

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

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 297  
3372243

BETWEEN	EDWARD LAWRENCE JOHN HOPPING Applicant
AND	FIRE & EMERGENCY NEW ZEALAND Respondent

Member of Authority: Rachel Larmer

Representatives: Simon Mitchell KC, counsel for the Applicant  
Tanya Kennedy, counsel for the Respondent

Investigation: On the papers

Submissions and other information received: 14, 16 and 22 May 2025 from the Applicant  
12, 13 and 23 May 2025 from the Respondent

Date of Determination: 28 May 2025

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Non-publication order**

[1] Pursuant to clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act), the Authority issued an interim non-publication order on 19 May 2025 that prohibited the publication of the names, identifying information and medical information of the two complainants whose bullying complaints against Mr Hopping were upheld by Fire & Emergency New Zealand (FENZ), and resulted in his dismissal.

[2] With the agreement of the parties, this interim non-publication order was based on health grounds.

[3] The interim non-publication order issued on 19 May 2025 is now extended to also cover the name and identifying information about the complainant who made a complaint on 16 October 2022 about Mr Hopping that was upheld by FENZ, and resulted in a written warning that expired before he was dismissed.

[4] This new interim non-publication order was made by the Authority to protect the privacy of a third party who is not associated with FENZ, and who will not be a witness in this matter.

[5] The first two individuals are referred to as Witness A and Witness B. The third individual is referred to as Person C.

[6] Both interim non-publication orders are subject to the condition that they do not apply to the employment institutions.

### **Employment Relationship Problem**

[7] The applicant, Mr Edward (Ed) Hopping was employed by FENZ as an Advisor Risk Reduction for the Waikato region. He started work for FENZ in 2019.

[8] After investigating Witness A's and B's complaints, FENZ concluded Mr Hopping had engaged in bullying, harassment and inappropriate behaviour towards other employees. FENZ concluded Mr Hopping's actions had fundamentally undermined trust and confidence in the employment relationship, and he was dismissed for serious misconduct in April 2025.

[9] Mr Hopping claimed his dismissal was procedurally and substantively unjustified. He denied the allegations against him, but said that even if they were proven (which he denied) then they could not have reasonably been viewed as serious misconduct. He also said the investigation and disciplinary process had taken so long that the allegations against him were stale.

[10] Mr Hopping sought interim reinstatement until his substantive unjustified dismissal claim had been determined. FENZ opposed interim reinstatement. This determination addressed Mr Hopping's interim reinstatement application only.

[11] Mr Hopping was dismissed on 2 April 2025 on four weeks' notice, which he was not required to work. His employment ended on 30 April 2025.

[12] FENZ informed Mr Hopping on 3 March 2023 that he had been the subject of complaints and that a formal investigation would be undertaken. Mr Hopping was consulted over the Terms of Reference (ToR) for the external investigation.

[13] FENZ's Behaviour and Conduct Office (BCO) started its investigation into the complaints about Mr Hopping in May 2023. However, after the BCO investigator left FENZ, Ms Charlotte Parkhill was appointed as an external investigator. Ms Parkhill, who is an experienced employment lawyer and independent workplace investigator, was engaged by FENZ on 10 August 2023 to provide a report on the two complaints about Mr Hopping.

[14] The BCO investigator interviewed a number of witnesses, but he did not interview Mr Hopping. Ms Parkhill interviewed Mr Hopping in September 2023, almost six months after FENZ had told him an investigation would be commenced. Ms Parkhill's draft report was released to Mr Hopping in March 2024, six months after he was interviewed. Ms Parkhill's final report was released to Mr Hopping on 1 July 2024, approximately three months after Mr Hopping had received the draft report.

[15] FENZ commenced a disciplinary process on 13 September 2024, which resulted in Mr Hopping being given notice of his dismissal on 2 April 2025.

[16] Mr Hopping said the delay from 3 March 2023, when he was first told he was under investigation, to being informed of the disciplinary outcome on 2 April 2025 made his dismissal unjustified. He pointed out he had continued to work in his role without incident during the investigation and disciplinary process.

[17] FENZ said the delay was explainable and had not made Mr Hopping's dismissal unjustified. FENZ acknowledged the investigation had taken longer than expected, but said there were good reasons for that, many of which it claimed were beyond its control. It also pointed out that Mr Hopping had not complained about the delay prior to his dismissal.

