

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 93/09
5099194

BETWEEN RICHARD TE AO
Applicant

AND THE CHIEF EXECUTIVE OF
THE DEPARTMENT OF
LABOUR
Respondent

Member of Authority: P R Stapp

Representatives: Richard Te Ao in person
Andrew Gane for Respondent

Investigation Meeting: 23 & 24 February 2009 at Hamilton

Determination: 30 March 2009

DETERMINATION OF THE AUTHORITY

[1] In April and May 2007 two people in an on going employment relationship attended mediation services provided by the Department of Labour. Both people after the mediation complained in writing about the mediator's behaviour: alleging he hugged one of them on three occasions during caucusing, he made inappropriate comments including asking about the other complainant's sexual orientation, and that his behaviour led to perceptions of bias. The allegations were investigated by the department including conducting interviews with both complainants separately and interviewing the mediator. The mediator was given all the relevant documentation and had an opportunity to comment. He denied some of the allegations, but made some admissions. He offered some explanations. Also he had an opportunity to comment on the likely outcome before a decision was made. The department's investigators' and regional manager's reports and the relevant documents were referred to a delegated decision maker. That person made his own decision based on the investigation and conclusions reached on credibility and the outcome after hearing

from Mr Te Ao. Mr Te Ao was dismissed for serious misconduct. Mr Te Ao was represented throughout.

Non publication order

[2] The details of the names of the complainants and any details likely to lead to their identification have been prohibited from publication under clause 10 Schedule 2 of the Employment Relations Act. The complainants will be referred to as Ms X and Ms Z.

Employment relationship problem

[3] Mr Richard Te Ao was a mediator employed by the Department of Labour. On 11 & 19 April and 4 May 2007 he provided mediation services to Ms X and Ms Z who were not represented. They had an on-going employment relationship.

[4] Both people complained to the department after the mediation about Mr Te Ao's behaviour. He was informed of the complaints on 21 May 2007.

[5] An investigation was put in place. On 22 May 2007 Mr Te Ao was suspended and a personal grievance was subsequently raised on Mr Te Ao's behalf challenging his suspension. Mr Te Ao informed me during the investigation meeting that he was not pursuing that issue.

[6] Two investigators were appointed and they interviewed the two complainants. There was an attempt to interview Mr Te Ao, but his interview was delayed by him taking matters to the Employment Relations Authority and the Employment Court about mediation proceedings and confidentiality.

[7] On 14 November 2007 Mr Te Ao and his representative attended an interview with the department's investigators. He had been provided with copies of the complainants' interview notes before the meeting so had time to consider them. One outcome of that meeting was that the investigators agreed to re-interview the complainants. The investigators became concerned about the veracity of Ms X's

complaint. Ms X was contacted again and her responses were discussed by the investigators and the information was provided to Mr Te Ao.

[8] A file note dated 26 November 2007 was made about a meeting with Ms X and the department's investigator who contacted her. A file note was given to Mr Te Ao that included a comment made by Ms X about "*collaborating*" with Ms Z. Mr Te Ao says because of this comment the employer should have believed him.

[9] A final report, findings and conclusions dated 28 November 2007 was passed on by the investigators to the department's Waikato Eastern region manager, Ms Ono De Rooy. Mr Te Ao was given an opportunity to discuss the report, the findings and conclusions with Ms De Rooy, before the report was handed on to the department's decision maker, Mr Maarten Quivooy, group manager workplace services. Mr Te Ao was also advised that the regional manager and another team leader had met on 21 November 2007 with Ms X who stated that she wished she had not made the complaint and made various comments that appeared to contradict her complaint, but she did not resile from the truthfulness of what she said had happened. A file note of that meeting was given to Mr Te Ao. He says the employer should have believed him because of the complainant's comments, which differed from her earlier complaint.

[10] On 4 February 2008 the regional manager and another departmental team leader met with Mr Te Ao and his representative to discuss the report and investigation and outcomes. Mr Te Ao had the opportunity to provide further feedback and information.

[11] Mr Te Ao told me that at that point he understood that a decision, including an outcome on his employment with the department would be made next. Also, he closed his mind to any other outcome because he believed that he was going to be dismissed.

