

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 327
5319771

BETWEEN

AUBREY KOHUNUI
First Applicant

RUTH MCCORKINDALE
Second Applicant

ROGER NIAO
Third Applicant

ANGIE TE RIINI
Fourth Applicant

MARIANA HERBERT
Fifth Applicant

SHARON NIAO
Sixth Applicant

AND

TUWHARETOA KI
KAWERAU HEALTH
EDUCATION AND SOCIAL
SERVICES CHARITABLE
TRUST
Respondent

Member of Authority: Vicki Campbell

Representatives: Alan Taylor for Applicants
Steve Franklin for Respondent

Investigation Meeting: 30 May 2011 at Whakatane

Submissions Received: 10 June 2011

Determination: 25 July 2011

DETERMINATION OF THE AUTHORITY

A The applicants have been subject to an unjustified disadvantage in their employment.

B The following sums in compensation are to be paid to each Applicant within 28 days of the date of this determination:

- (i) Ms Kohunui - \$250.00
- (ii) Ms McCorkindale - \$250.00
- (iii) Mr Niao - \$250.00
- (iv) Ms Angie Te Riini - \$250.00
- (v) Ms Herbert - \$750.00
- (vi) Ms Niao - \$250.00

C Costs are reserved.

[1] This is a claim by 6 employees of Tuwharetoa Ki Kawerau Health Education and Social Services Charitable Trust (the Trust) that they were subject to a disadvantage in their employment as the result of an incident which occurred on 1 September 2010 and that the Trust breached its obligations of good faith toward them. The Trust denies the claims.

[2] In investigating this matter the Authority was mindful that it had previously investigated and has now determined a personal grievance claim of the CEO, to whom the applicant's reported.¹

Unjustified disadvantage

[3] The applicants' say they suffered a disadvantage in their employment as a result of an incident which occurred on 1 September 2010 and actions or omissions by the Trust following that incident. The applicants claim the Trust failed to provide a safe workplace and working environment because it:

- failed to use appropriate processes when dealing with health and safety complaints;
- initiated an ongoing and escalating pattern of workplace bullying and a series of verbal and physical confrontations with the CEO and/or other employees;

¹ *Te Riini v Tuwharetoa Ki Kawerau Health Education and Social Services Charitable Trust* [2011] NZERA Auckland 287.

- threatened the physical safety of employees;

[4] Further, the applicants claim the Trust:

- threatened to suspend or dismiss employees without justification;
- advised the applicants they had been dismissed;
- the dismissal was rescinded only under a threat that if the applicant's were not loyal to the Trust they would be dismissed;
- failed to allow all those present during the 1 September 2010 incident to be interviewed as part of the investigation process;
- Failed to engage constructively with the applicants when they raised their personal grievances and in their attempts to resolve the matters between them.

[5] There is a two step test to establish a disadvantage grievance. Firstly, I must ascertain whether the Trust's actions disadvantaged the Applicant's in their employment, and secondly, whether that disadvantage has been shown to be justified or unjustified pursuant to section 103A of the Act.²

[6] Disadvantage alone is not prohibited by law. It must be a disadvantage that is unjustified. If the Trust can establish justification for a disadvantageous action, there is no grievance.³

[7] Finally, disadvantage is not identified narrowly and solely in terms of wages and conditions of employment. Rather it broadly considers effects on the total environment of the employee's employment. A claim for disadvantage depends upon an act or omission by an employer causing disadvantageous consequences, not merely an employee's subjective dissatisfaction at their circumstances.⁴

1 September 2010 incident

[8] On Friday 27 August 2010, after receiving a notification that the front door to the office had been left open the previous night following a Trust Board meeting, Ms

² *Mason v Health Waikato* [1998] 1 ERNZ 84

³ *McCosh v National Bank*, unreported, AC49/04, 13 September 2004

⁴ *NZ Storeworkers IUW v South Pacific Tyres (NZ) Ltd* [1990] 3 NZILR 452; *Bilkey v Imagepac Partners*, unreported, AC65/02, 7 October 2000

Herbert sent an email message to all Trust Board members reminding them of the security procedures.

