

Attention is drawn to the order prohibiting publication of certain information (refer paragraph 14)

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 320
3360983

BETWEEN	FELICITY SCOTT Applicant
AND	DAMAR INDUSTRIES LIMITED Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Melanie O'Neill, Andrea Twaddle and Alistair Clarke, counsel for the Applicant Rebecca Scott, counsel for the Respondent
Investigation Meeting:	30 May 2025 by AVL
Determination:	9 June 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

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

[2] Ms Scott was dismissed on 18 February 2025 for serious misconduct by the Respondent, Damar Industries Limited (Damar). Ms Scott claims that she was unjustifiably dismissed from her position as Head of Information Technology (IT), and is seeking reinstatement on both an interim and a permanent basis.

[3] Damar claims that Ms Scott's dismissal was warranted, and this decision was open to it as a fair and reasonable employer in all the circumstances at the relevant time. Damar opposes the claim for interim reinstatement and the substantive claim.

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

Non-publication

[5] Damar is seeking interim orders under clause 10(1) Schedule 2 of the Act prohibiting the publication of the names of employees who made complaints and any employees not involved in the Authority's investigation.

[6] Ms Scott does not oppose the application for interim name suppression but submits that the orders will be futile because the individuals will be easily identifiable unless her own and Damar's name are also covered by the non-publication order.

[7] The Authority may order that the name of any party or witness or other person not be published, subject to any conditions it thinks fit.

[8] In the recent case of *MV v Spiga* the Employment Court has outlined the approach to take.¹ The starting principle is open justice. The Authority may depart from open justice to the extent necessary to serve the ends of justice or where the administration of justice weighs against full openness.

[9] The Court described a two-step approach to take when considering non-publication. First, there must be reason to believe specific adverse consequences could reasonably be expected to occur from publication. This step focuses on the evidence, with reasonable inferences allowed based on the specific circumstances of the case when considered in context.

[10] Second, the Authority must consider whether those consequences justify departing from open justice in the circumstances of the case. This is a weighing exercise that looks at relevant factors. Relevant factors include the circumstances of the case, the interests of the person or entity applying for the order, the interests of the other party or any third party, the public interest (including the rights of media), any issues of equity and good conscience and tikanga and its principles, values or concepts.

[11] In the circumstances of this case the employees who have provided affidavits have set out in some detail their concerns that being identified by name in the interim determination will cause them emotional stress, and/or reputational damage, and/or outlined their concern about operational harm to Damar. There is also an employee who is named in an affidavit provided, but who will not be a witness in this case.

¹ *MW v Spiga* [2024] NZEmpC 147.

[12] I find that the affidavit evidence of the employees justifies a departure from the principle of open justice at this interim stage.

[13] I am not persuaded that extending the non-publication order to the identity of the applicant and respondent in this matter is necessary to protect the employees for whom the order is sought. The identity of the employees to whom the non-publication order applies may become known to others within Damar, but the order will prevent their identity being made known more widely.

[14] I order that at this interim stage, the name of the employees involved in the complaint and investigation process, or named in an affidavit by another employee, are not be published. They will be referred to by initials bearing no relationship to their actual name. This order is made under Schedule 2 clause 10(1) of the Employment Relations Act 2000.

The Authority's Investigation

[15] Following the initial application by Ms Scott, the parties attended mediation but this did not resolve the issue.

[16] The application for an interim injunction was accompanied by an undertaking as to damages and an affidavit by Ms Scott. Affidavits were also filed in opposition by Damar.

[17] A case management conference was held on 2 April 2025. The parties were directed to file submissions on 21 May 2025.

[18] 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.

[19] The evidence before the Authority for the purpose of determining this interim reinstatement application has been presented as is usual in such applications in affidavit form. by Ms Scott, and on her behalf by two Damar employees, QZ and SF, and Ms Davison.

[20] Affidavits were lodged on behalf of Damar by YD, NI and WH; Darin Hills, Chief Operating Officer, Heather Turner, HR Manager; John Anderson, Chief Financial Officer; and Christopher Bradley, Chief Executive Officer.

[21] 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.

[22] 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

[23] I granted Ms Scott'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

[24] At the Investigation Meeting held by AVL on 30 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 affidavit 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 Ms Scott 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?

[25] 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

[26] Damar operates in the Dangerous Goods manufacturing sector. It employs a large number of staff in senior management, manufacturing logistics, sales, marketing, technical support and product development, as well as finance, administration and IT services. In New Zealand it has one physical site in Rotorua which houses the Damar offices and one of Damar's

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.

hazardous substances handling and filing facilities. Mr Thomson is a shareholder and the Managing Director.

[27] In 2023 Damar initiated a company-wide IT platform upgrade known as the ERP project. Mr Bradley stated in his affidavit evidence that after unsuccessful attempts to have the ERP project lead and managed by external project managers, it had been decided to employ Ms Scott in the ERP project manager role.

