

**Attention is drawn to the order
prohibiting publication of certain
information in this Determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2025] NZERA 468
3385103

BETWEEN

ABC
First Applicant

DEF
Second Applicant

GHI
Third Applicant

JKL
Fourth Applicant

AND

MNO
Respondent

Member of Authority: Marija Urlich

Representatives: Andrew McKenzie, counsel for the Applicants
June Hardacre and Hamish Rossie, counsel for the Respondent

Investigation Meeting: 21 July 2025

Determination: 1 August 2025

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants seek interim reinstatement to the payroll pending determination of their personal grievances for unjustified disadvantage. The respondent opposes the application. It says its decision to move the applicants from paid suspension to unpaid suspension on 26 May 2025 effective 2 June was fair and reasonable in all the circumstances.

[2] The applicants are employees of the respondent, a government agency. The second and fourth applicants are team leaders. The first applicant holds a position in a general role and the third applicant is a casual employee in a general role. One of the applicants has been employed by the respondent for five years and the remaining applicants have been employed by the respondent for about four and a ½ years. The applicants are unable to perform their usual work duties due to bail conditions made following charges laid in late May 2024 relating to an incident which occurred at work in May 2023. Their trial is scheduled for March 2026. The applicants are currently being paid their annual leave entitlement which will be exhausted by the end of October 2025.

[3] This determination deals only with the application for interim reinstatement.

Non-publication order

[4] The parties jointly seek non-publication orders as to the facts of the 23 May 2023 incident and the identities of persons not directly involved in these proceedings involved in the incident. The grounds advanced by the parties in support of non-publication orders include the protection of the privacy of those not directly involved and to protect the fair trial rights of the applicants. Given these circumstances it is appropriate that the orders sought are granted.

[5] Under clause 10 of the second schedule of the Employment Relations Act 2000 non-publication orders are made prohibiting the publication of names and information which may lead to the identification of persons involved in the 23 May 2023 incident who are not directly involved in these proceedings: section 160(1)(f) and Schedule 2, clause 10 of the Employment Relations Act 2000.

The Authority's investigation

[6] The application was lodged on 13 June 2025. A case management conference was convened with the parties on 17 June at which timetabling directions were made by consent including that the parties would attend mediation by 30 June and if matters were not resolved, an investigation meeting to hear submissions would be held on 21 July.

[7] In determining this matter affidavit evidence of the applicants and two respondent managers have been considered as have the parties' statements of problem and reply, the documents attached thereto and their submissions. Evidential matters in dispute between the parties will not be resolved by this determination because the evidence is untested and in applying the relevant tests the Authority is not required to resolve any disputes.

The relevant law

[8] Section 127 of the Employment Relations Act 2000 (the Act) confers jurisdiction on the Authority to grant interim reinstatement. In considering the application the Authority is required to consider the following:¹

- (i) Do the applicants have an arguable case for unjustified disadvantage and an arguable case for permanent reinstatement?
- (ii) Where does the balance of convenience lie? This requires looking at the relevant detriment or injury that the applicants and the respondent will incur as a result of the interim injunction being granted (or not granted)?
- (iii) The Authority is then required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

[9] In determining whether to order interim reinstatement, regard must be had to the object of the Employment Relations Act 2000 (the Act) which is to build productive employment relationships through the promotion of good faith:²

One of the central features for the Act is its recognition of the importance of the employment relationship, the obligations both parties have to be responsive and communicative, and that issues ought to be dealt with promptly and between the parties if possible – in other words, supporting constructive employment relationships and repairing them where feasible.³

[10] It is with these factors in mind that applications for reinstatement are to be dealt.

¹ *Western Bay of Plenty District Council v McInness* [2016] NZEmpC 36 at [7].

² *Humphrey*, above n 1, at [5].

³ *Humphrey*, above n 1, at [5].

Arguable case of unjustified disadvantage

[11] The first question for consideration is whether there is an arguable case the applicants have been unjustifiably disadvantaged by way of the actions of respondent. An arguable case means a case with some serious or arguable, but not necessarily certain prospect of success.⁴ The threshold for a serious question or arguable case as stated in *McInnes* is that the claim is not frivolous or vexatious:

However, as Brooks Homes Ltd makes clear, an applicant must establish that there is a serious question to be tried, in that the claim is not vexatious or frivolous. The merits of the case (insofar as they can be ascertained at an interim stage) maybe relevant in assessing the balance of convenience and overall interests of justice...⁵

[12] Section 103A of the Act sets out the test for assessing whether a dismissal was justifiable. It requires an objective assessment of whether the respondent's actions and how it acted were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred. The Authority may take into account other factors it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in the applicants being treated unfairly.⁶ The Authority's task is to examine objectively the respondent's decision-making process and determine whether what it did and how it was done were steps open to a fair and reasonable employer.

