IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2011] NZERA Auckland 453
5331757

BETWEEN	HANA 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] Hana Merito says she was dismissed unjustifiably on the ground of redundancy. She also says she is owed payment in lieu of notice and payment for 16 hours' 'additional hours worked by agreement'.

[2] Her former colleagues Tinaka Merito, Rita Peka and Varlene Snell 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 raised a concern in all four employment relationship problems about whether the firm of Robinson Law is authorised to represent both respondents in the Authority. The concern was based on a fear that the determination of the Authority may not be enforceable if there is a subsequent challenge to counsel's authority to represent a respondent. Mr Austin said he seeks a determination of the Authority that will be 'enforceable in any jurisdiction'.

[4] Mr Austin submitted that s 236 of the Employment Relations Act 2000 is 'the relevant standard to be applied within the jurisdiction of the Employment Relations Authority'. I take that as a reference to s 236(3), which reads:

> *Any person purporting to represent any employee or employer must establish that person's authority for that representation*

[5] In reliance on that provision Mr Austin has said repeatedly that he required proof of Robinson Law's authority, to which Ms Humphrey has replied repeatedly advising that her firm was instructed by both respondents. The matter was raised again during the investigation meeting and again in submissions. During the investigation meeting Ms Humphrey again confirmed that Robinson Law had instructions and was authorised to represent both respondents in the Authority, doing so in the presence of both the CEO of Te Runanga o Ngati Awa (TRONA) and the chairman of the Ngati Awa Tertiary Training Organisation Trust (NATTO).

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[1] *Tinaka Merito v TRONA and NATTO* [2011] NZERA Auckland 450
Rita Peka v TRONA and NATTO [2011] NZERA Auckland 451
Varlene Snell v TRONA and NATTO [2011] NZERA Auckland 452

[6] Mr Austin's particular concern was with the possibility of an inability to enforce any order the Authority made against NATTO, on the ground that its lawyers were not authorised to represent it in the Authority. His insistence on proof of authority to represent was such that I asked at the investigation meeting whether there was a factual basis for concern about Robinson Law's instructions, or for the fear that its authority to represent NATTO may later be challenged, or that any order against NATTO would be unenforceable.

[7] No such factual basis was offered, either by Mr Austin or any of the applicants. There was ample opportunity to do so, not least because various family connections between the trustees and the applicants meant relevant information could have been made available if it existed and because several weeks before the investigation meeting Mr Austin had provided the trustees with copies of the material being produced to the Authority by the applicants. If, for example, there was a material issue between the trustees about whether Robinson Law was to be instructed to represent NATTO, this could and should have been brought to the Authority's attention. Nothing of this kind has occurred.

[8] Further, although an affidavit of Marianne Kingi-Merito, a trustee of NATTO and its former general manager, noted a lack of properly constituted meetings of trustees prior to early 2010 Ms Kingi-Merito gave oral evidence that she had no reason to believe any trustee would question Robinson Law's authority to represent NATTO. Moreover she was not able to say whether there were properly constituted meetings later in 2010 and in 2011, or to comment on whether the instruction of Robinson Law to represent NATTO in the proceedings in the Authority was discussed during these later meetings. Accordingly her evidence did not assist.

[9] I accept that Robinson Law is authorised to act for both respondents.

Identity of the employer

[10] Another preliminary matter arising in respect of all four employment relationship problems concerned the identity of the employer. The applicants said

they were employed originally by NATTO, but that TRONA assumed the role of their employer no later than 25 October 2010.

1. Background

[11] TRONA is a body corporate under the Te Runanga O Ngati Awa Act 2005, established to receive and administer on behalf of Ngati Awa the settlement negotiated with the Crown under the Treaty of Waitangi. To that end TRONA holds and administers assets in accordance with its charter. The charter specifies that the purposes of the Runanga are to receive, manage and administer the assets on trust for the relief of poverty, the advancement of education or religion or any other object or purpose that is beneficial to the Ngati Awa community.

[12] TRONA had offered private training courses, and the documentation indicates it had traded as Ngati Awa Tertiary Training Organisation for that purpose. However NATTO was registered as a charitable trust in September 2006, with the initial trustees being appointed by the Ngati Awa iwi. According to its trust deed NATTO provides tertiary education firstly to iwi of Ngati Awa, with an emphasis on those who have not succeeded in mainstream education.

