

**NOTE: This determination  
contains an order at paragraph  
[6] prohibiting publication of  
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKAURAU ROHE**

[2023] NZERA 603  
3242379

BETWEEN

TERINA MOKE  
Applicant

AND

RAUKURA HAUORA  
O TAINUI TRUST  
Respondent

Member of Authority: Robin Arthur

Representatives: Renika Siciliano, counsel for the Applicant  
Scott McKenna, counsel for the Respondent

Investigation Meeting: 21 September 2023 by audio-visual link

Determination: 16 October 2023

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**PRELIMINARY DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Terina Moke applied for interim orders requiring Raukura Hauora o Tainui Trust (RHOT) to end her suspension from her role as its Chief Executive Officer (CEO) and to not make any decision to dismiss her until the Authority had investigated and determined a personal grievance she had raised about how RHOT had gone about looking into allegations about her conduct.

[2] Before submissions were heard about that application Ms Moke withdrew the request for orders about her suspension but continued it in respect of any dismissal decision.

[3] As part of the arrangements for the Authority's investigation of her application, RHOT agreed not to make any decision to dismiss Ms Moke while her request for an interim order was under consideration.

[4] Ms Moke's personal grievance alleges RHOT has acted unfairly in how it arranged and carried out its inquiry into two complaints of bullying and harassment made against her. Ms Moke says the Board has unjustifiably disadvantaged her by failing to act in good faith and in accordance with tikanga while looking into those complaints.

[5] The Authority's investigation meeting about Ms Moke's disadvantage grievance is currently scheduled for late March 2024. The interim order Ms Moke sought would therefore run from now until at least some weeks after that meeting while a written determination was prepared and issued.

#### **Order prohibiting publication of some information**

[6] The names and positions of the two complainants are prohibited from publication in relation to these proceedings and this determination. In this determination they are referred to as Mr A and Mr B.

[7] This order is made under clause 10 of Schedule 2 of the Employment Relations Act 2000 (the Act). It is not appropriate, at this stage of these proceedings, for the complainants' identity to become a matter of public record. They understood their concerns were being considered through an internal workplace inquiry that was confidential between them, their employer and Ms Moke.

[8] Many people will be able to identify Mr A and Mr B through their own contact with RHOT or from other details mentioned in this determination. For this reason, it is important that all involved understand that the word 'publication' in this context (and in the prohibition order made) refers not only to print and broadcast media but also by what is written and said by individuals and groups in conversation between one another, in exchanges of texts and emails and through their various social media applications. From the date of publication of this determination, they must comply with the order made. This prohibition does not apply to communication of parties and witnesses with legal representatives or for the purposes of taking part in RHOT's own inquiry or the Authority's investigation of Ms Moke's personal grievance.

[9] This order is to be reviewed at the Authority's investigation meeting about Ms Moke's substantive application. After providing an opportunity for the parties' representatives or anyone else with an interest to be heard on the question, this order may be continued, expanded to include others or removed by further order of the Authority.

### **How Ms Moke's grievance arose**

[10] RHOT is an incorporated iwi charitable trust. It provides health care services in the rohe of the Tainui waka through four medical clinics and other services addressing addiction, mental health, dental care and community health needs. RHOT is governed by a four-member board (the Board). Delivery of its services is managed by a senior leadership team (SLT) comprising six positions, led by the CEO.

[11] Ms Moke began working as CEO on 2 December 2019.

[12] Mr A made a formal complaint about Ms Moke's conduct on 7 July 2022. Mr B made his complaint on 16 August 2022. Both men were members of the SLT. The Board arranged independent investigation of both complaints. Those arrangements included initially consulting Ms Moke, through her representative, about the terms of reference for the inquiry into each complaint.

[13] Ms Moke and Board representatives met with an independent mediator on 18 August 2022. Matters discussed included a proposal, made by a Board representative, for the concerns raised by the complainants to be addressed through a tikanga-based hohou i te rongu process. The complainants were subsequently asked for their views about taking part in such a process. Both declined, wanting the Board to carry out an investigation of their complaints. The Board then proceeded with the arrangements it had made for inquiries to be conducted by an independent investigator.

[14] At her request Ms Moke was on paid special leave from 31 August 2022. She returned to work on 21 September with agreed arrangements in place governing any contact she might have with Mr B at work. No arrangements were needed in respect of Mr A because he had resigned from his position with RHOT.

[15] In the following months Ms Moke and others attended interviews with the investigator. By February 2023 the investigation was not complete. During those

intervening months Ms Moke, through her representatives, had raised concerns about the delay and the Board, through its representatives, had asked the investigator about the delay. The investigator's replies to those queries identified health issues for one complainant, who was also a necessary interviewee in respect of the other complaint, as the main reason for the delay.