[18] FENZ said some reasons for the delay included that Mr Hopping was consulted over the ToR, at times his representative was not available to meet or provide feedback, Mr Hopping changed representatives and new representatives needed time to 'get up to speed' with the matter before engaging with FENZ. Witnesses were not available, or did not respond to requests to meet. People involved in the investigation were on leave.

Mr Hopping raised conflict of interest allegations more than once. He requested information under the OIA and Privacy Act 2020 before the investigation commenced, which had delayed the start of the investigation. In his interview Mr Hopping identified four extra witnesses he wanted interviewed, which caused three months' delay. The BCO investigator left FENZ, the external investigator had a compulsory sabbatical, witnesses wanted time to review the transcripts of their interviews, the complainants wanted to review the other witnesses' statements which was objected to by NZPFU, the Christmas holiday period intervened, the decision maker had other work commitments and there was extensive documentation that FENZ had to consider.

[19] Whether the delay that occurred was justified will be tested during the substantive investigation.

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

[20] By agreement with the parties, this application for reinstatement has been determined 'on the papers'.

#### *Undertaking*

[21] Mr Hopping lodged an undertaking that he would abide by any order the Authority may make regarding damages that were sustained by FENZ through the granting of interim reinstatement, which the Authority decided he ought to pay.

#### *Applicant's evidence*

[22] Mr Hopping lodged his original affidavit along with his statement of problem on 14 April 2025. On 16 May 2025 Mr Hopping lodged his reply affidavit together with an affidavit from Mr Peter Hallett who is employed by FENZ as a Senior Advisor Risk Reduction (SARR) for the Waikato Fire District. For thirty years Mr Hallett also held various local and national positions within the New Zealand Professional Firefighters Union (NZPFU).

[23] Mr Hallett believed FENZ had blamed "everything on Ed Hopping when the issues were more complicated." FENZ pointed out that Mr Hallett was not in the office for significant periods of time Mr Hopping worked for FENZ. Mr Hallett had a four year secondment from 2016/2017 to 2021 and he had an extended period away from the office in late 2024.

[24] Mr Hopping and Mr Hallett both attached exhibits to their affidavits.

*Respondent's evidence*

[25] The respondent lodged affidavits from:

- (a) Mr Michael Balmer - Behaviour and Conduct Office;
- (b) Witness A - complainant;
- (c) Witness B - complainant;
- (d) Mr David Guard - Region Manager for the Region Mr Hopping worked in before he was dismissed;
- (e) Mr Bruce Stubbs - Regional Manager and decision maker.

[26] FENZ lodged a bundle of documents that was 845 pages long in support of its opposition to Mr Hopping's interim reinstatement.

[27] Both parties provided written submissions on the interim reinstatement application.

**Issues**

[28] The following issues are to be determined:

- (a) Did Mr Hopping have an arguable case regarding his substantive unjustified dismissal claim?
- (b) If so, did Mr Hopping have an arguable case regarding the remedy of permanent reinstatement?
- (c) If so, where does the balance of convenience lie?
- (d) What does the overall justice of the case require?
- (e) What costs should the successful party be awarded?

**Relevant law**

[29] The Authority derives its jurisdiction to order interim reinstatement in personal grievance matters from s 127 of the Act.

[30] Section 127(4) requires the Authority in determining whether to order interim reinstatement to apply the law regarding interim injunctions and to have regard to the

object of the Act. One of the objects in s 3 of the Act is to build productive employment relationships through promoting good faith behaviour in all aspects of employment relationships.

[31] The law relating to interim injunctions is so well known that it does not require extensive repetition. To briefly summarise, the Authority must determine:

- (a) Whether Mr Hopping had an arguable case for unjustified dismissal and reinstatement as an available remedy?
- (b) Where the balance of convenience lay between the parties in the interim period until the substantive dismissal grievance claim had been resolved; and
- (c) Undertake an assessment of the overall justice of the case.

[32] In an interim reinstatement application the Authority must proceed on the basis of untested affidavit evidence. That meant the views expressed in this determination are preliminary, so are necessarily limited to an overview of the currently available evidence.

### **Material background**

[33] Witness A made a complaint to Human Resources on 19 December 2022 that alleged Mr Hopping had engaged in unacceptable behaviour that amounted to bullying during an interaction that had occurred on 11 December 2022. Witness A claimed that the way Mr Hopping had spoken “was threatening and bullish” and that similar behaviour had previously occurred towards two other employees, which needed to be addressed.

