

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2017] NZERA Auckland 347
5599036

BETWEEN KATENE PAENGA

Applicant

A N D BOARD OF TRUSTEES, TE
KURA KAUPAPA MAORI, O
PUAU TE MOANANUI-A- KIWA

Respondent

Member of Authority: Nicola Craig

Representatives: Richard Harrison, Counsel for Applicant
Nicholas Russell, Counsel for Respondent

Investigation Meeting: 29, 30 and 31 August and 1 September 2016
at Auckland

Submissions received: At the investigation meeting
And then 18 August 2017 for Applicant
22 August 2017 for Respondent

Date of Determination: 9 November 2017

**DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY (No 2)**

- A. Mr Paenga's application for reinstatement is declined.**
- B. The Board of Trustees of Te Kura Kaupapa Maori, o Puau Te Moananui-a-Kiwa is ordered to pay Katene Paenga the following sums within 28 days of the date of this determination:**
- (i) \$47,563.86 gross as lost wages; and**
 - (ii) \$25,000.00 as compensation under s 123(1)(c)(i) of the**

Employment Relations Act 2000.

C. Costs are reserved. A timetable is set for submissions.

Dismissal determination

[1] In an earlier determination¹ the Authority found that Katene Paenga had been unjustifiably dismissed as Tumuaki/Principal by the Board of Trustees, Te Kura Kaupapa Maori, o Puau Te Moananui-a-Kiwa (the Kura Board). Further submissions were sought and received from both parties on the issue of reinstatement.

Remedies for dismissal

[2] Mr Paenga claims reinstatement to his Principal's role, as well as lost remuneration and compensation for humiliation, loss of dignity and injury to feelings.

Reinstatement

[3] Mr Paenga claims permanent reinstatement to the Principal's role at the Kura. This is opposed by the Kura Board.

[4] Under s 125(2) of the Employment Relations Act 2000 (the Act), the Authority may, if satisfied that it is practicable and reasonable to do so, reinstate the unjustifiably dismissed employee.

[5] The test of reasonableness was considered by the Full Court in *Angus v Ports of Auckland Ltd*²:

¹ *Katene Paenga v Board of Trustees, Te Kura Kaupapa Maori, o Puau Te Moananui-a-Kiwa* [2017] NZERA Auckland 233

² *Angus v Ports of Auckland Ltd* [2011] ERNZ 466 at [65]-[66]

... the requirement for reasonableness invokes a broad inquiry into the equities of the parties' cases so far as the prospective consideration of reinstatement is concerned.

... an employer opposing reinstatement will need to substantiate that opposition by evidence ... evidence considered when determining justification may also be relevant to the question of reinstatement.

[6] Under *Angus v Ports of Auckland Ltd* reasonableness requires an assessment of the effect of any order for reinstatement on not only the individual employee and employer but also on any other persons, such as students, who may be affected³.

[7] In *Lewis v Howick College Board of Trustees*⁴ reference was made to practicality as “*capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully*”.

Mr Paenga's position

[8] Mr Paenga's reasons for seeking reinstatement include his commitment to education and Kura Kaupapa Maori, and the limited prospects of him getting his career in that area back on track without reinstatement. On his behalf it was submitted that without reinstatement he will lose his career as a principal.

[9] Mr Paenga did not claim interim reinstatement. He says that he initially was not sure about the support behind him from the whanau/community. However, over time he has received a lot of support from within the whanau, wanting him to return as principal. He has maintained contact with whanau, staff and individual board members with whom he has had positive relations.

[10] Several witnesses supported Mr Paenga's return, including those with children currently and formerly at the Kura. There was some evidence of intention to move particular children from the Kura if Mr Paenga is not reinstated. Lynley Paenga, a Kura teacher and Mr Paenga's wife, gave evidence that other staff and whanau would welcome Mr Paenga's return and are willing to operate under his leadership again.

³ *Angus v Ports of Auckland Ltd* [2011] ERNZ 466 at [68]

⁴ *Lewis v Howick College Board of Trustees* (2010) 7 NZELR at [2], citing *NZEI v Board of Trustees of Auckland Normal Intermediate School* [1994] 2 ERNZ 414 (CA) at p416

[11] The Kura Board describes the evidence in support of Mr Paenga's return as minimal. There was little evidence of widespread current support for either party's position. However, I accept that witnesses with current involvement in the Kura were willing to have Mr Paenga back as Tumuaki.

