

(IEA) purporting to be a 12-month fixed term agreement, and began work on the same day, on 6 September 2021. Mr Domigan says that by letter dated 21 November 2022 he was given six weeks' notice that his employment would be terminated, and that the termination of his employment was confirmed during a video call on 21 December 2022.

[3] BioOra say that Mr Domigan was employed on a lawful fixed term employment agreement as an interim CEO and that that employment terminated when the fixed term expired.

[4] Mr Domigan has lodged a statement of problem seeking, amongst other things, remedies for unjustified disadvantage and unjustified dismissal, including permanent reinstatement to the role of CEO. Mr Domigan seeks orders, on an interim basis, for reinstatement and injunction preventing the newly appointed CEO from performing duties and responsibilities of the CEO role.

[5] Mr Domigan's 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. Mr Domigan has provided an undertaking that he will abide by any order that the Authority may make in respect of damages.¹

The Authority's investigation

[6] The parties confirmed attendance at mediation on 7 February 2023, but they have been unable to resolve the employment relationship problem. The preliminary matters subject to consideration in this determination have been, with the agreement of the parties, dealt with 'on the papers' with affidavits and written submissions having been lodged.

[7] Affidavits were lodged from Mr Domigan and John Robson, General Manager BVNZ. The parties also lodged written submissions in addition to submissions made in the application for interim reinstatement and notice of opposition.

[8] Having regard to the interim proceedings, the evidence given has not been tested. The findings in this determination are provisional in nature and all relevant

¹ Employment Relations Act 2000, s 127(2) and (3); Neil Domigan - undertaking as to damages dated 18 January 2023, at [3].

evidence will be subject to further investigation at the substantive hearing scheduled to commence on 28 June 2023.

The approach to interim reinstatement

[9] The Authority may order interim reinstatement pending the hearing of a personal grievance.² 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.³

[10] To determine this matter, I must consider whether there is a serious question to be tried⁴. That requires consideration as to whether Mr Domigan has an arguable case, firstly, as to the substantive application for unjustified dismissal, and if so, secondly, as to his application for permanent reinstatement.⁵ If Mr Domigan 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.⁶

Background

[11] On 6 September 2021 Mr Domigan signed an IEA providing that he was expected to work 20 hours per week. His position was described by reference to a position description attached to the IEA. The reason stated in the IEA for the fixed term agreement was that “it’s because the work is for a fixed project”.

[12] As to the purported fixed term nature of the employment relationship, the IEA provided as follows:

1. FIXED TERM OF EMPLOYMENT

- 1.1 The Employee will work for BioOra Limited (the “Employer” for a fixed period of time. The Employee’s employment under this Agreement commences on the 6th of September 2021 and will continue until the 6th of September 2022 or earlier if terminated in accordance with the provisions of this Agreement. The employer and the employee agree there is a genuine reason for the fixed term and for employment to

² Employment Relations Act 2000, s 127(1).

³ Employment Relations Act 2000, s 127(4).

⁴ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90, at [12] and [13].

⁵ *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36, at [8].

⁶ *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA); *X v Y Ltd and the New Zealand Stock Exchange* [1992] 1 ERNZ 862 (EmpC), at 872.

finish when the term ends. The reason for it being fixed term, and finishing at the end of the term, is because the work is for a fixed project.

[13] Mr Domigan says that he was never of the understanding that the interim CEO role related to a specific fixed project, and that instead he understood it was in place to allow for the growth of the company and to allow for the full-time permanent role to be further defined. He says it was always contemplated that he would take the permanent role. Mr Domigan's IEA, at Schedule 1, included an entitlement to an equivalent of 2.5% equity via Phantom Options and attached a vesting schedule including five vesting dates over a 48-month period.

[14] Mr Robson says that there were significant discussions prior to entering into the fixed terms arrangement, including a request from Mr Domigan that he be engaged on a contracting arrangement rather than as an employee.

[15] Mr Domigan's evidence is that there were promising developments at BioOra over the first year, and that the expiry of the fixed term agreement came and went on 6 September 2022 without any extension being put in place. Mr Domigan does concede that Mr Robson flagged the need for an extension to the purported fixed term agreement on 4 September 2022.

[16] At a meeting held on 13 October 2022, Mr Domigan says that he was expressly told the permanent CEO role was his if he wanted it, but that a contestable process was required as being consistent with Bridgewest Group processes. Mr Domigan says that he was provided a one-page contract extension letter at the meeting which purported to extend the fixed term from 30 September 2022 through 31 December 2022.

