

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Vanessa Horo-Kirwera (Applicant)  
**AND** Te Ha O Te Oranga O Ngati Whatua (Respondent)  
**REPRESENTATIVES** Lynda Emmerson counsel for Applicant  
Anaru Kira for Respondent  
**MEMBER OF AUTHORITY** Marija Urlich  
**INVESTIGATION MEETING** 26 June 2006  
**SUBMISSIONS RECEIVED** 10 July 2006  
**DATE OF DETERMINATION** 8 August 2006

DETERMINATION OF THE AUTHORITY

**Employment relationship problem**

[1] Vanessa Horo-Kiriwera was employed by Te Ha O Te Oranga O Ngati Whatua ("Te Ha") from August 2002. Te Ha provides community health services and is a subsidiary of Te Runanga O Ngati Whatua. Mrs Horo-Kiriwera was first employed as administrative support for Te Ha's alcohol and drug division. In June 2004 Mrs Horo-Kiriwera accepted the position of Operation Manager. She had a written employment agreement and detailed job description. On 12 July 2005 Anaru Kira was appointed as Te Ha's General Manager. One of his first tasks was to conduct a review of Te Ha's organisational structure and implement any consequent changes. It is the implementation of these changes from which the grounds of Mrs Horo-Kiriwera's personal grievance claim flows. She says she was unjustifiably constructively dismissed from her employment and/or that she was unjustifiably disadvantaged in her employment as a consequence of the steps taken by Te Ha to implement these changes.

[2] Te Ha says Mrs Horo-Kiriwera has not been dismissed and that a position exists in the organisation for her to take up. Te Ha says the organisational review was justified and was carried out fairly and reasonably.

**Issues**

[3] The issues for the Authority to consider and determine are:

- (i) whether Mrs Horo-Kiriwera's employment was unjustifiably disadvantaged by the restructuring process; and
- (ii) whether Mrs Horo-Kiriwera was constructively dismissed

**Background**

[4] On 12 July 2005 Mr Kira received a briefing from the Runanga as to the financial state of Te Ha. Mr Kira was advised that the debts carried by Te Ha exceeded its budgeting level and that this was a serious situation for the organisation. Mr Kira was asked to conduct a review. He was also advised that a high level review had been carried out in 2004 and was mindful that another review on that scale in close proximity to the last would not be healthy

for the organisation. Mr Kira undertook a low level review. He said it was immediately apparent that the regional organisation of Te Ha was dysfunctional and that significant savings could be made by centralising the structure. He said he wanted to flatten the existing organisational structure. By this I understood Mr Kira to mean he wanted to remove layers of management.

[5] On 13 and 14 July Mr Kira meet with Mrs Horo-Kiriwera and told her he was undertaking a low level review of the whole organisation, that the purpose was to assess service delivery and financial processes and that the outcome of the review would be implemented over the next 3 months. Mrs Horo-Kiriwera said she specifically asked Mr Kira during this meeting whether there would be any changes which might affect her personally and that he replied she would have to wait until a meeting on 19 July when she would be advised of any changes. Mr Kira did not disagree with Mrs Horo-Kiriwera's evidence on this point. Prior to the 19 July meeting Mr Kira held similar discussions with a number of staff.

[6] On 19 July Mr Kira meet with Mrs Horo-Kiriwera and seven other senior staff members; the acting clinical managers, Doreen Scully and June Henwood, the mental health clinical manager, Connie Watts, the quality manager, Andrea Laiman, the accounts administrator, Georgina Connolly, the breast screening coordinator and IT administrator, Gailene Campbell and the home based support services coordinator, Alison Roach. The minutes of that meeting have been made available to the Authority. Mr Kira told the group that:

- (i) Ms Campbell would maintain her current roles and join the management team to upgrade current IT systems;
- (ii) Ms Henwood would be the clinical manager for the Northern region based in Dargeville;
- (iii) Ms Scully would be the clinical manager for the Southern region, based in Wellsford;
- (iv) Ms Laiman would take on additional responsibility for Youth Justice;
- (v) Ms Watts' position would be unchanged; and
- (vi) Mrs Horo-Kiriwera would maintain home based support services.

