

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH**

**I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI**

**[2025] NZEmpC 247
EMPC 438/2025**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN KNN
 Plaintiff

AND FIRE AND EMERGENCY NEW
 ZEALAND
 Defendant

Hearing: 1 October 2025
 (Heard at Christchurch)

Appearances: A Fechney, advocate for plaintiff
 P McBride, counsel for defendant

Judgment: 21 November 2025

JUDGMENT OF JUDGE J C HOLDEN

[1] In early April 2025, the plaintiff was offered and accepted employment with Fire and Emergency New Zealand. The offer from FENZ was conditional upon there not being a successful application for review of the plaintiff's appointment.

[2] An application for review was made and was successful. The plaintiff's appointment was cancelled, and the position was re-advertised. As the plaintiff had already started work, his employment was terminated.

[3] The plaintiff has filed a non-de novo challenge to a preliminary determination of the Employment Relations Authority that related to the inter-play between the Fire

and Emergency New Zealand Act 2017 and the Employment Relations Act 2000. The plaintiff challenges two findings:¹

- (a) That his offer of employment was conditional and, as a review of his appointment was validly initiated under FENZ's review of appointments policy, a completed review in the plaintiff's favour is necessary for his employment to become unconditional; and
- (b) The chief executive's decision on the review of the plaintiff's appointment provides substantive justification for the decision to cancel the plaintiff's appointment. This significantly limits the plaintiff's ability to proceed with an unjustifiable dismissal claim, although judicial review of the chief executive's decision is available.

[4] The plaintiff sought urgency for the challenge, which FENZ did not oppose. The plaintiff also sought a non-publication order from the Court. The Authority had made a non-publication order, and the Court therefore mirrored that order. This means that publication of the plaintiff's name and any identifying details are prohibited until either there is a further order of the Court or of the Authority.

[5] The hearing of the challenge proceeded promptly based on the facts as found by the Authority, with both parties giving written and oral submissions.

The Fire and Emergency New Zealand Act provides for reviews

[6] The FENZ Act makes provision for appointments. Relevant to these proceedings are the following provisions:

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

¹ *KNN v Fire and Emergency New Zealand* [2025] NZERA 531 at [51](a) and (d).

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.

(3) Nothing in this section relates to an acting appointment.

[7] Accordingly, FENZ had to have a policy in place for the review of appointments, which complied with the guidelines prescribed by the Public Service Commission.

[8] The Public Service Commission's guidelines include an example template of a review process, which is somewhat different from the review of appointments policy currently operated by FENZ. Nevertheless, there was no argument raised that the FENZ review of appointments policy was inconsistent with the guidelines prescribed by the Public Service Commission.

[9] Essential obligations that would be expected to be included in such a policy include notification of appointments, the ability for an employee to request a review of appointment, and for a review to be conducted in a way that is unbiased and fair. This includes that the requester of the review and the provisional appointee both should be advised in advance who will be conducting the review and given an opportunity to comment on those arrangements. The review panel then is expected to consider whether the provisional appointee was the person best suited to the position, and whether their appointment was made in accordance with good employer principles. A decision would then be made and given effect.

[10] In substance, FENZ's review of appointment policy included those obligations. Under FENZ's policy the ultimate decision on the review sits with the chief executive, to whom the review committee makes a recommendation, which may include:

- (i) confirmation of the original appointment;
- (ii) cancellation of the original appointment and re-advertising, or referral back to the initial selection committee for further consideration; or
- (iii) any other means of addressing the concerns of the reviewee, whether in whole or in part.

[11] Under the policy, the chief executive's decision is final.

[12] The policy provides that where an employee who applied for a role is unsatisfied with the explanation given for an appointment to that role, they may seek a formal review, which is what happened with respect to the plaintiff's appointment. The policy provides:

A request for formal review must be made in writing and received within 14 days, (inclusive of any time spent on an informal review), of the publication of an appointment in the Fire Service Gazette or other written notification of the outcome to the appointment process, whichever is earlier.

[13] Provided the application meets specified criteria, the chief executive of FENZ then must appoint a review committee, which is required to consider whether the requirement for appointments to be on merit (to appoint the person who is best suited to the position) and/or relevant guidelines and policies (covering due process) have been complied with. The review is to be completed, and a recommendation forwarded to the chief executive, no later than 21 days after the committee's appointment.

The timeframes in the policy were followed

[14] The plaintiff's appointment was notified to FENZ personnel on 8 April 2025. A formal review of the plaintiff's appointment was requested on 21 April 2025, within the 14-day period provided for in the policy's procedure.

[15] The plaintiff started employment with FENZ on 28 April 2025, before the review was completed.

[16] The review committee appointed to undertake the review forwarded its recommendations to the chief executive on 9 June 2025, complying with the requirement that it do so within 21 days of being appointed. It recommended that the plaintiff's appointment be cancelled, and the position re-advertised.

