

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 601
3398844

BETWEEN FATHIMA NIYAZA FAHMY
Applicant

AND MINIMARC CHILDCARE
CENTRE INCORPORATED t/a
MARC EARLY LEARNING
CENTRE
Respondent

Member of Authority: Eleanor Robinson

Representatives: David Fleming, counsel for the Applicant
Roxzanne Venter, advocate for the Respondent

Submissions received 22 September from the applicant
22 September from the respondent

Investigation Meeting: 24 September 2025 by AVL

Determination: 26 September 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

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

[2] Ms Fahmy was dismissed on 3 July 2025 on performance grounds by the Respondent, Minimarc Childcare Centre Incorporated t/a Marc Early Learning Centre (MARC). Ms Fahmy claims that she was unjustifiably dismissed from her position as an Early Childhood Teacher and is seeking reinstatement on both an interim and a permanent basis.

[3] MARC claims that Ms Fahmy'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. MARC opposes the claim for interim reinstatement and the substantive claim.

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

The Authority's Investigation

[5] Following the initial application by Ms Fahmy, the parties attended mediation, but this did not resolve the issue.

[6] The application for an interim injunction was accompanied by an undertaking as to damages and affidavits by Ms Fahmy. MARC also lodged an affidavit by Melissa Jordan, Board Chair.

[7] A case management conference was held on 12 September 2025. The parties were directed to file submissions on 22 September 2025.

[8] 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.

[9] 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.

[10] 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.

[11] 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

[12] I granted Ms Fahmy'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.¹

¹ Employment Relations Act 2000 s 3.

[13] At the Investigation Meeting held by AVL on 24 September 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.² Those principles fall to be addressed by the answers to the following questions:

(a) whether or not Ms Fahmy 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?

[14] 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

[15] MARC is a not-for-profit community based early childhood education (ECE) service located in the grounds of the Mt Albert Research Centre. The original childcare centre was founded by parents who worked at the Research Centre.

[16] MARC is governed by a Board of volunteers (the Board) who meet monthly. It is a small employer, currently employing 11 staff, the majority of whom are ECE teachers, and a General Manager (the GM). Ms Fahmy commenced employment at MARC on 9 April 2021 as a ECE teacher.

[17] Ms Fahmy stated in her untested affidavit evidence that the first two years of her employment at MARC went well.

[18] Ms Jordan in her untested affidavit evidence stated that employment concerns became evident with Ms Fahmy as early as 2022 when the GM had to address Ms Fahmy's communication with the children

[19] Ms Fahmy stated that in 2023 the GM changed her shifts and the age group of children she was working with without consultation. Ms Fahmy complained about the change, following which she claims she experienced ongoing bullying and victimization by the GM. She stated that she complained repeatedly about the GM to the Board, but no action was taken by it.

² *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.

[20] Ms Jordan stated in her affidavit that Ms Fahmy's shifts had not been changed as alleged without consultation. All the employees had been given an opportunity for comment prior to a decision being taken.

[21] In regard to the allegations of bullying made by Ms Fahmy not having been investigated by the Board, Ms Jordan stated that both complaints of bullying raised by Ms Fahmy had been fully investigated and involved the expenditure of significant resources and time. Both were found to be unsubstantiated.

[22] Ms Jordan stated in her affidavit that MARC spent three years attempting to support Ms Fahmy to improve the performance of her duties. Three separate performance management processes were conducted with Ms Fahmy which sought to address issues including her communication, active listening skills, unprofessional language/tone, feedback reception, following management instructions, and the quality of her writing. She stated that robust processes were followed each time. Ms Jordan stated in her affidavit that the PIP processes were designed to assist and support Ms Fahmy in her professional development,

[23] Ms Fahmy stated in her affidavit that she was subjected to two performance management plans (PIP) during 2024, the first was in respect of her grammar and not completed. The second PIP was for positive communication and her body language when communicating with children. On 17 December 2024 she was told she had failed the second PIP.

[24] Ms Jordan stated that in August 2024 another disciplinary process was undertaken with Ms Fahmy in respect of her not adhering to her health and safety obligations. This resulted in a PIP being undertaken.

[25] In December 2024 Ms Jordan stated that a second PIP was undertaken to address concerns about Ms Fahmy's communication with children, and her need to be open to constructive feedback. Although the GM recognised some improvement in Ms Fahmy's performance it did not meet the required level. The outcome of this review process was a first and final warning.

[26] In January 2025 Ms Fahmy stated that she was advised that she was being issued with a 'first and final' warning, without any proper process being completed. She objected to this warning.

[27] Ms Fahmy stated in her affidavit that in January 2025, the GM refused to support her application to the Teaching Council for a renewal of her practising certificate. As a result she had to make the application herself. The Teaching Council renewed her teaching certificate.

