

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2020] NZERA 475
3123258

BETWEEN	MICHAEL JOHNSTON Applicant
AND	HIFX LIMITED Respondent

Member of Authority:	Vicki Campbell
Representatives:	June Hardacre, counsel for Applicant Anthony Drake, counsel for Respondent
Investigation Meeting:	On the papers
Submissions Received:	10 November 2020 from Applicant 11 November 2020 from Respondent
Further information received:	13 and 16 November 2020 from Applicant and Respondent
Determination:	17 November 2020

PRELIMINARY DETERMINATION OF THE AUTHORITY

A. Mr Johnston’s application for interim reinstatement and compliance orders is declined.

B. Costs are reserved.

Employment relationship problem

[1] HiFX Limited (HiFX) is an authorised Qualifying Financial Entity (QFE) under the Financial Advisers Act 2008. As such it owes reporting obligations to the

Financial Markets Authority (FMA) and the Australian Securities Investments Commission (ASIC).

[2] HiFX is in the business of providing foreign exchange brokerage and international money transfer services for individual and corporate clients. It has various regulatory obligations imposed under its New Zealand Market Services Licence (MSL) and Australian Financial Services Licence (AFSL). This includes an obligation to report to the FMA if there is an actual or anticipated contravention of the MSL in a “material respect”, and to ASIC if it breaches or is likely to materially breach its obligations under its AFSL.

[3] Mr Johnston was employed as a Foreign Exchange Dealer in the Australia and New Zealand region from 1 November 2004 until his dismissal on 28 October 2020. Mr Johnston’s role involved advising and executing foreign exchange trades on behalf of HiFX’s clients. At the time of his dismissal Mr Johnston held a leadership role within the New Zealand operation.

[4] Following investigations into Mr Johnston’s conduct and a period of suspension, Mr Johnston was summarily dismissed for serious misconduct. Mr Johnston claims his dismissal was unjustified.

[5] HiFX denies Mr Johnston was unjustifiably dismissed. It maintains he was dismissed following a full and fair investigation.

[6] On 30 October 2020 Mr Johnston lodged an application seeking urgent orders from the Authority reinstating him on an interim basis, making compliance orders in respect of HiFX’s statutory obligation of good faith and orders restraining HiFX from speaking to any regulator until such time as:

- a) the matters set out in Mr Johnston’s statement of problem had been addressed by the Authority; or
- b) the respondent provides Mr Johnston with all the relevant information in relation to the regulatory concerns and a reasonable opportunity for Mr Johnston to respond to those concerns.

[7] This determination addresses Mr Johnston's urgent applications to the Authority for orders pending the Authority's investigation and determination of his substantive application.

[8] Mr Johnston applied for, and was granted, urgency on his application for interim orders. The parties agreed to the Authority determining the preliminary issues on the papers. Those papers included the contents of the statements of problem and reply, affidavits and submissions made by the parties' representatives.

[9] In support of his application for interim orders Mr Johnston has provided an undertaking as to damages together with an affidavit. The Authority has received two affidavits in opposition to the application from Ms Kerri Lewis, Vice President Global Human Resources.

Mandatory injunction

[10] The orders sought by Mr Johnston restraining HiFX from contacting FMA or ASIC in relation to its concerns about his conduct is, in essence, an application for a mandatory injunction.

[11] During a case management call with the parties on 2 November 2020 HiFX disclosed that it had made contact with FMA and/or ASIC in September and October 2020. Following a further case management call on Friday, 13 November 2020 Mr Johnston advised the Authority the application for a mandatory injunction could not progress due to the disclosures already made to the FMA and ASIC. He advised he may wish to progress with an amended application, but this would depend on whether he was able to review and comment on further information HiFX is required to provide to the regulators by 23 November 2020.

[12] On Monday, 16 November 2020 Mr Johnston confirmed that he will not proceed with his application for a mandatory injunction.

