

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Willie Bruce Ruwhiu (Applicant)

AND Omapere Taraire E & Rangihamama X3A Ahu Whenua Trust
(Respondent)

REPRESENTATIVES Richard Mark, Counsel for Applicant
Sally Leftley and Murray Broadbelt, Advocates for Respondent

MEMBER OF AUTHORITY Leon Robinson

INVESTIGATION MEETING 24 August 2006

DATE OF DETERMINATION 1 September 2006

DETERMINATION OF THE AUTHORITY

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- A. Omapere Taraire E & Rangihamama X3A Ahu Whenua Trust is ordered to pay to William Bruce Ruwhiu the sum of \$5,000.00 as compensation.
- B. Omapere Taraire E & Rangihamama X3A Ahu Whenua Trust is ordered to reinstate William Bruce Ruwhiu to his former position as Farm Manager or in a position no less advantageous to William Bruce Ruwhiu as shall be negotiated by the parties following mediation assistance to be undertaken within 21 days of this Determination.
- C. Omapere Taraire E & Rangihamama X3A Ahu Whenua Trust is ordered to reimburse William Bruce Ruwhiu lost income from 11 July 2006.
- D. Costs are reserved.
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The Problem

[1] Mr William Bruce Ruwhiu ("Mr Ruwhiu") says he was unjustifiably dismissed from his employment as Farm Manager with the Omapere Taraire E & Rangihamama X3A Ahu Whenua Trust ("the Trust"). The Trust operates two separate farms at Omapere and Rangihamama. Mr Ruwhiu was employed by the trust to manage both farms. He says his employment terminated on 11 July 2006 and that he was later informed that he was required to vacate his farmhouse accommodation by 31 August 2006. The Trust says Mr Ruwhiu's employment was justifiably terminated for redundancy.

[2] Mr Ruwhiu applies to the Authority for an investigation of the problem and asks that it be resolved in his favour by orders for his reinstatement, reimbursement and compensation.

[3] The Authority considered that mediation would undermine the urgent nature of the proceedings.

The legal principles

[4] The Authority scrutinises the Trust's decision to terminate Mr Ruwhiu's employment in accordance with the statutory test of justification set out at section 103 of the *Employment Relations Act 2000* ("the Act").

[5] The application of the statutory test has recently been clarified by the Employment Court although that clarification is premised in terms of a dismissal for misconduct. The Authority reviews the Trust's decision to ascertain whether it carried out a full and fair enquiry into the situation leading to the decision to dismiss. The statutory test then also obliges the Authority to separate out the employer's actions for evaluation against the specified objective standard of what a fair and reasonable employer would have done in the circumstances¹.

The circumstances

[6] By a notice dated 25 January 2006, Mr Ruwhiu was invited to attend a meeting of staff to be held on 31 January 2006.

[7] At the meeting held on 31 January 2006, the Trust's Chairperson Mr Babe Kapa ("Mr Kapa"), Trustee Ms Te Aroha Reihana Ruka ("Ms Reihana Ruka") and consultant Ms Sally Leftley ("Ms Leftley") addressed the staff. Mr Kapa outlined to staff the Trust's financial position. He said that a farm consultant engaged by the Trust had expressed concerns about the viability of the Trust's continued operations. He said that the Trust's financial backers were demanding Trustees take urgent action to reduce Trust debt. He then informed staff that decisions needed to be taken as to what action to take. He said that a restructure was most likely due to current costs and skill levels.

[8] I find that Mr Kapa then told staff that over the next few days they were to offer the Trust any ideas on how to increase performance, decrease costs and "*what a more effective staffing structure/positions/duties would look like to deliver positive changes*". Mr Ruwhiu agreed with Mr Kapa's evidence on this aspect of matters.

[9] Mr Kapa informed staff that the farming consultant would deliver a draft business plan on 4 February 2006 and was likely to include ideas on a new structure. He assured staff that the Board would look at all the options and ideas before making any final decision. He emphasised to staff that both the farming consultant and the financial advisors were recommending a restructure.

¹ *Pero Tamarua -v- Toll Tranzlink Limited*, unreported, WC11/06, 11 July 2006, Shaw J

[10] When he invited questions from staff, he was asked by one staff member what a new structure might look like. He said the Board did not have anything in mind and that was why staff were being asked for ideas.

