

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**

[2024] NZERA 776
3341880

BETWEEN JGO
 Applicant

AND MGN
 Respondent

Member of Authority: David G Beck

Representatives: Amy Keir counsel for the Applicant
 Bronwyn Heenan, counsel for the Respondent.

Investigation Meeting: 19 December 2024.

Submissions Received: 19 December 2021 from the Applicant
 19 December 2021 from the Respondent

Date of Determination: 23 December 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] JGO worked for MGN from July 2012 until 14 November 2024 when they were summarily dismissed. JGO claims the dismissal was procedurally and substantively unjustified and seeks interim and permanent reinstatement and compensation. MGN 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), JGO has also 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detail that may reveal their identity and/or the publication of any detail that the Authority considers ought not to be published.

[3] In order to consider the application on an interim basis I need to be satisfied that a 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.

[4] The full Employment Court in *MW v Spiga Ltd*¹ is a recent decision where the majority held that the existing presumption of open justice should only be departed from where sound reasons exist. This affirms the existing leading authority of the Supreme Court in *Erceg v Erceg*.² The majority in *Spiga* set out a twofold test:

- (1) Firstly, there must be “reason to believe that the specific adverse consequences could reasonably be expected to occur.”
- (2) Secondly, the “Authority or Court must consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case.” The Court said this part is a weighing exercise and that equity and good conscience may be involved.³

[5] The court also suggested the following “example” matters may be relevant balancing factors:

- (a) the circumstances of the case;
- (b) the interests of the person or entity applying for a non-publication order;
- (c) the interests of the other party or parties to the litigation;
- (d) the interests of any third party;
- (e) the public interest, including the rights of media;
- (f) any further issues of equity and good conscience; and
- (g) tikanga and its principles, values, or concepts.⁴

[6] JGO’s counsel sought non-publication briefly citing that the proceedings involve material not in the public domain in respect of matters where JGO could expect confidentiality. Further the negative impact on reputation and future job prospects was seen

¹ *MW v Spiga Ltd* [2024] NZEmpC 147.

² *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [13].

³ Above n 1 at [88] and [89].

⁴ At [94].

as at issue should details of the circumstances of JGO's dismissal be made public at an interim stage, when JGO was seeking reinstatement to their former role.

[7] MGN's counsel indicated they had no objection to the application for a non-publication order in respect of the interim reinstatement application and interim investigation meeting. If the application is intended to extend to the substantive hearing, MGN indicated they may wish to be heard on that in advance of any further investigation meeting but did not advance any further submission.

[8] In weighing the factors identified, I was hampered by a lack of corroborating evidence on specific issues other than the sensitive nature of the matters in dispute and contextual matters that indicated JGO was under considerable strain pertaining to health and domestic issues.

[9] I find the circumstances of the employment relationship breakdown and the factual matrix (specifically, JGO's personal circumstances) do lean toward non-publication as sought but only on an interim basis, and the Authority expects further detailed submissions should this matter proceed to an investigation meeting on a substantive basis.

[10] A continuing non-publication order is now in place on an interim basis.

[11] I now turn to the application for interim reinstatement that was lodged by JGO on 26 November 2024.

The Authority's investigation

[12] 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?

[13] The following brief summary is based upon affidavit evidence and documentation provided by both parties and my viewing of relevant CCTV footage.

[14] JGO worked in a responsible 'public facing' job that objectively requires the employer to impose upon them a duty of maintaining the utmost trust and confidence due to the nature of the role and wider working environment. JGO had been in the position prior to dismissal for approximately twelve years and was hitherto well regarded by MGN. MGN is a large nationwide organisation with developed policies pertaining to its employees. The work is of a sensitive nature.

[15] On the afternoon of 7 June 2004, JGO while in uniform, was involved in an incident at a food store. JGO left the store without paying for \$110 worth of various grocery items that they had selected and concealed in a grocery bag slung over their shoulder while exiting the store and only paying for one grocery item at a self-service checkout. MGN in objectively viewing the CCTV footage says they concluded JGO did not act in inadvertent manner.

