

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2012] NZERA Wellington 94
5351885

BETWEEN APERIRA HOHEPA-SMALE
 Applicant

A N D TE RAKAU O TE WAO TAPU
 TRUST INCORPORATED
 Respondent

Member of Authority: G J Wood

Representatives: Mary Hubble for Applicant
 Phil Mitchell for Respondent

Investigation Meeting: 8 and 9 May 2012 at Wellington

Submissions Received: By 14 May 2012

Date of Determination: 17 August 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Hohepa-Smale, claims that she was unfairly treated by Te Rakau/The Trust in the last year of her employment, effectively being sidelined, and unfairly singled out over her approach to a CYFS investigation. She also claims redundancy compensation as provided for in her employment agreement. Te Rakau denies that it has treated Ms Hohepa-Smale unfairly, and claims that the redundancy clause should be found to be null and void because it was improperly entered into.

Factual discussion

[2] The Trust was originally established as a charitable trust to promote a concept of *Theatre Marae*, thus fostering cross-culture understanding and offering training and guidance to young people. The principal mover behind Te Rakau was its present Chair, Mr Jim Moriarty, a psychiatric nurse and well known actor and director. Over

the years it came to focus on the use of performing arts to assist young people in their development. In addition, in 2005, it also entered into a funding contract with CYFS to provide 24/7 care to problem youth.

[3] In 2006 Ms Hohepa-Smale's sister was employed as Chief Executive Officer, in part to assist difficulties with the CYFS contract. Later that year she approached Ms Hohepa-Smale, who had a strong and varied background in management and administration, to assist in developing policies and procedures to ensure ongoing compliance with CYFS requirements. This included the development of a KOPPs (Key Operational Policies and Procedures), amongst other things. As a contractor engaged on a contract basis to the Trust Ms Hohepa-Smale focused on operations and systems, health and safety and the general environment facing the Trust.

[4] Ms Hohepa-Smale was again engaged by Te Rakau in November 2007 as a contract practice manager for three months. Before Christmas 2007 Te Rakau decided to offer Ms Hohepa-Smale a fulltime position as practice manager once her temporary contract had finished.

[5] The KOPPs document contains a number of provisions relating to the employment of staff. One is that if an employee's operating procedures are different from those in the KOPPs document, they must be notified and approval sought from the Director of Services and the Board. Another is that prior to the confirmation of employment of any new staff member, a letter of employment is to be offered. It should include the name of the appointee, the date of appointment, and shall be signed by one member of the recruitment panel. Such a letter is to include the standard terms and conditions of a *fixed term employment agreement*, i.e. a probation period of less than four months. The KOPPs document also notes that the Board of Trustees may delegate duties to others, but that any such person will conduct their affairs in accordance with the regulations imposed on it by the Board of Trustees. It also deals with the duties of trustees which are to avoid, if possible, any situation where a conflict of interest might arise and that where this can not be avoided, a trustees' interests must be declared and those trustees should not take part in negotiations or decision making which could put them at risk. For example, trustees must not vote on any matter they are involved in personally with the Trust ,such as leasing land from the Trust.

[6] In this case the chief executive (on behalf of Te Rakau) and her sister Ms Hohepa-Smale negotiated an individual employment agreement that is fairly standard, apart from two clauses. Those clauses are as follows:

[11.6] Notice of termination due to redundancy

In the event the employee's employment is to be terminated by reason of redundancy, the employee shall be provided with eight weeks' notice in writing. This notice is in substitution for and not in addition to the notice set out in the general termination clause.

[11.7] Compensation – formula based on years of service

*In the event the employee's employment is terminated on the basis of redundancy, the employee shall be entitled to redundancy compensation on the basis of the following formula: **2 months salary for each year of service.***

[7] I accept that no other employee of Te Rakau has a redundancy compensation clause. I also accept that this was negotiated in the context of Te Rakau wishing Ms Hohepa-Smale to give it six months' notice should she choose to leave, and her not wishing to accept more than eight weeks' notice on either side.

[8] The employment agreement was signed by Ms Hohepa-Smale and her sister, the CEO and was sealed with the Trust's common seal. However, her appointment did not meet some of the expectations set out in the KOPPs document, such as the provision of referees. Given this, and the close relationship between the two women and the generous nature of the redundancy provision (especially when all other staff had no provision for compensation), I was accordingly very sceptical as to why this provision was entered into. However, I accept Ms Hohepa-Smale's off the cuff evidence, which appeared genuine, that the reason this was entered into was not because redundancy was expected but because it was put in there after the discussions about notice, and that in the mid-80's Ms Hohepa-Smale had worked at the Huntly Power Station and the formula utilised was what her husband had been paid out on when he was made redundant by the New Zealand Electricity Department.

