**NOTE: Attention is drawn to the order prohibiting publication of the applicant's name and identifying details referred to in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**WELLINGTON**

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

[2025] NZERA 526
3385723

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| | BETWEEN | YQL<br>Applicant |
| | AND | FIRE AND EMERGENCY NEW ZEALAND<br>Respondent |

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| Member of Authority: | Davinnia Tan |
| Representatives: | Ashleigh Fechney, counsel for the Applicant<br>Paul McBride, counsel for the Respondent |
| Investigation Meeting: | On the papers |
| Submissions received: | 17 July 2025 and reply submissions on 28 July 2025 from the Applicant<br>22 July 2025 from the Respondent |
| Determination: | 27 August 2025 |

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## PRELIMINARY DETERMINATION OF THE AUTHORITY

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### Employment relationship problem

[1] YQL is an employee of Fire and Emergency New Zealand (FENZ).

[2] Following a successful recruitment process, YQL was offered a new role as Group Manager, which commenced on 10 February 2025. On 30 April 2025 YQL was advised by FENZ that the new Group Manager role was not "formally established", and as such YQL would return to their previous role in FENZ.

[3] YQL claims that FENZ's actions constituted an unjustifiable disadvantage and seeks reinstatement to Group Manager.

[4] On 14 June 2025, the Authority received an application from YQL for urgent interim reinstatement under section 127(1) of the Employment Relations Act 2000 (the Act). YQL also applied for interim non-publication orders to prohibit publication of their identity, on the basis that there would be specific adverse consequences resulting from publication.

[5] FENZ says there is no unjustifiable disadvantage because it considers that the issue arises solely from a dispute over the interpretation of the relevant employment agreement, the Fire Emergency Commanders Association Collective Agreement (FECA CEA).

[6] FENZ says the FECA CEA provides for all "appointment processes to comply with the relevant requirements of the Fire and Emergency Act 2017 (s.26-29 or s.30) and any relevant Fire and Emergency policies."

[7] For ease of reference the relevant provisions of the FENZ Act state:

> **26 Appointments on merit**
> The board, in making an appointment to FENZ under this Act, must give preference to the person who is best suited to the position.
>
> **27 Obligation to notify vacancies**
> If the board intends to fill a position in FENZ that is vacant or is to become vacant, the board must, if practicable, notify the vacancy or prospective vacancy in a manner sufficient to enable suitably qualified persons to apply for the position.
>
> **28 Obligation to notify appointments**
> The board must notify the FENZ personnel of every appointment (other than that of an acting, temporary, or casual employee) made by the board to a role, rank, or level of position in FENZ.
>
> **29 Review of appointments**
> (1) The board must put in place for FENZ a procedure for reviewing appointments made within FENZ that are the subject of any complaint by FENZ personnel.
> (2) The procedure must comply with the guidelines prescribed by the Public Service Commission for such review procedures.
> […]

[8] FENZ's appointments review policy includes a statement that the "decision of the Chief Executive is final".

[9] FENZ's position is that reinstatement (interim or otherwise) is not available to YQL as there is not a valid personal grievance.

*Background*

[10] YQL, a FENZ employee, applied for a Group Manager role at FENZ that had been advertised. YQL was successful and was offered the role on 9 January 2025 which they accepted on 13 January 2025.

[11] The letter of offer stated that the "terms and conditions of employment will be the terms and conditions in this letter" and in the FECA CEA "on an individual basis".

[12] The letter also included the following 'appointment reviews' clause:

> Fire and Emergency New Zealand is required by law to have a process whereby existing members of Fire and Emergency New Zealand can formally challenge an appointment to any position, including the position you are now being offered. They have 14 days in which to lodge a request for review. In the event that a request for review is lodged, we shall make every effort to notify you that this has occurred. You should be aware that if a request for review is lodged, the employee making the request may be entitled to your assessment and selection information. T*his offer is therefore conditional upon there not being any successful application for review of your appointment* as any successful review of appointment could result in *your offer being revoked or your employment being terminated* if you have already commenced work. (emphasis added).

