

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Pacific Information Advocacy & Support Services Trust (Applicant)
AND Tu'uta Pome'e (Respondent)
REPRESENTATIVES Gretchen Stone, Counsel for Applicant
Tu'uta Pome'e, In person for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 17 August and 20 September 2005
ADDITIONAL INFORMATION PROVIDED 4 and 18 October 2005
DATE OF DETERMINATION 28 October 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Pacific Information Advocacy and Support Services Trust ("PIASS") seeks the return of a substantial sum of money from its former employee, Tu'uta Pome'e. It also seeks the return of certain property owned by PIASS. It says Mr Pome'e took the money and property in breach of his employment agreement and in breach of his duty of good faith, fidelity and honesty owed to the applicant.

[2] Mr Pome'e was unrepresented. Because of the factual matrix underlying PIASS' claim I adjourned the investigation meeting of 17 August 2005 to allow him to seek legal advice. I record that Mr Pome'e had indicated during an earlier conference call that he would seek legal advice, but had not done so by 17 August. Although he had sought advice by the date of the resumed investigation meeting of 20 September, he continued to represent himself.

The first transfer of \$50,000

[3] PIASS employed Mr Pome'e as its general manager, commencing on 14 January 2002 according to documentary information PIASS has produced. The employment relationship ended after Mr Pome'e offered his resignation on 14 March 2005. The resignation was accepted at a trust board meeting of 17 March 2005, and Mr Pome'e was to take sick leave during the one-month notice period. In a letter dated 18 March 2005 Latoa Halatau, the board's chairperson and a trustee of the PIASS trust, confirmed the resignation and advised Mr Pome'e:

"In respect of final pay, as soon as factors such as leave entitlement can be confirmed, your final pay will be forwarded to you."

[4] Mr Halatau was already too late. He did not know, until he subsequently found the documentation, that on 17 March 2005 Mr Pome'e made two electronic transfers of funds. One was for \$20,000, and was transferred into the bank account of Michelle Halapio, Mr Pome'e's wife. The other was for \$30,000 and was also transferred into Ms Halapio's bank account. Both payments were described as payments to 'sundry creditor' on PIASS internal reconciliation documentation. The electronic record described the payee as 'Tu'uta Pome'e's support'.

[5] Other documentation associated with the transfers appears to have been prepared in late February 2005. It amounts to an invoice submitted on behalf of Mr Pome'e and Ms Halapio in respect of 'expenses for used our home for PIASS worked' (sic). Associated with the invoice were four 'expense statements' relating to the calendar years 2002, 2003 and 2004, and the part year 2005. These four statements happened to total \$50,000. Each one listed rent, electricity, telephone and 'amenities' payments in respect of the use of Mr Pome'e's home for work purposes, and contained a notation purporting to justify the payments as coming from Mr Pome'e's salary budget to cover his extra expenses. Not one of the 'statements' was supported by any further invoice.

[6] Even more indicative of at best the confusion and at worst the artificiality of the justification for the transfers, was the entry on Mr Pome'e's invoice which read:

"Invoice	\$50,000
our cost recovery	\$32,000
Sub total	\$18,000

We pay PAYE to Inland Revenue on \$18,000."

[7] This is astonishing. Aside from the unsatisfactory attempt to justify the entitlement to payment of \$50,000, there is no attempt to identify what is covered by 'our cost recovery' and the assertion that Mr Pome'e and Ms Halapio themselves would pay tax on \$18,000 is one the IRD would be likely to find interesting for a number of reasons I do not need to comment on here.

[8] Mr Pome'e had no reasonable grounds for believing he had any right to make those transfers. All I can do is list some of the reasons why:

- (a) while PIASS allowed Mr Pome'e to work from home on occasion, and he did so, there was no agreement between the parties that this would entitle him to claim reimbursement from PIASS of his 'home office' expenses;
- (b) Mr Pome'e has never even alleged there was an agreement to that effect - rather he said at the investigation meeting he made the claim on the advice of an accountant, which is a far from adequate explanation and incredible in any event;
- (c) Although Mr Pome'e had a general discretion to incur expenditure of up to \$50,000, it cannot reasonably be implied that he was entitled to spend that entire amount on his personal interests if he saw fit, rather than for one of the intended purposes of hiring additional staff members or meeting other unexpected staff or resourcing expenses;
- (d) Mr Pome'e's purporting to rely on his budgetary discretion is hopelessly inconsistent with his position of trust as general manager, and the expectation that, in that position, he would ensure appropriate financial management procedures were implemented; and
- (e) Even if Mr Pome'e was entitled to disburse the \$50,000 to the extent he said he was - and I do not accept that he was - there was no reasonable justification for transferring the money to Ms Halapio's bank account.

[9] Despite having initially relied on the reimbursement of home office expenses as the basis for the payment, during the investigation meeting Mr Pome'e raised a new line of argument to the

effect that he and Ms Halapio had not taken the full salary payments to which they were entitled during the course of their employment.

