

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 287  
5319740

BETWEEN

KARILYN TE RIINI  
Applicant

AND

TUWHARETOA KI  
KAWERAU HEALTH  
EDUCATION AND SOCIAL  
SERVICES CHARITABLE  
TRUST  
Respondent

Member of Authority: Vicki Campbell  
Representatives: Alan Taylor for Applicant  
Steve Franklin for Respondent  
Investigation Meeting: 13 and 14 April 2011  
Submissions Received: 9 May 2011  
Determination: 5 July 2011

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**DETERMINATION OF THE AUTHORITY**

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- A Ms Te Riini has suffered a personal grievance as a result of her unjustified suspension and is to be paid the sum of \$5,000.**
- B Ms Te Riini has established that the Trust acted in breach of its obligations of good faith.**
- C The Trust is ordered to pay a penalty of \$3,000. Half the penalty is to be paid to Ms Te Riini.**
- D Costs are reserved.**
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[1] Ms Karilyn Te Riini was employed by Tuwharetoa Ki Kawerau Health Education and Social Services Charitable Trust (the Trust) as its Chief Executive Officer (CEO). When this matter was originally lodged in the Authority the relationship between the parties was ongoing but it has since ended.

[2] Ms Te Riini claims her employment was affected to her disadvantage by unjustifiable actions of the Trust, and that the Trust has breached its obligation of good faith. The Trust denies Ms Te Riini's claims.

[3] The issues for determination are:

- Was Ms Te Riini's employment or 1 or more conditions of her employment affected to her disadvantage by an unjustifiable action of her employer?
- If so, what, if any, remedies should be awarded?
- Has there been a breach of good faith?

### **Background**

[4] Ms Te Riini had been employed by the Trust for seven years when, in 2004 she was appointed as CEO for the Health Centre run by the Trust and based in Kawerau. Ms Te Riini reported to the Trust Board. At the time the incident leading to this investigation meeting occurred Ms Helen Savage was the Trust's Chairperson.

[5] Since 2009 the employment relationship between these parties has encountered some difficulties. In July 2009 Ms Te Riini raised a personal grievance contending that the Trust's Board, in particular Ms Savage was interfering in the day to day management of the Health Centre and failing to respect Ms Te Riini's position as CEO.

[6] At the time there had also been a physical confrontation between Ms Te Riini and Ms Savage for which Ms Savage was formally warned by Police. The parties participated in mediation, however no agreement or outcome was achieved and no record of settlement was entered into. Ms Te Riini has not lodged a statement of problem with respect to the issues arising from the incident in 2009, however, she

does rely on those events to support her contention that the Trust has failed to ensure her health and safety at work.

[7] Ms Te Riini says that following mediation the relationship problems between herself and the members of the Trust Board continued to escalate. In particular her relationship with the Trust's Chairperson deteriorated significantly.

### **The incident**

[8] On 1 September 2010 Ms Savage attended the workplace at or about 12.30pm. On the two previous days Ms Savage had left two demanding voice mail messages for Ms Te Riini which threatened Ms Te Riini with a warning if documentation Ms Savage required was not made available. Ms Savage also warned Ms Te Riini that if Ms Te Riini was not available at the appointed time of 10.00am to meet with her, Ms Te Riini would be considered insubordinate and would receive a warning.

[9] Ms Te Riini was on sick leave at this time, although the Trust Board was unaware of this. In any event, as events transpired, Ms Te Riini attended work at the appointed time however, Ms Savage, herself, was two and a half hours late. It is notable that she did not make any contact with Ms Te Riini personally to advise her of her lateness.

[10] During their meeting Ms Savage became very hostile. Other employees who were present at the Hauora that day were threatened with dismissal and Ms Te Riini herself was suspended. The threat of dismissal made to the other employees is the subject of a separate personal grievance claim. The police were informed of the situation by both the employees present and Ms Savage.

[11] After the incident Ms Savage wrote an email to the rest of the Board criticising Ms Te Riini's conduct which she described as "...a tantrum and display of contempt". Ms Savage advised the Board members that Ms Te Riini had been verbally warned of her insubordination and asked the Board to meet urgently to arrive at a decision in the matter.

[12] As a result of the Board discussions Ms Te Riini's suspension was confirmed and she was advised not to enter the workplace. The reason for the suspension was to allow a full investigation into the matters arising out of the incident on 1 September 2010 to be undertaken.

[13] I am satisfied the incident on 1 September 2010 arose after Ms Savage attempted to obtain copies of all the employment agreements between the Trust and a number of its employees engaged on a specific project. From the evidence deduced at the Authority's investigation meeting I have concluded that Ms Te Riini and a number of other employees were 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 I find Ms Te Riini was 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.

