

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2013] NZERA Auckland 391  
5372780

BETWEEN

MARAMA TARAU  
Applicant

A N D

NGATI RANGINUI HOME  
AND COMMUNITY  
SUPPORT SERVICES  
COMPANY LIMITED  
Respondent

Member of Authority: K J Anderson  
Representatives: W Hika, Counsel for Applicant  
R Harrison, Counsel for Respondent  
Investigation Meeting: On consideration of the papers  
Date of Determination: 2 September 2013

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] For various reasons, this matter has had a rather protracted history. Via a statement of problem filed with the Authority on 2 March 2012, the applicant, Ms Marama Tarau, claimed that she is owed arrears of wages in the gross sum of \$1,670.95. Ms Tarau also claims that she was unjustifiably dismissed on or about 6 October 2011.

[2] In a statement in reply filed with the Authority on 21 March 2012, the respondent, Ngati Ranginui Home and Community Support Services Company Limited (Ngati Ranginui/ the company), posited that Ms Tarau was never employed by the company; hence her claims were rejected.

[3] Following a conference call with the parties convened by the Authority on 20 April 2012, it was agreed that there is a preliminary matter to be determined; being: Whether there was an employment relationship between Ms Tarau and Ngati Ranginui. It was also agreed that this matter should be decided “on the papers”. At that point in time, Ms Tarau was represented by Baywide Community Law Service – Tauranga, and her solicitor (then) informed that another solicitor would have to be instructed. The Authority was informed on 23 May 2012 that Mr Hika would be acting for Ms Tarau in the matter.

[4] Subsequent to the appointment of Mr Hika, a timetable was set for the provision of affidavit evidence and supporting documents from the parties. The papers for the applicant were duly received, following an extension of time granted to Mr Hika, due to him being affected by a bout of illness.

[5] Regrettably, Mr Harrison (for the respondent), incurred some difficulties in compiling appropriate evidence for the respondent, due to a key player in the events, Ms Tania Tutaki, no longer being employed by Ngati Ranginui.

[6] Upon an analysis by the Authority of the documents received from Ms Tarau, it became clear that there would be credibility issues relating to the respective positions of the parties. Therefore, it was consequently accepted by the parties that the matter could not be determined on the papers, as previously envisaged, and an investigation meeting would be required. This was set down for 29 May 2013 but was cancelled because, on 28 May 2013, the Authority received an email from the respondent. The substance of the content being that, in the absence of evidence to the contrary, the respondent was not able to dispute or contradict the affidavit evidence of Ms Tarau, in regard to whether an offer and acceptance of employment had come into existence. Mr Harrison conveyed that the parties would attempt to negotiate a settlement of the matter and in the event that this was not possible, they would revert to the Authority for a determination; based on the evidence available to it.

[7] It has now transpired that the parties have been unable to reach a settlement regarding the claims of Ms Tarau: hence this determination.

## Background

[8] From the evidence available to the Authority, it appears that the respondent provides home-based non-medical care to clients. It also seems that Ms Tarau has some experience in providing residential care to sick or infirm people.

[9] It is the sworn evidence of Ms Tarau that in July 2011 she was unemployed and informed Ms Monica Nicholas that she was seeking employment. It subsequently transpired that Ms Nicholas was advised by Support Net<sup>1</sup> that 23 hours per week of residential care for her mother had been approved. Ms Nicholas has provided a sworn affidavit and she attests that on 29 July 2011, she contacted Ngati Ranginui and spoke to Ms Tania Tutaki, who was the Home Care Coordinator at the time. Ms Nicholas attests that she asked Ms Tutaki if her mother could have a preferred caregiver and was assured that this would not be a problem. Ms Nicholas therefore nominated Ms Tarau as the preferred caregiver. The evidence of Ms Nicholas is that a discussion eventuated between her and Ms Tutaki pertaining to the qualifications and suitability of Mr Tarau to be the caregiver for Ms Nicholas's mother and an understanding was reached that Ms Tarau would commence her care giving services on 1 August 2011.

[10] The common evidence of Ms Tarau and Ms Nicholas is that on 29 July 2011, Ms Nicholas contacted Ms Tarau and informed of the discussion with Ms Tutaki, including that an assurance had been given by Ms Tutaki that Ms Tarau could commence care giving services for Ms Nicholas's mother on 1 August 2011.

