

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

*Under the Employment Relations Act 2000*

BETWEEN Carol Joy Paewai (Applicant)  
AND Te Reo Whakapuaki Iirangi operating as Te Māngai Pāho  
Member of Authority: P R Stapp  
Representatives: Frances Lear for Applicant  
Karen Spackman and Lucy Inglis for Respondent  
Investigation Meeting: Wellington, 23 April 2007  
Determination: 26 April 2007

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

[1] This is an application for interim reinstatement pursuant to s 127 of the Employment Relations Act. A signed undertaking for damages has been filed by the applicant.

**The issues**

[2] Pursuant to s 127 the Authority must apply the law relating to interim injunctions upon the established tests. Te Māngai Pāho opposes the application for interim reinstatement for the applicant to return to the work place. Te Māngai Pāho was not opposed to garden leave and waived any conditions previously put on such an option if the tests are met. The tests are: Is there an arguable case? Are there alternative remedies? Who does the balance of convenience favour? Where does the overall justice of the case lie?

**The facts**

[3] Carol Paewai commenced her employment with Te Māngai Pāho on 14 June 2004. She was employed as the Manager, Television Funding Portfolio. She reported directly to the Chief Executive, Mr John Bishara.

[4] Ms Paewai had a functional relationship with Te Māngai Pāho's Corporate Services Manager, Mr Tom Hood.

[5] Relationship difficulties arose between Ms Paewai and a subordinate. Ms Paewai says this related to the person's performance that she had to manage and she requested help from Mr Bishara regarding that person's performance and sought his assistance. She also raised her concerns about resources in the team with Mr Bishara.

[6] On 2 February 2007 three complaints were made about Ms Paewai. The complainants were the administrator who reported to Ms Paewai, the funding advisor Television Funding Portfolio and the office manager Corporate Services Portfolio.

[7] The applicant was on leave at the time the complaints were made. She was informed of the complaints when she returned to work on 12 February 2007. She was told by Mr Bishara that there would be an investigation. He handed her a pre-prepared letter dated 12 February 2007. A summary of the allegations was included in the letter and that more detailed information was being obtained about the allegations, including the complaints that had been made and that her computer was going to be examined. Ms Paewai was invited to take special leave, although she claims she had no choice in the matter and had been unilaterally suspended. A proposal was included in the letter to suspend the applicant and she was invited to provide a response to the proposal and attend a meeting to discuss it on 14 February with him. Mr Bishara says Ms Paewai agreed to take special leave. She disputed this.

[8] Te Māngai Pāho says that if there was any procedural failure on the special leave /suspension the outcome would not have been any different.

[9] Ms Paewai returned to Te Māngai Pāho on 14 February 2007 to respond to the proposal to suspend her and to return to work. Mr Bishara was not available. He says he was not available because Ms Paewai arrived unexpectedly at work. He says Ms Paewai had resiled from her agreement to take special leave.

[10] In the meantime Mr Bishara obtained the services of an investigator to complete the initial fact finding of the investigation on the complaints. The investigator, Ms Meg Cooksley, a Human Resources Consultant from Te Puni Kokiri, interviewed the three complainants. Ms Paewai was

informed in the letter from Te Māngai Pāho dated 12 February 2007 that if she wanted the opportunity to provide information to the external consultant she could. Te Māngai Pāho's statement in reply to the Authority says that Ms Paewai was given an opportunity to identify further people that could be interviewed by Ms Cooksley, but Ms Paewai did not take up the opportunity. Ms Cooksley compiled a report including attaching the notes from her interviews and copies of written statements made by the complainants. Her report reached damning conclusions against Ms Paewai on the basis that the three complaints were made independently. Ms Paewai decided to wait on the outcome of Ms Cooksley's information gathering and an interview with Mr Bishara.

[11] At this point another letter dated 1 March 2007 was sent to Ms Paewai which set out the allegations about bullying and unprofessional behaviour in greater detail. Ms Paewai was provided with a copy of Ms Cooksley's report and its attachments. Ms Paewai was also informed that emails had been discovered on her computer that involved her applying for jobs and sending information to her lawyers that had not been authorised. Te Māngai Pāho included them as an allegation of a breach of trust and confidence. Ms Paewai agreed she had used the computer to apply for another job.

[12] Mr Bishara decided to use the information from Meg Cooksley's report to reach his own conclusions. He met with Ms Paewai on 12 March 2007. Both parties had their representatives present. Ms Paewai's response was that the matter should have related to performance issues and her proposals about the lack of resources in the team were contributing factors for any inappropriate behaviour to which any offence had been taken. She admitted sending emails to her lawyer but says there could not be a breach of confidentiality for getting advice.

