

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 210
3300199

BETWEEN	STEPHEN MCCORMACK Applicant
AND	RESERVE BANK OF NEW ZEALAND Respondent

Member of Authority:	Andrew Gane
Representatives:	Michael O'Brien and Joseph Plunket, counsel for the Applicant Peter Chemis, counsel for the Respondent
Investigation Meeting:	By submissions hearing 7 March 2025
Submissions received:	5 March 2025 from Applicant 5 March 2025 from the Respondent
Determination:	14 April 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 17 January 2022 the Reserve Bank of New Zealand (RBNZ) employed Stephen McCormack. On 6 September 2024, Mr McCormack's employment ended by way of dismissal.

[2] On 11 December 2024 Mr McCormack lodged a statement of problem with the Authority in which Mr McCormack alleged that he was unjustifiably dismissed. Mr McCormack also applied for interim reinstatement (interim reinstatement application)

and in support of his application he provided an affidavit and an undertaking as to damages.¹

[3] In response to Mr McCormack's substantive claims RBNZ claims that it has acted fairly and reasonably, and in good faith throughout Mr McCormack's employment. It said that Mr McCormack was justifiably dismissed following his completion of a performance improvement plan where he was assessed as failing to perform to the required level of a Senior Analyst. RBNZ also opposed Mr McCormack's interim reinstatement application.

[4] This determination deals only with Mr McCormack's application for interim reinstatement. The investigation of Mr McCormack's substantive claims will be held in due course.

The Authority's Investigation

[5] On 13 December 2024, I held a case management conference with the representatives to set a timetable for Mr McCormack's interim reinstatement application. During the case management conference the parties agreed to determine the interim reinstatement application on the papers with the parties' representatives attending an investigation meeting to make oral closing submissions.

[6] In terms of the documents lodged with the Authority, an affidavit from Mr McCormack with supporting documents was provided in support of his interim reinstatement application and a further affidavit in reply. On behalf of RBNZ a statement in reply and an affidavit from Jessica Rowe, director of prudential policy, and supporting documents were lodged in the Authority.

[7] The investigation meeting took place on 7 March 2025 where the parties' representatives gave oral submissions, and each referred to detailed written submissions which addressed the relevant principles regarding interim reinstatement and how they applied in this case. As permitted by s 174E of the Act, I have not recorded all of the affidavit evidence provided and submissions given, but I have stated relevant findings of fact and law that I am required to assess at this interim stage to allow me to express a conclusion on whether the interim reinstatement order sought should be granted or declined.

¹ Employment Relations Act 2000, s127.

[8] While affidavit evidence is considered on an untested basis, I am not able to resolve evidential matters in dispute between the parties at this early stage of the proceedings. That is the function of the substantive investigation meeting.

The law relating to interim injunctions applications

[9] The Authority is a creature of statute and under s 127 of the Act it may, if it thinks fit, order interim reinstatement for an employee pending the hearing of their personal grievance. In considering such applications, the Authority must apply the law relating to interim injunctions and having regard to the object of the Act to build productive employment relationships through promoting good faith in all aspects of employment relationships.²

[10] The issues to be determined at this interim stage are:³

- (a) Is there a serious question to be tried in respect of Mr McCormack's claim and the relief sought by Mr McCormack?
- (b) Where does the balance of convenience lie pending a substantive investigation and a final determination of Mr McCormack's claim?
- (c) Where does the overall justice of this case lie from now until the completion of the substantive investigation and issuing of a final determination?

A serious question to be tried

[11] The threshold for a serious question is that the claim is not frivolous or vexatious. In deciding if Mr McCormack's claim is not frivolous or vexatious I must assess the evidence and the submissions from the parties.⁴

[12] This assessment must be applied to both Mr McCormack's claim, and the relief sought. I must assess whether there is a serious question to be tried that:

- (a) Mr McCormack was unjustifiably dismissed.
- (b) Mr McCormack should be permanently reinstated.

² Employment Relations Act, s 3.

³ *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59; and *Western Bay of Plenty District Council v Jarron McInnes* [2016] NZEmpC 36

⁴ *NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

Background

[13] Before considering whether Mr McCormack has a serious question to be tried for unjustifiable dismissal and permanent reinstatement, it is necessary to set out in some detail the relevant facts in order to put the parties' submissions in their proper context.

[14] Mr McCormack started working at RBNZ on 17 January 2022 as a senior analyst in the financial system policy and analysis department (FSPA department). Mr McCormack was employed pursuant to an individual employment agreement.

