

**NOTE: This determination
contains an order prohibiting
publication of certain
information at [1] and [86]-[91]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

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

[2026] NZERA 229
3444184

BETWEEN XFM
Applicant
AND PBH
Respondent

Member of Authority: Sarah Kennedy-Martin
Representatives: Adrian Straayer and Allan Halse, representatives for the Applicant
Louise Robertson and Tess Mortimer counsel for the Respondent
Investigation Meeting: 26 March 2026 in Wellington
Submissions: 26 and 30 March 2026 from both parties
Determination: 17 April 2026

DETERMINATION OF THE AUTHORITY

Interim Non-Publication Orders

[1] Both parties made applications for interim non-publication orders.

[2] For the reasons set out below under clause 10 of schedule 2 of the Employment Relations Act 2000 (the Act) interim non-publication orders were made. Publication of the names and identifying details of the applicant (XFM), the respondent (PBH), PBH's witnesses and residents is prohibited on an interim basis until the substantive matter is heard.

Employment Relationship Problem

[3] XFM seeks interim reinstatement to their role pending determination of their personal grievance claim. XFM worked at a residential facility and was summarily dismissed on 21 January 2026 after an employment investigation into an incident that occurred between staff and a resident in the facility involving XFM.

[4] The facility XFM worked in is operated by PBH and it is a regulated environment and workplace. PBH's employees receive regular training and are expected to comply with the policies and procedures in place. There is legislation and a number of policies that set out when and how force can be used by PBH's employees. The general rule is that employees of PBH should not apply force when working with PBH's residents unless one of the exceptions to that general rule apply.

[5] On 4 November 2025, XFM was one of several employees involved in physically restraining a resident. It does not appear to be in dispute that there were grounds for the restraint but it is XFM's conduct during and after that led to the concerns being investigated. The investigation concluded XFM had breached several policies that set out how employees are to engage with residents and that XFM had damaged property belonging to PBH. Ultimately the conclusion of the employment investigation was summary dismissal for serious misconduct.

[6] XFM initially sought reinstatement to their position or a position no less advantageous to them. At the investigation meeting it was indicated on XFM's behalf that they also seek reinstatement to the payroll in the event the Authority does not grant reinstatement to a position. XFM has provided an undertaking as to damages.

The Authority's investigation

[7] The parties were directed to urgent mediation but were unsuccessful in resolving the matters between them. Affidavit evidence was lodged from XFM, including an affidavit in reply to the evidence lodged by PBH. For PBH the manager of the residence (the Facility Manager) provided affidavit evidence. Another employee of PBH provided affidavit evidence of a parallel investigation commenced as a direct result of the incident XFM was involved in.

[8] The nature of interim reinstatement proceedings does not allow for the testing of evidence. The opportunity for that will occur when the substantive unjustified dismissal is heard. It was possible, however, to understand the differences over factual matters and the perspectives in relation to XFM and PBH from the affidavit evidence that was lodged.

The CCTV footage

[9] XFM's representatives made several applications to have the CCTV footage excluded from the Authority's investigation. The Authority declined the applications but said its reasons would follow.

[10] Those reasons are that the CCTV footage is relevant to the investigation because it is what PBH relied on to make decisions about XFM's conduct. Given the centrality of the CCTV footage to the actions of PBH and the decisions it made, there are difficulties with excluding it from the Authority's investigation. Generally evidence that is relevant is admissible.

[11] To the extent concerns were raised about the prejudicial value of the CCTV footage outweighing the probative value, parties can make submissions on the content of the CCTV and their respective views on the seriousness or otherwise of the conduct depicted on the CCTV footage.

[12] Assertions that XFM had not had an opportunity to view the CCTV footage during the employment investigation were not accepted. Although at this early stage the evidence is not tested fully, correspondence between the parties lodged in the Authority clearly show PBH offering opportunities to XFM and their representatives to view the CCTV footage.

[13] For those reasons the CCTV is considered to be relevant to the Authority's investigation and it is admissible.

Principles applicable to granting interim reinstatement

[14] The approach to interim injunctions is well-established.¹ XFM must establish there is a serious question to be tried in relation to the claim their dismissal was unjustified and the claim for permanent reinstatement.

¹ *NZ Tax Refunds v Brooks Homes Ltd* [2013] NZCA 90.

[15] 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.

[16] 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 Authority must provide for reinstatement wherever practicable and reasonable, irrespective of whether any other remedy is provided.

