

Attention is drawn to paragraph 5 of this determination prohibiting publication of certain evidence.

Determination Number: CA 89/05  
File Number: CEA 417/04

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

**BETWEEN** Roya Amini-Tu'inukuafe (Applicant)

**AND** Work & Income, a division of the Ministry of Social Development  
(Respondent)

**REPRESENTATIVES** Rachel Oldham, Counsel for Applicant  
Aaron Martin, Counsel for Respondent

**MEMBER OF AUTHORITY** Philip Cheyne

**INVESTIGATION MEETING** 1 June 2005  
2 June 2005

**DATE OF DETERMINATION** 27 June 2005

DETERMINATION OF THE AUTHORITY

***Employment relationship problem***

[1] Roya Amini-Tu'inukuafe was employed as a public servant from August 1992 until she resigned from the Ministry of Social Development by letter dated 22 October 2004. The last part of Mrs Amini-Tu'inukuafe's service with MSD was a series of secondments in Christchurch, away from her home which had been in Auckland. The first secondment started on 31 March 2003 and is documented in writing. It was followed by two other secondments subject to written agreements and a final period of secondment verbally agreed pending the outcome of Mrs Amini-Tu'inukuafe's application for a permanent Christchurch based position. When Mrs Amini-Tu'inukuafe was unsuccessful with that application, MSD required her to report to Auckland to resume her work there but Mrs Amini-Tu'inukuafe declined to do so. Once she had secured a permanent position with another employer based in Christchurch, Mrs Amini-Tu'inukuafe wrote a letter of resignation from her employment with MSD.

[2] There are many factual disagreements between Mrs Amini-Tu'inukuafe and MSD, principally centred on the period of the secondments. I have been provided with a substantial amount of documentation about MSD's policies and procedures and the factual issues just mentioned. Mrs Amini-Tu'inukuafe's statement of problem says that there are no less than four types of unjustified actions resulting in disadvantage to her. She also complains about breach of her individual employment agreement, and breach of MSD's policies and procedures concerning secondments, recruitment and review of appointments. There are additional complaints about a breach of the good faith duty and the implied obligation of fair and reasonable treatment. Mrs Amini-Tu'inukuafe says that her resignation is a constructive dismissal due to conduct intended to coerce her resignation and/or breaches of duty on the part of MSD.

[3] An applicant is required in a statement of problem to explain how they want their problem resolved. Mrs Amini-Tu'inukuafe's statement identifies 12 different amounts of compensation or penalty, plus costs, interest and two other general claims for other remedies or other outstanding monies. In her evidence, Mrs Amini-Tu'inukuafe particularised most of her claims. For example, her claim for expenses said to be incurred in relation to the secondments totalled \$35,190.72. Many of these items are not claimable even on the best view of the problem from Mrs Amini-Tu'inukuafe's perspective: Top Realty Limited for advertising (\$665.00), Residential Tenancies for a refundable bond (\$660.00), G Tui being a transfer of funds between Mrs Amini-Tu'inukuafe and her husband (\$3,000.00), legal fees on the sale of an Auckland property owned by Mrs Amini-Tu'inukuafe and another property owned by her husband (\$680.00 and \$453.75), commission on the sale of one of the Auckland properties (\$19,930.85), mini-bar, food and movie charges at hotels where Mrs Amini-Tu'inukuafe stayed when first in Christchurch. After deducting these untenable claims, less than \$10,000.00 is left from the \$35,190.72. Four separate penalties each of \$10,000.00 are sought. There is also a claim of \$30,000.00 for distress and a claim for lost remuneration. Neither the penalty claim nor the distress compensation claim is realistic, again on the best view of the problem from Mrs Amini-Tu'inukuafe's perspective. The short point of this is that couching a statement of problem in the form of multiple, overlapping causes of action and making untenable remedy claims is an impediment to resolution of an employment relationship problem.

[4] I have formed a clear view that Mrs Amini-Tu'inukuafe does not have any legally sustainable claim and is not entitled to any remedy. Section 174 of the Employment Relations Act 2000 requires the Authority to state relevant findings of fact, state and explain its findings on relevant issues of law and express its conclusions on issues that require determination in order to dispose of the problem before it. The result is that this determination might seem brief when compared to the written and oral evidence, documents and submissions advanced by the parties. I can assure the parties that I reviewed all that material before coming to the views expressed in this determination. However, it will not be necessary to refer to all the differences between the parties.

[5] There is evidence about Mrs Amini-Tu'inukuafe's medical history. I make an order prohibiting the publication of that evidence except that the express findings in this determination may be published.

