

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI A TARA ROHE**

[2026] NZERA 103  
3407004

BETWEEN	NASIR HILDIID Applicant
AND	ALLIED SECURITY LIMITED Respondent

Member of Authority:	Sarah Kennedy-Martin
Representatives:	Applicant in person Eve Martin for the Respondent
Investigation Meeting:	3 December 2025 in Wellington and by AVL
Submissions and further information received:	Up to 28 January 2026 from the Applicant Up to 28 January 2026 from the Respondent
Determination:	24 February 2026

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Nasir Hildiid seeks interim reinstatement to his role of security guard for Allied Security Limited pending determination of his personal grievance claims.

[2] Mr Hildiid lodged a statement of problem in the Authority claiming he was forced to resign because of the way Allied Security treated him. Mr Hildiid says he raised multiple employment relationship problems which remained largely unresolved. This includes that he was employed on a casual contract for several years when he was more correctly a permanent employee, annual leave was not calculated or paid correctly, he was compelled to take annual holiday leave and when he raised concerns with his manager about discrepancies with his leave and wished to escalate the matter

to MBIE, his manager and then the company refused to attend mediation leaving him with no option but to resign. He also raised issues about shifts being cancelled without his agreement, being disadvantaged by the actions of his manager after calling in sick and withholding of wages after his resignation.

[3] Mr Hildiid also says he was targeted by his manager in a retaliatory way after he continued to raise employment relationship problems with Allied Security. As a result of these concerns not being resolved, Mr Hildiid says he had no option but to resign. He now seeks interim reinstatement to his role until the substantive matter is heard.

[4] Allied Security says in August 2025 Mr Hildiid sought re-employment with Allied Security and he was advised he was welcome to apply for any roles advertised. It also says asking for interim reinstatement at this point is inconsistent and prejudicial to the proper determination of the constructive dismissal claim which is yet to be heard. Allied also points to issues with parts of Mr Hildiid's claim being lodged outside of the 90 day time frame and says constructive dismissal was never formally raised with it by Mr Hildiid when he emailed his personal grievance on 3 June 2024.

[5] Furthermore Allied Security say to the extent Mr Hildiid is seeking reinstatement to his former role with the client of Allied Security he had been placed with for a substantial period of time that following a restructure that role is no longer available. It is noted Mr Hildiid changed his position at the investigation meeting and now seeks reinstatement into any security officer role within Wellington.

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

[6] The parties were unsuccessful in resolving the matters between them at mediation. Mr Hildiid subsequently lodged a statement of problem in the Authority based on a constructive dismissal and wage and holiday arrears. Mr Hildiid then lodged an application in the Authority for interim reinstatement. The Authority convened an urgent investigation meeting to hear the application for interim reinstatement.<sup>1</sup>

[7] Affidavit evidence was lodged from Mr Hildiid and Eve Martin, Employment Relations Manager for Allied Security and both parties provided written submissions.

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<sup>1</sup> Employment Relations Act 2000, schedule 2, clause 17.

An accredited translator of the Somali language attended the investigation meeting by audio visual link and provided translation services.

[8] The nature of such interim proceedings does not allow for the testing of evidence. The opportunity for that will occur when the substantive matter is heard. It was possible, however, to understand the differences over factual matters and the perspectives in relation to Mr Hildiid and Allied Security.

### **Principles applicable to granting interim reinstatement**

[9] The approach to interim reinstatements is well-established.<sup>2</sup> Mr Hildiid must establish there is a serious question to be tried in relation to his claim he was unjustifiably constructively dismissed and his claim for permanent reinstatement.

[10] The Authority is also required to consider where the balance of convenience between the parties lies. This involves consideration of the impact on the parties of the granting of, and the refusal to grant, the interim order. Finally, the overall interests of justice are considered, standing back from the detail required by the earlier steps.

[11] Reinstatement is the primary remedy under s 125 of the Employment Relations Act 2000 (the Act). Section 125(2) of the Act applies if the remedies sought by an employee include reinstatement and it is determined that the employee has a personal grievance. In those circumstances the Court must provide for reinstatement wherever practicable and reasonable, irrespective of whether any other remedy is provided.

