

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2015] NZERA Wellington 2  
5459945

BETWEEN            TANYA WALLIS  
                                 Applicant

AND                    THE MANAGEMENT  
                                 COMMITTEE AND WHANAU of  
                                 TE KOHANGA REO O NGATIKI<sup>1</sup>  
                                 Respondent

Member of Authority:    P R Stapp

Representatives:        Natalie Bradley, Counsel for Applicant  
                                 Ruka Broughton, Advocate for Respondent

Investigation Meeting  
(including submissions):    26 November 2014 at New Plymouth

Determination:            12 January 2015

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     This is an employment relationship problem in which Tanya Wallis claims that she has been unjustifiably disadvantaged in her employment with Te Kohanga Reo o Ngatiki (Kohanga Reo) that led to her decision to resign. She claims that her resignation is a constructive dismissal. Also she has claimed that there has been a breach of good faith.

[2]     She is claiming lost wages, compensation and costs. Also, she has claimed damages for the breach of good faith.

[3]     Te Kohanga Reo o Ngatiki denies all Ms Wallis's claims.

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<sup>1</sup> Te Kohanga Reo o Ngatiki is not an incorporated society and/or a charitable trust, but the management committee and whanau accept responsibility under the Charter that applies. The office holders and whanau are named in the charter and they know who they are. Any enforcement of course will have to be based on the named individuals jointly and severally. More properly such individuals should be named, but that will have to be a matter for any enforcement, only if it is necessary.

**Issues**

- [4] Who was Ms Wallis's employer? Has it been correctly cited?
- [5] Was there any action of the Te Kohanga Reo o Ngatiki that was unjustified?
- [6] Has Ms Wallis been disadvantaged in her employment?
- [7] Was Ms Wallis constructively dismissed?
- [8] If there is a personal grievance, what is the nature of the personal grievance and is Ms Wallis entitled to remedies?
- [9] Has there been a breach of good faith?

**The law**

[10] The law requires Ms Wallis to establish that there was some action that she relies upon that was unjustified and that she has been disadvantaged. This relates solely to the process followed by the Te Kohanga Reo o Ngatiki in regard to the complaints and allegation of drug use. For the claim of constructive dismissal Ms Wallis has to establish that the initiative for leaving has come from her employer.

**The facts**

[11] Te Kohanga o Ngatiki is not incorporated. It is located in Hawera where Ms Wallis worked. It is a Kohanga Reo responsible for the care and education of tamariki and balancing the interest of the whanau. The management committee and the whanau of Te Kohanga Reo o Ngatiki employed Ms Wallis. The Tutohinga Charter applies to the individuals involved, and they know who they are. Each of their names is scheduled in the Tutohinga Charter between Te Kohanga Reo o Ngatiki and the National Te Kohanga Reo Trust Inc,<sup>2</sup> and sets out the governance principles. Te Kohanga Reo o Ngatiki operates by relying on the National Te Kohanga Reo Trust Incorporated for guidance and assistance in its operation, but the National Te Kohanga Reo Trust Incorporated is not a party in this matter.

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<sup>2</sup> The Charter was signed off by the Chairperson from the Te Kohanga Reo o Ngatiki and the National Trust District Coordinator and the Chairperson of the National Te Kohanga Reo Trust Inc. (the name being used by the parties in the Charter when it was signed in 1991).

[12] Ms Wallis was employed as a Kaiawhina at Te Kohanga o Ngatiki from 10 February 2014 to 5 June 2014 when she resigned. Her child attended the Kohanga Reo. In April 2014 an issue emerged in regard to information that came to the attention of the Te Kohanga o Ngatiki's Service Manager Angelique Ngeru. This information related to a claim that another person used Ms Ngeru's name publicly in regard to someone being sent to a house to get drugs. This matter was raised with the staff on or about 17 April 2014. At first Ms Ngeru thought it was just a joke, but soon concluded that her reputation was at risk.

[13] Ms Ngeru decided to investigate the matter and find out who was involved using her name. She visited the house to ascertain who was involved. Ms Ngeru has always denied that she had any involvement in allowing anyone to use her name, and especially associated with drugs. She denies any involvement associated with a person using her name, has no responsibility for what this person apparently said and at that point in time had nothing to do with Ms Wallis. She came to the conclusion that the person was related to Ms Wallis.

[14] On Monday 28 April 2014 Ms Ngeru raised this matter in the workplace and referred to the Te Kohanga Reo o Ngatiki's policies that include:

- Alcohol/smoking/substance abuse policy;
- Whanau/Kaimahi using her name to access drugs in the community;
- Job descriptions, responsibilities and roles;
- Te Korowai – one guideline per week. To be given to clarify policies/guidelines are being followed correctly;
- Programmes; and
- Assessments and profiles.