Applicable legal principles

[13] An application for interim reinstatement involves the exercise of discretion. The basis on which applications for interim orders are to be decided are summarised as follows:

- a) Mr Johnston must establish there is a serious question to be tried. In a claim such as this the questions of whether there is a serious question to be tried raises two sub issues:
 - i. Is there an arguable case that Mr Johnston was unjustifiably dismissed?
 - ii. If so, is there an arguable case in relation to the claim for permanent reinstatement?
- b) Consideration must then be given to the balance of convenience, and the impact on the parties and third parties of the granting of, or the refusal to grant, an order.
- c) Finally, the overall interests of justice are to be considered, standing back from the detail required by the earlier steps.

[14] The merits of this case, insofar as they can be ascertained at the interim stage, are relevant in the assessment of the balance of convenience and the overall justice of the case. The assessment relies on the as-yet-untested evidence in the affidavits and what can be discerned from the pleadings and documents provided by the parties.

[15] Any findings of fact made by the Authority in this determination are provisional only and may change later once the Authority has fully investigated the claims and after all witnesses have been examined about their evidence where necessary.

[16] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made as a result. While I have not referred in this determination to all the evidence and submissions received I have carefully considered all relevant material lodged with the Authority.

Background

[17] Mr Johnston says he enjoyed his job with HiFX but noticed changes in the work environment from May 2020 after HiFX announced it had employed ten Australian based EncoreFX employees. The ten employees were employed into similar roles to himself and others at HiFX. EncoreFX had been put into voluntary administration.

[18] Mr Johnston says the work environment deteriorated further in September 2020. He says a number of his colleagues left the business for reasons that were unclear to him although they all appeared to have Australian based clients.

[19] HiFX says it became aware, in late August 2020, of some irregularities with the management of one of its client accounts for which Mr Johnston was responsible.

[20] Mr Johnston attended a meeting on 10 September 2020 regarding the account he had serviced. At the meeting was an ex-EncoreFX New Zealand employee, Mr Phil Lynch, who had been engaged by HiFX on a three month contract to look into HiFX's credit policies and procedures. Mr Johnston's manager attended the meeting virtually via Microsoft Teams.

[21] During the meeting Mr Lynch asked Mr Johnston to explain some trades he had made on behalf of one of HiFX clients. Mr Johnston says he answered the questions to the best of his knowledge but he had not had time to prepare for the meeting or the questions that were put to him.

[22] Mr Johnston left the meeting believing he had answered all of Mr Lynch's questions satisfactorily and returned to his work.

[23] The following morning, Mr Johnston says he received a voicemail message from Ms Lewis informing him that his employment was suspended and he was not to go to the office or contact colleagues or clients.

[24] Ms Lewis confirmed her instructions in an email shortly after the voicemail message had been left. In her email, Ms Lewis informed Mr Johnston that the suspension was to allow an investigation into the discovery concerning information regarding his activity when dealing with a HiFX client account (the account that had been discussed with Mr Johnston on 10 September 2020).

[25] HiFX wrote to Mr Johnston on 21 September 2020 informing him that he was required to co-operate in the investigation. Mr Johnston was provided with copies of his employment agreement and the Disciplinary and Dismissal Policy.

[26] On 26 September 2020 Mr Johnston wrote to HiFX's London based lawyers raising a personal grievance in respect of his suspension and the investigation that had commenced on 10 September 2020.

[27] On 2 October 2020 Mr Johnston received a letter from HiFX in response to his letter dated 26 September 2020. In its letter HiFX states it has serious concerns relating to Mr Johnston's employment. In particular it had concerns around his management of account activities for one client, an individual and related companies. HiFX did not respond to Mr Johnston's personal grievances.

[28] In its letter HiFX recorded its concerns that the clients' corporate account was covering the losses for personal deal(s) of the client's CFO and the deal(s) were executed without appropriate authority. HiFX set out the specific transactions it was concerned about including dates of the transactions.