[7] Mr Kira told me that by 19 July he had not made a concrete decision about Mrs Horo-Kiriwera's position but had made some decisions about realigning the roles.

[8] Mrs Horo-Kiriwera wrote to Mr Kira that same day to raise her concerns about the 19 July meeting. She said, in that letter, that she was concerned about the changes that had been made and the manner in which they were announced. In particular Mrs Horo-Kiriwera said that staff, who reported to her, attended the meeting without her knowledge and that she was advised in that meeting that tasks would be removed from her and given to subordinates.

[9] Early the following week Mrs Horo-Kiriwera requested a meeting with Mr Kira to discuss the issues raised in her letter. The meeting was held later that week. Mrs Horo-Kiriwera went through her letter. Mr Kira said that the review was necessary because of the financial position of Te Ha and that it would happen. Mrs Horo-Kiriwera took from those comments that there would be no further discussion. She said she felt disappointed by Mr Kira's response because she did not feel as if she had been heard and that an opportunity to address her concerns had been lost.

[10] On 4 August Mr Kira emailed all staff, including Mrs Horo-Kiriwera:

*"As of the 8<sup>th</sup> of August 2005 the following roles and responsibilities will take effect:*

1. Missy will be working in "Accounts and IT in Wellsford";
2. Georgina will be responsible for Administration, HR, my PA and Accounts".
3. Vanessa will be responsible for "Home Help".
4. Gaylene will be responsible for "Te Ha IT, Breast Screening and car seats".
5. Andrea will be responsible for "QA, Training, Health & Safety, MPDS and Contracts."
6. June is "Clinical Manager, North" responsible for all clinical/nursing and nursing contracts.
7. Doreen is "Clinical Manager, South" with the same responsibilities as June.
8. Anaru will be responsible for "Kia Tupato until further notice, all contracts and funding."
9. Connie is responsible for "Whetu Ora, Mobile Mental health and Drug and Alcohol."

10. *Jasmine is responsible for IT, Home Help and registrations for Dargaville.*

*All other responsibilities will be maintained as is until they have been redefined and reallocated.*

*Georgina has delegated authority to sign all time sheets in my absence.*

*It is important that our IT system is continually updated, accurate statistical information is vital to the whole service.*

*Anaru Kira  
General Manager  
Te Ha O Te Oranga O Ngati Whatua"*

[11] I put it to Mr Kira that this email showed that there was no longer an operations role in Te Ha. He agreed.

[12] Mrs Horo-Kiriwera was on annual leave the following week. She was due to return to work on Monday, 15 August, but was unwell and took two days sick leave. Though still unwell Mrs Horo-Kiriwera returned to work on 17 August to attend a meeting in Whangarei regarding a service delivery contract held by Te Ha. That same day she received the following email from Mr Kira:

*"Kia Ora Vanessa*

*As part of my ongoing review of service delivery to our communities, I will now progress towards the next level of service realignment. As of 22 August, HBSS will be divided into two regions, this being Kaipara and Rodney. Allie will be appointed as the Co-ordinator HBSS for Kaipara and you are being offered the appointment of Co-ordinator HBSS for Rodney. This will ensure that both regions will be serviced well.*

*...  
I will meet with you and Allie and yourself early next week."*

[13] On 18 August Mrs Horo-Kiriwera emailed Mr Kira:

*"Morena Anaru*

*May I ask for clarification of your offer? Does this mean my current role is changing? Would I no longer be managing this service as a whole? What are the expectations of this role if I wish not to accept this offer, what are my other options?"*

[14] Mr Kira replied the same day:

*"Kia Ora Vanessa*

*The role will be changing from its present format and that I intend to deliver the HBSS contract by two distinctive regions. They being Rodney and Kaipara, primarily because Rodney is not being serviced well. I am offering Allie the position of Co-ordinator HBSS Kaipara and yourself the Co-ordinator HBSS Rodney, salaries to be negotiated. Contracts budgets are expected to be completed before 1 September 2005. Following this my final management plan will be implemented."*

[15] Mrs Horo-Kiriwera went to the doctor that same day and was given a medical certificate for seven days stress leave from 19 August. Mrs Horo-Kiriwera has not returned to work at Te Ha.

