IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 212
EMPC 270/2024

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	ALEXIOS KAVALLARIS Plaintiff
AND	INFRAMAX CONSTRUCTION LTD Defendant

Hearing:	19 September 2024 and by submissions filed by 18 October 2024 (Heard at Auckland)
Appearances:	J Cowan, counsel for plaintiff S Hornsby-Geluk, counsel for defendant
Judgment:	6 November 2024

JUDGMENT OF JUDGE M S KING

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[1] Alexios Kavallaris was employed by Inframax Construction Ltd (Inframax). On 19 June 2024 Mr Kavallaris was dismissed for serious misconduct. Mr Kavallaris raised a personal grievance and sought orders in the Employment Relations Authority (the Authority) seeking both permanent and interim reinstatement. In its determination of 16 July 2024, the Authority declined the application for interim reinstatement.[1] On 22 July 2024 Mr Kavallaris filed a challenge to that determination and sought urgency. A timetable for an early hearing of the challenge was agreed. The Authority has not yet considered Mr Kavallaris' grievance.

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1 *Kavallaris v Inframax Construction Ltd* [2024] NZERA 430 (Member Kinley).

[2] The only issue before the court at this stage is whether Mr Kavallaris ought to be reinstated on an interim basis. This judgment does not decide whether Mr Kavallaris was unjustifiably dismissed or disadvantaged, and it does not decide whether, if he was, that he will be reinstated permanently.

[3] Numerous affidavits and lengthy submissions were made in support of and in opposition to the challenge. While there was a significant amount of evidence filed, it is important to emphasise that the evidence is untested, and while broad impressions can be drawn from it, any conflicts cannot be resolved at this early stage. That will be the function of the substantive investigation meeting.

[4] Although there is a conflict in some of the affidavit evidence, there is a significant amount that is not in dispute. I set the background out in some detail to enable the parties' submissions to be put into context.

Background

[5] Inframax is a road maintenance and construction company. It is a council-controlled organisation (CCO) pursuant to s 6 of the Local Government Act 2002 and is wholly owned by the Waitomo District Council (the Council). A CCO is generally governed and managed independently at arm's length by a local authority, as if they are independent companies. The Council has no control or influence over decisions made about employment matters at Inframax, nor does it have any statutory powers to investigate Inframax.

[6] On 20 June 2023 Mr Kavallaris commenced employment with Inframax in the position of Divisional Manager – Construction, reporting to the Chief Executive Officer (CEO), Vesta Gribben. In his position he was responsible for leading the Construction Team in order to achieve Inframax's strategic goals, managing construction projects, championing health and safety, overseeing and maintaining all staffing matters, and pursuing new business opportunities.

[7] Issues arose between Mr Kavallaris and Ms Gribben. On 7 December 2023 Mr Kavallaris' lawyer wrote to Inframax raising concerns of workplace stress, unfair

disadvantage, and being subjected to unfair and unreasonable behaviour. The complaint primarily related to Ms Gribben. Mr Kavallaris requested that his concerns be investigated and that interim measures be put in place in the meantime.

[8] Inframax's board chair, Earl Rattray, was appointed as the decision maker of Mr Kavallaris' complaint. He engaged a lawyer, Alastair Espie, to investigate the complaint. Terms of reference were prepared for the investigation and provided to Mr Kavallaris for comment, before being finalised on 12 January 2024.

[9] On the same date that Inframax received Mr Kavallaris' complaint, it conducted a search of his mobile data and internet usage. On 19 December 2023 Inframax raised with Mr Kavallaris allegations that he had accessed content contrary to the Inframax's internet access policies. However, in February 2024, after hearing from Mr Kavallaris, Inframax discontinued its investigation into these allegations.

[10] Meanwhile, in January 2024 Mr Kavallaris had taken time off work on stress leave. On 19 January 2024 Mr Kavallaris' lawyer wrote to Inframax's board and raised further allegations involving Ms Gribben, which included failing to provide support and her further exclusion and undermining of Mr Kavallaris in his employment. In early February 2024 it was agreed that Mr Kavallaris would be placed on paid special leave for the duration of the investigation.

[11] On 22 March 2024 Claudene Greenwood, an employment advocate, emailed a formal complaint letter to the Inframax board on behalf of Mr Kavallaris. The formal complaint raised further personal grievances and levelled allegations against Ms Gribben, including allegations regarding Inframax's timing for raising allegations about Mr Kavallaris' mobile data and internet usage and that when raising these allegations, Inframax had breached Mr Kavallaris' privacy.

[12] On 16 April 2024 Inframax's lawyer, Blair Scotland, responded to Ms Greenwood and advised that it did not consider that the allegations raised by Ms Greenwood required any further action.

[13] On 16 April 2024 at 2.42 pm Ms Greenwood sent a further email to the Inframax board where she alleged that Ms Gribben was breaching the law by deliberately misleading and disadvantaging an employee of Inframax to conceal evidence of misconduct and putting the Inframax board at risk. Ms Greenwood alleged that she had provided clear evidence that Ms Gribben and Inframax's human resources contractor had committed serious misconduct and stated:

> I can only presume the appropriate response was delayed to ensure you did not raise any concerns with Waitomo District Council, prior to any decision being made on the bid for their contract. … concealing issues to prevent the potential to negatively impact a successful bidding process is not compliant with your duties as Directors of Inframax to Waitomo District Council …

[14] Ms Greenwood's email confirms that she and Mr Kavallaris were aware that Inframax was involved in the process of retendering for a road maintenance and sealing contract with the Council. Inframax was reliant on this single contract for 17–24 per cent of its business annually. The contract had been sized at a significant amount and was planned to run for five years. If secured, this contract would be a cornerstone contract for Inframax. The tender process was open, and Inframax competed with other providers on matters including price, resources, track record and experience. There was no guarantee that Inframax would win the tender. Losing the tender would have caused Inframax significant financial problems and impacted the long-term financial viability of its business.