The parties' employment agreement

[13] The applicants' employment is covered by collective agreements – one applicable to the team leaders (second and fourth applicants) and the other applicable to the applicants holding general positions (first and third applicants).

[14] The team leaders' collective agreement deals with suspension as follows:

4.6 Termination

...

4.6.3 Suspension

Where the [respondent] considers it necessary for the protection of its operational and business interests, it may require an employee to undertake reduced or alternative duties consistent with their abilities or remain away from work, on pay, while it conducts an investigation into conduct as an

⁴ *X v Y Ltd v New Zealand Stock Exchange* [1992] 1 ERNZ 863.

⁵ *McInnes* above n 1, at [9].

⁶ Section 103A Employment Relations Act 2000.

employee, or performance. Where any suspension extends beyond two weeks due to matters beyond the Ministry's control (such as a police investigation into conduct) the suspension may continue without pay.

[15] The general staff collective does not have an express provision dealing with suspension.

[16] The respondent's policies and procedures form part of the parties' terms of employment.⁷ The policies include supporting guidelines for disciplinary matters under which suspension is dealt:

Suspension

Suspension is in itself a serious step and should only be taken in a small number of sufficiently serious cases. However, in certain circumstances, it may be necessary that the employee is suspended from work while an appropriate investigation into an allegation of serious misconduct is completed. Such circumstances include, but are not limited to:

...

In the first instances, reasonable alternatives to suspension should be considered such as working at an alternative branch, restricting duties or putting additional monitoring in place. Suspension is a last resort if there are no suitable alternative options to mitigate the risk. In some cases, alternative action will require agreement and cannot simply be imposed.

If you wish to suspend the employee you will need to engage with your Senior HR Advisor and your DCE for approval before proposing suspension. In most cases, the employee must be given the opportunity to respond to a proposal to suspend and to provide their view on whether the suspension is warranted, the duration is reasonable and to give any mitigating factors the employee thinks should be considered. Generally, the employee will remain on full pay during the suspension. The key steps will usually involve the following steps:

- The employee is advised that suspension is being considered and why, and that they are entitled to seek advice and representation;
- The employee has the opportunity to comment on whether the suspension is warranted, and to provide any mitigating factors the employee thinks should be considered;
- The employee's response and reasonable alternatives are considered before a decision is made. If the decision is made to suspend, this should be followed in writing.

In extremely rare cases, there may be real or immediate concerns regarding health, safety or investigation integrity which require immediate resolution. You must engage with your Senior HR Advisor and your DCE immediately in these situations.

⁷ Clause 4.5 managers' collective agreement and clause 1.2 general staff collective agreement.

[17] Both collective agreements provide for discretionary leave with pay.⁸

Background

[18] In May 2023 the applicants were involved in an incident (the incident) at work. The respondent commenced an investigation into the incident in August and the first, third and fourth applicants were suspended on pay from 14 August. The second applicant was already suspended on pay, from an effective date of 17 July 2023, in relation to another matter.

[19] On 13 September an external workplace investigator was commissioned by the respondent to consider the applicants' involvement in the incident.

[20] On 25 October the respondent wrote to each of the applicants through their union asking them to confirm if they had been cautioned or charged by the police "for any reason". On 26 October the applicants' union confirmed in writing they had not.

[21] Following the outcome of the investigation report and further consideration of the issues by the respondent on 1 and 3 May 2024 respectively the respondent wrote to the first, third and fourth applicants, by way of their union, that "the HR process" was complete, their actions did not amount to misconduct or serious misconduct and no further formal action was required. The letters then outlined a return-to-work process, deemed appropriate given they had been away from the workplace for over 8 months, advised they would be invited to a return-to-work meeting, offered support and reminded the applicants of the confidential nature of the matter. In the following weeks the applicants commenced the return-to-work process. The second applicant did not receive a similar communication from the respondent.

[22] On 29 May the applicants were arrested and charged. The first, third and fourth applicants were attending training as part of the reintegration process. The second applicant was at home. The charges relate to the May 2023 incident. The subsequently made bail conditions prevent the applicants working at the respondent's facilities or contacting or trying to contact one another. These conditions continue unchanged as at the investigation meeting.⁹

⁸ Clauses 4.6.3 managers' collective agreement and clause 4.4.11 general staff collective agreement provide for discretionary paid leave.

