

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 490
3274279

BETWEEN MICHAEL FERRIS Senior
First Applicant

AND MICHAEL FERRIS Junior
Second Applicant

AND THE PROPRIETORS OF
NUHITI Q
Respondent

Member of Authority: Sarah Kennedy-Martin

Representatives: Ali Bendall, counsel for the Applicants
Richard Harrison, counsel for the Respondent

Investigation Meeting: On the papers

Submissions Received: Up to and including 17 May 2024 from the Applicants
3 May 2024 from the Respondent

Determination: 16 August 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Michael Ferris Snr and Michael Ferris Jnr (the applicants) seek an order that the Proprietors of Nuhiti Q (Nuhiti Q) comply with the orders made by the Authority on 26 July 2023 and 6 October 2023.¹

[2] Both parties agree partial payment has now been made and the total amount that remains to be paid is \$29,820.00. Nuhiti Q accepts it has been unable to meet the Authority's orders in full but says this is because it does not have available funds. It has made payments by instalment to the applicants amounting to \$56,307.56. Nuhiti Q

¹ *Ferris and Anor v the Proprietors of Nuhiti Q* [2023] NZERA 395 and [2023] NZERA 583.

says the remaining \$29,820.00 represents compensatory awards ordered by the Authority and it now seeks to off set this amount with rent arrears it says the applicants owe to Nuhiti Q.

The Authority's investigation

[3] It was agreed at the case management conference this matter would be heard on the papers. I have received submissions from the applicants dated 5 April 2024, together with affidavits from both applicants. Submissions were lodged on behalf of Nuhiti Q on 3 May 2024 together with affidavits from Diane Larsen, Chairperson, Committee of Management (the Committee) of the Incorporation and Kylie Potae, who is both the secretary of the Committee and a chartered accountant and partner in BDO Gisborne Limited. BDO also provide financial advice and services to the Committee. Reply submissions were lodged on behalf of the applicants on 17 May 2024 together with additional affidavits.

[4] I also received two decisions of the Māori Land Court involving the same parties dealing with claims brought by Mr Ferris Snr against Nuhiti Q.

Submissions

[5] The applicants submit that although they have received payments since this application was lodged, partial compliance is still non-compliance. They do not accept the financial position presented precludes payment of the outstanding amount and do not agree Nuhiti Q has used its best endeavours to comply, noting the timing of the payments they have received. They say they have not had the benefit of their awards and Nuhiti Q's application to pay by instalments would mean the total amounts owing to them would not be paid until May 2026.

[6] They seek a compliance order for the full outstanding amount to be paid in a lump sum. They disagree this is an appropriate situation for payments by instalment but are willing to wait until income from the next carbon payment is received by Nuhiti Q. Both applicants resist the application to set off any unpaid rental income said to be owing to Nuhiti Q on the basis that is a matter for the Tenancy Tribunal.

[7] Nuhiti Q says it is in a difficult financial situation and does not have the funds to make any payments to the applicants until 2025 based on its current budget. It seeks to pay by instalments at the rate of \$1,550.00 per month to Michael Ferris Snr and \$990.00 per month to Michael Ferris Jnr starting from June 2025.

[8] Nuhiti Q says the income from carbon is not confirmed because further work is required before anymore income will be received. Submissions on Nuhiti Q's behalf seek to have the Authority exercise its equity and good faith jurisdiction to offset the remaining amount Nuhiti Q owes the applicants (\$29,820.00) with unpaid rental income it says it should have received from the applicants (\$48,563.44). Nuhiti Q will write off the remaining amount owed if the Authority resolves this application in this way.

Jurisdiction to resolve the disputed rent arrears

[9] The dispute over unpaid rent arises from the applicants staying on in the farm accommodation after their employment was terminated. The applicants accept they stayed on in the accommodation after their employment ended. Mr Ferris Jnr has now moved out but Mr Ferris Snr has belongings in one house, although it is not clear whether he intends to live there again. Cyclones on the East Coast meant Mr Ferris Snr has at times based himself elsewhere but his belongings remain in the house and Nuhiti Q say the gate is padlocked. Mr Ferris Snr says the gate is not padlocked and there is no proper road access after the cyclones meaning he is unable to recover his possessions.

[10] They say no agreement was reached with them about rent to stay on in the houses after their employment was terminated. In addition, there were issues with meeting the healthy homes standards, the houses have been uninhabitable since the cyclones and there is temporary road access such that Mr Ferris Snr is unable to recover his possessions. Mr Ferris Jnr had to evacuate his whanau during one of the cyclones and they now live elsewhere.

[11] The applicants submit the Authority is unable to off set the amounts owed to them with rent arrears because the Tenancy Tribunal has exclusive jurisdiction to determine tenancy matters. Any unpaid rent arrears is a matter for the Tenancy Tribunal and not the Authority. They say the dispute about rent arrears arose after the employment relationship and the service tenancy ended making it clear the claim for unpaid rent does not fall within the Authority's jurisdiction.

