

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 450
5333144

BETWEEN

TINAKA MERITO
Applicant

AND

TE RUNANGA O NGATI
AWA t/as NGATI AWA
TERTIARY TRAINING
ORGANISATION
First Respondent

NGATI AWA TERTIARY
TRAINING ORGANISATION
TRUST
Second Respondent

Member of Authority: R A Monaghan

Representatives: S Austin, advocate for applicants
J Humphrey, counsel for respondents

Investigation meeting: 7, 8 and 9 June 2011 at Whakatane

Additional information provided: 15 June 2011

Submissions received: 16, 22 June and 21 September 2011 from applicant
16 June and 21 September 2011 from respondent

Determination: 20 October 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Tinaka Merito says she was dismissed constructively and unjustifiably and is owed holiday pay, payment in lieu of statutory holiday and payment for 12 hours 'additional hours worked by agreement'.

[2] Her former colleagues Hana Merito, Rita Peka and Varlene Snell have also raised personal grievances in that they were dismissed unjustifiably. All four grievances arose out of the same broad set of circumstances and were investigated at the same time. However there were some differences in the individual circumstances of each of the women, and in addition there were claims for the payment of monies owing which were not common to all of them. For that reason, and because the women lodged separate statements of problem, rather than issuing a single determination encompassing all of the claims I have issued four separate determinations.¹

The respondents' representative – authority to act

[3] Mr Austin has required proof of Robinson Law's authority to act in all four employment relationship problems. The Authority's response to that matter is contained in *Hana Merito v TRONA and NATTO*. For the reasons set out in that determination I am satisfied Robinson Law is authorised to act for both respondents.

Identity of the employer

[4] All four applicants say they were employed initially by Ngati Awa Tertiary Training Organisation (NATTO), but that Te Runanga O Ngati Awa (TRONA) had become their employer in the period leading to the termination of their employment.

[5] The relevant facts were common to all of the employment relationship problems. An account of the facts, as well as a determination of the identity of the employer, is set out in *Hana Merito v TRONA and NATTO*. For the reasons set out in that determination, I find that NATTO remained Tinaka Merito's employer throughout and that TRONA does not trade as the Ngati Awa Tertiary Training Organisation.

[6] This finding, together with the circumstances discussed later in this determination, means I do not accept that anything in Ms Merito's employment

¹ *Hana Merito v TRONA and NATTO* [2011] NZERA Auckland 453
Rita Peka v TRONA and NATTO [2011] NZERA Auckland 451
Varlene Snell v TRONA and NATTO [2011] NZERA Auckland 452

relationship problem raises an issue under Part 6A of the Employment Relations Act 2000. I do not address that matter any further.

Tinaka Merito's employment

1. Background

[7] Ms Merito began her employment at NATTO as a receptionist, and moved to a position as accounts and payroll manager in 2007. She and NATTO were parties to a written employment agreement dated December 2008 which identified the job title as accounts manager.

[8] According to clause 3.1 of the employment agreement, the employment agreement was to commence on 12 January 2009 and end on 11 December 2009. The reason for the apparent fixed term was expressed to be a contractual agreement with the TEC, which in the event was rolled over for another year. Despite the fixed term provision Ms Merito's employment continued beyond the end of that period, with no further fixed term arrangement being entered into under s 66 of the Act.

[9] Hours of work were provided for at clause 6 of the employment agreement. Clause 6.1 stated that the position was '*full time with an obligation to perform overtime as necessary but without extra payment*'. Ms Merito's normal hours of work were 40 hours per week.

[10] A job description for the position of accounts manager was signed and dated by the parties in December 2007. It identified the purpose of the position as being:

To provide leadership in the delivery of the financial accounting function, ensuring relevant standards, guidelines and best practice are used.

To lead on and provide expertise to the statutory financial reporting requirements of the Ngati Awa Tertiary Training Organisation.

[11] A number of responsibilities were listed. They included: selecting and establishing appropriate financial accounting procedures and the consistent and well documented operation of financial systems; ensuring appropriate financial processes and systems were in place; ensuring statutory annual accounts and statements were

produced and promulgated on time; ensuring annual accounts were produced on time and in accordance with best practice; analysing and reporting on budgetary circumstances; manage the financial accounting aspects of NATTO's aspects; provide technical financial advice and guidance to the management and others; and other duties including to oversee bank reconciliations and managing accounts payable and income.

