



Finau and the Society but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

### **Background**

[3] The Society is a community organisation that operates health services for its predominantly Tongan clients. The Society was governed by members of a Board (“the Board”) that included elected members and members of staff.

[4] The Society owns and operates two medical clinics, one located in Onehunga and the other in Panmure. The services operated at the clinics include diabetes management, mobile nursing services, school based nursing, mental health services and social services. The Society also runs a preschool, community garden and owns a community centre.

[5] Most of the Society’s 8,000 clients are Tongan with complex medical and social needs. The Society employs 51 employees.

[6] Dr Finau was involved in establishing the Society. He was a Board member for nearly ten years and also worked as a General Practitioner in the Society’s medical clinics from 1989-1991. At the time of the relevant events leading to this application, Dr Finau was a member of the Board and its Vice-Chairman.

[7] By early 2013 it became clear to the Board that the Society was in severe financial difficulties. At the 7 February 2013 Board Meeting a motion of no confidence in the current CEO was moved and carried. The Board agreed to establish a Special Board Committee on Finance comprising Dr Finau as the Chair and three others. The committee became known as the Interim Management Committee (“IMC”).

[8] The major funder for the Society was Alliance Health Plus (“AH+”). AH+ made arrangements with the Society to enter into a Transitional Agreement for transitional funding support. AH+ indicated its keenness to work with the Society to address additional issues including:

- a) Arranging a forensic financial audit to be undertaken;

- b) Provision and advice around restructuring;
- c) Consideration would be given to paying the Quality payments in advance for the next three months;
- d) AH+ will commit to fortnightly meetings with the Society to review progress and provide support;
- e) The provision of contracts;
- f) On request AH+ could assist the Society to prevent losses on expired products, but the Society must implement an imprest system and controlled purchasing system.
- g) Resolution of the high cost of IT;
- h) Development of the relationship between the Society and AH+;
- i) AH+ would work with the Society to consider options of selling the Panmure practice.

[9] On 27 February 2013 Dr Finau, in his capacity of Chair of the IMC, received an email from AH+ seeking information before funding would be provided. As well as information on the Society's cash flow situation and confirmation that the Society was solvent AH+ was seeking copies of three documents:

- a) The Trust Deed;
- b) Organisational structural changes; and
- c) Contract alignment with revenue.

[10] Mr Wilson, on behalf of AH+ reminded Dr Finau that the Society had known for some time of the impending issues and unless urgency to address the issues was given the amount of funding provided by AH+ would not resolve the issues but would provide only a temporary reprieve until the cost structure was changed.

[11] Mr Wilson reiterated that AH+ was keen to work with the IMC and assist it but the money would not pass until the requirements had been met.

[12] Dr Finau's response was less than accepting of AH+'s position. Dr Finau did, however offer to meet if there was still information AH+ required and advised Mr Wilson that the IMC would be appointing an Acting CEO at the next Board Meeting.

[13] In mid-February 2013 the Society's CEO resigned. This led to a special meeting of the Board on 5 March 2013 where the IMC chaired by Dr Finau recommended that Dr Finau be appointed CEO in an acting capacity. The Board adopted this recommendation and resolved that Dr Finau be appointed Acting CEO:

...until a decision regarding the vacant CEO position is made by the Board."

[14] Dr Finau accepted this role in a voluntary capacity.

[15] On 11 March 2013 Mr Wilson wrote to Dr Finau and advised that before committing to further funding the Society was required to address several outstanding issues including:

- a) Organisation restructure
- b) Improving the management of the Society;
- c) Appointing a new CEO;
- d) Reducing its financial deficits and overdraft;
- e) Review of its constitution; and
- f) Ensuring safe clinical services.

[16] As matters progressed between Dr Finau and Mr Wilson, the relationship between AH+ and the Society began to break down.

[17] Also, during March 2013 Dr Finau's relationship with some of the Society's employees also deteriorated. Complaints about Dr Finau's behaviour toward employees during a restructuring process were received by the Board on 20 and 22 March 2013. Then on 27 March 2013 the New Zealand Nurses Organisation raised a personal grievance on behalf of an employee as a result of the changes made to her role.