[13] Thereafter NATTO administered the provision of private training courses independently and through its own board of trustees. It was registered as a Private Training Enterprise (PTE) by the New Zealand Qualifications Authority (NZQA) in 2007. TRONA ceased trading as Ngati Awa Tertiary Training Organisation and formally transferred its responsibilities for the provision of private training services to NATTO in or about 2008, under a memorandum of understanding setting out the respective obligations of NATTO and TRONA. Although the two entities were separate it was a term of the memorandum that TRONA would provide advice and support to NATTO, including in the development of infrastructure and resources. For its part NATTO would work towards the education and training goals identified by TRONA, and provide annual reports on progress.

[14] At the times relevant to the present employment relationship problems NATTO was offering courses in computing and forestry skills, as well as support programmes for young people at risk. It obtained funding on its own account and was not funded by or through TRONA. Programmes for young people at risk were

funded by the Ministry for Social Development (MSD), while the remaining programmes were funded by the Tertiary Education Commission (TEC).

[15] In or about early 2010 the chairman of NATTO's board of trustees (the chairman) was approached by NATTO staff members expressing concern about the operation of the trust and raising a number of complaints about a variety of matters. Some of the staff members were also trustees themselves. A series of discussions followed. As increasingly serious issues were identified Ms Kingi-Merito commenced a period of leave in or about April, leading to her notice of resignation in or about May 2010 and the termination of her employment in June 2010.

[16] NATTO's financial position was of particular concern. It was discovered among other things that no financial accounts had been kept for the preceding three years. The staff were unable to rectify the problems or deal with the financial management of the trust. Considerable time has since been expended in attempting to locate records and prepare the accounts. Further, substantial sums were found to be owed to creditors.

[17] By letter to TRONA dated 1 April 2010 the chairman recorded that the trustees had recently become aware of significant management and staffing issues which could impact severely on NATTO's ability to continue to provide its programmes. He requested assistance in respect of its financial and trustees' liabilities, as well as human resource expertise. It was clear that assistance was necessary.

[18] Jeremy Gardiner, TRONA's CEO, offered to assist on an interim basis. In a memorandum to the NATTO staff dated 6 May 2010 the chairman advised that Mr Gardner had been appointed to review NATTO's financial position and report to the board. Some of the applicants denied seeing that memorandum, but I consider it more likely that the denials were based on a lack of recollection.

[19] In addition an independent human resources consultant was appointed to review and report on a number of employment-related issues which were relevant to NATTO's difficulties at the time. The report, dated 21 May 2010, concluded in part that the situation at NATTO was very serious, required urgent intervention and would take time and extra resources to rectify.

[20] After Ms Kingi-Merito resigned Mr Gardiner continued to provide assistance pending the recruitment of a new general manager. Hana Merito and her colleagues say Mr Gardiner exercised full day to day management control. Since no existing staff member was able to carry out that role - and the intention was that NATTO continue to operate as a PTE in its own right - such a level of involvement on the part of someone was necessary and inevitable.

[21] In her evidence Tinaka Merito discussed in more detail the nature of the oversight Mr Gardiner exercised during this period. She did so when discussing why she believed her job was to disappear, and I address the evidence in that context in the determination of her personal grievance. For present purposes I find the activity she described was consistent with the provision of the assistance NATTO required in the circumstances it faced, but did not mean TRONA became the employer. TRONA was exercising its statutory role, observing its obligations to NATTO under the memorandum of understanding, and observing obligations to the Ngati Awa iwi.

[22] Mack Ramanui was appointed to the general manager's position in August 2010, although his job title was training manager. His employer was NATTO. He took over the day to day management of NATTO on the commencement of his employment.

[23] In further support of their view that TRONA became the employer, Hana Merito and her colleagues pointed out that TRONA paid their wages from about November 2010.

[24] The evidence concerning the termination of Tinaka Merito's employment suggested that the transfer to TRONA of the payroll function was made at Mr Ramanui's request in association with that termination. I return to that matter in the determination of Tinaka Merito's personal grievance. In addition, commencing in or about November funds for the payments themselves also came from TRONA, but were to be repaid when NATTO was able to do so. This has since occurred, and NATTO resumed making wage and salary payments from its own funds in April 2011.

