

**Attention is drawn to the order
Prohibiting publication of certain
Information in this determination**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2015] NZERA Auckland 10
5440837

BETWEEN

ROSINA HAUITI
Applicant

A N D

TE REO IRIRANGI O NGA
RAUKAWA TRUST t/a
RAUKAWA FM
Respondent

Member of Authority: T G Tetitaha

Representatives: Applicant in person
A Bennett, Counsel for the Respondent

Investigation Meeting: 29-31 October, 4 December 2014 at Rotorua

Submissions Received: 10 November and 4 December 2014 from the Applicant
10 November and 4 December 2014 from the Respondent

Date of Determination: 13 January 2015

DETERMINATION OF THE AUTHORITY

- A. The term of Rosina Hauti's employment for payment of her wages was affected to her disadvantage by Te Reo Irirangi o Nga Raukawa Trust's decision to suspend her without pay from 24 October 2013 until 4 December 2013.**
- B. Rosina Hauti was unjustifiably dismissed by Te Reo Irirangi o Nga Raukawa Trust.**
- C. Te Reo Irirangi o Nga Raukawa Trust is to pay Rosina Hauti wages arrears of \$8,076.92 less PAYE pursuant to s131 Employment Relations Act 2000.**

- D. I decline to award any lost remuneration under ss. 123(b) and 128 of the Employment Relations Act 2000 because Ms Hauti failed to mitigate her loss of wages.**
- E. Te Reo Irirangi o Nga Raukawa Trust is to pay to Rosina Hauti compensation of \$1,250 for hurt, humiliation including a reduction of 75% for Ms Hauti's contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.**
- F. Costs are reserved. If either party seeks an order for costs a memorandum shall be filed by 28 January 2015. The other party shall have 11 February 2015 to file and serve a reply.**

Employment relationship problem

- [1] Rosina Hauti was employed as the General Manager of Te Reo Irirangi O Nga Ruakawa Trust trading as Raukawa FM until she was suspended on pay to 23 October 2013 then without pay thereafter. She was dismissed on 4 December 2013 for serious misconduct.
- [2] There is a non-publication order prohibiting the publication of the names of the respondent employees (both current and former) TU, HN and HU and a third party KN pursuant to clause 10 Schedule 2 Employment Relations Act 2000 (the Act). This order is made because the affected persons were not witnesses but were involved in the subject matter leading to the applicant's dismissal. Some of the employees and third parties have also concluded confidential settlements with the respondent.

Facts leading to dismissal

- [3] The respondent, Te Reo Irirangi o Nga Raukawa Trust trading as Raukawa FM, is a charitable trust governed by a board of trustees. At the material times, the trustees were Pua Taikato (until August 2013), Robert Wehipeihana (throughout), Mikere (Christine) Wairua, Marion Tanoa (from August 2013), and Colin Murray Heke (from July 2013). The respondent operated a radio station known as Raukawa FM.

- [4] In March 2013, Rosina Hauiti was employed by her sister, Claudette Hauiti, to assist the respondent. She was to initially assist with the HR aspects of implementing her sister's draft strategic plan.
- [5] In April 2013, Ms Hauiti was appointed by the respondent as their General Manager. On or about 9 April 2013, the parties signed an employment agreement¹.
- [6] On 29 April 2013 a motion was passed by the trustees authorising one of the trustees, Pua Taikato, to work with Ms Hauiti on behalf of the Board.²

TU Allegations

- [7] On 4 June 2013, a station employee (TU) returned to work after maternity leave. She met with Ms Hauiti. As a result of this meeting and subsequent action by Ms Hauiti, TU raised a personal grievance³.
- [8] Between 4 June and 5 July 2013, Ms Hauiti corresponded with TU's lawyer. The correspondence became terse. The matter was passed to Pua Taikato. Ms Taikato subsequently dismissed TU.

HN Allegations

- [9] On 1 July 2013, HN was employed as a personal assistant to Ms Hauiti. She did not have an employment agreement.
- [10] On 16 August 2013, HN's partner (who was also employed by the respondent) advised Ms Hauiti they would be away returning to work on 20 August 2013. When HN returned to work, Ms Hauiti advised she would be receiving a written warning for being absent.
- [11] On 23 August 2013, HN was called into Ms Hauiti's office and asked if she was happy with her job. She was asked if she wished to be sent on a journalism course, train to be an accountant or consider something else in photography or television production. HN was not interested.

¹ Document 78 bundle of documents

² Item 7 Minutes Respondent Board Meeting 29 April 2013 Applicant Exhibit 2 produced by P Taikato 30/10/14

³ Document 56 bundle of documents

[12] Ms Hauiti then alleged HN had accessed confidential information about the salary Ms Hauiti's son was receiving. A heated discussion occurred. Ms Hauiti told HN to go.