[15] Ms Ngeru says that during the week of 28 April 2014 Ms Wallis arrived at work "stoned", on three occasions. Ms Ngeru says that she told Ms Wallis that she did not want to look at her let alone work with her in that frame of mind, the meeting was over and that Ms Wallis needed to go home. Ms Wallis left to go home and another worker left voluntarily with her. Ms Ngeru says that after this Ms Wallis was going about complaining about her (Ms Ngeru) to other people. There was an

emergency hui held on 2 May 2014 called by Ms Wallis and another person in regard to what was happening. Ms Ngeru says that Ms Wallis was “*totally stoned out of her brains*” at the hui. Ms Wallis denies all the allegations about her; except that she acknowledges that she admitted that she had smoked synthetic drugs out of work and sometime in the past.

[16] The next step was that Ms Ngeru decided to take the matter to a whanau hui.

[17] For this she prepared the following papers:

- (a) Letter detailing areas of concern;
- (b) Complaints process;
- (c) Health and Safety Policy;
- (d) Supervision Policy;
- (e) Extract from contract – ss.7, 7.5 – 7.7; and
- (f) ERO Report G - Recommendations to Resolve the Issue.

[18] An emergency whanau hui was held on 9 May 2014. Ms Ngeru says that in the whanau hui she raised all her concerns in regard to the seriousness of drug use and Ms Wallis’s involvement. Ms Wallis complained that she had been bullied in her workplace and that she was hearing racism.

[19] After the hui Ms Ngeru reported to a Te Kohanga Reo national hui held at Turangawaiwai. Upon advice she went over all the information she had in her diary, telephone, documents, meetings, and concluded that Ms Wallis knew her every move with regards to the person visiting the house because of her knowledge of shared information held by staff as to what she was doing.

[20] Ms Ngeru wrote in her diary a plan as follows:

- (a) Ring the Police because Ms Wallis broke the law;
- (b) Send Ruka Broughton a letter of complaint, whanau did not act accordingly;
- (c) Request Kaimahi to submit a letter in their defence;

- (d) Contact Ms Wallis's father to have a meeting with Ms Wallis, and Mati, her partner;
- (e) Ring Mr Broughton for grievance – process; and
- (f) Renewal due for probation period – “a letter to dismiss her”.

[21] Ms Ngeru requested Ms Wallis to meet with her and the meeting was recorded. Ms Ngeru raised her options to help Ms Wallis, but only got through a few of them before Ms Wallis reacted and decided to walk out.

[22] Thereafter, Ms Wallis's lawyer became involved with further allegations and raised a personal grievance. First that there had been an unjustified disadvantage claim in regard to the procedure that the Te Kohanga Reo o Ngatiki was following.

[23] Ms Wallis went on sick leave and she obtained a medical certificate on 14 May 2014 for 8 days being unfit for work. In the background Ms Wallis' probation period was due to expire and Ms Ngeru prepared a dismissal letter dated 15 May 2014 in anticipation of what might happen in regard to the continuation of the employment, although she says that she signed it off much later than the date on the letter, and the chairperson signed it off on 16 May 2014. Ms Wallis had no knowledge of the letter until the Authority's investigation meeting when it was produced. Ms Wallis returned to work on or about 22 May. On the face of it this looks as if the plan was to dismiss Ms Wallis from her employment having regard to the revision at the end of the probation period.

[24] Te Kohanga Reo o Ngatiki provided Ms Wallis with a letter dated 3 June with an apology to try and settle on the terms claimed in the first personal grievance from Ms Wallis's lawyer, but there was no agreed settlement at the time.

[25] In the meantime Ms Wallis was requested on 29 May 2014 by the current chairperson Tina Tipene to undergo a drug test. Ms Wallis did so because she says she thought that she had no choice. Ms Ngeru says that there were continuing problems with Ms Wallis in the meantime. This included a claim that Ms Wallis was arriving at work late.

[26] Ms Wallis resigned on 5 June. Ms Wallis provided a written resignation that reads as follows:

*"I am writing you this letter to inform you that I will not be returning to work after today. I have a medical certificate pending and an appointment with WINZ next Friday after which I will provide you with the necessary paper work. I feel that your attitude and actions towards me recently have been designed to make me resign. I feel that I have no choice but to do this because you have been treating me so unfairly."*

[27] Second a personal grievance was raised later that there was a constructive dismissal when Ms Wallis resigned from her employment on 5 June 2014. She did not return to work.

