

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TAMAKI MAKAUROHE**

[2023] NZERA 181  
3205819

BETWEEN	EDITH TAMAKI Applicant
AND	FIRST UNION INCORPORATED Respondent

Member of Authority:	Robin Arthur
Representatives:	David Fleming, counsel for the Applicant Simon Mitchell KC, counsel for the Respondent
Investigation Meeting:	16 March 2023
Determination:	14 April 2023

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**DETERMINATION OF THE AUTHORITY**

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- A. Edith Tamaki's application for interim reinstatement, pending the Authority's determination of her personal grievance application, is declined.**
- B. Costs are reserved.**

**Employment relationship problem**

[1] FIRST Union Incorporated (FIRST) dismissed Edith Tamaki from her role as an organiser on 7 December 2022 on the grounds of serious misconduct. Ms Tamaki raised personal grievances of unjustified disadvantage and unjustified dismissal. She applied to the Authority for an investigation of her grievances and, if she was found to have been unjustifiably dismissed, for FIRST to be ordered to reinstate her as an organiser.<sup>1</sup>

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<sup>1</sup> Employment Relations Act 2000, s 125

[2] Ms Tamaki also asked the Authority to exercise its discretion to reinstate her on an interim basis from now until her grievance application is determined.<sup>2</sup>

[3] FIRST, in reply to Ms Tamaki's application, said its decision to dismiss her was justified and that even if her dismissal were found to be unjustified, reinstating Ms Tamaki would not be reasonable or practicable. It opposed Ms Tamaki's reinstatement on an interim basis for the same reason.

#### **Authority's investigation of interim reinstatement application**

[4] Ms Tamaki's application for interim reinstatement has been determined after considering the contents of the statements of problem and reply, affidavit evidence lodged by both parties from various deponents, relevant background documents lodged with those statements and affidavits, and submissions from the parties' representatives. The representatives attended an investigation meeting held by audio-visual link to give oral submissions, speaking to detailed written submissions, about the relevant principles on interim reinstatement and how they applied in this case. As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination states findings, expresses conclusions and specifies orders made. It does not record all evidence and submissions received.

[5] Affidavits were lodged by Ms Tamaki and 12 FIRST personnel or representatives. Those 12 deponents were its General Secretary Dennis Maga; its Kaiwhakahaere, Syd Keepa; former national organiser Ben Peterson; bargaining advisor Bill Bradford; transport sector secretary Mark Muller; delegate and Rūnanga representative on FIRST's national executive, Grahame Andrews; and six organisers: Neil Chapman (Auckland); David Cooney (Auckland); Phil Graham (Hamilton and Rotorua), Jacqueline Oldham (Hamilton), Kay Hearfield (Whanganui), and Moniqua Reid (Christchurch).

[6] Affidavit evidence is accepted on an untested basis but assessment of unanswered or disputed assertions in those sworn or affirmed statements may be made on a common-sense basis when considering whether to order interim reinstatement.<sup>3</sup>

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<sup>2</sup> Section 127.

<sup>3</sup> *Wellington Free Ambulance Service v Adams* [2010] NZEmpC 59 at [17]-[18].

## **Principles regarding interim reinstatement**

[7] In determining whether to order interim reinstatement the Authority must apply the law relating to interim injunctions and have regard to the object of the Act.<sup>4</sup> The object is to build productive employment relationships through promoting good faith in all aspects of employment relationships.<sup>5</sup>

[8] The relevant principles are applied in a three-step process: evaluating whether Ms Tamaki had “an arguable case”; assessing where the balance of convenience lay between now and when her substantive grievance claim will be determined; and assessing the overall justice of the matter.<sup>6</sup>

[9] At the initial step Ms Tamaki must show she has an arguable case, that is one with a possible (but not necessarily certain) prospect of success and is not merely frivolous or vexatious. In her case, the arguable case must affirmatively answer two questions. Firstly, was there a tenable argument that the decisions made to dismiss her, and how they were reached, did not meet the statutory test of justification that FIRST must satisfy? Secondly, if the Authority’s eventual substantive determination did find FIRST had treated Ms Tamaki unfairly, was there a tenable argument that she would then have a realistic prospect of reinstatement to her employment with the union, in the same position or another position no less advantageous?

[10] The next step looks at the balance of convenience during the interim period, that is until the Authority has determined the substantive claim. This concerns the relative impact on Ms Tamaki and the union of granting or refusing to grant an interim reinstatement order. Factors to be weighed also include the impact on third parties and whether other remedies that might ultimately be ordered would likely be adequate.

