IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE

[2022] NZERA 412
3146822

	BETWEEN	NILKANTH KUMAR De ZOYSA Applicant
	AND	WAITEMATĀ DISTRICT HEALTH BOARD Respondent

Member of Authority:	Peter Fuiava
Representatives:	Applicant in person Anthony Russell, counsel for the Respondent
Investigation Meeting:	11-12 May 2022
Submissions and information received:	18, 24 May 2022 from the Applicant 11, 12, and 18 May 2022 from the Respondent
Determination:	24 August 2022

DETERMINATION OF THE AUTHORITY

A. Dr De Zoysa's claim of unjustified dismissal is dismissed.

B. Costs are reserved.

Interim non-publication order now lapsed

[1] Nilkanth Kumar De Zoysa is an 86-year-old specialist physician who has over 60 years medical experience as a doctor. He commenced working as a senior medical officer (SMO) for the Waitematā District Health Board (the DHB) on 1 July 2005. On 16 July 2021, his employment ended by way of redundancy. Through his now former employment advocate, Arsalan Abdollahi, Dr De Zoysa applied to the Authority for interim reinstatement and for non-publication of his and the DHB's names and details.

[2] By preliminary determination of 20 October 2021, the Authority declined both applications but granted Dr De Zoysa a 28-day interim non-publication order so as to preserve his position should he wish to appeal the decline of non-publication. [1]

[3] No appeal against the Authority's preliminary determination has been made and the interim non-publication order that was granted has long since lapsed. For the purposes of this determination, the applicant shall be referred to by name rather than the randomly generated abbreviation of UKO which was used to depersonalise Dr De Zoya's details in the preliminary determination.

Employment Relationship Problem

[4] The matters which Dr De Zoysa wishes the Authority to investigate and determine is whether his dismissal satisfied the test of justification at s 103A of the Employment Relations Act 2000 (the Act). In other words, was the DHB's actions in dismissing Dr De Zoysa what a fair and reasonable employer could have done in all the circumstances. In particular, Dr De Zoysa says that, rather than making him redundant, the DHB could have credentialed him so that he could continue working in acute medicine.

[5] Here, it should be noted that acute medicine is where a patient requires urgent medical treatment. This is to be contrasted with general medicine which is where a patient has had a chronic illness for some time but does not require urgent medical attention. As will be seen, Dr De Zoysa has practiced in non-acute general medicine since September 2015. He has not practiced in acute medicine for the last seven years.

[6] Alternatively, Dr De Zoysa submits that the DHB could have redeployed him into a mentoring/teaching role for other registered medical officers (RMOs) working at Waitakere Hospital (WTH). If unjustified dismissal is established, Dr De Zoysa confirms that the only remedy he seeks is reinstatement of employment under s 125 of the Act.

[7] For completeness, the DHB denies Dr De Zoysa's claims and states that his dismissal was substantively and procedurally justified. In short, after a review and

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[1] *UKO v Waitemata District Health Board* [2021] NZERA 464.

restructure of WTH's general medicine outpatient clinics, Dr De Zoysa's role as an SMO in non-acute general medicine came to an end. Reinstatement is now not possible as there is no longer a position for him to be reinstated to. Furthermore, given that Dr De Zoysa has not practiced in acute medicine since September 2015, he would need to be credentialed in order to do that work. However, that would require significant time and resources which the DHB says is incommensurate with the part-time nature of Dr De Zoysa's employment.

The Authority's investigation

[8] It is to be noted that Mr Abdollahi withdrew approximately one week after the investigation meeting was completed. It is understood that he withdrew out of frustration with Dr De Zoysa who, against his advice, tried to put before the Authority a without prejudice letter from the DHB which has not been sighted.

[9] For the Authority's investigation, affidavits from Dr De Zoysa and his wife (both attested on 14 January 2022) were lodged. For the DHB, earlier affidavits opposing Dr De Zoysa's interim reinstatement application from Dr Jonathan Christiansen, chief medical officer, Alexandra Boersma, general manager of acute and emergency medicine, and Fiona McCarthy, people and culture director, were provided. All witnesses answered questions under oath or affirmation from the Authority and the parties' representatives. The representatives also gave oral closing submissions.

