IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-A-TARA ROHE

[2025] NZERA 276
3315120

	BETWEEN	BARRY YOUNG Applicant
	AND	HEALTH NEW ZEALAND - TE WHATU ORA First Respondent
	AND	CHIEF EXECUTIVE OF THE MINISTRY OF HEALTH Second Respondent

Member of Authority:	Claire English
Representatives:	Liz Lambert, advocate for the Applicant Rebecca Rendle and Mathew Austin, counsel for the First Respondent David Traylor, counsel for the Second Respondent
Investigation Meeting:	On the papers
Submissions received:	10 December 2024 and 28 February 2025 from Applicant 28 January 2025 from First Respondent 18 February 2025 from Second Respondent
Determination:	16 May 2025

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Mr Barry Young, raises claims of unjustified dismissal and unjustified disadvantage/s, and seeks remedies accordingly. He claims that he was

employed by the first respondent (Health NZ) and the second respondent (the Ministry) at relevant times.

[2] Health NZ states that at all relevant times, it was Mr Young's employer. It denies his claims, or that any remedies are properly owing.

[3] The Ministry states that at relevant times, it was not Mr Young's employer, and seeks to be removed from these proceedings.

[4] At a case management conference with all three parties, it became apparent that the identity of Mr Young's employer at the relevant time would need to be determined as a preliminary issue. Timetabling orders were made for the filing of relevant documents and legal submissions, and with the consent of all parties, this matter is determined "on the papers".

[5] 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.

The Issue

[6] The issue requiring investigation and determination is whether the first respondent or the second respondent was Mr Young's employer at the relevant time, period/s; and whether the second respondent should be properly removed from these proceedings going forwards?

[7] Both respondents also seeks costs against Mr Young.

Key Facts

[8] Mr Young was initially employed by the Ministry, in accordance with an individual employment agreement dated 13 February 2019.

[9] On 1 July 2022, Health NZ was established by the Pae Ora (Healthy Futures) Act 2022 (the Pae Ora Act). As part of this process, some staff working at the Ministry were transferred to Health NZ.

[10] Mr Young was advised that his employment would be transferred to Health NZ by way of a notification letter dated 30 May 2022. That letter referred to certain transitional provisions in the Pae Ora Act, specifically to clause 22 of Schedule 1 of that Act, which stated that:

> **22 Transfer of certain employees of Ministry of Health**
> (1) This clause applies to an employee of the Ministry of Health if, before the commencement date,—
>
> (a) the employee performed the functions or duties, or exercised the powers, of a specified departmental agency; and
> (b) the employee is notified in writing by the chief executive of that departmental agency and the Director-General that—
>
> (i) this clause applies to the employee; and
> (ii) on the commencement date, the employee will become an employee of Health New Zealand or the Māori Health Authority, as the case may be.
>
> (2) On the commencement date, the employee becomes an employee of Health New Zealand or the Māori Health Authority, as the case may be, on the same terms and conditions that applied to the employee immediately before the commencement date.

[11] The first respondent states that this transfer is further confirmed by the wording of clause 25 of Schedule 1, which refers to the employee's employment with the original entity ending with the date on which the employee moved to the new entity.

[12] In addition to the statutory provisions impacting Mr Young's employment, the first respondent says that as well as the letter of 30 May 2022, the change of employer was explained to Mr Young by way of an accompanying "Quick Guide" document, which stated amoung other things "You will then be employed by the new agency". The first respondent states that Mr Young did not query these matters at the time and it only became aware that Mr Young claimed to be an employee of the Ministry on the filing of the statement of problem.

[13] The Ministry states that it was not Mr Young's employer at the relevant time, being the period of November and December 2023 when the matters that gave rise to Mr Young's unjustified dismissal and unjustified disadvantage claims occurred.

[14] The Ministry supports the position taken by Health NZ and its submissions. It confirms its view that Mr Young was its employee from approximately 13 February 2019 (when Mr Young signed an individual employment agreement with it) to 10 June 2022 when Mr Young's employment was transferred to a transitional authority by way

of the Pae Ora Act, and then to Health NZ with effect on and from 1 July 2022, being the date Health NZ was established. The Ministry's position is that from that date, Mr Young became an employee of Health NZ and was no longer an employee of the Ministry.