[11] In a letter to Ms Tarau dated 29 July 2011, Ms Tutaki refers to the conversation with Ms Nicholas. Attached to the letter was an application form, a Police vetting form and an IRD declaration. Ms Tarau was also asked to supply a copy of her driver's licence and a curriculum vitae. As I understand the evidence of Ms Tarau, she returned the application form and the other documents required, on or about 7 August 2011. The "Office Use Only" section of the application form shows that Ngati Ranginui received the documents on 8 August 2011. It is also recorded that Ms Tarau's referees were contacted on 11 August 2011 and the Police response to the vetting form was received on 16 August 2011. All of this is signed off by what appears to be the signature of Ms Tutaki. It is also shown that it is recommended that Ms Tarau's application be accepted and that employment should be offered.

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<sup>1</sup> Support Net is a needs assessment and service coordination agency within the Bay of Plenty District Health Board.

[12] The evidence of Ms Tarau is that she commenced her home care duties for Mrs Nicholas (the client) on 1 August 2011. Ms Tarau attests that on or about 3 August 2011, she went to the main office of Ngati Ranginui in Tauranga and was given timesheets and various resources relating to the home care assignment; such as, gloves, aprons and shower boots. Ms Tarau says she was given the above items by Ms Tutaki. Ms Tarau also attests that at the same time Ms Tutaki offered her the role of caregiver for the client and Ms Tarau indicated her acceptance; albeit she had already been carrying out the duties since 1 August 2011.

[13] Also at her meeting with Ms Tutaki, Ms Tarau was given an employment agreement and a job description for the position of caregiver. Ms Tarau says that upon Ms Tutaki giving her “an in depth” briefing regarding the terms and conditions of employment, she conveyed to Ms Tutaki that she was happy with, and accepted, the proposed terms of employment. Ms Tarau says that she believed that she had reached an oral agreement with Ms Tutaki in regard to her employment in the role of caregiver; but she makes no mention of what action was required in regard to the employment agreement, despite saying that she received an in depth briefing from Ms Tutaki.

[14] Ms Tarau has provided the Authority with copies of the timesheets that she completed for the period 1 August to 28 August 2011. The timesheets were signed by the client and Ms Tarau. Along with the timesheets, Ms Tarau was also given a document that informs as to the dates that the timesheets must be provided by and the respective pay days. Ms Tarau attests that she provided all of her timesheets, as required by Ngati Ranginui, but she was not paid on the due dates. Ms Tarau contacted the office of Ngati Ranginui several times to ascertain why she had not been paid but it seems that she obtained little satisfaction. However, on 25 August 2011, Ms Tarau was contacted by the senior administrator for Ngati Ranginui. This person advised Ms Tarau that the reason she had not been paid was that she did not have an employment agreement. Ms Tarau attests that she informed the administrator that she had reached an oral agreement with Ms Tutaki. But it appears that Ms Tarau made no mention to the administrator that she had received an employment agreement from Ms Tutaki; or what she had done with it.

[15] While Ms Tarau does not mention it in her evidence, it appears that she had a telephone conversation with Ms Kimiora Rawiri, a director of Ngati Ranginui, on

16 September 2011. This is recorded in a letter of the same date from Ms Rawiri to Ms Tarau. Accompanying the letter was an employment agreement. Pertinent to matters before the Authority, Ms Rawiri informs:

Please note, as indicated in the Employment Agreement the terms and conditions of the employment relationship shall come into force “following signing of the agreement by both parties”. As such, once the agreement has been signed on behalf of the organisation a copy will be returned to you for your records following which time it is anticipated that our Coordinator will contact you to discuss any caregiver service requirements.

[16] This is all rather odd given that Ms Tarau had commenced care giving services on 1 August 2011 and there had been the discussion that Ms Tarau has attested took place with Ms Tutaki on 3 August 2011, along with the fact that Ms Tarau was in possession of timesheets and various equipment to allow her to carry out her role as the caregiver for the client.

[17] Ms Tarau attests that she received the letter dated 16 September 2011 and the accompanying employment agreement (the agreement), on or about 17 September 2011. In accordance with clause 22 of the agreement, Ms Tarau sought “independent advice” from Baywide Community Law Service; meeting with a solicitor on 6 October 2011. The Authority has not been told why Ms Tarau did not contact Ms Rawiri to acknowledge receipt of the agreement and inform that she was seeking advice. Neither has it been revealed why Ms Tarau did not see fit to inform Ms Rawiri that she had already received an employment agreement from Ms Tutaki at the same time that she received the Ngati Ranginui application form. Had she done so, the dispute now before the Authority may not have arisen because, via a further letter from Ms Rawiri dated 6 October 2011, Ms Tarau was informed:

I refer to my letter of 16 September 2011 setting out an offer of employment which I note has not been signed or returned to us. This letter is to formally advise that the offer is withdrawn and we have decided to continue utilising existing caregivers from within the organisation.

