

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2024] NZERA 425  
3291459

BETWEEN	PQR Applicant
AND	STU Respondent

Member of Authority: Antoinette Baker

Representatives: Pervinder Davies, counsel for the Applicant  
Andrew Shaw, Jack Whittam, counsel for the Respondent

Investigation Meeting: 30 May 2024

Submissions received: On the day

Determination: 12 July 2024

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant was employed by the respondent and dismissed without notice in March 2024 for serious misconduct. The applicant claims the dismissal was unjustified both procedurally and substantively and seeks interim and permanent reinstatement; and that they were unfairly disadvantaged in the workplace based on the same process. Reimbursement of lost earnings and benefits, compensation, interest, and costs are sought for the grievance claims. The respondent opposes all claims.

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

### **Non-publication**

[3] The applicant applies for interim non-publication orders in respect of prohibiting from publication the applicant's name and any other information that would identify them pending the Authority's determination of their substantive application.

[4] The respondent does not oppose non-publication for the reasons set out in the Applicant's application dated 24 April 2024.

[5] The Authority may, in respect of any matter, order that all or any part of any evidence given, or pleadings filed or the name of any party or witness or other person not be published, and any such order may be subject to such conditions as the Authority thinks fit.<sup>1</sup>

[6] There is a fundamental principle that justice should be administered openly.<sup>2</sup> The Employment Court has observed that damage to future career prospects was a factor to be balanced. However, a party seeking to depart from the principle of open justice needs to provide evidence identifying specific adverse consequences.<sup>3</sup>

[7] The Employment Court has also considered that the open justice principle may have greater weight importance at the stage when evidence is properly tested, and the Authority is in a position to make findings.<sup>4</sup>

[8] The grounds relied on by the applicant relate to the circumstances of third parties involved with conduct that if attached to the applicant in publicity could have serious adverse consequences for the applicant beyond the issues that relate to the matters before the Authority. The context of this conduct may be necessary to refer to

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<sup>1</sup> Employment Relations Act 2000, clause 10, Schedule 2.

<sup>2</sup> *Erceg v Erceg* [2016] NZSC 135; *Courage v The Attorney- General* [2022] NZEmpC 27.

<sup>3</sup> *Chief of New Zealand Defence Force v Darnley* [2021] NZEmpC 27.

<sup>4</sup> *JGD v MBC* [2020] NZEmpC 193

in this interim determination. I accept as set out in the application for non-publication that there is a risk of serious adverse consequences on the applicant, their family and the applicant's future employment prospects (if not reinstated) if they are able to be identified publicly in relation to this third party conduct.

[9] I am satisfied that this situation shifts from the usual starting point of open justice.

[10] Accordingly, there is to be an interim non-publication order prohibiting from publication:

- a. The name of the applicant
- b. The name of the respondent
- c. The workplace, the nature of the workplace and its geographical location
- d. The names of deponents of affidavit evidence
- e. Reference in untested evidence in affidavit evidence, applications, submissions, or associated documentation that identifies third parties and or conduct that is not conduct specific to the applicant nor arguably why she was dismissed.

[11] From here on the following random non identifiers will be used:

*The parties and workplace:*

The Applicant	PQR
The Respondent	STU
The workplace	The workplace

*Respondent affidavit deponents:*

Director of the workplace	A
PQR's immediate manager	B
Security manager at workplace	C
Investigator of allegations against PQR	D
Human Resource advisor	E
Senior investigator and forensic report writer	F

[12] Where necessary the non-publication of specific words or parts of sentences will be redacted from publication as necessary to be consistent with the non-publication

order. When this occurs, this will be shown as **[[redacted]]** in the publicised version of this interim determination. The unredacted references will appear within the same bold **[[ ]]** in the non-publicised version of this interim determination that will be sent to the parties.

[13] Third parties will simply not be named or identified in this interim determination.

[14] This interim non-publication order shall apply until further order of the Authority.

[15] Whether or not this interim non-publication order will be made into a final non-publication order is a matter which will be addressed by the Authority at the time of any substantive investigation meeting.

### **The Authority's investigation**

[16] Following the lodging of the application for interim reinstatement on 16 April 2024 with the requisite undertaking and affidavit by PQR, the Authority held a case management conference with the parties' representatives to set a timetable for the application. The parties have complied with timetabling directions including attending directed urgent mediation which was unsuccessful. The investigation meeting was held by AVL and included submissions (lodged just before) from counsel representatives.

[17] In determining this matter, I have received and considered the affidavit evidence of PQR including an affidavit in reply; for STU, affidavits from six deponents all referred to above at [11]. I have also considered where relevant to this interim matter the parties initiating and responding documents, associated documents and the parties' submissions.

[18] Evidential matters in dispute between the parties will not be resolved by this determination because the evidence is untested. In applying the relevant tests for interim reinstatement, the Authority is not required to resolve any disputes.

[19] As permitted by s 174E of the Employment Relations Act 2000 (the Act) I have not recorded all the affidavit evidence and submissions before me but set out my findings, conclusions and any orders made so as to dispose of this preliminary matter.

### **The approach to interim reinstatement**

[20] The Authority may order interim reinstatement while pending the outcome of a personal grievance.<sup>5</sup> When determining interim reinstatement, the Authority must apply the law as it relates and have regard to the object of the Act.<sup>6</sup> The object of the Act is to promote productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship. This includes an acknowledgment that an employment relationship is built on more than just implied mutual obligations of trust and confidence, but also that there is an inherent bargaining power in employment relationships.<sup>7</sup>

[21] Section 125 of the Act 2000 relates to where remedies are sought for a personal grievance and here the grievance is proven the Authority must provide for reinstatement ‘wherever practicable and reasonable, irrespective of any other remedy as specified in s 123 of the Act (compensation and lost earnings.) While s 125 refers to the substantive outcome, I also consider this statutory primary remedy in this interim application.

[22] To determine PQR’s application, I must first decide whether they have shown there is a serious case to be tried asking whether there is an arguable case for unjustifiable dismissal and then if so, whether there is an arguable case for permanent reinstatement.<sup>8</sup>

#### *Arguable case threshold*

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<sup>5</sup> Employment Relations Act 20900, s127(1)

<sup>6</sup> Employment Relations Act 2000, s127(4)

<sup>7</sup> Employment Relations Act, s3(a), (i) and (ii).

<sup>8</sup> *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90, at [12] and [13]; *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36, at [8]

[23] Whether a case is arguable is based on asking whether it has serious or arguable prospect of success but not necessarily certain as to that outcome, and that it is not based on a ‘frivolous or vexatious’ claim<sup>9</sup>. The latter is sometimes called the threshold test and I accept both parties’ submissions that the threshold is not high.

[24] If I find there is an arguable case to be tried under each head, I need to consider where the balance of convenience lies. This involves assessing the impact on the parties of granting or declining the interim reinstatement. Finally, I need to stand back and consider the overall justice of the case.<sup>10</sup>

[25] I will consider the application against these issues after first setting out a summary of the employment relationship problem using the affidavits lodged and some of the attached documentation before me. I do not refer to all references in this material. I note that almost two thousand pages have been submitted and I have attempted to focus on what is relevant to consider in this interim application. As already noted above, where necessary, I redact some words and phrases consistent with the non-publication orders made above.

### **Background to the employment relationship problem**

[26] PQR worked for approximately 10 years up to the time of dismissal in an instructor role at a **[[redacted]]**. That role included working with **[[redacted]]** who were being trained while carrying out tasks for the benefit of the wider STU workplace, working in a distribution area processing ordered goods for **[[redacted]]**. PQR had also worked in a front facing role for STU prior to this instructor role making a term of service close to 20 years. I will from here on refer to the people that PQR instructed as ‘trainees’ or redact from publication other identifying references as seems appropriate to the narrative and the non-publication orders made above.

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<sup>9</sup> *X v Y Limited v New Zealand Stock Exchange* [1992] 1 ERNZ 863; *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [9].

<sup>10</sup> *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA); *X v Y Ltd and the New Zealand Stock Exchange* [1992] 1 ERNZ 862 (EmpC), at 872

[27] The trainees were trained in an on the job setting and could gain trade related qualifications as part of a **[[redacted]]**. The work and training done by the trainees was under the supervision of PQR and their other colleagues. That supervision is connected to STU's statutory obligations to hold the trainees **[[redacted]]**. The workplace is therefore a high trust environment in terms of STU's employees to act within boundaries of appropriate conduct.

[28] PQR's immediate manager at the time of the employment relationship problem arising was B.

