IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2025] NZEmpC 76
EMPC 90/2025

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	VEGEPOD NZ LIMITED Plaintiff
AND	ANDREW LOWE First Defendant
AND	LISA MARIE LOWE Second Defendant

Hearing:	31 March 2025 (Heard at Wellington via Audio-Visual Link)
Appearances:	M O'Brien and J Plunket, counsel for plaintiff S Mitchell KC and A Drumm, counsel for defendants
Judgment:	14 April 2025

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] The defendants, Mrs and Mr Lowe, were employed at the plaintiff company (Vegepod NZ Ltd) as general managers (for New Zealand Operations and for New Zealand Sales and Marketing respectively). They were also shareholders in the company. Vegepod NZ Ltd is part of a global business.

[2] In early 2024 Vegepod NZ Ltd was advised that the global business was sustaining losses, which it would be passing on to the New Zealand company. Mrs

and Mr Lowe raised a shareholder dispute in respect of how the costs transfer issue was being approached. The relationship between Mrs and Mr Lowe, and the chief executive of Vegepod NZ Ltd (Matthew Harris) deteriorated. High Court proceedings were filed.

[3] A restructuring proposal was developed for Vegepod NZ Ltd. Matthew Harris took the lead. The proposal involved disestablishing the two roles that Mrs and Mr Lowe held, enabling several functions to be performed remotely through the Australian office. A business plan was considered by the board and ultimately approved. Mrs and Mr Lowe were asked for their feedback; information was provided to them; and they were invited to meetings which they did not attend. Ultimately, Mrs and Mr Lowe were given notice that their positions had been disestablished. They were paid out in lieu of notice but required to work two working days to complete a handover of the company. The handover did not go smoothly.

[4] The Lowes' last working day was 6 December 2024.

[5] The Lowes lodged a statement of problem in the Employment Relations Authority claiming that they had been unjustifiably dismissed and disadvantaged. They sought permanent reinstatement along with other remedies. They also applied for interim reinstatement pending the outcome of the Authority's substantive investigation.

[6] The Authority granted Mrs and Mr Lowe's application for interim reinstatement on 20 February 2025. The company has filed a challenge to the determination which was heard on an urgent basis. This judgment deals solely with the issue of whether Mrs and Mr Lowe should be reinstated on an interim basis to their positions within the company.

[7] The challenge was pursued by way of de novo hearing and, as is usual in a case such as this, it proceeded on the basis of untested affidavit evidence and submissions.

[8] As I have said, this judgment is confined to the issue of whether the Lowes ought to be reinstated on an interim basis. It does not decide whether they were

unjustifiably dismissed (or unjustifiably disadvantaged). Nor does it decide whether, if they were unjustifiably dismissed, they will be reinstated on a permanent basis; or what additional/or other relief they might be entitled to.

Framework for analysis

[9] When determining whether to make an order of interim reinstatement, the law relating to interim injunctions applies having regard to the object of the Employment Relations Act 2000 (the Act).[1] In essence, the object of the Act is to build productive employment relationships through the promotion of good faith.[2]

[10] The approach to applications for interim reinstatement is well established and can be summarised as follows.[3] An applicant must establish that there is a serious question to be tried. Consideration must be given to the balance of convenience, and the impact on the parties of the granting of, or the refusal to grant, an order. The impact on third parties will also be relevant to the weighing exercise. Finally, the overall interests of justice are considered, standing back from the detail required by the earlier steps. While the power to make an order for interim reinstatement is a discretionary one, the assessment of whether there is a serious question to be tried is not. It requires judicial evaluation.

[11] In a claim for interim reinstatement, the question of whether there is a serious question to be tried raises two sub-issues:[4]

(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.

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1 Employment Relations Act 2000, s 127(4).
2 Section 3.
3 *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59, [2021] ERNZ 153 at [6]-[9], citing *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12]-[13].
4 See *McKean v Ports of Auckland Ltd* [2011] NZEmpC 128, [2011] ERNZ 312 at [4].

[12] As the Court of Appeal made clear in *NZ Tax Refunds Ltd v Brooks Homes Ltd*, a serious question to be tried is one that is not vexatious and frivolous.[5] Once that (relatively low) threshold is overcome, 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.

[13] As Judge Corkill pointed out in *Savage v Wai Shing Ltd*:[6]

> [32] An interim injunction is fundamentally different to a permanent injunction. Under the general law, at the interim stage the parties legal and equitable rights are uncertain. At that time, the object is to preserve the Court's ability to give effect to the parties substantive legal and equitable rights at trial. It has been described as a 'holding remedy' to address a present position until the merits of the case can be fully adjudicated; or as a process to 'hold the ring' pending final determination of the merits or other disposal of the dispute. It does so by maintaining the status quo, which is the last settled position between the parties.

[14] As I have said, at this stage the Court proceeds on the basis of untested evidence. The evidence will be tested at the substantive hearing. The following emerges from the evidence at this stage.

The facts

[15] Matthew Harris invented and created the Vegepod, and operated a sole trader company in Australia from 2010. In 2016 he looked to expand operations to New Zealand, ultimately joining forces with Mrs and Mr Lowe, who were owners and directors of a company called Vegegardenz Ltd. Vegegardenz Ltd sold Vegepod products in the New Zealand market.

[16] Vegepod NZ Ltd was established and incorporated in 2019. Mrs and Mr Lowe each own a one per cent shareholding in the company; Vegegardenz owns a 28 per cent share of Vegepod NZ Ltd and a company called Vegepod Holdings has a 70 per cent share. Vegepod Holdings owns Vegepod Proprietary Ltd and Vegepod Services Proprietary Ltd (which is the supplier of Vegepod products and the global operating

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5 *Brooks Homes Ltd*, above n 3, at [12].
6 *Savage v Wai Shing Ltd* [2019] NZEmpC 153, (2019) 17 NZELR 100.

company for Vegepod Holdings). I refer to these companies as comprising the Vegepod group.