[28] Ms Scott was appointed as Head of IT on 26 August 2020 and was provided with an individual employment agreement. Ms Scott managed a small IT team. Her responsibilities and role requirements as set out in the position description included:

6.1 Leadership responsibilities including respecting team members, listening and consistently displaying a positive approach;

6.2 Efficiency responsibilities including to look for, and encourage others to look for, duties to be completed during periods of quietness;

6.3 Duties to ensure safe and healthy work practices are maintained at all times.

[29] Ms Scott reported to Mr Anderson and in addition to managing the IT team, communicated with senior management on IT issues.

[30] In late 2024, Damar was in the process of executing another large project and had signed a significant lease in Yennora, Australia, for a new manufacturing facility.

[31] On 31 October 2024 Mr Thomson directed NI, a member of the IT team, to make enquiries about setting up the IT infrastructure at the new Yennora site. After he received the instruction, NI spoke to Mr Anderson and voiced concerns about “stepping on toes” if he actioned Mr Thomson’s instruction because Ms Scott was his direct report.

[32] The next day, Friday 1 November 2024, Mr Anderson told Ms Scott about Mr Thomson having instructed NI in regard to the Yennora site and told her of NI’s concern about her possible reaction. Mr Anderson stated in his affidavit that he asked Ms Scott not to vent any frustration on NI.

[33] NI stated in his affidavit that about mid-day on Friday 1 November 2024 he received a telephone call from Ms Scott in which she questioned him regarding his actions in regard to the Yennora site. NI stated that her tone was accusatory.

[34] Approximately an hour later Ms Scott telephoned him again and NI decided to record the second call because of the accusatory nature of the first call. NI stated in his affidavit evidence that during the call Ms Scott repeatedly accused him of acting without proper authority, and her tone, language and approach were aggressive and intimidating. NI stated that he was so distressed when the call finished that he called Mr Hills for advice.

[35] Mr Anderson stated in his affidavit evidence that he received a telephone call from Mr Hills on the evening of 1 November 2024. In the call Mr Hills raised concern about what NI had told him of his interaction with Ms Scott during a telephone conversation.

[36] Mr Anderson stated that he contacted NI on Monday 4 November 2024. NI told him about the telephone call with Ms Scott, and agreed to send him the telephone call recording.

[37] Mr Anderson said NI was very concerned about what had occurred and was concerned about Ms Scott's future interactions to him. Mr Anderson stated that he notified Ms Turner and told NI he would be dealing with the situation. At that point he and Ms Turner sought legal advice.

[38] Later that day, Monday 4 November 2024 Ms Scott telephoned NI. The call was recorded. It lasted than that on 1 November, approximately 15 minutes, and NI stated in his affidavit that it felt more abusive. Ms Scott accused him of acting insubordinately and breaching her trust. She swore at him and made personal attacks. He stated that the call left him feeling very distressed and anxious. He called Mr Hills after the call.

[39] Mr Hills stated in his affidavit that he had contacted Mr Anderson and informed him about the second telephone call between NI and Ms Scott, that NI was stressed by what had occurred, and also told him that his wife had overheard the call from Ms Scott and she was also very distressed.

[40] Mr Anderson stated in his affidavit that NI saw him on Tuesday 5 November 2024, raised his concerns about Ms Scott's interactions with him and expressed concern about a meeting he had been asked to attend with Ms Scott on 8 November 2024.

[41] NI emailed Mr Anderson a formal complaint about Ms Scott's behaviour towards him on 5 November 2024. Mr Anderson stated that he and Ms Turner reviewed NI's complaint and listened to the two telephone call recordings.

[42] On 7 November 2024 a MS Teams meeting was held with Ms Scott to discuss a proposal to suspend her, after the meeting and the discussion, Ms Scott was suspended.

[43] In a letter to Ms Scott dated 8 November 2024 Damar outlined the process it intended to follow, and commenced a formal investigation into the complaint from NI. Mr Anderson was appointed as the investigator and Mr Bradley as the decision maker,

[44] Mr Anderson as part of the investigation process conducted interviews with HI and with Ms Scott. The transcripts of these interviews were provided to Ms Scott.

[45] The draft Investigation Report dated 24 January 2025 was provided to Ms Scott for review and comment. The final Investigation Report dated 31 January 2025 was provided both to Ms Scott and to Damar.

[46] The findings reached by Mr Anderson were that Ms Scott's behaviour was in breach of two internal Damar policies:

- a) Anti-Bullying & Occupational Violence Policy
- b) Code of Conduct – House Rules Policy – Protocol and Guidelines for Users

[47] A letter dated 3 February 2025 sent to Ms Scott outlined Damar's view that her alleged conduct towards NI in the telephone calls on 1 and 4 November 2024 may have constituted unacceptable behaviour and serious misconduct, and may have been a breach of Damar's policies and the Employment Agreement. It asked Ms Scott to attend a disciplinary meeting.

