

**NOTE: This determination contains an order prohibiting publication of certain information at paragraph [43]**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2025] NZERA 38  
3335800 and 3335860

BETWEEN JAN FRANCES LOVE and  
JUDITH CRESTANI  
Applicants

AND WHARE MANAAKI  
INCORPORATED  
First Respondent

AND LANNA COWIE  
Second Respondent

Member of Authority: Geoff O’Sullivan

Representatives: Andrew Little and Charlotte Cameron, counsel for the  
Applicants  
Caroline Rieger and Alex Sclater, counsel for the First  
Respondent

Investigation Meeting: 18 December 2024 in Wellington

Submissions Received: 18 December 2024 from the Applicants  
18 December 2024 from the First Respondent

Date of Determination: 24 January 2025

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] Jan Love and Judith Crestani (the applicants) were both employed by Whare Manaaki Incorporated (WM). Ms Crestani was employed by WM as an Agency Coordinator. Ms Love had been employed by WM as an NGO Coordinator.

[2] The applicants were both dismissed by letter on 17 October 2024 without notice on the basis both were guilty of serious misconduct. The two letters are essentially the same, namely the dismissals were based on allegations of:

- (a) An alleged misappropriation of funds; and
- (b) The operation of a wellbeing fund.

[3] Prior to the dismissal letter the applicants received on 17 October 2024, they had received an earlier letter on 3 October 2024 which confirmed WM's findings that the applicants' conduct amounted to serious misconduct and amongst other things "materially impacted our trust and confidence in you".

[4] The 3 October letter sent to each applicant was again for the purposes of this investigation meeting, much the same. The misconduct relied found by WM and relied on as justification ultimately for dismissal was as follows:

- (i) Both applicants had been complicit in the operation of a wellbeing fund without a policy in place and without appropriate notification and consent of the Collective. Accordingly, both applicants had used WM funds for non-work-related expenses without appropriate authority.
- (ii) In Ms Crestani's case, she had taken steps to interfere with WM property, acting contrary to the terms of suspension, and by failing to notify WM of her actions in removing, altering or deleting information from a WM device.
- (iii) Both applicants had made comments to the media which disclosed confidential information, had the potential to bring WM into disrepute, and were contrary to the terms of a suspension and their employment obligations to WM.
- (iv) In Ms Love's case she had made funding applications under WM's name without approval.
- (v) Both failed to appropriately manage conflicts of interest over making or being aware that funding applications made in WM's name should have been disclosed to other members of the Collective.
- (vi) Both made comments to the media which purports to conflate WM and the Women's Centre as one.

[5] Both applicants have filed proceedings in the Authority challenging their dismissals. The substantive matter has yet to be heard. In their statements of problem, both applicants seek reinstatement, lost wages and compensation, amongst other claims.

[6] It is the applicants' application for interim reinstatement that this determination deals with. The Authority is asked to decide whether or not the applicants or either of them should be reinstated to their positions with WM pending a hearing and determination of their substantive claims.

[7] It is important to note at this stage that this determination will not decide whether or not either applicant was unjustifiably dismissed or whether, if a later determination considers either applicant was unjustifiably dismissed, they would be reinstated on a permanent basis or what other additional relief either applicant might be entitled to. In *Alistair Ross Gordon Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* the Employment Court noted that Parliament had expressed that reinstatement is the primary remedy in circumstances where an employee has been unjustifiably dismissed.<sup>1</sup>

[8] WM disputes the validity of the applicants' personal grievances, including their claims of unjustified dismissal. It strongly opposes the application for interim reinstatement and resists this on a number of grounds. They say the applicants have not provided any evidence supporting reinstatement, they do not identify what steps they would take to improve the employment relationship between the parties, and that the evidence filed shows that both applicants consider that there are significant issues between the parties which make it unlikely that permanent reinstatement could be successfully achieved.

[9] WM also submits that there is an ongoing investigation into time owed in lieu (TOIL) which means that if both return on an interim basis, they would be under suspension in any event.

[10] WM also says that both applicants had brought proceedings against Lanna Cowie, WM's Chair, seeking penalties. They made the point it would be difficult for the applicants to work with Ms Cowie, bearing in mind the allegations they had made against her.

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<sup>1</sup> [2021] NZEmpC 59.

## **Legal framework, interim orders**

[11] As the Court observed in *Humphrey*, in determining whether or not to order interim reinstatement, regard must be had to the object of the Employment Relations Act 2000 (the Act) which is to build productive employment relationships through the promotion of good faith. In *Humphrey*, the Court noted:

One of the central features for the Act is its recognition of the importance of the employment relationship, the obligations both parties have to be responsive and communicative, and that issues ought to be dealt with promptly and between the parties, if possible – in other words, supporting constructive employment relationships and repairing them where feasible.