[12] While the power to order interim reinstatement is discretionary the assessment of whether there is a serious question to be tried requires evaluation by the decision maker. When considering whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the object of the Act.<sup>3</sup> The object of the Act is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship.

[13] This determination is confined to whether Mr Hildiid ought to be reinstated on an interim basis. It does not decide whether he was unjustifiably dismissed or

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<sup>2</sup> *NZ Tax Refunds v Brooks Homes Ltd* [2013] NZCA 90.

<sup>3</sup> Employment Relations Act 2000, ss 3 and 127.

disadvantaged or whether he should be reinstated on a permanent basis or what other remedies might be available. The Authority must decide whether Mr Hildiid has an arguable case that he was unjustifiably constructively dismissed and as arguable case that, if he was, he will be permanently reinstated and whether to exercise its discretionary powers and order interim reinstatement.

### **Background relevant to whether there is an arguable case**

[14] There was a casual employment agreement between Mr Hildiid and Recon Security from 26 March 2020 until September 2021 when Mr Hildiid's employment transferred to Allied Security after it purchased Recon Security. Allied Security say Mr Hildiid's employment transferred to it under Part 6A of the Act which provides for continuity of employment and transfer of employment to a new employer. Mr Hildiid's evidence was that he did not receive any final letter about this and he did not consider his employment had formally transferred to Allied Security. In any event both parties agree Mr Hildiid's employment continued and agree that they both treated it as casual until 13 May 2024 when the parties entered into a new permanent full time employment agreement.

[15] That agreement was the Collective Agreement in force at that time between the Union and Allied Security. A minimum of 36 hours per week were guaranteed and up to 60 hours per week could be worked if it was mutually agreed. Work could be rostered across seven days a week because Allied Security provides 24/7 services. Employment was permanent and full-time.

[16] Prior to that Mr Hildiid had started raising concerns with Allied Security as early as 2022 about the fact he was working full time and regular hours and in his view his employment should not be treated as casual. He remains of the view Allied Security did not listen to his concerns or respond in a reasonable timeframe to his request to become a permanent employee evidenced by how slow they were to agree to enter into the new permanent employment agreement. He accepts the first year of casual employment was reasonable but points out it took a further two years for Allied Security to listen to him and then only once he had assistance from the Union.

*The disagreement over annual leave*

[17] Mr Hildiid says as a casual employee he should have been paid 8 per-cent holiday pay and his final payslip confirmed this. Instead, his holiday pay accumulated into a large balance and Allied Security refused to pay this when he requested it be paid out until the Unions intervened and a lump-sum payment was made. In mid-2024 Allied Security suddenly added 44 days of leave to his balance without explanation. When questioned he says Allied denied any backdating had occurred.<sup>4</sup>

[18] Allied Security now say that was the balance of Mr Hildiid's annual leave accrued at that time. The pay out did not take his annual leave balance down to zero.

[19] On 25 July 2025, the Union wrote to Allied Security saying Mr Hildiid should have had his annual leave backdated to the start of his employment at Allied Security:

The second error is that upon providing Nasir with a permanent agreement, it is acknowledged that his work is of a regular nature which requires the conditions entitled to a permanent employee. We are making the point that this has been the case for several years, a point which is backed up by your confirmation that Allied was accruing his leave and which was raised in our first email in March 2024. We believe, not only should his recognition of service as a permanent employee be back dated, his annual leave balance should also. The issue is that Nasir's annual leave accrual balance was zeroed out when the casual pay was acknowledged and rectified earlier this year. Therefore, his balance under a casual agreement has in fact not carried over with him as stated.

This is why I have mentioned that in the Holidays Act 2003 Section 28 b 2 states that even if an employee has been paid a portion of their annual leave (his payment as a casual which he received in a lump sum earlier this year), where this has been paid incorrectly (e.g. it has been acknowledged that he was not a genuine casual employee) he remains entitled to the annual holidays as if payment had not been made.

