IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2026] NZERA 262
3448344

	BETWEEN	PAUL MCMILLAN First Applicant
	AND	DION ROBIN Second Applicant
	AND	QUBE PORTS NZ LIMITED Respondent
Member of Authority:	Sarah Blick	
Representatives:	Simon Mitchell KC and Angus Drumm, counsel for the applicants Alastair Espie and Bridget Craig, counsel for the respondent	
Investigation Meeting:	9 April 2026 in Auckland and by audio visual link	
Submissions received:	8 and 9 April 2026	
Determination:	30 April 2026	

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicants Paul McMillan and Dion Robin were employed by Qube Ports NZ Limited (Qube) as Terminal Tractor (TT) operators at the Port of Gisborne. While Mr McMillan was employed on a permanent basis, Mr Robin's employment agreement stated he was employed on a casual basis. After an incident on 8 January 2026, the applicants were found to have committed serious misconduct on the basis they refused to carry out reasonable and lawful instructions - by refusing to work with a co-worker, and coordinating that refusal with each other. Mr McMillan was dismissed, and Mr Robin was told he would not be re-engaged.

[2] The applicants say the termination of their employment was unjustified, with both seeking reinstatement on an interim and permanent basis.

[3] While Qube accepts Mr McMillan likely has an arguable case that he was unjustifiably dismissed, it says it is weak. It denies Mr Robin has any arguable case on the basis he was employed on a casual, as-and-when required basis and was not in an ongoing employment relationship between agreed shifts. Further, Qube submits the applicants do not have an arguable case for permanent reinstatement, including because reinstatement is not an available remedy to them under recent amendments to the Employment Relations Act 2000 (the Act) which came into force on 21 February 2026. Qube also submits the balance of convenience and overall justice of the case does not favour the applicants.

The Authority's process

[4] The parties were directed to mediation which was unsuccessful in resolving any matters.

[5] The parties agreed to the Authority determining the preliminary issue of interim reinstatement based on the amended statement of problem, statement in reply, documents submitted by the parties, affidavit evidence and submissions.

[6] Affidavits have been provided for the applicants. Qube has provided affidavits from Gisborne Port Operations Manager Jason Tuapawa, Area Manager Gregory Akroyd, Duty Operations Manager Lyrik Jacobs, and General Manager – Industrial Relations Dean Carter. Counsel have provided helpful written and oral submissions.

[7] As the affidavit evidence will remain untested until the substantive investigation of the personal grievances, any findings of fact in this determination are provisional only and may change later once the claims have been fully investigated and witnesses examined. Some material issues of fact remain in dispute from the evidence presented to this stage.

[8] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all of the evidence and submissions received but which has been considered.

Background

[9] Mr McMillan commenced employment on 22 May 2023, and Mr Robin on 6 July 2023.

[10] Qube says its business is largely split between marshalling and stevedoring/receival operations handles approximately 350-400 trucks per day and may have on average 2-3 vessels for loading at the Gisborne port per week, with four gangs (groups of stevedores working together to load a ship) per vessel. The applicants' duties involved collecting log trailers and transporting them to vessel loading areas, where they worked alongside loader operators responsible for loading the logs.

[11] Both applicants worked with a particular loader operator (the loader operator). Both applicants raised concerns about his operating practices in 2024 and/or 2025.

[12] In 2024, Mr McMillan says he reported an incident in which he said the loader operator drove into him while he remained attached to his trailer, after which the loader operator left to refuel. Mr McMillan told management he did not want to work with the loader operator. The loader operator was rostered to night shift, reducing their interaction.

[13] Further concerns were raised in 2025. On 16 February 2025, Mr McMillan emailed the Port Manager with concerns about the loader operator's attitude and work practices. Qube says the Port Manager investigated, reviewed CCTV footage, and moved the loader operator to the day shift for observation. Although there is no evidence about this investigation from the Port Manager before the Authority, Qube says observation of the loader operator found no unsafe behaviour during that monitoring period. In 2025 the loader operator was then brought back to work nights.

[14] Mr Robin says he filed two incident reports about the loader operator in October and December 2025. The December incident involved an allegation that the loader operator loaded logs onto a trailer while the TT was still attached. Qube's evidence is that CCTV footage later contradicted both applicants' statements about the incident, and the matter was treated as a communication issue rather than an unsafe act. The applicants dispute aspects of this account. It is, however, common ground that Qube management saw fit to address an issue with the loader operator verbally about some aspect of the concerns.