[10] Although, if it were credible, the explanation would not of itself authorise or justify the transfer Mr Pome'e made, it might affect the quantum of any loss suffered by PIASS as the result of any breach by Mr Pome'e of his employment agreement. For that reason I asked PIASS to check whether Mr Pome'e and Ms Halapio had received their full salary payments.

[11] That exercise yielded even more evidence of quite remarkable financial management on Mr Pome'e's part. Overall, according to the monthly schedule of payments which he forwarded to the IRD on behalf of PIASS, he was underpaid for the 2002 calendar year, slightly overpaid for the 2003 calendar year, and substantially overpaid for the 2004 calendar year. As for 2005, he provided the IRD with an employer's monthly schedule of payments covering several months after his employment had ended and listing only 'payments' to him. While he obviously did not receive at least some of the payments reported, I am not prepared to find his salary payments were underpaid in 2005.

[12] Mr Pome'e's response to the material provided in the course of this exercise was to say, among other things, that the material indicated Ms Halapio had been significantly underpaid. I reject this allegation. Ms Halapio's employment was for the purpose of assisting Mr Pome'e in the performance of his duties to the extent he was unable to perform his own duties himself (he suffers from sickness and disability). For that reason she was to be paid a part of his salary, and Mr Pome'e's own payment was to be reduced accordingly. In these unusual circumstances her employment was discussed from time to time by the trust board, and periodically it was the subject of express authorisation from the board. Mr Pome'e had no discretion to depart from the board's terms.

[13] Reported payments to Ms Halapio have therefore been incorporated in the totals attributed to Mr Pome'e.

[14] In summary, the total paid overall exceeded the joint contractual entitlement of the pair. Thus, if anything, the loss suffered by PIASS is greater than that claimed.

The second transfer of \$27,357.99

[15] On 29 March 2005 Mr Pome'e made further electronic transfers from the PIASS bank account. This time the total sum transferred was \$27,357.99. \$17,098.74 was paid to Ms Halapio's bank account and the rest was paid to Mr Pome'e's.

[16] The transfer purported to cover payments to both Mr Pome'e and Ms Halapio for time off in lieu of overtime, and for outstanding annual leave. In a letter to Mr Halatau dated 4 March 2005, but was more likely to be 4 April 2005, Mr Pome'e said it seemed to him that PIASS had no intention of paying the final pay to which he was entitled, so he 'took the initiative' of paying himself and Ms Halapio. If Mr Pome'e had any concern about whether he would receive the final pay to which he was entitled, he should have taken the matter up formally with PIASS and if he was dissatisfied with the outcome he could have approached the Authority for an order for payment. He had no right to 'take the initiative' he did.

[17] Again the attempt at providing documentation in support took the form of an invoice. It identified an outstanding annual leave entitlement of 52.82 days, and an outstanding entitlement of 49 days in respect of time off in lieu. It purported to apportion the payment between Mr Pome'e and Ms Halapio.

1. Annual leave entitlement

[18] It was common ground that Mr Pome'e was entitled to four weeks' paid annual leave per year. It was also common ground that PIASS closed down for two weeks over the Christmas-New Year period, although Mr Pome'e said he came into work for at least part of the close down period. However he did not record those attendances, so on the face of the matter he must have taken some 6 days' annual leave per year in respect of the closedown. He asserted otherwise, but recording those attendances was his responsibility and I do not accept the assertions that were unsupported by any record.

[19] Records which PIASS has been able to recover indicate that Mr Pome'e took only 4 days' leave in the 2002-2003 Christmas closedown. Further, for a period of four weeks in November 2004, he sought to work for two days a week and claim the rest as 'lieu days' and holidays. Assuming he did so, the absences for the period totalled 12 days.

[20] If Ms Halapio was entitled to any payment in respect of annual leave, in the light of the terms of her employment it is based on her entitlement to a share in Mr Pome'e's total entitlement to annual leave. In the present circumstances I do not believe anything will be gained by attempting to apportion any outstanding payments between them.

[21] Overall I assess Mr Pome'e's total accrued entitlement to paid annual leave as 3.17 years x 20 days = 63.4 days. I assess the number of days' leave taken as 4 + 6 + 6 + 12 = 28. When Mr Pome'e's employment ended he had an outstanding entitlement to 63.4 - 28 = 35.4 days' unpaid annual leave.

[22] Although Mr Pome'e was not entitled to make the transfer he did at all, he did at least have an independent entitlement to payment for 35.4 days. The dollar amount of that entitlement is 35.4 days x 8 hours x \$33.85 = \$9,487.20.

2. Payment in respect of time off in lieu

[23] Mr Pome'e was a salaried employee. While the parties have not been able to find a copy of their signed written employment agreement there was no dispute there was one. In addition a copy of a new agreement, under negotiation in the period prior to Mr Pome'e's resignation, was produced. The new agreement provided that the employee's hours of work were full time, with an obligation to perform overtime as necessary but without extra payment. The relevant provision was not marked for change, as many other provisions were. Not only that, an unsigned version of the original employment agreement provided that the remuneration under the agreement was in compensation for all time worked.

