

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2025] NZERA 484
3377003

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| BETWEEN | ANDY BIRCHALL Applicant |
| AND | WHAKAMOENGA POINT MANAGEMENT COMPANY LTD Respondent |

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| Member of Authority: | Peter Fuiava |
| Representatives: | Robert Macdonald, counsel for the Applicant Fletcher Pilditch KC and Sarah Ongley, counsel for the Respondent |
| Investigation Meeting: | 15 July 2025 by audio-visual link |
| Submissions and information received: | Up to, and including, 1 August 2025 from the Applicant Up to, and including, 1 August 2025 from the Respondent |
| Determination: | 8 August 2025 |

PRELIMINARY DETERMINATION OF THE AUTHORITY

What is the employment problem?

[1] Lying on the northwestern edge of Lake Taupō, in the Acacia Bay area, is Whakamoenga Point (the Point), an exclusive gated community spanning some 24 hectares of land that comprises 56 freehold residential allotments, conservation park, and various jointly-owned assets. Those assets include a service dwelling that was once the home of the Point's former Caretaker/Manager, Andy Birchall, who was recently summarily dismissed by his employer, Whakamoenga Point Management Company Ltd (WPMCL or the company), for serious misconduct.

[2] Mr Birchall claims that his dismissal was unjustified and that he was also unjustifiably disadvantaged by WPMCL's board of directors (the board) through

alleged bullying, harassment, and micromanagement of his role that Mr Birchall says was self-managing and effectively autonomous.

[3] The grievances are denied by the Board who say that Mr Birchall resisted its oversight, was often argumentative and disrespectful, and ultimately failed to follow its lawful and reasonable instructions. While the Authority investigates these matters, Mr Birchall seeks interim reinstatement which the company opposes.

[4] The grievances are somewhat nuanced owing to Mr Birchall's contention that his true employer is not WPMCL's board *per se* but rather the various allotment owners (approximately 52 in number) at the Point. While this claim is also denied, it may be noted that the board is made up of five other owners all of whom live at the Point and who serve on a voluntary and fixed-term basis. Mr Birchall claims that he has the support of 10 other owners who outnumber the present board two to one and if given the opportunity, those owners could resolve his employment problem with the present board resulting in his re-employment. He therefore seeks the Authority's assistance to convene an owners' meeting and an order that the board be directed to provide him with a safe working environment by establishing an alternative reporting line whereby Mr Birchall would report to his support person and property owner, Jenny Yule, and not the board.

[5] The above orders are opposed by WPMCL who in turn applies for an interim injunction against Mr Birchall. In broad terms, it seeks to injunct him and anyone acting on his behalf (notably his representative Mr Macdonald and Ms Yule) from disclosing any confidential information to any third party including any correspondence obtained during the course of the employment relationship or as part of this proceeding. In opposing the application, Mr Birchall says that he has waived confidentiality with respect to his employment problem with the board.

How has the Authority investigated?

[6] As required by s 127(2) of the Employment Relations Act 2000 (the Act) and cl 7 of the Employment Relations Authority Regulations 2000, Mr Birchall provided a written undertaking to abide by any order from the Authority in respect of damages, a witness statement from his support person Ms Yule, and a supporting affidavit from

himself. Written submissions and several emails from Mr Birchall's counsel, Mr Macdonald, have also been provided.

[7] For WPMCL, written submissions, a memorandum of counsel, and affidavits from board co-chair Gillian Burcher, board director Sylvie Doctot, board director Nicola Nunn, employment relations specialist Jannine O'Meara, board director and Mr Birchall's 'designated director', Lucjan Sajkowski, and John Wimsett, whose affidavit helpfully sets out a timeline of events, have also been provided.

[8] As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

What are the relevant facts?

[9] On 4 April 2018, Mr Birchall signed an individual employment agreement with WPMCL. His employment commenced on 21 May 2018 and ended on 13 June 2025. He has been the Point's caretaker/manager for the last seven years. Before Mr Birchall was employed, the previous caretaker/manager had worked at the Point for four-and-a-half years.

