

NOTE: An order prohibiting the publication  
of information appears at p 2 of this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 347/08  
5099194

BETWEEN                      RICHARD TE AO  
Applicant

AND                              CHIEF EXECUTIVE OF THE  
DEPARTMENT OF LABOUR  
Respondent

Member of Authority:      R A Monaghan

Representatives:            S Scott and M Chambers, Counsel for Applicant  
A Gane, Counsel for Respondent

Submissions received:      23 September 2008 from Applicant  
22 September 2008 from Respondent

Determination:                1 October 2008

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**DETERMINATION OF THE AUTHORITY  
ON APPLICATION FOR DECLARATION AS TO  
INTERIM REINSTATEMENT**

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**Employment relationship problem**

[1]     The applicant, Richard Te Ao, was employed under s 59 of the State Sector Act 1988 by the respondent, the Chief Executive of the Department of Labour (“the Department”), to provide mediation services in terms of s 144 of the Employment Relations Act 2000.

[2]     Mr Te Ao was dismissed on 10 March 2008. He has raised a personal grievance on the ground that his dismissal was unjustified, and seeks reinstatement as a remedy. He has also applied for a declaration as to interim reinstatement.

[3] This determination addresses whether there should be a declaration as to his interim reinstatement. By agreement, the application in respect of interim reinstatement has been determined on the papers.

### **Summary of events leading to dismissal**

[4] During meetings held on 11 and 19 April and 4 May 2007 Mr Te Ao provided mediation services to the parties to an employment relationship problem. The individuals involved in the problem were in a reporting relationship, and both were still in their employment. I confirm orders that the identities of the individuals not be published.

[5] In letters dated 8 and 14 May 2007 respectively, both individuals wrote letters of complaint to the Department about Mr Te Ao's conduct of the mediation. Both letters referred to bias, or 'obvious alignment' on Mr Te Ao's part towards one of the individuals. The individual in whose favour Mr Te Ao was said to be disposed raised additional concerns about the number of times he met with her privately as compared with the other party, and she also noted that he hugged her during these private meetings. Finally she reported certain comments Mr Te Ao made to her in the absence of the other party. They amounted to personal comments about the other party, including comment on her management style and her sexuality.

[6] On 21 May 2007 Mr Te Ao was suspended from his employment on full pay, pending the outcome of an investigation and a disciplinary process.

[7] The outcome was that the Department concluded that the conduct occurred as alleged, and that Mr Te Ao's actions of inappropriate physical contact and inappropriate comments breached his obligations as an employee and led to a perception of bias. These actions constituted serious misconduct. The Department could not maintain its trust and confidence in Mr Te Ao. By letter dated 10 March 2008, it dismissed Mr Te Ao with one month's notice.

[8] The parties to the mediation consented to the disclosure of information about the mediation. In its decision on a referral of a question of law for its opinion, the Employment Court concluded that s 148(2) of the Employment Relations Act does

not prohibit Mr Te Ao from giving evidence about the allegations made against him by the parties to the mediation.<sup>1</sup>

### **The application in respect of interim reinstatement**

[9] The tests applied in addressing applications in respect of interim reinstatement are:

- (a) whether the applicant has an arguable case;
- (b) whether damages would be an adequate remedy;
- (c) whether the balance of convenience favours the applicant or the respondent;
- and
- (d) the overall justice of the matter.

[10] Before the Authority can determine whether these tests have been met, evidence relevant to the tests is required. The expectation is that the evidence be provided by affidavit, although on occasion the Authority hears oral evidence. Here, as I have said, by agreement the matter was heard on the papers. Accordingly it was particularly important that full and informative affidavits, containing the necessary relevant information, be filed.

[11] Mr Te Ao had filed an affidavit in support of less than one page in length, and which merely asserted the above tests were met. I drew attention to the need for evidence addressing the tests, and a second affidavit was filed. It was a little over one page in length. For the most part it repeated the assertions already made. To the extent the second affidavit went any further, I address the matters it raised in the remainder of this determination.

#### **A. Arguable case**

[12] The following is an outline of the parties' positions for the purposes of the present application. It does not purport to set out final findings of fact, as these must await the outcome of the investigation of the substantive matter.

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<sup>1</sup> **Richard Te Ao v Chief Executive of the Department of Labour**, Chief Judge Colgan, 3 September 2008, AC 31/08

[13] Mr Te Ao challenges the justification for his dismissal primarily on the ground that he does not accept his conduct was inappropriate. He also disagrees with aspects of the detail of the Department's conclusions about whether he acted precisely as alleged, and in particular he does not agree that the Department should have preferred some aspects of the complainant's account of the conduct to his.

