management and HR manager being involved, no one at Damar took any immediate steps to raise these serious concerns with Ms Scott or took steps to ensure that NI was not subject to any similar, further conduct in the workplace.

[44] NI had hoped that Ms Scott would have cooled down over the weekend and was expecting her to acknowledge that her behaviour towards them was inappropriate.

In their evidence NI states that if this had been done, they would be willing to leave the conflict and try and move on. However, that morning Ms Scott led the IT team weekly meeting and NI felt that Ms Scott spoke to them harshly about the Yennora project and used derogative and demeaning comments towards them during the meeting.

[45] That afternoon at about 3.45 pm Ms Scott called NI about the IT setup of the Yennora site. NI once again recorded the call without Ms Scott's knowledge. Ms Scott says the purpose of the call was to try and obtain information from NI about the communications with Supplier A. She became frustrated during the call, she felt that NI was being evasive and that despite telling NI not to contact Supplier A on Friday, NI continued to do so by email and phone. NI described this call as being much worse than the previous calls. NI felt it was more abusive. Ms Scott accused NI of acting in subordination and breaching her trust. She swore at NI and made personal attacks.

[46] An extract from the transcript of the recording of the call is set out below:

FS: Here's the thing. You went over my head. I don't know why you did that. There was no need to. I was contactable all day and you contact me all the time. You should have called and discussed it with me. You've got no idea what I have got going on. You do know however that I was working on this. You also do know that the [ERP] project has been postponed so any suggestion you make about trying to help and not, you not having enough time... that's bullshit and you know it. So from hereon in, I asked you on Friday to hand this over to me. And here you are making another phone call and you've really screwed this up now. So can you please give me in detail everything that was discussed because I now need to reverse this. I'm just about to call [the managing director].

NI: Mmm. Flick it'd probably be easier if you just spoke to [CFO] I think.

FS: [NI] are you saying that you're not talking to me.

...

NI: Well because Flick you're, you're, you know you're upset about this, still and yeah, look... that's all I'm just telling you and updated you on things that ... in terms of my contact with [Supplier A], that's all. ... I only had an update from them this afternoon, just to make sure they got the email and understood it with any further questions, and that was it.

FS: And, and this you've done in direct contradiction to what I asked you not to do, again. So now I'm asking you [NI]. What the fuck are you up to?

NI: Flick...

FS: What is fucking going on here?

NI: I'm not up to anything. ...

...

FS: Look you're making it worse because you're not answering my fucking questions. What did you say to this guy? Has he [Supplier A] contacted [the managing director], yet or not?

...

[47] Following this call Ms Scott spoke with the CFO, who told her to speak to the managing director, which she did. Meanwhile, NI called the COO to discuss their concerns about the call with Ms Scott.

[48] On 5 November 2024 NI formally raised their concerns about Ms Scott's behaviour with the CFO. Later that day NI sent an email setting out their concerns. The CFO told NI not to take any of Ms Scott's calls and that they should be present for any Microsoft Teams meetings or in-person meetings with Ms Scott. However, Ms Scott remained unaware of Damar's serious concerns about her conduct until 7 November 2024 when she was invited to a Microsoft Teams meeting with the CFO and HR manager at 3 pm.

[49] During the meeting Ms Scott was advised that Damar had received a complaint from NI involving allegations that her conduct had breached Damar's anti-bullying policy and code of conduct. The CFO advised that they were considering suspension while they dealt with the complaint.

[50] The decision to suspend Ms Scott was made shortly after the 3 pm meeting. Ms Scott's email access was discontinued at 3.20 pm. Within an hour, she received a letter confirming her suspension from work and directing her not to have any contact with NI.

[51] On 8 November 2024 Damar wrote to Ms Scott and advised its intention to commence an investigation process into the complaint received by NI. The letter included a copy of NI's complaint, the audio recordings of the calls, a copy of the relevant Damar policies and her employment agreement. The letter alleged that her conduct towards NI was bullying and in breach of company policy.