[10] WPMCL was incorporated in November 1988. There are presently 52 shareholders with each owner contributing to the company's costs through a levy. Upon acquiring a shareholding in the company, each owner enters into a deed of covenant agreeing to be bound by the terms of a "Management Agreement".

[11] Clause 3.4 of the Management Agreement states that WPMCL manages the "conservation parking lot" (which comprises the residential allotments and lot 57 at the Point) for the purpose of ensuring its orderly management, utilisation and the maintenance of its facilities and amenities. The management agreement further states at cl 4.1 that the owners appoint the "Manager" (namely WPMCL) and that the Manager accepts appointment as the manager of the conservation parking lot to provide for its utilisation, development, management and maintenance.

[12] Clause 4.1 of the Management Agreement reiterates that the owners have appointed WPMCL as the conservation parking lot's manager and as manager, the company can, among other things, employ at its cost, an onsite permanent caretaker to

carry out caretaking, maintenance, supervision, security and management functions of the conservation parking lot.¹

[13] Clause 20.1(2) of WPMCL's company constitution states that "the [b]oard has all the powers necessary for managing and for directing and supervising the management of, the business affairs of the company".²

[14] In a subsequent deed of covenant ratified at an AGM on 25 January 2020, clauses 2.1 and 3.1 record WPMCL's role as "Manager" and that the company was incorporated by its owners to manage the land pursuant to the Management Agreement.

[15] Mr Birchall's individual employment agreement states that as caretaker/manager he was required to perform duties that were within his capability and experience as directed by his employer. Clause 1.1 of the employment agreement makes clear that the agreement was between WPMCL as the employer and Mr Birchall as its employee who was required to report directly to the elected Chairman of the company and, with respect to gardening and grounds maintenance, report to the "designated director" of WPMCL which at the time of the dismissal was Lucjan Sajkowski.

[16] Since January 2024, Mr Birchall has reported to three different designated directors. Those managers were Clive Macdonald (Clive) and Dean Schaeff from January to September 2024, Clive alone from September 2024 to February 2025 and Mr Sajkowski from 17 February 2025 onwards.

[17] Mr Schaeff's name appears regularly in a series of handwritten incident reports written by Mr Birchall and lodged with the Authority in support of his statement of problem that was filed on 8 May 2025. Mr Schaeff is described as being "toxic" towards Mr Birchall and who wanted the board to find a replacement caretaker/manager. Clive was described as having a "hands off" approach at the start but that this changed when Mr Schaeff joined the board. Mr Sajkowski is described as being aggressive, critical and unreasonable with his expectations of Mr Birchall's role.

¹ The Management Agreement, cl 4.2(k).

² Deed of Covenant dated 25 January 1997.

[18] On 17 February, and 3, 10 and 17 March 2025, Mr Sajkowski met with Mr Birchall. An external employment relations specialist, Ms O'Meara, was present for those meetings which she attended via Teams and is understood to have taken minutes.

[19] The minutes of the first meeting (17 February 2025) record that the issue of a caretaker annual plan for the Point was raised. Mr Birchall noted that such a plan was established in 2017 but had not been updated since then. It appears to have been agreed that the annual plan needed to be reviewed promptly because it contained tasks (not specified) that were no longer relevant and could be removed while not accounting for other new tasks (also not specified) that needed to be included.

[20] Following the last meeting on 17 March 2025, Mr Birchall went on stress leave for the remainder of that month. He appears to have taken sick leave only twice before during his employment. By letter of 30 March 2025, Mr Birchall raised a personal grievance with WPMCL stating that unqualified people were micromanaging and double-guessing his work and that he had experienced increased interruptions in the form of frequent meetings, unfiltered texts, emails, and phone calls "24/7". Further, there had been inconsistent changes to planning, reporting, health and safety inductions and call-outs to fix non-urgent matters outside reasonable hours. Until his personal grievance was considered, Mr Birchall requested that his meetings and contact with Mr Sajkowski and Ms O'Meara cease.