[16] In February 2023 Mr B also made further allegations about Ms Moke's interactions with him and raised his concerns formally as an employment relationship problem. The Board then moved to suspend Ms Moke from her position pending receipt of the final investigation report. Ms Moke, through her representatives, opposed suspension on the basis that it would undermine her mana and would further damage relationships. She said suspension was, therefore, "highly inappropriate from a tikanga perspective". She repeated an earlier request for a kanohi ki te kanohi hui with the Board, "together with her whānau, to address all employment matters in a manner that is tika and find a pathway forward". Earlier correspondence from her representative had said she was "willing to consider some form of exit arrangement".

[17] The Board, through its lawyer, told Ms Moke she was suspended from her duties as CEO from 8 March 2023 but it was willing to take up her offer to attend "a tikanga based hui". It proposed future dates to meet. Although some correspondence was then exchanged, no dates were agreed, and no hui was held.

[18] Ms Moke remained on paid suspension.

[19] On 20 March 2023 the investigator advised she expected to have a draft report in the following week.

[20] Around this time the Office of the Māori King asked for information about the investigation. An email from a senior official said the query was sparked by the office receiving "a significant number of emails expressing dismay and serious concern" about the Board and having come "largely from staff" of RHOT. The Board's chair, Korina Burne-Vaughn, was called to a meeting with a senior advisor in the King's office. She was asked to provide a copy of the draft report when it was available.

[21] On 21 April the investigator provided the Board and Ms Moke with a draft of her report about Mr A's complaint. No copy of the draft was provided to the Office of the Māori King as Ms Moke, when asked by the Board, declined to agree to its release.

[22] The draft report made what it called “multiple findings of unreasonable actions or inaction” by Ms Moke towards Mr A. It concluded that the allegation of her bullying Mr A was substantiated.

[23] On 5 May Ms Moke raised a personal grievance over how the investigation was being conducted and the delays in providing its reports. Her grievance alleged that, in the 43 weeks since the allegations were first raised with her, she had been subject to:

- an investigation process which failed to uphold RHOT’s values and tikanga;
- significant delay;
- inadequate communication;
- inappropriate communication to RHOT staff following her suspension;
- biased decision-making by the board chair and a board member;
- unfair suspension; and
- a refusal to engage in a hui-a-kanohi with her and her whānau.

[24] On 20 June the Board advised, through its representatives, that it had resolved to depart from its earlier agreed process and to progress the investigation on the basis of the draft report about Mr A’s complaint. It advised that, on reviewing that report, the Board had reached the preliminary view that Ms Moke’s conduct towards Mr A was serious misconduct for which the appropriate outcome was dismissal. It sought her feedback on going ahead on that basis and on the proposed outcome of dismissal.

[25] Unsurprisingly, Ms Moke rejected that approach describing the Board as “now moving to dismiss me with an absolute disregard of Waikato tikanga in refusing to resolve this matter via a whānau hui”.

[26] The Board did not then proceed on its proposed basis of using the draft report. Correspondence from its solicitors sent around this time to the investigator raised concerns about the delays. It instructed the investigator to “cease all work on this file immediately” but then asked her to continue on the basis of a commitment to “a firm deadline of 17 July”.

[27] The investigator then conducted a further interview with Ms Moke and delivered two reports on 17 July. One was the final report regarding Mr A’s complaint.

The other was about Mr B's complaint, but that report acknowledged Ms Moke had only received a preliminary version of it on 15 July and had not been given a reasonable opportunity to provide feedback on it.

[28] The final report about Mr A's complaint confirmed the draft report's "multiple findings of unreasonable actions" by Ms Moke towards him. It found she had not reasonably addressed with him some concerns she had about his work and had not provided a fair opportunity to respond to those concerns. It also confirmed the bullying allegation as substantiated and described Ms Moke's approach as inconsistent with RHOT's values.

[29] The report on Mr B's complaint concluded Ms Moke's behaviour towards him was "unreasonably negative", excluding him from work and information without informing him beforehand, criticising his work in SLT meetings without giving him a reasonable opportunity to respond, cutting him off and speaking over the top of him. It concluded the allegation of bullying was substantiated.

[30] The reports acknowledged the delay in issuing them. The investigator said this was "primarily due to the ill health and availability of a key participant ... receiv[ing] information from participants over a prolonged period of months ... [and] other competing work commitments".

[31] On 27 July RHOT's lawyers sent a further letter to Ms Moke's lawyers. It said the Board had considered and accepted the investigator's findings. It said the Board had reached a "preliminary view" that Ms Moke's conduct towards Mr A had destroyed its trust and confidence in its employment relationship with her and considered termination of her employment was "the appropriate outcome".

[32] The Board sought to arrange a further meeting to hear Ms Moke's feedback before reaching a firm conclusion.

