Employment Court of New Zealand

New Zealand Qualifications Authority v Hickey [2022] NZEmpC 76 (10 May 2022)

Last Updated: 16 May 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND WELLINGTON

I TE KŌTI TAKE MAHI O AOTEAROA TE WHANGANUI-A-TARA

[2022] NZEmpC 76
EMPC 94/2022

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	NEW ZEALAND QUALIFICATIONS AUTHORITY Plaintiff
AND	TIMOTHY PATRICK HICKEY Defendant

Hearing:	2 May 2022 (Heard at Christchurch via Virtual Meeting Room)
Appearances:	P McBride and A Nash, counsel for plaintiff P McKenzie-Bridle and R Bayer, counsel for defendant
Judgment:	10 May 2022

JUDGMENT OF JUDGE K G SMITH

[1] Timothy Hickey was employed by the New Zealand Qualifications Authority (NZQA) as a Senior Business Analyst. The individual employment agreement between them was for a fixed term until 24 December 2021. The agreement gave the reason for that fixed term as being the date when a workstream called PACER Plus was due to be completed.

[2] The PACER programme was not completed by then and the completion date was extended until the end of June 2022.

[3] On 2 December 2021, NZQA informed Mr Hickey that his employment would end on 24 December 2021 because it was for a fixed term. Mr Hickey did not accept that his employment would end then because he considered himself to be a permanent employee or was, at least, employed until the PACER programme ended.

[4] Mr Hickey's response was to lodge a claim in the Employment Relations Authority. He sought a declaration that he was a permanent NZQA employee and, among other claims, an order for interim reinstatement.

[5] On 25 March 2022, the Authority granted interim reinstatement.1 NZQA was ordered to reinstate Mr Hickey to the payroll from that date and to reinstate him to his former position within 21 days of the determination pending further order of the Authority.2 The parties were also ordered to attend urgent mediation.

[6] It is appropriate at this juncture to record that the Authority made an order for interim non-publication of the parties' names, or any information that could lead to them being identified, until the substantive investigation was concluded, or the Authority ordered otherwise.3 That non-publication order was continued by the Court.4 At the hearing of this challenge, Mr Hickey's counsel, Mr McKenzie-Bridle, confirmed that non-publication was no longer sought and the orders previously made are, therefore, discharged.

The challenge

[7] NZQA challenged the determination and sought a full rehearing.

[8] Mr Hickey sought to preserve the Authority's order for interim reinstatement pending the conclusion of the investigation, which I was advised by counsel is not anticipated to be held until September or October this year.

1 *PDE v RVU* [2022] NZERA 108 (Member O'Sullivan).

2 At [36].

3 At [40].

4 *RVU v PDE* [2022] NZEmpC 61 at [4].

[9] For completeness, the Authority's order reinstating Mr Hickey was stayed by consent subject to him being placed on, and remaining on, NZQA's payroll until further order of the Court.5

[10] The evidence at this hearing was provided by affidavit. Of necessity, it is untested. It goes without saying that the remarks in this decision are therefore provisional pending the Authority's substantive investigation and should be seen in that light.

What happened

[11] New Zealand is a party to the PACER Plus Treaty, the purpose of which is labour mobility in the Pacific region. The acronym was derived from the Pacific Agreement on Closer Economic Relations which is a free trade agreement.

[12] The Ministry for Foreign Affairs and Trade (MFAT) engaged NZQA by contract to deliver that part of the Treaty about facilitating the development, accreditation and recognition of Pacific Island qualifications.

[13] Shane Gaskin, the Chief Information Officer for NZQA, explained that MFAT contracted NZQA to perform the planning and scoping phase of PACER, described as Phase 1. It was to ascertain whether the framework was feasible. The contract was on a phase-by-phase basis with no guarantee as to any NZQA involvement in further phases. The planning and scoping phase of this work was to conclude by 24 December 2021.

[14] NZQA could not perform the projected work with its existing staff. It advertised for employees to work for fixed terms to undertake work for Phase 1. There is no dispute that the advertisement responded to by Mr Hickey was for a fixed-term position, although a copy of it was not produced in evidence.

5 At [2]–[3].

[15] An offer of employment was made to Mr Hickey by NZQA on 4 March 2021. He accepted the offer and began work on 15 March 2021. The position was Senior Business Analyst in Information Services, subject to conditions.

