

**Attention is drawn to orders prohibiting publication of certain information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 736  
3405104

BETWEEN                      QTR  
   Applicant  
  
AND                                BXD  
   Respondent

Member of Authority:        Sarah Blick

Representatives:            Applicant in person  
   Johanna Drayton and Ruby Prescott, counsel for the  
   respondent

Investigation Meeting:      6 November 2025 by audio visual link

Information and  
Submissions received:      Up to and including 7 November 2025

Determination:                14 November 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     QTR is an IT engineer who was employed by BXD until QTR's dismissal in October 2025. QTR has made an application for interim reinstatement and is ultimately seeking permanent reinstatement among other personal grievance remedies.

[2] BXD denies QTR was unjustifiably dismissed and says they were dismissed for serious misconduct following a lawful and reasonable process. It says QTR's suspension during the process was justified procedurally and substantively.

[3] BXD opposes interim reinstatement (including to the payroll) on the basis QTR does not have an arguable case for unjustified dismissal; the balance of convenience weighs strongly against reinstatement; the overall justice of the case does not favour the granting of interim relief and reinstatement is not practical and reasonable.

[4] Orders in respect of a compliance order, and non-publication orders in respect of the parties' names and identifying details, were made by way of a determination issued on 7 November 2025.<sup>1</sup> Those orders remain in place until they are otherwise varied by the Authority. The parties continue to be identified by the same randomly chosen letters.

### **The Authority's process**

[5] QTR has provided the required undertaking in respect of damages. The Authority also received affidavit evidence from QTR, their line manager, colleagues and HR staff. A significant amount of documentation was received, along with written and oral submissions.

[6] This determination addresses QTR's application for interim reinstatement only. Evidential matters in dispute between the parties will not be resolved by this determination because the evidence is untested and in applying the relevant tests the Authority is not required to resolve any disputes.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination does not record all evidence and submissions received and considered during the Authority's investigation but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders where made.

### **The issues**

[8] Section 127 of the Act confers jurisdiction on the Authority to grant interim reinstatement. For the Authority to grant interim reinstatement, an applicant must establish that there is a serious question to be tried. Consideration must be given to the balance of

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<sup>1</sup> *QTR v BXD* [2025] NZERA 716.

convenience, the impact on the parties of the granting of, and the refusal to grant, an order. The impact on third parties will also be relevant to the weighting exercise. Finally, the overall interests of justice are considered, standing back from the details required by the earlier steps.<sup>2</sup>

[9] The issues for determination in this interim reinstatement application are therefore:

- (a) Is there a serious question to be tried? That is, does QTR have an arguable case for unjustified dismissal?
- (b) If so, does QTR have an arguable case for permanent reinstatement?
- (c) Where does the balance of convenience lie?
- (d) The Authority is then required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

[10] In determining whether to order interim reinstatement, regard must be had to the object of the Act, which is to build productive employment relationships through the promotion of good faith:<sup>3</sup>

One of the central features of the Act is its recognition of the importance of the employment relationship, the obligations both parties have to be responsive and communicative, and that issues ought to be dealt with promptly and between the parties if possible - in other words, supporting constructive employment relationships and repairing them where feasible.

[11] It is in light of these factors that applications for interim reinstatement are considered.

## **Background**

[12] QTR commenced employment with BXD on 17 March 2025. As part of their role QTR had high level access to BXD's information technology systems.

### *Facilitation meeting*

[13] On 23 July 2025, QTR raised concerns over the behaviour of a team member during work interactions. Concerns were also raised by others about QTR, and as a result BXD organised a facilitated discussion with QTR and other team members, held on 26 August 2025s. BXD says this was to address concerns and plan a path forward. QTR criticises the facilitator's actions during that meeting, saying they were subjected to rude, biased, and intimidating

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<sup>2</sup> *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [7].