[15] Ms Greenwood's evidence was that she forwarded her 16 April 2024 email to Inframax's board on to Shyamal Ram, General Manager Infrastructure Service at the Council. In her cover email to Mr Ram, Ms Greenwood referred to formal complaints about Ms Gribben and Inframax's human resources contractor, and the lack of appropriate action being taken by the Inframax board. The email indicated that the allegations were being shared with Mr Ram on the basis that Ms Greenwood understood that the conduct in question posed a risk to the Council's investments. Ms Greenwood then forwarded a copy of her email to Mr Ram on to Mr Kavallaris.

[16] Mr Ram was influential in deciding whether Inframax would be successful in securing the Council's lucrative five-year roading contract. He was perceived to be

effectively the decision-maker for the Council on the tender process. Mr Ram denied receiving Ms Greenwood's 16 April 2024 email.

[17] Mr Kavallaris in his evidence confirmed that by 16 April 2024 he felt a culmination of frustration at not receiving any meaningful response to the serious concerns he had raised about Ms Gribben and Inframax. This was despite him escalating his concerns to Inframax's board. Mr Kavallaris accepts that he had discussed with Ms Greenwood raising his concerns with the Council, as the owners of Inframax. He confirmed that Ms Greenwood had:

> … a blanket instruction from me to raise matters of concern pursuant to the Protected Disclosures (Protection of Whistleblowers) Act 2022 … as she considered appropriate.

[18] Mr Kavallaris confirms in his evidence that he is aware Ms Greenwood referred the concerns raised in his complaint to the Inframax board on to the Council.

[19] On 20 April 2024 Ms Gribben announced that the Council had confirmed that it was the preferred tenderer. Being the preferred tenderer did not guarantee that Inframax would be awarded the contract. The Council could have pulled out of negotiations at any point in time if it had any issues or questions with Inframax or its tender proposal.

[20] On 22 April 2024 Ms Gribben was advised that a meeting had been scheduled with the Council for the next day, and she circulated the invitation to the tender team within Inframax. Ms Gribben considered the meeting was important for setting the tone for the subsequent negotiations, as tender negotiations rely on a high degree of trust between the parties given their competing interests.

[21] At 6.45 pm on 22 April 2024 Ms Greenwood sent an email to Mr Scotland responding to his letter of 16 April 2024. Ms Greenwood blind copied Mr Ram into her email to Mr Scotland. Mr Kavallaris was not copied into the email. Mr Kavallaris denies any knowledge of Ms Greenwood's 22 April 2024 email; he says he did not receive a copy of that email. Ms Greenwood's evidence is that she sent the email as evidence of ongoing concerns raised in the complaint that she sent to Mr Ram previously, on 16 April 2024.

[22] During the 23 April 2024 tender meeting Mr Ram requested that Ms Gribben see him after the meeting. Ms Gribben met with Mr Ram after the meeting, and he queried whether there were employment issues at Inframax. Ms Gribben confirmed there were. Mr Ram advised that he had been copied into an email from Ms Greenwood and that he did not know why he had been included, nor how his contact details had been obtained by her. He briefly showed Ms Gribben the email on his phone. Ms Gribben called the Council's CEO, Ben Smit, to inform him of the email sent to Mr Ram. Ms Gribben requested that if the Council deemed it appropriate, the email be forwarded to Mr Rattray as Inframax's board chair and to its lawyers.

[23] After reviewing Ms Greenwood's 22 April 2024 email that was forwarded to Mr Ram, the Inframax board became concerned about the various allegations made against Inframax and Ms Gribben. It was concerned about the potential impact that the email may have on Inframax's reputation, the reputation of its people, and the important tendering process that was underway at the time with the Council. The board decided to investigate the appropriateness of the email being sent to the Council. The Inframax board appointed Chris Ryan, a board member, to investigate and potentially make decisions of a disciplinary nature on behalf of Inframax in regard to the 22 April 2024 email. Mr Ryan was only peripherally aware of the issues that had arisen in regards to Mr Kavallaris as Mr Rattray had led and made decisions on behalf of the board in regards to Mr Kavallaris' earlier complaints.

[24] On 7 May 2024 Mr Ryan wrote to Mr Kavallaris. His letter alleged that Ms Greenwood's 22 April 2024 email was attributable to him on the basis that she was acting as his representative and was authorised by him to send the email to Mr Ram, that the email appeared to disclose confidential information regarding Mr Kavallaris' employment relationship problem with Inframax, and that it included personal information about Inframax's employees and contractors. Mr Ryan's letter advised that the Council was a key client of Inframax and that Inframax is currently in the process of tendering for a significant piece of work from the Council. It was alleged that Ms Greenwood's email had the potential to bring Inframax into disrepute and impact on its relationship with a key client. Finally, it was alleged that the email also

appeared to be in breach of Mr Kavallaris' duty of good faith owed to Inframax. Mr Kavallaris was invited to a disciplinary meeting to respond to the allegations.

[25] On 25 May 2024 Mr Kavallaris' lawyer, Philip Ross, wrote to Mr Scotland raising personal grievances and asserting that Ms Greenwood's email was a protected disclosure and that Mr Kavallaris had immunity from any disciplinary proceedings.