[48] The disciplinary meeting took place on 14 February 2025 at which Ms Scott did not speak but the lawyer she had instructed read out a written statement on her behalf. Ms Scott rejected the view that her conduct breached Damar policies and that, within the context, it did not constitute bullying.

[49] After considering her response, Damar terminated Ms Scott's employment, confirming the decision in a letter dated 18 February 2025.

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

A Serious Question?

[50] As a matter of principle, Ms Scott must establish that there is a serious question to be tried in respect of her 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.⁴

⁴ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

[51] 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 ...⁵

[52] 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,
- b) Whether there is a serious question to be tried in relation to the claim of permanent reinstatement.⁶

[53] 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.⁷

[54] My findings expressed in this preliminary determination are solely for the purpose of resolving Ms Scott'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?

[55] Ms Scott, who accepted that her manner of communication to NI was inappropriate, submits she has an arguable case that she was unjustifiably dismissed because Damar did not act as a fair and reasonable employer in terminating her employment after she had spoken to NI on two occasions over two business days.

[56] In particular she submits that there were flaws in the process, including that:

- Damar failed to appoint an external investigator;

⁵ *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC36 at[9].

⁶ *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* [2021] NZEmpC 59 at [7].

⁷ Above n 5 at [8].

- the investigation was predetermined; and/or
- Mr Anderson suffered from bias, ignored mitigating factors, and did not take into account the context in which NI had been given instructions outside his delegated authority without the knowledge of his manager Ms Scott.

[57] It is submitted for Ms Scott that her conduct towards NI on 1 and 4 November 2024 was inappropriate, but it cannot reasonably be said to reach the threshold of being repeated unreasonable conduct amounting to bullying, or constitute serious misconduct justifying dismissal without notice.

[58] Damar submits that the distress, anxiety and emotional harm that Ms Scott’s conduct caused NI is well documented and severe. It has policies and codes of conduct which set out that “bullying and occupational violence are neither accepted nor tolerated within Damar.

[59] Damar submits that following the formal complaint by NI, it followed a fair and reasonable process, and that its action in dismissing Ms Scott was fair and reasonable in the relevant circumstances.

[60] It is a low threshold and I find that Ms Scott has an arguable case that she was unjustifiably dismissed.

Reinstatement?

[61] Ms Scott must not only establish an arguable case for unjustifiable dismissal but must also establish that she would be reinstated if successful in such a claim.

[62] Reinstatement is the primary remedy and s125 (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. ...

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.⁸

⁸ *Hong v Auckland Transport* [2019] NZEmpC 54 at [66] and [67].

[63] It is submitted by Ms Scott that she was a hard-working loyal employee with no background of disciplinary or performance issues in her employment with Damar. Sue is capable of being reintegrated into work, noting that the business is substantial.

[64] It is submitted that Ms Scott is dependent on her income from Damar, and concerned about finding alternative employment given her specialist field, age and limited employment opportunities in the region where she lives.

[65] Ms Scott in her affidavit states that if reinstated there would be the ability for Damar to keep her and NI separated since they both work a number of work days remotely each week. It would also be possible for any contact between them to be supervised, any email exchanges could be monitored and any MS Teams calls could be recorded. She also affirms that it was an isolated incident and would like Damar to put in place a restorative process.

[66] Ms Scott further submits that she has a good working relationship with other members of the IT team who reported to her, two of whom have provided affidavits in support of her reinstatement.

[67] Damar submits that permanent reinstatement is neither practical nor reasonable. It submits that it is not reasonable nor practicable for Damar to implement a system whereby Ms Scott and NI work together without having direct contact or contact through an intermediary, this would be highly inconvenient and unduly burdensome on Damar and its resources. It would also be unfair to NI to have to work in an environment where all communications between him and Ms Scott were monitored to ensure his safety.

[68] It is submitted by Damar that if Ms Scott were to be permanently reinstated, it would have an adverse impact not only on NI who has stated in his affidavit that he would resign if Ms Scott were to be reinstated but on other employees on whom it would have a significant effect, including WH who had also stated she would resign should Ms Scott be reinstated. Damar submits that other employees have also expressed some anxiety about Ms Scott returning to the workplace.

[69] Damar submits that MS Scott's reinstatement would impact the work efficiency and functionality of NI and the IT team and that reinstatement is not commercially practicable. Since Ms Scott's suspension over six months earlier, the IT operations are functioning well and third-party providers and clients are accustomed to the restructured IT team. It is stated in the affidavits by Mr Bradley and Mr Hills that should Ms Scott be reinstated it would prejudice the productivity and innovation of other staff.

