

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2025] NZEmpC 159
EMPC 200/2025**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN STEPHEN MCCORMACK
 Plaintiff

AND RESERVE BANK OF NEW ZEALAND
 Defendant

Hearing: 26 June 2025
 (Heard at Auckland)

Appearances: J Plunket, counsel for plaintiff
 P Chemis and N Raman, counsel for defendant

Judgment: 28 July 2025

JUDGMENT OF JUDGE M S KING

Introduction

[1] On 17 January 2022 the plaintiff, Mr McCormack, commenced employment with the defendant, the Reserve Bank of New Zealand (the RBNZ), as a senior analyst.

[2] By April 2023, the RBNZ had expressed concerns about Mr McCormack's performance and it implemented a process to address its concerns. Early on in this process, Mr McCormack made a protected disclosure and became concerned that the RBNZ was using its performance management process in retaliation for him making a protected disclosure.

[3] On 6 December 2024 the RBNZ terminated Mr McCormack's employment on notice for poor performance. Mr McCormack raised personal grievances against the RBNZ claiming unjustified disadvantage and unjustified dismissal. He filed proceedings in the Employment Relations Authority (the Authority) seeking an order for permanent reinstatement by way of relief as well as interim reinstatement pending the determination of his grievances.

[4] In a determination dated 14 April 2025 the Authority dismissed Mr McCormack's application for interim reinstatement.¹ Mr McCormack then filed a de novo challenge to that determination. The challenge was heard on a priority basis and solely concerned whether Mr McCormack ought to be reinstated on an interim basis. This judgment does not decide whether he was unjustifiably dismissed. Nor does it decide whether, if he was unjustifiably dismissed, he will be reinstated on a permanent basis or what additional relief he might be entitled to.

[5] What is required on the application before the Court is an assessment of whether Mr McCormack has an arguable case that he was unjustifiably dismissed and an arguable case that, if he was, he will be permanently reinstated. The Court's assessment is based on untested evidence contained in sworn/affirmed affidavits.

The facts giving rise to the claim

[6] Mr McCormack was employed as a senior analyst in the RBNZ's Prudential Policy Department.² This department is responsible for advising on the structure, regulation and supervision of the New Zealand financial system as it relates to banks, non-bank deposit takers, insurers and payment systems. Mr McCormack initially reported to David Hargreaves, Manager of Policy Projects. From 1 July 2024 Annette Crequer took over this role from Mr Hargreaves.

[7] As a senior analyst, Mr McCormack was responsible for undertaking and leading analysis, research, and project work to support the development and

¹ *McCormack v Reserve Bank of New Zealand* [2025] NERA 210.

² The department was previously named the Financial System Policy and Analysis Department. It was renamed the Prudential Policy Department during Mr McCormack's employment with RBNZ.

refinement of policy, regulation, and legislation. An important part of his role involved engaging with stakeholders and providing influential advice to senior decision makers.

[8] On 11 April 2023 the RBNZ wrote to Mr McCormack advising him that it was initiating an informal plan (the April 2023 plan) aimed at addressing areas of Mr McCormack's performance. The April 2023 plan identified the following performance objectives:

- (a) Undertake an analytical process that focuses on the right policy questions at a sufficient level of detail and without trying to do legal drafting.
- (b) Work collaboratively with colleagues.

[9] The plan arranged for regular weekly meetings and provided for a reassessment upon completion. Mr McCormack's performance improved under the April 2023 plan, which concluded on 6 June 2023.

[10] On 20 July 2023 Mr McCormack emailed the RBNZ working group (which included his manager, Mr Hargreaves) about the concerns he had with the RBNZ's interpretation of tax treatment of the Depositor's Compensation Scheme (the Scheme).

[11] In August and September 2023 Mr McCormack had a medical condition which impaired his performance on an ongoing basis. Unfortunately, the medical condition was not diagnosed until late August 2023.

[12] On 9 October 2023 Mr McCormack raised further concerns in an email with Mr Hargreaves about the RBNZ's interpretation and operation of the Scheme. The next day, RBNZ informed Mr McCormack that it was commencing another informal plan to address ongoing performance concerns (the October 2023 plan).