[13] On 24 August 2013, HN raised a personal grievance.

KN Allegations

[14] On 9 August 2013 Ms Hauiti invited KN to the station to discuss possible employment opportunities. KN was not an employee at the time.

[15] KN believed she had been offered a job and handed in her notice to her employer on 12 August 2013. She wrote to Ms Hauiti advising she accepted her proposal and had given four weeks' notice to her current employer.

[16] The same day, Ms Hauiti emailed KN stating a formal offer had not been made because she needed the trustees okay and that KN had agreed.

[17] On 23 August 2013, Ms Hauiti advised the trustees had decided to engage someone else rather than employ KN.

[18] On 24 August 2013, KN complained to the trustees about Ms Hauiti's actions.

HU Allegations

[19] On 22 September 2013, a personal grievance was raised by HU. The personal grievance alleged HU's employment had been terminated on 19 July 2013 after he was handed a letter by one of the trustees, Pua Taikato.

Trespass Notices

[20] On 1 September 2013, Ms Hauiti attended a trustee meeting regarding the above personal grievances and complaint from KN. The meeting became heated. Ms Hauiti and Ms Taikato left before the meeting ended.

[21] On 24 September 2013, Ms Hauiti obtained a trespass notice against one of the trustees, Robert Wehipeihana.

[22] On 25 September 2013, Ms Hauiti obtained a trespass notice against two other trustees, Colin Heke and Marion Tanoa.

Broadcast

- [23] On 26 September 2013 at 3.23 pm Ms Hauiti advised the respondent's lawyer, Prue Dawson, that she had prepared a media release about the refusal of the trustees to investigate an alleged misappropriation of funds by a former manager. She also alleged she would write to the Herald newspaper about abuse and violence by two of the trustees saying *"I appreciate that I will not escape unscathed, but I would rather go out for right than cowering to bullies who protect their own."*⁴
- [24] Ms Dawson replied stating Ms Hauiti *"had been advised of the trustees' legal position by way of my letter to the Raukawa FM staff yesterday"* and *"should take independent legal advice on any proposed course of action as you risk defaming the trustees of the trust"*. Ms Dawson advised she would not be corresponding with Ms Hauiti any further.
- [25] On 26 September 2013, Ms Hauiti sent out a press release at 4pm (the broadcast). She alleged she had undertaken her own internal investigation into the financial dealings of a former manager. She found payments for works that were not invoiced correctly and a lack of co-operation. She stated the respondent was reluctant to investigate the allegations because of nepotism. She referred to the above employee personal grievances. She alleged abuse by a trustee for refusing to employ KN and that KN had an outstanding assault matter. She alleged this impropriety was being swept under the carpet. She stated she held the mandate from her staff, the majority of Raukawa and the taxpayers of New Zealand. She referred to attempting several avenues of resolution. She acknowledged she had placed her job at risk but believed she *"must be able to live with [her] conscience and have respect for the Board of Trustees to whom I report"*. The broadcast was posted to the respondent's Raukawa FM Facebook page.
- [26] The Trust had been investigating the allegations of misappropriation. The alleged misappropriation could not be detected by the trustees in their review

of the accounts. Te Mangai Paho had later commissioned a report from the accounting firm Deloitte. The report issued in April 2014 found no misappropriation had occurred.

Suspension

- [27] On 27 September 2013, two of the respondent trustees, Colin Heke and Robert Wehipeihana, and two of the respondent's lawyers, Prue Dawson and Katrina McCluskie, attended the Raukawa FM radio station to speak with Ms Hauiti.
- [28] Ms Hauiti locked herself in a room and went onto the Raukawa FM Facebook page seeking assistance. She refused to leave the room until the Police had been called. Upon her exiting the room, Ms Dawson served her with a trespass notice and told her she had been suspended on pay. Ms Hauiti subsequently became unwell.
- [29] On 27 September 2013, KN wrote to the respondent alleging defamation as a result of the broadcast.
- [30] On 28 September 2013, Ms Hauiti emailed KN refusing to remove the broadcast from the respondent's Facebook Page.
- [31] On 30 September 2013, a letter confirming the suspension on pay was sent to Ms Hauiti by email.
- [32] On 11 October 2013, the trustees sent a letter setting out 14 allegations of serious misconduct.
- [33] On 22 October 2013 the respondent's lawyer, Prue Dawson, emailed the applicant's lawyer, Alex Hope, proposing to discontinue payment of her wages during her suspension. It alleged the outgoings exceeded income and it was taking "*immediate steps across the board*" to reduce the outgoings. It referred to a shortfall of \$15,000 per month concluding "*our client cannot afford to continue to pay Rosina whilst she is suspended and not generating income.*" The email also referred to Ms Hauiti's medical certificate dated 21