8 January 2026 refusal to work with loader operator

[15] On 8 January 2026, Qube says the first major vessel operation after the holiday shutdown was scheduled to begin at 7pm. Qube says it was originally meant to run four gangs but had some issues so was running three gangs by the start of the shift. In each gang there is one TT operator and one loader operator who are paired with each other to load the cargo on the vessel. Mr McMillan, Mr Robin, and one other TT operator were rostered to work that night shift. It is common ground that prior to loading commencing, the three TT operators each said they would not work with the loader operator.

Investigation/disciplinary process

[16] On 19 January 2026, Qube held fact-finding meetings with the applicants. Management formed the view that the simultaneous nature of the refusals, the similarity of explanations, and the operators' use of collective pronouns indicated a coordinated refusal.

[17] On 22 January 2026, Qube issued disciplinary investigation letters alleging potential serious misconduct, including refusal to comply with reasonable and lawful instructions and possible coordinated action. Qube formed the view that the refusals were not motivated by genuine safety concerns but by interpersonal dissatisfaction and a desire not to work with the loader operator. Qube also considered that the operators' actions caused significant operational disruption and undermined trust and confidence.

[18] On 27 February 2026, Qube dismissed Mr McMillan for serious misconduct. On the same day, it advised Mr Robin his actions amounted to serious misconduct and it would not re-engage him in future.

[19] On 3 March 2026, both applicants raised personal grievances alleging unjustified dismissal.

Interim reinstatement

[20] Section 127 of the Act confers jurisdiction on the Authority to grant 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.

[21] In considering the applications for interim reinstatement the Authority is required to consider the following:[1]

(a) Is there an arguable case for unjustified dismissal?
(b) Is there an arguable case for permanent reinstatement?
(c) Where does the balance of convenience lie?
(d) Where does the overall justice of the case lie until the substantive matter can be determined?

[22] Pursuant to s 127(5) of the Act, the Authority may make any reinstatement order subject to any conditions it thinks fit.

New legislation

[23] On 21 February 2026, ss 123B and 123C were inserted into the Act).[2] Section 123B prevents the Authority or Court from awarding any remedy where it determines that an action of an employee contributed to a situation that gave rise to a personal grievance, and that action amounts to serious misconduct. Section 123C prevents the awarding of remedies of reinstatement or compensation for a personal grievance if an employee's behaviour contributed to the situation that gave rise to the grievance.

[24] The parties provided submissions on the impact of s 123B and s123C on the current application. Qube maintains the amendments apply due to the timing of the dismissals and in light of s 33 of the Legislation Act 2019, *Allen v C3 Ltd* and *Ramkissoon v Commissioner of Police*.[3]

[25] Section 33 of the Legislation Act provides:

> **33 Effect of repeal or amendment on existing rights and proceedings**
> (1) The repeal or amendment of legislation does not affect-
> (a) the completion of a matter or thing that relates to an existing right, interest, title, immunity, duty, status, or capacity (a **legal position**); or
> (b) the commencing of a proceeding that relates to an existing legal position; or
> (c) the completion of a proceeding commenced or in progress under the legislation.

[1] *XYZ v ABC* [2017] NZEmpC 40 at [5] and [6].
[2] Inserted on 21 February 2026 by the Employment Relations Amendment Act 2026, noting that s103A was also amended at the time.
[3] *Allen v C3 Ltd* [2012] NZEmpC 124, [2012] ERNZ 478; *Ramkissoon v Commissioner of Police* [2017] NZEmpC 85, (2017) 15 NZELR 203.

> (2) Repealed or amended legislation continues to have effect for the purposes stated in subsection (1) as if the legislation had not been repealed or amended.

[26] The applicants argue that s 33(1)(a) of the Legislation Act 2019 would appear to be sufficiently broad enough to capture conduct that commenced before the new changes to the Act. Notably, it refers to the completion of "a matter or thing" relating to an "existing legal right."

[27] Counsel for the applicants submitted that the commencement of a disciplinary process fixes the law to be applied for any following legal action. The applicants further submitted that the vast majority of the relevant events upon which their grievance is founded occurred prior to 21 February 2026, and it is "entirely likely" Qube waited for the new amendments to be enacted before affirming its preliminary decision. They say it does not serve the interests of justice with an estimated 90% of the disciplinary process having taken place "under the old legislation".

Analysis

[28] The amending Act does not contain transitional provisions relevant to the ss 123B and s123C of the Act. The Authority applies general principles for the interpretation of the legislation in the absence of other guidance.