[25] Hana Merito and her colleagues also said that, even after Mr Ramanui's appointment, Mr Gardiner continued to authorise the payment of accounts. Both Mr Ramanui and Mr Gardiner denied this, saying Mr Ramanui authorised the payments although records were provided to TRONA. Robyn Noema, TRONA's accounts manager, said she maintained a spreadsheet and prepared a schedule of payments acting on Mr Ramanui's authorisation. Records were provided in support, and I accept the respondents' evidence.

[26] NATTO's situation remained serious later in 2010.

[27] By letter dated 17 November 2010 the Charities Commission advised of NATTO's removal from the charities register because of the failure to file annual accounts in respect of the years ending December 2008 and December 2009. The Commission had warned of its intentions in a letter dated 12 October 2010, and given NATTO until 11 November 2010 to file the returns.

[28] By letter dated 15 November 2010 NZQA gave NATTO an extension of time from 8 November 2010 to 8 January 2011 to complete and provide its annual accounts. Failure to provide the accounts would mean NZQA would cancel or impose conditions on NATTO's registration as a training establishment.

[29] The redundancies with which the personal grievances are concerned were also effected in November 2010, at least ostensibly by Mr Ramanui. In support of their view that TRONA was the true employer Ms Merito and her colleagues pointed to emailed exchanges between Mr Gardiner and Mr Ramanui during the associated restructuring process at NATTO. Those exchanges raise other issues in respect of the merits of some of the grievances, and I address them in that context in the relevant determinations. For present purposes I do not accept that they are evidence of any more than NATTO's and Mr Ramanui's continued need for support and assistance from TRONA while NATTO's difficulties were addressed and its affairs put in order.

2. Determination of the identity of the employer

[30] The applicable approach is as follows:

> *[22] The question of who was the employer must be determined as at the outset of the employment. If that changed during the course of the employment there must be evidence of mutual agreement to that change.*[2]

[31] It was common ground that NATTO was the employer at the outset of all four employment relationships. The applicants' argument that TRONA became the employer does not rely on any express agreement between any of the parties to that effect. Rather it relies on a construction of the following actions in particular:

. direct payments of wages and salary by TRONA; and
. Jeremy Gardiner's involvement in management decisions up to and including the decisions on the redundancies.

[32] Although NATTO was experiencing severe management and financial difficulties, it continued to offer courses it had contracted with funders to provide, and there was nothing to suggest any attempt was made to have those contracts or any benefit under them assigned to TRONA. Students continued to attend the courses. In other words NATTO continued to conduct its business in its own name. Further, it continued to require staff for that purpose and the staff in turn continued to carry out the associated duties.

[33] NATTO's financial difficulties meant that by November 2010 it could not pay the staff and other creditors from its own funds. However, in the circumstances as I have found them, I do not accept the arrangement under which TRONA funded wage and salary payments amounted to one in which TRONA took over the role of the employer party in the respective employment relationships. There was no agreement between TRONA and NATTO to that effect, nor any such agreement between TRONA and the employees. The arrangement went no further than ensuring the staff were paid while NATTO carried out its business, and TRONA was eventually repaid the funds it advanced.

[34] As for Mr Gardiner's involvement in management decisions, Ms Kingi-Merito's absence and subsequent resignation left NATTO without anyone to perform the general manager's functions. There was an associated vacancy which had to be filled. I do not accept that the mere fact of Mr Gardiner's filling of it on an interim

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[2] *Mehta v Elliott (Labour Inspector)*[2003] 1 ERNZ 451, 458

basis meant TRONA became the employer, particularly as the permanent vacancy was advertised and filled by Mr Ramanui as an employee of NATTO. Thereafter, aside from continuing work by TRONA in providing accounting support and getting NATTO's financial accounts in order, Mr Ramanui took over the day to day management of NATTO.

[35] Otherwise the concerns about Mr Gardiner's involvement in management decisions were vaguely stated. To the extent the concerns were particularised they centred on concerns of the kind expressed by Tinaka Merito, and the matters arising from the emailed exchanges between Messrs Gardiner and Ramanui during the restructuring process. I have set out my findings on those matters.

