

Attention is drawn to the order prohibiting publication of certain information (refer paragraph 12)

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 565
3387185

BETWEEN

TAI MIRKO
Applicant

AND

MURIWAI GOLF CLUB
INCORPORATED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Martin Lyttleton, advocate for the Applicant
Jaime Rose Peacock, advocate for the Respondent

Investigation Meeting: 29 August 2025 by AVL

Determination: 12 September 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Before the Authority is an application for interim reinstatement brought by the Applicant, Tai Mirko, under s 127 of the Employment Relations Act 2000 (the Act).

[2] Mr Mirko was dismissed on 18 June 2025 for serious misconduct by the Respondent, Muriwai Golf Club Incorporated (MGC). Mr Mirko claims that he was unjustifiably dismissed from his position as a Greenkeeper and is seeking reinstatement on both an interim and a permanent basis.

[3] MGC claims that Mr Mirko's dismissal was warranted, and this decision was open to it as a fair and reasonable employer in all the circumstances at the relevant time. MGC opposes the claim for interim reinstatement and the substantive claim.

[4] This determination addresses the issue of interim reinstatement.

Non-publication

[5] MGC is seeking interim orders under clause 10(1) Schedule 2 of the Act prohibiting the publication of the names of employees and a Board Member who made affidavits in the interim matter.

[6] Mr Lyttleton notes Mr Mirko's view that a non-publication order appears of little value given that he has seen all the affidavit evidence which has been submitted.

[7] The Authority may order that the name of any party or witness or other person not be published, subject to any conditions it thinks fit.

[8] In the recent case of *MV v Spiga* the Employment Court has outlined the approach to take.¹ The starting principle is open justice. The Authority may depart from open justice to the extent necessary to serve the ends of justice or where the administration of justice weighs against full openness.

[9] The Court described a two-step approach to take when considering non-publication. First, there must be reason to believe specific adverse consequences could reasonably be expected to occur from publication. This step focuses on the evidence, with reasonable inferences allowed based on the specific circumstances of the case when considered in context.

[10] Second, the Authority must consider whether those consequences justify departing from open justice in the circumstances of the case. This is a weighing exercise that looks at relevant factors. Relevant factors include the circumstances of the case, the interests of the person or entity applying for the order, the interests of the other party or any third party, the public interest (including the rights of media), any issues of equity and good conscience and tikanga and its principles, values or concepts.

[11] In the circumstances of this case I consider that the names of the current employees who have provided affidavits and were not active participants in the events which occurred justifies a departure from the principle of open justice at this interim stage.

[12] **I order that at this interim stage, the names of the current employees who have provided affidavit evidence and were not actively involved in the circumstances which resulted in Mr Mirko's dismissal are not be published. They will be referred to by initials**

¹ *MW v Spiga* [2024] NZEmpC 147.

bearing no relationship to their actual name. This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.

The Authority's Investigation

[13] Following the initial application by Mr Mirko, the parties attended mediation but this did not resolve the issue.

[14] The application for an interim injunction was accompanied by an undertaking as to damages and an affidavit by Mr Mirko. Affidavits were also filed in opposition by MGC..

[15] A case management conference was held on 8 August 2025. The parties were directed to file submissions on 27 August 2025.

[16] The parties agreed to the Authority determining this preliminary issue of the interim reinstatement application based on the Statement of Problem and the Statement in Reply, documents submitted by the parties, on affidavit evidence, and on submissions from the parties.

[17] The evidence before the Authority for the purpose of determining this interim reinstatement application has been presented as is usual in such applications in affidavit form. by Mr Mirko.

[18] Affidavits were lodged on behalf of MGC by Mr L, Mr B and Mr E; Bryan Hutson, Chair of the Board of Directors, Andrew Jackson, General Manager, Harry Middleton, Golf Club Superintendent, and Bryce Campton, Assistant Superintendent.

[19] As the affidavit evidence presented must necessarily remain untested until the substantive investigation of the unjustified dismissal personal grievance, any findings of fact by the Authority in this determination are provisional only and may change later once the claims have been fully investigated and all witnesses have been examined on their evidence.

[20] As permitted by s.174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Principles

[21] I granted Mr Mirko's application for this matter to be dealt with on an urgent basis because this is the usual procedure for dealing with an application for an interim reinstatement. In determining this matter, I must apply the law relating to interim reinstatement as set out in

s 12(1) and s 12(4) of the Act which include recognising that employment relationships are built on the legislative requirement for good faith behaviour and addressing the inherent inequality of power in employment relationships.²

[22] At the Investigation Meeting held by AVL on 29 August 2025, I heard submissions from the parties' representatives in relation to the interim reinstatement application and tested these by questioning how the available untested affidavit evidence related to the relevant principles for determining an interim injunction application.³ Those principles fall to be addressed by the answers to the following questions:

- (a) whether or not Mr Mirko has established that there is a serious case to be tried in relation to the claim for unjustifiable dismissal; and if so:
- (b) Is there a serious case in relation to the claim for permanent reinstatement?

