

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 593
3255299

BETWEEN MEL WHAANGA
Applicant

AND NGĀTI REHUA NGĀTIWAI
KI AOTEA TRUST
Respondent

Member of Authority: Robin Arthur

Representatives: Nithi Prachankhet, counsel for the Applicant
Richard Harrison, counsel for the Respondent

Investigation Meeting: 6 and 7 June 2024 in Auckland and by audio-visual link

Submissions and further information: From the applicant on 14 June, 2 July, 5 July, 8 July
and from the Respondent on 14 June and 3 July 2024

Determination: 7 October 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Mel Whaanga applied to the Authority for findings that he had been unjustifiably dismissed from the role of interim general manager for the Ngāti Rehua Ngātiwai ki Aotea Trust (the Trust) and was owed arrears of wages for time spent in that role from 5 October to 3 November 2022.

[2] He also sought an award of lost wages for the following six months and of compensation for humiliation and loss of dignity and mana.

[3] The Trust denied entering an employment relationship with Mr Whaanga. While accepting he was offered an interim role, the Trust said that was solely on an independent contracting basis and Mr Whaanga had gone ahead, seeking to carry out the role, without him and the Trust having confirmed the terms of payment or what

work he was to do. It said there was no employment relationship, so the Authority lacked jurisdiction to investigate and determine his claim.

[4] Alternatively, if the Authority found the Trust had intended to enter an employment relationship with Mr Whaanga, the Trust said the same issue of failure to confirm the remuneration and duties arose, so employment was not offered and accepted on any certain terms. And, within a few weeks of offering him the interim position, the Trust's board also resolved that it had not been in a position to validly make that offer to Mr Whaanga anyway, whether as a contractor or an employee.

[5] Further, if Mr Whaanga was found to have become its employee in October 2022, the Trust said he owed it \$7,500 for an unauthorised payment made to him for work he claimed he had done earlier.

The Authority's investigation

[6] Mr Whaanga, the Trust's chair Opo Ngawaka and a trustee, Tipi Howe, each lodged a written witness statement for the Authority investigation. They, and another trustee Sonya Palmer, also gave oral evidence to the investigation meeting, answering questions under affirmation from me and the parties' representatives.

[7] Mr Howe did not attend the investigation in person. His evidence was heard through an audio-visual link, on the second day of the meeting, as he was overseas.

[8] Two other people who were involved in relevant discussions and decisions by the Trust's board could not give evidence.

[9] Rosanna Whaanga, who was also a trustee and is Mr Whaanga's wife, was too ill to provide a witness statement or attend the investigation meeting. Mrs Whaanga was at the meeting of trustees on 4 October 2022 which made the decision to offer the role of interim general manager to Mr Whaanga. She also wrote the board's Minute of that meeting which formed an important part of the evidence about what had or had not happened.

[10] Pam Armstrong, who served as the board's secretary on a voluntary basis, had sadly died some weeks before the Authority's investigation meeting. She had not attended the 4 October 2022 meeting where a resolution to "hire Mel Whaanga as the

interim GM” was agreed but was involved in communication with him, the trustees and others in the following weeks.

[11] The parties’ representatives gave oral closing submissions at the investigation meeting, speaking to written synopses, on the issues for resolution.

[12] Further information was called for with the parties then lodging some additional documents and having the opportunity to comment on them. Supplementary submissions from Mr Whaanga were lodged on 1 July 2024. Gathering further information ended on 8 July with a message sent through Mr Whaanga’s representative confirming some documents Mr Howe had been asked to look for could not be found and the Trust confirming it had no further comments about the additional documents.

[13] As permitted by s 174E of the Employment Relations Act 2000 (the 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 evidence and submissions received.

The issues

[14] The issues requiring investigation and determination were:

Employment status

- (a) Was Mr Whaanga employed as interim general manager by the Trust?
- (b) If he was an employee, what were the terms of his employment?

Personal grievance

- (c) If he was an employee of the trust, was the decision of Ngāti Rehua to end his appointment a dismissal?
- (d) If it was a dismissal, was that decision and how it was reached, what a fair and reasonable employer could have done in all the circumstances at the time?
- (e) If the Trust’s actions were not justified (by disadvantaging and/or dismissing him), what remedies should be awarded, considering:
 - Lost wages (subject to evidence of reasonable endeavours to mitigate his loss for whatever period is claimed); and
 - Compensation under s123(1)(c)(i) of the Act

- (f) If any remedies are awarded, should they be reduced (under s124 of the Act) for any blameworthy conduct by Mr Whaanga that contributed to the situation giving rise to his grievance?

Wages arrears

- (g) Is Mr Whaanga owed arrears of wages for hours worked between 5 October and 3 November 2022?
- (h) If arrears are owed, what amount should be ordered?
- (i) Should any award of arrears include an award of interest and, if so, for what period?

