

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 396
3251579

BETWEEN

RUSSELL KINZETT
Applicant

AND

FIRE AND EMERGENCY
NEW ZEALAND
Respondent

Member of Authority: Nicola Craig

Representatives: Victor Corbett, counsel for the applicant
Shaun Brookes and Mike Henderson-Rauter, counsel
for the respondent

Investigation Meeting: 19 June 2024 by audio-visual link

Submissions (and further information received): At the investigation meeting and 20 and 21 June 2024
from the applicant
At the investigation meeting from the respondent

Date of determination: 3 July 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Russell Kinzett is a long serving firefighter, being with Fire and Emergency New Zealand and its predecessor, the New Zealand Fire Service for over 30 years.

[2] Fire and Emergency New Zealand (FENZ) is New Zealand's unified urban and rural firefighting organisation.

[3] Serious tensions developed at a fire station between station officer Mr Kinzett and firefighters, A and B. Mr Kinzett laid a complaint about A and B. Some time later

they laid complaints about him. FENZ instructed an experienced solicitor as independent investigator, to investigate the complaints.

[4] The investigator's report concluded there were breaches of FENZ's Standards of Conduct Policy by all three. Mr Kinzett was also found to have breached FENZ's Policy to address bullying, harassment and victimisation due to repetitive sexual comments amounting to sexual harassment and bullying A and B. A was also found to have breached that policy by bullying Mr Kinzett, including telling Mr Kinzett there was only two ways to deal with the issues between them - the easy way or the hard way.

[5] The report led to disciplinary action against Mr Kinzett which ultimately resulted in FENZ summarily dismissing Mr Kinzett on 6 May 2024. A and B remain employed.

[6] Mr Kinzett brings claims including grievances that he was disadvantaged by FENZ's unjustified actions, that FENZ breached the duty of good faith and he was unjustifiably dismissed. He seeks reinstatement to his role on an interim basis until his grievance claims can be fully considered. FENZ strongly opposes interim reinstatement.

The Authority's process.

[7] Mr Kinzett originally lodged unjustified disadvantage claims relating to the investigation with the Authority. That matter had been set down for an investigation meeting in July 2024. Mr Kinzett then notified the Authority that he had been dismissed. An application for interim reinstatement was lodged on 13 May 2024 and a timetable set for the provision of affidavits.

[8] Affidavits were received from Mr Kinzett and a fellow firefighter, along with FENZ's Michael Balmer (Senior People Advisor), Rochelle Martin (District Manager/Commander of the Waitemata District) and David Guard (Region Manager). Mr Guard was the decision-maker in Mr Kinzett's dismissal. No affidavits were received from Mr Kinzett's line manager or A or B.

[9] An investigation meeting was held on 19 June 2024 by audio-visual link to hear submissions. An issue was raised by FENZ at the meeting about a company owned by Mr Kinzett. Further material was sought by the Authority as a result. Mr Kinzett lodged an additional affidavit.

[10] In the usual way, I have dealt with this application for interim reinstatement on the basis of untested evidence and submissions. Disputed matters cannot be decided on such evidence.

[11] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

The issues

[12] The issues for determination in this interim reinstatement matter are:

- Is there a serious question to be tried, so does Mr Kinzett have an arguable case for unjustified dismissal and for permanent reinstatement?
- Where does the balance of convenience lie?
- Where, standing back and considering the case, does the overall justice lie until the substantive matter is determined?¹

History

[13] Many of those involved in this matter are very long-serving, including Mr Kinzett, A and B. Also, Mr Guard has 45 years' experience and Ms Martin about 23 years.

[14] In recent years FENZ sought substantial reviews with a view to understanding and improving its culture. According to Ms Martin, they concluded culture change was required because of toxic or inappropriate cultures existing within the organisation around the motu. Reports by former Judge Coral Shaw (2019) and Belinda Clark QSO (November 2022) are described as the drivers of real change.

[15] The Shaw Report found bullying and harassment as a feature of the FENZ workplace with the best practice aim being elimination. The Clark Review noted poor behaviours remained a feature and a zero-tolerance approach was urgently needed. This

¹ For example, *Brooks Homes Limited v New Tax Refunds Limited* [2013] NZSC 60, *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 and *Humphrey v Canterbury District Health Board, Te Poari Hauora O Waitaha* [2021] NZEmpC 59.

included a recommendation of dismissal of personnel found to have committed bullying or harassment.

[16] Mr Guard describes FENZ as an organisation that is trying to do better. Supervisors, such as station officers, are seen as being role models for others.

[17] Neither Ms Martin nor Mr Guard had a lot of direct involvement with Mr Kinzett prior to the disciplinary process.