[10] The investigation meeting has been adjourned previously due to the COVID-19 Omicron variant. 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.

Background

[11] On 1 July 2005, Dr De Zoysa started working for the DHB as a specialist or senior physician. At that time, he worked full-time in general medicine and did ward rounds, on-call work and acute medicine.

[12] In May 2012, Dr De Zoysa's full-time equivalent (FTE) was 0.83 which equated to 33 hours per week. Of that time, 17.5 hours was for clinical work which included

post-acute rounds; nine hours was for general medicine outpatient clinic work, two hours for after-hours on-call duties, 3.5 hours for M&M (morbidity and mortality) meetings, and one hour per week was for "other" duties of an undescribed nature. Dr De Zoysa's job size at that time did not expressly include a teaching or mentoring component.

First occupational health assessment

[13] In March 2015, Dr De Zoysa sustained a back injury that required him to take six months off work as sick leave. Prior to returning to work in September 2015, he underwent an occupational health assessment by Dr Kenny who determined that he was fit to return to reduced duties only which did not include any acute medical work.

[14] An agreement was reached between Dr De Zoysa and the DHB that allowed him to work 0.3675 FTE or 14.7 hours per week. His 14.7 hours of part-time work would include two four-hour non-acute clinics per week with his remaining hours spent on office administration and continuing medical education. These have been Dr De Zoysa's hours of work since returning to work post-injury in September 2015. It is common ground that he has not practiced in acute medicine since this time.

Review of general medicine services at Waitakere Hospital

[15] In about December 2019, a DHB working group was established to review the outpatient clinic model at WTH to make better use of a large number of RMOs who were not being provided with sufficient training and development opportunities. A similar change had taken place earlier at North Shore Hospital which proved successful. However, work on the proposal to change WTH's outpatient model of care from SMO and RMO clinics to RMO led clinics with SMO supervision was placed on hold due to the first COVID-19 Alert Level 4 lockdown in March 2020.

COVID-19

[16] In line with the Ministry of Health's public health response to the pandemic, all SMOs aged over 70 years were advised that they could not have direct patient contact. As Dr De Zoysa was over 70 years of age, he was not able to work during this period.

All general medicine outpatient clinics (both SMO and RMO run) were instead run by two other SMOs who ran virtual daily outpatient clinics. This allowed the remaining SMOs and RMOs at WTH to manage the anticipated acute cases of COVID-19.

[17] After the country moved out of COVID-19 Alert Levels 3 and 4 in May 2020, Dr De Zoysa was permitted to return to work. He resumed his two general medicine outpatient clinics per week. However, by then patient demand for general medicine clinics had diminished and Ms Boersma stated in evidence that this presently continues to be the case for WTH.

Second occupational health assessment

[18] On 10 September 2020, Dr De Zoysa underwent a second occupational health assessment to ensure that he could continue with his two general medicine clinics per week. That assessment was again undertaken by Dr Kenny who stated among other things that Dr De Zoysa was 84 years of age and that he was medically fit to resume only those part-time duties that he was currently undertaking.

Complaints raised

[19] In October 2020, Dr De Zoysa made a series of complaints against some of his colleagues regarding the cancellation of his clinics and comments made to him or about him by others. The complaints were investigated by Ms McCarthy who in a report (23 November 2020) found them to be largely unsubstantiated.

[20] The report made a number of findings and recommendations including that Dr De Zoysa's credentialing, which had expired in 2016, was now "long overdue". It was recommended that Dr Gerard De Jong, the head of department of acute medicine and the emergency department, would continue his efforts in seeking specialist input into that process. If by the end of the year, he was not able to gain sufficient specialist input to complete Dr De Zoya's credentialing, Ms McCarthy recommended that the matter be escalated to Dr Christiansen as chief medical officer.

