

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 513  
3315260

BETWEEN ELIAS HUSSAIN  
Applicant

AND AUCKLAND TRANSPORT  
Respondent

Member of Authority: Jeremy Lynch

Representatives: Mark Ryan, counsel for the Applicant  
Laura Scampion and Julia MacGibbon, counsel for the  
Respondent

Investigation Meeting: 26 June 2025, in Auckland

Submissions and Other Material Received: 2 and 22 July 2025 from the Applicant  
6 July 2025 from the Respondent

Determination: 22 August 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This determination deals with an application Elias Hussain brings for interim reinstatement, pending the determination of his personal grievances for unjustified disadvantage and unjustified dismissal.<sup>1</sup>

[2] Mr Hussain was first employed by Auckland Transport (AT) as a parking officer in 2013. He was summarily dismissed from his employment by letter dated 22 May 2024.

[3] AT opposes Mr Hussain's application for interim reinstatement. It says the

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<sup>1</sup> Supported by an undertaking as to damages, an affidavit in support sworn on 1 August 2024, together with additional affidavits sworn on 15 January 2025, and 2 July 2025.

decision to dismiss Mr Hussain was procedurally and substantively justified.

**The Authority's investigation.**

[4] Mr Hussain's application was lodged on 5 August 2024. As interim reinstatement was sought, a duty Authority Member held a case management conference (CMC) by telephone. As is recorded in the directions issued to the parties following this CMC, Mr Hussain confirmed he was not seeking urgency. The parties were directed to attend mediation, but this was not successful in resolving matters.

[5] Following the unsuccessful mediation, the Authority convened a further CMC with the representatives on 14 November 2024, to progress the matter.

[6] Mr Hussain's counsel again advised that urgency was not sought. The Authority advised that due to the recent settlement of other scheduled matters, it was able to offer the parties a prompt date for a substantive investigation. However, this was declined by Mr Hussain's counsel.

[7] Timetable directions for the lodging of the parties' affidavits and submissions were made. This timetable accommodated the commitments of Mr Hussain's counsel, including his Court fixtures.

[8] Extensive affidavit evidence was lodged by Mr Hussain, including his primary affidavit sworn 1 August 2024, an affidavit in reply sworn on 15 January 2025, and a further affidavit sworn on 2 July 2025.

[9] For AT, an affidavit was lodged by Group Manager Parking Services, John Strawbridge sworn on 17 February 2025, together with an affidavit lodged by Parking Compliance Area Manager Jason Flay, also sworn on 17 February 2025.

[10] An investigation meeting to hear submissions was held on 26 June 2025 (the submissions hearing). The parties' representatives filed written submissions prior to the meeting, provided oral submissions at the meeting, and provided further written submissions after the meeting.

[11] Leave was granted at the end of the submissions hearing for Mr Hussain to lodge a further affidavit, and for AT to lodge further material following that.

[12] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded everything received from the parties, but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

[13] The Authority has carefully considered all the material provided.

[14] 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 such disputes.

### **The Issues**

[15] Section 127 of the Act confers jurisdiction on the Authority to grant interim reinstatement. For the Authority to grant interim reinstatement, 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 weighting exercise. Finally, the overall interests of justice are considered, standing back from the detail required by the earlier steps.<sup>2</sup>

[16] The issues for determination in this interim reinstatement application are:

- (a) whether there is a serious question to be tried - that is, does Mr Hussain have an arguable case for unjustified dismissal?
- (b) If so, does Mr Hussain have an arguable case for permanent reinstatement?
- (c) Where does the balance of convenience lie?
- (d) 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.

[17] In determining whether to order interim reinstatement, regard must be had to the object of the Act, which is to build productive employment relationships through the promotion of good faith:<sup>3</sup>

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<sup>2</sup> *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [7].

<sup>3</sup> *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* [2021] NZEmpC 59 at [5].

One of the central features of 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.

[18] It is in light of these factors that applications for interim reinstatement are considered

### **Background**

[19] Mr Hussain worked in AT's night team. As parking officers on the night team would otherwise be working alone, to ensure their safety, AT contracts security guards to accompany them on their nighttime duties.