[29] PQR was concerned that on a specific 'standalone' computer system used for the above distribution, the software system being used (Z) had become slow and was inefficient.

[30] PQR says problems with Z were known to others in STU including B. PQR talked with G1, a trainee 'good with computers', about Z's problem. PQR says they involved G1 in a phone call with the former supplier of Z because PQR did not fully understand what needed to be done to improve the way Z worked. PQR says they raised the problem of Z in staff meetings and that B had told PQR to 'see what they could do' after PQR suggested they engage the assistance of G2, a former trainee **[[redacted]]** who had also been 'good with computers' in the workplace that PQR worked in. The electronic meeting minutes that PQR says will show that B gave them this go ahead have not been found by STU. B denies having given PQR any authority to contact G2 in relation to Z and that if it had been raised they would not have done given that G2 was a **[[Redacted]]** and in the past PQR had been formally warned about liaison with G2. That incident with G2 was a trainee related to allowing G2 to use PQR's home address as a reference.<sup>11</sup>

[31] The next two things are acknowledged actions by PQR. I state them here chronologically but return to them as I set out the process of when these things came to

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<sup>11</sup> Affidavit of B sworn 17 May 2024 at paragraph 11.

STU's attention causing the start of an employment investigation into these actions by PQR.

[32] On 26 May 2023 PQR confirms that they brought an STU owned USB stick into the workplace and that on that stick was data that they understood G2 had uploaded to the device for the purpose of upgrading Z. PQR upon bringing the device into the workplace gave the USB to G1 and watched them download data but acknowledges apart from 'games' which they questioned and then considered generic, the rest was computer data that PQR did not understand.

[33] On 20 June 2023 PQR brought RAM sticks and an STU USB stick into the workplace. This was because PQR says they understood from G1 or G2 or both<sup>12</sup> that the first upgrade software for Z brought in by PQR did not work. PQR acknowledges that the RAM sticks were given to them by G2 and that the STU owned USB contained data that PQR copied from their home computer after it had been uploaded there by G2 when G2 visited PQR at their home<sup>13</sup>. PQR says they understood the data transferred was for an upgrade to Z.

[34] Two days after PQR brought the second devices into the workplace, material that was unauthorised in the wider STU workplace **[[redacted]]** and **[[redacted]]** was found in G1 and other trainee **[[redacted]]** accommodation areas in the STU wider workplace. I will hereon call this hard copy material found, 'unauthorised material'. The unauthorised material was found after an instructor colleague of PQR reported to B they had seen unauthorised material in bags to be distributed from the work area that PQR and G1 worked in. Also in the same search finding the unauthorised material a pay authorisation form to pay money to G2 was found.<sup>14</sup>

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<sup>12</sup> The point to me at this stage is untested.

<sup>13</sup> This was clarified by PQR to A in a meeting on 18 January 2024, lines 24-33 of the transcript, Document 84 of the Common Bundle and referred to in Affidavit of F, affirmed 17 May 2024 at paragraph 13.

<sup>14</sup> Affidavit of A sworn 17 May 2024 at paragraphs 5 to 10.

[35] G1 was interviewed by STU and explained in a recorded interview that the unauthorised material had come into the workplace because they had arranged PQR to bring it into the workplace on a device(s) to ‘upgrade’ Z. G1 confirmed in that interview that PQR knew nothing about the unauthorised material that was contained in the device(s) brought in.

[36] STU further investigated and found that phone calls between G1 and G2 showed they had communicated about PQR bringing the devices with data into the workplace. G1 and G2 had both **[[redacted]]**. A’s affidavit evidence includes that when they became aware of the above situation they considered a serious investigation was required. Police amongst others became involved. A forensic investigation was commenced including the taking of digital assets and computers in the workplace where the distribution of the unauthorised material appeared to have come from, the work area that PQR and G1 worked in.

[37] A then directed ‘containment’ steps that stopped the use of Z and any ‘non departmental equipment’ in areas of work throughout the wider STU in areas where product was similarly processed and distributed. A’s affidavit includes that this resulted in trainees losing their work placements, being disciplined within STU processes, and disrupting some distribution services throughout STU. In their affidavit A says they needed to assure those they reported to at a national level that the situation had been contained.<sup>15</sup>

[38] PQR was first notified by STU that it had concerns on 23 June 2023 when A asked PQR to go home from the workplace. A’s affidavit is that they told PQR that there was a serious issue, and they were told to go home for their health and safety. A did not elaborate on details but indicated they would write to PQR with concerns. PQR says A told them to go home and ‘read a book.’ After a brief discussion, PQR left the workplace with their union delegate.

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<sup>15</sup> Affidavit of A sworn 17 May 2024 at paragraphs 7 to 13.

[39] Four days later, on 27 June 2023 A wrote to PQR (the first investigation letter). The letter set out two allegations and gave an explanation as to why these allegations were being made.

[40] The allegations were set out as:

1. you may have brought contraband on site to [the workplace] by:
  - a. Bringing in USB Drive(s)/Stick(s) and/or other IT storage devices to site and providing them to a **[[redacted]]**<sup>16</sup>
2. you may have liaised and received the IT storage devices from **[[redacted]]** an **[[redacted]]**.

[41] The circumstances set out in A's letter to PQR included:

- a. An outline (as at that stage) into the unauthorised material found and the phone calls monitored between G1 and G2 and the interview with G1 that linked PQR to bringing the devices into the workplace.<sup>17</sup>
- b. STU's concern that PQR had breached the 'Code of Conduct' for their employment, and STU's 'IT Security Policy'<sup>18</sup>. These were set out in excerpts that I reproduce or summarise below.

[42] The section of the 'Code of Conduct' included in A's letter was:

**We are Accountable** – Being accountable means we have the confidence of the public and Government. We do what is expected of us and act with transparency and integrity. We exercise self-management at work and in our private lives. We constantly strive to meet or exceed the standards of performance of our work – particularly where this

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<sup>16</sup> Refers to what I call in this determination 'trainees'.

<sup>17</sup> The letter did not include that G1 had explained that PQR did not know about the unauthorised content on the device but the transcript of G1's interview was later provided to PQR and showed that G1 had said this.

<sup>18</sup> In full it is referred to as the 'IT Security and Information Technology and Services Acceptable Use Policy'.

relates to our safety and the safety of our colleagues, the public and **[[redacted]]**. To be accountable, at [STU] you must:

- Comply with the law at all times
- Uphold the policies, procedures and standards of [STU]
- Maintain appropriate professional boundaries and relationships with **[[redacted]]**

**We make a Difference** - To make a genuine difference, our decisions and actions support positive changes in the lives of **[[redacted]]** and our community. When we interact with **[[redacted]]** and our colleagues, we model behaviour that helps **[[redacted]]** to become better members of society. We are self-disciplined and fair and use good judgement. To make a difference you must;

- Maintain and role model high standards of integrity, presenting yourself in a way that enhances your credibility and supports our success.
- Behave in a way that reflects well on your position at [STU], both in and out of the workplace.
- Use [STU] resources lawfully, responsibly, appropriately, effectively and efficiently.

[43] The letter further includes:

In addition, the Code ... also includes as examples of conduct that falls below our expectations:

- Contraband: Bringing, carrying or allowing prohibited items within **[[redacted]]** or [STU] worksite for your own use or for that of **[[redacted]]**.
- Corruption: Accepting a bribe, inducement, reward or gift, or complying with a request or threat to use your position to provide a benefit to any person or third party, or allowing inappropriate activity or compromising the impartial performance of your duties.

[44] The first investigation letter continues with an excerpt regarding the IT Security Policy drawing PQR's attention to 'Principle 5 of the IT Security Policy' which I

summarise as requiring ‘authorisation and approval’ for all changes to IT systems and assets before any ‘actions, development or testing is performed’; and that all ‘IT assets that are purchased have a list of authorising rules including being labelled with unique identification and a tamper proof label and added to an asset inventory.’

[45] Having set out the above, the first investigation letter then provides that:

As you are aware, the [STU] takes such matters seriously. The allegations, if proven, may constitute misconduct or serious misconduct and be a breach of [the above mentioned policies]. You should also be aware that a substantiated act or acts of misconduct or serious misconduct may result in disciplinary action, including a form of warning or up to and including dismissal.

[46] The first investigation letter then set out a description of an investigation process and addresses the issue of suspension pending the investigation progress including that STU was considering suspension on pay pending an investigation and asking for feedback proposing a meeting to hear about this.

