

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2021] NZERA 358  
3138861

BETWEEN                      SHEND HARAQIA  
Applicant

AND                              ARCHIPRO LIMITED  
Respondent

Member of Authority:        Nicola Craig

Representatives:              Simon Mitchell and Jeremy Lynch, counsel for the  
applicant  
Rob Towner and Jeremy Ansell, counsel for the  
respondent

Investigation Meeting:        19 July 2021

Submissions received:        At the investigation meeting from both parties  
22 July 2021 from the respondent

Date of determination:        11 August 2021

---

**DETERMINATION OF THE AUTHORITY**

---

- A.      Shend Haraqia’s application for interim reinstatement is declined.**
- B.      Costs are reserved.**

**What is the employment relationship problem?**

[1]      Shend Haraqia was a senior client director for ArchiPro Limited (ArchiPro or the company). The company provides an online platform for building products and services.

[2] Mr Haraqia claims he was unjustifiably dismissed, along with having been disadvantaged by unjustified actions of ArchiPro and being owed wages. He seeks interim reinstatement to his former role. ArchiPro disputes all of his claims.

[3] Affidavits were provided from Mr Haraqia (first and reply), along with ArchiPro's Milot Zeqiri (chief executive), Brittany Gribben (co-founder and Mr Zeqiri's wife), Danica Paki (general manager of growth and client services), Kaltrina Zeqiri (people, experience and performance manager and Mr Zeqiri's sister), an ArchiPro Australia employee and Mr Haraqia's former landlord.<sup>1</sup>

[4] An investigation meeting was held on 19 July 2021 to hear submissions. The respondent provided a memorandum on 22 July clarifying an issue which had arisen at the investigation meeting. The applicant was offered an opportunity to comment but did not take it up.

[5] As is usual, I have dealt with this application for interim reinstatement on the basis of untested evidence and submissions. Therefore disputed matters cannot be decided.

[6] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

### **What are the issues?**

[7] The issues for determination in this interim reinstatement matter are:

- (a) Is there a serious question to be tried; does Mr Haraqia have an arguable case, both for unjustified dismissal and permanent reinstatement?
- (b) Where does the balance of convenience lie?
- (c) Where, standing back and considering the case, does the overall justice lie until the substantive matter is determined?<sup>2</sup>

[8] Both parties referred in submissions to the recent Employment Court decision in *Humphrey v Canterbury District Health Board*.<sup>3</sup>

---

<sup>1</sup> Ms Paki lodged a short second affidavit correcting a couple of errors in her first affidavit.

<sup>2</sup> For example, *X v Y Ltd and the NZ Stock Exchange* [1992] 1 ERNZ 863 and *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36.

<sup>3</sup> *Humphrey v Canterbury District Health Board* [2021] NZEmpC 59.

### **What was Mr Haraqia's involvement with ArchiPro?**

[9] Mr Haraqia has had a long association with ArchiPro and Mr Zeqiri with both men being of Albanian origin. As is not uncommon after the event in such situations, the two have different perceptions of the closeness of their connection.

[10] Mr Haraqia became involved with ArchiPro shortly after the company was established. Mr Haraqia paints a picture of high commitment to ArchiPro, working long hours and playing a pivotal role in the company's development. He is also a shareholder have bought 0.08% of the company's shares in 2018 via a nominee.

[11] Mr Zeqiri portrays a different image of occasional unreliability and dishonesty by Mr Haraqia. Mr Zeqiri describes having raised concerns and given Mr Haraqia second chances on numerous occasions over the years. Mr Zeqiri describes Mr Haraqia's behaviour as increasingly challenging over the last couple of years, leading to disciplinary steps.

[12] Mr Haraqia began as a contractor for ArchiPro about seven years ago, becoming an employed sales director in 2018. As a result of COVID-19 ArchiPro restructured, leading to Mr Haraqia being redeployed to a new role as senior client director. His primary responsibility was generating revenue and client spend.

### **What difficulties arose in 2019 and 2020?**

[13] In 2019 a neighbour living near the ArchiPro offices complained about someone sitting in an ArchiPro vehicle in the staff carpark with loud music between 1 and 3am in the morning. Around the same time there was a security alert of activity in the company's office around 7pm. CCTV footage showed Mr Haraqia entering and searching through managers' desks and going into Mr Zeqiri's office.

