

Attention is drawn to an order prohibiting publication of certain information in this determination.

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2025] NZERA 476
3387184

BETWEEN	BEG Applicant
AND	PCB Respondent

Member of Authority:	David G Beck
Representatives:	Andrew Marsh, counsel for the Applicant Elizabeth Coats, counsel for the Respondent
Investigation Meeting:	31 July 2025
Submissions Received:	31 July 2025 from the Applicant 31 July 2025 from the Respondent
Date of Determination:	5 August 2025

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] BEG worked for PCB until mid-June 2025 when they were summarily dismissed. BEG claims the dismissal was procedurally and substantively unjustified and seeks interim and permanent reinstatement and compensation. PCB opposes the application. This determination deals with the application for interim reinstatement.

Non-Publication

[2] In accord with clause 10(1) Schedule 2 of the Employment Relations Act 2000 (the Act), BEG applied for a non-publication order prohibiting the publication of any detail that may reveal their identity and/or the publication of any detail that the Authority considers ought not to be published. PCB also sought a limited non-publication order confined to details disclosing the identity of a party to their internal investigation. PCB does not support the granting of non-publication of BEG's identity or their identity.

[3] I granted a 'blanket' interim non-publication order on 31 July 2025 during an investigation meeting dealing with the interim reinstatement application. That order remains in place until I have considered further submissions by the parties. The parties are therefore described by randomly generated letters.

[4] I record in order to consider the application on an interim basis I needed to be satisfied that grounds for the exercise of the discretion the statute provides are made out, as it is apparent non-publication departs from the important principle of open justice.

[5] BEG's counsel sought non-publication briefly citing that the proceedings involve material not yet in the public domain. The negative impact on reputation and future job prospects was seen as at issue should details of the circumstances of BEG's dismissal be made public at an interim stage, when BEG was seeking reinstatement to their former role.

[6] PCB's counsel indicated they accepted the Authority's view that as a precautionary measure a non-publication order in respect of the interim reinstatement application and interim investigation meeting be granted. However, if the application is intended to extend to a substantive hearing, PCB indicated they wish to be heard on their likely objection to blanket non-publication being extended.

[7] I have found the circumstances of the employment relationship breakdown and the factual matrix lean towards non-publication as sought but only on an interim basis and have timetabled submissions on whether the order shall remain in place.

[8] I have also signalled that regardless of the outcome on further deliberation on non-publication, the Authority has resolved not to publish any details of the person involved in

the investigation that led to BEG's dismissal. That person will continue be referred to only as "the complainant" and I prohibit any further disclosure of the complainant's identity or details that would lead to disclosure of any of the specific circumstances of their complaint, beyond which is generally described in this determination.

[9] I now turn to the application for interim reinstatement that was lodged by BEG on 24 June 2025.

The Authority's investigation

[10] As permitted by s 174E of the Act, I have not recorded all of the affidavit evidence provided and submissions given but I have stated relevant findings of fact and law that I am required to assess at this interim stage to allow me to express a conclusion on whether the interim reinstatement order sought should be granted or declined.

What caused the employment relationship breakdown?

[11] The following brief summary is based upon affidavit evidence and documentation provided by both parties.

[12] BEG worked in a job that objectively required a duty of maintaining the utmost trust and confidence in various relationships due to the nature of the role and wider working environment that included regular liaison with external parties, where upholding the reputation and good standing of PCB is at issue.

[13] BEG had been in their position prior to dismissal for approximately thirteen years and was hitherto well regarded by PCB's local management. PCB is a large trans-Tasman organisation with developed policies pertaining to its employees that they say are the subject of regular staff awareness training.

[14] Late on an evening in November 2024 after a long work related social event, BEG engaged in an incident when by their own admission, they made an explicit and objectively lewd comment referencing a sexual act to another party (the complainant). There was another person who accompanied the complainant and overheard the comment and they angrily remonstrated with BEG before both the complainant and the other person walked

away. It was later alleged BEG also made a derogatory comment to the other person during their exchange.

[15] Two days after the incident, BEG received a conciliatory worded text from the other person involved, apologising for their reaction to the overheard comment. BEG responded by assuring the person it was not a problem for them and apologised for any offence the other person and the complainant may have perceived. BEG claimed they had not intended to cause offence. BEG did not at the time follow the matter up with the complainant.

[16] At the end of January 2025, a formal complaint was made to PCB detailing the offensive nature and context of BEG's comment during the incident. The complainant signalled they wished to remain anonymous and explained they had recently resigned from their employer.

