

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CIV-2024-404-002131  
[2024] NZHC 2732**

UNDER the Judicial Review Procedure Act 2016

IN THE MATTER OF an application for review of the exercise of  
statutory powers and decisions made under  
The Incorporated Societies Act 1908

BETWEEN DARLEEN TANA  
Applicant

AND CHLÖE SWARBRICK AND MARAMA  
DAVIDSON  
First Respondents

AND THE GREEN PARTY OF AOTEAROA  
NEW ZEALAND INCORPORATED  
Third Respondent

Hearing: 12 September 2024

Appearances: S K Green for applicant  
T G H Smith, D Qiu and M G Taylor for respondents

Judgment: 20 September 2024

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**JUDGMENT OF JOHNSTONE J**

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*This judgment was delivered by me on 20 September 2024 at 2.30 pm  
pursuant to r 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

Solicitors:  
McKenna King Dempster, Hamilton  
Te Aro Law Ltd, Wellington

[1] The Green Party of Aotearoa New Zealand Inc is a political party, registered as an incorporated society.<sup>1</sup> Its purposes include the election of its members to Parliament. Chlöe Swarbrick and Marama Davidson are members of Parliament (MPs), and the party’s co-leaders.

[2] Darleen Tana became a member of the Green Party in 2018. She was named on the party’s list of candidates at the October 2023 general election, and as such was elected as an MP. She took the oath of office of an MP on 5 December 2023.

[3] On 6 July 2024, Mrs Tana sent an email to the party’s Chief of Staff and General Manager, in connection with a process of inquiry that had been under way (the Inquiry). The Inquiry related to her knowledge of, and involvement with, allegations of migrant worker exploitation made in proceedings before the Employment Relations Authority. Mrs Tana’s email, directed to all members of the party’s parliamentary caucus, asserted that she had no confidence that a fair process would be followed. And it continued:

Accordingly, I resign as a member of the Green Party effective immediately.

[4] Following Mrs Tana’s email, she has also been requested to resign as an MP. She has not done so.

[5] Sections 55A to 55E of the Electoral Act 1993, known as the “waka jumping” legislation, are intended to maintain the proportionality of political party representation in Parliament as determined by electors.<sup>2</sup> Under s 55A, if an MP’s party leader delivers Parliament’s Speaker a notice, to the effect that the MP has ceased to be a parliamentary member of the party for which the MP was elected, the MP’s seat “becomes vacant”. The consequence, in the case of a list MP such as Mrs Tana, is generally that the vacancy is filled by the next highest unelected candidate on the party’s list.<sup>3</sup>

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<sup>1</sup> The Green Party was re-registered, under the Incorporated Societies Act 2022, on 6 September 2024.

<sup>2</sup> Section 55AAB(b).

<sup>3</sup> Sections 134–137.

[6] On 28 July 2024, the Co-Leaders commenced the process that might lead to Mrs Tana’s seat becoming vacant, by emailing her written notice of her entitlement to respond, within 21 working days, to their belief that her actions have distorted the proportionality of party representation in Parliament. The Co-Leaders’ email and attached letter mentioned the prospect of a special general meeting of the Green Party, “pencilled in” for 1 September 2024, to discuss whether to endorse the Speaker being notified under s 55A.

[7] In response, Mrs Tana brought this proceeding. With the respondents’ consent, Moore J made orders that they will not send the notice to the Speaker, nor will they hold a meeting to discuss doing so, until final judgment or further Court order.

### **Judicial review of incorporated societies**

[8] This Court’s broad jurisdiction upon judicial review is re-stated under the Judicial Review Procedure Act 2016 in terms that confirm its extension to decision-making by incorporated societies.<sup>4</sup> Judicial review is available where, as here, the society’s actions involve a public or quasi-public function.

[9] As stated in *Tamaki v Māori Women’s Welfare League Inc*:<sup>5</sup>

Typical qualifying circumstances will involve the denial of access to membership, the exercise of a disciplinary power, ... [or] the alleged misapplication of a society’s constitution in a manner that offends natural justice ...

### **Mrs Tana’s claim**

[10] Mrs Tana says that the Inquiry into her knowledge of, and involvement with, alleged worker exploitation was unlawful, unauthorised by the party’s constitution,

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<sup>4</sup> Section 5 (meaning of “statutory power”). See also, *Middeldorp v Avondale Jockey Club Inc* [2020] NZCA 13, (2020) 25 PRNZ 651 implicitly endorsing this point at [9] when agreeing with the High Court’s decision to find review appropriate in *Middeldorp v Avondale Jockey Club Inc* [2019] NZHC 901, [2019] NZAR 738; *Reay v Attorney-General* [2019] NZCA 475, [2019] NZAR 1914 at [39] and n 45; *Te Whakakitenga O Waikato Inc v Martin* [2016] NZCA 548, [2017] NZAR 173; *Tamaki v Māori Women’s Welfare League Inc* [2011] NZAR 605 (HC); *Stratford Racing Club Inc v Adlam* [2008] NZCA 92, [2008] NZAR 329; and *Hopper v North Shore Aero Club Inc* [2007] NZAR 354 (CA).

<sup>5</sup> *Tamaki v Māori Women’s Welfare League Inc*, above n 4, at [43] (footnote omitted).

unreasonable and unfair. She also says that, in the circumstances, she was “ousted” from the party.

[11] Relying on this Court’s jurisdiction to grant declarations in judicial review proceedings relating to incorporated societies, Mrs Tana seeks declarations that the Inquiry was flawed in the ways she claims, and that her “ousting” was also unlawful, unreasonable and unfair.

### **Issues for determination**

[12] I will determine whether the Inquiry was unlawful, unauthorised by the party’s constitution, unreasonable or unfair.

[13] I will also determine whether Mrs Tana was ousted from the party.

[14] Before doing so, I describe the course of the Inquiry in more detail, touching upon the party’s constitutional approach to disciplinary matters, and the events giving rise to Mrs Tana’s 6 July email. I also expand upon the 6 July email, and events following its receipt.

### **The course of the Inquiry**

#### *The emergence of the Inquiry*

[15] On 1 February 2024, a Green Party parliamentary staff member forwarded to the party’s then parliamentary Chief of Staff, Robin Campbell, an email that had been received that day into the inbox associated with Mrs Tana’s parliamentary email address. It was an email from a worker advocate, Nathan Santesso. Mr Santesso’s email contained a personal grievance and claims of breaches of minimum employment standards, brought by a named worker in respect of E Cycles NZ Limited.