[33] On the same day Ms Moke, through her representatives, lodged a statement of problem and an application for an interim injunction in the Authority. It was accompanied by the undertaking as to damages necessary for an application of this type.

[34] Her substantive application seeks:

- (i) findings that RHOT has breached obligations of good faith and tikanga and breached the terms of reference for its investigation;
- (ii) recommendations about how such matters are handled in the future; and
- (iii) remedies of compensation for humiliation and injury to feelings, reimbursement of health-related costs and an award for costs of representation.

[35] Subsequent events have included the parties attending mediation on 14 August by direction of the Authority, without resolution, and a further meeting on 8 September where Ms Moke attended the offices of RHOT's lawyers to provide her feedback on its proposal following the report about Mr A's complaint and about the report on Mr B's complaint.

[36] RHOT also lodged its statement in reply, saying it had acted in good faith and in accordance with tikanga. It described Ms Moke's application for interim orders as "an attempt to frustrate the employer's process and to avoid or delay ... being appropriately sanctioned for her conduct as revealed by the investigation".

### **The Authority's investigation**

[37] Ms Moke's application for an interim order has been determined on the basis of affidavit evidence from four deponents and written and oral submissions from the parties' representatives.

[38] Extensive background documents, totalling more than 750 pages, were lodged with the affidavits. The volume of correspondence reflects the fact that at least five Hamilton law firms and one employment advocate have been involved through RHOT's inquiry about these two complaints so far. These comprise representatives of the parties or the complainants and the employment law practitioner appointed as investigator.

[39] The four deponents were Ms Moke, her father Tom Moke, Ms Burne-Vaughn and a former board member, Alex Hope. The evidence of Ms Burne-Vaughn and Mr Hope concerned their involvement in the Board's inquiry into the complaints.

[40] Mr Moke's evidence was given both as part of Ms Moke's whānau and as a kaumātua of marae in the Kāwhia Moana rohe. He described his concerns on how the mamae or injury arising from a process not conducted in accordance with tikanga could

have lasting effects not only on the mana of Ms Moke, her whanau and hapu but also the mana of RHOT. He acknowledged not having details of the complaints made “but if the allegations are correct then of course there are responsibilities to be accepted, but dealt with in the right way”. He described the fundamental elements of tikanga processes in this instance as comprising korero kanohi ki te kanohi, the ending of mamae and the preservation of mana irrespective of outcome.

[41] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings to the extent they can be made on the basis of the untested affidavit evidence, expressed conclusions on issues necessary to dispose of the application made and specified and orders made. It has not recorded all evidence provided through the affidavits and accompanying documents or all the submissions made by counsel in writing and orally in an investigation meeting by audio-visual link.

[42] At the end of the 21 September meeting, following discussion with counsel, an order agreed and made during a case management conference on 3 August was modified and confirmed. Under that order, made by consent and by direction of the Authority, the Board of the Trust was not to make any decision to dismiss Ms Moke in respect of the current allegations being investigated until further order of the Authority. This order lapses on issue of this determination.

### **Assessing an application for interim orders**

[43] In determining whether to grant the order sought here, the Authority applies relevant principles from the law on interim injunctions and is guided by the objects of the Act. The Act promotes good faith in all aspects of the employment environment and the employment relationship. It also acknowledges and addresses the inherent inequality of power in employment relationships.<sup>1</sup>

[44] The power to make the order Ms Moke sought derives from s 162 of the Act which permits the Authority “in any matter related to an employment agreement” to make an order that the High Court may make under any enactment or rule of law relating to contracts. This includes interim injunctions.<sup>2</sup>

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<sup>1</sup> Employment Relations Act 2000, s 3.

<sup>2</sup> *Credit Consultants Debt Services v Wilson (No 2)* [2007] ERNZ 205 at [46] and [66].

[45] Ms Moke’s employment agreement, signed in 2019, includes the following relevant express or implied terms:

- allowing for her dismissal for serious misconduct “after following a fair process”;
- a requirement to follow RHOT’s policies and procedures described as forming part of the agreement and to carry out duties set out in her job description;
- the requirement, set in her job description, to maintain and protect the cultural integrity of RHOT and the Kīngitanga with the expectation that the actions of all leaders and staff are guided “in everything they do” by the principles of tika, pono and aroha;
- having, as described in her job description, as a personal attribute “a personal understanding of tikanga Māori ... in the modern context” and “putting the whānau member experience and whānau outcomes at the core of all decision-making, both strategic and operationally”;
- The implied term that the parties will act consistently with their statutory obligations, including under s 4 of the Act to deal with each other in good faith.

[46] Obligations relating to fair disciplinary processes, dealing in good faith and applying tikanga values are therefore part of the employment agreement open to enforcement by interim injunction under s 162 of the Act.

