

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2025] NZERA 109  
3345380

BETWEEN	LISA LOWE First Applicant
AND	ANDREW LOWE Second Applicant
AND	VEGEPOD NZ LIMITED Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Patrick Anderson, counsel for the Applicant  
Michael O'Brien and Joseph Plunket counsel for the Respondent

Investigation Meeting: 8 January 2025 by AVL

Submissions and further information received: 9 and 14 January 2025 from Applicants  
9 and 14 January 2025 from Respondent

Determination: 20 February 2025

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] Lisa Lowe and Andrew Lowe (the applicants) seek interim reinstatement to their respective roles of General Manager for New Zealand Operations and General Manager New Zealand Sales and Marketing at Vegepod NZ Ltd (VPNZ), pending determination of their personal grievance claims.

[2] The applicants lodged a statement of problem in the Authority claiming they were unjustifiably disadvantaged and dismissed from their employment and seek permanent reinstatement along with other relief.

[3] VPNZ is a limited liability company having its registered office in Tauranga and carries out the business of garden supply retailing.

[4] This determination resolves the applications for interim reinstatement. The Authority must determine whether the applicants have an arguable case they were unjustifiably dismissed and an arguable case, that if they were, they will be permanently reinstated.

### **The Authority's investigation**

[5] The Authority directed the parties to mediation to take place on an urgent basis which they duly attended but were unsuccessful in resolving the matters between them. The Authority convened an urgent investigation meeting to hear the applications for interim reinstatement.<sup>1</sup>

[6] The hearing was conducted by way of affidavits and submissions from the parties. The nature of such interim proceedings does not allow for the testing of evidence. The opportunity for that will occur when the substantive matter is heard. It was possible, however, to understand the differences over factual matters and the perspectives in relation to the applicants and the respondent.

[7] Affidavit evidence was lodged from Lisa Lowe, Andrew Lowe, and Helen Rickard. Matthew Harris, director and chairperson of VPNZ and director, Blake Harris, General Manager Vegepod Canada, USA and UK, Cindy Grass, human resources advisor and director and Victor Treisman, CFO provided affidavits on behalf of VPNZ. The representatives gave oral and written submissions.

### **Principles applicable to granting interim relief**

[8] When considering whether to exercise its discretion in an interim reinstatement application, the Authority is required to consider the following questions. Firstly, whether there is an arguable case or serious question to be tried. Secondly, where the balance of convenience between the parties lies and this involves consideration of the impact on the parties of the granting of and the refusal to grant the order. The final question to consider is, standing back and looking at the matter objectively, where the

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<sup>1</sup> Employment Relations Act 2000, schedule 2, clause 17.

overall justice sits.<sup>2</sup> The threshold for a serious question, is that the claim is not frivolous or vexatious

[9] In a claim for interim reinstatement the question of whether there is a serious question to be tried is in two parts:

- (a) whether there is a serious question to be tried in relation to the claim of unjustified dismissal; and if so,
- (b) whether there is a serious question to be tried in relation to the claim of permanent reinstatement.

[10] While the power to make an order for interim reinstatement is a discretionary one, the assessment of whether there is a serious question to be tried is not because it requires judicial evaluation by the decision maker.

[11] This determination is confined to whether the applicants ought to be reinstated on an interim basis. It does not decide whether they were unjustifiably dismissed or disadvantaged or whether they should be reinstated on a permanent basis or what other remedies might be available. The Authority must decide whether the applicants have an arguable case that they were unjustifiably dismissed and an arguable case that, if they were, they will be permanently reinstated.

### **The Vegepod Group**

[12] Matthew Harris is the inventor and creator of Vegepod and founded the company as a sole trader in 2010. He designed the original product and all variations since. The Vegepod Group operates with subsidiary companies in the United States of America, the United Kingdom, Canada and New Zealand.

[13] Matthew Harris is a director and the chairperson of the board of directors of VPNZ. VPNZ was incorporated on 17 January 2019. The main shareholder of VPNZ is Vegepod Holdings Pty Limited (VHPL). VHPL also owns Vegepod Proprietary Limited (VPL) and Vegepod Services Proprietary Limited (VSPL), which is the supplier of Vegepod products. Matthew Harris a director and chairperson of VHPL and

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<sup>2</sup> *NZ Tax Refunds v Brooks Homes Ltd* [2013] NZCA 90.

the CEO of VSPL. VSPL is described by Matthew Harris as the global operating company for VHPL.