[26] On 29 May 2024 Mr Ryan and Barnaby Locke, lawyer for Inframax, met with Mr Kavallaris, Ms Greenwood and Mr Ross via Microsoft Teams to give him an opportunity to respond to the allegations set out in Inframax's 7 May 2024 letter. The meeting was recorded, and a transcript was provided of this meeting. Other than introducing himself at the start of the meeting, Mr Kavallaris declined to participate or respond during the disciplinary meeting. Mr Ross responded on Mr Kavallaris' behalf at the meeting to the allegations; the key themes of his responses are summarised below:

(a) If Ms Greenwood was found to be acting as Mr Kavallaris' agent when she sent the 22 April 2024 email, the email qualifies as a protected disclosure to the Council from which Mr Kavallaris is entitled to the protection from disciplinary action provided under the Protected Disclosures (Protection of Whistleblowers) Act 2022 (the PDA); in the alternative, if Ms Greenwood was not found to be the agent of Mr Kavallaris when she sent the 22 April 2024 email, he cannot be disciplined for sending the email.

(b) Even without the protections provided by a protected disclosure to Mr Kavallaris and Ms Greenwood, the statements made in the email were not defamatory and relied on the defence of qualified privilege.

[27] On 10 June 2024, Mr Ryan wrote to Mr Kavallaris setting out his preliminary view that the allegations were substantiated, that the conduct had the potential to amount to serious misconduct, and that if confirmed, one potential disciplinary outcome being considered was summary dismissal. Mr Ryan did not accept that Ms Greenwood's 22 April 2024 letter was a protected disclosure, because it was sent

to Inframax's lawyers and only blind copied to the Council. There was no cover letter explaining that Mr Kavallaris was raising a protected disclosure. Mr Ryan explained that even if Mr Kavallaris' had intended the email to be a protected disclosure, he did not consider the email could amount to a protected disclosure because the email had not been made in good faith. Mr Ryan believed the email had been sent with the intention of negatively impacting Inframax's relationship with the Council and bringing Inframax into disrepute. Mr Ryan also considered that the Council was not an appropriate authority to receive a protected disclosure about Inframax, pursuant to the requirements of s 11 of the PDA.

[28] On 10 June 2024 Mr Ross responded on Mr Kavallaris' behalf by sending a letter rejecting Mr Ryan's preliminary findings and advising that it was not accepted that Inframax had jurisdiction to continue with the purported disciplinary process and that Mr Kavallaris would not participate further in the disciplinary process which was described as being "ultra vires."

[29] On 19 June 2024 Mr Ryan wrote to Mr Kavallaris advising that he had upheld his preliminary view and had determined that Mr Kavallaris was to be summarily dismissed with immediate effect. On 21 June 2024, Mr Kavallaris was asked to return Inframax's property in his possession by no later than 5 pm on the same day.

[30] On 21 June 2024 Mr Kavallaris' lawyer wrote to Inframax to advise that "the dismissal is a legal nullity" and refused to acknowledge any dismissal had taken effect. Subsequently, he advised that an application had been made to the Authority, and Mr Kavallaris also refused to return Inframax's property.

[31] On 16 July 2024 the Authority issued a determination declining Mr Kavallaris' application for interim reinstatement and confirming that despite his lawyer's submissions he had been dismissed.[2] Mr Kavallaris continued to refuse to return Inframax's property.

[32] On 25 July 2024 Inframax received the final investigation report from Mr Espie into the allegations Mr Kavallaris had made about Ms Gribben. All but one of the

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2 *Kavallaris,* above n 1, at [26] and [51].

22 allegations were found to be unsubstantiated. The one allegation that could amount to a breach was a minor issue relating to Ms Gribben's failure to follow up with Mr Kavallaris on a pricing issue, but the report indicated that this finding did not warrant any significant action by Inframax. Mr Espie found that there were six instances where Mr Kavallaris had engaged in behaviour which was unreasonable and which could amount to a breach of Inframax's expectations, policies or standards. These included four separate instances where Mr Kavallaris was rude and unprofessional towards colleagues.

[33] On 29 July 2024 Inframax applied to the Authority for a compliance order requiring the return of its property. On 9 August 2024 Mr Kavallaris finally returned Inframax's property.

The legal framework is well settled

[34] In considering an application for interim reinstatement, the Court is to apply the law relating to interim injunctions, having regard to the object of the Employment Relations Act 2000 (the Act).[3] The Court must consider:[4]

(a) whether there is a serious question to be tried;

(b) where the balance of convenience lies; and

(c) what is required in the overall interests of justice.

[35] The first question has a relatively low threshold.[5] Establishing if there is a serious question to be tried has two parts:[6]

(a) whether there is a serious question to be tried in relation to the claim of unjustifiable dismissal; and, if so,

(b) whether there is a serious question to be tried in relation to the claim for permanent reinstatement.

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

4 *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 130 (CA) at 142; and *Intellihub Ltd v Genesis Energy Ltd* [2020] NZCA 344, [2020] NZCCLR 29 at [23].

5 *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59, [2021] ERNZ 153 at [8].

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

[36] The merits of the case, so far as they are able to be ascertained at an interim stage, may be relevant in assessing the balance of convenience and the overall interests of justice.[7]

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

[37] Inframax submits that Mr Kavallaris does not have an arguable case for his unjustified dismissal claim. Mr Kavallaris says that there is a serious question to be tried in relation to his claim for unjustified dismissal.

[38] Although the central issue for the Court to determine is clear, there is some inconsistency between the amended statement of claim filed on behalf of Mr Kavallaris and the arguments pursued in the parties' submissions. The amended statement of claim challenged the Authority's determination on a non de novo basis, focusing, for the purposes of these proceedings, on whether Inframax was correct to conclude that the 22 April 2024 email was not a protected disclosure.

[39] On 12 August 2024 the plaintiff filed a notice of change of representation which also stated that the plaintiff's amended statement of claim did not clearly specify that the plaintiff was seeking to elect a full hearing of the entire matter under challenge (a hearing de novo) and indicated the plaintiff was electing to have the matter heard de novo. However, the plaintiff did not seek to make further amendments to the amended statement of claim filed with the Court. The defendant did not object to the election, and the hearing proceeded on a de novo basis.