[13] The October 2023 plan identified the same two objectives as the April 2023 plan and a third new objective: "Delivering work on time and to the quality expected of a senior analyst". The deliverables for this third objective were not dissimilar to those identified in the April 2023 plan. They focused on Mr McCormack providing

detailed drafts which required minimal additions and within the agreed timelines. The October 2023 plan provided for Mr McCormack to regularly meet with Mr Hargreaves and Jessica Rowe, Director of Prudential Policy, to review Mr McCormack's performance against the October 2023 plan's objectives.

[14] On 12 October 2023 Mr McCormack raised a personal grievance for unjustified disadvantage in relation to the October 2023 plan.

[15] On 7 December 2023 while communicating with Mr Hargreaves about the October 2023 plan and the interpretation of the Scheme, Mr McCormack sent an email to Mr Hargreaves which the RBNZ considered to contain inappropriate and accusatory language. A disciplinary process was commenced, resulting in Mr McCormack being issued with a written warning for misconduct. On 20 December 2023 Mr McCormack accepted that outcome. Subsequently, Mr McCormack claimed that the written warning was retaliation against him making a protected disclosure.

[16] Mr Hargreaves and Ms Rowe became concerned with Mr McCormack's behaviour. On or about 12 December 2023, these concerns prompted an assessment of whether Mr McCormack was an insider threat to the RBNZ. No specific security concerns were identified; however, Mr McCormack was placed on an insider threat pathway and monitored by the RBNZ until at least 4 July 2024.

[17] On 18 December 2023 Mr McCormack contacted the RBNZ's in-house legal counsel, Nick McBride, seeking help to make a protected disclosure.

[18] On 13 January 2024 Mr McCormack made three protected disclosures directly to the Chair of the RBNZ, Professor Neil Quigley.

[19] On 19 January 2024 Ms Rowe met with Mr McCormack and advised that she did not consider he was meeting the standard of performance for a senior analyst in terms of the quality and delivery of his work.

[20] On 31 January 2024 Ms Rowe wrote to Mr McCormack setting out her concerns about his performance and proposing to put in place a formal performance

improvement plan (PIP). A draft PIP was provided which identified the following three objectives:

- (a) Producing high quality policy analysis – working independently to identify the right steps to get a compelling answer.
- (b) Producing high quality written and verbal communication.
- (c) Working collaboratively with colleagues through the policy process.

[21] These objectives were not dissimilar to those identified in the earlier informal plans. Mr McCormack was advised that if he did not meet the requirements of the PIP this could result in a first written warning. Mr McCormack’s feedback described the draft PIP as a “fairly standard procedural development”.

[22] On 13 February 2024 the draft PIP was finalised and put in place.

[23] The PIP identified that Mr McCormack could consider using a writing coach to build his skills and improve his performance. While the RBNZ explored obtaining the support of a writing coach, this was never arranged.

[24] On 15 March 2024 a review meeting was held where Mr McCormack was advised that he had made progress in relation to the third objective of working collaboratively with colleagues. However, he had not met the first two objectives of the PIP to the standard required. The RBNZ’s preliminary view was to issue him with a first written warning. Mr McCormack did not provide any specific feedback on the preliminary view and a warning was issued.

[25] On 6 April 2024 Professor Quigley emailed Mr McCormack and advised that he did not consider the disclosures he made on 13 January 2024 were protected disclosures as defined by the Protected Disclosures (Protection of Whistleblowers) Act 2022.³ By the time of the Court’s hearing, the RBNZ had accepted that Mr McCormack’s 13 January 2024 disclosures were protected disclosures.

³ Protected Disclosures (Protection of Whistleblowers) Act 2022, ss 9 and 10.

[26] On 11 April 2024 Mr McCormack filed a statement of problem with the Authority regarding the October 2023 plan and the RBNZ's subsequent PIP process. Mr McCormack considered that the RBNZ's actions constituted retaliation against him for making a protected disclosure.

[27] On 17 April 2024 Mr Hargreaves directed Mr McCormack to spend more time working from the RBNZ's Auckland offices. Mr McCormack considered this directive was an attempt to cause him stress and adversely impact his performance.

[28] A second PIP was put in place on 18 April 2024 and ended on 17 May 2024. It carried over the three objectives from the first PIP and once again identified performance gaps, strategies to close the gaps, deliverables, and timeframes. It provided for regular meetings with Ms Rowe, Mr Hargreaves, and a human resources advisor.