[16] The letter offering employment contained two paragraphs about when and why the employment would end. They were:

End Date

Your employment at NZQA will end on 24 December 2021, subject to earlier termination in accordance with the terms and conditions of your employment.

Reason for Fixed Term

To lead the Information Systems, Data and Statistics workstream of the PACER plus programme due for completion by 24 December 2021.

[17] The letter referred to a collective agreement binding on NZQA. Mr Hickey was advised that if he was a member of the Public Service Association (PSA), or elected to join the union, he would be covered by its terms and conditions.

[18] For completeness, the offer was accompanied by a position description, an overview of NZQA and information about the public service.

[19] Phase 1 required interaction with Pacific Island countries about logistics. Some of that work could not, Mr Gaskin said, be done except in person. Border closures caused by COVID-19 and related difficulties meant that the work could not be

completed by 24 December 2021 as previously contemplated. By about September 2021, agreement between MFAT and NZQA was reached to extend the delivery of Phase 1 until 30 June 2022.

[20] Mr Hickey made inquiries about the possibility of extending his employment. The first occasion when he did so was before PACER was extended, by email dated 26 August 2021. He wrote to his manager, Russell Spencer, that day and asked if his employment end date could be amended by mutual agreement and confirmed by a "Letter of Variation". Mr Spencer was asked to make any necessary arrangements with the human resources department of NZQA.

[21] On 3 November 2021, Mr Hickey renewed his request for an extension of his employment in a further email to Mr Spencer. He sought confirmation about the extension and asked if it would be conditional on his good behaviour. Mr Hickey advised Mr Spencer that the uncertainty over his employment was having a detrimental effect on his health and work performance and the need to apply for alternative employment was adding to his difficulties.

[22] Mr Spencer's response confirmed the conversation they had the previous day, about an extension, and included the following passage which assumed significance in this hearing:

Your contract *will* be extended. The extension is *not* conditional. I'm sorry I didn't make that more clear.

(Original emphasis)

[23] Mr Gaskin's evidence was that the work that could be done in New Zealand, including the Business Analyst role undertaken by Mr Hickey, was substantially completed by the end of 2021. He accepted that there was potential for an extension of the employment agreement. He maintained, however, that any extension needed to be signed off by him and, in so doing, to identify for how long one would be granted. It would also need to be confirmed by the human resources department. His evidence was that this consideration was overtaken by subsequent events.

[24] Mr Hickey's reference to his good behaviour in the email to Mr Spencer was because his time at NZQA had not been incident-free. NZQA says that there were relationship problems between him and other staff almost from the beginning of his employment. The situation was such that Mr Hickey was moved to work on a different floor at the NZQA workplace, away from other members of his unit. Mr Spencer summed up some of the difficulties as Mr Hickey "feeling passionately that most people are stupid or incompetent and will benefit from [Mr Hickey] pointing that out".

[25] Perya Short, NZQA's International Business Development Manager, was blunter. She described the situation from mid-2021 as deteriorating, summed up in the expression "Tim just lost the plot at work". She described him as being angry and

making sexist or misogynist comments to others in the workplace. What those comments were was not explained.

[26] Matters came to a head at a workshop in November 2021 at which PACER work was to be presented. The workshop was attended by 100 people including Secretaries for Education and other senior officials from several countries and senior New Zealand diplomats. The meeting was being conducted virtually.

[27] During the workshop Mr Hickey was to make a presentation in conjunction with Juan Ermenyi. Delays in earlier presentations meant that the workshop did not run to the scheduled time, it was about 45 minutes late.

[28] As the delays became apparent, Mr Hickey wrote several strongly worded private messages to his NZQA colleagues that were critical of the slippage in time and were described in the evidence as paranoid, angry and abusive. An accusation was made by him that Ms Short (his immediate manager who was chairing the workshop) was deliberately running over the allocated time to prevent him from speaking. Attempts to pacify Mr Hickey were unsuccessful.

[29] Eventually, Mr Hickey sent a message to Ms Short saying he was taking sick leave and left work. He did not make his presentation. It had to be assimilated and presented by Mr Ermenyi who had not planned for that eventuality. Mr Ermenyi described Mr Hickey as extremely "fired up" about the delay in his presentation and was concerned about Mr Hickey's safety.

