

Attention is drawn to the order prohibiting publication of certain information (refer paragraph 11)

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 285
3371583

BETWEEN	QVM Applicant
AND	NSI Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Michael O'Brien and Joseph Plunket, counsel for the Applicant Emma Crowley and Bronwyn Colgan, counsel for the Respondent
Investigation Meeting:	16 May 2025 by AVL
Determination:	21 May 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Before the Authority is an application for interim reinstatement brought by the Applicant, QVM, under s 127 of the Employment Relations Act 2000 (the Act).

[2] QVM was dismissed on 31 December 2024 by the Respondent, NSI. QVM claims that he was unjustifiably dismissed from his role as Head of Department for the Bar and is seeking reinstatement on both an interim and a permanent basis.

[3] NSI claims that QVM's dismissal in circumstances in which he could no longer operate as a 'key person' for NSI without jeopardising its holding of a gambling licence was justifiable and followed a fair and reasonable process. NSI resists the claim for interim reinstatement and the substantive claim.

[4] This determination addresses the issue of interim reinstatement.

Non-publication

[5] Mr O'Brien on behalf of QVM is seeking interim orders under clause 10(1) Schedule 2 of the Act prohibiting the publication of :

- a) the Applicant's name and any identifying details; and
- b) the Respondent's name and any identifying details.

[6] The basis for the application is the termination of the Applicant's employment is closely connected with the fact that he has been charged with serious criminal offences to which he maintains his innocence; and, due to the role the Applicant held with the Respondent, naming it would have the effect of naming him.

[7] Counsel for NSI indicated that it had no objection to the application sought at this interim stage.

[8] In *MW v Spiga Ltd* a full Employment Court noted that the existing principle of open justice should only be departed from where sound reasons exist, confirming the existing leading authority of the Supreme Court in *Erceg v Erceg*.¹

[9] I must therefore, in considering this application, be satisfied that the grounds for the exercise of the discretion under that statute are established because the non-publication is contrary to the important principle of open justice.

[10] Having considered the matter, in particular the charges with which the Applicant is charged but to which he maintains his innocence, and of which he has not been convicted, I consider that a non-publication order should be granted, but only on an interim basis. Should the matter proceed to a substantive investigation, further detailed submissions from the parties will be expected.

[11] I order that at this interim stage, the name of the Applicant, and the Respondent and its advisor are not be published. The Applicant is to be referred to as QVM, the Respondent as NSI, the advisor as CXT and officers of NSI by letters bearing no relation to their names. This order is made under Schedule 2 clause 10(1) of Schedule 2 of the Employment Relations Act 2000.

¹ *MW v Spiga Ltd* [2024] NZEmpC 147; *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [13].

The Authority's Investigation

[12] Following the initial application by QVM, the parties attended mediation, but this did not resolve the issue.

[13] The application for an interim injunction was accompanied by an undertaking as to damages and an affidavit by QVM. Affidavits were also filed in opposition by NSI.

[14] A Statement of Problem with a supporting affidavit from QVM and an undertaking as to damages was filed by the Applicant on 14 April 2025, and a Statement in Reply was lodged by the Respondent on 30 April 2025.

[15] A case management conference was held on 1 May 2025. The parties were directed to file submissions, and in the case of the Respondent, supporting affidavits, on 14 May 2025.

[16] The parties agreed to the Authority determining this preliminary issue of the interim reinstatement application based on the Statement of Problem and the Statement in Reply, documents submitted by the parties, on affidavit evidence, and on submissions from the parties.

[17] The evidence before the Authority for the purpose of determining this interim reinstatement application has been presented as usual in such applications in affidavit form by QVM, and by KBM, former President of the NSI Committee on his behalf. An affidavit has been presented on behalf of NSI by SGL the current President of the NSI Committee.

[18] As the affidavit evidence presented must necessarily remain untested until the substantive investigation of the unjustified dismissal personal grievance, any findings of fact by the Authority in this determination are provisional only and may change later once the claims have been fully investigated and all witnesses have been examined on their evidence.