[29] Section 32(1)(b) of the Legislation Act states that the repeal or amendment of legislation does not affect an existing right. Section 33 addresses the effect of repeal or amendment on enforcement of existing rights. Section 33(2) provides that repealed or amended legislation continues to have effect in relation to an existing right (a legal position) as if the legislation had not been repealed or amended. The entitlement to the completion of "a matter or thing" under s 33(1)(a) therefore must relate to an "existing legal right." The issue must therefore turn on whether the applicants had an existing legal right before 21 February 2026.

[30] The applicants' claims involve only one type of grievance - unjustified dismissal. Termination of employment is an essential element of the cause of action of unjustified dismissal. Until termination happened the applicants did not have an existing right in terms of the law of dismissal. The relevant statutory test and remedies available for unjustified dismissal are therefore those that were in force at the time of the applicants' terminations on 27 February 2026. This finding is consistent with the

earlier authorities in relation to dismissal grievances in which mirror provisions of the Interpretation Act 1999 were considered and applied.[4]

[31] There are no other raised grievances before the Authority relating to the events prior to the new legislation coming into force (such as a separate disadvantage grievance). In oral submissions the applicants' counsel made the observation that the Authority is not prevented from making a finding that a personal grievance is of a type other than that alleged.[5] While that may so, the untested evidence presented to the Authority does not support any such finding that might be relevant to the present application.

[32] Finally, the Authority notes there is no evidence to support the applicants' claim that Qube waited for the new amendments to be enacted before affirming its preliminary decision.

Do the applicants have an arguable case for unjustified dismissal?

[33] When the Authority carries out its substantive investigation, it will be required to apply the justification test in s 103A of the Act and objectively assess whether the actions of Qube and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time that dismissals occurred.

[34] At this initial step, the applicants must show they have an arguable case, one with a possible (but not necessarily certain) prospect of success, meaning it must not be merely frivolous or vexatious. The threshold is not high.

Mr Robin's employment status

[35] Notably, there is an important but unresolved dispute about the nature of the relationship between Qube and Mr Robin. Mr Robin confirms he was employed under the applicable collective agreement which states casual employees will be engaged on an 'as and when required' basis with no guarantee as to continuing or future employment, and are paid on an hourly basis. Individual terms and conditions of employment apparently signed by Mr Robin on 8 July 2024 reiterate he was employed on a casual 'as and when required basis'.

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[4] Above n3 and *Ramkissoon v Commissioner of Police* [2018] NZCA 304, (2018) 15 NZELR 1017.
[5] Employment Relations Act 2000, s 122.

[36] In his affidavit evidence before the Authority, Mr Robin disputes that he was truly a casual worker, which annexes an Inland Revenue income summary, a small selection of screenshots of payslips and bank statements, which he says show he received consistent work sufficient for full time hours. Mr Robin further deposes that if he was a true casual worker, Qube would have simply stopped offering him shifts rather than undertake the disciplinary process it did.

[37] The authorities in this regard are clear that there is no specific factor or threshold required which is determinative of casual status. To the extent that Mr Robin disputes his classification as a casual employee, that will require a fact-specific assessment including reviewing the number of hours worked, the regularity of the pattern worked, any mutual expectation of continuity of employment, whether advanced notice for leave or absence was required, and whether Mr Robin worked consistent starting and finishing times. Although Mr Robin submits that the frequency of his hours worked supports a claim of permanent status, this is one factor and is not determinative of permanent employment status.

[38] If Mr Robin was not in ongoing employment with Qube, it cannot be said he was either dismissed, nor unjustifiably dismissed. The limited untested evidence currently before the Authority provides at least a weakly arguable case that Mr Robin was employed on an ongoing basis and as such Qube's stated decision not to offer him further casual work engagements constituted a dismissal. From that starting point the Authority now assesses the applicants' joint claims.

Arguable case for unjustified dismissal

[39] The applicants have identified two matters relating to the disciplinary process which may ultimately be relevant to the test for justification. Firstly, computer-generated transcripts containing errors of fact-finding meetings were relied upon by Qube. Secondly, the loader operator was spoken to following the 8 January incident, a fact which the applicants say was unknown to them during the process. While these procedural matters may be advanced during the Authority's substantive investigation, the focus of the applicants' submissions is around the substantive justification for the dismissals.

[40] The applicants rely on s 83 of the Health and Safety at Work Act 2015 (the HSWA). Section 83 relevantly states:

(1) A worker may cease, or refuse to carry out, work if the worker believes that carrying out the work would expose the worker, or any other person, to a serious risk to the worker's or other person's health or safety arising from an immediate or imminent exposure to a hazard.
(2) A worker may continue to refuse to carry out the work if—

(a) the worker attempts to resolve the matter with the PCBU as soon as practicable after first refusing to do the work; and
(b) the matter is not resolved; and
(c) the worker believes on reasonable grounds that carrying out the work would expose the worker or any other person to a serious risk to the worker's or other person's health or safety arising from an immediate or imminent exposure to a hazard.