[15] Both the Ministry and Health NZ reject the suggestion raised on behalf of Mr Young that he was employed by both of them "jointly". They both take the position that this is not contemplated by the Pae Ora Act, and is contrary to the plain words of that Act. They both also submit that this is not what occurred in practice, and as of 1 July 2022, Health NZ took over all aspects of Mr Young's employment.

[16] Mr Young says this transfer did not apply to him. In support of this, he raises several points, which I will summarise as follows:

a. that Health NZ is a crown agent "controlled" by the Ministry.

b. that his terms and conditions of employment, including his job title, work address, email address, and cell phone number, remained the same;

c. his manager remained the same;

d. he was not required to sign a new employment agreement;

e. the Ministry is an "appropriate authority" for the purposes of the Protected Disclosure Act 2022;

f. he intends to argue that his grievance claims are based on a course of conduct; and

g. that the transfer provisions set out in the Pae Ora Act only apply to collective employment agreements, whereas he was employed pursuant to an individual employment agreement.

Analysis

[17] I will consider these submissions for Mr Young in turn. First, I do not accept it is correct to state that Health NZ is a crown agent "controlled" by the Ministry. This is a bare assertion, and is contrary to the plain wording of the Pae Ora Act. Section 11 of Pae Ora states that "Health New Zealand is established", and that Health NZ itself is a

Crown agent as defined in the Crown Entities Act 2004, and that Act is to apply to Health NZ. I find that this assertion cannot support an argument that Mr Young was an employee of the Ministry on and from 1 July 2022.

[18] Mr Young states that he did not sign a new employment agreement with Health NZ. This is not a matter of dispute. Both Health NZ and the Ministry take the position that Mr Young's existing employment agreement with the Ministry was transferred to Health NZ by operation of statute, and that there was no requirement for Mr Young to sign a new employment agreement.

[19] This same argument applies equally to Mr Young's position that his terms and conditions did not change, his job title, work address, email address, and cell phone number, all remained the same, and his manager remained the same.

[20] Health NZ and the Ministry agree that these matters did not change. They say that this is exactly what was envisaged and intended by the Pae Ora Act in providing for the transfer of employment, in that existing terms and conditions of employment continued to be honoured, and to be managed in a way that was as least disruptive as possible.

[21] In particular, Health NZ and the Ministry say that Mr Young's manager did not change because that person was also transferred to Health NZ. There is no dispute about this. However, it is not explained how his manager's employment by Health NZ on and from 1 July 2022 might support Mr Young's claim that he himself remained an employee of the Ministry. I find that this cannot support Mr Young's argument.

[22] In relation to Mr Young's point that his email address did not change, Health NZ states there was a process to migrate approximately 100,000 email addresses to the new "tewhatuora.govt.nz" domain, and that the database team (of which Mr Young had been a member) did not have their addresses migrated until approximately April 2024. Health NZ submits that the email address on its own, is not sufficient to demonstrate employment status.

[23] In all other respects, I consider that these points are all part of a singular argument and a singular response by both Health NZ and the Ministry. That is, that Mr Young's employment was transferred to Health NZ by operation of law (as set out in

the Pae Ora Act), and that these other operational matters are not relevant to determining who his employer was which is a matter of law.

[24] I find that this is so. The transfer process is set out plainly at clause 22 of Schedule 1. It applies to certain employees of the Ministry immediately before the commencement date. Mr Young was such an employee. It requires that the employee has been notified in writing and in advance that the transfer clause applies to them and that on the commencement date, they will become an employee of either Health New Zealand or the Maori Health Authority, as the case may be. Mr Young was notified, by way of the letter of 30 May 2022, and his new employer was Health NZ.

[25] Subsection 2 of clause 22 provides that on the commencement date Mr Young became an employee of Health NZ, on the same terms and conditions as before. This occurred and Mr Young's own submissions point out that his terms and conditions of employment did not change. Insofar as this is relevant, I find that this is consistent with the statutory requirements of transfer, and tends to support the submissions of Health NZ and the Ministry that Health NZ was Mr Young's employer.

[26] Insofar as Mr Young's submissions suggest that his original employment agreement was signed with the Ministry and this has not changed, I find that this does not address the key point, that his employment was transferred to Health NZ by operation of statute law, and not by the signing of a new employment agreement. It cannot support the argument that the Ministry remained his employer following 1 July 2022.

