

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2022] NZERA 687  
3189359

BETWEEN

MIKAYLA ZHANG  
Applicant

AND

HEALTH NEW ZEALAND –  
TE WHATU ORA  
Respondent

Member of Authority: Marija Urlich

Representatives: Mark Donovan, counsel for the Applicant  
Tim Oldfield, counsel for the Respondent

Investigation Meeting: On the papers

Determination: 21 December 2022

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] This determination deals with an application Mikayla Zhang brings for interim reinstatement.<sup>1</sup> Health New Zealand – Te Whatu Ora (HNZTWO) opposes the application.

[2] Ms Zhang is employed as a senior financial analyst. Her terms of employment are set out in a written individual employment agreement which includes:

2. The position

2.1 You are employed in the position of Senior Financial Analyst in Finance Provider.

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<sup>1</sup> Supported by an undertaking as to damages and supporting affidavit affirmed on 13 September 2022.

2.2 Your principal place of work will be Q4, Smales farm, Takapuna, Auckland. However [the employer] operates from a number of sites and you may be required to carry out duties at other locations as part of your job. Positions are also, from time to time, relocated to other sites within the greater Auckland region. [The employer] reserves the right to relocate you to another site to meet the business needs of [the employer].

2.3 A position description is attached to this employment agreement. Please note that functions, duties and responsibilities may be changed from time to time by [the employer], after discussion with you, in order to meet its operational requirements. In this position you will be responsible to the Lead Finance Business partner.

[3] The referred to position description is generic and includes a document titled 'service responsibilities' which shows a financial analyst is coupled with business partners assigned to a portfolio within divisions in the organisation. HNZTWO wishes to move Ms Zhang's division. She is opposed to that move and brings this application to prevent HNZTWO from proceeding with the notified move pending determination of her substantive claim.

### **The Authority's investigation**

[4] By consent this matter is determined on the papers. The parties have complied with timetabling directions for the filing of affidavit evidence and submissions. The delay in issuing this determination is regrettable caused in part by the necessary reallocation of the file.

[5] In determining this matter an affidavit and affidavit in reply of Ms Zhang and affidavits of Grace Preston, Geoffrey Goodwin and Matthew Hix have been considered as have the interim reinstatement application and notice of opposition, the statement of problem Ms Zhang lodged setting out her substantive claim and HNZTWO's statement in reply opposing the claim, the documents attached thereto and the parties' submissions. Evidential matters in dispute between the parties will not be resolved by this determination because the evidence is untested and in applying the relevant tests the Authority is not required to resolve any disputes.

### **The Law**

[6] As the court observed in *Humphrey*, in determining whether or not to order interim reinstatement, regard must be had to the object of the Employment Relations

Act 2000 (the Act) which is to build productive employment relationships through the promotion of good faith:

One of the central features for the Act is its recognition of the importance of the employment relationship, the obligations both parties have to be responsive and communicative, and that issues ought to be dealt with promptly and between the parties if possible – in other words, supporting constructive employment relationships and repairing them where feasible.<sup>2</sup>

[7] It is with this in mind that applications for reinstatement are to be dealt.

[8] Section 127 of the Employment Relations Act 2000 (the Act) confers jurisdiction on the Authority to grant interim reinstatement. In considering Ms Zhang's application for interim reinstatement the Authority is required to consider the following:<sup>3</sup>

- (i) Does Ms Zhang have an arguable case for unjustified disadvantage and an arguable case for permanent reinstatement?
- (ii) Where does the balance of convenience lie? This requires looking at the relevant detriment or injury that Ms Zhang and HNZ will incur as a result of the interim injunction being granted (or not granted)?
- (iii) The Authority is then required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

### **Brief background**

[9] The genesis of this employment relationship problem is a telephone call Ms Zhang received from her manager Mr Hix on 23 May 2022. There is a dispute as to the conversation. Ms Zhang avers Mr Hix asked her why some month ending tasks had not been completed, the business partners were not happy and she was to move to a portfolio within the corporate & compliance division. She says she was shocked by Mr Hix's comments and told him she did not agree to the move. Mr Hix says he raised the issues with Ms Zhang including the portfolio change and suggested a meeting following the May month end financial result with Mr Goodwin to further discuss the portfolio change.

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<sup>2</sup> *Humphrey*, above n 1, at [5].

