

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Hone Te Rito (Applicant)

AND The Chief Executive/ Tumuaki of Te Wananga o Aotearoa Te Kuratini o Nga Waka, a tertiary institution established under Part XIV of the Education Act 1989 (Respondent)

REPRESENTATIVES Jervis Cleary and Graham Ogilvie for Applicant
Mark Hammond for Respondent

MEMBER OF AUTHORITY P R Stapp

INVESTIGATION MEETING Wellington
15 February 2005

DATE OF DETERMINATION 22 February 2005

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

1. Hone Te Rito, the applicant, has applied for an investigation into the respondent's action of deciding that he had abandoned his employment. He is seeking to have the problem resolved as a personal grievance with three weeks loss of wages, compensation for humiliation, loss of dignity and injury to feelings and costs.
2. The respondent, Te Wananga o Aotearoa (Te Wananga), has denied the claim and refused to pay any remedies for a personal grievance.

The Facts

3. Mr Te Rito was employed by Te Wananga in a full time position as Kaiako Te Ara Reo Maori at the Porirua Campus, Te Wananga (letter of appointment dated 31 January 2003 produced). He was paid \$1,643.46 gross per fortnight. His terms and conditions of employment were also governed by a collective employment agreement (Te Wananga o Aotearoa Te Kuratini o Nga Waka 2002/2004 produced).

4. In May 2004 a decision was taken to close the office where Mr. Te Rito worked, at Willis Street Wellington. However on 28 June 2004 a decision was taken to defer the closure. On 2 July 2004 and 7 October 2004 there were staff hui in regard to the issue of the Wellington site office being closed (Minutes 2 July 2004 and 7 October 2004 produced).
5. On 10 November 2004 Mr Te Rito requested a hui in town to air grievances to resolve the issues in regard to the closure. Matthew Maynard, Te Wananga's Operations Manager, was not able to meet the request. Mr Te Rito (and two other kaiako) requested Graham Ogilvie to assist and he sent a facsimile dated 13 October 2004 to Tumanako Wereta, the Campus Director, raising the following issues:
 - (1) Travelling to Porirua for hui that was not provided for in their employment agreements;
 - (2) Time in lieu for extra hours;
 - (3) Courtesy and respect from some management;
 - (4) Advice about transferring to Porirua and the lack of consultation.
6. Mr Ogilvie sought to meet over these matters and if need be obtain mediation assistance. There was no reply to his letter and he sent a reminder dated 3 November 2004 indicating that he had approached the Department of Labour for mediation service asking to arrange a meeting. He also contacted the Department of Labour's mediation service on 3 November 2004.
7. Mr Ogilvie and Matthew Maynard were able to arrange a meeting (outside of attending mediation) on 17 November 2004. Mr Ogilvie summarised the outcome in a facsimile dated 17 November 2004. The facsimile clearly indicated that the parties were discussing the issue of location of the kaiako, the effective travelling time for administration, preparing and marking work and the travel arrangements for classes where any travel was required.
8. On 23 November 2004 Matthew Maynard replied to Graham Ogilvie in regard to his letter dated 13 October 2004 and acknowledged receipt of Mr Ogilvie's letter dated 17 November 2004. The points he covered were:
 - (1) The move from Willis Street premises.
 - (2) Closing the Willis Street Office.
 - (3) Travelling to Porirua.

- (4) Time in lieu.
- (5) Respect from managers.

9. He said that the advice about closing the Willis Street Office was first discussed in May 2004. The decision was deferred until the end of semester two. It was his opinion that Mr Te Rito was employed as a full time “Pouako” at the Porirua Campus and that the move would not affect his current employment status. He also made the point that there had been ongoing requirements for staff to go to Porirua for meetings and training. He acknowledged that the decision to close the Willis Street Office would result in an increased number of hours that Mr Te Rito would be required to attend Porirua. He made some suggestions about the travel costs and that Mr Te Rito would be able to claim for reimbursement of business mileage when the use of a private vehicle was required. In his opinion there was a small outstanding matter that related to approval for a “special allowance” for transport. He agreed to investigate a matter relating to respect involving another manager. He noted that Mr Te Rito:

“has stated categorically that he does want to move to Porirua. This stance obviously allows little or no room for negotiation as a final decision has been made to move the office”.

10. At the conclusion of the letter Mr Maynard said:

“we do need to sit down and discuss things further and I am happy to meet with you, and your clients, at a mutually agreed time. Please contact me if you wish to arrange this meeting or if you require any further information.”