[47] The relevant principles for determining whether to grant or decline an application for interim orders are applied in a three-step process: firstly, evaluating whether Ms Moke has an arguable case; secondly, assessing whether the balance of convenience lies between now and when her substantive claim is determined; and, thirdly, assessing the overall justice of the matter in that interim period.

[48] At the first step Ms Moke must show she has an arguable case, that is one with a possible (but not necessarily certain) prospect of success and is not merely frivolous or vexatious. Here this means there must be some seriously arguable prospect that she will be able to establish, through evidence to eventually be heard and tested in the substantive investigation, that the elements of her personal grievance, listed earlier in this determination, were correct. If that level of doubt could arguably be established, there would, in turn, be an arguable case that RHOT could not move to act on

conclusions reached through that flawed process to make any decision to dismiss Ms Moke. This, again in turn, would make it seriously arguable that an interim injunction should be awarded to preserve the status quo of her ongoing employment (albeit on suspension) until the Authority could fully consider and determine her grievance.

[49] The next step looks at the balance of convenience during the interim period. This concerns the relative impact or detriment for Ms Moke and for RHOT of granting or refusing an interim order. Factors to be weighed include the impact on third parties and whether other remedies that might ultimately be ordered, specifically monetary compensation, would likely be adequate.

[50] Here, or at the next step, an assessment of the relative strengths of each party's case may also assist, to the extent one may be made from the untested evidence at the interim stage.

[51] The third step stands back from the detail required by the earlier steps and considers the overall interests of justice. It calls for a practical assessment of what the 'real world' implications of the orders sought might be in the interim period.

[52] An interim order made, if any, may include requirements about how it is to be performed.

### **An arguable case**

[53] The threshold for establishing an arguable case in applications of this type are not high. Ms Moke has, through her affidavit and submissions made, established she has at least an arguable case on the following four propositions:

- (i) the Board's investigation process, conducted by its appointed external investigator, was unreasonably long;
- (ii) RHOT must consider and apply tikanga values and processes in carrying out inquiries into employees' concerns and subsequent disciplinary processes;
- (iii) Declarations, recommendations and remedies Ms Moke sought in her statement of problem could be made or granted following investigation of her substantive application; and

- (iv) The Authority could make an order stopping RHOT from taking any decision to dismiss her until the Authority has investigated and determined her claim about shortcomings in what RHOT has done so far.

[54] The reasons those propositions are arguable follow. The relative strength or weakness of the arguments for those propositions is considered later in this determination.

#### *Unreasonable delay*

[55] The affidavits and attached documents lodged by the parties set out an extensive paper trail on the activity between 7 July 2022, when Ms Moke was informed of the first complaint, and 17 July 2023, when she got the investigator's final report on Mr A's complaint and initial report on Mr B's complaint, and from then until now.

[56] What has happened in that period of more than 12 months needed to be viewed in light of RHOT's policy on investigations and disciplinary processes. RHOT policies are incorporated as a term of Ms Moke's employment by a term in her employment agreement. Its policy document *Kaupapa here to tatou iwi/Our People Policies* says RHOT will promptly initiate a fact finding or investigation process in the event of an allegation of serious misconduct. It continues (bold emphasis added):

Depending on the seriousness of the performance concern, or degree of misconduct alleged, the "investigation" may be as simple as holding some fact-finding meetings. For other, more serious allegations, a full formal investigation may be undertaken. However, **the organisation makes a commitment to complete all investigation processes in a timely manner to resolve the matter as quickly as possible.**

[57] A close scrutiny of the correspondence backwards and forwards over that 12-month period showed Ms Moke, and an employment advocate representing her in the earlier stages of the investigation, were responsible for some of the delay at that time. However there are periods in the following months where there is no obvious or explained reason for the length of time taken between interviews and providing information. There is, as yet, no direct evidence from the investigator explaining this. The investigator's reports on the complaints say the delay resulted from health issues for one complainant and the investigator's other work commitments.

[58] RHOT submitted that, having handed the process over to the investigator, how long it took was largely out of its hands. However, while the appointment of an external

investigator may be intended to enhance confidence in the integrity and independence of the process, the investigator remains an agent of RHOT in what is done and how it is done. The investigator is carrying out an obligation of the employer, to conduct a full and fair inquiry, and remains subject throughout to the same standard of fairness and reasonableness expected of the employer under s 103A of the Act. There was a clearly arguable case that taking 12 months to conduct an investigation of this type fell well outside the scope of the “timely manner” to which its own policy committed RHOT.

*Obligation to consider and apply tikanga values and processes*

[59] RHOT submitted that “expert evidence is required to establish what tikanga is and what its implications are in [the] particular circumstances” and then Ms Moke “would need to establish ... exactly how the principles of tikanga apply to the investigation process”.

