

**This matter is subject to an interim non-publication order, see paragraph [40].**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2022] NZERA 108  
3159751

BETWEEN PDE  
Applicant  
AND RVU  
Respondent

Member of Authority: Geoff O’Sullivan  
Representatives: Peter McKenzie-Bridle, counsel for the Applicant  
Paul McBride, counsel the Respondent  
Investigation Meeting: 9 February 2022 at Wellington  
Submissions [and further Information] Received: At the investigation meeting, 1 March from the Applicant  
9-10 February, 3 March and 18 March from the Respondent  
Date of Determination: 25 March 2022

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] PDE is employed by RVU as a senior business analyst and his terms and conditions of employment are set out in a collective employment agreement and an offer of employment dated 4 March 2021. The offer of employment purported to be for a fixed term, as follows:

**End date**

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

[2] The reason for the fixed term was said to be the programme PDE was employed to work on, was due for completion by 24 December 2021.

[3] The parties are in agreement that despite PDE's view that his employment was permanent, or at least should continue until the programme was finished, it ended at the direction of RVU on 24 December 2021.

[4] RVU's position is that the employment ended as was provided for in the fixed term agreement. There was no dismissal.

[5] PDE has filed a statement of problem with the Authority alleging that although the employment was stated to be fixed term, PDE was employed to work on a work programme that was expected to last at least five years with approximately two years in planning and three years in implementation. Further, it is not disputed that he emailed his manager on 3 November 2021 stating, amongst other things, "I just wanted to confirm that you spoke to me yesterday about the extension of my contract ...". He received a response on the same day by email stating "We did speak yesterday. Your contract *will* be extended. The extension is *not* conditional. I'm sorry I didn't make that more clear".

[6] Accordingly, PDE's position seems to be that either the agreement was extended, or the reality of the situation is that the fixed term agreement was not fixed term in fact. PDE says this is the case because although the agreement provided for employment to end on 24 December 2021, this was only because it also provided that the project would end on the same day. As the project was continuing, PDE says so too should his employment. Accordingly he seeks compensation and reinstatement.

[7] RVU defends the matter in its statement of reply on the basis that the fixed term arrangement simply came to an end. In respect of the email of 3 November which PDE says purports to extend the agreement, RVU states the person sending the email did not have authority to extend the engagement and PDE was well aware that that was a decision that would rest with other parties. It follows therefore, says RVU, that he could not reasonably have inferred from the email that his employment was extended. In any event, it was not and came to an end in accordance with the agreement between the parties on 24 December 2021.

[8] PDE's substantive claim was lodged with an application for interim reinstatement and urgency. It is the application for interim reinstatement that this determination deals with. The

Authority is asked to determine whether PDE should be reinstated to his position pending a hearing and determination of his substantive claim.

[9] This determination will not decide the true nature of the agreement between the parties and/or whether PDE was unjustifiably dismissed. Nor does it decide whether, if a later determination considers PDE was unjustifiably dismissed and/or RVU could not rely on the agreement being fixed term, that PDE would be reinstated on a permanent basis or what other additional relief he may be entitled to.

[10] As indicated above, RVU disputes the validity of PDE's claims including the claim of unjustified dismissal. It strongly opposes the application for interim reinstatement which it resists on a number of grounds, though what seems to be the thrust of its opposition is –

- (a) As employment was subject to a fixed term employment agreement, and as that has expired, as a matter of law, by effluxion of time (and not any dismissal) the employment agreement has concluded. *“At its simplest, there is nothing to reinstate to”*.<sup>1</sup> If the Authority were to consider reinstatement, it would have no jurisdictional or other proper basis for doing that because in essence PDE is seeking to have the Authority create a new and different employment relationship.
- (b) Further, a number of affidavits were filed in opposition to interim reinstatement by the respondent and these focused on the difficulties other employees would have working with PDE in the future. The affidavits contained allegations that PDE grew angry and frustrated and others found his anger shocking and disturbing. I was told that if PDE were to be returned to the workplace, none of the people he was required to work with closely were prepared to work with him.
- (c) One affidavit focused on the effect the return to work would have on the deponent. This affidavit provided that the deponent would not consider themselves to be emotionally or professionally safe if the applicant were to be reinstated.