<sup>3</sup> *Western Bay of Plenty District Council v McInness* [2016] NZEmpC 36 at [7].

[10] A meeting arranged by Mr Hix on 16 June did not proceed.

[11] On 21 June Ms Zhang attended a meeting by telephone with Mr Hix and Geoffrey Goodwin, the Deputy Chief Financial Officer where the move was discussed. Ms Zhang recorded the conversation.

[12] On 23 June Mr Goodwin wrote to Ms Zhang including the reason for the move:

The reason for this suggestion is that we believe this move will enable you to work in an environment where you are able to perform to the best of your abilities. We note the challenges you have faced in your existing portfolio and believe that this move will be a better fit for you and the services you support.

[13] An exchange of correspondence followed. Ms Zhang sought clarification from Mr Goodwin as to the underlying performance concerns she understood were motivating the move. Mr Goodwin replied the move was not about performance but to find her a position with the best fit and to provide her support. Ms Zhang was not satisfied with this response. She instructed her representative who wrote to Mr Goodwin on 5 July:

- (i) seeking information as to the rationale for the move to allow Ms Zhang to be "...properly consulted and provide her views" and to understand what was wrong with her staying in her current role;
- (ii) that Ms Zhang preferred to stay in her current role because she enjoys it and feels she has good working relationships;
- (iii) no performance concerns had been raised with her and if there were any, she was entitled to be made aware of them;
- (iv) she had not opposed the last move but opposed a further move as disruptive;
- (v) requesting an explanation for any issue with her remaining in the current role and copies of any relevant document; and
- (vi) requesting postponement of a proposed meeting to allow her time to consider the requested information once received.

[14] There was a further exchange of correspondence. On 13 July HNZTWO informed Ms Zhang the move would take effect from 1 August 2022. On 27 July Ms

Zhang's representative wrote to Mr Goodwin raising a personal grievance for unjustified disadvantage by way of:

- (i) failing to act in accordance with the duty of good faith in particular s 4(1A)(b) of the Act by not sufficiently explaining the reason for the change and suggesting she could resign if she was not satisfied;
- (ii) failing to adequately consult with Ms Zhang about the move in breach of clause 2.3 of the employment agreement; and
- (iii) unilaterally varying her position to that of a materially different position.

[15] The letter continued that Ms Zhang was deeply upset by these events – she was concerned about the effect of the move on her reputation within the organisation, apprehending she could be the subject of gossip and this made her feel too ashamed to look at other staff. The letter concluded seeking HNZTWO revoke the decision to move her, retain her current position or if resolution was not possible that she may consider injunctive relief.

[16] HNZTWO agreed to defer the move pending the parties' attendance at mediation.

[17] By letter dated 18 August HNZTWO replied to Ms Zhang's personal grievance raising letter disputing that she had been disadvantaged in any way, that her terms and conditions of employment remain the same and there was no material difference consequent to the move. HNZTWO did not accept it had not acted in good faith and that it had acted as a reasonable employer. The letter also confirmed HNZTWO's agreement to attend mediation and that it would defer the portfolio move. The letter also included:

- (i) Ms Zhang's employment was not attached to any particular portfolio as set out in clause 2 of the employment agreement;
- (ii) that a possible move had been discussed on 21 June by Mr Hix and Mr Zhang;
- (iii) the new role would not require the same level of business partner support as required in the current role;
- (iv) there is no suggestion Ms Zhang is not succeeding in her current role;

- (v) the role move is not a response to complaints about performance and there is no further information to that already provided;
- (vi) the reason for the move had been discussed with Ms Zhang at length;
- (vii) Mr Goodwin's resignation comment during the 21 June discussion needed to be seen in context; and
- (viii) the move is not a demotion and her perception that it will attract a negative view of her is incorrect.

[18] On 7 September 2022 the parties attended mediation.

[19] On 9 September 2022 Mr Goodwin wrote to Ms Zhang confirming the change to her portfolio effective 19 September and that her terms and conditions of employment would remain the same. The letter went on to arrange a handover process and commented Ms Zhang was a valued team member who Mr Goodwin wished to support to be successful in the new portfolio. Regular one on one meetings with Ms Zhang's manager were confirmed and Mr Goodwin offered to meet with Ms Zhang to provide additional support if she that was helpful. The letter acknowledged this maybe a challenging time and reminded Ms Zhang a confidential counselling service was available.