[30] At some point Mr Hickey deleted the messages he had sent to his colleagues during the workshop. Mr Ermenyi was asked to recover them and did so, but they were not produced in evidence.

[31] Mr Hickey has not returned to NZQA's workplace since he left the workshop on 17 November 2021. When he did resume work, it was from home.

[32] On 26 November 2021, there was a meeting between Mr Gaskin and Mr Hickey who was then represented by the PSA. The reason for that meeting

was that Ms Short made a written complaint about Mr Hickey over what happened in the workshop, which NZQA decided it should investigate.

[33] Mr Gaskin separately made some inquiries of his own, prompted by a conversation he had about the workshop with Mr Ermenyi. In advance of the meeting on 26 November 2021, a copy of the complaint was supplied to the PSA but it was not separately sent to Mr Hickey by NZQA. There was also a discussion between Mr Gaskin and PSA officials about how to address matters in the anticipated meeting.

[34] The reason for these preliminary steps was because Mr Gaskin had become aware that Mr Hickey suffered from mental illness. As a result of contacting the PSA, Mr Gaskin was informed that Mr Hickey was supported by Workbridge, an organisation supporting people with disabilities and other physical and mental health issues in relation to their employment.

[35] The November 2021 meeting did not last long. Mr Hickey was provided with a copy of the complaint at it. It is alleged that in response he accused the union and NZQA of colluding and, after a brief private discussion with his union, he left and did not return.

[36] On 2 December 2021, NZQA advised Mr Hickey by letter that his fixed term employment agreement would not be extended and his employment would end on 24 December 2021. He was informed that the complaint by Ms Short was still to be investigated. The letter advised him that a complaint he had made concerning being stressed about work events would be investigated. Mr Hickey had requested a copy of a form he had filed relating to health and safety through NZQA's intranet and one was provided with the letter.

[37] At the time the 2 December 2021 letter was written the term of the employment agreement had about three weeks to run. It was proposed to Mr Hickey that he work from home during that time and attend the office only as specifically agreed with his manager. Comments about these interim working arrangements were sought.

[38] In response to NZQA's insistence that his employment would end Mr Hickey raised a personal grievance and lodged a claim in the Authority.

Applicable principles

[39] Under s 127 of the Employment Relations Act 2000 (the Act) the Authority, and the Court on a challenge from it, may grant interim reinstatement to a former employee pending the substantive investigation into that person's personal grievance.6

[40] The principles to apply are settled. In determining whether to grant interim reinstatement the law relating to interim injunctions is applied having regard to the object of the Act.7 The object of the Act is to build productive employment relationships through the promotion of good faith.8 A central feature of the Act is recognition of the importance to the employment relationship of the obligations both parties have to be responsive and communicative and that issues ought to be dealt with promptly and between the parties, if possible. In other words, supporting constructive employment relationships and repairing them where feasible.9

[41] The approach to interim injunctions can be briefly summarised:10

(a) The Court must consider whether the applicant has established that there is a serious question to be tried.
(b) The balance of convenience must be assessed.
(c) The overall interests of justice are to be considered.11

[42] There are two parts to establishing if there is a serious question to be tried:12

6 Employment Relations Act 2000, s 127(1).

7 Section 127(4).

8 Section 3.

9. See the discussion in *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59, [2021] ERNZ 153 at [5]–[7].
10. *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12]–[13]; see also *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [7].

11 *NZ Tax Refunds Ltd*, above n 10, at [12]; *Humphrey*, above n 9, at [6].

12 *Humphrey*, above n 9, at [7].

(a) Whether there is a serious question to be tried in relation to the claim of unjustified dismissal; and, if so

(b) Whether there is a serious question to be tried in relation to the claim for permanent reinstatement.

[43] A serious question is one that is not vexatious or frivolous.13 That is a relatively low threshold. Once it has been overcome, the merits of the case, so far as they are able to be ascertained at an interim stage, may be relevant in assessing the balance of convenience and overall interests of justice.14

Serious question to be tried of unjustified dismissal?

[44] Mr McBride submitted that a fundamental error was made by the Authority in approaching the matter as if Mr Hickey was dismissed. The case for NZQA is that there was no proper basis to order reinstatement because the employment was for a genuine fixed term. It was to a specified date, as provided for by s 66(1)(a) of the Act, so that when 24 December 2021 arrived, as a matter of law and through the effluxion of time, employment ended. It followed that Mr Hickey was not dismissed and could not therefore be reinstated.