[17] In early February, BEG's immediate manager informed them of the existence of the complaint and BEG provided them with the text exchange from the other person involved in the incident. The manager's text response to BEG was "Tks. Over and done with." BEG says in their affidavit they believed "everything had been resolved."

[18] However, PCB resolved to investigate the complaint and deputed a senior human resources operative to undertake the investigation. BEG was advised of the investigation proceeding and who would undertake it, in a letter of 12 February that noted the seriousness of the allegations and that appropriate disciplinary action may follow – a recipient of the investigation report and decision maker was identified. The scope of the investigator's task was detailed and it was noted once completed the investigator would prepare a report:

- detailing the investigation process;
- outlining whether the allegations are substantiated or not and this would be a finding based upon "the balance of probabilities;"
- whether the investigator found BEG's actions constituted a breach of PCB's code of ethics or any other policy.

[19] The investigation was hampered by the complainant expressing a wish after being interviewed, that they no longer wanted to participate and essentially made their complaint anonymous (despite the fact that they knew that their complaint had been disclosed to BEG

and others interviewed). The impact of this was once BEG was interviewed their version of what happened on the night of the incident was not provided to the complainant for comment. Notwithstanding, the investigation proceeded and a draft investigation report was provided to BEG for comment and the investigation report was finalised on 9 April.

[20] The investigation report concluded that:

- 1) The complainant's allegation of a previous contextual lewd interchange with BEG a year earlier, could not be substantiated due to an insufficiency of corroborating evidence.
- 2) The complainant's described more serious recollection of the second incident in November 2024 was not upheld but it was substantiated on BEG's admission that BEG made a lewd comment in reaction to being confronted by the complainant describing the nature of the earlier lewd comment (that BEG says they had denied making to the complainant).

[21] Based on the above and the investigator's finding that "the substantiated conduct constitutes sexual harassment" as per PCB's own policy, they resolved to persist with a disciplinary process which they signalled to BEG by letter of 17 April. The letter identified another senior manager as the decision maker who warned BEG that a potential outcome if serious misconduct was established, was "disciplinary action may be taken up to summary dismissal."

[22] The parties subsequently met by an audio-visual link on 6 May, at which BEG was represented by counsel. BEG during this meeting conceded the comments they made were "inappropriate" but contested in context, that they did not meet the threshold of being considered sexual harassment. BEG asked that their previous clean disciplinary record and length of service be taken account of and expressed a commitment to take steps to avoid being placed in a similar setting.

[23] By letter of 27 May, PCB's decision maker communicated a preliminary view that BEG's "substantiated conduct constitutes serious misconduct and summary dismissal is the appropriate outcome". BEG was invited to make further submissions on the preliminary decision.

[24] In a letter of 12 June, BEG's counsel provided comment vigorously contesting the preliminary decision. Essentially, while conceding that the conduct under scrutiny was cable of technically being described as sexual harassment, the contextual setting of BEG's remark was described as not one where their comment was made in isolation but rather in response to "a shocking allegation made to my client by the complainant". BEG's counsel also made further submissions claiming (in summary):

- The lewd comment made if it was deemed to be sexual harassment was only made in response to the complainant's equally lewd allegation.
- BEG's response was akin to an act of 'self-defence.'
- Comparison of PCB's Australian and New Zealand instances where dismissal had followed a sexual harassment finding, was not appropriate and nor had PCB disclosed enough detail (when requested) to show that disparity was not at issue.
- There was no evidence of detrimental impact on the complainant.
- An assumption that trust and confidence had partially been destroyed because BEG had refused to answer whether they thought they had or had not breached PCB's code of conduct and was evidence of lack of awareness, was unsustainable as BEG had indicated they regretted their comment and was remorseful.
- If trust and confidence was so at issue, the fact that BEG was not suspended from duties for four and a half months made no sense.
- Alternatives to dismissal had not been fairly assessed such as a formal warning that counsel stated BEG was prepared to accept.
- BEG's unblemished work history and lack of concern from their immediate manager and some co-workers (a reference and other testimonials were provided) had not been fairly taken account of.

The dismissal

[25] In a letter of 19 June, PCB's senior manager communicated they had carefully considered counsel's letter of 27 May but resolved to summarily dismiss BEG for serious

misconduct. The letter set out reasoning for the dismissal under a series of the following headings (sequentially reproduced in summary using PCB's headings):

Substantive Justification for dismissal

1. The decision was not solely based on a technical breach of PCB's own policy but: "Rather it reflects a holistic assessment of the seriousness of your conduct in which it occurred, and the impact on the complainant."
2. The comment made was "sexually explicit" and "inappropriate" but not found to be ameliorated by BEG's suggestion it was a spontaneous reaction or self defence (noting no physical threat had been made).