[16] From late 2014, Mrs Tana had assisted her husband, Christian Hoff-Nielsen, to establish the business of E Cycles NZ, operating under the trading name Bikes and Beyond. Initially, the business manufactured, sold and rented electric bicycles from premises on Waiheke Island. Over time, it came to operate from a total of five separate

premises. Mrs Tana was registered as a co-director and co-shareholder of the company, but only until 1 April 2019.

[17] Mr Campbell, Ms Davidson and Mrs Tana met later on 1 February 2024. Mrs Tana denied, and continues to deny, being involved in the allegations made in the personal grievance and standards breach claims. She also denied, and continues to deny, any prior knowledge of those allegations.

[18] Mr Campbell spoke with Mr Santesso on 9 February 2024. Mr Santesso informed Mr Campbell of a second set of allegations, relating to another E Cycles NZ worker, predating those the subject of his 1 February 2024 email.

[19] On 13 February 2024, Mr Campbell and Mrs Tana met again. Mrs Tana said that she had hired this second worker when she was running E Cycles NZ's Newmarket branch prior to the COVID-19 pandemic. Mrs Tana demonstrated she was aware of aspects of the allegations made by the second worker, by describing his complaint as arising after she left the business and relating to disputed hours worked and allegedly unpaid wages. She added that the second worker had filed a police report about an incident between her and the worker, occurring at E Cycles NZ's Waiheke Island shop in around 2022. She said she could not recall why, having left the business, she was at the shop. She suggested it may have been to mow the lawns or to look after an adjacent Airbnb property.

#### *The Constitutional disciplinary process for party members*

[20] The Green Party was registered as an incorporated society in 1991, under the Incorporated Societies Act 1908. That Act will be repealed and replaced by the Incorporated Societies Act 2022 when the 2022 Act comes fully into force.<sup>6</sup> The party has been pre-emptively re-registered under the 2022 Act, in the manner contemplated by transitional provisions. But it was the 1908 Act which gave rise to the rules that are relevant in this case.

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<sup>6</sup> Incorporated Societies Act 2022, ss 2 and 268. The 2022 Act will come fully into force on 5 April 2026, or earlier by Order in Council.

[21] Applications for the incorporation of societies under the 1908 Act were made by sending the Registrar a copy of the society’s rules.<sup>7</sup> If the necessary requirements were met, the society and its rules would be registered.<sup>8</sup> The rules might later be amended.<sup>9</sup> The relevant version of the Green Party’s rules was registered on 5 September 2023.<sup>10</sup> It described itself as the party’s “Constitution”.

[22] The Constitution provided for the making, consideration, and resolution of complaints about the conduct of party members, under the heading “Section 10: Dispute Resolution”.<sup>11</sup> In broad terms, a “Complaints Committee” of at least four party members was to be appointed.<sup>12</sup> Either a member or the party’s executive committee would make a written complaint.<sup>13</sup> The complaints committee would deal with the complaint in accordance with a procedure set out in a schedule to the Constitution.<sup>14</sup> And the committee might dismiss or uphold a complaint, making such directions as it thinks appropriate, including directions removing the party member the subject of the complaint “from any office or position the Member holds in the Party (including as a candidate or member of the candidate pool)”.<sup>15</sup>

[23] As discussed below, Mrs Tana now argues that it is this disciplinary process for party members that should have been applied in her case.

*The disciplinary process for the party’s MPs*

[24] The respondents rely on another disciplinary process, relating specifically to the party’s MPs, sourcing its authority elsewhere in the Constitution. Discussion of their argument requires further discussion of the Constitution.

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<sup>7</sup> Incorporated Societies Act 1908, s 7(1).

<sup>8</sup> Section 8.

<sup>9</sup> Section 21(1).

<sup>10</sup> An amended version of the rules was registered on 20 August 2024.

<sup>11</sup> Constitution of the Green Party of Aotearoa New Zealand.

<sup>12</sup> Clause 10.1.

<sup>13</sup> Clauses 10.3 and 10.4. The executive committee is the party’s “Kaunihera”: see further below.

<sup>14</sup> Clause 10.6.

<sup>15</sup> See cl 10.7.

## The Green Party Constitution in more detail

[25] The Constitution provided that the party has four sections, relating to: governance and party policy development; administration and operations; membership engagement and representation; and leadership.<sup>16</sup>

[26] Under the section of the Constitution that dealt with governance and party policy development,<sup>17</sup> a kaunihera (council) was established to oversee the party's governance and strategic direction. The Kaunihera was comprised of various party members, including the party's two co-leaders and two party co-convenors.<sup>18</sup>

[27] I note that the Constitution did not establish the Kaunihera as a separate legal entity, capable of being sued. However, it was named in the proceeding as a second respondent. In light of this lack of capacity, I direct that it should not be named as such in this judgment, nor should it be named in any future pleadings in this proceeding.

[28] The section of the Constitution dealing with leadership provided for it to have a parliamentary caucus (when the party has MPs), comprised of its MPs and a limited number of executive party members, and led by the Co-Leaders.<sup>19</sup> The party's Parliamentary Caucus was described as meeting regularly during Parliament sitting weeks, though "[a]dditional meetings can be held as required".<sup>20</sup> While decisions were to be made "by consensus where possible", the quorum for any meeting was "a majority of all MPs, including at least one Co-Leader".<sup>21</sup> The Parliamentary Caucus was obliged under the Constitution to advance the party's purposes in relation to its parliamentary activities.<sup>22</sup> The Constitution authorised the Parliamentary Caucus to "[d]elegate any function or responsibility as appropriate to fulfil its purpose".<sup>23</sup>

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<sup>16</sup> Section 4: Party Structure.

<sup>17</sup> Section 5.

<sup>18</sup> Clauses 5.2 and 5.5.

<sup>19</sup> Section 8, cls 8.2 and 8.4.

<sup>20</sup> Clause 8.7.

<sup>21</sup> Clause 8.8.

<sup>22</sup> Clause 8.10.1.

<sup>23</sup> Clause 8.11.1.