[16] From the CCTV footage, upon leaving the store, JGO is seen placing the grocery bag in a supermarket trolley they had used during their shop, and then placing the bag in their vehicle boot or hatch, closing it, then returning the supermarket trolley to a different area of the store car park. At this point, JGO was approached by a store worker and asked to return to the store. The store workers indicated they had contacted the police but with their agreement as JGO accepted the goods had not been paid for, JGO left to collect a child from school and then returned and completed the purchase. The police did not arrive at the store before JGO left or subsequently. Documentation from the police shows they were contacted by the store owner on 7 June and apprised of their concerns.

[17] On 11 July, a police inspector contacted MGN to report that JGO had been involved in a 'shoplifting' incident while in uniform (that displays MGN on each shoulder of an anorak) and that the store owner was aware of JGO's employer.

[18] JGO did not inform their employer of the incident and on being contacted by a police officer on 23 July, was offered (during a phone conversation) to participate in a restorative justice process, Te Pae Oranga (TPO). JGO was not interviewed or charged over the incident as she chose the TPO process. On the same day, the police advised MGN that JGO had consented to participate in the TPO process suggesting in an email that this would allow JGO to "get some help."

[19] JGO says the police officer had told them their employer need not know about the incident. JGO opted for the TPO process and signed a form to confirm the referral on 24 July. The form has a preamble stating JGO understood that in opting for the referral, JGO accepted “full responsibility for committing: Shoplifts (under \$500)”. The form then in part, states:

By participating with the Te Pae Oranga process, and by completing the agreed outcomes, you will not have to appear before a court, and you will not receive a conviction for this offence.

If you wish to deny the offence, fail to appear at the meeting, or fail to complete the sanctioned tasks, you may be summoned to

[20] JGO has no history of any other offending and they subsequently completed the TPO process (as confirmed by a letter from a TPO provider of 16 September 2024).

[21] I observe the form JGO signed, only provided the police with the right to share information with a participant’s employer in limited circumstances. A police internal legal opinion disclosed to JGO and the Authority, gave the view that the disclosure before the TPO process had commenced was inappropriate.

[22] MGN asserted that they did not solicit the information and resolved to wait a reasonable period until the police contacted JGO, to give JGO a chance to inform them of the incident and its aftermath.

[23] Having not heard anything about the incident from JGO and harbouring wider concerns about the nature of the incident and its perceived impact on the employment relationship, MGN by a letter of 30 July invited JGO to “a Formal Employee Meeting (Disciplinary Interview) to discuss an incident that occurred on 7 June 2024”. The letter disclosed that the police had notified MGN of the incident and that JGO had agreed to the TPO process. The letter, from a group manager, cited two of MGN’s policies on being respectively, accountable, and trustworthy that had potentially been breached. It further outlined potential outcomes if the breaches were established up to and including dismissal for serious misconduct. Five documents were attached to the letter – a disciplinary policy; a code of conduct; a declaring of conflicts of interest policy and two documents relating to the notification by NZ Police. MGN say that the appointment of the investigator and decision-maker involved a manager from an alternative work location.

[24] JGO was apprised of their right to be represented and was offered confidential counselling support.

[25] The meeting sought in the above letter, occurred at a neutral venue on 2 August and JGO and the Authority was provided with two sets of notes of the meeting. JGO chose not to be represented. The MGN group manager attended with an HR support person.

[26] At the meeting, JGO detailed significant life pressures and health issues they were experiencing at the time of the incident that they recounted in detail, broadly consistent with the CCTV footage (that at this point JGO had not viewed). However, later in the meeting is recorded as claiming “I don’t have any recollection of the incident.”

[27] JGO was specifically asked during the meeting why they had not disclosed what had happened to their employer. In response JGO is recorded as saying it was akin to an unrelated work procedure when they could not report till all the facts were gathered and that they were waiting for their doctor to confirm their mental state because they did not know why the incident had happened. This was a stance JGO maintained in their affidavit seeking reinstatement. In addition, at this stage (2 August) JGO was asked to disclose the CCTV footage and the document they had signed to access TPO. The latter document was not provided for MGN until the application for reinstatement was filed and the Authority directed its disclosure. Permission to view the CCTV footage was also denied.

[28] Despite being recorded as saying they had come to the meeting not to make excuses or convince the employer of their innocence and, that they took ownership and responsibility and were feeling accountable for what had happened, JGO is also recorded as saying her actions were not intentional and they felt they were ‘auto-piloting’ and their memory was very “foggy and patchy”. JGO also assured they would be following up a doctor’s appointment. The notes record JGO indicating they had no knowledge of a disclosed email that alleged they stole items and is recorded as saying this was not true.

