

[4] Mr Jung commenced his employment with Asian Savour in July 2019. In July 2023 his position was changed from assistant manager, to retail supervisor. He says his duties included overseeing inventory control, conducting stock accounts, and submitting reports. Mr Jung says he carried out these responsibilities diligently within the workplace's operational constraints.

[5] Mr Jung says that since 2023 he has been an active member and elected delegate of the Asian Savour in-house union, K Union Inc (the union).

[6] In July 2025 Asian Savour alleged that Mr Jung been grossly negligent in his work performance, specifically in relation to what it said was his failure to inspect deliveries from external suppliers, and failing to correctly supervise other staff in respect of the same. Asian Savour alleges that one particular supplier had been incorrectly invoicing it for goods delivered, the effect of which was that over time, this caused losses to the business of over \$65,000 (the stock handling errors).

[7] Asian Savour commenced a disciplinary investigation into Mr Jung's role in this alleged conduct. The investigation concluded that Mr Jung's conduct amounted to "wilful, reckless and deliberate defective performance of his duties". Asian Savour summarily dismissed Mr Jung from his employment for serious misconduct by letter dated 25 August 2025.

[8] Prior to the disciplinary investigation which resulted in his summary dismissal, Mr Jung had raised a personal grievance for unjustified disadvantage, in which he alleged he had been bullied and harassed, and experienced anti-union discrimination.

[9] In addition, Mr Jung had raised concerns around pay disparity with Asian Savour.

[10] Mr Jung says his personal grievance for unjustified disadvantage, and his pay disparity concerns remain unresolved, and that Asian Savour has discriminated against him on the basis of his membership of, and role in the union. Mr Jung says that his dismissal was predetermined, and that the disciplinary investigation into his conduct was entirely retaliatory in nature.

[11] For these reasons, Mr Jung says his dismissal is unjustified.

[12] Mr Jung's claims of unjustified disadvantage arising from bullying and harassment, anti-union discrimination, and of breach of the duty of good faith are not considered at this interim stage.

[13] This determination deals only with Mr Jung's application for interim reinstatement.

The Authority's investigation

[14] Mr Jung lodged his statement of problem in the Authority on 25 September 2025, together with an undertaking as to damages.

[15] The Authority granted the matter urgency, and the parties were directed to attend mediation. The requirement for Asian Savour to lodge its statement in reply was suspended until after the parties had attended mediation.

[16] Mediation occurred on 14 October 2025, but failed to resolve matters.

[17] An affidavit affirmed by Hyeju Kim, Asian Savour's Human Resources Administrator was lodged on 21 October 2025, together with Asian Savour's statement in reply.

[18] The Authority held a case management conference with the parties on 23 October 2025, at which timetable directions were made for the remaining affidavits and submissions to be lodged.

[19] Mr Jung lodged an affidavit affirmed on 31 October 2025, together with submissions in support of his application for interim reinstatement.

[20] Ms Kim lodged a further affidavit, affirmed on 10 November 2025, together with Asian Savour's submissions in opposition to Mr Jung's interim reinstatement.

[21] Mr Jung lodged an affidavit in reply affirmed on 24 November 2025.

[22] Despite timetable provision being made for Mr Jung to lodge reply submissions, he elected not to do so.

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

[24] Evidential matters in dispute between the parties will not be resolved by this determination because the evidence is untested, and in applying the relevant tests, the Authority is not required to resolve any such disputes.

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

The issues

[26] Section 127 of the Act confers jurisdiction on the Authority to grant interim reinstatement. For the Authority to grant interim reinstatement, an applicant must establish that there is a serious question to be tried. Consideration must be given to the balance of convenience, the impact on the parties of the granting of, and the refusal to grant, an order. The impact on third parties will also be relevant to the weighting exercise. Finally, the overall interests of justice are considered, standing back from the details required by the earlier steps.¹

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

- (a) whether there is a serious question to be tried; that is, does Mr Jung have an arguable case for unjustified dismissal?
- (b) If so, does Mr Jung have an arguable case for permanent reinstatement?
- (c) Where does the balance of convenience lie?
- (d) The Authority is then required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

[28] In determining whether to order interim reinstatement, regard must be had to the object of the Act, which is to build productive employment relationships through the promotion of good faith:²

One of the central features of the Act is its recognition of the importance of the employment relationship, the obligations both parties have to be responsive and communicative, and that issues ought to be dealt with promptly and between the parties if possible - in other words, supporting constructive employment relationships and repairing them where feasible.

¹ *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [7].

² *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* [2021] NZEmpC 59 at [5].

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

Arguable case

Is there an arguable case for unjustified dismissal?