[40] At the hearing, Mr Cowan, on behalf of Mr Kavallaris, argued that the dismissal was unjustified for a number of reasons which were not pleaded in the statement of claim. The parties' pleadings provide the guardrails for litigation; however, as a number of the additional issues raised by Mr Kavallaris have been engaged with by both parties in their submissions, I have also dealt with those points for completeness.

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

[41] The key arguments put forward in support of Mr Kavallaris' substantive claim are:

(a) If the 22 April 2024 email was not attributable to him, he should not have been disciplined for it.

(b) If the 22 April 2024 email was attributable to him, it was a protected disclosure and had the protections under the PDA.

(c) If the 22 April 2024 email was attributable to him, it was a statement given in the course of raising or furthering a personal grievance and the protections provided under s 121 of the Act apply.

(d) Inframax retaliated or had an ulterior motive when dismissing him.

(e) Inframax did not sufficiently investigate before dismissing him.

(f) His conduct did not amount to serious misconduct.

(g) As a CCO, Inframax had failed to meet its heightened obligations to be a "good employer".

[42] A number of these arguments can be dealt with briefly. The email sent to Mr Ram on 22 April 2024 was incapable of attracting the protections of s 121 of the Act; that provision does not provide a blanket of protection to employees who disclose information to third parties who have no possible role in the resolution of a personal grievance, which is essentially what occurred in this case. Even if the Council was an appropriate recipient of a protected disclosure, it was not the appropriate recipient of material relating to personal grievances against Inframax.

[43] When assessing Mr Kavallaris' substantive claims, the Court accepts that Inframax is a council-controlled organisation and that s 59(1) of the Local Government Act 2002 applies, providing enhanced obligations to be a "good employer". As held by the Court in *GF v Comptroller, New Zealand Customs Service*, those obligations are relevant in the assessment of whether Inframax's ss 4 and 103A obligations have

been met.[8] However, the fact that there is a heightened obligation on Inframax is not a claim by itself – it is merely relevant to the broader assessment being made by the Court.

[44] Finally, whether or not Mr Kavallaris' conduct amounted to serious misconduct is dependent on what findings are made in respect of the other issues, so that issue is not considered separately.

[45] For convenience, I will make observations as to the relative merits as I proceed, which will, at a later stage of the judgment, be relevant to the assessment of the balance of convenience and overall justice.

Mr Kavallaris says he is not responsible for the 22 April 2024 email

[46] Mr Kavallaris claims that the 22 April 2024 email was not attributable to him and that he should not have been disciplined and ultimately dismissed for it. Mr Kavallaris says that Ms Greenwood was pursuing her own agenda against Inframax. He points to a 19 April 2024 email from Inframax's lawyers raising concerns that Ms Greenwood was on a "personal campaign" against certain Inframax staff. Mr Kavallaris also points to the repeated use of first-person language in Ms Greenwood's emails of 16 and 22 April 2024, where she refers to her personal views and comments on matters.

[47] Mr Kavallaris submits that, in these circumstances, Inframax should have undertaken further investigation into whether Ms Greenwood's email of 22 April 2024 was attributable to Mr Kavallaris, or whether Ms Greenwood was pursuing her own personal campaign and making personal comments. He submits that the obligation to investigate was greater when Inframax was deciding on the appropriate sanction and deciding on the most severe outcome of summary dismissal.

[48] Inframax submits that Mr Kavallaris' evidence admits that Ms Greenwood was advocating for him and acting on his instructions. His evidence also confirms that he gave her a blanket instruction to raise matters of concern pursuant to the PDA as she

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8 *GF v Comptroller, New Zealand Customs Service* [2023] NZEmpC 101, [2023] ERNZ 409 at [19].

considered appropriate. Inframax says Ms Greenwood's 22 April 2024 email raises employment concerns and issues on behalf of Mr Kavallaris and states that she is acting "as his representative".

[49] Inframax's 7 May 2024 letter inviting Mr Kavallaris to a disciplinary meeting expressly alleged that the email was attributable to Mr Kavallaris on the basis that Ms Greenwood was representing him when she sent the email. At the disciplinary meeting on 29 May 2024 Mr Kavallaris was repeatedly and directly asked whether Ms Greenwood sent the email on his instructions. He failed or refused to directly answer the question. Ms Greenwood was also present at the meeting and did not comment or provide any clarification.

[50] On 10 June 2024 Inframax sent a letter setting out its preliminary view, which included a preliminary finding that Ms Greenwood's actions were attributable to Mr Kavallaris. Mr Ross responded by advising that Inframax's findings were rejected and that Mr Kavallaris did not consider Inframax had jurisdiction to continue with the purported disciplinary process due to the protections of the PDA. On that basis Mr Kavallaris refused to participate any further in the disciplinary process which he considered to be "ultra vires".

[51] Mr Kavallaris appears to have deliberately refrained from providing clarity on whether he authorised Ms Greenwood to send the 22 April 2024 email or not.

[52] Mr Kavallaris' failure or refusal to cooperate and provide an explanation as to whether he authorised Ms Greenwood to send the email during the disciplinary investigation was inconsistent with the duty of good faith, which requires both him and Inframax to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are responsive and communicative. In these circumstances, Inframax was entitled to proceed on the basis of the information that it had available at the time, or to draw adverse inferences from Mr Kavallaris' refusal to answer whether he authorised Ms Greenwood's 22 April 2024 email.[9]

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9 *B v Virgin Australia (NZ) Employment and Crewing Ltd* [2013] NZEmpC 40, [2013] ERNZ 72 at [155], applying *Radius Residential Care Ltd v McLeary* [2010] NZEmC 149, [2010] ERNZ 371.