[13] The above clause is intended to comply with s29 of the FENZ Act which requires the board of FENZ to put in place a procedure for reviewing appointments made within FENZ that are the subject of any complaint by FENZ personnel.

[14] In January 2025, there were two requests for formal review of YQL's appointment by two unsuccessful FENZ applicants.

[15] YQL commenced their role as Group Manager on 10 February 2025.

[16] On 12 February 2025, the review commenced.

[17] On 7 March 2025 the Review Committee recommended that YQL's appointment be confirmed.

[18] On 30 April 2025, YQL was advised by FENZ that the "role has never been formally established", with the effect of YQL being returned to their prior role.

*Documents obtained by YQL under the Official Information Act 1982 (OIA)*

[19] FENZ documents obtained by YQL following an OIA request shows that:

a. The business case for recruitment of the Group Manager role was approved in March 2024
b. A signed approval to recruit was made on 6 November 2024, which followed with an advertisement for the role. This was signed by the hiring manager and regional manager.
c. Over December 2024 and January 2025, two complainants who were the unsuccessful applicants for the Group Manager role, sought a formal review of the appointment.
d. Also in January 2025, the Secretary of FECA wrote "on behalf of the committee" to Chief Executive (CE) Kerry Gregory of FENZ, setting out "concerns" that the appointment did not align with the "Paearu Mahi framework" (technical competency framework) that had been "developed" between FECA and FENZ. The Secretary of FECA stated that the appointment should "be reviewed, and overturned and awarded to a suitable candidate holding a Senior Station Office rank or equivalent qualification that matches our agreed Paearu Mahi process. Alternatively, the role should be re-advertised with clearly defined operational requirements in the role description. If this appointment proceeds, FECA will consider whether it constitutes a breach of contract and good faith concerning the collaborative work on the Paearu Mahi framework." The Secretary of FECA was not representing any complainant.
e. The review process in relation to the two complainants commenced in February 2025.
f. FECA was informed of a "review process underway".
g. On 7 March 2025, the Review Committee recommended confirmation of YQL's appointment. It also included several other recommendations, including that YQL stay on the rural roster. The Review Committee also said it considered that FENZ had followed its procedures and policies, and fulfilled its obligation under the FENZ Act to "give preference to the person who is best suited to the position."

h. On 21 March 2025, FENZ's chief executive Janine Hearn wrote to the CE stating that she had some concerns about the outcomes of the review process, noting that while the review committee had done the "job asked of them", there were "wider factors" that she believes should be considered, which was "to relieve the on-call burden" of one of the urban centres which she believed YQL was not able to do. She then stated "I believe there are a number of matters that need to be tidied up with respect to the implementation of Paearu Mahi, including the development of clear supporting policy, ensuring position descriptions for executive officer positions reflect its requirements etc." Ms Hearn recommended cancellation of the appointment and for the position to be re-advertised.

i. On 1 April 2025, the CE wrote to FENZ's deputy chief executives Janine Hearn and Ken Cooper stating that "based on the review process itself, there appears to be no reason to prevent the appointment from proceeding. However, the concerns you raised do not specifically relate to the appointment process but rather to whether the advertised position aligns with the ELTs decision to approve a Group manager position…This matter falls outside the scope of the review panel."

j. On 2 April 2025, Ms Hearn wrote to the CE stating her opinion that the position description did not reflect the "strong feature of the rationale put forward for establishing the role".

k. On 3 April 2025, Mr Cooper emailed the CE stating that the business case had focused on "supporting the urban on call roster…" but that the "preferred candidate has now been placed on the rural on call roster…" which "does not speak to the … point above."

l. On 4 April 2025, the CE stated that his "intended approach is to cancel the appointment as there were position description deficiencies in what was advertised compared to the rationale for the role being created. I will also cancel the approval of this position to be created as the context the business case was approved under by ELT has changed considerably… is there anything I am missing here or need to consider before making the decision as I have not been able to review the business case provided to determine what other risks or components supported the case."