[60] It was a submission directed at instances Ms Moke’s application had identified of RHOT, as a kaupapa Māori organisation, failing to act consistently with tikanga values and practices. Those instances concerned how RHOT dealt with the proposal for a hohou i te rongu process (in August 2022), her request for hui-a-kanohi (in November 2022) and a whanau hui (in February-March 2023).

[61] An expectation that employers who express a commitment to kaupapa Māori and tikanga principles will act consistently with that commitment in their employment relationships and practices is not new or controversial.

[62] In *Daniels v Māori Television Service*, for example, an Authority determination issued in 2005 found the employer fell short in meeting obligations of rangatiratanga in how its leaders dealt with the employee’s concerns, of manaakitanga in support provided to the employee and of whanaungatanga in offensive personal remarks made to her. Those failures were found to have added to the employee’s sense of grievance because she was committed to tikanga Māori and worked for an organisation founded on the same commitment.<sup>3</sup>

[63] In *Good Health Wanganui v Burberry* the Employment Court found, in 2002, that an employer which adopted the kawa of pōwhiri for an employee joining its

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<sup>3</sup> *Daniels v Māori Television Service* (AA 330/05, 29 August 2005) at [133] and [134].

organisation had acted inappropriately by not affording that employee the dignity of a formal farewell, a poroporoaki, at the end of her employment. The Court held the fact that the employee was Māori and working in a Māori setting should have been sufficient to alert the employer's representatives to the need for an appropriate procedure, with no onus on the employee to have to assert her mana Māori or to plead for her cultural identity to be recognised.<sup>4</sup>

[64] More recently the obligation of employers to consider how those principles apply throughout the employment relationship have been confirmed as applying to all employees, whether Māori or not, where the employing organisation has expressed a commitment to tikanga principles or values. In *GF v Comptroller of the New Zealand Customs Service* the Employment Court described the incorporation of tikanga values as sitting comfortably in the “relationship-centric” nature of employment law in Aotearoa New Zealand, based on mutual obligations of good faith and focussed (where possible) on maintaining and restoring productive employment relationships.<sup>5</sup> In that case employment agreements and employee induction material incorporated tikanga principles as part of values guiding their work.

[65] In this case, and contrary to RHOT's submissions, the question of what tikanga principles are and how they might be applied in the context of an employment problem was clearly answered in the evidence of Mr Hope, who was a board member at relevant times and closely involved in liaison with Ms Moke and her representatives about how the issues raised by the complaint should be answered.

[66] In his affidavit Mr Hope described RHOT as operating under a strong culture of Kaupapa Māori. He said this guided the initial decision not to suspend Ms Moke while the allegations were investigated and to arrange the private mediation to discuss on a kanohi ki te kanohi basis how the complaints might be resolved. This resulted in interim arrangements for all parties to remain at work and the proposal for a hohou i te rongo process.

[67] On 10 September 2022 Mr Hope sent the employment advocate acting for Ms Moke at that time an email with the subject heading: “Raukura and Terina Moke – proposed hohou i te rangi process”.

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<sup>4</sup> *Good Health Wanganui v Burberry* [2002] 1 ERNZ 668 at [57] and [58].

<sup>5</sup> *GF v Comptroller of the New Zealand Customs Service* [2023] NZEmpC 101 at [16], [129]-[130] and [139].

[68] Mr Hope's email described RHOT as a Māori organisation and said it was "appropriate that the process is grounded in tikanga Māori" but "as the same time we have to be aware of and provide for our non-Māori employees and their knowledge and experience of tikanga Māori". He proposed a meeting with Board representatives where Ms Moke and Mr A, each accompanied by their lawyer or advocate and a support person or tikanga expert, would "use their best efforts to achieve resolution in accordance with the kaupapa". He described the kaupapa as being "to reach a resolution between the parties so that peace can be made, so that differences can be settled and so that parties can move on". He also described the proposed meeting as a mediation that would recognise and implement the principal object of the Act to build productive employment relationships through the promotion of good faith in all aspects of the employment environment.

[69] He said discussion would be "based on Raukura values" of tika me pono, me mate mangopare, hapai tangata, ngakau whakaiti me mahitahi and aroho me manaakitanga. Anything said in this meeting was to be confidential. The meeting was not to be used for the purpose of reaching financial settlements or exit packages. The tikanga experts were to assist parties, not to advocate for their respective party.

[70] The proposed process included karakia and mihi whakatau, followed by a paku kai and then whakawhanaunga. The board representatives would lead off the discussion and hand over to Ms Moke and Mr A. Speakers were to be heard without interruption, speaking in te reo Māori if they wished, with korero being interpreted by each party's tikanga expert. The parties could take breaks and go into separate sessions if they wished. Any resolution reached was to be recorded in writing and signed by the parties.