[11] The third step stands back from the detail required by the earlier steps and considers the overall interests of justice.

[12] 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.

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<sup>4</sup> Employment Relations Act 2000, s 127(4).

<sup>5</sup> Employment Relations Act 2000, s 3.

<sup>6</sup> *XYZ v ABC* [2017] NZEmpC 40 at [5] and [6].

[13] If an order for interim reinstatement is made, it may be subject to any conditions the Authority thinks fit.<sup>7</sup>

### **How FIRST came to dismiss Ms Tamaki**

[14] Ms Tamaki had worked as an organiser for FIRST and its predecessor unions for 16 years. She worked in the union's Retail, Finance and Commerce (RFC) division for members working in those sectors of the economy.

[15] In addition to her role as part of the FIRST's organising staff Ms Tamaki also held the office of Āpiha Māori. This was an elected position established to support the work of FIRST's Rūnanga in promoting the involvement and representation of Māori members. Under the union's rules she was allocated one day a week to work in that position, paid under the terms of the staff employment agreement, and her organising workload was adjusted to accommodate that work.

#### *Instruction to recall email*

[16] On 17 October 2022 Ms Tamaki sent a lengthy email to all organisers and managers of FIRST. It was headed "Behaviour of Paid Union Officials". She wrote that she was bringing forward concerns as the Āpiha Māori about "unbecoming behaviour" from some paid union officials during recent national negotiations of the Countdown collective agreement.

[17] FIRST has more than 9,000 members working in Countdown's national chain of supermarkets and a further 1,500 in its distribution centres. The Countdown supermarket workers comprise one half of FIRST's members in the RFC sector.

[18] In her email Ms Tamaki said she had received complaints about "abuse towards a group of team members of the Countdown bargaining team". She said those members' voices were "ignored", "smirked at", belittled and singled out in front of the rest of the team and those members felt as though they "were treated differently from those who aren't people of colour". She said they were "lectured and threatened" that if they did not "toe the line with the lead advocate" they could be removed from the bargaining team.

[19] She described those members as "being treated as excrement by paid officials".

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<sup>7</sup> Employment Relations Act 2000, s 127(5).

[20] She said some team members had made a complaint but she questioned whether they could trust their concerns were being investigated.

[21] Ms Tamaki said she was also concerned at the following passage in the RFC sector report due to go to an upcoming meeting of FIRST's national executive:

In our organisation

There are significant problems in the Auckland RFC team. A small group of the staff are actively hostile to the [RFC] secretary and to any measures of accountability or team direction. There is also alarming undercurrents of bullying and exclusion directed at [sic] organisers outside of this group. This small group is willing to lie and spread rumours within the organisation and to members to undermine the union's work and advance their own petty interests. These behaviours will need to be resolved by the management team and/or the incoming [RFC] secretary with urgency.

[22] Although Ms Tamaki did not say so in her email, readers among the union staff and managers would know that the report was written by Mr Peterson who had given notice of his resignation as the RFC secretary in order to take up a union post elsewhere. He had been the lead advocate for the Countdown negotiations earlier that year until he was replaced by Mr Bradford.

[23] Ms Tamaki's email continued by saying that she imagined "management are scabbling trying to find out who else knows about the report" but really "should be concerned about the behaviour of that individual". This was a reference to Mr Peterson. She said she and other Auckland staff were "once again having false accusations publicly thrown at us about undermining the union's work". She said some individuals had made complaints about him and wanted to know if there would be an investigation of them.

[24] She said she had learnt face-to-face discussions with FIRST's management gave "false hope", managers would "do whatever is best for them" and nothing came out of "going through the proper channels as management had dictated". She referred to upcoming elections for the RFC secretary role and said she felt "management are paving the way for one of their own". She said she knew her email would upset some people but the union was "going down the drain".

*Disciplinary process begun*

[25] Mr Maga reacted swiftly to the email. Sixty-four minutes after it was sent Mr Maga sent Ms Tamaki an email instructing her to recall her email and to tell its

recipients to delete it. He told her she had 24 hours to do so. Ms Tamaki did not comply with the instruction.

[26] Shortly after midday on 18 October Mr Maga issued Ms Tamaki with a letter headed “Proposed Suspension/Dismissal”. The letter stated his preliminary view that her 17 October email and her failure to comply with his instruction to recall it were instances of serious misconduct.