m. On 9 April 2025, the CE emailed Ms Hearn stating that he would be "erring on the side of disestablishing the role until such time explicit approval to create the position is given" then stated "should there be an approval to recruit form signed by myself or yourself so delegation to approve the position regardless of ELT approval, based on the outcomes of the review panel, I will retain the position and uphold the appointment."
n. On 10 April 2025, Ms Hearn wrote to the CE advising her "understanding…that the position was appropriately approved…" which included a meeting with the "Minister which I understand…did not result in any change in decision."
o. On 23 April 2025, the CE "cancelled this recruitment process" and provided instructions for the role to be "disestablished until explicit authorisation to create the position is received." He also emailed the New Zealand Professional Firefighters Union who had requested a decision on the review be communicated, stating that "this review did highlight some procedural issues that I needed to consider alongside the review findings."

**The Authority's investigation**

[20] The matter was heard on the papers by way of legal submissions and affidavits from YQL and Ms Hearn, and the OIA documents.

[21] All material from the parties was fully considered. However as permitted by s 174E the Act, this determination has not recorded all evidence and submissions received.

[22] During the case management conference of 27 June 2025 I asked parties' counsel to provide submissions on the following issues:

a. Whether interim non-publication orders should be granted;
b. Whether the employment relationship problem is a personal grievance (within the meaning of s103(3)(1)(b)) or excluded by virtue of being a dispute (under s103(3));
c. If the matter is a personal grievance, whether the Authority should make an order for interim reinstatement under s127 of the Act.

**OIA documents**

[23] FENZ submitted that it "does not consent to" the OIA documents being referred to by YQL for the purposes of the preliminary issues, and that this "creates issues if that material was to be referred to or relief on by the Authority".

[24] The purpose of the OIA documents was to assist parties' submissions made in relation to the preliminary issues.

[25] The OIA documents were disclosed to YQL on 14 July 2025, and provided to the Authority that evening.

[26] As all of these documents originated from FENZ, there is therefore no prejudice to FENZ or issue as to natural justice.

[27] The documents are relevant to the issues for investigation and determination before the Authority. The Authority is entitled to rely on these documents as part of this determination.

**Application for interim non-publication**

[28] The starting point is that of open justice in the Authority, including the names of parties.

[29] In *MW v Spiga Ltd (Spiga)*[1], the majority set out a two part test when considering whether to grant non-publication:

(1) Firstly, there must be "reason to believe that the specific adverse consequences could reasonably be expected to occur";

(2) Secondly, the "Authority or Court must consider whether the adverse consequences that could reasonably be expected to occur justify a departure from open justice in the circumstances of the case".

[30] The Court said this part is a weighing exercise and that equity and good conscience may be involved.

[31] The grounds advanced by YQL included adverse consequences to existing professional relationships and reputation within FENZ; concerns over public discussion about the employment dispute and privacy concerns for YQL and their family.

[1] *MW v Spiga Ltd* [2024] NZEmpC 147.

[32] YQL accepted those within FENZ would likely know who this matter related to, but had concerns about broader reputation harm arising from public reporting, including fears that publicity would undermine the contribution they make as a volunteer for FENZ and other community facing roles. Counsel for YQL submitted that there is a legitimate interest in ensuring that every member of the fire service including those in volunteer capacities, is able to perform their duties without the burden of harm arising from unresolved employment disputes, particularly in smaller communities where volunteer firefighters are highly visible.

[33] Counsel for YQL also submitted that given the "interim" nature of proceedings, there is still a "live" issue for which the parties could resolve through a confidential record of settlement.

[34] Therefore, as submitted for YQL, non-publication is both necessary and appropriate to protect their mental wellbeing, to uphold the integrity of the reinstatement process, support the potential for a confidential resolution, and align with the principles of the Act in promoting productive employment relationships.

[35] Submissions advanced for FENZ centred on the fact that YQL's name was already public, which had been what gave rise to the applications for review. Counsel for FENZ also submitted that the fact of appointments sought under s 28 of the FENZ Act must be published for FENZ.