[21] In December 2020, Dr De Zoysa made a further complaint about patient follow-ups during the lockdown period. This was addressed by a review of those cases by Dr De Jong in January 2021. In June 2021, Dr De Zoysa made a complaint regarding Dr

De Jong and Dr Christiansen which repeated his initial complaints about the cancellation of his clinics.

Proposal to change general medicine services at Waitakere Hospital

[22] In February 2021, the DHB completed its review of its general medicine services at WTH. The underlying reasons behind the review included a change in the acute/general medicine model of care with the implementation of home-based wards. There was also a need to increase the number of registrar clinics given the number of RMOs available so that there were sufficient training opportunities for them. In addition, there had been an ongoing reduction in the number of referrals to general medicine as a result of the COVID-19 pandemic.

[23] The most significant proposed change was the disestablishment of SMO led general medicine outpatient clinics which would be replaced by RMO led clinics with SMO supervision.

Consultation with affected staff

[24] In March 2021, a proposal document was distributed to all affected staff, including Dr De Zoysa. On 10 March 2021, he advised that he could not understand a graph in the proposal document which was due to a typographical error. The report was corrected and re-sent.

[25] On 31 March 2021, Dr De Zoysa met with representatives of the DHB which included Ms Boersma and Thereza Guttenbiel, human resources manager, to discuss the proposal. During that meeting, Dr De Zoysa did not object to the proposal.

[26] Further feedback was received from Dr De Zoysa by email of 6 April 2021 in which he acknowledged that the recommended changes at North Shore Hospital had been going for a while "presumably satisfactorily." He stated that he would be amenable to seeing patients referred from the assessment and diagnostic unit and emergency department and that he wished to have at least one GP (general practitioner)-referred patient per week because he believed that such referrals would "pick up" in the future.

[27] In another email to management (7 April 2021), Dr De Zoysa suggested that cases where a GP had not been able to diagnose a patient for a long time could be referred to an SMO.

Decision document

[28] The DHB took into account all the feedback it received from staff which were recorded in its decision document of 4 May 2021. The response to Dr De Zoysa's last comment was that GPs had access to a wide range of sub-specialty clinics which were SMO led. The RMO led clinics (that were to be introduced) would be supervised by an acute physician. The decision document confirmed that SMO general medicine clinics at WTH would be "discontinued" and replaced with RMO led clinics instead.

Post-decision consultation

[29] On 4 May 2021, Ms Boersma wrote to Dr De Zoysa to invite him to a meeting to discuss the impact the DHB's decision would have on his employment. The letter recorded that Dr De Zoysa was not able to move into an acute clinic role because he had not been registered or credentialed as an acute physician since 2016.

[30] On 12 May 2021, Ms Boersma and Nita Brink, a human resources manager, met with Dr De Zoysa to obtain his feedback regarding the decision document. He stated that he felt that he was being pushed out and that he wanted to improve his acute clinical skills by attending the acute ward rounds of his peers. He expressed a desire to do at least one acute clinic per week. Ms Boersma suggested that he be referred to occupational health for a further assessment.

[31] However, such an assessment was not undertaken because Dr Christiansen considered that Dr De Zoysa had not done any acute work since 2015 and that he had been assessed by occupational health in 2015 as not being fit for acute type work. Dr Christiansen noted further that Dr De Zoysa had agreed in 2015 to remove himself from acute work and that he had been doing general medicine work only since then. Finally, in order to have him credentialed for acute medicine, significant time, training and resources would be required which could not be justified in all the circumstances.

[32] On 21 May 2021, Ms Boersma wrote to Dr De Zoysa to advise him that moving him to an acute clinic role was not an option. The letter offered him the option of medical retirement from clinical practice or an honorary teaching position under the oversight and direction of the Assistant Dean of Auckland University's School of Medicine (who was Dr De Zoysa's son) at its Waitematā Campus. Dr De Zoysa did not accept the offer.