[27] Mr Maga’s 18 October letter identified the following concerns with Ms Tamaki’s 17 October email:

- It made serious allegations that other staff members, identifiable by its recipients, had treated members like “excrement”;
- It included excerpts from a National Executive report that should not have been disclosed;
- It suggested management were acting in a biased manner about the upcoming election for a new RFC secretary; and
- It said staff members were punished for raising concerns.

[28] He asked Ms Tamaki to respond by the end of that day on the proposal to suspend her and advised her of a proposed time, three days later, for a disciplinary meeting about the serious misconduct allegations. His letter included routine wording about the right to have support and representation at the meeting and instructed her not to discuss his letter with anyone other than her representative and not to email anyone about work matters or any union business.

[29] Ms Tamaki responded that she could not attend the proposed meeting date as she was on a gradual return to work programme, following back surgery, and had already used her working hours attending meetings for the ratification of the Countdown collective agreement. Mr Maga then confirmed her suspension and set a disciplinary meeting date and time for the following week.

[30] Mr Maga also sent an email to all FIRST staff saying some staff had raised concerns with him about Ms Tamaki’s email. He issued an instruction that no further emails were to be sent by any staff member about that matter and warned that any other staff member who “engages in email or other attacks against colleagues” would face serious disciplinary action. He also advised that FIRST’s National Executive had passed a resolution to conduct a complete review of the Countdown bargaining once

ratification of the collective agreement was concluded. He said the review would cover the selection process for bargaining representatives, the number of organisers attending as observers, conduct and expectations of the union's bargaining team members, communications and claims processes. He also referred to two nominations for the RFC secretary position being announced the previous day. He called on all FIRST staff members to respect guidelines set by the returning officer about their conduct during the union's election process.

*Difficulties in Countdown bargaining*

[31] The affidavit Mr Maga provided for the Authority's investigation of Ms Tamaki's interim reinstatement application described difficulties during bargaining held through July, August and September 2022 for a new collective agreement with Countdown. Tensions within the bargaining team, comprising union delegates and union organisers, resulted in Mr Maga removing Mr Peterson, Mr Cooney and one other organiser from the team. During the weeks over which bargaining was held Mr Maga had investigated concerns raised by some delegates and organisers and appointed Mr Bradford, an experienced negotiator, to join the team.

[32] Mr Maga also had a discussion with Ms Tamaki, initiated by her, on 13 September about concerns raised with her by another organiser about a conversation with Mr Bradford and about her views of Mr Peterson. Ms Tamaki was not involved in the Countdown bargaining and Mr Maga said she did not raise any concerns with him during that conversation from other delegates or organisers. Mr Maga said the conversation had ended positively and Ms Tamaki told him she supported him.

[33] The following day Mr Maga attended the FIRST National Executive meeting where, after reporting feedback about the Countdown bargaining, his proposal for a complete review of that bargaining was adopted.

[34] On 15 September Mr Maga met with the Countdown bargaining team and talked about feedback he had received. He told them of the plan for a review of the bargaining, once completed, and then "intentionally used strong and blunt language" about how they were to conduct themselves in order to achieve a successful settlement. This included saying anyone who obstructed or undermined the bargaining could face consequences, including potential expulsion from the union. The bargaining team

reached a recommended settlement on 16 September, later ratified by 93 per cent of union members who attended workplace meetings called to vote on the deal.

[35] Ms Tamaki's 17 October email was sent during the time union staff were holding those ratification meetings.

#### *Disciplinary process continues*

[36] The disciplinary meeting scheduled for 27 October was postponed after Mr Chapman, who was representing Ms Tamaki at that stage, advised Mr Maga that her doctor had "put her off work until 6 November". Mr Maga wrote to Ms Tamaki on 1 November seeking more information about how she got the National Executive report she had quoted from and asking her to provide copies of recordings and notes she referred to in her 17 October email. He asked for her response by 4 November.

[37] Mr Chapman, on Ms Tamaki's behalf, responded on 4 November with a letter calling for Mr Maga to step down from investigating allegations about her. It said the tone of Mr Maga's 1 November letter suggested he had become too close to the issues to be impartial and had formed a predetermined view she had breached confidentiality.

[38] Mr Maga declined to remove himself from the disciplinary process and extended the time for Ms Tamaki to respond to the allegations about her conduct to 11 November.