[36] For these reasons I conclude that, although it was being supported by TRONA while its difficulties were addressed, NATTO remained the applicants' employer.

Hana Merito's employment

1. Background

[37] Hana Merito and NATTO were parties to a written employment agreement dated August 2009, which is approximately when Ms Merito's employment began. Ms Merito's position title was administration clerk – young achievers programme. The programme was offered for the first time in mid-2009, and was intended for young people aged 14 – 17 who were considered at high risk. It provided courses in, for example, personal life skills, literacy and numeracy, and transition to work or further education. At any one time 10-15 students would be enrolled in young achievers courses.

[38] According to clause 3.1 of the employment agreement, the employment agreement was to commence on 10 August 2009 and end on 30 July 2010. The reason for the apparent fixed term was expressed to be a contractual agreement with the MSD, which in the event was rolled over for another year. No issue has arisen in respect of the ostensibly fixed-term nature of the relationship.

[39] Ms Merito's activities included recording enrolments, reporting to the MSD and the NZQA on outcomes including credits obtained, and liaising with the police youth aid service and local schools.

[40] 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.* Normal hours of work were 36 hours per week.

2. The termination of employment on the ground of redundancy

[41] Mr Ramanui commenced his employment on 20 September 2010, although he already had an indication of the nature of NATTO's problems and on an informal basis had carried out some preliminary preparation for addressing them. However he also said he found when his employment started that: there was no operating budget; essential classroom resources were lacking; expenditure was greater than income; no audited financial accounts had been provided in 2008 and 2009; as a result of the lack of financial accounts NATTO faced losing its charitable status and was on the verge of being de-registered as a PTE; and NATTO had a backlog of creditors. He concluded changes needed to be made immediately.

[42] Mr Ramanui's background included several years in a management position in a PTE of a similar size to NATTO. That experience caused him to form a preliminary view of the changes NATTO was likely to require. In addition, as a result of his previous employment he already had some information about the general direction of funding changes for courses to be offered in 2011.

[43] He also embarked on a 'meet and greet' process with the staff on the commencement of his employment, and to that end said he met with Ms Merito on 21 September. He asked her how long she had worked for the trust, and what her role and responsibilities were. She told him she was the administrator for the young achievers course, and that three tutors worked on the course. That meant there were 3 – 5 students per tutor, while in Mr Ramanui's experience a suitable ratio was 10 students per tutor.

[44] Mr Ramanui said he advised Ms Merito that he believed her activities duplicated those of Rita Peka, who administered the computer and forestry courses funded by the TEC and with whom he had already spoken. In evidence he said he told Ms Merito he was considering a merger of those roles. Ms Merito agreed that her position and duties were discussed, but not that there was any further discussion about a merger of her role and Ms Peka's.

[45] By email message dated 14 October 2010 Mr Ramanui circulated an agenda for a staff meeting to be held on 15 October. Attached to the agenda was a document headed 'NATTO organisation review' which set out a staffing structure Mr Ramanui proposed for 2011. The agenda itself noted a number of matters for discussion, and the restructuring was far from being the sole item on it.

[46] NATTO had 70 students enrolled at the time, and Mr Ramanui concluded with good reason that NATTO was overstaffed. The existing positions included: 6 full time positions (including the general manager's) and a casual position which I would describe as administrative; 7 teaching positions comprising one literacy and numeracy tutor, 4 computer tutors, a forestry tutor and a REAP contractor; and 3 people who carried out various driving, cleaning and caretaking duties. In addition to the overstaffing he identified Mr Ramanui was aware of NATTO's financial status, and while it was not yet certain which courses would be funded for the following year he also took such information as was available into account in his planning.

[47] Subject to confirmation of funding the new administrative and teaching positions were to include Mr Ramanui's position, one full time systems co-ordinator and one full time information liaison position, and a part time administration assistant. Cleaning and caretaking duties were to be contracted out. The teaching positions were to comprise two lead tutors and 6 full time tutors. Of those there were to be two youth tutors, a forestry tutor, two computer tutors and a hospitality tutor. There was also to be an 'industry partner co-ordinator'. The forestry and hospitality tutor's positions never became part of the establishment and are not relevant here.