Counterclaim

- (j) Does the Authority have jurisdiction to consider the Trust's counterclaim?
- (k) Did Mr Whaanga arrange an unauthorised transfer of \$7,500, for his own benefit, and, if so, should he be ordered to repay that money with interest?

Costs

- (l) Should either party contribute to the costs of representation incurred the other party?

Context of the problem

[15] Ngāti Rehua Ngātiwai ki Aotea are tangata whenua holding mana whenua and mana moana of Aotea and its outlying islands in the Hauraki Gulf. Its trust was incorporated in 1985 with board members elected by whanau who live on the islands, the mainland and elsewhere.

[16] In January 2002 the trust board appointed a Kaiwhakahaere or general manager to lead its work programme and develop the board strategy. The strategy concerned various work streams, including projects for conservation, health, education, learning and encouraging use of te reo. The projects were of varying sizes and pace, depending on funding from various sources and voluntary work from Ngāti Rehua whānau and others. Trustees each had a portfolio where they were responsible for co-ordinating work in these areas, reporting to the board, and with some discretion about the use of available funds.

[17] Those projects included Tū Mai Taonga, a programme to restore native species and ecosystems on Aotea through feral cat removal and rat control measures. Ngāti Rehua led the programme with substantial funding from the Department of

Conservation (DoC) and Auckland Council. A committee comprising representatives of iwi, the department and the community administered the programme.

[18] Another project for revitalising use of te reo as a first language in homes and schools was supported by Crown funding provided through an independent entity, Te Mātāwai. Mr Howe was the trust member responsible for that project, referred to in the documents as Mātāwai Te Reo.

Previous arrangement for general manager's work

[19] The work of the Trust general manager was, from January 2022, carried out under a contract for services with Nepia Strategic Management Limited. Its director, Charles Nepia, provided the services. The contract allowed for payment of up to 35 hours work a week, at \$55 an hour. Payment for any additional hours required prior written approval of the board.

[20] Mr Nepia was an experienced project manager of construction projects in New Zealand and South Pacific. He had been available for the Ngāti Rehua role at that time because border restrictions during the Covid-19 pandemic prevented work elsewhere. By August 2022, however, other projects were resuming, and Mr Nepia advised the board chair Mr Ngawaka that his overseas commitments meant he could not continue carrying out the 35-hour a week role for the trust.

Resolutions and call on 4 October

[21] Mr Ngawaka had reported this situation to the trustees and it was discussed again during the trust board meeting, held over Zoom, on 4 October. Also present were Mrs Whaanga, Mr Howe, Ms Palmer and Taumata Toki. Ms Armstrong and one other trustee were not present.

[22] The meeting minutes, prepared by Mrs Whaanga, recorded Mr Ngawaka saying he had not yet received a letter of resignation from Mr Nepia but one was to “be sent to the board to that effect”.

[23] Following discussion on the situation, the trustees agreed resolutions to accept Mr Nepia's resignation as general manager, to hire an interim general manager “to work for the [Trust] board” and to hire Mr Whaanga as the interim general manager.

[24] Mr Whaanga had been involved, on a voluntary basis, in Ngāti Rehua matters for several decades through Mrs Whaanga's connections with the iwi. He had served as a trustee in the 1990s.

[25] The 4 October minutes recorded Ms Palmer moving and Mr Howe seconding the resolution, with Mr Ngawaka agreeing to it. Abstentions were recorded for Mr Toki and Mrs Whaanga, in her case "because of her connection to Mel Whaanga".

[26] The Minutes that Mrs Whaanga later wrote recorded Mr Howe saying Mr Whaanga "will be hired as the interim GM for a period of 90 days". Three tasks were listed for him to carry out: arranging advertising the positions of general manager, administrator and Tū Mai Taonga project lead; reporting daily to Mr Ngawaka and Mr Howe, with a weekly report to the board; and "look[ing] after the GM position and Tu Mai Taonga".

[27] The Minutes also recorded Ms Palmer and Mr Howe asking that Mr Whaanga "starts straight away as there is a lot of work to be done". The trustees arranged for Mr Ngawaka to call Mr Whaanga "straight after this meeting is closed".

[28] There were some differences in the evidence of Mr Ngawaka and Mr Whaanga about their telephone conversation later that evening. Mr Whaanga said he was told the role was for three months, at an hourly wage of \$55, helping trustees with their portfolios and managing the Tū Mai Taonga project. He said he accepted the role and Mr Ngawaka told him to contact Ms Armstrong "for my contract".

[29] Mr Ngawaka said he told Mr Whaanga of the temporary interim position, with up to three months' work and Mr Whaanga said he was available. Mr Ngawaka said they did not talk about the rate of pay or hours of work. They did discuss the Tū Mai Taonga project and arranged for Mr Whaanga to attend a project hui scheduled to be held at the DoC offices on Aotea on 6 October. Mr Ngawaka said he did not require Mr Whaanga to come to the meeting, but Mr Whaanga said he was told he was expected to be there.

