

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Shona Hickey (Applicant)
AND Maori Legal Services - Te Ture Manaaki O Rehua Trust (Respondent)
REPRESENTATIVES Jeff Goldstein, Counsel for Applicant
Penny Shaw, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 2 December 2003
DATE OF DETERMINATION 10 February 2004

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Shona Hickey is the manager of Maori Legal Services – Te Ture Manaaki O Rehua Trust (the Trust). The Trust is a registered charitable trust and operates a free legal service based in Christchurch.

[2] Ms Hickey says that the Trust breached express terms of her employment and that she has an unjustified disadvantage personal grievance. These claims relate to problems that arose with the negotiation of her salary from about August 2001. The Trust admits that it did not properly undertake performance reviews in accordance with the written employment contract. However, the Trust says that the failure did not cause any harm or loss to Ms Hickey. It also denies that Ms Hickey has a valid personal grievance.

[3] Both Ms Hickey and the Trust endeavoured to resolve this problem through mediation and in other ways but they could not find a mutual resolution.

Background

[4] As is usual, the Trust is established by deed. The deed provides for the appointment of a chairperson and other trustees together called the Board. Ultimately, the Board is charged with responsibility for the affairs of the Trust.

[5] Ms Hickey commenced employment with the Trust about August 1999. There is a written employment contract dated 22 July 1999 signed by Ms Hickey and on behalf of the Trust. There is also a written job description. The initial salary was set at \$38,500 per year.

[6] On or about 17 August 2000 Ms Hickey and the Trust agreed to increase her salary to \$40,000 per year together with an additional \$1,000.00 for training.

[7] At clause 5, the contract provides that the Trust

...shall negotiate at least annually with the Employee a performance agreement setting out required outcomes and measures for evaluating the performance of the Employee against those outcomes. In negotiating the performance agreement, both MLS and the Employee shall have regard for the process for reviewing performance set out in clause 7 of this contract.

[8] Clause 7 provides

The process to be used to review the Employee's performance shall take into account the duties and responsibilities of the Employee under this contract, any particular objectives set for the Employee by MLS including those set out in any performance agreement ...MLS shall review the Employee's performance at least once per year. That assessment shall take place in May each year. In reviewing the Employee's performance, MLS shall meet with the Employee, ... The outcome of the review may result in an adjustment to the Employee's salary. Any such adjustment, if any, will be payable from such date as MLS shall, in its absolute discretion, determine.

[9] The salary increase mentioned above was not preceded by the negotiation of a *performance agreement* as envisaged by clause 5 or a *performance review* as envisaged by clause 7. Rather the Trust's chairperson and Ms Hickey engaged in a process of offer and counter-offer which resulted in the agreed increase.

[10] In early August 2001, Ms Hickey had discussions with the Board Chairperson (Cliff Bedwell) and a Board member (Philip Royal) about wage increases for Trust staff. There was also some discussion between them about a salary increase for Ms Hickey but agreement was not reached.

[11] Ms Hickey wrote to Mr Royal on 16 August, Mr Bedwell being then overseas. The letter was copied to other Board members. The letter refers to an earlier report on the Maori Legal Service that found that the manager's role far exceeded that described in the job description and was more akin to that of Chief Executive. Ms Hickey expressed the view that she was not adequately remunerated given her actual responsibilities and her performance. She pointed out the lack of a *fair and independent process for determining salaries* and stated that the minimum she would accept was a salary of \$50,000 per year.

[12] There was a meeting on 21 August between Ms Hickey and Mr Royal to discuss her salary, amongst other things. Mr Royal made an offer of \$42,500.00 per year plus a \$1,000.00 bonus and explained that Mr Bedwell wanted to reduce Ms Hickey's responsibilities with a commensurate increase in those of the Board. Ms Hickey rejected the offer and said that she did not consider that it was possible to transfer responsibility from her to the Board. It was agreed between Ms Hickey and Mr Royal that the Board would do a *job scoping* exercise to find other comparative positions. I accept Ms Hickey's evidence that she suggested this exercise.

[13] Mr Royal initially sought comparative information from the Legal Services Agency and the author of the earlier report mentioned above. He sent an email to Ms Hickey on 22 August to tell her what he was doing and of his intention to come back to her the following week.

