IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 452
5333159

BETWEEN	VARLENE SNELL 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] Varlene Snell says she was dismissed unjustifiably on the ground of redundancy. She also says she is owed payment in lieu of notice and payment for 'additional hours worked by agreement'.

[2] Her former colleagues Hana Merito, Tinaka Merito and Rita Peka 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 Ms Snell's employer throughout and that TRONA does not trade as the Ngati Awa Tertiary Training Organisation.

Varlene Snell's employment

1. Background

[1] *Hana Merito v TRONA and NATTO* [2011] NZERA Auckland 453
Tinaka Merito v TRONA and NATTO [2011] NZERA Auckland 450
Rita Peka v TRONA and NATTO [2011] NZERA Auckland 451

[6] Ms Snell began her employment in 2004. She became an employee of NATTO, and she and NATTO were parties to a written employment agreement dated December 2007. Her position was described in the agreement as programme manager.

[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 Snell'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] 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 Snell's normal hours of work were 40 hours per week.

[9] A written job description also dated December 2007 specified that the purpose of Ms Snell's position was to ensure the effective implementation of the assessment and moderation process. Ms Snell said her duties centred on the computing programme and ensuring NZQA requirements were met. She also said she began developing resources as the literacy facilitator at the end of 2008, then ceased carrying out that role to become a computer tutor when another tutor left towards the end of 2009. She continued as a computer tutor in 2010. None of these changes was reflected in any further written agreement, but I accept they occurred.

[10] Ms Snell holds NZQA certificates in: computing to level 4, which means she is entitled to tutor in computing to level 3; adult education to level 5; and business administration to level 3.

2. The termination of employment

[11] 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.*

[12] As also described in that determination, Mack Ramanui was appointed as training (or general) manager of NATTO commencing in September 2010.

[13] Mr Ramanui met with Ms Snell on 21 September as part of his initial 'meet and greet' with staff members. His evidence was that Ms Snell told him she was the computing level 3 tutor. She told Mr Ramanui she had been experiencing a difficult year in 2010 because of personal issues, but believed she was now performing better. Mr Ramanui said he informed her that funding cuts were likely in 2011, which would mean there would be fewer courses offered and a corresponding reduction in the number of tutors employed. Ms Snell replied that she had also worked as literacy co-ordinator and academic leader, and that she was not comfortable working with students in the classroom.

[14] Ms Snell agreed there was a discussion about her duties, but not that there was a discussion about NATTO's finances or the possibility of fewer courses in 2011. She also denied saying she was not comfortable with students.

[15] 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 indentified in the structure would be the subject of a recruitment process. With reference to factors affecting the tutors' positions there was reference to the anticipated receipt of information about funding for courses in 2011, although details were not available at the time.

[16] Ms Snell was absent on 15 October, when Mr Ramanui presented the proposed new staffing structure. A colleague provided her with a copy of the proposed structure on or about 18 October, and advised that she would be obliged to apply for her job. Ms Snell found unsatisfactory the advice that some staff members would not be required to apply for new positions, believing in particular that she could have applied for a new industry partner co-ordinator's position. However I accept that was an industry-specific position and Ms Snell was not qualified for it.

[17] The proposed structure included two computer tutors' positions and an associated lead tutor's position. It also included youth, forestry and hospitality tutors' and another lead tutor's position. Ms Snell applied for a computer tutor's position together with the associated lead tutor's position. She believed the computer tutor's position was similar to her current role. Beyond that, I note that in a diagram Ms Peka prepared for the purposes of the investigation meeting Ms Snell was described as 'head of academic staff/computer tutor'. I do not accept there is any substance to the 'head of academic staff' element in this title.

[18] Mr Ramanui interviewed Ms Snell for both the lead tutor's and the computer tutor's positions. The interviews were concurrent because Mr Ramanui intended that the tutors choose a lead tutor themselves, although he would decide the matter if no consensus could be reached. It was common ground that the fact Ms Snell had personal difficulties earlier that year was discussed during the interview, and Mr Ramanui commented on the adverse effect of these on her performance.