[12] On 21 February the report, the findings and conclusions were passed on to Mr Quivooy for a decision.

[13] First he had to decide and reach his own conclusions on the reported findings including credibility. Second he had to decide on any discipline required. He put Mr

Te Ao on notice dated 3 March 2008 of the issues and they met on 6 March for discussions. Mr Te Ao and his representative were given the further opportunity to make any other submissions and these were provided on the same day. Mr Te Ao and his representative covered off the substantive issue but made no further comments on the possible outcomes, which included dismissal. They submitted that Mr Te Ao should be believed. Mr Te Ao produced a supporting reference from a local lawyer and a personal poem written by Ms Z that was produced by Ms X during the mediation that Mr Te Ao relied upon to determine what was going on between the complainants.

[14] The decision was made that the complainants' versions of events were most likely to be true and that Mr Te Ao's behaviour fell short of the required standard for a mediator.

[15] It was decided that Mr Te Ao's actions constituted serious misconduct. Mr Te Ao was advised on 10 March 2008 that his employment with the department was terminated with effect from 10 April 2008.

The issues

[16] Would a fair and reasonable employer have concluded, on the information available to it at the time that the complainants were more credible than Mr Te Ao?

[17] Would a fair and reasonable employer have concluded on the information available at the time that the findings about Mr Te Ao's behaviour constituted serious misconduct?

[18] There are two legal tests I have to apply. S 103A of the Employment Relations Act requires consideration of whether the employer's action to dismiss Mr Te Ao was what a fair and reasonable employer would have done in all the circumstances.

[19] There is a credibility issue that the employer had to determine, between the two complainants and Mr Te Ao. The allegations were serious ones and the Court has said that where there are serious allegations the evidence in support needs to "*be as*

convincing in its nature as the charge was grave”: (*Honda NZ Limited v NZ Shipwrights etc Union* (1990) ERNZ Sel; Cas 855; also reported as *Honda NZ Limited v NZ Boilermakers’ etc Union* [1991]1 NZLR 392 (CA).

The complaints

[20] The written complaints were received by the department from Ms X on 8 May 2007 and from Ms Z on 14 May 2007. Their complaints were that:

- Mr Te Ao “*hugged*” Ms X. The first time it happened the complainant says Mr Te Ao “pulled her towards him into a hug”. Mr Te Ao says he did touch the complainant on both shoulders during the first caucus because she was crying. Secondly Ms X says Mr Te Ao came up behind her and put his arms around her during the next caucus. He denied that. Finally Ms X says during a break Mr Te Ao led her to the stairwell and hugged her. He denied that allegation. He explained at the time his natural disposition is to touch other people and that he was a “*hugger*”.
- Mr Te Ao made inappropriate comments to Ms X about Ms Z during a caucus. The comments included that (1) “*I feel sorry you have to work for her*”, (2) “*she is so cold, there’s nothing you or I can do to get through to her*”, and (3) “[name is withheld] *is a terrible manager and a poor leader*”. It was also alleged he asked Ms X if Ms Z was gay, to which it is alleged he added “*that doesn’t surprise me, tough lesbians are quite often cold like that*”. Mr Te Ao did not deny (1) and (2), but denied saying (3) and could not recall an allegation that he said to Ms X “*No don’t make excuses for her*”. He did not deny asking Ms X if Ms Z was gay. He denied that after Ms X had answered he allegedly replied “*That explains a lot. It’s typical of butch lesbians to pick on feminine women*”. He explained that his question was made to understand whether the complainants’ relationship problem was a personal or employment one because he had been given a copy of the personal poem written by Ms Z, about Ms X
- Mr Te Ao’s behaviour personally towards Ms X, his caucusing with that person and his comments created a perception of bias where he appeared to be taking sides and spent more time with Ms X.

- Ms Z alleged that she informed Mr Te Ao how distressed she was feeling and felt the process was biased to which she claimed he replied she would have to “*prove it*”. Ms Z alleged he was aggressive and angry in his demeanour and tone. Mr Te Ao accepted he had met with Ms Z at her request and accepted that Ms Z talked about how she felt, but he denied saying “*prove it*”.