[17] 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.² 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.

Background

[18] Affidavits were filed in support of, and in opposition to, the application for interim reinstatement. The affidavit evidence is untested. There is no requirement for the Authority at this stage to resolve any disputes or conflicts that are apparent in the affidavit evidence. The background is set out from the untested affidavit evidence and the documents attached to the affidavits and lodged with the Authority.

[19] On 4 November 2025, at approximately 6.20pm, several of PBH's employees including XFM engaged with a resident in response to the resident's behaviour. The situation that led to the incident culminated in the resident being restrained after a series of interactions failed to deescalate the situation. After the restraint was initiated by another employee XFM became involved in restraining the resident. It was XFM's

² Employment Relations Act 2000, ss 3 and 127.

actions after they became involved and immediately following the incident that were the focus of the concerns that led to an employment investigation.

[20] The outcome of the investigation was the decision that XFM's conduct constituted serious misconduct and summary dismissal was appropriate. XFM was advised of this in writing and their employment was terminated on 21 January 2026.

The incident on 4 November 2025

[21] The incident came to the Facility Manager's attention at some point during the evening of 4 November after another manager raised concerns about XFM's conduct during the incident. They viewed the CCTV footage and noted XFM appeared to have lost their composure. It was decided XFM could go home early and the Facility Manager planned to meet with XFM the following day to review next steps. It was the Facility Manager's understanding XFM agreed to go home early but XFM's evidence was they were ordered to go home by a different manager. XFM also says it is normal practice for staff involved in such an incident to be permitted to go home early.

[22] The next day was 5 November 2025. The Facility Manager read the incident report and a written concern about the incident from the resident which included allegations XFM had become angry and tried to swing at them. The incident report described the incident as an attempted assault on a staff member. The manager viewed the CCTV footage again with at least one other manager and decided to commence a formal employment investigation into XFM's conduct during the restraint. He was concerned by what he considered the CCTV footage depicted and that XFM's use of force during the restraint did not align with the policy and training provided to PBH's employees or with the applicable legislation. He also wished to consider suspending XFM from work until the investigation had been completed due to the seriousness of what he believed the conduct to be at that point.

XFM was suspended

[23] The Facility Manager emailed the employment relations advisor and copied in the senior manager he reported to. The senior manager had delegated authority to make

decisions about “discipline, dismissal and the conclusion of employment” under the applicable delegations set out in the HR Delegations 2025 document. The Facility Manager’s email set out his belief the matter was serious enough to warrant suspension pending a disciplinary investigation. He received a response from the senior manager who had been copied in thanking him for the heads up and asking him to let her know if he needed her to do anything.

[24] There is no dispute the Facility Manager was a Tier five manager. The policy recorded there was delegation down to Tier four managers to make decisions about discipline and dismissal. Tier five managers could have these powers delegated to them if they had been nominated by a Tier four leader to act as a decision maker on an employment dispute or personal grievance.

[25] The Facility Manager believed he had authority to proceed to propose XFM’s suspension because of the email he received above from the senior manager. It was submitted on XFM’s behalf the Facility Manager did not have the required delegated authority to suspend, investigate or dismiss XFM and I will return to that below.

[26] The Facility Manager says he met with XFM before work on 7 November and conveyed his concerns about the incident, told XFM he intended to commence a formal employment investigation and a letter proposing XFM be suspended on full pay while the investigation took place would follow. XFM says there was no conversation between them at that point and XFM was blindsided and surprised at the meeting on 7 November to hear a formal investigation process was being commenced and suspension was being considered.

[27] XFM says the Facility Manager’s affidavit also contains a number of additional factual matters that are incorrect. XFM also says they were told by their manager on 5 November they were already on disciplinary leave after the incident until the first meeting.

[28] The letter proposing suspension was sent by email later that day and recorded:

Allegations

I have received an allegation that you may have used excessive force to restrain [a resident] on 4 November 2025. This allegation prompted a review of CCTV

footage which also showed you being pulled off [the resident] by another staff member.

PBH is taking this matter seriously and is going to investigate the allegations and your alleged involvement.

[29] The reason for proposing suspension was then recorded as concern about the seriousness of the alleged conduct and a need to consider whether XFM may pose a risk to the organisation should they remain in the workplace at this time. XFM was invited to a meeting to receive their feedback on the proposal and to consider alternatives to suspension.