[14] Mr Royal sent Ms Hickey a further email on 28 August. He explained that he had some material but was awaiting other information. He also explained that he had not been able to discuss

matters with all the Board members and proposed further deliberation at the next Board meeting scheduled for 13 September. Mr Royal also referred to the proposal to engage an experienced person to do a job sizing exercise. Ms Hickey responded raising some issues about other staff which need not be mentioned here but not objecting to the proposal as it affected her.

[15] The job sizing exercise conducted by an accounting firm included information provided directly by Ms Hickey. Ms Hickey was not able to provide that information until November 2001. By email dated 22 November, Mr Royal told Ms Hickey that he and Mr Bedwell had given some feedback on her information. Then on 27 November, Mr Royal advised that the Board would have the results of the job sizing exercise for the matter to be considered at the Board meeting on 13 December.

[16] The result of the Board's consideration was conveyed in writing to Ms Hickey on 14 December. That was an offer of \$45,000.00 backdated to July 2001 said to reflect the current market value of the position and in acknowledgement of Ms Hickey's good work. Ms Hickey was asked to respond by 19 December.

[17] Ms Hickey requested a copy of the consultant's job sizing report which she received. Ms Hickey also received a letter from Mr Bedwell dated 17 December 2001. In that letter, Mr Bedwell claimed that Ms Hickey initially wrote and rejected the salary increase but then wrote a second letter asking for the consultant's report. Ms Hickey denied any knowledge of the first letter referred to by Mr Bedwell. The Trust could not locate the letter so I accept Ms Hickey's evidence on the point. Mr Bedwell made it clear that the Trust's decision to increase Ms Hickey's salary to \$45,000.00 was final and the Trust did not intend to reconsider. Ms Hickey was asked to make the necessary arrangements to implement the increase and back pay.

[18] The consultant's report recommended that the Board set a salary between \$41,342.00 and \$55,933.00 with a mid point of \$48,638.00. The mid point was said to represent a fully competent and experienced person while a newcomer or lower performer would normally commence at the bottom of the range. The range was said to be an assessment of the job against the market but strongly reflected the Trust's ability to pay. The first two sections of the report refer to a change in the consultant's original views after receipt of *further detailed information* from Mr Royal.

[19] Ms Hickey responded by writing to Mr Bedwell (copy to Mr Royal) on 18 December asking if she should infer from the offer of less than the recommended mid point (for a fully competent and experienced person) that her performance was at the lower end of the scale. She asked to be made aware of any performance concerns or to receive an explanation for the offer being at the *low end of the scale*. Ms Hickey proposed a meeting on 19 December. She also circulated material about the salary dispute to other Board members.

[20] Mr Royal's father was Ms Hickey's partner at this time. Mr Royal had received a phone call from his father to discuss the salary negotiations. Naturally, Ms Hickey's partner based his view of the developing dispute on what he had been told by Ms Hickey. The phone call resulted in raised voices between Mr Royal and his father. As a result, Mr Royal sent an email to Ms Hickey on 19 December advising that he would rather not be part of discussions.

[21] Mr Bedwell was not available for a meeting on 19 December and Ms Hickey was not available on 21 December which was the alternative proposed by Mr Bedwell. As a result, the dispute lay in abeyance until 15 January 2002 when Ms Hickey sent a note to Mr Bedwell asking for some proposed dates so she and her advocate could meet him to progress the negotiations. Mr Bedwell responded that he would advise dates as soon as he could organise his time. Ms Hickey copied this material to all the Board members.

[22] Meantime, on 17 January 2002, Mr Bedwell sent a fax to Ms Hickey asking for her to make arrangements for the Trust to join Canterbury Employers' Chamber of Commerce. Ms Hickey declined to do so on the basis that the instruction was unconstitutional by reference to the Trust's constitution.

[23] There was a special meeting of the Board of Trustees on 21 January 2002. They decided that the offer of a salary increase to \$45,000.00 was final and that it was therefore unnecessary to meet with Ms Hickey. The Board also ratified the decision to join Canterbury Employers' Chamber of Commerce. Ms Hickey was instructed to prepare a cheque for the membership fee. The Board also expressed concern about Ms Hickey communicating with members individually about the salary dispute and decided that Ms Hickey should direct all communications to the Chairperson. On 22 January 2002, Ms Hickey was given a letter setting out these matters.