[29] HiFX asked Mr Johnston to provide the specific details about the approval(s) of the transactions and evidence that the transactions had been authorised. This was because HiFX had been unable to locate any record of approvals. Mr Johnston was informed he would be required to confirm where he had documented the approvals for movement of the transactions within HiFX's systems.

[30] HiFX was concerned about the client's CFO and Financial Controller (FC) being added to the company accounts as recipients of payments with the payments being made directly to the individuals from closeout profits.

[31] Mr Johnston was advised that as the allegations related to his role as a dealer and that the nature of his role required a high degree of trust and confidence, HiFX was concerned he may have failed to follow company policies and procedures regarding the correct recording and approval of transactions. Mr Johnston was advised that, if proven, his conduct may undermine the essential element of trust and confidence necessary in the employment relationship.

[32] Mr Johnston was informed that if, after hearing his response to the matters raised in the letter, the allegations were substantiated HiFX may conclude serious misconduct had occurred and disciplinary action up to and including dismissal may be taken. He was reminded of his right to be represented at the meeting.

[33] On 13 October 2020 Mr Johnston requested the following information:

- a) Copies of the option and spot/forward/rollover contract notes that are in question;
- b) Details of who is authorised to instruct/direct trades for the client and its related entities;
- c) Details of HiFX's policies in respect of carrying out instructions and authorisation processes;
- d) Details of training provided to Mr Johnston where the requirement to document approvals was relayed;
- e) All information regarding the investigation that had been undertaken to date.

[34] Mr Johnston was concerned that he would not be able to respond without the information he sought because his access to HiFX's system had been suspended and he would be unable to provide the evidence being asked for by HiFX.

[35] In response HiFX emailed Mr Johnston on 15 October 2020, providing a zip file which it said contained copies of the transactions in question and policies. Mr Johnston says the attachments to the email contained copies of emails which he did not believe were relevant to the trades HiFX were concerned about. He says some of the emails were correspondence between his lawyers and HiFX or internal emails about his employment agreement. Mr Johnston was advised that HiFX may need to make reports to the FMA and ASIC in relation to its concerns.

[36] On 20 October 2020 HiFX emailed Mr Johnston further information, regarding the possible FMA and ASIC issues which it was intended be discussed at the meeting scheduled for 23 October 2020.

[37] On 20 October 2020 Mr Johnston confirmed he was happy to meet but required more information about the unexplained regulatory matters. Despite his assertions Mr Johnston records in his email his surprise at being provided "...a significant amount of new information..." that relates to the regulatory matters two days before he was expected to attend a meeting with HiFX.

[38] In response HiFX advised Mr Johnston that the meeting scheduled for 23 October 2020 would proceed given that Mr Johnston was already familiar with the documents, the company's systems and had been given seven days to prepare. Mr Johnston was given a formal instruction to attend the meeting. HiFX reiterated its previous assurances that if, during the meeting, Mr Johnston was unable to answer any of the issues based on the information he had to date, he would be provided with the opportunity to advise what further information he required and to explain why he was unable to answer specific issues or concerns.

[39] On 21 October 2020 Mr Johnston wrote to HiFX requesting the details of the possible FMA and ASIC issues and why HiFX considers it is obligated to investigate Mr Johnston's actions and why it had an obligation to report the findings of its investigation to the FMA and ASIC. Mr Johnston reiterated his previous advice that he would not be attending the scheduled meeting unless the information was provided by midday on 22 October 2020. Mr Johnston asked HiFX to advise the names of all attendees and confirmation that the meeting was to be an investigation meeting only.

[40] In response HiFX informed Mr Johnston the meeting scheduled for 23 October 2020 would proceed and that present in the meeting would be Mr Lynch and Mr Drake (HiFX's New Zealand based lawyer) in person, with Ms Lewis, Mr Liam Hennessy and Mr Guy Edgecombe attending via video link. Mr Hennessy and Mr Edgecombe are lawyers specialising in banking and financial regulatory law and are based in Australia.