[30] They met on 7 November to discuss the proposal to suspend. XFM attended with a union delegate as a support person because XFM was not a union member at the time of the incident. The Facility Manager says XFM accepted they were frustrated at the time of the incident but still considered they were okay to work. XFM also said they did not think they had lost control during the incident. XFM's support person said XFM was happy to work but would accept the decision the Facility Manager made about suspension.

[31] After the meeting on 7 November, the Facility Manager knowing he did not have delegated authority to suspend XFM sought endorsement from a different Tier four manager to suspend XFM from work on full pay. A number of emails between two senior managers and the Deputy Chief Executive were exchanged. These are relied on by PBH as endorsing the decision to suspend. The letter confirming XFM's suspension is dated 7 November. In the letter it was recorded XFM did not suggest any alternatives to suspension for consideration. XFM says they made one suggestion but this was declined in the meeting.

A further concern emerged

[32] A further issue came to the Facility Manager's attention several days after the incident. He enquired about a broken trolley and was told XFM had lost it and smashed it. He and other managers viewed more of the CCTV footage showing XFM kicked a door and the trolley immediately after the incident on 4 November. The Facility Manager said this increased his concerns about what had happened and he decided to add it to the allegations about XFM's conduct to be investigated.

The disciplinary allegations

[33] On 14 November 2025, the Facility Manager wrote to XFM inviting them to a disciplinary meeting to discuss the allegations XFM had used unreasonable force on a resident, had acted unprofessionally in front of residents and caused damage to PBH's property. The allegations were based on the resident's complaint and review of the CCTV footage. The letter recorded the CCTV appeared to show XFM in a physical altercation with a resident and use of force that was not consistent with the policy and training. It was also recorded the CCTV footage showed XFM leaving the room immediately following the incident and in an uncontrolled manner intentionally kick a door and then kick a trolley several times. This resulted in the trolley being broken.

[34] It was also set out that due to a letter of expectation dated 19 August 2025 having been issued three months earlier XFM's actions on 4 November indicated they had not taken the letter of expectation seriously. This had resulted in a concern there was a potential pattern of behaviour by XFM. Copies of stills from the CCTV footage and the written complaint from the resident were attached to the letter.

[35] XFM was advised if the allegations were substantiated XFM's conduct could be in breach of the policy, the code of conduct, the organisational values and the applicable legislation. The seriousness with which PBH considered the conduct was recorded and it was stated if the concerns were substantiated and the conduct may amount to serious misconduct that could lead to a disciplinary outcome including a final warning or dismissal.

The disciplinary meeting

[36] On 25 November, the disciplinary meeting was held with XFM. The Facility Manager attended with the employment relations advisor and XFM was supported by the union delegate. The Facility Manager says XFM took up the opportunity to watch the CCTV footage at the beginning of the meeting because they had not seen it. He says another employee showed them different angles of the CCTV footage of both the restraint and XFM kicking the door and a trolley. This occurred in a separate room and so they had privacy and could discuss the footage if they wished. The meeting resumed after that.

[37] There are conflicts in the affidavit evidence about the CCTV footage at the meeting. XFM says they were not shown the CCTV footage in a separate room. The Facility Manager brought up the footage on his computer and allowed them to watch it over his shoulder and refers to the automated transcription of the meeting to support this.

[38] The Facility Manager's affidavit records XFM denied using unreasonable force in the meeting but did accept their actions may have looked aggressive to the resident. XFM further explained it was momentum that caused their hand to move towards the resident's face when XFM was intending to grab the resident's arm. The Facility Manager says XFM told him in the meeting the other employee who was the team leader and had initiated the restraint told XFM to go away and calm down and go for a break. This is important because it was relied on to support the final outcome at the end of the process. In relation to the additional conduct as XFM walked away from the incident, XFM took responsibility for the damage to property and was embarrassed by their actions in this regard.

[39] This meeting and the final meeting on 15 January 2026 were recorded and automated transcriptions were created. The automation in this case does not appear to have captured an accurate record because large parts of the transcriptions do not make sense. PBH accepts this and says at the substantive hearing accurate transcriptions and the recordings will be available.