[52] On 13 November 2024 Ms Scott raised a personal grievance regarding her suspension. She says the suspension was unlawful as there was no ability to suspend in her employment agreement and that the suspension was procedurally unfair and unjustified.

[53] On 15 November 2024 Damar provided Ms Scott with its draft terms of reference for its investigation. Damar proposed that, should disciplinary action be required, the CFO would be the investigator and the CEO the decision-maker. Ms Scott's feedback included her concern that the CFO should not be the investigator because he was involved in key events and should be interviewed as part of the investigation. She also raised her concern that the CFO had predetermined her suspension from work and could not act impartially. Ms Scott proposed that an external investigator be appointed.

[54] On 5 December 2024 the terms of reference were finalised. The only amendment to the draft included a reference to Ms Scott being able to have a support person and/or representative present at her interview and confirmation that the CFO had control of how the investigation was conducted.

[55] The CFO interviewed NI, followed by Ms Scott. In her interview, Ms Scott expressed remorse and wanted the opportunity to apologise to NI and engage in a restorative process. She believed they could work together in the future and that their relationship could be restored.

[56] On 24 January 2025 the CFO provided Ms Scott with his draft investigation report and sought her feedback. Transcripts of the interviews were also provided to Ms Scott. The draft report findings simply repeated the relevant terms of Damar's bullying policy, code of conduct, employment agreement and then went on to conclude that Ms Scott's behaviour towards NI on 1 and 4 November 2024 breached these terms. It goes on to find that the allegations have been upheld and that there were no mitigating factors. There was no analysis of Ms Scott's responses to the allegations or an explanation of why Ms Scott's conduct was found to have met the threshold for bullying under Damar's policies, or the other forms of alleged serious misconduct identified in the code of conduct.

[57] Ms Scott's feedback pointed out inaccuracies with her transcript, but it primarily focused on the lack of substantive analysis in the draft report. She challenged the finding that she should have raised genuine concerns about NI's involvement in the Yennora site with senior management in the appropriate way. There was no explanation as to why the investigator did not accept Ms Scott's response that she had done precisely this. She had raised her concerns in conversations with the CFO on 1 and 4 November 2024 and separately with the CEO on 1 November 2024. This failure to explain underscored Ms Scott's earlier concern that the CFO should not have been appointed the investigator, because he was involved in, and likely to be a witness to key events. The draft report also did not consider any mitigating factors, such as Ms Scott's remorse, clean employment history with Damar prior to the complaint, her long-standing friendship with NI and her belief that bad language was commonly used in the workplace. Lastly Ms Scott's feedback pointed out that the CFO was also tasked with investigating the messages that were sent by Ms Scott's wife to NI.¹³ However, this matter did not appear to be addressed by the draft report.

[58] The following day the CFO finalised his investigation report. The CFO confirmed that he had accepted Ms Scott's changes to her interview transcript and had made no adverse findings against her relating to the conduct of her wife towards NI. The report recommended that Ms Scott's conduct warranted consideration under clause 24.4 of her employment agreement, which was a clause that permitted employment to be terminated without notice in the event of serious misconduct.

[59] On 3 February 2025 Damar sent Ms Scott a letter inviting her to a disciplinary meeting. The letter alleged that her conduct was a breach of the company's policy in relation to bullying and its code of conduct. The conduct was alleged to be serious misconduct and may result in termination of her employment.

[60] On 14 February 2025 Ms Scott attended the disciplinary meeting with her lawyer via Microsoft Teams. The CEO attended with the HR manager and the company's legal representative. During this meeting Ms Scott raised her concern that

¹³ The content and relevance of those messages is discussed at [70].

the investigation report clearly considered that her employment should be terminated. She set out the significant impact that dismissal would have on her and her desire to engage in a restorative process with NI. She raised issues with the lawfulness of her suspension and her concerns about the investigation process. This included the CFO's role as an investigator given his involvement in key events, the predetermination of the investigation, and the lack of substantive analysis on the conclusions reached, including an apparent failure to consider mitigating factors.