[39] On 11 November Mr Chapman sent Ms Tamaki's response to Mr Maga. It said she had not learnt of Mr Maga's request to recall her 17 October email until too late on 18 October and, before taking steps to recall the email, she had wanted to talk to him about an explanatory note to include with the recall advice. She also provided a written response to questions Mr Maga has sent on 1 November. Her response said the National Executive report was left anonymously on her desk and, at that time, she "was of the opinion that it wasn't a confidential document". Ms Tamaki said she was "absolutely devastated" by harsh words Mr Peterson had used about the RFC team. Around the same time she said she was approached by some delegates involved in the Countdown bargaining who complained to her, in her capacity as Āpiha Māori, about how some union officials had treated them during the bargaining process. She wrote "whilst I now acknowledge that my email of 17.10.22 was the wrong way to go about things, I genuinely felt that I had to do something to help the people we represent".

[40] Mr Chapman's message sent on 11 November also described Ms Tamaki as "now fully penitent as a result of the very poor judgement made when sending out the email in question".

[41] A further meeting was delayed due to medical appointments Ms Tamaki had. On 21 November she sent Mr Maga a medical certificate in which her GP recommended a further two weeks' leave due to "significant ongoing workplace stress". The GP's certificate said the recommended leave should be reviewed on 5 December.

[42] Mr Maga did not pause the disciplinary process. By letter on 22 November he asked for more detailed information about recordings and notes she had referred to in her 17 October email. Ms Tamaki's 11 November response had said she did not have the recordings but would not disclose who had shared them with her. Mr Maga said his investigation was being obstructed because he could not take steps to access the recordings and assess their contents for himself. He also said her references to Mr Bradford and two other organisers had caused considerable harm.

[43] He wrote that his preliminary view remained that Ms Tamaki had committed serious misconduct. He said sending the 17 October email breached the staff kaupapa of treating one another with respect and she had failed to follow his lawful and reasonable instruction to recall the email. He said she could have subsequently taken steps to comply with that instruction even if she had not seen his 18 October email before the deadline. He said he proposed summary dismissal but would consider any further information or response she made. He asked to meet by audio visual link with her and her representative on 28 November.

[44] On 24 November David Fleming, an employment lawyer, advised Mr Maga he was now acting as Ms Tamaki's representative. He asked Mr Maga to put the disciplinary process "on hold" until Ms Tamaki was well enough to engage fully in it as she was on sick leave due to work-related stress, with a medical review scheduled for 5 December. Mr Maga responded by advising the union would make a decision by Thursday 1 December and said if there was anything to add, to do so before that time.

[45] On 28 November Mr Maga received emails from five delegates who had attended the Countdown bargaining. They complained about some discussions within the union's bargaining team. Four referred to having raised those concerns with Ms

Tamaki. One of those messages attached a letter from one delegate addressed to Ms Tamaki, dated 16 September 2022. The letter raised concerns about the Countdown bargaining but Mr Maga said he had not seen the letter before it was sent to him on 28 November. He wrote again to Mr Fleming providing a copy of the email and the attached letter which he said were relevant to allegations about Ms Tamaki. Mr Maga wrote that Ms Tamaki's inaction in dealing with those issues had "knowingly undermined the union".

[46] Mr Fleming responded on 30 November. He wrote that Mr Maga could not go ahead with making a decision about Ms Tamaki's employment by 1 December, as earlier indicated, without first providing her with further information, including a statement from Mr Maga about his own perspective and previous discussions with Ms Tamaki about the complaints. Mr Fleming questioned whether any individual member of FIRST's management could appropriately conduct the disciplinary process. He said Ms Tamaki was being "shut down" for raising concerns expressed by Māori members and was being treated differently from another member of the management group who had made public comments critical of Ms Tamaki and other organisers. He called for Mr Maga to "step aside" while an independent person conducted an investigation. He said no response to Mr Maga's latest query would be made by 1 December.

[47] Mr Maga responded by email on the same day saying the latest information, comprising emails from and to concerned delegates, was not a new allegation. He said criticism of his role as decision-maker was not valid and there was no disparity of treatment.

[48] He said the allegations had been raised on 18 October. He said Ms Tamaki had already been given a reasonable time to reply to them but extended the timeframe for any further response from her to noon on 5 December.

[49] At 6.10pm on 5 December Mr Fleming replied to Mr Maga's message about an extended deadline saying he was not able to respond by the noon deadline due to other client commitments and difficulties communicating with Ms Tamaki. He said he had met Ms Tamaki that day and anticipated providing a substantive response "within the next few days".