[30] Mr Whaanga sent an email addressed to all the trustees later that night saying he was honoured to be invited "to be your interim GM" and would contact them all the end of the week to see how he could help. He said he was meeting the following day

with Mr Ngawaka “to discuss my objectives for the next 90 days”. He then set out a list of tasks he would start working on and wrote: “feel free to send more tasks”.

[31] The following morning Mr Whaanga sent a further email message to trustees saying he hoped to hold at least a weekly one-on-one with each trustee by Zoom, phone or in person. Ms Armstrong responded to his messages saying Mr Whaanga was “a real action oriented Kaiwhakehaere” and asking if he needed anything from her to assist with his tasks. She also wrote: “I hope you will consider applying for the permanent position”.

[32] Mr Whaanga said he also spoke by telephone on 5 October with Mr Ngawaka and Mr Howe about work he was expected to do, including daily reports to Mr Ngawaka.

Conflict at 6 October meeting

[33] On 6 October, Ms Armstrong sent an email to Auckland Council representatives telling them Mr Nepia had resigned and “the trust has only just brought on Mel Whaanga as our interim (as of yesterday)”.

[34] Also on 6 October, Mr and Mrs Whaanga travelled to Aotea, using flight tickets booked by Ms Palmer, and attended the Tū Mai Taonga committee meeting at the DoC offices. Also present were Mr Nepia and representatives of DoC, Auckland Council’s local board, and mana whenua. One of the mana whenua representatives was Marilyn Stephens. Ms Stephens is a kaumatua of Ngāti Rehua resident on Aotea and had previously been a trust board member.

[35] Mr Howe and Mr Ngawaka joined the meeting by Zoom connection but said in their later evidence that they did not hear all of what transpired.

[36] During this meeting Mr Whaanga stood to introduce himself in the role as interim general manager and went on to talk about work he would be involved in. His comments included how he saw the Trust using funds from the project. Mr Nepia interrupted him, considering those comments were for the Trust to discuss rather than air with the DoC and other representatives present. Mr Whaanga was offended at being interrupted.

[37] When Mr Whaanga continued to speak, Ms Stephens asked him to stop saying, according to a written complaint she later made to the Trust board: “This is not the place for this discussion. As kaumatua I am asking that you stop now and take this matter to the [Trust]”. Sharp words followed between the two of them. In her written complaint Ms Stephens said Mr Whaanga’s response included saying: “You are not my kaumatua, you are just a silly old woman. I told you that thirty years ago and I haven’t changed my opinion.” Ms Stephens said she responded “I don’t have to listen to this rubbish” and walked out, followed by the rest of the committee.

[38] As emerged in Mr Whaanga’s oral evidence, there was also a history of some tension between him and Mr Nepia, dating back to a time some years earlier when they had both worked together in roles with the Church of Latter-Day Saints.

[39] Also on 6 October Mr Nepia sent an email to all trustees about his plans. He said he “gave notice” in August that he would be unable to continue allocating “the necessary time to provide the contracted services of up to 35 hours a week required by the trust”. He said Mr Ngawaka had asked him to consider a lesser role and “assisting in a transition to a suitable replacement” but it had “become apparent that my schedule no longer affords sufficient time to do this”. He also referred to being advised that morning that “an interim GM has now been appointed”.

Complaint about 6 October

[40] In the following week Mr Whaanga worked on various tasks he had listed or discussed with Mr Ngawaka and Mr Howe. These include preparing a newsletter and drafting advertisements for three positions with the trust.

[41] On 13 October Mr Ngawaka, by email, advised Mr Whaanga of a written complaint sent by Ms Stephens. Mr Ngawaka said he was contacting the Trust’s legal advisor for guidance on the process to deal with the issue. He did not send Mr Whaanga a copy of the complaint.

[42] Mr Whaanga did not reply to that email but Mrs Whaanga did. She criticised Mr Ngawaka for seeking advice and Mr Nepia and Ms Stephens for interrupting Mr Whaanga during the 6 October meeting.

[43] On 16 October Mr Whaanga sent trustees a draft employment agreement for his role as he had not received one. His accompanying email message criticised Mr

Ngawaka for failing to give him an employment agreement and job description and for failing “to tell me what my hourly rate is” when they had talked on 5 October.

[44] The following day Ms Armstrong noted in an email to trustees that Mr Whaanga had been waiting since the 4 October meeting for “a contract and terms of reference” which “need to be formalised before any further work from the interim GM proceeds”. She said she was willing to help progress this as she had “assisted with the previous TOR for the kaiwhakahaere role” and it was not appropriate for Mr Whaanga to create his own agreement.

[45] In an email to Mr Ngawaka and Ms Armstrong on 19 October, copied to all trustees, Mr Whaanga made the following statement:

Since I do not have a signed employment contract with [the Trust] (as Pam [Armstrong] has stated in her email) then I did not represent the Trust at the [Tū Mai Taonga] meeting. This means that [Ms Stephen's] complaint has nothing to do with the Trust and the complaint is a private matter between her and I.

