

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN	Debra Ngamata (Applicant)
AND	Te Puna Reo Maori O Nga Maungarongo Incorporated (Respondent)
REPRESENTATIVES	Marcus Paewai, Advocate for Applicant Dianne Pomare and Honey Heemi, Advocates for Respondent
MEMBER OF AUTHORITY	Leon Robinson
INVESTIGATION MEETING	23 May 2006
SUBMISSIONS RECEIVED	23 June 2006
DATE OF DETERMINATION	26 June 2006

DETERMINATION OF THE AUTHORITY

The problem

[1] Ms Debra Ngamata ("Whaea Ngamata") says she was unjustifiably dismissed from her employment as assistant supervisor with Te Puna Reo Maori O Nga Maungarongo Incorporated (the "Puna"). Her statement of problem lodged in the Authority claims that she was both constructively and actually dismissed. The Puna says Whaea Ngamata resigned and it was not obliged to re-employ her. It has a counter-problem and claims damages against Whaea Ngamata.

[2] Whaea Ngamata applies to the Authority for an investigation of the problem and asks that it be resolved by orders in her favour for reimbursement and compensation.

[3] The parties were unable to resolve the problem by the use of mediation.

[4] As will shortly become clear, the situation of misconduct by another Puna employee features only fleetingly in this Determination. That is because it has limited relevance to the issues requiring determination. This investigation was never primarily directed to enquire into the detail of that other misconduct.

The facts

[5] On the evening of Tuesday 31 May 2005, the Puna held a special whanau hui to discuss inappropriate behaviour by a Puna employee. The whanau generally agreed that the employee's behaviour was highly inappropriate and the matter was to be dealt with by way of a written warning together with training and counselling.

[6] Whaea Ngamata did not agree with the whanau's consensus. She addressed the whanau and said that she did not feel supported or appreciated by either the Puna's supervisor Whaea Hera Wikitera ("Whaea Wikitera") or its licensee Whaea Diane Pomare ("Whaea Pomare"). She said she was sick of being treated "like a dog" by Whaea Wikitera before announcing she was resigning.

[7] Various whanau members spoke in support of Whaea Ngamata and encouraged her to reconsider her decision however, Whaea Ngamata left the hui confirming her resignation.

[8] The following day on Wednesday 1 June 2005, Whaea Ngamata phoned Whaea Wikitera and said she wanted to come back. They agreed to meet later at 4.00 pm that day. Whaea Wikitera informed Whaea Pomare of Whaea Ngamata's desire to return. Whaea Pomare informed Whaea Wikitera that Whaea Ngamata would have to make application to the Puna's management committee.

[9] At 4.00 pm that afternoon, Whaea Ngamata met with Whaea Wikitera. Whaea Ngamata confirmed she had changed her mind about resigning and wished to return to the Puna. Whaea Wikitera informed Whaea Ngamata it was for the Puna's committee to re-employ her. They agreed to work towards resolving difficulties in their working relationship. Whaea Wikitera asked Whaea Ngamata to submit a letter retracting her resignation and seeking re-employment, for the management committee's consideration. They agreed that Whaea Ngamata would return to work on Tuesday 7 June 2005 after Queens Birthday weekend.

[10] The following day and unknown to Whaea Ngamata, the Puna's management committee chairperson Mr Hakopa Te Whata, wrote a letter of the same date to Whaea Ngamata. That letter stated:-

...
We wish to advise that we have decided to accept your verbal resignation offered at the whanau hui on Tuesday 31st May 2005.

...
Your employment contract requires you to provide two weeks' notice, but we are prepared to accept your resignation effective immediately, as you requested. Your final salary will accept this.

We will be advertising your position in the next issue of the Education Gazette.

*Hakopa Te Whata
 Chairperson Puna Reo Management Committee*

[11] On the morning of Friday 3 June 2005, Whaea Ngamata handed Whaea Wikitera a handwritten letter stating:-

I am writing this letter regarding my verbal resignation on Tuesday night 31st May 2005. After some reflection and counsel with friends and family it was decided that we not part in this manner and it was advised that we get together and discuss our issues, hence our meeting at 4.00 pm yesterday afternoon. We agreed to work towards working out our differences and that I take leave from the Puna Reo until the end of this week. It was also agreed that I submit this letter and return to work next Tuesday 7th June 2005.

Whaea Debbie Ngamata

Whaea Wikitera presented this advice to the management committee on 8 June 2005.

[12] On Tuesday 7 June 2005, the Puna whanau attended a tangihanga. In the circumstances, there was no discussion about Whaea Ngamata's employment.

[13] On Wednesday 8 June 2005, Whaea Wikitera telephoned Whaea Ngamata and informed her not to attend work that day. She informed Whaea Ngamata there would be a letter in the mail for her. Whaea Ngamata retrieved the management committee's letter dated 2 June 2006 from her post.

[14] A letter dated 10 June 2005 was delivered to Whaea Ngamata's home at 11.30 pm on 9 June 2005. That letter stated:-

We wish to arrange a meeting between you and the Puna Reo Management Committee to discuss your verbal resignation at the whanau hui on 31 May 2005, and your subsequent letter dated 2 June 2005 and delivered to Whaea Hera on 8 June 2005.

