

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2011] NZERA Auckland 248  
5324850

BETWEEN WAYNE TREVOR BLISSETT  
Applicant

AND TE ROROA WHATU ORA and  
MANAWHENUA TRUSTS  
Respondents

Member of Authority: Rachel Larmer

Representatives: Wayne Blissett in person  
Chris LaHatte, Counsel for Respondent

Investigation Meeting: 16 May 2011 at Whangarei

Submissions Received 19 May 2011 from Applicant  
25 May 2011 from Respondent  
27 May 2011 from Applicant in reply

Determination: 09 June 2011

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**DETERMINATION OF THE AUTHORITY**

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- A. Wayne Blissett was an employee of Te Roroa Whatu Ora and Manawhenua Trusts (the Trusts), so the Authority has jurisdiction to hear his personal grievance claim.**
- B. The Trusts unjustifiably dismissed Mr Blissett from his position as General Manager.**
- C. The Trusts are ordered to pay Mr Blissett:**
- (i) \$11,538.46 for lost remuneration;**
  - (ii) \$5,000 for injury to his feelings; and**
  - (iii) \$71.26 to reimburse him for his filing fee.**

### **Employment relationship problem**

[1] Mr Blissett alleged he was unjustifiably dismissed from his employee position as General Manager of the Trusts by an email dated 20 August 2010 sent by the Chair of the Trusts' Board, Mr Turo Rahui. Mr Blissett said he received a further email on 22 August 2010 barring him from the Trusts' property and requiring all of the Trusts' property to be returned by 25 August 2010.

[2] Prior to 15 May 2010 Mr Blissett had been providing General Manager services to the Trusts as an independent contractor via his company Yesterday, Today, and Tomorrow Limited ("YTT"). Mr Blissett said he turned into an employee on 15 May 2010 when the Trusts' Board ("the Board") verbally offered him employment and he verbally accepted that offer of employment, because from that point on he was "*a person intending to work*".

[3] On 15 May 2010, the Board set up a Negotiations Committee to negotiate the detail of Mr Blissett's employment agreement. On 21 May 2010 Mr Blissett emailed the Negotiations Committee some negotiation points he wanted to discuss. The Board did not respond to Mr Blissett's email.

[4] On 30 July 2010 the Board decided it no longer wanted to employ Mr Blissett, so it embarked on a course of action which resulted in it "*withdrawing*" its original offer of employment. This purported withdrawal of the offer of employment terminated Mr Blissett's employment on 20 August 2010.

[5] The Trusts argued Mr Blissett was not an employee, so the Authority did not have jurisdiction to hear his personal grievance claim. They said Mr Blissett was not a person intending to work because there had been "*offer and a counter offer, but not acceptance*".

[6] The Trusts said Mr Blissett's email of 21 May 2010 was a counter offer which impliedly rejected the 15 May 2010 offer of employment and therefore entitled them to withdraw the original offer. The Trusts said it rejected Mr Blissett's counter offer because the Board lacked confidence in him and believed he did not have the financial acumen it required.

## Mediation

[7] The evidence established Mr Blissett took a number of steps to resolve his personal grievance directly with the Trust, but these were all rebuffed. Mr Rahui, on behalf of the Board, also outright refused to attend mediation.

## Issues

[8] The issues which require determination include:

- (i) Was Mr Blissett an employee?
- (ii) If so, was Mr Blissett dismissed?
- (iii) If so, was his dismissal justified?
- (iv) If not, what, if any, remedies should be awarded?
- (v) If remedies are awarded, should they be reduced on the grounds of contribution?

## Relevant law

[9] The Authority only has jurisdiction to hear Mr Blissett's personal grievance claim if he falls within the definition of employee in the Employment Relations Act 2000 ("the Act").