[11] Mr Kapa concluded the meeting by inviting staff to submit their ideas and thoughts to himself or Ms Reihana Ruka. I find that he then communicated this timetable: -

- *All ideas to be submitted by Thursday 2 February 2006;*
- *Business plan to be submitted to Farm Consultant on Friday 3 February 2006;*
- *Board meet on Friday 3 February 2006 to make decision on the way forward;*
- *Board take their decision to SGM on Saturday 4 February 2006;*
- *Staff to be told of new structure on Friday 10 February 2006.*

[12] The staff wrote to the Chairperson by letter dated 2 February 2006. That letter stated: -

We the staff received a memorandum dated 25 January 2006 requiring the attendance of all staff at a meeting on 31 January 2006. At the meeting staff were asked to provide feedback on the farm structure by 2nd February 2006. We understand that the Farm Consultant will report to the Board on 3rd February 2006, and the report will then be considered at the Special Meeting on 4th February 2006.

Although no details of the proposal were provided to the staff, we have met to consider the Trust Board's request for feedback into the proposed restructuring of the trust farms.

The staff appreciates the opportunity to give feedback but feel unable to give any constructive feedback until we receive details of any restructuring proposal. Once the staff receives details of the proposal we would welcome the opportunity to consult with the Board and provide feedback, particularly regarding job security and farm profitability.

The staff are also concerned that the timetable outlined at the meeting on 31 January 2006 does not give sufficient time for consultation and feedback.

There was no written response to this letter.

[13] On Saturday 4 February 2006, the Farm Consultant presented his findings, feasibility study and draft Business Plan at a special general meeting of the shareholders and the Trust Board. Mr Ruwhiu was on leave at the time and did not attend the meeting either as employee or shareholder. The meeting resolved that a restructure was necessary and that Trustees were to carry out the restructure.

[14] Trustees Ms Reihana Ruka and Ms Carol Brennan ("Ms Brennan") met with staff on Friday 10 February 2006. I find that the staff were told the new structure had not been finalised. The Trustees by way of response to the concerns raised by staff in the letter of 2 February 2006 asked the staff how much further time they needed. The staff said they wished to comment on the final structure. The Trustees said that would be too late and staff input was required before a final structure was proposed. The Trustees advised a final decision was some weeks away.

[15] Over the following weeks the Board discussed structures proposed by its various consultants. There were no submissions made by staff. A new structure was eventually decided upon. It involved a reduction in staff numbers from five to three and a significant change in the level of those positions. The farming consultant assisted the Trust to devise positions descriptions for the new positions.

[16] Staff were invited to attend a meeting on 21 March 2006. Present for the Trust were Ms Leftley and Trustees Ms Reihana Ruka and Ms Brennan. Ms Leftley informed staff a new structure had been finalised. Using a whiteboard Ms Leftley presented the new structure and discussed draft position descriptions. She further informed staff that they *"were all now*

displaced" and invited them to apply for the new positions and to do so by the end of the week. She said that Mr Kapa would then meet individually with staff on Monday 27 March. A memo was sent to Mr Kapa setting out interview times with each staff member. Ms Leftley confirmed that any staff not offered a new position would be made redundant.

[17] On 27 March 2006 all staff met with Mr Kapa. The meeting did not proceed beyond a general discussion of staff dissatisfaction with the restructuring process. The meeting degenerated until Mr Kapa concluded it by re-inviting staff to get back to the Trust about their individual preferences.

[18] Mr Ruwhiu gives evidence that he applied for a position on the Trust's Omapere farm in a letter dated 24 March 2006. The Trust denies any knowledge of that application. Mr Ruwhiu's letter presented to the Authority states: -

Tena koe Babe

I would like to re-apply for one of the positions on Omapere. My time is slotted in for 4.30 pm, Monday 27th March and I shall be supported by Farm Staff and Family Members.

Regards, Willie.

[19] On 4 April 2006, the Trustees met to discuss appointments for the new positions. The Trust says none of its existing staff applied for any of the new positions. The Trustees allocated the positions based on individual Trustees' knowledge of its existing staff. The new position of Farm Operations Manager was not filled. The Trustees considered that none of its existing staff had the level of technical or commercial expertise the position was thought to require.

[20] Mr Kapa was tasked with the job of informing staff of the Board's decisions. He attended on Mr Ruwhiu and informed him that there was no job for him in the new structure. He said the Board would be advertising and that two other staff would be out of a job.

[21] By letter dated 7 April 2006, Mr Ruwhiu was advised formally of his termination. The letter materially stated: -

Following our meeting of 4th April 2006, and with considerable regret, I have to formally confirm to you that your position with the Trust will become redundant.