Please contact me on 361-1626 (home) or 275 7274 (work) to advise which of the following times would suit you and any whanau support to attend this meeting at the Kura:

6pm, Wednesday June 15

6pm, Thursday June 16

Until such time as we have had an opportunity to have this meeting and agree on some resolutions, we would ask that you do not discuss this matter with any other staff or whanau members at the Puna Reo or the Kura. The Management Committee will undertake not to discuss this matter with anyone outside of the Committee, including other staff or whanau members, or your own whanau or friends.

A letter will be sent to all staff and whanau members explaining that we are working through a process with you, and asking them to also respect the confidentiality of our discussions until the matter is resolved to a point where we are able to once again involve the wider staff and whanau.

As stated in our previous letter dated 2 June 2005, your resignation has been accepted by the Management Committee and your salary payments have ceased accordingly to reflect this.

Noho ora mai

*Haakopa Te Whata
Puna Reo Management Committee*

[15] Whaea Ngamata wrote to Whaea Wikitera by letter dated 12 June 2005 as follows:-

This is a letter regarding our verbal agreement on the 1st of June 2005 where we agreed that I take leave from work until the end of the week, and return to work and continue with full duties on Tuesday the 7th June 2005. Whaea Kataraina was also there to witness and confirm this. You have broken that agreement and I wish to return to work. Since we cannot work this out between the two of us, I would like to bring in a Mediator. Can you please let me know as soon as possible if you agree to bringing in a Mediator to help us sort this out.

[16] Whaea Ngamata wrote again later that same day to Whaea Wikitera as follows:-

Further to the letter that I hand delivered to you this morning at 9.15 am, I would like you to reply in writing to me, within the next two days or before 1pm, Wednesday 14th June 2005. if I don't hear from you by this time I will file this matter with the Employment Relations who will help us to sort this out. I hope that we can resolve this before going further.

[17] Whaea Wikitera replied by letter dated 13 June 2005 as follows:-

I have received your letter dated 12 June 2005.

I would like to clarify a few issues.

You resigned to the whanau at a hui whanau. This was accepted by the management committee of the whanau. I am not able to make decisions on your employment.

All correspondence regarding your employment will be managed by the Puna Reo Management Komiti.

This komiti consists of the following members, Hakopa Te Whata (Chairman), Jette De Jong, Daena Carruth, and Honey Heemi. The license Holder, Diana Pomare and myself as the Puna Reo Supervisor, will participate in an advisory/support to the management komiti and not a decision making role.

On Thursday 2 June 2005, Puna Reo Management Komiti sent you a letter accepting your resignation. I have passed your letters to me onto the committee, and your indication to me that you want to return to work.

The management committee has arranged a meeting to discuss and attempt to resolve this issue has been set for Wednesday 15 June 2005, at 6.00 pm, at the Kura.

Your allegations of what was said between yourself and me on Wednesday 2 June 2005 in the carpark will be discussed further with yourself and whoever you choose to bring with you to the hui.

[18] At the meeting on 15 June 2005 Whaea Ngamata asked for her job back. She said she was unhappy with her colleague employee. She explained how serious she regarded his misconduct and the reasons why she had resigned on 31 May 2005. The management committee members asked questions of her. The committee advised Whaea Ngamata it would consider matters and get back to her.

[19] The following day Honey Heemi wrote to Whaea Ngamata by letter dated 16 June 2005. That letter stated:-

The management committee met with you on Wednesday 15th June regarding your application to return to work at the Puna Reo. We heard the issues surrounding your resignation.

*We heard that you have issues regarding
The handling of the incident with a fellow worker,
And communication and relationships to and with the Supervisor*

The committee wishes to reinstate you, but we need to discuss with you a support and guidance plan to help rectify these problems.

As mentioned to you at the meeting, there will also need to be a medical certificate provided by you. You will need to sign your contract and that you have read and will abide by the procedures and policies of the Puna, in particular those regarding reporting incidents.

We would like you to attend the next whanau meeting on 23-06-06 at 6.00pm and reaffirm your support for the supervisor and the Puna whanau.

The management committee will appoint you as a Qualified Teacher Your salary \$37,314 Is near the top of the scale in the Consenting Parties Award for a qualified Teacher.

A proposed date to discuss this letter and the advice and guidance plan is Saturday 18th June 2005 at 4.00pm. After this is completed we will be able to confirm a start date.

[20] There was a further meeting on Saturday 18 June 2005. The parties reached agreement that Whaea Ngamata would return as a Qualified Teacher on a salary of \$37,314. This was an agreement in principle that Whaea Ngamata would be re-employed in a new employment. Her previous employment as assistant supervisor had ended and she raised no issue about that in negotiating a new role. The offer of re-employment was conditional on Whaea Ng publicly declaring her support for Whaea Wikitera and the puna whanau. Whaea Ngamata agreed to this.