October 2013 which stated she *“is currently not medically fit to attend the disciplinary hearing which has been scheduled for 23/10/2013.”*⁵

[34] On 23 October 2013 the applicant emailed Ms Dawson advising *“she had not heard from Alex Hope, but I am available to meet for the disciplinary hui from next Wednesday afternoon say at 2 pm. I am still not well but wish for this matter to be over with.”*

[35] The same day Ms Dawson wrote to Alex Hope stating the respondent had resolved to end the paid suspension, Ms Hauiti would be paid to the end of the day and from the following day shall be on unpaid suspension.⁶

Termination

[36] On 31 October 2013 the parties met at the offices of the respondent’s lawyer. Ms Hauiti provided various responses to the allegations.

[37] On 14 November 2013, the respondent sent its preliminary conclusions. Three of the 14 allegations were upheld. Ms Hauiti was asked to attend a further meeting on 21 November 2013 to give her responses.

[38] Between 14 and 21 November 2013, there was correspondence between the respondent’s lawyer, Ms Hauiti’s representatives, and Ms Hauiti personally about the unpaid suspension, alleged termination as a consequence, the applicant’s health and a date for a further disciplinary meeting.

[39] On 27 November 2013 the respondent’s lawyer sent a letter disputing termination of Ms Hauiti’s employment and requiring her to attend a disciplinary meeting on 4 December 2013.

[40] On 28 November 2013, Ms Hauiti’s then representative, Dave Vinnicombe, wrote alleging the contract had been repudiated by the suspension without pay and stating:

Your client expects our client to prepare for the disciplinary inquiry on 4 December 2013. She is expected to travel at her expense to that inquiry. By not paying our client since 23 October 2013, our client is

⁵ Common Bundle Vol 1 Document 37

⁶ Common Bundle Vol 1 document 34

effectively precluded from preparing for and participating in the process. Our client's rights in this regard are likewise reserved. In all the circumstances our client will not be attending the proceedings on 4 December 2013.

[41] On 2 December 2013, the respondent denied Ms Hauti had been prevented from participating in the process. The letter also confirmed that as Ms Hauti would not be attending the meeting on 4 December 2013 the respondent would still meet to make a decision on the information it had before it.

[42] On 4 December 2013, the respondent's lawyer emailed Mr Vinnicombe advising:

[The respondent] had upheld all three allegations of serious misconduct against [the applicant]. Given your confirmation yesterday that [the applicant] deems the employment relationship to be over there does not appear to be any point in obtaining [her] view on the proposal to summarily dismiss her.⁷

[43] A statement of problem was filed on 26 November 2013. The matter is now before me for determination.

Issues

[44] At a teleconference on 14 July 2014, the following issues were identified for hearing:

- a) Was Ms Hauti unfairly disadvantaged in her employment by the respondent's decision to suspend her on pay until 23 October 2013, and then without pay until 4 December 2013?
- b) Was Ms Hauti's conduct misconduct that a fair and reasonable employer could have dismissed her for?
- c) Was the process leading to dismissal what a fair and reasonable employer could have done in all the circumstances?
- d) What remedies, if any, should be awarded?

Was Ms Hauti unfairly disadvantaged in her employment by the respondent's decision to suspend her on pay until 23 October 2013, and then without pay until 4 December 2013?

[45] The respondent submits Ms Hauti was suspended on pay due to the trespass notices and broadcast. Both were unexpected events and gave rise to a significant issue necessitating the removal of an employee. Ms Hauti expressed no regret for her actions, she now accepted the trespass notice was unwise and had made it clear she was not going to follow any lawful instructions by the trustees. There was a risk to the trust if her behaviour continued. Complaints had been received from persons named in the broadcast.

[46] In respect of the suspension without pay, it submitted the trustees acted on their honest belief at the time regarding their financial situation. The trust was insolvent but continued trading. It attempted to consult Ms Hauti about the suspension on pay and without pay. Ms Hauti refused to engage with the process. It denies Ms Hauti advised she was in financial hardship. Even if she was unable to travel she could have sent any responses in writing. There is no medical evidence about Ms Hauti's mental health state. It believes this is a convenient excuse and an attempt to 'rewrite' history.

Suspension on pay

[47] The parties' employment relationship was governed by an individual employment agreement⁸. It is common ground there was no contractual right to suspend Ms Hauti.

[48] In the absence of an express contractual provision authorising suspension, it will only be in unusual cases that it is justifiable. The fact that an employer may have reason to suspect that an employee has engaged in misconduct, or even serious misconduct, does not of itself justify suspension

⁸ Common bundle of documents, document 78

while those concerns are investigated. To justify suspension, an employer must have good reason to believe that the employee's continued presence in the workplace will or may give rise to some other significant issue⁹.

