

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Rena Mahauariki (Applicant)

AND Te Roopu Manaaki I Te Hunga Haua Charitable Trust (Respondent)

REPRESENTATIVES Mate Tangitu, Advocate for Applicant
John Burley, Counsel for Respondent

MEMBER OF AUTHORITY R A Monaghan

INVESTIGATION MEETING 31 July 2003

**ADDITIONAL
INFORMATION RECEIVED** 7, 15, 22 and 28 August 2003

SUBMISSIONS RECEIVED 2 and 19 September 2003

DATE OF DETERMINATION 15 October 2003

DETERMINATION OF THE AUTHORITY

Employment relationship problem

Rena Mahauariki says she was unjustifiably dismissed by her former employer, Te Roopu Manaaki I Te Hunga Haua Charitable Trust (“the trust”).

Background

The trust operates a residential care facility in the Whakatane area for people with disabilities. Its services are funded by central and local government organisations, with by far the most significant provider of grants being the Waikato Community Living Trust. The level of funding is directly related to the number of residents at the facility (or “the Whare” as the parties referred to it).

Qualified and salaried caregiving staff were employed on a permanent basis on Mondays to Fridays. Weekend care was provided according to a fortnightly roster by a pool of waged employees. Ms Mahauariki was a weekend caregiver, although rosters and timesheets indicated she worked on weekdays too, and began her employment in March 2000. During the relevant period there were four regular weekend caregivers on the core roster, and two weekend relief staff.

There was no written employment agreement between the parties, as they had been unable to reach agreement on drafts that had been proposed.

In May 2002 a resident died. In the context of the funding available to the trust, that meant a reduction was inevitable because of the link between funding and numbers of residents. A

representative of the Waikato Community Living Trust warned Danny Hona, the manager of the trust, of the likelihood of a reduction but did not indicate the amount of the reduction.

Mr Hona in turn warned all staff of the anticipated reduction, by memorandum dated 16 July 2002. The memorandum went on to advise that a change in the trust's structure and operation would be necessary, and that the trust's executive committee was exploring options. In the interim a committee member, Whaiora Brown, would assume responsibility for supervising the Whare, including managing the staff rosters and Whare finances. She would also be responsible for appraising client needs and programmes.

By letter dated 19 August 2002 the Waikato Community Living Trust confirmed that, from 31 July 2002, funding to the trust was reduced by an amount equivalent to 23 percent. This was a much greater reduction than expected and caused the trust to review the overall budget for its operation. Mr Hona conveyed this information to the staff in a memorandum dated 23 August 2002. However he did not tell them there was already a blowout in spending on the wages budget, brought about in part by an extensive use of relief staff, and that problem had to be addressed as well. He said of the reduction in funding:

“Unfortunately, this is a significantly greater level of reduction than originally anticipated and will have a major impact on our current operations, including staff numbers.

Although the new budget has already taken effect, we will nonetheless proceed with caution to ensure that all possibilities are explored before making any final decisions on the most appropriate areas in which to make the necessary cost cuts.

We are confident that salary staff positions will be maintained. In the meantime we will also be examining possible roster options so as to ensure that the quality of care for our residents is not adversely affected.

I expect the Roopu being in a better position to make final restructuring decisions in the next two or so weeks.”

Even before this memorandum was circulated the staff had been discussing ways of amending the rosters so that jobs could be preserved. Notes from a staff hui on 16 August 2002 indicate there was a frank exchange of views among the staff members concerning what could or could not be done in that respect. Specific proposals included moving to a 4 on and 3 off roster, although that pattern had not worked in the past, and one employee offered to reduce her daily hours. Staffing for sleepover shifts was discussed, but no agreement could be reached. Towards the end of the note there is a comment “Conversation still heated, no resolve being reached ... Staff leaving [Ms Mahauriki] and Tracey to talk with Whaiora and sort out legal stand ...”

Ms Mahauriki and another staff member, the aforementioned Tracey, took responsibility for working on possible roster changes. Eventually Ms Mahauriki came up with an approach in which a ‘shower shift’ of 10 hours per week, and a ‘van and drawers’ shift of 5 hours per week would disappear. Rostered hours would be cut back to 7 x 7 per week. Other changes also discussed did not affect this core change. The total saving envisaged was 22 hours per week.

However for his part, Mr Hona required the agreement of all staff members to proposals to change the shifts and rosters. His evidence was that staff members told him they did not agree. Ms Mahauriki was under the impression they did agree, but the notes from the 16 August hui indicate the nature of the difficulties she faced in obtaining agreement.