[12] The associated ideal person specification required a 'professional accounting qualification' in the form of a qualification in MYOB, and knowledge and understanding of the use of Microsoft Office software in particular. Also required was a thorough knowledge of financial accounting requirements and financial project appraisal, and of tax requirements.

[13] Ms Merito had a qualification in the use of MYOB, and business administration and computing certificates to level 3. Despite the language used in the position description, this together with Ms Merito's evidence about the work she did (or failed to do with reference to the position description and NATTO's circumstances in 2010) leads me to observe that in practice the position did not contain any element of management and its true nature was clerical or administrative.

[14] When NATTO's financial and management difficulties reached a crisis point in the first quarter of 2010, and the general manager Marianne Kingi-Merito resigned, TRONA provided significant management and financial support to NATTO in association with its own obligations. To that end Ms Merito was a key staff member assisting with the identification, organisation and reconstruction of NATTO's financial records, as well as continuing to carry out her current duties. She was aware that NATTO was in crisis, and acknowledged in questioning that it was beyond her own (and her mother Ms Kingi-Merito's) ability to address NATTO's financial problems. She acknowledged that someone had to come in and help.

[15] During the period from April 2010 Ms Merito continued to input payroll information to MYOB, prepare invoices and timesheets, and report on expenditure. The only change was that she reported to Jeremy Gardiner, the interim manager and CEO of TRONA, rather than to her mother.

[16] It was also Ms Merito's evidence that, during discussions conducted in her presence in July and August, Mr Gardiner and another member of TRONA's staff discussed the moving of NATTO's accounts to TRONA. None of this was raised directly with Ms Merito. To the extent that any discussions of that kind occurred, I consider it likely they reflected NATTO's practical needs for assistance from TRONA at the time and did not go as far as addressing the future of Ms Merito's employment.

2. The termination of employment

[17] Further detail of the background to the redundancy situation at NATTO late in 2010 is contained in the description of NATTO's financial and operational circumstances that year, as set out in the determination in *Hana Merito v TRONA and NATTO*.

[18] As also described in that determination, Mack Ramanui was appointed as training (or general) manager of NATTO commencing in September 2010. As part of the need to address the serious financial and operational problems NATTO was facing Mr Ramanui began a restructuring process which centred on a reduction in staff numbers. The process included a presentation at a staff meeting on 15 October of his proposals for a new staffing structure, and advice that many of the new positions identified in the structure would be the subject of a recruitment process.

[19] Mr Ramanui met with Tinaka Merito on 20 September 2010 as part of his initial 'meet and greet' with staff members. He discussed Ms Merito's duties and responsibilities with her. She advised that her main responsibility was to manage NATTO's finances and wages, but said that function was to be transferred to TRONA the following year. As a result she would be finishing her employment at the end of that year. She asked Mr Ramanui what should be done with the finances in the meantime, and was advised that she should continue to manage them.

[20] Mr Ramanui effectively accepted Ms Merito's account of the conversation, although he added that he did not enter into a discussion at the time about why Ms Merito believed her main responsibilities were to be transferred to TRONA. He said such a transfer was news to him. Indeed no such transfer had been discussed or agreed with anyone. Mr Ramanui also said he recognised staff morale was low and

believed Ms Merito's statement that her employment would end reflected her own lack of morale.

[21] Ms Merito said Mr Ramanui acknowledged the transfer of her duties was to be made. That is unlikely. I consider it likely that Ms Merito construed Mr Ramanui's failure to engage with her on the point at the time as an acknowledgement that was not intended.

[22] Otherwise Mr Ramanui was intent on designing a plan for the future, so rather than embarking on a discussion of those matters he informed Ms Merito he had become aware NATTO was late in providing the NZQA with financial audits for 2008 and 2009 and as a result NZQA had threatened to de-register NATTO as a Private Training Enterprise (PTE). He asked Ms Merito to make it her priority to ensure the necessary documents were available for the accountants so they in turn could prepare financial reports for the NZQA. A deadline of 8 October 2010 was agreed. Ms Merito was to provide Mr Ramanui with weekly updates on progress.

[23] To assist Ms Merito to prioritise the assembly of information for the accountants, Mr Ramanui provided her with the accountants' checklist of the required material. Ms Merito was unable to locate some of the material before the 8 October deadline, and said in evidence she had collated other information by then but had not passed it on.

[24] One of the reasons Ms Merito gave for failing to meet the deadline was that there were too many distractions at work, and she asked Mr Ramanui whether she could work from home. Mr Ramanui agreed, and gave Ms Merito a further two weeks to prepare the documents. She was to report on her progress, and inform Mr Ramanui if she encountered any difficulties. She was also to report to the office to action the payment of staff and suppliers, or to meet with Mr Ramanui if requested.