[41] HiFX reiterated its position that Mr Johnston had all relevant information and that if more information became necessary it could be discussed during the meeting. Mr Johnston was again instructed to attend the meeting. He was informed that if he chose not to attend HiFX would take a view of the issues, decide how to proceed and what to report to the FMA and/or ASIC.

[42] Mr Johnston wrote again on 22 October 2020 reiterating his position that he did not yet have the information required to allow him to respond properly. Mr Johnston was concerned that the allegations were historical and he would need a reasonable amount of time to work through call recordings and other relevant material. In a separate email that day Mr Johnston asked why Mr Hennessy and Mr Edgecombe would be attending the meeting.

[43] In response HiFX reiterated its position that Mr Johnstone had everything necessary for his attendance at the meeting and to respond to the allegations. HiFX informed Mr Johnston it was undertaking a fact finding investigation in respect of the regulatory matters which is why Mr Hennessy and Mr Edgecombe would be attending the meeting.

[44] On 23 October 2020 Mr Johnston reiterated in writing his view that while he was willing to attend a meeting he did not have the information needed to properly respond. This was, once again, denied by HiFX.

[45] Mr Johnston informed HiFX that he would not attend a meeting to be ambushed by HiFX and its external counsel. He continued to request all relevant information being relied on by HiFX in relation to both the employment and regulatory issues.

[46] Mr Johnston did not attend the scheduled meeting on 23 October 2020.

[47] HiFX wrote to Mr Johnston on 26 October 2020 advising him of conclusions it had reached after he did not attend the meeting on 23 October 2020. HiFX concluded Mr Johnston had:

- a) Engaged in inappropriate conduct of a client account including unauthorised movement of transactions between entities within the client group of companies and individuals connected with the client including the client's CFO and FC including:
 - i. Depositing transaction proceeds and/or payments from the client's corporate accounts to the personal bank account of the CFO and FC without documenting the corresponding instructions or diligence on HiFX's systems;
 - ii. Transferred losses from the personal accounts of the CFO to the client's corporate account(s);
 - iii. Allowed the proceeds of one client entity transaction to be transferred to another client entity without any apparent authority to do so;

- b) Engaged in sub-standard account management of the relevant documents, including the extension of transaction maturity dates and crystallisation of losses without proper documentation;
- c) Failed to uphold the standards expected of a senior corporate FX dealer, resulting in financial and potential regulatory implications.

[48] HiFX concluded it had lost trust and confidence in Mr Johnston. Mr Johnston was advised that disciplinary action was being considered and in particular the penalty of summary dismissal. He was invited to comment on the proposed penalty in writing by 12 noon on Wednesday, 28 October 2020.

[49] In response, Mr Johnston wrote to HiFX on 27 October 2020 raising concerns about the process used by HiFX to reach conclusions without his participation. Mr Johnston reiterated his willingness to participate and sought access to HiFX's systems so he could find the information relevant to the investigation.

[50] Mr Johnson did not address HiFX's preliminary decision to terminate his employment for serious misconduct.

[51] On 28 October 2020 HiFX emailed a letter dated 27 October 2020 to Mr Johnston. It confirmed Mr Johnston had been provided with all relevant information, details of the concerns he was required to answer and had been instructed to attend the meeting on 23 October 2020. HiFX reminded Mr Johnston he had been informed that if he could not answer the concerns based on the information he had, he was entitled to say so during the meeting, identify what further information was required and why its absence prevented him from answering specific concerns.

[52] In its letter HiFX confirmed its decision to terminate Mr Johnston's employment effective from that date (28 October 2020).

[53] After this matter had been lodged with the Authority Ms Lewis lodged a second affidavit setting out her recollection of a conversation she had with Mr Johnston on 7 November 2020. Ms Lewis deposed Mr Johnston:

- a) Made telephone contact with her and they spoke for approximately 17 minutes;

- b) Wanted to discuss the situation and resolve his claims by entering into settlement discussions with her directly;
- c) Wanted to explain his involvement in the transactions for the client which were the subject of the investigation meeting. He admitted he made the transactions but claimed there was nothing wrong with what he did because he had the requisite authorisations;
- d) Made threats to go to the FMA and the banks and “blow the whistle” on HiFX.