[9] Ms Helen Savage, the Trust Board's Chairperson responded by apologising for the oversight and asking for copies of the closing up process, alarm codes and contact details for the Security Company. The information was provided except the codes for those employees who had opening and closing responsibilities. Ms Herbert reminded the Board members of the need to keep the codes confidential and requested that they memorise the codes and then delete the email.

[10] On Sunday 29 August 2010 Ms Savage responded to Ms Herbert's email and stated:

Please let me enlighten you, the Trust are responsible for this organisation. I believe all Trustees are aware of this and do not need to be reminded of confidentiality or privacy, and ALL security codes are to be made available to the Board. As with the other issues I have contacted you about I will raise this with the CEO to ensure ALL staff are aware of the Boards position and expectations of staff in this organisation.

[11] On Monday 30 August 2010 Ms Herbert was subjected to a number of abusive telephone calls by the Chairperson. During the calls Ms Savage yelled at her and told her that she would be at the office the following day at 10.00am and that she [Ms Herbert] would be sacked. Ms Herbert and Ms Angie Te Rini, who witnessed the telephone conversation, later submitted written complaints and hazard reports about the events.

[12] Later that day Ms Herbert responded to Ms Savage's email and advised the Board members that her intention was only to provide a friendly reminder. To Ms Savage, Ms Herbert advised that she was welcome to contact her CEO but that if she required anything further Ms Savage was to communicate directly with Ms Herbert's manager, Mr Roger Niao.

[13] On 1 September 2010 an altercation took place between Ms Karilyn Te Riini, the Chief Executive Officer (CEO), and the Chairperson of the Board. When the applicants intervened to assist their CEO the Chairperson threatened them with suspension and/or dismissal. Eventually the Chairperson told the applicants in a general statement that they were all dismissed.

[14] The incident resulted in the Police attending the workplace but no formal action was taken. Following the incident the applicants completed Incident/Hazard Reports and submitted them to Management.

[15] The incident on 1 September 2010 arose after Ms Savage attempted to obtain copies of the employment agreements between the Trust and a number of its employees engaged on a specific project. From the evidence produced at the Authority's investigation meeting I have concluded Ms Herbert was under the misapprehension that the documents were confidential to the CEO and the Trust Board members should not have access to them. From the evidence available to the Authority it seems the CEO and employees reporting to her were reluctant to provide access to the documents and this was frustrating Ms Savage, who was trying to account for the costs associated with the project.

Failure to use appropriate processes when dealing with health and safety complaints and failure to allow all those present during the 1 September 2010 incident to be interviewed as part of the investigation process

[16] Following the altercation in the office on 1 September 2010 all those employees present completed incident reports and provided these to the Trust. These reports were the subject of an investigation two months after they were supplied to the Trust. There has been no explanation by the Trust as to the reasons why it took so long for it to investigate the incident reports, however, by November 2010 a full investigation had been undertaken by an independent third party.

[17] The Applicant's say the investigator failed to interview all those present on the day and that this failure has contributed to their claim for unjustified disadvantage.

[18] I am satisfied the investigator carried out a full investigation of the incident on 1 September 2010. I accept Ms Sally Harper's explanation that she did not need to interview everyone from the day as all employees had completed incident reports and had fully set out their view of what had occurred. Ms Harper told the Authority that she was satisfied that the information gleaned from those who were interviewed were consistent and largely confirmed the facts set out in the incident reports.

[19] The Report found that there was a serious lack of trust and confidence by Trust employees in the Trust Board as a result of a failure to address ongoing concerns about the behaviour of the Chairperson. The Report also noted that the employment

relationship was "...dysfunctional and strained..." and this had escalated over a number of months.

[20] I am satisfied the process adopted by the Trust regarding the complaints was fair and reasonable, however the delay was inordinate.