[36] Having reviewed parties' submissions and affidavits, I am satisfied that the making of interim non-publication orders is appropriate in the circumstances of this matter. I consider there is a potential risk of harm arising from the identification of YQL's identity for the reasons advanced on their behalf, particularly as they may impact, unnecessarily, on their family. There is merit in the submission that this also preserves confidentiality should parties settle the substantive matter.

[37] Although FENZ considers YQL's name is already made public due to the nature of the appointment which led to the current dispute, I consider that publication made for the purposes of the FENZ Act should not be conflated with publication made for the purposes of public reporting of an employment dispute.

[38] An interim non-publication order in relation to YQL's name and any identifying details is made under clause 10(1) of schedule 2 of the Act, until further order of the Authority.

[39] YQL is a randomly generated name and does not resemble the name of the applicant.

**Is this matter a personal grievance or does it derive solely from a disputed interpretation of an employment agreement?**

[40] The issue of whether the Authority may order interim reinstatement under s 127 of the Act is subject to whether the employment relationship problem arises from a personal grievance.

[41] Section 127(1) of the Act provides that:

> The Authority may if it thinks fit, on the application of an employee w*ho has raised a personal grievance* with his or her employer, make an order for the interim reinstatement of the employee pending the hearing of the personal grievance. (emphasis added).

[42] In relation to a claim for an unjustified disadvantage, s 103(3) of the Act sets out that:

> … unjustifiable action by the employer does not include an action deriving solely from the interpretation, application, or operation, or disputed interpretation, application, or operation, of any provision of any employment agreement.

[43] When s127(1) and s103(3) are read together, it is clear that interim reinstatements are not available to an applicant where the employment relation problem stems solely from a disputed interpretation or application of any employment agreement ("a dispute").

[44] In these circumstances, YQL claims they have raised a personal grievance. YQL's position is that FENZ's act of removing YQL from their position which they already commenced is a 'demotion' and constitutes an unjustifiable disadvantage under s103(1)(b) and must be assessed under s103A of the Act.

[45] FENZ's position is that the real issue is a disputed interpretation of an employment agreement that arises from an application of the appointments review provisions under the FENZ Act which is incorporated into the FECA CEA and reflected in FENZ policies.

[46] FENZ relies on an affidavit provided by Ms Hearn stating that following the Chief Executive's "investigations", that "neither he or I had formally approved the establishment" of the "position that had been advertised" and that "because the position had not been established, there was no vacancy". FENZ submits therefore, that there was no role to be demoted from and therefore no disadvantage.

[47] For reasons set out below, I have concluded that the employment relationship problem is *not* genuinely one deriving solely from a disputed interpretation of the employment agreement.

*Interpretation or application was not sole basis for FENZ's actions*

[48] Counsel for FENZ submitted that the fundamental issue between the parties is whether the Applicant "has some contractual right (albeit in the context of the FENZ Act) to employment (he says promotion into) the contended role" and that therefore, the issue is one that derives solely from the disputed interpretation, application or operation of the relevant employment agreement.

[49] It was further submitted that the CE's decision following the Review Committee's recommendation under the FENZ Act was to be "final" according to its appointment review policy and that he was bound by law to ensure compliance with the FENZ Act (and therefore to find otherwise would be to "quash" the CE's decision which could only be done by judicial review through the courts and not the Authority). I accept this would be the case if the CE was acting on the Review Committee's recommendations.

[50] FENZ submitted that the CE "concluded" as the "outcome of the review" that:

a. the 'vacancy' had never in fact or in law actually been created as required by the FENZ Act, it could not… be filled, and no one could be employed into the non-existent 'vacancy'; and
b. there was divergence…between what was…created…and the previous business case that was discussed."

[51] When reviewing the OIA documents, it became evident that YQL's appointment became problematic for FENZ following the email from the Secretary of FECA raising concerns that the appointment was not a suitable candidate based on its Paearu Mahi framework and stated that the role should be re-advertised otherwise FECA will consider whether proceeding with the appointment constituted a "breach of

contract and good faith". FECA's concern was not part of or subject to the appointment review process because appointment reviews can only be sought by FENZ personnel.

