

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2023] NZERA 739
3177959

BETWEEN	KRISSY LUIS DE SOUZA Applicant
AND	MĀORI WOMENS WELFARE LEAGUE INC (TE ROPU WAHINE MĀORI TOKO I TE ORA) Respondent
AND	ORANGA TAMARIKI Proposed Second Respondent

Member of Authority: Sarah Blick

Representatives: Erika Whittome and Karen Glass, advocates for the
applicant
Prue Kapua, for the respondent
Joe Perrott, counsel for the proposed second
respondent

Investigation: On the papers

Submissions and
information received: 31 July and 12 September 2023 from the applicant
14 August 2023 from the first respondent
28 August 2023 from the proposed second respondent

Determination: 12 December 2023

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Māori Women's Welfare League Incorporated (MWWL), known as Te Ropu Wahine Māori Toko i te Ora, is principally concerned with the wellbeing of wahine Māori and their whānau. Oranga Tamariki (OT) and the Ministry of Health (MOH) funded a whānau programme called Te Kete Aronui, delivered by MWWL kaimahi around New Zealand at the

relevant times. Krissy De Souza was employed as a kaimahi based in MWWL's Whangarei office until her dismissal in April 2022, when she was dismissed for not providing confirmation she had received a COVID-19 vaccination or had received a vaccination exemption. Ms De Souza raised a personal grievance with MWWL following the dismissal.

[2] This determination deals with an application Ms De Souza has lodged to join OT as a controlling third party on the basis she considers it caused or contributed to her personal grievance. It is common ground Ms De Souza did not notify OT within the 90-day employee notification period required under the Employment Relations Act 2000 (the Act).¹ OT has not consented to being notified after the relevant period, and therefore Ms De Souza would require the Authority's leave to notify OT after the expiration of that period. Both MWWL and OT oppose the substantive application to join OT as a controlling third party.

The Authority's process

[3] In determining this matter affidavits were provided for Ms De Souza and former MWWL Project Lead and Interim Team Leader, now National Operations Manager Ronda Pahau. The initiating and responding documents lodged by the parties and the attached documents have also been considered as have submissions made on behalf of the parties and OT. The parties and OT are agreeable to this matter being determined on the papers.

[4] As permitted by s 174E of Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all of the evidence and submissions received but which has been considered.

Background

[5] At relevant times MWWL was party to an Integrated Outcome Agreement (IOA) with OT and MOH that funded the Te Kete Aronui programme which MWWL delivered. Ms De Souza was one of 12 kaimahi employed by MWWL to carry out Te Kete Aronui, providing support for whānau in the Tai Tokerau Northland Region.

[6] In December 2021 Ms Pahau emailed MWWL kaimahi as part of establishing a COVID-19 Protection Tikanga and operationalising its service under the Government's COVID-19 Protection Framework (CPF). MWWL attached a copy of the Protection Tikanga.

¹ Employment Relations Act 2000, section 115A(1)(a).

[7] MWWL is part of an email distribution list as a provider to OT. During the implementation of the CPF, OT provided COVID-19 updates to providers including MWWL. On 10 January 2022, OT shared information explaining upcoming changes at OT regarding its COVID-19 Vaccination Policy, which included OT adopting a policy that all OT kaimahi were to be fully vaccinated to continue in their roles (subject to limited exceptions) and that they would be required to present a vaccine pass to enter OT sites and offices from 1 March 2022.

[8] On 9 February 2022 OT provided MWWL with an “Update for Partners: February 2022” which confirmed OT’s staff vaccination requirements. The Update stated it reminded partners that as of 3 December 2021 anyone who visited OT sites or offices in a professional capacity must show a vaccine pass before being allowed entry – and that this included any kaimahi of partners or providers who visit OT offices. The Update also stated:

...
We are unable to provide partners and providers with legal advice about their obligations (or the obligations of their staff members) under the Health Orders (or under any other relevant law). However, we are able to share our internal approach.

OT does not require the use of vaccine passes for members of the public (and the whānau, volunteer caregivers and non-professional support people) to access the services we provide. It is our view that access to and participation in these services should not be limited based on the vaccination status of our clients and other members of the public who either want to access these services or must engage with them.

Partners and providers may choose to implement a similar approach to the use of vaccine passes in their sites and offices to ensure a consistent experience for clients and whānau regardless of the organisation they are interacting with. This will also ensure clients and members of the public can continue to access your services and support, regardless of their vaccination status.

However, each organisation must make its own decisions around use of vaccine passes...

As a result of their organisation’s health and safety assessment, a provider may choose to vary the way they offer their services based on their clients’ or staff members’ vaccination status to reduce the risk associated with COVID-19. We encourage providers to consider ways of protecting clients and members of the public, as well as your own kaimahi, from COVID-19 with public health measures you maybe already using such as screening, online engagement, social distancing and mask use.

[9] Ms Pahau says that at a MWWL National Executive Committee (NEC) meeting on 12 and 13 February 2022, the NEC considered a draft vaccination policy and made decisions to align with the CPF. She says the decision was made to support the increase in COVID-19 vaccinations for Māori in New Zealand and to confirm MWWL’s strategy in protecting

whānau. One of the decisions made was that all kaimahi working with whānau were to be double vaccinated as well as boosted unless they had an exemption.

[10] On 15 February 2022 Ms Pahau emailed MWWL staff informing them of the vaccination resolution passed by the NEC. On or about the same date MWWL's draft COVID-19 policy was shared with kaimahi including Ms De Souza. The draft policy proposed a requirement that all MWWL kaimahi and others within the organisation be vaccinated or provide an exemption. The draft policy stated key drivers for the policy as:

MWWL, as an organisation, has a long term commitment to vaccination through its promotion of immunisation for tamariki that has been in place since 1992. MWWL is committed to providing a safe working environment for kaimahi and for all people within our communities that we come into contact with.