[21] At the investigation meeting it became obvious to the Authority that all the applicants in this matter had been waiting a long time to have their say about what they witnessed and the conduct they were subjected to on 1 September 2010.

[22] While all the applicants lodged incident reports they received no feedback on the investigation from the Trust. Neither were some provided the opportunity to tell their story when Ms Harper carried out her investigation. This omission by the Trust has led to a perception that the views of the Applicant's were not valued and the Applicant's have not been heard.

Physical safety and a safe workplace

[23] The Applicant's rely on an incident which incurred in 2009 to support their claim that their physical safety at work was at all times under threat. There has been no denial by Ms Savage that there was an altercation between herself and Ms Te Riini in 2009 which was witnessed by some of the Applicants.

[24] Ms Te Riini raised a personal grievance over the 2009 incident, however, none of the Applicant parties to this matter did. It was therefore a matter between Ms Te Riini and the Trust to resolve. By not raising the issues with the employer themselves the applicants have not allowed the respondent to address any issues which may have arisen for them, out of the incident.

[25] As set out above Ms Harper found there was a serious lack of trust and confidence by Trust employees in the Trust Board as a result of a failure to address ongoing concerns about the behaviour of the Chairperson. The Report also noted that the employment relationship was "...dysfunctional and strained..." and this had escalated over a number of months. It is obvious from Ms Harpers findings that there were some endemic issues in the workplace that required management. By the time this report was received however, Ms Savage had been removed as the Chairperson and therefore was no longer in a position to threaten or otherwise have any further contact with the applicants.

[26] I find the working environment for the applicants was disadvantageous in that they never knew when they may be subject to verbal attacks by Ms Savage.

[27] I am satisfied that in particular, Ms Herbert was subjected to a level of abuse which was unjustifiable. Ms McCorkindale gave evidence of the events she witnessed regarding the harassment of Ms Herbert and Ms Karilyn Te Riini. Ms McCorkindale taped the Chairperson during her verbal attack on the Ms Karilyn Te Riini on 1 September 2010. Ms McCorkindale also stepped in to try and put an end to Ms Savage's onslaught.

Threatened to suspend or dismiss and did dismiss the applicants without justification

[28] There are no denials by the Trust that Ms Savage conducted herself without proper justification on 1 September 2010. She initially threatened the Applicants with dismissal if they intervened and then dismissed them in the heat of the moment.

[29] At the investigation meeting all the Applicants acknowledged that they did not leave when threatened with dismissal and most acknowledged that they recognised Ms Savage was acting in the heat of the moment. The evidence shows that not one of the Applicants left the workplace and they all turned up for work the following morning. I am satisfied it is more likely than not that the Applicants did not really believe they had been suspended or dismissed from their employment.

[30] Further, within a couple of hours, all the Applicants had been advised by the Trust that no one was dismissed and all were to resume their normal work.

Revoked the dismissal but under the threat that they must show loyalty to the Trust and that failure to do so would result in dismissal;

[31] Mr Timi Peri, a Trust Board Member and Kaumatua, addressed the applicants at a hui on 2 September 2010. Mr Peri addressed the applicants in Te Reo. The applicants say the intention of what Mr Peri said was to threaten the applicants that if they did not show loyalty to the Board they could be subject to dismissal.

[32] All the applicants in this case were under the misapprehension that Ms Karilyn Te Riini was their employer. The Authority questioned each of the Applicants as to the identity of their employer and in each case, believed it to be Ms Karilyn Te Riini and not the Trust.

[33] I find it is more likely than not that during the hui on 2 September 2010 Mr Peri reminded the applicants that they had a duty of loyalty to the Board as their employer.

This was a reasonable statement to make given the emotion that was still present in the workplace on 2 September 2010 and the wrong the applicants considered had been handed to Ms Karilyn Te Riini when the Board had confirmed her suspension.