[47] In broad summary the following then occurred:

- a. PQR was represented by her union and suspended on full pay.
- b. PQR engaged legal counsel to represent them, Ms Davies;
- c. An investigator (D) was appointed by A, draft terms of reference (TOR) were provided to PQR, feedback was requested and given. The feedback included that PQR wanted those responsible for checking items brought into the workplace to be questioned by D. D declined this request based on not needing to broaden the investigation unnecessarily.
- d. D interviewed B; G1; and two other instructors that worked alongside PQR and then PQR. Transcripts of interviews were supplied to the interviewees for checking and then to PQR before PQR was interviewed.

- e. D reported<sup>19</sup> that G2 was scheduled to be interviewed but did not attend and attempts to reschedule were not successful. G2 was not interviewed.
- f. D interviewed PQR on 26 September 2023. PQR's counsel was not present. PQR had a support person. The transcript of that interview shows that PQR gave explanations for bringing the devices with the loaded software into the workplace to upgrade Z, that they had the go ahead from B to liaise with G2 to provide this upgrade, that STU IT services had not helped with Z and the STU contract with an external software supplier had expired and in the absence of management support PQR believed they had to take action to fix Z for the benefit of the distribution business within the STU workplace. PQR reflected that they should have got written approval which they 'could have got', and should have further discussed with colleagues what to do, and watched G1 more closely. PQR referred to the historic context of bringing devices in and out without problems. PQR confirmed they 'declared' the devices upon entry and that staff ought to have checked them.
- g. Regarding the second allegation, PQR confirmed they had been in contact with G2 from about 16 months prior to bringing the devices in, that G2 had PQR's contact details, phone and address, and that former trainees often communicated their thanks for the support they had previously received, including Christmas cards.
- h. PQR confirmed that the content that came through on the device(s) improved Z and that they were not concerned about what was on the devices because they believed G1 and G2 were 'doing good for the business [of distribution] to make those computers work.'
- i. At the end of PQR's interview<sup>20</sup> the 'two allegations' from the first investigation letter were put to PQR and their responses were to confirm (the first allegation) that they brought a STU USB into the workplace, declared at entry, gave it to G1 who had a 'key role' with Z in the workplace; (the second allegation) that they did meet and receive

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<sup>19</sup> Affidavit of PQR dated 16 April 2024 at paragraph 5.4 of Annexure F, Investigation Report by D.

<sup>20</sup> D interview with PQR, 26 September 2023 at page 42, lines 19-38.

software from G2 but did not believe G2 was still on a **[[redacted]]**.  
That the software was put onto a STU USB stick.

*The draft investigation report, PQR's feedback and D's responses.*

[48] The draft investigation report upheld the two allegations and this remained the case in the final investigation report. I will cover a summary of D's final investigation report below. I broadly summarise what was included in PQR's feedback<sup>21</sup> to the draft and the responses and changes made by D to the feedback:

- a. D agreed to change some descriptor words;
- b. D declined to interview entry point staff (again) stating that the responsibility for bringing the devices into the workplace lay with PQR;
- c. D did not agree to change wording relating to issues found regarding authorisation policies for USBs after PQR pointed out a comment by B in their interview about the asset registry and that 'asset approvals don't expire.' D responded they thought the approval and asset registry were different things.
- d. That PQR challenged two dates on a computer (on screen shots) in relation to two dates supporting that unauthorised material content must have been on the computer prior to PQR bringing the devices into the workplace. D's response its that 'on the balance of probabilities' if there was existing unauthorised material in computer files before PQR brought the devices into the workplace then unauthorised material in hard form would have occurred prior.
- e. PQR challenged that the electronic meeting minutes requested by PQR were not found.
- f. To PQR's other proposed changes D responded that they were not within scope or deferred to the decision maker in the category of mitigation. These included things relating to PQR's position that there was a context of others knowing what they were doing to fix Z, the practice of bringing devices in

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<sup>21</sup> Affidavit of A sworn 17 May 2024 at paragraph 4 u. referencing Letter dated 26 October 2023 from D to Ms Davis dated 26 October 2023, Common Bundle at Document 72.

and out of the workplace for administration and whether the devices required authorisation, and whether the USB's fell within description of 'electronic devices' in STU authorisation policies. To the latter D responded that they did not accept that USBs were not electronic devices.

- g. D responded to PQR's feedback that it was not clear about whether there were unauthorised files **[[redacted]]** on the devices (the forensic report was not yet available) saying that the devices themselves were unauthorised. D referred to the decision maker in relation to PQR's query about the forensic reporting still to come and noted this was outside of the scope of the investigation.
- h. PQR fed back that they had not been asked about their 'understanding' of the conflict of interest policy referred to in the report and that their previous manager could have reminded them. D responded that they considered reference to the conflict of interest policy relevant to the second allegation.

### *Final Investigation Report*

[49] A received D's final investigation report (the final investigation report)<sup>22</sup> on 31 October 2023 along with PQR's feedback and D's responses on the draft report.

[50] A's affidavit states that on 10 November 2023 they 'commenced the disciplinary process, by providing [Ms Davies] with the final investigation report and [D's] response to PQR's feedback.' A's cover letter to this communication included:

Under normal circumstances, at this stage I would ask you for any submissions on the final report before I make my preliminary view however as part of reviewing the documentation, I have identified the need for further inquiries. Once I have determined the nature of these, I will update you on the next steps.

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<sup>22</sup> The report is at Document 65 of the Common Bundle and referred to in A's affidavit dated 17 May 2024 at paragraph 19. The report is 13 pages with 48 annexures including transcripts of all interviews undertaken to that time and phone call transcripts obtained by STU between G1 and G2 between 6 May and 19 June 2023 and other calls after this time between G1 and others.

[51] The above communication from A did not use words saying that the ‘disciplinary process’ had started.

[52] The final investigation report upheld both allegations against PQR that had been set out in A’s first investigation letter to PQR dated 27 June 2023.

[53] Regarding the first allegation which involved bringing ‘contraband’ into the workplace, the report included the definition of contraband from a link to the workplace website and referred to a non-exhaustive list of examples and then that ‘seemingly innocent items, while not illegal, may be used inappropriately by **[[redacted]]**’. The report included a summary of the reasons why the first allegation was upheld including that PQR had confirmed they brought devices into the workplace, that it was for the person bringing devices into the workplace to check they were authorised and appropriate to be brought into the workplace (addressing PQR saying that other staff ought to have checked the devices upon entry for expiry of authorisation or what was on them)<sup>23</sup>; and that there were a hierarchy of permissions that ought to have been obtained, referencing a policy called ‘Electronic Devices entering’ the workplace. The report further found ‘no corroborating evidence’ that others knew PQR was bringing the devices with the software from G2 into the workplace and reported that B, PQR’s supervisor denied giving permission during his interview with D.

[54] Regarding the second allegation about PQR’s liaison with G2 as a former trainee **[[redacted]]** the investigation report included that STU had a ‘Conflict of Interest’ policy, quoting the same and that PQR knew that G2 was a former **[[redacted]]** and trainee but reported PQR confirming that they did not know G2 was continuing to be **[[redacted]]**. The report includes that PQR confirmed they had given G2 their contact details<sup>24</sup> (at paragraph 6.2.7) and had communication through texts and phone calls and that PQR ought to have declared involvement according to the above mentioned conflict policy.

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<sup>23</sup> Paragraph 6.1.34 of D’s Final Investigation Report, Common Bundle, Document 71 referenced at paragraph 4 u. of the Affidavit of D affirmed 17 May 2024.

<sup>24</sup> AS above, paragraph 6.2.7.

[55] The report includes reference to the end of the interview with PQR when the two allegations are put to them. I have already referred to this above at [47] i.

*Extra interviews conducted by A*

[56] I have referred above at [50] to the email of 10 November 2023 from A to Ms Davies communicating that A intended to make more inquiries. A communicated to PQR in a further email dated 15 November 2024 they would interview B, and a former manager of PQR, and a person working in the administrative side of the STU workplace (the extra interviews). The reasons for these extra interviews were expressed in the 15 November 2023 email from A as for the purpose of gaining ‘clarity around some of the things that [PQR] told the investigation during [their] interview on the 26 September 2023.’ A says in their affidavit that the reason for the extra interviews was to understand the ‘practices’ in relation to Z and the use of USBs in the distribution area of work at STU and the changes that occurred ... so that ‘[they] could be fully informed before meeting with [PQR]’.<sup>25</sup>

[57] A conducted the extra interviews on 20 November 2023.