[17] The Vegepod group operates with subsidiary companies in the United States of America, the United Kingdom, Canada and New Zealand. An operation in Germany closed down in June 2024.

[18] The Vegepod group of companies has a strong family influence. Matthew Harris is a director and chairperson of Vegepod NZ Ltd; director and chairperson of Vegepod Holdings and chief operating officer of Vegepod Services Pty Ltd. Blake Harris is Matthew Harris' son. Blake Harris is general manager and director of Vegepod Canada Ltd, manages the Vegepod USA business and became general manager for Vegepod UK in 2024. He was previously the national wholesale manager for Vegepod in Australia. He sits on what is described as the Vegepod senior leadership team. The senior leadership team guides strategic direction and key business challenges within the business.

[19] Matthew Harris also has another son working in the business, Brandon Harris. He is a director of Vegepod NZ Ltd. Cindy Grass is Blake and Brandon Harris' mother, and Matthew Harris' ex-wife. She also sits on the senior leadership team, and provides human resources advice and support on a consultancy basis. Blake and Brandon's stepmother (Melissa Harris) is married to Matthew Harris and is also involved in the business. Paul Harris (Matthew Harris' brother) was also involved in the business. He introduced Matthew Harris to Mrs and Mr Lowe.

[20] Mrs Lowe has been a director of Vegepod NZ Ltd since 2019. Mr Lowe is not a director. As a director Mrs Lowe owes duties to the company, distinct from her obligations as an employee, a point I return to later.

[21] Matthew Harris is the chairperson of the board of directors, and a director of Vegepod NZ Ltd. Prior to 15 May 2024, Paul Harris was a director of Vegepod NZ Ltd. He had been removed from his role as a global director the previous year. A breakdown in the relationship between Matthew Harris and Paul Harris eventually led to Paul Harris' removal from the business.

[22] There are now only three external shareholders in the Vegepod business; those shareholders are Mrs and Mr Lowe and their company, Vegegardenz Ltd.

[23] Mrs and Mr Lowe each signed an employment agreement with Vegepod NZ Ltd in May 2019; new employment agreements were presented to them on 1 August 2023, but they say they did not sign these, and there is no record that they did so.[7] The signed agreements contained a provision relating to redundancy, namely cl 18. Clause 18 included a requirement for the employer to use its best endeavours to redeploy into a suitable alternative position if one existed, a requirement that a fair process would be undertaken, and a requirement to consult about any possible redundancy situation.

[24] It is apparent that Mrs and Mr Lowe were largely left to manage the day-to-day running of Vegepod NZ Ltd and it was operating profitably.

[25] Around May 2024, Matthew Harris advised Mrs and Mr Lowe that the global business was sustaining losses and that the way in which such losses would be addressed was by passing costs through to Vegepod NZ Ltd. That led to Vegepod NZ Ltd being issued with an invoice for approximately $300,000 to pay retrospective charges dating back 12 months to cover costs associated with the global business. Shortly afterwards Mrs and Mr Lowe were advised that the global business would increase costs, from the cost of the product plus 10 per cent to the cost of the product plus 35 per cent.

[26] Mrs and Mr Lowe obtained legal advice, and advised Matthew Harris that such costs could not be imposed on Vegepod NZ Ltd under the Shareholder and Distribution Agreements dated May 2019. Mrs and Mr Lowe were then advised that "management fees", rather than costs, would be imposed. Mrs and Mr Lowe requested that Matthew Harris and the chief financial officer of the Vegepod group, Mr Triesman, engage an expert on transfer pricing. That request appears to have been declined.

[27] In the event, Mrs and Mr Lowe raised a shareholder dispute, and filed proceedings in the High Court.

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7 There is a dispute about which employment agreements apply.

[28] On 30 August 2024 a notice was issued calling for a meeting of directors of Vegepod NZ Ltd. The notice identified a number of proposals for discussion, including that Matthew Harris be appointed chairperson of the board; a proposed increase to the management and transfer pricing margin fee paid by Vegepod NZ Ltd and that there be an exploration of redundancies in Vegepod NZ Ltd (I pause to note that at the time there were three positions at Vegepod NZ Ltd, namely the two held by Mrs and Mr Lowe and a third, administrative, position).

[29] Included with the notice for the meeting was a business plan and transfer pricing report. The proposed business plan referred to a "thorough strategic review" indicating an opportunity to reshore essential functions from New Zealand to Australia; and a proposal to restructure. The restructure would involve disestablishing the two roles held by Mrs and Mr Lowe, and having a new (sales) role.

[30] As one of the directors, Mrs Lowe received a copy of the notice and the attached documentation. She was concerned about the accuracy of a number of matters in the proposed business plan and set her concerns out in writing. She conveyed her concerns to Matthew Harris before the meeting and reiterated them at the meeting. Amongst her expressed concerns was accuracy of the financial data said to support the recommendations contained within the proposed plan; the accuracy of a number of factual matters referred to; and the lack of any input from the New Zealand part of the business. She also queried how the business plan could be produced by the leadership group when the proposed transfer pricing and management fee dispute (which Mrs and Mr Lowe had raised) had not yet been resolved. This, she said, was fundamental to the business plan, the financials and the case proposed for a need to restructure.

[31] At the meeting of the directors on 24 September 2024, Matthew and Brandon Harris voted in favour of an increase in the management fee and transfer pricing margin (outvoting Mrs Lowe); issues relating to the proposed business plan and the option of management redundancies, including consultation with potentially affected employees (namely Mrs and Mr Lowe), were pushed out.

[32] The Lowes received an email from Matthew Harris the day after the meeting requesting that they attend a meeting the following day, 26 September 2024.

[33] They attended the meeting as requested. Ms Glass was in attendance with Matthew Harris, advising that she was present in her capacity as a human resources consultant (as I have said, she is also Matthew Harris' ex-wife and mother of both of his sons, Brandon Harris and Blake Harris).

