

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 363
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:	14 April 2023
Submissions and further information received:	At the investigation meeting from the Applicant and the Respondent
Determination:	10 July 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Zhang is employed by Health New Zealand – Te Whatu Ora (HNZTWO) as a senior financial analyst. She has held this position since July 2020.¹ The terms of her employment are set out in a written individual employment agreement (IEA). Attached to the IEA is a position description. The position description is generic. A document titled ‘service responsibilities’ shows people in roles titled ‘key accountant/analyst’ paired with ‘finance business partner’ in ‘divisions’ or

¹ Ms Zhang had previously worked for NZTWO’s predecessor, Waitemata District Health Board as a management accountant from 2016 until she was made redundant in 2018.

‘accountant/analyst’ paired with ‘finance business partners’ in ‘centralised tasks’. Ms Zhang accepts this document describes the structure in which she works.

[2] In her role with HNZTWO Ms Zhang currently works in the analytics and insights division providing accounting and analyst services to an operational team. She has worked with at least one different operational team since 2020. She enjoys this work and wishes to continue to work in this area. She says the work she does for a division is fundamentally different to the work performed in ‘centralised tasks’. HNZTWO wishes Ms Zhang to change where she works to the corporate and compliance services team in centralised tasks. This change is the genesis of the employment relationship problem.

[3] Ms Zhang opposes the change and seeks orders from the Authority to prevent this permanently. She also seeks a finding that HNZTWO’s actions have unjustifiably disadvantaged her in her employment. Ms Zhang seeks remedies in contractual damages and under s 123(1)(c)(i) of the Act for non-pecuniary loss suffered consequent to HNZTWO’s actions. She also seeks a finding that HNZTWO’s actions have breached the duty of good faith and the award of a penalty, a portion of which be awarded to her.

[4] HNZTWO says the change is within the contemplation of the parties’ IEA and job description, that it has acted fairly and reasonably towards Ms Zhang in respect of the move and denies any remedies or a penalty are warranted. HNZTWO has suspended the change pending the Authority’s determination of this employment relationship problem.

The Authority’s investigation

[5] In a determination issued on 21 December 2022 the Authority declined an application for interim injunctive relief brought by Ms Zhang.² The background narration to this employment relationship problem is set out in that determination. If Ms Zhang’s application for interim relief had been successful, it would likely have stopped the change pending determination of the substantive claim. As set out above, this has in effect occurred because HNZTWO has voluntarily suspended the change.

² *Mikayla Zhang v Health New Zealand – Te Whatu Ora* [2022] NZERA 687.

[6] The substantive application is now before the Authority. During the course of investigating this employment relationship problem the Authority heard evidence from Ms Zhang, her husband, Jonny Lu, Matthew Hix, who is Ms Zhang's manager and the manager of corporate and compliance and analytics and insights, Geoffrey Goodwin, the deputy chief financial officer and Mary Jane Augustin, who is a senior financial analyst and with whom it is proposed Ms Zhang swaps roles.

[7] As permitted by s 174E of the Employment Relations Act 2000 (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. In determining this matter the Authority has carefully considered all the material before it, including all evidence of the parties and their submissions.

Issues

[8] The issues identified for investigation and determination are:

- i. is the intended change a unilateral variation to Ms Zhang's employment agreement?
- ii. should an order be made preventing NZTWO from making the intended change?
- iii. have NZTWO's actions unjustifiably disadvantaged Ms Zhang in her employment?
- iv. should general damages be awarded to Ms Zhang for breach of contract and/or compensation under s 123(1)(c)(i) of the Act;
- v. has NZTWO breached s 4 duty of good faith?
- vi. if so, should a penalty be awarded any portion of which to Ms Zhang?
and
- vii. is either party entitled to an award of costs?

Discussion

- (i) *Is the intended change a unilateral variation to Ms Zhang's employment agreement?*

[9] It is axiomatic that an employment agreement cannot be unilaterally varied. The question for the Authority is whether the change from providing accountant/analyst

services in a division setting to providing accountant/analyst services in a centralised task setting, is within the terms of the parties' employment agreement. The starting point therefore is the parties' employment agreement.

[10] Clause 2.3 of the IEA provides:

2. The position

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

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.

[11] The position description is generic to any senior financial analyst employed by HNZTWO. The apparent quid pro quo of having such a broad position description is if HNZTWO wishes to "change" a senior financial analyst's "...functions, duties and responsibilities" two conditions must be met – such a change can occur after discussion with the subject senior financial analyst, in this case Ms Zhang and to meet the operational requirements of the business. If those conditions are met, the change can occur and could not amount to a unilateral variation of the employment agreement.