[14] Regarding the physical conduct complained of, he says he is warm and natural person whose manner lends itself easily to physical contact. He also denies that he actually hugged the person concerned, saying he put his arm across her shoulder and patted her shoulder.

[15] Regarding the comments complained of, he admitted the comments were made but said this was as a means of building empathy. As for the comments about sexuality, he said he raised the matter in order to ascertain whether there was a personal relationship between the parties which was impacting on their employment situation.

[16] Finally, Mr Te Ao denied that aspects of his behaviour could have led to a perception of bias.

[17] The Department believes Mr Te Ao does not have an arguable case. It says a full investigation upheld the original complaints. The ensuing disciplinary investigation gave Mr Te Ao an opportunity to address the findings and raise any other matters for consideration. The Department took into account Mr Te Ao's concerns about credibility, and concluded the complainants' version of events was most likely to be true. It concluded that Mr Te Ao's behaviour fell short of the required standard for a mediator, and that his conduct amounted to serious misconduct. It also took into account that it had already invested time in coaching and mentoring Mr Te Ao, but even with this input Mr Te Ao had failed to reach the standard of behaviour expected of him.

[18] Mr Te Ao has an arguable case concerning the fairness and reasonableness of the Department's conclusions about the nature and quality of his conduct. However his case is weakened to the extent that he admits many of the facts of the conduct

alleged against him. It was reasonable for the Department at least to be concerned about that conduct, and to seek to address it.

#### B. Whether damages would be an adequate remedy

[19] Mr Te Ao asserted that he stood to lose financially if he was not reinstated. However he did not provide any evidence in support of this assertion, let alone evidence capable of persuading me that, on the basis of his financial position, the balance of convenience favours him. He seemed to be relying on nothing more than the fact that he has not received income as a Departmental mediator since his dismissal took effect. More evidence than that is required.

[20] The Department says any inconvenience Mr Te Ao may suffer can be recovered by financial damages. There was nothing on which I could base any conclusion to contrary effect.

#### C. The balance of convenience

[21] Mr Te Ao asserted that he sought to protect the status quo, and said he sought reinstatement on a 'garden leave' basis. He pointed out that he had filed an undertaking as to damages, and said he did not believe the Department would face any potential loss as a result of his interim reinstatement. Regarding the availability of remedies other than the declaration sought here, Mr Te Ao said he believes his age precludes any other interim employment. However went no further than expressing this belief. There was no evidence allowing that expression to be put in any context, and no evidence that Mr Te Ao has made any approach to anyone regarding alternative employment. Nor did Mr Te Ao say anything about how he has spent his time since his suspension in 2007.

[22] The Department's expressed concern about putting clients at risk by allowing Mr Te Ao to recommence working as a mediator, even on an interim basis, is arguably met by Mr Te Ao's expressed willingness to be reinstated on 'garden leave'. However the Department says it is accountable for the expenditure of public funds and it cannot justify the continued payment of a salary to Mr Te Ao. It says the findings of the disciplinary investigation are very serious and there is a risk to the public

perception of the mediation service and the Department if Mr Te Ao were to be reinstated on 'garden leave'.

[23] Mr Te Ao has not provided evidence to persuade me that the balance of convenience favours him. The Department's concerns about its responsibilities to the public persuade me that the balance of convenience favours it.

#### D. Overall justice

[24] I have found Mr Te Ao has an arguable case, albeit it weakened by admissions he has made about the conduct alleged against him. I have also found the balance of convenience favours the Department, partly because of the lack of evidence from Mr Te Ao, but also because both the Department and Mr Te Ao have important public responsibilities which merit weight. Finally, there was no evidence that any loss Mr Te Ao suffered in the event this application was declined could not be remedied by an appropriate award should he be successful in the substantive application.

[25] Having said that, I am obliged to step back and assess the overall justice of the matter. In the light of the way in which this application has been pursued, there is nothing to add to the above conclusions.

#### **Determination**

[26] For these reasons the application is declined.

[27] The Authority has asked the parties for an indication of their availability for a substantive hearing. They are to reply without further delay. As at the date of this determination the Authority has dates available in November 2008.

#### **Costs**

[28] Costs are reserved pending the outcome of the substantive matter.

R A Monaghan

Member of the Employment Relations Authority