#### *A complaint is received*

[20] On 17 February 2024, AT received a complaint from the Armourguard security guard who had accompanied Mr Hussain on his shift the previous evening. For the purposes of this determination, this guard is referred to as Guard A.

[21] Guard A's complaint alleged that whilst on their shift, Mr Hussain had acted inappropriately, had been abusive, had driven recklessly, had instructed Guard A to remove his (work-issued) high visibility vest, and without any explanation visited a private residence in Henderson whilst the guard was required to remain in the car alone for nearly two hours.

[22] Following that, Guard A alleged that after stopping to withdraw cash from an ATM (again without any explanation), shortly before 1.00 am, Mr Hussain then drove to another private address, in an area Guard A described as "... a street with no lights, bumpy road in middle of nowhere... this road goes to nowhere and has a dead-end, total darkness... I felt frightened and threatened so I call 111."

[23] Guard A said that when he phoned the Police, Mr Hussain panicked and advised him he would return home to the AT base. Guard A said he remained on the call to the 111 operator until Mr Hussain had returned to the AT base.

[24] On 20 February 2025, Mr Hussain was suspended on full pay, while AT conducted an investigation into the complaint.

*A further complaint is received*

[25] On 27 February 2025, an additional complaint was received from another Armourguard security officer. For the purposes of this determination, this guard is referred to as Guard B.

[26] Guards A and B were interviewed by AT in early March 2024. As part of its investigation, AT obtained the GPS tracking data from Mr Hussain's vehicle, and his radio transmitter (RT). This data was broadly consistent with the information provided by Guards A and B.

[27] Guard B alleged (inter alia) that on 17 February 2024, after returning from a 30 minute break, Mr Hussain sat in his vehicle with the guard for approximately 90 minutes, with the engine off, for non-work purposes.

[28] AT considered there were similarities between the complaints received from Guards A and B.

[29] On 20 March 2024, AT wrote to Mr Hussain setting out a number of allegations.

[30] Mr Strawbridge's evidence is that AT sought to arrange a meeting with Mr Hussain's counsel at which Mr Hussain could respond to AT's allegations. Mr Strawbridge's evidence is that "attempts to arrange a mutually convenient date for the meeting did not eventuate, and [Mr Hussain] was therefore invited to provide his responses in writing rather than at a meeting".

[31] On 12 April 2024, Mr Hussain provided a written response to the allegations. He accused Guard A of being a liar, and rejected all of AT's allegations

[32] AT says it considered Mr Hussain's feedback. By letter dated 29 April 2024, AT advised of its preliminary decision to summarily dismiss Mr Hussain, together with its reasoning. AT invited Mr Hussain to provide written feedback as to its preliminary decision, or to attend an in-person meeting for this feedback to be provided.

[33] Mr Hussain wrote to AT on 7 May 2024. In this letter, Mr Hussain attached a copy of an undated, handwritten statement, purportedly from Guard A. Mr Hussain said that this handwritten statement was prepared by Guard A prior to the statement he provided when completing his Armourguard Security Incident Report. Mr Hussain said that Guard A's handwritten statement was in stark contrast to the contents of his later

statement (relied on by AT), the effect of which was that Guard A's veracity was brought into disrepute. Mr Hussain said that AT's failure to further interview Guard A, "highlights AT's failure to carry out a full and fair investigation", and that this alleged failure was "illustrative of predetermination on the part of AT".

[34] AT responded to Mr Hussain in writing, advising that it had never seen the handwritten statement before, and had not been provided with the statement by either Guard A, or Armourguard, and questioned how Mr Hussain came into its possession.

[35] On 10 May 2024, Mr Hussain provided his response to AT's preliminary decision. The response is brief. Mr Hussain sets out that he does not accept AT's findings, or that his behaviours are consistent with serious misconduct. No explanation is provided in support of this position.

[36] In addition, Mr Hussain reiterates his concern that AT has failed to carry out a full and fair investigation and sets out that the preliminary decision of summary dismissal as "inconsistent with the actions of a fair and reasonable employer". Again, no reasoning is provided in support of this position

[37] Mr Strawbridge says that he fully considered this response before making a final decision.