[29] Under the section of the Constitution that dealt with membership engagement and representation, the Co-Convenors of the party were obliged to “ensure that an agreement between the Party and its MPs that include[d] obligations and accountability of the parties is developed and reviewed as required”.<sup>24</sup> This reflects the party’s interest in ensuring that its MPs are appropriately connected to the party, and that they work to implement party policies and its strategic direction.

[30] The respondents produced in evidence a version of this agreement between the party and its MPs, descriptively titled the Party-Caucus Agreement, that was adopted by the Parliamentary Caucus and by the Member Assembly in late 2023. The Party-Caucus Agreement obliges the caucus “[t]o make rules, as permitted by the Party’s constitution, for the conduct of its business and to publish those rules for Party members to read.”<sup>25</sup> I infer that earlier versions of the Party-Caucus Agreement provided similarly for the caucus to make rules for the conduct of its parliamentary business.

[31] Here, then, is the source of authority for the more specific disciplinary process, directed toward the conduct of the party’s MPs, upon which the respondents rely. The process is set out in a document, descriptively titled the “MP Conduct Process”. It was developed and ratified by the Parliamentary Caucus as a “guide for how to address” situations of unacceptable conduct on the part of its “parliamentary team (MPs and staff)”.

[32] Mrs Tana disputes that an early version of the MP Conduct Process was ratified in 2022, and that its current version was ratified in August 2023, but she accepts it was in place by the end of that year. A post-election retreat for Green Party MPs including Mrs Tana, held in November 2023, featured a distinct time slot for discussion of the MP Conduct Process, led by Ms Davidson and Mr Campbell. Mr Campbell recalls Mrs Tana contributing to the discussion and being familiar with the process.

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<sup>24</sup> Clause 7.3.11.

<sup>25</sup> The Party-Caucus Agreement, cl 13.1.1.



## The MP Conduct Process

[33] The MP Conduct Process describes its purpose as follows:

This process provides options for Green MPs and the staff employed in the Green Party's parliamentary team to raise concerns about the conduct of Green MPs. It applies to a full spectrum of concerns, from minor to serious. It covers formal complaints and also less formal ways of raising issues.

The options in this process aim to address and resolve issues within the Green Party's parliamentary team. Staff also have the option of raising a concern directly to their employer (Parliamentary Service or Ministerial Service). MPs also have the option of using the Green Party's internal complaints process.

[34] Thus, the MP Conduct Process can be seen to provide a more specific disciplinary process, authorised under the Constitution by way of the Party-Caucus Agreement, and the obligation of the Parliamentary Caucus under that agreement to make rules for the conduct of its business. It is intended to be activated by a Green MP or parliamentary staff member wishing to "raise concerns about the conduct of Green MPs", as an alternative option to other avenues such as the party's more general "internal complaints process" under the Constitution. Broadly, the process is as follows.

[35] First, there is an informal stage at which "[l]ow level concerns and formal complaints" are raised with "process leaders". Process leaders, not being persons complained against, are appointed from amongst the party's Chief of Staff, Co-Leaders and Musterer (its whip). To continue beyond this point, the process requires a "formal complaint".

[36] Next, there is a "[s]coping and understanding stage" at which the formal complaint is the subject of initial discussion with the MP concerned. If, following that initial meeting with the MP, the process leaders "feel that a formal investigatory process that could result in disciplinary action is necessary", they are to notify affected parties and may "engage an appropriately qualified external person, who has the agreement of all parties". Disciplinary action may stem from either "unacceptable conduct" or "serious unacceptable conduct". Serious unacceptable conduct includes "[p]ublic behaviour that has the potential to impact adversely on the Party's public standing, its cohesion or its fundraising prospects".

[37] Then there is an investigation stage. If the process leaders are assisted by an external person, a “Terms of Reference” will be set. The process calls for both “[t]he complainant and the MP subject to allegations ... [to] be consulted on the Terms of Reference”. The process calls, during the investigation stage, for a “formal disciplinary meeting to investigate” the MP’s alleged conduct. This meeting is one the MP is notified to attend, such notice being provided “at least 72 hours prior to the meeting” and containing full details of the specific alleged breaches of expectations, evidence (including interview records) and potential consequences. The following appear at the end of a list of steps “that are to be followed”:

- > The Co-leader (or Process Leader) needs to decide whether they are satisfied or not that the allegations are correct, i.e, what actually happened.
- > The external facilitator will make findings and recommendations. A copy will be provided to the Process Leaders and the MP. The Process Leader may share this with other Process Leaders.

[38] Following the investigation stage (including the formal disciplinary meeting), the “Co-leader (or process leader) reviews the information, with other appropriate process leaders, before considering a course of action”. They then advise the MP of “the intended action”, and ask for input. The co-leader or process leader are then required to “personally consider” what the MP has said, and to “inform the MP about their decision at a further meeting and confirm it in writing”. The outcome may include a “[r]equest to resign as an MP”. However, such a request must be authorised by both co-leaders (if not involved as the subject of the complaint) and co-convenors “and must only happen after a Caucus discussion”.

*The decision to commission an independent investigation*

[39] By 13 March 2024, Ms Swarbrick had been elected as a Co-Leader of the Green Party, replacing James Shaw,<sup>26</sup> and the workers’ allegations relating to E Cycles NZ had not been resolved. A journalist approached Mrs Tana and the Green Party seeking comment. Mr Campbell arranged an internal videoconference for 9 am the next day, involving himself, the Co-Leaders, the Musterer

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<sup>26</sup> Ms Swarbrick was elected Co-Leader on 10 March 2024.

(Ricardo Menéndez March MP), and Mrs Tana and her support person (Green Party MP Hūhana Lyndon).

[40] Those present at the 9 am, 14 March 2024 meeting recall it differently. Mr Campbell says that during the discussion Mrs Tana recalled the worker who was making the first set of claims (described at [15] above) raising employment-related issues with her, and that she did work for E Cycles NZ in 2020, rather than ceasing any involvement in the business in 2019. Ms Swarbrick recalls Mrs Tana acknowledging that a worker may have come to her with a complaint. Mrs Tana says there was no timeframe put to this possibility. There is also a degree of variation between the participants on how the prospect of an investigation was raised.