[17] On 23 June 2025, the chief executive of FENZ advised the plaintiff he had accepted the review committee's recommendations, with the effect being that the plaintiff's provisional appointment was cancelled, and the position was to be re-advertised. He was then paid wages for a notice period of one month.

[18] The plaintiff has subsequently commenced employment with FENZ in a fixed term role and has applied again for a permanent role with FENZ. That application was successful, but again there has been an application for review, which, as at the date of the hearing, had not been resolved.

What did the Authority determine?

[19] The personal grievance raised by Ms Fechney, on behalf of the plaintiff, was that while his offer of employment was subject to the outcome of a review process under the relevant FENZ legislation, that process was not completed prior to his commencement and that by allowing him to begin work, FENZ effectively waived the condition or failed to enforce it in time. On that basis, it was claimed that the plaintiff was a permanent employee entitled to the full protection of the Employment Relations Act and FENZ could not subsequently rely on the unmet condition as grounds for termination (particularly without a fair and reasonable process).

[20] Before the Authority, the parties agreed that the preliminary issue to be investigated was: what impact is there on the plaintiff's rights under the

Employment Relations Act and his employment agreement, from the provisions of the FENZ Act, particularly s 29, Review of Appointments?

[21] It was agreed that following determination of the preliminary issue, there may be a need for the plaintiff's interim reinstatement application to be considered and that otherwise his substantive unjustifiable dismissal claim would need to be considered.

[22] The Authority sought submissions on:

- (a) Whether FENZ had waived its right to rely on s 29 of the FENZ Act due to allowing the plaintiff to commence employment;
- (b) Whether FENZ failed to advise the plaintiff of any request for formal review of his appointment, prior to him commencing employment, and any implications from FENZ failing to do so;
- (c) Whether FENZ complied with its review of appointments policy and, if not, any implications from FENZ failing to do so (including timing of receipt of any requests for formal review of the plaintiff's appointment notification, advice to the plaintiff of the review having been commenced and outcome of the review process).

[23] In its determination, the Authority found that the chief executive's decision on the request to review the plaintiff's appointment provided substantive justification for the decision to cancel his appointment.²

[24] Mr McBride, counsel for FENZ, says that in making that finding, the Authority made a considered decision, that is, it examined the reason the chief executive accepted the recommendation and cancelled the appointment, and accepted that his decision was reasonably open to him in the circumstances. Mr McBride also points to the following sentence in the determination, which says that the finding significantly limits the plaintiff's ability to proceed with his unjustified dismissal claim.

² *KNN v Fire and Emergency New Zealand*, above n 1, at [51](d).

[25] I accept that read in isolation, that part of the determination may suggest that the Authority turned its mind to the decision of the chief executive to accept the recommendation, leading to the termination of the plaintiff's appointment. In the context of the determination as a whole, however, and read against the agreement as to what the preliminary issue was, it is at best unclear whether the Authority examined the substantive basis for the chief executive's decision. It found that it was substantively open to FENZ to rescind or cancel the plaintiff's appointment, relying on the explicit contractual statement of the offer of employment being conditional, and that this significantly limited his ability to proceed with his unjustifiable dismissal claim.³

The position of the parties

[26] The plaintiff acknowledges that the review of appointments mechanism used by FENZ reflects a well-established and legislatively entrenched principle within New Zealand's public service: that public service roles must be awarded based on merit, and that this merit-based ethos has remained a cornerstone of public service hiring in New Zealand.

[27] The plaintiff says, however, that, once he commenced work with FENZ, his employment was covered by the Employment Relations Act, and that the review outcome under the FENZ Act did not of itself provide substantive justification for terminating his employment.

[28] He also says that, in order to give proper effect to the legislative intention of s 29 of the FENZ Act, any review of appointment must be completed before an appointee commences employment in the role.

[29] He seeks declarations to that effect.

[30] FENZ relies on the conditional offer made to the plaintiff, which it says survived the commencement of the plaintiff's employment. It says the chief executive accepted the recommendation of the review committee and FENZ's decision to

³ At [47]-[48].

terminate the plaintiff's employment followed that acceptance in accordance with the FENZ Act.

[31] It says there never was a completed offer and acceptance; FENZ was within its rights (and indeed was obliged) to end the plaintiff's conditional appointment.

[32] It says further that there were no unjustifiable actions on its part that caused the plaintiff disadvantage.

FENZ is bound by its Act

[33] As this Court has previously noted, the FENZ Act provisions on appointments provide a very clear roadmap or checklist that must be worked through by FENZ in dealing with vacancies as and when they arise.⁴

[34] Although the plaintiff argued that, to be effective, any review had to have been completed prior to employment commencing, that is not a requirement of the FENZ Act, the FENZ policy, or of the Public Service Commission guidelines, and would cut across the rights of review established by the legislation.

[35] The rights of other FENZ personnel to apply for the review of an appointment is an important right, which FENZ must honour. It must follow its review process and properly consider the points raised by the person who applied for the review

[36] In short, the FENZ Act's appointment requirements cannot be waived by FENZ and/or by the plaintiff; they cannot contract out of going through the statutory process, which includes a potential review of appointment raised by affected FENZ personnel to challenge an appointment.⁵

⁴ *New Zealand Professional Fire Fighters Union v Fire and Emergency New Zealand* [2020] NZEmpC 197, [2020] ERNZ 463 at [9].

