

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

Determination Number: WA 104/07  
File Number: 5084488

BETWEEN Carol Paewai  
(Applicant)

AND Te Roa Whakapuaki Irirangi operating  
as Te Māngai Pāho  
(Respondent)

Member of Authority: P R Stapp

Representatives: Frances Lear for Applicant  
Karen Spackman and Lucy Inglis for Respondent

Investigation Meeting: Wellington, 19 and 20 June 2007

Determination: 25 July 2007

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] The applicant says that her suspension from work was unjustified and affected her terms and conditions of employment and or employment to her disadvantage. The claim has been denied by Te Māngai Pāho.

[2] Further the applicant says her dismissal for serious misconduct was unjustified and that Te Māngai Pāho was unfair. Te Māngai Pāho denied the claim and acknowledged it was required to justify its action. Ms Paewai is seeking her job back on a permanent basis to return to work. Te Māngai Pāho is opposed to reinstatement.

**Issues**

[3] The issues can be summarised as follows.

[4] Was there any agreement that Ms Paewai would take special leave or was she suspended? Can Ms Paewai establish that she was disadvantaged by Te Māngai Pāho's action? Was the action justified?

[5] Would a fair and reasonable employer have reached a conclusion not to accept the applicant's explanations? Would a fair and reasonable employer have believed the complainants?

[6] How did the respondent find against the applicant on credibility, when it preferred the information provided by at least three complainants, and what were the reasons the respondent relied upon?

[7] Would a fair and reasonable employer have decided to dismiss the applicant for serious misconduct?

[8] Should the applicant be permanently reinstated if she has a personal grievance to resolve the employment relationship problem? Has she contributed to the situation that gave rise to any personal grievance? How else should the problem be resolved?

### **The Facts**

[9] A brief version of the facts can be summarised as follows. Carol Paewai was dismissed on 5 April 2007 on the grounds of serious misconduct for the reason that her behaviour was unacceptable. She was reinstated on an interim basis by the Employment Relations Authority but that order was made on the condition and by consent that it would be on "garden leave".

[10] The background involved two complainants separately going to Mr Bishara, the Chief Executive, to complain about Ms Paewai's behaviour towards another employee. Mr Bishara approached that employee for information about the complaints and he decided that there was enough information for him to treat their complaints seriously. In turn he decided to engage an external person, Megan Cooksley from Te Puni Kokiri, to investigate the complaints. In addition Ms Paewai was put on notice that there had been serious allegations raised needing investigation.

[11] Mr Bishara decided that the matters raised were sufficiently serious enough to take up with Ms Paewai. He offered her the opportunity to take special leave or that he would have to decide to suspend her while an investigation was carried out. He provided an outline of the issues he had

about her. He thought that she had agreed to take special leave. She denied that she agreed to take special leave. However, Ms Paewai returned to work and met with Thomas Hood, Te Māngai Pāho's Corporate Services Manager in Mr Bishara's absence whereupon she agreed to go home. She agreed to provide her input on any allegations to Mr Bishara. She was also informed that he had two further allegations about her computer use and release of information in breach of confidentiality requirements.

[12] Ms Cooksley contacted the three people who decided to participate, and she interviewed them all separately. She obtained written statements and other documents from them. She prepared a report that summarised the views and information from the three people. She handed her report to Mr Bishara. Mr Bishara arranged for the report and its attachments to be provided to Ms Paewai for comment and any explanation on the allegations made.

[13] The complainants were Lynn Parr, funding advisor, Serena Hakiwai, office manager, and Caytion Wineera, administrator. The theme that emerged was that Ms Paewai had treated the employees in an unprofessional and demeaning manner and she had used her position to bully and intimidate Caytion Wineera and Thomas Hood. Mr Bishara learnt that the complainants felt disempowered and unmotivated and were unwilling and reluctant to report for fear of reprisals from Ms Paewai. Each of the three women complained about past events that involved an earlier performance appraisal between Ms Paewai and Ms Wineera in September 2006. They each referred to another event on 31 January and 1 February 2007 involving another appraisal between Ms Paewai and Ms Wineera, where Ms Wineera became very upset, as observed by Serena Hakiwai and Lynn Parr. Ms Wineera alleged that Ms Paewai told her that she had to sign her performance appraisal, that her salary should be decreased and that she should pack her bags and go. Ms Paewai denied that occurred and says she gave Ms Wineera an opportunity to take away her appraisal, that she would not recommend any pay increase because of Ms Wineera's performance in the review period and denied saying to her to pack her bags and go.