### **Vegepod New Zealand Limited**

[14] On 10 May 2016, prior to VPNZ's incorporation, Vegegardenz Limited, a distribution company, was incorporated by the applicants to sell Vegepod products in the New Zealand market. Vegegardenz Limited is a limited liability company having its registered address in Tauranga. Lisa Lowe is the sole director and both applicants are the shareholders. Lisa Lowe says Vegegardenz Limited had exclusive rights to distribute Vegepod products in New Zealand and Matthew Harris says it did not. In any event, it was the vehicle through which applicants conducted their business distributing Vegepod products in New Zealand. By May 2019 Vegegardenz Limited had a turnover of NZD 1.8 million.

[15] In 2019, through Paul Harris, Matthew Harris' brother, the Lowes joined forces with the wider Vegepod group and created VPNZ, the jointly owned company to distribute Vegepod products in New Zealand. The applicants each hold a 1 per-cent share in VPNZ and Vegegardenz Limited holds 28 per-cent. The remaining 70 per-cent of shares are held by VHPL making VHPL the majority shareholder in VPNZ. A Shareholders Agreement and Distribution Agreement governs the relationships between the parties and entities.

[16] Lisa Lowe, Matthew Harris and Brandon Harris, who is Matthew Harris' son are the directors of VPNZ. Matthew Harris is the current Chairperson of the Board of Directors. That position was previously held by Paul Harris, Matthew Harris brother until May 2024.

[17] VPNZ has exclusive distribution rights for distribution of Vegepod products in New Zealand.

### **Employment at VPNZ**

[18] The applicants were employed by VPNZ. Lisa Lowe as General Manager of Operations and Andrew Lowe as General Manager Sales and Marketing for VPNZ. The employment relationships were governed by employment agreements between the

parties signed in 2019 and attached to their first affidavits. They were presented with new employment agreements dated 1 August 2023 but say they never signed those.

[19] The applicants say they were largely left to manage the day to day running of VPNZ and by June 2022, VPNZ was a \$6 million business, making NZD 1.4 million (after tax) profit.

[20] In early 2024, after changes to VPNZ's board of directors, they were advised the global business was sustaining large losses and the global business would need to start passing costs through to VPNZ. In mid 2024 an invoice was issued requiring VPNZ to pay retrospective charges in the amount of \$300,000.00 and they were informed the cost of the product would also increase.

[21] The applicants obtained legal advice that these costs could not be imposed on VPNZ in accordance with the Shareholder and Distribution Agreements dated May 2019. As a result they say Matthew Harris and the new CFO Alan Treisman, renamed the costs "management fees" and when asked, refused to engage an expert on transfer pricing.

[22] With regard to "management fees" the applicants' advice is that the global business would need to justify the increase as reasonable, costs that were already being performed in New Zealand could not be passed through, and the global business had to show the benefit VPNZ would receive from the costs being passed through. They say this never happened.

[23] The Lowes raised a shareholder dispute and the relationship deteriorated and they have since filed proceedings in the High Court. The Lowes set this out as the background to their dismissals.

[24] Matthew Harris says he was appointed a director of VPNZ on 15 May 2024. Because of declining profit and revenue he needed to have more involvement and visibility of the business. The figures provided show declining profits for the group.

[25] Significant restructures across the group occurred over the previous 18 months including closure of the Vegepod business in Germany in June 2023/2024, closing the United Kingdom (UK) head office in November 2023, including making three staff redundant and having that market managed from the United States (US) and removing

staff from the Canadian office and operating that market from the US. Over this time 17 roles were made redundant across the group internationally and they ceased to engage a pool of approximately 13 casual workers.

[26] Matthew Harris says he worked with the senior members of his team to develop a draft business plan for the New Zealand business. He described the plan as a proposal to disestablish the roles of General Manager Operations and General Manager Sales and Marketing enabled by moving several functions to be performed remotely through the Australian office. A new salesperson role would be created. The estimated cost savings of the proposed restructure was approximately \$250,000.00 which was made up of the cost of the two employee positions less the addition of the cost of the salesperson role.

[27] On 18 October 2024, the draft Business Plan was approved by the board, subject to the consultation process with the applicants.