[50] On 7 December Mr Maga sent a letter to Mr Fleming, addressed to Ms Tamaki, confirming she was dismissed for serious misconduct. He wrote that her email of 17

October was “totally unacceptable (as you have now formally accepted)” and contrary to her obligations to the union. He wrote that her failure to recall the email, and not attempting to do so after the deadline given, was a failure to follow an instruction and was destructive of trust and confidence in her.

[51] Mr Fleming replied to Mr Maga within the hour, criticising the decision to go ahead with a dismissal while Ms Tamaki was “undergoing medical treatment for stress arising from this situation”. He said a substantive response had been drafted and asked if FIRST would withdraw its decision and make a fresh one in light of her feedback. Mr Maga did not respond to that message.

[52] On 12 December Mr Fleming formally raised personal grievances for Ms Tamaki. He also notified FIRST that Ms Tamaki elected to have her dismissal reviewed in accordance with a clause in the staff collective agreement.

[53] The clause, headed Disciplinary Review Process, allowed an employee subject to disciplinary action to elect, within seven days of the disciplinary action, to be heard by a four-member sub-committee of the National Executive. The sub-committee had to review the reasonableness of the action against criteria similar to the test of justification set in s 103A of the Act. The clause preserved the employee’s right to raise a grievance but said members of the sub-committee had to keep confidential any information provided or documents made for the review. The sub-committee members were also said to be prevented from giving evidence about anything related to the undertaking of the review that came to their knowledge through the review.

[54] Mr Fleming also provided Mr Maga with his draft letter of response from Ms Tamaki that had not been sent before the decision to dismiss her was made.

[55] FIRST did not reply to Ms Tamaki’s election for review of the disciplinary decision by a sub-committee of its national executive.

[56] Ms Tamaki lodged her application to the Authority on 19 December 2022 and the matter was referred to mediation. On 23 January 2023 her counsel advised the Authority that the parties had attended mediation but had not resolved the matter. The Authority then made arrangements for the interim reinstatement application to be investigated, including by hearing submissions from counsel for Ms Tamaki and FIRST.

### **An arguable case: an unjustified dismissal?**

[57] Establishing an arguable case that a dismissal or a disadvantage resulted from unjustifiable actions of the employer has a low threshold. It is usually crossed simply by the affected worker disputing the justification of the employer's actions that are said to give grounds for a grievance. This is because, once such a claim is made, the statutory onus falls on the employer to justify what it did and how it did it.<sup>8</sup>

[58] Ms Tamaki's submissions listed the following tenable arguments that FIRST, through the disciplinary process Mr Maga undertook, failed to meet the statutory standard of what a fair and reasonable employer could have done in all the circumstances:

- (i) Mr Maga had, in setting out concerns FIRST wanted Ms Tamaki to respond to in the disciplinary process, made allegations about instances or events in which he had been directly involved and had a direct interest. His explanation of the allegations indicated firm views which made the commissioning of an independent investigation necessary for a fair and unbiased process.
- (ii) The union's Rūnanga was not adequately involved in decisions about Ms Tamaki's employment when her role included duties to the Rūnanga as the Āpiha Māori.
- (iii) The decision to dismiss Ms Tamaki should not have been made while she was on stress leave from work.
- (iv) Mr Maga went ahead with making a decision, issued on 7 December, after being told on 5 December that Ms Tamaki did want to comment on his preliminary decision to dismiss her and would do so in a few days.
- (v) Ms Tamaki was treated differently from other staff members who had criticised union colleagues.
- (vi) Inadequate consideration was given to alternative means of resolving the concerns about Ms Tamaki's conduct.
- (vii) FIRST failed to follow its own rules, after dismissing Ms Tamaki, by not setting up a review of the disciplinary process as required, if requested by the affected worker, under the staff collective agreement.

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<sup>8</sup> Employment Relations Act 2000, s 103A.

[59] FIRST, in its submissions, accepted it was not difficult for Ms Tamaki to reach the initial threshold of an arguable case. Accepting such propositions were arguable was not, however, an acceptance those arguments would succeed. As FIRST submitted, the relative strength and weaknesses of each argument must then be evaluated. This is done as part of assessing the balance of convenience and overall justice later in this determination.

### **An arguable case: permanent reinstatement reasonable and practicable?**

[60] Ms Tamaki submitted she had an arguable case for reinstatement as it was a primary remedy and FIRST has overstated the extent or effect of relationship difficulties with other staff. She submitted that FIRST could not rely on its own claimed loss of trust in her as a reason for opposing reinstatement.