[21] In response, the Board wrote to Mr Birchall on 31 March 2025 that it had sought urgent mediation but that in the meantime he was expected to interact with his manager, Mr Sajkowski whom he had told was not his manager and that he (Mr Birchall) would be self-managing going forward. Mr Birchall was reminded of his good faith obligations and that he was required to follow reasonable work instructions from Mr Sajkowski because failing to do so could be deemed serious misconduct and may result in disciplinary action being undertaken against him.

[22] On 8 April 2025 a meeting that involving Mr Birchall, his newly-instructed counsel, Robert Macdonald, Mr Sajkowski and Ms O'Meara took place. However, the meeting was not conducive as it appeared that there were constant interruptions by

Mr Macdonald who asserted that Mr Sajkowski was not Mr Birchall's manager and that he would self-manage.

[23] WPMCL subsequently wrote to Mr Birchall that this was unacceptable and that he was required to report to Mr Sajkowski. The company reiterated that failing to follow his manager's reasonable directives and lawful instruction could result in a disciplinary process that may have the potential of termination of Mr Birchall's employment.

[24] Despite requests from Mr Sajkowski that Mr Birchall meet with him on 16 April 2025 to discuss operational issues, there were no further meetings between the pair. Correspondence from Mr Macdonald to WPMCL described these meetings as "pointless" and that Mr Sajkowski was a "self-appointed manager".

[25] On 28 April 2025, on WPMCL's behalf, Mr Sajkowski wrote to Mr Birchall inviting him to attend a disciplinary meeting to discuss concerns that had failed to act in good faith and had repeatedly failed to follow his lawful and reasonable instructions. It was noted that Mr Birchall had not reviewed the annual plan and that he had failed to attend meetings to discuss operational matters.

[26] On 1 May 2025, Mr Birchall's support person Ms Yule advised that she had the support of 10 percent of the owners at the Point to request an owners' meeting. While the board initially agreed to call an owners meeting, it received legal advice that as WPMCL's shareholders were not collectively Mr Birchall's employer, and as the board held all the powers necessary for managing and directing the company's affairs, it could not discuss matters that would breach confidentiality of one of its employees. In the end, the board did not proceed with holding an owners meeting which Mr Birchall, Ms Yule and Mr Macdonald strongly disagree with.

[27] On 5 May 2025, the parties attended mediation but matters did not resolve there.

[28] On 6 May 2025, Mr Macdonald wrote to WPMCL stating that before mediation took place, Mr Sajkowski had purportedly broken an agreement that he would provide Mr Birchall with space to recover so that he could safely return to work. Counsel

suggested that any work-related correspondence be sent to Mr Birchall's support person, Ms Yule.

[29] In a written response dated 6 May 2025, WPMCL's co-chairs, Clive and Ms Burcher, made clear that cl 1.1 of Mr Birchall's employment agreement stated that he was employed by WPMCL and was required to report directly to its chairman. The co-chairs denied that the shareholders of WPMCL – either individually or collectively – were his employer. The letter further stated that Mr Birchall was required to report to the designated director of WPMCL namely Mr Sajkowski who was not “self-appointed” but his reporting manager.

[30] On 8 May 2025, Mr Birchall lodged a statement of problem in the Authority that stated his workplace had now become unsafe and that his employer had disregarded a request for an owners' meeting. That same day, the board wrote to all the owners at the Point stating that emails had been sent by three owners/shareholders regarding a private employment matter that the board was not able to discuss because of confidentiality. Doing so would expose the board and WPMCL to significant legal risk.