I accept it was critical for the staff to agree to the changes, since the changes affected the hours of work of all of them and the law does not allow changes to their terms of employment to be imposed unilaterally. In such circumstances I would require firm evidence that all those affected actually agreed to the changes and expressed that agreement to the trust as their employer. Even if I accept

the staff members indicated their agreement to Ms Mahauriki - or failed to indicate their disagreement - that is not sufficient to persuade me the necessary agreement existed from a legal point of view. This is particularly so in the light of Mr Hona's evidence about the lack of agreement. Mrs Brown, too, gave evidence that staff members expressed concerns to her.

Mr Hona concluded it would not be possible to secure agreement to rosters which made the necessary cuts. At a staff hui on 3 October 2002 he advised staff he had recommended the disestablishment of two positions.

Ms Mahauriki did not attend the hui. She said she did not know about it, and although her apology is recorded in the note of the hui she said it was not proffered at her request. I have no reason to disbelieve her when she said she did not know about the hui.

By a memorandum dated 4 October 2002 Mr Hona confirmed that two positions would be disestablished, and that he was currently reviewing the disestablishment process to determine which positions would be lost. He decided to use what was variously described in the evidence overall as a 'last on – first off' and 'least experienced' approach to identify the individuals who would lose their positions. It was not clear precisely which of these he applied. One of the weekend caregivers resigned voluntarily, so there remained only one position to be disestablished.

If a 'last on – first off' test was applied, then on that basis Mr Hona identified Ms Mahauriki's as the position to disappear. In her evidence Ms Mahauriki disputed that she was 'last on', naming two others who were appointed after she was.

According to Mr Hona one of the named employees had previously worked for the trust, and although several years had passed between that period and her re-employment the previous experience was taken into account. In further discussion on the point during the investigation meeting the focus seemed to be on a 'less experienced' test which Mr Hona amplified as being that Ms Mahauriki was less experienced 'in terms of working with residents'. When Ms Mahauriki asked how Mr Hona would know about her experience, he indicated that the expectation was that caregivers treat the people they worked with as 'residents' rather than 'patients'. For example, caregivers should work with residents, rather than tell them what to do. The discussion headed towards an indication that performance issues had a bearing on the decision to disestablish Ms Mahauriki's position rather than someone else's.

The second employee was employed as a caregiver after Ms Mahauriki's appointment, but subsequently took a cleaning position at the Whare instead. Mr Hona said at the investigation meeting that the employee was still working as a cleaner at the time of the redundancies. The cleaning position was not being disestablished. In general that would be sufficient to warrant retaining the employee concerned, rather than Ms Mahauriki, because the law does not oblige an employer to remove an employee from an existing position and place another employee in that position.

Mr Hona also asserted during the investigation meeting that Ms Mahauriki was offered the cleaning position herself but declined it. The details of when and how that happened were not clear. When I sought these details I was provided after the investigation meeting with a copy of a letter allegedly written by the cleaner's predecessor, dated 15 July 2001, in which she advised of health problems, sought to terminate her employment, and inquired about casual work. On that information, the best I can say is Ms Mahauriki might have been offered the cleaning position in July 2001. Documents she provided herself indicate that she even carried out some cleaning duties at about that time. However the matter is not relevant to a redundancy imposed in respect of a caregiving position in October 2002 so there is no need to take it any further.

Overall while Ms Mahauriki had a concern about nepotism in that the cleaner was also Mr Hona's sister, there was no evidence nepotism was an operative factor in continuing that employee's employment. There was nothing wrong with the trust retaining the cleaning position, and its incumbent.

Ms Mahauriki also gave evidence which seemed to be intended to criticise the management of the Whare in general, and to highlight her concern to ensure appropriate training and standards of care were in place to ensure the well being of residents. I understood an audit was pending, and that is the appropriate forum for identifying issues of that kind. Moreover the issues were not raised in connection with the termination of her employment and are not within the jurisdiction of the Employment Relations Authority, which in turn cannot make any findings or orders in respect of them. In the present context the Authority is empowered only to determine Ms Mahauriki's personal grievance in respect of her redundancy.

In addition Ms Mahauriki referred to a series of exchanges during 2001 concerning whether staff were being paid correctly, and which involved the labour inspectorate of the Department of Labour's Employment Relations Service. However that matter was dealt with by early 2002 and I do not believe it affected the decision to disestablish Ms Mahauriki's position.

There was also mention of an incident in September 2002 involving an allegation by a member of the public that Ms Mahauriki was intending to work while under the influence of alcohol and drugs. I believe the trust would have been remiss not to investigate that kind of allegation. It did so by arranging a hui, found the allegation could not be substantiated, and took no further action. There was no evidence the allegation affected the decision to disestablish Ms Mahauriki's position either.