### **The redundancy proposals**

[28] Several proposals including the redundancies were announced on 30 August 2024 in a notice calling for a meeting of VPNZ's directors. The proposals included that:

- (a) Matthew Harris be appointed Chairperson of the Board.
- (b) VPNZ adopt a delegated authority policy.
- (c) The Distribution Agreement between VPNZ and Vegepod Global be novated to replace a party to the agreement.
- (d) VPNZ consider a proposed increase to the management and transfer pricing margin fee paid by VPNZ, with the transfer pricing increase to take effect 20 days after the notice of the increase, and the management fee increase to take effect from 1 July 2024.
- (e) VPNZ consider a strategic review of and a business plan for VPNZ dated 30 August 2024.
- (f) VPNZ explore the option of management redundancies in the Company.

[29] On 24 September 2024, at the Board meeting the Board did not vote to implement the Business Plan, nor the redundancies.

[30] Matthew Harris had tried to have it approved at the 24 September Board meeting but a decision was not made at that meeting. Consultation with the applicants commenced on 26 September. Matthew Harris told them there was a need to restructure due to declining revenue in New Zealand and outlined the consultation process. They had until 2 October to provide feedback or any alternative suggestions on the Business Plan and to confirm whether they accepted the redundancies. After receiving feedback VPNZ would come back to them the following week.

[31] As a result of this being prior to having the proposal approved by the Board, consultation was paused until after the 18 October board meeting. After the meeting the applicants received letters titled “Notice of Proposed Workplace change and Commencement of Consultation Period” with the Business Plan attached. The letter proposed a meeting to discuss redundancy with the applicants on 30 October 2024.

[32] Of note prior to the 24 September meeting Lisa Lowe expressed concerns about the Business Plan, including inaccuracies and she recorded these in an email to Matthew Harris. By way of summary she raised:

- (a) That no New Zealand representative had been involved in creating the Business Plan;
- (b) That the plan was not thorough (extending only to four pages) and referenced excel spreadsheets not relevant to New Zealand;
- (c) There were costs in the Business Plan that had not been accounted for or improperly excluded. For example the cost of relocating Blake Harris to New Zealand should have been included.
- (d) The Business Plan incorrectly stated the New Zealand business was seeing a decline in profits. They considered the current state of the New Zealand business was still extremely profitable and viable as per the gross profit percentages from 2023 and 2024.
- (e) It included transfer pricing charges that had not been agreed between the entities involved and the management fees had been imposed on the New Zealand business with no legal basis.

[33] No response was provided to Lisa Lowe’s list of concerns and questions in her email and I will return to that below.

## **Consultation**

[34] The first scheduled meeting did not take place because the applicants had requested information through their solicitors. Lisa Lowe was interested in understanding the basis for the claims the New Zealand business was performing poorly and the financial reports they were provided related to the global business. She says not all the Board minutes were provided and not all the Leadership Groups' discussions about the redundancies or discussions of alternatives were provided.

[35] The applicants accept the comments made by the Leadership Group once the proposal to make the Lowes redundant had been put together were provided. The financial analysis of Blake Harris' costs to relocate, the Tauranga office additional costs post April 2025 and an updated budget to include the missing figures Lisa Lowe had pointed out were also not provided.

[36] The feedback meeting was rescheduled to 22 November which was two days after VPNZ's response to the information request. Lisa Lowe was also going on preplanned leave on 21 November. More time was requested. VPNZ advised the meeting would be moved to 27 November but with the caveat this would be the last time the meeting would be adjourned. It was also communicated to the applicants VPNZ had supplied them with significant information and they could submit feedback based on this. VPNZ would consider whether to adopt the proposal based on the information currently before it if they failed to provide feedback by 27 November 2024.

[37] A second request for information was made for the information the applicants said they were yet to receive. That was responded to on 27 November and the applicants were informed they had one further opportunity to provide written feedback by 29 November and that VPNZ would hold a Teams meeting on 3 December to make a decision about the proposed redundancies. They were then informed that written feedback could also be provided by 3 December.

[38] The applicants did not attend the meeting on 3 December or provide feedback because they felt they did not have sufficient information to explain the proposals to be in a position to give feedback. Nor did they think they had adequate time to consider what they did have and provide feedback. The communications between their

representatives show the applicants' position was set out their representative was also unavailable on 3 December.

[39] On 4 December Melissa Harris emailed Mr Lowe asking for access to VPNZ's Xero account. Blake Harris was also arriving in New Zealand. On the same day they received written confirmation that VPNZ had decided to disestablish the Lowes' General Manager roles. It was recorded by VPNZ the applicants had declined to attend the feedback meetings and the additional information requested had been provided. No written feedback was received and VPNZ considered all information before it. With no objection or concerns with the proposed new way of operating as outlined in the draft Business Plan, VPNZ adopted it, including the redundancies.