[58] At this time A also sent further ‘toolbox’ meeting minutes found that had been requested by PQR in relation to the point PQR continued to make that B had known or provided a form of permission for them to liaise with G2 and bring devices in to upgrade Z.

[59] PQR’s counsel, Ms Davies challenged A’s approach summarised as follows:

- a. A was ‘taking over’ the investigation stage and that PQR required confirmation that a different decision maker would now replace A;
- b. That there were further emails and meeting minutes still to be found as a result of or in addition to the extra interviews and that any further

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<sup>25</sup> Affidavit of A sworn 17 May 2024 at paragraph 20.

steps needed to be subject to these, and that it would be premature to have a ‘preliminary finding’ [referencing A’s prior emails about process] after the proposed meeting and that another meeting would be necessary. These minutes were wanted by PQR to show that B had known or instructed them to get assistance from G2 to address issues with Z. A’s affidavit includes that despite a further IT search these further minutes could not be found, and this was communicated to PQR on 30 November 2024.<sup>26</sup>

- c. That there were ‘inaccuracies and inconsistencies’ in what the extra interviews had to say about the way the computer system operated with Z, when and how Z was used and the knowledge the extra interviewees had of changes and when or whether USB sticks were taken in and outside of the workplace for admin purposes. PQR challenged inconsistencies in B’s answers in relation to G2’s involvement with computers in the workplace across (by then) B’s two interviews, the first with D and the second with A;
- d. PQR sought a more private meeting place for the meeting that A had proposed. An off workplace site was arranged as a result of this request.

[60] On 30 November 2023 A responded to PQR’s counsel with the following:

- a. A declined to interview the staff who PQR says ought to have checked the devices upon entry to the workplace saying ‘it has already been highlighted [in the final investigation report] that the responsibility of bringing USB sticks, or any technology related, sits with the person bringing it in.’
- b. A did not agree they could not ask further questions as the decision maker and that this was supported by an STU internal policy headed, ‘Responding to Staff Conduct and Behavioural Policy’ and ‘How do Managers address

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<sup>26</sup> Email dated 30 November 2023 from A to Ms Davies in Common Bundle, document 79 as referred to in Affidavit of A sworn 17 May 2024 at [22].

concerns about conduct and behaviour'. The relevant part was highlighted as:

If the employment investigation was carried out by another person, make further inquiries or interview/ re-interview any witnesses if they consider this is necessary to clarify any aspect of the material gathered.

- c. That PQR was now invited to provide feedback or written submissions on the extra interview transcripts, the further meeting minutes found and the final report (D's report) before A provided 'a preliminary view on the matter'.<sup>27</sup> PQR was invited to a further meeting because A 'had some questions' for PQR. The email concluded with:

Once this meeting has taken place, I will consider all the information available to me, and will then be in a position to make my preliminary view on this matter.

[61] On 6 December 2023 Ms Davies communicated a challenge that A could not form a 'preliminary view' because PQR asked for further information (B and PQR's former managers to be re interviewed) to clarify inconsistencies in the extra interviews. These things related to PQR's position that others knew about or had given authority to get Z fixed in the way PQR did this. Much of the challenge relates to PQR's view that how the computer system worked vis a vis Z was not described accurately. Ms Davies again challenged A continuing as a decision maker when they were now 'investigating'. Ms Davies indicated there needed to be further information to clarify whether **[[redacted]]** unauthorised files that resulted in the unauthorised material found in the wider STU workplace was found on the device(s) brought into the workplace by PQR.

[62] On 11 December 2023 A wrote to Ms Davies responding with further information that the extra interviewees had referred to in their interviews. A referred to

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<sup>27</sup> Email from A to Ms Davies dated 30 November 2023, Document 79 of the Common Bundle.

some of this material as not being strictly relevant and carrying some personalised information. A referred to the emails that they considered relevant to their investigation. Ms Davies responded that she was unable to attend the scheduled meeting on 14 December 2023 with PQR due to annual leave and proposed the 13 December 2023. She asked how A saw the personalised information should be handled in terms of sharing it with PQR.

[63] The meeting proposed by A for PQR to feedback about the final investigation report, and the additional material A had obtained and sent to PQR was then scheduled for 18 January 2024, the date a meeting was held.

[64] PQR attended the 18 January 2024 meeting with Ms Davies. By then further material was exchanged between A and Ms Davies including material regarding issues about sick leave vis a vis ACC leave that PQR had queried in the extra interview that A had with B.

*18 January 2023 meeting*

[65] The transcript<sup>28</sup> shows that PQR read out a pre prepared statement in relation to the final investigation report and the other material provided. A opened the meeting stating the purpose which was:

Prior to me making findings, I wanted to give you the opportunity today to discuss that final report and provide any further submissions that you may have to that report for me to either look into further, or for me to consider in making my preliminary decision. I'm not making a decision today. The purpose of today is purely to hear from you if you have any further submissions, or if I have any questions of information that I'd like to hear more about.

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<sup>28</sup> Document 84 of the Common Bundle and referred to in the Affidavit of A sworn 17 May 2024 at paragraph 26.

[66] In response to the above Ms Davies indicated ‘that’s fine’ and said she would also after talking with PQR make some points about the ‘entire process, allegations, everything.’

[67] The transcript of the 18 January 2023 meeting includes that PQR read out their pre prepared statement that can be summarised as including:

- a. [The first allegation] That the USB that they brought into the workplace had been brought in and out of the workplace before and that PQR and others did not know its authorisation tag had expired.
- b. Ms Davies interjected that there had been no forensic evidence of what the USB contained.
- c. That PQR’s colleagues were aware they gave the RAM sticks to G1, were aware of the slowness of Z and the problems it caused with the work in distribution of goods and that PQR had discussed this with B and ‘was told to do whatever I could to get the issues fixed.’
- d. That PQR brought the RAM sticks into the workplace and that G1 and G2 must have discussed these as necessary to speed up the computer speed to help resolve the ‘slowness issues’.
- e. That PQR was ‘not a computer or IT person’ but had researched that RAM sticks are not designed as a ‘permanent storage device.’
- f. That PQR did not witness the RAM sticks being used, this was done by another instructor.
- g. That the USB and RAM sticks were declared by PQR to staff at entry to the workplace, PQR did not try to hide them, the staff did not check them.
- h. [The second allegation] That the USB device was not received from G2. It was an STU device
- i. That PQR did have contact with G2 who had previously worked in distribution and had ‘updated programming’ in Z.
- j. That ‘all options’ to fix Z were discussed in staff meetings and ‘as we were running out of options and [Z] was running so slowly, I did mention contacting

[Z] to [B] in one of our meetings'. PQR says that the electronic meeting minutes had not been located.

- k. That G2's 'knowledge of IT skills' were mentioned in PQR's previous manager interview with A (one of the extra interviews) including that G2 had designed a system for use and that PQR had promoted the system for wider use. Ms Davies interjects and PQR confirms that this was in 2018.
- l. That PQR did not know that G2 was on a **[[redacted]]** and did not breach policy by looking this information up.
- m. That over a long period of employment PQR states they were 'loyal, dedicated and passionate in my role.'
- n. That there was no training on the role for instructor, and it was just taught by those who had worked there already and that PQR in turn trained others and that at one stage PQR had managed the operation of distribution before new staff were appointed.
- o. That 'management do very little to assist' in the area that PQR works in 'unless something goes wrong' and points to interviewees in the extra interviews demonstrating 'their lack of knowledge as to what and how the [workplace that PQR works in] functions and exactly what we do.'
- p. That the allegations have caused PQR distress.
- q. That others in STU knew of G2 being involved in giving 'assistance to design software' in the workplace and the continuance of Z.
- r. That the contents of the USB are referred to as 'unauthorised' but no forensic search has revealed unauthorised content on the devices despite this being taken into consideration in the final investigation report.
- s. That there were several USB sticks but the one involved has not been identified as part of the investigation [in relation to the above point].
- t. That staff should have been interviewed who had the security role of checking unauthorised items coming into the workplace, and that this was 'highly relevant' and those staff have not been questioned as PQR has asked.
- u. That PQR had reflected on how they could have done things differently and says 'I never challenged the authority of my manager, in 'hindsight' they should have got 'written approval' and referred the issue to 'higher management'; or got a

recommendation as to ‘a local system programmer,’ or left things as they were. ‘which would have resulted in the system to fail and become unworkable.’ PQR further says they ‘should have watched G1, ‘who put the USB into the port and installed the second upgrade.’