[34] The meeting was brief and no documentation was provided to Mrs and Mr Lowe at it or in advance of it. It appears to be common ground that Matthew Harris discussed a perceived need to restructure, which he said was due to declining revenue in New Zealand. He said that he wished to consult with Mrs and Mr Lowe prior to proceeding down that route. They were advised that they were to provide any feedback on the business plan or any alternative suggestions by 2 October. They were also to advise whether they accepted the proposed redundancies by that date. Matthew Harris indicated that he would come back to them within a week with a decision.

[35] Following the meeting, Matthew Harris sent Mrs and Mr Lowe each a letter headed "Notice of proposed workplace change and commencement of consultation period". The letter advised that it was proposed to restructure Vegepod NZ Ltd, which may impact their role. In summary it was said that the Vegepod Group had experienced declining revenues; Vegepod NZ Ltd was said to have had a 20 per cent decline in the financial year ending 30 June 2024, and a 24 per cent decline in net profit when compared to the year ending 30 June 2023. The proposal was for essential functions to be moved to Australia, disestablishing the roles Mrs and Mr Lowe held and establishing a new salesperson role. It was initially estimated that the proposal, if implemented, would save approximately $300,000. It was noted that, if the restructuring proceeded, consideration would be given to redeployment but noting that the company did not believe there were any suitable opportunities in New Zealand.

[36] The letter stated that the rationale for the proposal was as set out in the draft business plan, which had been presented to the board and discussed at the meeting on 18 October. The letter went on to say that the board had passed a resolution to begin

consultation regarding the proposed changes and to "adopt" the business plan subject to the outcome of consultation.

[37] This sequence of events occurred despite the fact that the directors had voted at the meeting to push out any decisions in respect of the business plan and the option of management redundancies.

[38] Mrs and Mr Lowe instructed a lawyer, who wrote to Vegepod NZ Ltd on 1 October 2024 raising concerns about the speed with which the process was being undertaken; the failure to provide supporting material in relation to the proposal; the fact that the business plan had not been approved and the minutes of the meeting had not been provided despite a request to do so. Reference was also made to the shareholder dispute and the potential relevance of the outcome of that as to whether the proposed restructure ought to proceed.

[39] The feedback meeting that had been scheduled with Mrs and Mr Lowe for 2 October 2024 was adjourned by the company on 1 October 2024, and on 4 October 2024 the company advised that the redundancy process was also adjourned and would be discussed at the next board meeting.

[40] On 4 October 2024 Matthew Harris sent an email to Mrs Lowe calling for a further meeting of the Vegepod NZ Ltd directors, to be held on 18 October 2024. Attached to the email was what was described as an "updated" business plan. The sole amendment to the plan was a change to the projected cost saving from $300,000 to $250,000, if the plan went ahead.

[41] The meeting occurred as scheduled on 18 October 2024. The minutes of the meeting are before the Court in heavily redacted form. The three directors were present, Matthew Harris, Brandon Harris and Mrs Lowe. Ms Glass was also present, recorded as being present in the capacity of note taker. The notes of the meeting which are before the Court have not been signed.

[42] The notes record that the business plan was discussed, as was the redundancy proposal. Matthew Harris and Brandon Harris voted in favour of both and Mrs Lowe

voted against both. The notes also record that Mrs Lowe took issue with what she regarded as financial inaccuracies in the business plan, particularly around cost changes; that she considered that the estimated costs around Blake Harris' proposed involvement in the New Zealand part of the business had been underplayed; that redundancies were not the solution as the New Zealand market remained profitable and that she considered that Matthew Harris was attempting to push her out of the business. Matthew Harris says that the plan was solely motivated by financial concerns.

[43] On 24 October 2024 Mrs and Mr Lowe were advised that separate meetings had been scheduled for 30 October 2024, about the proposal to make their positions redundant. Mrs and Mr Lowe instructed their lawyer to seek further information relating to the proposals.

[44] Mrs and Mr Lowe's lawyer advised the company that the 30 October meeting could not meaningfully go ahead until their clients had received all relevant information to inform their feedback, and set out a detailed list of information that was sought.

[45] On Wednesday 20 November 2024 Vegepod NZ Ltd's lawyer, Mr O'Brien, forwarded a response to the information request and enclosed numerous documents. He advised that the feedback meeting had been scheduled two days later, on Friday 22 November, at midday.

[46] Mrs and Mr Lowe raised concerns through their lawyer about the proposed timing of the meeting, including because Mrs Lowe was on pre-planned annual leave on 22 November 2024. They advised that while they were happy to attend a meeting they needed adequate time to prepare for it, and to assure themselves that they had all relevant information.

[47] Mr O'Brien responded on 22 November advising that Matthew Harris had instructed him that Mrs Lowe had not applied for annual leave; any requests had to be put through Mr Harris for approval; and Mrs Lowe was to provide evidence that she had sought and obtained approval. He went on to advise that, while the company

would allow some additional time to consider the information provided, the meeting would take place at 11.30am on Wednesday 27 November. It was made clear that, as it was the second time Mrs and Mr Lowe had requested an adjournment of the meeting, it would not be adjourned again; if they did not attend the meeting, the company would consider whether to proceed on the information before it.

[48] Insofar as the provision of information was concerned, Mr O'Brien expressed the view that the requirement of an employer to provide information pursuant to s 4 of the Employment Relations Act was distinct from any obligations arising from the Privacy Act 2020, and an employer was entitled to proceed with a consultation process regardless of whether there had been a request for personal information under the Privacy Act or whether any such request was outstanding. He went on to say that he understood that Mr Lowe had attended a leadership meeting the previous day during which the poor financial results for the New Zealand business were discussed and that Mrs Lowe had also had access to those figures. He attached an updated balance sheet reflecting the October results.