<sup>3</sup> *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* [2021] NZEmpC 59 at [5].

treatment by the facilitator. The facilitator acknowledges having to be quite forceful during the discussion, to give others a chance to have input, with QTR dominating the conversation. BXD says the way QTR engaged with various team members during the meeting raised significant and serious concerns.

*BXD proposes suspension and investigates*

[14] Following the facilitation meeting, BXD says QTR's colleagues continued to raise concerns about QTR's behaviours, which BXD says informed its decision to raise potential breaches of BXD's policies and code of conduct. QTR says it also became aware of potential unauthorised network use by QTR.

[15] On 1 September 2025, BXD wrote to QTR by letter outlining serious misconduct allegations. BXD proposed to suspend QTR while a disciplinary investigation was undertaken. As an alternative it proposed QTR could agree to take paid special leave. BXD asserts that it needed to act promptly to address concerns on an interim basis given the high risks QTR's alleged conduct potentially posed to it. The letter stated QTR's actions may amount to serious misconduct, and if established an outcome of the process could be disciplinary action up to and including summary/instant dismissal.

[16] The same day BXD's Chief Transformation & Technology Officer asked for QTR's administrative access to BXD's IT systems to be disabled. BXD says this was due to QTR's high level access to the systems and the allegations related to potentially unauthorised access and acts affecting critical operations. BXD says while this affected administrative or privileged access, this would not have affected 'normal' user access. This action was said to be taken due to the high security risk in allowing unrestricted access to those systems, with strong and uncompromised network security being critical to BXD. BXD says a security breach could irreparably damage its reputation, and it is subject to strict laws and regulations and failures could lead to consequences.

[17] BXD representatives met with QTR on 3 September 2025 regarding the suspension proposal. BXD says QTR opposed suspension but did not wish to take paid special leave as an alternative. It subsequently suspended QTR on full pay while a disciplinary investigation took place.

[18] QTR was invited to a further meeting on 16 September 2025 to give responses and feedback on the disciplinary allegations. BXD says QTR did not respond directly to the allegations or engage constructively and/or clearly in the process.

[19] A letter was sent to QTR on 19 September 2025 raising an additional allegation concerning an alleged unauthorised and undocumented change made to QTR's firewall. BXD says an almost undetectable change was made which allowed unrestricted outbound internet access from one of BXD's servers – which it says posed a significant risk, potentially exposing it to compromise or unauthorised access by third parties.

[20] A further meeting was held on 23 September 2025. QTR says this was to allow QTR to respond further to the disciplinary allegations, and the additional allegation about changes made to firewall settings. BXD says it was difficult to get a direct and clear response to the allegations, with QTR refusing to respond to the new allegation regarding changes to the firewall settings. It was agreed QTR would be given further time to respond to the additional allegation, namely until 5pm 24 September 2025. QTR responded on 24 September 2025.

*BXD reaches tentative decision on allegations and dismissal*

[21] BXD says it made enquiries of its Network and Security Manager in relation to QTR's responses about making changes to its firewall. The manager's response was provided with a tentative decision/views letter on 30 September 2025 from BXD's Chief People and Communications Officer. The letter stated a tentative decision had been reached that the following factual allegations were substantiated:

- (a) Allegation one: QTR failed to follow reasonable instructions from their line manager, NSM.
- (b) Allegation two: QTR accessed BXD's systems without authorisation, described as 'configuration changes ... without an approved change request or instructions from your manager. You did not lodge a change request until 4 August 2025, the day after you made the changes.'
- (c) Allegation three: taking a wilful act affecting critical operations, QTR had 'been instructed to pause any upgrades until the cause of the outage had been investigated. Despite this [QTR] contravened the instruction and undertook further changes, requiring urgent recovery work.'

- (d) Allegation four: breaches of health and safety impacting team members – QTR’s actions towards colleagues negatively impacted their wellbeing and safety at work, having ‘behaved rudely and aggressively towards ... colleagues’.
- (e) Allegation five: a breach of BXD’s code of conduct regarding treating everyone fairly and with respect, being professional and responsive and impacting trust.
- (f) Allegation six: unauthorised, undocumented changes to firewall settings breaching BXD’s Security Procedure – Firewall Rule changes was ‘primarily substantiated’ – in that QTR made unauthorised changes to BXD’s firewall settings which could have had serious consequences and QTR failed to summarise the changes made when requested.