[23] Also noted as needing consideration are the balance of convenience and the impact on the parties, including any third parties of granting, or not granting, an order for interim reinstatement, and the overall justice of the matter.

Brief Background Facts

[24] MGC is a community golf club operating with a small greenkeeping team responsible for maintaining the golf course for its members and visitors.

[25] Mr Mirko commenced working for MGC in 2019. He worked as a Greenkeeper, being responsible for basic daily course maintenance, including mowing, course setup and a significant amount of tree work. At the date of his dismissal Mr Mirko reported to the current Golf Course Superintendent, Mr Middleton.

[26] During the period of time when Mr Campion was the Golf Club Superintendent, Mr Mirko reported to him. In his affidavit evidence Mr Campion described his working relationship with Mr Mirko as being fine. He stated that Mr Mirko preferred to work alone, and he generally allowed him to do so. No significant issues were experienced or performance concerns raised with Mr Mirko during Mr Mirko's first five years of employment.

[27] Mr Mirko's co-workers Mr B and Mr L described Mr Mirko as having a good work ethic and being a hard worker.

² Employment Relations Act 2000 s 3.

³ *McInnes v Western Bay of Plenty District Council* [2016] NZEmpC 36 at [8] ERA Auckland 92 in which Judge Inglis (as she then was) referred to the court of Appeal decision in *NZ Tax Refunds v brooks Homes Ltd* [2013] NZCA 90.

[28] Approximately five years after Mr Mirko started working at MGC, Mr Middleton was appointed as the Golf Club Superintendent

[29] In his untested affidavit evidence Mr Campion noted two incidents which gave him concern after Mr Middleton's appointment. One arose when Mr Middleton announced to the Greenkeeping staff he would be enforcing MGC's smoking policy which prohibited smoking in golf carts or machinery. He stated that Mr Mirko reacted badly to the pronouncement, making a number of adverse comments about the decision to Mr Middleton.

[30] The other incident occurred on or about two weeks before 19 May 2025 when Mr Mirko mentioned to Mr Campion and a couple of other Greenkeeping staff that he was dissatisfied with Mr Middleton's personality and management style, describing Mr Middleton as being arrogant.

[31] On 19 May 2025 there was an incident between Mr Mirko and Mr Middleton. It started when Mr Middleton asked to speak to Mr Mirko in his office. Mr Middleton stated in his affidavit that he wanted to ask Mr Mirko the reason for his only providing two or three minutes notice of his non-attendance for his shift on 16 May 2025.

[32] Mr Middleton stated that Mr Mirko became upset and swore at him, not stopping doing so when he requested him to do so. Mr Middleton said the meeting ended when Mr Mirko said he did not want to discuss it further.

[33] Mr Mirko states that he had an emotional response to being confronted by Mr Middleton about his providing insufficient notice of sick leave, because he rarely took sick leave and had provided notice as soon as he was able to do so.

[34] Shortly afterwards Mr Middleton said there was a second incident when he and Mr Mirko were both in the Greenkeeper's Shed. He stated that Mr Mirko blocked his vehicle to prevent him leaving and spoke aggressively to him so he had felt threatened.

[35] Following the incident in the Greenkeeping Shed Mr Middleton emailed Mr Jackson to raise a complaint, and Mr Hutson documenting the incident. Mr Mirko was suspended on full pay pending an investigation meeting.

[36] An initial investigation meeting was held with Mr Mirko on 23 May 2025 during which Mr Mirko raised claims that he had been bullied by Mr Middleton on a number of occasions. He was asked to submit these separately.

[37] A disciplinary meeting was held on 29 May 2025 during which Mr Mirko raised responses to the allegations put to him, and raised further health and safety issues, and bullying claims against Mr Middleton.

[38] On 30 May 2025 MGC issued a preliminary decision finding that Mr Mirko was guilty of serious misconduct and advising that dismissal was being considered.

[39] Mr Mirko's bullying claims were considered by MGC and dismissed as lacking substance.

[40] On 18 June 2025 Mr Mirko was dismissed for serious misconduct.

[41] MGC issued a trespass notice against Mr Mirko on 29 July 2025 prohibiting him from entering the MGC premises.

Is there a serious question to be tried in relation to the claim of unjustifiable dismissal?

A Serious Question?