[49] The Lowe's lawyer responded to Mr O'Brien's email on 26 November. He pointed out that as a director of Vegepod NZ Ltd Mrs Lowe was permitted to approve her own leave for a period of five days; that regardless of which Act was referred to in the request for information, *Wrigley*[8] had made it clear that it was the employer's obligation to make all relevant information available; that some information that had been requested had not been made available; that the process was being unnecessarily hurried, appeared to be predetermined as to outcome and that further relevant information needed to be provided. He went on to say that once the information was provided, and Mrs and Mr Lowe had had an opportunity to consider it, a meeting could be scheduled. The correspondence concluded with notice that, if the company adopted the proposal based on the information before it, Mrs and Mr Lowe would seek interim relief.

[50] This prompted further correspondence from Mr O'Brien on behalf of the company, which included additional information and responses. Mr O'Brien advised

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8 *Vice-Chancellor of Massey University v Wrigley* (2011) 9 NZELC 93,782; [2011] NZEmpC 37.

that, in order to give Mrs and Mr Lowe one further and final opportunity to provide feedback, they could provide written feedback by 4pm on Friday 29 November and that a Teams meeting would be conducted at 12.30pm on Tuesday 3 December 2024. Mrs and Mr Lowe were, it was said, required to attend the meeting as current employees of the company. If they elected not to provide feedback the company would proceed to make a decision on the proposal on the basis of information before it.

[51] Mrs and Mr Lowe did not provide written feedback and did not attend the Teams meeting. They say that they were still waiting for relevant information to be provided to them to enable them to actively engage in the process, and because they had not received all of the information they had requested they were not in a position to attend a meeting to provide feedback.

[52] Matthew Harris wrote to each of Mrs and Mr Lowe on 4 December 2024. He said that he had been consulting with them since 24 October 2024; that information had been provided to them since and that they had failed to engage in meetings. The company had moved to consider all information before it. That included the financial performance of the company, which had deteriorated since the proposal was tabled, reflected in the updated balance sheet Mr O'Brien had provided to Mrs and Mr Lowe on 22 November. A decision had been made to adopt the proposal in the business plan, and to disestablish both of their roles. He noted that there were no redeployment opportunities.

[53] Matthew Harris' letter came on a Wednesday afternoon (4 December 2024). Matthew Harris advised Mrs and Mr Lowe that they were required to work until the end of the week, for the purposes of performing a handover, and would not be required to work out the notice period. As will be apparent, that gave them two working days to effect a handover immediately after receiving notice of their dismissals.

[54] Matthew Harris attached a check list that he directed the Lowes to work through by 2.00pm Thursday 5 December, noting that it was a lawful instruction. He also took the opportunity to remind them of their ongoing obligations of fidelity and good faith before thanking them for their contribution to the company and wishing them all the best for their future endeavours.

[55] Matthew Harris followed the letter up with an email on 4 December 2024 advising that Blake Harris would be undertaking the handover. He made it clear that Mrs and Mr Lowe were not to delete any company data/information and asked them to provide account details for the company account.

[56] The two-day period allocated for the handover of the company did not go well. Issues arose in relation to the provision of bank account details; the alleged deletion of information from devices; delays in returning company property and the like. The company says that Mrs and Mr Lowe were obstructive and failed to act in good faith; Mrs and Mr Lowe say that the company was unrealistic in assuming that a handover could be achieved smoothly within such a short period of time; deny that company information or records were deleted; and deny each of the allegations made against them. Mrs Lowe points out that she had additional obligations as a director of the company during this period which was relevant to how she responded to various requests. More broadly it is said that disestablishment of their positions had been motivated by ulterior motives, that they had not been adequately engaged with, and the process was fundamentally flawed.

[57] Mrs and Mr Lowe lodged a statement of problem in the Employment Relations Authority on 10 December 2024, claiming that they had been unjustifiably dismissed and disadvantaged. They sought, and obtained, interim orders reinstating them to their positions pending determination of their grievances.

[58] Finally, the company says that information has come to light following the Lowes' departure from the workplace which is relevant to an assessment of whether or not they should be reinstated to their positions on an interim basis. I return to this information below.

Serious question to be tried in relation to the claim of unjustified dismissal?

[59] Mrs and Mr Lowe's argument that their dismissals were unjustified primarily centres on the genuineness of the restructuring process and alleged deficiencies in the consultation process. Difficulties with the process are, they say, reflective of the fact that the restructuring was designed to oust them from their roles. They say that it is

seriously arguable that there were significant deficiencies in the way the company approached the issue, that the errors were not minor and the dismissals were both procedurally and substantively lacking justification.

[60] At the substantive investigation meeting Vegepod NZ Ltd will bear the onus of persuading the Authority that the redundancies were both genuine and the predominant motive for the dismissals.[9] At this stage, the Court need only be satisfied that it is arguable that the dismissals were unjustified; as I have said, the threshold is not high.

[61] I accept, based on the evidence currently before the Court, that it is seriously arguable that the redundancies were not genuine.[10] That argument is bolstered by a review of the surrounding facts (as they currently appear on the untested evidence) and the inferences that can be drawn, including from the way in which the business plan was progressed and the consultation process unfolded. I also accept, based on the evidence currently before the Court, that it is seriously arguable that there were significant procedural deficiencies in the process leading to the decision to terminate Mrs and Mr Lowe's employment.

[62] I return to the apparent strength of the argument later, as it is relevant to an assessment of the balance of convenience and where the overall interests of justice lie.

Serious question to be tried in relation to the claim of permanent reinstatement?

[63] I understood the thrust of Vegepod NZ Ltd's argument to centre on the reasonableness and practicality of reinstatement. There are three limbs to their argument that there is no arguable case that Mrs and Mr Lowe will be permanently reinstated following the Authority's substantive investigation. First, because the relationship has irretrievably broken down. Second, reinstatement would expose the company to significant risk in light of conduct alleged to have come to light following

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9 *Grace Team Accounting Ltd v Brake* [2014] NZCA 541, [2015] 2 NZLR 494, [2014] ERNZ 129 at [85]; *Rolls v Wellington Gas Co Ltd* [1998] 3 ERNZ 116 (EmpC) at 123.