[10] "Employee" is defined in s.6 of the Act as:

### **6. Meaning of employee**

(1) *In this Act, unless the context otherwise requires, **employee** –*

(a) *means any person of any age employed by an employer to do any work for hire or reward under a contract of service; and*

(b) *includes –*

(i) *a homemaker; or*

(ii) *a person intending to work;*

*[...]*

[11] The relevant s.5 definitions in the Act include:

*“Employer means a person employing any employee or employees; and includes a person engaging or employing a homeworker.*

*Person intending to work means a person who has been offered, and accepted, work as an employee; and intended work has a corresponding meaning.”*

[12] Section 6(1)(b)(ii) of the Act includes “a person intending to work” within the definition of employee. A person intending to work is defined in s.5 of the Act as “a person who has been offered, and accepted, work as an employee”. This definition recognises the acceptance of an offer of work creates mutual obligations between the parties which are sufficient to create a contract of service for the purposes of s.6(1)(a) of the Act.

[13] An employee therefore includes a person who has not yet started work but who has been offered work and has accepted it.<sup>1</sup> Under ordinary principles of contract law an offer, once accepted, cannot be withdrawn.<sup>2</sup>

[14] An offer of employment is capable of being accepted notwithstanding the parties still need to finalise details such as the job description or employment agreement.<sup>3</sup> The acceptance of an offer of employment may be communicated by words or conduct, or a combination of both. It is also possible for acceptance to be inferred from silence, if the surrounding circumstances signalled acceptance.<sup>4</sup>

[15] An employment relationship can therefore be formed by words of agreement, conduct, or a combination of both. The fact terms of employment have not been finalised does not necessarily preclude the existence of an employment relationship, provided there has been offer and acceptance and a mutual intention to enter into an employment relationship.

[16] The distinction between the formation of an employment relationship and the formation or articulation of its terms was recognised by the Employment Court in *Baker v Armourguard Security Limited*.<sup>5</sup> The Employment Court in *Weal v. Leusen Holdings Limited* noted employment relationships were often entered into with a minimum of formality, and held failure of parties to resolve all of the terms at the time

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<sup>1</sup> *Baker v. Armourguard Security Ltd* [1998] 1 ERNZ 424

<sup>2</sup> *Ibid* 1

<sup>3</sup> *Ibid* 1

<sup>4</sup> *Weal v. Leusen Holdings* [2002] 1 ERNZ 655

<sup>5</sup> *Ibid* 1

employment was agreed did not mean a contractual employment relationship had not been entered into.<sup>6</sup>

[17] A party who has offered employment can only withdraw the offer prior to it being accepted, in which case the withdrawal of an offer of employment must also be communicated to the prospective employee. If an offer of employment has been accepted before the offer is withdrawn, then the person who accepted the offer of employment is an employee in the same way a person who is already at work performing the duties and responsibilities of their role is an employee.<sup>7</sup>

### **Relevant facts**

#### *Background*

[18] Te Roroa settled its historical claims with the Crown in 2005. In December 2005 Te Roroa ratified a governance structure comprising of the Trusts, which were established by separate Trust Deeds on 15 August 2006.

#### *YTT contract*

[19] In 2009 the Trusts, via the former Chair of the Board Mr Alex Nathan, entered into a contract with YTT to provide General Manager services, with the contract services being provided by Mr Blissett. The YTT contract ran from 20 April 2009 to 20 April 2010, and it contained a 60 day notice of renewal or termination clause. This contract was a rollover on the same terms of a previous contract with YTT.

[20] The contract services were set out in a schedule, which provided a detailed role description and Key Performance Indicators (“KPIs”) for a General Manager position. Key responsibilities and accountabilities covered professional standards; strategic leadership; operational management; quality and risk management; and relationship management.

[21] The contract required Mr Blissett to exercise senior management, operational leadership, and financial control responsibilities across the different business units of the Te Roroa Development Group (“TRDG”). The Te Roroa Commercial Development Company and Te Roroa Social Development Company employees and contractors were direct reports to the General Manager role.

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<sup>6</sup> Ibid 4

<sup>7</sup> Ibid 4

*Review of GM role*

[22] The issue of the impending expiry of the YTT contract was raised at the Board meeting on 13 March 2010. The Board discussed whether to set up a Review Committee, but no resolution was passed.

[23] The issue of a Review Committee was raised again at the 17 April 2010 Board meeting. This time a resolution was passed which formed a Review Committee, which consisted of five Board members and which was to assess the delivery of the KPIs in the YTT contract. That necessarily involved a review of Mr Blissett's performance. The Review Committee was tasked with making a recommendation to the Board about the provision of General Manager services to the Trusts subsequent to the expiry of the YTT contract.