[41] What is clear is that those present understood it resulted in a decision to commission an independent investigation, and that Mrs Tana would take leave from her duties as a party MP while the investigation took place. The wider Parliamentary Caucus and the Kaunihera were informed of these developments at a special meeting by videoconference at 1 pm on 14 March, which Mrs Tana attended.

[42] Later that afternoon, Ms Davidson attempted to call Mrs Tana. She was unsuccessful, so sent an electronic message explaining that she had received new information from a journalist and needed to call “before things [went] public”. Mrs Tana called Ms Davidson back, at 3.05 pm on 14 March 2024.

[43] Mrs Tana says that during this phone call, Ms Davidson told her to resign “from the Greens”. Ms Davidson agrees that the topic of Mrs Tana resigning was raised, but she says that:

- (a) it was Mrs Tana who asked whether Ms Davidson was telling her to resign; and
- (b) the topic related to Mrs Tana resigning as an MP.

[44] For reasons set out below, I do not consider it necessary to resolve this dispute. In the context of the decision having been taken that morning to commission an

independent investigation, Ms Davidson's expressed concern that afternoon about public scrutiny does suggest an inclination to explore with Mrs Tana whether she might resign, rather than go through with the investigation. When interviewed on 28 March 2024, Ms Davidson told Ms Burt:

I was tasked with the job of calling her to get a feel for if she was feeling like she could withstand an investigation instead of just resign and get the heat off her and that did not go well. And she had already agreed to the investigation and here I was coming back saying, well things are coming out like — yeah ...

[45] And also in that context, it could only have been Mrs Tana's public role as an MP, rather than relatively privately as a party member, which Ms Davidson sought to discuss. But, in any event, Ms Davidson sent Mrs Tana a screenshot of the journalist's additional information (and new questions) at 3.19 pm. And at 3.48 pm, Mrs Tana responded "Wow. No we go on pls." Ms Davidson replied "Ka pai. We go on."

[46] Thus, it can be seen that the phone call between Mrs Tana and Ms Davidson of 14 March 2024 was resolved with Mrs Tana electing to proceed with the independent investigation that had been decided upon that morning. And that Ms Davidson accepted Mrs Tana's decision.

#### *Commissioning the Burt Investigation*

[47] Mr Campbell called a lawyer named on a list of providers, pre-approved by the Parliamentary Service in respect of employment issues, and spoke about a potential instruction to undertake the independent investigation. That lawyer was conflicted, but suggested Rachel Burt, barrister.

[48] Mr Campbell drafted the Terms of Reference for what became the Burt Investigation. The Terms were finalised on 18 March 2024 after the incorporation of emailed feedback from Mrs Tana. Mrs Tana's feedback included suggestions:

- (a) extending the timeframe for the investigation, to accommodate her desire to review transcripts of other witnesses' interviews and then to meet Ms Burt no sooner than five days after their receipt; and

- (b) limiting the scope of the investigation so as not to “cut across” the substantive matters likely to be before the Employment Relations Authority (ERA).

[49] Mrs Tana’s email, dated 15 March 2024, assured Mr Campbell she was taking the matter seriously and had therefore engaged legal counsel, Susan Hornsby-Geluk. And it commenced as follows:

Thankyou for the opportunity to provide feedback on the draft Terms of Reference.

Firstly I would like to say that I am deeply saddened by what has occurred and any damage done to the Green Party. I welcome the opportunity of an independent investigation and intend to fully cooperate with this in order to clear my name.

[50] Later on 15 March 2024, Mrs Tana adopted Mr Campbell’s suggestion that the media statement she had in mind, to be made in the terms of the last sentence cited at [49], should be supplemented with an additional sentence to the effect that she would be making no further comment. Mrs Tana described that suggestion as “very helpful”.

[51] The finalised Terms focussed the investigation’s scope upon Mrs Tana’s knowledge of allegations of employment standards breaches prior to 1 February 2024, and the extent to which she was involved operationally in E Cycles NZ during 2022 and 2023. The Terms recorded that the investigation was not to determine the alleged breaches, that being a matter for the ERA. The Terms provided that any change in scope would be determined by the Green Party after consulting with Mrs Tana.

[52] The Terms also set out the process for the investigation. The process called for Mrs Tana to receive other witnesses’ interview transcripts and then to be interviewed herself. And it contemplated Mrs Tana (only) being provided with the draft investigation report — by Thursday, 4 April 2024 — for feedback by the following Wednesday, with the final report (described as a “findings report”) to be released to the Green Party the following Monday, 15 April 2024.

[53] Finally, the Terms recorded that the existence of the investigation would not predetermine any particular outcomes, and that although the investigator was required

to make “findings”, she would not make recommendations as to the investigation’s outcome.

*The Burt Investigation proceeds*

[54] Having been involved in commissioning the Burt Investigation, Mr Campbell invited Eliza Prestidge Oldfield to act in a liaison role between Ms Burt and the respondents while the investigation took its course. Also in March 2024, Ms Prestidge Oldfield was appointed to replace Mr Campbell as the Chief of Staff for the Co-Leaders, as from 10 June 2024.

[55] The Burt Investigation encountered a number of delays. For example, Ms Burt proposed that her investigation’s scope should be widened, to include matters outstanding (following the determination of proceedings in the ERA) in relation to two further, former E Cycles NZ workers. Through her counsel, Ms Hornsby-Geluk, Mrs Tana did not object to the wider scope, on the basis that the focus remained on what Mrs Tana knew of the allegations against the business, rather than their substance.

[56] Also, it took time to complete a full round of interviews. Mrs Tana was provided transcripts of other witnesses’ interviews, and had a period of several days to consider them before she was interviewed last, on around 30 April 2024.

[57] Then, the original two workers, who had declined to be interviewed, made it known through their advocate by 23 May 2024 that they had changed their position. However, the Co-Leaders, Mr Campbell and Ms Prestidge Oldfield declined to authorise Ms Burt to open a further round of interviews.

[58] On 18 June 2024, the Speaker of the House of Representatives, the Rt Hon Gerry Brownlee, issued a new decision on the use of parliamentary funding for investigations into MPs’ conduct, taking effect from 22 May 2024. Following this decision, the Kaunihera approved the payment of invoices relating to the Burt Investigation by the Green Party.