The department’s investigation, findings and conclusion

[21] Mr Te Ao had no complaint about the procedure followed by the department. His issue was that the department should not have believed the complainants and that he acted properly and should not have been dismissed. I find that he accepted that the record of his interview held on 14 November with the department was accurate and correct. He was given all the relevant documents and given notice of the issues for any comment and further feedback. He had the opportunity to mitigate the department’s findings and comment on the likely outcome. He was represented throughout.

[22] The department’s investigation was conducted by John Pannett, service manager Invercargill and Leah McLay, Christchurch practice leader. They correctly identified that there was a credibility issue between the three people involved. They concluded that the two complainants were credible. They relied upon the two written complaints. These were supported by Mr Pannett’s and Ms McLay’s interviews conducted with the complainants separately and at a later time with Mr Te Ao.

[23] The allegations were serious and the law requires that the more serious an allegation is the greater the obligation is to prove it and the standard of proof required becomes higher. Thus, I carefully scrutinised the information relied upon by Mr Pannett and Ms McLay, Ms De Rooy and Mr Quivooy on the reasoning they had for making their findings at the time. I decided not to interview the complainants because my role was to scrutinise the information available at the time that the department made its findings on and reached its decision.

The findings on credibility

[24] I find that it was open to the department's investigators and regional manager to prefer the complainants' information to that of Mr Te Ao. My reasons are as follows.

[25] The department says that the complainants were consistent in outlining the allegations and they had nothing to lose or gain from complaining. Significantly, both made complaints about Mr Te Ao's behaviour in their mediation.

[26] The department found Mr Te Ao's explanations were implausible. For example he put forward issues about (1) getting "*all the hard mediations*", (2) gender and cultural issues, (3) his approach to mediation was not any different from other times, and (4) the law protecting mediators under the Employment Relations Act. On the last matter (4), that was a legal issue, where the Employment Relations Authority and the Employment Court found that the department was able to require Mr Te Ao to attend an interview on the allegations and that he was not protected by the confidentiality provisions of the Act over a complaint about his behaviour. The suspicion is left that Mr Te Ao's actions on the legal issues were to delay and avoid answering disciplinary matters. However he must get the benefit of the doubt because the issues were genuine issues to be ruled on.

[27] On matters (1 & 3) the department rejected the claims and was supported by Mr Te Ao undergoing a programme of personal development and coaching for most of his career. His pay was less than the competency rate of pay for a mediator. It was always open to Mr Te Ao to step aside from the mediation if he considered it was too hard for him. In this regard he was an experienced mediator having been employed since 2000. Furthermore he had been assessed and failed.

[28] On (2) Mr Te Ao said that the mediation should have been assigned to a women mediator because the parties were women. He also claimed that one of them, Ms Z, took a dislike to him because he was a Maori. Mr Te Ao accepted that there was very little information initially provided in support of the employment relationship problem. I conclude that there was nothing to signal that Mr Te Ao should not have been allocated the mediation in the first place and there was nothing

to indicate the employment relationship problem was too hard for him to undertake. There was no evidence that Ms Z was not well disposed toward Mr Te Ao because he was a Maori, irrespective of her demeanour during the mediation, which Mr Te Ao referred to, because that may have been related to her feelings about the issues with Ms X. It was fair and reasonable for the department to conclude that Mr Te Ao's explanations about getting all the hard mediations and the gender and Maori issues had no substance.

[29] Mr Te Ao said that there was a plan for another session of the mediation to take place that contradicted his explanation at the time that he could not take the matters any further. There was no further mediation.

[30] The issue was raised about Mr Te Ao giving Ms X his business card/telephone number and not giving a card and number to Ms Z. He says if he gave his card to one of them he would have given his card to them both to support that he did not act any different from his usual practice (3 above). The department's finding on this matter was included in the overall finding that Mr Te Ao was not credible. However, I find that the interviews held with the complainants would not have enabled a fair and reasonable employer to make a conclusion on what happened over the telephone numbers and business cards because:

- The questions put about the business card and telephone numbers were not probative.
- There was no follow up.
- There was no clear and unambiguous findings made.
- No particular reasons were given.

[31] While the department has not met the standard of proof in regard to the information available at the time over the telephone numbers and business card this was not fatal to its other conclusions because the information from the complainants and Mr Te Ao's admissions were enough to stand on their own. They were much more serious issues.