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<sup>1</sup> Submissions of counsel for the respondent dated 9 February 2022

### **Legal framework, interim orders**

[11] The Court observed in *Humphrey*, in determining whether or not to order interim reinstatement, regard must be had to the object of the Employment Relations Act 2000 (the Act) which is to build productive employment relationships through the promotion of good faith. The Court noted:

One of the central features of the Act is its recognition of the importance of the employment relationship, 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. It is with this in mind that applications for reinstatement are to be dealt with.

[12] In this case, although the affidavits filed by RVU are objecting to interim reinstatement, in essence the justification by RVU for its action in ending employment is that it had a valid fixed term agreement. Although it also says there were concerns about PDE's behaviour which, if employment had continued, would have been dealt with, there is nothing to suggest the relationship between the parties could not be fixed.

[13] The legal framework I must follow in respect of the application for interim orders can be summarised as follows:

- (a) The applicant must establish that there is a serious question to be tried to a claim of unjustified dismissal and if so the applicant must establish there is a serious question to be tried in relation to the claim for permanent reinstatement; and
- (b) Consideration must then be given to the balance of convenience and the impact on the parties if granting or refusing to grant, the interim orders sought. The impact on any third parties will also be relevant to the weighting; and
- (c) The overall interests of justice are to be considered, standing back from the detail required by the above steps.

[14] The parties each provided evidence by way of affidavits and made submissions at the investigation meeting held on 9 February 2022. This means, at this interim stage, the Authority has proceeded on the basis of untested evidence, which will not be tested until the substantive hearing.

**Serious question to be tried in relation to the claim of unjustified dismissal**

[15] The threshold for a serious question is that the claim is not frivolous or vexatious. Analysing this is not an exercise of a discretion, rather it must be based on a judicial assessment of the evidence, albeit untested, in the submissions advanced.<sup>2</sup> In this case, the serious question to be tried is whether or not PDE's employment arrangement was a valid fixed term or not. It further follows, that if not, then was the termination of PDE's employment something a fair and reasonable employer could do under all the circumstances.

[16] Mr McKenzie-Bridle, counsel for PDE, submitted that his client had a strongly arguable case that the termination of employment was unjustified. He based this on two grounds: first, that the employment arrangement only provided for employment to end on 24 December 2021 because the project itself was to end on that date. He submitted that this could never have been the intention as it was always clear the project would take much longer. He submitted that indeed the project was continuing and would carry on.

[17] Secondly, he pointed to RVU's email of 3 November which he said unequivocally stated that the employment agreement would be extended. He said his client was entitled to rely on that advice and indeed, under the circumstances, RVU had no other option but to either extend the employment agreement or accept it was permanent employment. He noted that there may have been complaints against PDE but if there were, these had not been investigated and no negative findings could be made against his client.

[18] For RVU, Mr McBride was adamant that there was no arguable case. This was strongly premised on his submission that there could be no dismissal. He relied on the Court of Appeal's decision in *Principal, Auckland College of Education v Hagg* [1997] ERNZ 116. He said interim reinstatement was ostensibly specific performance following an unjustified dismissal. The expiry of a fixed term agreement could never be a dismissal.

[19] With respect to Mr McBride's submission, the serious question to be tried in the circumstances of this case includes whether or not the employment agreement is indeed a valid fixed term agreement. It was accepted by Mr McBride that the project did not end on 24 December 2021 but carried on. He said however that this did not matter because the time for looking at whether or not the fixed term was valid was when the agreement was entered into

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<sup>2</sup> At *Western Bay of Plenty District Council and NZ Tax Refunds v Brooks Homes Ltd* [2013] NZCA 90

and not when it was coming to an end. Further he said, just because the project was ongoing that did not mean that there was funding available to continue the employment of PDE.