The following entitlements are available to you:

(1) You have three months notice effective from Friday 14th April 2006, together with holiday pay outstanding and any other monies due plus accommodation.

Or entitlement:

(2) A cash payout covering periods as mentioned above in entitlement (1), plus use of accommodation for that three-month period.

(3) Full cash payout covering above entitlement (1) inclusive of the accommodation period.

Please make contact with the Trust Board secretary by 12th April 2006, indicating your preferred entitlement.

On behalf of the Trust, I would like to take this time to thank you and your family for your contribution to Rangihamama X3A and Omapere Taraire E Ahu Whenua Trust and wish you all the best for the future.

Yours sincerely

Te Aroha Reihana Ruka

The merits

[22] Mr Ruwhiu says his dismissal for redundancy is both substantively and procedurally unjustified.

[23] Mr Ruwhiu criticises the Trust and says its excessive administrative costs imposed considerable financial constraints on its farming operations. As a consequence of that he says new stock could not be purchased which ultimately affected profitability.

[24] He is further critical of the redesignated Farm Operations Manager position and says that in truth there is little difference between that position and his existing Farm Manager position. He says that in essence they are the same position but he accepts that his computer skills could be improved. That concession implies his acceptance that the new Farm Operations Manager position has a more technical emphasis. He says that in his assessment, the new position would merely require him to attend appropriate training courses and at minimal cost to the Trust.

[25] He further says that as Farm Manager he ought to have been involved in the decision to make staff redundant. He says he was humiliated because he was not.

[26] The decision to terminate Mr Ruwhiu's employment must be carried fairly and sensitively. That is because the Act obliges the parties to act towards each other in good faith and additionally, the law implies in all contracts of employment a duty of fair and reasonable treatment. These are duties which both parties owe to each other.

[27] The parties are also obliged to deal with each other in good faith. Section 4 of the Act required the Trust to provide to Mr Ruwhiu access to information relevant to the continuation of his employment about the decision as well as an opportunity to comment on the information before the decision was made.

[28] I am satisfied that this was not the case. Mr Ruwhiu was not provided the Farming Consultant's reports and invited to comment. I am certain he had his own views on the Consultant's proposal for the new Farm Operations Manager position, but his employer never formally asked him. The Farming Consultant's reports were required in terms of the duty of good faith to be provided to Mr Ruwhiu but they were not. The Trustees confirmed to the Authority this information was deliberately not provided to Mr Ruwhiu. That was not fair to him.

[29] I therefore find that Mr Ruwhiu was not provided with any real opportunity to comment on whether his particular position was redundant prior to the decision that it was, being made. He was never invited to comment on whether his particular position was redundant before Ms Leftley advised him on 21 April 2006 that his position was displaced. The invitation extended by the Trust in the meeting on 31 January 2006 and thereafter did not invite this input. The input actually sought was in more general and broad terms than the actual decision eventually taken. Consultation about a general restructure is not the same as particular consultation about the termination of a specific position. The consultation with Mr Ruwhiu was not about his potential individual redundancy. I find that Mr Ruwhiu had no input into the decision as to whether his individual position was redundant and a fair and reasonable employer would have sought that input.

[30] Neither was he provided any opportunity to have input as to redeployment, retraining or any other alternatives to redundancy. The obligation on the Trust is to preserve continued employment wherever possible. It was obliged to Mr Ruwhiu to preserve his continued employment if it was possible to do so.

[31] I accept that the Trust invited applications or "expressions of interest" for the new restructured positions. Mr Ruwhiu gives evidence that he did in fact make such an application. I am not persuaded that he did. Firstly, his written statement appears to be the first mention of that contention. There is no other item of correspondence or documents gathered during the Authority's investigation which corroborates that contention. As well, I record that his written statement appears internally inconsistent in this respect. At paragraphs 19 and 31 Mr Ruwhiu says "*he would have applied*".

[32] But the Board considered him anyway when it met on 4 April 2006. The Trustees tell the Authority Mr Ruwhiu was given consideration for the new position of Farm Operations Manager. Ms Brennan gives evidence: -

I was aware of a recent disciplinary(sic) held with Willie Ruwhiu regarding his competency in commercial and administrative matters and did not therefore believe him capable of the new bigger role.

and Ms Reihana Ruka this evidence: -

I personally did not believe that Willie Ruwhiu had these skills as I was present at the disciplinary meeting held with him, just one month before and he had stated that he really struggled with administrative duties. Also, on many occasions he had failed to submit his required Farm Report to the Board, either in its entirety or in the format or detail we required.