The preliminary view is serious misconduct justifying summary dismissal

[40] Following the disciplinary meeting the Facility Manager formed his preliminary view the three allegations were upheld and XFM's conduct amounted to serious misconduct justifying summary dismissal. He notified a Tier four manager who notified the Deputy Chief Executive who endorsed the preliminary view to dismiss XFM for serious misconduct in an email. On 28 November, XFM was notified in writing of the preliminary decision and the reasons for it. XFM was invited to meet with the Facility Manager on 5 December 2025 to hear XFM's response to the preliminary decision. The second meeting did not go ahead on the scheduled day. The

meeting took place over a month later on 15 January 2026. Prior to the meeting there was correspondence with XFM's new representatives including information requests.

A meeting was held to discuss PBH's preliminary view

[41] At the 15 January meeting XFM's representative read out a letter but declined to provide a copy to the Facility Manager. Instead the letter was sent after the meeting to the Chief Executive. The letter recorded it was in reply to the proposal to dismiss and raised personal grievances on XFM's behalf in relation to a number of steps and decisions made by PBH including XFM's suspension, whether the authority to dismiss (and suspend) had been correctly delegated, the investigation process, that the matter was predetermined, inaccurate meeting transcripts, the information set out in the proposal to suspend and the allegations of serious misconduct.

[42] The general thrust of the letter was that the suspension and dismissal were procedurally and substantively flawed, that XFM's actions had knocked the resident's glasses off and were accidental. Because of this they could not form the basis for a decision to dismiss XFM for serious misconduct for unlawful use of force. It was also stated the allegation required an intention to apply force which could not be demonstrated in circumstances where contact between XFM and the resident was accidental.

[43] It was requested PBH lift the suspension and allow XFM to return to work because the suspension could not be justified and there was no evidence of serious misconduct. It was requested the proposal to dismiss XFM be withdrawn. The Facility Manager's affidavit records he listened carefully to the letter that was read out and noted several key points including that XFM's actions were accidental, and their continued denial of wrongdoing and lack of remorse was an appropriate position to take because it was XFM's belief there was no wrongdoing on their part.

The final decision was that summary dismissal was the appropriate outcome

[44] After the meeting the Facility Manager reached a final decision all three allegations were upheld and XFM's conduct amounted to serious misconduct justifying

summary dismissal with immediate effect. The letter terminating XFM's employment was dated 21 January 2026. It was recorded in the letter PBH did not accept XFM's actions were accidental and the reason why that was not accepted. It was noted the team leader involved in the restraint told XFM to calm down and take a break and the CCTV footage showed XFM being pushed away by colleagues. It was also noted XFM had admitted to being frustrated before getting involved in the restraint. The finding in relation to allegation one was that XFM's actions were not consistent with training and policy for those types of situations and may have resulted in harm to a resident. It was considered to be serious misconduct under the disciplinary policy.

[45] Allegation two followed on from allegation one because the use of force was considered to be inappropriate therefore the behaviour in front the residents was unprofessional. Allegation three was accepted by XFM. It was recorded XFM's actions resulted in damage to property and noted XFM's frustration appeared to have resulted in them leaving the floor in such a state they kicked a door and a trolley indicating to PBH that XFM did not have the emotional control they needed to continue with the work they were employed to carry out. PBH concluded it had lost trust and confidence in XFM and all three allegations were considered to be serious misconduct.

[46] PBH also recorded additional reasons to do with the earlier letter of expectation issued several months earlier requiring XFM to remain professional at all times while working with residents. Alternatives to dismissal were considered but because of the recent letter of expectation there was a concern XFM could be a risk to other staff and residents if the final decision was anything other than dismissal. It was also recorded XFM had not shown any remorse or self-reflection.

XFM raised a personal grievance

[47] XFM's representatives wrote to PBH the following day requesting a review of the decision to dismiss and raised concerns about the process PBH followed. A further personal grievance for unjustified dismissal was raised on XFM's behalf in a letter dated 29 January 2026. There was further correspondence between PBH and XFM's representatives.

[48] XFM lodged a statement of problem on 16 February 2026 setting out a claim the dismissal was unjustified listing numerous alleged flaws in the investigation process and the decision making of PBH. Reinstatement was sought as a remedy.

Serious question to be tried in relation to the claim of unjustified dismissal?

[49] PBH says XFM has a very weakly arguable case for unjustified dismissal but also says it is most unlikely XFM would be permanently reinstated following the substantive hearing.

[50] At the substantive investigation the Authority will be required to apply the justification test in s 103A of the Act and objectively assess whether the actions of PBH, and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time.