[12] In this case then, have the conditions been met? This is a factual inquiry.

[13] HNZTWO does not dispute the move would mean a change to Ms Zhang's day-to-day responsibilities but says the change is within the scope of clause 2.3 of the employment agreement. Ms Zhang's primary submission is the change amounts to a unilateral variation to her employment agreement. She submits the change is materially different to the role she currently holds and that the situation is analogous to redeployment in a redundancy setting in that both her role and her personal circumstances must be taken into account.

[14] This is not a situation where any change to salary, reporting line, commute time, ability to work from home or such other is required.³ Mr Hix and Mr Goodwin gave evidence that in their view Ms Zhang has the skills and would likely benefit from the change because she will be able to develop those skills further. The evidence before the Authority suggests Ms Zhang's personal circumstances have been or are able to be taken into account or accommodated by the change.

[15] Ms Zhang has the qualifications to perform the role – this is recorded in the IEA. Ms Augustin's evidence was that while the swap would be a challenge including because she would be required to work with different business partners, she said she had the skills to perform the work. Ms Augustin and Ms Zhang have the same job descriptions and near identical IEAs.

[16] With respect to the different nature of the roles themselves, Ms Zhang said they are as fundamentally different as that between medical specialities. When questioned on this assertion, Ms Zhang accepted she was qualified to do accounting/analyst services but it is her preference to remain where she is. Ms Zhang also said she had told the manager who offered her employment with HNZTWO's predecessor that she preferred to work only with the divisions. Ms Zhang may have had the opportunity then to elevate that preference to a binding term when she entered the employment agreement. That she did not indicates she understood and accepted the position was broader than her preference. Ms Zhang is bound by the terms of the employment agreement she freely entered which is to a generic role of senior financial analyst.

[17] The parties have not defined 'discussion' or 'operational requirements' for the purpose of clause 2.3. Giving those words their ordinary, natural meaning 'discussion' is an activity in which people talk about something and tell each other their ideas or opinions and 'operational need' can be interpreted in its ordinary sense of a matter that meets the routine functioning and activity of an organisation. HNZTWO has emphasised the change is motivated by an issue of fit, that it holds no concerns about Ms Zhang's work performance and wishes to support her to succeed in the role.

³ Though I note Ms Zhang's would no longer have a team leader.

[18] The change was first raised with Ms Zhang on 23 May 2022 when she received a telephone call from her manager Mr Hix. Ms Zhang says Mr Hix told her during the course of this call the business partners were “not happy” because month-end reporting packs had not been delivered, asked her why this had occurred but that before she could explain he said she was to change to Ms Augustin’s role in the corporate and compliance team. Ms Zhang said she told Mr Hix she did not agree to the change and he said he would manage her performance if she did not.

[19] Mr Hix’s recollection of the conversation is different. He says they discussed three matters – firstly, the reasons for the late return of the month-end reporting packs, secondly, the change which Mr Hix told Ms Zhang was necessary because in his opinion the relationship with the division business partners and Ms Zhang was not working well and she would benefit from the support he could provide her if she was working more closely with him and thirdly, acknowledged the COVID-19 circumstances which had caused Ms Zhang difficulties. He said the call ended with him suggesting a meeting to discuss the change in more detail with Mr Goodwin in mid-June.

[20] The 23 May conversation between Mr Hix and Ms Zhang has not discharged HNZTWO’s obligation to discuss the change. On either account the portfolio change was framed as a response to a situation which arose from Ms Zhang’s performance of duties for which she was responsible – the month-end reporting pack and the relationship with the business partners. Ms Zhang’s alarm on receiving such advice could have been reasonably anticipated. Given the contractual requirement to have a discussion about a change to meet operational needs HNZTWO was obliged to engage Ms Zhang in a more careful conversation which identified the issue, proposed a resolution in the context of the needs of the organisation and sought Ms Zhang’s comment. Such a discussion could have avoided Ms Zhang apprehending the change was proposed due to a hidden performance concern or, at least meant HNZTWO could have satisfied its contractual obligation in the face of Ms Zhang’s opposition to the change.

[21] The telephone call of 23 May has, unfortunately, set the tone of the parties’ subsequent exchanges about the change. The subsequent discussions including that on 21 June and exchange of correspondence do not cure this flaw.