[31] On 20 May 2025, WPMCL's counsel, Ms Ongley, sent a letter to Mr Macdonald reminding Mr Birchall that if he continued to fail to follow lawful and reasonable instructions, not engage with the board, or fail to act in a way that was responsive and communicative, this could be taken into account in determining the appropriate disciplinary outcome (if any).

[32] Mr Macdonald responded the following day writing that the board had become “feral” having sought to manage the Point according to its own preferences and people and without speaking to all the owners. Counsel advised that any direct contact by the board with his client before an owners' meeting was held would be ignored and that all contact including work-related matters should be put through Ms Yule in the first instance.

[33] Mr Sajkowski subsequently sent correspondence regarding work-related tasks to Ms Yule but it is unclear whether the entirety of the message was conveyed to Mr Birchall as intended.

[34] On 23 May 2025, Ms Ongley expressed in writing her concerns to Mr Macdonald about correspondence not reaching Mr Birchall as well as the tone of counsel's last letter in which the board was described as being "feral". That same day, WPMCL filed its statement in reply in the Authority in which the board reiterated Mr Birchall's refusal to acknowledge Mr Sajkowski as his manager who could provide him with reasonable instructions regarding his duties.

[35] On 25 May 2025, Mr Macdonald wrote to both the Authority and Ms Ongley. He repeated his earlier description of the board and commented that as it had refused to call an owners meeting to discuss matters, it had lost all right legally and morally to govern the company or represent its owners. He urged the board to step aside and to let the people to whom they were accountable determine the way forward.

[36] On 28 May 2025, Mr Macdonald emailed Ms Ongley and suggested that she had a conflict of interest in acting as advisor for multiple parties namely WPMCL and its board of directors.

[37] On 29 May 2025, Mr Macdonald emailed Ms Ongley that he had spoken to a barrister about trespass and restraining orders to be served at the Point. Although Ms Ongley sought further clarification of what was meant by this, Mr Macdonald stated that he would obtain orders to stop his client from being threatened, mentally destroyed and having the privacy of his home invaded.

[38] On 30 May 2025, Mr Macdonald emailed Ms Ongley whether she had any family or close connections to the board or other (undeclared) interests that could potentially be clouding her judgment. Ms Ongley confirmed that she had no such connection with anyone at the Point or on the board.

[39] By letter of 30 May 2025, Ms Ongley wrote to both Mr Macdonald and Ms Yule that the board had been in contact with the relevant owners who had requested an owners' meeting. However, three owners had since requested that their names be withdrawn from any request for a meeting. As for the others, none had responded to the board's correspondence regarding a meeting, despite two separate attempts. As such, Ms Ongley confirmed that the owners' meeting would not proceed.

[40] In the same letter, Ms Ongley referred to past communications from Mr Macdonald in which it was asserted that Mr Birchall was a self-managing employee, that the board needed to consult all owners before employment-related decisions were made, that the board was “feral”, and an alleged conflict of interest on her part. Recent correspondence from Mr Macdonald seemed to suggest that, in addition to the current disciplinary allegations the board had with Mr Birchall, the parties were now facing an issue of incompatibility.

[41] Ms Ongley sought further comment from Mr Birchall on the original disciplinary allegations as well as the new issue of incompatibility. She also wished to know whether his preferred forum was to meet in person on 6 June 2025 or provide a written response only.

[42] Mr Macdonald responded by sending a schedule of 84 questions for the board to answer.

[43] On 3 June 2025, Ms Yule sent an email to shareholders that contained letters and other communications between Mr Birchall and the board that were of a confidential nature. Ms Ongley emailed Mr Macdonald to express her concerns about this and that he had in open communications referred to matters raised in mediation. Mr Macdonald replied that he had advised Ms Yule to share employment information with the owners because Mr Birchall had waived his rights to any aspect of confidentiality.

[44] In an email dated 4 June 2025 to Ms Ongley, Mr Macdonald repeated his earlier description of the board being feral, that it lacked credibility, and “oozes bad faith”.