[16] On 26 August Mrs Horo-Kiriwera's solicitor raised a personal grievance on her behalf claiming that Mr Kira's actions were unjustified and had disadvantaged Mrs Horo-Kiriwera in her employment, including:

*"Our client believes that the General Manager is effectively trying to force her to leave through demoting her and removing any responsibility which she has previously had.*

*There has been no process or consultation followed in relation to these changes and our client believes that they are procedurally unfair.*

*Our client given the ways (sic) she has been treated by the organisation is reluctant to return and (sic) seeking to negotiate an exit package. She is currently on sick leave due to the way she has been treated. Her demotion has left her feeling embarrassed around staff, especially those it was her previous responsibility to manage."*

[17] On 9 September Mr Kira replied to Ms Emmerson's letter. This letter sets out Te Ha's view of events to date and the purpose and justification for the review. The letter notes that Mrs Horo-Kiriwera had not yet responded to the redeployment offer and denies that Mrs Horo-Kiriwera had been demoted or forced to leave or that the process had been procedurally unfair. Mr Kira then invited Ms Emmerson to submit the reasons why Te Ha should consider an exit package for Mrs Horo-Kiriwera.

[18] On 29 September and 19 December the parties attended mediation. There was no resolution of the employment relationship problem.

[19] Mrs Horo-Kiriwera moved to Sydney with her husband and three teenage children in March 2006 having made the decision to do so in January 2006. Mrs Horo-Kiriwera said she had unsuccessfully applied for about six positions prior to Christmas 2005, and felt she had not been successful because she lived in a small community and people had got to know about the restructuring at Te Ha.

### **Disadvantage claim**

[20] Did the restructuring process undertaken by Te Ha disadvantage Mrs Horo-Kiriwera in her employment and, if so, was that unjustifiable?

[21] Te Ha was under a general duty to treat Mrs Horo-Kiriwera fairly and considerately in the restructuring process. Te Ha was also obliged to comply with clause 9.3 of the employment agreement:

*9.3 You agree that we shall be entitled to give you notice if through lack of work, non-renewal of any agreement with funding agencies, or any restructuring or re-organisation we are unable to keep you on as an employee. If we give you notice under this clause, you agree that you shall not be entitled to claim any redundancy payment. We agree that we shall not exercise our right to give notice under this clause without consulting you."*

[22] A fair restructuring process requires that employees are consulted about any proposal which may impact on them and given a reasonable opportunity to put forward their comments. Mr Kira called a meeting with Mrs Horo-Kiriwera to advise a review of the organisation would be carried out and in answer to her question advised that she would find out in due course if her position was effected. Mr Kira did not tell Mrs Horo-Kiriwera how this review was to be carried out or how it might impact on her. It was Te Ha's duty to be up front with Mrs Horo-Kiriwera about such issues.

[23] Mr Kira convened a meeting on 19 July with all affected staff and told them the changes to their jobs. There is no evidence that a restructuring proposal was put to Mrs Horo-Kiriwera to comment on. There is no evidence that such urgent circumstances existed which would preclude a consultation process being conducted. At the very least, if matters had to proceed at such speed it would have been fair to have advised staff of this and the reasons why. This did not occur.

[24] Mr Kira said it was Te Ha's intention to find redeployment options for all staff affected by the restructuring. Mrs Horo-Kiriwera was not advised of this during the restructuring. If this was Te Ha's intention, which I accept it was, then it would have been in Te Ha's interests to openly discuss any proposal with staff and seek their comment.

[25] It was also unfair and insensitive of Te Ha to advise Mrs Horo-Kiriwera of the impact the restructuring on her position at this meeting in front of staff who reported to her and announce further restructuring details in the 3 August email. It is fair and reasonable that an employee whose unique role is to be affected by a restructuring is told so in private. They would then have a fair opportunity to absorb and consider that information and raise any issues without the added pressure of doing so before co-workers or reports. It is also fair and reasonable for an employer to alert an employee to their right to seek advice and have a representative present at such meetings. This did not occur here and is an example of further unfairness.