[13] Te Māngai Pāho has relied upon the terms of its employment agreement with the applicant, Te Māngai Pāho's personnel manual and a Confidentiality Deed, for the breaches involving serious misconduct made against Ms Paewai.

[14] Ms Paewai was advised by Mr Bishara on 20 March 2007 that all the allegations had been substantiated in his opinion, in particular the bullying and intimidation allegations, which amounted to serious misconduct. Mr Bishara decided that the breach of duty of fidelity, when Ms Paewai sent emails to her lawyer, and the disclosure of personal information to her lawyer, and the use of Te Māngai Pāho's computer, were serious matters, but he proposed to take no further action on them. Mr Bishara's preliminary view was to summarily dismiss Ms Paewai because her behaviour amounted to serious misconduct breaching his ability to have trust and confidence in her, but she

was given an opportunity to comment before he would make a final decision on the penalty. A meeting for this purpose was arranged for 22 March 2007. Proposals were made by Ms Paewai and put in writing dated 2 April 2007. Another meeting took place on 4 April 2007.

[15] Ms Paewai was summarily dismissed on 5 April 2007.

## **Determination**

[16] The first issue to determine is whether or not there is an arguable case. It is my finding that there is an arguable case to be answered. S103A of the Act makes it clear that there is an assessment required as to whether the action taken was what a fair and reasonable employer would do in all the circumstances. I agree that there are factors that impact on the employer's decision. These include:

- The way the suspension and special leave was handled.

This involved a separately raised personal grievance. There is a dispute about whether or not Ms Paewai agreed to take special leave. Te Māngai Pāho says that even if there was some fault (which it has denied) then the outcome would not have been any different.

- The length of time the applicant was on leave and suspended (eight weeks).

This involved an investigation to gather information. It does not appear to have been a deliberate delay. Ms Paewai decided not to be involved and to wait the completion of the information gathering and be interviewed by Mr Bishara.

- The focus on what the relevant allegations were in terms of the detail and specificity of them.

Te Māngai Pāho has focussed on the complaints from the complainants. It appears all the matters were put in front of Ms Paewai.

- The applicant's performance issues she had with one of the complainants.

Ms Paewai says that Mr Bishara failed to deal with the matter as a performance issue on behaviour instead of serious misconduct and that a fair and reasonable employer would have pursued other options. Te Māngai Pāho relies upon serious misconduct in the personnel manual as opposed to any poor performance for misconduct in the same manual. The reasons for the dismissal relate to allegations from three named witnesses for bullying and intimidation. Instances were uncovered by Ms Cooksley but only what the complainants say happened because they were the only witnesses interviewed by her. The manual makes provision for any complaints about personal conduct and provides a

range of disciplinary action from a warning to instant dismissal depending on the seriousness of the offence and circumstances. These are matters for assessment considering the allegations and whether or not it was open to Mr Bishara to say that they had been substantiated. He says he took Ms Paewai's comments and responses back to the three complainants but they were adamant and did not have anything to add.

- What factors Mr Bishara took into account in making his own decision having regard to the use of the investigator's report.

Mr Bishara has deposed that he made his decision based on some admissions from the applicant, his assessment that staff had been alienated, and Ms Paewai's denials when he says the complainants' allegations did occur and he had regard to any arguments of poor performance. It is a question of whether or not these were sufficient for him to reach a conclusion.

- The applicant's mitigation, atonement and remorse.

Ms Paewai says that she agreed to apologise for any offence taken by the complainants but that it could have only have related to her refusal to grant the administrator a salary increase and because she had raised performance issues that she says upset that person. She says the complainants smoked together and colluded in regard to making the complaints. The respondent relies upon the complaints being made independently. Ms Paewai says there had never been any complaints made before. The respondent's say that even if there had not been complaints made before, the situation had reached a point where the complainants could not put up with Ms Paewai's behaviour any more.

- Other factual disputes include the complainants' motives that have been challenged by the applicant given Ms Paewai's evidence of the existence of a performance matter with one of the complainants, and the substance of the allegations as they relate to remedies.

[17] There is an arguable case. It is not open to me to determine the merits of the matter at this stage. However I do note that Mr Bishara has made a major concession during this preliminary hearing in agreeing to garden leave and waive any conditions should the test for interim reinstatement be made out by the applicant. The offer was an open offer and I heard that the prior conditions related to the repayment of wages and interest if the applicant was not successful. Although there is an arguable case it does seem that parts of the applicant's claims will be difficult for her to establish such as a claim that there has been predetermination and bias based on subjectively held opinion. However she has countered with factors that she says a fair and reasonable employer would have applied to arrive at a different decision and applied lesser

remedies that have to be taken seriously. Further, however, the role is for the employer to justify its actions, and I note, it has relied upon serious allegations based on information gathered by another person, the complainants came forward and provided statements at the time and Ms Paewai was given an opportunity to comment on all the allegations in the report and correspondence and that the decision was made by Mr Bishara that he has shown he can provide some reasons for. Whether they will be entirely satisfactory is another matter.