⁹ The fourth respondent is awaiting judgment on dismissal of the charges.

[23] The respondent continued to pay the applicants. It is not clear on the evidence before the Authority if the parties' communications about the situation including the impact of their jobs or the basis for continued pay. The applicants' affidavit evidence says there was no communication until the following year. The affidavits in support of the respondent appear to confirm there was no communication between the parties prior to their advising the respondent in December 2024 of the trial being scheduled and nothing about their employment status until March 2025. However, at the investigation meeting an email dated 7 June 2024 was handed up. It is from a respondent manager to the fourth applicant subject line "Welfare Check In". It is in response to the arrest, advises a meeting with HR would be set up the following week "to discuss your employment status, and that you remain on discretionary leave from now to then" and provides contact details for support services. On the evidence before the Authority it is not clear if the meeting occurred, though it seems unlikely, what the manager meant by "discretionary leave" or if similar communications were sent to the other applicants.

[24] In early December the applicants advised their manager the trial was scheduled to begin March 2026.

[25] On 19 March 2025 the respondent wrote to each of the applicants, copying in their union, proposing to move them onto unpaid suspension and to hold a meeting on 21 March to discuss the proposal. The reasons outlined for the proposal include:

- the employment matter with the applicants could not be progressed until the police investigation and court trial were concluded;
- the respondent understood the trial date was a year away;
- the applicants had been on paid suspension while the police investigation was underway;
- the effective date of suspension was 8 August 2023 meaning they had been on paid suspension for 20 months; and
- the uncertainty as to the length of time until matters relating to the charges would be resolved and the ongoing impact of this and their being away from work on service delivery.

[26] When no response was received from the applicants or their union. On 9 May the respondent wrote to the applicants individually and copied in their union rescheduling the meetings to 13 and 14 May. The union organiser replied:

You have sent a number of invites regarding these matters.

[Union organiser] has spoken with [a respondent manager] this morning regarding these matters.

There appears to be some confusion and misunderstanding.

[The union] does not agree with the approach.

We have also engaged previously with [respondent manager] on this matter.

The members need to continue to be paid while this is worked through.

[27] The respondent sought to confirm the meetings with the applicants. On 12 May the respondent emailed the union advising it wished to proceed with the meetings with the applicants as advised. The union responded twice that day - the meeting on the 13th was not possible due to other business including collective bargaining with the respondent and the earliest the union could meet would be the beginning of the week 26 May. The second email ended:

We are really concerned with this approach and this decision to consider ceasing pay for the suspended staff at this time. The whole process has been really stressful for these members and we do not understand your reasoning at this time. The staff you are considering keeping suspended without pay are staff that were cleared to be back to work by your own arranged external law firm investigation. We are requesting the postponing of the proposed meeting and in addition we are requesting that you do not cease to pay for any of these members at this time. As you also know [the union] believes the [fourth applicant] should be back and there has been an application to dismiss the charges [relevant statutory provision]. This was advised to [respondent manager] and we understood a discussion would occur after this application to dismiss process.

As advised above we cannot meet tomorrow.

...

[28] The respondent replied on 13 May the meeting could be moved to 15 May, individual meeting invitations would be sent and the applicants were expected to be available to attend meetings at the respondents request as a condition of their suspension. The reply continued the applicants had had sufficient time to arrange support, the union could send a written submission if a delegate was not available to attend the meetings and ended if no comment or feedback was received by 4pm 15 May

the respondent would make a decision on the information available. Emails were exchanged through the day:

- at 2.04pm the union wrote repeating the request to delay the meetings to the week of 26 May due to existing commitments involving the respondent and to allow the union to speak with the applicants, an alternative was proposed to provide written comments by close of business 30 May, that insufficient notice or justification of the proposed change had been provided and, to the substantive issue, the applicants were charged after they had returned to work and were then stood down;

- at 4.17pm the respondent replied restating the reason for the meeting and the need to consider unpaid suspension, that the internal investigation had been superseded by the applicants being charged and until that matter was concluded the respondent could not assess when or whether the applicants could return to work and it was reasonable that the applicants make themselves available to attend the meetings; and

- at 5.12pm the union replied including they were seeking legal advice, it appeared the applicants were being denied their right to representation and given the potential impact on them and their children this was a serious issue and delegates were not a position to deal with it, asked for confirmation if the respondent had heard from the applicants in respect of this issue and again offered to meet in the week of 26 May.