[51] XFM's submissions that their dismissal was unjustified are wide-ranging and extend to 22 flaws that are both substantive and procedural. These were also detailed in the two affidavits lodged by XFM. A key issue is in relation to the delegations. XFM says the Facility Manager did not have the requisite delegation at the time to either suspend or dismiss XFM. The Facility Manager was a Tier five manager and could make decisions about employment matters so long as the required delegated authority had been properly delegated to him.

[52] PBH says the authority to dismiss and suspend was appropriately handled and delegated down to the Facility Manager although it accepts to justify its actions in that regard it would need to refer to a number of communications between several different Tier four and other senior managers and the Facility Manager who dismissed XFM.

[53] The significance of the delegation issue is said to be that if the power to dismiss was not properly delegated then XFM would have a very strongly arguable case of unjustified dismissal and I accept that. Based on the affidavit evidence only it appears several communications would need to be considered in order to establish the requisite delegations were in place. Although PBH was confident it would be able to be established at the substantive investigation meeting, the fact a number of

communications need consideration to establish this means it is arguable at this stage that the very low threshold the Authority must be satisfied of is likely met.

[54] Without referring to all 22 flaws raised, XFM also says the path the investigation took as compared with what the relevant disciplinary policy provided for, the early meetings the Facility Manager had with others to discuss the CCTV footage that were not disclosed to XFM, the use of the previous conduct as part of the justification for the conclusions reached and the lack of specificity regarding which part of XFM's conduct shown on the CCTV footage were of concern are also issues that tend to lend weight to whether XFM has an arguable case they were unjustifiably dismissed.

[55] XFM's submissions also focus on the policy and training on use of force and who was able to make assessments about the use of force. It is arguable a full and fair investigation could, amongst other matters, include assessment of the process followed against the relevant policy documents set out and consider whether all relevant information was considered before decisions were made about XFM's conduct.

[56] PBH says it is very strongly arguable its decision to dismiss XFM was substantively and procedurally justified because it says many of XFM's concerns about process are not borne out in the evidence and to the extent there were any defects in the process, those were minor and did not result in XFM being treated unfairly. It also says the factual disputes arising from the affidavit evidence will be able to be addressed.

[57] At the substantive investigation meeting PBH will have the opportunity to justify its actions in accordance with the fair and reasonable employer test. The threshold to establish an arguable case is not high and at this stage as far as the matter can be considered based on the untested evidence it appears there is an arguable case XFM was unjustifiably dismissed. This would be particularly so if the issues regarding the delegations were not able to be justified because that would automatically call into question the decisions made by the Facility Manager to suspend, investigate and dismiss XFM.

Arguable case for permanent reinstatement

[58] Section 125 of the Act provides that 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.

[59] XFM highlighted the importance of interim reinstatement to hold the position of an employee until their substantive matter is resolved with reference to the case law.³ It is accepted the courts have on more than one occasion commented on the purpose of reinstatement noting it is the primary remedy. In the recent decision in *Vegepod NZ Limited v Andrew Lowe*⁴ the Chief Judge recorded the following:

[113] Jobs are important and money is often a poor substitute. In this regard the Act has both an educative and regulatory function, which the Court recognises when dealing with applications for reinstatement, both interim and permanent. The point is that, while a claim for reinstatement is to be assessed against its own factual context, attention must also be paid to the impact of such orders more generally in the overall interests of justice. As the Court pointed out in *Ashton v Shoreline Hotel*: "...to award routinely compensation for the job loss instead of reinstating is to create a system for licensing unjustified dismissals." The same point applies to orders of interim reinstatement.

[60] XFM's submission in support of reinstatement also relied on the Facility Manager's affidavit at [89] where it is recorded it would be possible for PBH to accommodate XFM's return to the role if they were granted interim reinstatement.

[61] The full quote from the Facility Manager's affidavit relied on states:

While we do not currently have any full-time permanent vacancies at [the residence] it would be possible for us to accommodate XFM's return to the role if [they] was granted interim reinstatement. For the reasons I have set out above, though, I have no confidence in XFM's ability to safely engage with [the residents].

[62] On reading the whole quote it is evident the Facility Manager is not conceding PBH agrees to XFM's reinstatement. More correctly they are saying they would accommodate reinstatement if the Authority was to order it but the matters raised in

³ *Genesys Telecommunications Laboratories Ltd v Scott* [2019] NZEmpC 113.