Relevant policies

[54] HiFX operates a number of employment policies and procedures including a Disciplinary and Dismissal Policy. A copy of this policy was provided to Mr Johnston on 15 October 2020. The policy document:

- a) Sets out HiFX’s expectations and the authority of managers to act;
- b) Sets out actions which may constitute serious misconduct and may result in dismissal or termination of employment without notice. The list includes non-compliance of HiFX’s policies, procedures and rules not considered minor or of a low level;
- c) Describes suspension and the reasons why suspension may be necessary, including allowing time for HiFX to conduct a fair investigation;
- d) Requires managers to advise an employee of the general nature of any allegations that are to be investigated and why HiFX is considering suspension.
- e) Requires an employee be asked to comment on the decision to suspend before any decision is made;
- f) Requires an employee to comply with any directions issued by HiFX and remain available for interview or return to work when required during the suspension;
- g) Sets out a seven step process to be followed which requires:

- i. A preliminary investigation to be undertaken including interviewing relevant witnesses and assembling the facts and evidence;
- ii. Advice to the employee of the nature of the allegation, details of the investigation meeting including the right to representation, an opportunity to explain and the potential impact on the employees employment if the allegation is substantiated;
- iii. Conduct a disciplinary meeting;
- iv. Obtain the employee's explanation including options to adjourn the disciplinary meeting to allow further investigation to be undertaken;
- v. Consider any explanation provided before a final decision is reached;
- vi. If disciplinary action is considered appropriate the factors to be taken into account before determining the appropriate sanction include the employees overall work record, extenuating and mitigating circumstances, the employees knowledge of rules and requirements and the quality of the information/evidence to support the factual conclusion;
- vii. Implementation of the decision.

Arguable case of unjustified dismissal?

[55] An arguable case means a case with some serious or arguable, but not necessarily certain prospects of success.¹ The test for assessing whether a dismissal was justifiable is set out at s 103A of the Act. It requires an objective assessment of whether HiFX's actions and how it acted were what a fair and reasonable employer could do in all the circumstances at the time the dismissal occurred.

[56] The Authority may take into account other factors as it thinks appropriate and must not determine an action to be unjustified solely because of defects in the process if they were minor and did not result in Mr Johnston being treated unfairly.

¹ *X v Y Ltd and the New Zealand Stock Exchange* [1992] 1 ERNZ 863.

[57] The Court of Appeal has confirmed that the effect of section 103A(3) is that there may be a variety of ways of achieving a fair and reasonable result and that the overall requirement is for an assessment of substantive fairness and reasonableness, rather than minute and pedantic scrutiny to identify failings.²

[58] The Authority's task is to examine objectively the employer's decision making process and determine whether what the employer did and how it was done were steps that were open to a fair and reasonable employer.³

[59] Mr Johnston submits HiFX's decision to dismiss him including its actions leading up to the dismissal were not what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

[60] In particular he says there were fundamental flaws in the process followed by HiFX and the decision to dismiss lacked substantive justification. He submits HiFX failed to:

- a) comply with its statutory obligations of good faith which includes being required to attend a meeting on 10 September 2020 without prior notification of the purpose of the meeting and being required to respond to questions about matters that had not previously been brought to his attention;
- b) comply with its own policy in relation to his suspension because HiFX did not consult with him prior to the decision being made and it did not provide the specific details of the reasons for the suspension;
- c) address his personal grievance which he raised on 26 September 2020;
- d) sufficiently explain the allegations to Mr Johnston to enable him to provide a response to them;
- e) provide him with supporting relevant information. The information he was provided was largely irrelevant;

² *A Ltd v H* [2016] NZCA 419 at [46].

³ *Angus v Ports of Auckland Ltd (No 2)* [2011] NZEmpC 160; [2011] ERNZ 466 at [26].