[45] Mr McBride drew attention to the following:

(a) NZQA was undertaking a defined project for a third party (MFAT).
(b) The project was to conclude by Christmas 2021.
(c) A project team was required to undertake that work.
(d) Resourcing was sought for the project on a fixed term basis.
(e) Mr Hickey was appointed to a fixed term position following the advertisement of a fixed term engagement.

13 *NZ Tax Refunds Ltd*, above n 10, at [12].

14 *Brooks Homes Ltd v NZ Tax Refunds Ltd* [2013] NZSC 60 at [6].

(f) The terms of the employment agreement are clear and not disputed; it clearly states the fixed term and the reason for it.

(g) Appointment to a fixed term was permissible under the collective agreement.

(h) Mr Hickey knew throughout that his employment was to end, evident in his requests for an extension and applying for other jobs.

[46] The legitimacy of this fixed term agreement was said to be driven by the reality of funding from MFAT which defined its scope. On this analysis, it is immaterial that Mr Hickey was at the beginning of an inquiry into his behaviour arising from difficulties with his colleagues and what happened at the workshop.

[47] The argument was that the requirement in s 66(2)(a), to have a genuine reason for the fixed term agreement based on reasonable grounds, must exist at the beginning of the employment relationship. However, the legitimacy of the fixed term is not adversely affected by a subsequent change of circumstances. In a nutshell, the argument was that no dismissal occurred where the fixed term concluded and it was irrelevant that work on PACER continued after December 2021.15

[48] Mr McKenzie-Bridle took a different approach. He argued that there was a serious issue to be tried in relation to unjustified dismissal because:

(a) the employment agreement was not a valid fixed term one; and
(b) even if it was valid, NZQA is estopped from ending the employment relationship after the exchange of emails on 3 November 2021.

[49] The submission was that since both propositions are arguable, it could not be said that either of them was frivolous or vexatious. Consequently, the threshold was met.

15. Relying on *Principal of Auckland College of Education v Hagg* [1997] NZCA 410; [1997] 2 NZLR 537, [1997] ERNZ 116 (CA) at 546 and 547.

[50] The essence of Mr Hickey's case on these topics was that NZQA could not satisfy s 66(2)(a) of the Act. This submission relied on obligations under the PACER agreement and *Morgan v Tranzit Coachlines Wairarapa Ltd*.16

[51] A central criticism was about how and why NZQA nominated the 24 December 2021 end date, given that the PACER work is anticipated to take five years for planning and implementation. Mr McKenzie-Bridle observed that in providing its reasons for offering the fixed term, NZQA did not:

(a) acknowledge its broader role under PACER;
(b) refer to the funding arrangement between it and MFAT;
(c) explain that MFAT was funding NZQA's work on PACER in phases;
(d) explain that Phase 1 was only the planning phase; and
(e) explain it envisaged work taking approximately five years to complete.

[52] The submission was that the offer of fixed term employment to Mr Hickey was materially misleading and ambiguous as to the reason for the fixed term.

[53] The alleged misleading behaviour was about the relationship between MFAT's funding and NZQA's programme of work. This argument is linked to the fact that NZQA was employed to complete Phase 1 and, presumably because PACER-related work will continue for some time.

[54] The ambiguity was said to arise because the workstream required to be undertaken by Mr Hickey, which had both planning and implementation components, continued on and did not conclude on 24 December 2021. Phase 1 continued into this year, explaining NZQA's readiness to extend Mr Hickey's employment.

16 *Morgan v Tranzit Coachlines Wairarapa Ltd* [2019] NZEmpC 66, [2019] ERNZ 200.

[55] As mentioned, Mr McKenzie-Bridle relied on *Morgan* to criticise the funding arrangement NZQA used to justify the fixed term.17 In *Morgan* the Court found that financial uncertainty was not a genuine reason based on reasonable grounds to explain a lengthy serious of fixed term employment agreements. In the context of that case, the Court observed that financial uncertainty is an ordinary business risk and could not satisfy s 66 of the Act.18

[56] Consequently, Mr McKenzie-Bridle submitted that because the fixed term agreement did not comply with s 66 Mr Hickey was entitled to treat it as ineffective.19 In turn, the decision by NZQA to advise him that his employment would end on 24 December 2021 was an unjustified dismissal.

