

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 174/10  
5129488 & 5129492

BETWEEN                      ROWYNE PETERS  
   Applicant in 5129488

   WIREMU WAIKARI-RANGI  
   Applicant in 5129492

AND                              TE ROOPU WAIORA TRUST  
   Respondent

Member of Authority:      Dzintra King

Representatives:            John Burley, Counsel for Applicants  
   Richard Harrison, Counsel for Respondent

Investigation Meeting:    10 June 2009  
   11 August 2009

Submissions Received      18 November 2009 from Applicant  
   19 February 2010 from Respondent

Determination:              16 April 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicants, Ms Rowyne Peters and Mr Wiremu Waikari-Rangi, say that they were unjustifiably dismissed by the respondent, Te Roopu Waiora Trust (“the Trust”). They were dismissed summarily on 6 June 2008.

[2]     The respondent denies that the dismissals were unjustified.

[3]     The respondent is a publicly funded Maori health provider established by Maori with disabilities to work with families and communities. It provides disability information, advice and support to Maori with disabilities as well as creating a supportive environment for them to identify their own disability resource needs. It is

a small community organisation which, at the time of the dismissals, employed four staff as well as relying on a network of volunteers. It has been actively involved in the provision of these services since 2001.

[4] The Board that governs the Trust is made up of volunteer trustees who are usually part of the community that the Trust services, that is, Maori with disabilities.

[5] Ms Peters commenced work with the respondent in September 2007 initially in the position of Team Leader Operations before taking up the position of Team Leader on a salary of \$60,000. This was the position she occupied at the date of dismissal. This position was for a fixed term of 12 months.

[6] Mr Wiremu Waikari-Rangi, who is Ms Peters' partner, started work with the Trust on 14 January 2008. On 1 February 2008 he signed an individual fixed term employment agreement expiring on 30 June 2008 at an annual salary of \$35,000.

[7] The Trust was aware of his previous gang affiliations and it was a condition of his employment that there was a police check to ensure that there were no current issues which might make him unsuitable for employment by the Trust. There is a dispute as to whether Mr Waikari-Rangi revealed all his convictions to the Trust. The Trust says a number of attempts were made to obtain his sign off for a police check, that he resisted for some time, claiming that it was discriminating against him, until eventually the police check was able to be sent off and was received by the respondent on 3 June 2008. It disclosed a large number of convictions and a recent serious conviction on 6 December 2007 for threatening to kill and grievous bodily harm.

[8] Mr Waikari-Rangi deposed that he had revealed this conviction to the Trust. I am of the view that the Trust did not know until 3 June but that Ms Kingi knew of the allegations but not the conviction, for reasons which I set out later in this determination.

### **Damage to door**

[9] On 30 April 2008 staff arrived at work to find that the window in the photocopying office was open and that there were two holes in the door of Ms Tania Kingi's office. Ms Kingi was the CEO. Ms Peters and Mr Waikari-Rangi said there had been a burglary. The alarm system was checked. It was working and there was no fault. The alarm company said it could not have been a break in from the

photocopying office as the burglar would have triggered the alarm. Ms Kingi said she accepted the explanation that there had been a break in. She said Ms Peters and Mr Waikari-Rangi told her they would do a police report but did not do so.

[10] Ms Kingi said that prior to the damage to her door she had spoken to Mr Waikari-Rangi about statements he had made at a staff meeting about staff being overpaid and people ripping the Trust off. She told him these were inappropriate allegations.

[11] Later Ms Kingi came to the view that Mr Waikari-Rangi had kicked in her door out of frustration and anger regarding the comments she had made to him.

[12] Ms Paula Lynne, the Trust's Team Leader, Operations, told Ms Kingi that she had phoned the police and had been told that the people who had discovered the break in should go to the police and make a report. It appears that there was no follow up action to ensure that this had happened.

### **Cannabis allegations**

[13] On 23 May Mr Stephen Maaka, a volunteer, telephoned Ms Kingi and told her that Ms Peters and Mr Waikari-Rangi had used the Trust vehicle to go into town and purchase cannabis.

[14] Ms Kingi arranged for Mr Maaka to meet the Board regarding this allegation. The meeting was attended by Mr Shaun Toko, Ms Mamatere Strickland, Ms Geraldine Adams, Ms Kingi and the chair, Mr John Puhara.