Timeline

[18] The process involved:

- 20 October 2021 – Mr Kinzett formally complained about A and B
- November 2021 – mediator assigned from FENZ’s Behaviour and Conduct Office (BCO) to assist with possible resolution
- 22 November 2021 – Mr Kinzett was transferred to another station
- 23 March 2022 – Mr Kinzett returned to home station
- 4 and 6 July 2022 – A and B formally complained about Mr Kinzett
- August 2022 - independent Investigation begins
- January 2024 – independent investigator’s report released
- 5 February 2024 – FENZ invitation to meeting
- 12 February 2024- FENZ meeting with Mr Kinzett to hear his responses to the allegations
- 28 February 2024 – additional written material provided by Mr Kinzett
- 12 April 2024 – preliminary findings letter with proposed summary dismissal
- 19 April 2024 – Mr Guard met with Mr Kinzett and his lawyer. He also received a letter including written feedback
- 6 May 2024 – Letter advising of summary dismissal.

Arguable case regarding dismissal

[19] The first question is whether there is a serious question to be tried or an arguable case that Mr Kinzett's dismissal was unjustifiable. This is not a high test.

[20] The serious misconduct identified by FENZ was as follows:

- Breaches of Standards of Conduct Policy:
 - 20.1.20 – comment to B “where did you go wrong?” in presence of district manager who trained with B. Mr Kinzett says this was an attempt at humour and he apologised to B later when he learned how it made B feel
 - 16/17.6.21 – directing B to go into office and not come out after B declined to participate in a Girl Guides visit
 - 25.8.21 – yelling at A [in context of argument between the two];
 - 16.4.22 – telling a colleague word to the effect he would do “punitive [firefighting] drills on [A] and [B] to make them pay.”
- Policy to address bullying, harassment and victimisation and Sexual Harm Policy by making repetitive, unwelcome, and offensive comments found to amount to sexual harassment:
 - [Sometime from late 2020 to September 2021] telling A yogurt on his breakfast “looks like jizz”.
 - [Possibly in same time period and then on 16.7.22] making references to him blowing his load on two occasions
 - Having seen a baby on all fours in television saying, “on all fours and already in position.” See Mr Kinzett's comment below.
- Policy to address bullying, harassment, and victimisation by bullying A and B [seemingly covering the same events as above].

[21] Mr Kinzett highlights the following reasons why the decision to dismiss him was unjustified:

- The complaints were made after he was threatened in his office by the complainants and after they became aware he had recorded and made a formal complaint about them.

- The complaints were historical and seem to have been stored up by the complainants. This disadvantaged him as the decision maker placed ‘collective’ weight on the allegations.
- Most of the complaints related to the Covid-19 crisis where split second decisions had to be made, with widespread difference of opinion. In his view there were more arguments through the staff but the decision maker did not take that into account.
- The denied baby crawling comment was unnecessarily sexualised by the complainants and decision maker and laid at his door.
- The finding of sexual harassment should not have been made in this context of speaking to two long standing co-workers who were a little older than him.
- The decision maker failed to:
 - recognise those allegations were low level instead viewing them as serious misconduct when they were not.
 - separate out the two complainants when coming to his conclusion or consider the history and context
 - seek guidance on what constituted sexual harassment
 - consider Mr Kinzett’s claim and evidence that sexual banter and dark humour is rampant on station.
- The investigator and decision maker failed to interview Mr H, a key person involved in the “where did you go wrong” comment.
- The policies relied on had been a source of debate with his union and did not form part of his collective agreement.
- The decision maker failed to consider alternatives other than summary dismissal, stating they had been looked at but not identifying or describing why they did not adequately address his concerns.

[22] In order to justify the dismissal FENZ is required to act as a fair and reasonable employer could have done, under s 103A of the Act. This includes considering whether it had sufficiently investigated, put its concerns to Mr Kinzett, given him a reasonable chance to respond and genuinely considered his responses.²

² The Act, s 103A(3).

[23] Mr Guard accepts there was poor behaviour on both sides but sees Mr Kinzett's conduct as the most serious, as it involved sexual harassment and bullying. During interviews, Mr Guard was disappointed that Mr Kinzett downplayed or deflected the blame.

[24] FENZ says the investigator characterised some of the conduct as sexual harassment and it agrees, with the behaviour meeting the s 108(1) definition in the Act. Mr Kinzett's behaviour is seen as out of place with the modern work environment. Ultimately it concludes Mr Kinzett has a weak arguable case.

Conclusion

[25] The independent investigator carried out a detailed investigation which established the conduct identified and that it breached FENZ's policies. However, some of Mr Kinzett's points put up an arguable challenge to the process or decision-making followed by FENZ, leading to the point of dismissal. Possible concerns include disparity of treatment, the seeming application of a zero-tolerance approach to historical conduct occurring before the adoption of that approach, and whether this situation should reasonably have resulted in a lesser penalty than dismissal considering all the circumstances. Mr Kinzett was a long serving staff member. There was little evidence about what education FENZ had undertaken with staff, including Mr Kinzett, to train them on the changing standards of behaviour expected.