### **Unjustified disadvantage**

[14] Ms Te Riini has a number of claims under this heading including claims that she has been subjected to ongoing bullying in the workplace, including a series of verbal and physical confrontations. Ms Te Riini claims the Trust has:

- threatened her physical safety;
- failed to provide a safe workplace;
- failed to use appropriate processes when dealing with health and safety complaints;
- undermined her role as CEO;
- failing to allow all staff members who witnessed and or had been involved in the events of 1 September 2010 to be interviewed as part of the Independent Investigation.

#### *Physical safety and a safe workplace*

[15] As already set out in this determination Ms Te Riini relies on the incident in 2009 to support her contention that her physical safety at work was at all times under threat. There was no denial by Ms Savage at the investigation meeting that the 2009 incident, as reported by Ms Te Riini, occurred. I have concluded that it is more likely than not that it occurred just as described by Ms Te Riini.

[16] Given that Ms Te Riini raised a personal grievance over that matter, it seems illogical that the Trust appears to have completely disregarded the issue and allowed Ms Savage to continue to have direct communication with Ms Te Riini with no intervention from the Trust.

[17] I am satisfied that the Trust was fully aware of the state of play between the two women and ought to have taken steps to ensure a similar situation did not occur.

*Failed to use appropriate processes when dealing with health and safety complaints*

[18] Following the altercation in the office on 1 September 2010 all those employees present completed incident reports and provided these 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.

[19] Ms Te Riini says it took too long for the Trust to investigate the complaints made by herself and other employees about the incident on 1 September 2010. She also claims that the investigator failed to interview all those present on the day and that this failure has contributed to her disadvantage claim.

[20] 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.

[21] 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.

[22] I am satisfied the process adopted by the Trust regarding the complaints was fair and reasonable, however the delay was inordinate especially taking into account that Ms Te Riini was on suspension for the period between 1 September and until the date of this investigation meeting. The reason for the suspension being for such a long period has not been explained by the Trust and I find that is a breach of the Trust's duty of good faith, especially in light of Ms Harper's findings.

*Undermined Ms Te Riini in her role as CEO*

[23] Ms Te Riini provided an example of how the Trust undermined her role when in April 2010 she initiated a disciplinary investigation process against two staff members relating to their use of work premises as a venue for a meeting with a local Member of Parliament. Ms Te Riini says the meeting was relating to the personal business interests of the staff members concerned and was not a work related meeting. During

the meeting one of the staff members held himself out to be the General Manager of the Trust which was a false claim. Both employees received sanctions of warnings.

[24] Correspondence was then received at the Hauora addressed to the General Manager but was not intended for Ms Te Riini. Ms Te Riini opened the letter and the staff member for whom the correspondence was intended, made an informal complaint to the Trust via a family member. Without discussing the matter with Ms Te Riini the Board formally withdrew the warnings.

### *Conclusion*

[25] With regards to the justification for suspension the Employment Court has stated:<sup>1</sup>

Each case about the justification for suspension of employment must take account of both broad principles of procedural fairness and the particular circumstances of the employment including the consequences of both suspending and not suspending for the employee and the enterprise. There is no immutable rule requiring that an employee must be told of the employer's proposal to suspend with a view to giving the employee an opportunity to persuade the employer not to do so.

[26] The Court considered its decision in *Tawhiwhirangi v A-G in respect of Chief Executive, Department of Justice*<sup>2</sup> where the Court confirmed a flexible and sensible approach should be taken.<sup>3</sup>

[27] I am satisfied that in this matter Ms Te Riini was suspended by Ms Savage in the heat of the moment. That means the Board needed to take a step back and consider all the circumstances and the reasons for the suspension before it confirmed the suspension was to stand.

[28] Having heard from all the witnesses and having read the correspondence between Board members and Ms Savage immediately following the suspension I am satisfied that the Board acted prematurely. When the Trust confirmed Ms Te Riini's suspension it provided no reasons for the suspension and neither did it disclose the conduct which required investigation. This conclusion is supported by Ms Harper when she notes in her report that:

The CEO is currently suspended on full pay while the investigation into her conduct (not specified) leading up to and including the incident on 1 September is completed by the Trust Board. The specifics of her conduct which have not been specified need to be provided to assist this process. [my emphasis]

<sup>1</sup> *Graham v Airways Corporation of New Zealand Limited* [2005] ERNZ 587 at [104].

<sup>2</sup> [1993] 2 ERNZ 546.

<sup>3</sup> See *Supra* n 1 at [104].

[29] The suspension impacted negatively on Ms Te Riini's employment, in that she was not allowed to work. The suspension was unjustified as it was for unspecified reasons and took place in the heat of the moment. The action by the Trust in confirming the suspension without more investigation including speaking with Ms Te Riini, and in the face of several incident reports which indicated that it was Ms Savage who had acted completely inappropriately, was not what an employer acting fairly and reasonably in the same circumstances would have done.

