IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2024] NZERA 430
3305140

	BETWEEN	ALEXIOS KAVALLARIS Applicant
	AND	INFRAMAX CONSTRUCTION LIMITED Respondent

Member of Authority:	Shane Kinley
Representatives:	Philip Ross, counsel for the applicant Blair Scotland and Barnaby Locke, counsel for the respondent
Investigation Meeting:	On the papers
Submissions:	11 July 2024 for applicant and respondent
Determination:	16 July 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Alexios Kavallaris was employed by Inframax Construction Limited (Inframax) as Divisional Manager – Construction until he was summarily dismissed on 19 June 2024 for serious misconduct. Mr Kavallaris says the actions for which he was dismissed were a protected disclosure by an advocate on his behalf under the Protected Disclosures (Protection of Whistleblowers) Act 2022 (PDPWA), which Inframax is unable to retaliate against him for.

[2] Mr Kavallaris claims he was unjustifiably dismissed, unjustifiably disadvantaged and retaliated against after the protected disclosure was made and is seeking, amongst other things, permanent reinstatement. This determination addresses

Mr Kavallaris' claim for interim reinstatement under s 127 of the Employment Relations Act 2000 (the Act).

[3] Inframax says that its actions were those of a fair and reasonable employer, and resists Mr Kavallaris' claim for interim reinstatement.

The Authority's investigation

[4] For the Authority's investigation, affidavit evidence was lodged by Mr Kavallaris and for Inframax by Vesta Gribben, Chief Executive Officer of Inframax, Christopher Ryan, Board Director of Inframax, and Shyamal Ram, General Manager, Waitomo District Council (the Council). Written submissions were provided on behalf of Mr Kavallaris and Inframax.

[5] The evidence given has not been tested. The findings in this determination are provisional in nature and all relevant evidence will be tested in the course of the Authority's substantive investigation.

[6] Mr Kavallaris' substantive claims are to be investigated at a future date and this determination deals only with his application for interim relief until such time as the substantive matter has been determined.

[7] Mr Kavallaris has provided an undertaking that he will abide by any order that the Authority may make in respect of damages.

[8] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

The approach to interim reinstatement

[9] The Authority may order interim reinstatement pending the hearing of a personal grievance.[1]

[10] In determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the objects of the Act.[2]

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[1] Act, s 127(1).
[2] Act, s 127(4).

[11] The Employment Court has referred to the restorative nature of the Act's aims for employment relationships when dealing with applications for interim reinstatement and the approach to interim injunctions which is well established:[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, and the refusal to grant, an order. The impact on third parties will also be relevant to the weighting 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.
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> In a claim for interim reinstatement, the question of whether there is a serious question to be tried raises two sub-issues:
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> (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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> As the Court of Appeal make clear in *Brooks Homes Ltd*, a serious question to be tried is one that is not vexatious and frivolous. 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.

[12] To determine this matter, I must consider whether there is a serious question to be tried. That requires consideration as to whether Mr Kavallaris has an arguable case, firstly, as to the substantive application for unjustified dismissal[4], and if so, secondly, as to his application for permanent reinstatement. If Mr Kavallaris has a serious case to be tried, I must then exercise my discretion by considering where the balance of convenience lies and, standing back from the case, consider what the overall justice of the case requires I do. Assessing the balance of convenience and the overall justice may include an evaluation of the merits of the case, insofar as they can be discerned at an interim stage.

Background

[13] Mr Kavallaris commenced work with Inframax in June 2023, reporting to Ms Gribben, having previously held other civil engineering roles in several organisations. Issues arose in the working relationship between Mr Kavallaris and Ms Gribben, culminating in a complaint being raised on Mr Kavallaris' behalf on 7 December 2023.

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[3] *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* [2021] NZEmpC 59 at [6] to [8], footnotes omitted, referring to *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90.
[4] Applying ss 103(1)(a) and 103A of the Act.

Inframax appointed an independent investigator to consider the complaint, reporting to Earl Rattray, Independent Chairman of Inframax's Board of Directors, with the investigation commencing in January 2024.

[14] A subsequent formal complaint was made on Mr Kavallaris' behalf by an advocate, Claudene Greenwood, to Inframax's Board of Directors on 22 March 2024. It appears from the evidence before me that there was some correspondence in relation to that complaint from Mr Scotland, although that correspondence was not provided to me.