[61] FIRST submitted that, even if Ms Tamaki was able to establish a grievance that she was unjustifiably disadvantaged or dismissed, she did not have an arguable case that reinstating her would meet the requirement for that remedy to be ordered only where it was practicable and reasonable to do so.<sup>9</sup> It pointed to extensive evidence from Mr Maga about Ms Tamaki's conduct in sending her 17 October email as "part of a series of problematic and undermining behaviours" and his concern that here reinstatement, if ordered, would negatively affect the work of other union staff.

[62] Assessing all the affidavit evidence, Ms Tamaki had established to the low threshold of an arguable case that her reinstatement could be reasonably and practicably achieved. Whether this was, however, sufficient to support her interim reinstatement was a matter for evaluation of the strengths and weaknesses of the merits of that prospect, again to be made later in this determination.

### **The balance of convenience**

[63] The balance of convenience weighs the potential effect on Ms Tamaki if she were declined interim reinstatement against the potential effect on FIRST if interim reinstatement were granted. This comparison is sometimes referred to as considering the relative hardships to the parties and any relevant third parties.<sup>10</sup> The period under assessment is from the date of this determination on the interim issue until the date of

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<sup>9</sup> Employment Relations Act 2000, s 125.

<sup>10</sup> *Angus v Ports of Auckland Limited* [2011] NZEmpC 125 at [56].

issue of the Authority's substantive determination on Ms Tamaki's personal grievance claims. The investigation meeting on the substantive issues has been notified for 2 and 3 August. A determination following that meeting is expected to be issued by October.

*Evaluating strengths and weaknesses of merits of the case*

[64] In this case evaluating the relative strength or weakness of aspects of Ms Tamaki's case is helpful in assessing the balance of convenience. As noted earlier, this evaluation is reached from reading untested affidavit evidence and hearing the parties' submissions. At this stage of the proceedings, conclusions reached are provisional and subject to change when the evidence is fully tested through questioning at the eventual substantive meeting.

[65] The argument that fairness required FIRST to commission an independent, external investigation of the concerns raised by Mr Maga is only weakly arguable. Putting robust questions to Ms Tamaki for answer did not necessarily indicate bias or predetermination of conclusions that might be drawn from her responses. Similarly, involvement with or knowledge of some of the events that formed part of the context did not generate an obligation to have a third party conduct the disciplinary inquiry.

[66] Ms Tamaki's role as Āpiha Māori did not suspend her good faith obligations as an employee of the union to be constructive in her relationships with other staff and in addressing issues of concern to members. The union's rules establishing its Rūnanga did not include any limit on the power given to FIRST's General Secretary as chief executive officer of the union to "generally supervise the work of paid officials of the union and its administration".<sup>11</sup> That power was subject only to the General Secretary's duty to carry out lawful instructions given by the National Executive. The National Executive's membership included a representative of the Rūnanga but the union's rules set no requirement for the Rūnanga to be consulted on employment matters where the Āpiha Māori, an elected position, was also an employee of the union. On that basis the proposition Ms Tamaki was unfairly disadvantaged because the Rūnanga was not consulted about the disciplinary process was only weakly arguable.

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<sup>11</sup> FIRST Union Inc Registered Rules 2020 r 24.4.

[67] Mr Maga's affidavit addressed at length the contention that it was unreasonable for him to proceed with the disciplinary process, and the dismissal decision, because Ms Tamaki was said to be too unwell to fully engage and respond to the allegations.

[68] He provided a detailed analysis of the traffic in her work email account showing that from when the concerns were raised with Ms Tamaki on 18 October she had regularly forwarded relevant emails to her personal Gmail account, gathered information relating to the allegations and drafted and edited responses to Mr Maga's queries. This activity included drafting, on 22 November, a template for delegates to submit complaints to Mr Maga about other officials. His evidence included copies of complaints then sent to him on 24 November by four delegates and one union official against the union officials identified in Ms Tamaki's template and adopting the format she appeared to have drafted.

[69] Around the time Ms Tamaki was said to be unable to respond by a 1 December deadline, the analysis of her work account activity showed she had drafted a timeline of events and notes about conversations with Mr Maga and Mr Bradford. Between 2 and 4 December Ms Tamaki also appeared to have created, and edited on several occasions, a document headed "My Response to the Accusations".

[70] Ms Tamaki was also involved in email traffic about a number of other office and work-related matters.