[6] To determine this problem, I need to review the various secondment agreements, outline some attempts by Mrs Amini-Tu'inukuafe to find a permanent position with MSD in Christchurch, apply the law relating to disadvantage grievances, set out the circumstances of Mrs Amini-Tu'inukuafe's resignation and assess whether it amounts to a constructive dismissal, make findings about the requirements of Mrs Amini-Tu'inukuafe's employment contract and whether it was breached by MSD and assess whether there was any breach by MSD of its implied contractual obligations or the duty of good faith.

## *Secondments*

[7] About March 2003 Mrs Amini-Tu'inukuafe and her husband were considering moving away from Auckland. The evidence indicates that Mr Tu'inukuafe visited Christchurch several times in March and perhaps earlier to canvass work opportunities. Mrs Amini-Tu'inukuafe sent an email to other MSD offices inquiring about work opportunities in Canterbury. At the time, there was a temporary vacancy in the Sydenham service centre for a work broker while the incumbent was on a short-term secondment. The service centre manager (Lynley Bateman) had some discussion with Mrs Amini-Tu'inukuafe's Auckland manager and Mrs Amini-Tu'inukuafe. That resulted in agreement between all involved to second Mrs Amini-Tu'inukuafe to fill the vacancy for 11 weeks from 14 April 2003 until 27 June 2003. There is a written agreement signed by both MSD managers and Mrs Amini-Tu'inukuafe.

[8] Mrs Amini-Tu'inukuafe is now very critical of MSD for not meeting all the costs associated with her and her family's move to Christchurch in connection with this secondment. She refers me to her individual employment contract and the MSD secondment policy in particular. I see no merit in the criticisms. There is a signed secondment agreement that records the conditions of the secondment. Under the heading *Travel & Accommodation* it records the agreement that MSD will reimburse Mrs Amini-Tu'inukuafe for the cost of her airfare from Auckland to Christchurch. MSD did so. There is no provision for any other additional payment. If Mrs Amini-Tu'inukuafe was not satisfied with the arrangements, she should have discussed that further at the time. Her signature on the secondment agreement indicates her agreement with the secondment arrangements which cannot be undone now, short of unfair bargaining or the like.

[9] Mrs Amini-Tu'inukuafe's 1999 individual employment contract includes clause 5.3 *Reimbursing Expenses, Travel and Relieving* and clause 8.5 *Transfers*. The contract does not assist Mrs Amini-Tu'inukuafe's argument. Her 1999 contract must be read as subject to the 2003 secondment agreement for the duration of the secondment. I also find that clause 5.3 does not apply to secondments. It provides for reimbursing expenses *Where the employee is required to travel overnight or on a relieving basis ....* It does not refer to secondments which are dealt with comprehensively by MSD policy. Clause 8.5 does not apply either. That provides for MSD to meet relocation costs *Where the employee is appointed to a position in another location*. Mrs Amini-Tu'inukuafe was seconded not appointed to a position in another location.

[10] The second and third written secondment agreements covered the periods from 30 June 2003 to 1 August 2003 and 2 August 2003 to 30 June 2004. The second agreement under the heading *Travel & Accommodation* says *NIL*. Mrs Amini-Tu'inukuafe signed the secondment agreement on 26 June 2003. There is no reason to go beyond the effect of her agreement.

[11] The third agreement is in a different format, reflecting changes to MSD's secondment policy in about November 2003. This agreement includes the following headings: *Travel allowance: (if applicable)*, *Accommodation: (if applicable)*, *Secondment location allowance: (if applicable)*, *Other expenses: (if applicable)* and *Liability (for accommodation)*. Alongside each line is recorded *Not applicable*. Mrs Amini-Tu'inukuafe signed and dated the agreement on 2 February 2004, well after the commencement of the secondment period. That came about because the manager who arranged the secondment (Lyn Hughes) was unwell and was transferred to another role soon after the secondment commenced. The replacement manager did not become aware of the lack of any written agreement but it came to Ms Hughes's attention upon her return about January 2004. The written agreement was then prepared and signed by all involved, including the Auckland manager for Mrs Amini-Tu'inukuafe's original position. It was made clear to Mrs Amini-Tu'inukuafe that the Auckland manager (Sandra Biggs) was unlikely to agree to any further secondment. There is

nothing in these circumstances that would allow Mrs Amini-Tu'inukuafe to resile from the secondment agreement as she now seeks to do.

[12] I should note that there is no acceptable evidence that Mrs Amini-Tu'inukuafe was in the least bit dissatisfied with the secondment arrangements until after it became clear that she was not able to obtain a permanent position in Christchurch, more of which shortly.