[46] He also complained that he was not invited to the 22 October trust board meeting where the complaint was to be discussed.

Trust adopts different view of interim role

[47] The agenda circulated for the 22 October Trust board meeting included an item titled “complaints received”, with Ms Stephens to attend that part of the discussion, and “terms of reference/contract for Interim GM role”.

[48] Minutes of the 22 October meeting record the board having discussed Mr Nepia’s “official resignation” by email of 6 October, “formally” accepting that resignation and then deciding that their resolution to appoint Mr Whaanga as interim general manager on 4 October “was passed on presumptions that were not correct”.

[49] The Trust told Mr Whaanga of its discussion and decision in a letter on 25 October, signed by Mr Ngawaka. The letter said an earlier motion appointing Mr Whaanga as interim general manager on 4 October was not valid as Mr Nepia’s resignation was not received until 6 October. It told Mr Whaanga there was “not currently an IM General Manager role in place” and he was not to represent himself as being in that role or otherwise representing the board. It said the board’s next meeting

on 31 October would discuss the situation further and, if a decision was made to proceed with Mr Whaanga on an interim basis, on what terms and conditions.

[50] A further letter from Mr Ngawaka to Mr Whaanga dated 3 November told him that the 31 October board meeting resolved not to continue the interim GM role. It directed him to “cease undertaking any work for [the Trust]” and to “cease and desist from any further communications of any nature on behalf of the Trust Board”.

[51] Discussions between the parties in late November did not resolve their different views about Mr Whaanga’s appointment.

Mr Whaanga claims payment

[52] On 7 December Mr Whaanga proposed settling their dispute by the Trust issuing a written public apology and paying him \$44,525. This amount comprised:

- \$7,500 for work he said he completed for Mr Howe as a separate “service contract” as a Kaiako advisor for the Mātāwai Te Reo programme;
- \$27,025 for his “90 day IGM contract” from 4 October 2022 to 4 January 2023; and
- \$10,000 as compensation for comments that had demeaned his good name.

[53] In a chronology Mr Whaanga included with this claim he criticised the “orientation” given to him by Mr Ngawaka by telephone on 5 October because, among other things, “he failed to tell me what my hourly rate is”.

[54] When the board’s legal advisor asked for a breakdown of the time and activities for the work Mr Whaanga said he did in October, Mr Whaanga used a previous invoice submitted by Mr Nepia as his template. The invoice was worded on the basis that the work was done as an independent contractor, not an employee.

Payment made for part of claim

[55] On 22 December Mr Whaanga told the Trust’s legal advisor he had “removed the \$7,500 fee” from his claim as “Trustee Howe has settled this with me”.

[56] In an invoice dated 22 December 2022 addressed to Mr Howe, Mr Whaanga said the \$7,500 was for planning, implementing and managing a 40-week Te Reo course for the Trust which had started in Auckland, with a second course to start on Aotea in February 2023.

[57] When the invoice was not processed through the Trust's accounts system, Mr Howe arranged for payment to be made directly to Mr Whaanga. As emerged in the oral evidence of Mr Howe and Mr Whaanga, this involved Mr Howe going with Mrs Whaanga to a bank where Mr Howe arranged for her to be added as a signatory to an account so he and she could meet the requirement for two trustees to sign off a payment. Mr Howe said the payment made was within the spending authorisation he had as portfolio holder for that area of the Trust's activities.

[58] Mr Howe's evidence was that Mr Whaanga had done that work under a service contract they had agreed and signed in June 2022 for work in the education portfolio for which Mr Howe was responsible. This included work on a curriculum for the reo project supported by Te Mātāwai funding. Mr Howe was unable to provide a copy of the contract he said they had signed.

An employment relationship created on 4 October 2022

[59] The Trust submitted no employment relationship was entered into through the telephone conversation of Mr Ngawaka and Mr Whaanga on 4 October 2022 because the requirements of offer and acceptance were not met. While accepting a written agreement was not required to create legal relations, the Trust submitted the following "fundamentals of contractual law" were lacking:

- (a) a clear offer with certainty of essential terms;
- (b) unequivocal acceptance; and
- (c) consideration.

[60] Alternatively, the Trust submitted that even if those elements were met, the relationship then created would have been between the Trust as principal and Mr Whaanga as an independent contractor, not one of employment. The Trust submitted this reflected the reality of the situation because the existing General Manager, Mr Nepia, was working on that basis and Mr Whaanga had later insisted he was to work on the same basis as Mr Nepia.

[61] For the following reasons, however, the evidence favoured a conclusion that the Trust did form an employment relationship with Mr Whaanga on 4 October.