[15] In his role Mr McCormack was a senior analyst, and was responsible for undertaking and leading analysis, research and project work to support the development and refinement of policy, regulation and legislation.

[16] Mr McCormack reported to David Hargreaves from 17 January 2022 to 1 July 2024. Mr Hargreaves was the manager policy projects, FSPA department/prudential policy department. From 1 July 2024 Annette Crequer took over the role from Mr Hargreaves.

[17] On 11 April 2023, RBNZ initiated an informal action plan (IAP 1) which was focussed on the quality and quantity of Mr McCormack's work outputs. Mr McCormack made sufficient progress and IAP 1 concluded on 6 June 2023.

[18] In October 2023, RBNZ commenced a second informal action plan (IAP 2), and the parties exchanged emails about IAP 2. There were also various meetings during the IAP.

[19] On 13 December 2023 RBNZ commenced a disciplinary process in relation to Mr McCormack's behaviour towards a RBNZ manager. On 17 January 2024 the process concluded with Mr McCormack being issued with a first written warning.

[20] On 18 December 2023 Mr McCormack requested assistance with making a protected disclosure. Mr McCormack was referred to the Director of Risk & Compliance, Gavin Pearce, and met with Mr Pearce on several occasions between December 2023 and February 2024 to discuss his concerns. Mr Pearce had no further involvement.

[21] On 13 January 2024 Mr McCormack made a protected disclosure to the Chair of the Board of RBNZ, Neil Quigley. Mr Quigley advised that he would let Mr McCormack know about the approach he would take to the protected disclosure by 19 January 2024.

[22] On 31 January 2024 RBNZ proposed putting a formal performance improvement plan (PIP) in place for Mr McCormack. At this time, RBNZ states that the relevant manager / decision-maker was not aware that Mr McCormack had made a protected disclosure.

[23] On 8 February 2024 Mr McCormack lodged a personal grievance in relation to IAP 2 by filing a statement of problem with the Authority. A mediation date was set for 22 March 2024. Mr McCormack cancelled this mediation and on 11 April 2024 advised RBNZ that he had withdrawn his claim in the Authority. Mr McCormack lodged a second statement of problem the same day in regard to the alleged retaliation to the protected disclosure.

[24] RBNZ met with Mr McCormack on 9 February 2024 to discuss the proposed PIP. The PIP formally commenced on 13 February 2024.

[25] On 13 March 2024 the RBNZ provided Mr McCormack with specific feedback about his performance and proposed a first written warning. It also invited Mr McCormack to a formal review meeting set for 15 March 2024.

[26] On 15 March 2024, after the formal review meeting and having heard Mr McCormack's feedback, Mr McCormack was given a first written warning that he was not meeting the performance expectations of a senior analyst. He was advised that the PIP would be extended into a second review period.

[27] Mr McCormack was advised a second PIP would commence on 18 April 2024 and end on 17 May 2024.

[28] On 21 May 2024 the RBNZ provided Mr McCormack with its feedback about his performance and proposed a second and final written warning in relation to his performance.

[29] On 23 May 2024 Mr McCormack attended a formal review meeting and later gave feedback.

[30] On 28 May 2024 RBNZ confirmed its decision to give Mr McDonald a second and final written warning in relation to his performance and advised he was not meeting the performance expectations of a senior analyst. RBNZ stated he was also advised that a finding of unsatisfactory performance following a third formal review period could result in dismissal.

[31] Mr McCormack was placed on a third PIP with a provisional end date of 3 July 2024. This was extended to 26 July 2024 to allow for leave taken by Mr McCormack during this period.

[32] Mr McCormack and RBNZ attended mediation on 15 July 2024.

[33] On 25 July 2024 RBNZ provided Mr McCormack its opinion of the third review period. Mr McCormack was invited to a meeting on 30 July 2024 to discuss his performance during the third PIP. RBNZ stated it advised Mr McCormack that after the meeting it would consider what the appropriate outcome of the PIP should be.

[34] On 2 September 2024 RBNZ wrote to Mr McCormack with its preliminary decision that after being put on three PIPs he had not met the performance expectations of a senior analyst and RBNZ advised it would be terminating his employment on notice.

[35] On 11 September 2024 Mr McCormack met with RBNZ to provide his feedback on its preliminary decision.

[36] On 26 September 2024, RBNZ wrote to Mr McCormack to follow up on aspects of the meeting and to provide a further opportunity for Mr McCormack to respond to its preliminary decision

[37] On 20 November 2024, RBNZ wrote to Mr McCormack setting out its views on Mr McCormack's recent performance and the two documents. It invited Mr McCormack to respond.

