

**NOTE: This determination  
contains an order prohibiting  
publication of certain  
information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2025] NZERA 548  
3376884

BETWEEN

FHE  
Applicant

AND

AUCKLAND TRANSPORT  
Respondent

Member of Authority: Robin Arthur

Representatives: Applicant in person  
Charlotte Parkhill and Luke Ji, counsel for the  
Respondent

Investigation Meeting: 25 July 2025 in Auckland

Determination: 3 September 2025

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**DETERMINATION OF THE AUTHORITY**

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[1] This determination resolves an application for interim reinstatement until the Authority has investigated and determined a personal grievance application in which permanent reinstatement is sought as a remedy.<sup>1</sup>

**Order prohibiting publication of certain information**

[2] By order made under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act) publication is prohibited of the publication of:

- the name of the applicant in this matter, and
- the names and identifying details of a person who made a complaint about the applicant and of the complainant's mother.<sup>2</sup>

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<sup>1</sup> Employment Relations Act 2000, s 127.

<sup>2</sup> Employment Relations Act 2000 Sch 2 cl 10.

[3] Information available, at this early stage of this matter, indicated some real risk of serious health-related adverse effects giving sufficient grounds to limit the usual principle of open justice. The complainant, and her mother who was involved in communication with AT about the complaint, would also reasonably have expected their identities were not open to public disclosure.

[4] This order was made orally at the investigation meeting and confirmed in writing by a subsequent Minute of the Authority. In relation to the applicant, the order is to be reviewed as part of a further investigation meeting notified for 26 and 27 November 2025.

[5] To give effect to the order, this determination refers to the applicant as FHE, the complainant as Ms C and her mother as Ms P. These letters were generated randomly and are not related to their names.

[6] The names of some other people referred to in this determination, who are employees of Auckland Transport (AT) or who provided information in response to AT inquiries, are also anonymised or omitted.

[7] The order does not cover the names of AT managers or others in positions of responsibility who were involved in dealing with investigation of the complaint and the subsequent disciplinary process for FHE.

### **Employment relationship problem**

[8] FHE worked as a Parking Officer for AT from 21 January 2019. AT dismissed him for serious misconduct on 7 May 2025.

[9] AT Group Manager for Road Corridor Access, Tracey Berkhan made that decision. She had conducted a disciplinary investigation of FHE's conduct because AT's Group Manager for Parking Services, John Strawbridge was due to be on extended leave during the time of that inquiry.

[10] Ms Berkhan concluded FHE breached AT's code of conduct and its policy about harassment by harassing Ms C, in person and electronically (by email and text), during his working hours. She referred to the policy's definition of harassment which included unnecessarily watching or following someone around at work or near their home,

accosting someone or acting in a way that caused the person to fear for their safety and inappropriate contact by phone or email.

[11] Ms C was a former AT employee and FHE's former girlfriend. Concerns about FHE's conduct included the amount of time he had spent near Ms C's new workplace while on parking patrols and emails found in his work email account addressed to Ms C. At least one of those emails was said to have been sent to her from his work email address.

[12] FHE raised a personal grievance claiming AT's decision to dismiss him, and how it reached that conclusion, was unjustified. He also said he was unjustifiably disadvantaged by how AT suspended him from his duties at the start of a disciplinary process. In his application to the Authority FHE said the disciplinary process was "riddled with delays, shifting justifications and withheld evidence". He said he was not provided with "the original complaints" relied on to support the allegations made against him. He said issues he raised about the reliability of some information provided for the disciplinary investigation was not properly addressed and AT had not considered operational alternatives to his dismissal. He said AT could have addressed its concerns about possible contact with Ms C by changing his shift or work area.

[13] He also said there was a "retaliatory undertone" to the disciplinary process begun in February 2025. This related to an earlier instance of what he called "whistleblowing". Some months earlier he had been involved in identifying an incorrect ticketing policy or process which had then proved costly for AT to resolve.

[14] FHE sought remedies of reinstatement and lost wages and to compensate for distress he said he experienced because of an unfair process and unreasonable outcome. He also sought interim reinstatement until the Authority had investigated and determined his personal grievance. He also lodged the undertaking as to damages necessary with an interim reinstatement application<sup>3</sup>

[15] AT denied its disciplinary process and dismissal decision was unfair or unreasonable. It said FHE was not entitled to any remedies and opposed the interim reinstatement he sought until his grievance claim was heard and determined.

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

### **Authority's investigation of interim reinstatement application**

[16] Following its usual procedure for interim reinstatement applications the Authority directed FHE and AT to urgent mediation. The time for AT to lodge its statement in reply was suspended pending the outcome of mediation. The matter was not resolved there and AT then lodged its reply.