[15] Mr Maaka expressed concerns about what he saw as breaches of confidentiality by Ms Peters and Mr Waikari-Rangi. This related to their talking about staff pay rates and personal invoices from contractors who were said to be falsely invoicing the Trust. Mr Maaka said he had driven with Mr Waikari-Rangi (who is legally blind and unable to drive) into town and marijuana had been purchased and smoked in the car. Mr Maaka said that after this incident Ms Peters had taken Mr Waikari-Rangi into town to get his cannabis which had also been smoked in the car. The Board did not ask Mr Maaka how he knew this.

[16] Mr Puhara asked Mr Maaka whether he would be prepared to make and sign a statement. He did so and it was given to the Board. The statement Mr Maaka wrote

was completed after 27 May and before 6 June. In this statement Mr Maaka said that Mr Waikari-Rangi told him that Ms Peters knew what he was doing as she took him into town on Tuesdays to buy cannabis. Mr Maaka said that when they returned to the Trust he told Mr Waikari-Rangi he did not want to be in that situation ever again. Ms Peters then told him she would take Mr Waikari-Rangi to buy cannabis next time. He also said he had been in the car when Ms Peters had taken Mr. Waikari-Rangi to make the purchases.

[17] There is no explanation of the circumstances in which Ms Peters came to tell Mr Maaka that she would take Mr Waikari-Rangi next time. Nor is there any explanation of how Mr Maaka came to be in the vehicle when a further purchase was made when he had said he did not want to be in that situation again. The Board did not ask these questions nor did anybody look at the log books for Tuesdays to ascertain whether the allegations regarding Ms Peters might have substance.

[18] Mr Puhara asked Mr Maaka why he had taken so long to bring the allegations to the Trust's attention. Mr Maaka said he had been distracted by his mother's serious illness and that she had recently died.

[19] The Board discussed how to proceed. They decided to get an independent investigator to follow up on the complaints. Ms Strickland told the Board she had history with the applicants and did not want to be involved. Ms Adams also said she would not be involved as she was Ms Peters' cousin.

[20] Ms Strickland then contacted Mr Anton Blank, a communications consultant. Mr Blank had done some work for her previously. He then spoke to Ms Kingi who told him it was an employment matter but did not give him much detail.

[21] Mr Blank acted solely upon the instructions of Ms Kingi and did not carry out any true or independent investigation. He was told his role was information gathering and that he was to interview the staff, gather information regarding Ms Peters and Mr Waikari-Rangi and their relationship with the Trust and record it.

### **Suspension 27 May 2008**

[22] On Tuesday 27 May 2008 at 4.50pm Ms Peters and Mr Waikari-Rangi were asked by the Ms Lynne to meet with the Board members and Ms Kingi immediately. No information was provided about the purpose of the meeting. Ms Peters believed

this to be a regular trustee meeting. They were not given an opportunity to obtain a representative.

[23] Mr Puhara told them about the allegations but did not identify the complainant. He said the Board had decided to engage an independent investigator and an investigation might take three or four days. The applicants were suspended from work immediately.

[24] Ms Peters asked that the allegations be put in writing so she could seek legal advice. She handed over the keys to the Trust vehicle at the request of Mr Puhara and Ms Kingi. Ms Kingi confirmed that the suspensions were on full pay before the applicants left the room.

[25] On 29 May Ms Kingi wrote to Ms Peters confirming the suspension and the allegations, which related only to the use of the vehicle for the purchase of cannabis.

#### **Mr Blank's investigation 29 May**

[26] Mr Blank said he was aware of the applicants' suspension but was not advised of the reasons for the suspensions.

[27] Mr Blank interviewed Ms Kingi, Mr Maaka, Ms Georgina Nathan, Ms Natasha Smith and Ms Lynne. He interviewed them individually for about an hour each. He could not recall whether he had a specific set of questions to ask and whether he asked the same questions of everybody. He did not interview either of the applicants. He said this was because Ms Kingi had not asked him to do it. Mr Blank did the interviews on one day and produced the report the same day: 29 May.

[28] The statement Mr Maaka had produced was given to Mr Blank after he interviewed the staff.

[29] On 29 May he provided his report to Ms Kingi, which primarily set out the comments made by the staff interviewed and in summary noted the information volunteered by Mr Maaka.

[30] His report was not released at any stage to the applicants and his identity was not revealed either.

[31] At some stage Ms Smith wrote a statement (an undated copy was produced) regarding conversations she said had taken place with Ms Peters and Mr Waikari-Rangi regarding the damage to Ms Kingi's door. She asserted that on 30 April Ms Peters had told her that Mr Waikari-Rangi had kicked in the door out of frustration about what he had read in the Board's minutes. Ms Peters asked her not to say anything. On 16 May Mr Waikari-Rangi approached her and said something like he was just going to play out the thing with the door and that Ms Peters had told him she had told Ms Smith. Ms Smith was told to play ignorant. Ms Smith told him that if she was approached about it she would not be able to lie. It was incumbent on Ms Smith to have revealed that information to her employer at the time.

