

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

Determination  
Number: WA28A/08  
File Number: 5117137

BETWEEN                      TAUIRA TAKURUA  
   Applicant  
  
AND                              TE AUTE COLLEGE BOARD  
   OF TRUSTEES  
   First Respondent  
  
   KENNETH JAMES WILSON  
   Second Respondent

Member of Authority:      G J Wood  
  
Representatives:            Stuart Webster for Applicant  
   Paul Robertson for Respondents  
  
Investigation Meeting:     14 March 2008 at Napier  
  
  
Determination:              25 March 2008

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**REASONS FOR DETERMINATION OF THE AUTHORITY ON INTERIM  
REINSTATEMENT**

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**Employment Relationship Problem**

[1]     In my oral determination of 14 March 2008 I dismissed the applicant's claim for interim reinstatement. The following sets out the reasons for that determination.

[2]     The applicant, Mr Taura Takurua, claims that his employment at Te Aute College ended as a result of a constructive dismissal. While he resigned he says that his employment was terminated as the result of a course of conduct intended to secure his resignation and that he was given a choice between resigning or else being dismissed.

[3] The respondents, the Te Aute College Board of Trustees (the Board) and Mr Wilson (Te Aute's Limited Statutory Manager or LSM), deny these claims and consider that Mr Takurua resigned for reasons of his own accord. For brevity, where the views and/or interests of the two respondents coincide I refer to them as Te Aute.

[4] Mr Takurua resigned on 4 February 2008 and he left the school almost immediately, although he continues to be paid until the end of Term One. He has sought interim reinstatement to his position as principal until the Authority can deal with the substantive matter in a three day investigation meeting between 8 and 10 July 2008. Because it was not absolutely clear whether Mr Takurua's legal employer was the Board or Mr Wilson, the parties agreed with my suggestion that both be cited as the employer, at least until the substantive investigation, by which time the issue should have been clarified.

### **The Facts**

[5] Te Aute College, as is well known, is a school that has faced a significant number of challenges in the last ten years or so. When Mr Takurua was appointed principal in January 2005 he was the third principal in five years. Mr Wilson was involved in appointing him as he was the LSM at the time and remains so. Mr Wilson had been appointed by the Minister of Education to take over all functions, powers and duties of the Board as an employer and to manage the health and safety of students in both the college and the hostel.

[6] Mr Wilson became dissatisfied with Mr Takurua's performance from a fairly early stage. Mr Wilson and the former Board chair considered at the end of Mr Takurua's first year as principal that he needed to pay attention to education compliance and staffing/student matters in particular. It was considered that he needed to gain knowledge of the basics of educational resourcing and of management tools.

[7] In 2006 the school was reviewed by the Education Review Office (ERO) and its report raised a number of concerns about the operation of Te Aute. At the end of that year Mr Wilson's concerns had reached the point where he considered that the performance of Mr Takurua was seriously unsatisfactory compared to the standards expected of him in his performance agreement. Disciplinary procedures under parts 4 and 6 of the collective agreement were proposed, subject to Mr Takurua's response. The appraisal process was determined to be dealt with by the new Board chairman, Mr John Tangaere.

[8] This advice coincided with two other letters sent to Mr Takurua that day by Mr Wilson, raising complaints against him about the appointment of staff and an alleged failure to deal properly

with complaints about staff and students. One of the complaints later led to Mr Takurua being issued with a warning for the appointment of a staff member without Mr Wilson's approval (which was required as he had all the powers of the employer). The warning was not disputed. All other formal complaints of potential misconduct, however, were dismissed.

[9] In June 2007 ERO reviewed the school again and its report was published in August. It was noted that there were ongoing problems in the school and in particular around the lack of senior management experience, which had been a disadvantage for successive principals. It concluded that support was still needed for the recently elected Board and senior managers to assist address health, safety, personnel and curriculum matters.

[10] In relation to Mr Takurua it noted that since 2003 the school had lacked knowledgeable and effective professional leadership, excluding the executive manager. It states:

*The principal, appointed in 2005, supports the tikanga and special character of the school. He has a key intention to build positive relationships with students, staff and whanau. His aim is for students to succeed academically. Limited experience as a secondary principal and the need for further development of senior management skills means his aim is not yet achieved. The Tumuaki is unable to give necessary attention to strategic responsibilities, such as leading a coherent approach to self review, as excessive involvement in day to day matters diverts his attention.*

*The principal does not always follow the Board's complaints procedures and record the follow up actions and resolutions to report grievances. More judicious notice of board instructions and LSM advice should assist in establishing his leadership.*

[11] In relation to the LSM the ERO report states:

*The LSM appointed in 2005 has provided the Board with sound advice and guidance. He has put into place a considerable number of effective procedures and systems that enhance the quality of management and governance practices. The LSM has identified the areas within curriculum that need strengthening and provided relevant advice. He has undertaken rigorous appraisal of the principal. However a fundamental role of a principal is to support the Tikanga and special character of the school. This is an area that the principal provides leadership, but this was not commented on in the performance cycle. Recently, the relationship between the principal and the LSM has become strained and they have struggled to maintain an effective working relationship. Despite this dissension, the school has benefited, particularly in governance, from the work of the present and past LSM.*

[12] Mr Takurua considers that Mr Wilson had pre-determined by at least 2006 that he should be removed as principal because he had made comments to that effect, had unfairly used the performance appraisal process to Mr Takurua's disadvantage, was authoritarian, raised minor matters to the level of misconduct, gave him too much work to do, brought forward the ERO review and ignored positive trends within the college. Mr Takurua also considered that Mr Wilson had become involved in management issues instead of governance ones and thus unfair pressure was

placed on him, with the intention of having him dismissed or replaced. All these claims are disputed by Mr Wilson.

[13] The principal ran a study weekend over Labour Weekend at the school. A pupil's money was stolen over the course of the weekend, which understandably upset Mr Takurua greatly. He started to investigate the incident but had not completed his investigations when Mr Tangaere was informed of allegations that students had been drinking in the hostel over the course of the weekend.

[14] Having heard nothing from him on this issue, Mr Tangaere decided on 5 November to ask Mr Takurua about the drinking allegations, to which Mr Takurua responded that he was not aware of them. Mr Tangaere asked him for a report. The report was provided on 9 November and stated that investigations were ongoing. At that point Mr Tangaere decided that, in his role as the Board chair, he could not continue to support Mr Takurua, one of his whānau. After raising the matter with the Board he then spoke to Mr Takurua with some Board members and then with Mr Takurua's wife, telling Mr Takurua he no longer supported him, particularly because of the seriousness of the Labour Weekend incident.

[15] Mr Takurua states that Mr Tangaere told him that the preferred option of the Board was for Mr Takurua to resign. These actions appear to have been taken without the knowledge of Mr Wilson, who held the Board's powers as employer.

[16] Mr Takurua refused to resign and instead arranged to go to mediation on this issue. Following mediation it appeared to Mr Takurua at least that the above issues were resolved. He continued in his position as principal.

[17] The matter had been formally referred to Mr Wilson however, who advised Mr Takurua that he would be investigating it. Mr Wilson asked Mr Takurua for his response in a performance appraisal meeting of 22 January, which was not, however, completed that day. Mr Takurua subsequently provided his report the next day and Mr Wilson decided that a formal disciplinary investigation should be undertaken by an independent third party. He wrote up draft terms of reference for the investigator and sent a copy to Mr Takurua through his PPTA representative. The terms of reference included the comment that Mr Wilson was considering suspending Mr Takurua for the duration of the investigation process.

[18] Mr Takurua gave evidence that he got a call from his PPTA representative stating that Mr Wilson had said that he intended to pursue the Labour Weekend incidents and other allegations and that Mr Takurua would be suspended for 12 weeks, the expected duration of the investigation. His

PPTA representative told him that if he chose to resign then all the allegations would be dropped, that the Board and the Chair and the LSM would do all in their power to keep his mana intact and that they were happy to look at a good exit package. Mr Takurua discussed the situation with his wife and decided that he was not prepared to be exposed to the continued and relentless attempts by the LSM to discredit him, his performance and his integrity.

[19] The PPTA representative emailed Mr Wilson confirming the resignation and stating that he would email Mr Wilson *as to the process that we can do to ease Mr Takurua from the position with his mana intact*. Mr Wilson was thanked for his patience in seeing the situation through. Mr Wilson emailed back stating that it would be appropriate for Mr Takurua to email a formal letter, including any proposed terms advised by the PPTA, to the Chair and himself.

[20] Mr Takurua subsequently resigned on 4 February in the following terms:

*I wish to resign as principal of Te Aute College effective immediately, 4 February 2008. I agree with the settlement package that we have reached today. I seek a letter of reference from the Board of Trustees for the work I have carried out over three years as principal of Te Aute College. I believe there has been a difference of view for a way forward for Te Aute, so we, the principal and Board of Trustees have agreed to part ways.*

[21] Clearly, there had already been a meeting between the PPTA representative and Messrs Wilson and Tangaere, which resulted in this letter of resignation, plus an agreement of terms for his departure, including payment for Term One of 2008.

[22] Mr Takurua soon recanted from that position. He took alternative legal advice and raised a personal grievance claiming constructive dismissal on 8 February. This was because Mr Takurua wanted to continue with the progress he feels he made at Te Aute. In particular he wishes to raise educational standards through a transformative approach, by investing in and working with people to bring about enduring change. He states:

*The reality is I do not lead or manage in a style that they (being Messrs Wilson and Tangaere) recognise or believe in.*

[23] He also stated:

*The LSM has never understood what the school needs or for that matter what is required to lift Maori educational achievement. His attempt to mould me into a good main-stream day principal were not only futile but I believe became destructive.*

[24] Mr Takurua has undertaken that he is prepared to work in a professional relationship with both Mr Wilson and Mr Tangaere for the good of Te Aute College.

