

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 451  
5333154

BETWEEN

RITA PEKA  
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

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Rita Peka says she was dismissed unjustifiably on the ground of redundancy, and is owed payment in lieu of notice and payment for 6 hours' 'additional hours worked by agreement'. The record showed she had been paid for public holidays for which she also sought payment, and I take that matter no further.

[2] Ms Peka's former colleagues Hana Merito, Tinaka Merito 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.<sup>1</sup>

### **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 during the relevant period NATTO remained Ms Peka's employer and that TRONA does not trade as the Ngati Awa Tertiary Training Organisation.

### **Rita Peka's employment**

#### 1. Background

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<sup>1</sup> *Hana Merito v TRONA and NATTO* [2011] NZERA Auckland 453  
*Tinaka Merito v TRONA and NATTO* [2011] NZERA Auckland 450  
*Varlene Snell v TRONA and NATTO* [2011] NZERA Auckland 452

[6] Ms Peka began her employment with TRONA in 2002. She became an employee of NATTO when it was established, and she and NATTO were parties to a written employment agreement dated December 2007. Her position was described in the agreement as office manager. Her duties in practice were to provide administrative support for the programmes offered under contracts with the Tertiary Education Commission (TEC).

[7] According to clause 3.1 of the employment agreement, the employment agreement was for a 48 week period commencing on 21 January 2008 and ending on 19 December 2008. The reason for the apparent fixed term was expressed to be '*TEC contracts are for 48 weeks.*' Despite this provision Ms Peka's employment continued beyond the end of that period with no further fixed term arrangements being entered into under s 66 of the Act.

[8] Clause 6 of the agreement set out Ms Peka's hours of work. According to that clause, Ms Peka's normal hours of work were 40 hours per week, between the hours of 9 am to 5 pm Monday – Friday inclusive. Clause 6.1 stated that the position was '*full time with an obligation to perform overtime as necessary but without extra payment.*'

## 2. The termination of employment

[9] A 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*.

[10] As also described in that determination, Mack Ramanui was appointed as training (or general) manager of NATTO commencing in September 2010. One of his early actions was to consider restructuring the staffing of the organisation having identified, correctly, that it was overstaffed. The detail of the proposed restructuring is also set out in the determination in *Hana Merito v TRONA and NATTO*.

[11] Mr Ramanui met with Ms Peka on 20 September as part of his initial 'meet and greet' with staff members. His evidence was that he explained that there were problems with the trust and that there may be some changes to its structure. He also said that during the conversation Ms Peka admitted to certain conduct which is not

relevant to the present grievance, and which Ms Peka has denied in all respects. I take that matter no further.

[12] There was also a discussion about Ms Peka's hours of work and her attendance. According to Mr Ramanui, Ms Peka told him that because of her family responsibilities she started work at 10 am and finished at 4 pm. Mr Ramanui pointed out that this amounted to 30 hours' work a week, not 40. Ms Peka informed him that she sometimes stayed until 5 pm, to which Mr Ramanui replied this still did not total a 40 hour week. He told Ms Peka she would be paid only for the hours she worked.

[13] Ms Peka denied most of this account. The exception related to Mr Ramanui's observation that she would start work later than her agreed starting time. However Ms Peka accepted as a fact that she sometimes started work late, saying this was for childcare reasons and that she made up the time at the end of the working day. I consider it likely that the conversation proceeded as Mr Ramanui said it did. I accept there was cause for concern about Ms Peka's hours of work and timekeeping.

[14] In addition, Mr Ramanui said he asked Ms Peka whether there were any other administrators working for the trust. Ms Peka advised him of Hana Merito's role, and asked whether it would continue to be required since her position and Ms Merito's involved similar tasks although for different funders. Ms Peka also advised there was a third person employed as an assistant administrator. Mr Ramanui indicated that Ms Peka's and Hana Merito's positions could be merged, and Ms Peka asked to be advised as early as possible if her position was to be made redundant.

[15] Ms Peka also denied that this exchange occurred.