[49] In this case there was reason to believe Ms Hauti's continued presence in the workplace would give rise significant issues. Firstly a significant issue arose when Ms Hauti issued trespass notices against three of the four respondent trustees. The respondent employer was unable at the time to manage the workplace as a result. I return to the effect of trespass notices upon the employment relationship later in my decision.

[50] Secondly, a significant issue arose with the broadcast. Ms Hauti accepted at hearing that the broadcast "*was not legally okay*" and allowed the release of confidential information about the respondent's operations. Her employment agreement contained a clause she would "*not make any statements or take any actions at any time which are intended or likely to adversely affect the operation of the station.*"¹⁰ The broadcast fell within this clause.

[51] Thirdly there was evidence Ms Hauti would not engage or obey any instruction from her employer. Attempts to discuss the matters giving rise to the above personal grievances and a complaint at a meeting on 1 September 2013¹¹ were resisted. She refused to work with Mr Wehipeihana¹² and by issuing trespass notices, refused to work with three of the four trustees.

[52] Ms Hauti did not seek legal advice about the broadcast. When asked to desist from this conduct she refused to do so. Even when she became aware of KN's allegation of defamation, she still refused to remove the broadcast from the respondent's Facebook page.¹³ There was evidence she would not be prepared to refrain from continuing this conduct in future.

⁹ *Singh v. Sherildee Holdings Ltd* AC54/05, 22 September 2005 at [91]

¹⁰ Clause 1.7 Employment Agreement Common Bundle Vol 2 Document 78

¹¹ Common Bundle Vol 1 Document 58 Minutes Special Extra-Ordinary Meeting 1 September 2013

¹² Common Bundle Vol 1 Document 58 Email 24 September 2013 R Hauti to R Wehipeihana

¹³ Common Bundle Vol 1 Document 58 Email 24 September 2013 R Hauti to R Wehipeihana

- [53] I do not accept Ms Hauiti's explanation that she had no other choice. There was a fourth trustee, Mikere (Christine) Wairua, whom she could have brought her grievances. She did not, admitting at hearing she never turned her mind to this possibility. She could have sought mediation through the Ministry of Business, Innovation and Employment or filed proceedings seeking urgency in the Employment Relations Authority. She did not.
- [54] I do not accept Ms Hauiti's actions fell under the "whistleblowers act" if she refers to the Protected Disclosures Act 2000 (PDA). Information must be disclosed in accordance with the PDA to be a protected disclosure (s6). There is no evidence this was a protected disclosure within the terms of the PDA. The PDA does not authorise disclosure to the general public to whom the broadcast was made.
- [55] The evidence shows there were attempts to consult Ms Hauiti prior to the implementation of the suspension. I accept the respondent's lawyer, Prue Dawson attempted to speak with Ms Hauiti about the suspension but was unable to do so due to Ms Hauiti's bizarre behaviour - locking herself in an office, refusing to come out and going on Facebook to seek assistance. Ms Hauiti's alleged risks to her safety but there was no evidence of this. Even if she was fearful, it is inexplicable why she didn't seek the immediate assistance of her staff or call the Police. The Police were called by others.
- [56] Given the above, Ms Hauiti's suspension on pay on 27 September 2013 was justified in the circumstances. The respondent had good reason to believe that her continued presence in the workplace will or may give rise to significant issues. Ms Hauiti was not unjustifiably disadvantaged by the respondent's decision to suspend her on pay.

Suspension without pay

- [57] The decision to suspend Ms Hauiti without pay was made on 23 October 2013. The basis for the suspension was set out in the respondent's lawyers email of the same date. In short it was due to the respondent's alleged financial situation.

- [58] Payment of Ms Hauti's wages weekly by direct credit to her bank account was an express term of her employment agreement.¹⁴ Suspension without pay was a breach of that express term.
- [59] The respondent trustee, Colin Heke, made the unpaid suspension decision on behalf of the respondent. He made no direct enquiries of the respondent's accountant. He relied upon the advice of the respondent's lawyers. They had made the direct enquiries with the accountant and sent the email alleging the trust was losing \$15,000 per month.¹⁵
- [60] I directed the respondent to produce its cashflow statements for the period of 1 to 30 November 2013¹⁶. It also produced a cashflow statement for 1 to 31 December 2013, financial statements for the month ended 31 October 2013¹⁷ and for three months ending 31 December 2013.¹⁸
- [61] At the time of the unpaid suspension decision, the respondent had an opening credit balance of \$22,605.50. During the month of November 2013 it received income of \$36,800 and incurred expenses of \$47,615.79. There were funds in the bank at the end of November 2013 of \$11,789.71. Taking into account contingent liabilities for December 2013, it had a surplus of \$2,624.71.
- [62] The financial statements for the three month period ending 31 December 2013 showed current assets of \$104,209 as at 31 March 2013. These included amongst other things, \$3,581 in a cheque account and term deposits of \$91,700. The 2014 figures showed the term deposits at nil.
- [63] I questioned Mr Heke about the term deposits. He gave evidence the term deposits were security for a loan of \$70,000. He made the decision at the time of unpaid suspension to liquidate the term deposits and repay the loan and other unsecured creditors. They were prioritised for payment over Ms Hauti's wages.