[62] Section 6 of the Act requires the Authority to consider the real nature of the relationship between the parties when deciding whether a person has been employed by

another under a contract of service. This analysis may address an initial question of whether or not any such contract has been formed at all, as well as the potential next question of whether any agreement found to have been formed was one for work as an employee or work as an independent contractor.

[63] These statutory requirements guide this inquiry rather than solely common law principles relating to contract formation.¹ All relevant matters, including indications of the parties' intentions, are considered but statements made by them are not to be treated as determining the reality of the situation where evidence points to other conclusions about the real nature of the relationship.²

Relevant matters for consideration

[64] Relevant matters include any written terms, how the parties conducted themselves during whatever period is said to have been the employment, along with answers to the questions about the degree of control exercised by the alleged employer, how closely the person's work was integrated with the operation of that employment and the so-called 'fundamental' test of whether the person was in business on their own account.

[65] Here there was no agreed written document. Mr Whaanga had sent the Trust his own proposed employment agreement around a fortnight after starting work. This indicates his understanding of the nature of the relationship. At that time Mr Whaanga had not yet seen the written terms on which Mr Nepia carried out the role of general manager. The agreement with Mr Nepia's company to provide services was very much an independent contractor-style agreement.

[66] While the accounts of Mr Ngawaka and Mr Whaanga differ about the detail of what they said in the 4 October telephone call, the common features of their evidence establish they both knew they were talking about a paid role with a set period, with Mr Whaanga to be under close direction from the chair and trustees throughout and he was to start immediately. These elements of what Mr Ngawaka offered and Mr Whaanga accepted are evident from the email he wrote and sent to all trustees very shortly after talking to Mr Ngawaka that evening. There was no doubt from his description of being "honoured" by Mr Ngawaka's call inviting him "to be your interim GM" and the list of

¹ *Prasad v LSG Sky Chefs New Zealand Limited* [2017] NZEmpC 150 at [31] and [34].

² Employment Relations Act 2000, s 6(2) and (3).

tasks he set out that Mr Whaanga had accepted the position. The requirement for an immediate start was confirmed by that list, referring to plans to meet Mr Ngawaka the next day “to discuss my objectives for the next 90 days” and a promise to contact all trustees by the end of the week (which was in three days).

[67] Not all details were agreed. Mr Whaanga’s evidence to the Authority many months later said Mr Ngawaka had mentioned an hourly rate of \$55. This was at odds with what Mr Whaanga had written in an email on 16 October 2022. His message that day, only 12 days after the 4 October telephone conversation, said Mr Ngawaka had “failed to tell me what my hourly rate is”. The draft employment agreement Mr Whaanga provided on 16 October also left the salary figure blank which suggests no specific rate was discussed.

[68] However the conduct of Mr Whaanga, the trustees and Ms Armstrong all indicated a mutual understanding that he was carrying out duties as the interim general manager. Mr Howe and Ms Palmer liaised with him about their portfolios. Ms Armstrong advised an Auckland Council representative that Mr Whaanga was in that role.

Tests point to employment relationship

[69] Turning to the tests of control, integration and the fundamental nature of the relationship, the evidence and circumstances also favoured a conclusion on the balance of probabilities that the relationship formed was, in reality, one of employment rather than providing services as an independent contractor.

[70] The Minutes of 4 October said Mr Whaanga was to report to Mr Ngawaka every day and to the trustees each week. While, in his oral evidence Mr Ngawaka said he did not give that instruction to Mr Whaanga, he accepted that Mr Whaanga did provide daily reports. Those arrangements did not indicate the degree of discretion about when and how duties would be performed that is more typical of an independent contracting arrangement.

[71] The various tasks Mr Whaanga carried out in the weeks between 4 October and when the relationship was effectively suspended on 3 November were integrated with the activities of the Trust. He exchanged emails with trustees and received emails about trust matters, such as from Auckland Council’s development agency, Eke Panuku.

Until he was directed in the 3 November letter to remove any reference in correspondence to being the Trust's interim general manager, he was seen by others as being integral to the Trust's work.

[72] Mr Whaanga's email of 19 October, reacting to news of Ms Stephens' complaint about his conduct at the 6 October Tū Mai Taonga meeting, does not negate this conclusion. His statement that he did "not have a signed employment contract" with the Trust, so was not representing it at that meeting, is an instance of a person describing the nature of the relationship that is not to be treated as determinative. Rather, it should be seen as a statement by a lay person, expressing a view about a matter of legal analysis, in a situation where whether an agreement had or had not been *signed* did not answer the question of whether he was or was not an employee at the time.

[73] The same point applies to the question of whether Mr Whaanga was, fundamentally, in business on his own account in taking up the work of the interim general manager.

[74] In his evidence about their 4 October telephone call Mr Whaanga said Mr Ngawaka described the job as being "like what Charles [Nepia] is doing". Mr Ngawaka said he had not mentioned the pay rate, hours or "other key issues" in that discussion. While he did not say he put the following view into words during that conversation, Mr Ngawaka's evidence was that he had "thought that it would probably be a similar arrangement to that of Charles [Nepia] as an independent contractor" but that would be subject putting together an offer and getting board approval.