[14] When approached Mr Haraqia admitted he was in the office, looking for keys for a company wagon so he could move a bike to a friend's house. There were suspicions of him being the person playing loud music in a car in the carpark but he denied it.

[15] Ms Gribben felt betrayed by the office incident and her relationship with Mr Haraqia appears to have been damaged. Her affidavit describes various events over the years which she sees as broken promises and breaches of trust. She describes her

husband as having numerous “last chance” discussions with Mr Haraqia. She sees her husband as feeling obligated to Mr Haraqia as they were both Albanian.

[16] It appears from 2020 the company decided that it would no longer take a lenient approach to Mr Haraqia’s behaviour.

[17] Ms Paki started in February 2020 as Mr Haraqia’s manager. She reports finding him increasingly challenging of her authority and reluctant to follow her instructions. He thought she harboured some resentment against him.

[18] In April 2020 ArchiPro issued Mr Haraqia a warning for failing to be responsive and follow instructions from Mr Zeqiri. This related to the COVID-19 lockdown when Mr Haraqia did not complete a number of requested work tasks and failed to respond to Mr Zeqiri’s requests for updates on work progress. This warning had expired by the time that ArchiPro dismissed Mr Haraqia.

[19] In mid-2020 Ms Paki says Mr Haraqia had occasions of being late to work, particularly after a Thursday night out.

[20] On 31 July 2020 Ms Paki considered Mr Haraqia’s behaviour at work to be very unusual and she believed indicative of drug and possibly alcohol use. She spoke to him and he denied being impaired. He explains his behaviour as relating to sales pressures. She “cautioned him firmly” that if he turned up impaired like that again she would arrange for a drug and alcohol test.

[21] Around the same time a review of GPS data showed Mr Haraqia driving his work car on a number of short trips late at night or in the early hours of the morning. This included on the night of 31 July and the morning of the following day.

[22] At their meeting Ms Paki told Mr Haraqia that the work vehicle should not be used during the night and past 10pm. Whether this was a lawful instruction was in dispute at the Authority’s investigation meeting. Mr Haraqia explains some of his night driving as an approach to deal with anxiety.

[23] In September 2020 Ms Paki issued Mr Haraqia with a final written warning for misleading the company and failing to follow a number of lawful and reasonable instructions regarding a client related matter. The letter advises that the warning will be in place for 18 months and will be taken into account if there is a repeat of behaviour

such as misleading the company, not being open and honest in dealings with it or failing to follow instructions.

[24] No personal grievances were raised over either of these warnings.

[25] I note the evidence from Mr Haraqia's former landlord describing his concerns about Mr Haraqia as a tenant but give most of it little weight at this stage. It is really what could be described as negative character evidence. I refer below to the issue regarding Mr Haraqia's ability to repay under his undertaking if required.

### **What events lead to Mr Haraqia's dismissal?**

[26] On the evening of Wednesday 31 March 2021, Mr Haraqia went out with friends in Ponsonby. The company later discovered that shortly before 5am his car was driven from Ponsonby Road to Grey Lynn.

[27] He did not arrive at work at the usual start time and Ms Paki had not heard from him. She messaged him asking whether he was coming into work. No response was received. Ms Paki was aware that Mr Haraqia had a scheduled client meeting and given there was no appearance or message from him, she asked another staff member to contact the client to reschedule.

[28] Later that morning Ms Paki messaged again via the company's instant messenger communication platform. The two were scheduled to meet at 11.30 but Mr Haraqia did not show up.

[29] In the early afternoon Ms Paki learned that Mr Haraqia had attended a team lunch that day in Parnell with some of his team members. Later she noticed him in the office on a video call. He did not speak to her before leaving the office. He did not return that day.

[30] At some point Mr Zeqiri was contacted by a client to raise concerns about a meeting she had this day with Mr Haraqia.

### **What process did ArchiPro use?**

[31] Ms Paki spoke to at least one staff member at the team lunch who reported having heard Mr Haraqia tell a colleague that he thought his drink had been spiked the night before. ArchiPro became concerned that Mr Haraqia may not have presented for

work at the usual time because he was impaired and potentially may have driven in that state.