[17] At the parties' request they were directed to further mediation but again did not reach resolution.

[18] The matter then proceeded to an investigation meeting to hear submissions about the interim reinstatement application. The parties' submissions relied on information available from three sources:

- (i) FHE's second amended statement of problem (15 July 2025) and AT's statement in reply (11 June 2025);
- (ii) Affidavits from FHE (23 May, 11 June and 16 July 2025), Ms Berkhan (10 June and 30 June 2025) and AT Employment Relations Consultant Anthony Lowen (10 June 2025); and
- (iii) Documents the parties provided with their pleadings and the affidavits of FHE, Ms Berkhan and Mr Lowen.

[19] In investigating and determining an interim reinstatement application this information is accepted, without the questioning of witnesses, but some commonsense assessment is applied in considering this untested evidence.

[20] FHE and counsel for AT provided written submissions on the issues for resolution in an interim reinstatement application. They assisted further by discussing aspects of those submissions with me.

[21] During this investigation meeting timetable directions were also set for the Authority's investigation meeting on the substantive application, to be held in late November 2025. The terms of the order prohibiting publication of certain information were also discussed before the order was made.

[22] 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 evidence and submissions received.

## **Principles regarding interim reinstatement**

[23] In determining whether to order interim reinstatement the Authority must apply the law relating to interim injunctions and have regard to the object of the Act.<sup>4</sup> The object is to build productive employment relationships through promoting good faith in all aspects of employment relationships.<sup>5</sup>

[24] The relevant principles are applied in a three-step process: firstly, evaluating whether FHE has an arguable case; secondly, assessing where the balance of convenience lies between now and when his substantive grievance claim will be determined; and, lastly, assessing the overall justice of the matter.<sup>6</sup>

[25] At the initial step FHE must show his application has raised what can be called either a 'serious question' or an 'arguable case'. However described, this step considers whether his case seems to have a possible (but not necessarily certain) prospect of success and is more than merely frivolous or vexatious.

[26] An arguable case must be sufficient to affirmatively answer two questions.

[27] Firstly, was there a tenable argument that AT's actions failed to meet the test of justification set by s 103A of the Act? This test asks whether AT's actions, and how it acted in carrying out its inquiries and deciding to dismiss him, were what a fair and reasonable employer could have done in all the circumstances at the time.

[28] Secondly, if AT was found to have acted unjustifiably, was there then a tenable argument that the Authority would likely order FHE be reinstated to his employment, in the same position or another position no less advantageous?

[29] The next step looks at the balance of convenience during the interim period, that is from now until the Authority has determined the substantive claim. This concerns the relative impact on FHE and AT if an interim reinstatement order is granted or refused. Factors weighed in this balance may include:

- an assessment of the merits of the case and its likelihood of success (insofar as this can be discerned at an interim stage);

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<sup>4</sup> Employment Relations Act 2000, s 127(4).

<sup>5</sup> Employment Relations Act 2000, s 3.

<sup>6</sup> *XYZ v ABC* [2017] NZEmpC 40 at [5] and [6].

- the impact on third parties, such as other employees and members of the public with whom AT parking officers engage; and
- whether other remedies that might ultimately be ordered would likely be adequate.

[30] The third step in this evaluative process stands back from the detail required by the earlier two steps and considers the overall interests of justice.

[31] If an order for interim reinstatement is made, it may be subject to any conditions the Authority thinks fit.<sup>7</sup>

### **The disciplinary process and outcome**

[32] At the relevant times FHE's duties as a warranted parking officer were mostly carried out in an allocated patrol area in the streets around Dominion Road and Mount Eden. This involved routine checking for illegal parking, for illegal driving in transit or bus lanes and for evidence of vehicle inspection offences as well as attending reported instances of potential offences or other parking-related issues.

[33] In June 2024 AT received an information request from Ms P. This led to further correspondence with her in August and September. On 2 August 2024 Ms P reported what she described as "ongoing annoyance from a number of your staff" towards her and Ms C. Her message specifically named FHE and described him as "an ex-partner" of Ms C. Ms P later said FHE was harassing and stalking Ms C through "contact via AT mobile and email addresses". AT said it had attempted to contact Ms C about those concerns but did not communicate with her directly until 17 December 2024. Contact with Ms C was delayed, in part, because Ms P had described Ms C as being out of the country "on mental stress leave". In early February 2025 two members of the AT Risk and Assurance team met with Ms C and her employer to discuss the allegations and take statements.