[27] Submissions in reply for Mr Young state that clause 22 of Schedule 1 only applies to employees employed under a collective agreement, and therefore "persons who have IEA with the Ministry are retained as its employees". Submissions on this point refer to subclauses (3) and (4) of clause 22, which refers to employees covered by a collective agreement, and submits that because Mr Young was not employed under a collective agreement, clause 22 does not apply to him.

[28] However, subclause (1) and (2) of clause 22 apply to employees with individual employment agreements, which included Mr Young. Both Health NZ and the Ministry rely on subclauses (1) and (2) of clause 22, rather than subclauses (3) and (4). The fact that subclauses (3) and (4) provide transfer provisions for employees employed under

a collective agreement is not relevant to Mr Young's situation, which is as an employee with an individual employment agreement. This cannot support Mr Young's argument.

[29] Two further arguments are raised on behalf of Mr Young, being that the Ministry is an "appropriate authority" for the purposes of the Protected Disclosure Act 2022; and that he intends to argue that his grievance claims are based on a course of conduct.

[30] Health NZ submits that there is no requirement for a person to be employed by an appropriate authority as defined in the Protected Disclosure Act 2022, and submits that this definition is not relevant to the question of who Mr Young's employer was. The Ministry also submits that even where a protected disclosure is made in accordance with that legislation, this does not create an employment relationship.

[31] The submissions for Mr Young do not specify how or why the definition of an "appropriate authority" has any relevance to the question of who his employer was at the relevant time. A protected disclosure can be made to persons other than an employer and making a protected disclosure does not create an employment relationship. No attempt is made by Mr Young to argue otherwise. This cannot support Mr Young's argument.

[32] Finally, it is submitted for Mr Young that he intends to submit that his grievances were based on a course of conduct. It is submitted for Mr Young that "both Health NZ and the Ministry" were Mr Young's employers when "Mr Young was gathering evidence to raise the alarm".

[33] In considering this submission, I have considered the claims raised by Mr Young in his statement of problem and whether the Ministry properly needs to remain a party to these proceedings to respond to his claims. The claims made by Mr Young are those as set out in paragraph 1 of the statement of problem and summarised below:

a. A claim of unjustified disadvantage against Health NZ, that it took measures against him after 30 November 2023 causing him to resign his employment on 5 January 2024;
b. That Health NZ locked him out of his workplace email on 30 November 2023;
c. That Health NZ suspended him around 1 December 2023;

d. That Health NZ obtained an urgent interim injunction on or around 1 December 2023;
e. That Health NZ mislead the Authority in relation to certain emails on around 1 December 2023;
f. That Health NZ made a complaint to the police around 2 December 2023 and matters said to arise from this;
g. That both Health NZ and the Ministry failed to provide a safe workplace following disclosures made by the Mr Young on 30 November 2023;

[34] The statement of problem describes only one claim against the Ministry, namely the claim that on and from 30 November 2023, both Health NZ and the Ministry failed to provide a safe workplace.

[35] At 30 November 2024, Health NZ was Mr Young's employer rather than the Ministry. Mr Young has not explained how the Ministry might owe him any such duties as of that date. In addition, this claim is one he is explicitly pursing against Health NZ on the grounds that Health NZ owed him such duties as his employer at that time. This does not support a claim the Ministry was his employer at the relevant time, being as the statement of problem makes clear from 30 November 2023 through to 5 January 2024. It also does not suggest that the Ministry needs to remain party to these proceedings, as Mr Young is able to pursue this claim against Health NZ, which is in line with how he has expressed this claim in his own statement of problem.

Conclusions and Orders

[36] Mr Young was employed by Health New Zealand – Te Whatu Ora on and from 1 July 2022. This is as set out in the Pae Ora (Healthy Futures) Act 2022.

[37] There is no basis for the Chief Executive of the Ministry of Health to remain a party to these proceedings beyond its participation in this preliminary issue as to the identity of Mr Young's employer. Mr Young is able to pursue the claims as set out in his statement of problem against Health NZ, which is how they have been pled in that document.

[38] Accordingly, I direct that the Chief Executive of the Ministry of Health is removed as a party to these proceedings going forwards.

Costs

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

[40] If the parties are unable to resolve costs, and an Authority determination on costs is needed, the respondents may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum, the applicant will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[41] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual "daily tariff" basis unless circumstances or factors, require an adjustment upwards or downwards.[1]

Claire English
Member of the Employment Relations Authority

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