[59] Ms Burt provided her draft report to Mrs Tana on Monday, 24 June 2024. Initially, she sought Mrs Tana's comments by noon on Monday, 1 July 2024, offering a little longer than the six-day timeframe allowed for that purpose under the original Terms of Reference. Mrs Tana sought to have until 5 pm on Tuesday, 2 July. The Co-Leaders agreed to an extension until 5 pm on 1 July. Correspondence on this topic informed the Co-Leaders that Ms Burt would be working to finalise her report during the week of 1 July 2024.

*Mrs Tana's response to Ms Burt's draft report*

[60] On 1 July 2024, Ms Hornsby-Geluk wrote to Ms Burt on Mrs Tana's behalf. Her lengthy letter expressed Mrs Tana's considerable disappointment that little of her explanation had been accepted. And it characterised findings made in the draft report as "second hand accounts and assumption". Amongst an extensive list of complaints about the process, Ms Hornsby-Geluk's letter complained about Ms Burt being directed to continue the investigation without a second round of interviews. And it suggested that "at least from a certain point the investigation became framed to support a particular narrative or conclusion". Ms Hornsby-Geluk's letter annexed a copy of Ms Burt's draft report, marked up with amendments that Mrs Tana suggested should be made.

*The substance of Ms Burt's final report*

[61] As required by the Terms of Reference, Ms Burt did not provide the respondents with a copy of her draft report of 24 June 2024; that is, Ms Burt did not provide a copy of her draft until after Mrs Tana brought these proceedings without attaching a copy of the draft to her affidavit. On 6 September 2024, Ms Prestidge Oldfield obtained a copy, and produced it as an attachment to her affidavit.

[62] Comparison between Ms Burt's draft report and her final report, issued on 5 July 2024, confirms that Ms Burt's key findings did not materially change when she finalised her report. Ms Burt did, however, provide further explanation and detail. And she moderated some of her observations about the extent of Mrs Tana's knowledge of worker allegations.

[63] It is not necessary for the purposes of this judgment that Ms Burt's report be described in detail. However, it needs to be noted that, in summary, Ms Burt found it more likely than not that:

- (a) Mrs Tana became aware of grievances raised by all four workers in the period from January 2019 to October 2023;
- (b) much of this awareness arose following her formal resignation as a co-director and co-shareholder of E Cycles NZ in April 2019, because, although it lessened over time, she retained an ongoing operational involvement in the business into 2023;
- (c) Mrs Tana did not discuss the grievances with Green Party leadership during her candidacy or the early part of her career as a Green MP; and
- (d) when approached by Mr Campbell on 1 February 2024 about the grievance of one worker, she denied her prior awareness.

*Delivery of Ms Burt's report*

[64] While Ms Burt did not provide the respondents with her draft report, she was in communication with Ms Prestidge Oldfield prior to delivering her final report. On 4 July 2024, she advised that her report would be delivered early the following afternoon. And she advised that Mrs Tana's comments on the draft, which she had previously described as "extensive", had not led her to change her underlying findings.

[65] During the morning of Friday, 5 July 2024, Ms Prestidge Oldfield booked a flight to Auckland, anticipating that she and others would meet Mrs Tana during the weekend. Ms Prestidge Oldfield had been engaged in contingency planning for the receipt of Ms Burt's report. She says that she believed that some form of meeting with Mrs Tana following receipt of the report would best reflect the MP Conduct Process; in particular, the post-investigation stage meeting at which a co-leader or process leader is to advise the MP of their intended action.



[66] At 5.37 pm on 5 July 2024, Ms Burt sent the executive summary of her final report to Ms Prestidge Oldfield. She forwarded it to the Co-Leaders, Ms Davidson and Ms Swarbrick.

[67] The Kaunihera met from around 7 pm to around 9.30 pm. Ms Davidson says that, like Ms Swarbrick, she believed the matters set out in the executive summary to be very serious, and that in advance of this meeting they were considering a co-leader proposal to the Parliamentary Caucus that Mrs Tana be requested to resign. Ms Davidson says she too had been involved in contingency planning, and agreed with Ms Swarbrick that Mrs Tana should have an opportunity to address the caucus before it discussed its decision.

[68] Minutes of this Kaunihera meeting of 5 July 2024 record the passing of a motion to follow the principles of the MP Conduct Process, despite it not necessarily reflecting the situation.

[69] Ms Burt sent Ms Prestidge Oldfield the full final report at 9.34 pm. As had been arranged at the Kaunihera meeting, Ms Prestidge Oldfield sent a copy, electronically, to all Green Party MPs other than Mrs Tana, and to party representatives also forming part of the Parliamentary Caucus, around 10 minutes later. She advised that Mr Menéndez March would follow up with the videoconferencing details of a remote meeting to take place the next day, 6 July 2024. Ms Swarbrick added to this group message that the meeting would be held at 1.30 pm.

#### *The Parliamentary Caucus meeting of 6 July 2024*

[70] Mrs Tana called Ms Swarbrick back, following a missed call at 8.50 am, at 9 am on 6 July 2024. Ms Swarbrick advised that Ms Burt's report had been received. She said that, on behalf of herself and Ms Davidson, she was inviting Mrs Tana and two support people to a caucus meeting at 1.30 pm that afternoon.

[71] Ms Swarbrick says she advised Mrs Tana that the caucus meeting had been convened to discuss the report and the Co-Leaders' recommendation that caucus endorse their request for Mrs Tana's resignation as an MP.

[72] Ms Swarbrick advised that Mrs Tana’s invitation was to the first part of the meeting only, Mrs Tana not being able to participate in the meeting’s decision-making component. Following the meeting, the outcome would be confirmed in writing and Ms Swarbrick, Mr Menéndez March and Ms Prestidge Oldfield would seek to meet her again that afternoon or the next day.

[73] Ms Swarbrick confirmed the content of this phone call by email sent to Mrs Tana, and copied to Ms Hornsby-Geluk and Ms Davidson, at 9.20 am that morning, attaching a copy of Ms Burt’s final report. Ms Swarbrick’s email was headed “[i]nforming you of caucus at 1.30 pm today”. Amongst other things, it stated “[t]he Green Party Caucus will be meeting today at 1.30pm to discuss matters relating to this report”. It referred to the Co-Leaders “as process leads for the MP conduct process”. And it added “we wanted to let you know we intend to ask caucus to approve a request for your resignation at that discussion”.