¹⁴ Common bundle of documents, Vol 1 document 78 Individual Employment Agreement clause 7.1

¹⁵ Common bundle of documents, Vol 1 document 37

¹⁶ Respondent Exhibit E produced C Heke 4/12/14

¹⁷ Common bundle of documents, document 36

¹⁸ Respondent Exhibit E produced C Heke 4/12/14

- [64] At hearing Ms Hauti cross-examined Mr Heke about the payment of unsecured creditors. The cashflow statement for the month ended 31 October 2013 showed trustee travel fees (\$2,250), consultancy expenses (\$9,010) and payment of a one-off settlement (\$7,000). Mr Heke could give little explanation about these unsecured creditors including what the expenses related to and why they had been paid in advance of Ms Hauti's wages.
- [65] Mr Heke admitted at hearing that he did not approach any other employees about the respondent's financial situation. He also did not approach the bank about reorganising the respondent's lending to accommodate payment of Ms Hauti's wages.
- [66] Suspension decisions are disciplinary in nature. They require some action by the employee to justify its imposition. The decision to convert a paid suspension to a suspension without pay was not made for disciplinary reasons at the time. The respondent's financial situation was not caused by Ms Hauti. There were no new significant issues justifying further disciplinary action. The respondent's financial position may have given rise to a redundancy situation but it did not justify a further decision to suspend without pay.
- [67] There was insufficient evidence to prove on the balance of probabilities the respondent was in fact unable to pay Ms Hauti's wages at the time. The decision to place Ms Hauti on unpaid suspension was not the action of a fair and reasonable employer.
- [68] Accordingly the term of Ms Hauti's employment for payment of her wages was affected to her disadvantage by the respondent's decision to suspend her without pay from 24 October 2013 until 4 December 2013.
- [69] As a consequence, this gives rise to an issue of wage arrears for the period 24 October 2013 until 4 December 2013. I deal with this below under remedies.

Was Ms Hauti's conduct misconduct that a fair and reasonable employer could have dismissed her for?

[70] Ms Hauti alleged the decision to dismiss her was pre-determined given the suspension. She accepted responsibility for her mishandling of HN's personal grievance. She did not accept responsibility for TU's personal grievance stating she sought legal advice and believed she had acted appropriately throughout. She was not aware of HU's personal grievance as it had not been given to her prior to the suspension. She denied any responsibility for KN's allegations.

[71] Her decision to issue the trespass notices was not taken lightly although she accepts it was not a "*good decision*". She believed those trustees were influencing the staff and an impediment to the radio station's operations. She believed staff spied on her for the trustees. She gave an example of her office keys going missing, inferring somehow this involved these trustees.

[72] Ms Hauti submits that her decision to make the broadcast was due to the respondent's refusal to participate in mediation following an offer from a Te Mangai Paho representative to intervene. She believed no one was listening to her and that they were acting in a disciplinary manner. She submits there was no other option and her circumstances had become unbearable.

[73] She accepted her health issues may have impacted upon her decision-making, but overall she believed her decisions to broadcast and issue the trespass notices were done in good faith. She asserts she was always willing to look at what could be done to remedy the situation.

[74] The respondent upheld three of 14 allegations. Although a large part of the hearing involved evidence about the allegations that were not upheld, I have for the purposes of the determination focused upon the three allegations leading to dismissal only. These were:

- a) Ill-conceived and incompetent actions from 4 June 2013 in respect of TU

b) Inept and appalling management of staff between 11 June to 23 September resulting in three personal grievances by TU, HN, HU and one complaint from KN.

c) Trespassing three of the four trustees

[75] The parties employment agreement attached a job description and house rules defining serious misconduct resulting in summary dismissal. The agreement set out examples of serious misconduct.¹⁹ The letters setting out the allegations made and then upheld make no reference to the employment agreement and the definition or examples of serious misconduct set out therein.²⁰

[76] The first two allegations relied upon unsatisfactory work performance as the basis for dismissal. Unsatisfactory work performance may be grounds for dismissal if the employee is warned that his or her performance has become unsatisfactory and an opportunity to improve is given.²¹ This includes *“previously identified the perceived deficiencies to the employee and given the employee an opportunity that is reasonable to improve his or her performance by means and to a standard both of which are objectively measurable and have been objectively measured”*²²

[77] Ms Hauiti was employed as the General Manager. Her duties included management of staff including employment matters.²³ There were no performance reviews undertaken of Ms Hauiti’s work. All three of the employee grievances arose within six months. It appeared they were linked to implementation of the strategic plan compiled by Claudette Hauiti earlier in the year reviewing employee roles against the funding requirements of Te Mangai Paho.