11. On 7 December 2004 Matthew Maynard wrote directly to Hone Te Rito as follows:

“Tena koe Hone.

Recently I met with you to discuss your concerns regarding the move from the Willis Street Office to Porirua. At the conclusion of that meeting I wrote to your advocate outlining our discussions and asking you to get back to me if you wished to discuss the matter further. To date I have not heard from you.

So effective from 13 December 2004 I confirm once again that the Willis Street Office is closing and you will therefore be required to report to work at the Porirua Campus site from 13 December 2004 onwards. I have attached a copy of my letter dated 22 (sic) November for your reference.”

12. This letter was sent by Mr Maynard directly to Mr Te Rito. Upon receiving it Mr Te Rito telephoned Graham Ogilvie and told him that he had received the letter about the shift to Porirua. Mr Ogilvie says he assured Hone that he had things in hand and would contact Matthew Maynard to arrange a meeting. Mr Ogilvie says that he believed that it had already

been agreed that there would be a meeting to continue the discussions. Mr Ogilvie did not receive a copy of the letter sent by Mr. Maynard to Mr. Te Rito. Mr. Ogilvie says that he was not aware of the detail of that letter but further says he did not think that it was too important because another meeting had been agreed. At the first opportunity he says he sent a facsimile to Matthew Maynard (on 9 December 2004) proposing available dates for a meeting. Matthew Maynard says that he never received this facsimile. Mr Ogilvie produced a journal of facsimiles including one that was sent on 9 December 2004 to the facsimile number of Te Wananga. Mr Maynard produced a hand written inward log of documents received at the Porirua Office of Te Wananga because the facsimile machine was not able to produce an electronic record of facsimiles received. There is no record of any facsimiles being received on 9 December from that record. There was no reply.

13. Mr Ogilvie says that he endeavoured to telephone Mr Maynard at his office around 15 or 16 December and says he was told that Mr Maynard was at the Head Office in Te Awamutu. He decided to wait until Mr Maynard returned. Being unable to make any contact Mr Ogilvie then sent another facsimile dated 20 December trying to arrange a meeting. His electronic record indicates that a facsimile was sent on 20 December at 1647 hours to Te Wananga's fax number. Mr Maynard says the facsimile was not received.
14. In the meantime, on 17 December 2004, Mr Maynard had a meeting with Tumanako Wereta where he gave him the following information: that the letter dated 7 December 2004 was hand delivered to Mr Te Rito, that Mr Te Rito was not present at the campus as instructed, that Mr Te Rito had attended the Willis Street Office on 13 December 2004 to help pack up, that there had been no contact from Mr Te Rito regarding his whereabouts and Mr. Te Rito and Mr. Ogilvie had not written back in regard to the meeting of 17 November 2004, the letter dated 23 November 2004 or the letter dated 7 December 2004. Mr Maynard says he inquired of managers and receptionist staff and no one had received any contact from Mr Te Rito. He says he concluded that Mr. Te Rito was not going to move to Porirua.
15. On Sunday 19 December 2004 Mr Maynard was instructed to draft a letter for Mr Wereta in regard to Mr Te Rito's absence from the Porirua site. Mr Maynard then went on annual leave from 20 December 2004 to 18 January 2005.
16. On Monday 20 December 2004 Mr Wereta decided to sign and send the abandonment of employment letter to Mr. Te Rito, terminating Mr Te Rito's employment, effective from 20 December 2004. This letter read as follows:

“Tena koe Hone.

I refer to our letter dated 7 December 2004 regarding the move from the Willis Street Office. In this letter we confirmed that the Willis Street Office was closing and that you would be required to report to work at the Porirua Campus site from 13 December 2004.

It has now come to my attention that you have not reported to work at the Porirua Campus as instructed and to date we have received no communication or notification from you regarding your absence.

In terms of s.38.0 of the Te Wananga o Aotearoa collective employment agreement, if an employee is absent from duties for more than three (3) consecutive working days, the employment will be deemed to have terminated. The employee will be deemed to have terminated their employment, through abandonment.

I therefore regret to inform you that your employment with the Te Wananga o Aotearoa has been terminated, with effect from 20 December 2004.

Naka noa.”

17. Mr Te Rito advised Mr Ogilvie that he had received the dismissal letter and went into Mr Ogilvie’s office. Mr Ogilvie immediately sent a facsimile (produced) to Tumanako Wereta contesting the decision and raising a personal grievance claim to seek immediate reinstatement. In reply Tumanako Wereta sent a facsimile dated 21 December (produced) to Graham Ogilvie as follows:

“Tena koe Graham,

A letter was sent by Matthew Maynard to Hone Te Rito dated 7 December 2004 requesting him to report to work at the Porirua Campus site on 13 December 2004. Hone Te Rito failed to do so but moreover, he made no attempt whatsoever during the period, 13-17 December to advise management of his whereabouts.