[53] Based on the affidavit evidence before the Court, I consider the plaintiff's argument that he did not authorise the email and that it is not attributable to him is not seriously arguable.

Was the 22 April 2024 email a protected disclosure?

[54] Mr Kavallaris claims in the alternative that if Ms Greenwood's email of 22 April 2024 is attributable to him, it was a protected disclosure under the PDA, and that in the event he was found to be responsible for it, no retaliatory action should have been taken.

[55] The purpose of the PDA, as set out in s 3 of that Act, is to promote the public interest by facilitating the disclosure of serious wrongdoing in or by an organisation and by protecting people who disclose in accordance with the Act. Thus, the PDA does not indiscriminately protect all disclosures of alleged wrongdoing – it is only intended to protect people who disclose in accordance with the Act.[10]

[56] When considering whether a protected disclosure has been made under the PDA, it is necessary to consider the following issues:

(a) Is the person claiming protection a "discloser"?[11]

(b) Has the discloser raised concerns about serious wrongdoing?[12]

(c) Does the discloser have reasonable grounds to believe that serious wrongdoing has occurred?[13]

(d) Was the disclosure made to the discloser's organisation or an appropriate authority?[14]

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10 See *Reeves v OneWorld Challenge LLC* [2006] 2 NZLR 184 (CA) at [66](d).
11 Protected Disclosures (Protection of Whistleblowers) Act 2022, s 8.
12 Section 10.
13 Section 9(a).
14 Section 11.

(e) Was the disclosure made in good faith?[15]

[57] The definition of "discloser" in s 8 includes various categories of people. The only category that could be relevant to the present case is employees. Mr Kavallaris was an employee of Inframax and was therefore capable of being a discloser for the purposes of s 8. However, he did not send the email dated 22 April 2024, nor did he send the email dated 16 April 2024. Those emails were sent by Ms Greenwood, who was not an employee.

[58] However, the fact that Ms Greenwood was not an employee does not mean that she could not make a disclosure on Mr Kavallaris' behalf. It would be perverse if the protections of the PDA were lost in situations where disclosures are made on an employee's direction and on their behalf; that would disincentivise people from obtaining legal advice before purporting to raise disclosures. I consider it is arguable that, so long as Ms Greenwood was acting on his behalf when she sent the emails, the PDA does not prevent Mr Kavallaris being a discloser in relation to those emails.

[59] The second issue to consider is whether Mr Kavallaris raised concerns about serious wrongdoing as defined in s 10 of the PDA. Mr Kavallaris submitted that the information disclosed in the email was about an act or omission of an employee of a public sector organisation that was oppressive or grossly negligent or that was gross mismanagement. That reflects s 10(e) of the PDA, which states:

> **10 Meaning of serious wrongdoing**
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> In this Act, **serious wrongdoing** includes any act, omission, or course of conduct in (or by) any organisation that is 1 or more of the following:
>
> …
>
> (e) oppressive, unlawfully discriminatory, or grossly negligent, or that is gross mismanagement, and is done (or is an omission) by—
>
> (i) an employee (if the organisation is a public sector organisation):
>
> (ii) a person performing (or purporting to perform) a function or duty or exercising (or purporting to exercise) a power on behalf of a public sector organisation or the Government.

[15] Section 9(c).

[60] Inframax is a public sector organisation as it is a CCO within the meaning of s 6 of the Local Government Act 2002.[16] Ms Greenwood's emails of 16 and 22 April 2024 referenced allegations against Ms Gribben and Inframax's human resources contractor. It is arguable that at least some of the allegations contained or referred to in the emails could constitute oppressive conduct for the purposes of s 10(e) if established.

[61] The third issue is whether Mr Kavallaris believed on reasonable grounds that the concerns raised were about serious wrongdoing. Given the allegations raised, it is arguable that Mr Kavallaris believed on reasonable grounds that the alleged wrongdoing had occurred.

[62] The fourth issue addresses who the disclosure was made to. Mr Kavallaris submitted that the disclosure was made to Mr Scotland and that if a disclosure was inappropriately made to Mr Ram, he could have referred it to Inframax under s 16 of the PDA. Additionally, Mr Kavallaris submitted that he is entitled to protection even if he technically failed to comply with ss 11 and 14, which relate to the appropriate recipient of a disclosure, so long as he substantially complied with those provisions. On the other hand, Inframax submitted that the Council was not an appropriate authority for the purposes of s 11.

[63] Section 11 of the PDA states:

> **11 Discloser's entitlement to protection**
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> (1) A discloser is entitled to protection under this Act for a protected disclosure made (in accordance with this section) to their organisation or to an appropriate authority.
>
> (2) A discloser is entitled to protection for a protected disclosure made to their organisation if it is made—
>
> (a) in accordance with any internal procedures; or
>
> (b) to the head or a deputy head of the organisation.
>
> (3) A discloser is entitled to protection for a protected disclosure made to an appropriate authority at any time. (This applies whether or not the discloser has also made the disclosure to their organisation or to another appropriate authority.)
>
> (4) A discloser is entitled to protection even if—

[16] Protected Disclosures (Protection of Whistleblowers) Act, s 4.

…

(c) they technically fail to comply with this section or section 14 (as long as they have substantially complied); or

…

[64] The fact that emails were sent to Mr Scotland is irrelevant. An email or emails were also sent to Mr Ram. The question for the purposes of the PDA is whether any email sent to Mr Ram was sent to Inframax or to an appropriate authority. Mr Kavallaris submitted that because the Council was the 100 per cent shareholder of Inframax, it could be described as "the organisation", or as Inframax essentially, for the purposes of s 11, but I do not consider that submission is seriously arguable as Inframax has a separate legal personality from its shareholders.[17]

[65] Examples of appropriate authorities are set out at s 25:

25 Meaning of appropriate authority

(1) In this Act, **appropriate authority**, without limiting the meaning of that term,—

(a) includes the head of any public sector organisation; and

(b) includes any officer of Parliament; and

(c) includes (as examples) the persons or bodies listed in the second column of Schedule 2; and

(d) includes the membership body of a particular profession, trade, or calling with the power to discipline its members; but

(e) does not include—

(i) a Minister; or

(ii) a member of Parliament.