¹⁹ Common Bundle Vol 2 Document 78 Schedule C House Rules

²⁰ Common Bundle Vol 1 Documents 18 and 55

²¹ Brookers *Employment Law* (online ed) at ER 103.9

²² *Ramankutty v Vice-Chancellor of the University of Auckland* EmpC Auckland AC53B/01, 25 October 2001 at [23]–[24]

²³ Common Bundle Vol 2 Document 78 Individual Employment Agreement Schedule A Job Description p13

- [78] Ms Hauti accepted at hearing she had little HR experience. This was despite being hired by her sister to assist with the respondent's HR requirements.
- [79] During the disciplinary meeting Ms Hauti alleged she had taken legal advice from Francis Peters of Corban Revel but no copy of that advice was produced. A filenote of a conversation with Mr Peters of Corban Revell confirmed the firm had never been retained to provide legal advice to the respondent on employment matters.
- [80] Ms Hauti's dealings with TU's lawyer were unprofessional. She sent an email to TU's lawyer stating "*bitch lawyer*" is the term I used to describe you not TU". This was misconduct under the House rules which forbade "*abusive language causing offence to another person ... while on company business.*" It may also have fallen under serious misconduct being "*verbal violence against any person ... while on company business.*"²⁴ However this aspect of her conduct was not part of the respondent's later findings.
- [81] Ms Hauti did not terminate TU's employment. One of the trustees, Pua Taikato did. Accordingly she cannot be totally at fault for the confidential settlement. The respondent trustees had authorised Ms Taikato to act on their behalf in these matters. HU was also terminated by Ms Taikato.
- [82] Ms Hauti accepted her management of HN was unacceptable. It was unknown if any settlement other than reinstatement was required for HN or HU. All three matters fell within incompetency as opposed to misconduct.
- [83] KN was not an employee. Her dealings should not have been included under the allegation of incompetent staff management at all.
- [84] There is no evidence incompetent performance had been raised previously with Ms Hauti. There was no evidence she was given an opportunity to remedy any performance defects. There was no evidence of performance reviews. These allegations at best indicated incompetency which a fair and reasonable employer could have given her an opportunity to remedy prior to dismissal. It did not.

- [85] The findings also allege dishonesty in respect of her responses to the allegations about her handling of TU as opposed to incompetency. All of the findings express the respondent's belief Ms Hauti was being untruthful.²⁵ Dishonesty was not raised as a concern on 11 October 2013.
- [86] The broadcast was serious misconduct. Ms Hauti accepted her decision to broadcast included the release of confidential information. This was serious misconduct being "*unauthorised disclosure of confidential ... information*".²⁶ However this allegation was not upheld and did not form part of those leading to her dismissal.
- [87] The only allegation leading to her dismissal which was serious misconduct was the trespass notices against three of the four trustees. The trespass notices prevented her employer from entering or managing the workplace. Breaching a trespass notice is a criminal offence.²⁷ A trespass notice issued by an employer has been held to have the effect of a dismissal.²⁸ A trespass notice issued by an employee against an employer must breach the implied duty of trust and confidence between the parties.
- [88] At hearing Ms Hauti stated the reason for the trespass notice against Robert Wehipeihana was "*because he threatened legal action against me*". This threat occurred when Mr Wehipeihana came to discuss her employment and questioned her experience in running a radio station. He allegedly told her "*to take legal advice about your contract and employment.*"
- [89] This trespass notice was a complete overreaction to the issues raised and responses allegedly made by Mr Wehipeihana. There was no issue of personal safety caused by Mr Wehipeihana's statement to her to get legal advice.
- [90] The subsequent trespass notices against Colin Heke and Marion Tanoa were also a complete overreaction. The reason for Mr Heke's trespass notice was the assistance he gave to her ex-partner and stepson to leave the country.

²⁵ Common Bundle Vol 1 Document 18 Letter K McLuskie to A Hope p 2 paras (b) to (h)

²⁶ See above p22

²⁷ Trespass Act 1980 s.11

²⁸ Tropotova v OCS Ltd ERA Christchurch CA 157/10, 6 August 2010

There was no issue of personal safety requiring a trespass notice. Ms Tanoa's trespass notice related to their altercation at the 1 September 2013 trustee meeting. My impression of the evidence was that both were being equally loud and strident at the meeting. There was no issue of personal safety three weeks later requiring Ms Tanoa to be trespassed from the station.