⁵ See *Principal of Auckland College of Education v Hagg* [1997] ERNZ 116 (CA). The Court emphasised that the conceptual underpinnings of employment law should not displace other important statutory obligations, specifically those that ensure appointments by merit in the public service.

Beyond that, the dispute is narrow

[37] Beyond that, the issue between the parties was narrow.

[38] FENZ accepted that the plaintiff was an employee of FENZ, albeit on a conditional agreement; as such, he was able to take a personal grievance for unjustifiable dismissal in respect of the termination of his employment. FENZ also accepted that the decision to terminate the plaintiff's employment had to be a decision that was open to a fair and reasonable employer in all the circumstances at the time the decision was made.⁶ It accepted too that consideration of the justifiability of the decision encompassed both substantive and procedural issues.

[39] FENZ says, however, that the Authority had the relevant material before it and found the chief executive's decision under the review policy on the request to review the plaintiff's appointment provided substantive justification for the decision to cancel the plaintiff's appointment;⁷ it found the termination of the plaintiff's employment was substantively justifiable. As noted earlier, I do not consider the Authority to have dealt with that issue determinatively.

[40] It is common ground, however, that the Authority left open for challenge whether the cancellation of the plaintiff's appointment was unjustifiable on the basis of it being procedurally unfair.⁸

Different issues arise depending on employment status of appointee

[41] The position of an appointee changes once they become employed by FENZ.

[42] Where a provisional appointee has not yet commenced, they are not an employee; they do not fall within the extended definition of employee, which includes "a person intending to work."⁹ If a conditional appointment was withdrawn prior to the employee starting work, the provisional appointee would not be able to bring a personal grievance. Where the employer withdraws an appointment as an exercise of

⁶ Employment Relations Act 2000, s 103A(2).

⁷ *KNN v Fire and Emergency New Zealand*, above n 1, at [51](d).

⁸ At [51](e).

⁹ *Edwards v Laybuy Holdings Ltd* [2023] NZEmpC 188, [2023] ERNZ 770.

a public power, however, the provisional appointee would be able to apply for judicial review.

[43] Once a person commences employment, they are an employee, and the Employment Relations Act applies to their employment. This includes that the termination of their employment, for whatever reason, would give rise to the right to bring a personal grievance. Again, where the employer withdraws the appointment as an exercise of a public power, the provisional appointee would be able to apply for judicial review. These rights are noted in the Public Service Commission's guidelines.¹⁰

[44] Where an employee, or former employee brings a personal grievance, in respect of a termination following a review, the issue under s 103A of the Employment Relations Act is whether the FENZ has acted as a fair and reasonable employer in the circumstances. Clearly, the context and purpose of the review procedures would inform that assessment, but it would be open to the Authority or Court to find the decision to withdraw the appointment and terminate the employee's employment was not one that was open to a fair and reasonable employer in the circumstances. That exercise would be a limited one, the Court and Authority could be expected to generally defer to the views of FENZ as to whether the appointment should be confirmed or cancelled, but nevertheless, could determine that the decisions were not ones that a reasonable person could have made in the circumstances.

[45] As acknowledged, and as noted by the Authority, procedural issues also may be considered, although it would be unlikely for a decision to terminate the employee's employment to be effectively rescinded, and the employee reinstated, based on procedural issues.

¹⁰ Public Service Commission *Guidelines for public service agencies conducting a review of appointments* (August 2024) <www.publicservice.govt.nz/system/public-service-people/employment-relations> at 9.

In conclusion

[46] In conclusion:

- (a) The plaintiff's appointment was conditional, as required by the FENZ Act.
- (b) Contrary to the plaintiff's submissions, his appointment remained conditional even after he started employment, and FENZ remained obligated to comply with its obligations under the FENZ Act, including to follow its review process and to properly consider the points raised by the person who applied for the review.
- (c) The plaintiff was, from the commencement of his employment, an employee of FENZ; he was entitled to raise a personal grievance about the cancellation of his appointment and the subsequent termination of his employment.
- (d) Any such personal grievance can raise both substantive and procedural grounds.
- (e) In assessing the justifiability of FENZ's actions, the test will be that under s 103A of the Employment Relations Act, of whether the dismissal or action was one open to a fair and reasonable employer in the circumstances.
- (f) Those circumstances include the context and purpose of the review process.
- (g) While that does limit the Authority or Court's consideration of the substantive basis for the cancellation of the appointment and consequential termination of the plaintiff's employment, it still leaves open for argument whether those decisions were ones that were open to FENZ in the circumstances.

[47] While my present inclination is that costs should lie where they fall, if either party seeks costs, memoranda may be filed.

J C Holden
Judge

Judgment signed at 9.30 am on Friday 21 November 2025