[16] Mr Ramanui said he had a further discussion with Ms Peka on 14 October during which he again discussed the possibility of a merger of hers and Hana Merito's positions. He said Ms Peka was not surprised as she was the one who had brought to his attention the duplication in their roles. He also said Ms Peka told him she believed the merger was the right thing to do.

[17] Ms Peka also denied that this conversation occurred. I have reservations about the precise timing and detail of the respective conversations on the merger of

the two positions, but it was at least clear that between themselves and - probably to Mr Ramanui - Hana Merito and Ms Peka effectively acknowledged the duplication in their roles. They did so to the point that by or about mid-October Ms Merito and Ms Peka arranged their own order of priority regarding appointments to the new positions. While I am prepared to accept Ms Peka did not go as far as to say to Mr Ramanui that the merger was the right thing to do, in other respects I accept Mr Ramanui's account.

[18] At a staff meeting on 15 October Mr Ramanui presented his proposals for a new staffing structure, and advised that many of the new positions identified in the structure would be the subject of a recruitment process.

[19] The new structure included the merger of Ms Peka's and Hana Merito's duties, which in turn were incorporated in a new information liaison position. The third administration position disappeared. Ms Peka concluded from the presentation that that the information liaison position looked like hers. For my part I find the position incorporated elements of Ms Peka's former position, but it was not the same position. The new part-time administration assistant's position also comprised duties like those Ms Peka had been carrying out, although its part time nature meant it was not the same position.

[20] Mr Ramanui said Ms Peka came to see him on 26 October to collect the job descriptions for the information liaison and administration assistant's positions. She told him she was interested only in the administration assistant's position but he encouraged her to apply for both. There was a discussion about whether the hours of work for the information liaison position could be changed to accommodate Ms Peka's parental responsibilities, to which Mr Ramanui replied that he was willing to discuss that.

[21] Ms Peka denied that such a conversation occurred. Again I consider it likely that parts of it occurred as Mr Ramanui said they did and parts did not - at least during the particular conversation in question - so that some of Ms Peka's denials are also correct. In light of the history of the discussions on the matter of hours of work I consider it likely that matter at least was raised. Because of my reservations about

whether either party gave a full and accurate account of that and associated conversations I make no further finding.

[22] Ms Peka applied for both positions, but decided she would prefer the part time position. Her reason was that a part time position was more suitable because it would allow her to focus on her family and in particular to give more time to her children. She advised Mr Ramanui of her preference and withdrew her application for the information liaison position. Neither party identified with any reliability the dates on which Ms Peka forwarded her applications, and the date on which she withdrew the application for the full time position. It is likely these events occurred in late October and early November.

[23] In a message from a funder dated 15 November 2010 Mr Ramanui received further information about restrictions on funding for 2011 which led him to decide the part-time position was not necessary. The position never became part of the final establishment for 2011.

[24] As a result Ms Peka was not interviewed for either of the positions. An existing employee who had formerly held a position described as literacy and numeracy tutor was offered the information liaison position.

[25] By emailed message dated on the evening of Friday 19 November 2010 Mr Ramanui contacted Jeremy Gardiner, the CEO of TRONA, setting out his recommendations for the new positions. Referring to the part time administration assistant's position he commented: *'Undecided, although Rita is suitably skilled I have grave concerns that her loyalty to my predecessor will interfere with her ability as a team player.'* Surprisingly he did not refer to the effect of likely restrictions on funding, although I accept that the matter was not finalised until later.

[26] The message came to Ms Peka's attention on the morning of Monday 22 November. She was angry and upset when she saw it.

[27] In addition, in notes about staffing requirements for 2011 which were provided to the Authority after the investigation meeting, Mr Ramanui had listed a number of concerns about Ms Peka's performance. According to the notes he found her resistant

to his instructions and reluctant to work with other staff. The note repeated the concerns raised with Ms Peka in September regarding her hours of work, as well as the admissions she had allegedly made at the time regarding actions which could have amounted to misconduct.