[22] The letter advised a tentative decision was reached that the allegations amounted to both misconduct and serious misconduct and QTR’s employment should be terminated on notice, and they would not need to work out their notice period. QTR was given the opportunity to provide feedback by 3 October 2025.

[23] The 30 September 2025 letter was received by QTR around 20 minutes prior to the parties attending an unsuccessful mediation. BXD explains there was a delay in sending the letter due to an IT issue, but BXD believed it was important QTR have a tentative decision letter prior to mediation, to be fully informed of its tentative views.

[24] QTR sought and was granted an extension to respond and provided feedback on 6 October 2025. It is fair to say that QTR denied any wrongdoing.

*BXD notifies of dismissal*

[25] On 16 October 2025 BXD issued a final disciplinary decision letter. It addressed each allegation, referenced the feedback, and outlined reasoning for finding the allegations substantiated. It found QTR had breached BXD’s code of conduct, its Security Standards Firewall and Procedures, and health and safety obligations by acting in a manner which had seriously impacted the psychological wellbeing of its staff. BXD recorded that QTR had high level access to its systems and that it did not have the necessary trust in QTR, given their actions, to have that access. It was recorded QTR’s lack of insight into their behaviours was concerning. In summary BXD recorded the substantiated conduct findings had seriously eroded the trust and confidence it could have in QTR from a systems security perspective and a health

and safety perspective. QTR's employment was terminated for serious misconduct on notice, with their notice period paid out in lieu.

[26] Later the same day, BXD sent a letter to QTR regarding QTR's apparent Open AI use, expressing its concern that QTR appeared to be inputting confidential BXD information into an Open AI platform, in contravention of continuing confidentiality obligations in the parties' employment agreement.

### **Arguable case**

*Is there an arguable case for unjustified dismissal?*

[27] The first question the Authority must consider is whether there is an arguable case that QTR was unjustifiably dismissed. An arguable case means a case with some serious or arguable (but not necessarily certain) prospect of success.<sup>4</sup> The threshold for a serious question or arguable case as stated in *McInnes*, is that the claim is not frivolous or vexatious:<sup>5</sup>

... an applicant must establish that there is a serious question to be tried, in that the claim is not vexatious or frivolous. The merits of the case (insofar as they can be ascertained at an interim stage) may be relevant in assessing the balance of convenience and overall interests of justice...

[28] QTR says BXD's process and reasons for dismissal were unjustified, saying:

- (a) The facilitation meeting turned into an evidence-gathering exercise which misled QTR as to the meeting's true purpose.
- (b) Predetermination played a part in the dismissal which did not accord with natural justice principles (BXD's action limiting QTR's access to IT systems prior suspension was cited in support).
- (c) The allegations against QTR shifted and/or evolved.
- (d) QTR was provided with inadequate access to relevant information.
- (e) The allegations were unsubstantiated, whereas documentary evidence QTR had produced supported their account of events.
- (f) By issuing a decision on the day of mediation, BXD acted inconsistently with good faith obligations.

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<sup>4</sup> *X and Y Limited v New Zealand Stock Exchange* [1992] ERNZ 863.

<sup>5</sup> Above n 2, at [9].

- (g) The ‘after-acquired allegation’ of OpenAI use was notified after the dismissal decision had been communicated and could not be used to justify dismissal after the fact.

[29] While BXD denies these arguments, QTR’s claims meet the low threshold of an arguable case for her personal grievance for unjustified dismissal.