[20] In respect of the 3 November email from RVU purporting to say that the agreement “*will*” be extended, Mr McBride submitted that the author of the email had no such authority to extend the employment agreement and that this was known to PDE.

[21] Although at this interim stage the Authority is not in a position to make any finding in respect of contested facts, it is clear that at the nub of the dispute between the parties is PDE’s view that as the expiry date of this agreement was inextricably linked to the expiry date of the project, and as the project has continued, the fixed term date cannot be relied on. Further, he says his employer expressly agreed to extend the agreement, presumably till the end of the project.

[22] Under these circumstances, it must be seriously arguable that RVU was not entitled to rely on any fixed term nature of the agreement to enforce the end of PDE’s employment. If that is the case, it must also be seriously arguable that if the agreement is not a genuine fixed term agreement, then the termination of employment would constitute an unjustified dismissal.

[23] Accordingly, I find it is seriously arguable that RVU was not entitled to rely on the fixed term nature of its agreement with PDE to bring employment to an end.

### **Serious question to be tried in relation to the claim of permanent reinstatement**

[24] Mr McKenzie-Bridle submitted there was a strong case for permanent reinstatement if his client was ultimately successful with his claims. He said this was because reinstatement was a primary remedy and in essence his client was dismissed simply because, in his submission, RVU wrongly believed that the employment relationship was fixed term. He also said that as the project was continuing, reinstatement would be practical and reasonable.

[25] Mr McBride on the other hand submitted, based on his submissions regarding there being no seriously arguable case, because there had been no dismissal, reinstatement could not be reasonable or practicable because PDE could not show a dismissal had occurred. He said also there was no ongoing full-time role and no available role at all. He said it would be to err in principle to reinstate an employee after a fixed term agreement had expired. He said there was no credibly arguable case as to reinstatement.

[26] The difficulty with that submission is that reinstatement is a primary remedy. Clearly, if it is later found that the employment agreement is indeed a valid fixed term arrangement, then Mr McBride would be correct. However, it is the status of that agreement which is being argued. It is therefore seriously arguable that if PDE was successful in his claims, that PDE would be reinstated. I am mindful of a number of third party affidavits. However, at this early stage I do not see any grounds which I could say safely negate permanent reinstatement as a remedy should PDE be successful in his claims. Further, there is also a serious question to be tried in respect of RVU's confirmation of 3 November that PDE's employment agreement would be extended. It is seriously arguable that such a statement binds RVU whether or not the person making the statement had authority to make it.

[27] I conclude on the untested evidence there is a seriously arguable case for permanent reinstatement.

### **Balance of convenience**

[28] In this case, assessing the balance of convenience requires a comparative analysis of the impact on PDE, RVU and the identified third parties if the interim orders sought are either granted or not. This involves a weighing exercise.

[29] I must also assess what would happen if the interim position is reversed in any substantive determination. For PDE, this means assessing the consequences to him of not reinstating him on an interim basis but then later deciding in his favour and permanently reinstating him. For RVU, this means assessing the consequences of requiring it to reinstate PDE on a temporary basis but then subsequently deciding either against PDE's claims or against the remedy of reinstatement. RVU submitted that the claim for reinstatement was not strong. In fact, it submitted it was virtually non-existent. It pointed to issues that had arisen, which remain uninvestigated, but which it says shows there has been a complete breakdown in the relationship which precludes any realistic future employment arrangement. It also submitted that there was no available role at all. The thrust of the submission was that as Mr McBride put it, "Reinstating to an expired fixed-term agreement, where the uncontested evidence is that there is not a role would be, at the most charitable highly irregular. ...". The difficulty I have with that submission, is that the evidence is contested. Mr McKenzie-Bridle submits that the project is ongoing and indeed that seems to be the case.