[29] JGO was not suspended and they continued working. By letter of 8 August MGN suggested to address the identified stressors that JGO take paid special leave and the EAP offer was further extended. JGO declined the leave saying their doctor had recommended

their anxiety was best controlled by keeping busy and that they had not been referred to any specialist treatment provider.

[30] On 16 August, the group manager (and ultimate decision-maker) and the HR officer, met with two senior police officers (one being the inspector who had alerted MGN to the incident) to view the CCTV footage. The Authority was provided brief notes of the meeting that showed the two police officers guided MGN while viewing the footage, (in my view improperly influentially) placing their 'gloss' on what was being watched including suggesting that JGO was likely to have done this before but that was not proven (a suggestion, recorded as being made three times) and an assertion, after the TPO process was explained, that it was "still theft".

[31] On 19 August MGN's HR officer also phoned the shopkeeper and provided the Authority with notes of this conversation. This conversation with some prompting elicited the shopkeeper's view that reinforced what the police concluded. The HR officer also in my view, inappropriately disclosed MGN was in the process of a disciplinary investigation involving JGO. Likewise, however JGO according to the shopkeeper, inappropriately identified her specific workplace and that there were personal issues of mitigation.

[32] The shopkeeper also indicated JGO who had been a regular customer prior to the incident, had returned to their shop about two weeks later and they had no problem with this.

[33] By way of a letter to JGO of 20 August, MGN's general manager communicated they had viewed the CCTV footage and described their perception of what it showed - this was a view that JGO had acted with deliberation and intention. MGN's manager's view was reinforced by an expressed belief that JGO's participation in the TPO could only follow from them taking responsibility "for your offending." The manager concluded a preliminary view that the allegations levelled had been substantiated and amounted to serious misconduct. Reference was made to JGO being in MGN's 'uniform' at the time of the incident and that this raised an issue of "potential reputational risk." Further, the manager cited a concern that non-disclosure at the time the incident occurred did not recognise a policy obligation (said to be contained in MGN's Declaration of Interest Policy) and the actions of JGO during the incident transgressed MGN's code of conduct resulting in a

“complete loss of trust and confidence in the employment relationship”. Attached to the letter were eight appendices including the shop owner’s online report: the police report and CCTV still shots and three MGN policy documents.

[34] The letter concluded with a proposal JGO be summarily dismissed but before this being finalised, JGO was invited to meet the manager and HR officer on 21 August, to provide a response to the proposal. The manager strongly urged JGO to obtain independent advice and bring a representative or support person to the meeting.

[35] JGO engaged counsel and it was agreed by MGN the meeting would be delayed to 26 August. In the interim, by way of a letter of 23 August, counsel for JGO suggested a preliminary decision was premature because JGO had not had an adequate opportunity to provide all the information they wished MGN to consider. Counsel also suggested several factors, including untested factual summaries being unreliable and opined that the unverified issue was whether JGO “actions in leaving the store without paying for the bag of groceries were absentminded or deliberate.” Counsel asserted their client “says it was absent minded” and that their explanation of intent was more reliable. The letter from counsel went on to suggest no serious misconduct had been established due to a number of factors. The penalty proposed was contested as being disproportionate in the circumstances and alternatives to restoring trust were proposed. A written statement from JGO was attached to the letter and counsel asked that the preliminary decision be withdrawn in favour of a new preliminary decision after the letter and JGO’s statement had been considered in mitigation.

[36] MGN agreed to the request made to defer the meeting and agreed to issue a further preliminary decision.

[37] JGO’s statement expanded upon her responses at the first disciplinary meeting and gave wider context to why she had been particularly stressed and distracted on 7 June.

[38] On 25 August, JGO provided MGN with a letter from her GP who described observations gained during a 13 August consultation. The GP reiterated the significant personal and health stressors JGO was experiencing as context to the 7 June incident and described a diagnosis of severe anxiety. The GP also noted JGO had disclosed a frustration with a lack of career development and difficulty with peer relationships in the workplace.

There was no mention of any further explanation for JGO's actions during the 7 June incident nor any indication of any ongoing treatment plan or any reference to a specialist mental health practitioner.

