

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 282/07  
5092192

BETWEEN                      MONIQUE KAPUA  
   Applicant

AND                              TE HAUORA O TE HIKU O  
   TE IKA TRUST  
   First Respondent

AND                              NORTHLAND DISTRICT  
   HEALTH BOARD  
   Second Respondent

Member of Authority:      R A Monaghan

Representatives:           Benjamin Moore, Counsel for Applicant  
   Jane Latimer, Counsel for First Respondent  
   Rodger Poole, Counsel for Second Respondent

Submissions received:      10 August 2007 from Applicant  
   23 August 2007 from Second Respondent

Determination:              11 September 2007

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**DETERMINATION OF THE AUTHORITY ON PRELIMINARY MATTER**

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**Employment Relationship Problem**

[1]      Monique Kapua has raised an employment relationship problem in respect of a suspension and her dismissal.

[2]      The statement of problem cited two respondents, the Te Hauora o Te Iku o Te Ika Trust (“the trust”) and the Northland District Health Board (“NDHB”). The NDHB has applied for an order striking it out as a respondent, on the ground that it was not Ms Kapua’s employer. Both the trust and the NDHB say the trust was the employer. This determination addresses the application for an order striking the NDHB out as a respondent.

## **The parties' relationships**

[3] Ms Kapua and the trust were parties to a written employment agreement. According to the job description attached as a schedule to the agreement, Ms Kapua was employed as tamariki ora manager, and one of the primary functions of her position was to provide professional leadership for tamariki ora staff to ensure service delivery was co-ordinated, seamless and integrated. Most of the trust's clients were Maori, and there was a strong Maori cultural focus in the services the trust provided.

[4] The ideal person specification included holding a qualification as a nurse or a midwife, with a current practising certificate. Ms Kapua was a qualified and registered midwife, and had originally been employed as a midwife. She continued to provide some midwifery services after her appointment as tamariki ora manager.

[5] Ms Kapua was also an 'authorised practitioner' under a notice issued by the Crown pursuant to s 88 of the New Zealand Public Health and Disability Act 2000 and gazetted in 2002 ("the principal notice").

[6] Briefly, a s 88 notice sets out the terms and conditions on which the Crown or a DHB will make a payment for the services of maternity practitioners. The principal notice is lengthy and detailed. It sets out service specifications and quality requirements for lead maternity carers, rules and procedures regarding payment and schedules of payments. Payment may be sought by an organisation or an individual practitioner. The notice appends a standard form of access agreement under which an authorised practitioner may access a maternity facility for the purpose of providing labour and birth, and inpatient postnatal care, to the practitioner's maternity clients. The NDHB and Ms Kapua were parties to such an agreement.

[7] The agreement contained this provision:

"2.3 The relationship between the maternity facility and the practitioner gives the practitioner access to the maternity facility upon these terms and conditions and is not to be construed as one of employment or a contract for service by the practitioner...."

[8] The remainder of the terms of the agreement were concerned with the parties' obligations in respect of cultural safety, the observation of the facility's (the NDHB's)

policies and guidelines, the observation of relevant legislative requirements, and the maintaining of qualifications. The agreement also contained a dispute resolution procedure and a right to suspend access.

### **Determination**

[9] On the documents as filed, there was no difficulty in identifying the existence of the employment relationship between Ms Kapua and the trust, but considerable difficulty in identifying the existence of an employment relationship between Ms Kapua and the NDHB.

[10] Mr Moore acknowledged that the purpose of the access agreement was to provide Ms Kapua with access to the NDHB's maternity facilities. I did not understand him to be submitting that the agreement evidenced wholly or in part a separate employment relationship between Ms Kapua and the NDHB, and nor was any additional information offered in support of such an argument. Rather, Mr Moore's submitted that there was sufficient relational proximity between Ms Kapua and the NDHB for the matter to be 'brought within the jurisdiction of the Employment Tribunal.'

[11] The submission appeared to have been based on the fact that the NDHB suspended the access agreement following complaints about Ms Kapua, and Ms Kapua's argument that the suspension directly affected her employment with the trust. The matter was therefore said to be 'related to the employment relationship' in terms of s 161 (1) (r) of the Employment Relations Act 2000. The submissions were not developed any more fully than that.

[12] Section 161 (1) (r) provides:

“(1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including –

(a) ...

(r) any other action .... arising from or related to the employment relationship .... (other than an action founded on tort):”

[13] There did not seem to be any dispute that the employment relationship in question is the relationship between the trust and Ms Kapua. Thus any approach to

the Authority in respect of any action arising from or related to an employment relationship must concern that particular relationship.

[14] If, as I accept in the face of the access agreement and the absence of argument to the contrary, there was no employment relationship between Ms Kapua and the NDHB, then on the face of the matter the Authority cannot address the merits of the positions in respect of any problem arising between those two parties. It certainly cannot review the actions of the NDHB in suspending the access agreement, or treat the suspension as the basis of a personal grievance in respect of the NDHB. The problem must be addressed elsewhere. The relevant consideration in the employment context is how the trust addressed the existence of the problem, with particular reference to the implications of the suspension of the access agreement, and whether Ms Kapua can establish she has a personal grievance in respect of the trust and as a result of its actions.

[15] For these reasons I order that the NDHB be struck out as a party to this employment relationship problem.

### **Costs**

[16] Mr Poole sought costs on behalf of the NDHB.

[17] Mr Moore indicated Ms Kapua was unlikely to be in a position to pay any costs. I remain uncertain as to whether Ms Kapua is in receipt of a grant of legal aid.

[18] Mr Moore is ordered to advise the Authority immediately and in writing as to whether an application for legal aid has been made but either declined or not yet granted, or whether a grant has been made.

[19] At the same time Mr Moore is to copy the advice to Mr Poole. If as a result the representatives wish to address me further on the matter of costs, they may do so in writing by the close of business on 18 September 2007.

[20] Costs are reserved pending receipt of that information.

R A Monaghan

Member of the Employment Relations Authority