[15] On 22 April 2024 Ms Greenwood sent an email in relation to the complaint to Mr Scotland, which was blind copied to Mr Ram. Mr Ram said he mentioned this to Ms Gribben at a meeting on 23 April 2024, with an email following from Ms Gribben to Ben Smit, Chief Executive Officer of the Council, requesting the correspondence be forwarded to Mr Rattray and Mr Scotland. Mr Ram did so on 23 April 2024.

[16] On 7 May 2024 Mr Ryan wrote to Mr Kavallaris inviting him to a disciplinary meeting in relation to Ms Greenwood's email raising a concern that it appeared to disclose confidential information about the employment relationship problem between Mr Kavallaris and Inframax, in breach of Mr Kavallaris' employment agreement and Inframax's Privacy Policy. Concerns were also raised that the email may have contained defamatory statements, which could have brought Inframax into disrepute and may have breached Mr Kavallaris' duty of good faith to Inframax. Mr Ryan advised Mr Kavallaris the allegations, if substantiated, may amount to serious misconduct and if established, disciplinary outcomes could include summary dismissal.

[17] On Mr Kavallaris' behalf the response through the disciplinary process was that Ms Greenwood's email of 22 April 2024 was a protected disclosure sent on Mr Kavallaris' behalf under the PDPWA. It was asserted that Mr Kavallaris was immune from disciplinary action and should Inframax proceed, then he would raise these proceedings. The claim for the disclosure to be protected was based on the Council being an appropriate authority for a disclosure to be made, given Inframax is wholly owned by the Council, and the disclosure being said to have raised concerns about serious wrongdoing at Inframax.

[18] The disciplinary meeting occurred on 29 May 2024, attended by Mr Kavallaris, his counsel, Ms Greenwood, Mr Ryan and Mr Locke. Mr Ryan then wrote to Mr

Kavallaris on 10 June 2024 advising Inframax did not accept, on a preliminary basis, Ms Greenwood's email was a protected disclosure. Mr Ryan also advised his preliminary views were:

a. Ms Greenwood's actions were attributable to Mr Kavallaris;
b. Ms Greenwood's email was not a disclosure made in good faith, rather it was likely sent "with the intention of negatively impacting [Inframax's] relationship with [the Council] and causing disrepute to Inframax";
c. he did not consider the Council was an appropriate authority for a protected disclosure to be made to;
d. sending the email to the Council appeared to be a breach of Mr Kavallaris' employment agreement and Inframax's Privacy Policy, had the potential to bring Inframax into disrepute and was in breach of Mr Kavallaris' duties of good faith and fidelity; and.
e. Mr Kavallaris' actions had the potential to amount to serious misconduct.

[19] In light of Mr Ryan's preliminary views he advised Mr Kavallaris that if he reached the view that serious misconduct had occurred, then he would be considering disciplinary outcomes including summary dismissal. Mr Kavallaris was invited to respond, with a meeting proposed for that purpose on 17 June 2024 or the opportunity for written submissions.

[20] On 10 June 2024 Mr Kavallaris' counsel responded rejecting "in toto the purported fundings made" and advising as it was not accepted Inframax could continue with a disciplinary process, given the claimed protected disclosure, Mr Kavallaris would not "participate further in this process which we consider ultra vires".

[21] On 19 June 2024 Mr Ryan communicated his final decision, which confirmed his preliminary views and summarily dismissed Mr Kavallaris. Mr Ryan said while he had considered other sanctions, he did not see those as practical given "the serious concerns I have in respect of your decision making and judgment, and the fact your conduct has destroyed the trust and confidence in the employment relationship".

[22] Mr Kavallaris commenced these proceedings on 22 June 2024 and asserts his dismissal is a nullity.

[23] At an initial case management conference on 26 June 2024, I directed Mr Kavallaris and Inframax attend urgent mediation, which occurred on 10 July 2024 but did not resolve this matter.

Is there a serious case to be tried that Mr Kavallaris was unjustifiably dismissed?

[24] Submissions for Mr Kavallaris included "On the basis that [Mr Kavallaris] was making a protected disclosure, he has a personal grievance if he faces or is threatened with retaliatory action, and he has a statutory immunity from civil, criminal or disciplinary proceedings". In response to Mr Ram's affidavit, submissions for Mr Kavallaris said "Perhaps the disclosure could have been more felicitously worded but that is not the legal test for a communication to be a protected disclosure".