[20] On 12 September Ms Zhang's representative wrote to HNZTWO's representative restating she held a different view as to the lawfulness of the decision to move her portfolio, that she would be taking urgent action including seeking an injunction and would HNZTWO defer the move until any application had been heard and determined. By reply email dated 13 September the deferment request was declined.

[21] Ms Zhang then lodged her application for interim reinstatement in the Authority. The Authority understands the move has been deferred pending determination of the injunction application.

### **Arguable case of unjustified disadvantage**

[22] The first question for consideration is whether there is an arguable case Ms Zhang was unjustifiably disadvantaged. An arguable case means a case with some

serious or arguable, but not necessarily certain prospects of success.<sup>4</sup> The threshold for a serious question or arguable case as stated in *McInnes* is that the claim is not frivolous or vexatious:

However, as *Brooks Homes Ltd* makes clear, an applicant must establish that there is a serious question to be tried, in that the claim is not vexatious or frivolous. The merits of the case (insofar as they can be ascertained at an interim stage) maybe relevant in assessing the balance of convenience and overall interests of justice...<sup>5</sup>

[23] Ms Zhang says her claim is neither vexatious nor frivolous and is seriously arguable because there is a genuine disagreement between the parties as to whether the notified move amounts to a unilateral variation to her employment agreement or is within the terms of the parties' agreement. She says the material differences between the roles of medicine senior financial analyst and corporate senior financial analyst are so significant as to break the continuity of her employment.<sup>6</sup> In addition, she says there has been no or insufficient discussion because to be meaningful such a discussion would need to be equivalent to consultation.<sup>7</sup>

[24] HNZTWO says there is no serious question to be tried or arguable case. It submits as a senior financial analyst it is not seriously arguable the duties in the corporate portfolio already performed by a senior financial analyst do not fall within that position. HNZTWO submits further, the flexibility apparent in the parties' agreed job description is consistent with a role which allows the employer to deploy labour as needed and exposes an employee to a broader range of work where they can make full use of their skills. This flexibility, it says, also avoids the arguments before the Authority in this matter which it characterises as "minor changes to work focus or move[s] between teams [which] are met with stubborn resistance". It also argues the effect of Ms Zhang's application is to craft a closed list of tasks at this point in time which is inconsistent with what the parties agreed in their terms of employment and beyond the jurisdiction of the Authority.<sup>8</sup>

[25] The Authority is satisfied Ms Zhang's claim meets the low threshold of an arguable case for her personal grievance of unjustified disadvantage. At the very least

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<sup>4</sup> *X v Y Ltd v New Zealand Stock Exchange* [1992] 1 ERNZ 863.

<sup>5</sup> *McInnes* above n 1, at [9].

<sup>6</sup> *Carter Holt Harvey v Willis* [1998] 3 ERNZ 984.

<sup>7</sup> *Simpsons Farms Ltd v Aberhart* [2006] NZEmpC 92 at [62] – [63].

<sup>8</sup> Employment Relations Act 2000 s 161(2)(b).

there is dispute between the parties as to the nature of their discussions and if these disputes are resolved in Ms Zhang's favour that may require further consideration of whether HNZTWO have properly discharged the discussion obligation under clause 2.3 of the parties' employment agreement.

### **Arguable case for permanent reinstatement**

[26] Where it is practical and reasonable to do so and sought, the Authority must provide for reinstatement as a primary remedy<sup>9</sup>. HNZTWO says the order as sought would require fixing the terms of employment which is not within the Authority's jurisdiction. While fixing is barred for want of jurisdiction, at this stage, given Ms Zhang's reinstatement position is dependent on the outcome of her personal grievance, reinstatement within a possible range cannot be said not to be a possibility particularly given the breadth of Ms Zhang's job description, reinstatement may be a range of portfolios. The arguable case threshold for permanent reinstatement is met.

### **Balance of convenience**

[27] This ground for consideration involves the relevant detriment or injury the parties will incur if interim reinstatement is granted or not. An assessment of what might happen if the interim position is reversed in any substantive determination including consideration of whether damages can adequately compensate any harm if reinstatement is not ordered is also to be made.