[34] AT said the complainants gave consent on 16 February 2025 for their complaints to be relied on for an investigation of their allegations about FHE's behaviour.

### *Suspension*

[35] On 18 February 2025 FHE was called to a meeting with AT's head of parking and compliance, Rick Bidgood, and Mr Lowton. He was given a letter signed by Mr Strawbridge. The letter set out eight allegations about FHE's conduct and proposed placing

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<sup>7</sup> Employment Relations Act 2000, s 127(5).

him on paid suspension while those allegations were investigated. It also set 5 pm on the following day, 19 February, for FHE to provide any feedback on the “proposal to suspend”.

[36] According to Mr Lowton, he and Mr Bidgood then suggested FHE “go home on an interim basis” until a decision was made the next day on the proposal to suspend him. Mr Lowton said FHE agreed with that suggestion, was asked to “temporarily return his work phone” and, on his way out of the premises, had handed in his office access ‘swipe card’ to his supervisor. According to FHE he was told to go home, rather than agreeing to do so, and handing in his phone and access card meant he had, in effect, already been suspended by the time he left the workplace on 18 February.

[37] A lawyer representing FHE wrote to Mr Strawbridge later that day asking that FHE be placed in an alternative ticketing route and saying he would undertake not to approach or contact any of the complainants.

[38] Mr Strawbridge considered the suggestion of FHE’s lawyer but, after receiving advice from Mr Lowton, decided FHE was to be suspended on full pay while inquiries continued. FHE was told of this outcome by letter on 20 February.

#### *Disciplinary meetings*

[39] With the initial suspension letter given to him on 18 February FHE was provided with some of the documents AT relied on for the allegations made about his conduct. This included a statement by Ms P dated 17 December 2024 and two statements from people at Ms C’s place of employment, dated 3 February 2025.

[40] Ms P’s statement listed mobile phone numbers she said FHE had used to send text messages to her and to Ms C. It also said she believed FHE had “vandalised” Ms C’s vehicle at her home.

[41] One statement from a current work colleague of Ms C referred to three instances of seeing FHE walking around the area where staff at the business parked their cars. The three instances occurred between “a few months prior to Christmas” 2024 and 22 January 2025. The colleague said she had identified FHE as the parking officer she saw from a photo shown to her by Ms C.

[42] The other 3 February statement was from Ms C’s manager. It said Ms C had told her manager she did not feel safe because she had seen FHE “hanging around her car” and

when the manager escorted her back to her car he “saw her ex-boyfriend just standing there looking her way”.

[43] The formal disciplinary process began with a letter to FHE dated 3 March 2025. It set out four allegations, removing some from those listed in the proposed suspension letter of 18 February, and providing more detail on the remaining allegations. This included references to dates of alleged events or activities and related documents. He was also provided copies of those documents or electronic access to them.

[44] AT alleged FHE had:

- (i) used his AT email account to send one message directly to Ms C and nine messages indirectly (via his personal email address) that harassed her.
- (ii) waited outside her place of work, in uniform, to harass or intimidate her on five occasions. This was said to have occurred at times during working hours and before or after those hours. Two specific dates were identified. The other three alleged occasions were identified as occurring a “few weeks” or “few months” before or after specific dates.
- (iii) misrepresented himself as other staff members of AT in communications from his work email to his personal email on two specified dates.
- (iv) sent emails from his work account to his personal email address attaching templates for infringement notices. One template included a field still populated with a real person’s personal information.

[45] A disciplinary meeting proposed for 7 March was postponed while AT addressed a request for further documents. Those documents included a cybersecurity report relevant to FHE’s view that his AT account for work emails had been ‘hacked’ and this had resulted in some messages being sent that were not written or sent by him. The latter messages were relevant to AT’s allegations that FHE had misrepresented himself as being another AT staff member, Mr Z. They comprised an email composed on FHE’s work email account and sent to his personal email account, written as if it was from Mr Z and addressed to Ms C. There were also two text messages to Ms C which appeared to be from Mr Z. When interviewed by AT representatives Mr Z denied any knowledge of the email and text messages said to be from him.

[46] By letter on 19 March Mr Lowen, on AT’s behalf, refused to provide some information to FHE about Ms C’s allegations, citing some Privacy Act 2020 provisions. Those provisions were said to allow for some information to be withheld on safety grounds and for its existence to be neither denied nor confirmed.

[47] By further letter dated 21 March FHE was provided with “updated allegations”, incorporating references to some additional documents released to him, and calling him to a disciplinary meeting which was held on 1 April.