[30] The first question the Authority must consider, is whether there is an arguable case that Mr Jung was unjustifiably dismissed. An arguable case means a case with some serious or arguable (but not necessarily certain) prospect of success.³ The threshold for a serious question or arguable case as stated in *Western Bay of Plenty District Council v McInnes*, is that the claim is not frivolous or vexatious:⁴

... 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...

[31] Mr Jung submits that Asian Savour did not provide him with a reasonable opportunity to respond, prior to its finding that his actions had contributed to the stock handling errors.

[32] Asian Savour submits that there is no serious question to be tried, as Mr Jung was dismissed following a fair process, and it has fully complied with the requirements of the test of justification under s 103A of the Act.

[33] In an interim application, reliance is placed on untested affidavit evidence. The Authority cannot resolve disputed matters on the basis of untested affidavit evidence. Mr Jung's claim meets the low threshold of an arguable case for his personal grievance for unjustified dismissal. At the very least, there is a dispute between the parties as to the process followed which led to Mr Jung's dismissal.

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

Is there an arguable case for permanent reinstatement?

[35] Again, this is a low threshold.

³ *X and Y Limited v New Zealand Stock Exchange* [1992] ERNZ 863.

⁴ Above n 2, at [9].

[36] Where it is practicable and reasonable to do so, the Authority must provide for reinstatement (when sought) as the primary remedy.⁵

[37] Asian Savour submits that Mr Jung has no arguable case for permanent reinstatement because:

- (a) the requisite trust and confidence and has been irrevocably destroyed by Mr Jung's actions;
- (b) there is no evidence that Mr Jung is being discriminated against on the basis of his membership of the union;
- (c) there is no evidence to suggest that Mr Jung would perform his duties to the required standard should he be reinstated, and therefore a high likelihood of the same issues reoccurring;
- (d) Mr Jung's duties have already been reassigned;
- (e) Mr Jung has made very serious allegations against the company, which suggest that he himself also believes that trust and confidence has been broken.

[38] It is not sufficient for an employer to show resistance and strained circumstances in order to avoid an order for reinstatement.⁶

[39] If Mr Jung is able to establish his personal grievance, it cannot be said that reinstatement is impossible, particularly given that the Authority may order reinstatement subject to any conditions it thinks fit.⁷

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

The balance of convenience

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

[42] Mr Jung submits that the balance of convenience favours him because:

⁵ Employment Relations Act 2000 s 125(2).

⁶ *Angus v Ports of Auckland* [2011] NZEmpC 122 at [63].

⁷ Section 127(5).

- (a) having no income creates substantial financial pressure, particularly given his family responsibilities and long-term commitments in New Zealand;
- (b) a dismissal for alleged gross negligence damages his professional standing in the Korean business community in Auckland, where his reputation is critical for future employment prospects;
- (c) allowing dismissal to remain while discrimination claims are pending sends a clear message that union activity will not be protected despite statutory safeguards;
- (d) the harm caused to Mr Jung, should he not be reinstated on an interim basis, may not be adequately addressed by an award of damages at the substantive stage of the investigation.

[43] No reasoning or support is provided for Mr Jung's submissions, and these matters are not adequately addressed by Mr Jung in his evidence.

[44] Mr Jung's affidavit evidence is lacking in any detail as to balance of convenience. He does not provide any information about his financial circumstances, other than the bald statement that he is under financial pressure.

[45] He does not provide any reasoning as to why an award of damages would be an inadequate remedy, and nor does he provide any evidence in support of his ability to meet an award of damages.

[46] There is no evidence as to what (if any) efforts Mr Jung has undertaken to seek new employment.

[47] Asian Savour submits that the balance of convenience favours it because:

- (a) Mr Jung's former duties have been reassigned to other employees;
- (b) Mr Jung has been critical of Asian Savour's ability to run an employment process, meaning that if future issues were to arise, external providers may need to be engaged, leading to unnecessary costs;
- (c) there have been issues between Mr Jung and other staff in the past so reintegration is "therefore questionable", and staff morale may be negatively impacted.

[48] Asian Savour has provided almost no evidence to support its position.

[49] Asian Savour's evidence is that it has already reallocated Mr Jung's former duties, and has been providing systems training to a particular employee, together with forklift driver licence training for this same employee.

[50] As noted above, it is not sufficient for an employer to show resistance and strained circumstances in order to avoid an order for reinstatement.

Evaluating the strengths and weaknesses of Mr Jung's case

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

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

[53] A significant aspect of Mr Jung's case is his belief that he was dismissed because of his role as delegate for the union.

[54] Related to this, is Mr Jung's claim that his dismissal renders him unable to perform his role as union delegate during an upcoming period of collective bargaining, which he says is the cause of "irreversible and uncompensable harm".