10 During the course of oral submissions counsel for the company conceded that there was an arguable case of unjustified dismissal.

the termination of their employment. Third, the roles that had previously been occupied by Mrs and Mr Lowe no longer exist, and the company cannot afford to re-establish those positions.

[64] I deal with each in turn.

Difficulties in the relationship

[65] The company submits that the relationship has deteriorated to a point where there is no realistic prospect that it can be resuscitated. There is a subsidiary issue as to whether Mrs and Mr Lowe actually, genuinely, wish the employment relationship to be resuscitated.

[66] It is clear that the relationship between Mrs and Mr Lowe and the Harrises is at a low ebb and has been for some time. In this regard the company placed particular emphasis on an email that has recently come to light dated 30 June 2024 in which Mr Lowe wrote (apparently on his and his wife's behalf) that: "As a result the relationship between us and [Matthew Harris] is past the point of no return, we cannot and do not want to continue working with him moving forward. After a heated discussion with [Matthew Harris] and [Alan Triesman] Lisa [Lowe]/I we all agreed the relationship is now toxic and untenable."

[67] Mr O'Brien referred me to the judgment in *Maddigan v Department of Conservation* where the Court found that there was no serious argument that Mr Maddigan would be permanently reinstated in light of the serious breakdown in the relationship.[11]

[68] However, as Mr Mitchell KC, counsel for Mrs and Mr Lowe, points out, while there has undoubtedly been a deterioration of the relationship, as reflected in various communications between the parties, it does not appear at this stage to have reached the level of dysfunction that was found to exist in *Maddigan*.

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[11] *Maddigan v Director-General of Conservation* [2019] NZEmpC 190, [2019] ERNZ 550.

[69] As Mr Mitchell also pointed out, there is a need for a degree of reality to be brought to bear when considering the particular circumstances of this case. Temperatures were running high, most notably around the time that the handover was due to occur. It is perhaps unsurprising that this was so given the compression in timeframes applied by the company in organising the handover and advising Mrs and Mr Lowe that their positions in a company they had been instrumental in establishing and running had been disestablished.

[70] The communications that did occur, including Mr Lowe's emailed communication of 30 June (discovered after his departure) which the company places much weight on, need to be taken in the context within which they occurred (in other words, arguably reflecting a high level of disappointment, anger and frustration at the way in which the company was conducting itself, and the different hats being worn at any given time – shareholder, director, employee).

[71] It is accepted on behalf of Mrs and Mr Lowe that the relationship is strained, but they consider those difficulties can be managed; both Mrs and Mr Lowe confirm their preparedness to constructively engage in a return-to-work process in their affidavits.

[72] I agree with a more general point made by Mr Mitchell. Reinstatement of a dismissed employee is invariably a challenging process for all concerned – the employer, the employee and co-workers. Reinstatement generally only arises as an issue in circumstances where an employer has decided to terminate the employment relationship. Reinstatement requires, by its nature, a walking back. That walking back is often not what an employer wishes to do (hence an order of the Authority or the Court is required) and the walking back is almost always difficult. Nonetheless, Parliament has expressly stated that reinstatement is the primary remedy and can be taken to have understood the difficulties generally associated with such a step.[12]

[73] All of this is relevant to the threshold that must be met when seeking to argue that reinstatement is not practicable and/or reasonable, including on an interim basis.

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[12] Employment Relations Act 2000, s 125. See also (4 December 2018) 735 NZPD 8529.

In my view the fact that reinstatement is prescribed as the primary remedy, and that it has long been acknowledged by the Courts that money is a poor substitute for the loss of a job, means that the threshold (not practicable/not reasonable) is a high one.[13] As has previously been observed, routinely declining orders of reinstatement in the face of unlawful action monetises the employment relationship. That, in turn, serves to undermine the dignity of workers, contrary to fundamental precepts of employment law.[14] It also tends to incentivise unlawful behaviour.

[74] Returning to the particular circumstances of this case, it is relevant to the assessment process (arguability of permanent reinstatement) that much of the apparent ill-will, which the company points to as supporting its position, appears to have been generated by the (currently untested) actions of the company itself.

[75] Furthermore, the company is relatively well resourced and has access to specialist human resource support and assistance. It appears to be better placed than many employers to devise and implement a return-to-work programme, including with the additional support of Mediation Services (which is free of charge). This is relevant to an assessment of how arguable it is that the Lowes will be permanently reinstated.

[76] Also relevant is the extent to which the Lowes would need to actively engage with Matthew Harris and his sons, having previously operated largely independently. The difficulties identified by the company in this regard, including that Blake Harris would need to be in daily contact with them, appears (on the evidence currently before the Court) to be exaggerated.

[77] Finally, it is not without significance that Mrs and Mr Lowe are very experienced and have a significant financial interest in the fortunes of the company, via their personal shareholdings and via the shareholding of their own company. While the company seeks to argue that there is a real risk that, if reinstated, they would take steps to damage the company, I see that as an unlikely scenario.

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13 See the discussion in *Humphrey*, above n 3, at [48].

14 See generally Declaration concerning the aims and purposes of the International Labour Organisation (10 May 1944) (Declaration of Philadelphia).

The High Court proceedings

[78] As Mr O'Brien observed, part of the claim in the High Court proceedings is directed at requiring the buy-out of the Lowes' shareholding in the company. This, it is submitted, is reflective of the fact that they want to cut ties with the company; their claim for reinstatement is inconsistent with this and weighs against reinstatement being seriously arguable. I see the argument as having more relevance to where the balance of convenience lies, and deal with it at that point of the analysis.

Alleged misconduct

[79] The second limb of the company's argument that it is not seriously arguable that the Lowes will be permanently reinstated (and ought not to be reinstated on an interim basis) is based on conduct said to have been committed while employees of Vegepod NZ Ltd but which has only recently come to light. The company also seeks to rely on difficulties during the handover period and what it characterises as clear breaches of employment duties.