[34] Witness A alleged their health had suffered to the extent they had to stop working, and they attributed that to Mr Hopping’s actions towards them.

[35] Witness B claimed that Mr Hopping’s alleged bullying of them started in August 2022. They kept a chronological record of their concerns (referred to as “diary notes”). Witness B said their health suffered to the point where they required time off work and had to obtain medical assistance due to what they said was Mr Hopping’s actions towards them. They also claimed their career opportunities were curtailed due to their desire to avoid Mr Hopping due to “the stress and toxic bullying environment” they claimed Mr Hopping had created.

[36] Witness B made a formal complaint to Human Resources about Mr Hopping on 20 January 2023. This covered issues/interactions with Mr Hopping that had arisen over the period 17 August to 7 November 2022. Witness B subsequently provided some additional information to BCO which alleged Mr Hopping was “the man instigator of the bullying and harassment” and that two other employees had ignored and excluded them for a significant period of time.

[37] The Human Resources Manager referred the complaints from Witnesses A and B to the BCO on 1 February 2023. The BCO Panel decided a formal investigation was warranted, appointed an internal investigator and started drafting ToR.

[38] On 3 March 2023 the BCO advised Mr Hopping of the complaints, gave him copies of the complaints and invited him to comment on the draft ToR. He was also provided with FENZ’s Policy to Address Bullying, Harassment and Victimisation (the Bullying Policy), Code of Behaviour/Tikanga Whanonga (the Code) and Standards of Conduct Policy (the Standards Policy) which were considered relevant to the BCO investigation.

[39] The period from 10 March 2023 (when NZPFU advised it was representing Mr Hopping) to 12 May 2023 (the date the BCO investigator commenced the investigation) was taken up with consultation over and revisions to the ToR, addressing Mr Hopping’s concerns about conflicts of interest, changes in the decision maker, responding to OIA and Privacy Act requests and to NZPFU’s other concerns, and the Easter break.

[40] Witness A was interviewed on 18 May 2023 and Witness B was interviewed on 19 May 2023. Other witnesses were interviewed on 30 May and 31 May 2023, 7 June, 12, 20 and 23 June 2023. On 6 June 2023 the original BCO investigator identified a conflict with one of the witnesses, so a new BCO investigator (Rose Ayers) was brought in to interview that one witness on 11 July 2023.

[41] Mr Bowman resigned in July 2023. FENZ proposed that Ms Ayers would take over the BCO investigation but NZPFU objected to her, and requested an external investigator. Ms Charlotte Parkhill, a partner at law firm Dentons Kensington Swan, was appointed and new ToR were issued to her on 10 August 2023.

[42] Ms Parkhill sought to interview Mr Hopping on 5 September 2023 but this was delayed at NZPFU’s request to 27 September 2023 due to a change in Mr Hopping’s

union representative. A second interview was held with Mr Hopping on 28 September 2023.

[43] On 20 October 2023 NZPFU raised complaints with FENZ's Chief Executive about the proposal to disclose witness information and interviews to Witness B. This was responded to on 28 and 29 November 2023.

[44] On 20 October 2023 FENZ issued Mr Hopping with a verbal warning that remained in effect for 12 months regarding Person C's complaint. Mr Hopping raised a disadvantage grievance about this warning, but that claim is not part of these proceedings. The verbal warning had expired before Mr Hopping was dismissed.

[45] Ms Parkhill interviewed Witness A on 7 December 2023 and Witness B on 8 December 2023. Witness B provided further information in emails dated 19 and 20 March 2024.

[46] Ms Parkhill's draft report was released to NZPFU on 28 March 2024, with feedback requested by 11 April 2024. NZPFU asked for an extension of time to 18 April 2024, which was granted. On 8/9 April 2024 NZPFU objected for the first time to the decision maker who had been recorded in the ToR since 10 March 2023. On 23 April 2024 FENZ amended the ToR to make Mr Stubbs the decision maker.

[47] On 18 April 2024 Mr Hopping provided feedback on the draft report and identified four further witnesses he wanted interviewed. Ms Parkhill interviewed these additional witnesses on 15, 17, 22 and 23 May 2024. On 28 May 2024 Mr Hopping made comments on three of these four interviews. On 31 May 2024 Mr Hopping was given copies of the interviews with the four additional witnesses to provide feedback on.