[32] No drug and alcohol test was undertaken despite this being provided for in the employment agreement.<sup>4</sup> Ms Paki says this was because Mr Haraqia had left the office without talking to her on 1 April and the following day was the start of the Easter long weekend, meaning the window for testing had passed by the time Mr Haraqia was back at work.

[33] ArchiPro wrote to Mr Haraqia on 6 April 2021, notifying him that it was starting an investigation into his recent conduct. He was invited to a meeting. The identified issues included failing to turn up to work, the client meeting having to be rescheduled, failure to reply to Ms Paki's messages, attending a team lunch (including telling colleagues he had a big night the night before and thought his drink had been spiked) and work vehicle usage issues. The letter recorded that at this stage this was an investigation but a disciplinary process may be started.

[34] On 8 April 2021 a meeting was held between Ms Paki, Ms Zeqiri and Mr Haraqia. He provided some explanations but the company did not find them convincing.

[35] Mr Zeqiri spoke to the client about her 1 April interaction with Mr Haraqia. The client indicated she was agitated after her experience with Mr Haraqia, as the meeting was "weird". She described him as storming into the meeting, speaking over and patronising her.

[36] The client also said Mr Haraqia had made negative comments running down ArchiPro and his team, disclosing internal matters. She reported that another colleague had attended the meeting for a while but left, saying afterwards that he thought Mr Haraqia was on drugs. That person later did not wish to provide a statement confirming this.

[37] The client reported other colleagues coming in after the meeting to check she was okay as they had heard how the meeting went.

---

<sup>4</sup> Employment agreement, cl 5.3.

[38] ArchiPro decided to move from the investigation to a disciplinary process and detailed the allegations, along with code of conduct and employment agreement provisions.

[39] Mr Haraqia indicated that he was seeking representation but did not reply to requests from ArchiPro about who he would be bringing to the next meeting. Mr Haraqia and his lawyer attended a meeting with ArchiPro on 20 April. A written statement by Mr Haraqia was provided along with written submissions from his lawyer.

[40] There were a number of skirmishes between the representatives during the process.

[41] An issue arose about Mr Haraqia's access to and communication of an ArchiPro email. Mr Haraqia found an email, seemingly accidentally put on the company's lawyer, from Ms Zeqiri to the company's legal advisor asking him to take steps. Mr Haraqia forwarded the email to his lawyer who then sent it on to the company's lawyer with claim that the company had acted in an entirely predetermined manner.

[42] Having sought comment, Archipro decided to suspend Mr Haraqia. It was concerned that there had been no response to its instruction to explain whether he had accessed any other private or privileged communications and to provide and then delete any such communications.

### **What were Mr Haraqia's responses?**

[43] Mr Haraqia acknowledged going out on the evening of 31 March 2021 and drinking a moderate amount of alcohol. He stayed with a friend in Ponsonby. He began feeling extremely anxious and agitated. He has an anxiety condition which he has medication for. However, the speed with which this anxiety came on and the agitation made him wonder if his drink may have been spiked. After not being able to get to sleep, at around 5am he walked to his car to get his medication and drove the car back to near his friend's house.

[44] Mr Haraqia took the medication which resulted in a deep sleep, not waking until just after 10am. He panicked as he had a client meeting at 10.15 am. His phone was flat but he was able to sufficiently charge it to enable him to move the 10.15am meeting to 10.30. Mr Haraqia said that he went into "panic mode" and thus did not respond to Ms Paki's messages.

[45] Mr Haraqia accepts that there was mention in 2020 of not driving the work car after 10pm. However, he questions whether it was an instruction and whether it was lawful as it was not part of the policy and was not applied to other staff. The absence of a specified start time for driving each morning is also noted.

[46] The use of GPS data was challenged, particularly tracking in personal time. Mr Haraqia did not accept that he had been informed about the tracking, there being no GPS policy at ArchiPro.

### **What were ArchiPro's next steps?**

[47] On 30 April 2021 ArchiPro wrote to Mr Haraqia outlining where it had got up to:

- (i) It accepted his explanation for not getting to the office on time on 1 April but concluded that there was a failure to notify Ms Paki of his absence and respond to her messages asking him to clarify his whereabouts;
- (ii) It could not substantiate that Mr Haraqia had attended work in an unfit state but concluded that his conduct with the client that day brought the company into disrepute; and
- (iii) Mr Haraqia had disregarded the company's instruction not to use the company car past 10pm.