### **Determination**

[28] This determination focusses first on the unjustified disadvantage claim for failure to follow a correct procedure and a drug test, second the constructive dismissal claim, and third the claim of a breach of good faith (for damages).

#### **(a) Unjustified disadvantage claim**

[29] This relates to the procedure followed by the Kohanga Reo. Ms Wallis has no complaint about the 17 and 28 April and 2 May meetings and discussions.

[30] Her complaints relate to the hui held on 9 May and the meeting with Ms Ngeru on 12 May. The purpose of the 9 May meeting was to raise general matters relating to the implementation of the Kohanga Reo policies, but included matters relating to Ms Wallis personally. This could not possibly be part of any investigation. This is because the charter implies that an investigation would be separate from the whanau deciding on matters and to ensure an investigation is sensitive to the employee's needs. Ms Wallis had no opportunity to have her own representative present at the hui. She should have been entitled to this given the seriousness of the allegation about her alleged use of drugs and being "stoned" at the whanau hui. Also I hold that Ms Ngeru as Ms Wallis's accuser and supervisor responsible to the whanau did not conduct a thorough investigation to conclude that Ms Wallis was "stoned" at work, other than relying on her own opinion that was based on an observation from experience and Ms Wallis' admission that she had smoked synthetic drugs outside work some time earlier. I accept that Ms Ngeru's opinion was entirely genuine, but she did not properly investigate the observation and thus she did not have sufficient proof of it given the seriousness of the allegation. The matter remained unresolved because Ms Wallis denied being under any influence of drugs at work. I accept that Ms Ngeru considered she had a very difficult situation to resolve. Indeed I accept that she believed if the matter was left to the whanau they wanted to suspend Ms Wallis

without pay until investigations were followed through or instantly dismiss Ms Wallis. This is supported by her evidence that she was trying to help Ms Wallis and that she had a difficult situation between Ms Wallis and the whanau when the matter was not resolved and that Ms Ngeru had to follow the human resources and charter policy in regard to the matter.

[31] At first I considered that Ms Ngeru's options on 12 May were to put Ms Wallis on notice of her concerns, which she had listed in writing, but this is not what they are. I hold that the options were conclusions and/or findings reached by Ms Ngeru as to outcomes to deal with Ms Wallis. Ms Wallis had no opportunity to comment before the options were decided and to have adequate input into any options. It follows that without an opportunity being given to Ms Wallis the whanau could not give genuine consideration to her reply before making a decision. Indeed there was no other whanau meeting after 9 May with Ms Wallis and any representative. The Kohanga Reo's process implies that there would be some separate (discrete and fair) investigation first. A fair and reasonable employer could not act in the way it did by taking the matter to the whanau hui first, I hold, despite how genuine Ms Ngeru was trying to be to help Ms Wallis. Ms Ngeru's difficulty is that Ms Wallis denied being under the influence of drugs at work. An independent investigation with its findings would have been of considerable assistance, involving others being interviewed. This would not have prevented the whanau exercising its responsibility based on sound information being considered later. I am satisfied that the Kohanga Reo had access to resources to help with this, such as the National Trust, which is party to the Charter. Moreover Ms Ngeru was too personally involved in the matter because of what she says she witnessed seeing of Ms Wallis's demeanour and the background where she says her name was used in public that she took exception to. The matter did involve Ms Wallis to the extent that a family member of hers had been implicated in the matter. This matter has only added to the confusion and I hold was separate to the workplace issues. As a result Ms Ngeru should therefore have stepped aside for someone else to conduct the investigation.

[32] This means that Te Kohanga Reo O Ngatiki's action was unjustified and as a result put Ms Wallis's employment in jeopardy. Even so as the procedure did not follow strictly the provisions of the human resources manual and Charter that means she was also disadvantaged in regard to her terms and conditions of employment.

[33] Ms Wallis has complained that the alleged demand for a drug test was unjustified and disadvantaged her in her employment. I do not accept that claim. First the Kohanga Reo chairperson had reasonable grounds to ask for one to be undertaken based on what Ms Ngeru observed as she was Ms Wallis' supervisor. Ms Ngeru was responsible for the Kohanga Reo and she says that she had genuine observations about Ms Wallis's demeanour at work and that Ms Wallis had denied the allegations. Second the employment agreement permits drug testing. I can understand how Ms Wallis feels that she had no option but to do it, and she agreed to be tested. However if she felt that the employer was not following the correct process and did not have reasonable grounds to ask for it the matter could have been treated as a dispute for enforcement under her employment agreement in the operation interpretation and implementation of the agreement. Lastly she never provided the results to her employer. By 6 June she had resigned anyway.