[52] When the CE sought comments from Ms Hearn and Mr Cooper, Ms Hearn's response was that the job description did not reflect the "strong rationale" for the business case. Mr Cooper commented that the business rationale had focused on "supporting the urban on call roster…" whereas YQL had been put on the rural roster. The CE then described the issue as "whether the advertised position aligns with the ELTs decision to approve a Group manager position…"

[53] When the CE was considering how to "solve" the "problem", he stated that the proposal would need to "come back to ELT with a more specific case about the problem to be solved and the specialisation/skillset required to address the problem". At one point, the CE expressed his intention to "cancel" YQL's appointment due to "position description deficiencies" and was leaning towards "disestablishing" the role in order to address the current "problem".

[54] FENZ relies on Ms Hearn's affidavit that neither her or the CE "formally approved" the job description that was advertised. However, the documents obtained under OIA also show that Ms Hearn's view at the time was that the position was appropriately approved and a formal signed approval to recruit was provided.

[55] Further, as the OIA documents show, the Review Committee found that all FENZ procedures and policies and obligation under the FENZ Act were fulfilled. It is therefore unclear what provision of the FENZ Act FENZ is relying on in purporting to attribute the returning of YQL to their previous role as "compliance with the FENZ Act". The CE's decision, therefore, was made outside the appointments review process.

[56] I consider it significant that the CE acknowledged that the Review Committee[2] found that the appointment process conducted was "robust" and he accepted that the issues he was facing (including those raised by Ms Hearn which mirrored FECA's concerns) fell "outside the scope of the review panel" (who supported the appointment of YQL).

[57] I find the CE's acknowledgement that these issues sat outside the scope of the Review Committee clearly indicates that the "problem" that needed to be addressed was

[2] For the avoidance of doubt, references to 'Review Committee' in this determination is synonymous with all references to 'review panel'.

*not* related to the appointments review process and that the two issues, although process related, were and are, distinct and separate processes.

[58] FENZ has not made clear how its decision to return YQL to their previous role derives *solely* from a disputed interpretation or application of the FECA CEA which includes the appointments review policy.

[59] In *Breen v Prime Resources Company*[3], there was "insufficient evidence to conclude that [the employer's] understanding of [the provision in the employment agreement] was anything other than genuinely held".

[60] However, in these circumstances, I am unable to conclude from the evidence (including Ms Hearn's affidavit) that FENZ's actions in returning YQL to their previous role within FENZ derived solely from a disputed interpretation or application of the FECA CEA, the terms and conditions of the letter of offer, or the FENZ policy.

[61] I am not persuaded by FENZ's attempt to rationalise its actions as solely an outcome of its interpretation (rightly or wrongly) of the FECA CEA. The action that led to YQL being returned to their previous role was an action by FENZ to retrospectively reengineer an imperfect internal process, that was unrelated to the appointments review process. The issue had more to do with internal functions of the Executive Leadership Team, and criticisms received by FECA which I find was one of the drivers for its actions in returning YQL to their previous role within FENZ.

[62] While I acknowledge the facts suggest there was potentially some technical flaw in FENZ's internal procedures, I am not persuaded that there is a genuine causal link between FENZ's decision to "return" YQL to their previous role (or cancelling the appointment) and an interpretation of the FECA CEA (which includes the provisions of the FENZ Act). On the facts and evidence, the issue FENZ was attempting to rectify more likely related to a separate procedure or issue; one that YQL was not party to and therefore could not form part of their employment agreement. A fair and reasonable employer could not, in these circumstances, make a decision on other grounds.

[63] I note that in *Clarkson v Department of Child Youth and Family Services*[4] Chief Justice Goddard held the following:

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[3] *Breen v Prime Resources Company Ltd* [2023] ERNZ 816.
[4] *Clarkson v Department of Child Youth and Family Services* EmpC Christchurch CC9/04, 5 May 2004 at 21.