Context and Initiation of the Conversation

3. The suggestion that BEG's comment was justified by the complainant's conduct was soundly rejected citing BEG's comment as being disproportionate, unsolicited, and inappropriate," regardless of the context claimed. BEG was reminded of an obligation to always respond professionally and seek to deescalate matters.

Impact on the Complainant and Workplace

4. The notion that the complainant was not impacted was contested and the fact that they were not seeking BEG's dismissal did not negate "the seriousness of the misconduct or [PCB's] responsibility to maintain a safe and respectful workplace.

Trust and Confidence

5. The notion advanced by BEG that trust and confidence had not been destroyed was described as "untenable." It was suggested BEG's failure to comment on whether the code of ethics and conduct had been breached demonstrated a lack of "insight and accountability" and "alignment with our values."

Consistency of Approach

6. A comparative approach across the trans-Tasman company was deemed appropriate to ensure fairness and consistency.

Mitigating Factors

7. PCB asserted BEG's long tenure and unblemished record had been considered but found to not outweigh the seriousness of the misconduct.

The Health and Safety Considerations

8. While noted in the context of a suggestion that implied a 'sensible host' policy had not prevailed during the function that proceeded the incident at issue, PCB emphasised BEG needed to otherwise demonstrate responsibility for their own behaviour.

Test of Justification

9. PCB contended their decision was within a permissible range of 'what a fair and reasonable employer could do in all the circumstances.'

Your Admittance

10. PCB suggested BEG's counsel in accepting final written warning was appropriate (in their 27 May submission on the preliminary finding) was acceptance that the threshold of serious misconduct had been met that would warrant summary dismissal in a range of discretionary responses [I note this may have wrongly overstated counsel's advocacy that was a 'formal warning' would be an accepted sanction].

Summary

[26] In essence, PCB concluded BEG had by his own admission, breached the companies code of ethics and conduct policy and had engaged in an act of sexual harassment sufficiently unacceptable to warrant a finding of serious misconduct that led to BEG's summary dismissal.

[27] In response BEG has made an application to the Authority seeking interim and permanent reinstatement arguing the dismissal was unjustified. BEG's counsel has submitted that although the procedure leading up to the dismissal appears to have been thorough it was compromised by PCB failing to fairly consider a number of mitigating factors and the substantive decision was not one that a fair and reasonable employer could have made in all the circumstances.

The approach to an interim injunction/legal test

[28] The well-established legal framework I must follow in respect of assessing an application for an interim injunction is in summary:

Step one — the applicant must establish that there is a serious question to be tried;

Step two — consideration must then be given to the balance of convenience and the impact on the parties of the granting of, or refusal to grant, the interim orders sought. The impact on any third parties will also be relevant to this weighing exercise; and

Step three — the overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

Discussion - is there a serious question to be tried?

[29] The ‘threshold’ to be met in assessing that a claim is either frivolous or vexatious is arrived at on a judicial assessment of the evidence and the submissions of the parties and is not just an exercise of bare discretion.¹ However, it is acknowledged in case law that the initial consideration is not a high threshold to be met.

[30] Two parts to the issue of assessing a serious question to be tried are here:

- (a) Is there a serious question to be tried that BEG was unjustifiably dismissed?
- (b) Whether there is a serious question to be resolved in regard to the suggestion BEG be permanently reinstated?

Assessment an arguable case for unjustified dismissal?

[31] Ms Coats acknowledged that BEG had a case for interim reinstatement albeit weakly arguable and asserted the argument for permanent reinstatement was likewise weak. These assertions were made in view of PCB’s view that the objectively offensive nature of BEG’s admitted lewd comment; an objective assessment it constituted sexual harassment of an

¹ *NZ Tax Funds v Brooks Homes Limited* [2103] NZCA 90.

unwanted and offensive nature and the potential impact on PCB's workers should BEG be reinstated were relevant factors. Ms Coats noted that despite this being a 'one off' incident PCB was entitled in the circumstances, to reasonably conclude the behaviour breached their own policies, impacted negatively on the complainant and was at a sufficiently offensive level to warrant a sanction of dismissal.