[19] As permitted by s 174E of the Employment Relations Act 2000 (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

[20] I granted QVM's application for this matter to be dealt with on an urgent basis because this is the usual procedure for dealing with an application for an interim reinstatement. In determining this matter, I must apply the law relating to interim reinstatement as set out in s 12(1) and s 12(4) of the Act which include recognising that employment relationships are built

on the legislative requirement for good faith behaviour and addressing the inherent inequality of power in employment relationships.²

[21] At the Investigation Meeting held by AVL on 16 May 2025, I heard submissions from the parties' representatives in relation to the interim reinstatement application and tested these by questioning how the available untested evidence related to the relevant principles for determining an interim injunction application.³ Those principles fall to be addressed by the answers to the following questions:

- (a) whether or not QVM has established that there is a serious case to be tried in relation to the claim for unjustifiable dismissal; and if so:
- (b) Is there a serious case in relation to the claim for permanent reinstatement?

[22] Also noted as needing consideration are the balance of convenience and the impact on the parties, including any third parties, of granting, or not granting, an order for interim reinstatement, and the overall justice of the matter.

Brief Background Facts

[23] NSI is an incorporated company which holds a class 4 operator's licence under the Gambling Act 2003, which allows it to provide gambling/gaming services on site (the Club) to its members. NSI is a class 4 operator under the Gambling Act 2003 and required to comply with the requirement that both NSI and any 'key person' are suitable within the meaning prescribed.

[24] A 'key person' under the Gambling Act 2003 is a person who: "exercises significant influence in the management of an operator who holds a class 4 licence" (Key Person).⁴ Further a Key Person is defined as: "A person who has a significant interest in the management, ownership or operation of a venue operator. .."⁵

[25] The Club has approximately 7000 members. QVM was employed by NSI as Head of Department for the Bar at the Club pursuant to an individual employment agreement (the Employment Agreement). He was promoted to General Manager of NSI on or about June 2015. His responsibilities included overseeing the everyday operations and management of NSI,

² Employment Relations Act 2000 s 3

³ *McInnes v Western Bay of Plenty District Council* [2016] NZEmpC 36 at [8] ERA Auckland 92 in which Judge Inglis (as she then was) referred to the Court of Appeal decision in *NZ Tax Refunds v Brooks Homes Ltd* [2013] NZCA 90.

⁴ Gambling Act 2003 s 4 Definitions, Key person (a)(iii).

⁵ As above s 4 Definitions Key person (b)(iva).

which included the gaming operations. QVM was by virtue of his position defined as a Key Person under the Gambling Act 2003.

[26] Schedule B of the Employment Agreement set out that being a Key Person was an essential requirement of QVM's role:

GAMING

The employee must be able to qualify as a 'key person' under the terms of regulations attached to the **Gambling Act**, and any subsequent amendments and ensure compliance within **the Act**.

[27] On or about 2 March 2023 the New Zealand Police (the Police) executed search warrants at QVM's home and at the Club in relation to criminal charges. QVM was subsequently informed by the Police that nothing of relevance had been found in the searches.

[28] QVM stated in his affidavit that he informed KBM about what had occurred, apologised for the Police executing a search warrant at the Club and offered to resign. KBM in his affidavit stated that he had accepted QVM's assurance that he had done nothing wrong and confirmed he should continue in his role at NSI.

[29] SGL in her affidavit stated that KBM informed her and NSI Committee members that there had been a team of inspectors visiting the Club. At the Committee meeting the following week, KBM advised that the visit had been by the Police who were conducting a search warrant which related to QVM's longstanding school friend who had a criminal history and whom QVM was supporting.

[30] On or about September 2023 QVM became subject to a separate legal proceeding and was charged with money laundering and participating in an organised criminal group in connection with a wider investigation into the large-scale manufacture and distribution of methamphetamine (the Criminal Charges).

[31] On 4 September 2024 following a merger with another Club and a resulting increase in the number of gaming machines, NSI needed to apply to the DIA for an increase in gambling machines under its licence.