[40] The applicants' last working day was 6 December and they were to be paid out the remaining three weeks' notice. The handover process that followed became contentious and will be referred to below. The applicants lodged their statement of problem in the Authority on 10 December 2024. The parties attended urgent mediation but were unable to resolve their dispute.

### **Serious question to be tried in relation to the claim for unjustified dismissal?**

[41] VPNZ submits there is no serious question to be tried that the applicants' dismissals were unjustified. VPNZ's principle arguments are that VPNZ's deteriorating financial performance was a genuine commercial reason for the redundancies and the applicants failed to be responsive and communicative to the proposal and chose to provide no substantive feedback over the consultation period of five weeks.

[42] VPNZ faces a number of problems and I will deal with consultation on redeployment first. The applicants' employment was governed by their Individual Employment Agreements (IEA) entered into in 2019 and attached to the statement of problem. Those IEA contain the following clauses:

18.1 **Restructuring:** If your job is disestablished for any reason other than the kind of restructuring described in the clause above, the Employer will use its best endeavours to redeploy you into a suitable alternative position if one exists. If redeployment is not possible, you will receive notice in accordance with clause 18.4.

18.2 **Consultation:** The Employer will follow a fair process and will consult with you about any possible redundancy situation.

[43] The effect of clauses 18.1 and 18.2 is a contractual obligation to consult on redeployment and there was no evidence that occurred. This is perhaps unsurprising when the redundancy proposal letter indicated before the proposal was circulated for consultation that it had already been decided there were no re deployment opportunities:

Please note, if the proposal was adopted in the current form and your role was selected for disestablishment, we would explore with you any viable redeployment opportunities. If there are no suitable redeployment opportunities available, then regrettably your employment would end on the grounds of redundancy (and you would be given notice as provided for under your individual employment agreement). As discussed today, the Company does not believe there are currently any suitable alternative opportunities in New Zealand. We will update you if any other roles become available throughout the consultation period.

[44] Concluding there were no redeployment opportunities before consultation was entered into is a problem for VPNZ because of the positive obligation to consult on redeployment flowing from the applicants' IEAs.

[45] This is especially so when Andrew Lowe had been the Sales and Marketing Manager since VPNZ was incorporated. The proposal included the creation of a new sales role. The short point is the IEA required consultation on redeployment and that did not happen.

[46] The other difficulty VPNZ has is the haste with which the consultation moved and the difficulties with the provision of information requested. The applicants agree the consultation period lasted five weeks in total, but say three weeks were waiting for a response to their requests and they did not receive some key information they say is relevant to the redundancy decision making.

[47] The initial request for information was on 30 October. VPNZ provided a response on 20 November. On 26 November the applicants' representative recorded in eight bullet points the information they still required and considered relevant. In particular, Board or Leadership Group discussions about redundancy and any alternatives considered, including minutes from meetings prior to 30 August when the proposal and redundancies were discussed and agreed on and evidence of when concerns about costs were raised with Lisa and Andrew was requested.

[48] It was communicated the applicants were not likely to be prepared to meet for the purposes of feedback on the redundancy until the balance of the information requested had been provided.

[49] What followed is captured in the emails between the representatives. Further information was provided in an email on 27 November 2024 from VPNZ's representative together with a suggestion the applicants were in breach of their good faith obligations to VPNZ by delaying the feedback meeting and leaving it to the afternoon before the scheduled meeting to request further information. One final opportunity to give feedback by 3 December 2024 was given requiring written feedback to be provided prior by Friday 29 November.

[50] The applicants' representative was away 28 and 29 November (when written feedback was required by) and 3 December was the following Tuesday. On Sunday 1 December the applicants' representative emailed saying he had been out of the office but had forwarded the 27 November email to his clients for instructions but noted he was unavailable on 3 December. He repeated that without all the information sought being provided it was unlikely the applicants would be in a position to meet for the purposes of providing feedback.

[51] On Monday 2 December, VPNZ's representative emailed saying this was the fourth time the applicants had declined to meet to provide feedback. Concerns about the applicants' good faith obligations were mentioned again. One further and final opportunity to provide written feedback would be given so long as it was received by 4.00pm the next day, on 3 December. The need for a meeting was not expressly dealt with but it appears this was dispensed with on the basis VPNZ intended to move forward and consider whether to adopt the proposal based on any written material received. A decision would follow.