- f) act reasonably and lawfully when it gave him an instruction to attend the meeting on 23 October 2020 because he did not have sufficient information;
- g) act reasonably when making the decision to dismiss because the decision was made in circumstances where he had not been given an adequate opportunity to provide his explanation and HiFX did not have good cause to make such a decision;
- h) act reasonably when it did not provide Mr Johnston sufficient time to consider the proposal to dismiss and provide feedback.

[61] HiFX submits Mr Johnston does not have a strongly arguable case that he was unjustifiably dismissed. It says Mr Johnston had more than 16 years' experience as a dealer in foreign exchange for clients and he understood the regulatory requirements in relation to reporting and obtaining and recording authorities before undertaking transactions on behalf of clients.

[62] Standing back and objectively assessing the untested affidavit evidence and the documentation produced I find that while Mr Johnston has an arguable case, although it is not strongly arguable, that the process used by HiFX leading to its decision to summarily dismiss Mr Johnston was flawed.

[63] Mr Johnston's suspension did not meet the requirements set down in HiFX's own policy which required it to seek Mr Johnston's feedback before a decision to suspend was made. This was not done. Instead Mr Johnston received a voicemail message and a follow up email advising him of the decision to suspend his employment. At no stage prior to the voicemail or the follow up email was Mr Johnston provided with an opportunity to comment on a proposal to suspend his employment.

[64] In respect of the information requests, HiFX made it clear to Mr Johnston that he had all of the information necessary for him to attend a meeting and provide an explanation. HiFX assured him on a number of occasions that if, during the meeting, it was found that other information was necessary, this information would be made available to him.

[65] The policy allows HiFX to give Mr Johnston instructions during a suspension. On 20 October 2020 the invitation to attend a meeting had become an instruction to attend. This instruction was reiterated on 21 October 2020.

[66] Mr Johnston ignored the instruction to attend the meeting in full knowledge that a decision might be made in the absence of his explanation. Ms Lewis deposed that during his call with her on 7 November 2020 Mr Johnston explained that he had wanted to attend the meeting but was advised not to attend.

[67] I find Mr Johnston does not have a strongly arguable case that he was unjustifiably dismissed.

Is there an arguable case for permanent reinstatement?

[68] Section 125(2) of the Act requires the Authority to provide for reinstatement wherever practicable and reasonable, irrespective of whether it provides for any other remedy.

[69] Mr Johnston argues reinstatement is feasible. He respects his peers and is keen to reconnect with his clients. He submits reinstatement would assist in repairing any damage done to the relationship, would allow him to participate in a full and fair investigation and provide his views on the allegations. He argues that there is no evidence he has engaged in serious misconduct.

[70] HiFX advances two grounds as to why it is neither practicable nor reasonable to reinstate Mr Johnston;

- a) HiFX has statutory obligations to report matters of concern to FMA and/or ASIC and Mr Johnston has admitted he was involved in the transactions under investigation;
- b) HiFX has lost trust and confidence in Mr Johnston to carry out his duties in accordance with the policies of HiFX.

[71] HiFX has written to both FMA and ASIC to inform the regulators of concerns that have arisen. A report from HiFX to FMA is required to be completed by 23 November 2020. The Authority is not aware of the process of involving Mr Johnston in the completion of any report sent to the FMA or whether and to what extent Mr

Johnston will have the right to answer any allegations made about him personally in that report.

[72] During the 7 November 2020 call to Ms Lewis Mr Johnston appears to have admitted to making the transactions, however, he countered his admission with an assurance that he had authorisation to do so.

[73] Having considered the parties' respective arguments and based on the untested evidence, it is doubtful there is any practicable prospect for successfully re-establishing an employment relationship between Mr Johnston and HiFX. However, while there is doubt, there must, conversely, be some hope.

[74] Mr Johnston has an arguable case for permanent reinstatement, however it is not strong.

Balance of convenience

[75] The question of balance of convenience requires an assessment of the impact on the parties of granting or not granting the interim order, having regard to, amongst other things, the relative merits of the case. Relevant to this assessment is the question of whether the impact on a party is harm that can be adequately compensated by damages.