[91] All three persons trespassed were kuia and kaumatua. With respect it would have been difficult for most if not all of them to take any physical action against Ms Hauiti. One of the affected trustees was 80 years old.

[92] As noted above, Ms Hauiti had other options. She could have engaged with the fourth trustee about her issues and taken legal advice. She chose not to.

[93] The respondent employer was in an untenable situation. It was prevented from accessing its own workplace. The respondent was unable to practically manage its staff or property because it had been denied access. The remaining fourth trustee could not have managed the respondent's business on her own. She had full time employment elsewhere.

[94] My impression of Ms Hauiti's actions was that they appeared to acts of brinkmanship, not last resort.

[95] Ms Hauiti's conduct deeply impaired and was destructive of that basic confidence or trust that is an essential of the employment relationship²⁹. That kind of misconduct will generally involve deliberate action inimical to the employer's interests.³⁰ This is what occurred here.

[96] I am satisfied Ms Hauiti's conduct in issuing the trespass notices was misconduct that a fair and reasonable employer could have dismissed her for.

Was the process leading to dismissal what a fair and reasonable employer could have done in all the circumstances?

[97] The respondent submits it raised its allegations in the letters to Ms Hauiti dated 11 October and 14 November 2013. It took several weeks to investigate the matters prior to raising them with her. Following their meeting with her on

²⁹ Northern Distribution Union v BP Oil New Zealand Ltd [1993] 3 ERNZ 483 (CA) at 487
³⁰ Makatoa v. Restaurant Brands (NZ) Ltd [1999] 2 ERNZ 311 (EmpC) at 319

30 October 2013, the respondent investigated and considered her responses. As a result, only three of the 14 allegations were upheld. The respondent offered Ms Hauti a further opportunity to meet and discuss the preliminary decision to uphold three of the allegations which she refused.

[98] It submits Ms Hauti's did not raise her health problems and that she was financially unable to attend meetings with the respondent and even if they were raised, she could have provided a written response as opposed to a physical meeting. Ms Hauti chose to refuse to engage with the process. As a result, the trustees made their decision without further reference to her.

[99] The fact Ms Hauti's employment was terminated is accepted. The onus falls upon the respondent to justify whether its actions *were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred* (s103A(2) of the Act). In applying this test, the Authority must consider the matters set out in s.103A(3) of the Act. These matters include whether having regard to the resources available, an employer sufficiently investigated the allegations, raised the concerns with the employee, gave the employee a reasonable opportunity to respond and genuinely considered the employees explanation prior to dismissal.

[100] The Authority must not determine the dismissal unjustifiable if the procedural defects were minor or did not result in the employee being treated unfairly (S103A(5) of the Act). A failure to meet any of the s.103A(3) tests is likely to result in a dismissal being found to be unjustified.³¹

[101] I accept the concerns were properly raised and investigated by the respondent. I do not accept she was given a reasonable opportunity to respond prior to dismissal.

[102] The respondent was aware of Ms Hauti's health problems. Mr Heke gave evidence he had been told by the Police when they attended the radio station on 27 September 2013 that she was undergoing a psychiatric assessment. On 21 October 2013, Ms Hauti provided a medical certificate stating she was

³¹ *Angus v. Ports of Auckland Limited* [2011] NZEmpC 160 at [26]

unfit to attend a disciplinary hearing on 23 October 2013.³² Ms Hauiti also advised she was still unwell on 23 October 2013³³.

[103] There was evidence her financial situation due to the unpaid suspension affected her opportunity to respond to the concerns. On 28 November 2013, Ms Hauiti's advocate advised that due to the suspension without pay, Ms Hauiti had been "*effectively precluded from preparing for and participating in the process*". It then advised that Ms Hauiti would not be attending the meeting on 4 December 2013. Ms Hauiti was not entitled to any WINZ benefits because she remained employed. Her evidence showed she relied and continues to rely upon whanau support.

[104] The issues of health and financial impecuniosity were before the respondent prior to making its decision. No alternative was proposed by either party at the time to assist her to respond. It is insufficient to now suggest she could have provided a written response especially given her health and financial situation.

[105] In the circumstances I determine Ms Hauiti was not given a reasonable opportunity to respond and consequently there was no genuine consideration of her responses pursuant to s103A(3) of the Act. These defects were not minor and did result in Ms Hauiti being treated unfairly.

[106] Rosina Hauiti was unjustifiably dismissed by Te Reo Irirangi o Nga Raukawa Trust.