[33] In an email of 24 May 2021, Dr De Zoysa queried whether all SMO outpatient clinics were being disestablished and why he had not been referred for an occupational health assessment. He stated that he was a registered neurologist and that he had not made any medical mistakes. He asked why he could not be credentialed for acute medicine and he warned that he would be contacting the New Zealand Medical Council and the Health and Disability Commissioner regarding Dr De Jong who had cancelled his outpatient clinics and was slow to review his patients' cases.

[34] On 9 June 2021, Ms Boersma, Dr Christiansen and Ms McCarthy met with Dr De Zoysa and his wife met to discuss his concerns. Redeploying him into acute medicine was not an option that the DHB could offer for the reasons set out above. The options of retirement, redundancy or an honorary teaching position were reiterated to Dr De Zoysa.

[35] On 11 June 2021, Ms Boersma wrote to Dr De Zoysa requesting his feedback regarding the above options. He was invited to a further meeting on 21 June 2021 to discuss his feedback. However, by email of 14 June 2021, Dr De Zoysa advised that he was unwilling to meet again until his complaints regarding Dr De Jong were resolved. In his email, Dr De Zoysa referred to a "lady doctor" who was on maternity leave and questioned whether she could work swifter and better than he could in the acute clinics.

[36] On 25 June 2021, Ms Boersma wrote to Dr De Zoysa to formally advise him that his position had been disestablished and that he was to be made redundant. His last day of work was 16 July 2021.

Whether Dr De Zoysa was unjustifiably dismissed?

[37] The onus is on the DHB to show that, at the time of the dismissal, its actions were what a fair and reasonable employer could have done in all the circumstances. Section 103A of the Act sets out the test of justification:

> 103A Test of justification
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> (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
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> (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[38] In relation to a dismissal for redundancy the Court of Appeal has described the test of justification in this way:[2]

> … If the decision to make an employee redundant is shown not to be genuine (where genuine means the decision is based on business requirements and not used as a pretext for dismissing a disliked employee), it is hard to see how it could be found to be what a fair and reasonable employer would or could do. The converse does not necessarily apply. But, if an employer can show the redundancy is genuine and that the notice and consultation requirements of s 4 of the Act have been duly complied with, that could be expected to go a long way towards satisfying the s 103A test.

Removal of the SMO led outpatient clinics was substantively justified

[39] During the investigation meeting, it became apparent that there was a divergence of opinion between Dr De Zoysa and his former representative, Mr Abdollahi, as to whether the DHB's decision to change its outpatient clinic model was substantively justified. Mr Abdollahi sought to challenge the substance of that decision which did not align with Dr De Zoysa who understood the rationale behind the review. Dr De Zoya's concession is consistent with one of his earlier emails to Ms Boersma (6 April 2021) which states:

> … Reading the detailed documents, I appreciate the problems that are arising in W.D.H.B., as also the fact that the recommended method of patients being seen by the Internal (General) Medicine Physicians for Waitakere, has been carried out in North Shore Hospital, for a while, presumably satisfactorily, by R.M.O.s …"

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[2] *Grace Team Accounting v Brake* [2014] NZCA 541 at [85].

[40] I find the DHB's decision to review its general medicine outpatient clinics at WTH to be genuine.

Review was procedurally fair

[41] In terms of the process, Dr De Zoysa was provided with relevant information as to the proposed change to WTH's outpatient clinics and he was given an opportunity to comment on that information. It is noted that Dr De Zoysa did not disagree with the proposal in principle and neither did he question the motivation behind the review.

[42] The feedback Dr De Zoysa provided were few. He pointed Ms Boersma to what was a clear typographical error with a line graph in the DHB's report. The error was minor in nature and was corrected and the report resent. Dr De Zoysa's next comment involved a hypothetical situation of a GP who was not able to diagnose a chronically ill patient for some time. The DHB's response to Dr De Zoya's scenario is noted above.

[43] The only other comment Dr De Zoysa had was a desire to continue with his general medicine outpatient clinics in one form or another. However, the DHB was not able to offer Dr De Zoysa his outpatient clinics as these would be disestablished and replaced with RMO led clinics with SMO supervision.