[12] Mr Paenga describes himself as open to addressing areas where he has gaps or where there is room for improvement although my impression from his evidence was that he has some degree of non-acceptance of deficits.

[13] Submissions on behalf of Mr Paenga emphasised that the invalidity of the dismissal, being made without a quorum and without a resolution to dismiss, should be a factor in my consideration regarding reinstatement. Also that focus should be on the equities of the case between the parties.

The Kura Board's position

[14] The Kura Board opposes reinstatement. This includes on what it described as the fundamental ground that Mr Paenga had let his teaching practising certificate, which was necessary for a principal to hold, lapse in 2015 when he was on sabbatical leave.

[15] The Board's objection to reinstatement also relies on the lack of an application for interim reinstatement, the time lapse since dismissal, the appointment of a permanent replacement, Mr Paenga's complete denial of his own shortcomings, the shortcomings identified in his performance, and the irreparable damage to the relationship.

[16] The Board decided to appoint temporary tumuaki Ngaire White to the position permanently. On Mr Paenga's behalf it was suggested that this was not only reckless, but presumably intended to defeat the reinstatement claim.

[17] Mr Paenga's then representative sought reinstatement in his letter of 6 November 2015, putting the Board on early notice of that claim. However, interim reinstatement was not sought. Mr Paenga's Statement of Problem was filed on 14 April 2016 and included a claim for reinstatement. Ms White was originally on a temporary or fixed term agreement but Board Chair Niki Tauhara says that she was permanently appointed after interviews in April 2016.

[18] The only explanation for the appointment offered by the Kura Board was that the Kura needed certainty. Mr Paenga has not been in that role for some time as he was off on sabbatical leave for almost a year before his dismissal. Reinstatement is said to be difficult when the school needs stability.

[19] Several cases have referred to the risks involved in appointing when a reinstatement claim has been identified as pending.⁵ The Kura Board should not be able to resist a reinstatement claim where it had notice that reinstatement was being sought.

[20] There was evidence from Board members Niki Tauhara and Mere Austin, of their resistance to Mr Paenga's return. Given their roles on the Board this is a significant difficulty for reinstatement. Although Mr Paenga gave evidence that he can work with them, it is hard to see the relationship being re-established.

Lack of practising certificate

[21] Mr Paenga does not have a teaching practising certificate. It appears that his previous certificate expired in May 2015 and he has not been in a teaching position to enable him to retain his practising certificate.

[22] There was consensus that the Tumuaki required a practising certificate. However, quite different impressions of the ease or otherwise of Mr Paenga obtaining another practising certificate were given by the parties.

[23] Mr Paenga's representative has been told that the process for renewal required an application form to be completed and some processing time required. In the event that Mr Paenga was not granted a full practising certificate, he could be allowed to return to his position as principal "subject to confirmation", which would likely involve undergoing a mentoring programme to be eligible for a full practising certificate at the completion of this process.

[24] Submissions for the Kura Board stressed the unlawfulness of the Kura employing any person in a teaching position who does not have a practising

⁵ *Wheat v The St Peters College Board of Governors Inc* [1989] 1 ERNZ 827, *Gratton v Wilder Transport Ltd* (unrep) WEC 51/99, 27 May 1999 and *Murphy v Steel and Tube New Zealand Ltd* (2007) 4 ERNZ 719

certificate⁶. Professional development requirements were emphasised which the Board is unclear whether Mr Paenga has met. The renewal of a full practising certificate is said to require the Board to sign an endorsement saying that the teacher/principal has been appraised and met professional development requirements, and even a “subject to confirmation” required a testimonial from professional leader/s regarding the applicant’s satisfaction of the Practising Teacher Criteria⁷.

[25] Reference was made to *Masina v Commissioner, Te Kura Kaupapa Maori o Piripono Te Kura Whakahou o Otara*⁸ where the Employment Court noted regarding a principal “the statutory requirements which pervade the relationship”. The Court also noted in *Pacific Blue Employment & Crewing Ltd v B*⁹ successful reinstatement as requiring the parties to be able to “fully discharge” their responsibilities to that relationship.

[26] I am left with considerable uncertainty about whether Mr Paenga would be in a position to promptly renew his practising certificate with the Education Council, particularly without the support of the Board.

Conclusion on reinstatement

[27] Mr Paenga is very desirous of being reinstated. However, on considering the balance of the factors described above I am not satisfied that it can be said to be reasonable and practicable for him to be reinstated. In particular, it is difficult to see the parties re-establishing a trustful working relationship and there is uncertainty regarding the resumption of Mr Paenga’s practising certificate without Board endorsement.