[19] Ms Snell believed Mr Ramanui's mind was made up about her. For his part Mr Ramanui said Ms Snell raised again her discomfort with classroom duties but said she considered herself qualified for the lead tutor position. He had reservations because that position still required the delivery of courses to students.

[20] Ms Snell denied ever saying she was uncomfortable with students – rather she informed Mr Ramanui that she preferred teaching literacy and numeracy to teaching computing. However Ms Snell's effective recognition that her performance during 2010 had at least caused concern leads me to consider it likely that on at least one occasion she also sought to address or comment on those matters as Mr Ramanui indicated she did.

[21] Other tutors already employed at NATTO applied for the computer tutors' positions, and very little information about the selection process undertaken in making the appointments was available at the investigation meeting. Indeed I would characterise the process as an interview process for recruitment purposes rather than an interview process for the purpose of selecting a person for redundancy. The requirements of these processes are quite different – particularly as the latter incorporates a need to observe a wider range of legal obligations than the former.

[22] It appeared from material provided after the investigation meeting that Mr Ramanui was assessing applicants under the criteria of: qualifications; experience and skills; and performance. There was no detailed rating system, rather comments were made about the applicants under each of these headings and an overall conclusion was reached.

[23] According to the material, the person appointed as lead computer tutor (W) had qualifications including computing to level 3, and was completing another qualification to level 5. Efficiency and understanding of responsibilities were identified under 'relevant experience and skills', with the relatively shorter period as a tutor also being identified. There were also positive comments on W's performance.

[24] One of the two appointees to a computer tutor's position, B, had a qualification in computing to level 2, was identified as a hardworking tutor, and generalised difficulties with her performance were attributed to the lack of guidance she had received in 2010. B had been employed relatively recently. The second appointee, E, had qualifications including computing to level 3, and was completing another qualification to level 5. She was the longest serving tutor, but again generalised difficulties with her performance were mentioned. Those difficulties were attributed the year's 'ups and downs'.

[25] No breakdown of the above kind was available in respect of Ms Snell. When asked about the approach to Ms Snell's application during the investigation meeting Mr Ramanui said he had referred to a set of diary notes prepared by a senior NATTO employee who had stepped in to the extent possible after Marianne Kingi-Merito resigned as general manager earlier in 2010. The notes themselves were also provided after the investigation meeting. They made repeated reference to concerns I summarise as: Ms Snell's absences from work; inability to handle her classes; failure to complete an evaluation report on time; and failures to follow up with students who were not attending classes. The notes also made repeated references to warnings being given to Ms Snell, and included a reference to Ms Snell being advised that other tutors were carrying her workload.

[26] Indeed in an emailed message to Jeremy Gardner, the CEO of TRONA, dated 19 November 2011 Mr Ramanui simply said that Ms Snell would not be returning in

2011 because of her performance. Mr Ramanui had based his conclusion on information of the kind set out in the notes.

[27] By message dated 23 November 2011 Ms Ramanui advised Ms Snell that no offer of employment would be made to her for the 2011 year.

[28] Terminology of that kind suggests Mr Ramanui approached the relationship as if employment agreements were offered on a fixed term basis each academic year, with the employment relationship terminating at the end of a year according to its tenor if no agreement was offered for the following year. From the agreements produced in this investigation it appears all of the relevant fixed term agreements were allowed to continue past their expiry date so that arguably the respective employment relationships could no longer correctly be characterised as fixed term. Since that matter has not been in issue here, I simply observe further that it would probably have been more accurate to advise Ms Snell she was not being offered one of the computer tutor's positions available in the new structure and as a result her employment was to be terminated at the end of 2010 by reason of redundancy.

