

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 132/08
5050272

BETWEEN DIANNE GIBSON
 Applicant

AND NGATI POROU HAUORA
 INCORPORATED
 Respondent

Member of Authority: Alastair Dumbleton

Representatives: Andrew Swan, Counsel for Applicant
 John Bunbury, Counsel for Respondent

Investigation Meeting: 10 October 2007

Submissions Received 10 October 2007 from Applicant
 21 December 2007 from Respondent

Determination: 7 April 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Authority has investigated problems in the employment relationship between Ms Dianne Gibson and Ngati Porou Hauora Incorporated (NPH).

[2] The relationship existed from January 1998 until February 2006 when NPH dismissed Ms Gibson. On 13 February 2006 she received a letter from the Chairperson of the Board of NPH, Mr Ben Tahata, advising that the Board considered she had breached her individual employment agreement and NPH policies, and that “*just cause*” was present within the meaning of the employment agreement for the Board to terminate her employment with immediate effect.

[3] Near the end of the 90 day statutory time limit for doing so, Ms Gibson raised a personal grievance against NPH. She claimed the dismissal was unjustified.

[4] When the matter remained unresolved between the parties a statement of problem was lodged with the Authority in September 2006. Mediation held in March 2007 did not end the dispute and an investigation by the Authority was commenced.

[5] To resolve her grievance Ms Gibson seeks a determination from the Authority that her dismissal was unjustified. She seeks \$44,000 as reimbursement for lost wages over a period of 22 weeks, \$25,000 in compensation for humiliation and injury to feelings, and \$12,500 as compensation for loss of the benefit of having her employer pay the fees for the MBA course she was taking.

[6] In the statement in reply lodged by NPH the employer denied that it dismissed Ms Gibson without justification. By way of 'counterclaim' NPH sought from Ms Gibson reimbursement of \$3,364.65 unauthorised personal expenditure by her and \$580,000 as compensation for a breach of her employment agreement causing NPH funds to be misspent. The counterclaim was subsequently amended, reducing the amount claimed considerably.

[7] NPH is incorporated under the Incorporated Societies Act 1908. Its objectives are to provide high quality, integrated health services to all people within the Ngati Porou rohe, which is an area covering some 200 km of the East Coast between Gisborne and Hicks Bay.

[8] NPH is governed by a Board of representatives from local communities of the East Coast. It owns or administers properties including a hospital at Te Puia Springs and it employs over 100 people including medical practitioners and support staff. NPH is also a Primary Health Organisation (PHO). It receives funding from the Tairāwhiti District Health Board (the DHB) under contractual arrangements periodically entered into with that entity.

[9] Ms Gibson, who had developed a career in health services administration, was initially engaged as a consultant to NPH before being offered a position of employment. In 1998 she was appointed Kai Arataki (CEO) of NPH.

[10] At the time of dismissal her employment was subject to a written individual employment agreement entered into over two years earlier in February 2004. That agreement made the following provision for dismissal:

13.1.1 The Employer may, in cases of serious misconduct or for other just cause, having established just cause by appropriate investigation, forthwith terminate this Agreement without notice and without payment of any compensation or damages other than payment for salary entitlement being due. The Employer shall seek and fairly consider an explanation from the Employee before taking such action.

[11] In February 2005, when Ms Gibson had been in the role of Kai Arataki for nearly eight years, she applied to the NPH Board for sabbatical leave to be taken six months between July 2005 and January 2006. In her application she referred to the study she had been doing for the MBA at Massey University and said that a sabbatical would allow her to devote more time and effort to completing the course.

[12] The Board resolved in principle to allow Ms Gibson to take the leave. This was to be on pay but without any other “*privileges*” of her employment agreement applying during the sabbatical.

[13] In May 2005, before Ms Gibson had commenced the approved sabbatical leave, Board chairperson Mr Tahata wrote to her raising a concern that she had failed to carry out directions of the Board. Mr Tahata referred to a direction requiring Ms Gibson to appoint a Human Resource Consultant for a specified time.

[14] Ms Gibson responded to Mr Tahata by asserting that she had not failed to carry out the directions of the Board and that therefore no misconduct had occurred. Ms Gibson sought to have the accusation withdrawn and an apology made to her.

[15] This issue was not resolved by the time Ms Gibson commenced her sabbatical leave in July 2005. Mr Tahata advised her that the Board had not approved the withdrawal of the “*letter of misconduct*” as requested by Ms Gibson but that the Board had resolved;

.....that the appointment of a Human Resource Consultant for a specified time ‘lie on the table’ and that your employment contract with the amendments provided and sabbatical leave details be finalised prior to you taking leave.

[16] Mr Tahata confirmed to Ms Gibson that payment of her salary would continue during the leave term applied for and he noted “*this approval is outside of your current employment contract*”.

[17] Not long after Ms Gibson had commenced sabbatical leave NPH was advised by its Financial Controller of a serious situation developing with funding which was likely to have up to a \$1m negative effect on NPH finances for the 2005-2006 year.