[48] The staff meeting duly went ahead on 15 October. Mr Ramanui gave an account of NATTO's financial situation, having advised the size of the financial deficit in the previous day's message. He explained the reasons for the structure he

was proposing, with particular reference to the need to eliminate the duplication of roles. He intended that the new positions be the subject of a recruitment process, and that staff who chose not to apply for a position, or whose applications were not successful, would face redundancy. New job descriptions were to be available the following week.

[49] Mr Ramanui indicated that he would be available that day to speak with anyone who wished to discuss the new structure.

[50] He spoke with Ms Merito at the end of the meeting. According to Mr Ramanui, Ms Merito expressed surprise that her position was not being retained. Mr Ramanui informed her that her duties would be incorporated in the new 'information liaison' position, and invited her to apply for the position.

[51] Mr Ramanui said he had another meeting with Ms Merito on 19 October, during which he informed her that her position would be made redundant at the end of the year and encouraged her to apply for both the information liaison position and the administration assistant position.

[52] Ms Merito denied having the 19 October conversation. There were several examples in the four employment relationship problems of conversations alleged by one party to have occurred, but denied by the other. There were inaccuracies in the evidence of both parties on the timing of some of the meetings, as well as of the mattes discussed during them, so that I cannot say in a general way that I prefer the evidence of one party over the other when such conflicts arise. On this occasion the circumstances suggest that Mr Ramanui's is the more likely account so I accept it.

[53] At a general staff meeting on 19 October Mr Ramanui advised that the new job descriptions would be available by 22 October. Following a delay the job descriptions were made available on or about 4 November. Mr Ramanui also advised on 19 October that all of the positions in the new structure were available except: his own; the cleaning and caretaking position; the systems co-ordinator's position; and the industry partner co-ordinator's position. The applicants have complained about statements Mr Ramanui is alleged to have made regarding a REAP appointment in association with the availability of new positions but the appointment is not relevant

to their circumstances, has not given rise to any loss to any of them, and I do not take the matter any further.

[54] Otherwise the systems co-ordinator position was not available because Mr Ramanui considered it a key position which needed to be filled by someone who was able to perform the duties immediately without requiring training. There was one staff member capable of meeting that requirement. The industry partner's position was not available because it related expressly to an arrangement with the forestry industry. There was one staff member appropriately qualified for that position.

[55] Ms Merito did not apply for a new position. Of the positions for which she could have been qualified, she considered the information liaison position to be Rita Peka's position. Moreover she and Ms Peka had discussed the structure Mr Ramanui presented on 15 October, and agreed that only Ms Peka would apply for the information liaison position. On Ms Merito's account when Ms Peka became aware another employee was applying for the information liaison position she indicated to Ms Merito that she might apply for the part time administration assistant's position. As a result Ms Merito decided not to apply for that position either.

[56] In addition Ms Merito said she concluded from the position description that she did not have the necessary qualifications or experience for the information liaison position. Indeed she said she had never worked in a position like her own before. She also believed that Ms Peka was better qualified for the administration assistant's position. Those were probably realistic assessments.

[57] On the morning of 9 November Mr Ramanui told Ms Merito he had noticed there was no application from her and asked why. She replied that she did not want to apply. The discussion went no further. The end result was that MS Merito did not apply for, and was not appointed to, any of the new positions.

[58] In December Ms Merito approached WINZ for assistance in respect of her pending lack of employment. Her employment terminated on 17 December 2010, at the end of the academic year.

Whether the dismissal was justified

[59] Since Ms Merito's employment was terminated before the coming into force of the Employment Relations Amendment Act 2010, which substituted a new s 103A in the Employment Relations Act 2000, I apply the approach set out in *Simpsons Farms Limited v Aberhart.*[3].

[60] There the Employment Court summarised earlier case law regarding an employer's obligation to consult with an employee who may be affected by a redundancy, as well as discussing the effect on redundancy dismissals of s 103A of the Act. It pointed out that s 4(1A) of the Act – which detailed aspects of the statutory obligation to deal in good faith – included requirements that an employer proposing to implement redundancies provide to the affected employees access to information about the proposal, and an opportunity to comment on it, before the decision is made. Although an employer is entitled to have a working plan in mind, mere prior notification of a proposal was not sufficient and consultation must be a reality, not a charade. The obligation to consult does not, however, extend to a requirement that the consent or agreement of the employee consulted be obtained.