> Looking at this case from a broad perspective, it seems to me that this is precisely *the kind of case in which the Authority should have shunned technicalities, including the technicality that the plaintiff's case may involve construing an employment agreement*. As it seems to me, *it includes much more than a dispute and does not turn solely upon a disputed interpretation, application, or operation of an employment agreement*. What it turns on is how the employer in this case handled the situation that had arisen and whether it treated the plaintiff with respect and dignity having regard to the fact that he was a long-standing departmental employee. (emphasis added)

[64] Therefore although the action to return YQL to their previous role followed the appointments review process, it was not solely derived from the provisions governing the appointments review process in the FECA CEA, FENZ Act or FENZ policy. While those provisions and the policy may be relevant to the issue, they are not the genuine sole reason for the employment relationship problem.

[65] As the Court noted in *Matthes v New Zealand Post Limited (No 3)*[5]*:*

> It will frequently be necessary in dealing with a claim that an employer's actions were unjustified, to determine whether the employer acted in breach of some binding obligation. If the nature of that obligation is in dispute the resolution of that dispute may be necessary in order to determine whether the employer's actions were justified.

*Outcome*

[66] I find that YQL's employment relationship problem is a personal grievance under s 103(1)(b) of the Act, and not a dispute excluded under s103(3) of the Act.

[67] As a consequence, I now consider the application for interim reinstatement under s 127 of the Act.

**Interim reinstatement**

*Applicable principles*

[68] The Authority has power to order interim reinstatement on the application of an employee who has raised a personal grievance, subject to any conditions considered appropriate. In exercising the power, the Authority must, pursuant to s127 of the Act,

[5] *Matthes v New Zealand Post Ltd (No 3)* [1992] 3 ERNZ 853 (EmpC) at 853.

apply the law relating to interim injunctions, having regard to the objects of the Employment Relations Act 2000.

[69] In summary, YQL must show that there is a serious question to be tried in relation to the claim of unjustified disadvantage and in relation to the claim of permanent reinstatement. Consideration must be given to the balance of convenience and the impact on the parties of granting or refusing an interim order. Finally, I must consider the overall interests of justice.

*Interim reinstatement not limited to an unjustified disadvantage claim*

[70] Counsel for YQL submitted that the power to grant interim reinstatement under s 127 was not limited to cases where a dismissal had taken effect, referring to the Court's statements in *WN v Auckland International Airport Ltd*[6]:

> While the power to order interim reinstatement is generally applied in cases where dismissal has taken effect, the wording of s 127 is not limited in this way — it is predicated on the existence of "a personal grievance", notably not "a personal grievance for unjustifiable dismissal". Unjustifiable disadvantage is, of course, a personal grievance and is specifically pleaded by the plaintiff in both the statement of problem and the statement of claim…

*Arguable case for unjustified disadvantage*

[71] The first question for consideration is whether there is an arguable case that YQL has been unjustifiably disadvantaged by way of the actions of FENZ. An arguable case means a case with some serious or arguable, but not necessarily certain prospect of success.[7]

[72] Section 103A of the Act sets out the test for assessing whether YQL suffered a disadvantage in their employment, and if so whether this was caused by an action by FENZ and whether that action was unjustified. This requires an objective assessment of whether its actions and how it acted, were what a fair and reasonable employer could have done in all the circumstances at the time the action occurred.

[73] FENZ's decision to "return" YQL to their previous role following commencement of the new role, will need to be assessed against the s103A test for justification.

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[6] *WN v Auckland International Airport Limited* [2021] NZEmpC 153.
[7] *X v Y Ltd v New Zealand Stock Exchange* [1992] 1 ERNZ 863.

[74] FENZ submitted that YQL has "no bona fide serious argument" that:

a. there was in law, or in fact, any vacancy in the new role, nor was YQL "entitled to any such role" after the CE's decision "on the review of the (purported) appointment";
b. "the 'final' decision of the CE in the review can and should be quashed";
c. "there was any unjustified disadvantage in the employment or terms thereof";
d. "He has any rights to the role that can override the statutory regime";
e. "that such rights are ones, under the guise of 'reinstatement', he is entitled to be placed into that…vacancy permanently, or at all".