[17] Mr Domigan says that he learnt on 22 November 2022 that the General Manager of MIMR had been told by Dr Peter Crabtree, Director and Chairperson of BioOra, that Mr Domigan was not interested in the full-time CEO role. Mr Domigan says he then contacted Mr Crabtree who referred him to an email from 21 November which attached a letter confirming that applications for the permanent CEO role had closed.

[18] Mr Domigan's evidence is that he then read the letter of 21 November 2022 which confirmed the termination of his employment with six weeks' notice. The letter also recorded that the recruitment process had commenced on 25 October 2022 and closed on 18 November 2022.

[19] Mr Domigan then emailed the BioOra board of directors on 24 November 2022 requesting an opportunity to apply for the role. He says that request was granted by the board, following which he applied for the permanent CEO role.

[20] Mr Domigan says BioOra released a letter on 6 December 2022 confirming his departure, following which he attended an interviews on 7 December 2022 and 11 December 2022.

[21] On 21 December 2022 Mr Domigan attended a Zoom call during which he says Mr Robson told him that there was a short list of two to three candidates, and that he was not one of them.

[22] Mr Domigan maintains that he was, at least in effect, promised the permanent role as CEO. That role is currently occupied by another person. Mr Domigan submits that BioOra's actions in appointing another person to the role were intentional and deliberate, and that they followed notification by Mr Domigan of his claim and the seeking of an undertaking that the appointment would not be made.

Step 1 - Is there a serious case to be tried?

Does Mr Domigan have an arguable case as to his substantive claims?

[23] Mr Domigan's substantive claims include that his employment was not subject to a valid fixed term employment agreement for the purposes of s 66 of the Act and consequentially that he was unjustifiably dismissed from his employment, on the purported basis that his fixed term agreement had come to an end.

[24] Section 66 of the Act is as follows:

66 Fixed term employment

- (1) An employee and an employer may agree that the employment of the employee will end—
 - (a) at the close of a specified date or period; or
 - (b) on the occurrence of a specified event; or
 - (c) at the conclusion of a specified project.
- (2) Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must—
 - (a) have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and
 - (b) advise the employee of when and how his or her employment will end and the reasons for his or her employment ending that way.
- (3) The following reasons are not genuine reasons for the purposes of subsection 2(a):
 - (a) to exclude or limit the rights of the employee under this Act;
 - (b) to establish suitability of the employee for permanent employment:

- (c) to exclude or limit the rights of an employee under the Holidays Act 2003.
- (4) If an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing—
 - (a) the way in which the employment will end; and
 - (b) the reasons for ending the employment in that way.
- (5) Failure to comply with subsection (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.
- (6) However, if the employer does not comply with subsection (4), the employer may not rely on any terms agreed under subsection (1)—
 - (a) to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or
 - (b) as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective.

[25] Mr Domigan submits, relevant to s 66(2) of the Act, that there are no contemporaneous documents evidencing a genuine basis for the fixed term and nor he was advised of any such reasons. Mr Domigan also relies on other terms of the IEA, including as to annual leave entitlements, which he submits reflect an intention of ongoing employment beyond the 12-month term otherwise stated. Mr Domigan submits that 'Phase One' was never put to him as being the reason for the fixed term agreement and that available documents suggest a contrary intention based on completion of other events.⁷

[26] BioOra submit that there were genuine reasons based on reasonable grounds for the employment to terminate at the end of the fixed term, including, but not limited to, the fixed term relating to Phase One of an automation project and what in summary might be described as reasons relating to the start up nature of the business and associated considerations that BioOra say supported a requirement for a part-time interim CEO. This is said to contrast with the permanent CEO role that BioOra says was required later and the requirements of which were not fully known to the parties at the time of entering the initial fixed term agreement.

[27] There is considerable disagreement as to whether the fixed term was simply time limited, or whether there were known genuine reasons based on reasonable grounds based on completion of a project, or 'Phase One'. Mr Domigan rejects the proposition that there was any link between the fixed term and Phase One, at least that

⁷ Mr Domigan's submissions also refer to page 3 of the Phantom Share Option Plan attached to the IEA which refers to a 6 month period for the delivery of Phase One.

he was advised of. BioOra asserts they had genuine reasons for the fixed term and that Mr Domigan had knowledge of the reasons for the fixed term.