[52] The applicants say no feedback was provided in the timeframe given because they did not have all the information they needed to understand the proposal. Regardless of whether they provided written feedback the opportunity to meet was dispensed with in the face of their representative being unavailable on 3 December.

[53] Consultation also took place during VPNZ's peak season in New Zealand and it was repeatedly set out that the applicants' required a complete answer to their

information requests before they would be in a position to understand what sat behind the redundancy proposal and give meaningful feedback about it.

[54] The applicants say they are yet to receive key information namely all records of internal communications between VPNZ's Board members and/or Global in respect of the applicants' employment and an explanation and details of alternative options that were considered. Accepting this matter is at an interim stage and the evidence is not fully tested however, it would appear this would be information relevant to a redundancy decision and while a lot of information was provided, this was not.

[55] In those circumstances, with VPNZ knowing the applicants' requests for information were fulsome and that significant amounts of information were provided, it is strongly arguable the amount of time provided for feedback was not reasonable.

[56] It is certainly arguable that dispensing with a meeting at short notice in response to counsel's unavailability with no attempt to reschedule or find new mutually convenient dates were not the actions of a fair and reasonable employer during consultation about a redundancy proposal.

[57] Section 4 of the Act makes consultation mandatory in New Zealand and that has been found to include reasonable time frames to allow information to be provided, considered and responded to. Unilaterally removing the opportunity to meet to discuss would also likely be considered insufficient to comply with what the legislation intended.

[58] Another issue for VPNZ is overlooking the fact feedback had been provided. Lisa Lowe raised as an alternative the possibility of the Sales role being made redundant but her role continuing to exist. Lisa Lowe also provided feedback in writing with further questions she had about the Business Plan and sent this by email to Matthew Harris. The termination letter recorded no feedback had been provided. VPNZ's rationale for this was that both those actions were taken by Lisa Lowe in her capacity as a director and shareholder of VPNZ and not as an employee and that they occurred before the redundancy proposal had been finalised and communicated to the applicants.

[59] Further, Matthew Harris also recorded in his affidavit that he never received any written feedback on the proposal and the Business Plan from Lisa Lowe. However, the applicants provided an email to the Authority indicating it was sent to him.

[60] There was also no explanation as to why Matthew Harris recorded he had not received Lisa Lowe's email and it might be that will be subject of further evidence and submissions when the substantive matter is heard but for present purposes that email represented a comprehensive response to what was proposed and a fair and reasonable employer would have recognised its significance and sought to engage with it.

[61] That calls into question the conclusions that no feedback was received set out in letters of termination.

[62] In addition, an email emerged during the Authority's investigation that suggests the redundancy decisions were predetermined. On 20 August 2024, an email from Ms Grass about numbers of attendees for the 2024 Christmas party records:

Nick has advised that Pam will not be attending the Christmas Party.  
We are presuming the NZ team is not joining us.  
Below is the list we are assuming will attend (16 which is good for table setting)  
...

[63] The relevance is the date of the email which was 10 days before the redundancies were first proposed and discussed at the VPNZ Board meeting and well before the Business Plan and restructure proposal was sent to the applicants.

[64] The financial information provided at the time of the redundancy proposal is relevant to the Authority's assessment of the claim. At the time of the proposal there was a decline in VPNZ's profits which the applicants say was due to New Zealand's general economic climate. When considered over the preceding years, VPNZ's financial position looks to be healthy. The rationale for the restructuring was stated to be "to assist in preserving profitability and attempting to secure the Vegepod Group's long term success, including that of Vegepod NZ."

[65] The Global position was described in the Business Plan as follows:

**Global revenue decline**

Since 2022, the Vegepod Group has experienced a consistent decline in revenues and profitability across all global operations, including New Zealand. The economic downturn and market challenges, coupled with concerns as to the serious mismanagement at the most senior levels across the Vegepod Group, have necessitated a comprehensive restructuring of the entire group to achieve significant cost savings and improve profitability.

[66] Genuine financial reasons can be relied on to justify a redundancy however, the applicants remain very concerned about the motivations of Matthew Harris and the genuineness of the proposal. Lisa Lowe says she was unaware as a Director of VPNZ of the serious concerns set out above and the draft Business Plan in conjunction with the redundancy proposals was the first time concerns about serious mismanagement of the Group emerged.