[13] All the written secondment agreements contained an expiry date. It was always clear to Mrs Amini-Tu'inukuafe that the written and verbal secondments were of limited duration. She was encouraged to apply for permanent appointment to Christchurch and did her best to obtain one but she always knew that she would be appointed only if she was considered the best candidate. The concept of a legitimate expectation was raised but has no application in the present case.

### ***Work broker vacancies***

[14] In about March 2004, during the third secondment period, Mrs Amini-Tu'inukuafe applied for a six week secondment as a work broker based at the New Brighton service centre. She was interviewed for the position by the service centre manager, Lynley Speers. Later, Ms Speers offered that secondment to Mrs Amini-Tu'inukuafe, who indicated she wanted to think about whether she should accept the secondment. Before Mrs Amini-Tu'inukuafe accepted the position, she was advised by MSD that it was no longer on offer. The reason for that change is not in dispute and had nothing to do with either Mrs Amini-Tu'inukuafe or Ms Speers. It related to budget projections and regional staffing levels. At a regional level, MSD froze further appointments in advance of decisions about staffing levels.

[15] Mrs Amini-Tu'inukuafe says that Ms Speers developed an animosity towards her because Ms Speers blamed her for the regional office directive that prevented the proposed secondment proceeding. I prefer Ms Speers' account. Ms Speers learnt of the freeze and contacted the candidates for the secondment position including Mrs Amini-Tu'inukuafe to advise them of and apologise for the change in circumstances. It is unlikely that Ms Speers blamed Mrs Amini-Tu'inukuafe for the change because she knew its real geneses. Mrs Amini-Tu'inukuafe says that Ms Speers threatened her by saying that she would find it difficult to find a permanent work broker position in the region. I accept the evidence of Ms Speers that no threat was made. At the time, Ms Speers had no regional overview. I also find it probable that Mrs Amini-Tu'inukuafe would have complained at the time to MSD managers if she had been threatened in the manner now alleged.

[16] Following on from the complaint about animosity on the part of Ms Speers, Mrs Amini-Tu'inukuafe says that she should not have been involved in the decision making about a work broker vacancy that Mrs Amini-Tu'inukuafe applied for in June 2004. By that time, Ms Speers had been appointed to a wider work services manager role. As a result, she chaired the selection panel. Mrs Amini-Tu'inukuafe did not object to the involvement of Ms Speers until later.

[17] When she applied for the June 2004 vacancy, Mrs Amini-Tu'inukuafe was still subject to the third secondment agreement set to end on 30 June 2004. When it became apparent that the appointment process would not be finished until after that date, Mrs Amini-Tu'inukuafe was offered and accepted a verbal extension (twice) to the secondment. That was arranged with Ms Hughes whose evidence on the point I accept. If it had not been offered and accepted, Mrs Amini-Tu'inukuafe would have been obliged either to return to Auckland at the beginning of July, resign from her permanent position with MSD or take whatever paid or unpaid leave she was entitled to. The verbal extension was a common sense arrangement that favoured Mrs Amini-Tu'inukuafe,

given the possibility that she may have been appointed to the permanent work broker position that she had applied for.

[18] In the end, Mrs Amini-Tu'inukuafe was shortlisted and interviewed for but not offered the vacancy. Mrs Amini-Tu'inukuafe is very critical of that decision. I acknowledge that MSD was obliged under sections 61 and 60 of the State Sector Act 1988 to notify the vacancy to enable suitably qualified people to apply and to give preference to the person best suited to the position. As a matter of practicality it was necessary to publicly advertise the position. Candidates were then shortlisted (including Mrs Amini-Tu'inukuafe) and interviewed. In the view of the appointment panel, the person best suited was someone other than Mrs Amini-Tu'inukuafe. I have been provided with copies of the notes and scores recorded by the interview panel. All three panellists ranked Mrs Amini-Tu'inukuafe well outside the top half of candidates. The combined score ranked her twelfth out of fourteen, with four to be appointed. There is no reason to question the outcome on the information available to me bearing in mind that I reject the allegation of bias on the part of Ms Speers. Naturally, Mrs Amini-Tu'inukuafe believes she was the person best suited but that assessment was one for the panel to make.

[19] There is a further hurdle for Mrs Amini-Tu'inukuafe in trying to impugn the decision not to appoint her to this and other permanent vacancies. In *Victoria University of Wellington v Haddon* [1996] 1 ERNZ 139, the Court of Appeal held that there was no jurisdiction to enquire into the functioning of an appointment committee by way of personal grievance in the circumstances of that case. A university lecturer on a fixed term employment contract applied for a different permanent position and alleged various procedural defects in the consideration of his application for that permanent position. The present case is analogous. Neither Mrs Amini-Tu'inukuafe's permanent Auckland position nor her Christchurch secondments could have been affected disadvantageously by the concerns (if substantiated) about how MSD handled her various applications.