[32] Upon receiving the application, the DIA advised NSI through its advisor, CXT, a leading New Zealand Gambling Law expert, that it had become aware that QVM was facing serious Criminal Charges. It advised he was not suitable as a Key Person and NSI could lose its gambling licence if it continued to employ him. This was confirmed in an email to CXT dated 30 September 2024

[33] On 2 October 2024 NSI wrote a letter to QVM informing him of its concerns as a result of the DIA determining he was not suitable as a Key Person. It enclosed the letter from the DIA.

[34] As a result of the situation (being the DIA's conclusion that QVM was not suitable to be employed as a Key Person and there was the potential for NSI to have its gambling licence cancelled), NSI stated in the letter that it was considering the possibility that the Employment Agreement with QVM was frustrated at law.

[35] QVM was invited to a meeting to discuss the possibility and provide any feedback on NSI's view.

[36] The meeting was delayed while documentation requested by his counsel was supplied to QVM.

[37] The meeting took place on 4 November 2024. QVM attended with his counsel who contended that the process and/or proposed reason for termination did not meet the threshold for frustration at law, and suggested alternatives to termination of employment. These included:

- i. QVM relinquishing responsibilities in relation to gaming in the role of Club Manager and enter a variation in his employment agreement to reflect changes;
- ii. QVM could relinquish his role as Club Manager and take up another role; and
- iii. NSL could enquire with the DIA whether QVM could remain in his role with varied duties, i.e. NSI could negotiate directly with the DIA.

[38] Following the feedback provided, NSI sought an opinion from CXT. His expert legal opinion on 13 November 2024 confirmed that alternatives such as varying QVM's Employment Agreement, changing his role, or negotiating with the DIA were not viable options for allowing QVM to remain in employment without jeopardising the NSI gambling licence.

[39] NSI provided QVM with a copy of its letter to CXT, his response and legal opinion and QVM was asked to provide any feedback.

[40] On 27 November 2024, not having received any feedback, NSI wrote to QVM advising it had reached a preliminary conclusion that his employment could not continue and proposed that it come to an end on 29 December 2024. Detailed reasons were provided for its decision and his feedback to the preliminary request was invited to be provided.

[41] QVM's feedback was received on 2 December 2024. In it concerns were raised including that the termination was not justifiable and CXT had a possible conflict of interest being an advisor to the DIA. It disputed that (i) NSI had no control over the DIA's decision given the availability of judicial review, (ii) CXT's interpretation of the Gambling Act 2003 and (iii) denied that NSI could not negotiate with the DIA.

[42] NSI considered the feedback and contacted the DIA providing it with a copy of the preliminary conclusions letter dated 27 November and the letter from counsel for QVM dated 2 December 2024.

[43] On 13 December 2024 the DIA responded that it did not become involved in private employment disputes, and reiterated the advice NSI had received from CXT that it was not prepared to negotiate with the parties.

[44] On 16 December 2024 NSI provided the email to QVM. On 20 December 2024 NSI advised QVM via his counsel that his employment would end on 31 December 2024.

Is there a serious question to be tried in relation to the claim of unjustifiable dismissal?

A Serious Question?

[45] As a matter of principle, QVM must establish that there is a serious question to be tried in respect of his claim of unjustifiable dismissal and for permanent reinstatement. A serious question was described in *Brooks Homes Ltd v NZ Tax Refunds Ltd* as an arguable case.⁶

[46] The threshold for a serious question or arguable case as stated in *Brooks Homes* and *Western Bay of Plenty District Council v Jarron McInnes* is that the claim is not frivolous or vexatious:

... However, as *Brooks Homes Ltd* makes clear, 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 ...⁷

[47] In *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* the Chief Judge confirmed that whether there is a serious question to be tried raises two sub-issues, these being:

- a) Whether there is a serious question to be tried in relation to the claim of unjustified dismissal; and, if so,

⁶ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

⁷ *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC36 at [9].