[22] HNZTWO can make changes to Ms Zhang's functions, duties and responsibilities within the scope of the IEA and the job description if the changes are first discussed with Ms Zhang and meet its operational requirements. For the reasons set out above, HNZTWO has not yet discharged the obligation to discuss the change with Ms Zhang within the terms of clause 2.3 of the IEA.

(ii) *Should an order be made preventing NZTWO from making the intended change?*

[23] The effect of such an order would be to freeze Ms Zhang's functions, duties and responsibilities. Such an order would be inconsistent with both the terms of the parties' employment agreement and the ongoing nature of the employment relationship which will invariably be subject to the type of change the parties have anticipated and made provision for in their employment agreement. The order sought is declined.

(iii) *have HNZTWO's actions unjustifiably disadvantaged Ms Zhang in her employment?*

[24] Under section 103(1)(b) of the Employment Relations Act 2000, an employee will have a personal grievance where their employment, or one or more conditions of their employment, has been affected to their disadvantage by some unjustifiable action by the employer.

[25] Under the terms of the IEA HNZTWO was obliged to discuss a change in functions, duties, and with an effected employee. Such a discussion was not carried out with Ms Zhang. This flaw is at the heart of this employment relationship problem. There can be no doubt Ms Zhang has concerns about the change and she was entitled under the express terms of her employment agreement, read through the lens of good faith, as obliged by statute, to discuss those concerns with HNZTWO. This has not happened. Ms Zhang has established a personal grievance because she has suffered an unjustified disadvantage in her employment.

Remedies

[26] Ms Zhang has established a personal grievance for unjustified disadvantage. She is entitled to a consideration of the remedies sought.

Compensation for humiliation, loss of dignity and injury to feelings

[27] It is clear to the Authority Ms Zhang is profoundly upset by this situation. She feels strongly there is a hidden performance motive to the change and this has made her feel less secure in her employment including that her reputation has or will be damaged. She feels strongly that she has been treated unfairly and disrespected.

[28] The circumstances of her personal grievance have had a negative impact on Ms Zhang. She is entitled to an award to compensate the humiliation, loss of dignity and injury to feelings consequent to such of \$10,000. HNZTWO is ordered to pay that sum to Ms Zhang without deduction within 21 days of the date of this determination.

If any remedy is awarded, should it be reduced (under s 124 of the Act) for blameworthy conduct by Ms Zhang that contributed to the situation giving rise to his grievance?

[29] As set out above HNZTWO's flaw in its approach to this issue was manifest from the start. Ms Zhang has not contributed to that situation and HNZTWO have repeatedly stated it holds no performance concerns about Ms Zhang. There is to be no reduction under s 124 of the Act.

Breach of good faith and penalty

[30] Ms Zhang seeks a penalty for breach of the duty of good faith. This is not a matter for which a finding of breach of good faith should be made or a penalty awarded. HNZTWO's actions have been found to amount to an unjustified disadvantage because its approach to the situation was not consistent with the terms of the parties' employment agreement and this has occasioned a disadvantage to Ms Zhang. Ms Zhang has been compensated for established losses arising from her personal grievance.

[31] A further matter which weighs against the award of a penalty is Ms Zhang's actions in secretly recording the meeting of 21 June 2012.⁴ Parties to employment relationships are obliged to be active, constructive, responsive and communicative.⁵ Secretly recording a meeting Ms Zhang had agreed to attend for the purpose of advancing an issue between the parties is not consistent with that good faith obligation.

⁴ Employment Relations Act 2000, s 157(3).

⁵ Employment Relations Act 2000, s 4(1A).

[32] While it is accepted Ms Zhang was alarmed and concerned by the change and upset by views expressed in the meeting it does not justify a secret recording or explain why Ms Zhang could not have told the other participants she wished to record the meeting or take other steps to feel supported in the meeting such as attending with a witness. The evidence before the Authority is that the revelation of Ms Zhang's actions in making the secret recording has caused strain in the employment relationship. This is very unfortunate but one that such action could reasonably anticipate.

Summary

[33] Health New Zealand - Te Whatu Ora must pay Mikayla Zhang \$10,000 under 123(1)(c)(i) within 21 days of the date of determination

Costs

[34] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[35] If parties are unable to resolve costs between them and an Authority determination on costs is needed Ms Zhang may lodge, and then should serve, a memorandum on costs within 21 days of the date of issue of the written determination in this matter. From the date of service of that memorandum NZHTWO would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[36] All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence. The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁶

Marija Urlich
Member of the Employment Relations Authority

⁶ For further information about the factors considered in assessing costs see: www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.