[25] However by letter dated 11 October 2010, noted as received by NATTO on 18 October, Ms Merito resigned. The reason she gave was that:

... the administrating of the accounts etc will be moved over to Te Runanga o Ngati Awa in the near future; leaving me without a position here at Ngati Awa Tertiary

Training Organisation in the 2011 year, therefore it is with regret that I hand in this letter of resignation as accounts/payroll manager effective as of the above date.

[26] The letter went on to advise that Ms Merito would endeavour to complete and update payroll and accounting records, so that her last day of employment would be 17 December 2010.

[27] Mr Ramanui did not respond to the letter until 5 November.

[28] Meanwhile at a staff meeting on 15 October Mr Ramanui had presented his proposals regarding a new staffing structure. The proposals did not contain any position obviously corresponding with Ms Merito's.

[29] Also in the interim, Ms Merito had commenced the working from home arrangement on or about 21 October. She suffered a bereavement on 29 October and was unavailable for several days. Because he had not received reports from Ms Merito Mr Ramanui became concerned about where she was. He contacted her by email on 3 November, reminding her of a new NZQA deadline of 8 November for the production of the outstanding accounts and asking for a response.

[30] On 5 November Mr Ramanui visited Ms Merito's home because he had not received a response to his 3 November email. He was concerned in particular to ensure current staff wage payments were processed, and because Ms Merito had taken the computer used for MYOB transactions off NATTO's premises. Ms Merito was at home on 5 November and assured Mr Ramanui she would report for work on 9 November, being the day on which she would normally have reported to pay the staff.

[31] There was no discussion of the resignation letter, and Mr Ramanui sent his response to it after the 5 November visit. He said in the response that he had decided Ms Merito's termination of employment should be effective immediately, and advised that she would be paid her salary until 17 December. The reason for the immediate termination was that the work in obtaining the material for the accountants had been completed, and since Mr Ramanui had asked TRONA to take over processing the payroll he concluded there was nothing more for Ms Merito to do.

[32] Ms Merito reported for work on 9 November, where she found Mr Ramanui's 5 November response.

[33] Meanwhile Mr Ramanui had prepared a further email message dated 9 November, and sent it to Ms Merito at 12.31 pm. According to that message Ms Merito had not reported for work, and the parties were to meet to discuss Ms Merito's future employment plans. The precise time at which Ms Merito reported for work that day was not clear but it was clear that, as at approximately 12.30 pm, Mr Ramanui believed she was not present on the premises. Even on Ms Merito's evidence it is likely that she reported for work at or about the middle of the day. Mr Ramanui and Ms Merito had a discussion that afternoon in which arrangements were made for the handover of information, including passwords, to TRONA.

[34] Ms Merito's employment terminated accordingly.

Whether there was a dismissal

[35] Ms Merito says her resignation amounted to a constructive dismissal.

[36] An often-cited test of whether a resignation amounts to a constructive dismissal is found in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Offices IUOW*:²

... we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer ... If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words whether a substantial risk of resignation was reasonably foreseeable having regard to the seriousness of the breach.

[37] The breaches of duty relied on here were Mr Ramanui's failure to reassure Ms Merito regarding the transfer to TRONA of the accounts and payroll processing functions, and the failure to address in a timely way her understanding of that intention when she included it in her letter of resignation.

² [1994] 2 NZLR 415, 419

[38] In general I agree Mr Ramanui should have acted as suggested by these submissions. Ms Merito was saying in her letter of resignation that she was leaving because she thought she would no longer have a job at the end of the year. Nothing in the contents of the letter indicated that the termination of her employment was her choice, or that the letter amounted to any more than her acknowledgement of a decision she thought had been made by her employer. If Ms Merito's understanding was wrong as I am prepared to accept it was, or if the fate of her position was under consideration but had yet to be determined, Mr Ramanui should have responded promptly explaining these matters.

[39] Instead of doing so, or at least enquiring further about Ms Merito's concerns, Mr Ramanui completed a proposed staff restructuring which in reality did not include a position for Ms Merito. Nor did the proposed structure allocate her duties to another position within NATTO. This is explained in that Mr Ramanui had taken Ms Merito at her word when she informed him in September that she would be leaving at the end of the year, but unfortunately the omission aggravated the consequences of Mr Ramanui's failure to clarify the question of any transfer of Ms Merito's duties to TRONA when she raised it.