[75] In an email on 31 October, before the trustees' meeting that day, Mr Whaanga had asked to be sent "a signed contract from the trust as Interim GM for 90 days". He wrote that Mr Ngawaka had told him "I have the same contract as Charles [Nepia] so all the trustees need to do is replace Charles' name and details with mine and send it to me. I will sign and return it".

[76] Mr Whaanga had not, however, seen the contract for services under which Mr Nepia had carried out the role of general manager. The arrangement made through Mr Nepia's company was one that, it can be inferred, suited him as someone working as a consultant on a range of projects. There was nothing in the evidence to suggest Mr Whaanga intended to have an agreement made through the separate legal identity of an incorporated company. Rather, he appeared to use the word "contract" as a synonym

for an employment agreement and the phrase “90-day IGM contract” as meaning a fixed-term employment agreement.

[77] After the relationship had ended, and Mr Whaanga was asked in December 2022 to provide a breakdown of the amounts he was claiming for work done, Mr Whaanga sent an invoice and what he called a “consultant time sheet”. He said the time sheet was based on a document Mr Nepia had used in calculating payments due to him. Mr Whaanga said Ms Armstrong or Ms Palmer had sent him a copy of what Mr Nepia submitted and he used that “as a template”.

[78] This form included a reference to the contract type being a “contract for service” (that is independent contracting). It was a phrase in the copy Mr Whaanga was given and used as a template. He did not change it. It was unlikely Mr Whaanga knew or understood how that differed from a contract *of* service (that is employment) when he used that form in December 2022 or, when looking back now to consider the reality of the situation then, that it confirmed the mutual intention of the parties in October 2022.

[79] Weighing that evidence, there was not enough to say Mr Whaanga was intending to carry out the role as someone in business on his own account or that the Trust had, in reality, engaged him on that basis.

Employment was real nature of the relationship

[80] On that s 6 analysis, the reality of the relationship formed on 4 October, and carried out by Mr Whaanga in the following weeks, was one for hire or reward under a contract of service, albeit an oral one.

[81] As a cross check, returning to common law principles on contract formation, the evidence and reasonable inferences from it confirmed this conclusion.

[82] There was a clear offer with essential terms sufficiently certain. Mr Whaanga was to take up the role of interim general manager. It was a fixed term of 90 days. He was to be subject to daily reporting and direction. He was to be paid but the ‘paperwork’ on those details was to be completed later. The duties and the actual level of pay was to be “like” that of Mr Nepia.

[83] He confirmed acceptance of those terms by his conduct from the evening of 4 October and onwards. It is well established that the existence of a contract may be inferred from such conduct.³

[84] Consideration for the formation of the relationship was expressed through facilitating Mr Whaanga's attendance at the 6 October hui with DoC, making flight and rental car arrangements for him to get to the meeting on the island, and Mr Whaanga attending that hui. This, and Mr Whaanga's contact with trustees about their work, showed the "requisite mutuality of obligations" which comprise an employment relationship had been established.⁴

An unjustified dismissal

[85] In its oral closing submissions the Trust accepted that, if the Authority found Mr Whaanga had been in an employment relationship with the Trust, the termination of his employment was an unjustified dismissal.

[86] This concession was appropriate. The termination of Mr Whaanga's employment, and how it happened, did fall below the statutory standard of being what a fair and reasonable employer could have done in all the circumstances at the time, for the following two reasons.

[87] Firstly, the Trust acted unreasonably when concerns arose about Mr Whaanga's conduct. Rather than simply address the concerns raised by Ms Stephens through a disciplinary process, the Trust created a technical argument to reverse a decision about hiring Mr Whaanga that some trustees had quickly come to regret. The technical argument was based on an incorrect notion that appointment to an interim role was invalid if the incumbent had not completed the formality of resignation.

[88] As described in Mr Nepia's 6 October email to trustees, he "gave notice" in August. The subject had already been discussed by trustees prior to their 4 October meeting, as noted in the "matter from previous meetings" section of the Minutes for that meeting.

[89] Overlapping appointments are a regular feature in workplaces, often for the practical reason of facilitating handover of information and tasks. While there may be

³ *LSG Sky Chefs New Zealand Ltd v Prasad* [2018] NZCA 256 at [23].

⁴ *Prasad*, above n x, at [97].

practical financial issues if two salaries are being paid, such an arrangement is not “invalid” as some trustees claimed.

[90] Secondly, the Trust did not act fairly in addressing the complaint Ms Stephens had made about Mr Whaanga’s conduct at the meeting on 6 October. He was told of the complaint but not given a copy and not given the opportunity to attend the trustees’ meeting where they met with Ms Stephens and heard from her. As the concerns about how he acted that day were, in fact, a prime motivator in the decision to effectively end his employment, Mr Whaanga was entitled to be heard before the decision was made, whatever the rights or wrongs of his conduct on that day may have been.