[33] So while he was considered, it was decided he was unsuitable. Unfortunately, the views the Trustees so candidly disclosed to the Authority were not tested with Mr Ruwhiu. It was not fair to Mr Ruwhiu to not put these matters to him for his comment. Having quite properly decided to consider him, the Trust ought not have reached the conclusions it did without Mr Ruwhiu's input on those matters. A fair and reasonable employer would have invited this input.

[34] For these reasons, I conclude that the Trust did not act towards Mr Ruwhiu in good faith or treat him fairly and sensitively. I am satisfied that Mr Ruwhiu's input was never sought in relation to the justification for his dismissal or the continued preservation of his employment. I am satisfied that it was practicable for there to have been this consultation with him. It must follow then, that his dismissal for redundancy was unjustifiable because it was not effected in a fair and reasonable manner.

[35] After its consultation process, the Trust concluded Mr Ruwhiu was displaced and no other position was available to him. I am satisfied that the Trust did not carry out a full and fair process which entitled it to reach the decision it did.

[36] I must now separate out the Trust's decision to dismiss and evaluate it against the specified objective standard of what a fair and reasonable employer would have done in these circumstances.

[37] Standing back and assessing matters objectively from the perspective of a fair and reasonable employer in these prevailing circumstances, I conclude that the Trust's decision to dismiss Mr Ruwhiu was **not** what a fair and reasonable employer **would** have done.

Determination

[38] **Accordingly, I conclude Mr Ruwhiu was unjustifiably dismissed. I find that Mr Ruwhiu has a personal grievance arising out of his dismissal. He is entitled to remedies in settlement of that personal grievance.**

[39] Having made that finding and in considering both the nature and the extent of the remedies to be provided, I am bound by section 124 of the Act to consider the extent to which Mr Ruwhiu's actions contributed towards the situation that gave rise to his personal grievance, and if those actions so require, to reduce the remedies that would otherwise have been awarded accordingly.

[40] I find that Mr Ruwhiu did not contribute to the situation that gave rise to the personal grievance and there was no blameworthy conduct on his part which could constitute contributory fault which led to that situation, nor which requires a reduction. There is therefore no basis for reducing the nature and extent of the remedies to be granted to Mr Ruwhiu.

[41] Mr Ruwhiu is entitled to be compensated for the unfairness in the process by which his position was deemed to be redundant. I accept that he has suffered humiliation, loss of dignity and injury to his feelings because of that unfairness.

[42] The Court of Appeal has held that in cases where dismissal is regarded as unjustifiable on purely procedural grounds, the question of the chances of the employee being dismissed absent those procedural irregularities must be considered when fixing compensation. I am not prepared to find that Mr Ruwhiu's dismissal would have been inevitable if there had been no procedural irregularities. It is far too speculative in my view to reach such a conclusion.

[43] Having regard to his evidence I award him \$5,000.00 compensation. **I order Omapere Taraire E & Rangihamama X3A Ahu Whenua Trust to pay to William Bruce Ruwhiu the sum of \$5,000.00 as compensation pursuant to section 123(1)(c)(i) of the Employment Relations Act 2000.**

[44] For the same reasons I have outlined in paragraph 42 above, I am unable to conclude that Mr Ruwhiu's position was genuinely redundant so as to disentitle him from any claim to reimbursement. He has not received income since 11 July 2006. He ought to be reimbursed income from that date. **I order Omapere Taraire E & Rangihamama X3A Ahu Whenua Trust to reimburse William Bruce Ruwhiu lost income from 11 July 2006.**

[45] Mr Ruwhiu seeks reinstatement. I accept that reinstatement is an appropriate remedy in this instance. It is the primary remedy available to a grievant wherever practicable. I am not persuaded that reinstatement is impracticable and I understand the Farm Operations Manager position remains vacant. I make it clear that I do not regard the matters sought to be introduced at the Authority's investigation meeting by the Trust, as relevant.

[46] I direct the parties to mediation in relation to the issue of reinstatement and I direct that such mediation shall take place within 21 days of the date of this Determination. **Omapere Taraire E & Rangihamama X3A Ahu Whenua Trust is ordered to reinstate William Bruce Ruwhiu to his former position as Farm Manager or in a position no less advantageous to William Bruce Ruwhiu as shall be negotiated by the parties following mediation assistance to be undertaken within 21 days of this Determination.**

Costs

[47] If costs are sought they are reserved.

Leon Robinson
Member of Employment Relations Authority