[18] Co-incidentally on 22 March 2013 the Board resolved that the IMC was to cease but Dr Finau would continue acting as CEO until the Board decided the process to select the new CEO.

[19] On 17 April 2013 the Board resolved that Dr Finau would continue to hold office as Acting CEO to the end of June 2013. The Board resolved that the conditions applying to Dr Finau's appointment were to be the same as the previous CEO and would apply from 1 April 2013. Dr Finau was now a paid employee of the Society albeit in an acting capacity.

[20] Despite a positive result for the Society in May 2013, the Society went on to experience further financial deficits for July and September of 2013. On 28 May 2013 the Board resolved to extend Dr Finau's acting appointment for a further three months beyond June 2013.

[21] On 25 June 2013 the Board established a recruitment committee of five to oversee the recruitment of a permanent CEO. Following this meeting (at which Dr Finau was present) Dr Finau widely circulated an email with the advertisement for the CEO role.

[22] On 30 July 2013 the Board, including Dr Finau, appointed a group of five interview panellists to conduct interviews for the CEO role, resolved that the decision of the panel would be final and that the panel would determine the salary of the new appointee.

[23] After interviewing five applicants including Dr Finau the interview panel unanimously decided that Dr Glen Doherty be appointed. The appointment took effect from 23 August 2013. After the decision on the preferred candidate was made on 21 August 2013, two members of the interview panel (including the Chairman of the Board) met with Dr Finau and advised him that he had been unsuccessful in his application and his employment as Acting CEO would come to an end and he would be paid until 30 September 2013 in line with the resolution made by the Board on 28 May 2013.

**Issues**

[24] The issue for determination is whether Dr Finau was unjustifiably dismissed from his employment with the Society and if so, what if any, remedies should be awarded.

**Dismissal**

[25] There is no dispute that the Board appointed Dr Finau initially in a volunteer capacity and then as an employee to take up the role of CEO in an acting capacity to enable the Board to recruit and make a permanent appointment to the role of CEO.

[26] The reality of the situation facing the Society was that in February 2013 following the resignation of its then CEO, the Board (which included Dr Finau as its Vice-Chairman) needed to take urgent action, not only to find a temporary solution to filling the role of the CEO, but also to address its critical financial situation.

[27] The IMC, headed by Dr Finau, recommended that the Chairman of the IMC (Dr Finau) be appointed Acting CEO until such time as the Board made a decision regarding the vacant CEO position. The Board resolved on 5 March 2013 to accept this recommendation. From 5 March 2013 the role was undertaken on a voluntary basis.

[28] On 17 April 2013 the Board (Dr Finau as Vice-Chairman was present at this meeting) resolved that Dr Finau would hold office as the Acting CEO to the end of June 2013. The Board also resolved that the position of Acting CEO would attract the same conditions as the previous CEO. This referenced a change for Dr Finau in that he was now an employee of the Society. The Board then resolved that it would deliberate on the recruitment process in due course.

[29] On 28 May 2013 the Board requested Dr Finau to leave the meeting and in his absence resolved to extend the appointment of the Acting CEO for a further three months past June 2013. While Dr Finau was not present for the discussion leading to the resolution, he did receive a full copy of the minutes and so was aware that the Acting role would end on 30 September 2013.

[30] On 30 July 2013 the Board (including Dr Finau) passed a resolution empowering the interview panel to make the final decision on the appointment of the

successful candidate to the permanent CEO role. It follows that on the confirmation of the appointment of a permanent CEO the Society would no longer have any requirement for the role filled by Dr Finau which was the role of Acting CEO.

[31] This employment relationship problem has arisen because the Board believed it had entered into a fixed term agreement with Dr Finau. Dr Finau says the Board cannot rely on the fixed term nature of his appointment.

[32] The Act at section 66 deals with fixed term employment agreements. The section requires employers to have genuine reasons based on reasonable grounds for specifying the employment will end at the close of a specified date, on the occurrence of a specified event or at the conclusion of a specified project.