[71] The same proposed process was also set out in emails sent by RHOT's lawyers to lawyers for the two complainants. While both declined to participate, the point relevant for present purposes was that a RHOT representative had identified tikanga principles as appropriately guiding how matters should be addressed.

[72] The affidavit evidence and correspondence did not really explain why the whānau hui that Ms Moke requested in February and March 2023 did not end up being arranged when RHOT had said it was prepared to attend and had proposed some dates for it.

[73] However it was clearly arguable that more should have been done to consider and apply accepted tikanga principles to how the complaints were dealt with, from the outset and through to the issue of the reports in July 2023 and the disciplinary process that then followed.

*Declarations, recommendations and remedies sought are possible outcomes*

[74] It was also clearly arguable that, when the evidence is fully presented and examined in the Authority's substantive investigation meeting scheduled for March 2024, the outcomes Ms Moke sought could be granted.

[75] It is open to the Authority to find, if established on the balance of probability through the testing of that evidence, that the delays in the process and the proposal to proceed with disciplinary measures on the basis of the draft report on Mr A's complaint were failures to follow the agreed process and to act in good faith through the process.

[76] Similarly, it is open for the Authority to find that tikanga principles were not adhered to in how that process was conducted and how requests to engage in other ways, by hohou i te rongo and hui-a-kanohi, were dealt with. This includes the argument over whether RHOT did breach agreed terms of reference in how it proposed acting on the draft report or, in a departure Ms Moke argued should have been made, could have changed from that agreed process to address matters through forums described as better meeting tikanga principles.

[77] The prospect that the determination, whichever party was successful on issues of justification, could include recommendations on measures needed to prevent similar problems occurring in the future is provided for by s 123(1)(ca) of the Act. It was an outcome provided in the *Daniels* and the *Customs* cases referred to earlier. The dispute over process apparent in the extensive correspondence lodged shows there was a clearly arguable basis that such recommendations may be appropriate.

[78] It was also clearly arguable that Ms Moke would be entitled to remedies she sought, including distress compensation, if RHOT was found to have acted unjustifiably in how the investigation and disciplinary process was conducted.

*Orders pausing a disciplinary process or outcome may be made in rare circumstances*

[79] A high threshold applies when considering applications to intervene in an employer's investigation of workplace issues or a disciplinary process. The Employment Court, for example, observed in one case where such an order was sought that "it did not discount the possibility that there may be cases in which an order permanently restraining an employer from taking any further steps in a disciplinary inquiry may appropriately be made".<sup>6</sup> However, while accepting that may be *possible*, the following summary of the principles given in that particular case described the more *probable* outcome that would apply in most cases:<sup>7</sup>

... [O]rders restraining an employer from proceeding with an investigative/disciplinary process into concerns about employee conduct will be rare. That will be even more so where, as here, permanent orders are sought restraining an employer from taking any further steps at all, effectively halting an employer's processes in their tracks. The reasons for this are clear. The first point is that such an approach runs the risk of putting the cart before the horse, and pre-judging the endpoint that an employer might (but might not) get to. It also runs the risk of cutting across an employer's obligation to investigate concerns, including health and safety concerns impacting on other employees. Also relevant is the interest, both to the individuals concerned and more generally, in allowing such processes to run their course without undue interruption and delay. A stop-start approach to an investigative and disciplinary process which invites intervention along the way from the Authority; the Employment Court on a challenge; and potentially the Court of Appeal and Supreme Court by way of further appeal; is plainly undesirable for public policy reasons.

[80] Ms Moke's argument, supported by the affidavit evidence of Mr Moke, was she and her whānau would carry the *mamae* and *whakamā* of her likely dismissal for an indefinite period through the future if it resulted from a process carried out without sufficient regard to *tikanga* principles. Once done, it could not be undone. The damage to her *mana* could not be remedied by an award of compensation. The repercussions would affect not only her and the Board but also, according to Mr Moke, the representatives of *marae* in Kāwhia Moana who had attended the *pōwhiri* presenting Ms Moke to RHOT when she was appointed to the CEO role.

[81] If RHOT's declared commitment to *tikanga* principles were to be of any real meaning or weight, it was at least arguable that those potential effects were sufficiently grave to warrant interfering with the ordinary rights of an employer to carry out an

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<sup>6</sup> *Ports of Auckland Ltd v Findlay* [2017] NZEmpC 45 at [42]. See also *Russell v Wanganui City College* [1998] 3 ERNZ 1078 at 1080

<sup>7</sup> *Ports*, above n 6, at [23].

investigation of an employee's conduct without interference or modification.<sup>8</sup> If, on that argument, RHOT's process was found by the Authority's substantive investigation to have fallen short of its tikanga obligations, there was an arguable prospect that RHOT would then have to take account of those obligations in whatever steps it subsequently took to complete that process and thereby avoid the *mamae* that otherwise would have occurred.