[32] In his report, under the heading "Background", Mr Blank wrote:

*The two staff are currently suspended following allegations you have received about their behaviour. They are in a relationship living apart and the allegations are that on two occasions Wiremu used a work car during work hours to travel into the city to purchase cannabis.*

*Also, that Wiremu damaged your office door by kicking it and that Rowyne was present during this incident.*

*There are other more general concerns about their behaviour and influence in the workplace. This includes:*

- *Questioning organisational systems and management decisions in meetings*
- *Inappropriate use of organisational resources*
- *Breaching confidentiality and spreading malicious rumours.*

....

#### ***What they said***

*There was a lot of general discussion about this couple's behaviour and influence in the workplace. Apart from the concerns I have already alluded to (challenging management decisions inappropriately) they mentioned that equipment had gone missing from the premises.*

*There is also an incident where your office door has been kicked in and staff believe that Wi was responsible for this.*

#### ***Summary***

*The notes attached to this memo provide more detail and should give you enough information to decide next steps.*

*The most specific detail was volunteered by Stephen Maaka who said that on two occasions he accompanied Wi into town in a work car. Wi purchased marijuana. On the first occasion he smoked this in the work car and then proceeded to visit a client.*

*On the second occasion Rowyne drove the car and by implication knew the purpose of the visit. Stephen also says he has seen both Wi and Rowyne smoking cannabis on the work premises.*

*These are clear and serious breaches of the Trust's house rules and Employment Agreement.*

***Recommendation***

*Given the serious nature of these allegations, I recommend further action be taken by the trust and that instant dismissal be considered.*

[33] Mr Blank told the Authority that he had initially given the report to Ms Kingi without a recommendation but she asked him to recommend instant dismissal. It is surprising that Mr Blank put his name to a report with such a recommendation when he had not interviewed the applicants or tested the evidence.

[34] In the notes of the interviews with staff Ms Kingi is noted as saying that Mr Maaka had said he had driven with Mr Waikari-Rangi twice when drugs were purchased and that on the second occasion Mr Maaka and his partner Anna were in the car. It is unclear how Ms Kingi came by this knowledge as it is not in Mr Maaka's written statement and no-one deposed to that information having been given to the Board. Mr Blank said he did not interview Mr Maaka's partner as he had not been asked by Ms Kingi to do so. Neither did Mr Blank attempt to ascertain who the client that Mr Waikari-Rangi was said to have visited was.

[35] Ms Kingi told Mr Blank that staff said they had smelt marijuana in the car. How Ms Kingi came to ascertain that information and when is unclear.

[36] Ms Kingi also stated that the Trust had just found out that Mr Waikari-Rangi had charges including assault, threatening to kill but the Trust could not use those unless he was found guilty. Ms Kingi said Ms Peters had laid the charges against him in October 2007 and failed to disclose it to the Trust. This was inaccurate.

[37] Given that the Trust asserted that it had no knowledge of the offending until the police report arrived on 3 June, some days after Mr. Blank interviewed Ms Kingi,

the question arises as to how Ms Kingi came to be in possession of this knowledge prior to that unless disclosure had been made to her.

### **Confirmation of suspension and allegations**

[38] Ms Peters received formal confirmation of the suspension by letter dated 29 May 2008, signed by Ms Kingi on behalf of the Trust. This letter included a claim from an unnamed eye witness that she had allegedly used a Te Roopu Waiora Trust vehicle to transport Mr Waikari-Rangi to purchase cannabis which was smoked in the vehicle. This letter was hand delivered to Ms Peters on 30 May 2008.

[39] On the same day Ms Peters received a further letter also dated 30 May 2008 advising her that the investigation had been completed and set out the summary of findings from staff interviews which revealed that:

- It was alleged that in December 2007 she had driven Mr Waikari-Rangi in the Trust vehicle to Symonds Street to purchase an illegal substance.
- Staff (unnamed) had reported that they had detected the smell of marijuana in the car for which Ms Peters had responsibility.
- Ms Peters and Mr Waikari-Rangi had smoked marijuana in the office courtyard during the Christmas period.
- Staff believed the damage to the office door was wilful and had been carried out by Mr Waikari-Rangi with Ms Peter's knowledge and that she had failed to disclose this.