*Is there an arguable case for permanent reinstatement?*

[30] Where it is practicable and reasonable to do so, the Authority must provide for reinstatement (when sought) as the primary remedy.<sup>6</sup>

[31] QTR says the evidence clearly demonstrates that they were not only performing their role but were a contributing and effective member of the team and it is both practical and reasonable to reinstate them permanently. QTR says the evidence demonstrates:

- (a) A functional working relationship existed at a technical level.
- (b) QTR was successfully integrated, collaborated effectively on projects and received positive feedback from end-users.
- (c) There is no evidence of a complete, irreparable breakdown in trust and confidence that would make reinstatement impracticable. The interpersonal issues raised were management-level concerns, not a failure to perform QTR’s core duties.
- (d) QTR was a high-performing contributor and proactive and valuable engineer.
- (e) They acted transparently, followed instructions, and engaged professionally.
- (f) Any erosion of trust was self-inflicted by BXD through procedural mismanagement and premature access revocation.
- (g) Cooperation, professionalism, and transparency on QTR’s part, consistent with good faith behaviour.

[32] BXD submits the arguable case for reinstatement is a weak one on the facts of this case, given the substantiated serious misconduct, the nature of the breaches, and significant loss of trust and confidence. Irreparable harm is said to have been done to the employment relationship by QTR.

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<sup>6</sup> Employment Relations Act 2000 s 125(2).

[33] BXD submits, given the findings of serious misconduct in relation to the very important issue of security of BXD's systems, breaches of the code of conduct, and wider health and safety requirements it is not practical for BXD to have QTR back in the workplace. Further, alternatives to dismissal were considered by BXD's decision maker and found not to be workable, and this was advised as part of the tentative decision to allow QTR to respond to that concern. It says QTR's responses to the tentative decision did not alleviate those very real concerns.

[34] Reinstatement is also said not to be reasonable given the serious erosion of trust and confidence BXD has in QTR in their role and the breakdown of relationships within their small team of three. When viewed against the lens of the effects reinstatement would have on QTR's colleagues, (severely impacting QTR's colleagues to the extent they do not feel safe working with QTR and have lost trust in QTR), it is not practical or reasonable BXD to have QTR back in their role in the workplace.

[35] Taking all the submissions into consideration, and on the basis of the untested affidavit evidence as presented to the Authority, while I find that QTR has an arguable case that they were unjustifiably dismissed, I am unable at this stage to conclude that they have more than a weak arguable case that they would be reinstated permanently.

### **Balance of convenience**

[36] The Authority now turns to weigh the interests of QTR against those of BXD. The Authority considers the potential effect on QTR if they were declined interim reinstatement, against the potential effect on BXD and affected third parties if interim reinstatement was granted.

[37] BXD submits the balance of convenience strongly favours it because interim reinstatement would cause material disruption and risk to BXD and its staff. It says:

- (a) There would be a real and serious ongoing risk to the security of its IT network.
- (b) The sensitive nature of QTR's role necessitates access to secure BXD systems, yet there was a failure to follow instructions and protocols (e.g change requests).
- (c) There would be difficulty in maintaining appropriate supervision for QTR in their role if they were to be reinstated - which is reinforced by the substantiated disciplinary allegation of undocumented, unauthorised and almost undetectable

changes QTR made to one of the BXD's firewalls. If this had not been discovered, it could have had significant consequences for BXD as an organisation.

- (d) There are no viable alternative duties - QTR's suggestions of limited right access, neutral supervision and reintegration support are not realistic in the circumstances and lack insight.
- (e) There is a breakdown and lack of workability given loss of trust and confidence between QTR and management, as well as her colleagues – with QTR exhibiting bad faith behaviour, making it exceedingly unlikely workplace relations can be restored.
- (f) A return would have an adverse impact on workplace morale and the psychological safety of QTR's colleagues.

[38] QTR denies BXD's suggestion that reinstating them would be inconvenient or 'disruptive' for colleagues, as speculative and irrelevant. They say perceived discomfort among colleagues is not a lawful basis to deny reinstatement when there is no evidence of misconduct or incapacity. QTR says BXD has a clear and ongoing need for QTR's skills and reinstatement would cause minimal disruption, with QTR being familiar with systems, processes, and key projects, requiring little to no re-onboarding.