Conclusion

The actions of Ms Savage, as the Chairperson of the Board, disadvantaged the applicants in their employment. Ms Savage's conduct led to an environment in which the Applicant's felt threatened and some were subject to unnecessary verbal abuse. Such conduct by a senior representative of the employer was unjustified and the Applicant's are entitled to a consideration of remedies.

Breach of good faith

[34] The Applicants claim that after they were advised that the workplace would continue to operate as usual during the CEO's suspension a decision was made to implement a restructuring prior to the CEO's situation being resolved and that this constitutes a breach of the good faith provisions of the Act.

[35] There was no evidence produced to the Authority with respect to this claim. It follows that the claim has not been established.

[36] The applicants also claim that the action by the Trust in undertaking to attend mediation only to refuse to attend until after an investigation into the 1 September 2010 incident is also a breach of good faith.

[37] I am satisfied the sequence of events in this matter meant that the statement of problem was lodged in the Authority before the Trust had an opportunity to complete its investigation into the incident reports lodged by the applicants. By the time the Authority investigated this matter the Applicants had lodged two amended statements of problem in addition to the original statement of problem which was lodged on 20 September 2010.

[38] The parties had failed to attend mediation by 26 October 2010 and were directed to attend and attempt in good faith to resolve the matters between them. That mediation took place on 7 December 2010, at which time both parties were in receipt of the independent report from Ms Harper. The Authority was advised on 10 December 2010 that the parties were continuing to discuss settlement possibilities.

[39] I find that neither party has breached its obligations of good faith as it seems to me they were intent on attempting to resolve all issues between them. The reluctance of the Trust to attend mediation initially can be explained by the fact that the Applicant's lodged their statement of problem, before providing a proper opportunity to the Trust to sit down and attempt to resolve the matters between them. Once directed to mediation the parties attended mediation. Throughout the investigation meeting, the parties adjourned and continued to attempt to resolve the matters between them.

Remedies

[40] There were no wages lost as a result of the Applicant's personal grievance and having considered contribution, I find the Applicant's did not contribute to the actions giving rise to the grievance.

[41] It follows that the only remedy available is compensation for hurt and humiliation and I have addressed each individual applicant. Each Applicant seeks the payment of \$1,000. All applicants gave compelling evidence as to the affect Ms Savage's actions had on them on 1 September. With the exception of one Applicant, the evidence was clear that what they most valued was the opportunity to be heard and listened to. With the exception of Ms Herbert I am satisfied that an appropriate award for the Applicants is \$250.00.

[42] Ms Herbert was subjected to more verbal abuse than the other applicants, and had been threatened more than once that her job was in jeopardy. Ms Herbert's evidence of her hurt and humiliation was palpable. An appropriate award of compensation for Ms Herbert is \$750.00.

Tuwharetoa Ki Kawerau Health Education and Social Services Charitable Trust is ordered to pay to Ms Kohunui, Ms McCorkindale, Mr Niao, Ms Angie Te Riini, and Ms Niao the amount of \$250.00 each, pursuant to s 132(1)(c)(i) of the Employment Relations Act.

Tuwharetoa Ki Kawerau Health Education and Social Services Charitable Trust is ordered to pay to Ms Herbert the amount of \$750.00 pursuant to s 132(1)(c)(i) of the Employment Relations Act.

Payment must be made within 28 days of the date of this determination.

Costs

[43] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If they are not able to reach agreement on the matter of costs, the Applicant's may lodge and serve a memorandum as to costs within 28 days of the date of this determination. The Trust will have 14 days from the date of service to lodge a reply memorandum. No application for costs will be considered outside this time frame without prior leave.

[44] In order to assist the parties with resolving costs themselves, I can indicate (subject to any submissions) that a tariff based approach to costs is likely. In which case the usual starting point would be around \$3,000 (GST inclusive) per day. That figure would then be adjusted in light of the particular circumstances of this case.

Vicki Campbell
Member of Employment Relations Authority