[28] By emailed message dated at the end of the afternoon of 23 November Mr Ramanui advised Ms Peka of his decision not to appoint anyone to the part time position. The message ended: '*Please note that at the conclusion of this term I am willing to support you in finding other work and will provide you with a reference should you require one.*'

[29] On becoming aware that no appointment was to be made to the part time position Ms Peka sought to speak to Mr Ramanui. She was able to do so on 24 November. Mr Ramanui informed her that the reason for his decision not to proceed was that no confirmation of funding for the position had been received. By then the full time information liaison position had been offered to the other employee although the offer had not yet been accepted. Mr Ramanui said he did not raise the possibility of pursuing the full time position with Ms Peka because she had already indicated that position was not suitable. Instead he confirmed that Ms Peka's position would be redundant at the end of the year.

[30] Ms Peka's employment terminated on 17 December 2010 at the end of the academic year.

### **Whether the dismissal was justified**

[31] I refer to [58] and following in the determination in *Hana Merito v TRONA and NATTO*, and in particular the noting of applicable passages in *Simpsons Farms Limited v Aberhart*<sup>2</sup>. The passages address:

- . the employer's right to make business decisions to make positions or employees redundant provided the employer acts genuinely; and

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<sup>2</sup> [2006] ERNZ 825

. the employer's duty to make those decisions in the way a fair and reasonable employer would have, and in particular to comply with the statutory obligation to deal with the employee in good faith.

[32] Further to the genuineness of the decision to disestablish Ms Peka's position and merge it with Hana Merito's, I consider the decision was made for genuine reasons. I also accept that the information liaison and part time administration assistant's position were created for genuine reasons.

[33] Ms Peka believes she was not appointed to the part time position because of the concern about her loyalty to the former general manager, Marianne Kingi-Merito, which Mr Ramanui expressed in his message to Mr Gardiner. Despite that expression of concern I accept also that the substantial reason for the decision not to make an appointment to the part time position was because funding restrictions meant the position would not be required.

[34] I turn next to the obligation to comply with the statutory obligation to deal with the employee in good faith. The obligation incorporates an obligation to provide employees with access to information and an opportunity to comment before a decision is made. There were general failures to provide enough information about the proposed restructuring, or opportunities to have input into the proposal or its implementation. Further to Ms Peka's circumstances the decision not to proceed with an appointment to the part time position was also information relevant to the fate of Ms Peka's employment at NATTO.

[35] Ms Peka said in evidence that, because she needed a job, had she known the part time position would not be available she would have reconsidered her application for the information liaison position. I accept that evidence. Since the alternative was to become unemployed I consider it very likely that she would have reviewed her decision not to apply for the full time position once it came to her attention that the facts on which the decision was based had changed in a material respect.

[36] Mr Ramanui should have advised Ms Peka of the possible reduction in funding and the implications for the part time position. Even if I accept the information did not become available until relatively late in the recruitment process,

there was sufficient time for it to be made available to Ms Peka so she could make a properly informed decision about whether to apply for the information liaison position. There was also sufficient time before the announcement of the decisions on the new appointments later in November to consider any renewed application Ms Peka made as a result. Since another employee had also applied for the position, it would then have been necessary to embark on a proper selection process before deciding which of the two would be appointed and whose employment would terminate by reason of redundancy.

[37] That Ms Peka had already indicated her preference for the part time position because of her family responsibilities is not a sufficient answer to the above failures. As Ms Peka said, she made her original decision believing she could apply for two possible positions, and she made her decision to apply for only one by prioritising her family's needs. She should have been given the opportunity to review her decision in the light of the new information.

[38] I consider this failure to be a breach of the obligation to consult with Ms Peka. In that it cut her off entirely from the prospect of obtaining an alternative position in NATTO it did more than disadvantage her, so that I have not considered it necessary to consider re-framing her grievance with reference to the approach in *Simpsons Farms Limited v Aberhart*.<sup>3</sup>

[39] For these reasons I find Ms Peka's dismissal was unjustified.

## **Remedies**

### **1. Reinstatement**

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

[41] 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

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<sup>3</sup> See the discussion at [69] and following in *Hana Merito v TRONA and NATTO*

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.