[14] Particulars of the complaints included that:

- Ms Paewai had yelled and berated Caytion Wineera and Mr Hood.
- She micro managed Caytion Wineera and made her cry, feel inadequate and isolated and humiliated.
- She created a highly unpleasant atmosphere and had angry outbursts usually directed at Caytion Wineera.

- Ms Paewai was disrespectful, belittled and degraded other people. Examples were provided of some instances.

[15] Ms Paewai says that she had previously raised managing Ms Wineera's performance with Mr Hood. She understood that the incident involved with the September appraisal had been dealt with and says it is now being brought up again. She says that the cause of any upset that Ms Wineera had related to the decision not to recommend a salary increase because of Ms Wineera's performance during the relevant period. Ms Paewai says that that decision on Ms Wineera's pay is the source of her discontent and the complaint.

[16] Ms Paewai replied to the allegations in writing. She had also obtained representation during the process and a lawyer attended a meeting with her. Mr Bishara says he returned to Ms Hakiwai and Ms Parr but did not get anything new from them. Options were discussed around a preliminary view that Mr Bishara had reached to dismiss her. He then dismissed her.

### **The Evidence**

[17] There has been much information provided on the many instances recalled by the witnesses, including producing many documents. Despite this a credibility finding is required because of the conflicts. Much in this matter has to do with perception, which has made the determination of the employment relationship problem more difficult. I have decided to deal with each relevant matter in turn.

### **Findings**

[18] It is my decision that whether or not Ms Paiwai agreed to take special leave, or that she thought she was being suspended, is a side issue. There is every possibility that this matter could have involved a misunderstanding, putting the best light on it. I have reached this decision on the basis of the two different versions that both parties have. Also Mr Hood understood the situation involved special leave. Ms Paewai went to the office on 14 February on her own and without her representative. Thus it is more than likely that there was an agreement for special leave notwithstanding there was no contractual obligation. In any event the allegations were a serious matter and the terms of the employment arrangements between the parties would have permitted Te Māngai Pāho to suspend Ms Paewai, even although there are three different versions that could be treated with pedantic scrutiny to find some fault. I am satisfied there was a correct attempt to fix

any failure in the process by the respondent. In the event that any suspension was unjustified I have not been convinced by Ms Paewai that she was disadvantaged in her employment because she agreed to the continuing process of the inquiry put in place and to have her own input into it once the conclusions and facts were put forward by Ms Cooksley. She was also paid.

[19] Next there is the matter of Mr Bishara's decision on credibility. Mr Bishara decided to believe the complainants: i.e. information from Ms Hakiwai and Ms Parr and the complaint from Ms Wineera. I have not been able to discern from the evidence that the three of them colluded. It was open to Mr Bishara to conclude that it would have been difficult for Ms Parr to complain considering her friendship with Ms Paewai for over 20 years. Mr Bishara says he made his decision on the basis that Ms Hakiwai, Ms Parr and Ms Wineera had no reason not to tell him the truth. He simply believed them and what they had to say. I conclude that a fair and reasonable employer would have tested the information and Ms Paewai's reply with much more thoroughness, given the serious nature of the allegations and divergence of the views between the complainants and Ms Paewai, especially since she denied telling Ms Wineera to pack her bags and go.