[29] The RBNZ provided feedback on Mr McCormack's performance against the second PIP. It noted that while he had progressed on working collaboratively with colleagues, he failed to produce a high-quality draft paper to the required analysis and logic, and he struggled to prioritise his time and provide timely updates to Mr Hargreaves.

[30] Ms Rowe assessed Mr McCormack as not meeting expectations and a final written warning was issued. Mr McCormack was warned that if his performance remained unsatisfactory following a third formal review period, it may result in termination of his employment. A third PIP was put in place for the period 28 May 2024 to 3 July 2024. A copy of this PIP was not provided to the Court.

[31] On 28 May 2024 Mr McCormack filed a statement of problem with the Authority regarding the protected disclosures he had made.

[32] Shortly after the third PIP commenced, Mr McCormack took four weeks of wellness leave. The third PIP was extended from 26 June to 26 July 2024 due to Mr McCormack's leave.

[33] On 1 July 2024 Ms Crequer replaced Mr Hargreaves as Mr McCormack's manager. On the same date, Mr McCormack returned from leave and sent an email flagging health and safety concerns he had about the workplace and his "need to be able to operate in a psychologically safe work environment". He declined to attend meetings in relation to the PIP on the basis that employment issues needed to resolve before he could safely resume work.

[34] Ms Rowe wrote to Mr McCormack raising concerns about his lack of engagement and warning him that this would be an unfavourable factor when reviewing his performance under the third PIP.

[35] On 15 July 2024 the parties attended mediation with the Ministry of Business, Innovation and Employment.

[36] On 7 August 2024 Mr McCormack began to engage with Ms Crequer, more than a month after she had taken over as his direct manager. Ms Crequer raised concerns about Mr McCormack's work directly with him, including his feedback on a colleagues work which she advised were inappropriate and disrespectful. The feedback included that the colleagues work "appears to lack common sense" and "look like a waste of space". Ms Crequer also pointed out that his assessment that the work was "wrong", was incorrect and advised him against such emphatic statements. She informed Mr McCormack that she could not pass on his work without rewriting it and suggested he do so, including improving the tone and correcting the inaccuracies she had identified.

[37] On 9 August 2024 the RBNZ notified Mr McCormack that he would not be receiving an increase to his pay on the basis that he was subject to a performance process. Mr McCormack considered this to be an unjustified disadvantage and further evidence of ongoing retaliation.

[38] On 2 September 2024 Ms Rowe wrote to Mr McCormack setting out her preliminary view that in her assessment, Mr McCormack's performance had continued to fall below the standard expected by the RBNZ of a senior analyst. She considered

he had failed to cooperate and engage in the PIP process and proposed to terminate his employment on notice.

[39] On 11 September 2024 Mr McCormack attended a meeting to provide his feedback on Ms Rowe's preliminary view. Both parties had legal representatives present. During the meeting Mr McBride mentioned that Mr McCormack had made a protected disclosure to the Minister of Finance. Mr McCormack considered this to be a malicious outing of him making a second protected disclosure and that this constituted a personal grievance under the Employment Relations Act 2000 (the Act).⁴

[40] On 12 September 2024 Mr McCormack's legal representative sent a letter referring to an earlier request made on 29 July 2024 for all relevant information under s 4(1A) and asserted that the RBNZ had failed to comply with that request.⁵ The letter requested that the RBNZ provide an undertaking that it had provided all relevant information and made what it acknowledged was an expansive request under s 4(1A) of the Act and principle 6 of the Privacy Act 2020.⁶ Specifically, it requested information regarding Mr McCormack that was produced or otherwise sent or received, involving a number of the RBNZ individuals. Mr McCormack made further requests for information from the RBNZ post termination.

[41] On 26 September 2024 Ms Rowe wrote to Mr McCormack following the 11 September 2024 meeting to address his concerns around his protected disclosures and explain why his allegations that the RBNZ had retaliated were not accepted. She sought a further response in writing from Mr McCormack regarding her preliminary view that he was underperforming and proposed to terminate his employment on notice in writing. She gave him an opportunity to further comment on a number of matters before she made a final decision.

[42] On 11 November 2024 Ms Rowe met with Mr McCormack. Once again both parties had legal representatives present. Mr McCormack maintained that he was performing to the standard required of a senior analyst and that the actions taken by

⁴ Employment Relations Act 2000, ss 103(1)(b) and 103(1)(k).