[48] An extensive summary of FHE’s responses at the 1 April disciplinary meeting was set out in a letter of 24 April signed by Ms Berkan. The letter advised FHE of her preliminary decision to dismiss him for serious misconduct for “harassing [Ms C] in person and electronically (via email and text message) while representing AT”.

[49] In their 1 April meeting, according to the 24 April summary, FHE had denied the allegations of sending harassing messages and of impersonating other AT staff. He said his presence in streets near Ms C’s workplace was for work purposes and he was not told his presence was unwelcome. He was described as saying the complaints were based on misunderstandings and fabrications.

[50] The latter point appears to relate to a concern raised in a written response FHE made to the allegations. His response questioned why AT had not done more to check the credibility of what Ms P and Ms C were reported to have said about him. He said Ms C had accused him in July 2024 of “serious crimes against her” in January 2024 but “the Police never approached me about this allegation”. He also provided a link to some news media articles regarding a trial of Ms C’s former stepfather on serious sexual charges. He said the charges were dismissed at a District Court jury trial. FHE alleged this was in part because Ms C’s evidence was said to have inappropriately influenced by Ms P, suggesting something similar had happened with the allegations made against him.

[51] Ms Berkan’s 24 April letter indirectly referred to his request to consider the credibility of the complaints by saying she was unable to make findings in relation to incidents between him and Ms C that were not connected to his employment.

[52] In responding to Ms Berkan’s preliminary conclusion FHE’s lawyer said AT had not supplied the content of Ms C’s complaint, saying it was “entirely blanked out” and said AT was relying on evidence withheld from FHE.

[53] Ms Berkhan’s preliminary outcome was unchanged by submissions made in response to it. She said AT had provided the initial complaint from Ms C and Ms P and continued to “neither confirm nor deny whether any other correspondence exists”. Her decision rested on being satisfied that FHE had sent Ms C an email on 9 July from his work email account, which had the effect of harassing her, and on other evidence showing he

was present near Ms C's workplace on at least four other occasions for reasons not supported by relevant data about his work patterns.

[54] Ms Berkhan referred to ticketing data. It showed that, in the three months prior to Ms C starting her new job at a Dominion Road workplace, FHE had spent only 15 minutes in the nearby side street where staff at that workplace had car parks. However, after Ms C started work there, FHE spent more than half of one shift in that street on one day.

[55] On two other specified days, GPS data showed FHE was in that street at times that were not consistent with expected work patterns and when there were no reported incidents which required his attendance there at those times. Relying on that information, and statements from Ms C's colleagues at her workplace, Ms Berkhan concluded FHE had been outside Ms C's workplace on 10 September, 6 November and 27 November 2024 and 23 January 2025 and his presence had resulted in Ms C feeling intimidated and harassed.

[56] Ms Berkhan rejected FHE's suggestions that AT's concerns could be addressed by assigning him to work in other areas of central Auckland, with increased monitoring of his system activity (monitoring email use and the GPS data available from his radio telephone and AT incident cars). She said those alternatives did not adequately address the damage done to the trust and confidence AT needed to be able to continue his employment.

### **An arguable case: an unjustified dismissal?**

[57] Against that background, the first question in considering the interim reinstatement application was whether the information available to the Authority at this stage showed FHE had an arguable case that how AT acted in carrying out its disciplinary process and reaching its decision to dismiss him did not meet the requirements of the test of justification set by s 103A of the Act.

[58] The s 103A test asks whether an employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time of the dismissal. In applying the test the Authority must consider whether, having regard to its resources, the employer sufficiently investigated allegations made against the employee; whether the employee was given a reasonable opportunity to address concerns raised by the employee; and, whether the employer genuinely considered any explanations given by the employee before making its decision to dismiss.<sup>8</sup>

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<sup>8</sup> Employment Relations Act 2000 s 103A(2) and (3).

[59] Establishing an *arguable* case of unjustified dismissal or disadvantage has a low threshold. It is usually crossed simply by the affected worker disputing the justification for the employer's actions that are said to give grounds for a grievance. This is because, once such a claim is made, the statutory onus falls on the employer to justify what it did and how it did so under the s 103A test.