…

[66] The examples set out in sch 2 identify a long list of concerns and then provide examples of appropriate authorities for each type of concern. Ultimately, Mr Ram does not fit the description of any group or individual described in either s 25 or sch 2. However, the examples provided in sch 2 are not comprehensive.

[67] The Court considered an analogous situation to the present in *Bracewell v Richmond Services Ltd.*[18] Although decided in the context of the Protected

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17 Section 4 definition of "organisation"; and Companies Act 1993, s 15.

18 *Bracewell v Richmond Services Ltd* [2014] NZEmpC 111, [2014] ERNZ 434.

Disclosures Act 2000 rather than the current PDA, the principles remain relevant. In that case, an employee made disclosures to a DHB, the Police, their family, and the media. Their employer was a health services provider which was under contract to various DHBs.[19]

[68] Judge Corkill held that the DHB and the Police were appropriate authorities for the purposes of making a protected disclosure.[20] However, when discussing whether it was appropriate to make disclosures to family members, he noted the following about the definition of the term "appropriate authority:[21]

> The term is defined with reference to certain investigative bodies, public sector organisations and private sector bodies comprising members of a particular profession or calling which possess the power to discipline. It is apparent from the examples given that an appropriate authority is intended to be an independent body capable of conducting a formal investigation, if necessary on a confidential basis. Since the bodies are constituted by statute or exercise statutory functions, they are bodies whose processes are likely to be amenable to judicial review.

[69] Judge Corkill held that neither family members nor the media could qualify as an appropriate authority under this definition.[22]

[70] In *Bracewell* Judge Corkill held that the DHB, which contracted with the employer, was an appropriate authority, so it could be argued that by analogy the Council, which contracted with Inframax, was also an appropriate authority. However, the DHB in *Bracewell* had powers to investigate and take action in relation to the disclosures made. The same cannot be said for the Council. There is no indication that the Council was capable of conducting a formal investigation of the allegations made against the relevant individuals, making it difficult to see how the Council could have been an appropriate authority for the purposes of the test set out in *Bracewell.*

[71] Further, even if it could have been appropriate for Mr Kavallaris to inform someone in the Council about his concerns, there does not appear to be any conceivable reason he should have informed Mr Ram. Continuing the comparison

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19 At [1].
20 At [88]–[96].
21 At [98].
22 At [98] and [105].

with *Bracewell,* informing Mr Ram would have been like the employee in *Bracewell* disclosing information to whichever individual from the DHB negotiated contracts between the DHB and the employer – that would have been inappropriate. The Council was in the middle of negotiating a critical business contract with Inframax, and Mr Ram was responsible for that decision-making process at the Council. As such, Mr Ram was at arm's length from Inframax and was not in a position to exercise any kind of oversight over Inframax's employees. Mr Ram could decide whether or not the contract would go ahead, but that is not the type of oversight described by the Court in *Bracewell.*

[72] Mr Kavallaris' submissions appear to acknowledge that Mr Ram was not an appropriate authority, but he suggests that his failure in contacting Mr Ram was a technical failure and that he had substantially complied with the requirements of s 11 so that he is still entitled to protection.

[73] By way of example, a technical failure under s 11 could occur where an employee makes a disclosure to their organisation which does not follow their employer's internal procedures for making a disclosure, but which ends up generally in the right direction.[23]

[74] However, sending information to a person that could not conceivably be an appropriate authority, and where that person is in fact negotiating with the discloser's employer, is more than a technical failure.

[75] Finally, turning to the issue of whether the disclosure made to Mr Ram was made in good faith, Inframax submits that it could not have been sent in good faith and that it was likely sent to the Council with the intention of negatively impacting Inframax's relationship with the Council in the context of the tendering process for a significant piece of work.

[76] Given the language of the email allegedly sent to Mr Ram on 16 April 2024 and the email on 22 April 2024, it appears that Ms Greenwood intended for her correspondence to have an impact on the tendering process. There is no other apparent

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[23] At [91].

reason why the emails would have been sent to Mr Ram, rather than someone else at the Council. Using a protected disclosure to attempt to sabotage a business' negotiations cannot be consistent with the principle of good faith.

[77] Of course, such sabotage could have the effect of incentivising the timely investigation of allegations of wrongdoing, but as noted by the Employment Relations Authority in *Neil v New Zealand Nurses Organisation,* the PDA does not give people licence to say whatever they like rather than waiting for a proper process to be conducted in accordance with the Act.[24]

[78] On the evidence before the Court, I consider the plaintiff's argument that the 22 April 2024 email was a protected disclosure to be weakly arguable. I accept that it is arguable that Mr Kavallaris had reasonable grounds to believe that serious wrongdoing had occurred and that Ms Greenwood's emails to Mr Ram identified that serious wrongdoing. The argument that the Council and Mr Ram are capable of being considered an appropriate authority and that the email was sent to Mr Ram in good faith appear to be weak. However, it is not so weak as to be frivolous and vexatious. These are evidential issues, which would benefit from being tested at the substantive investigation meeting. Therefore, by a slim margin I find that there remains a serious question to be tried on this point. The argument meets the threshold of raising a serious issue to be tried.

[79] Having found that Mr Kavallaris has a weakly arguable case that the 22 April 2024 email was a protected disclosure, it follows that Inframax's dismissal of Mr Kavallaris for sending that email gives rise to a weakly arguable case that the dismissal was retaliation in breach of the PDA.