[68] In the 18 January 2024 meeting A then clarifies the point PQR referred to above about the USB belonging to STU and whether this meant that data was not transferred to it by G2. PQR clarified that the STU USB that PQR brought into the workplace had data on it that G2 had transferred. PQR further clarified that they watched G1 the first time they inserted the USB but not the second time because they were too busy ‘doing my job’.<sup>29</sup>

[69] Ms Davies then submitted that nothing PQR had done was malicious and raised issue that others were at fault for allowing the devices into the workplace, that PQR was not asked about the ‘conflict of interest’ point in the investigation, that there are systemic failures that contributed to the situation, that PQR’s colleague held back and did not report the unauthorised material when he first saw it, that security staff ought to have been interviewed regarding the checking of the devices that PQR declared when entering the workplace, that the ‘investigation report’ ‘lacks objectivity in presentation of facts and refers to the [Z] system being on a standalone computer that was not connected to the main STU network and while the service contract had expired there was permission to continue to use Z. Ms Davies summarises by saying:

there is absolutely no need for a disciplinary proceeding or further action. We think it would be unnecessary and unjustified given the context that we have now explained. And I can assure you that there will most certainly be a personal grievance coming your way if the disciplinary process results in adverse results for [PQR].

[70] A then asks PQR about their understanding of the ‘conflict of interest’ policy and whether they filled in a conflict form regarding G2. PQR responded no, and that

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<sup>29</sup> As above.

they could not recall getting updates by emails over their long years about this policy and sometimes their place of work missed out on those emails.

[71] The meeting transcript shows that there was further discussion about the forensic report still to be supplied and that this had been some months coming. There was further discussion about how STU managed the information release about the investigation into PQR's conduct. A acknowledged the stress that these types of things cause and referenced the Employer Assistance Programme.

[72] After the 18 January 2024 A emailed Ms Davies a transcript of the meeting and later made some minor changes that PQR asked for.

### *The forensic report*

[73] On 24 January 2024 A received the awaited forensic report that had been commissioned in July 2024. The next day this report was provided to Ms Davies for PQR and invited feedback. The feedback for PQR (A agreed to an abridged time frame to respond compared to that asked for by Ms Davies) included that of the **[[redacted]]** found on a computer that was not the workstation of either PQR or G1. PQR further said that some of the unauthorised content in relation to two files containing this material had historic 'create dates' that predated PQR bringing the devices into the workplace. The forensic report included that an unnamed trainee **[[redacted]]** had created 35 sub folders of unauthorised content the same day that the second devices were brought in and given to G1 by PQR. PQR then asks that the first allegation be withdrawn because there was no unauthorised content found on the USB that PQR brought into the workplace, that it was only games and no STU related content. The Affidavit of F responds to this that they concluded further analysis of the USB that PQR had brought into the workplace had been inserted onto the dispatch computer where G1 had downloaded the 35 sub folders containing unauthorised content on the same day that PQR brought the second devices into the workplace.

[74] The feedback on the forensic report from PQR then went on to include further feedback about the second allegation and a ‘complete lack of direction and clarity from [STU] around engaging former [[redacted]] to provide services’ referring again to the use of G2’s expertise in the past and this was known to STU. The feedback continued that at the time G2 was involved in assisting with the computer system in 2018 STU raised no issues with PQR liaising with G2.

[75] The letter giving feedback on the forensic report concludes that PQR should now be allowed to return to work.

[76] A’s response was a letter with cover email dated 5 February 2024 which can be summarised as A attaching a ‘preliminary view’ to the employment investigation of PQR and would like to meet again on 14 February 2024 to hear submissions on the final finding prior to making a final decision. A indicated written submissions would also be accepted. A responded in this letter to the above feedback on the forensic report.

*The preliminary view letter 5 February 2024*

[77] The preliminary view letter attached to the above mentioned 5 February 2024 cover email is ten pages long. It has been challenged by PQR as making a final decision and that it was not a preliminary view. I will return to this below but for now set out in summary what the letter from A communicated:

- a. The letter is headed ‘preliminary view’.
- b. A set out the background and repeated the allegations and subsequent investigation stages including A’s extra interviews and the provision of the forensic report and feedback received on this.
- c. First allegation: To PQR’s feedback that no unauthorised material [[redacted]] was found and the first allegation should be withdrawn, A confirmed that the first allegation would not be withdrawn. A notes that Ms Davies confirms that the USB device ‘Strontium 16GB’ was the one that PQR used for software upgrade purposes. I note here that this device is identified in the forensic report as containing no STU related content and lists games.

- d. Second allegation: A refers to PQR saying the second allegation should be withdrawn because there was a lack of direction and clarity from STU about engaging with those who had been former trainees **[[redacted]]**. A refers to the Code of Conduct and IT Security Policies referred to in the first investigation letter dated 27 June 2024 and specifically the IT security Policy regarding levels of authorisation.
- e. A refers to genuinely considering all the information, sets out the same policy excerpts as the 27 June 2023 first investigation letter including the Code of Conduct and says that they are of the view that what PQR had admitted to in terms of bringing the devices from G2 with software loaded and giving them to G1 in the workplace **[[redacted]]** constituted serious misconduct.
- f. A refers to the admissions by PQR of the conduct and responds that PQR's explanations that others should have checked the devices upon entry and that others were aware of what PQR was doing did not alter the responsibility that PQR had to act with integrity and demonstrate good judgment in the role.
- g. A continued to say that they found it 'extraordinary' that with PQR's length of experience they would consider it appropriate conduct without checking what was being brought into the workplace. A refers to the wider impact of the conduct. Conflict of interest policies are in place to keep staff and 'those in our care' safe.
- h. A continues that they considered PQR had put a level of trust in G1 and G2 which demonstrated either 'extreme naivety or 'considerably poor judgment' and a lack of awareness at 'being got'.
- i. A acknowledges that there were failings in the security systems, but that PQR was the only one who knew content had been loaded onto those devices by a **[[redacted]]**. A says that PQR with their length of experience ought to have known not to liaise or to declare the conflict with G2 irrespective of whether PQR knew G2 was **[[redacted]]**.
- j. A concludes that based on G1 and G2 phone calls there was a deliberateness relating to security tags on the devices.

- k. In relation to the forensic report A says there was a ‘clear trail’ of unauthorised content in ‘35 subfolders’ created on the same morning the second device was brought into the workplace.
- l. A repeats again that the responsibility for checking the devices lay with PQR.
- m. A notes that those involved in the investigation of the forensics considered that two items in the unauthorised content found from the 35 sub folders ‘would be deemed objectionable’ if formally classified.<sup>30</sup>
- n. A continues that the content of the USBs did not form part of the allegations against PQR, A says they were highly concerned that ‘knowingly or otherwise’ PQR had been party to providing **[[redacted]]**.
- o. A says that an instructor should not have taken it upon themselves to fix Z
- p. That A did not accept that others fully knew what PQR was doing and that because G2 in 2018 when **[[redacted]]** did work on computers for distribution work that did not give ‘open approval’ to PQR for ‘continuing to work with G2 indefinitely’.
- q. A expressed concern that PQR had said (in the 18 January 2024 meeting) when asked by A that they did not know about entering a STU conflict of interest. A refers to the length of service of PQR and that ‘I would have expected you to keep yourself up to speed with all relevant policies and procedures.’
- r. A concludes that they have lost trust and confidence in PQR ‘in your ability to make sound decisions’ in their role.
- s. A referred to the range of sanctions, and that they ‘were considering’ the sanction of Summary Dismissal ‘at this stage’ subject to any mitigating circumstances PQR felt there were. A continues that they cannot disregard that PQR’s actions were ‘unlawful’, did not uphold policies procedures and standards of STU and that PQR did not maintain professional boundaries with **[[redacted]]**. A then says:

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<sup>30</sup> Referred to in the Affidavit of F affirmed 21 May 2024 at paragraphs 13 and 14 referring to the Forensic report, Document 85 of the Common Bundle.

I consider Summary Dismissal to be the appropriate sanction in these circumstances. To be clear, I do not consider there to be any mitigating circumstances to your actions.

[78] A finished the above 5 February 2023 letter by saying the view was preliminary and before reaching a final view would like PQR to make final submissions on the preliminary view.