It is with this in mind, that the applications for reinstatement are to be dealt with.

[12] The legal framework I must follow in respect of the applications for interim orders can be summarised as follows:

- (a) The applicants must establish that there is a serious question to be tried in relation to the claim of unjustified dismissal and if so, they must also establish there is a serious question to be tried in relation to the claim of permanent reinstatement; and
- (b) Consideration must then be given to the balance of convenience and the impact on the parties of granting or refusing to grant, the interim orders sought. The impact on any third parties would also be relevant to the weighting exercise; and
- (c) The overall interests of justice are to be considered, standing back from the detail required by the above steps.

[13] Both parties have provided evidence by way of affidavit and both parties have spoken to written submissions presented at the investigation meeting. This means, at this interim stage, the Authority has proceeded on the basis of untested evidence, which will not be tested until the substantive hearing.

## **Background**

[14] WM is a duly incorporated society operating as a charitable organisation. It is governed by a collective of members who term themselves the Collective and provides immediate crisis response in emergency housing to women and children who are victims of domestic violence.

[15] WM is a member of the National Collective of Independent Women's Refuges (NCIWR) and receives a significant portion of funding from it.

[16] Both applicants therefore, as well as being employees of WM, are also members of the Collective.

[17] At the end of 2023, some members of the Collective became significantly concerned regarding the financial management of WM and on 18 April 2024, NCIWR raised several concerns with WM and proceeded to investigate them.

[18] On 13 June 2024, a complaint was raised with WM about an alleged breach of privacy. This related to Ms Crestani. And on 19 June 2024, Ms Crestani was placed on a period of paid special leave whilst the complaint was investigated. Ms Crestani disagreed with the proposal and following this, she was suspended from her employment.

[19] On 29 July 2024, NCIWR released its investigation report. This report included alleged financial mismanagement by the applicants and others and recommended a full forensic audit into WM's accounts. I am told this also triggered WM's fraud policy and purchasing policy.

[20] In August 2024, WM notified the applicants of a proposed investigation into the allegations set out earlier, including an alleged misappropriation of funds, and the operation of a wellbeing fund.

[21] On 7 August 2024, WM considered suspension was necessary to protect the integrity of the investigation and to preserve its records.

[22] On 22 August 2024, WM engaged Deloitte's New Zealand to undertake a forensic investigation into its accounts. As mentioned above, further allegations were made set out in WM's 3 October 2024 letter to each applicant.

[23] On 3 October 2024, WM made its findings against each applicant in that the applicants had used WM funds for non-work related expenses without a policy being in place, without appropriate notification and consent of the Collective, and appropriate authority. As set out above, ultimately both applicants were dismissed on the grounds set out in each applicant's letter of 3 October 2024 and 17 October 2024. They challenge the justifiability of their dismissals saying:

- (i) The grounds for review by NCIWR did not justify an investigation;
- (ii) The NCIWR investigation predisposed the first respondent against the applicants;
- (iii) Those involved in investigating the allegations against the applicants and making decisions about those allegations were themselves closely involved in the events and decisions of the investigation;
- (iv) WM predetermined issues in relation to the allegations of financial mismanagement;
- (v) WM breached its duty of good faith to the applicants by disclosing confidential employment information about the applicants to third parties.
- (vi) WM's conduct is otherwise irrational.
- (vii) There are no substantive grounds justifying dismissal.

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

[24] The threshold for a serious question is that the claim is not frivolous or vexatious. Analysing this is not an exercise of a discretion, rather it must be based on a judicial assessment of the evidence, albeit untested, and the submissions advanced.<sup>2</sup> In this case, the serious question to be tried is whether or not the termination of the applicants' employment was something a fair and reasonable employer could do under all the circumstances.