[38] On 26 November 2024, Mr McCormack provided his response

[39] On 6 December 2024, RBNZ met with Mr McCormack to advise of its final decision to terminate Mr McCormack's employment on notice, paid in lieu. Following the meeting, RBNZ wrote to Mr McCormack with its final decision

[40] On 11 December 2024 Mr McCormack lodged a second amended statement of problem for unjustified dismissal and lodged an application for interim reinstatement.

Serious question to be tried

[41] The first question for consideration is whether there is a serious question to be tried that Mr McCormack was dismissed unjustifiably and that Mr McCormack will be permanently reinstated. In doing so I must decide whether Mr McCormack's claims are more than frivolous or vexatious.

Analysis for unjustifiable dismissal

[42] Section 103A of the Act sets out the test for justification which requires an objective assessment of whether RBNZ's actions were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred. An employer's decision to dismiss an employee must be, when examined objectively, substantively justifiable and procedurally fair for it to survive scrutiny by the Authority or the Employment Court.

[43] From a review of the affidavits and documents lodged by the parties Mr McCormack appeared to have reached the relatively low threshold for an arguable case, with the following tenable arguments that RBNZ's actions and decision to dismiss him failed to meet the statutory standard of what a fair and reasonable employer could have done.

[44] Mr McCormack referred to several grounds as to why they had an arguable case for unjustified dismissal. In summary, Mr McCormack's arguments fell into the following categories:

- (a) The performance improvement process carried out by RBNZ was inadequate and procedurally unfair.
- (b) The decision to dismiss was pre-determined and the outcome of the disciplinary process was not substantively justified.
- (c) The dismissal was retaliatory in that Mr McCormack had raised a protected disclosure.

The performance management process carried out by RBNZ was inadequate and procedurally unfair

[45] Mr McCormack submitted that the focus of performance management should be to assist the employee to improve, rather than a box-ticking exercise so as to end the employment relationship.

[46] The RBNZ placed Mr McCormack on an IAP from the first half of 2023 and identified it would be beneficial for Mr McCormack to undertake some writing training, However it appeared RBNZ failed to provide such support.

[47] RBNZ submits the informal and formal performance processes were lengthy, detailed and well documented. The first informal performance process commenced in April 2023 17 months prior to his termination. It was only after Mr McCormack completed these processes without discernible improvement or significant engagement, that it was justifiable to bring his employment to an end.

[48] Mr McCormick argues that a fair and reasonable employer could have taken further supportive steps before dismissing Mr McCormack, including providing him with significant formal writing training, feedback on report writing and work in general.⁵

The decision to dismiss was pre-determined and the outcome of the performance process was not substantively justified.

[49] Mr McCormack described the RBNZ's performance process as a "predetermined scam". He submitted that the RBNZ regularly "shifted the goalposts" of the PIP with the intention of decreasing Mr McCormack's performance, and subsequently this did cause his performance in his role to suffer throughout the course of the various performance processes. He submitted that was RBNZ's intention.

[50] Mr McCormack submitted RBNZ's predetermination of the termination of his employment is borne out by the fact that it consistently refused to provide substantive responses to genuine issues he raised regarding the PIP process.

[51] Mr McCormack submits that RBNZ did not genuinely consider alternatives to dismissal or redeployment options, including moving Mr McCormack to a different area of the bank.

⁵ *Bagchi v Chief Executive of the Inland Revenue Department* 5 NZELR 767 (EmpC) at [68].

[52] RBNZ submitted the first formal PIP commenced in January 2024, ten months prior to his dismissal, and that it had substantial and reasonable grounds to be concerned about Mr McCormack's lack of performance. RBNZ claims Mr McCormack did not engage constructively or positively with the PIP process.

[53] Mr McCormack submitted that faced with the shifting goalposts, he had an arguable case that he was not provided with a fair opportunity to prepare and engage with the PIP process. It was also arguable, on the tentative assessment made at this stage from the affidavit evidence and the related documents, that it was unclear whether RBNZ had considered Mr McCormack's explanations and feedback during the PIP process, and therefore failed to reasonably and fairly assess Mr McCormack's performance.

The dismissal was retaliatory in that Mr McCormack had raised a protected disclosure

[54] Mr McCormack made a protected disclosure to the Chair of the RBNZ's board on 13 January 2024 and alleges that RBNZ has also failed to discharge the positive onus placed upon it, that its dismissal of Mr McCormack was not in retaliation for his making of a protected disclosure.⁶

[55] Mr McCormack emphasises the fact that he was "outed" for having made a protected disclosure, and referred to as a "timewaster", was proof of the retaliatory nature of RBNZ's actions within the context of the procedure it undertook in terminating his employment.