[18] On the weight of the evidence available to the Authority, I conclude that it is more probable than not that an employment relationship was entered into as a result of the discussion between Ms Tarau and Ms Tutaki on or about 3 August 2011; as evidenced by the provision of timesheets and other equipment necessary to carry out the work of caregiver. Of course it is possible that Ms Rawiri may not have been aware of the agreement that was reached between Ms Tarau and Ms Tutaki, but given

my conclusion that it is more probable than not that an oral employment agreement had been reached; it was certainly not appropriate for Ngati Ranginui to “formally advise that the offer is withdrawn”. On the one hand it could be said that via the letter of 6 October 2011, Ms Tarau was dismissed. But then, there is the evidence of Ms Tarau that she ceased providing care to the Ngati Ranginui client as of 5 September 2011, as she had not been paid for the services she had provided from 1 August 2011. Oddly, there is no evidence before the Authority in regard to who took over the care of the client after Ms Tarau ceased doing so. But then it has to be said that there are a number of oddities present in this case. Not the least of which is: where was Ms Tutaki when Ms Tarau was seeking to be paid for the work she had done - and subsequently?

### **Analysis and conclusions**

[19] The first question that falls for determination is: **Was an employment relationship created?**

[20] Because Ngati Ranginui is not able to produce evidence to contradict that of Ms Tarau, her evidence, along with that of Ms Nicholas, is the only tangible evidence that is available to the Authority. On the weight of this, I conclude that it is more probable than not that an oral agreement was reached between Ms Tarau and Ms Tutaki. The agreement was that the former would be engaged to carry out home care services for the client who was entitled to such, following the approval of Support Net. The agreement is apparent from the fact that Ms Tarau was provided with timesheets which she duly filled in and had signed by the client; in accordance, it seems, with the instructions given to her.

### **The wage arrears**

[21] Ms Tarau has produced evidence (the timesheets) that she worked 115 hours whilst providing home/house tasks and personal care to the client on behalf of Ngati Ranginui. The pay rate was \$14.53 per hour. I find that Ms Tarau is entitled to be paid for the work she carried out in good faith under the agreement that she reached with Ms Tutaki, acting as an employee (or agent) of Ngati Ranginui. An order will follow.

**Was there a dismissal?**

[22] Ms Tarau claims that she was dismissed on 6 October 2011; with the dismissal being implemented via the letter of that date. However her evidence is that she ceased providing care giving services to the client on 5 September 2011, because she had not been paid. It could be said that the failure by Ngati Ranginui to pay Ms Tarau wages for the services she provided constituted grounds for a resignation and a consequent claim of constructive dismissal. However, Ms Tarau did not at any time resign from her employment. Rather, she appears to have just simply stopped providing her services while she sought payment. Furthermore, Ms Tarau has not claimed that she was constructively dismissed and given the overall circumstances, I am reluctant to apply s.122 of the Employment Relations Act 2000 and treat the grievance as being other than what she has claimed it to be.

[23] I also have some difficulty in regard to the action, or perhaps more correctly, inaction, of Ms Tarau regarding her obligations upon receiving the initial employment agreement from Ms Tutaki. It would have been a relatively simple matter for Ms Tarau to have obtained some advice and then sign and return what was just a fairly standard employment agreement. Having said that, it does not excuse the lack of constructive communication or action by Ngati Ranginui when it became obvious Ms Tarau was caring for a client and (justifiably) seeking payment for doing so; as evidenced by the timesheets she presented. It seems to me that if someone had “joined the dots” as it were, this dispute could, most probably have been avoided.

[24] This is a most unusual dispute in that the actions of both parties are somewhat inexplicable and hence I am not prepared to find that Ms Tarau was unjustifiably dismissed. Indeed, it is questionable as to whether she was dismissed at all. Rather it seems to me that both parties were at fault in the circumstances and neither party met their respective obligations towards each other.

**Determination**

[25] Ms Tarau is successful with her claim for unpaid wages. Ngati Ranginui Home and Community Support Services Company Limited is ordered to pay to Ms Tarau the gross sum of \$1,670.95.

[26] I am unable to conclude that Ms Tarau was unjustifiably dismissed and her claim in this regard is unsuccessful.

**Costs**

[27] Costs are reserved. The parties are invited to reach an agreement on this matter. In the event that a resolution is not achieved, the applicant has 28 days from the date of this determination to file and serve a memorandum. The respondent has a further 14 days to file and serve submissions in response.

**K J Anderson**  
**Member of the Employment Relations Authority**