[71] An affidavit in reply lodged by Ms Tamaki, after Mr Maga lodged his affidavit setting out an account of her activity in this period, did not address or refute the activity he described.

[72] In that light, the argument that Ms Tamaki was too unwell to participate effectively in the disciplinary process was not strong.

[73] In the period from 18 October to 5 December Mr Maga had made arrangements to meet with Ms Tamaki and her representative four times and twice extended the period for her to provide written responses, the latest being the period from 1 December to 5 December. Reviewing the course of correspondence and the extensions of time provided, it was not strongly arguable that FIRST acted unreasonably in going ahead with a decision after Ms Tamaki had not responded by the last extended time.

[74] Ms Tamaki's concern about disparity of treatment focussed on her concern that Mr Peterson had made and continued to make disparaging comments about her to the National Executive and other Union staff. Mr Maga's affidavit addressed that concern. It disclosed Mr Peterson was also subject to a disciplinary process about the content of an internal email to union staff. Mr Maga had also, earlier during the Countdown bargaining process, removed Mr Peterson from his role as union advocate as Mr Maga deemed this was necessary to effectively progress that bargaining. In that light, it was only weakly arguable that Ms Tamaki, compared with Mr Peterson, was subject to disparity of treatment.

[75] The two strongest arguments in Ms Tamaki's case concerned what alternative measures were considered to address concerns about her conduct, in the context of wider discord between factions of the union staff, and the union's apparent lack of response to her contractual right of election to a National Executive review of the decision to dismiss her.

[76] The extent to which FIRST could have or should have done more to consider alternatives to Ms Tamaki's dismissal will need to be explored in the Authority's substantive investigation of her claim.

[77] Similarly, more detailed inquiry is needed of why FIRST had not carried out the review process set in its collective agreement with its staff. The Disciplinary Review Process clause provides an option for an affected worker to "elect to be heard by the National Executive's Review Sub-committee".

[78] What the clause describes as "this right of election" must be exercised within seven days of the day on which the outcome of the disciplinary action was notified to the employee. Ms Tamaki was notified of her dismissal by letter on 7 December. By letter on 12 December Ms Tamaki, through her representative, notified FIRST she wished to exercise her right of election and asked for information about who would be on the review sub-committee and what opportunities there would be to make representations to it.

[79] The collective agreement requires the sub-committee to comprise FIRST's National President or Vice-President, another National Executive member, the General Secretary or relevant manager and a staff delegate.

[80] Answering a question while making submissions on the interim reinstatement application, counsel for FIRST said the review process had been overtaken by Ms Tamaki raising her personal grievances and making her application to the Authority. Whether those steps superseded the contractual right to review and, if provided, what difference such a review might have made to the outcome are matters requiring further examination in the Authority's substantive inquiry.

[81] The last point about the relative strengths and weaknesses of the case concerns the prospect that, if Ms Tamaki were found to have a grievance of unjustified dismissal, she should be awarded the primary remedy of reinstatement to her employment as an organiser or a similar, no less advantageous position.

[82] There is extensive affidavit evidence from Ms Tamaki, Mr Maga and the various deponents supporting one or other side of the parties in this matter. Standing back from the history of considerable discord between the clusters of opinion expressed, some evaluation was needed of whether reinstatement would be practicable and reasonable.

[83] There is reason to doubt sufficiently harmonious and productive relationships could be restored between Ms Tamaki and colleagues and managers she would need to work with in carrying out organising and other representative tasks in the union. Some fellow union organisers who strongly expressed support for her and her reinstatement worked in other regional offices or different sectors of the union. The same could be said about some other staff members who deposed that they were concerned about being able to work constructively with Ms Tamaki as they too work out of other offices or have left or will soon leave the union's employment so would have little or nothing to do with her anyway. It would, however, be necessary to establish that Ms Tamaki could restore trusting working relationships with Mr Maga, Mr Keepa as the senior Māori representative within FIRST's governance structure, Mr Bradford as a negotiator and a possible RFC secretary and, as identified in Mr Maga's affidavit, two senior Auckland-based organisers in the RFC sector.

[84] FIRST places a high degree of trust in its union organisers who operate with considerable independence in workplace visits and other contact with union members and delegates. By its nature, it is not a role capable of close supervision and monitoring.

[85] On balance, it could not be said with certainty either that Ms Tamaki was highly likely to be reinstated or, conversely, that the evidence was sufficient to say there was

no practicable or reasonable prospect of restoring a sufficiently constructive relationship.