[28] In March 2025 the GM gave notice of resignation.

[29] On or about May 2025 a third PIP was undertaken with Ms Fahmy. Ms Jordan stated in her affidavit that the third PIP addressed four concerns with Ms Fahmy's performance:

- a) Professional communication with her manager;
- b) The need to follow legitimate instructions;
- c) Her communication with children; and
- d) Her writing of quality individual plans for children.

[30] Ms Fahmy stated in her affidavit evidence that she believed the PIP process was not objective and it had been the GM's intention to remove her from MARC before a new manager commenced.

[31] Ms Jordan stated that sufficient clarity was provided regarding the PIP framework. Areas of concern had been identified; these were effectively communicated to Ms Fahmy for her feedback. She stated in her affidavit that MARC had exhausted all steps in order to assist Ms Fahmy with improving her performance.

[32] Following the third PIP Ms Fahmy was dismissed on 3 July 2025. Ms Fahmy stated in her affidavit that she did not accept that the third PIP was objective, but that the GM had intended to use it as a means to have her terminated from MARC before a new manager was appointed.

[33] Ms Jordan stated in her affidavit that the decision to terminate Ms Fahmy's employment had not been made solely by the GM but had been authorised by the Board.

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

A Serious Question?

[34] As a matter of principle, Ms Fahmy must establish that there is a serious question to be tried in respect of her 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.³

[35] 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

³ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

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 ...⁴

[36] 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.⁵

[37] 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.⁶

[38] My findings expressed in this preliminary determination are solely for the purpose of resolving Ms Fahmy'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?

[39] Ms Fahmy submits she has an arguable case for unjustifiable dismissal and permanent reinstatement because there are serious questions to be tried in respect of her dismissal.

[40] Ms Fahmy submits that MARC did not act as a fair and reasonable employer because a reasonable employer would have had someone objective to review the PIP process evidence.

[41] She submits that it is strongly arguable that the GM's concerns did not relate to her performance, but to her questioning of decisions by the GM, her victimisation by the GM and the subsequent complaints of bullying.

[42] Ms Fahmy submits that all remedial steps had not been exhausted, and a fair and reasonable employer would not have moved from a first and final warning to dismissal.

[43] MARC submits that it spent three years attempting to improve Ms Fahmy's performance, spending a significant amount of time on the processes in addition to expending financial resources on engaging external third parties to assist with the processes.

⁴ *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC36 at [9].

⁵ *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* [2021] NZEmpC 59 at [7].

⁶ Above n 5 at [8].

[44] It is submitted for MARC that the fact it invested three years in working with Ms Fahmy to improve her performance does not support claims that she was targeted by the GM. It was submitted that the PIP processes also involved two Team Leaders at the request of MS Fahmy, and was not solely conducted by the GM.

[45] It submits that MARC was open and communicative with Ms Fahmy about the performance concerns, the PIP processes were robust, involving clear communication of the concerns, weekly meetings and consideration of the feedback provided by Ms Fahmy. It is submitted that MARC engaged in fair and reasonable processes to address its concerns about Ms Fahmy's performance in order to provide a solution.

[46] It is a low threshold, and I find that Ms Fahmy has an arguable case that she was unjustifiably dismissed.

Reinstatement?

[47] Ms Fahmy must not only establish an arguable case for unjustifiable dismissal, but she must also establish that she would be reinstated if successful in such a claim.

[48] 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 affected employees of the same employer, and in some cases, perhaps third parties who would be affected by the reinstatement.⁷

[49] It is submitted by Ms Fahmy that no evidence has been submitted by the Respondent demonstrating that reinstatement would be impracticable. It is submitted that if reinstated, Ms Fahmy would be able to restore a positive relationship with the children, staff and parents. She submits that any comments in Ms Jordan's affidavit that other staff at MARC had complained about her are hearsay and no reliance should be placed on them.

[50] It is submitted for Ms Fahmy that whilst MARC claims to have lost trust and confidence in her, a claimed loss of trust and confidence is not in itself grounds for declining reinstatement.

⁷ *Hong v Auckland Transport* [2019] NZEmpC 54 at [66] and [67].

[51] MARC submits that Ms Fahmy's performance did not improve despite three years of corrective action. This fact gives it no confidence that Ms Fahmy's performance would improve should she be reinstated.

[52] It submits that trust and confidence is an essential element in the employment relationship and here it has been irrevocably destroyed. It is submitted it would not be reasonable to return Ms Fahmy to the workplace with no indication that her performance would improve to the required standard.

[53] MARC further submits that Ms Fahmy makes serious allegations against it as the business to which she claims to wish to return. If Ms Fahmy were to be reinstated permanently, although the GM may have left, the Board would still be chaired by the same Chairperson which it is submitted makes it incomprehensible why Ms Fahmy would seek to return to a workplace where she has made an accusation that her claims of bullying were not investigated.