[42] Since Ms Peka's original position has genuinely disappeared I find it is not practicable to order reinstatement and decline to do so.

[43] I add that the information liaison position became available in mid-2011 because of the resignation of the incumbent. Mr Austin sought to assert on behalf of Ms Peka a right of preference to the appointment. There was no such right of preference in the parties' employment agreement and I do not accept Ms Peka has such a right.

## 2. Reimbursement of lost remuneration

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

[45] As to the quantification of the loss, Ms Peka 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.

[46] I am unable to make a finding on whether Ms Peka would have been appointed to the information liaison position if she had sought it, although Mr Ramanui's notes on the person who was appointed indicated the person was experienced and well regarded. In turn I am unable to say that Ms Peka would have lost her employment by reason of redundancy even if she had been given an opportunity to apply for the position.

[47] 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 Peka 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. Taking into

account all of the circumstances of this employment relationship problem there are no grounds on which to exercise the discretion in s 128(3) to award a greater amount.

[48] 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.

[49] There were concerns about Ms Peka's conduct, but even if she had been guilty of some form of misconduct this did not affect what I have found to be her grievance – namely the significant failure to consult with her. If the concerns were relevant to the failure to advise Ms Peka of the decision not to proceed with an appointment to the part time position, then the failure to raise them in that context prevented her from addressing them and aggravated the extent of the failure to consult.

[50] For these reasons I do not find any contribution on Ms Peka's part to her personal grievance. I do, however adjust her weekly earnings on the ground that I consider it likely that in the period prior to the termination of her employment she worked a 30-hour week not a 40-hour week.

[51] I calculate the loss of earnings as:

$$13 \text{ weeks} \times [30 \times \$25] = \$9,750$$

[52] NATTO is therefore ordered to reimburse Ms Peka for remuneration lost as a result of her personal grievance in the sum of \$9,750.

### 3. Compensation for injury to feelings

[53] Ms Peka also sought compensation for the injury to her feelings caused by her personal grievance. Much of that injury came from her reaction to seeing Mr Ramanui's 19 November message to Mr Gardiner. Since the personal grievance as I have found it to be lies in the failure to consult then any compensation to which Ms Peka is entitled flows from that breach rather than from other matters, such as that one, which upset her.

[54] In setting a suitable amount by way of compensation for the injury to Ms Peka's feelings I take into account the evidence of the injury, the mix of remedies awarded to Ms Peka, and NATTO's circumstances. Regarding the latter NATTO is a small trust. It is funded to be a provider of education, particularly to young people who might otherwise be at risk. It struggled to survive in 2010.

[55] On balance I do not consider a substantial order for the payment of compensation to be called for. NATTO is therefore ordered to compensate Ms Peka in the sum of \$1,000 for injury to her feelings.

### **Claim for monies owing**

[56] Ms Peka seeks payment in lieu of notice and payment for 6 days' alternative holidays not taken.

#### 1. Payment in lieu of notice

[57] Ms Peka did not receive a formal written notice that her employment would terminate on 17 December 2010 by reason of redundancy. For that reason she says she did not receive notice of the termination of her employment and seeks two weeks' pay in lieu of notice.

[58] Nevertheless I find that the background circumstances together with the message of 23 November made it sufficiently clear to Ms Peka that her employment would terminate at the end of the academic year. There was sufficient information to Ms Peka to amount to notice of termination of employment, and the information was available in sufficient time to provide her with at least 14 days' notice of the termination.

[59] There will be no order for payment in lieu of notice.

#### 2. Payment for 'alternative holidays not taken'

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

*Annual leave due: 360 hours, alternative holidays due: 6 days*

[61] Ms Peka seeks payment of 6 days' wages in reliance on that entry. She did not provide any information about the dates when the associated work was done.

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

### **Summary of orders**

[63] NATTO is ordered to pay to Ms Peka:

- a. the sum of \$9,750 as reimbursement lost as a result of her personal grievance; and
- b. the sum of \$1,000 under s 123(1)(c)(i) of the Employment Relations Act.

### **Costs**

[64] Costs are reserved.

[65] 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.

[66] 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