[45] On 5 June 2025, Ms Ongley emailed Mr Macdonald to advise, among other things, that in light of the language used to describe members of the board, the proposed face-to-face meeting would not proceed. In the event that Mr Birchall wished to present his side to the board, he could do so in writing.

[46] By letter of 13 June 2025, the board advised Mr Birchall of its decision to terminate his employment with WPMCL effective immediately. The letter acknowledged his concerns of ongoing bullying, harassment, intimidation,

micromanagement and a lack of trust. However, despite multiple written and verbal reminders, Mr Birchall had refused to acknowledge Mr Sajkowski as his manager, declined to attend operational meetings with him, and had failed to follow his lawful and reasonable instructions.

[47] When viewed together, the board found that Mr Birchall's actions amounted to serious misconduct. It considered whether it could have trust and confidence in him and whether a final written warning would suffice. However, he had on multiple occasions through his support person disseminated confidential information to all shareholders resulting in a significant breakdown in trust and confidence. Dismissal for serious misconduct was the only option available.

[48] Following the dismissal, Mr Birchall applied to the Authority for interim reinstatement on 23 June 2025. He also sought orders that an owners' meeting be called and that WPMCL be directed to provide him with a safe workplace through an alternative reporting arrangement that did not require Mr Birchall to report to the board.

[49] In addition to filing a notice of opposition to interim reinstatement, on 4 July 2025, WPCL lodged its application for an interim injunction to restrain Mr Birchall and anyone acting on his behalf from disseminating to any third party any confidential information relating to his employment relationship or as part of this proceeding. I turn to consider the application for interim reinstatement first.

What are the relevant legal principles for interim reinstatement?

[50] In assessing an application for interim reinstatement, I am required to consider three key principles:

- (i) Is there an arguable case? Here an employee must demonstrate an arguable case for their personal grievance as well as an arguable case for permanent reinstatement.
- (ii) The Balance of Convenience which involves weighing the impact on both parties of granting or refusing interim reinstatement. This includes an assessment as to whether damages is an adequate remedy and the potential disruption to the workplace.

- (iii) Overall justice of the case which requires the Authority to stand back and ascertain where this lies until the substantive matter can be determined?

An arguable case of unjustified disadvantage and unjustified dismissal

[51] The first question for consideration is whether there is a serious question to be tried that is not vexatious and frivolous.³ The serious question threshold though is a “relatively low” one,⁴ and an arguable case is one with some serious or arguable, but not necessarily certain, prospect of success.⁵

[52] Mr Birchall’s statement of problem includes support documents that make clear that he has been allegedly disadvantaged in his employment through bullying, harassment, intimidation, and being micromanaged by the board. He further alleges that his dismissal was predetermined and was made in bad faith by a board that has, in breach of its fiduciary duties to the owners at the Point, failed to call an owners’ meeting when requested.

[53] Mr Birchall’s 37 handwritten incident reports sets the narrative of his unjustified disadvantage claims against WPMCL. The reports remain to be verified but allege that former board director, Mr Schaefer, was aggressive and threatening towards Mr Birchall and let him know on one occasion that he had in his possession an extremely sharp knife. Although the board in its termination of employment letter to Mr Birchall makes reference to these allegations being investigated by an unnamed board member who is not the subject of his allegations, the question remains whether that investigation was sufficiently robust and whether in the circumstances a fair and reasonable employer could have outsourced that role to an external independent investigator instead.

[54] On its face, I am satisfied that Mr Birchall has an arguable case of unjustified disadvantage and unjustified dismissal.

³ *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90 at [12].

⁴ *Humphrey v Canterbury District Health Board* [2021] ERNZ 153 at [8].

⁵ *X v Y Ltd v NZ Stock Exchange* [1992] 1 ERNZ 863 at 872.

No arguable case for permanent reinstatement

[55] Section 125 of the Act states that reinstatement is the primary remedy but it must both be practical and reasonable to do so. Here I look at the feasibility or practical workability of re-imposing the employment relationship.