[38] On 22 May 2024, AT wrote to Mr Hussain, confirming its decision to summarily terminate him from his employment for serious misconduct. The letter sets out that:

...prior to confirming that summary dismissal was the appropriate sanction, we consulted with you, and also considered lesser sanctions. We have determined that no lesser sanction is appropriate in the circumstances due to the seriousness of the conduct, the values and expectations of AT around honesty and integrity, the fact that there has been an irrevocable breach of trust and confidence and the compelling reason that you are required to work as a warranted officer, at night time, in a typically highly autonomous role.

[39] On 5 August 2024, Mr Hussain lodged his application for interim reinstatement in the Authority, and raised personal grievances for unjustified dismissal, and unjustified disadvantage.

### **Arguable case**

*Is there an arguable case for unjustified dismissal?*

[40] The first question the Authority must consider is whether there is an arguable case that Mr Hussain was unjustifiably dismissed. An arguable case means a case with

some serious or arguable (but not necessarily certain) prospect of success.<sup>4</sup> the threshold for a serious question or arguable case as stated in *McInnes*, is that the claim is not frivolous or vexatious:<sup>5</sup>

... 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) may be relevant in assessing the balance of convenience and overall interests of justice...

[41] Mr Hussain submits that as a fair and reasonable employer, AT ought to have carried out a full and fair investigation into the allegations made against him, which should have included obtaining a copy of the 111 call made by Guard A, and discussing with Guard A his signed handwritten statement, amongst other enquiries.

[42] AT accepts that the threshold for an arguable case is low. However, AT does not accept that Mr Hussain has an arguable case for unjustified dismissal. Rather, it submits that Mr Hussain's termination was both procedurally and substantively justified, and AT's decision to dismiss was one that was open to it, having found all allegations against Mr Hussain had been established.

[43] AT submits that the information before it, including Mr Hussain's responses, did not establish a reason to question the genuineness of the complaints from Guards A and B. In addition, AT submits that given Mr Hussain accepted that the 111 call took place, there was no need for AT to obtain further evidence in relation to this call.

[44] Furthermore, AT submits that the handwritten note purportedly from Guard A, (provided by Mr Hussain) "serves as confirmation of a broad pattern of events described by [Guard A] and was not in 'stark contrast' to [Guard A's] statement" as alleged by Mr Hussain.

[45] In an interim application, reliance is placed on untested affidavit evidence. As part of the Authority's substantive investigation, Mr Hussain's actions and his failure to provide any adequate explanation for being at a particular location, (despite his vehicle GPS data and the statement of Guard A confirming he was at this address), will need to be considered. In determining an interim application, the Authority cannot resolve disputed matters on the basis of untested affidavit evidence.

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<sup>4</sup> *X and Y Limited v New Zealand Stock Exchange* [1992] ERNZ 863.

<sup>5</sup> Above n 2, at [9].

[46] Mr Hussain's claim meets the low threshold of an arguable case for his personal grievance for unjustified dismissal. At the very least there is a dispute between the parties as to the reasonableness of AT's decision not to further interview Guard A, or obtain a copy of the 111 call.

[47] The Authority is satisfied that there is an arguable case that Mr Hussain was unjustifiably dismissed.

*Is there an arguable case for permanent reinstatement?*

[48] Again, this is a low threshold.

[49] Where it is practicable and reasonable to do so, the Authority must provide for reinstatement (when sought) as the primary remedy.<sup>6</sup>

[50] AT submits that reinstatement is not practicable or reasonable because:

- (a) Mr Hussain engaged in serious misconduct.
- (b) Mr Hussain did not provide any responses which explained and justified his conduct.
- (c) a significant period of time has elapsed since termination, making reintegration into the workplace difficult.
- (d) AT has already recruited for Mr Hussain's role
- (e) for Mr Hussain to be able to perform his role, AT needs to issue a statutory warrant of appointment. AT submits that Mr Hussain's conduct does not meet the requirements for AT to issue such a warrant which is a requirement for the performance of the parking officer role.