[26] I conclude there is an arguable case that Mr Kinzett was unjustifiably dismissed.

Arguable case for permanent reinstatement

[27] I now look at whether it is reasonable and practicable to reinstate Mr Kinzett. The factors overlap somewhat in this case. FENZ stresses Mr Kinzett's contributory behaviour which it says would disqualify him from permanent reinstatement.

[28] Reinstatement has been returned to its previous status as a primary remedy.³ That has an impact on how reinstatement is assessed.

Reasonableness

[29] Is it reasonable for Mr Kinzett to be reinstated?

³ The Act, s 125.

[30] Other than regards these complaints, Mr Kinzett appears capable of performing his role. He specifies that he holds no animosity towards FENZ, having had a clean disciplinary record for more than 28 years and maintaining good working relationships with his colleagues. He sees himself as remaining professional throughout the investigation and being able to remain so.

[31] Mr Kinzett denies hating the complainants. They have been working on opposite shifts at the same station during most of course of the investigation.

[32] There was some evidence of support for Mr Kinzett - one affidavit and over half a dozen emails from other staff.

[33] By contrast, Mr Guard refers to having lost trust and confidence in Mr Kinzett, with the unwanted sexual conduct being extremely serious. This included sexual harassment coupled with bullying and was in relation to Mr Kinzett's subordinates.

[34] Mr Guard, who has met with the complainants, describes them as visibly upset and crying when they described the impact of Mr Kinzett's behaviour on them. He understands this has continued. Ms Martin holds similar views.

[35] Ms Martin's broad evidence is that much distress and stress were suffered because of the investigation with a sense that Mr Kinzett was "not a very popular figure for a lot of our staff due to the investigation." His presence "during the investigation and after it was divisive." Ms Martin thinks that if Mr Kinzett were reinstated "we would see issues with staff refusing to work with him." In the absence of specifics, it is difficult to give this substantial weight.

[36] Ms Martin is also concerned about FENZ's reputation being at risk if Mr Kinzett is reinstated.

Practicality

[37] Mr Kinzett's role has properly been left vacant since his dismissal given the awareness, he was seeking reinstatement. There are also some other station officer roles at other stations.

[38] Mr Kinzett refers to being ready, willing, and able to return to work. The misconduct found by FENZ largely does not focus on him being unable to do his core job properly.

[39] Mr Kinzett's evidence is that he is committed to maintaining a productive employment relationship with FENZ. He has taken note of FENZ's position about making the types of comments referred to and has not and will not repeat that sort of behaviour.

[40] Of significance is the fact that throughout the lengthy disciplinary and investigation process, for over two years, it appears there has been no further incidence or complaint regarding Mr Kinzett.

[41] The affidavit from a fellow firefighter supports there being at least some level of support for Mr Kinzett. The two work in different stations but have worked various shifts together for over 20 years. That firefighter describes Mr Kinzett as making the right decisions and being no different to any other firefighter in terms of his demeanour and attitude.

[42] Ms Martin decided not to reach out to the complainants for their views on reinstatement as she thought it could negatively impact their health.

[43] Mention is made by Ms Martin of uncertainty about how FENZ would manage the risk of Mr Kinzett's interactions with the public, other staff, and other organisations. Yet it presumably felt itself able to manage those risks right up until his dismissal with no adverse events reported. Other than being on separate shifts to A and B, few if any additional precautions had been imposed or agreed on the basis of the evidence before the Authority.

Conclusion

[44] Although Mr Kinzett is likely to face some challenges if he seeks permanent reinstatement, including as regards contributory conduct, I conclude that he has an arguable case to be permanently reinstated.

Balance of convenience

[45] I now move on to weigh the interests of Mr Kinzett against those of FENZ, including a consideration of the adequacy of damages.

Mr Kinzett

[46] The firefighter's job was Mr Kinzett's childhood dream and is a big part of his life. He has lost that unless he is reinstated.

[47] Mr Kinzett describes dismissal as putting him under considerable financial strain. He has a substantial mortgage with repayments of around \$2,000 a fortnight. Mr Kinzett lives with his partner but he makes the mortgage repayments. He has two adult children living with him whom he cares for.

[48] Mr Kinzett describes there being a very real prospect of his having to sell the family home he has lived in since 1988. He does not have any savings. Having been dismissed he lost his entitlement to a gratuity payment of about six months' pay which he would have received if he had retired or resigned.

[49] The water blasting company Mr Kinzett has owned for over ten years is described as more of a hobby, operated primarily in summer months. He provides some documentation from a chartered accountant that the business has made a loss recently and the accountant recommended it was sold. On the evidence before me, the company does little to improve Mr Kinzett's financial position and does not substantially detract from his comments about his financial hardship.