[80] Mrs and Mr Lowe have addressed these issues and concerns in their evidence. While they are issues which may well arise in the substantive investigation meeting in the Authority, and will need to be resolved on the evidence tested in that forum, I do not consider that they are sufficiently clear cut to weigh into the mix in deciding whether to grant or decline interim orders. However, I deal with these concerns in more detail under balance of convenience as they are relevant to an additional argument raised by the company, namely that reinstatement may be futile.

No role to be reinstated to, on either a permanent or interim basis

[81] The company makes the point that the two roles have been disestablished and no-one has been appointed to them. The relevance of the point is said to be two-fold. First, reflective of the fact that the redundancy process was not a sham; second, there is no position to return them to. It is also noted that a warehouse lease is coming to an end and that its operations are being outsourced to a logistics provider.

[82] It appears (from the proposal documentation) that the work previously undertaken by the Lowes is being shifted to Australia. If that is so, the work still needs to be done; it is simply a question of where. Further, these steps (including in relation to the warehouse) have all been taken while the company was on notice that reinstatement was being sought. Prior to termination of their employment the Lowes' lawyer clearly reiterated that, if the proposal proceeded, interim orders would be sought and soon afterwards a statement of problem was filed.[15] These factors weigh against the company's argument on this point.

Balance of convenience

[83] This part of the analysis ultimately involves a weighing exercise in the Court's discretion. It requires consideration of the impact on the parties of the granting of, or refusal to grant, the order.[16]

[84] I have already dealt with the obvious difficulties in the relationship, and reached the conclusion that it is seriously arguable that Mrs and Mr Lowe will be permanently reinstated.[17] I have also reached the view that the relationship issues, which otherwise might weigh into the balance of convenience, can likely be dealt with through the support of the human resource capacity it has access to.[18] This is relevant to the assessment process and what can fairly be expected in terms of what is reasonable and practicable. There is also access to the assistance of specialist employment mediation services, which can work with the parties to develop an appropriate return to work programme.[19]

Futility

[85] The plaintiff company argues that if the defendants were reinstated on an interim basis, disciplinary investigations for serious misconduct may be commenced,

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15 See *Asken v New Zealand Rail Ltd* EmpC Wellington WEC33/94, 12 July 1994 at 20.
16 *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12]-[13].
17 Contrast *South Taranaki Free Kindergarten Assoc v McLennan* [2006] ERNZ 1019 (EmpC).
18 The position might differ where, for example, the employer is small, or has constrained resources. For a recent example see *Kavallaris v Inframax Construction Ltd* [2024] NZEmpC 212, (2024) 21 NZELR 38.
19 See, for examples, *Hong v Auckland Transport* [2019] NZEmpC 54, (2019) 16 NZELR 555; *Humphrey*, above n 3.

which may lead to their suspension. This, it is said, weighs against interim reinstatement having regard to the balance of convenience and the overall interests of justice.

[86] In support of this part of the argument Mr O'Brien drew my attention to two judgments, which he submits are authority for the proposition that the Court will be slow to order reinstatement where disciplinary action is pending. The first case is *Moore v Countrywide Banking Corp Ltd*, where the Court stated that it was: [20]

> …loath to make orders which can be unmade by the act of the parties, or one of them. The very real prospect of the defendant dismissing the plaintiff on other, even more serious, grounds that have come to light since the dismissal for non-performance adds to the considerations that give the Court pause.

The second is *Baguley v Coutts Cars Ltd*, where Chief Judge Goddard observed:[21]

> To reinstate the applicant to position in which the sword of Damocles would hang above his head would not help to heal the grievance.

[87] Whether it would be open to the plaintiff to commence disciplinary action against the defendants if they were reinstated on an interim basis to their roles, and then suspend and/or dismiss them, is not something that needs to be decided now. Suffice to say that any such action would likely raise a number of issues which would need to be worked through. The obligations on all employers to act fairly and reasonably, and in good faith, having regard to all of the circumstances, would be the benchmark against which any such action would be tested. I note too that there are circumstances in which the Court may consider it appropriate to retain an oversight role, requiring an employing party to make an application for revision or variation of the order of reinstatement on an interim basis.[22]

[88] While I agree with the company that there may be cases where subsequently discovered misconduct may be relevant to whether interim reinstatement ought to be granted, it is not any alleged misconduct that suffices, and I do not understand *Baguley*

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20 *Moore v Countrywide Banking Corp Ltd* [1997] EMHNZ 239.
21 *Baguley v Coutts Cars Ltd* [2000] 2 ERNZ 409 (EmpC) at [68].
22 See, for example, *Savage*, above n 6.

or *Salt v Fell*[23] to suggest otherwise. If any alleged misconduct sufficed it would be problematic, for obvious reasons.

[89] In this case the alleged misconduct which the company seeks to rely on is strongly refuted and there is (as Mr Mitchell points out) a distinction to be drawn between Mrs Lowe's role as a director and as an employee, and the capacity in which she undertook – or declined to undertake – certain actions. The Lowes have, at this interim stage, provided plausible explanations to most of the concerns subsequently raised by the company. While I accept that the delay in returning keys and the like does not weigh in the Lowes' favour, the context in which this behaviour occurred (namely fraught and compressed in terms of timeframes within which the company was demanding action) is, as I have said, relevant.

Undertaking as to damages

[90] Where an employee seeks interim reinstatement they must, at the time of filing the application, file a signed undertaking that they will abide by any order that the Authority may make in respect of damages sustained by the employer through the granting of an order of reinstatement and that the Authority decides the employee ought to pay. The law relating to interim injunctions must be applied, having regard to the objects of the Act.[24]

[91] Issues were raised by the plaintiff company in terms of the adequacy of the undertakings given by Mrs and Mr Lowe. I understood Mr O'Brien to say that if the Lowes were reinstated, and if the company sustained commercial losses (for example a reduction in the assessed value of the company that could be sheeted home to them), the damages that might be ordered against them may well be substantial. Detailed affidavit evidence as to their financial capacity was accordingly required. The Lowes indicated that they were happy to provide detailed information on a counsel-to-counsel basis but were reluctant to do so more broadly.