[51] It is not sufficient for an employer to show resistance and strained circumstances in order to avoid an order for reinstatement.<sup>7</sup>

[52] For an employer the size of AT, it would not be unreasonable to expect that it would have sufficient HR resources at its disposal, to put in place the necessary arrangements to support Mr Hussain's successful reintegration to the workplace.

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<sup>6</sup> Employment Relations Act 2000, s 125(2).

<sup>7</sup> *Angus v Ports of Auckland* [2011] NZEmpC 122 at [63].

[53] If Mr Hussain is able to establish his personal grievance, it cannot be said that reinstatement is impossible, particularly given that the Authority may order reinstatement subject to any conditions it thinks fit.<sup>8</sup>

[54] The arguable case threshold for permanent reinstatement is established.

### **The balance of convenience**

[55] The Authority now turns to weigh the interests of Mr Hussain, against those of AT. The Authority considers the potential effect on Mr Hussain if he were declined interim reinstatement, against the potential effect on AT if interim reinstatement was granted.

[56] The period under assessment is from the date of this determination as to the interim issue, until the date of the Authority's substantive determination of Mr Hussain's personal grievance claims.

[57] As set out above, during the CMC held with the representatives on 14 November 2024, the Authority offered the parties a prompt substantive investigation meeting date, but this was declined by Mr Hussain's representative.

[58] At the submissions hearing the parties enquired as to the Authority's availability for the substantive investigation of Mr Hussain's claims. The Authority advised that due to the recent settlement of other scheduled matters, it had capacity to hear Mr Hussain's substantive matter in late October or early November 2025. Mr Hussain's counsel declined this offer and advised that because of his Court commitments, he was not available for a substantive investigation until sometime in 2026. This is a relevant factor in the Authority's assessment of the balance of convenience.

[59] Mr Hussain says the balance of convenience favours him for the following reasons:

- (a) any award of damage is not adequate compensation for him, as he has and will continue to suffer loss of earnings and humiliation and distress as a result of his unjustified dismissal.

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<sup>8</sup> Section 127(5).

- (b) Despite applying for new roles, he has been unable to secure new employment, and as a result, his financial position has further deteriorated, and he is “struggling to make ends meet”.
- (c) There is no downside to AT, and any issues as to trust and confidence and/or arising from Mr Hussain not being issued with the requisite statutory warrant can be addressed by reinstating Mr Hussain to the payroll only, and placing him on ‘garden leave’ pending the Authority’s substantive determination.
- (d) An award of lost wages and compensation will not alleviate the “serious prejudice faced by [him] through the delay in having the claim heard by the ERA, nor with the servicing of [his] ongoing financial commitments”.

[60] In respect of the issue of delay, Mr Hussain submits that:

- (a) his application for interim reinstatement was lodged within the statutory timeframe, there is no separate or abridged period within which an application for interim reinstatement is to be made.
- (b) There is a medical reason as to why he did not seek urgency, and he has provided a medical certificate from his doctor which the Authority should accept at face value.
- (c) The medical certificate also provides a response as to AT’s criticism in respect of the low number of Mr Hussain’s job applications.
- (d) Mr Hussain’s counsel accepted that a small portion of the total delay was attributable to Mr Hussain himself, but that was addressed by the medical certificate (provided after the submissions hearing). He further submitted that the significant majority of the delay was attributable to counsel’s own workload commitments and overseas travel, which should not be held against Mr Hussain.

[61] AT submits that there are no factors which point to the balance of convenience weighing in favour of Mr Hussain because:

- (a) there are unexplained delays in Mr Hussain’s application for interim reinstatement, which was not lodged until some 75 days after the date of his dismissal.