[39] On 27 August MGN again offered JGO paid special leave that was declined.

[40] Following an exchange of correspondence through counsel over consent to release the CCTV footage of the incident, it was confirmed on 16 September that the footage would be released to MGN's counsel's law firm but with an undertaking that MGN could not view it. MGN on this date also provided JGO with copies of correspondence between them and the police and the shopkeeper.

[41] On 24 September MGN in a letter to JGO, clarified the allegations and provided an analysis from their counsel of the CCTV footage and stills from the footage. JGO was invited to a further disciplinary meeting on 26 September. The clarification (with redactions) was it is alleged that:

1. You shoplifted from [store identified] on 7 June 2024 while wearing [MGN's] uniform.
2. You acknowledged guilt to the offence of shoplifting when you agreed to participate in the TPO.
3. Your actions in committing an offence in a public place while in [MGN's] uniform have harmed [MGN's] reputation and brought it into disrepute.
4. You did not proactively disclose to me or [MGN] that the shoplifting incident had occurred, despite you being clearly identifiable as a representative of [MGN] in your uniform.
5. You did not proactively disclose to me or [MGN] that you acknowledged guilt to the offence of shoplifting or agreed to participate in the TPO.

[42] MGN offered to "work through the CCTV footage" with JGO. The letter emphasised should the allegations be proved; they could amount to serious misconduct. The meeting had to be deferred to 22 October by a combination of counsel unavailability and MGN's group manager being on scheduled leave.

[43] On 16 October JGO's counsel wrote to MGN and raised concerns about information provided, its inappropriate source (the police) and the timeliness of such disclosure. JGO asserted the offence was objectively considered minor by the police hence the offer of a restorative justice option directed at rectifying any harm done. Counsel then provided a submission on whether JGO's conduct could be categorised as 'serious misconduct outside of work' asserting: "There is nothing what [JGO] is alleged to have done that demonstrates [JGO] is no longer fit for [their] role. Counsel noted JGO had maintained their role up to this point in the disciplinary process. The notion of disrepute was also challenged as not being justifiable in the circumstances of a restorative justice outcome where the shopkeeper had moved on.

[44] Counsel in reiterating mitigating health and personal factors noted there may be a medical explanation for the 7 June incident and that counsel had asked JGO to seek further medical advice and the outcome of this would be provided as soon as possible.

[45] On 22 October JGO with counsel attended a further disciplinary meeting with MGN's group manager and HR officer. The Authority was provided with an uncontested transcription of the meeting that came from a recording of the meeting. The HR officer attended 'in person' with the group manager joining the meeting by an audio-visual link (AVL). By this point in time, JGO had not provided any further medical information for MGN to consider. MGN's group manager emphasised the purpose of the meeting was to allow them to clarify any matters arising including those pertaining to the CCTV footage and to hear what JGO had to say before a second preliminary decision was issued.

[46] JGO's counsel however, indicated JGO had instructed her to answer questions and speak on their behalf. This included firm advocacy around a belief that MGN had no right to view the CCTV footage and a suggestion it be disregarded and a reiteration of the nature of the incident including JGO not being formally interviewed or charged by the police.

[47] Counsel for JGO stressed that JGO may have been suffering a "dissociative episode in which she can't particularly be held responsible for her actions." Further, counsel indicated she had "last week" advised JGO to return to their GP to disclose what were consider additional and hitherto undisclosed past dissociative episodes and stressors. Counsel

disclosed the GP had opined a dissociative episode was a potential explanation for JGO's conduct and he had suggested a psychiatric referral. Counsel advised JGO had been given a referral to a psychiatrist and had made contact to arrange a consultation. On being pressed for the date of the psychiatric consultation JGO indicated they had not been given a date and had been told it could be between two weeks or more (perhaps next year). JGO said they went back to their GP and asked they provide a preliminary report as soon as possible.

[48] At this point in the meeting, the group manager offered further special paid leave and expressed a concern about reoccurring dissociative episodes posing an environmental risk at work but JGO's counsel declined the leave offer on their behalf saying JGO wished to remain at work, and they were better managing stress since the June incident.

[49] A dispute then ensued between counsel and MGN's group manager on whether they could conclude a criminal offence had been committed as opposed to accepted wrongdoing. MGN's group manager expressed a view that; "It might be that the nexus remains is wearing the uniform off duty and committing an offence so that's where it sits with me."