[24] The Review Committee met on 1 May 2010 and members were assigned specific areas to investigate and report back on. Each member was to write an individual report on the area they were investigating, and a further meeting was scheduled for 14 May 2010 to enable the Review Committee to discuss their individual findings as a group, and then formulate a recommendation to be put to the Board meeting on 15 May 2010.

[25] The outcome of the Review Committee's process was a recommendation that the existing three day a week contract General Manager position be changed into a five day a week employee role, with a recommended salary range of \$100,000 plus incentives.

*Offer of employment*

[26] The Review Committee's recommendations were discussed at the Board meeting on 15 May 2010. Mr Blissett was present at the Board meeting but left the room when the YTT contract and the General Manager role was being discussed.

[27] The Board minutes record the Review Committee recommended:

- “1. The existing role [General Manager position] be changed to a five day a week **employment** position that has a base salary and an incentive plan.
2. The position be offered to Wayne Blissett.”

[28] The Board voted to adopt the Review Committee's recommendations and it resolved by a 9:2 majority:

*"That the Board accept the recommendations of the Review Sub Committee then form another Committee to negotiate the terms with Wayne."*

[29] When Mr Blissett rejoined the Board meeting on 15 May 2010 he was verbally offered:

- (i) Employment by the Trusts;
- (ii) The position of General Manager;
- (iii) A job description for the employee role as per the YTT contract services;
- (iv) A salary of \$100,000 per annum;
- (v) A full time position involving five days work a week;
- (vi) A bonus incentive scheme and travel allowance to be discussed.

[30] Mr Blissett said he verbally "*accepted the offer in principle*" at the time it was made and agreed to enter into negotiations to finalise the terms of his employment agreement.

[31] It was agreed the negotiations were to be conducted by a Negotiations Committee. The members of the Negotiations Committee were the same as those on the Review Committee, except for the addition of Ms Shelly Panoira who had not been on the Review Committee.

[32] Mr Rahui agreed:

- (i) An offer of employment was made;
- (ii) Mr Blissett verbally accepted the offer in principle;
- (iii) The parties agreed they would enter into negotiations to finalise the terms of Mr Blissett's employment;
- (iv) The negotiations would be conducted by a Negotiations Committee.

[33] Mr Rahui's written statement confirmed that Mr Blissett had "*accepted the offer [of employment] in principle*". When giving evidence, Mr Rahui also confirmed, at least three times, Mr Blissett had accepted the offer of employment which had been made by the Board at its meeting on 15 May 2010.

[34] I find there was offer and acceptance of employment on 15 May 2010. Accordingly, Mr Blissett was a person intending to work and as such he falls within the definition of employee in s.6(2)(b)(ii) of the Act.

*Arrangements made by Mr Blissett*

[35] The YTT contract expired on 20 April 2010, but was extended by agreement until the Board had made a final decision about the General Manager role. Mr Blissett had anticipated an offer of employment would be made, so prior to the Board meeting on 15 May 2010 he had discussed with his business partner Ms Materoa Mar his desire to become an employee and what that would mean for YTT.

[36] Mr Blissett and Ms Mar had been business partners for 12 years so his intention to change from a contractor to an employee was a major change which had serious implications for their business. They discussed how they would handle that and agreed, if offered employment, YTT would have to turn down work to enable him to reduce his commitments with a view to taking up employment.

[37] After the offer of employment had been made and accepted on 15 May 2010, Mr Blissett started to reduce his YTT commitments in anticipation of starting work as an employee. Mr Blissett and Ms Mar both gave evidence that YTT turned down potential work over the 15 May to 20 August 2010 period due to the belief Mr Blissett would not be available to do it.

*YTT invoices*

[38] Subsequent to 20 April 2010, YTT continued to invoice the Trusts on its usual basis pending the finalising of Mr Blissett's terms and conditions of employment. YTT's invoices for June, July and August which total \$14,118.75 remain unpaid.

[39] Mr Blissett sought an order that the unpaid invoices be paid. The Authority has no jurisdiction to make such an order because YTT and the Trusts are not, and have never been, in an employment relationship.