[28] Ms Zhang says the balance of convenience favours her for the following reasons:

- (i) if she is forced to move to the corporate role against her wishes and refuses to comply her employment may be in jeopardy;
- (ii) if another staff member replaces her in the current portfolio, it will be more difficult to move back;
- (iii) she is unfamiliar with a revenue focussed role and is concerned about moving from three business partners to 13;
- (iv) any perception of deficiencies in her work performance in her current role will be 'baked in' if she moves to the new role because she is

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<sup>9</sup> Section 125(2) of the Employment Relations Act 2000.

unfamiliar with the role and has never worked in a revenue focused role before; and

- (v) her reputation within the business will be negatively affected because she was moved from facilities and mental health earlier in 2022 to medicine and she will find it humiliating to be moved again within such a short time and without a clear understanding as to the reasons for the move.

[29] HNZTWO says the balance of convenience favours it:

- (i) preservation of the status quo includes movement between portfolios which has occurred twice since Ms Zhang commenced employment – it is a normal part of the parties’ employment relationship;
- (ii) the basis for a concern about reputational harm is not clear given the move is not a punitive measure or a demotion;
- (iii) in any event damages would be an adequate remedy – Ms Zhang has quantified her damages; and
- (iv) Ms Zhang has not given evidence that she is unable to perform the senior finance role in the corporate portfolio.

[30] Though Ms Zhang has been given the benefit of the doubt at the arguable case stage the range of what reinstatement might mean given the nature of Ms Zhang’s role sounds in the balance of convenience. By this I mean Ms Zhang is one of a number of senior financial analysts employed by HNZTWO who have been and may still yet be moved to different portfolios. The evidence before the Authority suggests, albeit untested, there have been a number of such moves in the last 18 months and that movement of senior financial analysts is normal. I acknowledge Ms Zhang disagrees with the frequency of portfolio moves, a factual assessment of which will need to be assessed at any substantive investigation, however it is significant that she has moved twice in recent times without raising any objection. This weighs in favour of movement between portfolios being the status quo.

[31] While I accept Ms Zhang’s concern about reputational harm is sincere the evidential basis of such harm arising from the proposed move is not entirely clear. There is information before the Authority which suggests strained relationships with current business partners which may be heightened by the recording issue however, given the

apparent frequency of portfolio movement it is difficult to correlate the move with punishment, as Ms Zhang suggests. Given this, it is likely any damages awarded would be an adequate remedy for Ms Zhang.

[32] Ms Zhang has expressed a concern that she does not have the skills to perform the role in the proposed portfolio. The evidence for HNZTWO suggests Ms Zhang's is considered a good employee who can perform in and will have the necessary support to succeed in the portfolio move.

[33] I have carefully considered whether the distinction HNZTWO seeks to draw between performance issues (any of which it denies) and relationship and fit issues to justify the move is too fine. At this stage, on the untested evidence, and given the other factors including the apparent normality of movement across portfolios, this factor does not tip the balance in favour of the reinstatement Ms Zhang seeks. That said, it would be unfortunate if such issues were left unaddressed and I would encourage the parties to discuss them in a manner consistent with maintaining a productive employment relationship.

[34] For the above reasons, the balance of convenience weighs in favour of HNZTWO.

### **Overall justice**

[35] Standing back from the detail of the claim where on balance does the overall justice lie? This has been described by the Court of Appeal as:

The overall justice assessment is essentially a check on the position that has been reached following the analysis of the earlier issues of serious question to be tried and balance of convenience.<sup>10</sup>

[36] Ms Zhang's claim turns on whether, under the terms of her current employment agreement, HNZTWO can move her to a different portfolio without her agreement and in the face of her concerns. If it is found to, then consequences will likely flow from that including the possibility of damages. In the meantime, she has a role with HNZTWO with the same terms of employment she has always enjoyed. It is wholly accepted she would like to remain in the medical portfolio however, the evidence in

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<sup>10</sup> *NZ Tax Refunds Limited v Brooks Homes Limited* [2013] NZCA 90 at [47].

support of the reasons why in the short term do not outweigh the impact reinstatement as she seeks would have on HNZTWO.

[37] The overall justice of this matter does not weigh in favour of interim reinstatement.

### **Outcome**

[38] Ms Zhang's application for interim reinstatement is declined.

[39] Given the parties are in an ongoing employment relationship they are directed to attend mediation within 30 days of today's date to ensure appropriate arrangements are made for any portfolio move. Ms Zhang is to advise following the mediation if she wishes to proceed with her substantive application. Timetabling orders can then be made.

### **Costs**

[40] Costs are reserved.

Marija Urlich  
Member of the Employment Relations Authority