[12] Nuhiti Q says as a matter of equity and good conscience, the applicants cannot on the one hand knowingly deprive Nuhiti Q of rental income, either by refusing to pay or moving out to allow for rental income from other tenants, while insisting that the remainder of the Authority award be paid to them. Nuhiti Q say the service tenancy is

still in existence. They accept a new agreement about the farm accommodation was entered into after the applicants' employment was terminated but say this was to allow the applicants time to argue their case for reinstatement in the Employment Relations Authority. Despite that application being withdrawn, they say the accommodation dispute arose in the context of the employment relationship problem and is therefore within the Authority's exclusive and broad jurisdiction.

[13] While I am attracted to a solution that would resolve all outstanding matters between the parties, I would still need to be satisfied the Authority has jurisdiction to resolve the tenancy dispute if I was to determine all matters in the manner suggested on behalf of Nuhiti Q. The Supreme Court case of *FMV v TZB*² is relied on by both parties to support their contrary positions on whether the Authority has jurisdiction.

The Authority's exclusive jurisdiction

[14] *FMV v TZB* held that the Authority's exclusive jurisdiction in s 161(1) of the Employment Relations Act 2000 (the Act) gives the Authority the power to make determinations about employment relationship problems generally, not specific causes of action. The only requirement is that the "problem" must be an employment relationship one.³ "Problem" is not defined but it is a factual category, not a legal one. That means that whether the problem relates to or arises out of the employment relationship is a factual enquiry. The language of s 161(1) provides for jurisdiction based on the factual context.⁴

[15] Where there are overlapping jurisdictions, these are to be dealt with on a case by case basis and parties will have recourse to the Employment Court if they wish to challenge a determination of the Authority in relation to jurisdiction.

Factual context to the dispute about rent arrears

[16] In a broad sense the applicants living in the houses associated with their employment appears to be connected with their employment relationship, and for at least some of the time during their employment written service tenancy agreements were in place. However, the employment relationship ended by way of redundancy and

² *FMV v TZB* [2021] NZSC 102.

³ Above n1 at [60] – [67].

⁴ Above n1 at [75].

the service tenancy provided for the specified length of time after employment ended, that the service tenancy would end.

[17] In addition, there are a number of other relationships overlapping the employment relationship in the context of this matter. Nuhiti Q is made up of three main blocks of land including land leased from the Crown. It is managed by Nuhiti Q, a Māori Incorporation under the Te Ture Whenua Māori Act 1993. The relationship between the applicants and Nuhiti Q was described in submissions to the Authority as a relationship “of whanau and their whenua and that meant that unlike other businesses, the parties to this dispute remain connected and this will never change.” The applicants and their whanau are both shareholders of the land and future committee members.⁵

[18] It is relevant that after Nuhiti Q issued eviction notices to both applicants dated 7 November 2022, on application by Mr Ferris Snr, the Māori Land Court issued an interim injunction preventing Nuhiti Q from proceeding with the eviction proceedings.⁶ I also note the eviction notices were headed up “Notice of Termination of Periodic Tenancy” which as the applicants submit, suggests Nuhiti Q accepted the service tenancy ended.

[19] The same decision records Ms Potae’s evidence confirming the applicant’s submissions to me that at least one of the houses had failed the healthy homes assessment. That was said to be the reason the eviction notices were sent so they could work though the issues with an empty dwelling.⁷ This is submitted by the applicants as calling into question the quantum or any rent arrears that are said to be owing.

[20] There is also reference in the same decision to the houses being on Crown land and needing to seek advice as to whether they could, as a matter of law, be sublet to the applicants.

No jurisdiction to resolve the dispute about unpaid rent

[21] Based on the facts of this matter, I consider the Authority does not have jurisdiction to resolve the dispute about the unpaid rent. Even if the Authority had jurisdiction to consider issues arising from the service tenancy, this appears to have ended when the employment ended. The reasons why the applicants stayed on may

⁵ *Ferris and Anor v the Proprietors of Nuhiti Q* [2023] NZERA 395 at [89] – [90].

⁶ *Michael Kenneth Raymond Ferris v Proprietors of Nuhiti Q* 117 Tairawhiti MB 113.

⁷ Above n1 at 109.

have been in part to do with Nuhiti Q acting reasonably while an application for reinstatement was in motion, but also because of the relationships of “whanau” and “whenua”. It seems unlikely an employee without those additional relationships, whose employment had ended, would have stayed on the farm because based on evidence I heard previously it is in a remote area with very few other employment opportunities.

[22] The fact the Māori Land Court has exercised its jurisdiction to hear and issue an interim injunction pertaining to the rental accommodation after the employment relationship ended, the fact the applicants are shareholders of Nuhiti Q and the eviction notices referring to periodic tenancies support my conclusion that the facts in this particular case lend themselves to matters that are outside the Authority’s jurisdiction.