[67] With the passing on of costs through VPNZ, further analysis would be required to understand the assertion that VPNZ was in a dire financial situation. Andrew Lowe's reply evidence sets out that the current state of VPNZ's New Zealand business is profitable. As at January 2025, he says there was approximately \$800,000.00 cash in VPNZ's bank account and approximately \$500,00.00 in stock. VPNZ has no debt and it contributes 30 per-cent of Global Vegepod revenue. The financial performance of VPNZ will be relevant to the overall question of whether the dismissals were able to be justified at the substantive hearing.

[68] Noting at this preliminary stage, based on minimal affidavit evidence, definite findings cannot be made until the substantive hearing, I am satisfied there is a serious question to be tried in relation to whether the applicants were unjustifiably dismissed based on the failures set out above to adequately consult with the applicants. Consultation has to be meaningful. Failing to provide relevant information requested, unilaterally removing the opportunity to meet, rushing the process and failing to consult on redeployment mean it is arguable VPNZ has failed to meet its statutory obligations under s 4 of the Act and fell below the standard required of a fair and reasonable employer under s 103A of the Act.

### **Serious question to be tried in relation to the claim for interim reinstatement?**

[69] VPNZ's main argument was that there was no serious question to be tried in relation to either unjustified dismissal or permanent reinstatement because reinstatement of any kind is neither practical nor reasonable. This is because the applicants had made several statements about Matthew and Blake Harris that collectively can be taken to mean the applicants have no trust and confidence in the employment relationship.

[70] VPNZ also argues the filing of non-employment proceedings in the High Court by the applicants against VPNZ and naming Matthew Harris personally supports the conclusion that there is a focus on perceived injustices and on Matthew Harris, making reinstatement even less likely to be practical or reasonable.

[71] The case of *Maddigan v Director General of Conservation*<sup>3</sup> was relied on to support the submission that where a deep level of distrust in a manager existed that would seriously undermine attempts to reintegrate an employee back into the workforce.

[72] If reinstated the applicants would need to deal directly with both Matthew Harris who they would report directly to and to Blake Harris who has taken over many of the management functions.

[73] In addition, VPNZ takes the view that on termination both applicants failed to follow reasonable and lawful instructions during the handover and the Authority was informed the applicants would both immediately face disciplinary action should they be reinstated.

[74] I consider it appropriate to set aside proceedings in another forum. They are distinct from the employment jurisdiction and the comments recorded in the pleadings filed in the High Court are at an early stage and considered through a different statutory framework in a different jurisdiction.

[75] I agree with the submissions of the applicants regarding the breakdown of the relationship. The facts in this case can be distinguished from *Maddigan* in that there had previously been a good relationship and collaboration on the business venture that was mutually beneficial to all parties. Even if there is now a level of distrust, Matthew and Blake Harris are separated from the applicants by virtue of the Harris' being in Australia. The comments highlighted as negative in VPNZ's submissions are opinions provided about how the applicants felt during a redundancy consultation process in circumstances where the applicants are both employees and company shareholders and in Lisa Lowe's position, also a company director and had previously held a position equivalent to managing director.

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<sup>3</sup> *Maddigan v Director General of Conservation* [2019] NZEmpC 190 at [84] – [86].

[76] It was submitted the applicants would be willing to attend mediation to discuss reintegration to the business whereas VPNZ focussed on the nature of comments made by one or both the applicants saying they cannot resile from those because they have eroded the employment relationship to the extent it is irreparable.

[77] Reinstatement is the primary remedy in New Zealand and it has long been acknowledged by the Courts that money is a poor substitute for loss of a job.<sup>4</sup> In *DQJ v The Commissioner of Inland Revenue* it was recently stated:

As has previously been observed routinely declining orders of reinstatement in the face of unlawful action monetises the employment relationship. That, in turn, serves to undermine the dignity of workers, contrary to fundamental precepts of employment law. And it incentivises unlawful behaviour.

[78] I do not consider the applicants' comments made in the course of this proceeding to be at such a level to have undermined the employment relationship to the extent submitted by VPNZ. VPNZ's decision making impacted on the applicants as both employees and company owners and it was accepted by both parties there is cross over in this case. The applicants incorporated VPNZ with the other Vegepod entities and this business has been their focus.