The government has mandated vaccinations for early learning services and providers (which includes our kaimahi providing He Kete Aronui services). To date MWWL has supported and endorsed vaccinations for everyone, but particularly for Māori.

[11] As part of a "Workplace Vaccination Risk Assessment" in the draft policy, it stated that pursuant to OT's criteria for He Kete Aronui, whānau include pre-school children, who are unvaccinated and there is no option available that would result in no direct contact with whānau. It appears the draft policy was approved by MWWL's NEC on 18 February 2022.

[12] Ms De Souza did not provide evidence of vaccination status and took leave for a number of weeks. On 30 March 2022 Ms De Souza emailed Ms Pahau enclosing a document called a "notice of non-consent and conscientious objection".

[13] On 4 April 2022 MWWL advised Ms De Souza by letter that in the absence of confirmation of vaccination or receipt of an exemption from MOH, Ms De Souza was unable to undertake the role of kaimahi under He Kete Aronui. The letter advised employment would terminate on 8 April 2022 and relevantly stated:

Given your time both as a member and kaimahi of the League, you will be aware that much of our work in hauora has been to encourage and ensure our pepi and tamariki have been vaccinated. Since 1990 that has been a task undertaken by branches and has been a part of the He Kete Aronui contract.

As a kaimahi employed to deliver He Kete Aronui in Taitokerau, your work involves working with our whānau, more often vulnerable whānau and with tamariki under 5 years. Our obligation is to our whānau and therefore it is imperative that in order to protect our whānau, those who work most closely with them have taken all steps to limit the possibility of compromising the health of whānau and our policy recognises that and requires all those working with whānau to be fully vaccinated.

...Services to whānau we are contracted to provide for under He Kete Aronui by Oranga Tamariki and the Ministry of Health requires direct contact with whānau and by not being vaccinated you constitute an unacceptable risk to whānau in our assessment. There is no alternative way to provide those services without direct contact.

[14] On 8 July 2022 Ms De Souza lodged a statement of problem in the Authority naming MWWL as the only respondent. On 26 August 2022 the Authority was notified Ms De Souza was now represented by a union and her current advocates. The parties attended mediation on 28 October 2022, which was unsuccessful in resolving any matters. On 1 November 2022 an amended statement of problem was lodged on Ms De Souza's behalf which again named only MWWL as a respondent.

[15] At a case management conference with the Authority on 5 December 2022, Ms De Souza's advocate advised (for the first time the Authority is aware) that Ms De Souza wished to join OT as a controlling third party. Timetabling orders were subsequently made including around the lodgement and service of a formal application to join OT as a controlling third party.

[16] On 16 January 2023 a formal application to join OT was lodged. The application was ultimately accepted for service by OT on 29 March 2023.

[17] Ms De Souza says OT meets the definition of a controlling third party under s 5 of the Act because it had a contract with MWWL under which employees of MWWL performed work for the benefit of OT pursuant to the IOA under which He Kete Aronui was delivered, and the IOA required direct contact with whānau. MWWL says that OT did not at any time exercise direction or control over MWWL or its employees, and its decision to implement a vaccination policy was the result of decisions made in accordance with MWWL's Constitution and without any input or influence from OT. OT's position largely mirrors MWWL's, and points out OT expressly declined to give any direction to providers and rather indicated that all OT could do was advise on its own internal policy relating to its own staff.

Discussion

Ms De Souza did not notify OT of personal grievance within employee notification period

[18] Section 115A of the Act provides that an employee has complied with the requirement to notify a controlling third party that they consider their actions have caused or contributed to their personal grievance if the notification occurs within the same statutory 90-day period in

which the effected employee must raise their personal grievance with their employer. In submissions, Ms De Souza has acknowledged in her application and through her advocate in written submissions that OT was not notified within the employee notification period under s 115A(1)(a) and (6) of the Act.

Whether leave to notify after expiration of period should be granted

[19] If the notification requirements are not met, then there is provision to apply to the Authority for leave to notify after expiration of the timeframe, where the controlling third party does not consent to being notified after the relevant period.² As noted above, OT has not consented to being notified under s 115A(2) of the Act and Ms De Souza would require leave from the Authority to do so. Leave to notify does not involve the high test of exceptional circumstances which is required for leave to be granted to raise a personal grievance out of time with an employer.

[20] Ms De Souza has provided no explanation as to why she did not notify OT within the employee notification period, or in the many months following the dismissal. By August 2022 Ms De Souza was represented by an advocate, and yet no attempt to notify OT was made. As far as the Authority is aware, OT first became aware of Ms De Souza's grievance on 29 March 2023, almost 12 months after Ms De Souza's dismissal.

[21] I acknowledge that in its investigatory role, the Authority is required to establish the facts and determine matters based on the substantial merits of the case without regard to technicalities.³ However, the Authority's discretion is to be exercised on a principled basis. Section 115A of the Act requires an employee or an employer wanting to join a controlling third party to a proceeding to give notice. Notification is expressly a pre-condition of granting joinder. While I have a discretion to grant leave, given the significant delays and there being no explanation for them, I do not consider it just to grant leave to notify. Leave is therefore declined.

Costs

[22] Costs are reserved between the parties pending the substantive hearing of Ms De Souza's personal grievance.

² Employment Relations Act 2000, section 114(3).

³ Employment Relations Act 2000, s 157(1).

[23] As the proposed second respondent, OT took the opportunity to be heard in relation to the application to notify. If OT wishes to pursue costs in relation to the application, it may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Ms De Souza would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Sarah Blick
Member of the Employment Relations Authority