[56] In my view, recent communications from Mr Birchall through his representative Mr Macdonald and support person Ms Yule have been to the detriment of the employment relationship being stitched back together again where the parties can be responsive and communicative with each other.

[57] Despite requests not to, Mr Birchall's representative has referred to members of the board on multiple occasions as feral and on another occasion threatened board members with trespass and protection orders. How it may have been possible to trespass someone from living in their own home is unclear but what is clear is that the rhetoric has reached a level where Mr Birchall's relationship with the five owners on the board have irretrievably broken down.

[58] Mr Birchall's answer is to simply replace the board but this overlooks the fact that for the members of the board, the Point is not a work place for them but their home. They are unable to leave. In particular, Mr Sajkowski lives next to the service dwelling that Mr Birchall previously occupied as caretaker/manager. Seeing the dwelling itself is stressful and uncomfortable. Seeing Mr Birchall on the grounds would be unfathomable for Mr Sajkowski and his fellow board members. Given the extensive breakdown in trust in this small community due to unnecessary pejorative statements and legal threats, interim reinstatement is no longer tenable and would be too disruptive for it to be practical and reasonable in all the circumstances.

The balance of convenience

[59] The balance of convenience 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.⁶

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

[60] Mr Birchall has filed an undertaking as to damages which Mr Macdonald is prepared to make good if required. I am not aware of any other disciplinary matters that WPMCL has had with Mr Birchall in the past. I accept that he is more than suitably experienced to manage the village grounds having regard to his previous employment and his seven years of service at the Point.

[61] It is understood that Mr Birchall and his wife and child who is in secondary school are well-settled in Taupō. Before matters escalated with his employment, Mr Birchall's immediate family had left the Point to live in alternative accommodation elsewhere in the area. Mr Birchall's affidavit indicates that he is not in employment but still has bills to pay. His financial resources are limited. As such, I have considered where there is the possibility of him being reinstated to WPMCL's payroll only. However, external contractors are now undertaking his caretaking and maintenance duties and are being paid to do so. While the external contractors could be stopped, having Mr Birchall undertake the grounds and caretaking work is not practical and reasonable for the reasons given.

[62] A return to the payroll would assist Mr Birchall and his family financially but would come at additional cost for the Point and this would be the state of affairs for several weeks if not months before an investigation meeting is held and a determination rendered. Although Mr Macdonald has agreed to underwrite damages for his client, should he be unsuccessful with his claims, the amount of wages that would need to be re-paid would be considerable. On the other hand, if Mr Birchall was not reinstated to the payroll but was successful with his personal grievances against his former employer, an award of compensation, lost wages, and costs would be an adequate remedy for him.

[63] Weighing the factors discussed above, the balance of convenience lies against interim reinstatement.

Where does the overall justice lie?

[64] The Court of Appeal stated that the overall justice assessment was 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.⁷

⁷ *NZ Tax Refunds Ltd v Brooks Homes Ltd*, above n 1, at [47].

[65] In terms of the merits, I do not assess permanent reinstatement particularly strong in this case and the balance of convenience favours WPMCL. The overall justice does not favour interim reinstatement. The application for interim reinstatement is unsuccessful and is declined.

Whether the Authority has jurisdiction to call an owners' meeting?

[66] On Mr Birchall's behalf, Mr Macdonald seeks an order from the Authority that a meeting of Point owners take place. In seeking such an order, counsel makes clear that he is not asking the Authority to order a shareholders' meeting. I see this as recognition by counsel that no one other than a board, shareholders of a company, or the High Court can call a shareholders' meeting.⁸

[67] The Authority has jurisdiction over employment relationship problems and related matters and its powers are broad. It can for example call for evidence and information from the parties or any other person and take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.⁹ However, being a creature of statute, the Authority's jurisdiction is not unlimited and the Act does not permit it to call an owners meeting when the owners are not Mr Birchall's employer. The individual employment agreement makes clear that the employer is WPMCL and the company's constitution and management agreement spells out in no uncertain terms that WPMCL's board, not the owners, has all the powers necessary for managing, directing and supervising the day-to-day business affairs of the company.