[48] Ms Parkhill's report was finalised on 27 June 2024. It was released to the BCO and NZPFU (to pass to Mr Hopping) on 1 July 2024. Mr Stubbs received the final report on 2 July 2024.

[49] On 13 September 2024 FENZ invited Mr Hopping to a disciplinary meeting to discuss the final report. The disciplinary meeting occurred on 7 October 2024. On 8 October 2024 Mr Hopping provided written feedback on the final investigation report and NZPFU set out its concerns about "significant procedural issues ... evident in the investigation process and report" in an email to FENZ.

[50] A transcript of the disciplinary meeting was sent to NZPFU and Mr Hopping on 11 October 2024. No changes were requested as a result of that.

[51] Mr Stubbs was on leave from 19 December 2024 to 21 January 2025. On 24 January 2025 FENZ provided Mr Hopping with preliminary disciplinary findings, a proposed disciplinary outcome and he was invited to attend a disciplinary meeting on 11 February 2025.

[52] On 24 January 2025 Mr Peter Cranney advised FENZ he was now representing Mr Hopping and required time to familiarise himself with the documentation. The meeting was changed from 11 February to 7 March 2025 to accommodate Mr Cranney's availability.

[53] Mr Hopping attended the 7 March 2025 meeting with his union representative Ms Wattie Watson, Mr Hallett as a support person and Mr Cranney as counsel. Attending for FENZ were Mr Stubbs, Mr Mike Todd and Ms Tania McGovern from Human Resources.

[54] FENZ wrote to Mr Hopping on 2 April 2025 with its final decision, which was dismissal for serious misconduct on four weeks' paid notice, which he was not required to work.

[55] FENZ concluded that Mr Hopping's interactions with colleagues, particularly Witness B "show a concerning pattern of exclusionary and intimidating behaviour." Dismissal was considered appropriate due to Mr Hopping's "lack of interest in addressing the substance of your conduct and reflection of the impact of your conduct i.e. harm to your colleagues."

**Does Mr Hopping have an arguable case for unjustified dismissal?**

[56] Whether Mr Hopping had an arguable case that his dismissal was unjustified meant he had to establish he had a possible (but not necessarily certain) prospect of success, meaning his dismissal grievance must not be merely frivolous or vexatious. This test is a low bar to clear.

[57] Mr Hopping has challenged his dismissal on procedural fairness and substantive justification grounds.

[58] Mr Hopping disputed he had engaged in any misconduct or serious misconduct, and he said there was insufficient evidence to establish he had done so. An investigation was therefore required into what evidence supported each disciplinary allegation to establish whether FENZ was justified in concluding that Mr Hopping had engaged in serious misconduct.

[59] Mr Hopping (among other process related concerns) focused on the unfairness of the lengthy delay, which he said made FENZ's decision to dismiss him unjustified as he had continued working during the intervening period without issue.

[60] Mr Hopping, NZPFU and Mr Cranney had also all raised other procedural and substantive concerns with FENZ before Mr Hopping was dismissed. These concerns were raised during the disciplinary meeting on 7 October 2024 and were reiterated in the email information and attached documents (including Mr Hopping's written comments) that Ms Wattie sent Mr Stubbs on 8 October 2024.

[61] NZPFU raised the following concerns with FENZ about its investigation before the decision to dismiss Mr Hopping was made:

- (a) Mr Stubbs received a copy of a prior warning Mr Hopping had disputed before they met to discuss the disciplinary allegations and investigator's findings;
- (b) No specific breaches of the Standards Policy were specified for each disciplinary allegation;
- (c) The Code was not a term or condition of employment so it did not set standards where behaviour could be assessed as disciplinary in nature. The Standards Policy was what applied;
- (d) There was no full and proper inquiry into the disciplinary concerns;
- (e) The Human Resources Advisor was "seriously conflicted" so should have been removed from the matter; and
- (f) Ms Parkhill failed to speak to relevant witnesses, limited interviews with management to specific points and did not allow for full discussion of the workplace context and events and failed to consider or investigate collusion by Witnesses A and B and/or the HR Advisor.