#### *Negotiations*

[40] On 21 May 2010 Mr Blissett emailed “*a couple of negotiation points*” to the Negotiations Committee, namely:

- (i) He proposed the salary of \$100,000 be paid for a monthly average of 3.5 days work per week;
- (ii) He requested five weeks’ annual holiday and ten days’ paid sick leave per annum;
- (iii) He asked to be paid either a \$10,000 travel allowance or be provided with a lease vehicle;
- (iv) He asked for a cell phone;
- (v) He registered an interest in receiving training and development;
- (vi) He suggested a review occur in 12 months time.

[41] Mr Blissett ended the letter by stating “*I hope this helps us in our discussions*”. No response was provided to any of the issues he had raised.

#### *Trusts’ change of heart*

[42] The Board held an “*In Committee*” meeting on 25 July 2010 to discuss Mr Blissett’s situation. There was a discussion about the review process which had resulted in the Board offering Mr Blissett employment and concern regarding financial and management issues was raised. The Board took a vote on whether it wanted Mr Blissett to stay on as General Manager and concluded 6:2 (there was one abstention) it did not.

[43] The minutes record the Board was aware:

- (i) Going back on the Board’s offer of employment would “*open [it] to legal retaliation*”;

- (ii) “*natural justice had to take place with Wayne*”;
- (iii) “*Wayne [should be] given opportunity to answer these [concerns]*”;
- (iv) Failure to comply with natural justice would be “*opening ourselves to further legal challenges*”.

[44] It was agreed the Negotiations Committee would meet with Mr Blissett so Mr Rahui wrote to him to set up the meeting.

*Trusts’ actions*

[45] On 30 July 2010 Mr Rahui wrote to Mr Blissett but, because he sent it to the Trusts’ PO Box address instead of YTT, the letter was not received by Mr Blissett until 11 August 2010.

[46] Mr Rahui’s letter called Mr Blissett to a Board meeting on 14 August 2010 to discuss difficulties it believed he was experiencing with KPIs in the expired YTT contract.

[47] The letter identified the following issues:

- (i) Historical GST liability;
- (ii) Under-performance of business units;
- (iii) Debt by the Commercial Company to the Trust the Board was previously unaware of;
- (iv) Concern about a Consultancy Agreement with AL Silver.

[48] Mr Rahui’s letter stated:

*“While the Board continues to support you during these difficulties you are experiencing with your key performance indicators outlined in your previous contract. We believe it is not operationally or financially possible to continue to support you in the long term.*

*[...]*

*The Board believes that you lack the necessary skill set in terms of financial management and see that as the main cause for the under performing business units, a situation which we believe cannot continue.”*

[49] The letter said Mr Blissett would have an opportunity at the meeting on 14 August 2010 to put forward points he wanted to be considered and that he could be accompanied by a support person.

*14 August 2010 meeting*

[50] Mr Blissett's friend Ms Moana Tane accompanied him to the Board meeting on 14 August 2010 which lasted 35 minutes.

[51] The meeting notes record:

*"Turo outlined the reason for the meeting being due process in regards to employment issues between Wayne Blissett and the Te Roroa Trust. Turo hoped that the outcome of the meeting to finalise current employment issue (sic)."*

[52] Mr Rahui told Mr Blissett the majority of the Board had no confidence in him as General Manager. Mr Blissett's response to that was the Board had reviewed his performance and offered him employment, with the negotiations around his terms yet to be finalised. His position was that needed to occur before any new process was started.

[53] The meeting notes reflect an apparent confusion over the purpose of the meeting, with the concerns about Mr Blissett's performance and suitability to continue as General Manager being mixed in with the issues arising from the failure of the Negotiations Committee to engage in and finalise negotiations over Mr Blissett's terms and conditions of employment.

[54] Mr Blissett's view was that the meeting was to finalise his terms and conditions of employment because he believed that had to occur before the Board started any new employment process. Mr Rahui's view was that because there had been a counter offer the original offer of employment "*was off the table*", so he saw the meeting as an opportunity to address performance concerns.