[9] Given these circumstances, I accept that this was not a deliberate attempt by Ms Hohepa-Smale to take advantage of her position with the Trust. Rather, it was a naïve approach based on outdated information about levels of redundancy compensation in New Zealand. In addition, while a number of items required by the KOPPs document were not followed, this is not unexpected given the organisation as it was then structured. Furthermore, I accept that as the Board of Te Rakau and Mr

Moriarty knew of Ms Hohepa-Smale's appointment, there was no attempt to hide the terms of the employment agreement from them. I note also that appointments such as this are not uncommon in trusts such as Te Rakau, which employ a large number of family members. For example, Mr Moriarty's partner and son were also employed by Te Rakau over the same period.

[10] In December 2008 the Chief Executive, Ms Hohepa-Smale's sister resigned. The Board decided to alter its management structure. A director of services position was created, which included parts of the practice manager role that Ms Hohepa-Smale held, together with parts of the Director of Services position that Mr Moriarty held, and the Chief Executive's position. This position was focussed on the administrative management functions. The other management position created was that of Tuaki/Creative and Therapeutic Services Director. Clearly Mr Moriarty was well suited to the latter position and was so appointed. Ms Hohepa-Smale was appointed to the new position of Director of Services. Her offer of employment, which was accepted by Ms Hohepa-Smale on 12 January 2009, included some specific terms of the offer. One of those terms was:

The individual employment agreement (IEA) shall be completed on receipt of your acceptance of this offer, along with an indication of your preferred remuneration arrangements. Set out below are the key terms of this offer of employment for your consideration.

[11] Ms Hohepa-Smale's preferred remuneration arrangements involved a set salary based on a 40 hours per week job. Unfortunately, no individual employment agreement was ever completed, not because of any lack of effort on Ms Hohepa-Smale's part, but because of significant changes on the Board. It therefore followed that Ms Hohepa-Smale's terms and conditions of employment continued to comprise those terms (other than remuneration) that were set out in her previous employment agreement, including the redundancy compensation provisions.

[12] Unfortunately and as presaged by Ms Hohepa-Smale in early January, as well as Board disruptions, there was an unclear delineation and/or dual responsibility for many strategic management functions of the Trust between her director of services position and Mr Moriarty's position. This was to cause significant tension over the next year or more. Ms Hohepa-Smale was also concerned about the size of her new job, given that there had previously been a CEO as well as her and Mr Moriarty in management.

[13] Ms Hohepa-Smale formally raised these matters with the Board in July 2010 and sought additional administrative assistance. Instead, the Board in its discretion decided to appoint the Chairperson to become an Executive Chairperson. This meant that he was responsible for both Ms Hohepa-Smale and Mr Moriarty, whereas previously both had reported directly to the Board. No doubt this well intentioned initiative caused Ms Hohepa-Smale some concerns, but I do not accept that she was then effectively demoted to an assistant as she claims. Instead the Executive Chairperson took some workload away from Ms Hohepa-Smale, which was to her benefit.

[14] Over the course of 2010 the Trust had issues with CYFS, which were able to be dealt with to Te Rakau's satisfaction if not CYFS's. However, by December 2010 CYFS began its own investigation into Te Rakau. This resulted from a number of allegations made by young people under the care of the Trust that crystallised into formal complaints to various authorities. These complaints were investigated by the Police as well. No charges were ever laid against anyone associated with the Trust as a result of these complaints.

[15] In late March 2011 CYFS reported to Te Rakau that, following its investigation, it had a number of serious concerns about operations within Te Rakau. The Police were soon to become formally involved as well. Ms Hohepa-Smale was determined to investigate the complaints from students in the programme on her own accord, in order to try and find out what, if anything, had occurred.

[16] By 8 April the Police were interviewing staff, including Ms Hohepa-Smale. At around that time it came to the attention of the Board that Ms Hohepa-Smale was also conducting her own internal investigation or review. It sought advice from its legal advisers about whether such internal investigations and reviews were appropriate in the light of the CYFS and Police investigations. As a result the Executive Chairman called a meeting of all staff on 14 April to implement the advice he had received. That advice was repeated in a letter dated 19 April, which stated:

As you will be aware, there are investigations underway into Te Rakau Trust. These are being carried out simultaneously by police and CYPS.

Te Rakau has been cooperating with these investigations.

However, it has come to my attention that one or some members of staff have been conducting their own parallel investigation into activities at the Trust.

As your employer, I am directing that any such unauthorised investigation cease immediately.

You should all be aware that any such unauthorised investigation could adversely affect Te Rakau. It also places those involved at risk. Allegations could arise that in conducting your own unauthorised enquiry into matters, you have attempted to pervert the course of justice. Attempting to pervert the course of justice is a criminal offence that carries 7 years imprisonment as a maximum penalty.

As your employer, the Board wants to ensure that none of you place yourself in jeopardy by carrying out such an investigation that could result in a staff member being liable to prosecution.

Further, there must be no unauthorised discussion of the police and/or CYPS investigations with the media, or any third party agency (this includes all government agencies, Maori authorities or any third party organisation or person). Once more this is to ensure the integrity of the investigative process is not compromised.

These prohibitions are being put in place to safeguard the best interests of Te Rakau and its employees. Breaching these prohibitions will be treated as serious misconduct and will result in a warning and/or any other sanction which Te Rakau sees fit to impose, up to and including dismissal.