⁵ Employment Relations Act 2000, s 4(1A).

⁶ Privacy Act 2020, s 22.

the RBNZ were in retaliation for him making a protected disclosure. He believed the preliminary decision to terminate was fundamentally flawed and predetermined. Given the time that had elapsed since Mr McCormack had last met with Ms Rowe, he requested that she review two recent pieces of work, which was agreed. However, Ms Rowe's feedback was that the written work did not meet the performance standards expected of a senior analyst, which Mr McCormack disputed.

[43] On 6 December 2024 Ms Rowe met with Mr McCormack to provide him with her final decision to terminate his employment on notice based on his failure to meet the required standards expected of a senior analyst. Her decision was recorded in a letter dated the same date which elaborated on the performance concerns and the matters that had been taken into consideration, including alternatives to dismissal, before determining that termination on notice was the appropriate outcome.

[44] On 10 December 2024 Mr McCormack raised personal grievances pursuant to ss 103(1)(a) and 103(1)(k) of the Act.

The legal framework is well settled

[45] When determining whether to make an order of interim reinstatement, the law relating to interim injunctions applies having regard to the object of the Act.⁷ The Court must consider:⁸

- (a) whether there is a serious question to be tried;
- (b) where the balance of convenience lies; and
- (c) what is required in the overall interests of justice.

[46] The first question has a relatively low threshold.⁹ Establishing if there is a serious question to be tried has two parts:¹⁰

⁷ Employment Relations Act 2000, s 127(4).

⁸ *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) at 142; and *Intellihub Ltd v Genesis Energy Ltd* [2020] NZCA 344, [2020] NZCCLR 29 at [23].

⁹ *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* [2021] NZEmpC 59, [2021] 89 ERNZ 153 at [8].

¹⁰ *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [8].

- (a) whether there is a serious question to be tried in relation to the claim of unjustifiable dismissal; and, if so,
- (b) whether there is a serious question to be tried in relation to the claim for permanent reinstatement.

[47] The merits of the case, insofar as they are able to be ascertained at an interim stage, may be relevant in assessing the balance of convenience and the overall interests of justice.¹¹

There is an arguable case for unjustified dismissal

[48] The RBNZ accepts that Mr McCormack's claim of unjustified dismissal clears the initial low threshold as to whether there is a seriously arguable case, in the sense that his causes of action are not frivolous or vexatious. However, it says his claims are at best weak, particularly in relation to permanent reinstatement.

[49] Mr McCormack asserts that his claims are strong. At this stage it is necessary to describe each of Mr McCormack's causes of action. For convenience I will make observations as to the relative merits as I proceed which will, at a later stage, of the judgment, be relevant to the balance of convenience and overall justice considerations.

First cause of action – RBNZ's informal and formal performance processes were disingenuous, predetermined and procedurally unjustified

[50] Mr McCormack claims that RBNZ's informal and formal performance improvement processes were not genuine. He claims that his dismissal was a predetermined box-ticking exercise, designed to end the employment relationship. He put forward various arguments in support of his claim, the key arguments are addressed below.

[51] Mr McCormack's first argument is that the April 2023 plan was not an informal performance plan, but part of RBNZ's annual review process. However, the April 2023 plan and covering communication, clearly describe it as an informal plan aimed

¹¹ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

at addressing areas of development. The plan sets out objectives, deliverables, weekly meetings, and a review assessment of Mr McCormack's performance at the end.¹² Further, Mr McCormack participated in the annual review cycle on 30 June 2023, after the April 2023 plan was implemented, which supports the RBNZ's position that they were two distinct processes.

[52] Mr McCormack's second argument is that the October 2023 plan was unlawful because his performance was evaluated based on periods when he was unwell. The RBNZ's evidence is that Mr McCormack's illness constituted only a small portion of the four-month period giving rise to the October 2023 plan. While Mr McCormack provided feedback on the proposed plan about the impact of his illness, the RBNZ concluded that he had been underperforming for a significant period, which justified proceeding with the plan.