[60] The merits and strength of FHE's case is considered later in this determination. At this stage of assessment, on the relatively low threshold applied, FHE has established an arguable case on at least the following propositions:

- (i) The process and decision to suspend his employment was not carried out correctly, because he was effectively suspended from work on 18 February without the AT representatives waiting for his comments on the proposal to suspend him, which he had been told he had until the next day to do.
- (ii) An investigation of complaints first made about him in June and August 2024 were unreasonably delayed until February 2025 and the contents of those complaints, including from an interview with Ms C in February, were not fully disclosed to him for response.
- (iii) Concerns about the reliability or credibility of the complaints were not fairly considered.
- (iv) Concerns about the quality or reliability of information used in AT's investigation were not adequately addressed. This information included a cybersecurity report related to FHE's allegation that his work email account may have been 'hacked' and the GPS location data and ticketing data AT had used for comparisons and conclusions about his whereabouts at various dates and times.
- (v) The investigation had a "retaliatory undertone" because of his earlier "whistleblowing" about ticketing arrangements, which had proved costly for AT to resolve.
- (vi) Alternatives to dismissal, such as changing his shift or assigning him to work in other patrol areas in the city, were not adequately considered.

**An arguable case: permanent reinstatement reasonable and practicable?**

[61] The available information and FHE's submissions were sufficient to establish an arguable case that his reinstatement would be practicable and reasonable if the

Authority's later substantive investigation did establish AT had failed to act fairly and reasonably in investigating its concerns and in deciding his dismissal was appropriate.

[62] If the dismissal decision was found to be unjustified, AT would not be able to rely on its earlier conclusions that his actions made him so untrustworthy that it could not continue the employment relationship.<sup>9</sup> The factual foundation for that view would have been found faulty.

[63] The prospect of reinstatement, its practicability and reasonableness, would then need to be assessed in a different light, on facts less negative about FHE's conduct and more positive about maintaining a productive employment relationship.<sup>10</sup>

[64] In that light there was an arguable case, if AT's actions were found to be unjustified, that it would be practicable and reasonable for AT to be ordered to reinstate FHE's employment. This was because AT is a relatively well-resourced organisation with access to specialist human resources support and assistance; roles as parking officers are available; FHE could be assigned to patrol other areas of the city, possibly on one of the two-officer patrols; and AT could adequately monitor his work through GPS information and its access to messages his work devices and work email account. There was no information about dysfunctional relationships with other AT staff or interactions with members of the public that could not be managed through AT's usual performance or other processes.

### **The balance of convenience**

[65] The balance of convenience weighs the potential effect on FHE if he were declined interim reinstatement against the potential effect on AT if interim reinstatement were granted. This comparison is sometimes referred to as considering the relative hardships to the parties and any relevant third parties.<sup>11</sup>

[66] The period under assessment is from the date of issue of this determination on the interim application until when the Authority's substantive determination on FHE's personal grievance claims is issued. An investigation meeting has been scheduled for late November. A determination would then be expected to be issued within the

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<sup>9</sup> *Harris v The Warehouse Limited* [2014] NZEmpC 188 at [162].

<sup>10</sup> Employment Relations Act 2000, s 4(1A)(b) and s 125.

<sup>11</sup> *Angus v Ports of Auckland Limited* [2011] NZEmpC 125 at [56].

following three months. On that basis, interim reinstatement, if ordered now, could be for a period of around six months.

*Evaluating strengths and weaknesses of merits of the case*

[67] Evaluating the relative strength or weakness of aspects of FHE's case assists with assessing the balance of convenience in this case. As noted earlier, this evaluation is reached from reading untested affidavit evidence and background documents and by considering the parties' submissions. Conclusions reached at this stage of the proceedings are provisional and subject to change when the evidence is fully tested through questioning at the eventual substantive meeting.

[68] FHE's case about the fairness of AT's inquiry and decision includes some complex and technical arguments about the reliability and credibility of some of the information available at the time. Some of his argument involves an assertion that he has been the victim of an elaborate ruse where fake messages have supposedly been written or sent posing as him. It is an assertion easy to make but hard to prove. Similarly, his criticisms of the adequacy of a cybersecurity report, which AT had considered did not support his suggestions about his account being 'hacked' on certain dates, and the accuracy of GPS data do not appear to answer some of the simpler points of fact Ms Berkhan had relied on for her conclusions. These included the eyewitness accounts of two people from Ms C's workplace that he was present within sight of her car park on certain days and other parts of the GPS data that show an apparently disproportionate period of time spent in that vicinity.

[69] Another aspect in the assessment of the relative merits of the parties' arguments concerns the extent of the inquiries AT should have carried out in order to reach its conclusions. The law requires those inquiries to have been conducted to a reasonable standard, not that of a judicial hearing or a criminal investigation. Provided allegations are "sufficiently investigated", an employer may justifiably rely on a reasonably found belief, honestly held, for its conclusion that serious misconduct has occurred.<sup>12</sup>

[70] The strengths and weaknesses of the arguable elements of FHE's case, summarised in paragraph [60] above, are assessed at this interim stage against that standard of reasonableness.