[32] Another matter raised was that Mr Te Ao and the complainants had a difference over the number of separate meetings (caucusing) held with each party. The investigators accepted the complainants' accounts that he met more with Ms X

than with Ms Z and that each meeting lasted 10 to 25 minutes. On its own this was a difficult conclusion to reach because the complainants were referring to what they understood happened when the caucusing occurred and about what Mr Te Ao had said occurred. However a fair and reasonable employer would have concluded that Mr Te Ao probably spend more time with Ms X because he had build up an empathy with her and said he found Ms Z difficult to get a response from. The information available suggests much of the time was spent with Ms X considering the records of the interviews and the written complaints.

[33] During the investigation process Ms X had a separate meeting with Ms De Rooy and another team leader where she raised her concerns about making the complaint in the first place because of the relationship she had with Ms Z at the time as an employee. Ms De Rooy considered Ms X's statement, but found significantly that she was nevertheless telling the truth about Mr Te Ao's behaviour because Ms X stressed the things she had reported in her statement was the truth about the events she said had happened: "*In hindsight I now wished I had not made a statement. There was a lot of pressure on me from the other party involved to make a statement. Mr Te Ao had been fair*". The statement also says that Mr Te Ao was "*a good mediator and that he had done a good job*" and "*events were blown out of proportion by someone who did not want to be in the wrong*". Also, Ms McLay's file note recorded Ms X replied "*Everything I wrote and said was true and correct*"...It was open to the department to make its own conclusion on the events.

[34] Ms X used the word "*collaboration*" during the telephone conversation with Ms McLay on 21 November 2007. Ms X informed the department that her allegations "*looked worse than what it was*". She informed the department that Ms Z said she was "*going to get him*" and "*break that man*". I am satisfied that the department took these into account but it was still entitled to make its own conclusions about the events and I am satisfied that its investigation findings and conclusions would have led it to conclude that it was more than likely Mr Te Ao did say to Ms Z "*proof it*" in their last deteriorating caucus.

[35] Mr Te Ao says that Ms X's significant concessions above should have gone in his favour. They were considered by the department. A fair and reasonable employer would have considered these comments in context. First Ms X said that she told the

truth about her allegations that Mr Te Ao hugged her and had made inappropriate comments. Second it would be reasonable to consider that the word “*collaborate*” meant that Ms X and Ms Z later discussed what happened during the mediation and made their decision to make separate complaints. Given that Ms X did not resile from her allegations about the events a fair and reasonable employer would conclude that the complainants had genuine concerns. The department’s investigators and regional manager concluded that Ms X had nothing to lose or gain from complaining. They considered that Ms X changed her mind about the extent of her allegation against Mr Te Ao and was more supportive of him, but that was her judgement and not the employer’s, and the employer was entitled to make its own conclusions.

[36] The investigators found that there were significant points of agreement particularly when Mr Te Ao admitted that he touched Ms X and asked about Ms Z’s sexuality and did make some of the alleged comments including: “*I feel sorry you have to work for her*” and “*she is so cold, there’s nothing you or I can do to get through to her*”. Also, it was open to the department to reject Mr Te Ao’s claim that Ms Z had set about to destroy his career because Ms X advanced her own allegations and did not change her mind about the actual events when she left her employment.

[37] A final matter was that Mr Te Ao tried to explain how the position was reached over the difference between him and Ms Z during the separate caucus where she put to him that he was biased. She was particularly clear during her interview with the department that she considered the problem was related to Mr Te Ao’s behaviour, whereas Mr Te Ao said that that issue related to the employment problem. A fair and reasonable employer would have concluded that he had confused the situation and had come away with the wrong conclusion. The department reasonably concluded not to accept Mr Te Ao’s explanation.

[38] The department was entitled to reject Mr Te Ao’s mitigation and had reasons for doing so, I hold.

The allegation of the perception of bias

[39] The allegation of the perception of bias rested on the following:

- The number and length of caucusing meetings.

- An offer made to Ms Z for contact outside the mediation.
- The comments Mr Te Ao made to Ms X about Ms Z.
- Asking Ms X to stay behind after the mediation.
- The perception that Ms Z had after finding out what had happened with Ms X and Mr Te Ao during their caucusing.