*14 February 2024 meeting*

[79] PQR and Ms Davies attended a meeting with A and E on 14 February 2024. Emails were exchanged before this and in particular Ms Davies letter dated 12 February 2024 challenged the process again based on reasons that repeated prior concerns. A at that meeting commenced by saying the purpose of the meeting was to hear submissions about A's preliminary view. A asked PQR if they had anything to say and PQR responded that they were leaving it to Ms Davies to speak. Ms Davies then gave submissions challenging the process and A included that STU stood by their process.

*Communications after the 14 February 2023 meeting*

[80] PQR continued to challenge the process after the 14 February 2023 meeting.

[81] PQR provided A with a statement from an STU employee who said that they had found **[[redacted]]** in another part of the STU workplace. PQR said this showed that this was something that occurred. PQR also referred to a further question that need to be asked as to whether the unauthorised hard copy material found was black and white or coloured because this would show whether it could have been printed in the workplace area PQR worked in where G1 had been given the devices.

[82] A's response to the above was to explain that it was not the content of the devices that was relevant or whether PQR knew about that. A said they did not consider

this further information from an STU employee altered their preliminary view and invited final feedback before making a final decision.

*Final decision made to summarily dismiss*

[83] STU made a final decision to summarily dismiss PQR on 27 March 2023 for serious misconduct concluding that the two allegations were upheld, and its preliminary view stood. The letter is detailed and approximately 10 pages long.

[84] PQR through counsel raised personal grievances for unjustified dismissal and disadvantage.

**Is there an arguable case for unjustified dismissal?**

[85] Whether PQR has an arguable case that they were unjustifiably dismissed is based on the case being arguable as to an eventual assessment of whether STU in dismissing PQR acted in the way a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. Minor defects in procedure may not result in a finding of unjustified dismissal if the defects did not result in the employee being treated unfairly.<sup>31</sup>

[86] I find that PQR has a weakly arguable case for unjustified dismissal for the reasons I outline below.

*Fair process*

[87] It is submitted for PQR that it is seriously arguable that STU's procedure used to investigate the concerns about PQR's conduct which led to their dismissal fell well short of the actions of a fair and reasonable employer under s103A of the Act. It is

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<sup>31</sup> Employment Relations Act 2000, s103A; s103A (5).

submitted for PQR that STU failed to carry out a fair process in coming to the decision to summarily dismiss for serious misconduct.

[88] I have to consider whether there is a serious case to be tried that any defect in process was based on actions that could not have been those of a fair and reasonable employer in all the circumstances at the time. Then that any defects were more than minor and resulted in PQR being treated unfairly. STU submits that any defect in the process was minor.<sup>32</sup>

[89] The submissions relating to an arguable case for process failure for PQR have been summarised<sup>33</sup> as STU failing to:

- a. Clearly state that serious misconduct was alleged.
- b. Clearly particularise the factual basis for alleging serious misconduct.
- c. Invite PQR to a disciplinary meeting to provide feedback on the allegations of serious misconduct to the decision maker.

[90] There are other matters raised that touch on procedure, but following submissions for the applicant I will consider these below under whether there is a seriously arguable case regarding the substantive decision to dismiss.

*Not clearly stating that serious misconduct was alleged.*

[91] STU submits that in the first investigation letter, the connection to potential breach of serious misconduct was stated with policy excerpts with the potential sanction that could include the consequence of dismissal. I accept this is arguably expressed in the first investigation letter.

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<sup>32</sup> Employment Relations Act 2000, s103A (5).

<sup>33</sup> 'Submissions of Counsel for the Applicant in Support of Interim Reinstatement Application' dated 29 May 2024 at paragraph 51.

[92] PQR's submission is that the 5 February 2024 letter from A to Ms Davies that was headed 'preliminary view' was a final view because within that letter A used words of finality.

[93] STU's submits that any wording that reflects finality in the 5 February 2023 letter is a minor defect. I find that it is arguable that a reasonable overall reading of the letter even at this untested stage shows it relates to a preliminary view, inviting submissions and feedback at a proposed meeting before a final view is reached. While A uses a definitive reference to conclude that they have found serious misconduct and that there are no mitigating circumstances, these references sit within the whole of the letter that references it being a preliminary view at the beginning and end and within the letter itself. I do not find persuasive PQR's submission then that this detailed letter could not have been understood to be a preliminary view to be responded to while including the preliminary view of a finding of serious misconduct with consideration of summary dismissal.

*Not clearly particularising the factual basis for alleging serious misconduct*

[94] For the same reasons as above I find that the 5 February 2024 letter set out in detail why A considered PQR's actions were serious misconduct based on the preliminary view A had reached about the investigation findings. PQR submits the allegations were unclear in terms of what contraband was and whether it was the devices or what was on them and if the latter, then there was insufficient evidence that **[[redacted]]** was found on the device brought in by PQR. Again STU submits that the allegations and their connection to a potential breach of the Code of Conduct were also set out then. I also note the definition and explanations of contraband provided including that provided in the investigation report that PQR was able to dieback on. I find it weakly arguable that there was a defect in process more than minor in that STU did not clearly particularise what the allegations in the 5 February 2024 letter and then set out why in a preliminary view it considered the conduct serious.

*Not inviting PQR to a disciplinary meeting to provide feedback on the allegations of serious misconduct to the decision maker*

[94] For the same reasons as above and based on the 5 February 2024 letter I find this point weakly arguable that there was a defect in process more than minor. STU submits that the letter could have used the words inviting to a ‘disciplinary’ meeting but that this would seem to be a minor fault given the overall content of the letter. I find this submission persuasive.

*The substantive decision to dismiss*

[96] It is submitted for PQR that the final decision to dismiss was not justified. For me to consider whether there is a serious case to be tried I have to ask whether it is seriously arguable that the decision reached was not within the scope of what a fair and reasonable employer could have reached in all the circumstances at the time.<sup>34</sup>

[97] The submissions for PQR relating to the justification of the substantive decision can be summarised as:

- a. The serious misconduct finding was based on things never put to PQR being:
  - i. The existence of the ‘unauthorised content’ on the devices was a focus of the investigation but later explained by STU as not an allegation after the forensic report (according to PQR) did not show there was content connected to the device they brought into the workplace.
  - ii. That PQR failed to appreciate the seriousness of their actions.
  - iii. That PQR had provided misleading information to the investigation.
  - iv. That PQR had a written warning for liaison with G2 in 2020 that was never put to them as something that was of ‘considerable concern’ to A, the decision maker.
- b. The decision to find serious misconduct warranting dismissal was predetermined.
- c. Lines of inquiry were not pursued.

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<sup>34</sup> Employment Relations Act 2000, s103A.

*The existence of the 'unauthorised content' on the devices was a focus of the investigation but later explained by STU as not an allegation after the forensic report (according to PQR) did not show there was content connected to the device they brought into the workplace.*

[98] STU submits that the decision made was what a fair and reasonable employer could have done in all the circumstances at the time because the evidence before A showed PQR's actions fell short of the expectations of the STU Code of Conduct, and as expected of an STU employee of long standing who had access to online policies and had been recorded as attending training on various aspects of the role including training on 'getting got' by trainees **[[redacted]]**. STU further submits that the action of bringing contraband into the workplace was an action for STU that was very serious given the nature of its statutory role and obligations to contain 'good conduct and security' within the workplace, the **[[redacted]]** and STU's reputation in carrying out its role.

[99] STU says that the allegations were clear from the commencement of the employment investigation and the first investigation letter. It submits that it was clear that the **[[redacted]]** content was integral context to the investigation and findings but not pivotal to the findings made. Considering the progression of the employment investigation, the extensive feedback given at every step of the way by PQR including not just what they did but their explanations of why, I find it weakly arguable that they did not understand what the allegations were and that they related to their behaviour in relation to the action of bringing the devices into the workplace with content loaded onto them by a **[[redacted]]** and what they were responding to.

[100] Further I accept as likely the position of STU that at the outset it held serious concerns that prompted an investigation into 'containing' what looked like the end product of PQR bringing the devices into the workplace, or at least the means to produce the hard copy material that was found being distributed. That was not the end of it for STU, it further had concern as to what that content could have contained in digital form given the **[[redacted]]** of G1 and G2. The matter to be tested will likely include whether

this aspect of STU's process infused something more serious into the consideration of PQR's conduct and ultimate result of finding serious misconduct and summary dismissal. However, I find that the investigation about the existence of the **[[redacted]]** was arguably necessary for STU to have focused on as context the PQR's employment investigation. The documentation and communications before me show that at several points, including the commencement of the employment investigation STU made it clear that it was the conduct expected of PQR in their role at STU that was what the allegations were based on. I find in these circumstances to the extent that PQR claims STU did not clearly communicate what it was investigating, it is arguable, but weakly arguable. I find, to the extent to which PQR says any level of clarity resulted in the outcome of A's final decision being unjustified is also arguable, but weakly arguable.