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<sup>12</sup> *Ritchies Transport Holdings Ltd v Merennage* [2015] NZEmpC 198, at [78].

(i) *Unfair suspension*

[71] The following principles assist in assessing whether a suspension, and how it was implemented, was justified:<sup>13</sup>

An employer is required to be fair to an employee when considering suspension. But that issue must be looked at in a sensible, flexible, and reasonable way to ascertain what the requirements of fairness are on the particular occasion and in the particular surrounding circumstances. By its nature, suspension often needs to be considered and implemented quickly, and the Court may need to take this into account in assessing the requirements of natural justice in any particular case.

A suspension is not justifiable on the basis of suspicions of misconduct but may be justifiable where the employer has good reason to believe that the employee's continued presence in the workplace will or may give rise to some other significant issue. This would include, for instance, creating adverse impacts on other employees, which should be handled promptly.

[72] In this case FHE has the stronger case than AT that he was, in fact, suspended on 18 February without getting a real opportunity to comment before it was imposed. Excluding him from the workplace so abruptly does not appear to have been justified on safety grounds. Any issue about contact with others concerned Ms C and Ms P, who were not at his workplace, rather than colleagues or general members of the public with whom he could have come into contact if he had been allowed to come to work on the next day. Although suspended he could still have asked AT on 19 February to consider allowing him to come back in to work on an alternative, interim arrangement, such as doing desk-based office duties or patrolling other areas. It was, however, unlikely such a proposal would have been genuinely considered, given AT's actions on 18 February.

(ii) *Delay in investigating complaints and complaints not fully disclosed*

[73] In light of the seriousness with which AT later said it regarded Ms C's complaint, there appeared to be legitimate concerns about the time AT took from August 2024 to make further inquiries and why, during those months, there appeared to have been no check on FHE's activities, or at least any apparent from the evidence available so far.

[74] AT personnel were in contact with Ms P in September 2024, when Ms C was said to overseas for three weeks, but had no further contact from Ms P until 17 December, a further two months after Ms C was due to be back. Arrangements to

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<sup>13</sup> *Mutonhori v Wairoa District Council* [2025] NZEmpC 44, at [80]-[81] (footnotes omitted).

interview Ms C were then not made until early February 2025. The incidents where FHE was reportedly sighted near Ms C's workplace had occurred during that intervening September to January period.

[75] According to Mr Lowton's affidavit, two members of AT's risk and assurance team interviewed Ms C and two work colleagues on 3 February 2025. They then handed over a "case file" which Mr Lowton reviewed with AT's head of parking and compliance Rick Bidgood. On 16 February Ms C agreed some information about her complaint could be provided to FHE. AT began its disciplinary investigation in the following week, sending FHE its initial letter of allegations.

[76] It is not clear, from documents presently available, whether FHE was provided with the entire content of the complaint made by Ms C, as contained in the 'case file' AT interviewers provided Mr Lowton. It is also not clear what parts of that complaint were provided, directly or indirectly, to Ms Berkhan once she was appointed as decision-maker in the disciplinary investigation which followed.

[77] FHE was later denied access to that information on what were said to safety and privacy grounds. The consequence of that situation was the real risk FHE did not have the opportunity to comment on all the information held by AT concerning Ms C's complaint and which, potentially, had shaped the view of those conducting the disciplinary process about an appropriate outcome concerning the future of his employment.

[78] On that aspect of procedural fairness, which could have made a substantive difference, FHE's concern appeared to have stronger merits than AT's reason for not disclosing to him during its disciplinary investigation all of what Ms C had said in her complaint and whatever contextual information she gave about it.

*(iii) Concerns about reliability or credibility of complaint not fairly considered*

[79] This concern about contextual information also related to another of FHE's argument which, again, appeared to have some merit.

[80] During the disciplinary process FHE provided Ms Berkhan with some information, said to be supported by information drawn from media coverage, referring to a court case in which Ms P was criticised for influencing what Ms C had said on other occasions about some earlier events in their family (which had not involved FHE).

[81] It is not clear how Ms Berkhan dealt with that information or a reference Ms P made in her communication with AT about a Police complaint made by Ms C about FHE. Ms Berkhan's decision letter of 24 April appeared to expressly exclude considering the context of what she referred to as "incidents" between him and Ms C that were "not connected" to his employment.

[82] The prospect that a complaint may be influenced by others or by other motivations is a relevant consideration in a fair investigation.