[50] Despite initially saying the CCTV should be ignored counsel for JGO did respond reiterating JGO's previous explanations on specific observations MGN made.

[51] Counsel outlined a summary of case law concerning misconduct out of work factors favourable to JGO and their applicability to the decision making but emphasised JGO recognised they "did a bad thing" but thought there was an explanation for it that they could confirm once further medical advice was received.

[52] After the meeting MGN's group manager indicated a deadline of 25 October to receive further medical information. In the event none was provided and in a letter of 31 October the group manager provided a second preliminary decision. The letter set out in considerable detail how a preliminary decision had been reached with reference to the MGN code of conduct. The group manager indicated they had formed the view that the allegations are upheld i.e. that JGO in summary, had:

1. "Shoptlifted" on 7 June while in MGN's uniform.
2. Acknowledged "guilt/wrongdoing" by agreeing to the TPO process.

3. Engaged in actions in a public place that have harmed MGN's reputation and brought it into disrepute.
4. Not proactively disclosed the incident and acknowledgment of their "guilt/wrongdoing to the offence of shoplifting" or participation in the restorative justice process.

[53] MGN's manager concluded a preliminary decision was summary dismissal for serious misconduct. Before finalising the decision, the MGN group manager invited JGO to a meeting on 6 November to hear their feedback on the preliminary decision to summarily dismiss them.

[54] After receiving the above letter on 29 October JGO provided a copy of a GP report dated 29 October addressed: "To Whom it May Concern". JGO's GP, who indicated they had been their GP since 2004 and was acquainted with JGO's family circumstances and expressed stressors arising from such, outlined JGO's physical health issues that they noted had around late May 2024 flared up and had caused "quite marked fatigue". The GP indicated that JGO had recalled to them on 13 August, the 7 June incident that JGO was under investigation for. The GP outlined JGO "clearly described she had no awareness of what happened until [JGO] discovered the items in her grocery bag when arriving back at her car." The GP opined:

When I went over what was happening at work for [JGO] and also at home as detailed above it was pretty clear to me that [JGO] was very stressed and probably had a dissociative episode.

[55] The GP went on to describe what a dissociative episode involved describing it as a "mental health condition" and in their view this should be taken account as "out of character" behaviour of JGO. The GP urged MGN to consider the factors they had highlighted in managing JGO. Again, the GP did not outline what treatment options they had suggested to JGO and did not refer to having made a psychiatric referral.

[56] JGO without representation, met the group manager by AVL and HR officer (in person) on 6 November. The minutes disclosed to the Authority show JGO urged the decision-maker to take a holistic view of JGO and their individual circumstances. The

minutes disclose the group manager explaining the GP letter had been taken account of and the 31 October second preliminary decision being used as a guide to the conversation.

[57] A discussion of the lack of timeliness on provided medical information elicited from JGO that they had a hitherto undisclosed letter from a psych referral agency, indicating to set up an appointment a specific referral letter from their GP was needed and a letter from their lawyer. This led to JGO saying “it could be next year before I get an appointment.”

[58] At the investigation meeting I was provided a copy of a 31 October letter from the Psych referral agency to JGO GP that appeared to confirm while their referral had been made to specifically prepare a report in relation to JGO’s employment situation, the referrer also required it be “requested by the patients lawyer with proper instructions and processes” before any triaging by their clinical team could occur. What this showed was JGO may have taken insufficiently timely steps to provide their employer with a specialist report on their claimed mental health status at the time of the incident.

[59] JGO then disclosed what they wanted to say at the second meeting (despite instructing their counsel to talk on their behalf) was they had viewed the CCTV footage with their partner (also an experienced employee of MGN in a similar role) and agreed with their assessment that “it’s not looking very good”. JGO then described “it was as though I was looking at it as a third person – from a different perspective.” JGO then suggested that when the group manager and HR officer had, accompanied by the police officers, viewed the CCTV footage it was “with bias in mind.” The group manger denied this assertion saying they viewed it with an open mind and reminded JGO that their initial explanation was that if the shopkeeper viewed the footage, they would have had a different view.

[60] JGO then described the circumstances (phone conversation with police officer) that led her to the TPO option, indicating “To go down the path to not being charged you have to admit it.”