Remedies

[91] As Mr Whaanga had established his personal grievance for unjustified dismissal, he was entitled to an assessment of remedies.

Arrears and lost wages

[92] His claim for arrears of wages, for the period from 5 October until he was told on 3 November “to cease undertaking any work for Ngāti Rehua” is best addressed along with his claim for lost wages for the period following the end of his employment.

[93] This overlap of a personal grievance remedy and a wage arrears claim occurs because of the fixed term for which his employment was intended to last and because his evidence about lost wages beyond then was very limited.

[94] Remuneration of the interim role was clearly intended to be for up to 35 hours a week, at \$55 an hour. While not committed to writing, this hourly limit and rate is consistent with three sources. Firstly, it was same as the term in the Trust’s agreement for Mr Nepia’s services, so consistent with comments that the arrangement would be like his. Secondly, a review of invoices for those services from Mr Nepia show those were the rates actually paid to him for performing the role Mr Whaanga was to take up on an interim basis. Thirdly, the role of Trust general manager was, in part, funded from a Lottery Grants Board grant. The application for that grant referred specifically to paying \$55 an hour for 35 hours a week for the role that was to be supported by that grant.

[95] Accordingly, the most Mr Whaanga could have earned in the 90 days from 5 October 2022 to 3 January 2023 was \$25,025.⁵ Applying the statutory eight per cent loading for annual leave for employment ending within a year, an additional \$2,002 would be due. This meant his total potential remuneration for that period would have been \$27,027.

[96] Within that amount Mr Whaanga was entitled to \$7,700, plus \$616 holiday pay, for the period he worked, or was available to work, from 5 October to 3 November 2022.

[97] Pay for the remaining nine weeks of his fixed term was also due to him because he was unjustifiably dismissed during that term. But for the dismissal, he would more likely than not have completed the term.

[98] This finding does not align neatly with Mr Whaanga's claim for arrears of wages and, for the period after his dismissal, an award of lost wages. He initially claimed six months for lost wages. By the time of making closing submissions, however, Mr Whaanga's claim was reduced to three months' lost wages, acknowledging he had not looked for paid work to offset his lost wages after the termination of the relationship was effectively confirmed by the Trust's letter of 3 November. In the following months he had opted to do voluntary work for a marae and also did some work as a cultural advisor for schools, receiving only honoraria and koha for occasional workshops.

[99] Weighing that evidence, the appropriate remedy as arrears of wages and for lost wages was for the full amount that Mr Whaanga would have received if the fixed term had run its course. There was some possibility that he could have sought the full-time position, if things had not gone awry, but that uncertain prospect was not enough to extend the lost wages award beyond the two months to the end of the fixed term.

Some payment already secured – the \$7,500 “invoice” paid for the Reo project

[100] Payment of the amount of \$27,027 due as wage arrears and lost wages, for the period from 5 October 2022 to 3 January 2023 also needs to be considered in light of the disputed payment of \$7,500 made to Mr Whaanga on 23 December 2022.

⁵ $5 \times 7 = 35 \times \$55 = \$1,925 \times 13 = \$25,025.$

[101] Mr Whaanga says this payment was for separate, earlier work done between June and September 2022 on the curriculum and delivery of the Te Mātāwai Reo project and the payment was made using separate funds which Mr Howe had the discretion to approve and pay. He submitted the payment was for work done, initially, as a volunteer with the later payment being made to him as a contractor receiving payment after completing the work. He submitted the Authority lacked jurisdiction to make orders in respect of that payment.

[102] The Trust says the payment was not authorised and, given the details of how Mr Howe and Mrs Whaanga came to authorise the payment, was irregular. It sought an order for its repayment.

[103] The oral evidence of Mr Whaanga and Mr Howe was inconsistent about arrangements made for Mr Whaanga to help with developing the curriculum for Ngāti Rehua's programme using Te Mātāwai Reo funding. Mr Whaanga said he had agreed to help on a voluntary basis, unless there was funding, and there was "no contract, just verbal". Mr Howe insisted there was "a signed contract issued on my behalf" for work Mr Whaanga did in that period. Mr Howe, despite searching for it after the Authority investigation meeting, could not locate that document or provide any other proof of such an agreement having been prepared and signed.

[104] Mr Whaanga did not raise a claim for pay for the time he spent on a voluntary basis on the Te Mātāwai Reo project until December 7. It was only sought, it can reasonably be inferred, because of the dispute about payment for the interim general manager role. The claim really concerned matters that were within the scope of the employment relationship, as this determination has found it to be, between 5 October 2022 and 3 January 2023. Arranging payment of \$7,500 on 23 December was effectively, a 'self-help remedy' arranged between Mr Whaanga and Mr Howe, with Mrs Whaanga's assistance, to secure some of the money claimed in the employment dispute.