[40] Mr Te Ao says that he could not have been biased when the parties continued in the mediation. However, a further session in mediation never went ahead and Mr Te Ao accepted that Ms Z had raised with him her concerns at the end. The department rejected his explanation.

The department's findings on the allegation of the perception of bias

[41] It is very difficult for the department to support that caucusing, the offer of contact after the mediation session and asking a party to stay behind after the mediation necessarily mean there was a perception of bias. This is because caucusing is practiced regularly and will involve different amounts of time spent with parties separately. The offer of business cards and telephone numbers is a legitimate part of follow up and in tense and conflict ridden circumstances planned departures from mediation sessions occur. However in this situation the department's finding about how the parties' perceived the situation was based on what they say they understood of the process from the complainants comparing their experiences, particularly Ms X. Ms X said that initially she thought that Mr Te Ao's behaviour was a normal part of the mediation and she did not know any different, however when she discussed what had happened with Ms Z she realised his behaviour was not appropriate.

[42] Ordinarily an allegation of a perception of bias would be a performance issue, but considering the allegation was made by two people against Mr Te Ao and was related to him hugging one of the complainants and making inappropriate comments, it was open to a fair and reasonable employer to treat the overall complaint as potentially serious misconduct.

[43] Also, both complainants considered that Mr Te Ao spent more time with Ms X and his behaviour led them both to conclude he was favouring Ms X more than Ms Z and created the impression of a perception of bias.

[44] A fair and reasonable employer would conclude that the allegations and conclusions reached by Ms X and Ms Z led to them having a perception of bias.

The investigators' and regional manager's conclusion

[45] The investigators and regional manager reached conclusions about the standards of behaviour expected of a department mediator based on a document called an "*insitu assessment*" guideline. They were entitled to rely on their standards supported by this document I hold. Mr Te Ao was familiar with that document. It covered clearly the factors relied upon in conducting mediation.

[46] It was open to the department to conclude that it was inappropriate for Mr Te Ao's to touch one of the parties and ask if Ms Z was gay. Mr Te Ao clearly could have handled Ms X's upset disposition without touching her, and he could have asked what the problem was about without asking about Ms Z's sexuality. They relied on being informed that Mr Te Ao accepted that he touched Ms X once and that he was a "*hugger*" and that was how he operated. The investigators found this totally inappropriate. The information that the complainants told the department left it open for the department to conclude that Mr Te Ao made some derogatory comments and created the perception of bias, even if Ms Z was disaffected about her employment relationship. A fair and reasonable employer would have concluded that Mr Te Ao made comments that were inappropriate about Ms Z because of the comments he admitted making at the time including: "*I feel sorry you have to work for her*" and "*she is so cold, there's nothing you or I can do to get through to her*". He left himself open to the allegations that he made other derogatory comments that the department accepted. A fair and reasonable employer would have reached such a conclusion in all the circumstances.

[47] These alongside the allegations and conclusions reached by Ms X and Ms Z that led to them having a perception of bias would be very serious and as such a fair and reasonable employer would conclude they contributed to unprofessional and unethical behaviour where it would be difficult for the department to continue to have trust and confidence in Mr Te Ao. As such Mr Te Ao failed to meet the standards required by the department based on the "*insitu assessment*" guideline.

[48] Mr Te Ao had an opportunity to respond to the complaints and the range of options the department set out in regard to his future employment. He chose not to respond on the possible outcome on the future of his employment. I find that he closed his mind to any other outcome other than being dismissed and the employer cannot be held responsible for that. Thus, the nature of Mr Te Ao's personal grievance has been to challenge the substance of the employer's decision and for him to get his job back. This approach does not prove that Mr Te Ao's denials and explanations represent the truth, although I have no doubt Mr Te Ao genuinely believed he did nothing improper and did his best to try and understand the essence of the employment relationship problem between the complainants.

The decision-maker's role

[49] Mr Quivooy decided to rely on the regional manager's report and documents produced at the time (including the investigator's report and interview notes) to base his own findings on and make a conclusion.

[50] His findings were that:

- The credibility of the complainants was preferred to that of Mr Te Ao.
- Mr Te Ao's behaviour was unacceptable.
- The department could no longer have trust and confidence in him.
- Mr Te Ao's continued employment with the department was untenable.