*Arguable case*

[25] It was submitted on behalf of WM that there was no arguable case to be tried. It was argued that this was because WM was entitled and obligated to raise concerns with staff and that a number of statements by the applicants were demonstrably wrong, including the applicants' view that the Women's Centre was not a separate legal entity to WM. I disagree, the applicants have an arguable case that their dismissals in each case were unjustified. It is true however that some statements by the applicants are difficult to make out. For instance, the Women's Centre was obviously a separate legal entity. Indeed, the Women's Centre has since closed. Counsel for the applicants characterises WM as an organisation whose origins were a voluntary movement but which is now more reliant on professionals and whose governance and accountability

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<sup>2</sup> *Western Bay of Plenty District Council and NZ Tax Refunds v Brooks Homes Limited* [2013] NZCA 90.

arrangements have been surpassed by the more professional funding arrangements supporting it. That characterisation is attractive when one looks at the structure the applicants are in. On the untested evidence before the Authority, reporting lines are blurred. For instance, all parties agree that WM is governed by a collective of members. These seem to include volunteers as well as paid employees. All members of the Collective have equal responsibility in governing the operations of WM. There appears to be no clear differentiation between employer and employee when it comes to management of WM. On behalf of WM, it was also submitted that when the Employment Court heard WM's application for a freezing order,<sup>3</sup> it noted that WM's claims are arguable, which in WM's submission meant the applicants' claims were not. The point needs to be made that:

- (i) When the Court was discussing whether or not to make a freezing order, it was considering the High Court Rules, noting that the Court may make a freezing order against a respondent if an applicant has a good arguable case on a prospective cause of action. The court then noted in declining the application that WM had a good arguable case that its former employees received payments to which they were not entitled to.
- (ii) However, the Court also noted that the application before it was a without notice application and it had not heard from the former employees or their representatives. Also, the Court dealt with an allegation that time off in lieu (TOIL) may have been taken in breach of WM's TOIL policy. The Court noted WM's submission that this may have led to annual leave balances higher than they ought to be and that this matter was being investigated.

[26] The application before the Court was not about whether the dismissal of the applicants was procedurally and/or substantively justified or unjustified. In this case, the applicants do not deny they accessed the wellness fund, and do not deny what they used the funds for. Their argument is that they were entitled to do this. Just because the Court noted WM may have a good arguable case that the applicants received payments to which they are not entitled, that does not mean that the applicants themselves do not have an arguable case, even a good arguable case, that their dismissals were unjustified.

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<sup>3</sup> *Whare Manaaki Incorporated v Kylie Anderson & Ors* [2024] NZEmpC 209..

[27] The general meeting minutes of WM's Collective certainly show the discussion of a wellbeing fund for staff members. Further, there is a discussion of a \$500 allowance and a further discussion in June 2023 about an increase in that amount. Accordingly, I consider that the applicants have an arguable case that WM was aware, or should have been aware, of the wellness fund and how the applicants were viewing it. The management function of the Collective, on the untested evidence before me, is at the very least blurred. Governance of WM seems to have been carried out by the Collective which included the applicants.

[28] It is certainly arguable that the blurred lines of responsibility between the applicants and WM could be blamed for the situation the applicants find themselves in. This is especially so in respect of the wellbeing fund and the allegation that funds were unlawfully used for non-work related expenses without a policy in place and without appropriate notification and consent of the Collective. It is certainly arguable that the Collective was aware of the applicants' actions and it is arguable that in relying on that ground as a basis for dismissal, WM may not have acted as a fair and reasonable employer under the circumstances.

*Serious question to be tried in relation to the claim of permanent reinstatement*

[29] WM argues that there is no arguable case for permanent reinstatement. They say the applicants have not provided any evidence supporting reinstatement. It is submitted also that in seeking penalties against Ms Cowie for breaches of good faith means reinstatement is not practicable or reasonable. WM takes issue with the applicants' view exhibited in the affidavits, that Ms Cowie has acted in a way that is contrary to what a reasonable employer with no vested interest would do. They say the applicants are accusing Ms Cowie of having a vested interest in the dismissal.

[30] WM also submits that even if the applicants were reinstated, they would be reinstated on suspension as an investigation continues into the use of TOIL.

[31] I accept that the untested evidence does indicate that significant relationship issues have arisen between the parties that may have a negative impact should the applicants be reinstated. However, at this stage of proceedings where evidence is untested, it cannot be said that the applicants' claim of permanent reinstatement should they succeed in their claim of unjustified dismissal has no chance of success. I find there is an arguable case to claim permanent reinstatement should the applicants

succeed with their claim of unjustified dismissal. Although I do not see this as a strong claim, nonetheless there is a serious question to be tried in relation to the claim of permanent reinstatement.