[61] When pressed on not in MGN’s view that disclosure of the incident in a timely fashion was an obligation and a core trust and confidence matter, JGO reiterated their stance that they needed to have all the information on their mental state before choosing to disclose the matter.

[62] At the close of the meeting MGN's group manager reiterated a view that JGO's judgment in not disclosing the incident was fundamental to the decision making.

[63] By way of a letter of 14 November 2024 that was delivered by another senior manager and the HR officer at a meeting of the same day, MGN confirmed a decision to summarily dismiss JGO. MGN's group manager set out the reasons for the summary dismissal decision and specifically in response to a submission that this was a premature decision with all medical evidence not yet available noted:

I remain of the view that it is not reasonable to wait for an unknown period of between two weeks to potentially next year for you to provide relevant information, be re-triaged and be assessed by a specialist, particular in circumstances where you have been aware of my concerns since my letter dated 30 July 2024.

[64] A personal grievance was raised by letter of 25 November and responded to on 28 November. In the interim on 26 November, an application seeking interim reinstatement was made. The Authority held a teleconference on 29 November and directed the parties to urgent mediation.

[65] While a 19 December investigation meeting was set to deal with the interim application and a direction was made that JGO disclose the TPO referral agreement, the Authority offered the parties an alternative substantive investigation meeting in early February 2025. JGO declined this suggestion in favour of pursuing the matter on an interim basis.

[66] Mediation took place on 11 December but matters remain unresolved.

The approach to an interim injunction/legal test

[67] The well-established legal framework that 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?

[68] The ‘threshold’ to be met in assessing that a claim is either frivolous or vexatious is arrived at on an assessment of the evidence and the submissions of the parties and is not just an exercise of bare discretion.⁵

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

- (a) Is there a serious question to be tried that JGO was unjustifiably dismissed?
- (b) Is there a serious question to be tried that as a consequence of any finding of unjustified dismissal JGO should be permanently reinstated?

Is there an arguable case for unjustified dismissal?

[70] JGO’s counsel in submissions suggested JGO’s application to be strongly arguably, 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. This submission emphasised a view that the framing of the issue as admitted theft while in work uniform was a defective categorisation of the issue. The incident that led to the dismissal was in submissions described as ‘more nuanced’ and that it was not theft nor was it admitted to so be. It was suggested that JGO had (in summary):

- (a) Immediately when approached outside the grocery store explained their failure to pay was an oversight based on distraction and their “arrangement of items across two bags.”
- (b) Not stolen the items but immediately returned to the store to pay for them.

⁵ *NZ Tax Funds v Brooks Homes Limited* [2103] NZCA 90.

- (c) Not admitted to theft; had not been charged with an offence and had admitted to a “wrongdoing” that had been rectified by participation in a restorative justice process.
- (d) Subsequently considered the entire incident may have been caused by an unconfirmed psychological condition as mooted by JGO’s general practitioner and which if confirmed would establish no intentional conduct was involved to deprive the shop owner of the goods in question.

[71] On the latter point JGO’s counsel submitted that a fair and reasonable employer would have awaited the outcome of the specialist psychological assessment to aid a decision on whether JGO could be held responsible for their actions on 7 June. Counsel also asserted the police’s inappropriate involvement had caused undue prejudice and procedural unfairness. On the failure to disclose issue counsel argued the relevant cited policy was unclear and not specifically noted as an obligation to disclose a mere engagement in the criminal process (in contrast to being charged or convicted) and was in any case being applied on an overly narrow and technical basis. In the alternative the wrongdoing was described as minor as evidenced by the police offering the restorative justice option.

[72] In concluding submissions on the dismissal, counsel for JGO asserted even if a finding of serious misconduct was justified alternative outcomes to dismissal had not been sufficiently explored. Emphasis was placed on the fact that JGO had not been suspended and had worked on through the disciplinary process (including acting up in a more senior role) which highlighted ongoing trust and confidence.