[61] The court concluded:

> *"[65] Following the new s 103A, the Authority or the Court must consider on an objective basis whether the decisions made by the employer, and the employer's manner of making those decisions, were what a fair and reasonable employer would have done in all the circumstances at the relevant time. The statutory obligations of good faith dealing and, in particular, those of s 4(1A)(c) inform the decision under s 103A about how the employer acted. A fair and reasonable employer must, if challenged, be able to establish that he or she has complied with the statutory obligations of good faith dealing in s 4 including as to consultation because a fair and reasonable employer will comply with the law."*[4]

[62] I refer to the following additional comment in *Aberhart*:

> *"[67] … So long as an employer acts genuinely and not out of ulterior motives, a business decision to make positions or employees redundant is for the employer to make and not for the Authority or the Court, even under s 103A."*

[3] [2006] ERNZ 825
[4] P 842

[63] These passages address in particular:

> . the employer's right to make business decisions making 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, and in particular to comply with the statutory obligation to deal with the employee in good faith.

[64] Regarding the genuineness of the redundancy Ms Merito believes her position was disestablished because she is Ms Merito-Kingi's daughter. That was not the case. Not only was NATTO in dire financial circumstances and plainly overstaffed, it was also plain that there was unnecessary duplication between Ms Peka's and Ms Merito's positions. Beyond that, the decision not to attempt to secure an appointment to a restructured position was entirely Ms Merito's own. The redundancy situation affecting Ms Merito's position was genuine.

[65] Regarding the obligation to deal with an employee in good faith, including engaging in a consultation process, Mr Ramanui obtained information in his 'meet and greet' discussions with Ms Merito and the others which assisted him to decide on how to restructure the organisation, although by a small margin I consider it likely that the relevant exchanges did not go any further. I do not in any event consider the discussions were structured enough to amount to clear advice to the employees concerned that restructuring was being considered and why, and that their input into that decision was being sought. Mr Ramanui did not offer the affected employees access to information about the proposed structure or an opportunity to comment on the matter before the meeting of 15 October.

[66] Reliance was also placed on the discussions during the 15 October staff meeting. On the evidence, the approach to the 15 October meeting was to treat the discussion as a briefing, rather than as an opportunity for the exchange of information and for the employees to provide input. Further, there was no detailed discussion of how the proposed structure had been arrived at and job descriptions had not been prepared. Beyond the information about NATTO's financial deficit, no supporting information was provided.

[67] Finally I do not accept that any real consultation followed the 15 October meeting. Rather Mr Ramanui prepared the position descriptions, there were discussions in some cases including Ms Merito's of whether applications for new positions would be made, and recruitment began.

[68] The Employment Court found in *Simpson's Farms* that Mr Aberhart's dismissal was substantively justified in that his position was superfluous to his employer's needs (as I would find in Ms Merito's case), but the approach to consultation meant Simpson's Farms Limited had not acted as a fair and reasonable employer would have. The court went further to note that Mr Aberhart's grievance had been framed as an unjustified dismissal. After asking the parties to address the possibility of reframing the grievance pursuant to s 122 of the Act the court found there was an unjustified disadvantage grievance in respect of the failure, and replaced the Authority's finding of unjustified dismissal with that finding.

[69] After the investigation meeting I referred the parties to that aspect of the court's decision and sought their comment on whether the approach embodied in the relevant passage could be applied in these employment relationship problems.

Disadvantage or dismissal grievance

[70] In responding counsel for NATTO drew attention to the 90-day period for raising a grievance set out in s 114 of the Act. I am mindful of that provision, but do not believe it prevents re-framing of Ms Merito's grievance. In particular, Ms Merito's grievance was raised by letter dated 20 December 2010, and was in time. The letter said the termination of Ms Merito's employment was unjustified, but did not expressly raise a grievance on the ground of unjustified disadvantage. It did, however, centre on the lack of consultation as the reason why the dismissal was unjustified. Since the matter of lack of consultation was the core concern in respect of the justification for the termination of Ms Merito's employment - at least when the grievance was raised with the employer - it is open to me to reframe the grievance so raised as one of unjustified disadvantage.