[53] Mr McCormack's third argument is that the 13 February 2024 formal PIP identified issues with his writing and that providing him with writing training would be of material value to him. However, the RBNZ failed to organise and provide the writing training. Mr McCormack submits that this failure falls short of the proactive and supportive approach reasonably expected of a public sector employee and is unlawful.¹³

[54] The RBNZ provided evidence that it explored obtaining an individual writing coach in late February 2024. However, the writing coach was unavailable for several months which coincided with Mr McCormack taking leave. When Mr McCormack returned, he had difficulties engaging in the PIP process and on 8 May 2024, he declined additional support from Ms Rowe. Ms Rowe also considered the RBNZ's failure to provide writing training when making her decision to terminate Mr McCormack. However, she determined it would not have changed the outcome given the significant assistance he received through one-on-one coaching from his direct manager and the provision of additional policy documents, his belief that he was performing at the level required, and that the PIP process was retaliation for his disclosures.

¹² See [8] and [9] above.

¹³ *Bagchi v Chief Executive of the Inland Revenue Department* (2008) 5 NZELR 767 at [68].

[55] Mr McCormack's fourth argument is that the RBNZ failed to reasonably and fairly assess his performance. He provided examples of what he considered to be the RBNZ shifting the goal posts. This included Ms Rowe's assessment of two pieces of his work in November 2024 shortly before she made the decision to terminate his employment.

[56] The first piece of work involved working on a solution to a policy problem. Ms Rowe considered that Mr McCormack had failed to identify and offer a recommended solution. Mr McCormack responded that he did not identify solutions as he did not consider there was a problem that required solutions. Ms Rowe found his response problematic, she pointed to the commissioning document that clearly set out the problem.

[57] The second piece of work was a memorandum on which Mr McCormack had already received feedback from Ms Crequer. However, he chose to submit the work to Ms Rowe without incorporating the feedback. Ms Rowe was unaware Mr McCormack had submitted the same memorandum and was critical of his failure to incorporate the feedback and the time taken to produce the work.

[58] Mr McCormack believes Ms Rowe's feedback on the second piece of work was either unreasonable, or in the alternative, Ms Crequer's feedback was insufficient. Either way, he considered that the feedback demonstrated that he was not being treated fairly in the PIP process. The RBNZ accepts that Ms Rowe's feedback was more detailed. However, it submits that this does not make it unreasonable or unfair. Her feedback was given in the context of the end stages of a formal PIP process where she was explaining why Mr McCormack's work was not meeting the expectations for his role and termination was a potential outcome.

[59] Mr McCormack's fifth argument is that the RBNZ failed to comply with the obligation to provide all relevant information as required under s 4(1A) of the Act. Mr McCormack acknowledged some of his requests were expansive, such as his 12 September 2024 request. However, he claims that the RBNZ withheld relevant information, including information that it had placed him on the insider threat

pathway, which was only provided to him after his termination when he did not have an opportunity to comment.

[60] Ms Rowe's evidence is that her team handles highly sensitive material, and she is trained to raise any concerns about unusual or highly negative behaviour from staff, which is what she did following Mr McCormack's behaviour in December 2023. She did not consider that this information was relevant to Mr McCormack's termination of employment under the PIP process.

[61] Further, the RBNZ submits that it has provided significant tranches of documents to Mr McCormack both pre and post termination. At the date of the hearing, its lawyers had spent 340 hours addressing Mr McCormack's requests and provided 2,968 pages of documents. Ms Rowe maintains that all information relevant to her decision to dismiss has been provided to Mr McCormack in accordance with RBNZ's legal obligations.

[62] Mr McCormack's sixth argument is that the RBNZ shifted the goal posts and put pressure on him by unilaterally directing he spend more time physically working in the RBNZ's offices. On its face, this does not appear to be an unreasonable instruction for an employee who is working through a performance process which requires significant one-on-one time with their direct manager.

[63] Mr McCormack's last argument is that the termination of his employment is predetermined. He points to a Microsoft Teams message with Senior RBNZ Managers discussing the upcoming mediation with Mr McCormack as evidence of this claim. Mr McCormack also points to the RBNZ not considering redeployment options or presuming that he was neurodiverse but failing to take steps to raise and address this presumption.