- b) Whether there is a serious question to be tried in relation to the claim of permanent reinstatement.⁸

[48] In *Humphrey* the Employment Court noted that once the relatively low threshold as identified in *Brooks Homes Ltd* had been met:

... 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 the overall interests of justice.⁹

[49] My findings expressed in this determination are solely for the purposes of resolving QVM's application for interim reinstatement. At the substantive hearing there will be opportunity to fully test the relevant evidence and disputed questions of fact and law.

An arguable case?

[50] QVM submits he has an arguable case that he was unjustifiably dismissed because NSI initially posited its dismissal decision on the basis of frustration and it is submitted that the circumstances of QVM's situation do not meet the legal test for frustration.

[51] It is submitted that the presumption of innocence should apply in this case, and that NSI failed to properly consider alternatives to dismissal.

[52] On the basis that there is a low threshold for an arguable case for unjustifiable dismissal, NSI accepts that QVM may be found to have an arguable case.

[53] It is a low threshold and I find that QVM has an arguable case that he was unjustifiably dismissed.

Reinstatement?

[54] QVM must not only establish an arguable case for unjustifiable dismissal but must also establish that he would be reinstated if successful in such a claim.

[55] Reinstatement is the primary remedy and s 125(2) of the Act states the Authority must provide for reinstatement if it is practicable and reasonable. This was commented upon by Judge Holden in *Hong v Auckland Transport* in which she set out that practicality and reasonableness are two separate requirements:

Practicability ... means more than simply being possible. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible, and have the potential for the re-imposition of the employment relationship to be done or carried out successfully. ...

⁸ *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* [2021] NZEmpC 59 at [7].

⁹ Above n 5 at [8].

Looking at reasonableness, the Court needs to consider the prospective effects of an order, not only upon the individual employer and employee in the case, but on other affected employees of the same employer, and in some cases, perhaps third parties who would be affected by the reinstatement.¹⁰

[56] It is submitted that QVM is entitled to the presumption of innocence. He claims he has been wrongly identified due to racial profiling by the Police and has applied to have the Criminal Charges against him dropped. The wrongful identification application will be heard in August, and the Criminal Charges will be heard in September 2025.

[57] It is submitted that the reasonable employer would be alive to the fact that if the Criminal Charges against QVM are withdrawn, dismissed, or QVM is found not guilty, permanent reinstatement would be the outcome.

[58] It is submitted that, given QVM had been employed more than 10 years at the time of his dismissal, that he was well-liked by colleagues, officers and members, and that there had been no work-related issues during the course of his employment, a fair and reasonable employer would have considered alternatives to dismissal which could have included:

- a) Moving him to a non-Key Person role (and making it clear to other employees that in the interim he had no managerial powers). This could have included QVM working remotely on administrative duties;
- b) Suspension; and
- c) Extended leave (whether paid, unpaid, or using some of his annual leave entitlements).

[59] NSI submits that QVM has made himself unavailable to perform a significant part of his role as Club Manager by his own alleged actions. QVM at the time of his dismissal was unable to fulfil the essential requirement of his role to qualify as a Key Person and remains unable to do so whilst the criminal charges are still pending.

[60] At the time QVM was dismissed it is submitted that he was facing Criminal Charges for which there was no definite end in view. There was no evidence that the Criminal Charges would be resolved within a definitive timeframe, and no certainty that they would be dismissed or withdrawn, or that QVM would be found not guilty.

[61] Moreover NSI submits, even if QVM is exonerated of the Criminal Charges, it does not follow that the DIA will consider him an appropriate Key Person to hold a class 4 operating

¹⁰ *Hong v Auckland Transport* [2019] NZEmpC 54 at [66] and [67].

license. It is noted that the New Zealand Gambling Law Guide indicates that the DIA can take into account a person's known criminal associations, and QVM has not denied being associated with the person at the centre of the Criminal Charges.

[62] It is submitted that even if NSI has adopted any of the alternatives suggested by counsel for QVM, even working remotely, these would still place its operating licence in jeopardy.

[63] It is submitted that NSI must have a Key Person to maintain its class 4 operator's licence under the Gambling Act 2003. Without the licence SGL in her affirmation states that NSI will lose a significant source of revenue and thereby place a financial strain on NSI which is already operating at a deficit.