[25] Submissions for Inframax acknowledged the threshold for establishing an arguable case is relatively low but said Mr Kavallaris' dismissal was substantively and procedurally fair and reasonable, and Inframax does not accept that the email was a protected disclosure on behalf of Mr Kavallaris. Inframax said the sending of the email by blind copy to Mr Ram, without explaining it was a protected disclosure and without any follow-up, meant the evidence does not support it being a protected disclosure, with the assertion it was a protected disclosure not being made until 29 May 2024. Inframax also says the email was not sent in good faith and the Council was not an appropriate authority for a protected disclosure to be made to.

[26] Despite submissions for Mr Kavallaris that his dismissal was a legal nullity, I consider he has been dismissed. Mr Kavallaris' substantive claims are likely to turn on whether Ms Greenwood's email was a protected disclosure on behalf of Mr Kavallaris under the PDPWA, given submissions for Mr Kavallaris said the email was sent on his behalf. Both Mr Kavallaris and Inframax's positions are likely to essentially succeed or fail based on this point.

[27] If I were to find that a protected disclosure was made on Mr Kavallaris' behalf to the Council, then it would appear likely that Inframax's actions were substantively unjustified and retaliatory, meaning he would likely have been unjustifiably dismissed. On the other hand, if I were to find that Ms Greenwood's email was not a protected disclosure on Mr Kavallaris' behalf, then Inframax's substantive reasons for and procedure in summarily dismissing Mr Kavallaris would need to be considered further.

[28] I do not consider I can determine whether a protected disclosure was made at this preliminary stage, based on untested affidavit evidence. I am, however, satisfied there is an arguable case that Inframax unjustifiably dismissed Mr Kavallaris.

Does Mr Kavallaris have an arguable case for permanent reinstatement?

[29] Section 125 of the Act requires the Authority to provide for reinstatement wherever practicable and reasonable. Reinstatement is the primary remedy.

[30] Inframax submitted Mr Kavallaris does not have an arguable case for permanent reinstatement referring to "groundless and highly inflammatory accusations" about Inframax and Ms Gribben in information sent in Ms Greenwood's email, and the sending of that email had the effect of destroying the trust and confidence in the employment relationship. Inframax also claimed it would be difficult to reintegrate Mr Kavallaris due to him displaying "a significant level of antipathy" to Inframax.

[31] Inframax's submissions also said that the outcome of the independent investigation:

> could be in favour of [Mr Kavallaris], it could exonerate [Ms Gribben], it could implicate [Mr Kavallaris] in wrongdoing, or some possible combination of these outcomes. Although there is no evidence before the Authority as to the outcome of the investigation (primarily because it has not been completed), the fact of this occurring is a relevant factor as it goes to the extent of the evident damage to the employment relationship …

[32] Submissions for Mr Kavallaris (albeit in response to Inframax's opposition to interim reinstatement) said an employer must do more than assert trust has been lost and there is insufficient evidence of why Mr Kavallaris could not faithfully discharge his employment obligations. Submissions for Mr Kavallaris also said:

> It is reasonable to expect that [Inframax] would act seriously in relation to any recommendations contained in the investigator's report and take meaningful steps to resolve problems meaning the applicant could resume his normal employment duties.

[33] I consider the question of whether a protected disclosure was made on behalf of Mr Kavallaris will have a significant impact on whether he has an arguable case for permanent reinstatement. Inframax also said Mr Kavallaris' lack of willingness to engage with the allegations put to him, refusal to return property when he was dismissed and uncertainty over the outcome of the independent investigation into Mr Kavallaris' original complaint, mean it would be neither reasonable or practicable for him to be reinstated.

[34] I do not accept Inframax's submissions. If I find a protected disclosure was made on behalf of Mr Kavallaris, then Inframax will need to consider his actions in relation to the disclosure and during the investigation process in light of that finding. Similarly, if I find a protected disclosure was not made on behalf of Mr Kavallaris, then he may need to reconsider his position.

[35] I consider it would be premature to reach a view that permanent reinstatement is not reasonable or practicable, when I might find that a protected disclosure had been made on behalf of Mr Kavallaris and the independent investigation might find in favour of him too. I therefore find Mr Kavallaris has an arguable case for permanent reinstatement.

Who does the balance of convenience favour?

[36] Submissions for Mr Kavallaris said the overall balance of convenience lay with him and (albeit in the context of references to potential delays in determining this interim reinstatement application) he would be harmed by any delays and was obviously dependent on his income. He also asserted Inframax would not be prejudiced by the making of an order maintaining the status quo, which appeared to reflect assertions on Mr Kavallaris' behalf that he had not been dismissed.