[79] The Court also commented on restorative practices in *DQJ v the Commissioner of Inland Revenue* with regard to reinstatement:<sup>5</sup>

The benefits of a restorative approach to the breakdown of employment relationships have been gaining increased recognition. Such an approach has synergies with the underlying objectives of the legislation and the primacy of reinstatement as remedy and may be said to align with tikanga norms and values.

[Foot notes omitted]

[80] The Court in that case held that with appropriate support for the employer there was a basis for arguing that despite being challenging, permanent reinstatement is both practicable and reasonable.

[81] I note VPNZ is a different type of entity when compared with a Government Department, but it does have a Human Resources advisor in Ms Grass. With the

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<sup>4</sup> *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59 at [48].

<sup>5</sup> *DQJ v the Commissioner of Inland Revenue* [2025] NZEmpC 10 at [60].

applicants having started the business in conjunction with the global Vegepod Group in New Zealand and with VPNZ having only one other employee, and a managing director and operations manager based in Australia, I consider with the assistance of mediation, reinstatement is both practicable and reasonable.

[82] I have also given weight to the fact there the terminations came about as a result of restructuring for financial reasons. There are no allegations of misconduct or impropriety in relation to the applicants.

[83] The findings above mean I have found there is a serious question to be tried in relation to the applicants' reinstatement claims.

### **Balance of convenience**

[84] This part of the analysis involves a weighing exercise and requires consideration of the impact on the parties of the granting of, and the refusal to grant, an order. It also requires consideration of whether adequate alternative remedies exist. I must also assess what would happen if the interim position is reversed in the later substantive determination.

[85] For the applicants this means assessing the consequences to them if they were not reinstated on an interim basis but then later deciding in one or both's favour in permanently reinstating one of the other or both. For VPNZ, this means assessing the consequences of requiring it to reinstate the applicants on a temporary basis but then subsequently deciding either against the applicants or against the remedy of reinstatement.

[86] VPNZ submits the balance of convenience favours it because of the applicants conduct during handover after termination. It is alleged the applicants failed to follow lawful instructions in the last few days of employment and that there are ongoing breaches of post-employment obligations. VPNZ says the applicants failed to handover the bank account information, complete the handover, return company property and not to delete company data from VPNZ's devices.

[87] This includes failing to meet with Blake Harris when he arrived in New Zealand, returning a company phone that had been wiped removing company information,

returning the company laptops a week after termination, failing to provide banking information as part of the handover and to arrange for account authorisation so that other signatories in addition to Lisa Lowe could be added. That failure is said to be ongoing.

[88] The applicants say the Notice of Termination dated 4 December included a handover checklist that the applicants were to comply with by 5 December 2024 which was within 24 hours of termination. This was despite an earlier assurance from Ms Grass on behalf of VPNZ that a month would be provided for a handover. The applicants say the time frame provided made it impossible to achieve given how intertwined they were with the business and the banks administrative requirements. They also say the email asking them to meet Blake Harris was sent at a time when both applicants were scheduled to attend a Global Shareholder Meeting.

[89] The applicants also say Blake and Matthew Harris already had access to most of what was required at handover in the company systems such as Shopify, Xero, Microsoft 365 and the Company email accounts. Andrew Lowe refutes that he destroyed Company information from the phone. He said what he did was to remove his Apple ID information which belonged to him and was his personal information.

[90] Lisa Lowe denies withholding access to the bank account and sets out what occurred from her perspective and notes as a director of VPNZ she has duties she must comply with including personal guarantees in place that could see her personally liable for VPNZ's debts. Her evidence is she only received the paperwork about adding Matthew Harris as a signatory to the VPNZ bank account on 19 December. Matthew had signed it on 9 December and she signed it on 19 December when she received it.

[91] With regard to the assertion Lisa Lowe's failure to facilitate access to the VPNZ bank account has resulted in significant costs and consequences, Ms Lowe says she contacted Alan Treisman, Vegepod's part-time CFO on 24 December and offered to pay anything urgent that was required. She also paid IRD on behalf of VPNZ.

[92] Mr Triesman's affidavit sets out that Ms Lowe has failed to give verbal approval which is necessary along with the signed authorisation form meaning there is still not access to VPNZ's accounts. It was accepted at the investigation meeting that there was a point in time when Ms Lowe's actions would be considered to be the actions of a director rather than as an employee, but when that became so was open to debate. It

was also submitted on the applicants' behalf that all handover steps had been completed by the time of the investigation meeting.