[68] If Mr Birchall wishes to pursue an owners meeting, the correct forum is the High Court and not the Authority. In any event, it remains unclear to me whether anything would change for Mr Birchall if an owners meeting was called bearing in mind there are 52 owners at the Point. The information before me seemed to indicate that he either had the support of 10 percent of the owners or the support of 10 owners. In either scenario; not a majority.

⁸ Companies Act 1993, s 123.

⁹ Employment Relations Act 2000, s 160(1)(a) and (2).

No jurisdiction to direct an alternative reporting line for Mr Birchall

[69] Mr Birchall's employment agreement makes clear that he is to report to the chairman of the board and, with respect to gardening and grounds maintenance, he was required to report to the designated director of WPMCL who was Mr Sajkowski at the time of the dismissal.

[70] There is no ambiguity in the agreement which is clear as to its meaning and intent of Mr Birchall's reporting lines. If this was to be changed, it would have to be by mutual agreement and evidenced in writing in accord with the parties' employment agreement. I find no basis for the Authority to direct an alternative reporting line for Mr Birchall given the terms and conditions of the employment agreement. In any case, the employment relationship between the parties has now ended and interim reinstatement declined for the reasons given.

Whether to grant an interim injunction?

[71] WPMCL seeks an interim injunction against Mr Birchall to prevent him and anyone acting on his behalf from disseminating any confidential information obtained during the course of his employment or as part of these proceedings including all material or statements made during mediation. Mr Macdonald opposes the application on the basis that Mr Birchall has waived confidentiality to any aspect of his own case. The legal test for an interim injunction have been mentioned previously namely serious question to be tried, balance of convenience and the overall justice of the case.

[72] Mediation is the cornerstone of this jurisdiction and is recognised as the primary problem solving-mechanism under the Act other than for enforcing employment standards.¹⁰ The reality is that mediation is the means by which thousands of employment problems in New Zealand are resolved every year. This is made possible in large part because of s 148 of the Act which allows parties to speak freely on a without prejudice basis under the umbrella of confidentiality.

[73] While the section provides robust protections, confidentiality is not absolute and may be overridden in limited circumstances, such as where evidence can be found

¹⁰ Employment Relations Act 2000, s 3(a)(v).

independently of mediation or for public policy reasons.¹¹ However, neither of these limited exceptions or those set out in s 148(6) of the Act apply to Mr Birchall who is otherwise barred from referring to material or statements made during the course of mediation. To be clear, mediation confidentiality cannot be waived either as this would discourage open and frank discussions from occurring which is needed if matters are to be resolved at a low level without the need for judicial intervention.¹²

[74] Mr Macdonald's communications make clear that he has breached mediation confidentiality and has advised Mr Birchall's support person Ms Yule to disseminate written correspondence from WPMCL that the company intended be kept confidential. On its face, there is an arguable case for the grant of an interim injunction. The adverse effects these breaches have had on good neighbourly relations at the Point is such that the balance of convenience favours an interim injunction.

[75] However, the matter is now before the Authority. Any future reference to what occurred in mediation can be excluded in witness statements. This determination being a matter of public record will go some way to dispelling the effects of misinformation that may be still permeating between different owners at the Point and directions can be made following a case management conference that will ensure that the investigation meeting is robust and procedurally fair for both parties. For these reasons, standing back and assessing the justice of the case, the application for an interim injunction is unsuccessful and is declined.

[76] Costs are reserved.

Peter Fuiava
Member of the Employment Relations Authority

¹¹ *Just Hotel Ltd v Jesudhass* (2007) 5 NZELR 60.

¹² Employment Relations Act 2000, s 3(a)(vi).