[23] In addition, it appears Nuhiti Q is seeking vacant possession of the property Michael Ferris Snr occupies in addition to rent arrears. That matter is more suited to consideration by a specialist jurisdiction noting that the Tenancy Tribunal has exclusive jurisdiction over disputes between landlords and tenants.⁸

[24] I have concluded the Authority does not have jurisdiction to resolve the dispute about unpaid rent because the facts do not disclose a sufficient connection with the employment relationship and the employment relationship problems resolved by the Authority in its previous determinations. Māori Land Court involvement is further evidence of additional relationships outside the employment relationship and the range of reasons why the applicants lived in the houses on land managed by Nuhiti Q’s Committee of Management on behalf of its shareholders before, during and after the employment relationship ended.

[25] It follows that I am unable to consider the application to offset unpaid rent against the remainder of the monies owing under the Authority orders because I have concluded the Authority does not have jurisdiction to resolve the rent dispute,

Compliance

[26] It is accepted by Nuhiti Q there has been partial compliance with the Authority orders. The total amount paid to date by instalment is \$56,307.56. There is a balance due and owing of \$29,820.00.

⁸ Residential Tenancies Act 1986, s 77.

[27] Nuhiti Q says its financial position is poor, in that it has very little in the way of liquid assets. As of April 2024, the Corporations bank balance was \$146,754.96. This money is not available for payment towards the monies owing to the applicants. It consists of money that is tagged for cyclone recovery, commitments to MPI and other outgoings. It says there is a legal duty on the Committee to be responsible for the prudent fiscal management of the Corporation's affairs and this would not be met if the remainder of moneys owing to the applicants was paid in one lump sum.

[28] Instead, it proposes commencing payments by instalment in June 2025 to Michael Ferris Senior at the rate of \$1,550.00 per month and to Michael Ferris Junior at the rate of \$990.00 per month based on its current budget.

[29] The applicants disagree and say the financial information provided to the Authority is selective and with reference to cash on hand, although ringfenced for various reasons, that Nuhiti Q is not precluded from reviewing the budget and re forecasting. It is pointed out that the full financial picture would include Nuhiti Q's assets and additional financial documents over and above what has been provided to the Authority.

[30] The applicants also submit there is a term deposit and refer to an email from Ms Potae to Mr Ferris Snr dated 24 January 2024 that would appear to confirm that. Based on the information provided it is not clear whether that term deposit forms part of the Corporations' current bank balance referred to in the affidavits about its financial position and the current budget.

[31] There is no doubt on the information provided to me that Nuhiti Q's outgoings amount to more than what is available in terms of cash in the bank, if those amounts are ringfenced. There will be further income from the carbon income stream, despite that being paused temporarily. I am unsure what conclusion I can draw about the submission there is additional money on term deposit other than to assume it has been taken into account as part of the current budget. With this in mind, there is the fact there is ongoing non-compliance with the Authority's orders.

Compliance orders

[32] A compliance order may be made under s 137(1)(b) of the Act when any person has not observed or complied with any determination of the Authority. Given the amount of time that has passed since the orders were made by the Authority and the

fact those orders have not been observed or complied with in full, I consider it is appropriate to make a compliance order.

[33] Section 138(4A) of the Act allows the Authority to order payment to the employee by instalment but only if the financial position of the employer requires it. From the information available to me it appears carbon payments are expected that will change the current position and the financial situation presented refers only to cash on hand. The bigger financial picture is somewhat more positive.

[34] I consider the financial position of Nuhiti Q makes it appropriate at this time to order payment of the amount owing to the applicants by instalments.

Orders

[35] The Proprietors of Nuhiti Q are ordered to comply with the Authority determinations dated 26 July and 6 October 2023 and pay the outstanding amount of \$29,820.00 by instalment commencing 28 days after this determination to:

- (a) Michael Ferris Senior at the rate of \$1,550.00 per month; and
- (b) Michael Ferris Junior at the rate of \$990.00 per month.

Costs

[32] Costs are reserved. If the parties are unable to resolve costs, and an Authority determination on costs is needed, the applicants may lodge, and then should serve, a memorandum on costs within 28 days of the date of this determination. From the date of service of that memorandum Nuhiti Q will then have 14 days to lodge any reply memorandum. On request by either party, an extension of time for the parties to continue to negotiate costs between themselves may be granted.

[33] The parties can anticipate the Authority will determine costs, if asked to do so, on its usual “daily tariff” basis unless circumstances or factors, require an adjustment upwards or downwards.⁹

Sarah Kennedy-Martin
Member of the Employment Relations Authority

⁹ <https://www.era.govt.nz/determinations/awarding-costs-remedies#awarding-and-paying-costs-1>