[61] Ms Scott also denied her conduct breached Damar's policies. She focused on the circumstances giving rise to the phone calls and considered that her questions were legitimate, that NI was evasive and that the CFO and CEO had failed to be open and communicative with her. Those factors contributed to her conduct towards NI. Ms Scott considered that her behaviour in the context fell short of conduct that would justify termination of employment. She considered her friendship with NI was not properly considered in the context of the call and that bad language was commonplace in Damar's workplace.

[62] On 18 February 2025 the CEO sent a letter to Ms Scott advising her that the allegations had been upheld and he had made the decision to terminate her employment. Similar to the investigation report, the letter did not expressly explain why the CEO determined that Ms Scott's conduct breached Damar's policies and amounted to serious misconduct justifying dismissal. The letter does not appear to consider Ms Scott's responses and explanations given at the disciplinary meeting. It simply records that the CEO did not consider that there were any mitigating factors or circumstances that justified Ms Scott's conduct towards NI. Damar then requested that Ms Scott return all company property.

[63] Around the time of Ms Scott's termination, an employee at Damar believed he was subjected to bullying, intimidating and threatening behaviour in the workplace by a colleague. He made a formal complaint and had received no further information about the complaint. Ms Scott submits that this is in stark contrast to how Damar treated the complaint against her.

Ms Scott has an arguable case for unjustified dismissal

[64] Damar does not accept that Ms Scott has an arguable case that her dismissal was unjustified. It claims that her conduct towards NI amounted to serious misconduct which justified dismissal. It maintains that its investigation and disciplinary processes were fair and reasonable in the circumstances.

[65] Ms Scott accepts that the manner in which she communicated with NI was inappropriate. However, she claims that there is an arguable case that terminating her employment for speaking to NI inappropriately during two conversations over two business days, was not an action that a fair and reasonable employer could take in all the circumstances.

[66] I consider that Ms Scott has an arguable case that Damar's decision to dismiss her was unjustified. If Ms Scott can prove all of the facts which she alleges then she will have an arguable case. That is to say, she has a case with some serious or arguable, but not necessarily certain, prospects of success.¹⁴ Ms Scott's strongest claims include:

- (a) The CFO could not fairly and impartially investigate the allegations because he was a witness who was involved in contentious events that an investigator would need to make findings on, this included:
 - (i) the CFO's evidence that he told Ms Scott "not to take it out on [NI]" before her first phone call with NI on 31 October 2024. Ms Scott denies that the CFO told her this.
 - (ii) the CFO denies that Ms Scott approached him following her first call with NI on 31 October 2024 to voice her concerns about NI's involvement with the Yennora site.
- (b) The investigation conducted by the CFO failed to fairly and reasonably consider Ms Scott's responses to the allegations.

¹⁴ *X v Y and NZ Stock Exchange* [1992] 1 ERNZ 863 (EmpC) at [872].

- (c) There is a disparity in treatment concerning similar complaints of alleged bullying, intimidating and threatening behaviour towards other employees.
- (d) The failure to consider all of the relevant circumstances when considering the outcome of the disciplinary meeting, including Ms Scott's employment history, the common usage of "blue" language in the workplace, her friendship with NI, as well as her remorse and desire to engage in a restorative process with NI.
- (e) Damar's contribution in whole or part to the development of the dysfunctional relationship between Ms Scott and NI. Damar failed to be transparent with Ms Scott about what instructions were given to NI in relation to the Yennora site and it did not act promptly to raise its concerns with Ms Scott after the first recorded phone call. Damar's complicity, through enabling the interpersonal conflict and failing to intervene, should be taken into account when considering the reasonableness of dismissal and reinstatement.

[67] The above arguments provide clear grounds for a serious question to be tried in relation to Ms Scott's unjustified dismissal claim.