[42] As a matter of principle, Mr Mirko must establish that there is a serious question to be tried in respect of his claim of unjustifiable dismissal and for permanent reinstatement. A serious question was described in *Brooks Homes Ltd v NZ Tax Refunds Ltd* as an arguable case.⁴

[43] The threshold for a serious question or arguable case as stated in *Brooks Homes* and *Western Bay of Plenty District Council v Jarron McInnes* is that the claim is not frivolous or vexatious:

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

[44] In *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* the Chief Judge confirmed that whether there is a serious question to be tried raises two sub-issues, these being:

- a) Whether there is a serious question to be tried in relation to the claim of unjustified dismissal; and, if so,
- b) Whether there is a serious question to be tried in relation to the claim of permanent reinstatement.⁶

⁴ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

⁵ *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC36 at[9].

⁶ *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* [2021] NZEmpC 59 at [7].

[45] In *Humphrey* the Employment Court noted that once the relatively low threshold as identified in *Brooks Homes Ltd* had been met:

... the merits of the case (insofar as they can be ascertained at an interim stage) may be relevant in assessing the balance of convenience and the overall interests of justice.⁷

[46] My findings expressed in this preliminary determination are solely for the purpose of resolving Mr Mirko's application for interim reinstatement. At the substantive hearing there will be opportunity to fully test the relevant evidence and disputed questions of fact and law.

An arguable case?

[47] Mr Mirko submits that his dismissal was unjustifiable because the outcome of the disciplinary investigation was predetermined. He also submits that the disciplinary process was flawed because key witnesses were not interviewed; key CCTV footage of the incident was not played to him during the investigation meeting; and his contextual evidence and evidence in mitigation was not considered.

[48] It is submitted for MGC that it acted as a fair and reasonable employer could have done in all the circumstances at the relevant time. It submits that Mr Mirko was dismissed following a fair disciplinary process in which it had been found that serious misconduct had occurred.

[49] It is a low threshold and I find that Mr Mirko has an arguable case that he was unjustifiably dismissed.

Reinstatement?

[50] Mr Mirko must not only establish an arguable case for unjustifiable dismissal but must also establish that he would be reinstated if successful in such a claim.

[51] Reinstatement is the primary remedy and s125 (2) of the Act states the Authority must provide for reinstatement if it is practicable and reasonable. This was commented upon by Judge Holden in *Hong v Auckland Transport* in which she set out that practicality and reasonableness are two separate requirements:

Practicability ... means more than simply being possible. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible, and have the potential for the re-imposition of the employment relationship to be done or carried out successfully. ...

Looking at reasonableness, the Court needs to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other

⁷ Above n 5 at [8].

affected employees of the same employer, and in some cases, perhaps third parties who would be affected by the reinstatement.⁸

[52] Mr Mirko was a hard-working employee with no background of disciplinary or performance issues in his employment with MGC until the incident between him and Mr Middleton on 19 May 2025.

[53] It is submitted for Mr Mirko that he attempted to raise health and safety issues both prior to, and during, the disciplinary process. He had also raised his concern about Mr Middleton's management style with Mr Campion prior to 19 May 2025 although he had not formalised this.

[54] Mr Mirko has accepted in his second affidavit that his behaviour on 19 May 2025 was completely unreasonable and unnecessary and that he owed an apology to Mr Middleton.

[55] Mr Mirko submits that he believes he can work effectively with both Mr Campion and Mr Middleton with the benefit of counselling and would like MGC to put in place a restorative process.

[56] MGC submits that permanent reinstatement is neither practical nor reasonable. It submits that since his dismissal Mr Mirko has engaged in inappropriate behaviour including sending hostile messages to staff such that they are fearful

[57] It is submitted that the affidavit evidence supports the fact that the workplace environment has improved markedly in Mr Mirko's absence. This post-employment conduct reinforces the seriousness of the original misconduct and demonstrates that reinstatement would expose staff to unacceptable risk.

[58] MGC submits that reinstatement is neither practicable or reasonable. It submits that as stated in his affidavit evidence Mr Middleton would not feel safe managing Mr Mirko again if he were to be reinstated. Mr Middleton also states that he does not consider that a restorative process would be possible because trust has been broken.

[59] Reinstatement on an interim or permanent basis must be practicable and reasonable. It appears from the untested affidavit evidence that Mr Mirko was a good and hard worker and the relationships between him and the other employees apart from Mr Middleton prior to 19 May 2025 was positive.

⁸ *Hong v Auckland Transport* [2019] NZEmpC 54 at [66] and [67].

[60] It does appear from Mr Campion's affidavit evidence that Mr Mirko may have raised some concerns with him, including about Mr Middleton's management style, prior to the 19 May 2025 incident although Mr Mirko did not make a formal complaint.