[20] Mr Hildiid's position is that s 28 of the Holidays Act 2003 applies which means if he was incorrectly paid holiday pay with his wages on a "pay as you go" basis then despite any payments he may have received, he is entitled to have his annual leave back dated to the start of his employment at Allied Security.

[21] Allied Security's position was that Mr Hildiid had never been paid his annual leave on a pay-as-you-go basis. He had instead been accruing annual leave at 8 per-

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<sup>4</sup> Statement of Problem – Holiday and Leave Discrepancies on page 2.

cent and was paid his holiday pay correctly. Allied Security's response to the email above was:

“...If he had been on pay-as-you-go and we had not been accruing his annual leave at that point you may have a claim for annual leave to be granted on top of the 8%, as this is not the case you can't claim additional annual leave when he has been accruing it as a permanent employee...”

[22] Allied Security noted leave was not zeroed out the holiday and leave records provided show 280 hours annual holiday leave being paid to Mr Hildiid on 2 June 2024 after he entered into the new agreement. A partial balance remained and more leave accrued until his resignation and this is reflected in his final pay.

[23] Mr Hildiid also noticed his annual leave balance unexpectedly increased from 3 days to 44 days in mid-2024 without explanation after he transferred to the permanent employment agreement. At some point Allied told him he had 41 days carried over and during communications with MBIE, Allied claimed he was only paid 37 days from the previous period plus 8 per-cent since signing his permanent contract. Mr Hildiid says it was 44 days.

[24] Further discussions over the next six months were unsuccessful in resolving the issues about annual leave. Mr Hildiid still does not understand how those days could be added without explanation after Allied Security had previously refused to backdate his annual leave when at the same time it was willing to recognise his service back to the start of employment at Allied Security. He also says there were discrepancies with Allied Security's leave calculations that were never resolved and claims he is entitled to a payment equal to the total of his annual leave accrual backdated to the start of his employment with Allied Security.

#### *The requirement to take annual leave*

[25] In January 2025, Mr Hildiid was contacted by his manager and asked to take some annual leave because of his high leave balance. Mr Hildiid requested cashing out his leave instead but this was refused. He was given 14 days' notice that his employer required him to take annual leave from 10 February to 18 May 2025. This was a 13-week period and would have used 45.5 days of 56 days of annual leave he had accrued at that point.

[26] Mr Hildiid says he asked to escalate the annual leave issues to MBIE and his manager refused. In the interim Mr Hildiid had complained about his manager denying him the opportunity to pick up shifts he would ordinarily have worked and penalising him for taking sick leave and declining to work on a scheduled day off when he had followed the correct process for taking sick leave.

[27] Allied Security investigated a number of complaints from Mr Hildiid about his manager but these were not resolved to Mr Hildiid's satisfaction. Mr Hildiid responded to the investigation findings saying the manager lied to the investigator and that he could show he was being denied shifts. This matter remained unresolved from Mr Hildiid's perspective and contributed to his decision to resign.

[28] In his personal grievance email to Allied Security on 3 June 2024, Mr Hildiid recorded he had requested his manager resolve his dispute regarding annual leave and other grievances through MBIE intervention but he was told the matter was not open for negotiations and that there were no discrepancies therefore Mr Hildiid would be on forced leave which left him no choice but to resign from his job.

[29] Allied Security say the issues about its investigation of Mr Hildiid's complaints were raised with it outside of the 90-day timeframe because Allied Security was first aware of this when the statement of problem was lodged and that was outside the 90-day time applicable employment notification period in the Act.

#### *Cancellation of shifts*

[30] Cancellation of shifts without agreement was also an unresolved issue Mr Hildiid had raised with Allied Security that remained live. He says on five occasions between 10 March 2024 and 28 June 2024 shifts were cancelled without the proper notice being given to him.