[57] Relevantly s 66 of the Act reads:

66 Fixed term employment

(1) An employee and an employer may agree that the employment of the employee will end—

(a) at the close of a specified date or period; or
(b) on the occurrence of a specified event; or
(c) at the conclusion of a specified project.

(2) Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must—

(a) have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and
(b) advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.

...

17 *Morgan*, above n 16.

18 At [20], [26] and [28].

19 Employment Relations Act 2000, s 66(6)(b).

[58] Where a fixed term employment agreement has been entered into it must state the way it will end and the reason for it ending that way.20

[59] Reasons that are not genuine for the purposes of s 66(2)(a) are those designed to exclude or limit employees' rights under the Act, to establish suitability for permanent employment or to exclude or limit rights under the Holidays Act 2003.21

[60] There is a stark difference in approach by both parties. Mr McKenzie-Bridle's approach takes with it an obligation on the part of an employer in NZQA's position to make more detailed disclosures to its employee, or potential employee, to explain the reason for the fixed term. It overlooks what was actually happening in this case. While it is true that the PACER Plus Treaty obligations were anticipated to last for several years, Mr Gaskin and Ms Short both gave uncontested evidence to the effect that NZQA was only contracted to provide the planning phase. That planning phase was to be completed by the end of December 2021.

[61] I do not agree that detailed disclosure of the sort argued for is required. Section 66(1)(a)–(c) of the Act provides three circumstances in which a fixed term employment agreement may end. They can be relied on where the employer satisfies s 66(2)(a) and (b); that is, to have genuine reasons based on reasonable grounds for specifying that the employment is to end in one of the ways stipulated by s 66(1). The conjunction linking s 66(2)(a) and (b) requires the existence of that genuine reason and advice to the employee of when or how the employment will end when the agreement is entered into.22 It does not require the reasons for the existence of the fixed term to be incorporated into the employment agreement in any more

detail. The employment agreement in this case did state an end date and a reason for it. If accepted, Mr McKenzie-Bridle's submission would create practical difficulties as illustrated by his reluctance to say how much more of the details of the transaction between MFAT and NZQA needed to be included in the employment agreement.

[62] There is no evidence, in my view, that Mr Hickey was misled by NZQA in the way claimed. Essentially, the argument put forward conflates the ability to plan and

20 Section 66(4).

21 Section 66(3).

22 Section 66(4).

then to decide to carry out the project without asking whether the tasks required in the first part are still required in the next part.

[63] This case is not analogous to the circumstances in *Morgan*.23 The ordinary business risk in *Morgan*, about ongoing funding, is different from this situation where NZQA was funded to provide only one aspect of the PACER work and had no guarantee of anything more.

[64] I consider that this aspect of Mr Hickey's claim does not meet the threshold test of being a serious question to be tried.

[65] That is not, however, the end of this analysis because the issue of potential ambiguity remains. Mr McBride's arguments for NZQA did not entertain any potential ambiguity and rested entirely on the date being clear as to its meaning and effect.

[66] However, as Mr McKenzie-Bridle pointed out, the letter of offer is potentially ambiguous because it may link the date when employment ends to the workstream, giving the impression that the purpose of the job is to complete that workstream. In that situation, the 24 December 2021 date assumes no particular importance beyond being an indication of when the workstream was initially anticipated to finish.

[67] There is support for this analysis in NZQA's conduct. While Mr Gaskin explained that most of the work of the Business Analyst's job was completed by the end of 2021, there was no dispute that consideration was being given to a contract extension for Mr Hickey. That would not have been necessary if his work was no longer needed.

[68] At this threshold stage, it could not be said that arguments about the potential ambiguity in the employment agreement can be dismissed as either vexatious or frivolous. Having made that observation, however, the point is only weakly arguable.

23 *Morgan*, above n 16.

[69] Is there an estoppel?24 The crux of this argument was that Mr Hickey was informed that he had secured an extension of his employment agreement, despite comments to the contrary by Mr Gaskin and Mr Spencer. They both said that while an email was sent to Mr Hickey about an extension, he knew that formalities needed to be completed through the human resources department and that no offer was binding on NZQA until that happened.