[62] Mr Hopping provided detailed feedback on the Final report, that claimed the investigator had failed to check facts or interview all necessary witnesses. He contested the evidence against him, the timing of the complaints about him, the investigator's determination of credibility issues and her findings on the complaints made about him.

[63] Prior to Mr Hopping's dismissal, Mr Cranney raised the following concerns with FENZ about its investigation:

- (a) The workplace tensions and content within which the disciplinary allegations arose had not been adequately considered or addressed;
- (b) The final report was biased and wrong;
- (c) The investigation was "unprofessional and took an unbalanced approach";
- (d) The external investigator was working for FENZ and did "lots of these reports for FENZ", so was not independent;
- (e) The investigation "picked on Mr Hopping";
- (f) There "was appalling delay";
- (g) The available evidence was not properly considered by Ms Parkhill and FENZ;
- (h) Evidence was distorted, misstated, ignored or not properly considered;
- (i) Witnesses should have been reinterviewed but were not;
- (j) Proven conduct was not dismissible;
- (k) Mr Hopping had a "bullish nature as do lots of fire fighters" so FENZ "should have put proper support around him and given him information about how to deal with people";
- (l) The issues that concerned FENZ should have been dealt with "at a low level";
- (m) The behaviour in issue was not Mr Hopping's normal patterns and not the way he conducted himself;
- (n) Mr Hopping was upset because he believed his manager had been dishonest;

- (o) FENZ failed to follow through on addressing problems with Mr Hopping's team, as it "abandoned" a series of facilitated teams sessions it had arranged after only two sessions had been held; and
- (p) Mr Hopping should have been supported and given supervision, not dismissed.

[64] Mr Mitchell KC said the disciplinary allegations against Mr Hopping were "completely stale" by the time he was dismissed. He submitted FENZ had a responsibility to conclude the disciplinary process in a timely manner, which did not occur.

[65] Mr Mitchell KC submitted the investigation report was unsound as it made findings based on minimal evidence and was biased against Mr Hopping. Mr Mitchell KC submitted that even if substantiated, the allegations against Mr Hopping did not amount to serious misconduct. He described them as "weak allegations, that resulted in a weak investigation report that exaggerated the extent of the allegations", which Mr Stubb then "slavishly followed".

[66] Mr Mitchell KC submitted that instead of addressing deeper issues within the workplace and the conflict that was developing with the personalities involved, FENZ placed the blame onto Mr Hopping and "dismissed him as an example, rather than working with the team to address the underlying issues."

[67] FENZ said it had properly considered and responded to all of the feedback and concerns Mr Hopping and his representatives raised on his behalf, before it made the decision to dismiss him. It said the disciplinary findings and outcome were justified.

[68] The parties' evidence about these disputed matters is yet to be tested by the Authority. Until that has occurred, none of Mr Hopping's arguments could reasonably be said to be inarguable. That is not to say he will be successful, but it cannot be said these arguments are obviously frivolous or vexatious.

[69] For Mr Hopping to reach the threshold of an arguable case he must affirmatively establish he had a tenable argument that the decision to dismiss him, and how that decision was reached, did not meet the statutory justification test in s 103A(2) of the Act. Mr Hopping has established that.

[70] Accordingly, FENZ's submission that there was no seriously arguable question to be tried did not succeed.

**Does Mr Hopping have an arguable case for reinstatement, if his unjustified dismissal claim succeeds?**

[71] Given Mr Hopping discharged his onus of establishing he had an arguable case for unjustified dismissal, the Authority had to consider whether he also had a tenable argument that he would have a realistic prospect of obtaining the remedy of reinstatement, to the same position or another position no less advantageous if his dismissal grievance was successful.

[72] Section 125 of the Act provides that reinstatement is to be the primary remedy, subject to it being reasonable and practicable. Both elements of this test need to be met. To be practicable reinstatement must be feasible and capable of being carried out. The effects of doing so must also be reasonable not only for the employee being reinstated but for the employer, and others who will be affected such as third parties or other affected employees.<sup>1</sup>

[73] Because it is a primary remedy, and Mr Hopping is seeking permanent reinstatement, he has a strongly arguable case that if his dismissal was not substantively justified then he would likely be permanently reinstated.