The point you raise about seeking a meeting with Matthew Maynard is a separate matter. The real issue is that Hone failed to respond to the letter of 7 December by not coming to work at the designated site as requested. It is on this basis that the abandonment clause was applied. This was not an unreasonable request and I am saddened that Hone showed no flexibility in this regard.

Terminating Hone’s employment has weighed heavily on management but in the end, ‘the buck stops with me as Campus Director to manage the campus in a fair and efficient manner’. As I mentioned to you, my door is always ‘open’ and I can recall the many times when Hone would often call in to see me, just to have a general chat. Sadly, at no time did he do so in recent times. Accordingly, it appears that Hone has taken a fixed position regard his ‘rights’ as a staff member, but fails to acknowledge that the employer also has ‘rights’. Taken in this context, I have terminated Hone Te Rito’s employment under the terms of the collective employment agreement with Te Wananga o Aotearoa. Regretfully, I have no reason at this stage to change my position.

Nai Mihi Nui.”

18. On 21 December 2004 Graham Ogilvie again contested the decision but this time with the Chief Executive of the Te Wananga o Aotearoa. There was no reply. On 23 December 2004 he advised the Te Wananga that he would be commencing a personal grievance claim for unjustified dismissal and filing an employment relationship problem in the Employment Relations Authority. An application was filed in the Authority on 5 January 2005 for interim reinstatement. The parties agreed to attend mediation and in this time Mr Te Rito was fortunately able to obtain alternative employment. He has withdrawn his claim for reinstatement and the parties agreed to proceed to a substantive hearing on the employment relationship problem. The matter was not resolved and thus a determination is required from the Authority.

The Issues

19. In essence the respondent says that Mr Te Rito took an implacable stand to refuse to attend his work at the Porirua Campus site instead of the Wellington office which was being closed. Incidentally, the lease on the building was due to expire on 31 January 2005. The respondent relied on the paper trail involving the minutes of 2 July 2004 and 7 October 2004 to support Mr Te Rito's implacable position not to move. The respondent says that when it had not had any contact from Mr Te Rito it was entitled under the employment agreement to treat his absence as an abandonment of employment. It relied on clause 38 Abandonment of Employment:

“38.1 If an employee is absent from work without notification to the employer for more than three (3) consecutive working days, the employee will be deemed to have terminated their employment through abandonment.

38.2 An employee who is deemed to have abandoned their employment shall not be entitled to any notice or pay in lieu of notice.”

20. The respondent disputed that there has been any dismissal. It further says that the onus is on the applicant to establish that he was dismissed.
21. It is common ground that Mr. Te Rito attended the Willis Street office on 13 December 2004. Mr Maynard accepted that he knew that this was the case and accepted that it was reasonable for him to be there to finish some packing up. In his evidence Mr Te Rito says that he continued to do some work at the Wellington office after 13 December while he was waiting for a meeting to be arranged. He told the Authority that he went into the office on 14, 15 and 16 December and got annoyed on 17 December 2004 when he decided to go home. The

respondent says this was an extraordinary action when there was no furniture, no desks and no telephones.

Determination

22. Mr. Te Rito was instructed to attend the Porirua campus site from 13 December (7 December letter). It is common ground that Mr. Te Rito was at the Willis Street office on 13 December and that Mr. Maynard knew that he was there. Mr. Te Rito made no contact with anyone at Porirua between 14 and 17 December when he says he went to the office that had no furniture, no desks and no telephone to wait for a meeting to be arranged. He went home on 17 December without telling anyone what he was doing because he was annoyed. Also, he told the Authority that he wanted all the issues resolved before going to Porirua. But he did not tell anyone this was what he wanted at the time.
23. Mr. Maynard took the view that Mr. Te Rito implacably did not want to go and would not go to work at Porirua. He relied upon the minutes of the hui and that he had received no replies to his letters dated 23 November and 7 December. His conclusion was that if Mr. Te Rito had any disagreement with his position, he expected Mr. Te Rito and Graeme Ogilvie to reply to him. Without having heard from Graeme Ogilvie and Hone Te Rito Mr Maynard drafted an abandonment letter as instructed.
24. I find the employer's action unjustified notwithstanding the contribution by Mr. Te Rito to the respondent's view that he had abandoned his employment.
25. However, in relying on the employment agreement the employer had an obligation to act in good faith, which I conclude it did not do in this case. This is because Mr. Maynard knew that Mr. Ogilvie was representing Mr. Te Rito but bypassed him with the letters dated 7 December and 20 December 2004 which were sent directly to the applicant. Mr. Maynard also proposed, in his letter of 23 November 2004, another meeting of the parties. A fair and reasonable employer could be expected to contact a worker's representative.
26. Mr. Maynard says the conclusion was reached that Mr Te Rito had implacably decided not to go to Porirua. The minutes support this conclusion. Mr. Maynard expressed his conclusion in the letter dated 23 November to Graeme Ogilvie. However it falls short of Mr. Te Rito refusing to go considering that Mr. Te Rito was represented and was waiting on Graeme Ogilvie to arrange a meeting. He was entitled to rely upon his representative and in this regard a fair and reasonable employer would be expected to consult the representative.