### **Balance of convenience**

#### *Relative detriment or inconvenience*

[82] RHOT argued it should not have to bear the cost of Ms Moke's salary for another six months on paid suspension while also bearing the salary-cost for an acting CEO meanwhile. It also said the delay over the future of her employment was hampering its efforts to rebuild its depleted SLT, in turn affecting users of its services and staff working those services. It regarded Ms Moke's application as delaying the inevitable outcome of dismissal to gain several more months income at its expense.

[83] There was no evidence from Ms Moke about her capacity to meet the financial cost in the intervening period. Evidence and submissions, from her point of view, focussed on the irreparable effect on her of the process ending, perhaps inevitably in dismissal, in a way that was not "mana-enhancing" and which had not sought to remedy whatever *mamae* was suffered by all participants.

[84] While RHOT was inherently better placed to bear the relative financial detriment, the organisational inconvenience of uncertainty and further delay for RHOT appeared to be the relatively greater detriment.

#### *Effect on third parties*

[85] There was little direct information on the extent of likely detriment or inconvenience to potentially affected third parties during the period that the requested interim orders would run.

[86] Users of the services could be affected by disruption among the SLT and staff but there was no evidence that the arrangements in place under the acting CEO were

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<sup>8</sup> *Russell v Wanganui City College* [1998] 3 ERNZ 1078 at 1080.

not maintaining service standards or meeting users' needs at least as well as they had been previously.

[87] Some staff had voiced concerns about disruption within RHOT which, among other things, had resulted in interest from the office of the Māori King. There were also resignations and disciplinary processes involving other employees at the same time. However there was no sufficient evidence to say the effect on staff from now until the outcome of Ms Moke's case made suspending the disciplinary process more or less inconvenient.

[88] Mr B remained employed by RHOT. He would be without a final outcome to his August 2022 complaint if completion of the disciplinary process was paused under interim orders. This was not consistent with RHOT's commitment to timely completion of investigation into complaints. However, with Ms Moke out of the workplace as a result of ongoing suspension, there was no direct detriment to him.

*Possible compensation not an adequate alternative remedy*

[89] Ms Moke's case, in short form, was that money was no remedy for the potential loss of mana and reputation to her and, acknowledged in a manner consistent with tikanga principles, her whanau. However, in her substantive claim that is to be investigated whether or not interim orders are granted, Ms Moke has also sought declarations about whether RHOT has met obligations of tikanga and good faith. Such findings by the Authority in its role as a specialist decision-making body can be presumed to have some value, if granted, in addressing any damage to mana and reputation.<sup>9</sup> In that way, money is not the only alternative remedy involved.

[90] In other cases already discussed, compensation has been held to be an appropriate and adequate remedy for stigma and loss of mana resulting from dismissal. In one case the applicant submitted that allowing a disciplinary process to continue in the interim would cause anxiety and stress and "a degree of stigmatisation and impact on [the applicant's] mana". The Court responded to that submission by "not accept[ing] the proposition that compensation under the Act would be an inadequate remedy in such circumstances".<sup>10</sup>

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<sup>9</sup> Employment Relations Act 2000, s 143(f) and s 157.

<sup>10</sup> *Ports*, above n 6, at [33].

*Relative strengths and weaknesses of the parties' arguments*

[91] A robust assessment of the merits of the parties' arguments may assist with conclusions on the balance of convenience and overall justice in any application for interim orders. Any conclusions are tentative, being made from affidavit evidence, and subject to what full testing of the evidence at the eventual substantive investigation meeting may show.

[92] RHOT placed an unconvincing 'spin' on the extended period of its investigation, at odds with its policy commitment to prompt and timely investigation of complaints. It submitted the length of time taken had "enhanced" rather than compromised the quality of the investigation, creating more time for Ms Moke to respond. This minimised the obviously unsatisfactory state of affairs during the period from March to July 2023 where RHOT sought to proceed on the basis of a draft report, without Ms Moke's feedback, then resiled from that approach, later ordered the investigator to cease investigating but then directed her to resume having extracted an undertaking for completion by a set date. The new deadline resulted in one final report and one report still subject to getting Ms Moke's feedback. It was not until getting that feedback on 8 September that RHOT was in a position to properly consider whatever disciplinary investigation might flow from the second report.

[93] RHOT also advanced the weak argument that progress was out of its hand once it commissioned an external investigator. The employer remains responsible for whether such an investigation is meeting the standard, including of timeliness, of what a fair and reasonable employer could have done.

[94] While Ms Moke bore responsibility herself for some of the delay, she had the stronger argument that the length of time taken for the investigation was unfair, albeit not just to her but also the complainants. While some of that time was due to health and other issues concerning one of the complainants, there were gaps in the correspondence and activities of the legal representatives and the investigator yet to be satisfactorily explained.