⁴ *Vegepod NZ Limited v Andrew Lowe* [2025] NZEmpC 76 at [62].

support of PBH's position that it is not practicable or reasonable to reinstate XFM still stand. PBH does however accept reinstatement is arguable on the basis of a very weakly arguable case for unjustified dismissal but says it is strongly arguable permanent reinstatement would be neither practicable nor reasonable meaning it is highly unlikely XFM would be permanently reinstated.

[63] The focus of PBH's submissions was on third parties who may be affected if XFM was reinstated. This included staff and residents generally as well as the resident involved in the incident and others who witnessed it. Although two residents who witnessed the incident are currently elsewhere the Authority was advised they are likely to return in the future. The resident involved in the incident is currently living in the residence.

[64] PBH also says other employees would be affected given PBH has concluded it no longer has trust in XFM to carry out their role in a safe and appropriate manner. There are also parallel investigations including a complaint to Police that may impact on XFM's ability to return to their role.

[65] In addition, PBH also notes XFM's lack of remorse or insight into their actions means it cannot be confident XFM would conduct themselves appropriately in the future. This presents a health and safety risk to other staff and residents and returning XFM to their role would send the wrong message. Furthermore, even if XFM was ultimately successful their conduct significantly contributed to the circumstances giving rise to the grievance making reinstatement unreasonable.

[66] Reinstatement must be both practicable and reasonable and they are two separate requirements. In *Hong v Auckland Transport* the practicableness and reasonableness as it relates to reinstatement were described as follows:⁵

[66] Practicality is not given a narrow meaning. It 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. A wide range of considerations may be brought to bear on the question of practicality, including matters which, although they may not have formed reasons for the

⁵ *Hong v Auckland Transport* [2019] NZEmpC 54 at [66] to [67].

dismissal, are nevertheless germane to the prospects of a renewed employment relationship.

[67] 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.

...

The Court must broadly inquire into the equities of the parties' cases insofar as the prospective consideration of reinstatement is concerned, and balance the interests of the parties and the justice of their respective cases.

[footnotes omitted]

[67] Noting in particular the impact on residents who currently live in the facility on the untested evidence I conclude it is only weakly arguable XFM would be permanently reinstated. The parallel investigations arising from the same set of facts that led to the dismissal but do not form part of the reasons for the dismissal are also relevant to this assessment. The outcome of one or more of these will have a bearing on whether or not XFM would be able to return to this particular workplace meaning it is likely reinstatement is neither practicable nor reasonable at this time although reinstatement may become more likely depending on the outcome of those investigations.

Balance of convenience

[68] 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.

[69] XFM and PBH 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 reinstatement.

[70] XFM says there was no allegation that related to trust and confidence and given the inaccurate information in the Facility Manager's affidavit and the assertion the outcome was predetermined together with the fact there is a serious question to be tried means the balance of convenience falls in XFM's favour. Rostering was suggested as a way to avoid contact with the resident and doubt as to whether that person was still a

resident in the facility was raised but this was addressed by PBH who confirmed the resident was in the facility.

[71] XFM's position was that they have suffered financial hardship due to the summary dismissal and the difficulties in finding work given the need to inform prospective employers of the employment investigation and findings.

[72] PBH say the nature of XFM's conduct leads to safety concerns that cannot be overlooked and says the fact dismissal was based on findings of fault by XFM means the balance swings in its favour. With reference to case law PBH submitted the extent to which there is an arguable case is relevant to the balance of convenience and overall justice aspects of the test for interim reinstatement. Because it says XFM's case for unjustified dismissal is only weakly arguable this goes towards the balance of convenience and interests of justice test weighing in favour of PBH.

[73] PBH also notes there was little actual evidence of financial hardship and that proximity to a substantive investigation is only one of many factors to consider. The Authority indicated it will be able to hear this matter within the next couple of months.

[74] It is generally acknowledged dismissal will have a financial impact on an employee and PBH appears to accept that but made the point financial hardship had not been established. XFM attached letters from their bank demonstrating an application for financial hardship had been made and arrangements were in place with the bank to ensure mortgage obligations can be complied with. This a factor that can be given some weight when combined with the financial impact of dismissal generally.