[17] Ms Hohepa-Smale complains about this approach being unfair towards her, and that she was singled out. The clear weight of evidence does not support that claim, even though I accept that Mr Moriarty's son may have been disingenuous when asking who the person who was conducting the internal investigation was and that Ms Hohepa-Smale felt obliged to name herself at the meeting. This is because the letter is clear on its face, and it was an entirely appropriate response from an employer faced with a situation such as this. Furthermore, I do not accept that there were any other ulterior motives in the issue of the letter by Te Rakau.

[18] Similarly, the preponderance of evidence was that Ms Hohepa-Smale found it difficult to cope with an Executive Chairman being put in a position of authority over her, that she was not undermined in any way and nor was she declined access to staff either. For instance, Ms Hohepa-Smale claims that she was excluded from Board meetings but in fact did attend the Board meeting on 30 April. I accept, however, that it must have been uncomfortable for Ms Hohepa-Smale to have the Executive Chairman download the contents of her computer hard drive.

[19] Ms Hohepa-Smale did not agree with the Executive Chairman's actions, and wrote a letter of protest and concern to the Board, insisting that she had the power to manage complaints as director of services. She was also concerned about an allegation of grooming a team leader to *lie* to the authorities. She also took legal advice, and her lawyers wrote a letter seeking all relevant personal information held by the Board about Ms Hohepa-Smale from March 2010 onwards.

[20] The response of the Executive Chairman in a meeting on 19 April was that he supported Ms Hohepa-Smale, except for the one issue of a discussion with a team leader referred to above. Then in the Board meeting on 30 April the Executive Chairman apologised to Board members for getting the circumstances between two complainants mixed up. Unfortunately Te Rakau did not provide the information sought in Ms Hohepa-Smale's formal request for information.

[21] At the same time the future of the CYFS contract was in the balance. On 21 June Ms Hohepa-Smale wrote to the Board, given the decision to extend the contract for another three months, asking that her ongoing role in that contract be clarified. On 27 June 2011 Ms Hohepa-Smale raised personal grievances over her employment relationship problems about the above matters.

[22] Unfortunately no prompt response was forthcoming because of the illness of the Executive Chairman. This delay extended into August at which point Ms Hohepa-Smale's position was made redundant because of the loss of the CYFS contract. Ms Hohepa-Smale takes no issue with the decision to make her redundant at that time.

Determination

[23] I do not accept that Te Rakau breached Ms Hohepa-Smale's employment agreement, as she continued as director of services throughout and did not lose any authority. Furthermore, she was not undermined in her position (for the reasons given above). She was also not unfairly treated by Te Rakau when it properly raised the issue of staff members including Ms Hohepa-Smale undertaking investigations that could be seen as interfering with the Police's investigations.

[24] While the Board's responses were not prompt, this was affected by the illness of the Executive Chairman and the other issues it faced with the CYFS funding, which later led to the justifiable termination of Ms Hohepa-Smale's employment for redundancy. When considering what Te Rakau did, and how it did it, compared to

what a fair and reasonable employer would or could (depending on whether the actions took place before 1 April 2011) have done, I consider that Ms Hohepa-Smale has not made sufficient allowances for the issues being faced by Te Rakau at the time, when claiming that its actions were unjustified. These included official investigations into its practices and culture, together with a major threat to its key source of funding (which came to pass), and Board member changes and illnesses. I therefore dismiss her breach of contract, breach of good faith and disadvantage claims.

[25] Ms Hohepa-Smale's employment agreement was, however, breached by the Trust's failure to pay her redundancy compensation under her employment agreement. Any conflict of interest or KOPPs-related obligation in this regard could really only have been the responsibility of Ms Hohepa-Smale's sister, who was acting on behalf of the Trust at that time. The chief executive had ostensible, if not actual, authority to bind the Trust at that time. Ms Hohepa-Smale was acting on her own behalf. Sealed employment agreements could only be struck down in the circumstances by fraud involving Ms Hohepa-Smale. To the contrary, I have accepted Ms Hohepa-Smale's explanation as to the genuine reasons for the insertion of the redundancy clause. The Trust should take any residual concerns it has over that matter up with Ms Hohepa-Smale's sister.

[26] For the reasons given above in the factual discussion section, Ms Hohepa-Smale is entitled to be paid in accordance with the redundancy clause. Instead she was paid five weeks pay. She should have been given eight weeks pay in lieu of notice. She is therefore entitled to three weeks pay for unpaid notice, namely \$4038.46 gross, together with six months redundancy compensation for the three years that she worked. She is not entitled to seven months simply because she had worked over a half year. The compensation is set at *two months salary for each year of service*. Therefore an employee has to work a full year before being entitled to another two months salary. Six months salary is \$35,000 gross.

[27] I therefore order the respondent, Te Rakau O Te Wao Tapu Trust Incorporated, to pay to the applicant, Ms Aperira Hohepa-Smale, the sum of \$39,038.46 gross.

Costs

[28] Costs are reserved.

G J Wood
Member of the Employment Relations Authority