[64] Reinstatement on an interim or permanent basis must be practicable and reasonable. It is possible that QVM will, as he expects, be cleared of all involvement in the Criminal Charges in due course.

[65] However taking all the submissions into consideration, and on the basis of the untested affidavit evidence as presented to the Authority, whilst I find that QVM has an arguable case that he was unjustifiably dismissed, I am unable at this stage to conclude that he has a more than a weakly arguable case that he would be reinstated permanently.

[66] Accordingly I do not find that QVM has a strongly arguable case for interim reinstatement.

Balance of convenience

[67] As set out in the Employment Court case *X v Y Limited*¹¹ this principle requires that the Authority balance the relative inconvenience, in terms of detriment or injury, to NSI who will have to bear the burden of an order reinstating QVM until the substantive case is heard, against the inconvenience to QVM who may have a just case, of having to bear the detriment of unjustifiable dismissal until the case is heard.

[68] There is no date set down for the Authority to hear the substantive matter. This could not feasibly take place until after the Criminal Charges have been heard due to QVM's right to silence. It is submitted for QVM that the delay weighs in favour of interim reinstatement.

[69] It is further submitted for QVM that damages would not be an adequate remedy because there is an inherent dignity in work which cannot be fulfilled by posthumous damages. This is

¹¹ *X v Y Limited* [1992] 1 ERNZ 863, at pg 10.

submitted to be especially so in this case where QVM appears to have been a victim of racial profiling by the Police.

[70] NSI submits that the financial impact of reinstatement on it would be significantly detrimental. It is currently operating at a significant loss and if it were to lose its gaming licence, the resulting financial damage would be approximately \$1.5 million per annum. This is likely to be compounded by the likely loss of patronage to NSI's bar and kitchen if its members go elsewhere to gamble.

[71] It is submitted by NSI that it had to employ a replacement manager as it required someone to manage its operations and act as the Key Person for the gambling licence. While reinstatement to the payroll of QVM might not result in the loss of its gambling licence, it would result in an increase to its deficit because it would need to continue employing the incumbent Manager to oversee the running of its operation and act as the Key Person whilst also incurring QVM's annual salary cost.

[72] SGL in her affidavit stated that if QVM were to be reinstated and NSI lost its gaming licence, this would impact on the number of members who regularly use the gaming machines at the Club. Revenue would also be lost as a result of less Club patrons using the bar and kitchen facilities. This in turn would adversely impact on NSI current staff.

[73] NSI submits that damages will be an adequate remedy in the event that QVM is successful in the substantive claim for permanent reinstatement. NSI is able to meet any further damages awarded because it holds insurance for employment disputes that covers remedies for unjustifiable dismissals. Consequently the impact on QVM in the event of a finding of unjustifiable dismissal can be remedied by a compensatory award.

[74] Having taken into consideration the submissions put forward by the parties, balancing the potential prejudice to QVM of not reinstating him against the potential prejudice to NLS of so doing, I find that the balance of convenience favours not reinstating QVM on an interim basis.

Overall Justice

[75] The Authority must assess the overall justice of the case from a global perspective. This has been described by the Court of Appeal as:¹²

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'

¹² *NZ Tax Refunds Ltd v Brooks Homes Limited* [2013] NZCA 90 at [47].

[76] It is submitted on behalf of QVM that damages are not an adequate remedy for QVM. It is observed that the right to be presumed innocent until proven guilty is a fundamental tenet of New Zealand's justice system.

[77] NSI submits that the overall justice of the case does not support the granting of an interim order and it would be unjust to require it to continue to pay QVM's salary when one of the direct consequences of reinstatement is likely to be the loss of revenue from the retraction of its class 4 operator's license.

[78] I find that the overall justice of the case subsists in declining the application for interim reinstatement.

Next Steps

[79] The Authority will convene a case management conference to set timetable directions for the investigation of QVM's substantive claims.

Costs

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

Eleanor Robinson

Member of the Employment Relations Authority