[33] Section 66(4) of the Act requires an employment agreement to specify in writing the way in which the employment will end and the reasons for the ending of the employment in that way. There is no dispute that Dr Finau did not have a written employment agreement.

[34] Section 66(6) states that if the employer does not comply with section 66(4) the employer may not rely on any term agreed under a fixed term agreement as having been effective to end the employee's term of employment, if the former employee elects to treat that term as ineffective.

[35] The Society relies on the Minutes of the Board meetings which were attended by Dr Finau, where resolutions regarding Dr Finau's appointment in an acting capacity were made and recorded in writing.

[36] I find that the Society has demonstrated it had genuine reasons based on reasonable grounds for the appointment of Dr Finau (on the recommendation of the IMC chaired by Dr Finau) to an acting CEO role. The minutes of the Board meetings show that the end of the relationship would occur on 30 September 2013 on the appointment of a permanent CEO.

[37] There is no dispute that there was no compliance with the requirements of section 66(4) of the Act to state in writing in the employment agreement the way the employment would end and the reasons for it ending in that way. The question then is, did Dr Finau elect to treat the term of his appointment as ineffective?

[38] I am satisfied that at all times Dr Finau was fully conversant with the reasons about why he was appointed into the role of Acting CEO. It was a committee led by him that made the original recommendation to the Board which was accepted. Dr Finau was also fully aware that that role would no longer be required when a permanent appointment was made. This was always anticipated by the Board, of which Dr Finau was a member. Dr Finau was fully conversant with all decisions made about the Acting CEO role because he was either in attendance at the meetings or in one instance when he was asked to leave the meeting for a short period of time, received a full copy of the minutes which set out the resolutions made by the Board.

[39] The information that the role would end on the appointment of a permanent CEO was clear to Dr Finau, was not a secret and there was transparency at all times that that was the likely outcome. Being on the Board provided Dr Finau the opportunity to raise any concerns about any of the resolutions passed by the Board and to seek clarification should he wish to do so. The Minutes do not record any issues or concerns being raised by Dr Finau in relation to the impact the appointment of a permanent CEO would have on his continued employment.

[40] Dr Malakai Ofanoa is the Chairman of the Board. Dr Ofanoa together with interview panel member Leopino Foliaki, met personally with Dr Finau on 22 August 2013 to advise him of Dr Doherty's appointment. Dr Ofanoa set out in an email a summary of his discussions with Dr Finau on 21 November 2013.

[41] At the investigation meeting Dr Finau confirmed that during the discussion and after being advised that he had not been successful in his application, he asked who had been appointed. Dr Ofanoa advised him that the successful applicant was Dr Doherty to which Dr Finau replied that that was fine. Dr Finau enquired as to when Dr Doherty would commence and was advised "*...as soon as possible*". Dr Finau expressed his opinion that the new CEO should have been recruited earlier. The discussion then centred on Dr Finau's pay and Dr Finau was advised that he would be paid until the end of September 2013.

[42] The uncontested evidence from the Society is that Dr Finau welcomed the news of the permanent appointment and agreed to leave the following Monday after he had cleared his personal items from his office. I find Dr Finau was expecting to

leave the acting role and at no time after the appointment of Dr Doherty, did Dr Finau elect to treat the term of his appointment as ineffective. Quite the opposite, in an email sent by Dr Finau on 27 August 2013 Dr Finau acknowledges that his employment ends on 30 September 2013.

[43] Dr Finau was not unjustifiably dismissed when he was given notice that the acting role he was filling would end on 30 September 2013 in accordance with the resolutions of the Board.

[44] I am satisfied Dr Finau was not unjustifiably dismissed from his employment. Dr Finau could have no reasonable expectation of continued employment given the clearly stated reasons for his appointment to the acting role. This is so particularly in light of his involvement in the appointment process and all decisions relating to his appointment and the reasons why the appointment would end.

#### **Costs**

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

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

Vicki Campbell

Member of the Employment Relations Authority