*(iv) Concerns about the quality or reliability of AT internal information*

[83] FHE's allegations about the reliability of a cyber security report and the accuracy of GPS location data were on weaker ground.

[84] A cyber security report addressed FHE's suggestion that a hacking incident could be responsible for emails sent from his work account. As noted in AT's submissions however, a hacking incident in August 2024 did not really explain an email dated 9 July 2024 sent from FHE's work account to Ms C's email address.

[85] The email of 9 July, shown on AT's email system as being sent from FHE's work email account to an email address of Ms C, made a number of personal comments and criticisms about her and described emotional distress FHE was experiencing. FHE subsequently said the email had inaccurate information about his personal circumstances and family, suggesting this showed it was not written by him.

[86] Given the apparent source, and AT's checking of its system, AT appears to have the stronger argument for a reasonable belief, honestly held, that the email was written and sent by FHE to Ms C. Its contents are similar to other draft emails, sent from his work email to his personal address.

[87] Given their emotional content, those emails support the conclusion made by AT, that FHE was also likely to have been, in later months, in the vicinity of Ms C's workplace more than was necessary to carry out his duties as a parking officer.

*(v) Retaliatory purpose*

[88] FHE's argument that the disciplinary process begun in February 2025 was retaliation for his part in disclosing some problems with ticketing procedure or criteria

was, at best, weak. No evidential basis was advanced for it, apart from a loose temporal proximity.

*(vi) Unfair failure to consider alternatives to dismissal*

[89] Ms Berkhan considered her findings about the nature of FHE's conduct meant a disciplinary outcome other than dismissal was untenable. She said alternatives FHE had proposed, such as patrols elsewhere, did not adequately address how severely his conduct had damaged AT's trust in him as an employee.

[90] The merits of that view depend on the eventual determination on whether AT could fairly and reasonably have concluded FHE did commit serious misconduct.

*(vii) Conclusion on substantive merits*

[91] Weighing the merits of the competing arguments, AT has the stronger case that its investigation was sufficiently thorough to reasonably reach the conclusions made.

[92] There are however some significant concerns about the extent of the information provided to FHE about Ms C's complaints, and the opportunity given to him to respond to the full context. This may, eventually, affect the Authority's findings about the fairness of the outcome and the steps taken to reach it.

*(viii) Prospects for eventual order for reinstatement*

[93] The relative merits of the parties' cases regarding the prospect of successful reinstatement were more clear cut. As already noted, reinstatement would need to be addressed only if FHE did eventually establish his dismissal was unjustified.

[94] Reinstatement is a primary remedy. As directed by s 125(2) of the Act, it must be provided "wherever practicable and reasonable" when a determination of unjustified dismissal has been made and the remedies sought for that personal grievance include reinstatement. Denying reinstatement, and awarding only money compensation in such cases, is recognised in case law as enabling a system of "licensing" for dismissals, that is permitting employers to go ahead with an unjustified action provided they are prepared to pay a monetary price for having done so.<sup>14</sup>

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<sup>14</sup> *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421, at 436.

[95] If a finding of unjustifiable dismissal was made, reinstatement was likely to be *practicable* in the sense that AT had a large contingent of parking officers, so a role would be available. There was no evidence that FHE had dysfunctional relationships with his colleagues or managers that would be an impediment to successful reinstatement, if ordered.

[96] AT has the necessary management and human resources systems to enable FHE's reinduction to the workforce and update any training on work systems. It also has the ability to assign FHE to work in a different area of the city and the technology to monitor, as it can do with all officers, where and how he is working.

[97] AT's arguments that such an order would not be *reasonable* had less merit than FHE's argument that his reinstatement could be reasonable.

[98] AT said it no longer had trust and confidence that FHE could be relied on but that reasoning faltered if there was a finding that AT was not justified in having, earlier, reached that conclusion.

[99] AT said it could not in good conscience agree to FHE being reissued with the statutory warrant necessary to carry out his duties as a parking officer "given the findings that have been made". This reasoning, again, would not stand in the scenario that those findings were unjustified.

[100] Similarly, AT's concern that FHE might be a risk to the public or other colleagues would not be sustainable as a reason against reinstatement if its concern was found to be unjustifiably reached.

[101] Overall, as a matter of initial assessment, FHE's prospects for eventual reinstatement were stronger than the arguments of AT opposing that prospect. It was, however, a scenario that would only be considered if FHE had established that the outcome of his dismissal, and how that outcome was reached, had been unjustified. His prospects on the justification question were significantly weaker.