[32] In contrast, Mr Marsh urged the Authority to consider BEG's case to be strongly arguable, essentially contending that the conduct in dispute that led to the summary dismissal, was not capable of being assessed as serious misconduct and a reasonable employer would have imposed a lesser sanction. Citing factors that went to both procedural and substantive issues, Mr Marsh argued (in summary):

- a. That BEG's immediate manager had sufficiently dealt with the matter and been satisfied with BEG's response to the complainant.
- b. A contextless 'zero tolerance' approach had been taken concentrating on offensive words used and not what they were in response to.
- c. Erroneous or irrelevant factors had contributed to the decision making, including wrongly placing emphasis on BEG's failure to state they had transgressed PCB's policies and further suggesting they had taken a consistent trans-Tasman approach without disclosing sufficient detail of similar dismissal circumstances.
- d. Not putting to BEG for comment at the preliminary decision-making stage, that a perceived lack of contrition (based on BEG's responses during the disciplinary process including them raising personal mitigating factors) was at issue.
- e. A lack of evidence to support PCB's suggestion of a fatal deterioration in trust and confidence in BEG's ability to continue working as a result of the comments made both during and after the disciplinary investigation, including that BEG worked for four and a half months while under investigation.
- f. Overall, a failure to give sufficient weight to BEG's hitherto unblemished work history and the 'one off' nature of the incident that counsel described as being akin to a "brain explosion."

[33] In answer to the first consideration, without traversing detail, BEG has been dismissed and the onus shifts to PCB to justify this decision having regard to s 103A(1) – (5) of the Act and good faith factors.

[34] From the untested affidavit evidence and contextual correspondence, I consider that an arguable case has been made out that BEG was unjustifiably dismissed. However, notwithstanding the procedural concerns raised by BEG as to the decision-making process, I concur with PCB’s submission that the arguable case is weak. I base this on:

- (a) The objectively offensive nature of BEG’s sexually explicit comment and the circumstance in which it was made. While I observe even if BEG’s version of events is more likely than not to have occurred or was accepted by PCB, then a reactive and directed comment of such a lewd nature constituted sexual harassment.
- (b) The initial, objectively inadequate texted apology made by BEG indirectly to the complainant.
- (c) An objectively naïve and speculative suggestion in BEG’s second affidavit in reply, which should their co-workers be made aware of the “exact nature of what had occurred” they would be supportive of BEG.
- (d) A lack of appreciation of the impact on PCB’s reputation should BEG be reinstated when their conduct becomes known to other parties. Given PCB has limited control over the dissemination of information, disclosure is objectively likely to occur.

Is there an arguable case for permanent reinstatement?

[35] Section 125(2) of the Act provides that in considering reinstatement as a “primary remedy” the Authority “must provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy as specified in section 123”.²

² Section 125(2) Employment Relations Act 2000.

[36] Ms Coats asserted that reinstatement is neither practicable nor reasonable given the breakdown in trust between the parties suggesting; “The Substantiated Comments were highly offensive and the respondent had reasonable basis for concern as to the applicant’s appreciation for how offensive this conduct was.”

[37] The omission to suspend BEG during the investigation process was described as being based on an assessment that BEG would not be interacting with the complainant as they were not a co-worker; PSB wished to avoid a claim of predetermination and case law was cited where reinstatement had not been granted despite suspensions not being imposed.

[38] PSB identified three concerns opposing BEG’s reinstatement – 1) The immense difficulty of maintaining confidentiality if an explanation as to why BEG was being reinstated was to be given to co-workers; 2) The impact generally on PCB being seen to not take a serious approach to complaints of sexual harassment and a fear such a signal would deter future complainants together with the likelihood some co-workers may feel uncomfortable working with BEG; 3) PSB’s continuing perception that BEG did not recognise or ‘take ownership’ of his comments and their impact.

[39] In contrast Mr Marsh cited BEG’s perception of support from co-workers; his willingness to work with PCB on any integrative strategy they want to impose; the fact that BEG had worked on without incident during the lengthy investigation process and BEG’s previous unblemished record of service.

[40] Assessing practicality involves an overall assessment of the prospects of re-establishing the employment relationship and includes a factor of whether I consider BEG could be a sufficiently harmonious worker if they were reinstated it does not mean simply being possible irrespective of consequences. The scope of assessing practicability is wide and can include matters that may not have been advanced as reasons for a dismissal but are ones that go to whether a renewed relationship is feasible.³

[41] Assessing the separate requirement of reasonableness can take account of the potential impact on the employer and other employees and also where appropriate third

³ *Hong v Auckland Transport* [2019] NZEmpC 54 at [66].

parties (in this case external suppliers).

[42] One factor I have to consider is the delay between the dismissal date and the interim investigation meeting that was lengthened by BEG's counsel availability and BEG turning down the opportunity for an early substantive investigation meeting.

[43] Ms Coats in trying to establish that PCB has lost all trust and confidence in BEG and therefore reinstatement is not practicable or reasonable, placed emphasis on the professional reputation and high ethical standards the company needs to impose to generate trust in the community.