[74] Ms Hornsby-Geluk responded at 9.28 am, confirming she would attend the meeting with Mrs Tana, and seeking the necessary videoconferencing details for access. Ms Swarbrick responded to advise that the details would be sent shortly, and to seek permission to send the caucus a copy of Ms Hornsby-Geluk’s 1 July 2024 letter to Ms Burt (which had been forwarded to Ms Prestidge Oldfield under without prejudice correspondence). Ms Hornsby-Geluk agreed that would be helpful.

[75] At 9.38 am on 6 July 2024, Ms Prestidge Oldfield sent the caucus (other than Mrs Tana) a copy of Ms Hornsby-Geluk’s 1 July 2024 letter criticising Ms Burt’s investigation and draft report. And, at 9.40 am, Ms Swarbrick updated this group on her discussion with Mrs Tana, also providing a copy of the 1 July 2024 letter and asking the group to be “across this before caucus too”.

[76] The Parliamentary Caucus meeting of 6 July 2024 proceeded by videoconference, commencing at around 1.30 pm. Mrs Tana attended with Ms Hornsby-Geluk and with long-standing Green Party member Rolf Mueller-Glodde in support. Miriam Ross, the party’s general manager and party secretary, and a member of its Parliamentary Caucus,<sup>27</sup> took extensive notes.

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<sup>27</sup> Constitution, above n 11, cl 8.4.7.

[77] Ms Swarbrick described Ms Burt's report as confirming that Mrs Tana had exhibited unacceptable conduct. She referred to her recommendation, made jointly with Ms Davidson, that the caucus should request Mrs Tana's resignation. She referred to Mrs Tana having been invited to the meeting to present her case on whether that recommendation should be adopted, prior to discussion and decision-making in which Mrs Tana would not take part.

[78] Ms Hornsby-Geluk spoke on behalf of Mrs Tana. She noted that they had received Ms Burt's final report only that morning. She said that she thought due constitutional process had not been followed, and that Mrs Tana had not been offered a reasonable time in which to respond. She expressed concern that the Co-Leaders had expressed a view to the caucus prior to hearing from Mrs Tana. Ms Hornsby-Geluk then turned to Mrs Tana's disappointment in Ms Burt's approach, as set out in her letter of 1 July 2024, speaking to the various criticisms that had been made, particularly of pre-determination.

[79] Mrs Tana then spoke, referring to having engaged openly, sincerely and in a manner reflecting her values and those of the party, and to having been disappointed by the process and its unjust outcome. Ms Hornsby-Geluk confirmed that she did not consider it appropriate that Mrs Tana should be asked questions.

[80] Ms Swarbrick sought to ask questions she described as purposefully straightforward: did Mrs Tana know of the employee allegations; if so, did she do anything about them; and did she inform the party? Ms Hornsby-Geluk reiterated concerns about the process, but Mrs Tana commenced to discuss matters the subject of Ms Burt's investigation, responding to other MPs' questions, and insisting overall that she was not aware of the detail of events within the business and that she had not lied to the party.

[81] Mrs Tana, Ms Hornsby-Geluk and Mr Mueller-Glodde left the meeting at 2.43 pm. The remaining caucus members were offered a moment to write down their own reflections, and general discussion commenced. A range of caucus members spoke. At 3.23 pm, while the discussion was continuing, Ms Prestidge Oldfield and Dr Ross received Mrs Tana's email.

### **Mrs Tana's email**

[82] Mrs Tana's email was headed "For Members of Parliamentary Caucus". In full it reads:

This email is directed to all members of the Parliamentary caucus of the Green Party of Aotearoa via the Chief of Staff and General Manager.

Further to the caucus hui this PM, I have no confidence that a fair process will be followed.

Accordingly, I resign as a member of the Green Party effective immediately.

Ngā mihi

Darleen Tana

### **Events following Mrs Tana's email**

[83] The notes Dr Ross had been keeping refer to the arrival of Mrs Tana's email, and they continue, demonstrating how the email was understood within the rest of the Parliamentary Caucus, and describing the consensus that was then reached. The email was understood immediately to address a separate question from that which had been under discussion during the meeting; that is, Mrs Tana's email expressed her resignation as a party member, rather than as an MP. It left to one side, albeit significantly affected by Mrs Tana's new status as a former party member, the issue of her role as an MP who had been elected as a Green Party list candidate.

[84] Ms Prestidge Oldfield observed that Mrs Tana's resignation as a party member made it necessary to inform the Speaker of the House of Representatives: Mrs Tana had in effect become an independent MP. This was done in the form of an email sent by Mr Menéndez March at 4.25 pm that afternoon.

[85] Ms Swarbrick observed that Mrs Tana's resignation would lead to the need for the Green Party to decide whether to activate the waka jumping legislation. But, for the moment, she maintained her request for caucus endorsement of Mrs Tana being requested to resign as an MP. The caucus formally endorsed that request, in a manner recorded in Dr Ross's notes as involving "consensus".

[86] By email sent at 6.02 pm on 6 July 2024, Ms Swarbrick and Ms Davidson wrote to Mrs Tana, referring to Mrs Tana’s resignation email and formally requesting her resignation as an MP. The Co-Leaders have since sent similar requests, on 15 July and on 26 July 2024.

[87] From 6 July 2024 onwards, Mrs Tana has sat in the House of Representatives as an independent MP. She has voted with the Green Party, except when she was not present on 21 August 2024 to vote on the Resource Management (Extended Duration of Coastal Permits for Marine Farms) Amendment Bill.

**Was the Inquiry unlawful, unauthorised, unreasonable or unfair?**

[88] As may be apparent, I describe the entire process, from the point at which Mr Santesso’s email of 1 February 2024 was forwarded to Mr Campbell, to Mrs Tana’s email of 6 July 2024 and the request that day that she should resign as an MP, as the Inquiry.

*Unlawful?*

[89] Mrs Tana claims that the Inquiry was unlawful because it amounted to a parallel investigation into matters within the exclusive jurisdiction of the ERA.