[18] There are alternative remedies whereby a substantive investigation will consider reinstatement as the primary remedy if Ms Paewai has a personal grievance. The dates for a full investigation meeting are 19 and 20 June 2007. The applicant is entitled to consideration on the basis that she will be able to prove her case, and on the basis there are factors that exist for her to do this where a fair and reasonable employer would have considered the matter differently and applied different remedies. Her application for interim reinstatement must be seriously considered.

[19] While alternative remedies exist for lost wages and compensation these may be inadequate for the loss of a senior position given the type of position it is and the industry. Although Ms Paewai has been off work since her dismissal on 5 April, and before that she had been suspended and on paid special leave, there is no reason that her reinstatement could not involve garden leave until the matter is dealt with fully or the parties settle. This would be a constructive way to deal with the Respondent's submission that there is no position for her (not challenged), although that is not the applicant's responsibility, and I do not know what the reasons are for the position not being available. In any event the respondent does not contest it has the funds to pay her compensation. The arguable nature of the case means that her right to work should be preserved in the meantime given the investigation meeting can take place on 19 and 20 June 2007. The work and being in paid employment are clearly important to the applicant.

[20] The applicant's evidence will require determination in the future but the onus is on the employer to justify its actions. It purports to do this on Mr Bishara's decision, that there was serious misconduct involving bullying and intimidation and a loss of trust and confidence. He has given evidence how he went about this and the reasoning for finding against the applicant. If she is right and the decision was flawed, including the use of wrong facts relied upon, and the matters should have been treated as performance matters about her behaviour, because there is no complaint about her actual work performance, then would a fair and reasonable employer have considered a lesser penalty? However her opinion must be balanced with that of the employer where Mr Bishara has made a decision he believed was the right one and that he believed that he followed a correct

procedure. The assessment will also be crucial to determining the heart of the matter on whether or not Ms Paewai has a personal grievance and reinstatement as a primary remedy will become critical in the matter. A decision in the applicant's favour later will not necessarily preclude reinstatement, which is the primary remedy on a finding of a personal grievance.

[21] For these reasons the balance of convenience favours the applicant.

[22] I now turn to the overall justice of the matter. The matter has been filed quickly. The parties have attended mediation services provided by the Department of Labour. A substantive investigation can take place on 19 & 20 June 2007. The applicant asserted her health and feelings have been affected by her dismissal. Of course these matters can be addressed by compensation. The return to work in an awkward atmosphere will probably not assist her. She agrees it will be awkward. She has not elaborated on her claim that being out of work affects her financially and has caused hardship. This has not been challenged and I accept it on the basis that her wages ceased from 5 April. In addition she claims by not being at work causes her isolation and being cut off from the industry. The justice of the matter favours the applicant who has not delayed the matter and who wishes to return to work quickly. She has not been at work from 12 February 2007. There has been a concession to give her garden leave without conditions pending the outcome of the Authority's investigation and this supports the seriousness in which Mr Bishara considers his decision he made and the safety concerns he says he has for the complainants. He says the complainants might resign if Ms Paewai was to return. There is no other supporting evidence for this possibility from him. He says that he decided not to involve the complainants in these proceedings.

[23] The suggestion has been made for garden leave and conditions have been waived by Te Māngai Pāho that means the undertaking for damages does not apply on the wages, as I understand Te Māngai Pāho's position. The garden leave ensures the applicant does not lose any pay before the investigation meeting. The garden leave also covers any problems likely to arise with the awkwardness of any reintegration needed in the work place in the meantime, and to allay any concerns that Mr Bishara has about safety in the workplace. The overall justice can be met with at least an interim declaration for an order that Te Māngai Pāho reinstate Carol Paewai until the outcome of the Authority's substantive investigation and for her to remain on garden leave as a condition.

**Declaration on an Application for Interim Reinstatement**

[24] I hereby make a declaration that Te Reo Whakapuaki Irirangi operating as Te Māngai Pāho reinstates Carol Paewai until the outcome of the Authority's substantive investigation and for her to remain on garden leave as a condition.

[25] I have raised with both parties the need to settle the substantive matter. I am of the opinion that mediation services provided by the Department of Labour would be useful now that the interim proceedings are out of the way. I indicated I was disposed to direct the parties back to further mediation with a mediator from the department and now include it as part of this declaration.

**Costs**

[26] Costs are reserved.

P R Stapp  
Member of the Authority