[30] Ms Te Riini is successful in her claim for personal grievance and is entitled to a consideration of remedies.

### **Remedies**

[31] Ms Te Riini seeks payment of compensation for the hurt, humiliation and distressed caused by her unjustified suspension. Before commenting on the quantum of compensation to be awarded I have considered whether any award should be reduced by way of contribution in accordance with section 124 of the Employment Relations Act (the Act).

[32] Ms Te Riini reported to the Trust Board and had a responsibility to provide it with information as and when required. Ms Te Riini had failed to provide documentation which would allow the Trust to account for its project costs. It was Ms Te Riini's refusal to provide the employment agreements for the employees employed in the project which was the final straw for Ms Savage.

[33] However, that does not forgive the completely inappropriate behaviour of Ms Savage on 1 September 2010 when she yelled at Ms Te Riini in front of other employees. Having heard the taped version of the conflict, I find Ms Savage's conduct was threatening and totally unnecessary.

[34] I find it was the behaviour of Ms Savage and the unjustified way in which the suspension was carried out that has given rise to this personal grievance. While the catalyst for the confrontation on 1 September 2010 was Ms Savage's frustration over not receiving the documents she had requested, her behaviour can not be sheeted home to Ms Te Riini. For that reason I have concluded that no reduction of remedies will be ordered.

[35] Ms Te Riini gave compelling evidence as to the impact her suspension has had on her. As is common in similar Trusts, members of the Trust Board and other employees were whānau members and the parties all live in a small rural township. In all the circumstances of this case an appropriate award of compensation is \$5,000.

**Tuwharetoa Ki Kawerau Health Education and Social Services Charitable Trust is ordered to pay to Ms Te Riini the sum of \$5,000 pursuant to section 123(1)(c)(i) within 28 days of the date of this determination.**

### **Breach of Good Faith**

[36] Ms Te Riini claims the Trust has breached its statutory duty of good faith by:

- offering Ms Te Riini's position to another person;
- failing to engage constructively with Ms Te Riini and her representative and failing to provide Ms Te Riini with any specific reason for her suspension and/or failing to initiate any investigation process to resolve the issues;

#### *Offering Ms Te Riini's position to another person*

[37] Some months following Ms Te Riini's suspension Ms Savage was also stood down as the Chairman of the Trust Board. During Ms Te Riini's absence Mr Chris Marjoribanks was engaged by the Trust to oversee the activities of the Trust on a day to day basis. When Ms Savage was stood down from her role as Chairman, the Bay of Plenty District Health Board stepped in and appointed Mr Marjoribanks interim Chairperson to oversee the governance of the Trust.

[38] Mr Marjoribanks gave evidence at the Authority's investigation meeting that he had never been offered the position of CEO on a permanent basis. The evidence was not disputed by Ms Te Riini and I have no reason not to accept what Mr Marjoribanks told me.

#### *Failing to engage constructively with Ms Te Riini and her representative and failing to provide Ms Te Riini with any specific reason for her suspension and/or failing to initiate any investigation process to resolve the issues*

[39] Initially Ms Te Riini lodged her application in the Authority seeking urgent reinstatement on the basis that she had been dismissed. During a conference call it was accepted that Ms Te Riini was still employed by the Trust and was in receipt of her usual pay.

[40] Further, the correspondence provided to the Authority indicates the Trust was in regular contact with Ms Te Riini's representative. The parties attended mediation following the production of Ms Harper's report however, mediation failed to constructively resolve the matter, thus the need for an investigation by the Authority.

[41] I find that through extending the suspension of Ms Te Riini well beyond the period necessary for investigating the incident on 1 September 2010 and in light of Ms Harper's findings in her report, the Trust has breached its obligations of good faith toward Ms Te Riini and for that a penalty is warranted.

[42] Further, I find the actions of Ms Savage on 1 September 2010 and her conduct toward her employee was also a breach of good faith. This breach was exacerbated by the lack of any reasons being provided by the Trust to Ms Te Riini when it confirmed her suspension on 2 September 2010.

[43] I am satisfied the breaches of good faith were deliberate, serious and sustained and in all the circumstances I find a penalty of \$3,000 is appropriate. In determining this amount I note the breaches preceded the 1 April 2011 amendment of the Act which has doubled the fines for breaches of this type.

[44] Pursuant to s 136(2) of the Employment Relations Act 2000 half of the penalty is to be paid to Ms Te Riini.

**Tuwharetoa Ki Kawerau Health Education and Social Services Charitable Trust is ordered to pay a penalty of \$3,000 pursuant to section 4A within 28 days of the date of this determination. Fifty percent of the penalty is to be paid to Ms Te Riini.**

#### **Costs**

[45] 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, Ms Te Riini may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Tuwharetoa Ki Kawerau Health Education and Social Services Charitable 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.

[46] 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