*That PQR failed to appreciate the seriousness of their actions*

[101] It is submitted for PQR that STU did not request PQR's feedback about them not appreciating the seriousness of their actions before making a final decision about this. STU submits that PQR's 'ongoing view, that [they] were trying to help and that [their] actions were not serious' was not accepted as a mitigation by STU in the investigation process. STU submits that the remorse expressed in PQR's Affidavit in Reply was not apparent in the investigation process. I note the references in PQR's Affidavit in Reply relate to regret at what they had done and that they had expressed to D that there were things they could have done differently including getting written permission which they said they could have got. I note that PQR had also expressed these things to D in the 26 September 2023 interview. STU points to the same paragraph in PQR's Affidavit in Reply where PQR refers to being sorry for their actions, continues to say that B gave the go ahead for them even though PQR's same affidavit evidence includes that, 'I'm not suggesting that my conversation with [B] was a direct authorisation ...'.<sup>35</sup> It would appear on the face of it that what B said or discussed with PQR directly or indirectly still forms the focus for PQR that they were not fully responsible for making a decision about their actions. STU submits it made it clear from

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<sup>35</sup> Paragraphs 14 and 21 of PQR's Affidavit in Reply dated 24 May 2024.

the commencement of the investigation process, reiterated in a preliminary view and A's final decision that it was STU's concern about deciding to act in a certain way that was STU's concern. I find STU's position strongly persuasive and points away from PQR having been treated unfairly as a result of any lack of opportunity to say what they wanted to about the seriousness of their actions that would arguably support that the dismissal was unjustified.

*That PQR had provided misleading information to the investigation*

[102] PQR says that a finding of 'deliberateness' in relation to swapping of devices was not put to PQR before making the finding of serious misconduct. A's letter dated 5 February 2024 refers to the evidence of monitored phone conversations between G1 and G2 (transcripts of which had been provided to PQR during the investigation process) that referred to them discussing that PQR would switch the authorisation tag to the device they would bring into the workplace. A's view was expressed as being that there was likely an element of deliberateness about this because the forensic report had found that the one device without STU encrypted security had an approval tag, while one of the encrypted devices did not. A expressed the view 'that the tag more than likely belonged to' the encrypted device pointing to a swap. This finding was contained in the 5 February 2024 letter from A to Ms Davies which I have already considered is arguably a preliminary view inviting submissions when PQR submits it was a final decision. I note here that the transcript of the 14 February meeting shows that PQR answered A's question that they did not swap USB authorisation tags, however I cannot find that PQR provided feedback on the preliminary finding that this indicated a level of deliberateness.

[103] PQR in the investigation process and in submissions here says they cooperated and have been open to STU about what they have done. The reference then to a finding by A of deliberateness seems on the face of it inconsistent and not well formulated. However, STU's final decision centred on finding that PQR had been 'got' and that there was a level of either 'extreme naivety' or 'considerable poor judgment' not mitigated by their position that others were also to blame or had sanctioned the conduct

when due to a long time in the job they ought to have known better. Given this message appears on the face of it to have been clear in the final decision I find it arguable but not strongly arguable that an element of deliberateness may have influenced A;s decision making towards the final decision to dismiss for serious misconduct.

*That PQR had a written warning for liaison with G2 in 2020 that was never put to them as something that was of ‘considerable concern’ to A, the decision maker.*

[104] Neither the ‘preliminary view’ letter dated 5 February 2023 from A to Ms Davies nor the final decision letter dated 27 March 2024 refers to a prior written warning in 2020.

[105] PQR’s submission refers to this being referred to as part of these proceedings. STU submitted that the reason that the existence of the prior warning has been included in material before me is to support a weighing in favour of STU when considering the balance of convenience. I accept this submission and will return to this below when weighing the balance.

#### *Predetermination*

[106] It is submitted that the wording in A’s 5 February 2024 letter from A to Ms Davies that was headed ‘preliminary view’ held definitive wording that showed it was a final decision. The submission includes that having the heading ‘preliminary view’ does not alter that finality of the decision. I have already covered this above and find the point weakly arguable.

#### *Lines of inquiry were not pursued*

[107] It is submitted for PQR that various lines of inquiry were important to the final decision and were not pursued or not pursued sufficiently. I take these to relate to the same things referred to under the above procedural defects that have been challenged by PQR. These lines of inquiry all appear to relate to PQR’s continued position that

their actions were mitigated because of the context of why PQR took the action they did. PQR wanted to show from these lines of inquiry that B had given the go ahead for their actions due to B's and potentially PQR's other colleagues or former management's knowledge of Z's use and or deficiencies, and that G2 had known skills previously utilised and sanctioned by STU to assist. I accept that STU responded to these challenges more than once with explanations including that it was PQR who carried the responsibility for their conduct.

[108] Further, the line of inquiry about the point of entry staff was repeatedly challenged and the responses became consistent from D and then A that it was PQR's responsibility to ensure they knew what they were bringing into the workplace. PQR's responses to D, and affidavit evidence, includes they did not understand the computer content data. A's final decision linked to PQR's own decision making and responsibility under the Code of Conduct. That Code was clearly set out in the first investigation letter.

[109] Accordingly, while I find an arguable case, I find it weakly arguable that STU did not investigate sufficiently to have come within scope of what a fair and reasonable employer could have concluded about PQR's actions falling within serious misconduct relating to the high trust environment of the STU workplace.

### **Is there a seriously arguable case for reinstatement?**

[110] Section 125(2) of the Act says that the Authority when considering remedies for an employee found to have been unjustifiably dismissed it must provide for reinstatement as a remedy for unjustified dismissal (if found) wherever practicable and reasonable, irrespective of whether it provides for any other remedy (for example compensation and or lost earnings as the two most commonly awarded).

[111] It is submitted for PQR that reinstatement on an interim basis would not be unreasonable or impracticable because:

- a. The area of work PQR worked in is physically remote from the larger STU workplace and third parties would not be affected.

- b. Any concerns STU has about unauthorised items being brought into the workplace by PQR could be dealt with by training, a precautionary measure and better screening by staff that monitor entry to the workplace.
- c. That the conduct was a ‘once off mistake’ in PQR’s long employment career.
- d. That there is no evidence (other than ‘management’ stating the same) of concerns being held by other staff at STU being affected by STU’s reinstatement.
- e. There are a number of other jobs where PQRs skills could be put to good use.
- f. PQR further submits that STU has not shown how PQR’s conduct ‘is incompatible with [their] faithful discharge of duties under the employment agreement, and that it cannot do that.
- g. PQR has fully cooperated with the investigation process.
- h. PQR has acknowledged that they could have done things better.
- i. STU has not acknowledged PQR’s long loyal employment, and this has been ‘counted against’ them rather than as a credit. That PQR would not have had such a long career if they did not make ‘sound and defensible decisions and that PQR has often been the ‘problem solver’ in the workplace.
- j. That the decision to dismiss was a ‘disproportionate and unjustified response’ to a long serving STU employee.
- k. That the above points are not ‘frivolous or vexatious’. That they are strongly arguable.

[112] It is submitted for STU that it is not practicable or reasonable to reinstate PQR. STU submits that there is a ‘high trust’ environment that STU operates in with its employees. STU draws my attention to two Employment Court cases<sup>36</sup> in the aviation industry where reinstatement was not found practicable or reasonable given the ‘high

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<sup>36</sup> *Appleton v Tasman Cargo Airlines Pty Limited* [2023] NZEmpC at 191; *Scullin v Airways Corporation of New Zealand Limited* [2021] NZEmpC at 180.

trust' environment where an employee had contributed to the situation that led to the dismissal, and where the loss of trust and confidence in an employee's ability to ensure public safety had been undermined where they had been found to have breached the Code of Conduct as it related to a drug and alcohol policy. In a local body setting STU further notes comment from the Employment Court that reinstatement is not practicable or reasonable 'without a high degree of trust.' While this is an interim matter, I agree with the submission for STU that the workplace that STU operates has a significantly high level of trust required in its employees, likely higher than in the industry environments in these cases.