**(b) Constructive dismissal claim**

[34] The letter of dismissal was prepared for an entirely separate matter about performance and review at the end of the probation period. Although Ms Wallis was put on notice of the pending expiry of her probation she was never informed properly that her employment was at risk in such a definitive term. The letter was discovered during the Authority's investigation. I cannot draw a linkage between the existence of the letter and the allegation of Ms Wallis being under the influence of drugs at work for it to support the claim that the Te Kohanga Reo o Ngatiki's action was aimed with the dominant purpose to coerce her to resign. First Ms Wallis had no knowledge of the letter. Second I am satisfied that it was prepared with the sole purpose of addressing the probation period and performance. Third Ms Wallis was never dismissed with it. Lastly if the course of events played out and Ms Wallis was dismissed with the letter being used at the time it would have been found to be predetermined, without proper notice and no input in regard to Ms Wallis addressing the performance issues as required for a probation period.

[35] Next Ms Wallis's claim for constructive dismissal relates to the breaches of her rights under the individual employment agreement and the procedure the Kohanga Reo was required to follow in the charter and the human resources policy. There is no doubt there has been a breach, but such a breach was not serious enough to make it reasonably foreseeable that Ms Wallis would resign, I hold. This is especially so

since she had raised a personal grievance to remedy the breach and she was on sick leave. I note that there is absolutely no independent evidence as to what her illness related to.

[36] I find in the circumstances that her resignation was not reasonably foreseeable.

[37] I hold that Ms Wallis was not constructively dismissed but decided to resign of her own accord and her own reasons.

### **(c) Breach of good faith claim**

[38] I am not certain at all of the cause of action that Ms Wallis claims was a breach of good faith. If it relates to the findings already made about the breach of the procedure then that has been dealt with in the first part of the unjustified disadvantage claim. There are no details and specific matters for me to take the claim any further. The claim for damages was abandoned during the investigation meeting.

### **Conclusion and remedies**

[39] I hold that Ms Wallis has established that Te Kohanga Reo O Ngatiki's action in following its procedure relating to complaints, investigations and possible discipline was unjustified and disadvantaged Ms Wallis in her employment. Ms Wallis has a personal grievance.

[40] I now turn to remedies. There can be no lost wages. Ms Wallis has failed to mitigate her loss. She confirmed that she was not available to work and indeed did not have a medical clearance to return to work when she was on sick leave when she resigned. It was submitted that trying to find child care arrangements meant that she could not look for work because of her child. She has not established with any evidence that there were no other options available to her. I dismiss her claim for lost wages.

[41] I accept Ms Wallis's claim that she was hurt and her feelings upset that can be attributed to the way the Kohanga Reo failed to follow proper process. In this regard I assess her claim to be worth \$2,000. I have to consider her contribution and she cannot be blamed for the respondent's action in failing to follow its own procedures. I can understand that Ms Wallis got upset on 12 May and stormed out. She did return to work, albeit however difficult that may have been. She was entitled to raise a

grievance and entitled to try and settle that. The apology was not enough for her and she cannot be blamed for not settling when the personal grievance remained live. She did close her mind to Ms Ngeru's genuine approach to resolve the matter, but Ms Wallis cannot be blamed for any confusion about what was happening in the process when the employer has the responsibility to ensure the process is carried out clearly and fairly. There was insufficient proof to establish that Ms Wallis was blameworthy and contributed to her grievance by using drugs and being under the influence of drugs at work, I hold. Any communication breakdown was mutual, I hold. I make no deduction on the sum.

### **Costs**

[42] Ms Wallis is legally aided. Costs must follow the event. Ms Wallis has been successful. The tariff must be adjusted because her costs are much less than the daily tariff for one day. She was unsuccessful on a part of the unjustified disadvantage claim and the constructive dismissal claim and damages for the breach of good faith. Her successful claim was the main plank in her case and as the investigation meeting did not last a full day and taking into account preparation, I award costs in the sum of \$1,250 plus the filing fee of \$71.56 to Ms Wallis.

[43] The whanau and management committee of the Te Kohanga Reo o Ngatiki is to pay Tanya Wallis:

[1] \$2,000 compensation under s 123 (1) (c) (i) of the Act; and

[2] \$1,250 costs plus the filing fee of \$71.56

P R Stapp  
Member of the Employment Relations Authority