[73] In contrast counsel for MGN asserted the dismissal was justified on a procedural and substantive basis citing a breach of MGN’s policies including the code of conduct. The well-established legal premise that conduct outside the workplace that brings an employer into disrepute and impacts upon trust and confidence was at issue in this particular context of the position being one where the utmost trust was squarely at issue and the nexus between JGO’s conduct and the workplace was clearly established given JGO was in uniform at the time of the incident. Counsel observed that an aggravating factor that caused MGN to consider JGO’s actions to be serious misconduct was from their perspective the inexplicable failure to be open

and communicative about the incident and the TPO process that offended against good faith principles and disclosure obligations. Counsel described the cumulative failings in this aspect as conduct that deeply impaired the basic trust and confidence essential to the employment relationship.

[74] This has to be balanced against the employer's apparent reluctance to place enough weight on compelling mitigating personal circumstances.

[75] In addressing the issue of the allegation that the dismissal was premature, MGN's counsel suggested adequate time was made available for JGO to submit additional medical information due to MGN offering paid special leave (twice) that was declined and accommodating requests to adjourn or reschedule meetings and, the fact of the time between the issue being identified and the decision to dismiss being made (around 14 weeks or 17 weeks if the starting point was the date of the incident).

[76] In submissions on why JGO was not suspended given that utmost trust and confidence was at issue, counsel cited a commitment to ensuring no allegation of pre-determination was made and the need to maintain JGO's right to confidentiality.

Assessment

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

[78] From the untested affidavit evidence, contextual correspondence, documentation, and CCTV footage I consider that an arguable case has been made out that JGO may have been unjustifiably dismissed. I base this on the following narrow grounds:

- (a) Concern about how MGN interacted with the police once information about the 7 June incident was disclosed and the suggestion that this may have prejudiced the outcome.
- (b) Whether MGN can reasonably establish JGO was adequately or constructively aware of the relevant policies allegedly breached

- (c) The possibility that a fair and reasonable employer, given all the circumstances (including JGO's health and personal stressors that appeared significant), would have afforded more time or made alternative arrangements to deal with the ongoing and imprecise delay in obtaining a specialist diagnosis.
- (d) Whether all relevant contextual factors, including JGO's service record and potential cultural factors were fairly considered and whether alternatives to dismissal were fairly considered.

Is there an arguable case for permanent reinstatement?

[79] 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".⁶

[80] MGN's counsel asserted in submissions that reinstatement is neither practicable nor reasonable given the significant breakdown in trust between the parties and the fact that the particular workplace has an exceedingly high trust model and has distinct ongoing potential vulnerabilities if it cannot maintain a high degree of trust and confidence in its employees. The job JSO occupied was said to involve significant discretionary powers and involvement in sensitive proceedings where personal credibility is a high requirement. JSO's apparent failure to recognise that the 7 June incident warranted immediate disclosure by reference to it only becoming apparent when the police disclosed it, was seen as an aggravating factor to displace the possibility of restoring ongoing trust and confidence.

[81] It was acknowledged that unusually no evidence was led from co-workers due to the maintenance of confidentiality and the fact that the misconduct occurred outside the workplace. It would appear from the evidence without judging such either way, that the erosion of trust and confidence stems from an institutional rather than local basis.

[82] In contrast, JGO's counsel noted MGN is a large employer with a diverse range of work that, although JGO's position remains vacant (by agreement up to the interim outcome),

⁶ Section 125(2) Employment Relations Act 2000.

may allow for deployment of JGO elsewhere (impliedly where a higher degree of trust is not evident or possibly less 'front line' work).

[83] Assessing practicality involves an overall assessment of the prospects of re-establishing the employment relationship and normally includes a factor of whether I consider JGO could be a sufficiently harmonious employee if they were reinstated. It does not however, 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.⁷

[84] Assessing the separate requirement of reasonableness can account for the potential impact on the employer and other employees and also where appropriate third parties.

[85] Counsel for MGN in trying to establish that MGN has lost all trust and confidence in JGO and therefore reinstatement is not practicable or reasonable, points to obstructive and potentially misleading behaviour during the disciplinary process (including reluctance to disclose TPO documentation and CCTV footage). Whereas counsel for JGO asserted that contextual factors including outrage at how MGN obtained what they saw as confidential information from the police may adequately explain JSO's defensiveness.

[86] I also take note an 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.⁸

[87] JGO explained how important the job was to their family's economic well-being and her regard and pride in their role and high job satisfaction. JGO also noted a willingness to engage in any process deemed necessary to restore trust.