[75] It was submitted in the alternative that "even if some argument might be made, that is at best very weak…"

[76] Submissions advanced for YQL referred to *NZPFU v New Zealand Fire Service*[8]*(NZPFU)*, where the Court directly addressed and rejected the argument that a flawed appointment and review process rendered the appointments incomplete. The Court expressly stated that it did not accept the submission that "the appointments were in some way incomplete because the process of making them was defective".

[77] Counsel for YQL also noted that the Court in *Draper v New Zealand Fire Service Commission*[9] held that matters concerning decisions made under the FENZ Act must be brought by way of judicial review in the High Court, which counsel submitted "reinforces that the review of appointments scheme" itself sits "outside" the Authority's personal grievance framework.

[78] Counsel also referred to the Employment Court's decision of *Ramkissoon v Commission of Police*[10] which, although was a decision in the context of police promotions, found that a revocation or "non-appointment" following a review process constituted an unjustifiable disadvantage.

[79] Counsel for YQL submitted that the decisions above show that while review rights exist, they do not override employment protections once an employee is actively working in the role.

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[8] *NZPFU v New Zealand Fire Service* [2008] NZEmpC WC 9/08, at [11].
[9] *Draper v Chief Executive of the New Zealand Fire Service Commission* [2000] NZEmpC WC 58A/00.
[10] *Ramkissoon v Commission of Police* [2017] NZEmpC 85.

[80] The letter of offer stated that the offer was "conditional upon there not being any successful application for review of your appointment", as it could result in the offer "being revoked or your employment being terminated if you have already commenced work."

[81] On the facts, I consider that there was no "successful" review as none of the review applications were upheld.

[82] FENZ has characterised its actions as "returning" YQL to their previous role rather than a "demotion" because it says there was no role created due to flaws in the approval process. However, it did not address how YQL was able to commence the new role on 10 February 2025 where they were remunerated at a higher salary, had access to a vehicle as a result of the new role, and was publicly referred to as Group Manager.

[83] As counsel for YQL has aptly submitted:

> Accepting FENZ's position would allow an employer to remove an employee from a role they have already commenced, without applying the legal test for justification under section 103A. This would set a dangerous precedent, particularly for external applicants who accept employment in good faith and begin performing their duties. If the review process can be used to retrospectively undo such appointments, then these employees could have their employment terminated without the protections ordinarily afforded under the ERA. That outcome is not only inconsistent with the statutory scheme, it also significantly undermines the integrity of fair employment practices across the public sector.

[84] Furthermore, I find that while there may well be some flawed technicality or procedure involved, as noted above in *NZPFU*[11], an appointment is not incomplete simply because the process in making an appointment was defective.

[85] What remains clear is that notwithstanding that none of the review applications were upheld, a decision was made following YQL's commencement of the new role to "return" them to their previous role, which YQL considers a demotion following approximately three months performing the role. As the Court found in *Ramkissoon v Commission of Police*[12], this can constitute an unjustified disadvantage.

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[11] *NZPFU v New Zealand Fire Service* [2008] NZEmpC WC 9/08, at [11].
[12] *Ramkissoon v Commission of Police* [2017] NZEmpC 85.

[86] As such, I find YQL has an arguable case that they were demoted by way of the "return" to their previous role, which could constitute an unjustifiable disadvantage.

**Arguable case for permanent reinstatement**

[87] Where it is practicable and reasonable to do so and sought, the Authority must provide for reinstatement as a primary remedy pursuant to s125(2) of the Act. The question is whether it is feasible or practical to "re-impose" the employment relationship. It is not sufficient for the employer to show resistance and strained circumstances to avoid reinstatement. [13] The threshold in arguing that reinstatement is not practicable or reasonable is a high one.[14]

*Practicable*

[88] For YQL, counsel submitted that reinstatement is practicable on the basis that the role was operative and that FENZ's claim that the role is non-existent is a "retrospective attempt to reverse a lawful appointment" which does not support the fact YQL was being paid and actively working in the role. Counsel submitted that any perceived gaps in YQL's experience or capability can be addressed through support and training.