[74] Although FENZ believed the trust and confidence inherent in the parties' relationship had been destroyed to such an extent that reinstatement would not be an available remedy, that evidence had to be treated cautiously when the basis of that claim has not yet been tested.<sup>2</sup>

[75] There are third party interests in this case that could potentially impact on the reasonableness and/or practicability of reinstatement as a remedy. However, based on the currently available (as yet untested) evidence the third party interests are not such that they would be likely to override the presumption in favour of reinstatement as the primary remedy, if the dismissal was substantively unjustified.

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<sup>1</sup> *Christienson v Fonterra Co-Operative Group Limited* [2021] NZEmpC 142 at [39].

<sup>2</sup> *C3 Limited v O'Brien* [2024] NZEmpC 6 at [24].

[76] An assessment of contribution under s 124 of the Act could potentially affect the availability of reinstatement as a remedy. However, that cannot be properly assessed until after a substantive investigation meeting has occurred. It therefore cannot be said that remedy of reinstatement was not even arguable on the currently available evidence.

[77] Notwithstanding the concerns raised by FENZ, Mr Hopping established that it was arguable he would be permanently reinstated if his dismissal was substantively unjustified.

### *Finding*

[78] The arguable case tests favour Mr Hopping's interim reinstatement.

### **Where does the balance of convenience lie in the interim period?**

[79] The next step in the test for interim reinstatement required the Authority to determine the balance of convenience during the interim period until Mr Hopping's unjustified dismissal grievance could be resolved.

[80] This involved an assessment by the Authority of the relative impact on Mr Hopping and others of granting or refusing to grant him interim reinstatement. The factors to be weighed included the impact on these parties, third parties and whether other remedies that might ultimately be ordered would adequately compensate Mr Hopping if his unjustified dismissal grievance succeeded.

[81] The balance of convenience required the Authority to weigh the potential detrimental effects of failing to reinstate Mr Hopping against the potential detrimental effects on FENZ and others if interim reinstatement was granted. This comparison is sometimes referred to as a consideration by the Authority of the relative hardships to the parties and to any relevant third parties.<sup>3</sup>

### *Timing of substantive investigation meeting*

[82] A three day in-person substantive investigation meeting has been set down from 28 to 31 July 2025 in Hamilton. That is only two months from now.

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<sup>3</sup> *Angus v Ports of Auckland Limited* [2011] NZEmpC 125 at [56].

[83] During the case management conference held on 26 May 2025 with the parties' counsel, the Authority said at the conclusion of the evidence on the substantive claims it intended to give the parties (to the extent that was possible) a preliminary indication during the investigation meeting as to whether the reinstatement was likely.

[84] The timing of the substantive investigation weighed against interim reinstatement.

#### *Financial information*

[85] The Authority recognised that many employees who are dismissed are likely to face financial stress while they are without work. An applicant who sought interim reinstatement on financial hardship grounds was expected to provide the Authority with detailed information about their financial situation.

[86] The information Mr Hopping provided about his personal and family's financial situation was that his wife works 28 hours a week, but her income covers less than half of the family's monthly outgoings. They have a mortgage which includes school fees that she is unable to pay from her own part-time earnings. Mr Hopping said they support a daughter who is at University.

[87] No information was provided by Mr Hopping about his assets, bank balance or ability to borrow. There was no evidence of specific hardship he or his family would suffer if he was not reinstated for the two months between now and the substantive investigation meeting.

[88] FENZ pointed out that Mr Hopping's final pay was such that if broken down into the amount he would have received each week had he remained employed, then he would have received the equivalent of 12 weeks' pay. His employment ended on 30 April 2025, so 12 weeks' pay would take him up to two working days before the substantive investigation was scheduled to occur.

[89] On that analysis, and in the absence of evidence to the contrary, even without obtaining alternative work Mr Hopping should be able to manage the household finances until the substantive investigation meeting has been completed. This weighed against interim reinstatement.

*Work options*

[90] Mr Hopping has previously worked as a plumber but said it was “not that simple” for him to return to that trade. He left plumbing after a serious work injury on his lower back, but did not say if that had been resolved or was an ongoing concern.

[91] Mr Hopping has also previously done plumbing work in an office based role, but he said such roles are scarce. It would cost him \$579.50 to renew his plumber and gasfitter licenses and he would need to complete the 2024 Continuing Professional Development course if he wanted to obtain work in that field again.

[92] This weighed in favour of interim reinstatement.