[56] RBNZ submits that at no stage did it retaliate or threaten to retaliate against the applicant because of any concerns he raised or the protected disclosure he made. It says that performance management had been ongoing for some time, well before Mr McCormack raised concerns or a protected disclosure was made. The RBNZ states the original PIP formally commenced on 13 February 2024 and at that time, the relevant manager / decision-maker was not aware that Mr McCormack had made a protected disclosure.

[57] Although the RBNZ bears the onus of establishing, on the balance of probabilities, that the disclosure was not a substantial reason for the employer's actions

⁶ Employment relations Act 2000, s110B(3).

or omissions, these issues cannot be examined in detail or determined on the basis of untested evidence as part of this interim reinstatement application.

Conclusion of case for unjustified dismissal

[58] Based on all the information I accept Mr McCormack has an arguable case against RBNZ for unjustified dismissal. This is based on the grounds that RBNZ's alleged actions, with respect to Mr McCormack's performance and subsequent disciplinary process warrant further scrutiny through an Authority investigation. For this reason I am satisfied Mr McCormack's claims, based on the affidavit evidence, are claims that are more than just frivolous or vexatious.

Analysis for permanent reinstatement?

[59] In order to establish that there is a serious question to be tried in respect of the claim for reinstatement, I need to be satisfied that there is an argument, that is not frivolous or vexatious, that permanent reinstatement of Mr McCormack is practicable and reasonable.

[60] The test for practicable and reasonable has been discussed and analysed by the Court of Appeal.⁷ Practicable means assessing whether reinstatement can be achieved successfully, noting that this it is not as simple as assessing if it can happen. Reasonable is an assessment of what is fair and right in terms of the parties' cases and an assessment of the effects of an order on the parties and others, i.e., whether it should be ordered.

[61] Mr McCormack submits that the employment relationship can be successfully reimposed and that he bears no ill will against any particular RBNZ employee.

[62] Mr McCormack submits the RBNZ is a large organisation, with a dedicated human resources capacity and is well placed to manage his return to work. The fact that reimposition of the employment relationship may be "challenging" is not a basis to say that it is not practicable nor reasonable.

[63] RBNZ submits that Mr McCormack has shown no insight into his sustained poor performance nor demonstrated any aptitude or ability to perform his role. RBNZ submits that it put in place significant and lengthy processes to manage that poor performance.

⁷ *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School (NZEI)* [1994] 2 ERNZ 414 (CA); and *Lewis v Howick College Board of Trustees* [2010] NZCA 320

[64] RBNZ submits that it is concerned about what it considers will inevitably be ongoing poor performance, which will involve intense support and will impact his team members and his team's work plan. It considers that if Mr McCormack is reinstated this will be at significant cost to RBNZ, both financially, and in terms of the wellbeing of its people and work programme.

[65] While I am yet to question RBNZ's witnesses regarding their evidence, based on what is before me, I see difficulties in Mr McCormack returning to his role. The accusations Mr McCormack has made about his managers and others, raises a level of distrust in his former employer. Reinstatement pending the outcome of the investigation places the parties in the position they would have been in but for the dismissal – balancing the competing tensions of complaints and an investigation in an ongoing work environment.

Conclusion of case for permanent reinstatement

[66] Based on the current evidence before the Authority Mr McCormack has a relatively weak case of permanent reinstatement, however, it is possible on the facts that it could be both practical and reasonable for Mr McCormack to be reinstated to his role with RBNZ. Mr McCormack's case for reinstatement is not frivolous or vexatious. In the circumstances I find that there is a serious question to be tried in respect of the reinstatement of Mr McCormack to his role at RBNZ.

Conclusion on the question of serious question to be tried

[67] RBNZ accepts that based on available, but untested evidence Mr McCormack has an arguable case, but not a strong case.

[68] Considering all the relevant issues, my assessment at this early stage is that there are serious questions to be tried in respect of Mr McCormack's unjustifiable dismissal claim and for reinstatement.

Balance of convenience

[69] An assessment of the balance of convenience concerns the relative positions of the parties during the interim period, which requires an assessment regarding the impact on each party if interim reinstatement is granted or not. The Supreme Court has held that the merits of the case (in so far as they can be ascertained at the interim injunction stage)

may be relevant in assessing the balance of convenience and the overall interests of justice.⁸

[70] The balance of convenience weighs the potential effect on Mr McCormack if he was declined interim reinstatement against the potential effect on the RBNZ if interim reinstatement were granted. This comparison is sometimes referred to as considering the relative hardships to the parties and any relevant third parties.⁹

[71] The period under assessment is from the date of this determination on the interim issue until the date of issue of the Authority's substantive determination on Mr McCormack's personal grievance claims.