[70] Mr McBride submitted that Mr Hickey knew a binding agreement would not be created until and unless those formalities were completed, as shown by his August 2021 email asking about a letter of variation, and from the surrounding circumstances. He submitted that the email response from Mr Spencer should not be overread. In context, he was only communicating to Mr Hickey an event that was to take place in the future but had not actually taken place.

[71] I do not accept Mr McBride's submission. While it is likely that Mr Hickey understood formalities needed to be completed, the email from Mr Spencer was unequivocal. It is at least arguable that he had ostensible authority to bind NZQA given his seniority relative to Mr Hickey and that any other necessary formalities to be completed were not a prerequisite for an agreement to be concluded.

[72] A difficult issue that arises in considering an estoppel is whether NZQA is estopped from relying on the fixed term ending in December 2021, or from disputing the employment was for a fixed term at all. Mr McKenzie-Bridle's argument was aimed at the emails being about a project-related extension and responsibly acknowledged they could not go beyond completion of the workstream. Whatever the analysis, what is clear is that there was work for Mr Hickey to undertake relating to the reason for his employment.

[73] Perhaps recognising the difficult position NZQA is in over the 3 November 2021 email, Mr McBride accepted that there may be a serious question to be tried but submitted that it was only a weak case. I agree.

24 Mr McBride made the point that estoppel was not pleaded, but in his threshold argument that had little weight, the pleadings might be amended and Mr McKenzie-Bridle's observation was that it was offered in response to arguments for NZQA that there was no serious question to try.

[74] Mr McBride submitted that there was no basis for permanent reinstatement because:

(a) it is not reasonable or practicable;
(b) there is no funding, no ongoing role available to fill and reinstatement to an expired fixed term agreement would be irregular;
(c) there is "clear and undisputed" evidence of a material non-disclosure by Mr Hickey in applying for the job;
(d) the events of November 2021, in context, show a breakdown in the relationship precluding any realistic future employment arrangement;
(e) the deletion of data by Mr Hickey in relation to the November 2021 meeting counts against reinstatement;
(f) Mr Hickey's own sentiments about NZQA, expressed in his affidavits in the Authority and repeated in the Court, underscore that reinstatement would not be "workable or feasible"; and
(g) reinstatement would be highly problematic because Mr Hickey would then be in a position of facing disciplinary processes about the workshop, the deletion of data, and what is alleged to have been pre- employment non-disclosure.

[75] The argument that reinstatement would not be reasonable or practicable has already been touched on and arises from the submission that the Business Analyst's position had almost concluded by the end of December 2021. The deterioration in the working relationship has been mentioned and, to an extent, Mr Hickey acknowledged some problems but did not see them as insurmountable.

[76] Ms Short referred to circumstances which made working with Mr Hickey intolerable to her, although without much specificity. Mr Spencer described Mr Hickey not holding back opinions about others. While Mr Spencer did not work directly with Mr Hickey, regular issues were brought to his attention. The theme of them, according to Mr Spencer, was that they were usually about Mr Hickey getting angry or talking or behaving in ways which others found confronting and disturbing.

[77] Those concerns led to Mr Spencer meeting Mr Hickey regularly, trying to keep an eye on what was happening, encouraging him to work from home more than otherwise might have happened, moving his workstation from one floor to another away from the PACER project team, and weekly meetings with him.

[78] Mr McBride sought to emphasise how these difficulties in dealing with and managing Mr Hickey manifested themselves in problems over the workshop and, in particular, deleting the messages sent to Mr Hickey's colleagues. That action was characterised as an attempt to frustrate any future investigation.

[79] Mr Hickey was also said to have no insight into the problems he caused, which were likely to result in ongoing difficulties if he returned to the workplace because he did not accept his part in what happened. The basis for this submission was Mr Hickey's response to being asked to take leave while the workshop incident was investigated. He criticised NZQA for what was claimed to be a level of disorganisation, poor recruitment practices and a lack of incentives to perform well. That criticism extended to observing that those matters were the root causes of dissatisfaction in the workplace that NZQA needed to address rather than to "just blame people like me who strive for better". He described NZQA as dysfunctional and claimed that the events which gave rise to the workshop behaviour were preventable and had been caused by it. NZQA's decision to investigate what happened at the workshop was criticised by him as an astonishing over-reaction.