Remedies

[107] The respondent submits in the event the Authority was to find an unjustified disadvantage or dismissal, the respondent seeks a 100% reduction for her contributory behaviour. It also points to the sparse evidence of mitigation. A list of jobs applied for was insufficient to meet the evidential requirements to show mitigation.

³² Common bundle of documents, document 38

³³ Common bundle of documents, document 35

Wages Arrears

[108] Given my finding she was unjustifiably disadvantaged by the unpaid suspension, Ms Hauti is owed wages for the period 24 October to 4 December 2013. This is a period of six weeks. Her salary at the time of the dismissal was \$70,000 gross per annum. Her gross weekly wage is \$1,346.15 multiplied by six weeks totals \$8,076.92.

[109] Te Reo Irirangi o Nga Raukawa Trust is to pay Rosina Hauti wages arrears of \$8,076.92 less PAYE pursuant to s131 Employment Relations Act 2000.

Lost Remuneration

[110] Ms Hauti seeks lost remuneration. Where the Authority determines an employee has a personal grievance and has lost remuneration as a result of that grievance, the Authority must order the employer to pay to the employee the lesser of a sum equal to that lost remuneration or to 3 months' ordinary time remuneration.³⁴

[111] In considering an order for remuneration, the employee has an obligation to mitigate loss by seeking alternative paid employment irrespective of whether she seeks reinstatement.³⁵

[112] An employee who has not acted reasonably to mitigate loss of wages has not lost remuneration as a result of the grievance. If the remuneration has been lost because of a failure to mitigate there is no statutory requirement to order reimbursement.³⁶

[113] In practice, this requires evidence of a detailed account of efforts made to obtain employment including dates, places, names, copies of correspondence and the like³⁷.

³⁴ Section 128 of the Act

³⁵ *Carter Holt Harvey Ltd v Yukich* (CA, 04/05/05)

³⁶ *Finau v. Carter Holt Building Supplies* [1993] 2 ERNZ 971 (EmpC) at 977

³⁷ *Allen v Transpacific Industries Group Ltd (t/a Media Smart Ltd)* [2009] 6 NZELR 530 para.[78]

[114] Ms Hauti gave no evidence of mitigation of her lost wages. This may have been due to her health. There were medical certificates produced asserting she was unable to attend disciplinary meetings immediately prior to dismissal. At hearing she gave evidence she started looking for work three months after dismissal due to health reasons. It would appear she was unable to work during this period and could not mitigate her losses.

[115] In the circumstances I decline to award any lost remuneration under ss. 123(b) and 128 of the Employment Relations Act 2000 because Ms Hauti failed to mitigate her loss of wages.

Compensation

[116] Ms Hauti seeks \$20,000 compensation. She points to the effect of the decisions upon her health resulting in chronic depression.

[117] There is no medical evidence supporting this submission. Ms Hauti gave evidence her depression was primarily caused by her ex-partner and stepson's abrupt departure. She complained of Mr Heke's assistance to them. While unfortunate, the event cannot be the fault of the respondent. Mr Heke was not acting as a representative of the respondent when he gave her family assistance to leave.

[118] Ms Hauti's dismissal was insensitive given her circumstances. She was unwell and had no funds to attend meetings or pay for legal advice. She gave evidence that because she was suspended, she could not access WINZ benefits.

[119] Where an employee was dismissed insensitively the Court of Appeal has awarded \$7,000 compensation.³⁸ Based upon the evidence before me an amount of \$5,000 compensation is appropriate subject to any contribution below.

[120] I must consider the extent to which Ms Hauti's actions contributed towards the situation that gave rise to the personal grievance and if required, reduce the

³⁸ *NCR (NZ) Corp Ltd v Blowes* [2005] ERNZ 932 (CA) at [44]

remedies that would otherwise have been awarded (s.124 of the Act). Contributing behaviour is behaviour which is causative of the outcome and blameworthy.³⁹

[121] There was contributing behaviour by the trespass notices and broadcast. This behaviour was causative and blameworthy. However there was also behaviour by the respondent giving rise to the personal grievance. In the circumstances a 75% reduction in remedies is appropriate.

[122] Te Reo Irirangi o Nga Raukawa Trust is to pay to Rosina Hauiti compensation of \$1,250 for hurt, humiliation including a reduction of 75% for Ms Hauiti's contributory behaviour pursuant to ss.123(c)(i) and 124 of the Employment Relations Act 2000.

[123] Costs are reserved. If either party seeks an order for costs a memorandum shall be filed by 28 January 2015. The other party shall have 11 February 2015 to file and serve a reply.



T G Tetitaha
Member of the Employment Relations Authority

³⁹ *Goodfellow v Building Connexion Ltd t/a ITM Building Centre* [2010] NZEmpC 82.