[24] On 23 January 2003 Ms Hickey wrote to Mr Bedwell. She characterised the Trust's *take it or leave it* attitude over the salary as a breach of good faith and said that the Trust was obliged to meet and discuss the issue. Ms Hickey also sought clarification over her ability to challenge future orders from the Chairperson on similar constitutional grounds.

[25] Mr Bedwell responded by letter dated 25 January 2002. He repeated the direction about the cheque for Canterbury Employers' Chamber of Commerce and cautioned Ms Hickey that she might be dismissed if there was non-compliance with the direction. He explained that Ms Hickey was entitled to raise any concerns with him or at Trust Board meetings which she normally attended. Lastly, he advised that he would deal with the salary matter separately.

[26] Next, Ms Hickey's representative (Paul Montgomery) wrote to Mr Bedwell. Mr Bedwell's response was to agree to Ms Hickey addressing the Trust Board members on 12 February, their next scheduled meeting.

[27] Ms Hickey usually attended and presented a report to Board of Trustees meetings. Her report to the February 2002 meeting identified her concerns about the way the Board worked. It referred to unilateral not consensual decision making, unprofessional and demeaning communications to the manager and arbitrary decision making by the Board.

[28] Ms Hickey presented a separate memorandum to the Board concerning the salary dispute. She criticised the Trust because her request just before Christmas to bring an advocate to a meeting about her salary had not been accommodated. She said that she was entitled to a fair and transparent negotiation process but, contrary to that, the Trust adopted a *take it or leave it attitude* and did not disclose the consultant's original views or the information that caused a change in these views. Under the heading of *good faith bargaining*, Ms Hickey characterised the Board's communication as high handed and in some instances disrespectful. She also noted her salary was significantly less than the previous manager's and that the Trust's offer was at the low end of a scale based on inadequate comparisons.

[29] By letter dated 8 March 2002, Mr Bedwell on behalf of the Trust, responded to Ms Hickey's memorandum. The letter concluded by advising that the Board saw no compelling reason to alter its offer of a salary of \$45,000.00 and would implement that decision effective from 1 July 2001.

[30] Arrangements were made in early March 2002 to convene a mediation meeting. However the mediation did not resolve the problem.

[31] By letter dated 28 March 2002, Ms Hickey's representative formally raised her claimed personal grievance pursuant to section 103 (1) (b) of the Employment Relations Act 2000.

[32] Attempts were made through correspondence between the respective representatives to resume attempts to mediate or facilitate a resolution of the problem. Letters and documents placed before me refer to events at the mediation and material prepared for or produced at that mediation. I do not intend to canvass those events and issues in this determination.

[33] A statement of problem was lodged with the Authority in May 2002. Nonetheless, the parties continued their attempts to resolve the problem including the wider issues raised by both sides in the context of the mediation. Following a phone conference with the Authority, dates for an investigation meeting were scheduled but the parties also agreed to attempt further mediation.

[34] Meantime, Mr Bedwell and other Board members were replaced by a new Chairperson (Norm Dewes) and new Board members. Mr Dewes was aware that Ms Hickey's salary increase and personal grievance claims were unresolved. The new Board discussed that and other matters on 5 November 2002. Mr Dewes then sent an email to Ms Hickey. That advised that the Board was withdrawing all wage adjustment offers including the managers but would welcome any new information concerning claims for salary increases. The new Board thereby attempting to clear away the residue of the difficulties that had developed particularly between Ms Hickey and Mr Bedwell and allow a fresh start on the contentious matters.

[35] Correspondence between Ms Hickey and Mr Dewes (and their representatives) evidences a developing tension over a number of matters. In October 2003, counsel for Ms Hickey wrote to Mr Dewes alleging that Ms Hickey continued to be disadvantaged by Mr Dewes' actions in issuing contradictory instructions/demands, treating Ms Hickey in a rude and aggressive manner at meetings and interfering in management issues. In particular, Ms Hickey complained about the decision that the Trust would not fund her attendance at a national hui of community law centres despite such funding being built into a grant received from the Law Services Agency.