[80] Other examples relied on include Mr Hickey acknowledging a difficult working relationship with Ms Short and making a snide comment to her that his anxiety was preventable, meaning that it was avoidable if the workshop had not been allowed to run late. In these proceedings, Mr Hickey referred to his frustration at "stupid and incompetent things that NZQA staff did".

[81] Mr McBride's submission was that these examples showed that in brushes Mr Hickey had with NZQA the common feature was blaming his colleagues or NZQA and taking no personal responsibility for identified problems.

[82] Mr McBride's point about the nature of an alleged non-disclosure was Mr Hickey's response to a question asked of him before he was employed about any medical condition he had that might affect his work. He candidly and completely disclosed suffering from depression. There is a dispute between Mr Hickey and Mr Spencer as to whether an anxiety condition or other medical condition was also disclosed. Mr Hickey says he made full disclosure. Mr Spencer says he was only informed about depression.

[83] For completeness, no medical evidence about the nature and extent of Mr Hickey's health issues was presented, although it is worth noting that he did comment in his affidavit that he was medically fit for work.

[84] All of that was said by Mr McBride to lead to a conclusion that despite reinstatement being the primary remedy under

the Act, it was not practicable or reasonable in this case.25

[85] Mr McKenzie-Bridle said that there was a serious question to be tried about permanent reinstatement because:

(a) there was no valid fixed term to justify cessation of employment;
(b) the Act requires reinstatement to be considered as the primary remedy and will in this case be both practical and reasonable;
(c) the PACER project is ongoing;

25 Employment Relations Act 2000, s 125(2).

(d) there was no evidence from NZQA about its financial resources to count against reinstatement;

(e) the assertion that there is no job for Mr Hickey to return to is a self- serving one by NZQA, not supported by other evidence and is contrary to its preparedness to consider an extension;

(f) Mr Spencer, a senior manager, was sufficiently convinced of the need for Mr Hickey's ongoing role to make unequivocal binding representations to him about an extension of time; and

(g) there was no evidence of previous concerns being raised that might have led to termination of the agreement.

[86] It is arguable that Mr Hickey might be able to persuade the Authority to permanently reinstate him because NZQA agreed to an extension. The difficulty facing Mr Hickey is that, on the best view of his case, any order would only be until the completion of Phase 1 of the project on 30 June 2022. That must be considered alongside difficulties to be faced over inquiries into his alleged poor-quality behaviour, pre-employment disclosure about his health, problematic working relationships and alleged lack of insight into what caused them.

[87] Weighing up these factors, it is at best weakly arguable that Mr Hickey might be able to obtain reinstatement to employment for a limited time.

Balance of convenience

[88] The balance of convenience involves weighing up the interests of the parties, at this stage, to determine whether interim relief ought to be granted. Although referred to as the balance of convenience, it has been described elsewhere as assessing the balance of the risk of doing an injustice.26 The task required is to balance the injustice that would be caused to Mr Hickey if an interim order was refused and a

26 *Mitre 10 (New Zealand) Ltd v Benchmark Building Supplies Ltd* [2003] 3 NZLR 186 (HC) at 191 citing *Cayne v Global Natural Resources plc* [1984] 1 All ER 225 at 237. See also *VMR v Civil Aviation Authority* [2022] NZEmpC 5 at [136].

permanent one subsequently obtained, against the injustice that would result to NZQA if an interim order was made and subsequently discharged.

[89] Mr McBride argued that the balance of convenience favoured declining interim relief. The submission was primarily based on the short-term nature of the fixed term employment agreement. He characterised the present litigation as an unjustified attempt to convert that short term into something else, which is unfair to NZQA.

[90] The other factors said to favour NZQA have already been touched on. They were the breakdown in the employment relationship, concerns about alleged non- disclosure and the weak nature of the substantive claim.

[91] Importantly, the Court was cautioned against putting Mr Hickey back into the same workplace where the working environment had seemingly not been conducive to his health, and where his conduct was to be called into question.

[92] Finally, on this subject, Mr McBride argued that this assessment requires a consideration of damages and whether they would be an adequate remedy. If they would, his argument was that interim relief ought to be refused. Part of the submission was an observation that there is a significant disadvantage to NZQA if the Authority's interim order stands until the investigation meeting is held later this year. NZQA would continue to pay Mr Hickey but there was no evidence supporting his undertaking as to damages to show that he would be able to repay what is paid to him if it transpires that his employment ended lawfully by effluxion of time on 24 December 2021.