[51] Mr Quivooy found that nothing more Mr Te Ao had to say changed the findings and conclusions that the investigators and regional manager had reached. He considered the 6 March submission and the reference supporting Mr Te Ao. However he focussed also on the fact that Ms X did not change her mind about the events she said occurred and formed the basis of her complaint. In this regard it was open to Mr Quivooy to put to one side the attempt by Ms X to change her complaint and made his own conclusion.

[52] I am satisfied that it was open to Mr Quivooy to reach his conclusions based on the department's "*insitu assessment*" document and the standards of conduct expected of a mediator employed by the department. I conclude that a fair and

reasonable employer would have concluded in all the circumstances that Mr Te Ao's behaviour was serious despite his length of service and that he had not reached the competency assessment. Thus it was open to Mr Quivooy to put to one side the reference provided by one local lawyer supporting Mr Te Ao. This was underpinned by Ms McLay's evidence of her conclusions in the investigation, which was supported by her experience as a team leader and as a practicing mediator. Both Mr Quivooy and Ms McLay gave evidence of the importance of maintaining the integrity of the mediation service that could not involve a mediator "*hugging*" a party, making inappropriate comments and leading to perceptions of bias.

[53] It is my conclusion that it was open to the department to distinguish the matters complained about as serious misconduct compared to any on-going performance issues for a lesser penalty because of the nature of the complaint and the allegations made. The department's consideration included that the complaint had been made by two parties in the same mediation as a significant factor. Indeed Mr Te Ao's behaviour was so inappropriate that the department would have been able to conclude that Mr Te Ao could not be trusted with people left alone and vulnerable.

[54] Mr Quivooy stressed his desire to try and keep the matters involved in the complaint separate from any performance issues associated with Mr Te Ao although he was aware of Mr Te Ao's employment record. He was very clear about that in his evidence and for example he said he did not access Mr Te Ao's file. I was given no evidence of any disciplinary action about Mr Te Ao's performance other than that he had training and counselling and had failed two competency assessments before this matter.

[55] Mr Quivooy reasonably took into account Mr Te Ao's length of service in coming to a decision in the absence of it being raised by Mr Te Ao who had the opportunity to raise it if he thought it was significant. Indeed it would have been amiss of Mr Quivooy if he did not take it into account considering Mr Te Ao's experience as a mediator with the department since 2000, was hard working and there were no other disciplinary issues.

[56] It was not fatal that Mr Quivooy mixed his consideration of the information available at the time and disciplinary process together without a step providing a

tentative or preliminary conclusion before making his findings and handing down a decision. This is because Mr Te Ao had been clearly put on notice of all the matters he had an opportunity to reply to, comment on and to give any explanations for his actions, and he was represented throughout. The department's findings and conclusions were provided with details in writing and Mr Te Ao accepted that the most likely outcome was dismissal.

[57] Finally, I reject the submission that the dismissal was predetermined. The decision was made separately from the investigation process. The investigators were different people to the decision maker. Mr Quivooy reached his own conclusions based on the investigators' findings and conclusions and documents of interviews and submissions. Mr Te Ao was given every opportunity to provide comments, responses and explanations to the investigators and the decision maker. The department was open with Mr Te Ao throughout, for example Ms De Rooy's separate meeting with Ms X was disclosed and the investigators pursued concerns they had about Ms X's veracity and informed Mr Te Ao.

Conclusion

[58] I conclude that the department has justified Mr Te Ao's dismissal for serious misconduct having come to an honestly held belief that the allegations were reliable. A fair and reasonable employer would have found the complainants more reliable than Mr Te Ao and that his behaviour was so serious having regard to the incidents complained about. A fair and reasonable employer would have dismissed Mr Te Ao in all the circumstances, especially considering that there was a concern about the integrity of the mediation services provided by the department that led to a conclusion the department could not trust Mr Te Ao, especially where he would be left alone with people. The department decided to exercise its discretion to give Mr Te Ao a month's notice and pay that does not diminish the seriousness of the grounds relied upon. There was no unfairness.

[59] Mr Te Ao's claim is dismissed.

[60] Costs are reserved.

P R Stapp
Member of the Employment Relations Authority