[48] The company concluded that Mr Haraqia had committed misconduct regarding the first and third matters and breached the company's code of conduct regarding the second matter.

[49] The company also sought any further comments about the disclosure of Ms Zeqiri's email as a potential breach of the code of conduct.

[50] A detailed response was provided through Mr Haraqia's lawyer.

### **What did ArchiPro decide?**

[51] ArchiPro communicated its decision in a lengthy 6 May 2021 letter. The decision to dismiss was based on the three matters outlined in the 30 April letter. Mr Haraqia was seen as lacking contrition and insight, with the company concluding that it had lost trust and confidence in him. ArchiPro said Mr Haraqia appeared to not

believe that he was accountable to the manager and directors. It also believed that his responses to the allegations changed at times during the process. The company's trust and confidence was said to be further damaged by the email disclosure issue.

[52] ArchiPro took into account the previous warning given, seeing a theme of refusal to follow instructions as running through the warning and the recent events.

[53] Mr Haraqia was summarily dismissed.

### **What did ArchiPro discover later?**

[54] On his departure Mr Haraqia's work vehicle was described as "incredibly untidy, mouldy and damp" along with having a burn mark on a seat. The company arranged to have it tested.

[55] The results came back positive for methamphetamine. Although Mr Haraqia was the usual operator of the vehicle there were occasional times when others had access to it.

[56] Mr Haraqia denies being aware of any drug use in the car. If he is reinstated ArchiPro intends to begin an investigative process with him regarding the methamphetamine result and the state of his car on return.

### **Is there an arguable case regarding unjustified dismissal?**

[57] For Mr Haraqia it is argued that there is substantive inadequacy in the grounds on which ArchiPro chose to dismiss and flaws in the company's process.

[58] Given the relatively low standard required at this stage, ArchiPro appropriately conceded that there is a serious question to be tried in respect of Mr Haraqia's claim that he was unjustifiably dismissed.

[59] The company does however argue that there are significant parts of evidence from the respondent's affidavits which Mr Haraqia did not dispute in his affidavit in reply. Also, it indicates that there was substantial compliance with procedural obligations.<sup>5</sup>

---

<sup>5</sup> *Air New Zealand Limited v Sutherland* [1993] 2 ERNZ 210 and *Hines v Eastland Port Limited* [2018] NZEmpC 79.

[60] For Mr Haraqia it was asserted that the dispute about work vehicle use was effectively a dispute about the interpretation of the employment agreement, which should have been dealt with in that way rather than through a disciplinary process.<sup>6</sup>

[61] It appears a decision was made to take a firmer approach with Mr Haraqia. This raises the prospect of predetermination and that the change of approach may not have been sufficiently indicated to Mr Haraqia.

[62] The movement of matters into and out of the investigation and disciplinary process has the potential to be problematic for ArchiPro:

- (a) The company may have taken into account references to times other than 1 April 2021 when Mr Haraqia was said to be late but failed to provide particulars; and
- (b) Different matters could be seen to have been taken into account in the dismissal letter than were raised in the 20 April 2021 letter inviting Mr Haraqia to the disciplinary meeting.

[63] There is a question about whether the previous warning was of sufficiently similar nature to be relied upon to establish the suggestion by ArchiPro of repeat misbehaviour.

[64] I conclude that there is an arguable case that Mr Haraqia was unjustifiably dismissed.

### **Is there an arguable case for permanent reinstatement?**

[65] I now look at whether it is reasonable and practicable to reinstate Mr Haraqia. Reinstatement has been brought back as a primary remedy.<sup>7</sup> The question is what is the feasibility or practical workability of re-imposing this employment relationship, noting that it is not sufficient to show resistance and strained circumstances to avoid reinstatement?<sup>8</sup>

---

<sup>6</sup> *Sky Network Television Limited v Duncan* [1998] 1 ERNZ 354 (EC) and [1998] 3 ERNZ 917 (CA).

<sup>7</sup> Section 125 of the Act.