[64] The RBNZ acknowledges that a Senior RBNZ Manager made negative comments about Mr McCormack. However, Ms Rowe was the decision maker. It maintains that she was removed from those comments and there is no direct evidence that these comments impacted on her decision making. The RBNZ denies that a note made by a human resource team member mentioning neurodiversity placed an

obligation on it to explore it further, particularly given it had been accommodating Mr McCormack's health issues throughout the process. The RBNZ maintains that it had substantial and reasonable grounds to be concerned about Mr McCormack's performance. It says that after a lengthy, detailed, and well-documented process, and without discernible improvement or engagement by Mr McCormack, it justifiably brought his employment to an end.

[65] I have considered Mr McCormack arguments about the genuineness and procedural fairness of the RBNZ's performance process. The RBNZ's performance and disciplinary process was not perfect. His second and third arguments in relation to whether the October 2023 plan fairly considered his illness and the impact of the RBNZ's failure to provide him with writing training, are strongly arguable. However, it is unclear on the evidence before the Court whether these arguments would render the dismissal unjustified, or at most, would constitute an unjustified disadvantage. This lessens the impact of these two arguments on the question of whether he has an arguable case for unjustified dismissal.

[66] Standing back, Mr McCormack's seven arguments do not appear particularly strong on the untested evidence before me. The RBNZ process spanned 18 months, during which it set expected standards and put Mr McCormack clearly on notice of the possible consequences if he failed to improve his performance. This view is supported by the extensive evidence of the RBNZ, including the voluminous documentation provided as part of its process, and the intensive coaching and one-on-one feedback from management. However, Mr McCormack's assertions meet the low threshold of an arguable case, his claims are more than just frivolous or vexatious and warrant further scrutiny in the substantive case before the Authority.

Second cause of action – retaliation

[67] Mr McCormack says that his dismissal and a number of unjustified actions leading up to his dismissal were in retaliation for him making a protected disclosure on 13 January 2024.

[68] Mr McCormack submits that Mr McBride's decision to expose him as having made a further protected disclosure to the Minister of Finance, combined with the

negative sentiments expressed about him before mediation, are evidence that the RBNZ's decision to dismiss him and his protected disclosure are intertwined.

[69] In cases where it is alleged that an employer's action or omission was retaliation for an employee making a protected disclosure, the onus shifts to the employer to prove on the balance of probabilities that the disclosure was not the substantial reason for the dismissal.¹⁴

[70] The RBNZ has accepted the 13 January 2024 disclosure was a protected disclosure. However, it is critical of Mr McCormack's view that the 18 months of informal and performance management was a sham, a disguise for retaliation. It refers to the substantial volumes of documentation detailing concerns regarding his performance, which it began documenting in April 2023, prior to him making a protected disclosure. The performance concerns in the April 2023 plan appear to be consistent with the concerns in the May 2024 PIP which resulted in the preliminary view to terminate Mr McCormack's employment. The timing and consistency do not appear to support his claims of retaliation.

[71] The RBNZ also relies on the detailed affidavit evidence of Ms Rowe that she managed Mr McCormack through the PIP process and decided ultimately that he was not performing to the standard required. Ms Rowe also denies involvement in the protected disclosure process and the assertion that Mr McBride's comments or views on Mr McCormack played a part in her decision-making.

[72] Ms Rowe's evidence, combined with the substantial amount of documentation covering the 18-month performance process, appears credible and persuasive.

[73] Whether the performance process and other unjustified actions flowing from it were in retaliation for making a protected disclosure will need to be considered in the substantive case before the Authority. However, I consider this aspect of Mr McCormack's claims to be arguable, but weak. The claims face difficulty, due to the timing from when the RBNZ commenced its performance process, the consistency

¹⁴ Protected Disclosures (Protection of Whistleblowers) Act 2022, s 21 and Employment Relations Act 2000, s 110B(3).

of the performance concerns throughout the process and the voluminous documentation which appear to support the RBNZ holding genuine and ongoing concerns over Mr McCormack's performance.

[74] Mr McCormack repeats a number of his earlier concerns in support of his retaliation claim including whether the insider threat pathway and the RBNZ's failure to provide all relevant information supported his retaliation. These claims have not been repeated, as they are not his strongest claims and were dealt with in his first cause of action above.

Evaluation of Mr McCormack's claims

[75] In my assessment at this interim stage and without the evidence being tested, I am satisfied that there is a serious question to be tried, or an arguable case in relation to Mr McCormack's claims for unjustified dismissal. However, for the reasons above, I do not consider his case to be a strong one.