[93] Mr McKenzie-Bridle said that the balance of convenience favoured Mr Hickey. He relied on the merits of the claim,27 both as to the absence of a valid reason for a fixed term agreement and NZQA being estopped from relying on one because of the exchange of correspondence.

27 See *NZ Tax Refunds Ltd*, above 10.

[94] An unlikely coincidence between Mr Hickey's employment ceasing and the avoidance by NZQA of having to investigate the complaint by Ms Short was said to favour interim reinstatement.

[95] Mr McKenzie-Bridle also argued that there would be no impact of any significance on other parties but there would be a significant one on Mr Hickey. That is because he would lose employment, having a profound effect given his previous unemployment, inability to find replacement work and that being in employment is more important to him than financial compensation.

[96] It was said that full disclosure was made by Mr Hickey of his medical condition and it was incumbent on NZQA to take appropriate measures to assist him in the workplace so that should have no bearing on the outcome; conversely, NZQA's concerns about the health and safety of other staff was overstated and working relationships were able to be managed.

[97] Importantly, Mr McKenzie-Bridle criticised the present expressions of concern about Mr Hickey being in ongoing employment, given that they all seemed to come to a head at or after the November 2021 workshop, but none of the previous interchanges between him and other staff prevented an extension being offered.

[98] In a sense, the case was that there was no substance to the argument of a breakdown of trust and confidence that meant reinstatement was inappropriate. That is because mere assertions of lost trust and confidence are insufficient to be a genuine barrier to reinstatement, especially since it is the primary remedy.28

[99] Finally, on the issue of balance of convenience, Mr McKenzie-Bridle addressed the proximity to a substantive hearing. He referred to *Wellington Free Ambulance Service Inc v Adams* where the Court observed that the relative proximity of an outcome in the Authority favoured declining interim reinstatement.29 In that case the hearing was two months away whereas in this case it is not clear when it will be. That uncertainty, it was said, should count in favour of interim reinstatement.

28 See *Western Bay of Plenty District Council v McInnes*, above n 10.

29 *Wellington Free Ambulance Service Inc v Adams* [2010] NZEmpC 59, [2010] ERNZ 128.

[100] I consider the balance of convenience favours NZQA. It is being required to employ, or re-employ, an employee who has been difficult to manage over the short duration of his employment. In that time NZQA was obliged to deal with a continually deteriorating working relationship. The close management Mr Spencer described did not bear fruit or prevent what happened at the November 2021 workshop.

[101] As well as deteriorating, or deteriorated, working relationships, if Mr Hickey was to return to work he would face more than one investigation into the alleged non- disclosure of relevant aspects of his health, about what happened at the workshop and his deletion of information.

[102] While reinstatement is the primary remedy, the evidence presented at this stage, and acknowledging that it is yet to be tested, suggests it will be very difficult to re-establish a working relationship. There was sufficient evidence of how Mr Hickey behaved in the workplace to give little confidence that there would be a change in his attitude or behaviour given his strongly held views about NZQA. The situation is different from, for example, *Humphrey* where an independent investigator was able to conclude that the employment relationship was not beyond repair.30

[103] Ranged against that, Mr Hickey has at best an opportunity to be reinstated until the conclusion of the PACER workstream that is to end on 30 June 2022. On the basis of an arguable case, the best position he might be in is to obtain reinstatement until then but that would not carry through to continuing on NZQA's payroll until the investigation later this year.

[104] The balance of convenience favours NZQA.

Overall interests of justice

[105] This part of the assessment invites the Court to step back and look at the overall issues before reaching a decision.

[106] I consider that the overall interests of justice track in the same way as the balance of convenience.

30 *Humphrey*, above n 9.

Conclusion

[107] Mr Hickey has a weakly arguable case that his employment did not end in December 2021. The balance of convenience favours NZQA, as does the overall interests of justice.

[108] My conclusion is that an adequate basis for interim reinstatement was not made out and it follows that the challenge to the Authority's determination must succeed. The order reinstating Mr Hickey to his former position at NZQA is set aside. The stay ordered on 31 March 2022 is also set aside.

[109] Costs are reserved. If they cannot be agreed, memoranda may be filed requesting an exchange of submissions.

KG Smith Judge

Judgment signed at 3 pm on 10 May 2022