#### *Effect on third parties*

[102] Returning to the balance of convenience in the interim period only, the evidence did not show a substantial risk of negative effects on third parties. There was no evidence that FHE would not be able to work productively with colleagues.

Supervision and monitoring of his work, along with conditions placed by the Authority on any interim reinstatement order, could minimise the risk of contact with Ms C and Ms P.

[103] AT's argument that, if reinstated on an interim basis, FHE could behave inappropriately towards other members of the public while working as a parking officer, was not compelling. The concerns about his conduct in relation to Ms C and Ms P had arisen in a particular, personal context. He was previously in a personal relationship with Ms C and had, for some of that time, lived in Ms P's house. They were not connections that applied to members of the public generally with whom he might come in contact.

#### *Relative hardships on the parties*

[104] The additional effort and time that an order for interim reinstatement would impose on AT was a relatively lesser hardship for the agency than that faced by FHE during the interim period. It has the resources to make necessary working arrangements.

[105] FHE faced this period without his regular income on which he was relying to meet mortgage commitments on a recently purchased residence. His affidavit evidence said, at the time of writing, he had been unsuccessful in several job applications and had no income. It did not address what prospects for support in the interim period he might have from family, friends, financial institutions or from successfully obtaining temporary employment.

#### *Operational difficulties*

[106] One specific factor in the balance of convenience in this particular case concerned the issuing of the statutory warrant necessary for FHE to work as a parking officer if he were reinstated on an interim basis. The warrant is required under the Land Transport Act 1998 to issue parking infringement notices and carry out other duties as a parking officer.

[107] FHE's warrant was cancelled after his dismissal. In her affidavit Ms Berkhan said the AT manager responsible for issuing warrants could not issue another warrant to FHE given the findings made about his conduct. This was because the relevant AT manager, in this case Mr Strawbridge, could not be satisfied that FHE met the 'fit and

proper person' test that was one of the factors which had to be considered in deciding whether or not to issue, or re-issue, a warrant.

[108] This was a particular problem in this interim period. Until the substantive investigation was held and findings made about the justifiability of AT's action, AT was arguably entitled to rely on its own earlier conclusions. It had not, at this stage, been found to be wrong, albeit it was alleged to be.

[109] It was a difficulty which was, however, not necessarily an impediment to an order for interim reinstatement. If the order was made, AT would have to consider re-issuing a warrant. If the relevant manager considered the warrant could not be ordered, because of his assessment of the fit and proper test, AT would still have to comply with the effect of an interim reinstatement order, by finding whatever work FHE could reasonably be asked to do for AT without a warrant and to pay him. If behind-the-scenes or other unwarranted work was not available, AT would have to reinstate him to the pay roll only. While this would mean AT lost the usual benefit of the wage-work bargain, that would be a consequence of its own decision about the warrant, and not one by which AT could defeat an order lawfully made under the Employment Relations Act.

[110] The effect of this difficulty is, therefore, neutral in the assessment of the balance of convenience. It is not necessarily an impediment to the interim reinstatement if that was warranted on the assessment of other factors.

#### *Conclusion on the balance of convenience*

[111] On the assessments made of the relative merits of each party's case and the relative hardships during the interim period, the balance of convenience does not support ordering interim reinstatement.

[112] AT appears, at this stage, to have the stronger argument that evidence of FHE's repeated and unusual visits to the vicinity of Ms C's workplace was sufficient for its decisionmaker to form a reasonable belief, honestly held, that FHE's activity amounted to serious misconduct, measured on the criteria in AT's policy against harassment. It is an untested assessment, subject particularly to better evidence about what information was actually available to AT and whether limits on its disclosure may have

had a substantive effect on FHE's ability to respond fully in the disciplinary process and, if so, whether that resulted in him being treated unfairly.

**Overall justice: where does it lie meanwhile?**

[113] This last step stands back from the details about the arguable case and the balance of convenience and considers the overall justice of the matter, from now until its eventual determination.

[114] While there are clearly arguable facets of FHE's claim that his dismissal was unjustified, the initial assessment of the merits of his claim overall weigh against his reinstatement on an interim basis.

[115] If his dismissal is later found to have been unjustified, declining interim reinstatement at this stage is unlikely to reduce the prospects for his eventual reinstatement on a permanent basis.

[116] For the reasons given, FHE's application for interim reinstatement is declined.

[117] Timetable directions are already in place for the parties to lodge witness statements and documents for the Authority investigation of FHE's personal grievance.

**Costs**

[118] Costs are reserved, pending the outcome of the substantive investigation of FHE's grievance application.

Robin Arthur  
Member of the Employment Relations Authority