[40] When Mr Ramanui became dissatisfied with Ms Merito's progress in providing the material sought by the accountants, and even more dissatisfied with her failures to report to him as he had asked her to in October, he responded on 5 November by pronouncing her employment at an end.

[41] I accept that Mr Ramanui had reason to be dissatisfied with Ms Merito's response to the instructions he had given her on 20 September and following. Her absence for genuine reasons in late October does not explain this. However against the general background to the termination of the relationship as I have described it this does not amount to justification for the termination of employment on 5 November, and this is even less so in respect of the purported acceptance of Ms Merito's resignation.

[42] There was sufficient in the failures to adequately address Ms Merito's understanding of the fate of her employment to conclude that the circumstances of her

resignation and its acceptance amounted to a termination of her employment at the initiative of the employer. The circumstances amounted to a dismissal.

[43] Even if this conclusion is wrong and Ms Merito did resign, Mr Ramanui's action on 5 November was an actual dismissal.

Whether the dismissal was justified

[44] Whether it occurred at the time of acceptance of the resignation or when Mr Ramanui purported to end the relationship immediately on 5 November, the dismissal was imposed on the basis of the view that Ms Merito had resigned. As discussed above, that was not the correct way to view the circumstances of the resignation.

[45] Inevitably in the light of such an approach the dismissal was not justified. No proper ground for it was established and Ms Merito had no opportunity to provide input on either the ground of termination or whether termination of employment was appropriate.

[46] Ms Merito has a personal grievance in that she was dismissed unjustifiably.

[47] Further to the possibility of re-framing a grievance, which was discussed at [69] and following in the determination in *Hana Merito v TRONA and NATTO*, Tinaka Merito's circumstances differed from her sister's and there was no need to consider re-framing her grievance.

Remedies

1. Reinstatement

[48] Reinstatement was sought in the letter raising Ms Merito's personal grievance, but not in the statement of problem as it should have been. It was addressed again in submissions for Ms Merito. Despite this unsatisfactory approach I address the matter.

[49] Included in the submissions for the applicants was a suggestion that the Authority consider the reinstatement of each of the four applicants on the basis of an

order of preference which they had apparently agreed among themselves. That is not appropriate. The grievances of each applicant must be determined on their own merits, with the remedies available in ss. 123 – 128 of the Employment Relations Act also applying to each grievance on its merits.

[50] The restructured organisation does not include Ms Merito's position or one which is no less advantageous. I accept there is no existing position to which she can be reinstated, and find it would be unduly disruptive to an organisation the size of NATTO to make an order which in effect would oblige it to create one.

[51] I find therefore that reinstatement is not practicable and decline to order it.

2. Reimbursement of lost remuneration

[52] Ms Merito sought the reimbursement of remuneration lost as a result of her unjustified dismissal.

[53] As to the quantification of the loss, Ms Merito was paid at the rate of \$25 per hour for a 40 hour week. Her gross weekly earnings were \$1,000. She is obliged to attempt to mitigate her loss, and says she has applied for alternative positions but has been unsuccessful.

[54] For its part TRONA says Ms Merito has been assisting her husband in his business. Ms Merito denied any ongoing involvement in the business, although she said that in early November 2010 she was assisting her husband to set the business up. There was no evidence that she obtained any income in that respect, or that her activities otherwise prevented her from seeking to obtain employment elsewhere, and I do not take it into account.

[55] A loss has been suffered as a result of the unjustified dismissal, so that s 128 of the Act applies. With reference to s 128(2), Ms Merito has lost more than three month's ordinary time remuneration but the subsection requires the Authority to order payment of the lesser sum of 3 months' ordinary time remuneration. There are no grounds on which to exercise the discretion in s 128(3) to award a greater amount.

[56] Section 128 is subject to s 124, which requires the Authority to consider the extent to which the actions of the employee contributed to the situation that gave rise to the grievance and, if those actions so require, reduce the remedies that would otherwise have been awarded.

[57] The situation that gave rise to the personal grievance began with Ms Merito's understanding that her employment was to terminate at the end of the year because her duties were to be transferred to TRONA, against a background in which NATTO's circumstances had become so parlous that TRONA had been obliged to step in to assist.

[58] The circumstances included fundamental failures to observe financial accounting and reporting obligations. I do not hold Ms Merito solely or primarily responsible for those failures, but she had failed, for example, to perform parts of her job description which included ensuring statutory annual accounts were produced and promulgated on time. The level of the duties the evidence suggests she had actually been carrying out was such that at the very least questions about the hours of work required of the position at the level at which it was being performed, supervision of her, and an appropriate rate of pay, would have needed to be addressed if NATTO had not chosen to rely on her resignation. In that respect Ms Merito's concern about the future of her position did not arise in a vacuum. It arose out of circumstances of which she was aware and to which she had contributed in a blameworthy way.