Further to the procedure used in disestablishing the position, in his statement of evidence prepared for the purposes of the investigation meeting Mr Hona said:

"Following the 3 October hui and 4 October memorandum I met with Whaiora to discuss how we would advise Rena about the decision that had been made to declare her position redundant? (sic) Over the next couple of days, including Saturday the 5th and Sunday the 6th of October I went to Rena's house at least twice to personally advise her of the decision and the reasons for it. Unfortunately Rena was not at home on either occasion.

As I was not able to locate Rena, I prepared a letter formally advising her of the Executive Committees decision, dated 6 October, which I subsequently delivered by hand to Rena's post box at the Postal Delivery Centre in Te Teko later that same day."

The trust provided me, after the investigation meeting, with copies of a set of rosters in respect of the period September – mid October 2002. There was also a timesheet in Ms Mahauriki's name showing her as having worked on the nights of 4 and 5 October, and the mornings of 7, 8 and 11 October. The document was not signed by anyone and it appears it was prepared in advance of the time being worked. Because of the events of 3 – 7 October it is apparent neither document recorded what actually happened, so that the documents did not advance the investigation.

In a note at the foot of the record of the 3 October hui, Mr Hona set out the following:

"4.30 pm [3 October] Met with Whaiora to discuss process of disestablishment of Rena's position. She was out of town but closure was sought as soon as possible. Raised that only possible option available could be in writing. I will present her a new roster on Saturday for perusal.

Sat 5/10/02 Met with Whaiora to present new roster.

[note of discussions with individual staff members concerning new roster follows]

Met with Whaiora: Sunday 10.30 am and 12.35 pm

Completed a memo to staff with a new roster for her implementation and monitoring.

Effective date as at 7 October 2002

Also advised that as unable to contact Rena, I have written her a letter of disestablishment effective as of 18 October 2002."

Thus by the time the roster was completed and its contents made known to at least some staff members - by 7 October at the latest - Ms Mahauariki still had not been advised of the decision to disestablish any position, let alone hers. When she telephoned the trust on Monday 7 October to confirm her next rostered days of work the staff member who took the call advised she was not on the roster at all. Mr Hona's note, as well as the staff member's direct evidence, indicate that information was correct.

This is a particularly unfortunate way to find out about a redundancy. Not surprisingly Ms Mahauariki was upset, assumed she was not required to report for work again, and wanted to know when and how she would receive her final pay. On or about 10 October she telephoned Mr Hona's father, Hakahaka Hona, to ask for her final pay. Mr Hona senior was the chairman of the trust. Presumably because she had not cleared her post office box Ms Mahauariki had not received the letter of termination, but it read in part:

"It is with regret that I inform you that your position is one of the disestablished positions to be effected as at 18 October 2002.

I will forward recommendations for your final pay to be forwarded to you as soon as possible. I extend to you all the best wishes for your future endeavours."

Although the wording of the second paragraph not clear, it is consistent with an expectation that Ms Mahauariki would not report for work again as well as with her removal from the roster. I do not accept that Ms Mahauariki's failure to report for work from 7 October was at her initiative.

Mr Hona senior delivered a cheque for final pay in the sum of \$290.30 to Ms Mahauariki's post office box on or about 13 October. Payment was calculated at 44 hours x \$8.00 per hour, and included holiday pay on that amount. There was a conflict in the evidence concerning whether Mr Hona handed it to Ms Mahauariki in person at the post office, or whether it was left there for her. Nothing turns on this, in the circumstances.

Determination

The Employment Relations Authority is obliged to apply the law as it is set out in statute and by decisions of superior courts. The law relevant to Ms Mahauariki's employment relationship problem is as set out by the Court of Appeal in **Coutts Cars Ltd v Baguley** [2001] ERNZ 660 and **Aoraki Corporation Ltd v McGavin** [1998] 1 ERNZ 601.

In the context of the principles contained in those decisions, one issue raised by Ms Mahauariki's circumstances is whether her redundancy was imposed for genuine commercial reasons, or whether it cloaked some other reason. I consider it inevitable that a drop in funding as significant as the one notified by the Waikato Community Living Trust would require a reduction in the trust's wage bill. Of course the trust was also addressing cuts in other areas of its budget to match the drop in funding and was not seeking to cover the reduction solely through spending on wages. Nevertheless an attempt to achieve agreed reductions in the wage bill by reducing staff members' hours of work failed, which meant consideration had to turn to reducing the number of staff positions. In that respect I accept that the decision to disestablish two positions was made for genuine commercial reasons.

Another line of investigation arises from the decision in the **Baguley** case and concerns the method by which Ms Mahauriki was identified as the person to be made redundant. Subject to the express provisions of an applicable employment agreement there is no hard and fast rule that a ‘last on – first off’ principle should apply, and in any event I find Mr Hona went beyond that and his assessment of relevant experience affected his decision. The problem with such an approach is that Ms Mahauriki had no input into that selection process, and was not advised of the criteria which led to the decision to disestablish her position.