[36] On or about 14 October 2003, Ms Hickey received advice from Mr Dewes that the Trust's secretary (rather than Ms Hickey and Trust employees) would make arrangements for the Trust's annual general meeting. Ms Hickey objected on the basis that removing these tasks which she had previously performed disadvantaged her.

[37] More positively, from about September 2002, Ms Hickey and the Board were able to agree on and commence a process aimed at formulating a performance agreement for the first time. That is the annual performance agreement referred to in Ms Hickey's employment contract of July 1999.

[38] Ms Hickey gave evidence about the personal difficulties that arose from the involvement of her (then) partner's son (Philip Royal) with the salary negotiations, at least prior to 19 December 2001 when Mr Royal sent his email saying he preferred not to be part of the discussions. There is hearsay evidence to suggest that Mr Royal had argued for her to receive a smaller salary increase than that offered. Ms Hickey explained that she could not discuss her salary negotiations with her partner or her family members because of Mr Royal's involvement. Ms Hickey also felt that she did not want Mr Royal present in her house but if she had excluded him, she would have created the possibility that a member of her family might have been similarly excluded at some point. Ms Hickey said she was not prepared to take that risk so she and her partner separated. That is the basis of the claim by Ms Hickey that she was discriminated against because of her marital status.

[39] Ms Hickey pointed out the irony that the Trust works with other *not for profit* agencies providing training about governance and management roles within such agencies yet the Board of

the Trust *improperly and unlawfully* intervened in her management role. One instance was an instruction in November 2002 to declare redundant an employee in circumstances likely to create a substantial personal grievance. Ms Hickey found such instructions distressing and depressing.

[40] From the time that the new Board was elected and began to focus on the Trust's financial situation, Ms Hickey believes there has been an underlying suggestion that she is *ripping the place off*.

[41] Finally, Ms Hickey gave evidence about what she called the recent actions of Mr Dewes interfering with funders of the Trust.

[42] Staff and others involved with the Trust gave evidence broadly supportive of Ms Hickey. It is not necessary to canvass that evidence in detail at this point.

Issues

[43] In an amended statement of problem Ms Hickey seeks \$10,000.00 damages for the breach of the express obligations set out in clauses 5 and 7 of the written employment agreement. The contract provides a direct link between the performance agreement to be negotiated at least annually, the performance review to be conducted at least annually (in May each year) and any adjustment to the employee's salary. I note also that the Trust expressly agreed to treat Ms Hickey fairly and reasonably and promised to act as a good employer as identified in the State Sector Act 1988.

[44] Counsel for the Trust referred me to two cases regarding the failure to conduct salary reviews. In *Rankin v Attorney General* [2001] ERNZ 476 the Employment Court was not persuaded that it was within the contemplation of the parties that a delay falling short of a refusal to perform an annual performance appraisal should give rise to a claim for damages. However, the Court also noted that if the employer had refused to carry out the review or continued to delay it after a complaint from the employee, that could give rise to a personal grievance or an action for breach of contract with damages for vexation.

[45] In *Alton-Lee v Victoria University of Wellington* [2000] ERNZ 152 the Court found that the employer's failure to carry out periodic performance appraisals was in breach of the contractual obligations to the employee and caused her loss constituting upset and loss of a chance to qualify for salary increases. Only that second loss was quantified to avoid double recovery for upset, as distress damages were awarded under other causes of action.

[46] From early on in the negotiations, Ms Hickey was critical that the earlier decisions on her salary were not based on her performance and did not compensate her adequately for her responsibilities. She referred to the lack of a fair and independent process for setting salaries. The outcome of Ms Hickey's rejection of the initial increase was an agreement that the Trust would embark on a job scoping exercise. That was not a review of Ms Hickey's performance but rather a comparison of her existing role and salary to the market generally. It resulted in an offer of \$45,000.00 per year, which offer was said to include consideration of Ms Hickey's work in her role by which I presume is meant her performance. When Ms Hickey learnt that the offer was below the rate recommended as the mid point for a person fully competent and experienced she questioned whether her employer then viewed her performance as somehow less than satisfactory. The Trust responded by reiterating the same offer and then focussed on the developing stand-off between Ms Hickey and the Chairperson. Thereafter, Ms Hickey met with the Trust Board and presented a paper outlining her criticisms particularly of the process which resulted in the offer. The Board defended its process and repeated the same offer. At least as regards the open exchanges between the parties thereafter, there was no change up to November 2002.