There is an arguable case for permanent reinstatement

[76] Where an employee who succeeds in his or her claim of unjustifiable dismissal seeks reinstatement, that must be provided for wherever practicable and reasonable.¹⁵ It likely will be the most significant remedy claimed because of its importance to the grievant; it is often not enough for a monetary judgment to be substituted for the job.

[77] Mr McCormack's evidence is that he bears no ill will against any particular RBNZ employee. The RBNZ is a large public sector organisation, with 'good employer' obligations. He relied on *DQJ v The Commissioner of Inland Revenue*¹⁶ to submit that it has heightened employer obligations (by virtue of it being a public service organisation) making it better placed than many employees to manage his return to the workplace.

[78] Mr McCormack submits that the RBNZ's evidence and position on permanent reinstatement is weak. The RBNZ only provided evidence from Ms Rowe challenging

¹⁵ Employment Relations Act 2000, s 125.

¹⁶ *DQJ v The Commissioner of Inland Revenue* [2025] NZEmpC 10 at [55] and [67].

the practicability of reinstatement. However, as Ms Rowe has been promoted, she would be his three-up manager if he were reinstated and her evidence of the impact of reinstatement on other RBNZ managers carries little weight.

[79] Lastly, Mr McCormack submits that the extent that the evidence discloses a breakdown in the employment relationship, which he denies, means the RBNZ must shoulder the responsibility for that. He points to its actions in failing to respond or acknowledge that his disclosures were protected disclosures. Its conduct in outing his disclosures at meetings had a significant impact on the employment relationship.

[80] Nevertheless, the RBNZ points out the difficulties with reinstatement and returning Mr McCormack back to his senior analyst role. Its submissions make the following key arguments:

- (a) the lengthy period in which Mr McCormack has underperformed;
- (b) his lack of insight or acceptance of the performance concerns raised during the lengthy process;
- (c) that he has disengaged from the process at times;
- (d) that he has made disparaging comments about Ms Rowe and Mr Hargreaves (leading to him being given a warning) which undermines his submission that he bears no ill will towards the RBNZ employees, nor does he share in the responsibility for the breakdown of the employment relationship; and
- (e) the likelihood of ongoing difficulties if Mr McCormack was returned to the workplace because he does not show any insight or accept any part in what has happened.

[81] The issues raised by the RBNZ will be relevant to the practicability and reasonableness of permanent reinstatement. The evidence before the Court is that Mr McCormack has demonstrated a high level of distrust toward the RBNZ and its senior managers. There is also the inescapable difficulty of how Mr McCormack could be

reintegrated into the RBNZ when each party has such polarising views of his performance and his willingness to engage in performance discussions. It may be that, even if Mr McCormack is successful in his claim for unjustified dismissal, his contribution towards the situation that gave rise to the dismissal requires reinstatement to be declined.¹⁷

[82] However, Mr McCormack only needs to establish that he has an arguable case for reinstatement. The threshold is low. Mr McCormack's claim is not frivolous or vexatious. Weighing up the factors, I find that Mr McCormack has an arguable case for permanent reinstatement, although, it is not a strong case.

Balance of convenience does not favour interim reinstatement

[83] The balance of convenience involves weighing up the interests of the parties, at this stage, to determine whether interim relief ought to be granted. Although referred to as the balance of convenience, it has been described elsewhere as assessing the balance of the risk of doing an injustice.¹⁸ The task required is to balance the injustice that would be caused to Mr McCormack if an interim order was refused and a permanent one subsequently obtained, against the injustice that would result to the RBNZ if an interim order was made and subsequently discharged.

[84] Mr McCormack has claimed that interim reinstatement is required for financial hardship reasons. His evidence is that he remains out of work and this is impacting his ability to pay his mortgage and living expenses, which is causing financial stress on both him and his family. He has equity in his home of over \$1.7 million which could be realised to support any payment of damages, if his undertaking for damages was called upon.

[85] However, money is not everything. Mr McCormack's submissions also focus on the importance of his employment relationship with the RBNZ. His evidence is that he made a conscious decision to take up employment with the RBNZ, including

¹⁷ Employment Relations Act, s 124.