Ms Scott has a weakly arguable case for permanent reinstatement

[68] When considering whether there is a serious question for permanent reinstatement, practicality and reasonableness are two separate considerations. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible and have the potential for the reimposition of the employment relationship to be done or carried out successfully. There may be considerations separate from the reasons for the dismissal that are germane to this question. In looking at reasonableness, the Court needs to consider the respective effects of an order, not only on the individual employer and employee in the case, but also on other affected

employees of the same employer and, in some cases, perhaps third parties who would be affected by the reinstatement.¹⁵

[69] Damar's position is that there is no serious question to be tried in relation to permanent reinstatement. Its key argument was that Ms Scott contributed to the situation giving rise to her dismissal. It submitted that even if she succeeded in her unjustified dismissal claim, her conduct was so significant that it would impact on remedies. In the circumstances, reinstatement is not reasonable nor practicable.

[70] Damar claims that reinstatement is operationally impractical and unreasonable due to Ms Scott's ERP role being undertaken by a contractor and the appointment of a new CFO. However, I do not consider the appointment of a new CFO or contractor as an impediment to Ms Scott's reinstatement. There is no evidence before the Court as to what, if anything, has happened to the work of Ms Scott's substantive role. If Ms Scott is reinstated it will be incumbent on Damar to provide her with work in accordance with the terms and conditions of her employment.

[71] Damar has also raised concerns with Ms Scott's refusal to comply with instructions to return company property for over two months following her dismissal. When the property was returned, Ms Scott had completed a factory reset of her phone and laptop, effectively deleting all company information. A forensic audit of the laptop indicated that a USB device was connected around the time of the reset.

[72] While Damar's concerns around the return of company property are valid ones, Ms Scott's evidence does go some way to explaining her conduct. She believed the Authority investigation into her reinstatement was to be heard imminently and it made sense to her to retain the property until this occurred. Once she realised that the investigation was deferred, she arranged to return the company's property. Ms Scott admits to using a USB stick to copy personal information and information in support of her claim for reinstatement but maintains that resetting her devices following her dismissal was consistent with Damar's standard practice. She insists that commercially sensitive or confidential information was not retained. While Ms Scott

¹⁵ *Smith v Fletcher Concrete & Infrastructure Ltd* [2020] NZEmpC 125 at [19], citing *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160, [2011] WENZ 466 at [68].

certainly ought to have returned Damar's property without delay and been more transparent over what information she had retained, this conduct is not an obstacle to reinstatement in the circumstances.

[73] Damar's strongest argument was the impact that reinstatement would have on NI and other affected employees. NI's evidence demonstrates that Ms Scott's conduct has had a significant impact on them. NI describes it as demeaning, derogatory and abusive, and resulted in NI deliberately minimising their interactions with Ms Scott, believing the work environment had become toxic. Damar considers her reinstatement would have a detrimental impact on NI's wellbeing and ability to continue working at Damar.

[74] Ms Scott says that Damar prevented her from reaching out to NI earlier due to the terms of her suspension. She also says that Damar did not make NI aware of her desire to provide an apology and engage in a restorative process. She says the failure would have contributed to NI's belief that her remorse was not genuine.

[75] However, on the evening that Ms Scott was suspended from work, her wife created a WhatsApp messenger group titled "spineless coward" and added NI to this group. The inference being that NI was the "spineless coward". At 9.09 pm that night she sent NI a message which said: "are you serious" and another message at 11.03 pm which said: "You do realise your actions have cost Flick her job. Why?". On 13 November another message was sent but was deleted before NI could read it. NI reported the WhatsApp group and messages to Damar.

[76] On 5 January 2025 Ms Scott's wife changed the title of the WhatsApp messenger group from "spineless coward" to "Little Big YFA". NI's evidence was that this was a reference to a song Ms Scott and NI had previously talked about called "You Fucking Asshole" by the band Little Big. NI interpreted the name change as being sent a message that they were a "fucking asshole". NI gave evidence that the WhatsApp messages exacerbated "the enormous anxiety this whole situation had caused me and my family".

[77] While the Court acknowledges that Ms Scott's ability to prevent her wife from contacting NI was limited, it cannot ignore the reality of the conduct, which was inappropriate and unacceptable. Ms Scott's anger at NI and the blame directed toward NI can be inferred from these messages. That inference is underscored by the absence of any evidence from Ms Scott's wife explaining her conduct or ensuring the Court that such behaviour will not continue in the future.