[71] This conclusion should not be applied in support of a practice under which grievances are raised in documents containing a discursive account of an employee's

often numerous concerns, and ending with the broad assertion that the employee has a disadvantage grievance. That practice is unhelpful. The difference here is that the particular concern regarding the adequacy of the consultation process was central, and was raised with the employer in a grievance context.

Whether there was an unjustified disadvantage

[72] I turn to whether Ms Merito's employment was affected to her disadvantage by an unjustified action of her employer's, in terms of s 103(1)(b) of the Act.

[73] While the failure to consult was an unjustified action of the employer's, I find also that Ms Merito was not disadvantaged by the failure. NATTO's employees were aware of and had been attempting to work through its difficulties for several months; NATTO was a small organisation; the duplication between Ms Merito's and Ms Peka's positions was obvious; and neither Ms Merito nor Ms Peka sought to suggest otherwise. Further, neither of them has questioned the suitability of merging the positions. Finally the size of the organisation, and Ms Merito's qualifications and experience, meant there was no realistic prospect of identifying an alternative for her at NATTO. Again Ms Merito has not sought to suggest otherwise.

[74] An essential element of a 'disadvantage grievance' is missing. Ms Merito's circumstances do not fall within the statutory definition of personal grievance.

Claim for monies owing

[75] The statement of problem included a claim in respect of wages underpaid, which has since been resolved. The remaining claims are for payment in lieu of notice and for payment in respect of an entitlement to payment for 'alternative holidays not taken' as at the date of termination of employment.

1. Payment in lieu of notice

[76] Ms Merito 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.

[77] NATTO relied on the various statements Mr Ramanui made to Ms Merito to the effect that her position would be made redundant at the end of the year.

[78] Ms Merito should have been given formal written notice of the termination of her employment. Mr Ramanui could not rely on any assumption that, for example, her employment terminated according to its terms at the end of each academic year and was subject to an offer of re-employment for the following year. While the sole written agreement between NATTO and Ms Merito appeared to comply with s 66 of the Employment Relations Act in respect of the fixed term specified in it, Ms Merito's employment did not end in accordance with that term and instead was rolled over. No further fixed term arrangement was entered into.

[79] Nevertheless Ms Merito was aware before December that her employment was to end at the end of the academic year on the ground that her position would no longer exist. There was no doubt or uncertainty about that. I find there was sufficient information available to Ms Merito 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.

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

2. Payment for 'alternative holidays not taken'

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

> *Annual leave due: 147 hours, alternative holidays due: 2 days*

[82] Ms Merito seeks payment of two days' wages in reliance on that entry. She said the two days in question were worked on a weekend when she was assisting to move offices, although she was unable to provide any further indication of when that occurred.

[83] There was also a difficulty with the reliability of that record. There were no other payslips containing such a record, and no evidence that the work for which Hana Merito claims payment was entered into NATTO's MYOB system at all until Tinaka Merito made the relevant entry in September 2010. Tinaka Merito said she made the entry because she was otherwise unable to generate a report. This answer begs the question of the basis on which the entry was made.

[84] To investigate that matter further extensive efforts were made to locate the source timesheet(s) recording the work done – or otherwise explaining the basis for the September 2010 entry. The efforts were not successful.

[85] I find the vagueness of this claim unsatisfactory. It seems to rely only on the entry at the foot of the payslip, in circumstances that are also unsatisfactory.

[86] A final difficulty concerns the precise nature of the payment intended. It was identified on the payslip as a payment for 'alternative holidays due'. That terminology suggests an arrangement that extra work done be compensated by some form of time off in lieu - presumably of overtime. There was no provision in the employment agreement for paid time off in lieu, let alone for a payment on the termination of employment in respect of such time off accumulated but not taken. Instead clause 6 seems to pre-empt such a prospect. Ms Kingi-Merito's broad assertions that she authorised paid time off in lieu were not sufficient to address those difficulties.

[87] For the above reasons I decline to make the order for payment sought.

Costs

[88] Costs are reserved.

[89] 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.

[90] 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