[95] Ms Moke has a strong argument that RHOT could have done more from the outset to consider how relevant tikanga principles should be applied in the investigation and, once the Board had received at least the draft report and its strong conclusions, what became a disciplinary process.

[96] This is not a one-sided argument however.

[97] The Board, as clear from Mr Hope's evidence, was open to addressing matters in a tikanga manner at the outset. Part of the controversy is whether it could impose a hohou i te rongo process on the two complainants, who wanted the investigation process promised by RHOT's policy manual, when the person complained about wanted the issues addressed in a different way. Why RHOT has not developed better policies incorporating tikanga principles in employment processes is an issue for exploration at the Authority investigation meeting, including with Ms Moke, as RHOT's CEO for around 18 months before her own concerns in this area arose.

[98] The investigation proceeded under terms of reference that Ms Moke had the opportunity to comment on and had agreed to. No reference was made in those terms to how tikanga principles or values might apply to conduct or content of the investigation.

[99] There may be a legitimate argument that the Board was bound to complete the agreed, albeit badly delayed, investigation process under those agreed terms of reference and could not switch to dealing with this matter through a whānau hui as Ms Moke requested once the likely conclusion of the investigation and its potential disciplinary effect became clear. There is, however, a strong argument that the tikanga-based approach she sought at that later stage, and which could still be followed by the parties, became more appropriate at that time. Taking an approach that addressed the mamae, not only to her but to others involved, and reaching an outcome which enhanced rather than damaged the mana of all affected, appears consistent with conclusions reached in the cases referred to earlier in this determination.

[100] The argument regarding the adequacy of compensation in a context concerning mana and reputation, that may have effects beyond the individual and extend to their family and wider community, has been noted earlier. The concern about those effects has its own importance and meaning when considered in a tikanga Māori context. Many cases involving non-Māori parties also share this concern that the effect of employment disputes and dismissals reach well beyond the individual worker and employer representatives involved in the particular case into the relationships of their family, both immediate and extended, along with their standing in their wider communities of location or interest (such as in a small town, a school, a church or sport

community). The schema of the Act provides compensation as one remedy, along with the power to make findings (which are declarations of fact or law) and, in appropriate cases, recommendation about future action. Ms Moke, in her case has sought all three outcomes.

*Presumption that intervention confined to rare and clear circumstances*

[101] The major hurdle to Ms Moke's application for interim orders is the general principle that the Authority, or the court, will only intervene in an employer's investigative and disciplinary process in rare circumstances.

[102] While Ms Moke had an arguable case that such an order was possible, the principle weighs heavily in the balance of convenience against making such an order in this case.

[103] As noted in the extract from the case referred to earlier summarising the principle, there is a risk of pre-judging the endpoint that the employer might yet (or might not) get to.<sup>11</sup> RHOT has notified Ms Moke of its finding that she had committed serious misconduct and it was considering dismissing her. However it also agreed, by consent, not to make any final decision until the Authority had issued a determination on the interim order application. It is still open to RHOT, in taking its next disciplinary step in light of this determination, to address Ms Moke's concerns about applying tikanga principles in reaching whatever final conclusion it may reach and, importantly, how any such conclusion may be implemented.

[104] What it does now may also be relevant to the assessment of Ms Moke's case as it is by the time that the Authority's investigation meeting is held.

[105] A further concern is that pausing an investigation or disciplinary process risks cutting across the employer's obligations to deal with concerns impacting on other employees. In this case that included Mr A and Mr B but was likely less relevant as the investigation reports had been issued and RHOT was at the disciplinary stages of its process.

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<sup>11</sup> *Ports*, above n 6.

[106] The circumstances of Ms Moke's case, while of great importance to her, did not raise issues sufficiently severe, clear and rare to override the general principle against intervention during an employer's process.

### **Overall justice**

[107] As shown in the evaluation of whether Ms Moke had an arguable case and in some elements of the assessment of the balance of convenience, there were clearly matters to be addressed with RHOT in the Authority's scheduled investigation meeting on her substantive claim. Other elements in the balance of convenience meanwhile, however, weighed more heavily against the interim order sought.

[108] Standing back from the detail of the evidence and the parties' submissions, the overall justice did not favour making the interim order Ms Moke sought.

### **Outcome**

[109] For the reasons given, Ms Moke's application for interim orders preventing RHOT making any decision about whether or not to terminate her employment is declined.

### **Costs**

[110] Costs are reserved pending resolution of Ms Moke's substantive application.

### **Next steps**

[111] A case management conference is to be convened to confirm timetable directions for lodging witness statements and any further documents needed for the investigation meeting on the substantive application.

Robin Arthur  
Member of the Employment Relations Authority