[21] At the whanau hui held on 23 June 2005 Whaea Ngamata intended to meet the committee's requests and make the public declarations it desired. When the whanau was advised of the steps it was taking to deal with the misconduct of the other staff member, Whaea Ngamata became agitated and upset. She was dissatisfied with the committee's progress and continued to disagree with its actions. She communicated her dissatisfaction in very vocal terms to the whanau. The hui descended into shouting and arguing and whanau children had to be removed.

[22] Whaea Ngamata did not give the public commitments she had agreed she would. She did not sign the employment agreement offered to her.

[23] The management committee wrote to Whaea Ngamata by letter dated 23 June 2005 as follows:-

Following your conduct and comments at the whanau hui this evening, the Management Committee has decided to withdraw our offer of re-employment at the Puna Reo.

We are intending to seek legal advice and will contact you again once we have had the opportunity to do this.

Until then, we ask that you:

- *Do not visit the Puna Reo or discuss any matters regarding your own or anyone else's employment with staff or whanau members;*
- *Address all communications in writing to the Management Committee and deliver them either to the Kura office or to my home address.*

[24] Whaea Ngamata did not return to the Puna thereafter.

Constructive dismissal

[25] The well settled tests for constructive dismissal are:-

- (i) Did the employee resign?
- (ii) Was the resignation caused by a breach of duty on the part of the employer?
- (iii) If it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.¹

[26] Whaea Ngamata says this about her alleged constructive dismissal:-

The situation at work was intolerable and unbearable to such the(sic) extent that I felt I could not remain in the job, hence I verbally resigned towards the end of the meeting Management didn't see the Physical Child Abuse as serious anymore because the parents had left.

[27] Whaea Ngamata resigned at the whanau hui on 31 May 2005. That resignation must be caused by a breach of duty. Whaea Ngamata vehemently disagreed with the way the Puna

¹ *Auckland Electric Power Board -v- Auckland Local Authorities Offices Union* [1994] 1 ERNZ 168 (CA)

dealt with the misconduct of her colleague. She held very firm views about the matter and issues surrounding the care of tamariki by male staff. She is entitled to her views.

[28] But it is the Puna's prerogative how it chose to discipline and manage its employees' misconduct. The Puna consulted its whanau in taking action against the staff member concerned. Whaea Ngamata disagreed with that action. But in taking the action it did, it breached no duty to Whaea Ngamata.

[29] In any event, even if Whaea Ngamata resigned because of a breach of duty by her employer, the following day she retracted her resignation. She asked to return to her employment. That is entirely inconsistent with an assertion that she had no option but to leave. In doing so, she must be taken to have affirmed her employer's actions. Lawyers call this a waiver of her legal rights or a rejection of repudiatory conduct. Accordingly, for these reasons, I find Whaea Ngamata was not constructively dismissed.

Actual dismissal

[30] Whaea Ngamata says this about her alleged actual dismissal:-

Management withdrew their offer of re-employment. I was unjustifiably dismissed for trying to stand up for the safety of the children in our centre. My conduct and comments that I was dismissed for, were I stood up and I strongly voiced my concerns for the safety of our children. My words were "I will stand for the safety of our children".

[31] Whaea Ngamata was not actually dismissed. She had been offered re-employment but on certain conditions. She had agreed to those conditions. She had agreed that she would publicly declare her support for Whaea Wikitera and the Puna whanau. At the whanau hui where Whaea Ngamata had agreed and indeed intended to offer that support, she failed to do so. Instead, she continued to challenge the Puna's management on its actions in relation to the colleague's misconduct.

[32] Whaea Ngamata agreed to be re-employed as a qualified teacher. She negotiated and reached agreement that she would publicly declare her commitment to working with Whaea Wikitera and the Puna whanau. The offer of re-employment was subject to conditions that Whaea Ngamata agreed to. They were reasonable conditions and in my view entirely appropriate.

[33] As well, the Puna provided Whaea Ngamata with a draft written individual employment agreement that was hand delivered to her later that same evening. Whaea Ngamata took no issue with the written individual employment agreement. She did not communicate any difficulty with it at all or any difficulty about the conditions of re-employment. She did not sign the agreement.

[34] Whaea Ngamata failed to sign the individual employment agreement and comply with the conditions of re-employment. She had agreed to meet those conditions. As a result, Whaea Ngamata did not accept the offer of re-employment and she was not re-employed. But she was not dismissed and there was no dismissal.

Counter-problem

[35] The Puna has a counter-problem and claims the sum of \$5,000.00 from Whaea Ngamata as damages for loss it has suffered to its reputation and goodwill.

[36] The Puna has failed to establish any such loss and further, that Whaea Ngamata caused that loss.

[37] There will be no orders in relation to this counter-problem.

Determination

[38] The Authority determines that this employment relationship problem does not require resolution in the form of the orders sought by Whaea Ngamata or by the Puna. Accordingly, there will be no formal orders.

Costs

[39] As the Puna was not represented by professional advocate, I do not expect to be asked to address costs. However, should the Puna wish to make application for costs, it may lodge a memorandum detailing any such actual costs incurred and making a case for an award in its favour within 14 days of the date of this Determination. Mr Paewai should lodge a memorandum in reply within 14 days thereafter but in any case, no later than 28 days after the date of this Determination.

Leon Robinson
Member of Employment Relations Authority