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23 *Salt v Governor of Pitcairn and Associated Islands* [2008] NZCA 128, [2008] 3 NZLR 193, [2008] ERNZ 155.

24 Employment Relations Act 2000, s 127.

[92] I doubt the correctness of the submission that damages on an employee's application for interim reinstatement extends to "any" losses sustained as a result of their reinstatement, although I do not need to decide the point. If Mr O'Brien was correct, it would create a very significant barrier to employees seeking to retain their employment status pending a full investigation of a claim that they had been unjustifiably dismissed, and would almost certainly present a serious deterrent to those wishing to take issue with the justification of their dismissal.

[93] Given the Act is designed to support access to the employment institutions to resolve employment relationship difficulties; specifically acknowledges the inherent imbalance of power between employers and employees; and the Authority and the Court are required to exercise their powers consistently with equity and good conscience, it seems unlikely that an approach that imposes significant potential financial liability aligns with the statutory scheme. It would have a major disincentivising effect. Damages for wages paid in the intervening period is in a different category. And while it is true, as Mr O'Brien pointed out, that s 127 requires the law relating to interim injunctions to apply, it is expressed to be subject to an important caveat – namely the need to have regard to the objects of the Employment Relations Act.

[94] Further, an undertaking has been described as needing to cover damages shown to be a natural and direct consequence of the granting of the interim reinstatement, and such damages should not be too remote.[25] It is not at all clear that damage caused by misconduct would be a direct and natural consequence of the reinstatement; and an employer would have other means to address such a scenario.

[95] In any event, having reviewed the material filed in opposition to the challenge and in support of the original application for orders, I am satisfied that there is adequate information before the Court. As Mr Mitchell pointed out, the Lowes have a house (which they say in evidence has a modest mortgage over it); they own a 30 per cent share in a business which has substantial assets (according to the information currently before the Court); and their evidence is that they have other investments too.

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25 *Empress Abalone Ltd v Langdon* [2004] 1 ERNZ 222 (EmpC) at [48].

Timeframes

[96] The proximity to a substantive investigation is often considered on interim reinstatement matters. Mr O'Brien was critical of Mrs and Mr Lowe for not seeking urgency in the Authority in respect of the substantive investigation. I note that it is open to either party to apply for urgency if they consider it appropriate, and the Authority member will be well aware of the nature of the proceeding and the fact that permanent reinstatement is in issue. The Authority has since confirmed that an investigation meeting can be accommodated promptly, and a case management conference scheduled without delay.

[97] It is clear from the evidence and argument that both parties feel strongly about their respective positions. Mr O'Brien, for example, requested the Court to defer any order of reinstatement on the challenge for a 14-day period to enable the company to apply for leave to appeal to the Court of Appeal; a similar request is recorded in the Authority's determination. I infer from the material before the Court that it may well be that a challenge will be pursued against any substantive determination made by the Authority. That is relevant to an assessment of likely delay and where the balance of convenience lies in the interim. The likely delay in having a substantive claim finally determined will often weigh in favour of interim orders, and does so in this case.

Merits

[98] The merits of the claim for unjustified dismissal and permanent reinstatement, insofar as they can be assessed at this stage, also weigh in favour of interim reinstatement.

[99] The chronology of events, the way in which the process unfolded and the surrounding context, provides a basis for a relatively strong inference to be drawn that the restructuring and disestablishment of the Lowes' positions was significantly motivated by a desire to get rid of the last remaining shareholders from what is otherwise a family owned and operated business.

[100] The company sought to characterise the Lowes' objection to the company proceeding to consult on a proposal that had not yet received board approval as "technical." That is a difficult characterisation for the company to advance. A reasonably available inference, in all of the circumstances, is that it is reflective of predetermination – having agreed to pause the proposal, apparently to enable further work to be done on it in light of one of the director's queries and concerns (Mrs Lowe), the very next day Matthew Harris proceeded with the process, requesting Mrs and Mr Lowe to attend a meeting, where he advised them that the proposal was that their positions would be disestablished.

[101] Pushing ahead in the face of apparently legitimate requests for information made through the Lowes' lawyer also supports a negative inference; as does the imposition of tight timeframes for feedback and engagement, for little apparent reason.

[102] The "failure" to provide feedback on a proposal to disestablish a role is, as Mr O'Brien says, not the sort of approach one would usually expect from an employee who was serious about retaining their position or who was genuinely engaged in a consultation process. The context is, however, important in considering the apparent strength of each party's case. The context included the fact that the Lowes considered, apparently on the basis of legal advice, that they had an incomplete picture of the information on which the proposal was based, and the company appears to have adopted what might be described as a combative attitude to their requests for more information. It is perhaps telling that, rather than confirming that all information relevant to the proposal had been provided to them, the company persisted in drawing a distinction between information sought under the Employment Relations Act and the Privacy Act.

[103] The company pointed to difficulties in the handover as reflective of weaknesses in the argument for permanent reinstatement. Again, while I agree that those difficulties weigh in the assessment, the context is relevant, including the tight timeframe imposed by the company for a handover and the fact that the Lowes were acting on legal advice during this period. And it appears that issues were arising as between the lawyers as to what was and was not appropriate in terms of various actions from a legal perspective.

[104] It might also be inferred that the two-day period for the handover of the company (that the Lowes had apparently worked hard in developing and did not want to leave), was designed to ramp up a sense of anger and frustration, and to prompt a response that could then be used to support an opposition to reinstatement if their dismissals were found to be unjustified. All of this will, of course, need to be tested in evidence in due course. For present purposes it suffices to say that a number of negative inferences can reasonably be drawn about the company's conduct.