[28] I consider that whilst the requirements for incorporation of those reasons into an IEA may be relatively minimal, there is a sufficient basis to establish an arguable case on the basis that BioOra did not advise Mr Domigan when and how his employment would end and the reasons for his employment ending that way. I consider Mr Domigan's case in relation to this aspect to be arguable, but I would not go as far as saying strongly arguable.

[29] Mr Domigan does not solely rely on the absence of a genuine reasons based on reasonable grounds as the basis for his claim. He also claims that he remained employed and continued working beyond the purported expiration date of the fixed term contained in the IEA. Mr Domigan submits that, as a result, if his employment had initially been of a fixed term nature, it then became permanent. Counsel for Mr Domigan referred to several authorities in support of that proposition.⁸

[30] There is no apparent dispute that a letter extending the purported fixed term agreement was signed on 13 October 2022, although the legal effect of that agreement is contested. That letter referred to the previous fixed term arrangement as having ended on 30 September 2022, and not 6 September 2022 as stated in the IEA. BioOra submit that that was a genuine error and had no impact on the parties' intentions. The letter provided a new date for the end of the fixed term as being 31 December 2022.

[31] Mr Domigan's submissions as to the extension raise two distinct issues. Firstly, he says that the employment became permanent as soon as he worked beyond 6 September 2022 in circumstances where a valid extension agreement had not been signed. Secondly, he says that any extension was non-compliant with s 66 of the Act and therefore invalid.

[32] Both parties provided detailed submissions as to the effect of Mr Domigan working beyond the IEA expiry date, 6 September 2022, and referred to various authorities. Whilst some general propositions as to the case law have been made, the circumstances of this case arguably differ, to varying degrees, to those found in the

⁸ *Varney v Tasman Regional Sports Trust* EmpC Christchurch CC15/04, 23 July 2004; *Electrotech Controls Ltd v Rarere* [2007] ERNZ 586; *Stewart v AFFCO New Zealand Ltd* [2021] NZEmpC 103, at [48] to [50].

authorities cited. In the present case, there is a written extension agreement, albeit signed following the initial expiry period, and Mr Domigan was employed for a period not much longer than 12 months.

[33] Whilst an extension letter was ultimately signed, that occurred sometime after the fixed term as stated in the IEA had already expired, albeit that there were discussions held and/or written communications exchanged prior to the expiry. BioOra also submits that at no stage was a permanent employment relationship contemplated. It submits that there was agreement between the parties, prior to the expiry of the initial fixed term agreement, that the fixed term would be extended. It says that there is no evidence that that extension created an expectation of permanent employment on Mr Domigan's part.

[34] BioOra does not take the position that Mr Domigan's claim is vexatious or frivolous but says that his case is weak. I have considered the submissions, and the principles that can be elicited from the authorities referred to. I conclude that Mr Domigan has an arguable case that, as he continued working beyond the expiry date without a valid extension being signed, that he become an employee of indefinite duration.

[35] Whilst I consider Mr Domigan's case in this regard to be arguable, that is not to say that there are not hurdles, and perhaps significant ones, for Mr Domigan in making good his substantive claim. Such hurdles might well include whether there was any expectation of ongoing employment on Mr Domigan's part, whether such expectations are relevant, and whether any other relevant discussions or knowledge is relevant.

[36] I consider that, if Mr Domigan is successful as to his claims regarding the nature of his employment, then he would have a strong case that he was unjustifiably dismissed having regard to the test of justification at s 103A of the Act. I conclude that Mr Domigan's case is more than weakly arguable, but not that it is strongly arguable case. For the same reasons, I consider that Mr Domigan's claim for an injunction relating to the performance of the CEO duties is arguable.

Does Mr Domigan have an arguable case for permanent reinstatement?

[37] Section 125 of the Act requires the Authority to provide for reinstatement wherever practicable and reasonable.⁹ Reinstatement is the primary remedy.

⁹ Employment Relations Act 2000, s 125.

[38] Mr Domigan submits that reinstatement is practicable and reasonable. He points to his experience with BioOra as being successful and submits that he will only have been out of the role for a relatively short period.

[39] BioOra submits that the permanent CEO position has been filled, with the new CEO having commenced on 19 January 2023. It submits that the appointment of the new CEO has been announced to external partners and any change in that position would have a “chilling effect” on the business and its ability to grow. BioOra further submit that there is a lack of confidence on the part of the board based on the respective positions and versions of events detailed in these proceedings.