[44] Having been given access to information relevant to the continuation of Dr De Zoysa's employment and an opportunity to comment on that information before his employer made its decision, I find the DHB's process was transparent and procedurally fair. The disestablishment of the SMO led outpatient clinics meant that Dr De Zoysa was effectively out of a job unless he could be redeployed.

No evidence of bad faith or ulterior motive

[45] In order for Dr De Zoysa to work in acute medicine, he needed to be credentialed for that work which he had not practiced since September 2015. Dr De Zoysa states in an affidavit of 30 July 2021 that his problems started in 2016 when Dr Christiansen resigned as Head of Division as a result of Dr De Zoysa pointing out several mistakes to him.

[46] However, I find Dr Christiansen's resignation coincidental and unrelated Dr De Zoysa's complaint at the time. Dr Christiansen resigned to take up the role of NZ President of the Royal Australasian College of Physicians which he had been elected to in 2014. This was a *pro bono* role which required him to travel to Australia once a week.

[47] Dr Christiansen had notified his CEO that he was resigning as head of division in April 2016 which predates Dr De Zoysa's email of 7 September 2016 in which he asks Dr Christiansen to reapply for his job. Given the timeline, I find no connection between Dr Christiansen's resignation and Dr De Zoysa's complaint. Put differently, there is no evidence of Dr Christiansen having harboured a longstanding and existing "grouse" or grudge against Dr De Zoysa from 2016.

A further occupational health assessment was not required

[48] It is noted that it was Dr Christiansen as chief medical officer who decided in May 2021 against a further occupational health assessment for Dr De Zoysa. This was a prerequisite if he was to be credentialed for acute medicine. The factors that Dr Christiansen took into account in making his decision included an earlier occupational health assessment by Dr Kenny some eight months earlier on 10 September 2020.

[49] That assessment recorded that Dr De Zoysa was medically fit to continue his usual restricted part-time duties only and that he was currently not undertaking any on-call or after-hours duties or acute work. When asked whether Dr De Zoysa was likely to be able to resume his full duties in the foreseeable future, Dr Kenny stated that this was not the case and that he was medically fit for restricted/part-time duties only.

[50] To reiterate, upon Dr De Zoysa's return to work in September 2015, he and the DHB came to an agreement that resulted in his FTE being reduced from 0.83 to 0.3675. This translated to a reduction of hours from 33 to 14.7 hours per week. Of the 14.7 hours Dr De Zoysa agreed to work, he had two four-hour general medicine (non-acute) clinics per week. He would also have three hours per week for administration duties and 3.7 hours per week for his own continuing medical education. It is observed that there has not been an acute medicine component to Dr De Zoysa's work for the last seven years.

[51] The cost of having a further occupational health assessment done for Dr De Zoysa would not have been expensive. However, even so, I find that it was reasonable of Dr Christiansen to rely on Dr Kenny's occupational health assessment from September 2020 which was then only eight months old and was still valid. Not much would have changed in that time for Dr De Zoysa apart from the passage of time.

[52] Without an occupational health assessment stating that Dr De Zoysa was medically fit for acute work, he could not be credentialed. However, even if by some material change in circumstances that he was declared medically fit, it was Dr Christiansen's evidence that it would take approximately six months for a full-time member of staff to complete the training and supervision requirements to be credentialed for acute medicine. Because Dr De Zoysa worked part-time and his FTE was 0.3675, I find that it would have taken the DHB approximately 18 months if not longer to have him credentialed.

[53] To compound matters further, there would be a need for another SMO to supervise Dr De Zoysa while he was going through the credentialing process. As a result, patients at WTH would be without two of its SMOs. This cannot be a prudent and responsible use of scarce medical resources when Dr De Zoysa would only be working part-time in any event.