[24] While those documents do not prove the same or a similar provision was a term of the parties' signed employment agreement, I consider it more likely than not that was the case. Otherwise the provision in the new agreement would have amounted to a significant change, and would inevitably have attracted attention. It is in any event common practice for payments of salary to incorporate payment for all time worked, and for express provision to be made if additional time worked is to be paid for. There was no evidence of any such express provision here.

[25] Mr Pome'e did not rely on any provision in any written agreement to the effect that he was entitled to time off in lieu of overtime, or payment if he did not receive that time off. He merely asserted that the PIASS board had agreed he could take time off in lieu of overtime. When Mr Halatau denied being party to any such agreement, Mr Pome'e alleged that Mr Halatau's predecessor was the one who had made it. However Mr Halatau's predecessor, Ava Faamoe, also

gave evidence. Mr Faamoe denied Mr Pome'e's allegation. His evidence, which I accept, was that in association with one or two particular weekend planning or training sessions, he offered all staff the opportunity to have the following Monday off in lieu. There was never any offer of payment if the time off was not taken.

[26] Mr Pome'e seemed to rely also on an argument that he gave PIASS staff reporting to him time off in lieu, so he should have the same entitlement. However it was not open to Mr Pome'e to claim such an entitlement unilaterally for himself. There was no agreement between the parties that Mr Pome'e have a blanket right to take time off in lieu, let alone that he should be paid for untaken time off in lieu.

[27] Accordingly neither Mr Pome'e nor Ms Halapio was entitled to any payment in respect of time off in lieu.

Determination in respect of the transfer of funds

1. The first transfer of \$50,000

[28] Mr Pome'e transferred out of PIASS' bank account \$50,000 which he was not entitled to transfer, and he did so in breach of his duties of good faith, fidelity and honesty. In doing so he caused it loss. He is to remedy that loss by returning the \$50,000.

2. The second transfer of \$27,357.99

[29] Mr Pome'e transferred out of PIASS' bank account \$27,357.99 which he was not entitled to transfer, and he did so in breach of his duties of good faith, fidelity and honesty. In doing so he caused it loss.

[30] He did, however, have a valid claim to part of that sum, so the loss to PIASS is the difference between the amount of Mr Pome'e's valid claim and the amount he transferred. The difference is $\$27,357.99 - \$9,487.20 = \$17,870.79$. Mr Pome'e is to remedy the loss by repaying PIASS \$17,870.79.

The return of property

[31] In a letter dated 21 March 2005 Mr Halatau required the return to the PIASS offices of PIASS property including: files (both hard copy and electronic); computers; financial records; equipment such as cellphones and recording equipment; and vehicles. After several letters to Mr Pome'e, and concerted efforts to obtain the property, PIASS sought orders for the return of the following items which it believed were still in Mr Pome'e's possession or control:

- . 3 Toshiba Satellite laptops;
- . 1 Fuji Finepix camera; and
- . 1 IPAQ pocket PC.

[32] Mr Pome'e insisted these were not in his possession so I asked PIASS to refer to the serial numbers to check whether they were in the possession of someone else in the organisation. It seems that is not the case, and a further list of property has been identified or confirmed as missing. The property includes:

- . a Dymo Label Writer
- . a laminator

- . a Xerox colour printer, serial number C1618
- . MS Office software (8 licences)
- . Windows XP Professional Operating System (8 licences)
- . a number of items including a water cooler, shelving system and disk stacking system delivered directly to Mr Pome'e's home

[33] Missing, too, is extensive financial material relating to PIASS' operation over the entire period of Mr Pome'e's employment, as well as copies of the quarterly trust reports for the same period. PIASS wants an order for the return of that material while Mr Pome'e insists he does not have it.

[34] I am afraid Mr Pome'e was the most unreliable witness I have ever encountered. For that reason I have difficulty accepting his insistence that he does not have any of the property or records PIASS wants returned. At the very least he is accountable for its whereabouts but in the face of the insistence that he does not have it, and the lack of other evidence as to its whereabouts, and my doubt about whether the Authority can make orders as extensive as those sought, I do not believe I can do more than place on record the items which are missing and unaccounted for. I make no order in respect of them.

Summary of orders

[35] Mr Pome'e is ordered to pay to PIASS the sum of \$50,000 in respect of the unauthorised transfers made on 17 March 2005.

[36] Mr Pome'e is ordered to pay to PIASS the sum of \$17,870.79 in respect of the unauthorised transfer made on 29 March 2005.

Costs

[37] Costs are reserved. The parties are invited to reach agreement on the matter. If they seek a determination of the Authority they should file and exchange written statements of their positions.

R A Monaghan
Member, Employment Relations Authority