[75] Noting the discussions about the resources of an organisation to facilitate reinstatement in previous cases,⁶ PBH is an organisation that would have the requisite human resource capacity but the issue for PBH appears to be the impact on residents and PBH's obligations to provide safe and secure environments in its residences together with the outcome of the parallel investigations. The outcome of at least one of those investigations, which is separate from the employment jurisdiction, may preclude

⁶ See for example: *DQJ v Commissioner of Inland Revenue* [2025] NZEmpC 10 at [55].

XFM from working in a particular sector including for PBH because of the nature of those enquiries.

[76] There were no submissions directly on whether damages would be an adequate remedy. Noting XFM's general submissions about the purpose of reinstatement joining the dots about the work XFM does and the professional registration they hold damages would not be an adequate remedy. As far as can be assessed on the untested evidence, damages would be unlikely to be an adequate remedy for someone in XFM's situation.

[77] PBH is in the position where the parallel investigations will be a deciding factor about whether or not XFM can return to the workplace or work in the same field which tends to favour PBH because it points away from reinstatement of XFM. However, the outcome of those investigations is at this stage unknown because these matters are at an early stage.

[78] I have found above the relative strength of XFM's case for unjustified dismissal is arguable but the case for permanent reinstatement is only weakly arguable. Having balanced the respective hardships each party will suffer if interim reinstatement is granted or not, I find the balance of convenience narrowly lies with PBH because of the difficulties with reinstatement of XFM to the workplace, particularly because of the responsibilities and obligations PBH has towards third party residents in the facility.

[79] However, as discussed with the parties at the investigation meeting there is the option of reinstatement to the payroll. Concerns regarding third parties who would otherwise be impacted by XFM's reinstatement could be ameliorated by interim reinstatement to the payroll only until the substantive matter is resolved.

Overall justice

[80] The overall justice assessment is a final check on the position reached following the analysis of the earlier steps. It requires stepping back and considering the strengths of each party's case to ascertain where the overall justice lies.

[81] On the strength of the untested evidence XFM has an arguable case they were unjustifiably dismissed noting in particular the issues raised concerning the delegations and the effect issues with delegations would have on decisions made by the Facility Manager about XFM's conduct. However, PBH has provided a number of compelling reasons why reinstatement would not be reasonable or practicable based on the impact on third parties, the nature of the conduct depicted on the CCTV footage and the parallel investigations which tips the balance of convenience in PBH's favour.

[82] Nonetheless, the apparent strength of XFM's case provides some weight to the balancing exercise and the concerns about the impact on third parties can be dealt with by reinstatement to the payroll only.

[83] Noting that the option of reinstatement to the payroll was canvassed with the parties at the investigation meeting, in these circumstances I consider the overall justice requires that XFM is not reinstated to the workplace but to the payroll only on an interim basis until the substantive matter is heard.

Outcome

[84] XFM's application for interim reinstatement succeeds pending the outcome of the Authority's substantive investigation but on a limited basis to the payroll only.

[85] PBH is ordered to reinstate XFM to the payroll on an interim basis from the date employment ended.

Non-publication orders

[86] XFM made an application for interim non-publication orders preventing publication of their name and identifying details. That application was not opposed and PBH sought non-publication orders of the names and identifying details of its residents.

[87] XFM relies on the interim nature of the proceedings being only a partial record of the facts until the substantive matter is heard and the impact on XFM of this information being in the public arena. PBH did not oppose interim non-publication

orders in relation to XFM's name and noted if the name of PBH and its witnesses were published this could also potentially result in XFM being identified.

[88] The interim nature of these proceedings means the presumption of open justice could be displaced in relation to XFM. There are adverse consequences that could reasonably be expected to occur should XFM be identified in relation to evidence which is yet to be fully tested, particularly given the nature of the conduct PBH had concerns about.⁷

[89] Noting it has also been accepted that non-publication of additional information may be appropriate if the publication of that information would undermine the original orders by providing other ways of identifying an individual it is appropriate to extend orders to cover the name of the employer and its employees on an interim basis.

[90] It has also been accepted that third parties who are named in documents lodged in the Authority and referred to in evidence but do not give evidence and are only provided as context should remain confidential.

[91] It was appropriate to make the non-publication orders requested.

Next steps

[92] The Authority will contact the parties to convene a case management teleconference to confirm the investigation meeting date and timetable the evidence.

Costs

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

Sarah Kennedy-Martin
Member of the Employment Relations Authority

⁷ *Erceg v Erceg* [2016] NZSC 135 and *MW v Spiga Ltd* [2024] NZEmpC 147 at [94].