Did Inframax have an ulterior motive in dismissing Mr Kavallaris?

[80] Mr Kavallaris argues that Inframax had an ulterior motive for dismissing Mr Kavallaris and that it had used the 22 April 2024 email as a convenient excuse. Prior to his dismissal Mr Kavallaris had raised a number of complaints and personal grievances which were being investigated by Inframax. In particular, Mr Kavallaris

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[24] *Neil v New Zealand Nurses Organisation* [2019] NZERA 160 at [27].

had raised a personal grievance for retaliation as a result of Inframax's actions in investigating his mobile data and internet usage on the same day it received a personal grievance letter from his lawyer.

[81] Inframax says it was conscious of Mr Kavallaris' complaints and personal grievances that were being investigated. The investigation into Mr Kavallaris' mobile data and internet usage ceased following Inframax receiving an explanation from Mr Kavallaris. Inframax's board chair, Mr Rattray, appointed an external investigator to investigate the previous concerns raised by Mr Kavallaris, and this was underway when Ms Greenwood sent the 22 April 2024 email. Inframax deliberately chose to appoint a separate board member, Mr Ryan, to investigate its concerns about the 22 April 2024 email, so as to limit the influence of Mr Kavallaris' earlier complaints and grievances on the process. The board member had not been closely involved with managing Mr Kavallaris' earlier complaints and grievances. It maintains that its decision to dismiss Mr Kavallaris in the above circumstances were what a fair and reasonable employer could do in all the circumstances.

[82] The timing of the investigation into Mr Kavallaris' mobile and internet usage is concerning and could suggest, based on the evidence before the Court, that it may have been a retaliatory response to Mr Kavallaris raising a personal grievance. However, ultimately no action was taken against Mr Kavallaris, and steps were taken by Inframax to limit the influence of Mr Kavallaris' earlier complaints and grievances from its investigation of the incident that led to his dismissal. However, the effectiveness of those steps is unclear based on the affidavit evidence before the Court. I consider Mr Kavallaris' argument that there was an ulterior motive in dismissing him is weakly arguable, and this argument meets the low bar for a serious issue to be tried.

Did Inframax sufficiently investigate before dismissing Mr Kavallaris?

[83] Mr Kavallaris says that it is strongly arguable that Inframax's investigation into his alleged serious misconduct was insufficient and did not comply with its own disciplinary policy. Mr Kavallaris says the deficiencies in the investigation include a failure to investigate the circumstances surrounding Ms Greenwood's 22 April 2024 email, how and why the email came to be blind copied to the Council and seeking

answers from Ms Greenwood in regard to the same. He says Inframax also failed to investigate the consequences of Ms Greenwood's email, including how the Council dealt with the email.

[84] Mr Kavallaris' main criticism appears to be that Inframax, upon becoming aware of Ms Greenwood's email, moved quickly to a disciplinary investigation process. The first time Inframax sought an explanation from Mr Kavallaris and Ms Greenwood for the 22 April 2024 email was in a disciplinary meeting. Mr Kavallaris submits that he should not be criticised for any failure or refusal to respond at the disciplinary meeting when Inframax leapfrogged investigating its concerns and went straight to a disciplinary meeting.

[85] However, there are no contractual or policy requirements which require Inframax to complete an investigation process, or which would otherwise prevent it from investigating as part of its disciplinary process. In the absence of such requirements, I do not consider Mr Kavallaris' criticisms of Inframax's investigation process, or his using this as a basis for not participating in the process, carries much weight.

[86] Section 103A(3) of the Act sets out the procedural steps that must be taken in a disciplinary context. There must be a sufficient investigation; the employer's concerns must have been raised with the employee; the employee must be given a reasonable time to respond to the concerns; and his/her explanation must be given genuine consideration. Section 103A(5) provides that the Court must not determine a dismissal to be unjustifiable solely because of defects in the process followed by the employer if the defects were minor and did not result in the employee being treated unfairly. Inframax's disciplinary process on the face of the evidence before the Court appears to comply with the s 103A requirements.

[87] Ultimately, I consider that Mr Kavallaris' argument may be arguable but that, based on the evidence before the Court, it is only weakly arguable.

There is a serious question to be tried, but the case is not strong

[88] I have set out above that at this interim stage, without the evidence being tested, I am satisfied that there is a serious question to be tried in relation to Mr Kavallaris' claim for unjustified dismissal in relation to whether Ms Greenwood's email of 22 April 2024 could constitute a protected disclosure, whether Inframax had an ulterior motive for dismissing Mr Kavallaris, and whether Inframax followed a fair process. However, for the reasons given above, I do not consider his case to be strong.

Serious question to be tried in respect of permanent reinstatement?

[89] Permanent reinstatement is the primary remedy under the Act. If an employee succeeds in their claim for unjustifiable dismissal and seeks reinstatement, it should be ordered where it is practicable and reasonable.[25]

[90] Nevertheless, here there are very significant barriers to permanent reinstatement. The significant difficulty Mr Kavallaris has relates to his conduct towards the defendant and its employees, not only during employment, but also post-employment.

[91] Ms Greenwood's 22 April 2024 email to Mr Ram at the Council causes Mr Kavallaris significant difficulty. While the Council may own Inframax, it is operated at arm's length from its shareholder and has an independent board. The Council is a key client of Inframax. At the time the email was sent, Inframax was in the middle of an open tendering process with the Council. There was no guarantee Inframax would win the tendering process. Winning the tender was critical to Inframax; losing the tender would have caused it significant financial problems and impacted on the long-term financial viability of its business. Ms Greenwood and Mr Kavallaris knew that the tender process was critical for Inframax. Ms Greenwood's 16 April 2024 email referred to the tender process. Mr Ram was a key decision maker in that tender process. With this knowledge in hand, Ms Greenwood nevertheless sent the 22 April 2024 email to Mr Ram, which levelled

[25] Employment Relations Act, s 125.

various allegations against Inframax and made personal and potentially defamatory allegations against its CEO, Ms Gribben.