[59] For these reasons I find a reduction in the remedies that would otherwise have been awarded is required, and reduce by 25% the amount I would otherwise have awarded by way of reimbursement of remuneration lost as a result of the grievance.

[60] Accordingly I calculate Ms Merito's loss as follows. The three-month period under s 128(2) commenced on 9 November 2010, when the employment terminated. Ms Merito was paid to 17 December, which was 6 weeks' pay. The loss is:

$$[13 - 6] \text{ weeks} \times \$1,000/\text{week} = \$9,000$$

reduced to

$$\$9,000 - (25\% \times \$9,000) = \$6,750$$

[61] NATTO is ordered to reimburse Ms Merito for remuneration lost as a result of her grievance in the sum of \$6,750.

3. Compensation for injury to feelings

[62] Ms Merito is entitled to compensation for the injury to feelings resulting from her unjustified dismissal.

[63] The lack of justification for the dismissal arose out of the failure to address Ms Merito's understanding about the future of her employment. Although a number of other matters were discussed there was little evidence of injury in that respect, and applying the reduction set out above I order NATTO to compensate Ms Merito for injury to her feelings in the sum of \$500.

Claim for monies owing

[64] Ms Merito sought holiday pay outstanding as at the date of termination of employment, holiday pay in respect of the Christmas-New Year 2010 – 2011 public holidays, and pay for 12 days alternative holidays due but not taken.

1. Holiday pay

[65] The claim for holiday pay was withdrawn at the investigation meeting.

2. Public holiday pay

[66] Ms Merito was not paid for the Christmas-New Year public holidays because of the view that her employment had ended with her resignation.

[67] Section 40 of the Holidays Act 2003 is relevant. It reads:

- i.* ...
- ii.* *Subsection (3) applies if –*

- (a) *the employment of an employee comes to an end; and*
- (b) *the employee is entitled to annual holidays; and*
- (c) *the employee has not taken the annual holidays or has taken only some of them.*

- iii. *The employee is entitled to be paid for a public holiday if the holiday would have –*
 - 1. *otherwise been a working day for the employee; and*
 - 2. *occurred during the employee's annual holidays had the employee taken his or her remaining annual holidays entitlement immediately after the date on which the employee's employment came to an end.*

[68] Applying the provision involves identifying the number of days' leave outstanding at the date of termination of employment, notionally extending the date of termination by that number of days, identifying whether any public holiday occurred during the notionally-extended period, and if a public holiday occurred during the period then whether the holiday would otherwise have been a working day for the employee.

[69] Ms Merito's employment ended no later than 17 December 2010. Because her claim for holiday pay was withdrawn I am not able to determine the number of days' leave outstanding as at the date of termination, and in turn whether Ms Merito is entitled to the payments sought. The parties are to follow the above steps and attempt to resolve the matter themselves.

[70] Leave is reserved to approach the Authority for an order in respect of this matter if necessary. If no approach is made within 28 days of the date of this determination the reservation of leave will lapse and there will be no order for payment.

3. Alternative holidays

[71] The following note appeared at the end of Ms Merito's payslip for the period ending 24 October 2010:

Annual leave due: 410 hours, alternative holidays due: 12 days

[72] Ms Merito seeks payment of 12 days' wages in reliance on that entry. She did not provide any information about the dates when the associated work was done.

[73] For the reasons detailed in the determination in *Hana Merito v NATTO and TRONA* I decline to make the order sought.

Summary of orders

[74] NATTO is ordered to pay to Ms Merito:

- a. \$6,750 as reimbursement of remuneration lost as a result of her personal grievance; and
- b. \$500 under s 123(1)(c)(i) of the Act as compensation for injury to feelings.

Costs

[75] Costs are reserved.

[76] The parties are invited to reach agreement on the matter. If they are unable to do so any party seeking costs shall have 28 days from the date of this determination in which to file and serve memoranda on the matter. The other party shall have a further 14 days in which to file and serve a reply.

[77] In their submissions NATTO and TRONA made a generalised request for costs, and attached copies of invoices showing costs incurred. The above paragraph applies despite that, and they may address me further in accordance with the timetable if they wish.

R A Monaghan

Member of the Employment Relations Authority