[90] However, the exclusive jurisdiction of the ERA under s 161 of the Employment Relations Act 2000 is an exclusive jurisdiction — as against other publicly constituted courts or tribunals — “to make determinations about employment relationship problems”. It could not render unlawful an inquiry into Mrs Tana’s awareness of, and involvement in, E Cycles NZ’s employment relationship problems, constituted pursuant to Terms of Reference which, at Mrs Tana’s lawyer’s request, made it plain there would be no attempt to determine those problems (see [51] above).

[91] This aspect of Mrs Tana’s case is misconceived.

*Unauthorised?*

[92] The constitution of an incorporated society takes effect as a contract between its members and can be enforced via Court application.<sup>28</sup> Mrs Tana claims that the Inquiry was unauthorised by the Green Party’s Constitution, and that accordingly, as a member at the time, she is entitled to a declaration to that effect so that she may insist on this members’ contract being observed. She says that the Inquiry should have been conducted in accordance with the general disciplinary process stated in the Constitution itself under the heading “Dispute Resolution”. She complains that that process requires a formal, written complaint, which must be dealt with by the Complaints Committee, and that neither requirement was observed.

[93] However, the general process would not have been an appropriate vehicle for inquiry into Mrs Tana’s conduct, following her election in October 2023, as an MP. The general process is directed to whether a party member should be disciplined, including by their removal as a party member, or from any office or position held as a party member, short of the office of MP. Yet the emergence of the need for the Inquiry, in February 2024, indicated the possibility Mrs Tana had not brought compromising details of which she was aware to the party’s attention during her candidate selection process, or to the attention of her Parliamentary Caucus colleagues following election. And given the apparent media interest expressed by journalists, it was clear that the issue required consideration of her position as an MP.

[94] That there may have been a more appropriate vehicle for inquiry is demonstrated in the fact that the MP Conduct Process exists. As outlined above, the MP Conduct Process is sourced in Green Party constitutional authority. It derives from a constitutional obligation to ensure party MPs are accountable to the party, but more specifically from the obligation of the Parliamentary Caucus to make and publish rules for the conduct of its business. Reflecting the more specific purpose of the MP Conduct Process, it provides for a range of outcomes which expressly may include a “request to resign as an MP”, made only following caucus discussion.

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<sup>28</sup> *Tamaki v Māori Women’s Welfare League Inc*, above n 4, at [43]; *Peters v Collinge* [1993] 2 NZLR 554 (HC) at 557; and *Awatere Huata v Prebble* [2005] 1 NZLR 289 (SC) at [36].

[95] That said, the MP Conduct Process was not followed either. While it describes itself as a “guide” for how to address unacceptable conduct within the party’s parliamentary team, the stages of the process described above are set out in prescriptive terms. Amongst other things, they require a formal complaint from an identifiable complainant, whether as an individual or as a group, before the matter proceeds to initial discussion with the MP concerned. There was no formal complaint before Mr Campbell arranged the 14 March 2024 meeting. Further, the investigation stage of the process requires a formal disciplinary meeting with the MP concerned, at which (albeit an external facilitator may make findings and recommendations), a co-leader or process leader is to be present and to decide “what actually happened”. Yet the independent investigation decided upon on 14 March 2024 contemplated the independent investigator determining the extent of Mrs Tana’s knowledge of the worker grievances and involvement in E Cycles NZ’s business at the time.

[96] In my view, however, these two processes do not comprise the extent of the constitutionally sound options that were available.

[97] As noted above, the Parliamentary Caucus was obliged by the Constitution to act so as to advance the party’s purposes in relation to its parliamentary activities. And it was entitled under the Constitution to delegate any of its functions “as appropriate to fulfil its purpose”. Those purposes included the party having “trustworthy leaders who embody our kaupapa at all times” and having “strong, reliable representation in the public”. In this case, therefore, the Parliamentary Caucus (including Mrs Tana) was entitled to decide upon, and to delegate the task of, independent investigation into Mrs Tana’s conduct as a Green Party MP, even in the absence of a formal complaint, and on the basis that the investigator would make findings informing the question of what the caucus might then resolve to do by way of outcome.

[98] It might be noted that the morning meeting of 14 March 2024, at which Mrs Tana agreed to independent investigation, was not a meeting of, and did not amount to decision-making by, the Parliamentary Caucus. But the outcome was discussed at a special meeting of the caucus convened later in the day. In essence, the plan formulated in the morning was adopted by consensus in the afternoon.

[99] Mrs Tana now regrets agreeing to the Burt Investigation. She has deposed that “[i]n hindsight [she] should have not agreed to any investigation as it was in the ERA and no claim was against [her]”. But plainly she did agree. Her email of 15 March 2024, asserting that she “welcome[d] the opportunity of an independent investigation”, confirms as much.

[100] Overall, I find that the decision that Mrs Tana and the balance of the Parliamentary Caucus took on 14 March 2024, to have an independent investigation commissioned and completed so that the caucus might then consider its findings, was constitutionally authorised.

[101] This finding calls for consideration of the position on 5 July 2024, when Ms Burt had completed her investigation by issuing her final report. Then, too, I consider the calling of another special meeting of the Parliamentary Caucus on 6 July 2024, and the process adopted at that meeting, to be well within the bounds of that body’s constitutional authorisation (subject to reasonableness and fairness in the judicial review sense, discussed below). As the body charged under the Constitution with advancing the party’s purposes in relation to the party’s parliamentary activities, and with fulfilling the purposes described above of maintaining trustworthy leadership and reliable public representation, it had obvious authority given the report’s conclusions to address the ongoing appropriateness of Mrs Tana’s position as a Green Party MP.

[102] Of course, this authority could not extend to removing Mrs Tana as an MP. Removal of that status, except on the basis of statutory ineligibility or the vacancy of her seat under the Electoral Act, falls within the privilege of the House of Representatives to regulate its own composition.<sup>29</sup> But the calling and commencement of the meeting on 6 July 2024, for the purpose of considering the Co-Leaders’ proposal that Mrs Tana be requested to resign, was not of that character, and in my view amounted to the constitutionally authorised conduct of the Parliamentary Caucus.

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<sup>29</sup> *Awatere Huata v Prebble* [2004] 3 NZLR 359 (HC) at [7] and (CA) at [41]–[42].



*Unreasonable or unfair?*

[103] The essence of Mrs Tana's claims that the Inquiry was unreasonable and unfair resides in submissions criticising the conduct and conclusions of the Burt Investigation, and to the effect that she was not afforded natural justice.