<sup>8</sup> *Angus v Ports of Auckland* [2011] NZEmpC 122 at [63] and *Air New Zealand Ltd v Hudson* (unrep) Employment Court, Auckland, AC 46/05, 17 August 2005, Judge Colgan at p 8.

[66] ArchiPro concedes that there is an arguable case for permanent reinstatement but submits that it is weak.

### *Practicability*

[67] Can the employment relationship be successfully re-imposed?<sup>9</sup> There is substantial evidence that the relationship is broken although I recognise that such evidence has yet to be tested. This evidence comes not only from Mr Haraqia's direct manager Ms Paki but from the two majority owners of the business, Mr Zeqiri and Ms Gribben.

[68] There is considerable ill feeling by managers and owners, seemingly the result of their view of Mr Haraqia's behaviour as negative and destructive. Ms Paki believes him to be disrespectful of her as a manager and that he would be even more challenging to manage if he returned. She sees it as impossible to maintain a functional working relationship.

[69] Mr Haraqia also makes a number of critical comments about Ms Paki and Mr Zeqiri in particular. For example, he considers Ms Paki harbours resentment against him and predetermined that he was not suitable for his role. At points of his evidence he attacks Mr Zeqiri personally.

[70] Mr Haraqia does acknowledge that there would need to be relationship building on both sides if he is reinstated.

### *Reasonableness*

[71] Looking forward is it reasonable to require Mr Haraqia's return?

[72] There is a risk of significant detrimental effects on ArchiPro's business and its employees. This could include disruption to others' jobs and responsibilities. Potentially client relationships could be disrupted although there was less evidence on this point.

[73] The company says that special restrictions regarding how Mr Haraqia was to perform his job would be needed. There is some acknowledgement of this in Mr Haraqia's affidavit in reply.

---

<sup>9</sup> *Smith v Fletcher Concrete & Infrastructure Ltd* [2020] NZEmpC125 at [20].

[74] The company questions whether there is power to reinstate Mr Haraqia to what could be seen as a less advantageous position incorporating for example, limitations on or the complete removal of his company car use. Reinstatement under s 123(1)(a) of the Act is to “the employee’s former position or the placement of the employee in a position no less advantageous to the employee”.

[75] Given the negative client comments ArchiPro would want to assign another staff member to attend sales meetings with Mr Haraqia to ensure he was not saying anything to disparage ArchiPro. Ms Paki describes discovering after Mr Haraqia left that he was not supporting and visiting them as he should have. A higher level of supervision would be required than would normally be the case.

### *Conclusion*

[76] ArchiPro also relies on Mr Haraqia’s contribution to the situation he finds himself in.<sup>10</sup> I accept that there is a reasonable prospect of Mr Haraqia’s conduct being found to have been a contributing factor in the situation leading to his dismissal and that that could have an impact on his permanent reinstatement claim.

[77] At this interim stage I consider that whilst there is an arguable case for permanent reinstatement it is not a particularly strong one.

### **What is the balance of convenience?**

[78] I move on to weigh the interests of Mr Haraqia and those of ArchiPro, including a consideration of the adequacy of damages.

### *Mr Haraqia*

[79] Mr Haraqia describes having put his heart and soul into ArchiPro over a number of years, working hard to help establish the business.

[80] He found the disciplinary process and dismissal hugely stressful, describing it as going through a sort of grieving process. He has found it embarrassing to tell others of his dismissal. It is distressing for him still being associated by others with ArchiPro when he is not working there. Mr Haraqia reports his anxiety increasing significantly since his dismissal.

---

<sup>10</sup> *Western Bay of Plenty District Council v McInnes* [2016] NZEmpC 36 at [68].

[81] Mr Haraqia had been saving to buy a property but has had to abandon that plan since his dismissal. He has some debt and expenses which he indicates cost around \$2,000 a month. He describes finding it hard if not impossible to keep these payments up without income.

[82] Efforts to look for other comparable work have been unsuccessful. Mr Haraqia suggests this is a niche area although his role was focused on sales or sales management skills which should be transferrable elsewhere. He also has a degree in accounting and finance as well as having almost completed a commercial law degree so has the education for a variety of roles.

[83] Mr Haraqia is concerned that if he is out of the fast evolving 'technology space' for too long, it may be hard to return. However, his role was not technologically based and so I give little weight to this.