[55] The notes appear to support Mr Blissett's understanding and account of the meeting because they show the discussion was predominantly about contractual issues. The notes do not show Mr Blissett was asked to respond to the particular concerns identified in Mr Rahui's letter of 30 July 2010, which would have happened if Mr Rahui's evidence was correct.

[56] For example, the notes record the following offer:

- (i) Five days week;
- (ii) \$100,000 base salary;
- (iii) Five weeks annual leave;
- (iv) \$20,000 incentive plan on achievement of budgets (TBC);
- (v) Ten days sick leave;
- (vi) \$150 phone component each month;
- (vii) Travel was not discussed.

[57] I consider this offer reflects (at least once it began) the meeting involved discussion about Mr Blissett's unresolved terms and conditions of employment. I consider the notes are inconsistent with Mr Blissett having been given a genuine opportunity to respond to performance concerns, because none of the concerns in the letter of 30 July 2010 were discussed.

[58] Mr Blissett and Ms Tane left the meeting with the understanding the Board was going to commit to writing its proposed terms and conditions for Mr Blissett's General Manager position and that any other matters would be dealt with after that. Based on the notes, I consider that view was reasonable. However, that did not occur. The next communication Mr Blissett received from the Board terminated his employment.

### *Termination*

[59] Mr Rahui sent Mr Blissett a letter dated 15 August 2010 which advised the Board's original offer of employment had been withdrawn. Mr Rahui appeared to rely on a number of matters to support the Board's decision to "*withdraw employment*", namely:

- (i) The counter offer of four days per week (which was actually 3.5 days) was unacceptable;
- (ii) The original offer had to be accepted unchanged;

- (iii) The counter offer of 21 May 2010 was an implied rejection of the original offer;
- (iv) The counter offer had been rejected because “*the Board had a lack of confidence in you*” and “*you do not have the financial acumen required to effectively and efficiently manage trust funds*”.

[60] However, this letter was not actually received by Mr Blissett until 20 August 2010 because once again it was sent to the Trusts’ PO Box address, instead of YTT.

[61] On 19 August 2010 Mr Blissett and Mr Rahui on behalf of the Trusts both met with the CEO of the Poutama Trust. Surprisingly Mr Rahui did not make any mention to Mr Blissett of his letter dated 15 August 2010.

[62] It was not until Mr Rahui sent Mr Blissett an email on 20 August 2010 which said the Board lacked confidence in him, he was not to attend the Board meeting on 21 August 2010, and which referred to his previous letter (which at that point had not been received), that Mr Blissett became aware his employment had been terminated.

## **Outcome**

*Was Mr Blissett an employee?*

[63] I find Mr Blissett and the Trusts mutually agreed to enter into an employment relationship and they had set in place a process to enable them to finalise the terms of Mr Blissett’s employment agreement. The fact negotiations over his terms had not been concluded did not mean the parties had not formed an employment relationship.

[64] Mr Blissett was employed by the Trusts and although he had not actually started work in his new capacity as an employee, he was nevertheless an employee because he was clearly a person intending to work, as per the s.6(1)(a) definition of employee in the Act. The Authority therefore has jurisdiction to resolve his personal grievance claim.

[65] Mr Blissett was employed as General Manager of the Trusts on the terms and conditions he was verbally offered and which he verbally accepted at the 15 May 2010 Board meeting.

*Was Mr Blissett dismissed?*

[66] Mr Blissett was dismissed. The initiative for ending his employment came from the Board. It is clear Mr Rahui's letter of 15 August 2010 and his emails of 20 and 22 August 2010 ended Mr Blissett's employment. The withdrawal of the original offer of employment amounted to a dismissal.

*Was Mr Blissett's dismissal unjustified?*

[67] Mr Blissett's dismissal was substantively and procedurally unjustified. I find that the Board's actions and how it acted were not what a fair and reasonable employer would have done in all the circumstances at the time Mr Blissett was dismissed.<sup>8</sup>

[68] The evidence did not establish Mr Blissett had engaged in misconduct serious enough to justify his summary dismissal.

[69] The Board was also not justified in treating Mr Blissett's email of 21 May 2010, which contained negotiation points, as a counter offer which had voided the original offer of employment.