[105] On those grounds, and as a matter of equity and good conscience, the payment of \$7,500 had to be offset against the order for payment of arrears and lost wages to Mr Whaanga.⁶ Not to take account of it, as part of the overall justice of the outcome and remedies, would be highly artificial.

⁶ Employment Relations Act 2000, s 157(3).

Compensation for humiliation and loss of dignity and mana

[106] Mr Whaanga was upset by how his employment with the Trust came to end. He said it affected his mental health and he found himself struggling to get out of bed as a result. He said he was humiliated in front of his hapu and iwi and not given the opportunity to defend himself or restore his mana.

[107] Accepting Mr Whaanga's evidence of the effects on him of how the Trust treated him, the sum of \$15,000 was an appropriate award of compensation under s 123(1)(c)(i) of the Act in the particular circumstances of this case and considering the range of awards made in similar cases.

Deduction for contributory conduct

[108] Under s 124 of the Act the Authority must consider whether any remedies awarded should be reduced due to blameworthy conduct by Mr Whaanga that contributed to the situation giving rise to his grievance.

[109] In this case Mr Whaanga's conduct required a reduction of the award for compensation. A reduction is not applied to the order for arrears and lost wages related to the fixed period for which he was employed and should have been paid.

[110] While Mr Whaanga was entitled to be heard before the board made its decision, there was no real dispute about what happened at the meeting on 6 October which then led to Ms Stephens' complaint about his conduct and was loosely intertwined with what the board subsequently did in ending his employment. It, therefore, had contributed to the situation giving rise to his grievance.

[111] Mr Whaanga may have felt there was a breach of tikanga in interrupting his speech but he was attending that meeting in a new role, on behalf of the Trust, and not just on his own standing as a part of Ngāti Rehua's wider whānau and someone who had, alongside many others, been involved in voluntary work and support of its kaupapa for many years. In that context Mr Whaanga ignored the guidance given by Mr Nepia and Ms Stephens about whether the content of his korero had strayed into areas that were not appropriate to air with representatives of DoC and the community who were present, without further prior discussion with the Trust. Having now heard Mr Whaanga's explanation during the Authority investigation of what happened that day before drawing a conclusion about it, his dismissive and derogatory comments to Ms

Stephens was blameworthy conduct when he stood to speak on behalf of the Trust, however annoyed he may have been by the interjections from her and Mr Nepia. Because the award of compensation to Mr Whaanga addressed what he had said about the impact on his mana of what had happened in ending his employment, it was appropriate to adjust that award in order to acknowledge that his conduct had also negatively affected the mana of the Trust and Ms Stephens in her role at the meeting.

[112] For that reason, a reduction of 10 per cent is applied to that award, that is a reduction to \$13,500.

[113] One further element of Mr Whaanga's conduct has not been taken into account in assessing contributing behaviour under s 124. This concerns email messages that he sent to Ms Armstrong and one other trustee in December 2022. In his written witness statement Mr Whaanga said he deeply regretted sending those "unpleasant emails" and he knew those actions by him were "not excusable". While his description of those emails is correct, it was conduct which occurred *after* the Trust had terminated his employment. It was not subsequently discovered misconduct that had occurred *during* the employment, so cannot be used to adjust remedies under s 124 of the Act.⁷

Summary and orders

[114] Mel Whaanga was in an employment relationship with the Trust from 5 October 2022 intended to last for a fixed term of 90 days to 3 January 2023.

[115] The Trust acted unjustifiably in terminating his employment.

[116] Mr Whaanga was entitled to an award of \$27,027, comprising arrears of wages for the period from 5 October to 3 November 2022 and lost wages from then to the end of the fixed term.

[117] The sum of \$7,500 is to be deducted from this amount to account for a payment made to Mr Whaanga on 23 December 2022.

[118] The Trust must pay Mr Whaanga the remaining amount of \$19,527 within 28 days of the date of this determination.

⁷ *Salt v Fell* [2008] NZCA 128 at [104].

[119] The Trust must also pay Mr Whaanga the sum of \$13,500, as compensation for humiliation and loss of dignity and mana, within 28 days of the date of this determination. This level of this award has been reduced by 10 per cent due to blameworthy conduct by Mr Whaanga which contributed to the situation giving rise to his grievance.

Costs

[120] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[121] If they are not able to do so and an Authority determination on costs is needed Mr Whaanga may lodge, and then should serve, a memorandum on costs within 28 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the Trust would then have 14 days to lodge any reply memorandum. If requested by the parties, an extension of time to resolve costs between themselves may be granted.

[122] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁸ As a preliminary indication, subject to submissions if necessary, the investigation meeting would likely be treated as lasting one-and-a-half days for the purposes of applying the daily tariff.

Robin Arthur
Member of the Employment Relations Authority

⁸ See www.era.govt.nz/determinations/awarding-costs-remedies.