[76] Identifying the balance of convenience – in the sense of detriment or injury – in this case requires the likely impact on Mr Johnston to be weighed against the potential impact to HiFX and the extent to which such risks might be managed or minimised.

[77] Mr Johnston has lodged an undertaking as to damages. There is no dispute that Mr Johnston is in a position to honour his undertaking.

[78] Mr Johnston is not seeking to return to work, but is asking the Authority to return him to the payroll so that he can continue to meet his financial outgoings. Mr Johnston is the primary income earner for his family. He has three teenaged children with regular outgoings on mortgages for two investment properties. His home is mortgage-free. He argues that the dismissal is affecting his reputation and a return to the payroll would allow him to present to others that he is employed. This may make securing alternative employment less difficult.

[79] Mr Johnston argues that any potential detriment suffered by HiFX as a result of Mr Johnston's physical presence in the office can be accommodated by an order that he not attend work. Further, there will be no impact on third parties and this should weigh in his favour.

[80] HiFX says that while Mr Johnston is the primary wage earner he has provided no evidence as to what other income is generated. Further, Mr Johnston is not claiming to be suffering from financial hardship. On the contrary Mr Johnston is in a strong financial position. As to his reputation damage, HiFX argues this issue can be addressed through the award of remedies in the event that Mr Johnston establishes a personal grievance.

[81] HiFX also points to the integrity and reputation of its business operations and argues these are significant factors to be weighed in the balance of convenience. If Mr Johnston is returned, HiFX's licences may be put at risk. Mr Johnston has not taken the opportunity provided to him to dispute HiFX's findings. Further Mr Johnston's threats to Ms Lewis on 7 November 2020 to make harmful disclosures about HiFX to the regulators further undermines the essential element of trust and confidence.

[82] It is not enough, for HiFX to merely assert a loss of trust and confidence for it to be a reality. HiFX must be able to point to some established conduct by Mr Johnston that is incompatible with continued faithful discharge of his duties.⁴

[83] The Authority is unable to provide the parties with an indication of when the substantive case might be set down for hearing. This is due to the Covid-19 situation which has resulted in a back log of cases still to be heard by the Authority. Because of this I accept the likelihood that Mr Johnston will continue to suffer a degree of financial difficulties until this problem is resolved.

[84] Mr Johnston has admitted he undertook transactions that have given rise to concerns that have, in turn, been reported to the FMA and ASIC. Mr Johnston has asserted to Ms Lewis he has the necessary authorisations for the transactions, however, he failed to take the opportunity provided to him to demonstrate this to HiFX. He had an opportunity to attend the meeting on 23 October 2020 with

⁴ *Orme v Eagle Technology Group Limited* (unreported, Employment Court Wellington, WEC40/95, 15 June 1995, Goddard CJ).

assurances that HiFX had disclosed full information but would provide access to further information if it was necessary.

[85] Weighing the relevant detriment and injury each party will incur if an interim order is granted, I have concluded the balance of convenience weighs in HiFX's favour against interim reinstatement. I am persuaded that damages will be an adequate remedy if Mr Johnston succeeds with his claims. Even if he is not successful in this interim application, Mr Johnston does not lose the prospect of pursuing his claim for permanent reinstatement. I must emphasise that this is a conclusion reached only on an interim basis.

Overall justice

[86] The Authority's assessment of the overall interests of justice require it to stand back and review the overall position regarding interim reinstatement. I conclude the overall interests of justice follow the balance of convenience and favours declining Mr Johnston's application for interim reinstatement.

Compliance Orders

[87] Mr Johnson has applied for compliance orders in respect of HiFX's statutory obligations of good faith. The good faith provisions apply to employment relationships. At this point in time there is no employment relationship. Accordingly no compliance orders will be made and the application is declined.

Costs

[88] Costs are reserved pending the substantive investigation of this matter.

Vicki Campbell
Member of the Employment Relations Authority