[88] Finally, MGN asserted reinstatement should not be made available to JGO because they have contributed to the circumstances given rise to their dismissal and to reinstate would

⁷ *Hong v Auckland Transport* [2019] NZEmpC 54 at [66].

⁸ At [68].

ignore the serious misconduct engaged in.

Assessment

[89] I am of the view that there is a clear negative nexus between the nature of the incident and JGO's potentially ongoing role. I consider JGO's conduct and approach to communication after the incident and during the disciplinary process, may not have objectively demonstrated an attempt to maintain trust between the parties. Because the maintenance of a high degree of trust and confidence is necessary in the specific employment context due to the nature of the role, I consider reinstatement on a permanent basis would be distinctly problematic.

[90] I conclude in all the circumstances that there is not a strongly arguable case for permanent reinstatement.

Balance of convenience

[91] 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. In this matter I take three factors into account:

1. The relative strengths of each party's position.
2. The impact of making an interim order – the status quo or restoration of the employment relationship albeit on an interim basis.
3. The adequacy of available remedies should an interim decision be reversed.

[92] JGO while suggesting they have a strong claim, says the impact of not reinstating on an interim basis is that they are uniquely unable to find alternative similar employment due to the nature of the summary dismissal and reasons for such. This is according to JGO, compounded by the lack of available career options available in their specialist skill set area. With a high degree of objective reality in their submission, JGO reasoned the wider sector they were employed in would be inaccessible due to the nature of how the employment ended despite the non-publication order (if it were to remain unopposed). JGO also gave limited

affidavit evidence on the budgetary impact of the dismissal. I record the evidence provided was simply insufficient for the Authority to assess in a positive light and JGO did not assist their cause by initially neglecting to disclose a significant landholding and then when disclosed, did not provide any evaluative information to assist the Authority. As an aside, MGN had to bring the existence of the additional asset to the Authority's attention which did nothing to foster a potential renewed level of trust in JGO.

[93] By contrast, MGN affidavit evidence emphasised that from their perspective trust was absolutely destroyed and they had no confidence in a future restoration of it based on JGO's actions and failure from their perspective of JGO's judgment in not spotting that being apprehended in uniform while objectively engaged in an unlawful act did not give rise to a need to disclose given the sensitive nature of their role.

[94] MGN submitted that damages could be an adequate remedy should the Authority determine JGO was, unjustifiably dismissed. MGN noted they have the infinite capacity to meet any award if it becomes necessary. There is also no unusual delay evident before the matter can be dealt with on a substantive basis.

[95] MGN suggested although they are a large diverse organisation they could not be compensated for any damages if JGO was reinstated and the unique nature of the service they provide exposes them to a significant reputational and practical internal risk if JGO was reinstated on an interim basis given the circumstances of the incident that potentially could lead to a risk (albeit remote) of JGO being compromised in their ongoing role.

Assessment of where the balance of convenience falls

[96] Weighing all factors I find that the balance of convenience does not favour the granting of an interim reinstatement order. I have found an arguable but not strong claim exists but consider damages if subsequently granted, would be an adequate remedy if JGO is not reinstated on an interim basis. I observe any remedies may potentially be the subject of contributory conduct when this matter is determined on a substantive basis. The arguable case is displaced by the unique features and responsibilities of JGO's role, that on the balance of convenience favours MGN's stance of not being able to countenance interim reinstatement.

Overall justice

[97] 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. I have found, there is an arguable case to be assessed in regard to the distinctly unique circumstances of JGO’s summarily dismissed. However, I consider the case for permanent reinstatement to be significantly less compelling and suggest there is difficulty in context to restore the employment relationship if an unjustified dismissal is found.

[98] Standing back and looking at all factors from an overall justice perspective I am not persuaded given the unique high trust environment that prevails, that the factors of concern I have identified pertaining to this dismissal warrant the granting of interim reinstatement. I have considered placing JGO back on the payroll on an interim basis but have rejected that option given the lack of sufficient detail establishing JGO’s financial position and the knowledge that an early substantive investigation meeting can be scheduled.

Orders

[99] The application for interim reinstatement is declined.

Further steps

[100] A telephone conference is to be convened as soon as practicable (from 6 January 2025 onwards) to organise a date for a substantive investigation meeting.

Costs

[101] Costs are reserved.

David G Beck
Member of the Employment Relations Authority