#### *Mr Hildiid resigned and raises a personal grievance with Allied Security*

[31] Mr Hildiid resigned on 2 April 2025 recording that his resignation was "due to the disputes relating to annual leave and other grievances which my union have discussed with you previously." A further concern arose after resignation to do with

the withholding of Mr Hildiid's wages. On 3 June 2024 Mr Hildiid raised a personal grievance with Allied Security in relation to following:

- (a) discrepancy and mismanagement of annual leave
- (b) cancellation of shifts in breach of contractual obligations
- (c) unfair treatment after sick leave and declining additional shifts
- (d) misclassification of employment status
- (e) incorrect holiday pay after reclassification
- (f) withholding of final wages

[32] The parties attended mediation but were unable to resolve their differences other than the withholding of wages. It had transpired that Mr Hildiid returned a wage payment after he resigned because he did not believe the amount was correct. After mediation Allied Security paid the outstanding amount to Mr Hildiid because it says that was the point in time they understood what the claim was about.

[33] Allied Security further explained the reason Mr Hildiid might have thought that amount was incorrect was because it was Mr Hildiid's last regular wage payment. His final pay was paid in a different cycle to regular wages and on a different date. It understands Mr Hildiid had expected the wage payment to be his final pay from Allied Security and because he did not think it was the correct amount he returned it. He received his final pay the following week which Allied Security says included all outstanding entitlements.

[34] Mr Hildiid lodged his statement of problem in the Authority on 16 September 2025. He alleges he was forced to resign because of the way Allied Security treated him and the actions it took in relation to the problems he had raised. He lodged a separate application for interim reinstatement and after the first case management call leave was given to lodge an amended statement of problem to include a constructive dismissal claim.

[35] Mr Hildiid outlined in his statement of problem he was left in a position where he had no option but to resign because of Allied Security's actions and sought to have his resignation treated as a constructive dismissal because of that. In support of his application he said he is suffering hardship because he provides financial support to multiple extended family members and relatives who depend on him as their primary

source of income. Since his resignation he has been relying on his limited savings which are running out. Without employment income he says he and his dependents have no means of financial support.

[36] Mr Hildiid also provided additional information about the number of vacancies he has applied for and about vacancies Allied Security currently have.

### **Serious questions to be tried - unjustified constructive dismissal**

#### *Constructive dismissal*

[37] In order for there to be a constructive dismissal, the employer must have in substance dismissed the employee, although technically there has been a resignation.<sup>5</sup> In circumstances where Mr Hildiid resigned from his employment at Allied Security and is seeking interim reinstatement, the Authority will need to be satisfied Mr Hildiid was constructively dismissed from his employment. If it is the case Mr Hildiid resigned, rather than being constructively dismissed, interim reinstatement would not be available.

[38] In order to find there has been a constructive dismissal the employer may have followed a course of conduct with the deliberate and dominant purpose of coercing the employee to resign. An employer may also have committed a sufficiently serious breach of duty that foreseeably compelled the employee to resign.<sup>6</sup> In that case the employer does not have to intend the employee to resign. Instead the question is whether the employer's actions or inaction were a breach of its duties and caused the employee to resign and these breaches were sufficiently serious to make the resignation reasonably foreseeable.

#### *Casual employment*

[39] What Mr Hildiid describes is a number of events occurring over a period of time that resulted in his decision to resign which he says amounts to a constructive dismissal. The first major concern was Mr Hildiid's requests for consideration of his casual employment status. The issue for Allied Security is the length of time it took to engage

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<sup>5</sup> *Auckland Shop Employees Union v Woolworths (NZ) Ltd* [1985] 2 NZLR 372 (CA) at 374.

<sup>6</sup> *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW Inc* [1994] 1 ERNZ 168 (CA) at 172.

with Mr Hildiid about this. At a very high level, the wage and time records appear to show periods of consistent full-time work over a number of years and long periods where Mr Hildiid was placed regularly with the same client of Allied Security. The correspondence from Allied Security to Mr Hildiid shows this was also the basis for the decision to enter into the new permanent full time employment agreement with Mr Hildiid.