Lost Wages

[28] Under s 128 (2) of the Act where the employee has lost remuneration as the result of a personal grievance, I must order payment of the lesser of the lost

⁶ Education Act 1989, s 350(2)

⁷ Education Council’s *Interim Policy for Registration, Practising Certificate and Limited Authority to Teach* at 32 and 38, Education Act s 361(6)(c)

⁸ *Masina v Commissioner, Te Kura Kaupapa Maori o Piripono Te Kura Whakahou o Otara* [2010] NZEmpC 141 at [63]

⁹ *Pacific Blue Employment & Crewing Ltd v B* (2010) NZEmpC 112 at [22]

remuneration or three months' ordinary time remuneration. I have discretion under s 128(3) of the Act to award a larger sum if further remuneration has been lost.

[29] Mr Paenga was paid two months' salary by way of notice at the date of his dismissal. That takes his salary though to 24 November 2015. Mr Paenga claims lost wages of \$8,479.26 gross from 24 November to 21 December 2015 when he started his new job. He also claims the difference between his old and his new salary. This amounts to \$3,257.05 per month.

[30] Mr Paenga relies on cases involving principals and teachers where lost remuneration was awarded for relatively long periods¹⁰.

[31] In its submissions the Kura Board challenges Mr Paenga's attempts at mitigation, in terms of attempting to find another job on a commensurate salary to that which it paid him.

[32] Mr Paenga gave evidence of applying for positions outside of schools, as he did not consider that he was employable in schools, having been dismissed. That evidence was not challenged.

[33] The evidence was that Mr Paenga had been a teacher since 1988 before becoming a principal. There was no evidence that he had skills or expertise in other areas which he could have explored in looking for higher paid work. I am satisfied that Mr Paenga attempted to mitigate his loss.

[34] I am satisfied that Mr Paenga lost substantial remuneration and consider that he should be reimbursed for the \$8,479.26 remuneration lost in the month before he found another job, as well as for a 12 month period after that. The latter at the monthly difference of \$3,257.05 gross, amounts to \$39,084.60 gross. Subject to a consideration of contribution, Mr Paenga is awarded the sum of \$47,563.86 gross.

¹⁰ Such as *Edwards v BOT Bay of Islands College* [2015] NZEmpC 6 and *Fox v Hereworth School Trust Board* [2015] NZEmpC 206.

Compensation for non-pecuniary loss

[35] Mr Paenga claims \$30,000 as compensation for humiliation, loss of dignity and injury to feelings. The Kura Board claims that there was a lack of evidence for the effects of the dismissal on Mr Paenga, either from himself or his wife, who gave evidence on other matters.

[36] Mr Paenga says that at various steps of the process he was upset by what he felt was a harassing and heavy handed approach and that he felt quite sick to receive the Kura Board's various communications. He found it frustrating and disheartening that the Kura Board was not prepared to put in the effort to try to work the relationship out.

[37] Mr Paenga was upset and hurt when he was notified of the dismissal. The process took its toll on his health and his spiritual well-being has suffered. He became very focused on the process. Mr Paenga saw his wife, daughters and wider whanau in turmoil as a result of his dismissal. Ms Paenga confirmed that the events during her husband's sabbatical were upsetting for the family to say the least. Although I cannot compensate family members, I take into account Mr Paenga's distress about the effects on his family.

[38] Mr Paenga's claim for non-pecuniary loss is partially based on the events at the Whanau hui in October 2015, which are outlined in the earlier determination¹¹. There were an estimated 60 or more people at that hui. Although the Board made some attempt to ensure that a moderate description of Mr Paenga's departure was provided, that did not ensue.

[39] Unfortunately the Board's formal statement, read at the hui, referred in error to Mr Paenga being dismissed for "serious misconduct" whereas the dismissal letter refers only to "misconduct". Significantly, the unscripted reference by the Chair, after mentioning Mr Paenga, to money being said to be not there, the deficit and the auditors having concerns, with the serious misconduct reference, could be taken to suggest that Mr Paenga was involved in financial impropriety.

¹¹ *Katene Paenga v Board of Trustees, Te Kura Kaupapa Maori, o Puau Te Moananui-a-Kiwa* [2017] NZERA Auckland 233 at [57] to [64]

[40] Mr Paenga's distress was profoundly exacerbated by the impression gained by community members at the hui of his dismissal being due to dishonesty.