[72] There is a serious question to be tried in relation for unjustified dismissal, and for permanent reinstatement.

[73] Mr McCormack submits that his claims are jointly and severally strongly arguable. That is relevant to both the balance of convenience and the Authority's investigation as to where the interests of justice might lie¹⁰

Adequacy of damages

[74] Mr McCormack submits there is a dignity in work which cannot be fulfilled by posthumous damages¹¹

[75] Mr McCormack submits the RBNZ is a well-resourced Public Service organisation, with a sizeable dedicated human resources function. Mr McCormack has also stated his willingness to attend facilitated mediation and that he will willingly enter into any mentoring or coaching arrangement.¹²

Impact on third parties

[76] Mr McCormack has provided details of his current financial situation, and submits that his family have a vested interest in his reinstatement, particularly given the serious financial implication for them of his income being stopped.

⁸ *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

⁹ *Angus v Ports of Auckland Limited* [2011] NZEmpC 125 at [56].

¹⁰ *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59, [2021] ERNZ 153 at [41].

¹¹ *The Vice-Chancellor of Lincoln University v Cheng* [2024] NZEmpC 227

¹² *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59, [2021] ERNZ 153 at [41]

[77] RBNZ submits that although Mr McCormack has provided some limited financial information, with little detail of his family's financial position. He has not provided any details of any other income he may receive.

[78] RBNZ submits that although Mr McCormack expresses a desire to be back at work and contributing and says he bears no ill will towards any particular RBNZ employee, that this is in contrast with his evidence and the allegations he has made.

[79] RBNZ submits that Mr McCormack's failure to engage, his lack of improvement and substantial underperformance and the high cost (both financially and organisationally) of reinstating a chronic and long-term underperformer who refuses to accept or acknowledge that he has any performance issues at all.

[80] Weighing up the arguments of both sides I find that the disruption that would occur as a result of Mr McCormack's return to work would have been for nothing if he did not succeed with his application for permanent reinstatement.

Conclusion on the balance of convenience

[81] Weighing up this assessment, I find that the balance of convenience favours RBNZ's argument against the granting of reinstatement.

Overall justice

[82] I go on to consider the overall justice of the case. The Court of Appeal stated that the overall justice assessment is essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and balance of convenience.¹³

[83] There are serious questions to be tried in respect of Mr McCormack's claims for unjustifiable dismissal and permanent reinstatement, however the balance of convenience does not favour granting Mr McCormack interim relief.

[84] Mr McCormack submits, it is highly desirable on a policy basis that employees who are retaliated against are not able to be unjustifiably removed from the workplace, on either an interim or permanent basis. It is squarely in the interests of justice that those

¹³ *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA at [47]

who are willing to put their heads above the parapet and have the courage to raise issues of serious wrongdoing remain in organisations.

[85] RBNZ submits that Mr McCormack was the subject of performance management processes for nearly half of his employment at RBNZ, two informal processes commencing in April 2023 and then a formal process (with 3 phases) commencing in January 2024 and concluding in September 2024. RBNZ submits that Mr McCormack did not engage in any meaningful way and he did not accept that he had any performance issues.

[86] RBNZ submits that Mr McCormack underperformed for a significant period of time, his performance did not improve in any way, his work required significant revision and he was unable to perform at the level required of a Senior Analyst. RBNZ stated that it had been difficult and stressful for his team who had to pick up the work that he did and has had a corrosive impact on the team and department.

[87] Standing back and assessing all the factors, I find that the overall interests of justice works against Mr McCormack being reinstated on an interim basis.

Conclusion on the overall justice

[88] The overall justice of this case does not favour reinstatement.

Conclusion

[89] As outlined above, whilst I am satisfied that there are serious questions to be tried in respect of Mr McCormack's claims for unjustifiable dismissal and permanent reinstatement, the balance of convenience weighs in favour of RBNZ and the overall interest of justice also favours RBNZ. As a result, I decline Mr McCormack's application for interim reinstatement.

[90] Mr McCormack's application for interim reinstatement is unsuccessful.

Next steps

[91] Having not granted the interim reinstatement application, the next step is to proceed to the substantive investigation meeting on 4 August 2025. Parties have attended mediation, however, if further mediation would assist then a direction can be made.

Costs

[92] Costs are reserved pending the outcome of the substantive investigation of Mr McCormack's grievance application.

Andrew Gane
Member of the Employment Relations Authority