*Ability to return to FENZ role*

[93] There was no evidence that if Mr Hopping was not interim reinstated, but he succeeded in obtaining permanent reinstatement as a remedy after establishing that his dismissal had been substantively unjustified, he would not be able to return to the type of work he had previously undertaken for FENZ because he had been away from the workplace for a few months.

[94] This weighed against interim reinstatement.

*Assessment of the merits*

[95] An evaluation by the Authority of the relative strength or weaknesses of Mr Hopping’s case can assist when assessing the balance of convenience. This evaluation is reached from reading untested affidavit evidence and from considering the parties’ submissions.

[96] There are inherent limitations in evaluating untested affidavit evidence, which could result in the Authority taking a different view once the evidence had been fully tested through thorough questioning during the substantive investigation meeting by the Authority and/or cross-examination by the parties.

[97] Subject to that caveat, the investigation report set out conduct by Mr Hopping that on the face of it appeared to breach the Bullying Policy. Witnesses A and B also attribute their health problems and career limitations to Mr Hopping’s actions towards

them. Bullying is the type of conduct that could potentially be viewed as serious misconduct for which dismissal was the appropriate sanction.

[98] However, whether that FENZ's decisions about those matters were justified in this particular case will require a close examination of each disciplinary allegation and the evidence FENZ relied on to support its findings. Dismissal does not automatically follow a serious misconduct finding. That outcome must still be justified in all the circumstances.

[99] Questions will arise regarding FENZ's assessment of the severity of the conduct in issue, as Mr Mitchell KC has submitted that the disciplinary concerns, even if proven, were not capable of being viewed as serious misconduct.

[100] It was not clear from the currently available evidence whether Mr Stubbs had weighed the severity of the conduct that FENZ had found to have been proven and assessed the appropriate sanction in line with what a fair and reasonable employer could have done in all the circumstances.

[101] Mr Hopping's concern about the length of time the complaints took to investigate had merit. The fact Mr Hopping had remained employed without incident during that time and that FENZ was aware of wider problems with the workplace culture in his team were factors that could potentially undermine FENZ's ability to justify the decision to dismiss him, instead of electing another disciplinary sanction short of dismissal.

[102] While the Authority cannot not substitute its subjective view for FENZ's, it is required to determine what disciplinary sanctions would have been available to a fair and reasonable employer in all the circumstances if serious misconduct was established. A harsh but fair outcome can therefore also still be justifiable.

[103] It was too early in the Authority's investigation to be able to form a view about such matters, so an assessment of the merits of each parties' position was therefore treated as a neutral factor.

#### *Impact on third parties*

[104] There are others in addition to FENZ who could be adversely affected by Mr Hopping's interim reinstatement. Witnesses A and B have provided affidavits that

said their health had been seriously adversely affected by Mr Hopping's actions towards them. Both witnesses claimed their chosen career paths had been adversely impacted as a result of Mr Hopping's conduct towards them.

[105] Witness A is no longer employed by FENZ. Witness B expressed concern about being anywhere near where Mr Hopping was. Although Witness B no longer works in Mr Hopping's team, they still said they "will not feel safe" if Mr Hopping was returned to work. Witness B deposed to experiencing "significant stress" which was "impacting on [their] mental and physical health" to the extent that they expressed concern about their "safety and psychological wellbeing", so had taken steps to obtain professional support.

[106] Mr Stubbs in his affidavit stated Witness B did not feel confident to move freely around within the organisation, apply for roles within FENZ or interact with his team if Mr Hopping was in the workplace. Mr Guard described the toll Mr Hopping's alleged conduct had on Witness A's and B's wellbeing and professional sense of safety.

[107] This factor weighed against interim reinstatement.

*Effect on other staff*

[108] Witness B said they had been told by other staff that Mr Hopping had treated them poorly, ignored them and/or made them feel uncomfortable in the office. It was alleged that these other staff "were afraid to speak the truth for fear of repercussions" during the investigation interviews. FENZ expressed concern that other staff could be scared to speak out if Mr Hopping was interim reinstated.

[109] FENZ produced text messages from an employee (employee 1) to Witness B that said (among other things):

- (a) "I know you are in a yucky situation";
- (b) "the workplace is so toxic ...";
- (c) "I really don't blame you [re making a complaint] and have considered it myself, and I'm torn between what I love and a toxic team;
- (d) "definitely upsetting that bullying works in the damn organisation and shows bad behaviour is rewarded";
- (e) "I hate you have had to go through it [bullying]".