[88] STU draws my attention to an Authority matter with STU as respondent employer<sup>37</sup> which did not result in reinstatement. In that matter there was a front line young employee only new to the employment. There were significant flaws in the investigation and disciplinary process which included not providing the employee with all material relied on, not interviewing her two immediate supervisors except by way of informal non recorded interactions by the decision maker. Here there have been extensive communications where all material (except meeting notes that have not been found) have been put to PQR for feedback and this has been responded to in a detailed way. That Authority case reflected that STU operated a workplace that was 'fluid and complex' and it was not reasonable to continue to monitor all staff in that environment. The Authority concluded that the employee's lack of appropriate judgment in this type of workplace meant that it found the employer could not maintain 'sufficient levels of confidence in the employee to continue in their front line role. That employee was considered new to the job but had been trained on how to behave.

[113] STU refers me to take note of the training that PQR received over the years as set out in B's Affidavit.<sup>38</sup> I note that part of that training related to 'being got'. In the circumstances of what was admitted as conduct by PQR to allegations that linked to Breach of Conduct in a high trust environment it is understandable that STU considers it is not reasonable or practicable to reinstate PQR even at this interim stage. This

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<sup>37</sup> [2020] NZERA 110.

<sup>38</sup> Affidavit of B sworn 17 May 2021 at paragraph 9.

appears particularly so when I stand back and consider the overall continued position of PQR which has focused on explaining their actions based on G2 being someone suitable to engage as someone able to assist with fixing a software programme operated within the STU workplace. STU submits that there is a downplaying by PQR of their actions into why their actions were so serious and dangerous in the environment that STU operates and where employees on the front line are at risk of 'being got'. I find I am persuaded that this arguably leans away from anything more than a weakly arguable case for reinstatement.

[114] STU submits that part of considering the reasonableness of reinstatement is a concern about those employed by STU and how the effect of PQR's reinstatement would be for those employees as well as third parties **[[redacted]]**. The 'remoteness' on the site where PQR worked within the greater STU workplace, as submitted for PQR as a way of reducing any 'risk,' seems not greatly relevant given the overall circumstances and that the instructor role, as STU submits, is still a front line role. While PQR says the instructor role was somehow quite different to other core front line staff in relation to breach of Code of Conduct issues and the allegations investigated STU does not accept this. Again, I note STU's submission that the workplace operates in a high trust environment.

[115] I find it persuasive that STU has a concern that reinstatement to the actual workplace could open PQR to being seen as a target for being 'got' again.

[116] STU further submits that there are no current vacancies at STU that are not front line vacancies as suggested by PQR as an interim placement. While neither PQR nor STU have provided anything other than their respective assertions I find STU's submissions more persuasive that in the current fiscal environment with public sector jobs being down sized, that the non-front-line type roles suggested by PQR would not be current vacancies.

[117] PQR submits that interim reinstatement would have no detrimental effect on STU. I find the submission for STU more persuasive that it has accountabilities to costs and rationale for those costs at the very least.

[118] While at this interim stage I have found an arguable case for unjustified dismissal, I have found it weakly arguable. This combined with the considerations under this head lead me to conclude that the case towards an arguable case for reinstatement is also weakly arguable that interim reinstatement would be practicable and reasonable.

### **Balance of Convenience**

[119] PQR submits that in considering the balance of convenience I should consider the purpose of an interim reinstatement as being to preserve the status quo and that this favours the continuation of employment on an interim basis.

[120] I will consider what PQR submits weighs in favour of interim reinstatement under the headings of those submissions.

#### *Career prospects if not reinstated*

[121] PQR submits they have no career prospects other than as a front line employee of STU and they are 'highly unlikely to gain equivalent employment.' It is further submitted that PQR's career prospects have been 'reduced to nil' due to STU having 'contributed' to others knowing (beyond those needing to know) about their actions with an incorrect link in some of that information dissemination that PQR was being investigated for bringing **[[redacted]]** into the workplace **[[redacted]]**. A's affidavit includes in response to PQR's affidavit in reply that "the allegations being investigated were not about the images, as repeatedly stated in correspondence".<sup>39</sup>

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<sup>39</sup> Affidavit of A sworn 17 May 2024 at paragraph 62.

[122] I accept that PQR held a discreet role in STU in the way it combined experienced trade knowledge with the ability to instruct and train in a unique environment. I can accept from PQR's affidavit evidence and their explanations of their role and their detailed understating of the work, especially the impressive way they explained this to D in the 26 September 2023 interview, that PQR has considerable trade skills and experience. I do not find it plausible that PQR will have limited job prospects.

[123] While still to be tested and potentially in relation to the disadvantage grievance, STU says it was not responsible for the apparent wider dissemination of knowledge about PQR's employment investigation or whether it contributed to identifiers that could have linked to PQR's identity and them being contacted about this causing them understandable distress. I note that while PQR submits here that effectively because their identity is known in relation to **[[redacted]]** they will have 'nil' prospects in future employment, their own application for non-publication refers to only those who knew them already being able to identify them due to the release of information. Even then PQR referred to those who knew them not believing the connection to that third party conduct. The very purpose of the reasonably extensive non-publication orders are in place to continue that limited level of identification. In these circumstances [124] I find the effect of identification is overstated here in terms of the risk of future employment prospects. I find the balance here is evenly weighed.

#### *Mental health considerations*

[125] PQR submits their mental health has suffered due to STU's 'actions' and returning to work would assist PQR to heal and they want to return to work. I have little to go on other than PQR's assertions about this. I accept that PQR is likely stressed from losing a long standing job and not by their own choice. PQR submits that they desire to return to work and maintain relationships with colleagues so that they can continue to gain job satisfaction from the 'highly rewarding' instructor role. However, against this is that I have found PQR has a weakly arguable case to challenge their dismissal, and for interim reinstatement. Also weighing against PQR's clear desire to

return to a role they enjoy is STU's submission that it has found it cannot trust PQR to continue to make good decisions in relation to working in the high trust environment that STU operates. While STU says they could do a non-front line position, STU says there are no such positions available in the current fiscal environment.

#### *Financial loss*

[126] PQR submits that they will suffer financial losses if not reinstated on an interim basis. PQR refers to losing long service benefits. STU submits that I have little financial information in front of me to support this as an aspect to support balancing in favour of PQR. I agree that I do not have details. PQR refers to breaking savings to pay legal bills. I find it plausible that a long standing government employee may find the loss of earnings and ongoing long term benefits something that is causing financial loss. However, given the lack of anything more towards financial loss I find this point only slightly weighs in favour of PQR.

#### *PQR's submission that there would be no loss to STU if interim reinstatement was ordered*

[127] I have already referred to this above. PQR submits that there is nothing weighing as a detriment to STU, including the option that PQR could continue to be on 'garden leave' as a condition for interim reinstatement thus, if there are concerns, eliminating these. STU submits that it is accountable for expenditure, and it cannot be said there is not a detriment to continuing to pay an employee in this way. I find STU's position persuasive and do not accept as persuasive there would be no detriment to STU even if PQR remained on paid 'garden leave' as an interim measure.

#### *Previous warning*

[128] PQR submits that a previous written warning was something that goes to the arguable case for challenging the dismissal because it was never put to PQR before the

decision to find serious misconduct resulting in summary dismissal. STU submits that the fact of the written warning has been put in front of me to show that this is a factor weighing against reinstatement. I accept STU's submission that the previous warning PQR had after a prior disciplinary process in 2020 weighs towards supporting the detriment to STU if interim reinstatement is ordered. This is because the warning related to PQR having a previous caution for giving their home address to G2 as a reference address. While it has been submitted for PQR that they did not have the conflict of interest aspect of STU's concerns in relation to G2 put to them for feedback, the warning on the file weighs in favour of STU being in a position where it can more certainly be concerned that PQR does not understand their responsibilities in terms of conflict despite this warning. It would seem even more pointed that the warning related to G2.

[129] Based on the above I find that the balance of convenience favours STU and does not support interim reinstatement.

### **Overall justice**

[130] Overall, I have found that PQR has a mostly weakly arguable case for unjustified dismissal and reinstatement. I have found the balance of convenience favours STU. Considering those things and then standing back from this I am particularly persuaded that in the circumstances of the high trust environment operated by STU, and that PQR has a prior warning that relates to the second allegation with the same **[[redacted]]** involved [G2] I find that the overall justice does not support an order of interim reinstatement.

### **Outcome**

[131] Accordingly, based on the above the application is declined.

[132] Costs are reserved and will be dealt with at the substantive stage.

[133] The Authority will as soon as possible contact the parties' representatives to deal with timetabling for a substantive investigation meeting.

Antoinette Baker  
Member of the Employment Relations Authority