[29] Mr Ramanui also referred in the 23 November message to the availability of funding. Even if that was an adequate explanation for the disappearance of one computer tutor's position, it does not address the method of selecting the tutor whose employment would end as a result. When Ms Snell asked Mr Ramanui why no offer was being made to her he replied that the decision was based on her performance.

[30] Accordingly Ms Snell's employment ended on 17 December 2010, being 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*[2]. The passages address:

[2] [2006] ERNZ 825

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

. 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 question of genuineness I do not accept the submission that Ms Snell's dismissal was the result of a *'blatant attempt to disguise dismissal for performance as redundancy'*[3] and I do not accept that a question of mixed motives arises. This was not a case in which a redundancy situation was created in order to effect a dismissal when the real or substantial concern was with the affected employee's performance. There was a genuine redundancy situation at NATTO and the restructuring was genuine.

[33] However while I am prepared to accept that the reduction in the number of tutors arose in a genuine redundancy situation, questions remain about the way in which Ms Snell's redundancy was effected.

[34] In general I would find that Ms Snell was not provided with enough information about the proposed restructuring, or opportunity to have input into the proposal or its implementation, to meet the obligation to deal in good faith and in particular to consult with Ms Snell. In addition, in Ms Snell's circumstances there is a particular question of whether her selection as the tutor who would lose her position was fair and reasonable, and whether concerns about her performance were unfairly taken into account in making the selection.

[35] Obligations under the duty of good faith in s 4(1A) of the Employment Relations Act as they arise in the process of selection for redundancy were discussed by the Employment Court in *Jinkinson v Oceana Gold (NZ) Limited*[4]. The court referred to the employer's failure to inform candidates who were existing employees of the criteria for selection and the weight to be applied to those criteria. As a result the employees concerned did not have an opportunity to comment on that information prior to the selection decisions being made. The court also pointed to the employer's

[3] Ref: *Farmers Transport Limited v Kitchen* (unreported Shaw J, 14 December 2006, WC 26/06)
[4] [2010] NZEMPC 102

adverse view of certain of the aggrieved employee's skills, pointing out that the employee was not told of that view or that the future of her employment turned on it. Again the employee did not have an opportunity to comment.

[36] These were the key deficiencies leading to the court's finding that the selection process was flawed and unfair and the dismissal unjustified in that case.

[37] Although concerns about her performance were raised with Ms Snell in what on the evidence at the investigation meeting was a limited and generalised way, I find that materially the same deficiencies were present here. Otherwise neither party gave a full and detailed account of their conversation, although Ms Snell alleged that Mr Ramanui made notes during its course.

[38] It is not clear whether such notes exist, but I required their production and they were not produced. The notes whose existence Mr Ramanui acknowledged were those made by the senior staff member. It was clear that Mr Ramanui relied on the matters raised in the notes, and did not raise the contents or his reliance on them to Ms Snell or allow her an opportunity to respond.

[39] Those actions lead me also to consider it likely that Ms Snell's perception that Mr Ramanui had already made up his mind about her was accurate.

[40] For these reasons I find Ms Snell's dismissal was unjustified.

[41] After the investigation meeting I sought the parties' comments on re-framing grievances with reference to the approach the Employment Court had taken in *Simpsons Farms Limited v Aberhart.* Because of the above findings Ms Snell's circumstances differed from those of Hana Merito, so that there is no need to consider re-framing Ms Snell's grievance.[5]

Remedies

1. Reinstatement

[5] See discussion at [69] and following in *Hana Merito v TRONA and NATTO*

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

[43] 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

[44] The suggested order had Ms Snell last. However Ms Snell was made redundant from a tutor's position. For the purpose of reinstatement the appropriate enquiry in the first instance concerns whether it is practicable to reinstate her to her former position as computer tutor or to a position no less advantageous.