[41] Mr Paenga was a relatively long serving employee with around nine years' service. His family's life was intertwined with the Kura. He had been intensively involved in the expansion of the Kura. His role as teacher and tumuaki was an important part of his life and his self-esteem suffered due to his removal from that role and that community.

[42] I find that the appropriate award to Mr Paenga under s 123(1)(c)(i) of the Act is \$25,000, before consideration of contribution.

Contribution

[43] I have carefully examined whether Mr Paenga contributed to the situation which gave rise to his dismissal. The Kura Board submits that there should be a deduction both for the matters of Mr Paenga's actions on which they found misconduct, and regarding his actions in the disciplinary process. No particular figure was suggested.

[44] The Board says that there were repeated refusals during the disciplinary process to meet with it and a complete lack of engagement with and insight into the allegations put to Mr Paenga.

[45] If Mr Paenga's actions are to be taken into account they must be both causative of the outcome and blameworthy¹².

[46] I firstly consider the Board's submission of contribution based on Mr Paenga's actions which the Board found to be misconduct. As noted earlier the dismissal letter refers only to misconduct, not to serious misconduct¹³.

¹² *Harris v The Warehouse Ltd* [2014] NZEmpC 188 at [178], *Xtreme Dining Ltd (t/a Think Steel) v Dewar* [2016] NZEmpC 136 Full Court at [175]

¹³ *Katene Paenga v Board of Trustees, Te Kura Kaupapa Maori, o Puau Te Moananui-a-Kiwa* [2017] NZERA Auckland 233 at [83]

[47] In the earlier determination I found that the issues which the Board had were largely performance or competency issues which should have been addressed in that manner¹⁴. However, the Board had not put Mr Paenga on notice previously that it had concerns about these areas of his work, or directed him to address certain matters.

[48] There was no performance agreement, appraisal or review. The Board's expectations of the tumuaki role appear to have developed considerably after Mr Paenga went on sabbatical leave and he thus had no opportunity to adapt. In all of those circumstances I do not consider that Mr Paenga's actions can be said to be sufficiently blameworthy for the purposes of a contribution deduction.

[49] The Board's second basis for claiming contribution is Mr Paenga's behaviour during the disciplinary process. Mr Paenga is said to have had a complete lack of engagement with the process and insight into the allegations put to him.

[50] An employee's conduct during a disciplinary process, such as refusing to answer questions or communicate with the employer, may contribute to a dismissal¹⁵. However, I do not consider that Mr Paenga's behaviour should be seen in that way.

[51] Mr Paenga attended the McDonalds meeting with the Chair and mediations subsequently. He did not agree to exit his position, as some Board members wanted, but I do not see that as a failure to engage with the Board.

[52] There was some time taken in providing Mr Paenga's response when the Board did put its concerns to him formally. However, Mr Paenga had changed representatives which necessitated some additional time. He also faced an eight page letter¹⁶ with five headings of issues and a number of allegations under each heading. He quite understandably considered that he had to respond in detail.

[53] He sought further details, such as which staff were being referred to in allegations in the Board's 10 August 2015 letter. Mr Paenga was not in the workplace and so had to request related documents and these were provided. I do not consider Mr Paenga's actions in these regards to be blameworthy.

¹⁴ *Katene Paenga v Board of Trustees, Te Kura Kaupapa Maori, o Puau Te Moananui-a-Kiwa* [2017] NZERA Auckland 233 at [152]

¹⁵ *Radius Residential Care Ltd v McLeay* [2010] ERNZ 371 EC at [55]

¹⁶ Letter of 10 August 2015

[54] It was suggested on behalf of the Board that Mr Paenga refused to attend a meeting with the Board. In August and September 2015 the Board's representatives did on several occasions pursue a meeting with Mr Paenga.

[55] While a meeting may have been of some benefit, the letter of 10 August 2015 which started the process did state that instead of a meeting "[a]lternatively, you may wish to provide written submissions. Please advise if this is your preference". On that basis I do not find Mr Paenga's decision not to attend a meeting to be blameworthy.

[56] In conclusion, I do not find that there was blameworthy behaviour by Mr Paenga to justify a reduction in remedies.

Costs

[57] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Mr Paenga shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The Board shall have a further 14 days in which to file and serve a memorandum in reply. Submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[58] The parties could expect the Authority to determine costs, if asked to do so, on its usual 'daily tariff' basis unless factors require an adjustment upwards or downwards.

Nicola Craig
Member of the Employment Relations Authority