[78] In the circumstances, this conduct is relevant to the assessment of whether reinstating Ms Scott into the workplace is reasonable or practicable, given the impact on NI. Ms Scott was made aware of this conduct in November 2024, although it continued into January 2025. Her subsequent interactions with NI do not display an active effort to repair the harm caused. Following her termination, Ms Scott reached out to NI directly; however, the messages do not appear to address the derogatory remarks made toward NI. NI did not respond to these messages.

[79] While Ms Scott cannot be held responsible for her wife's conduct, her failure to acknowledge it or to directly address the harm caused to NI, (without invoking provocation) casts some doubt on the sincerity of her remorse.

[80] Further, NI does not consider Ms Scott has shown any genuine remorse or accountability for her behaviour. NI does not accept her explanations that her South African nationality, or their friendship justified her behaviour towards them, nor does NI accept the claim that bad language was commonplace at Damar. NI acknowledged that while there is rough language in the workplace, it was never directed at a person. NI maintains that: "There is no excuse to talk to someone in the disrespectful, aggressive and intimidating way she spoke to me."

[81] NI does not trust Ms Scott and is concerned about what reinstatement will mean. If Ms Scott was reinstated to her role, she would return to being NI's manager. NI's role as Damar's system architect requires them to work closely with Ms Scott, as head of IT. This was evident from the way Ms Scott and NI worked closely together prior to the complaint. NI has given evidence that they cannot imagine a way to work with Ms Scott again, and that they will resign from employment with Damar if Ms Scott is reinstated.

[82] Ms Scott considers that the concerns about her reinstatement on the impact of NI's health and wellbeing is exaggerated. She has produced an affidavit in support of her return from a member of her IT team. Further evidence was initially provided that another two members of her team were prepared to confirm that they were happy to work with her again; however, they stepped back from this position after a meeting was held by Damar advising staff that if they were contacted by Ms Scott's lawyer, they should respond with no comment.

[83] Damar has also pointed to other staff members, who are not in Ms Scott's immediate team, raising concerns about her return to work. Those concerns appear to relate to existing interpersonal issues which were informally managed prior to NI's complaint, or concerns that arose following NI's complaint from colleagues alleging a loss of trust and confidence. Damar also relies on Ms Scott's adversarial response to NI's complaint and its view that the work culture has improved since Ms Scott's termination. Senior managers also say that they no longer have trust in Ms Scott based on her conduct and that this cannot be rebuilt.

[84] The Court must be cautious of statements about loss of trust and confidence from employers as a reason for not reinstating an employee. Similarly, claims by co-workers that they will resign if another employee returns to work must be treated with care.¹⁶ This is particularly the case for the claims made by Ms Scott's co-workers (other than NI) who appear to oppose reinstatement on the basis of previous interpersonal issues which either have been or should have been worked through with Damar's human resources team.

[85] However, the issues raised by Damar in relation to NI are compelling and go to the heart of the practicality and reasonableness of permanent reinstatement. In particular, issues around the practicality and reasonableness of reinstating a working relationship between Ms Scott and NI.

¹⁶ *Smith*, above n 15, at [31]-[32]. See for example *Vice Chancellor of Lincoln University v Cheng* [2024] NZEmpC 277, [2024] ERNZ 1091 at [40]-[45] where interim reinstatement was ordered despite health and safety and interpersonal issues identified.

[86] NI gave persuasive evidence of the personal impact of Ms Scott's behaviour on them. On the evidence before me, it does not appear that Ms Scott takes full responsibility for her conduct towards NI and is truly remorseful, such that the behaviour would be unlikely to be repeated in the future. This can be seen in Ms Scott's responses during the investigation and disciplinary meetings where she repeatedly blames NI for being evasive and maintains that her questions to NI during the phone calls were legitimate. She also blames the CFO and CEO for failing to be transparent with her about the instructions given to NI, which contributed to her conduct. However, even if Ms Scott was feeling provoked or upset, this is no excuse for the way she behaved toward NI. Her behaviour is particularly pronounced given her role as senior manager, who was expected to display leadership qualities in the workplace. Further Ms Scott's communications with NI following her termination, when she would have had an opportunity to reflect, do not appear to express remorse or demonstrate taking full responsibility for her conduct.