### ***The resignation***

[20] Mrs Amini-Tu'inukuafe had several meetings with her Christchurch managers after learning that her work broker application had been unsuccessful. In respect of these exchanges, I prefer the evidence of Ms Speers and the regional manager (Michelle Mitchell) to the effect that they were supportive of Mrs Amini-Tu'inukuafe in the situation she faced of having to return to her permanent position in Auckland. In early August, Mrs Amini-Tu'inukuafe agreed to return to Auckland to resume her position by 6 September 2004. Her evidence is that she agreed to this *reluctantly*. That is no doubt accurate, but the reluctance concerned her family situation since she and her husband had settled in Canterbury having purchased land in about May 2003 and having built a home on that land by early 2004.

[21] In her evidence, Mrs Amini-Tu'inukuafe alleged that her difficulties in Christchurch over securing a permanent position and with Ms Speer caused her to be concerned about how MSD would treat her in Auckland. Her letter dated 16 August 2004 raising a personal grievance claim is inconsistent with that evidence. In the letter, Mrs Amini-Tu'inukuafe said *I have been assured by the Auckland manager that I am welcome back in the area and still maintain the positive relationship I have had with the Service in Auckland ....* Mrs Amini-Tu'inukuafe also asked for her grievance issues to be handled within the Canterbury region. The evidence (which I accept) is that MSD complied with this request. I therefore find as a fact that there was no valid basis for Mrs Amini-Tu'inukuafe's expressed concern.

[22] Following 16 August 2004, there was discussion and correspondence between MSD and Mrs Amini-Tu'inukuafe's solicitor concerning her grievance claims and support for her impending return to Auckland. MSD denied that there were any grounds for a valid grievance and

comprehensively set out its view of the facts. MSD also granted Mrs Amini-Tu'inukuafe two periods of special leave on pay (through to early October 2004) and offered \$1,000.00 towards Mrs Amini-Tu'inukuafe's costs in relocating to Auckland. However, in a letter dated 7 October 2004, Mrs Amini-Tu'inukuafe's solicitor advised MSD that she would be seeking alternative employment. In a letter dated 22 October 2004, Mrs Amini-Tu'inukuafe resigned. By that time, Mrs Amini-Tu'inukuafe had been appointed to another unrelated position based in Christchurch.

### *Constructive dismissal*

[23] In *Wellington etc Clerical etc IUOW v Greenwich* [1983] ACJ 965, the Arbitration Court held that, in considering whether a resignation amounts to a constructive dismissal, it is helpful to look at the true source of the initiative for termination of the employment. Later, in *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963, the Court of Appeal identified at least three types of constructive dismissals. There is no suggestion in the present case that Mrs Amini-Tu'inukuafe was required either to resign or be fired. I also find as a fact that no-one within MSD embarked on a course of conduct for the purpose of coercing Mrs Amini-Tu'inukuafe's resignation. Rather, the evidence indicates that all involved at MSD took reasonable steps to support and encourage Mrs Amini-Tu'inukuafe in her efforts to obtain ongoing work in the Canterbury region.

[24] In her resignation letter, drafted by her solicitor, Mrs Amini-Tu'inukuafe says ... *I feel unable to return to work in the Canterbury region, because of Lynley Spears' attitude towards me and the influence she has within the Canterbury region and further afield, and the way I have been treated in my employment.... I also feel unable to return to the Auckland region because of financial constraints (partly due to not receiving financial entitlements during my secondment) and my family circumstances.* In fact, Mrs Amini-Tu'inukuafe could not return to work in the Canterbury region because her third secondment as extended by agreement had come to an end. She had no position in the Canterbury region to return to. Indeed, that was precisely her problem because she and her family had permanently settled in Christchurch no later than about February 2004. By 7 October 2004, Mrs Amini-Tu'inukuafe had decided not to return to Auckland and she had at least hopes of securing the other unrelated position based in Christchurch. That was the true source of the initiative for the termination of the employment. She confirmed her resignation in writing on 22 October 2004 after receiving confirmation of the alternative employment.

[25] In her resignation letter, Mrs Amini-Tu'inukuafe includes a reference to not receiving secondment allowances. I have already found that she received everything she was contractually entitled to in respect of the secondments. It follows that there is no merit in the argument that a failure to provide additional financial assistance during her secondments comprised a breach of duty sufficient to induce her resignation.