[70] I find Mr Blissett's email was an attempt to renegotiate some of the terms originally agreed by the parties on 15 May 2010. It was quite normal in the course of doing so for him to propose some further terms which would have been satisfactory to him. Those were not accepted, so the original 15 May 2010 terms continued to apply.

[71] In any event, by the time the Board purported to withdraw the original offer of employment, it had already been accepted, so it was no longer open to the Board to withdraw it.

[72] In terms of the alleged performance concerns, the matters relied on were all issues known to the Board when it adopted the Review Committee's recommendation Mr Blissett be offered full time employment. Mr Rahui was unable to explain to my satisfaction why information which was known to the Board at the time it offered Mr Blissett full time employment on 15 May 2010 should justify his summary dismissal three months later. I find that it did not.

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<sup>8</sup> Section 103A justification test in the Act

[73] Even if the Board had genuine concerns about Mr Blissett's performance, and I am not convinced from the evidence before me Mr Blissett was responsible for the matters the Board sought to lay at his feet, the manner in which it attempted to deal with its concerns was seriously deficient.

[74] The Board breached its statutory good faith obligations because it failed to provide Mr Blissett with information relevant to the continuation of his employment and it follows he was therefore deprived of an opportunity to comment on such information, contrary to the requirements in s.4(1A) of the Act. A fair and reasonable employer would have complied with its good faith obligations.

[75] The meeting on 14 August 2010 focused on contract issues rather than performance concerns, so Mr Blissett was never given an opportunity to respond to the matters identified in Mr Rahui's letter of 30 July 2010. Even if he had been given an opportunity to do so, the lack of information provided in support of the alleged concerns would have hampered Mr Blissett from providing a full response.

[76] I find the Board did not properly or fully investigate any of its alleged performance concerns before it concluded Mr Blissett's performance was so poor his employment had to be terminated.

[77] There was sufficient information before me to suggest the Board itself may bear some responsibility for issues which were of concern. For example, the historical GST issue appeared to have arisen because there were differing views over the accounting model to be used which had flow on tax implications. In March 2010 Mr Rahui instructed the Board's accountant not to provide Mr Blissett with financial statements. A Grant Thornton report noted fundamental disagreements and discontent at Board level and which was likely to have had an impact on the operation of the Trusts and associated businesses. It also reported underdeveloped accounting and reporting systems and a lack of an agreed structure resulting in financial performance being assessed against structures and income flows implemented after year end.

## **Remedies**

### *Unpaid invoices*

[78] The Authority has no jurisdiction to award the amount Mr Blissett has claimed as unpaid YTT invoices.

*Mitigation of loss*

[79] Mr Blissett stated that it had taken him six weeks to obtain work equivalent to the salary the Trusts had agreed to pay him. He gave evidence about the steps he took to build up his business and obtain work again after his employment was terminated and I find that he properly mitigated his loss.

*Lost remuneration*

[80] I order the Trusts to pay Mr Blissett \$11,538.46 being six weeks' lost remuneration, based on a salary of \$100,000 gross per annum, pursuant to s.128(2) of the Act.

*Injury to feelings*

[81] Mr Blissett sought \$7,000 compensation for injury to his feelings.

[82] Mr Blissett gave convincing evidence of the hurt, humiliation and injury to feelings he had suffered. He spoke of the effects on his family and relationship and about his deep embarrassment at having to tell people who knew he had been employed by the Trusts that he was no longer working for them. Mr Blissett was obviously still distressed about his situation because he broke down twice in the course of giving his evidence.

[83] Bearing in mind he had not actually started work I consider an award of \$5,000 under s.123(1)(c)(i) of the Act is appropriate.

*Contribution*

[84] Pursuant to s.124 of the Act I am required to determine whether Mr Blissett contributed to the situation which gave rise to his personal grievance claim.

[85] I am not satisfied from the evidence available to me that Mr Blissett contributed to the situation which gave rise to his unjustified dismissal, so I made no reduction to his remedies on the grounds of contribution.

**Costs**

[86] Mr Blissett was not legally represented, so no issue arises as to legal costs.

[87] The Trusts are ordered to reimburse Mr Blissett \$71.26 for his filing fee.

Rachel Larmer  
Member of the Employment Relations Authority