[104] I do not accept these submissions. Once the need for inquiry emerged in February 2024, Mrs Tana was a willing participant in the Burt Investigation, "welcoming" its commission. In the absence of formal complaint, the Terms of Reference to which Mrs Tana contributed established a clear scope of investigation. The scope was only enlarged with Mrs Tana's agreement. The investigative procedure, agreed and adopted, afforded Mrs Tana the opportunity to review transcripts of other witness interviews before she herself was interviewed. And it permitted Mrs Tana a period of a week to respond to the draft investigation report, and a further period of several days in which to prepare to discuss Ms Burt's findings with her fellow Parliamentary Caucus members. These aspects served to meet the requirements of natural justice.

[105] Mrs Tana's complaint that Ms Burt's investigation had been conducted so as to support a particular narrative was made only upon receiving notice that Ms Burt was minded to find against Mrs Tana's preferred account (her own). As mentioned above, I do not consider it necessary to rehearse Ms Burt's report in detail. However, I have found it necessary to review the report, and have done so, on the basis that it was produced for the respondents as admissible evidence of the fact of its contents, and of the basis upon which the respondents reacted as they did on 5 and 6 July 2024. Adduced for those purposes, it is not hearsay. The respondents do not need to profess, and I do not make any comment, on whether any of Ms Burt's findings are correct.

[106] Reviewing the report, then, I do not observe, and Mrs Tana has not sought to identify, particular findings which are unsupported by evidence or available inference. Ms Burt's findings are findings that could reasonably be drawn from the material that was available. In the absence of any other evidential foundation for it, I therefore cannot accept Mrs Tana's allegation of predetermination. And the fact that Ms Burt

did not accept Mrs Tana's account neither establishes that Ms Burt's findings were plainly wrong, nor suggests that Mrs Tana was not treated with respect.

[107] Similarly, there is no evidence that the respondents had predetermined how they might respond to Ms Burt's report in advance of receiving it.

[108] Overall, the Inquiry was neither unreasonable nor unfair, and certainly not in the administrative law sense that might justify declarations by way of judicial review.

### **Was Mrs Tana ousted from the Green Party?**

[109] Mrs Tana's claim that she was ousted from the Green Party is based on her evidence that she was both told to resign from the party, and found herself unable in the circumstances to resist.

[110] Mrs Tana points first to the phone call she received from Ms Davidson, during the afternoon of 14 March 2024, after the Parliamentary Caucus meeting at which the independent investigation and Mrs Tana's leave of absence were declared.

[111] But as discussed above, while Ms Davidson may well have been calling to explore whether Mrs Tana might resign rather than go through with the investigation, the point of the discussion could only have been in respect of Mrs Tana's role as an MP, rather than a party member. And in any event, Mrs Tana found herself capable of resisting any pressure to resign as an MP, confirming later that afternoon that the independent investigation should "go on". I return to Mrs Tana's resilient character below.

[112] Mrs Tana points next to the invitation she received from Ms Swarbrick, both by phone call and then by email during the morning of 6 July 2024, inviting her to attend the meeting later that day. Mrs Tana says that Ms Swarbrick was asking her to resign her membership of the party, and that the purpose of the meeting later that day (as Ms Swarbrick outlined it) was for the purpose of discussing that kind of resignation. Mrs Tana says that this is more likely because it would have been a more logical approach for Ms Swarbrick to have taken, as Mrs Tana's party membership was more directly in the respondents' control.

[113] I cannot accept these propositions either.

[114] First, they are entirely undermined by the text of the follow-up email Ms Swarbrick sent at 9.20 am on behalf of herself and Ms Davidson as co-leaders. As mentioned above, the email was headed “[i]nforming you of caucus at 1.30 pm today”. Amongst other things, it stated “[t]he Green Party Caucus will be meeting today at 1.30pm to discuss matters relating to this report”. It referred to the Co-Leaders “as process leads for the MP conduct process ... want[ing] to let [Mrs Tana] know [they] intend to ask caucus to approve a request for [Mrs Tana’s] resignation at that discussion”. In light of these aspects of the email, and given the context in which it was sent, it can only have been understood as confirming Ms Swarbrick’s advice that she would be seeking a mandate to request Mrs Tana’s resignation as an MP. The meeting was to be a meeting of the Parliamentary Caucus, the body charged under the party’s Constitution with advancing its purposes in Parliament, and not with controlling admission to or removal from party membership. And the email expressly referred to the Co-Leaders’ capacities as process leaders for the MP Conduct Process, as the capacities in which they would be seeking their mandate. While the Co-Leaders were not, strictly, acting pursuant to that process, the reference to it confirms the meeting was directed to Mrs Tana’s status as an MP.

[115] Second, seeking a mandate to request resignation as a party member would not have been more logical. Mrs Tana resigning as a party member would not have addressed the question of her status as an MP, elected via the Green Party list. Given the tenor of the Burt Report, and the impact on the party of Mrs Tana remaining independently in Parliament, it is to be expected that the party will wish to address this question.

[116] Third, I consider Mrs Tana’s email of 6 July 2024 may best be understood as the product of a strategy of her own devising; that is, a strategy, formulated in response to an inquiry which might well on its own have resulted in her being formally asked to resign as an MP. Had it been reflected upon, the strategy of resigning as a party member would have been seen to leave Mrs Tana vulnerable to the procedures under s 55A of the Electoral Act, which might in future vacate her seat. But at least for the

time being, a request, issued on behalf of the Green Party, that she resign as an MP, could be rebuffed as one inappropriately addressed to a newly independent MP.

[117] Overall, it is clear that Mrs Tana was not pressured to resign as a party member. The pressure that she is likely to have felt related to her position as an MP. The result is that Mrs Tana simply cannot have been ousted as a party member.

### **Result**

[118] In light of the above findings, Mrs Tana's application for declarations is declined.

[119] The respondents appear entitled to costs. If costs cannot be agreed, the respondents are to file and serve by **5 pm on 4 October 2024** a memorandum, no more than four pages in length, setting out the desired basis and quantum of an award. And Mrs Tana is to respond in kind by **5 pm on 18 October 2024**.

[120] I will thereafter determine the issue of costs on the papers.

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Johnstone J