- (b) Mr Hussain has been the cause of further delays in that he:
  - (i) retrospectively sought two extensions for lodging documents after the timetable dates had lapsed;
  - (ii) lodged his affidavit over a month after its due date;
  - (iii) requested the scheduled interim investigation meeting be postponed due to a subsequent date conflict
- (c) Due to delays on Mr Hussain's part, the submissions hearing is occurring 400 days after the date of dismissal, an effect of which is that the likelihood of successful reintegration to AT's workplace is negligible.
- (d) Mr Hussain has not demonstrated any willingness to "constructively move forward", and instead his evidence suggests that he was not prepared to work with security officers such as Guards A and B, which AT submits "appears to be in direct contention with establishing and maintaining a productive employment relationship".
- (e) The evidence of Mr Strawbridge is that he would not issue a statutory warrant to Mr Hussain to complete duties as a parking officer;
- (f) As a primarily ratepayer and taxpayer funded organisation, AT has an obligation to manage its funds prudently. There is a risk to AT that funds may not be recovered if Mr Hussain faces a damages award.
- (g) Mr Hussain had (as at the time of the submissions hearing) only provided evidence of two job applications, which is insufficient to establish mitigation of loss.
- (h) Even if Mr Hussain was successful in his claim of unjustified dismissal (which is denied), his contributory conduct towards the situation giving rise to his dismissal is significant and would require that reinstatement be declined.

*Mr Hussain's claimed impecuniosity*

[62] Mr Hussain's evidence is that he has no savings, having no income has had a significant impact on his financial position and that his "financial circumstances are dire". In support of this, he has provided bank statement showing his outgoings, including as to mortgage payments for the house he says he owns.

[63] During the submissions hearing (and in response to a submission from AT that Mr Hussain would not be able to meet an award of damages), Mr Hussain's representative submitted that he had been advised by Mr Hussain that his partner has a well-paying job with a bank, and that as such he would be in a position to meet a damages award.

[64] Although this information is not expressly set out in his affidavit evidence, the bank statement information provided by Mr Hussain does appear to support this claim. The bank statements are clearly from a joint account, and consistent with the advice provided during the submissions hearing, the bank statements disclose regular fortnightly salary payments from a well-known Australasian bank. The payments suggest a gross salary of approximately \$100,000 per annum.

[65] Although Mr Hussain's evidence is that due to his lack of employment he is "struggling to make ends meet", there is no evidence before the Authority of any failure to meet any required payment by its due date. Certainly, from the bank statement information Mr Hussain provided, it appears that his obligations in terms of mortgage payments, rates, electricity and the like, have all been met on a regular basis, and he does not say in his affidavit evidence that he is in danger of losing his house (as is often the case with applicants seeking interim reinstatement).

[66] An award of compensation for "humiliation and distress" (as Mr Hussain puts it), is a remedy considered by the Authority as part of its substantive investigation into his personal grievance, it is not a consideration at the interim stage.

[67] On balance, although I accept Mr Hussain's evidence that being without an income has been a significant struggle, I do not accept that an award of lost wages (at the substantive stage) would be an inadequate remedy.

[68] In addition, there are aspects of the information about Mr Hussain's own efforts to secure alternative employment and income in the interim period (notwithstanding the medical certificate provided) which do not support the order he seeks.

#### *Reinstatement to the payroll*

[69] At the submissions hearing, Mr Hussain confirmed he was seeking reinstatement to the payroll only.

[70] Mr Hussain submits that any concerns as to trust and confidence, and/or issues around Mr Hussain not receiving the requisite statutory warrant to perform the role of parking officer is addressed by his seeking to be reinstated to the payroll only.

[71] Such a request is somewhat unusual. More typically, an order is sought for return to the workplace, or some form of work, such as working from home, or from another location. In some cases, particular circumstances may result in the order for interim reinstatement reserving a discretion to the employer to elect to restore the employee to its payroll but not require them to perform any work. Exercising that discretion means the employer is incurring the cost of paying the employee but not getting the benefit of any work in return. In those circumstances, the employer makes a choice not to get the usual value from the wage-work bargain.

### *Delay*

[72] It is unusual for an application for an interim order not to be progressed with urgency. Ordinarily, an applicant seeking interim reinstatement would seek that their matter was granted urgency by the Authority.

[73] Mr Hussain was dismissed on 22 May 2024, and lodged his application for interim reinstatement (on a non-urgent basis) some 75 days later. This is a lengthier period than usual for an interim reinstatement application before the Authority.