[40] I am not persuaded at this stage that BioOra’s submissions present a substantial obstacle to reinstatement if Mr Domigan is successful with his substantive claims. However, I do consider them relevant to the question of interim reinstatement and I address that further below. Whilst another candidate was seemingly preferred over Mr Domigan, it is not the case that there were clear or significant performance or conduct concerns permeating through the employment relationship.

[41] I consider the appointment of the new CEO, at this stage, as a neutral consideration. I do not accept that any disparity between Mr Domigan’s version of events and that of board members, nor the serious nature of his claims, can reasonably be said to have resulted in a loss of confidence which should be taken into account. Further, whilst some embarrassment might be caused by the external announcement already made, I do not consider that a relevant consideration going significantly against Mr Domigan’s claim that permanent reinstatement is practicable and reasonable.

[42] I consider the case for permanent reinstatement and for the granting of a permanent injunction to be more than weakly arguable, but do not conclude they are strongly arguable cases. For the same reasons, I consider that Mr Domigan’s claim for an injunction relating to the performance of the CEO duties is arguable.

Step 2 - Who does the balance of convenience favour?

[43] BioOra submit that granting interim relief now and later overturning that would outweigh the injustice caused to Mr Domigan if it were declined now but later ordered on a permanent basis. It also submits that interim reinstatement on a payment only basis would jeopardise BioOra’s budget and ongoing viability. BioOra also made

submissions as to Mr Domigan's ongoing employment and income from Malaghan, the availability of remedies in the form of lost wages, and the prospect of Mr Domigan being unable to repay wages should interim but not permanent reinstatement be ordered.

[44] Mr Domigan has provided the required undertaking as to the payment of damages in the event he is unsuccessful. Having regard to the, albeit untested, evidence as to Mr Domigan's financial position, I am not persuaded by BioOra's submission to the effect that Mr Domigan would not be in a strong position to repay any wages if reinstated on an interim but not permanent basis is a relevant consideration.

[45] Mr Domigan submits that he is suffering, and will continue to suffer, significant financial disadvantage should he not be reinstated on an interim basis. He says that, outside of disappointment with the process followed by BioOra as to his claims, he has no concerns about working with BioOra employees, directors, and stakeholders, and says there is no reason why he could not perform the CEO role.

[46] BioOra made submissions as to the potential "chilling effect" of reinstatement given previous notifications to external stakeholders, and additionally as to a lack of confidence in Mr Domigan as to the board. I do not consider those are factors, on the current evidence, that go against the prospect of permanent reinstatement. However, I do consider them relevant to the issue of interim reinstatement.

[47] The basis for that is that Mr Domigan is scheduled to have his personal grievance claims resolved by the Authority. In doing so, evidence will be tested, and conclusions drawn in an independent and fair process. At present, factually incorrect but genuinely held views may well be held by board members and stakeholders as to Mr Domigan's departure and related events, and if orders were made as to his reinstatement. The basis for such concerns may well be more limited once a substantive determination has been issued. I consider the concerns raised by BioOra as to a lack of confidence and potential impacts on its business weigh against Mr Domigan.

[48] Mr Domigan's evidence is that he could work with the new CEO in a collegial and professional manner and that there is no shortage of work to be done. Mr Domigan says he would prefer to be reinstated to work rather than on a payroll basis, but that reinstatement on a payroll basis would be acceptable if necessary. Mr Robson's evidence is that Mr Domigan's proposal to work in conjunction with the new CEO is unworkable. He says that the new CEO has superior knowledge and experience that is

required for Phase 2, does not require assistance, and that there is no budget for any additional role.

[49] Mr Domigan says he has retained his part-time role with MIMR with a salary of \$100,000 per annum, but that he should now be earning at least \$250,000 per annum as BioOra CEO. He says that MIMR will waive any notice requirement should he be reinstated. Mr Domigan's mortgage repayments are said to be \$5,882 per month. He also says that he has usual everyday cost of living expenses and significant legal expenses. Whilst I do not accept BioOra's submissions to the effect that Mr Domigan cannot be said to be exposed hardship, his ongoing alternative employment certainly limits the financial impacts somewhat and I take that into account.

[50] Mr Domigan has costs related to rental accommodation in Wellington of \$720 per week that he says are necessary given the anticipated transition to the permanent CEO role. Mr Domigan says that whilst he lives in Auckland, both his MIMR and BioOra roles were Wellington based. Mr Robson says that Mr Domigan was already living and working in Wellington at the time negotiations were entered into relevant to the fixed term agreement. Regardless, the expense is one that may well depend on Mr Domigan receiving a full salary. In that regard, whilst the rental arrangement may have preceded the commencement of the initial fixed term, I consider the matter once that weighs in favour of Mr Domigan.