[55] However, the union is not a party to Mr Jung's personal grievance.

[56] In addition, any harm caused to the union as a result of Mr Jung not participating in collective bargaining is a matter for the union to address with Asian Savour. It is not a stand-alone factor that the Authority needs to consider in assessing the balance of convenience in an interim reinstatement setting.

[57] Furthermore, Mr Jung's dismissal does not prevent him from participating in collective bargaining with Asian Savour. Despite no longer working for Asian Savour, there is no reason why Mr Jung could not continue in his role as union organiser. That is a matter for Mr Jung and the union, not for Asian Savour.

[58] Asian Savour's evidence is that Mr Jung was not dismissed from his employment due to his union affiliation, and has provided evidence that a number of other employees faced disciplinary consequences as a result of its investigation into the stock handling errors.

[59] In addition, Mr Jung has claimed an unjustified disadvantage arising from what he says was Asian Savour's failure to fairly remunerate him. Asian Savour says that in his capacity as union delegate, Mr Jung requested the pay records of all union members, and then used that information for personal reasons, including to query his own rate of pay. Asian Savour says this was an abuse of his position as union delegate, and is inconsistent with the duty of good faith.

[60] Such an evidential matter cannot be resolved by way of untested affidavit evidence. However, the Authority notes that if Asian Savour was able to establish that Mr Jung misused confidential information for his own benefit, this could be a relevant factor at the substantive stage of the Authority's investigation.

[61] There is no evidence of any significant impact on third parties, arising from the granting of, or refusal to grant, an order for Mr Jung's interim reinstatement.

[62] An assessment of the relative merits of the parties' cases, although not clear-cut, favours Asian Savour.

Conclusion as to balance of convenience

[63] Should Mr Jung be reinstated on an interim basis, this would be disruptive for Asian Savour's business. Asian Savour has already begun the process of upskilling another employee to perform Mr Jung's former duties.

[64] Any detriment to Mr Jung in not being reinstated on an interim basis, can be remedied through an award of damages if his claim is successful at the substantive stage. Mr Jung does not provide any reason as to why an award of damages would not adequately address any detriment to him in not being reinstated on an interim basis.

[65] Similarly, although Mr Jung says that a dismissal for gross negligence damages his reputation within the Korean community, an order for his interim reinstatement would not undo such a finding. The unjustifiability (or otherwise) of Mr Jung's dismissal would only be considered at the substantive stage of the investigation, not at this interim stage.

[66] In addition, although Mr Jung says that his reputation within the Korean business community is critical in terms of securing future employment, there is nothing preventing him from searching for alternative employment more widely.

[67] Asian Savour has provided evidence of a Seek website job search showing approximately 375 vacancies for the role of Retail Supervisor in Auckland in November 2025.

[68] By contrast, Mr Jung has not provided any evidence of any effort to secure alternative employment, either from within the Korean business community, or more widely.

[69] Considering all relevant factors, the balance of convenience weighs in favour of Asian Savour.

Overall justice

[70] Standing back from the detail of the claim, the Authority must then consider where the overall justice lies. This has been described by the Court of Appeal as:⁸

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.

[71] Mr Jung's claim turns on whether Asian Savour was justified in terminating his employment, having made a finding of gross negligence. Mr Jung says that Asian Savour found him solely responsible for the stock handling errors. Mr Jung says the decision to dismiss him was discriminatory, and was motivated by "improper considerations", and that he had no meaningful opportunity to respond to Asian Savour's concerns.

[72] However, on the information presently available to the Authority, it appears that Mr Jung faces a number of hurdles in establishing that his dismissal stemmed from his role in the union. Asian Savour's evidence is that a number of other employees (comprising members of the union, and non union members) also faced disciplinary sanctions.

[73] The Authority is required to make an assessment of the evidence, and determine this interim matter on the basis of the material before it. There is no evidence before the

⁸ *NZ Tax Refunds Limited v Brooks Homes Limited* [2013] NZCA 90 at [47].

Authority as to Mr Jung's personal (including his financial) circumstances, which provides any basis for the order he seeks. Nor is there any information to show why an award of damages would be an inadequate remedy.

[74] Similarly, seeking to restore his reputation within the Korean business community is an insufficient basis for an order for interim reinstatement.

[75] In the circumstances of this matter, an order for Mr Jung's reinstatement is not in the overall interests of justice at this interim stage of the case.

Outcome

[76] Mr Jung's application for interim reinstatement is declined.

Mediation

[77] The parties may wish to attend further mediation prior to the Authority's substantive investigation of Mr Jung's grievance. The parties have 14 days from the date of this determination within which to inform the Authority of their views regarding further mediation.

Costs

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

Jeremy Lynch
Member of the Employment Relations Authority