[45] I am not satisfied there is a position no less advantageous to Ms Snell to which she could be reinstated. As for reinstatement to a computer tutor's position, Ms Snell herself expressed to Ms Ramanui a preference for a different position and I have accepted that she indicated reticence when it came to dealing with students directly. Secondly, an order for Ms Snell's reinstatement to a tutor's or indeed any position would either displace one of the incumbents or create a position which is surplus to NATTO's needs. That would be unduly disruptive to an organisation the size of NATTO.

[46] For these reasons I find reinstatement is not practicable and reinstatement is declined accordingly.

2. Reimbursement of lost remuneration

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

[48] Here I am unable to make a finding on whether Ms Snell would have been ranked last even if a fair and reasonable selection process had been embarked upon, so

I am unable to say that she would have lost her employment by reason of redundancy in any event. This is particularly so because performance issues had been noted in respect of two of the appointees, as well as with Ms Snell. Although generalised explanations of those concerns were provided at the time, there was no basis on which I could find those explanations adequate while Ms Snell's – namely the personal difficulties she was experiencing – was not.

[49] Further, an important and relevant factor in any selection process is a consideration of the respective qualifications of those seeking particular positions in a restructured organisation. Ms Snell's qualifications were superior and should at least have been taken into account in her favour. There was sufficient difference between the respective qualifications of the applications to add to the uncertainty about the likelihood of Ms Snell's redundancy even if a fair and reasonable selection process had been followed.

[50] For these reasons I find Ms Snell has lost remuneration as a result of her personal grievance.

[51] As to the quantification of the loss, Ms Snell was paid at the rate of $18 per hour for a 40 hour week. Her gross weekly earnings were $720. She is obliged to attempt to mitigate her loss, and says she has applied for alternative positions but has been unsuccessful.

[52] 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 Snell 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.

[53] 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.

[54] In that Ms Snell did indicate reticence in relation to her commitment to the positions for which she was applying, I find that she contributed to the circumstances leading to her personal grievance.

[55] I therefore reduce by 15% the amount I would otherwise have awarded.

[56] Accordingly I calculate Ms Snell's loss as follows:

13 weeks x $720/week = $9,360
$9,360 – (15% x $9,360) = $7,956

[57] NATTO is ordered to reimburse Ms Snell for remuneration lost as a result of her personal grievance in the sum of $7,956.

3. Compensation for injury to feelings

[58] Ms Snell suffered injury to her feelings as a result of her personal grievance. The knowledge that she had 'missed out' on a tutor's position was hurtful and embarrassing.

[59] In setting a suitable amount by way compensation for this injury I take into account the evidence of injury, the mix of remedies awarded to Ms Snell, 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.

[60] On balance, I do not consider a substantial order for the payment of compensation to be called for. Commencing with a figure of $2,000 and reducing it to reflect Ms Snell's contribution, I order NATTO to compensate Ms Snell in the sum of $1,700 for injury to her feelings.

Claim for monies owing

[61] Ms Snell seeks payment in lieu of notice and payment for 9 days' alternative holidays not taken.

1. Payment in lieu of notice

[62] Ms Snell 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.

[63] Nevertheless Mr Ramanui advised her in the message dated 23 November that she would not be offered employment for the following year. Ms Snell was aware before December that her employment was to end at the end of the academic year. There was no doubt or uncertainty about that. I find there was sufficient information available to Ms Snell to amount to notice of termination, and that the information was available in sufficient time to provide her with at least 14 days' notice of the termination.

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

2. Payment for 'alternative holidays not taken'

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

> *Annual leave due: 274 hours, alternative holidays due:9 days*

[66] Ms Snell seeks payment of 9 days' wages in reliance on that entry. She did not provide any information about the dates when the associated work was done.

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

Summary of orders

[68] NATTO is ordered to pay to Ms Snell:

i. $7,956 as reimbursement of remuneration lost as a result of her personal grievance; and

ii. $1,700 under s 123(1)(c)(i) of the Employment Relations Act

Costs

[69] Costs are reserved.

[70] 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.

[71] 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