[51] Mr Domigan also refers to the phantom share option plan, saying it was put in place in lieu of being given a founding shareholding, and asserts that it is a benefit that can only be preserved through his ongoing employment with BioOra. Whilst the availability of such remedy is yet to be determined, Mr Domigan seeks an order that BioOra issue an Option Certificate vesting in him the Phantom Options he says he is entitled to. I am not persuaded that declining to order interim reinstatement is likely to have any significant impact on such a claim if reinstatement is, following determination of Mr Domigan's substantive claims, ordered on a permanent basis. I consider this a neutral factor.

[52] Mr Domigan points to BVNZ's significant shareholding in BioOra in answer to any concerns as to BioOra's financial position that might result from interim reinstatement. Mr Robson disputes that and says that BVNZ cannot simply access capital from its parent company without a formal investment case and subscription

process. I do not consider the mere potential for further funding a factor weighing in Mr Domigan's favour.

[53] The untested evidence suggests that BioOra were clearly put on notice of the claims, that reinstatement was to be pursued by Mr Domigan, and of his view that no appointment should be made to the CEO role. Mr Robson's evidence is that the new CEO was not employed "despite being on notice of [Mr Domigan's] claim" as asserted by Mr Domigan. Instead, he says that the final candidates were identified, and negotiations concluded before receiving notice of Mr Domigan's claims.

[54] In appropriate cases any attempt to deliberately undermine, through replacement or appointment, the prospect of reinstatement would rightly be seen for what it is, and a respondent left to deal with the consequences. Based on the evidence before me, I cannot find that BioOra's appointment of the CEO was other than the continuation of a recruitment and appointment process that had been underway well before Mr Domigan made any claims.

[55] I consider that, in the present case, the impact on the third party (i.e. the new CEO) is a relevant consideration. Such relevance is more limited when considering the question of interim reinstatement, as opposed to the interim injunction sought. However, I consider the potential implications for the new CEO weigh against Mr Domigan's interim application.

[56] In assessing the balance of convenience, I have considered the merits of Mr Domigan's substantive claims. In summary terms, I have found Mr Domigan's claims to be arguable, but neither weakly nor strongly so. I consider the merits a neutral consideration.

[57] Considering and balancing all the relevant submissions and evidence, I find the balance of convenience marginally favours BioOra.

Step 3 - Where does the overall justice lie?

[58] I must now stand back and consider where the overall justice of the matter lies.

[59] I have concluded that Mr Domigan has an arguable case in relation to both his claim of unjustified dismissal and in relation to permanent reinstatement. However, I have concluded that the balance of convenience in this case marginally favours BioOra.

I must now, standing back from the case, consider what the overall justice of the case requires I do.¹⁰

[60] Having regard to the overall justice of the matter, I consider an order for reinstatement on a payroll basis to be appropriate. I consider such order would avoid the claimed relationship issues, implications for third parties, and at least minimise the claimed issues as to notification to external stakeholders. Those are matters that I have found marginally, and only marginally, tip the balance of convenience in BioOra's favour. They can be resolved to large extent by reinstatement on a payroll only basis and I consider that appropriate having regard to, amongst other things, Mr Domigan's financial circumstances.

[61] I order that BioOra Limited reinstate Mr Domigan, on a 0.5 FTE payroll only basis, with effect from 31 December 2022.

[62] Given the nature of the order made, the application for interim injunction in relation to the performance of the CEO duties and responsibilities is declined.

Summary of orders

[63] I order as follows:

- (a) that BioOra Limited reinstate Mr Domigan, on a 0.5 FTE payroll only basis, with effect from 31 December 2022. The reinstatement order is to remain in place until such time as a determination has been made as to Mr Domigan's substantive claims, or otherwise until further order of the Authority.
- (b) Mr Domigan's application for interim injunction in relation to the performance of the CEO duties and responsibilities by the new CEO is declined.

Costs

[64] Costs are reserved.

¹⁰ *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA); *X v Y Ltd and the New Zealand Stock Exchange* [1992] 1 ERNZ 862 (EmpC), at 872.

Substantive claims

[65] Directions have already been made as to the procedural arrangements for the hearing of the substantive claims. A further case management conference will be scheduled should either party request any variation to those directions.

Rowan Anderson
Member of the Employment Relations Authority