[105] The Lowes submit that the company erred in failing to consider or engage with them over redeployment, which was required in their employment agreements. The company submits that there were no other roles for them to be redeployed into and so no breach occurred. Mrs Lowe gave evidence that she raised with Matthew Harris the possibility of retaining one general manager role but that the company failed to respond to this proposal. This part of the evidence is in dispute. However, it is for the employer to fulfil its obligations during a restructuring exercise, and there is little evidence currently before the Court that the company actively considered other alternatives. That weighs in favour of the strength of the Lowes' case.

[106] Mr O'Brien submitted that the Lowes' alleged contribution to the situation giving rise to their grievance made reinstatement unlikely. Again, any issue as to contribution will arise in the substantive investigation and when the facts can be tested. As I have said, the context in which any allegedly contributory conduct occurred will likely be relevant, and the context does not weigh in favour of the company's position.

The purpose for which interim reinstatement is sought

[107] Mr Mitchell acknowledged that Mrs and Mr Lowe are willing to be bought out of Vegepod NZ Ltd. Indeed, one of the orders sought in the High Court proceedings is an order requiring the company, or any other person, to purchase Mrs and Mr Lowe's shareholding at a "fair and reasonable price" to be determined by the High Court. Mr O'Brien submits that it is plain that Mrs and Mr Lowe wish to remove themselves from the company and that this sits uncomfortably, indeed illogically, with a claim for interim or permanent reinstatement. This raises a question as to whether the

application for reinstatement is pursued for strategic reasons, serving little other purpose, and (if so) whether this weighs against reinstatement.

[108] Generally, an employee wishing to be reinstated is not, via a different process, seeking to extract themselves from the relationship. This situation is not in the usual run of cases. The company's submission that reinstatement is inappropriate because the Lowes do not wish to be employees is, on one level, attractive. However, the Lowes plainly do wish to preserve their employment status in the meantime, to protect their interests – they are concerned that the company will take steps to devalue it, to reduce the costs associated with any buy-out.

[109] I see force in Mr Mitchell's argument that, if the company wants to force the Lowes out of the business (and there is a strongly arguable case that this is what has motivated the company's actions), then the appropriate way to do that is via the shareholder agreement, not a sham redundancy process. In other words, the argument is that it was the company that acted improperly by removing the Lowes from their employment positions. Placing the Lowes back into the position they arguably should have been in is consistent with the interests of justice and reflective of where the interests of the parties lie. The balance of convenience would, as Mr Mitchell acknowledged, shift if the Lowes were bought out of the company.

[110] While the reasons why the Lowes seek reinstatement differ from the usual category of case, I do not see those reasons as telling against the appropriateness of an order being made.

Overall interests of justice

[111] The company submits that the interests of third parties are engaged and weigh against it being in the interests of justice to order interim reinstatement, namely the interests of the chief financial officer and the human resources officer. I am unable to discern how their interests are affected, other than, as external consultants, being engaged to work with Mrs and Mr Lowe as required.

[112] Reference is also made to the risk of the New Zealand operation having to be shut down. I have already dealt with the financial position insofar as it can be discerned at this stage.

[113] Jobs are important and money is often a poor substitute. In this regard the Act has both an educative and regulatory function, which the Court recognises when dealing with applications for reinstatement, both interim and permanent. The point is that, while a claim for reinstatement is to be assessed against its own factual context, attention must also be paid to the impact of such orders more generally in the overall interests of justice. As the Court pointed out in *Ashton v Shoreline Hotel*:[26] "…to award routinely compensation for the job loss instead of reinstating is to create a system for licensing unjustified dismissals." The same point applies to orders of interim reinstatement.

[114] In my view, the overall interests of justice follow the balance of convenience in this case.

Reinstatement to the payroll only?

[115] The plaintiff company submits that if interim reinstatement is to be ordered it should be on a limited basis, to the payroll only.

[116] Where interim reinstatement is ordered the default should be full reinstatement, acknowledging that there will be times where reinstatement on conditions will be appropriate. While I have considered the plaintiff's alternative submission, I do not consider that such a restriction is warranted in the circumstances. Nor do I consider that it would adequately address the risks that Mrs and Mr Lowe have identified associated with a physical removal from the workplace.

Delay sought to enable application for leave to appeal to be advanced

[117] Finally, Mr O'Brien sought orders that, if interim reinstatement was granted, those orders not take effect for a period of time to enable an application for leave to

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[26] *Ashton v Shoreline Hotel* [1994] 1 ERNZ 421 (EmpC) at 436.

appeal to be advanced. I do not propose to suspend the orders made on these grounds. Issues about an appeal and stay can be dealt with in the usual way.

Result

[118] The plaintiff's challenge to the Authority's determination is dismissed.

[119] I order that Mrs and Mr Lowe be reinstated to their former positions at Vegepod NZ Ltd pending the outcome of the Authority's substantive investigation. Reinstatement is to be achieved via a managed process. The parties are directed to attend urgent mediation to identify and implement the necessary steps to ensure a managed transition. A copy of this judgment is to be provided to the national manager, Mediation Services of the Ministry of Business, Innovation and Employment by counsel for the Lowes. Mediation Services is requested to make the necessary arrangements for a mediator to assist the parties in the interim reinstatement process.

[120] I draw particular attention to s 188, requiring the parties to attend the mediation I have directed in accordance with the good faith provisions contained in the Act.

[121] There is to be a full return to the workplace **no later than three weeks from the date of this judgment**. The three-week period is to provide the parties with sufficient time to make the necessary arrangements and attend mediation. During the intervening period Mrs and Mr Lowe are to remain on the payroll.

Costs

[122] The defendants are entitled to costs. If they cannot be agreed I will receive memoranda, with the defendants filing and serving within 20 working days of the date of this judgment; the plaintiff within a further 10 working days; and anything strictly in reply within a further five working days.

Christina Inglis
Chief Judge

Judgment signed at 2.45 pm on 14 April 2025