[74] Similarly, the length of time from the date of Mr Hussain's dismissal, to the date of the submissions hearing, is significant at some 400 days.

[75] At the conclusion of the submissions hearing, Mr Hussain sought leave to lodge a further affidavit (annexing a medical certificate) to explain some of the delay, and then lodged further written submissions. The medical certificate could have been provided earlier. This resulted in a delay of an additional 26 days.

[76] Mr Hussain submits that the initial period of 75 days it took him to lodge his application for interim reinstatement is due to the effects of a medical condition "as confirmed by [his] medical certificate". AT submits that the medical certificate does not provide evidence as to why Mr Hussain did not seek interim reinstatement sooner.

[77] In response, Mr Hussain submits that "[AT's] lawyers are not medical experts. The Authority... has the applicant's doctor's medical certificate, and it should be taken at face value".

[78] I accept the medical certificate at face value. It does not state that Mr Hussain's medical condition has been the cause of any delay, nor does it state that Mr Hussain's medical condition has in any way impeded his ability to participate in this proceeding. The medical certificate does not provide any clinical basis for the delay. The medical certificate simply confirms that Mr Hussain has had a medical condition since June 2024 for which he has received treatment.

[79] Mr Hussain submits that he cannot be held accountable for any delays caused by the workload commitments and overseas travel plans of his representative. However, I must also recognise that as a barrister, Mr Hussain's representative acts on instruction. There is nothing before the Authority to suggest that Mr Hussain had attempted to instruct an alternative representative (with fewer trial commitments) to act for him. It can therefore be assumed that Mr Hussain would have been advised about issues to do with delay, and rather than seeking alternative representation, decided to continue his instruction of his counsel.

[80] In this regard Mr Hussain must bear some responsibility for the delay in progressing his own matter.

[81] In addition, the fact that at the 14 November 2024 CMC Mr Hussain declined a prompt substantive investigation is also relevant. Mr Hussain's evidence that he will face "serious prejudice... through the delay in having the claim heard by the ERA..." is at odds with his own decision to decline a prompt investigation date. Furthermore, Mr Hussain's own conduct has had the effect of delaying the progression of this matter. He failed to comply with agreed timetable directions which meant that the scheduled investigation meeting had to be vacated, and a new (later) date of 1 May 2025 set down. Mr Hussain's counsel then advised the Authority he was unable to attend on this day due to a Court commitment in Christchurch.

[82] The 1 May 2025 investigation meeting date was vacated and the parties offered alternative dates in early May 2025. These were declined by Hussain's representative who advised that he would be travelling overseas between May and June 2025, and requested an investigation meeting date of after 23 June 2025.

[83] This is inconsistent with the requirement in *Humphrey* that issues be dealt with promptly.<sup>9</sup>

*Evaluating the strengths and weaknesses of Mr Hussain's case*

[84] Evaluating the relative strength or weakness of aspects of Mr Hussain's case is helpful in assessing the balance of convenience. As noted above, this evaluation is reached from considering untested affidavit evidence. Conclusions reached at this stage of the proceeding are provisional, and subject to change when evidence is fully tested through questioning at the substantive investigation meeting.

[85] Although Mr Hussain has an arguable case that his employment ended unjustifiably, this argument does not appear strong.

[86] AT's investigation appears to be procedurally sound. Mr Hussain was represented by his same counsel throughout the disciplinary process. Concerns were put to him, and his response sought prior to any decision being made. In addition, at the conclusion of its investigation process, AT gave Mr Hussain the opportunity to provide further comment to its preliminary decision before this was confirmed.

[87] The GPS data from Mr Hussain's vehicle and RT appears to broadly support the statements of Guards A and B relied on by AT during its disciplinary investigation. Mr Hussain's responses throughout the disciplinary process failed to address specific concerns put to him by AT, failed to address the significant amount of vehicle and RT GPS data provided to him, and failed to adequately explain why he was at particular locations, and the duration of these attendances.

[88] In the circumstances, AT appears to have the stronger case that it met the standard of acting fairly and reasonably in seeking to address the concerns that it had in respect of Mr Hussain's conduct.