¹⁸ *Tellen Systems NZ (2013) Ltd (in rec and in liq) v Fibre Investments Ltd* [2022] NZHC 19 at [69] citing *Cayne v Global Natural Resources plc* [1984] 1 All ER 225 at 237. See also *VMR v Civil Aviation Authority* [2022] NZEmpC 5 at [136].

undertaking additional courses at his own expense to obtain a qualification relevant to his work. He maintains his commitment to his employment with the RBNZ and the dignity in work which cannot be fulfilled by posthumous damages.¹⁹

[86] Mr McCormack reiterates that the RBNZ, as a public service organisation, is well-resourced with a sizable human resources function. It has the resources to put appropriate measures in place (if any) to ensure the employment relationship is harmoniously resumed. He has also indicated his willingness to attend mediation, enter mentoring or coaching, and undertake writing training.

[87] Lastly, Mr McCormack urges the Court to support the continuation of his employment on an interim basis, as a matter of public policy, so as not to encourage other employers to dismiss whistleblowers on the calculation they will not be reinstated.

[88] However, the evidence of retaliation will ultimately need to be tested at the substantive hearing of his case. If the Authority finds the RBNZ has retaliated against Mr McCormack, I accept at that point in time Mr McCormack's submission would carry significant weight. At this interim stage, where the evidence is untested and not particularly strong, I do not consider it carries much weight.

[89] The RBNZ's key argument that the balance of convenience does not support reinstatement, falls squarely on its PIP process. It reiterates that this commenced before Mr McCormack made a protected disclosure and it was a well-documented, genuine and detailed 18-month performance process. Mr McCormack's demonstrated lack of insight into the RBNZ's concerns about his performance and failure to engage in the process gives it little confidence that anything will change if he is reinstated, despite his assurances to the contrary. The RBNZ submits that reinstatement would require it to provide significant support and inputs from others. Given Mr McCormack's concerns about Ms Rowe and other senior RBNZ managers, this would likely involve the Assistant Governor, which would be operationally unrealistic.

¹⁹ *The Vice Chancellor of Lincoln University v Cheng* [2024] NZEmpC 227 at [47].

[90] The RBNZ does not place much weight on Mr McCormack's evidence of financial hardship, which it considers fails to provide detail over his total family income and liabilities. It submits that the cost to it of reinstating a "chronic underperformer who refuses to accept that he has any performance issues at all", would impose a heavy and unfair burden. This cost outweighs Mr McCormack's temporary loss of income, given his substantial assets and the proximity of the Authority investigation meeting next month.

[91] The detriment suffered by Mr McCormack by not being reinstated pending the hearing of his claim can be substantively rectified if he succeeds. There is no suggestion that he would not be able to return to the work that he had previously undertaken with the RBNZ because of the gap in his employment. His situation is dissimilar from workers where ongoing experience is critical, either to maintain particular skills or because of external certification requirements.

[92] Mr McCormack's concerns are valid ones but they could be rectified should he succeed in his substantive claims which are due to be heard in the Authority next month. However, the concerns of RBNZ, if it succeeds, may not be able to be reversed. At an interim stage, where the justification for the dismissal has not been properly tested, the practicality and reasonableness of such a reintegration is considerably less. Further, Mr McCormack's lack of willingness to accept RBNZ's performance issues as legitimate is relevant to the balance of convenience, lending weight to the prospect that reintegration will impose an undue burden on the RBNZ, in terms of operational feasibility and practicability. For these reasons the balance of convenience does not support an order for interim reinstatement.

Overall justice does not displace the balance of convenience issues

[93] The threshold for an arguable case is low. While Mr McCormack has an arguable case for unjustified dismissal and permanent reinstatement, on the untested evidence before me, these do not appear particularly strong. This is not a situation where it is clear that the RBNZ has made material errors – either procedurally or in terms of its substantive decision-making.

[94] Standing back and looking at the position overall, I am satisfied that an order for interim reinstatement is not in the interests of justice. The application is unsuccessful.

Costs

[95] The parties are to discuss and hopefully agree on costs. If no agreement is reached, the RBNZ may apply for costs by memorandum filed and served within 28 days of the date of this judgment. Any response from Mr McCormack is to be filed and served within a further 21 days, with any reply from the RBNZ to be filed and served within seven days thereafter. Costs will then be determined on the papers.

M S King
Judge

Judgment signed at 4.15 pm on 28 July 2025