[26] By the time of these proceedings, the point has evolved into a broader complaint about the breach of various MSD policies but it remains without merit. First, the secondment policy identifies the sort of financial assistance that can be available but that must be subject to the secondment agreement reached in any particular case. MSD says that Mrs Amini-Tu'inukuafe would not have been offered any secondment from Auckland to Christchurch if she had sought paid accommodation and other financial assistance at the time. That is undoubtedly correct and illustrates the essential unfairness in the position now adopted by Mrs Amini-Tu'inukuafe. She cannot agree to terms, perform the duties, then later make a claim for payments that were never part of the original agreement. Secondly, it is said that MSD failed in its obligations to manage the secondments, especially the third one. I do not accept that there was any failure in this regard on the part of MSD. It was always explicit that Mrs Amini-Tu'inukuafe was entitled to return to her Auckland position at the conclusion of the secondments. To the extent that Mrs Amini-Tu'inukuafe

was anxious and uncertain about her situation, it was because she wanted to secure a permanent Christchurch post rather than exercise that right. I also note that MSD complied with its obligation to support Mrs Amini-Tu'inukuafe by its performance appraisal process. Mrs Amini-Tu'inukuafe also sought and obtained feedback about her job applications and interviews. The comments made by MSD managers were intended to be constructive and helpful. There is no merit in the criticisms now made of this. It is correct that the June 2004 extensions were not documented and the first secondment agreement was not signed by one of the managers. Such minor imperfections are of no consequence. Both parties complied with the first secondment agreement nonetheless and the June 2004 extensions were for Mrs Amini-Tu'inukuafe's benefit.

[27] There is a complaint about the application of MSD's recruitment policy in respect of other secondment positions, it being said that Mrs Amini-Tu'inukuafe was deprived an opportunity to be considered for those positions. Assuming that MSD did not follow its policy, it does not assist Mrs Amini-Tu'inukuafe's employment relationship problem because of the application of *Haddon*. Neither Mrs Amini-Tu'inukuafe's Auckland position nor her Christchurch secondment was affected by any breach of policy.

[28] There is also a complaint about a breach of MSD's review of appointment policy. As was her right, Mrs Amini-Tu'inukuafe sought a review of her non-appointment to the June 2004 position. The reviewer satisfied himself that the appointment process had been properly followed. The review process specifically envisages that the reviewer might rely on the written application and not speak to the applicant, which is what happened in the present case. He cannot be justifiably criticised for taking that approach. However, he should have considered the point about bias on the part of Ms Speers but specifically declined to do so as it was the subject of a personal grievance. That said, the failure does not advance Mrs Amini-Tu'inukuafe's employment relationship problem because of my finding that Ms Speers was not biased.

### ***Breach of employment agreement***

[29] It is said that MSD breached clauses 2.1, 2.3, 5.3, 7.5, 7.7 and 8.5 of Mrs Amini-Tu'inukuafe's employment contract. The point about clause 5.3 and 8.5 has been dealt with above. Clause 2.1 is a general provision that MSD is committed to consultation which includes providing employees with accurate and relevant information. MSD's secondment policy was always available to Mrs Amini-Tu'inukuafe through MSD's intranet. Clause 2.3 expresses MSD's commitment to training and development. It is linked to the performance appraisal process with which MSD complied. Clause 7.5 deals with workplace health and safety. It is raised in connection with the claim that Mrs Amini-Tu'inukuafe suffered work place stress. The medical notes adduced in evidence link *work stress* with *Needs to move back to Auckland* in September 2004. There was no breach of any of MSD's obligations over the ending of the secondments, the non-appointment to any permanent positions or the offer for Mrs Amini-Tu'inukuafe to return to Auckland. It follows that Mrs Amini-Tu'inukuafe is not entitled to any remedy against MSD for any stress suffered by her at the time. Around May 2003, Mrs Amini-Tu'inukuafe was prescribed anti-depressant medication in connection with events outside of work so the same conclusion must follow. Clause 7.7 is about harassment. The finding that Ms Speers did not harass or threaten Mrs Amini-Tu'inukuafe answers this point.

### ***Implied obligations and the duty of good faith***

[30] It is said that MSD also breached these obligations. However, the factual basis for this has already been rejected in my earlier findings. It is not necessary to discuss the claims further other than to say that there were no breaches by MSD.

*Summary*

[31] There is no merit in any of Mrs Amini-Tu'inukuafe's claims against MSD.

[32] Costs are reserved.

Philip Cheyne  
Member of Employment Relations Authority