[40] The last matter had not been raised at the suspension meeting. The letter concluded with an invitation to the applicants to attend a meeting of the Board of Trustees and management to respond to the letter on 4 June 2008 at the Trust's offices. The letter also advised that if the Trust were to uphold the findings of the investigation immediate termination of employment would take place.

[41] The letter raises a number of concerns. The complainants are not identified and there is no explanation as to why such serious allegations were not raised at the time they became concerns. Ms Peters sought legal advice and the meeting was postponed to 6 June.

[42] On 4 June, Mr Burley wrote seeking information regarding the parameters of the investigation, the identity of the investigator and the specifics of the information obtained by him.

[43] Mr Burley also stated that the applicants felt the allegations were the result of concerns they had raised regarding payments to contractors.

### **Friday 6 June meeting**

[44] Ms Peters was advised that her earlier requests for details of the investigator's and accusers' identity was declined on the basis of fear of possible retribution because of Mr Waikari-Rangi's disclosed gang connections.

[45] On 6 June Mr Burley provided written statements from the applicants and they spoke to them at the meeting. They denied all the allegations.

[46] Ms Peters provided an explanation for going into the city and said the clients involved could be approached to provide information. The Board did not follow up on this.

[47] Ms Peters said there had been damage to two doors, not just to Ms Kingi's door. Ms Peters said she believed there had been a discussion about whether the alarm had in fact been set and this discussion had taken place between Ms Lynne and Ms Kingi. Mr Waikari-Rangi had said the police should be contacted and that Ms Lynne had told him not to write an incident report until the police had been rung. The Board did not follow up on any of this.

[48] The applicants also raised concerns regarding Mr Waikari-Rangi's past relationship with Ms Strickland regarding dissatisfaction with accommodation supplied by her; and Mr Waikari-Rangi taking tenants from Ms Strickland's apartment building to live elsewhere. It was alleged that Ms Strickland had threatened Mr Waikari-Rangi with accusations of illegal drug taking. Mr Waikari-Rangi said that Ms Strickland summoned him to Te Aorana Hou Inaianei where in the presence of a kaumatua, Henare Heta, Ms Strickland accused him of drug use and selling class A and B drugs at her premises in Otahuhu. The Board did not look into this matter.

[49] Mr Waikari-Rangi said he had written to the Board regarding his concerns regarding Ms Strickland and had been supported by Ms Kingi who warned him to watch out as Ms Strickland had begun a serious vendetta against him. This was not investigated.

[50] Towards the end of the meeting the applicants were provided with copies of signed but undated statements from Ms Smith in respect to the allegation regarding damage to Ms Kingi's door and from Mr Maaka relating to the alleged drug use. Both Ms Peters and Mr Waikari-Rangi denied the accounts provided by Ms Smith and Ms Maaka.

[51] The Board members considered all the information they had received and were satisfied that the allegations were true and decided in the circumstances to dismiss both people immediately. Ms Kingi was not present when the Board made its deliberations. They were advised that their employment was being terminated summarily.

[52] At the end of the meeting Ms Peters was escorted to her office to uplift the remainder of her personal effects.

[53] Ms Peters later claimed that prior to her leaving the Trust premises Ms Smith told her that she had been made to provide the statement signed by her, that she had no choice and had had to do it, although the contents of the statement were incorrect. During the hearing Ms Smith denied that she made the remarks retracting the truth of her statement.

### **Were the dismissals justified?**

[54] The Trust says it had valid concerns regarding the release of information to the applicants during the investigation. While I accept that the Board had concerns regarding possible retaliation the applicants could not properly respond to the allegations without knowing the identity of the accusers. There was no justification for failing to reveal the identity of the investigator or his report.

[55] The applicants' responses to the allegations made should have been put to Ms Smith and Ms Maaka for their reply prior to the decision to dismiss being made. Matters raised by the applicants regarding Ms Strickland should have been followed up. I agree with Mr Burley's submission that considerable doubt must be cast upon

the objectivity of the internal inquiry commenced by Mr Blank for the Trust after the applicants' suspension. It was controlled by Ms Kingi and Mr Blank did not function as an independent investigator.

[56] It is of concern that the first draft of the report of the report did not contain any recommendation regarding further disciplinary action being taken against either of the applicants, and that the recommendation for their instant dismissal followed a directive from Ms Kingi for such a recommendation.

[57] Mr Puhara said that the decision to dismiss both applicants was as a consequence of the Board preferring the statements made by Mr Maaka and Ms Smith to the applicants' denials.