[92] Inframax was right to be seriously concerned that Ms Greenwood's email had the potential to bring Inframax into disrepute and impact on its relationship with a key client. Ms Greenwood's 16 April 2024 email refers to the tendering process, giving Inframax cause to be concerned that she intended for her correspondence to have an impact on the tendering process. Inframax could fairly and reasonably question in the circumstances whether that email and the subsequent email of 22 April 2024 was made in good faith.

[93] The 22 April 2024 email sent by Mr Kavallaris' representative would have significantly damaged Inframax's trust and confidence in him. Further, Mr Kavallaris displayed a negative attitude towards Inframax, he refused to engage in the disciplinary process and respond to Inframax's concerns about the 22 April 2024 email and refused to accept his termination of employment and Inframax's instruction to return its property. Mr Kavallaris' conduct demonstrates a high level of distrust towards Inframax, making it difficult to see how he could be reintegrated into its workplace.

[94] In the circumstances of this case, and notwithstanding the position of permanent reinstatement under the Act, it is not seriously arguable that Mr Kavallaris would be reinstated on a permanent basis.

[95] It follows that Mr Kavallaris' challenge to the Authority's determination is unsuccessful. There is no order for interim reinstatement.

[96] I nevertheless consider the balance of convenience and overall justice.

Balance of convenience does not favour the plaintiff

[97] It is accepted that Mr Kavallaris would have suffered financially from losing his job; however, no evidence has been provided about his financial position and steps taken to mitigate his loss. Mr Kavallaris is an experienced and qualified civil engineer. He will not lose any skills or experience as a result of his delay in having this matter

heard at a substantive investigation. Mr Kavallaris says that his ability to be reinstated will be lost if he commences employment for another employer in the period prior to a determination being issued by the Authority. However, Mr Kavallaris has the ability to resign from employment; he is not an indentured servant. I do not find this argument persuasive. In the circumstances, damages are an adequate remedy, which Inframax is able to meet if it is unsuccessful in the substantive investigation.

[98] Inframax has given evidence, from a number of employees, raising concerns about Mr Kavallaris returning to the workplace. The concerns range from Mr Kavallaris intentionally continuing to cause harm to Inframax and his lack of insight when dealing with other employees. Inframax gave evidence that if Mr Kavallaris was to return to the workplace, other employees would find it disruptive and distressing and some would resign from their employment.

[99] The Court must be cautious of suggestions that employees will refuse to work with a staff member if they return to work. Even where such differences exist, once a dismissal has been found to be unjustifiable, it often is reasonable for employers to arrange for a reintegration process to smooth the employee's return to the workplace. At an interim stage, where the justification for the dismissal has not been properly tested, such a reintegration process may be considerably less practical or reasonable. Nevertheless, at this interim stage, the evidence has not been tested and I do not place much weight on the suggestion of employees that they will refuse to work with Mr Kavallaris should he return to work.

[100] Under this head it is usual to consider the prospective date for a substantive investigation. The substantive investigation was originally scheduled to occur on 29 October to 1 November 2024. However, that investigation has been delayed until 3 December 2024 because of issues which arose in relation to a challenge to the evidence filed on behalf of Mr Kavallaris. Mr Kavallaris has raised concerns that the Authority's determination may not be issued until March or April 2025. I am satisfied that the Authority has granted the matter urgency and that despite the deferral of the investigation meeting by four weeks, the substantive investigation will be heard in a relatively short time. This does not materially change the balance of convenience, given the findings on the impracticability of permanent reinstatement.

[101] In short, I consider that due to the impracticability of interim reinstatement, the balance of convenience favours Inframax.

Overall interests of justice do not favour the plaintiff

[102] The overall interests of justice do not displace the view reached on the preceding matters.

[103] In particular, the plaintiff appears to have a relatively weak case for unjustifiable dismissal, and his conduct during and after his employment has now almost certainly caused irreparable harm to his relationship with the defendant. The impracticability of reinstatement means the overall justice strongly favours the defendant.

[104] For the sake of completeness, I acknowledge that Mr Cowan submitted during the hearing that Mr Kavallaris had not been afforded the opportunity to file reply evidence. Mr Kavallaris originally filed a without notice application for interim reinstatement, but the Court directed that the matter was to proceed on notice. At the 24 July 2024 directions conference, the parties' representatives agreed that the application would be dealt with expeditiously. The timetable set at the directions conference did not include the filing of reply evidence. However, the Court expressly provided that leave was reserved for either party to apply to the Court for further directions or orders on reasonable notice. Upon receiving Inframax's evidence, Mr Kavallaris did not seek leave to file evidence in reply.

[105] In any case, much of the evidence is recorded in writing, meaning a significant amount of the evidence is not in dispute. In the current circumstances of this case, where the Court has made findings based on that undisputed evidence, namely that there are very significant barriers to permanent reinstatement for Mr Kavallaris, such as to make permanent reinstatement impracticable, I do not consider the outcome to this case would have changed had Mr Kavallaris sought and been granted leave to file evidence in reply.

Defendant is entitled to costs from the plaintiff

[106] Having successfully defended this challenge, the defendant is entitled to costs from the plaintiff. Those costs ought to be able to be agreed. If that does not prove possible, the defendant may apply for costs by filing and serving a memorandum within 21 days of the date of this judgment. The plaintiff is to respond by memorandum filed and served within 14 days thereafter with any reply from the defendant filed and served within a further 7 days. Costs then will be determined on the papers.

M S King
Judge

Judgment signed at 3 pm on 6 November 2024