[70] Damar submits that the ERP project is vital to its business and Mr Bradley and Mr Hills have expressed concern in their affidavits that reinstatement would mean transitioning Ms Scott back into the ERP project which will derail the progress made since her dismissal.

[71] Damar further submits that Ms Scott's reinstatement would have an adverse impact on its culture. Over past years Damar has been focused on improving its culture through its Te Mea Tika: 'to do right' culture and wellbeing initiative. This has resulted in a noticeable positive cultural switch which it is feared Ms Scott's reinstatement will undermine as stated in the affidavit evidence lodged by Mr Bradley and Ms Turner. This is on the basis that reinstatement could risk setting a dangerous precedent that bullying and intimidatory behaviour within Damar is acceptable.

[72] Reinstatement on an interim or permanent basis must be practicable and reasonable. Taking all the submissions into consideration, and on the basis of the untested affidavit evidence as presented to the Authority, whilst I find that Ms Scott has an arguable case that she was unjustifiably dismissed, I am unable at this stage to conclude that she has a more than a weak arguable case that she would be reinstated permanently.

[73] Accordingly I do not find that Ms Scott has a strongly arguable case for interim reinstatement.

Balance of convenience

[74] As set out in the Employment Court case *X v Y Limited* this principle requires that the Authority balance the relative inconvenience, in terms of detriment or injury, to Damar who will have to bear the burden of an order reinstating Ms Scott until the substantive case is heard, against the inconvenience to Ms Scott who may have a just case, of having to bear the detriment of unjustifiable action until the case is heard.⁹

[75] The Authority hearing on the substantive matter has been set down in late October 2025. It is submitted for Ms Scott that the delay weighs in favour of interim reinstatement.

[76] It is further submitted for Ms Scott that damages would not be an adequate remedy. Ms Scott's affidavit evidence is that she has made reasonable attempts to search for employment through the broader Waikato/Bay of Plenty region, via recruitment consultancies, internet job searches, family and friends. She has not been able to find alternative employment even when applying for positions at a lesser responsibility and remuneration level.

⁹ *X v Y Limited* [1992] 1 ERNZ 863, at pg 10.

[77] An affidavit lodged by Ms Davison, Principal Consultant at a recruitment agency, supports the difficulties encountered by candidates of a senior level like that of Ms Scott to find suitable employment.

[78] Ms Scott has provided supporting evidence with her affidavit evidence that she has no other source of income and it is submitted that while she can discharge her obligations as given in her undertaking if called upon to do so, this would involve a liquidation of assets.

[79] Damar submits that Ms Scott's reinstatement would not only almost certainly result in the resignations of two valued employees, but would force Damar to operate with disharmonious employment relationships between Ms Scott and senior management. This would impact financially on the business and the overall culture.

[80] It submits that Ms Scott has been away from the business since 7 November 2024 and the time which has passed in the interim amplifies the disruption reinstatement would cause to its operation.

[81] It is submitted for Damar that damages would not be sufficient compensation if interim was to be wrongly granted, whereas for Ms Scott if reinstatement is declined, monetary damages would be an effective remedy.

[82] It is submitted that reinstating Ms Scott to the payroll would be prejudicial to Damar in that it would create an unfair financial burden to Damar without it receiving any benefit from work from Ms Scott. Salary for Ms Scott has not been budgeted and Damar has engaged a third party contractor to assist with the ERP project.

[83] Having taken into consideration the submissions put forward by the parties, balancing the potential prejudice to Ms Scott of not reinstating her against the potential prejudice to Damar of so doing, I find that the balance of convenience favours not reinstating Ms Scott on an interim basis.

Overall Justice

[84] The Authority must assess the overall justice of the case from a global perspective. This has been described by the Court of Appeal as:¹⁰

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'

¹⁰ *NZ Tax Refunds Ltd v Brooks Homes Limited* [2013] NZCA 90 at [47].

[85] It is submitted on behalf of Ms Scott that she has acknowledged her contribution to the situation in which she found herself. However this must be considered in light of the circumstances which gave rise to it.

[86] It is submitted this was an isolated incident in her employment, Ms Scott promptly acknowledged what had occurred, sought to address it and engage in a restorative process with NI.

[87] It is submitted that Ms Scott's mental well-being has deteriorated since she was dismissed and there is no prejudice to Damar in her returning to work. There are no health and safety implications that her reinstatement would cause that could not be reasonably managed.

[88] Damar submits that the overall justice supports not granting interim reinstatement. It submits that interim reinstatement would be a premature step, not warranted in the current circumstances: a full exploration of all the circumstances, both at the time preceding the dismissal and those existing at the time of the hearing will need to be undertaken with cross-examination prior to the Authority being able to determine reinstatement.

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

Next Steps

[90] The substantive investigation is set down in October with an agreed timetable.

Costs

[91] 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