27. Furthermore, Tumanako Wereta wrote to Mr Ogilvie on 21 December with the comment “*The real issue is that Hone failed to respond to the letter of 7 December by not coming to work at the designated site as requested*”. This suggests that there was another course of action open to the employer that could have involved disciplinary action being taken against Mr. Te Rito for failing to carry out a reasonable instruction. The decision was the employer’s but it would have been open to challenge in any event. Nothing turns on this final point.
28. Finally Mr. Maynard and Tumanako Wereta did not attempt to properly contact Mr. Ogilvie in the first place, or Mr. Te Rito, to determine what was happening. The conclusion was instead reached that Mr. Te Rito would not attend work at Porirua where a fair and reasonable employer would be expected to contact the representative and, failing that, Mr. Te Rito. I reach this conclusion because:
- Mr. Te Rito was represented by an advocate over issues that related to the move.
 - There was one outstanding matter relating to the “special allowance”.
 - In the letter dated 23 November Mr. Maynard recognised that [Mr. Te Rito] “*has stated categorically that he does want to move to Porirua. This stance obviously allows little or no room for negotiation as a final decision has been made to move the office*” but “*we do need to sit down and discuss things further and I am happy to meet with you, and your clients, at a mutually agreed time. Please contact me if you wish to arrange this meeting or if you require any further information.*” This placed obligations on both parties. A fair and reasonable employer would have tried to make contact when it had accepted there was a need to sit down and discuss things further.
 - Mr. Te Rito confirmed that he had previously chatted with Tumanako Wereta on other matters. They knew each other and Mr. Wereta must have known from the information given to him that Mr. Te Rito was represented. Therefore it would not have been unreasonable for Tumanako Wereta to try and contact Mr. Te Rito’s representative.
29. The situation is also affected by the employer’s failure to reasonably alert Mr. Ogilvie and the applicant to the consequences of its conclusion that Mr. Te Rito had decided “implacably” not to go to Porirua. It failed to do this to an employee where there was no question about his performance.

30. The respondent's actions have affected Mr. Te Rito's employment to his disadvantage because his employment was terminated on 20 December 2004.
31. It is my conclusion that Mr. Te Rito has a personal grievance but he has contributed to it by his extraordinary conduct of remaining in an office without furniture, desks and telephone while knowing he had been instructed to attend work at Porirua. He made no attempt to contact anyone. Nothing turns on where Mr. Te Rito's terms of employment required him to work because his contract made it clear his work place was the Porirua campus that included the Wellington and Porirua sites of the Te Wananga.
32. He has lost 3 weeks wages because he found new employment early. I determine his contribution results from his decision not to reasonably attend the Porirua site. His reason for not doing so is inexplicable. It was unfortunate that his advocate was not able to arrange a meeting. It was unfortunate that his advocate's facsimiles, which for some unexplained reason were not received by Messrs Maynard and Wereta, were not followed up with hard copies to ensure their receipt. This would in hindsight have been prudent to ensure receipt of the advice of the applicant's desire to meet. The time involved 4 days before Mr. Wereta took action. I calculate Mr. Te Rito's loss to be \$2,465.19 and deducting approximately 4 days pay (\$657.38) I order the Te Wananga to pay Mr. Te Rito the sum of \$1,807.81 reimbursement of lost wages.
33. He is also entitled to compensation for humiliation loss of dignity and injury to feelings discounted by 25%. He would have been entitled to \$4,000 on the evidence but I award him \$3,000 under section 123 (c) (i) of the Act.
34. Costs are reserved.

P R Stapp
Member of Employment Relations Authority