[40] Mr Hildiid says his requests were not responded to in any meaningful way until 2024 when Allied Security accepted Mr Hildiid was more correctly a permanent employee. By that stage he had been employed for approximately three years with Allied Security. He accepts the first year as a casual employee was appropriate but raises issues about the two years it took for Allied Security to take steps to address his concerns.

[41] Mr Hildiid says the delay in reclassifying his employment to permanent full-time deprived him of critical entitlements for several years. A question arises as to how Mr Hildiid was denied his annual leave entitlement as provided for in s 16 of the Holidays Act 2003 and/or how this disadvantaged Mr Hildiid in his employment. Allied Security's evidence was annual leave accrued over the full period of employment and annual leave was therefore available if he wished to take it.

[42] Allied Security's records also appear to show steady and consistent full-time work and the rationale for entering into the permanent employment agreement was that Mr Hildiid's work pattern was more akin to that of a permanent full-time employee. I also note the concerns about cancelling shifts did not arise until 2024 which is close in time to when the new collective employment agreement was signed between the parties.

[43] Accepting this concern was ultimately resolved when the new employment agreement was entered into Mr Hildiid may still have a grievance in relation to the amount of time it took to respond to his requests. Further evidence would need to be given by Mr Hildiid about how this disadvantaged him and Allied Security's responsiveness and the totality of the communications with Mr Hildiid would need further consideration.

*Annual holiday entitlement backdated to start of employment relationship*

[44] The situation in relation to whether Mr Hildiid is owed annual holiday leave and whether under s 28(4) of the Holidays Act 2003 he is owed arrears arising from an entitlement dating back to the start of his employment at Allied Security is less clear. The position in the correspondence advanced by both Mr Hildiid and the Union is that casual employment equates to pay as you go annual leave. They say at all times when Mr Hildiid was a casual employee he should have been paid eight per-cent annual leave with his pay. Because of that he can rely on s28(4) of the Holidays Act 2003 and his entitlement should be backdated to when he started at Allied Security and he is due a payment of annual holiday arrears.

[45] Section 28 of the Holidays Act 2003 sets out when annual holiday pay may be paid with the employee's pay. The test is not whether the employment agreement was casual but whether the employee's work is so intermittent or irregular that it is impracticable for the employer to provide the employee with four weeks annual holidays. The employee also has to agree in their employment agreement.<sup>7</sup> While casual employment arrangements can and do involve intermittent or irregular work that is not always the case and was not the case with Mr Hildiid's employment.

[46] This is evidenced by Allied Security eventually agreeing with Mr Hildiid his employment was regular and consistent and more akin to permanent and full-time work and a new employment agreement was entered into with Mr Hildiid to reflect that. That does not appear to be a situation where s 28 of the Holidays Act would permit pay as you go annual leave payments.

[47] Allied Security also say Mr Hildiid's annual leave was not paid to him as "pay as you go" payments in his wages and the emails from the Union in the correspondence provided by Mr Hildiid accepts that. Section 28 of the Holidays Act envisages a situation where pay as you go annual leave has been paid incorrectly to an employee and that is not the situation Mr Hildiid was in.

[48] If as Allied Security assert annual leave was accrued Mr Hildiid will have received his entitlement to not less than four weeks paid annual leave under s 16 of the

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<sup>7</sup> Holidays Act 2003, s 28(a)(ii) and (b).

Holidays Act 2003. On the basis of affidavit evidence, the communications provided to the Authority appear to show the Union and Mr Hildiid agreed annual leave was accrued. That means it is unlikely Mr Hildiid will be able to rely on this to support his claim he was constructively dismissed.

#### *Holiday and leave record discrepancies*

[49] Allied Security provided holiday and leave records showing Mr Hildiid accrued annual leave from the start of his employment, the dates he took annual leave and the dates and amounts cashed out. On 2 June 2024 he was paid a portion of his entitlement but not all of it. He continued to accrue annual leave up until he resigned when he received a payment equivalent to 294 hours of annual leave which Allied Security say was the remainder of Mr Hildiid's annual leave entitlement owing to him at the end of his employment.