[29] On 15 May the respondent replied to the union listing dates of communication to the applicants and the union on the issue over the preceding two months, that the purpose and rationale for seeking to meet was set out in those communications and given the amount of time which had passed since the initial request to meet it was reasonable to expect the union and the applicants to be available to meet.

[30] On 16 May the union wrote to the respondent confirming the applicants had “heard nothing from the [respondent] since they were placed on special leave after having been returned to work and then being arrested...and placed on special leave. It is our opinion that all of the members [the union] is representing in their employment should remain on paid special leave until the conclusion of this matter”.

[31] The respondent replied outlining steps taken to communicate the meeting request and purpose of such to the respondents and the union, seeking advice if any contact details had changed, that it was aiming to write to the applicants next week regarding the proposal to cease pay, the union would be copied in and it's view that the applicants should remain on pay was noted.

[32] On 26 May the respondent wrote to the applicants individually, copying in their union, advising the decision had been made to suspend them without pay.

Arguable case for unjustified disadvantage?

[33] The respondent's decision to suspend the applicants without pay in the circumstances known to it at that time and the applicants' opposition will need to be assessed against the s 103A test for justification.

[34] The respondent does not accept the applicants have an arguable case of unjustified disadvantage despite the low threshold. It accepts they suffer a disadvantage as a result of the decision but do not accept the disadvantage is unjustified because:

- (i) the decision was substantively justified due to compelling operational reasons, the length of the applicants' absence from work, the prospect of their continued absence from work for the foreseeable future and in accordance with the respondents' disciplinary policies and the collective agreements; and
- (ii) it was carried out in a fair manner that the applicants and their union were aware of from the start.

[35] Suspension, and particularly suspension without pay, may amount to an unjustifiable disadvantage.¹⁰ An unpaid suspension is a serious step in an employment relationship:¹¹

In the absence of express agreement to suspension without pay, either in the applicable employment agreement or by agreement between the parties at the time, suspension without pay will not be justifiable other than in very few truly exceptional circumstances.

¹⁰ *Canterbury Rubber Workers IUW v Dunlop (NZ) Ltd* [1983] ACJ 367.

¹¹ *Singh v Sherilee Holdings Ltd*, EmpC, AC 53/05, 26 October 2005.

[36] Three of the applicants were suspended in August 2023. The second applicant had been suspended earlier. The suspensions relate to the respondent's investigation of workplace matters of sufficient seriousness to warrant suspension. The suspension power appears to have been exercised under the disciplinary process in the policy document. On 1 May 2024 the respondent wrote to the first, third and fourth applicants that the "HR process and your involvement in the incident on 23 May 2023...has now ended". On 3 May the respondent wrote to the first, third and fourth applicants setting up a meeting to discuss the return-to-work plan referred to in the 1 May letter. It is arguable the August suspension was exhausted by 1 May for at least three of the applicants when they were advised no disciplinary action would be taken against them and they were to be reintegrated to work. Given this, it is also arguable the respondent could not in March 2025 rely on the employment matter as it related to the incident and the accompanying suspensions being extant when these three applicants were arrested and charged in respect of the incident. This is particularly acute given the respondent had investigated the incident and found no grounds to proceed with disciplinary action against the applicants, communicated this to the applicants and put in place active steps for their reintegration. It follows, it is arguable the respondent has misapprehended the situation when in March 2025 it proposed to move to suspension without pay because the first, third and fourth applicants were not suspended under the terms of collective agreement.

[37] It is also arguable the process followed by the respondent in May 2025 which resulted in the decision to suspend the applicants without pay was unjustified. Given the length of time the applicants had been away from the work and the apparent lack of regular contact with the respondent during that time, the clear and repeated requests from the union to delay the meetings for two weeks to accommodate obligations with the respondent including collective bargaining and to allow the union to speak with the applicants and get legal advice and further, the concern raised as to whether contact had in fact been made with the applicants, the refusal to accommodate the delay was arguably unreasonable and unfairly denied them an opportunity to respond fully to the proposal, the outcome of which was potentially serious for them and their families.

[38] It is also arguable that the respondent has not fairly considered the issues raised on behalf of the applicants including the view that there was "confusion and misunderstanding" and that the applicants were on special leave. The letters of 26 May

arguably do not explore these issues to the extent that could reasonably be expected. Indeed, the letters state no feedback had been received.

[39] The applicants' claim meets the low threshold of an arguable case for their personal grievances of unjustified disadvantage by way of unpaid suspension.