[89] The relative merits of the parties' cases regarding the prospect of successful reinstatement are not as clear-cut. AT is a large employer, with significant HR resources at its disposal. It is not unreasonable to assume that measures could be put in place to support Mr Hussain's eventual successful reintegration. However, this is a matter that would need to be addressed only if Mr Hussain does eventually establish that his

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<sup>9</sup> Above n 3.

dismissal was unjustified. A factual analysis of the practicability and reasonableness of reinstatement would then be required.

[90] However, the Authority acknowledges AT's concerns around Mr Hussain's failure to provide adequate responses to its disciplinary allegations. Mr Hussain accused Guard A of being a liar, and indicated that he was not willing to work with certain security officers, instead stating that "...going forward Auckland Transport needs to put in place to strict guidelines on what guards are sent to oversee the safety and well-being of parking officers...". Mr Hussain also categorically rejected all the allegations against him, despite the significant vehicle and RT GPS data. AT submits that Mr Hussain's approach "appears to be in direct contention with establishing and maintaining a productive employment relationship".

[91] There is no immediate effect on third parties that weighs strongly for or against the order sought. The merits of this second aspect, concerning the prospects for successful reinstatement, are evenly balanced.

*Conclusion as to balance of convenience*

[92] Considering all the relevant factors, the balance of convenience favours AT. Any detriment to Mr Hussain in not being reinstated on an interim basis, can be remedied through an award of damages if his claim is successful at the substantive stage.

[93] Should Mr Hussain be reinstated on an interim basis, this would be disruptive for AT's business, particularly for reasons arising from Mr Hussain's apparent reluctance to work with certain security guards.

[94] In addition, reinstatement must be practicable and reasonable.<sup>10</sup> Mr Hussain's suggestion of reinstatement to the payroll is not practicable or reasonable, particularly in circumstances in which he has declined the offer of a prompt substantive investigation, as well as indicated that his instructed counsel would be unavailable to attend a substantive investigation for an extended period.

[95] Considering all the relevant factors, for the above reasons, the balance of convenience weighs in favour of AT.

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<sup>10</sup> Section 125(2).

### *Overall justice*

[96] Standing back from the detail of the claim, the Authority must then consider where the overall justice lies. This has been described by the Court of Appeal as:<sup>11</sup>

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 in balance of convenience.

[97] Mr Hussain's claim turns on whether AT was justified in terminating his employment. On the information presently available to the Authority, it appears that Mr Hussain faces a considerable hurdle in establishing that the decision to dismiss him, was not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.<sup>12</sup> From the untested affidavit evidence, it appears that AT conducted a procedurally sound disciplinary investigation, in which allegations were put, but inadequate responses received.

[98] In addition, despite his evidence that he requires reinstatement on an interim basis to address the serious prejudice caused by the delay in having his personal grievance investigated by the Authority, Mr Hussain has declined a prompt substantive investigation, and contributed to the not insignificant delays outlined above.

[99] Mr Hussain's evidence in support of the reasons as to why he seeks to be reinstated on an interim basis does not outweigh the impact that reinstatement would have on AT.

[100] In such circumstances, an order for his interim reinstatement (either to his former role, or to AT's payroll only) until his personal grievance application has been investigated and determined is not in the overall interests of justice at this stage of this case.

### **Outcome**

[101] Mr Hussain's application for interim reinstatement is declined.

### **Mediation**

[102] The parties may wish to attend further mediation prior to the Authority's substantive investigation of Mr Hussain's grievance (particularly in light of the

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<sup>11</sup> *NZ tax refunds Limited v Brooks Homes Limited* [2013] NZCA 90 at [47].

<sup>12</sup> Section 103A(2).

unavailability of Mr Hussain's counsel to attend an investigation meeting). The parties have 14 days from the date of this determination within which to inform the Authority of their views regarding further mediation.

**Costs**

[103] Costs are reserved, pending the outcome of the substantive investigation of Mr Hussain's grievance application.

Jeremy Lynch  
Member of the Employment Relations Authority