[50] Submissions from Allied Security set out its position regarding Mr Hildiid's leave as follows:

From 20/09/2021, the applicant has taken and being paid out leave as below.

- Annual Leave (cashed out) = \$2256.00 gross on 19/01/2022
- 31 days of sick leave (taken and paid)
- 14 days of Annual leave (taken and paid)
- 20 days of Alternative days (cashed out) = \$6,644.40 gross on 02/06/2024

[51] The leave and time records attached at "E" of the affidavit in opposition do not show annual leave in the amount of \$2256.00 being cashed out on 19 January 2022 although the document titled "Transactions by Payroll Item" shows a figure on that date representative of that payment. 31 days are shown as having been taken and paid as sick leave but it is not clear from the "Transaction by Payroll Item" documents that alternate days were cashed out on 2 June 2024 in accordance with the summary.

[52] Mr Hildiid says even after his employment status changed to permanent his pay continued to reflect holiday pay at the casual rate of 8 per-cent and his final payslip recorded this. This in his view indicates the company failed to properly update payment and apply his full-time entitlement. There are multiple communications between them about holiday pay calculations stretching back over several years. The issue was not able to be resolved from Mr Hildiid's perspective.

[53] At this interim stage and on the basis of untested evidence, I accept there may be some discrepancies in the holiday and leave records and in what was recorded on Mr Hildiid's payslips in which case it is possible the communications Allied Security entered into with Mr Hildiid over time about his annual leave entitlements did not fully explain the position. However, any discrepancies would appear to be minor and Mr Hildiid will have issues arguing he was not paid his annual leave entitlement because it appears it will be able to be established his leave was accrued over the total period of his employment.

#### *Forced leave*

[54] In relation to Mr Hildiid being forced to take annual leave when he did not wish to the Act provides for occasions when employees can be required to take annual holidays if they are unable to reach agreement as to when the employee will take their holiday. That appears to be the situation the parties found themselves in on 29 January 2025. By this stage Mr Hildiid was employed as a permanent full-time employee. Allied Security gave Mr Hildiid notice under s 19(2) of the Holidays Act 2003 he was required to take leave after it was clear Mr Hildiid did not agree to take leave. Notice was given within the required time frame of not less than 14 days of the requirement to take annual holidays.

[55] Unless Mr Hildiid is able to show through the lodging of his evidence this was a retaliatory act by his manager, it is unlikely on its own to reach the threshold required to show he has a grievance in relation to it. While it was Mr Hildiid's assertion the forced leave was in retaliation, this was denied by Allied Security.

#### *Cancellation of shifts and sick leave*

[56] Mr Hildiid says five shifts were cancelled at late notice and not in accordance with the applicable employment agreement at the time. The first three shift cancellations occurred before Mr Hildiid transferred to the permanent employment agreement. The casual employment agreement with Recon in force until 13 May 2024 when the new employment agreement was signed, provided Allied was required to give 12 hours' notice of cancellation of a shift. It appears from the untested evidence notice to cancel shifts was given on three occasions for shifts on 10 March, 15 March and 22 March 2024. On each occasion shifts were cancelled with more than 12 hours' notice.

It is unlikely Mr Hildiid will be able to show he has a grievance in relation to these shifts.

[57] In relation to the remaining two shifts (10 May and 28 June 2024) these fall for consideration under the new permanent collective employment agreement. Allied Security accepts these shifts were removed without mutual agreement and the collective agreement provided for mutual agreement but says the shifts were approved in the first place in error. Mr Hildiid should not have been able to be rostered to work those shifts because he had worked excessive hours outside of the safe rostering policy. The decision to remove them was based on a health and safety risk arising from the number of hours Mr Hildiid was working. That had been raised with Mr Hildiid and both the Union and Mr Hildiid were advised of this in writing.