[110] Employee 1 denied during the investigation interview that she had seen Mr Hopping treat Witness B in any way they were not comfortable with. Employee 1 when asked to describe her relationship with Mr Hopping said “.. we are friends.” The same was said about Witness B.

[111] Witness B said employee 1 had also struggled with the workplace culture (specifically if you aren't “with them” you are isolated) and had spoken to Witness B about how they would not have been able to cope and would have left if they had been treated as poorly as Witness B. Witness B claimed employee 1 had been too afraid to speak the truth during the investigation due to fear of repercussions.

[112] Another employee (employee 2), who Witness B said had heard an adverse comment made by Mr Hopping about Witness B which employee 2 passed on to Witness B, told the BCO investigator “I cannot recall this conversation – not denying that it ever happened, I just do not recall it.”

[113] Another employee (employee 3) reported to the BCO investigator that Witness B was “pretty much ignored” at work. Employee 3 also stated that witness B “was treated like shit by everyone pretty much” and “wasn't treated well right across the board.”

[114] Employee 3 also said they had seen Witness A immediately after the 11 December 2022 discussion with Mr Hopping that resulted in the complaint, and that Witness A “was physically trembling or shaking”. Employee 3 reported that Witness A “was visibly distressed”. Employee 3 also said that Witness A had told him they didn't “go down to the office where [the] team is because [they] didn't feel safe in there.”

[115] Another employee (employee 4) described Mr Hopping as “manipulative” and said “with his confidence he overpowers those ones who are not strong”. Employee 4 described themselves (and Witness B) as “strong” but said “my worry was for other people that come in that weren't strong”. Employee 4 said Witness A “was scared of engaging with [Mr Hopping]” and that Witness B was “often left out of things.”

[116] Employee 4 said Mr Hopping “would always talk in a bad way about his family, his brigade, and females in his brigade. This would be at least once a week. He would talk derogatory about people and would use the “C” word a lot. He was not very

professional and would also talk about [Witness A] badly from time to time and [Witness B].”

[117] Employee 4 described how Mr Hopping “had a habit of muttering under his breath, making derogatory comments about people within the room.” Employee 4 said it was “not a nice place to be” and that although they were away from it now they knew Employee 3 still “struggles quite a bit from time to time.” Employee 4 described the tone of the workplace as “quite different” when Mr Hopping was present and said “it is one of those controlling behaviours that you can’t pinpoint.”

[118] Another employee (employee 5) who is a supporter of Mr Hopping described him slamming a door so hard in anger at a work related comment Witness A had made during a workplace discussion that “dirt and dust and everything from the tiles on the ceiling came down and went all over the table” as “that was the level of anger that he had”. Employee 5 said he was “laughing underneath thinking “Jesus, good on you mate, you have done the right thing there, get out of the room before you belt somebody”.”

[119] This weighed against interim reinstatement.

#### *Adequacy of damages as a remedy*

[120] If Mr Hopping was not interim reinstated, but his dismissal grievance succeeded, he could seek an award of lost remuneration for the period he was without an income.

[121] An award of lost remuneration would adequately compensate Mr Hopping if his dismissal was substantively unjustified. This weighed against interim reinstatement.

#### *Finding*

[122] The balance of convenience criteria weighed against Mr Hopping’s interim reinstatement for the two months between now and the substantive investigation meeting.

**What does the overall justice of the case require during the interim period?**

[123] The final step in the interim reinstatement test required the Authority to stand back from the details that have been assessed under the earlier stages of the interim reinstatement test in order to consider what the overall interests of justice required.

[124] After considering all relevant factors, the Authority concluded the overall justice of the case weighed against interim reinstatement.

[125] The substantive investigation meeting is two months away, and Mr Hopping's final pay would likely cover his household expenses until then. Third party interests weighed against interim reinstatement. Damages would be an adequate remedy if Mr Hopping's dismissal grievance was successful.

**Outcome**

[126] Mr Hopping's interim reinstatement application did not succeed.

**Costs**

[127] FENZ as the successful party is entitled to a contribution towards its legal costs based on the notional daily tariff for a half-day investigation meeting. However, costs are reserved and will be addressed after the substantive claims have been resolved.

Rachel Larmer  
Member of the Employment Relations Authority