[84] Mr Haraqia mentions the restraint of trade restricting his ability to find other work. However, the provision limits solicitation of previous clients or staff. It does not prevent him from working in the same industry, even for a competitor.

[85] Mr Haraqia has expenses including making a contribution to family expenses but is not in the situation of having a family to support or housing costs he is responsible for.

[86] Of significance is the fact that Mr Haraqia's losses can largely be recompensed by damages.

### *ArchiPro*

[87] Archipro's owners and senior managers express a deep loss of trust in Mr Haraqia. Whilst some of this concern is based on previous incidents rather than the immediate concerns which lead to his dismissal, Mr Haraqia had received two unchallenged warnings in the 14 months prior to his dismissal.

[88] There is a theme of failure to follow instructions running through the disciplinary actions. The concerns on matters of substance are reinforced by what are described as his breaches of good faith or failure to be co-operative during the disciplinary process. For example, Mr Haraqia is said to have failed to describe what

he had done with his car on the night in question and whether he had accessed and viewed other private and confidential information.

[89] The difficulties in the relationship between Mr Haraqia and Ms Paki must be considered. Mr Haraqia regards her as resentful of him. There are also personal attacks on Mr Zeqiri by Mr Haraqia in his affidavit in reply. Given those matters and the managers' views it is difficult to envisage the parties could work co-operatively together.

[90] The company also faces the possible detriment of having back in the workplace an employee who has been involved in a number of discussions about his behaviour, along with three instances of disciplinary action.

[91] Ms Paki describes the mood in the office as noticeably improved with staff commenting to her that they found Mr Haraqia as being like a dark shadow in the office as his energy and vibe were so negative. Caution is needed with such evidence as there is no mention of who these staff are.

[92] Similarly Ms Paki's negative mention of Mr Haraqia by clients, largely unnamed. Mr Haraqia has been contacted by some former clients disappointed that he is no longer with the company. I cannot give this factor a lot of much weight.

[93] Mr Haraqia's role is also said to have been filled by another employee as the seniority of the role meant that it could not be left unfilled indefinitely. Work would need to be redistributed if Mr Haraqia returned.

[94] The human resources consequences are worth noting. To minimise the risks the company would want to put in place constraints on Mr Haraqia. These include regarding car use, meetings with clients and access to company information. Some of these are agreed to by Mr Haraqia. However, they impose a burden on the company. ArchiPro also intends to investigate the methamphetamine result and this would require more company time.

[95] Submissions on behalf of ArchiPro note that Mr Haraqia's affidavits do not contain a denial that he uses drugs. The evidence of potential drug use must be approached cautiously, particularly at this stage. There are no doubt other possible explanations for the events ArchiPro relies on.

[96] Overall I accept that damages may not be an adequate remedy for ArchiPro.

[97] In addition, ArchiPro questions Mr Haraqia's ability to meet his undertaking in light of his financial position. Mr Zeqiri and Ms Zeqiri give evidence of Mr Haraqia's indebtedness and non-payment of debts, including money deducted from wages under an attachment order. On the other hand ArchiPro appears to be able to compensate Mr Haraqia by way of damages if required to do so.

#### *Conclusion on the balance*

[98] I have taken into consideration that this matter would not be substantively heard until a few months into 2022. Whilst this means Mr Haraqia would have to wait that period of time until full consideration of his claim including to permanent reinstatement occurs, it is also an extended period which the possible negative effects of having Mr Haraqia back at ArchiPro may arise.

[99] I find that the balance of convenience favours ArchiPro.

#### **Where is the overall justice of the case?**

[100] Having concluded that the balance favours ArchiPro, I stand back and look at whether there are other considerations which might suggest that the overall justice should be seen as favouring Mr Haraqia.

[101] Whilst Mr Haraqia had some arguments which appear to be in his favour, I am not confident that his case, particularly as regards permanent reinstatement, should be characterised as strong.

[102] I conclude that the justice assessment does not favour granting Mr Haraqia's claim and his application for interim reinstatement is declined.

#### **Costs and next steps**

[103] Costs are reserved. An Authority Officer will contact the parties about the next steps in the process.

**Nicola Craig**

**Member of the Employment Relations Authority**