[54] In redundancy cases, the Authority must be wary of substituting its own decision for that of the employer. In my view, Dr Christiansen's decision not to have Dr De Zoysa credentialed was not motivated by ill will or an ulterior motive. It was a decision that took into account several relevant factors including that Dr De Zoysa had not practiced in acute medicine since 2015; was assessed by Dr Kenny in 2015 as not being fit for acute work; that since that time Dr De Zoysa was content with working in general medicine and had removed himself from acute medicine; and the resources required to have him credentialed could not be justified in all the circumstances.

[55] Added to these factors, is the challenge Dr De Zoysa would present in being receptable to further training. Certain correspondence from him to staff and various medical colleagues included remarks of a belittling, disparaging and unprofessional nature. He has referred to another doctor as "autocratic and despotic"; has continued to assert that he caught Dr Christiansen out in 2016 which resulted in his resignation

when clearly that is not the case; and he has stated to his operations manager that "if anyone should be examined it should be you."

[56] Dr De Zoysa's lack of collegiality towards his colleagues counts against reinstatement as a primary remedy. Under s 125, reinstatement must be both practicable and reasonable. In *Christieson v Fonterra Co-Operative Group Ltd*, the Employment Court made the following comments in respect of reinstatement:[3]

> Practicability and reasonableness are two separate considerations. For reinstatement to be practicable, it must be capable of being carried out in action, be feasible and have the potential for the re-imposition of the employment relationship to be achieved successfully. There may be considerations separate from the reasons for the dismissal that are germane to this question. In looking at reasonableness, the Court needs to consider the respective effects of an order, not only on the individual employer and employee in the case, but also on other affected employees of the same employer and, in some cases, perhaps third parties who would be affected by the reinstatement.

[57] I have sighted multiple emails from Dr De Zoysa which on a plain reading show a lack of collegiality on his part towards fellow doctors and members of staff. Of concern is an email in which he refers to one female SMO on maternity leave as a "lady doctor." As there are several employees who would be adversely affected by Dr De Zoysa's reinstatement, I do not consider such a remedy reasonable in the circumstances.

[58] The above examples of a lack of collegiality on Dr De Zoysa's part gives me little confidence that he would have the required humility to take on board any new developments in acute medicine which would have eventuated over the last seven years he has not practiced in the area. This would only prolong the time, expenditure, and resources it would take to have him credentialed. While it is laudable that Dr De Zoysa wishes to continue working, the expenditure of resources would not be commensurate with the part-time nature of his employment.

[59] A failure to consider redeployment may support a finding that a redundancy was not genuine.[4] This is not the case here. The DHB offered Dr De Zoysa an honorary teaching position for the University of Auckland medical school but this was rejected

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[3] *Christieson v Fonterra Co-Operative Group Ltd* [2021] NZEmpC 142 at [39].
[4] *Simpson Farms Ltd v Aberhart* [2006] ERNZ 825.

by Dr De Zoysa because he would be working under his son which Dr De Zoysa considered was not a good look for him.

[60] Dr De Zoysa stated that he could have been redeployed to a teaching or mentoring role for other RMOs. However, upon reviewing his job size worksheet for his role, there was no expressed teaching component to Dr De Zoysa's position. In any case, the changes at WTH are such that RMOs will have a supervising SMO whom they can approach for additional training and mentoring, if required.

[61] It is noted that Dr De Zoysa has a sub-specialty in Neurology. However, he could not be redeployed into that field as WTH has no Neurology department. The Auckland District Health Board is the sole employer for Neurology.

Conclusion on unjustified dismissal

[62] Under section 103A of the Act, the process the DHB followed to terminate Dr De Zoysa's employment on the grounds of redundancy was one that gave him an opportunity to consider all relevant information concerning the continuation of his employment and an opportunity to comment on that information before the DHB made its final decision. The Authority finds that Dr De Zoysa's redundancy was for genuine reasons and that his dismissal was substantively and procedurally justified. As for redeployment, there was no practicable position for the DHB to redeploy Dr De Zoysa to.

[63] For these reasons, the claims of unjustified dismissal and for reinstatement under s 125 of the Act are dismissed.

Costs

[64] Costs are reserved.

Peter Fuiava
Member of the Employment Relations Authority