[20] Ms Cooksley's role cannot be criticised because she pulled together information from one side only and summarised this to recommend to Mr Bishara that there was an issue about Ms Paewai's behaviour that had to be addressed. She then left it for Mr Bishara to pursue and make his own decision. From this point he put all the information to Ms Paewai to reply to. That is a correct process, except that I find a fair and reasonable employer would have tested the differing information more thoroughly. It seems in believing Ms Hakiwai, Ms Parr and Ms Wineera he made a judgement call rather than putting in place a process of inquiry. This is especially so given the serious attempt by Ms Paewai to reply to the allegations and because she adamantly denied the allegations. Furthermore the respondent has provided evidence of the allegations relied upon but has left me with a lingering suspicion considering the mix of issues put to Ms Paewai and the issues finally relied upon. Ms Paewai has a personal grievance. The lack of thoroughness as I have commented on does not implicate Mr Bishara being biased or lacking impartiality.

[21] Would a fair and reasonable employer have dismissed Ms Paewai? The above reasoning leads me to the conclusion that a fair and reasonable employer would not have dismissed her given the wide nature and mix of the allegations relied on and a credibility finding. This leads to the next matter of any reinstatement. I have considered contribution as I must under s 124 of the Act. It is my conclusion that there has been no contribution because of the diverging information and complaints and Ms Paewai's serious attempt to answer and reply to them. Moreover, the

allegations were very serious. I am not prepared to conclude that Ms Paewai was primarily responsible given the existence of Ms Wineera's performance issues and pay.

[22] However, it is my decision not to reinstate Ms Paewai to her former position for reasons separate to any consideration of contribution that I have dealt with earlier. The main consideration I have given to this matter has been Ms Paewai's behaviour toward Mr Hood that makes it probable that she has been the cause for the feelings that Ms Hakiwai, Ms Parr and Ms Wineera had about their employment when she was present. There was no reason advanced for me not to believe Mr Hood. I was satisfied he was a credible and believable witness. Furthermore Ms Paewai has accepted that her conduct toward Ms Wineera on at least one occasion was inappropriate. There is evidence of the potential for a dysfunctional environment should Ms Paewai be reinstated and I have seriously had regard to Mr Bishara's decision that erred on the side of providing a safe place of work in a small office without Ms Paewai, and without her abruptness and direct management style. He has given evidence that there would be difficulties in reintegrating Ms Paewai back in the work place and I accept his evidence on that, including that he is convinced that the three complainants would leave. He was supported by Mr Hood's evidence. This conflicts with Ms Paewai's opinion about her own ability to reintegrate, which I consider would be difficult given every one's feelings. Therefore I have concluded that reinstatement would not be practicable, or an appropriate remedy in the circumstances, and I have decided accordingly, not to make the interim order a permanent one. I rescind that order accordingly.

[23] Ms Paewai is entitled to other remedies. She has applied for lost wages. She has been paid and therefore has not lost wages from the date of the decision to dismiss her. I am satisfied she has a claim for future lost earnings that I fix at four weeks wages for the parties to calculate. Leave is granted to return to the Authority if the matter cannot be agreed. The four weeks is consistent with the notice period in the individual employment agreement. If there is any claim for more, given that it was raised as an alternative remedy if reinstatement was not granted, I confirm that leave was granted for both parties to return to the Authority on the matter. Ms Paewai has been waiting for reinstatement without mitigating her loses in the circumstances. Not mitigating her loses would be entirely reasonable given her interim reinstatement. I find she should be awarded four weeks wages for future economic loss. Such a time period would be entirely reasonable to expect her to get other employment.

[24] Ms Paewai has provided sufficient evidence to claim compensation. Ms Paewai was supported in her evidence about the impact of the dismissal on her and no reason was raised for me

not to give that evidence any weight. I award her \$15,000 compensation for humiliation, loss of dignity and injury to feelings under s 123 (1) (c) (i) of the Act.

[25] Costs are reserved.

### **Summary of Orders of the Authority**

[26] Mrs Paewai has a personal grievance. I have decided not to make the interim order for reinstatement a permanent one. I rescind that order accordingly and dismiss the claim for reinstatement. I order Te Roa Whakapuaki Irirangi operating as Te Māngai Pāho to pay Carol Paewai four weeks wages for future economic loss, and \$15,000 compensation under s 123 (1) (c) (i) of the Act for humiliation, loss of dignity and injury to feelings.

[27] Costs are reserved. Leave is granted for the parties to return to the Authority on the matters referred to above.

P R Stapp

Member of the Employment Relations Authority