[54] Reinstatement on an interim or permanent basis must be practicable and reasonable. Taking all the submissions into consideration, and on the basis of the untested affidavit evidence as presented to the Authority, whilst I find that Ms Fahmy has an arguable case that she was unjustifiably dismissed, I am unable at this stage to conclude that she has a more than a weak arguable case that she would be reinstated permanently.

[55] Accordingly, I do not find that Ms Fahmy has a strongly arguable case for interim reinstatement.

Balance of convenience

[56] 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 MARC which will have to bear the burden of an order reinstating Ms Fahmy until the substantive case is heard, against the inconvenience to Ms Fahmy who may have a just case, of having to bear the detriment of unjustifiable action until the case is heard.⁸

[57] It is submitted for Ms Fahmy that if she is not reinstated, she is likely to suffer losses that could not later be rectified by an award of compensation.

[58] It is submitted that Ms Fahmy wishes to restore relationships with other staff of MARC, the children she worked with, and their parents. If she is reinstated on an interim basis, she will

⁸ *X v Y Limited* [1992] 1 ERNZ 863, at pg 10.

have the opportunity to do so. However, if she is not reinstated, many of those relationships will be permanently severed.

[59] It is submitted that Ms Fahmy has temporary work through an agency, but her current role is not equivalent to the role she had with MARC. She has no job security; she has a lower rate of pay and has significant travelling requirements. There is no guarantee of ongoing permanent employment with a temporary placement due to the agency involvement.

[60] It is submitted that even if MARC considered she might require support and supervision if returned to the workplace, Ms Fahmy submits that offering this to her would not be unreasonably burdensome.

[61] It is submitted that if Ms Fahmy were not reinstated on an interim basis, she is likely to suffer the severing of important relationship that could be renewed and restored at this early stage. She would also suffer irreparable harm to her career due to being able to only undertake temporary relieving work while she works through the mandatory Teaching Council process and whilst awaiting the outcome of the Authority's substantive process.

[62] MARC submits that the balance of convenience does not favour Ms Fahmy's reinstatement, whether in person or to the payroll.

[63] It submits that MARC is experiencing financial difficulties and if Ms Fahmy were to be reinstated, given that she has questioned MARC's ability to investigate concerns and run the performance processes objectively, it would incur the expense of engaging external representatives to assist with the processes. This would be an added financial cost it would struggle to meet.

[64] It is submitted that MARC will bear significant risk if Ms Fahmy is granted reinstatement in that it will need to pay her irrespective of whether she returns to the workplace, or is placed on the payroll, because there is no guarantee that her performance will be to the required standard.

[65] It is submitted that should Ms Fahmy return, and the performance issues persist, or Ms Fahmy has a strained relationship with the new GM, MARC will need to engage external parties to assist with the processes again.

[66] The costs of reinstatement, whether actual or to the payroll, and the need to engage external assistance, would be financially prohibitive for MARC.

[67] I observe that MARC is in the final stages of recruiting a fixed term candidate to fill a vacancy to cover a period of parental leave. MARC was on notice that Ms Fahmy would be

seeking reinstatement at an early stage, and I do not take this factor into consideration when weighing the balance of convenience to the parties.

[68] Having taken into consideration the submissions put forward by the parties, balancing the potential prejudice to Ms Fahmy of not reinstating her against the potential prejudice to MARC of so doing, I find that the balance of convenience favours not reinstating Ms Fahmy on an interim basis.

Overall Justice

[69] The Authority must assess the overall justice of the case from a global perspective. This has been described by the Court of Appeal as:⁹

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'

[70] It is submitted on behalf of Ms Fahmy that the overall justice favours her. She seeks permanent reinstatement and, it is submitted, has a strongly arguable case for unjustifiable dismissal. Further there are no obvious factors that would make reinstatement impracticable. It is submitted that Ms Fahmy's prospects of being permanently reinstated should not be eroded by decisions made at the interim stage.

[71] It is further submitted that wider policy considerations support the interim reinstatement of Ms Fahmy. The Act intention is that reinstatement should be the primary remedy and decisions at the interim stage should be consistent with, and promote, the statutory intent.

[72] MARC submits that the overall justice favours it since it would have an unfair financial and procedural burden should Ms Fahey be reinstated.

[73] Having carefully considered the submissions, I find that the overall justice of the case subsists in declining the application for interim reinstatement.

Next Steps

[74] A case management conference will be convened shortly to progress the application by Ms Fahmy.

⁹ *NZ Tax Refunds Ltd v Brooks Homes Limited* [2013] NZCA 90 at [47].

Costs

[75] 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