[44] I however have to take note of Judge Holden's observation in *Hong v Auckland Transport* that caution is required when objectively assessing the loss of trust and confidence in the context of a dismissal where contested procedural issues arise and give rise to subjective opinions around ongoing trust and confidence.⁴

[45] In this context given the allegations that led to BEG's dismissal did not involve co-workers and the incident was outside the workplace, it could be argued the case for the impracticality of reinstating BEG has been overstated. In assessing the situation, I was hampered by no affidavit evidence being provided by PCB's co-workers of BEG but I do understand that bringing such evidence was problematic for PCB in regard to maintaining confidentiality. Notwithstanding, I do appreciate that due to the offensive nature of BEG's admitted comments that should they become known to co-workers, PCB would objectively have an exceedingly difficult situation to manage.

[46] In contrast, BEG has explained how important the job is to them and has suggested that finding alternative employment may be problematic but the evidence on this was generalised and not particularly compelling.

Assessment

[47] I consider some of the matters highlighted by PCB have not been overstated given the nature of their business and the role BEG has to undertake. I find that within a context

⁴ Above n 3 At [68].

of setting and communicating appropriate ethical behaviour, PCB is entitled to appropriately sanction transgressions to uphold their stated standards. However, when this involves dismissal, this must be balanced by adherence to statutory provisions governing how a fair and reasonable employer is to act. In assessing PCB's approach to BEG's dismissal, I was convinced on the limited affidavit evidence and extensive documentation that a careful and lengthy process took place and BEG was ably represented throughout and had ample opportunity to explain the conduct in question and make submissions on the final outcome.

[48] I also appreciate the issue of delay but observe this is mitigated by BEG placing PCB on early notice that they would be seeking reinstatement.

[49] These factors, if I re-instated BEG into the workplace on an interim basis, will be challenging to PCB and may be insurmountable with a very real potential for further disruption of workplace relationships should co-workers feel uncomfortable if they become aware, as is objectively likely, of the reasons for BEG's dismissal.

[50] I conclude there is a weakly arguable case for permanent reinstatement.

Balance of convenience

[51] Assessing the balance of convenience between the parties requires an analysis of the impact on each party and any third parties if the interim order sought is either granted or not, much of which has been discussed above.

[52] BEG says the impact of not reinstating them is that because of age and the nature of the dismissal it will make it difficult to find alternative employment. This was not expanded upon and no information was provided to show significant hardship or actual financial or other circumstances. I note BEG upon dismissal, was paid a significant sum of accumulated holiday pay. However, in the unique circumstances, I accept interim reinstatement is potentially the only way BEG will find a remunerated position in the industry they work in and have done so, for a considerable period of time.

[53] By contrast, PCB's submission was while BEG's job is still open, there would potentially be too much disruption in the period leading up to a substantive investigation meeting should BEG be put back in the workplace.

Assessment of where the balance of convenience falls.

[54] Weighing all factors including some clear merit in PCB's perspective of the situation and the difficulty they may face in recovering money should the substantive proceedings not favour BEG, I nevertheless find by a fine margin. that the balance of convenience does favour the granting of an interim reinstatement order.

[55] I consider damages if subsequently granted, may be an inadequate remedy for BEG if they are not reinstated on an interim basis as they will potentially be the subject of contributory conduct when this matter is determined on a substantive basis.

Overall justice

[56] An overall justice assessment is a 'reality' check on the position which has been reached after the analysis of the serious question to be tried and the balance of convenience has been weighed.

[57] As I have said, there are some issues to be assessed in regard to the manner by which BEG was summarily dismissed and consequently I conclude BEG has an arguable case for unjustified dismissal. I consider the case for permanent reinstatement to be less compelling and suggest there is significant work to be done for BEG to restore their employer's trust and confidence in them, including BEG's appreciation of the impact of their comments on the complainant and appreciating why PCB is entitled to hold their employees to high ethical standards.

[58] Standing back and looking at all factors, I find that the balance of convenience does favour granting the interim reinstatement order sought pending a substantive investigation meeting.

[59] In all of the circumstances however, it is appropriate to place BEG back on the pay

role rather than back at work as the potential interim disruption this would involve, would in my view not be conducive to either party.

Orders

[60] On the basis of the signed undertaking as to damages and pending this matter being determined on a substantive basis, I direct PCB to reinstate BEG on an interim basis to their payroll from the date of this determination.

[61] All issues of claimed lost remuneration and other remedies sought, will be dealt with at the substantive investigation meeting.

Further steps

[62] A telephone conference is to be convened as soon as practicable to organise a date for a substantive investigation meeting.

Costs

[63] Costs are reserved.

David G Beck
Member of the Employment Relations Authority