[58] I find the employer did believe that the allegations had substance. The difficulty for the Trust arises when consideration is given to whether they had reasonable grounds to form that view.

[59] The Trust did not conduct a full and fair investigation. It relied on Mr Blank's report and the two statements without consideration of possible anomalies such as why Mr Maaka was present in the car on the second occasion.

[60] The evidence establishes that little or no consideration was given to possible ulterior motives.

[61] Ms Smith was not asked why she did not report the conversation she had had with Ms Peters and Mr Waikari-Rangi regarding the door incident until she was interviewed by Mr Blank.

[62] Although Ms Kingi was not present when the Board considered its response she was responsible for the recommendation to dismiss, not Mr Blank. It appears that the Board did not know this.

[63] The test in s.103A is more concerned with the reasonableness of the decision based on the confirmed findings upon which the employer relied rather than separating out processes and substance. As observed by Judge Travis in *Blaker v. B & B Doors NZ Ltd* 29/9/07, Travis J, AC8B/07 at para.[91] of that decision:

*I take into account the comments of the Chief Judge in the Henderson case, that issues of fairness and process may be less important under*

*s.103A, if the substantive conclusion reached is one that in all the circumstances is what a reasonable employer would have reached.*

[64] Mr Harrison said that the objective standard of a fair and reasonable employer must also take into account the nature of the employer and the environment in which it operates. In this case it was a small and largely voluntary trust that had limited funding and was governed by and on behalf of Maori with disabilities in the community.

[65] The employer was limited in terms of the nature of any inquiry that could be undertaken from a practical point of view and options open to it in terms of looking at an alternative course of action rather than dismissal. The concerns that were the subject of the disciplinary inquiry were of a serious nature particularly in regard to the work of this Trust.

[66] While I understand the tenor of those submissions there were inquiries that the Board should have made that it did not make, in order to ensure fairness to the applicants. Following up on the statements made by Ms Peters and Mr Waikari-Rangi at the 6 June meeting would not have been difficult. The allegation that Ms Peters regularly drove Mr Waikari-Rangi into the city on Tuesdays to buy marijuana could have been checked by a perusal of the log books.

[67] The allegations made were serious. When allegations of serious misconduct, such as possession of illegal drugs, are levelled against an employee the evidence to support the allegations has to be as compelling because of the seriousness of the charge: *Honda NZ Ltd v NZ (with exceptions) Shipwrights etc Union* (1990) ERNZ Sel Cas 855. Given the seriousness of the allegations there was an obligation to ensure that the evidence was sufficiently compelling.

[68] The dismissals were unjustified.

### **Remedies**

[69] Mr Waikari-Rangi was employed on a fixed term employment agreement at a salary of \$35,000. The term was to expire on 30 June 2008. Ms Peters was employed on a fixed term agreement at a salary of \$60,000. The term was to expire on 12 September 2008.

[70] Mr Waikari-Rangi did not find alternative employment until nine months after his dismissal.

[71] Ms Peters started alternative employment on 30 June 2008. At the time of the hearing her salary was \$47,000 for a three day week, the work having been reduced from five to three days in mid February 2009. Her full week salary in her new position was higher than she had been receiving while employed with the respondent.

[72] Both applicants are entitled to lost remuneration until 30 June 2008. Mr Waikari-Rangi's employment was due to end on that date and Ms Peters started other employment on that date.

[73] Mr Waikari-Rangi is to be reimbursed the sum of \$2,019.23.

[74] Ms Peters is to be reimbursed the sum of \$3,461.53.

[75] Ms Peters was commendably honest about her resilience. Nonetheless she did suffer adverse emotional effects as a result of the dismissal. Ms Peters is to be paid \$4,000 pursuant to s 123 (1) (c) (1).

[76] Mr Waikari-Rangi said he had suffered emotionally as a result of the dismissal. He had had to leave where he was living as he could no longer afford the rent. Given that he was on a fixed term contract due to expire in three weeks matters such as the financial effect and the distress occasioned by that must be limited in that there was no guarantee that his employment would have continued. Mr Waikari-Rangi is to be paid \$2,000 pursuant to s 123 (1) (c) (1).

[77] I need to consider the question of contributory conduct. The conduct that allegedly led to the dismissals has not been proven and no issue of contribution can therefore arise.

### **Costs**

[78] If the parties are unable to resolve the issue of costs the applicants should file a memorandum within 28 days of the date of this determination. The respondent should file a memorandum within 14 days of receipt of the applicants' memorandum.

Dzintra King  
Member of the Employment Relations Authority