[25] Mediation was not successful in resolving the employment relationship problems between the parties.

### **Determination**

[26] As was held in *Baker v. Armourguard Security Ltd* [1998] 1 ERNZ 424, the tests to be applied in determining an application for interim reinstatement are four-fold:

- (i) Is there an arguable case;
- (ii) If so, is there an adequate alternative remedy available to the applicant;
- (iii) If not, where does the balance of convenience lie;
- (iv) What is the overall justice of the case.

[27] Nothing that follows will be determinative of any issues between the parties, as these can only be determined by the Authority following a full investigation. At this interim stage, however, I must assume that Mr Takurua will prevail in any claims he makes if there is some evidence of them, even if they are disputed by Te Aute. Because of this it is clear that Mr Takurua has an arguable case that he was constructively dismissed, because he was given an option to resign or be dismissed by the Board Chair (even if the Board Chair could not act as the employer and was not acting with Mr Wilson's authority), and/or that he was subject to a course of conduct by Mr Wilson, the dominant purpose of which was to obtain his resignation.

[28] I accept that there is no adequate alternative remedy available to Mr Takurua. If he is not reinstated as principal, he will not only have no job to go to but his opportunities to get work of a like nature will be restricted, particularly as at Te Aute he was in his first role as a principal.

[29] The balance of convenience is evenly poised. As stated above, if Mr Takurua is not reinstated in the interim he has no where else to go, particularly as he genuinely pursuing full reinstatement. This is an important factor (see for example *Melville v. Chatham Islands Council* [1999] 2 ERNZ 76).

[30] On the other hand, there is clearly tension between Mr Takurua and Messrs Wilson and Tangaere. These tensions are not only about personal relationships but also about the direction of the school. While Mr Takurua says that he can work effectively with Messrs Wilson and Tangaere, this is likely to be difficult when their approach to educational achievement at Te Aute appears so different. With such divergent views it is likely that any issues of trust and confidence between the key players are not at all easily capable of repair, even in the interim. In such circumstances interim

reinstatement is only reluctantly granted (see for example *Walesby v. Sky Network Television Ltd* unreported, Colgan J, AEC 114/97, 23 December 1997). This issue for Mr Takurua is supplemented by the fact this is a constructive dismissal case, where it is often impracticable to order reinstatement, whether at the interim stage or not (*Williams v. The Malthouse Ltd* [1993] 2 ERNZ 1075).

[31] Under the balance of convenience third party issues must also be considered – in this case what is best for the school and its pupils. Mr Takurua resigned and left almost immediately. The prospect of further instability if he is reinstated in the interim and does not succeed in being reinstated is a factor that goes in favour of Te Aute.

[32] In essence, however, because these matters are evenly balanced it is important to assess the overall interests of justice. In this regard one key matter is that this is a claim for constructive dismissal. This is the major reason for concluding that the interests of justice favour the non-reinstatement of Mr Takurua, on an interim basis at least.

[33] First, in order to gain full reinstatement, Mr Takurua would have to prove his constructive dismissal case. I make no comment on the likelihood of that. However, given that he resigned it may be a relevant factor that he was assisted throughout the process by the PPTA, his union.

[34] Second, a constructive dismissal situation is often not consistent with reinstatement because for Mr Takurua to have been constructively dismissed there must have been serious breaches of duty by Te Aute's representatives, which led him to reasonably conclude that he could not continue working there. This necessarily makes reinstatement more difficult, particularly as the LSM, Mr Wilson, is in effect the employer and there is no reason to believe he will not continue in that role, whether Mr Takurua is reinstated or not.

[35] Third, the issues between Mr Takurua and the Board and Mr Wilson go beyond disciplinary issues. There is a fundamental difference in philosophy, as identified by Mr Takurua himself, which simply can not be expected to change. It is Mr Takurua who has stated that the *LSM has never understood what this school needs or for that matter what is required to lift Maori educational achievement. His attempts to mould me into a good mainstream day principal were not only futile but I believe became destructive.* He has also stated that the *reality is I do not lead or manage in a style that they recognise or believe in.*

[36] Many of these views relate to matters of governance, not management, of Te Aute and are therefore the responsibility of the *de facto* employer, Mr Wilson. Because it is the employer's responsibility to set Te Aute's direction or *way forward*, not the principal, it is clear that were

Mr Takurua to be reinstated conflict could be expected and therefore reinstatement unlikely (see for example *NZEI v. ANI School Trustees* [1992] 3 ERNZ 243).

[37] It is for all the above reasons that I dismissed Mr Takurua's application for interim reinstatement at the investigation meeting on 14 March.

**Costs**

[38] Costs are reserved pending the outcome of the Authority's substantive determination.

**G J Wood**  
**Member of the Employment Relations Authority**