…
(5) Subsection (1) does not authorise a worker to refuse to do work that, because of its nature, inherently or usually carries an understood risk to the worker's health and safety, unless that risk has materially increased beyond the understood risk.
(6) To avoid doubt, nothing in this section limits or affects an employee's right to refuse to do work under any other enactment or the general law.

[41] Qube's position is that the applicants engaged in serious misconduct when they refused to carry out a lawful and reasonable instruction at the commencement of their shift on 8 January 2026. It says the concerns about the loader operator appeared to be about his personality, and style and manner of communication, rather than about any specific risk of serious harm. It says such concerns fall well short of a genuine belief that they would be exposed to the type of "serious risk" contemplated by section 83(1).

[42] Qube provided affidavit evidence from managers that no unsafe incident occurred immediately prior to the refusal and that neither applicant could identify any specific hazard arising on the night in question. Further, they say previous concerns had been investigated to conclusion, and that when given notice of the opportunity to raise concerns on the shift prior to the incident, Mr McMillan did not raise any before his refusal to work with the loader operator on 8 January 2026.

[43] Qube's Disciplinary Policy identifies refusal to follow a lawful and reasonable instruction as serious misconduct which relevantly states:

> A refusal to carry out reasonable and lawful work instructions – It occurs when an employee refuses to take instructions to undertake work assigned to them. It could include being asked to stop what they are doing and go and work in another part of the operation such as would happen when an operator is asked to stop what they are doing to assist other workers complete a task. Provided that the work is lawful there is no ability for an employee to refuse to do the work (unless on proven medical grounds).

[44] Whether the applicants were entitled in law to refuse to work on the grounds it was unsafe is in issue. The applicants say they were, in light of the nature of their concerns and how they (or had not) been addressed. They say this was not a disciplinary matter, but a health and safety matter, and it should have been dealt with as such.

[45] The applicants' arguments are not frivolous or vexatious. The issues above go to the reasonableness and justifiability of the dismissal decision. The applicants have met the threshold for an arguable case of unjustified dismissal; however in Mr Robin's case its strength is tempered by the outstanding issue of his status.

Is there an arguable case for permanent reinstatement?

[46] Under s 125 of the Act, if it is determined an employee has a personal grievance, the Authority must provide for reinstatement wherever it is practicable and reasonable to do so.

[47] For permanent 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 achieved successfully.[6] When assessing reasonableness, the Authority must consider the effects of permanent reinstatement on relevant parties, including the applicants, Qube, other employees, and any relevant third parties.[7]

[48] Affidavits lodged by Qube's witnesses outline what it says is the relevant operating context, said to be crucial:

(a) Qube's operation and the degree to which it can provide work for staff, depends entirely on its customer vessels arriving on time, and departing the berth within its allocated window.
(b) Qube is subject to strict customer expectations as to the timely loading of vessels. Where those expectations are not met, and the loading of a vessel can be significantly delayed, this can result in customer KPIs not being met and have adverse operational and commercial consequences for Qube.
(c) A refusal by an employee to work at short to no notice can result in whole gangs being undermanned or dropped entirely as happened on 8 January

[6] *Christieson v Fonterra Co-Operative Group Limited* [2021] NZEmpC 142 at [39].
[7] Above n6 at [13].

2026. Such refusals can cause a disproportionate reduction in Qube's capacity to load a ship and to meet customer KPIs and expectations.

(d) Qube's staff are well aware of customer requirements and the need to commence vessel loading on time. Staff are also well aware of the difficulties in finding last minute replacements.

[49] Qube has also highlighted the effect of the insertion of ss 123B and s123C and of the Act as impacting the applicants' chances of permanent reinstatement.

[50] The applicants submitted that if they were wrong in their submissions on the amendments to the Act, s 123B in any event does apply to the current matter, as their actions on the relevant date cannot constitute serious misconduct. During oral submissions, counsel for the applicants further submitted that the applicants' conduct also did not amount to misconduct, such that s 123C would also not apply.

[51] Had Qube come to the Authority with clear evidence of what it did to investigate the prior concerns raised by the applicants, there might be a stronger argument for Qube. The Authority cannot with confidence at this interim stage say that safety issues were adequately considered, resolved and communicated to the applicants by Qube.

[52] Mr McMillan says there were two earlier occasions where he has refused to work with the loader operator on shift. While Qube has referred the Authority to its operating environment, it remains unclear why this time was any different. Mr McMillan's evidence is notable given that Lyric Jacobs on one recent occasion covered for Mr McMillan as a TT on one shift, without consequence to Mr McMillan, when the loader operator was allocated to work with Mr McMillan.