[30] I have considered the impact on third parties. Although the evidence is untested at this stage, perhaps the strongest statement states:

While I have little concern for myself in terms of physical safety, I would not consider myself to be emotionally or professionally safe if [PDE] was back in the workplace”.

[31] That is perhaps the strongest statement made by a third party.

[32] RVU should be in a position to protect other parties and staff from anything untoward if interim reinstatement was granted.

[33] To reiterate, the submissions on behalf of RVU in respect of allegations that other staff would be adversely affected should PDE return in the interim, are not particularly strong. It is worth noting the grounds relied on for the ending of PDE’s employment that the employment agreement was fixed term and simply expired. Although it is accepted there are allegations and perhaps even complaints regarding PDE’s behaviour, these have not been investigated and it may well be that PDE would face an investigation into those matters should he return in the interim.

[34] I conclude that the balance of convenience weighs in favour of interim reinstatement in this case. The longer PDE is away from the project, the more difficult it will be for him to integrate back into it. It will be some months before the parties are ready for a substantive hearing as the Employment Court noted in *Alistair Ross Gordon Humphries v Canterbury District Health Board*.<sup>3</sup> “Jobs are important and money is often a poor substitute”.

### **Overall interests of justice**

[35] The overall interests of justice favour the granting of reinstatement in this case. There is a seriously arguable case that PDE’s dismissal was unjustified on the basis there is no valid fixed term agreement. Further, it is seriously arguable that he would be reinstated to his role should he be successful in his substantive hearing. Although it is on the basis of untested evidence, I have concluded that the merits weigh in PDE’s favour. I accept that PDE will suffer professionally and emotionally if he is not able to return to the workplace in the meantime. I do not accept at this interim stage that damages would be an adequate remedy. PDE has made

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<sup>3</sup> [2021] NZEmpC 59 at paragraph [37]

it clear that being in employment is more important than the money. As the Court noted in *Humphrey*:<sup>4</sup>

Our understanding of the benefits of a restorative approach in supporting successful employment relationships is developing at pace, and is consistent with the underlying objectives of the legislation and the mutual obligations of good faith. This has implications for the steps that a fair and reasonable employer, particularly a well resourced one, can be expected to take in dealing with relationship difficulties.

### **Conclusion and orders**

[36] PDE's application for interim reinstatement is granted. I order that he be reinstated to his former position with RVU within 21 days of this determination, pending further order of the Authority. He is to be reinstated to the payroll from the date of this determination. The parties are directed to attend urgent mediation within ten working days so that they can ensure there is a managed return to the workplace which recognises and deals with the interests of the parties including the interests of any third parties.

[37] The parties are reminded of their obligations under s 188 of the Act. If the parties cannot agree to the necessary arrangements and the timing of them, leave is reserved to apply to the Authority for urgent orders to be made.

[38] Costs are reserved. I suggest that the issue of costs be left until a substantive determination in respect of this matter has occurred.

### **Interim non-publication**

[39] The grounds put forward for the interim non-publication order are relatively strong and supported by a letter from PDE's general practitioner. He says that publication could be harmful for his patient's mental wellbeing in the long term. I have carefully considered Mr McBride's submissions. It is clear that in order for the non-publication order to be effective, I needed to anonymise not only the applicant's name, but also that of the respondent as identifying one, in essence identifies the other.

[40] The Authority has wide powers to determine its own procedure. It is able to order non-publication including on such conditions as the Authority thinks fit under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act). Further, at this interim stage,

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<sup>4</sup> See paragraph [9] above

which deals with untested evidence, RVU has raised concerns in respect of PDE's behaviour. Whilst it is likely RVU will proceed with any investigation it needs to in respect of allegations regarding PDE, at this interim stage PDE has had no chance to respond to any allegations and/or defend his position. That creates another ground favouring non-publication at least in the interim. Accordingly, I make an interim order prohibiting publication of the parties' names and of any information which would lead to those names being revealed, until the substantive proceeding is determined and/or until further order of the Authority.

**Geoff O'Sullivan**  
**Member of the Employment Relations Authority**