Arguable case for permanent reinstatement

[40] Where it is practical and reasonable to do so and sought, the Authority must provide for reinstatement as a primary remedy.¹² The question is whether it is feasible or practical to re-impose the employment relationship. It is not sufficient to show resistance and strained circumstances to avoid reinstatement.¹³

(i) *Practicability*

[41] Can the employment relationship be successfully re-imposed?¹⁴ The respondent accepts from a bare financial perspective reinstatement to the payroll can be carried out and, in that sense, would be practicable.

(ii) *Reasonableness*

[42] Is it reasonable to require the applicants to be put back on the payroll? The applicants face charges arising from events which occurred during the course of their duties. They are innocent until proven guilty. The applicants had been paid for a significant number of months without comment or engagement from the respondent as to their status. While it is accepted the respondent is under operational pressure it is a large agency and information as to the proportionate impact of the four respondents continued absence from work will need to be explored at any substantive investigation. Steps the respondent has taken to accommodate the applicants' absence from work is in the knowledge their circumstances may change rapidly, including barriers to their return to work. Information before the Authority indicates the applicants are a small portion of staff currently off work on paid whose absences the respondent is accommodating. It is reasonable for the applicants to be returned to the payroll.

¹² Section 125(2) of the Employment Relations Act 2000.

¹³ *Angus v Ports of Auckland* [2011] NZEmpC 122 at [63] and *Air New Zealand Limited v Hudson* (unrep) Employment Court, Auckland, AC 46/05, 17 August 2005, at p 8.

¹⁴ *Smith v Fletcher Concrete & Infrastructure Ltd* [2020] NZEmpC 125 at [20].

Conclusion

[43] The applicants have an arguable case for permanent reinstatement.

Balance of convenience

[44] This ground for consideration involves the relevant detriment or injury the parties will incur if interim reinstatement is granted or not. An assessment of what might happen if the interim position is reversed in any substantive determination including consideration of whether damages can adequately compensate any harm if reinstatement is not ordered is also to be made.

[45] If the applicants were reinstated to the payroll on an interim basis this would, on the affidavit evidence, be a financial and operational burden for the respondent. The respondent accepts, in practical terms it can carry the burden of the applicants returning to the payroll.

[46] If the applicants are not reinstated to the payroll, then they can continue on their annual leave until it is exhausted which will occur at the end of October 2025. Their use of annual leave is understandable given the respondent's decision to place them on unpaid suspension and if they are ultimately reinstated to the payroll the use of annual leave may be recovered in damages. These factors weigh against interim reinstatement to the payroll. The applicants are free to find other work. However, given their circumstances, this may not be straightforward. This is a neutral factor.

[47] Considering all the relevant factors the balance of convenience favours the applicants. This is because the preservation of the position of the applications, on the payroll, was the last settled position between the parties and is a significant and this matter the determining factor in assessing balance of convenience.¹⁵ The respondent is assessed as able to bear the burden of reinstating the applicants to the payroll until the substantive claim is heard and determined by the Authority. Given the gravity of the circumstances faced by the applicants, damages are unlikely to be an adequate remedy.

¹⁵ *Savage v Wai Shing Limited* [2019] NZEmpC 141.

Overall justice

[48] Standing back from the detail of the claim where on balance does the overall justice lie? This has been described by the Court of Appeal as:

The overall justice assessment is essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and balance of convenience.¹⁶

[49] The applicants have established they have an arguable case their being placed on unpaid suspension was unjustified and an arguable case for permanent reinstatement to the payroll. It is accepted the removal from payroll and prospect of no income is devastating to them and will have a negative impact on their households. They are facing trial for their part in an incident which occurred during their work duties and for which they were cleared following a workplace investigation. The respondent in practical terms can accommodate the applicants return to the payroll at least in the short term.

[50] Overall justice favours reinstatement of the applicants to the payroll. In making this order I do not underestimate the impact on the organisation of employees being away from work on pay for significant periods or the solemn responsibility the respondent carries as a steward of public funds.

Outcome

[51] The applicants are to be reinstated to the payroll forthwith.

[52] The parties are directed to mediation.

[53] If, following mediation, the applicants wish the investigation of this employment relationship problem to continue, they should advise the Authority. A case management conference will then be convened to timetable an investigation meeting of the substantive employment relationship problem. The dates indicated to the parties for an investigation meeting of the substantive matter remain available.

¹⁶ *NZ Tax Refunds Limited v Brooks Homes Limited* [2013] NZCA 90 at [47].

Costs

[54] Costs are reserved.

Marija Urlich
Member of the Employment Relations Authority