*Balance of convenience*

[32] In this case assessing the balance of convenience requires a comparative analysis of the impact on the applicant, WM, and any third parties if the interim orders sought by the applicants are either granted or not. This involves a weighing exercise in the Authority's discretion. I must assess what would happen if the interim position is reversed in the later substantive determination. 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 other's or both's favour in permanently reinstating one or the other or both. For WM, this means assessing the consequences of requiring it to reinstate the applicants on a temporary basis and to position within WM but then subsequently deciding either against the applicants or against the remedy of reinstatement. As discussed above, WM submit that the applicants' claims for permanent reinstatement were not strong. In that regard, Ms Crestani's evidence was:<sup>4</sup>

I do not believe natural justice has been served. I have had my name and reputation trashed by claims, basically dishonesty, have been made in the media. Getting my job back is important to me to restore my dignity and reputation in the community I have adopted, loved and worked in for the last 32 years.

[33] Ms Love's evidence is of a similar vein, stating:<sup>5</sup>

Reinstatement is a key part of the process to begin restoring my reputation and have me back working where it is needed until such time as all the issues can be fully examined by the ERA process.

Reinstatement is also important because my role is a specialised role and the skills are not easily transferrable to other roles.

Reinstatement is also important because it is not just me, personally who is being affected by what is happening and the publicity about it others have caused. It has seriously affected my whole family with the ripple effects still occurring to this day ...

[34] In other words, whilst there is evidence in respect of the applicants' desire for reinstatement, in considering interim reinstatement, the evidence is not strong. By that I mean interim reinstatement is unlikely to restore dignity and reputation in the community for either applicant. As the name suggests, interim reinstatement is interim

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<sup>4</sup> Ms Crestani's brief of evidence dated 5 November 2024 at 112.

<sup>5</sup> Ms Love's brief of evidence dated 5 November 2024 at 94.

reinstatement on a temporary basis until the substantive matter is heard. Even if the applicants were to succeed in the substantive matter and secure a finding that their dismissals were unjustified, they may or may not be reinstated. Accordingly, interim reinstatement does not have the effect of restoring the applicants' reputations.

[35] The limited and untested evidence before the Authority from the applicants, gives no guide to any vision the applicants may have which may help restore a severely damaged relationship. As the Court has noted, the benefits of a restorative approach to the breakdown of employment relationships has been gaining increased recognition and certainly is in keeping with the underlying objectives of the Act and reinstatement as a primary remedy.

[36] Initially, the applicants sought penalties against the very person they would need to be working with for the relationship to be mended. Although the penalty action was withdrawn during the investigation meeting verbally and subsequently formally, nonetheless it is indicative of the hostility between the parties. In saying that, I need to be clear I am not criticising the applicants seeking a penalty. It is their right and not unusual in cases involving an unjustified dismissal, although less usual when a party is seeking interim reinstatement. Nonetheless, it does give a limited insight to the relationship between the parties.

[37] WM also submits that as there are still concerns regarding TOIL which remain under investigation, the applicants would come back and face a very high possibility of suspension whilst that investigation continued. I do not put weight on that argument as a block to reinstatement.

[38] There is an issue with timing. Initially, a substantive investigation was to be scheduled for some time in February. This will now not be possible. This is because the applicants are part of an application to join NCIWR into the proceedings as a controlling third party. A decision on that application has yet to be made. Nonetheless, there will be an inevitable delay.

[39] Whilst it is not a criticism, the filing of the application has caused the delay. This means a determination on the substantive issues between the parties may be some time away. However, it is the substantive determination which holds the key to the applicants' concerns. Should they be successful there, and achieve their goal of

reinstatement, permanent reinstatement would go a long way to restoring their reputation and mana.

[40] The applicants have also levelled accusations against WM's employment committee, the Collective and of course the Chair. Some of these people will be responsible for the direction of the day-to-day duties. On the limited evidence currently before the Authority, the balance of convenience by a small margin favours WM.

*Overall interests of justice*

[41] The overall interests of justice do not favour the granting of interim reinstatement in this case. There are current difficulties with the parties' relationship and there remains of course the allegation of impropriety against the applicants. Whilst such issues are unlikely to affect permanent reinstatement being available as a remedy should the applicants succeed in their substantive claim, it is nonetheless a matter to consider at this interim stage. I have also considered the nature of the work undertaken by Whare Manaaki and its operating model.

**Conclusion**

[42] The application for interim reinstatement is unsuccessful.

[43] Some of the evidence before the Authority contains references to clients of WM. The parties have requested that I make non-publication orders in respect of any information or evidence before the Authority which may lead to their identification. Further to clause 10 of schedule 2 of the Act, orders are made accordingly.

**Costs**

[44] Costs are reserved and will be dealt with after the substantive determination in respect of this matter has issued.

Geoff O'Sullivan  
Member of the Employment Relations Authority