[61] Based on Mr Campion's affidavit, it appears that the concerns were not considered as requiring investigation at the time and there is a possibility that if Mr Mirko's concerns had been addressed earlier, the tensions between him and Mr Middleton that resulted in the incident on 19 May 2025 may have been addressed and not have eventuated

[62] Taking all the submissions into consideration, and on the basis of the untested affidavit evidence as presented to the Authority, I am able to conclude that Mr Mirko has an arguable case that he would be reinstated if successful in the substantive matter.

Balance of convenience

[63] As set out in the Employment Court case *X v Y Limited* this principle requires that the Authority balance the relative inconvenience, in terms of detriment or injury, to MGC who will have to bear the burden of an order reinstating Mr Mirko until the substantive case is heard, against the inconvenience to Mr Mirko who may have a just case, of having to bear the detriment of unjustifiable action until the case is heard.⁹

[64] It is submitted for Mr Mirko that he loved his job and working at MGC on the greens. He has found the dismissal to be a traumatic experience which has left him feeling very depressed and fragile. He has been prescribed medication for depression.

[65] Mr Mirko lives in rental accommodation close to MGC and friends. He assists his mother who lives in a retirement village from his income. He has no other form of income. Despite applying for a number of greenkeeping jobs, he has been unsuccessful to date.

[66] MGC submits that it would suffer harm if Mr Mirko were to be reinstated in terms of risks to staff safety, erosion of trust and confidence and serious operational disruption. There is also a risk that Mr Middleton would resign if Mr Mirko were to be reinstated.

[67] It submits that rumours were circulating in the local community that Mr Mirko would pay a visit to Mr Middleton, which rumours caused distress to staff and were considered serious enough for MGC to issue the trespass notice.

⁹ *X v Y Limited* [1992] 1 ERNZ 863, at pg 10.

[68] I observe that these rumours, as confirmed in the Respondent's evidence, are unsubstantiated and are hearsay only.

[69] MGC is also opposed to Mr Mirko being reinstated to the payroll on the basis that this would be an improper use of member resources and undermine confidence in MGC's governance.

[70] It submits that any hardship to Mr Mirko would be financial only and could be addressed through alternative remedies including compensation should he ultimately succeed at a substantive hearing.

[71] Having considered all the circumstances and the submissions put forward by the parties, balancing the potential prejudice to Mr Mirko of not reinstating him, against the potential prejudice to MGC of so doing, I find that the balance favours the interim reinstatement of Mr Mirko.

Overall Justice

[72] The Authority must assess the overall justice of the case from a global perspective. This has been described by the Court of Appeal as:¹⁰

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

[73] An overall justice assessment is a 'reality' check on the position which has been reached after the analysis of the serious question to be tried and the balance of convenience has been weighed.

[74] There were no performance issues raised with Mr Mirko during his period of employment at MGC prior to the incident on 19 May 2025. Whilst there is some concern as to the relationship between the parties since the dismissal and legal challenge to that decision, it is not unexpected that emotions and tensions accompany such a process.

[75] However there is no evidence to support a view that they will subsist and prevent the previous cordial relationship being re-established given Mr Mirko's insight into the unacceptable nature of his behaviour towards Mr Middleton on 19 May 2025 and with the assistance of a restorative process being undertaken which Mr Mirko has requested and has stated in his affidavit evidence he will support.

¹⁰ *NZ Tax Refunds Ltd v Brooks Homes Limited* [2013] NZCA 90 at [47].

[76] Having taken into consideration all the circumstances, I find that the overall justice of the case subsists in granting Mr Mirko's application for interim reinstatement.

Interim Reinstatement

[77] For the above reasons the Authority exercises its discretion in relation to interim reinstatement by making the orders sought.

[78] Under s 127 of the Act and in reliance upon his undertaking as to damages lodged with his application to the Authority, I therefore order the interim reinstatement of Mr Mirko as a Greenkeeper with effect from the next working day after the date of this determination.

[79] It is however appreciated that MGC may wish to take steps to initiate a restorative process prior to Mr Mirko's return, and therefore it may, at its discretion, exercise the option to restore Mr Mirko to the payroll until such time as that process is in place.

[80] If MGC does exercise that option not to use Mr Mirko's skills in the interim period, it would not be able to seek to recoup the cost of his salary if it were later to be successful in establishing that its decision to dismiss him was justified.

Next Steps

[81] The Authority will convene a case management conference to set timetable directions for the investigation of Mr Mirko's substantive claims.

Costs

[82] Costs are reserved for determination following the substantive investigation meeting and its outcome or until this matter otherwise ceases to be before the Authority.

Eleanor Robinson

Member of the Employment Relations Authority