[50] Being away from the job is described as a major career setback for Mr Kinzett, having dedicated himself to developing for years. He is not confident he could find a job with the same financial reward as FENZ. The prospect of seeking work in his mid-50's after spending so long in the fire service is daunting.

[51] Although some of Mr Kinzett's losses could readily be compensated by damages, others could not. He has lost his long standing dream job. He faces the risk of losing the long term family home he and his adult children live in.

FENZ

[52] I now look at any detriment which FENZ could or would suffer if Mr Kinzett is reinstated on an interim basis.

[53] FENZ is understandably concerned if there is a repeat of the behaviour in question – in terms of impacts on the recipients and on its reputation. However, the likelihood of that seems fairly minimal given, on the evidence before me, Mr Kinzett

has been able to maintain an acceptable standard of conduct over the last couple of years.

[54] FENZ is also invested in trying to improve the standard of behaviour and improve the culture within the organisation. Its witnesses are concerned about the perception which might be gained or confusion created if Mr Kinzett is allowed to return to the workforce, even if on an interim basis.

[55] On the other hand, it could be suggested that Mr Kinzett's continued workplace presence in the last couple of years, without behaviour of the type identified as misconduct, supports FENZ's mission of improving the organisational culture.

[56] Another thing FENZ is concerned about is the possible impact on A and B of Mr Kinzett being reinstated. Under other circumstances that could be a compelling element. Here however, A and B have been working at the same fire station as Mr Kinzett for a prolonged period, albeit on opposite shifts. There is little to support that arrangement seeming problematic although I cannot rule out the prospect of further impact on them.

[57] If reinstatement is ordered it would usually be on the basis of a return to actual work, rather than just to the payroll.⁴ If reinstatement proceeds to the payroll FENZ could face having to pay Mr Kinzett on an on-going basis but without the benefit of his work. It could potentially attempt compensation under the undertaking which it indicates may be difficult.

Conclusion on the balance

[58] For whatever reason, both parties have provided little direct sworn evidence from those who would be working at the same station as Mr Kinzett if he is reinstated. I do have to take into account his seemingly uneventful presence in the station for the last two years.

[59] Weighing up all I have got, the balance favours Mr Kinzett.

⁴ *Pacific Blue Employment & Crewing Limited v B* [2010] NZEmpC 112 at [22]-[23].

Overall justice

[60] In summary, Mr Kinzett has an arguable case for unjustified dismissal and for permanent reinstatement. The balance favours him. I now step back and check where the overall justice lies.

[61] It is difficult to fully assess the strength of the parties' cases on the limited material before me. It is fair to say that procedurally a substantial investigation was undertaken and the disciplinary process broadly reflected the elements in s 103A(3) of the Act. However, full information about disparity for example, is not available. I do not consider Mr Kinzett's case so weak as to unsettle the balance.

[62] Dates for investigation meetings in November 2024 are currently being offered. This means Mr Kinzett faces waiting until very late this year or early 2025 before his substantive claims are determined. This weighs in his favour.

[63] I have considered whether it would be appropriate to reinstate Mr Kinzett on an interim basis to a firefighter role rather than to his station officer role. As a station officer he was responsible for a handful of firefighters on a shift. Mr Kinzett was agreeable to reinstatement to a firefighter's role as an alternative. However, FENZ's position was that the reference to reinstatement being to the "former position or ... a position no less advantageous" in s 123(1)(a) of the Act prevents that.

[64] Consideration has also been given to whether Mr Kinzett should be required to move to another fire station to avoid further contact with A and B. There are roles available at other stations. This is a matter which I consider FENZ should be left with some discretion on.

[65] Mr Kinzett received a not insubstantial sum of holiday pay upon his dismissal. He undertakes to repay this upon interim reinstatement so his holiday balance could be reinstated.

[66] There is nothing under this head which sufficiently dissuades me from granting Mr Kinzett's application.

Orders

[67] I grant the application for interim reinstatement to the extent that FENZ is ordered to reinstate Mr Kinzett to a position of station office at a fire station in the

Auckland area by **5pm** on **17 July 2024**, as an interim measure until the Authority is able to determine his substantive claim. Mr Kinzett is to co-operate with FENZ regarding any arrangements necessary for his interim reinstatement.

[68] The parties are encouraged to attend mediation to discuss any arrangements relevant to Mr Kinzett's reinstatement and resolution of the issues between them. If voluntary attendance at mediation does not occur, the parties may return to the Authority to seek further orders.

Costs and next steps

[69] Costs are reserved. An Authority Officer will be in touch with the parties regarding the next steps in this proceeding.

Nicola Craig

Member of the Employment Relations Authority