*Effect on third parties*

[86] The evidence about other union staff who were most likely to need to work closely with Ms Tamaki, including two senior RFC organisers in the Auckland office, weighed against the practicality of reinstatement in the interim period.

[87] Members involved in Rūnanga activities lost the benefit of Ms Tamaki's support but it had already taken steps to address that by appointing another person as acting Āpiha Māori. While that person had subsequently resigned because of the dispute over Ms Tamaki's dismissal, there was nothing to suggest someone else could not be appointed from FIRST's staff to provide the support to the Rūnanga mandated in the union's rules.

[88] It was difficult to assess the effects on union members generally if Ms Tamaki was granted interim reinstatement. It was unlikely, however, that the effort and potential distraction of doing so would be of benefit to them.

*Relative hardships on the parties*

[89] In her affidavit in support of her application for interim reinstatement, Ms Tamaki said losing her job meant she was unable to afford the basics to live. However Mr Maga said Ms Tamaki was paid more than \$12,500 net in final pay in December, which included amounts for annual leave and service leave, so she was not without some resources to tide her over while waiting for investigation of her application. FIRST had also allowed her to keep her mobile phone and provided her with a laptop for private use.

[90] The intervening period would not be without some financial pressure but, if Ms Tamaki were successful with all or some of her grievance claims, this could be adequately addressed by awards of lost wages and compensation. There was also nothing to suggest that, if reinstated as an ultimate outcome following the substantive investigation, there would not be an organiser's role of the same or similar nature to which she could be appointed.

[91] FIRST, on the other hand, was not likely to be able to offset the potentially negative effects on its operational capacity if required to reinstate Ms Tamaki on an interim basis. As acknowledged in the oral submissions of Ms Tamaki's counsel, a significant "level of distraction" was caused by her dismissal. Reinstating her on an interim basis would require further time and effort to establish and maintain parameters for her and other staff to work co-operatively in carrying out their organising duties.

*Practicability and reasonableness in the interim period*

[92] There was reason to doubt that a sufficiently harmonious and co-operative working relationship could be established if Ms Tamaki were reinstated on an interim basis. Representations from her initial advocate, Mr Chapman, had described Ms Tamaki in November 2022 as "now fully penitent as a result of the very poor judgement made when sending out the email in question". By March 2023 she appeared to have walked back from that concession about the effect of her email on other staff. In a reply affidavit sworn on 7 March she described those upset by her email as "the ones dishing it out, not me". She also minimised its effect with this description:

In hindsight I could have phrased my email differently, or handled things in another way. But I don't believe my email had anything like the effect they are making it out to have.

[93] It was a combative rather than conciliatory approach. It did not express a level of insight helpful for the practical process of restoring working relationships in the interim period.

[94] The practicalities of what arrangements might have been able to have been made were discussed with counsel when they were making oral submissions about interim reinstatement. The standard here is not resolving all problems that might previously have existed but what could realistically be done to establish sufficiently harmonious and effective working relationships during the interim period.

[95] Following that discussion I considered whether interim reinstatement might practicably and reasonably be made to a closely supervised office-based role which would provide a balance of ongoing work and income for Ms Tamaki without fuelling disruptive ongoing internal disputes between staff that distracted from the union's operational need to focus on its collective bargaining and other representative work for its members. However, as submitted by FIRST counsel, an organiser's role was not factory work in a confined area capable of close monitoring and supervision. The

relative independence of the day-to-day role with many interactions with members, delegates and other organisers could not easily be made subject to suitable conditions both parties might reasonably operate under during the interim period.

[96] Overall, for the reasons given, assessment of factors in the balance of convenience weighed against interim reinstatement.

**Overall justice: where does it lie meanwhile?**

[97] Standing back from the details considered in relation to the factors concerning an arguable case and the balance of convenience, an order for interim reinstatement was not in the interests of justice in this case.

[98] The merits of Ms Tamaki's case were not strong enough to make her eventual prospects for permanent reinstatement sufficiently clear. Ordering her reinstatement meanwhile had operational and relationship difficulties that could not have practically and reasonably provided a workable solution in the interim period.

[99] Accordingly, Ms Tamaki's application for interim reinstatement is declined.

[100] Timetable directions have been set for the parties to lodge witness statements and documents for the Authority investigation meeting notified to examine the substance of her personal grievance applications.

**Costs**

[101] Costs are reserved pending the outcome of the substantive investigation of Ms Tamaki's grievance application.

Robin Arthur  
Member of the Employment Relations Authority