[93] What is clear is that there is disagreement over the handover and VPNZ's submissions do not take into account or reference the applicants' responses to the various assertions about their failures to follow lawful directions. I am also not persuaded by the submission that if reinstatement were ordered that the applicants would be subject to a proposal to suspend on the basis their conduct during the handover amounted to serious misconduct. A process including hearing and considering the applicants' responses would need to be followed if VPNZ was to be acting as a fair and reasonable employer under s 103A of the Act which includes complying with its s 4 good faith obligations before making any decision that would effect the applicants' employment.

[94] As discussed above there is an arguable case for unjustified dismissal and permanent reinstatement that I would assess as moderate at this stage. While reinstatement would impact on Matthew and Blake Harris given the process VPNZ has gone through with the applicants, the submission was not that there was no work for the applicants to carry out, rather that some functions had been relocated to Australia. Given their integral role in the business up until termination of their employment I consider at this stage based on the untested evidence there is work available and this includes the sales role that was created in the Business Plan.

[95] The impact appears to be more along the lines of interpersonal consequences. Other than assertions about how the applicants acted over handover, there was no suggestion either Matthew or Blake Harris had any concern over the applicants' conduct as employees, other than perceived animosity as they work through the company issues and after the redundancy process.

[96] No conduct issues have been raised and the evidence was the applicants had in the past until approximately September 2024 had complete operational oversight of VPNZ.

[97] There is one other employee of VPNZ who has worked solely with the applicants up until their redundancy. The impact on her would be minimal should the applicants be reinstated.

[98] The applicants say they have lost their livelihood and wish to resume making a living in a job they enjoy and have performed for an extended period of time. There has not been a delay that would make it difficult to reintegrate back into the workplace. Noting the primacy of reinstatement in New Zealand, I do not consider that damages would be an adequate remedy given the submissions on the financial position of the Vegepod Global Group.

[99] Given the strength of the applicants' case, I find the balance of convenience lies with them.

### **Overall justice**

[100] The overall justice assessment is a final check on the position reached following the analysis of the earlier steps. I am now required to step back and consider the strengths of the applicants' and VPNZ's cases to ascertain where the overall justice lies. I have found the applicants have an arguable case for both their unjustified dismissal claim and for reinstatement. The balance of convenience tips in the applicants' favour and I do not find damages to be an adequate remedy in the circumstances.

[101] I note there are concerns about the handover but prior to that no concerns have ever been raised. At this early stage, the applicants' response to VPNZ's concerns over the handover had not been considered and on the untested evidence, it emerges there are two sides to the story about the handover period. The handover period was also conducted with haste. Ms Lowe's obligations as a Director are also relevant to how things unfolded.

[102] I note the strong submissions on behalf of VPNZ that the other legal proceedings show an intention to terminate the key relationship they have with the company. As set out above, those exist in a different jurisdiction and there is more than one relationship between the parties in this case. This determination is necessarily concerned with the employment relationship.

[103] There remains a risk of the New Zealand operation being shut down but this was not the basis on which the redundancy consultation proceeded and this position emerged in the affidavit evidence of Matthew Harris. It is obvious the financial position

of VPNZ is an issue to be worked through but is not clear how a company could be so exposed financially by an interim reinstatement until the substantive matter is heard.

[104] When I consider those submissions in light of the primacy reinstatement has in the employment jurisdiction, at this interim stage, on untested evidence, I am satisfied that the overall interests of justice fall in favour of Lisa Lowe and Andrew Lowe.

[105] I consider the applicants' have the ability to meet their undertaking if called upon to do so.

[106] VPNZ requested any order for reinstatement not to come into effect for 21 days to allow VPNZ to advance any challenge to the Employment Court and to seek a stay. In order to balance the interests of both parties I consider reinstatement to the payroll with a period of two weeks to allow for reintegration to the workplace to be appropriate.

### **Orders**

[107] I order that in accordance with the undertakings provided by Lisa Lowe and Andrew Lowe they are to be immediately reinstated to their former positions or to positions no less advantageous to them at Vegepod NZ Limited.

[108] Reinstatement is initially to the payroll with a period of two weeks to allow the parties to make arrangements for reinstatement to their positions by 6 March 2025 until further order of the Authority or the Court.

### **Costs**

[109] Costs are reserved pending a final determination on the substantive matters.

### **Next steps**

[110] The Authority will be in contact with the parties to confirm a telephone conference for the purpose of progressing the substantive matter.

**Sarah Kennedy-Martin**  
**Member of the Employment Relations Authority**