[39] QTR says they are a New Zealand permanent resident and plans to establish their long-term future here, including purchasing a home next year.

[40] QTR says the part of the IT sector they work in in New Zealand is small, and the stigma of an unjustified dismissal - particularly from an entity like BXD - poses a serious and ongoing barrier to their future employability. Without reinstatement, QTR says it will be nearly impossible for them to continue in their chosen career.

### *Assessment*

[41] In the circumstances, BXD appears to have the stronger case that the decision to dismiss QTR was one that was open to a fair and reasonable employer. An assessment of the relative merits of the parties' cases favours BXD. Given that assessment, it is not appropriate to impose the potential disruption and risk associated with reinstating QTR on an interim basis on BXD, their former small team and line manager.

[42] QTR has shown no compelling evidence of financial hardship or efforts to mitigate losses. QTR's evidence is that they have suffered financial stress, but that does not equate with the evidence that they have been on paid suspension and were paid out in lieu of notice (at QTR's discretion). QTR is able to look for other work in their area. QTR says they will face difficulty finding work in the IT sector in light of being required to declare the serious misconduct investigation undertaken by BXD and its outcome. While this may be the case, such a consequence is not inappropriate in light of my assessment of the relative merits of the parties' cases at this interim stage.

[43] BXD further says reinstatement to the payroll is inappropriate. Counsel for BXD says it is not likely to address QTR's ultimate wish to be reinstated to her role and will create real problems downstream, given the weakness of QTR's case for reinstatement. Even if successful, the level of QTR's contribution to potential personal grievance remedies, against BXD's likelihood of being reimbursed, weighs against reinstatement to the payroll. I agree.

[44] The Authority considers that should QTR be found to be unjustifiably dismissed at the substantive stage of its investigation, an award of damages to compensate them for the wages they would otherwise have received, subject to any reductions for contribution, would be an adequate remedy. As a well-resourced employer, BXD has the financial means to meet an award of damages.

[45] Considering all relevant factors, the balance of convenience weighs in favour of BXD. QTR is assessed as able to bear the burden of not being reinstated in the period until their substantive claim is able to be heard by the Authority.

### **Overall justice**

[46] Standing back from the detail of the claim, the Authority must then consider where the overall justice lies. This has been described by the Court of Appeal as:<sup>7</sup>

...the overall justice assessment is essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and balance of convenience.

[47] QTR has established has an arguable case their dismissal was unjustified and a weakly arguable case for permanent reinstatement. However, on the information presently available

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<sup>7</sup> *NZ Tax Refunds Limited v Brooks Homes Limited* [2013] NZCA 90 at [47].

to the Authority, it appears that QTR faces a hurdle in establishing that the decision to dismiss them, was not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. From the untested affidavit evidence, it appears that QTR conducted a largely procedurally sound disciplinary investigation.

[48] It is accepted the loss of QTR's job and income is upsetting to QTR and this will have negative impacts. However, QTR's evidence in support of the reasons as to why they seek to be reinstated on an interim basis does not outweigh the impact that reinstatement would have on BXD. In such circumstances, an order for interim reinstatement (either to their former role, or to BXD's payroll only) until their personal grievance application has been investigated and determined is not in the overall interests of justice at this stage of this case.

[49] In making this finding I have had regard to s 127(4) of the Act and am cognisant of the principle that productive employment relationships are based on good faith behaviour and on mutual trust and confidence.

### **Outcome**

[50] QTR's application for interim reinstatement is declined.

### **Next Steps**

[51] The Authority will be in contact with the parties shortly to progress QTR's substantive application. If the parties wish to attend further mediation prior to the substantive investigation meeting, the Authority is willing to make a direction to do so.

### **Costs**

[52] Costs are reserved.

Sarah Blick  
Member of the Employment Relations Authority