[58] In relation to sick leave Allied Security denied Mr Hildiid was treated unfairly. Mr Hildiid said this was also in the same category as the forced leave and his manager used it as retaliation against him because he was asserting his basic employment rights. Allied Security investigated complaints from Mr Hildiid about how he was treated by his manager. Mr Hildiid disagrees with the conclusions reached and says his manager lied to the investigator.

[59] Allied Security appears to have justifications in relation to two of the five shifts that were cancelled. It is weakly arguable Mr Hildiid may have disadvantage grievances in relation to alleged unfair treatment about sick leave and two shift cancellations but further evidence would need to be assessed in relation to these.

#### *Constructive dismissal*

[60] Of the matters Mr Hildiid says led to his resignation the most significant is failure to address his requests for a permanent employment agreement and backdating his annual leave entitlement to the beginning of employment. I have concluded above the claim related to backdating of annual leave to the beginning of employment is unlikely to be successful and a permanent employment agreement was entered into, albeit sometime after Mr Hildiid started to raise his concerns.

[61] I note Mr Hildiid's concern his annual leave cash out payments did not represent eight per-cent of his earnings but also note this was responded to by Allied Security. Nonetheless at this stage I accept there are some holiday and leave calculations that

may not have been fully explained and it is possible there may be some discrepancies but they appear to be minor in that they are about the calculation of what was paid out. Large lump sum payments were made that are tagged in the employer's records to Mr Hildiid's annual holiday leave accrual so it is not a case of Mr Hildiid not receiving annual leave entitlements, but rather a question about whether his accruals and lump sum payments were calculated correctly.

[62] From the snapshot of email communications provided it does not appear all of Mr Hildiid's requests for explanations and information were engaged with fully. Mr Hildiid has formed the view he was being brushed off without a proper explanation in circumstances where he believes he was being denied his statutory entitlement to annual leave and that the calculations provided to him were incorrect.

[63] For the purposes of considering constructive dismissal those discrepancies, together with the two shift cancellations and time it took to resolve the casual employment concerns are unlikely on their own to reach the threshold of seriousness required for Mr Hildiid's resignation to be treated as a constructive dismissal. The claims about forced leave and the three additional shift cancellations are unlikely to be successful.

[64] The concerns about how Mr Hildiid was treated by his manager, refusing to agree to mediation, unhappiness about the conclusions of the investigation into Mr Hildiid's concerns about his manager were also not raised with the employer until the statement of problem was lodged in the Authority. These issues and the constructive dismissal claim will likely face further hurdles if they are to proceed in the face of the employer indicating it does not consent to these matters proceeding in the Authority outside the applicable employee notification period of 90 days.<sup>8</sup>

[65] The concerns about withholding of wages cannot form part of a constructive dismissal claim because this occurred after employment ended so cannot be said to have contributed to Mr Hildiid's decision to resign.

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<sup>8</sup> Employment Relations Act 2000, ss 114 and 115.

[66] Although based on untested affidavit evidence at this stage it is unlikely a finding could be made that Allied Security committed a sufficiently serious breach of duty that made it foreseeable Mr Hildiid would resign.

[67] Mr Hildiid may have some disadvantage claims but he has only a very weakly, if at all arguable case that he was constructively dismissed.

### **Arguable case for permanent reinstatement**

[68] Section 125 of the Act provides if the remedy sought by an employee includes reinstatement and it is determined the employee did have a personal grievance, the Authority or Court must provide for reinstatement wherever practicable and reasonable.

[69] Allied Security does not accept reinstatement is reasonable or practicable because it says Mr Hildiid voluntarily resigned having concluded he was deeply unhappy with his employer. It says over a prolonged period of time it has engaged in detailed correspondence with Mr Hildiid in attempts to resolve his various employment relationship problems and in essence the relationship became unworkable. Mr Hildiid holds very firm views that Allied Security has wrongly handled a number of employment concerns and no matter how much explanation has been provided matters are unable to be resolved.