The Court of Appeal said this about selection criteria in **Baguley**:

“[34] If there was any uncertainty before as to whether criteria should be disclosed, there is none under the Employment Relations Act. An express object of Part 9 is to recognise that, in resolving employment relationship problems, access to information is more important than adherence to rigid formal procedures.

[35] It will not follow from non-disclosure of selection criteria that a dismissal for redundancy is necessarily flawed. If criteria are properly formulated and applied according to the standard of a reasonable employer acting fairly and in good faith towards the employee, subsequent challenge is unlikely to be fruitful.” (p 671)

Since Ms Mahauriki was not the ‘last on’, I would expect evidence about the criteria used to decide that Ms Mahauriki’s experience was less than that of the employees who were retained. However the discussion during the investigation meeting indicated that the criteria applied were vague. For example an assessment of qualifications does not seem to have been treated as a relevant criterion, although Ms Mahauriki has some qualifications in counselling and Maori perspectives. As I have said, the discussion during the investigation meeting indicated that the real criterion amounted to an assessment of Ms Mahauriki’s performance in respect of her manner of dealing with residents. Even so, while I would accept affinity with residents as an example of a reasonable criterion, it was not identified to Ms Mahauriki as a reason why she was the person whose position was made redundant.

Overall I am not satisfied that criteria for selection for redundancy were properly formulated and applied. On that ground I find that Ms Mahauriki’s dismissal was unjustified and that she has a personal grievance.

This finding means it is not necessary to comment on the procedure followed by the trust in implementing the redundancy.

Remedies

Ms Mahauriki is entitled to reimbursement of remuneration lost as a result of her personal grievance calculated as the lesser of: a sum equal to that lost remuneration; or 3 months’ ordinary time remuneration. The Authority has discretion to order a greater sum (but not a sum exceeding the total actual loss), and reduces the sum it would otherwise have awarded if it finds the employee concerned is guilty of contributory and blameworthy conduct in respect of the circumstances of the grievance. The Authority also takes into account whether the employee has mitigated any loss of remuneration – for example where an employee has made no attempt to find alternative employment this would be regarded as a failure to mitigate loss and count against the employee.

Here I have a concern about the extent to which Ms Mahauriki attempted to mitigate her loss of remuneration. There are a number of valid reasons why she might not have actively sought employment, including the breakdown of her marriage and her move to Wellington in February 2003. It is to her credit that she has worked on a voluntary basis while in Wellington. However there is a question as to the extent to which the trust should be required to reimburse her for lost

earnings in such circumstances. For these reasons, together with the obviously limited ability of the trust to pay, I consider it appropriate to order the trust to reimburse Ms Mahauariki for 3 months' lost remuneration.

Ms Mahauariki's hours of work fluctuated. When I asked her at the investigation meeting for an assessment of her usual weekly hours of work she nominated the figure of 32 hours per fortnight, or 16 hours per week. At \$8.00 per hour, her total loss of remuneration over 3 months is \$1,664.00. The trust is ordered to reimburse Ms Mahauariki in that sum.

Ms Mahauariki is also entitled to compensation for the injury to her feelings resulting from her personal grievance. Ms Mahauariki told me she has been unable to 'move on' after her dismissal and I accept there has been significant injury to her feelings. Given the breadth of the issues she raised, however, it is more difficult to identify whether the injury was caused solely by her unjustified dismissal or whether the injury accumulated from a number of factors including her view of the quality of the management exercised in respect of the Whare. I consider the latter to be more likely. The Authority can compensate Ms Mahauariki only for the injury to her feelings arising out of her unjustified dismissal.

Bearing this in mind, as well as the limited ability of the trust to pay, the trust is ordered to compensate Ms Mahauariki for injury to her feelings in the sum of \$2,000.

Costs

Costs are reserved but the parties are invited to agree on the matter themselves. If they are unable to do so they shall have fourteen days from the date of this determination in which to file and exchange memoranda on the matter. If either wishes to reply to anything in the memorandum of the other they shall have a further 3 working days from the date of receipt of the relevant memorandum in which to file and exchange such reply.

Both parties are advised that, for the purpose of resolving costs, I recognise Robinson Law as Ms Mahauariki's representative on record. I record that the Authority received advice of that firm's receipt of instructions on 30 September 2003 - after the investigation was closed and all that remained to be done was the issue of this determination. However because the firm is now instructed the trust should deal directly with it over costs, including for the purpose of the service of documents where necessary.

R A Monaghan
Member, Employment Relations Authority