[89] FENZ has not provided submissions explicitly on this point but has asserted that the "Authority is being asked to order creation of a new role, to then appoint to. A new role that the Respondent does not have, and does not need, or want…" and that "creation of such a role…is outside the Authority's proper power".

[90] I consider that the OIA documents do not support the assertion that FENZ does not have, need, or want, the creation of such a role. For example, I am cognisant that the business case for the role was driven by a "capacity gap" in the region in which YQL was subsequently appointed to. The business case discussed the existing Group Managers' "challenges… to catch up on or keep on top of growing workloads", noting that the region was "under-resourced" and that the existing Group Managers "struggle with the workload" and this had led to "extremely high" levels of stress. The need to relieve the "on-call burden" in relation to the urban region was noted under "*other* factors contributing to Group Manager workload" (emphasis added). As such, absent any contrary evidence, on the facts and evidence available before me, there remains a

[13] *Angus v Ports of Auckland* [2011] NZEmpC 122 at [63] and *Air New Zealand Limited v Hudson* (unrep) Employment Court, Auckland, AC 46/05, 17 August 2005, at p 8.
[14] *Vegepod NZ Ltd v Lowe* [2025] NZEmpC 76 at [73].

live issue of the operational need within FENZ for the role YQL was appointed to, in addition to the need to relieve those on the urban on-call roster. Notwithstanding that YQL had been put on the rural roster which had been the subject of the ELT's discussion and basis for finding a misalignment between the job description advertised and the claimed focus of the "business case" for the appointment, this is not a practical impediment to re-impose the employment relationship nor are there any other practical impediments to re-impose the employment relationship.

*Reasonable*

[91] Reasonableness involves looking at the prospective effects of an order on the applicant, the employer, other employees and, if appropriate, third parties.[15]

[92] In considering this factor, I acknowledge that reinstating YQL to the role may be of continued concern by FECA (not party to proceedings), which were specific to a technical competency framework it had developed in collaboration with FENZ. However, one can reasonably expect that such concerns can be managed as between FENZ and any third parties, or as YQL's counsel noted, any concerns about whether YQL meets every aspect of the role can be addressed through support and training, which I consider to be fundamental to any employment relationship where parties act in good faith. This is reasonable.

[93] I find YQL has an arguable case for permanent reinstatement.

**Balance of convenience**

[94] I accept that there would be significant prejudice to YQL if interim reinstatement were not granted as they had performed the role for some three months following previous secondments acting in this role. YQL had been on a higher salary, issued a vehicle, assumed day-to-day leadership of nine volunteer brigades regionally, and developed stakeholder relationships. It was submitted that YQL's appointment was the culmination of sustained professional effort.

[95] I accept that to refuse interim reinstatement would have the effect of not only exacerbating the loss of income, but, on the affidavit evidence, have a greater detrimental effect on YQL's career progression and loss of purpose. I do not consider that the effects can adequately be remedied by compensation and reimbursement.

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[15] *Hong v Auckland Transport* [2019] NZEmpC 54 at [65] – [67].

[96] FENZ has not provided any evidence of any prejudice from reinstatement.

[97] As a large entity, I consider that FENZ is able to accommodate reinstatement.

[98] I therefore find that the balance of convenience favours YQL.

**Overall justice**

[99] When I stand back from the detail of the claim, I consider that on balance, the overall justice favours YQL's case especially as it is undisputed by FENZ that YQL is faultless in these circumstances.

**Orders**

[100] YQL is to be reinstated to Group Manager.

[101] The parties are directed to mediation.

[102] If, following mediation, YQL wishes the investigation of this employment relationship problem to continue, they should advise the Authority, and a case management conference will be convened to timetable an investigation meeting of the substantive matter.

**Costs**

[103] Costs are reserved.

Davinnia Tan
Member of the Employment Relations Authority