[70] Mr Hildiid says Allied Security is advertising vacancies and his old job is still available. In response Allied Security points out Mr Hildiid messaged some Allied Security employees without telling them the full picture and has presented their responses to the Authority in a way that looks as if his old job is available, but that is not the case. The untested evidence from Allied Security is that a contract with the client has ended and although Allied Security still provides services for the same client, they are different to the static guard services Mr Hildiid was employed to provide.

[71] Allied Security also says reinstatement at this stage would be inconsistent with and prejudicial to the proper determination of the constructive dismissal claim. The essence of a constructive dismissal allegation is that the employee had no reasonable choice but to resign because of the employer's conduct. Ordering reinstatement before that issue is tested would effectively invalidate the claim. It says reinstatement should

be determined after the Authority has determined whether a dismissal in law occurred under s 103(1)(a) of the Act.

[72] On the untested evidence I conclude the reasons Mr Hildiid gave for his resignation and the way Mr Hildiid views Allied Security together with the fact his claim for unjustified constructive dismissal is only weakly, if at all arguable means it is unlikely to be reasonable or practicable for Mr Hildiid to return to the workplace.

### **Balance of convenience**

[73] This part of the analysis involves a weighing exercise and requires consideration of the impact on the parties of the granting of, and the refusal to grant, interim reinstatement. It also requires consideration of whether adequate alternative remedies exist. What would happen if the interim position is reversed in the later substantive determination must also be assessed.

[74] Mr Hildiid and Allied Security both say the balance of convenience falls in favour of them and the impact on them would be great if the Authority granted or refused to grant reinstatement.

[75] Mr Hildiid refers mostly to financial reasons and the burden on him financially that has come about because he is without an income after resigning. I accept Mr Hildiid provided evidence of his efforts to find new employment and that he has found it difficult to obtain new employment and this continues to impact on him in that he is facing continued financial insecurity.

[76] Allied Security say Mr Hildiid resigned of his own volition and was clearly very unhappy with a number of actions Allied Security had taken with regard to his status as a casual employee, his annual leave calculations and accrual and the taking of annual leave. Allied Security says it was entitled to take the steps it did and it has responded in good faith with Mr Hildiid on a regular basis over a significant period of time.

[77] Given the strength of Mr Hildiid's views about Allied Security's actions as an employer and that he resigned because he could no longer put up with how he was being treated, despite significant attempts to resolve the issues between them, Allied Security says the balance of convenience lies in its favour.

[78] Both parties have advised the Authority a complaint has been made to the Labour Inspector about Mr Hildiid's entitlement to minimum employment standards. That means concerns about the final pay calculation and annual leave accrual will likely be investigated separately by the Labour Inspector and potentially be able to be resolved through that process.

[79] Having balanced the respective hardships each party will suffer if interim reinstatement is granted or not, I find the balance of convenience lies with Allied Security. Mr Hildiid's case for constructive dismissal is only weakly if at all arguable in relation to a portion of his claim. Aspects of his claims are also being investigated by the Labour Inspectorate.

[80] There has been a small delay in progressing Mr Hildiid's claims after he resigned but there is no evidence Allied Security has contributed to this delay and a substantive hearing date can be scheduled promptly.

[81] Overall the balance of convenience lies with Allied Security.

### **Overall justice**

[82] The overall justice assessment is a final check on the position reached following the analysis of the earlier steps. I am now required to step back and consider the strengths of each party's case to ascertain where the overall justice lies. I have found Mr Hildiid has only a weakly arguable case for constructive dismissal and permanent reinstatement. To the extent discrepancies in the annual leave entitlement calculations and final pay are identified, the Labour Inspector is also seized of this matter. The constructive dismissal claim can be heard promptly. Taking into account all the circumstances the balance of convenience favours Allied Security.

[83] In these circumstances the overall justice of the case requires that the application for interim reinstatement is declined.

### **Outcome**

[84] Mr Hildiid's application for interim reinstatement is declined.

[85] The Authority will be in contact with the parties to confirm a telephone conference for the purpose of progressing the substantive matter.

**Costs**

[86] Costs are reserved pending a final determination on the substantive matters.

Sarah Kennedy-Martin  
Member of the Employment Relations Authority