[37] Submissions for Inframax acknowledged that Mr Kavallaris would have lost income but said no evidence had been provided about his financial position. Inframax said "any delay between the dismissal and the substantive hearing will not unduly prejudice [Mr Kavallaris], compared to the prejudice to [Inframax] should [Mr Kavallaris] be allowed to return to the workplace" and "damages are an adequate remedy in this case". Inframax also said Mr Kavallaris had been off work since February 2024 without concerns this was adversely impacting on his skills.

[38] I do not consider either Mr Kavallaris or Inframax have provided compelling evidence to support their position in relation to the balance of convenience and treat this as a neutral factor. Mr Kavallaris' evidence about financial impact was limited, while Inframax's evidence overlapped with general concerns about Mr Kavallaris returning to the workplace, which I consider are premature.

[39] Having considered all of the relevant evidence, I am not satisfied financial impacts favour Mr Kavallaris' interim reinstatement application and consider damages

or an award of lost wages, should he be successful in the substantive matter, may be an adequate remedy.

[40] I have also considered the strengths and weaknesses of the merits of the case, insofar as they can be discerned at an interim stage. I expect the substantive investigation of this matter to address whether there is any particular form a protected disclosure must take, including whether a blind copy email can be a protected disclosure and whether any follow-up action was needed to the blind copying of Mr Ram into Ms Greenwood's email to Mr Scotland, in order for that to qualify as a protected disclosure. I also expect the substantive investigation to consider whether the Council was an appropriate authority for a protected disclosure to be made to.

[41] While not tested, I consider that the blind copy nature of Ms Greenwood's email to Mr Scotland makes it only weakly arguable that this was a protected disclosure, in the absence of any features clearly drawing Mr Ram's attention to the fact it was a protected disclosure. While understandable that a blind copy recipient would not be identified in the sending of an email, the lack of any follow-up action at all presents a challenge to the assertion that Mr Ram should have known it was a protected disclosure.

[42] I also consider it only weakly arguable the Council is not an appropriate authority, although I observe this would only be relevant should I find that a protected disclosure had in fact been made.

[43] There are also potential challenges for Mr Kavallaris in how he could practically be reinstated into the workplace at Inframax, given his direct reporting to Ms Gribben, whom he has made complaints about. Inframax said that Mr Kavallaris' "own conduct during the disciplinary process is evidence of the extent to which the broader employment relationship has broken down and is irreparable". I consider that this is also a neutral factor and make no observations as to the strengths or weaknesses of the case for permanent reinstatement, as I consider this will depend on findings I make about whether there was a qualifying protected disclosure.

[44] Overall, for the reasons given, my assessment of factors in the balance of convenience weighs against interim reinstatement.

Where does the overall justice lie?

[45] I have concluded Mr Kavallaris has an arguable case but the balance of convenience weighs against interim reinstatement. I must now, standing back from the case, consider what the overall justice of the case requires I do.

[46] This has been described by the Court of Appeal as:[5]

> The overall justice assessment is essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and balance of convenience.

[47] Submissions for Mr Kavallaris said the overall balance of convenience and justice lay with him, while submission for Inframax said the overall justice of the matter rests with it.

[48] It is difficult to fully assess the strength of the parties' cases on the limited and untested material before me. It is fair to say that procedurally a substantial investigation was undertaken and the disciplinary process broadly reflected the elements in s 103A(3) of the Act.

[49] Both Mr Kavallaris and Inframax have strongly held views on whether Ms Greenwood's email was a protected disclosure on behalf of Mr Kavallaris under the PDPWA. Both Mr Kavallaris and Inframax's positions are likely to essentially succeed or fail based on this point.

[50] While arrangements are still to be made for the Authority's investigation of the substantive matter, it is possible that this could be heard in September or October 2024. This means Mr Kavallaris may have his substantive claims determined late this year or early in 2025. I am comfortable that this timeframe does not alter the overall justice of the situation, which does not favour interim reinstatement.

Outcome

[51] Mr Kavallaris' application for interim reinstatement is declined.

Costs and next steps

[52] Costs are reserved pending the outcome of the investigation of Mr Kavallaris' substantive application.

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

[53] An Authority Officer will be in touch with the parties regarding the next steps in this proceeding.

Shane Kinley
Member of the Employment Relations Authority