[26] In such circumstances it is understandable that Mrs Horo-Kiriwera, in her letter of 19 July, expressed disappointment and concern at the manner in which the changes had been announced. In this same letter Mrs Horo-Kiriwera set out her view of the restructuring and asked Mr Kira to address these issues. In the circumstances this was a very reasonable proposal and presented Te Ha with an opportunity to remedy its failure to consult over the restructuring plan. Unfortunately, Te Ha did not take up this opportunity; Mr Kira meet again with Mrs Horo-Kiriwera, allowed her to go through her letter and reiterated that the restructuring would be implemented. Again, there was no opportunity given to Mrs Horo-Kiriwera to put her views of the proposal (which by this stage was in the first stages of implementation) and have those views fairly considered.

[27] I have found Te Ha unreasonably failed to consult with Mrs Horo-Kiriwera about the restructuring proposal and unfairly announced details of the restructuring of her position in an open meeting and open email, without any prior consultation with her about this issue. I have found further that Te Ha unreasonably failed to take up Mrs Horo-Kiriwera's 19 July offer to consult over the restructuring.

[28] The vaulting progress of the implementation of the restructuring overtook the process of consulting and discussing with staff, and in particular Mrs Horo-Kiriwera, about the proposal and its implementation. This understandably created uncertainty for Mrs Horo-Kiriwera that her employer would abide by its obligations to treat her fairly and reasonably. I find Te Ha failed to treat Mrs Horo-Kiriwera fairly and sensitively through the restructuring process.

### **Constructively dismissed?**

[29] From 8 August it is clear that Mrs Horo-Kiriwera's operations manager position no longer existed; those duties had already been reassigned. Mrs Horo-Kiriwera was left with Home Help, which represents a fraction of her former duties. In these circumstances it was appropriate that Te Ha move to explore redeployment options with Mrs Horo-Kiriwera. The email trail shows that Mrs Horo-Kiriwera wrote to Mr Kira on 18 August seeking further information about the offered position and that he responded that same day. There is nothing further. Mrs Horo-Kiriwera did not resign from her position and she was not given notice of dismissal under clause 9.3 of the employment agreement.

[30] Mrs Horo-Kiriwera says that she was constructively dismissed during the period of stress leave which commenced on 19 August. During this time Te Ha and Mrs Horo-Kiriwera were actively engaged in discussions regarding her employment relationship problem. The redeployment offer remained open. There is no evidence to support a claim that during the period of stress leave Te Ha repudiated Mrs Horo-Kiriwera's employment agreement and that that repudiation was accepted. Mrs Horo-Kiriwera was not constructively dismissed. It is clear to me that the parties' employment relationship no longer exists; Mrs Horo-Kiriwera did not resume her duties following her period of sick leave, started the process of looking for another position prior to Christmas 2005 and has relocated to Sydney.

[31] Having found Mrs Horo-Kiriwera's employment was not terminated by way of redundancy there is no need to consider further if its motivation was for genuine reasons.

### **Remedies**

[32] Mrs Horo-Kiriwera seeks the sum of \$12,000 in compensatory damages for distress caused as a consequence of her personal grievance and three months lost wages.

[33] I have found that Mrs Horo-Kiriwera has a personal grievance for unjustified action causing disadvantage in relation to the restructuring process. She gave evidence that the restructuring had had a significant toll on her and her family. Mrs Horo-Kiriwera said she was upset by the public manner of the restructuring announcements and felt she had not been heard despite her reasonable attempts to draw her concerns to her employer's attention. Te Ha did not provide any compelling explanation as to why the restructuring had to be implemented so quickly and at the expense of its obligations to Mrs Horo-Kiriwera.

[34] Taking all relevant factors into consideration I set the level of compensation at \$6,000. Mrs Horo-Kiriwera did not contribute to the circumstances which gave rise to her personal grievance.

[35] I have found Mrs Horo-Kiriwera was not dismissed. Accordingly, there can no be claim for lost wages.

**Costs**

[36] Costs are reserved. The parties are invited to attempt to resolve this issue themselves. If they are unable to do so Ms Emmerson may file and serve a memorandum as to costs within 21 days of the date of this determination. Mr Kira may file and serve any memorandum in reply within a further 14 days.

Marija Urlich  
Member of Employment Relations Authority