[47] In all of this, what did not happen was a review of Ms Hickey's performance taking account of her duties and responsibilities. There was no meeting with Ms Hickey to review her performance, nor was there a written record of the review incorporating Ms Hickey's comments. The Trust's failure to do these things was in breach of the employment agreement. There is no doubt that the breach has caused Ms Hickey considerable distress and vexation to mirror the words used in the two cases mentioned above. Such damage was a foreseeable consequence of a breach given the nature of the employment (see particularly clauses 2 and 4 of the contract) and the contractual provisions regarding the review process. I find that Ms Hickey's situation is analogous to that of the employee in *Alton-Lee*. This case differs from *Rankin* in that the Trust failed to adhere to the contractual process in the face of Ms Hickey's complaints about its process. The Court's obiter comment mentioned above is very much applicable on the present facts.

[48] Damages of \$10,000.00 are sought. I agree with counsel that it is a modest claim in the light of the evidence of distress given by Ms Hickey.

[49] Ms Hickey also sought orders requiring the Trust to undertake performance reviews for the years to July 2000, July 2001, July 2002 and July 2003. However, at the investigation meeting, counsel observed that it would be difficult to properly remedy the past and that Ms Hickey wanted to put matters behind her. I understood that to be a concession that no orders in respect of the years up to July 2003 were required. Since the parties have now concluded a performance agreement under clause 5 of the contract there should be no difficulty with conducting the next performance review. Whether that results in an increase in salary is a matter for the parties once the review has been completed.

[50] Ms Hickey also seeks \$15,000.00 compensation for a personal grievance as defined by section 103 (1)(b) of the Employment Relations Act 2000. To some extent the grievance also rests on the breaches of the employment agreement mentioned above. To find such a grievance established and award compensation would be to allow double recovery and I decline to do so.

[51] There are also other aspects to the alleged disadvantage, as mentioned above. I note Mr Dewes denied being rude and aggressive towards Ms Hickey. I accept that denial.

[52] Mr Dewes acknowledged that he spoke to funders about the existence of Ms Hickey's legal claim against the Trust. I see nothing untoward in that and do not accept that it evidences any ill will towards Ms Hickey. Generally as between Mr Dewes and Ms Hickey, I consider the tension over a number of matters is the result of them both being strong minded individuals with different views about those issues. While I accept that Ms Hickey has a legitimate complaint about the Trust's failure to adhere to her employment contract over salary reviews, I do not consider that any difficulties between her and Mr Dewes are such as to give rise to a grievance.

[53] In part, Ms Hickey's alleged disadvantage relates to the view that there must be a separation between governance (the Board's role) and management (her role). There is no overarching legal principle that requires the Board to respect such a distinction although it is a practice adopted by many organisations including those in the *not for profit* sector. The actions of Mr Dewes or the Board do not amount to disadvantageous treatment of Ms Hickey just because they constitute the exercise of a management role rather than a governance role.

[54] Ms Hickey also said she was discriminated against due to the involvement of Mr Royal in the salary negotiations. There was a clear conflict of interest that Mr Royal (and Ms Hickey) eventually recognised. However, the existence of such a conflict is quite distinct from discrimination. Discrimination exists in a case such as this where an employee is afforded different terms of

employment or subjected to some detriment (including dismissal) compared to other employees, that difference being by reason directly or indirectly of one of the prohibited grounds of discrimination. There is no evidence to sustain the view that Ms Hickey was treated any differently because of her relationship with her partner. Hence, there is no valid claim that Ms Hickey was subjected to discrimination.

Summary

[55] For the reasons explained above, I uphold Ms Hickey's complaint that she suffered loss as a result of the Trust's breach of her employment contract. The Trust is to pay Ms Hickey damages of \$10,000.00

[56] I decline Ms Hickey's claims in respect of any other personal grievances.

[57] Costs are reserved. If the parties are unable to resolve any costs issues between themselves, Ms Hickey may lodge and serve a memorandum within 14 days. The Trust may then lodge and serve a reply within a further 7 days.

Philip Cheyne
Member of Employment Relations Authority