[53] Qube's finding at the timing of dismissal that the applicants' actions on 8 January 2026 were coordinated (and the relevance of any coordination) is disputed by the applicants.

[54] On the evidence presented it is not clear whether ss 123B or 123C of the Act, which limits permanent reinstatement as a remedy in cases of serious misconduct or misconduct, will be applicable. The evidence relating to Qube's finding that the applicants' conduct amounted to misconduct needs to be tested at the investigation meeting. Further, it is not possible to conclude on the untested evidence that the

applicants' conduct was culpable and/or blameworthy contributory conduct that created or contributed to the situation giving rise to the dismissal.

[55] It is again noted that whether Mr Robin has an arguable case for permanent reinstatement depends on whether he was employed on an ongoing basis. The untested evidence currently before the Authority again provides at least an arguable case that the true nature of Mr Robin's employment was ongoing.

[56] Based on the untested evidence before the Authority, the evidence indicates the parties are capable of re-establishing and maintaining a productive employment relationship. The applicants have met the threshold for an arguable case of permanent reinstatement; however in Mr Robin's case its strength is again tempered by the issue of his status.

Where does the balance of convenience lie?

[57] The balance of convenience requires the Authority to weigh the potential effects of failing to reinstate the applicants against the potential effects on the respondent if interim reinstatement is granted. This comparison involves considering the relative hardships to the parties and to any relevant third parties. The period under assessment is from the date of this interim reinstatement determination until the date of issue of the Authority's substantive determination regarding the unjustified dismissal claims.

[58] Qube argues that interim reinstatement of the applicants would set a dangerous precedent, as employees may believe they can legitimately refuse to work with any colleague they dislike. Mr Carter states that reinstating the applicants would send a message to other staff that withholding labour can be used to influence staffing allocation, creating significant risks for the business. This submission is not accepted as likely on the evidence presented at this interim stage.

[59] In reply evidence (to which Qube did not have the opportunity to respond) Mr McMillan deposed that the loader operator was back working on day shifts. The applicants say this is an arrangement that works and can be continued for the purposes of interim reinstatement. It was submitted that the applicants are unlikely to cause issues with the loader operator at the workplace if they are not working with him.

[60] Mr McMillan says dismissal will have a significant impact on his life. He has provided evidence of his family and financial circumstances, and says his age may mean he is not able to be employed easily. That evidence is acknowledged.

[61] Qube has in the past shown a willingness, and ability, to absorb the rostering arrangements on an ongoing basis Mr McMillan is now suggesting, pending the outcome of his substantive application. Overall, I am satisfied there is greater inconvenience to Mr McMillan if he is not reinstated as compared to the inconvenience for Qube if he is.

[62] For Mr Robin it is submitted he also will suffer significant losses from his dismissal, that he is not a genuine casual and his financial evidence shows he was working consistently at full time hours. It is said his income from Qube was his primary source of income. While the impact on Mr Robin is acknowledged, the uncertainty around his status and expectation of ongoing work means the Authority is not satisfied the balance of convenience favours him in this interim period.

Where does the overall justice of the case lie until the substantive matter can be determined?

[63] The Authority must assess the overall justice of the case from a global perspective. 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.

[64] The Authority found there is an arguable case the applicants' have arguable cases for unjustified dismissal and for permanent reinstatement. Mr Robin's case is contingent on his employment status. The balance of convenience was found to favour Mr McMillan, but not Mr Robin.

[65] Stepping back from the details of this case, this is a case where the justice lies with the applicants, I am satisfied that overall justice favours Mr McMillan's interim reinstatement, but not Mr Robin's for the reasons outlined.

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

Conclusion and orders

[66] Mr McMillan's application for interim reinstatement succeeds.

[67] Mr Robin's application for interim reinstatement does not.

[68] Qube Ports NZ Limited is ordered to interim reinstate Paul McMillan to the role he was dismissed from, subject to the conditions below, until further order of the Authority:

(a) Mr McMillan is to be restored to the payroll within two days of the date of this determination;
(b) Mr McMillan is to be rostered on to work within seven days of the date of this determination.

[69] In accordance with the undertakings given, Mr McMillan is to abide by any order that the Authority may make in respect of damages that are sustained by Qube through the granting of the order for interim reinstatement and that the Authority decides he ought to pay.

Next Steps

[70] A case management conference will be held with the parties to progress the matter to a substantive investigation.

Costs

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

Sarah Blick
Member of the Employment Relations Authority