[87] If Ms Scott was reinstated there is a requirement for her and NI to work closely together which affects both the practicality and reasonableness of reinstatement being able to be ordered. It may also be that, even if Ms Scott is successful in her claim of unjustifiable dismissal, her contribution towards the situation that gave rise to the dismissal requires reinstatement to be declined. However, Ms Scott needs only to establish that she has an arguable case for reinstatement. She has been employed by Damar since August 2022. She has given evidence that she has not had any disciplinary issues raised with her previously and understands that the company was happy with her work.

[88] In these circumstances, Ms Scott has a weakly arguable case for permanent reinstatement.

Balance of convenience does not favour reinstatement

[89] The balance of convenience is finely balanced.

[90] Ms Scott has given evidence of the effect on her of the dismissal. Of importance for this application is the extent to which that effect cannot be rectified if she succeeds in the substantive proceedings.

[91] Understandably, the dismissal has had a significant financial impact on Ms Scott. She is dependent on her income from Damar to meet her mortgage commitments and is concerned about finding alternative employment, given her specialist field, age, health and the limited employment opportunities in the region in which she lives. Ms Scott has filed evidence from a recruitment consultant working in the Waikato region who also confirms that Ms Scott's prospects of obtaining a similar position and remuneration are not favourable.

[92] While Ms Scott's concerns are valid ones, they could be rectified in time, should she succeed in her substantive claim.

[93] Ms Scott has an arguable case. Her strongest claim focuses primarily on the process followed by Damar and any impact this may have had on the substantive decision to dismiss. She acknowledges that her conduct toward NI was inappropriate; however, she raises issues as to whether her conduct was a breach of Damar's policies and justified her dismissal. As stated, there appears to be procedural defects in Damar's decision-making although based on the untested evidence it is not clear whether there were material errors, either procedurally or in terms of its substantive decision-making.

[94] As noted above, the Court must be cautious of statements about loss of trust and confidence from employers as a reason for not reinstating an employee. At an interim stage the basis for that claimed loss of trust and confidence has not yet been tested. The dismissal may be found to be justifiable and the employer's claim of loss of trust and confidence may be valid.

[95] Likewise, claimed differences between employees, including suggestions that employees will leave if another staff member returns to work, must be treated with care. Even where such differences exist, once a dismissal has been found to be unjustifiable, it is often reasonable for employers to arrange for a reintegration process

to smooth the employee's return to the workplace. However, at an interim stage, where the justification for the dismissal has not been properly tested, the practicality and reasonableness of such a reintegration process is considerably less.

[96] In these circumstances, Ms Scott's conduct is recorded and undisputed. NI is the individual directly impacted and that impact has been significant and demonstrated by compelling evidence. NI does not believe her remorse is genuine and cannot see a way that they could work together in the future. Given Ms Scott is NI's direct manager and their roles are closely aligned, in practice this makes any order for interim reinstatement challenging. Further, NI has made it clear that they will resign if Ms Scott is reinstated. These matters will go not only to justifiability, but to remedies.

[97] These issues point away from an order for interim reinstatement.

[98] In short then, the detriment suffered by Ms Scott by not being reinstated pending the hearing of her claim can be substantively rectified if she succeeds; the concerns of Damar, if it succeeds, may not be able to be reversed. For these reasons, the balance of convenience does not support an order for interim reinstatement.

[99] Overall justice does not displace the balance of convenience issues.

[100] Standing back from the matter and considering the overall justice of the case, I am satisfied that interim reinstatement ought not be ordered.

Costs

[101] Having been successful in defending this challenge, Damar is entitled to costs. If there is any disagreement as to the calculation of costs to be paid by Ms Scott in respect of the challenge, then the matter can be referred back to the Court by appropriate memoranda for a decision.

M S King
Judge

Judgment signed at 11 am on 29 September 2025