[18] The Board determined that when Ms Gibson returned from her sabbatical leave it would investigate her responsibility for this financial crisis, as it was being viewed.

[19] Mr Tahata contacted Ms Gibson in January 2006, near the end of the leave period, to arrange a hui with her at which the issues of concern to NPH could be discussed.

[20] Before the hui took place Ms Gibson acknowledged she understood from Mr Tahata that broadly the issues were:

- *SIA (Services to Improve Access) contract*
- *The recruitment and employment of a consultant*
- *Budgets 2004-2005 and 2005-2006*

[21] Mr Tahata confirmed that he would provide full information about the issues at the hui. It was arranged that Ms Gibson would have a support person at the hui, to be held at Gisborne, and that the fees and costs of that person, a lawyer based in Auckland, would be met by NPH. To suit Ms Gibson the date of the meeting was set back a few days until 31 January 2006.

[22] For the meeting NPH prepared a briefing paper which began with the following item:

Purpose:

The purpose of the hui is to advise you of major concerns of the Board that have arisen in your absence but were the subject of prior actions or knowledge as KA [Kia Arataki]: provide time for your consideration of the issues and to reach agreement on where we go from here. Any additional information you may require will be provided.

All matters were brought to the attention of the Board by the Management Team (MT).

[23] The paper then went on to list under the heading **Major Concerns** the three matters Mr Tahata had previously advised Ms Gibson of and which she had acknowledged her awareness of in broad terms. These were addressed in the paper in detail. The paper ended with the following under the heading **Conclusion**:

As representatives of our respective communities Board Members are accountable to them as KA is accountable to the Board. The events of the last few months will have impacts on the communities and staffing which should have been averted.

The Board has lost confidence in the ability of the KA to manage the organisation and considers that there has been 'serious misconduct'. The KA Individual Employment Agreement has provisions for instances of serious misconduct. However, the Board consider that to maintain the integrity and mana of the KA and Ngati Porou Hauora we work together to resolve the matter as a matter of urgency to eliminate any further risks to NPH.

[24] Following the meeting held on 31 January to which Ms Gibson was accompanied by her legal representative, there was correspondence and telephone conversations between Mr Tahata and Ms Gibson and/or her lawyer Mr Bradley Watson. He sent Mr Tahata a lengthy and comprehensive memorandum setting out Ms Gibson's response to the issues of concern which included some recommendations to the Board.

[25] That response given through Mr Watson was dated 9 February 2006, although apparently it was not until early on 13 February 2006 that it reached NPH by facsimile.

[26] A few hours later on 13 February, by email Mr Tahata sent back to Mr Watson a letter in which he advised of the Board's decision to terminate Ms Gibson's employment with immediate effect on the basis that "just cause" had been shown for doing so.

[27] As there is no dispute that Ms Gibson's employment was ended by NPH dismissing her, the focus of the Authority's investigation into her personal grievance claim has been the employers justification for taking that action against her.

Test of justification

[28] Section 103A of the Employment Relations Act 2000 provides the test of justification. The statutory provision, which has been in force since the end of 2004,

requires that justification is to be determined by the Authority on an objective basis. As the Employment Court has explained this aspect of the test, the dismissal must be looked at:

... .. *from the point of view of a neutral observer.*

See *Air New Zealand Ltd v. Hudson* [2006] 3 NZ ELR 155, at para 113.

[29] In applying s 103A in this case, the Authority must consider whether NPH's actions and how NPH acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[30] I am satisfied that NPH carried out reasonable inquiries which fully extended to Ms Gibson herself and that those inquiries left NPH with clear evidence upon which a reasonable employer could rely that Ms Gibson had in several respects acted in breach of her employment agreement and its terms on which she had been appointed Kia Arataki.

[31] The Authority is satisfied that NPH was reasonably able to conclude from its inquiries that the conduct of Ms Gibson provided "*just cause*" within the meaning of the employment agreement for NPH to forthwith terminate the employment without notice. The Authority is further satisfied that the just cause given by Ms Gibson amounted to a form of "*serious misconduct*" under clause 13.1.1 of the employment agreement, for which dismissal may be the punishment.

[32] I find that the substantive grounds for Ms Gibson's dismissal were in relation to the following matters;

- (a) the Services to Improve Access contract (SIA) with the DHB, and also the use of SIA funds, and
- (b) unauthorised expenditure on the McKenzie Street property owned by NPH,
- (c) unauthorised salary increases made to NPH staff,
- (d) unauthorised appointment of a staff member (also giving rise to an undeclared conflict of interest on the part of Ms Gibson),

- (e) unauthorised personal expenditure in relation to fees, travel and accommodation for Ms Gibson's MBA course.

SIA contract and funding

[33] SIA service contracts entered into with the Tairāwhiti DHB provide a major source of funding to enable NPH to meet its objectives as a health service provider.

[34] I am satisfied from the evidence provided to and obtained by the Authority that NPH was reasonably able to conclude that Ms Gibson as KA, the employee having overall responsibility in the organisation, failed to respond to repeated requests by the Tairāwhiti DHB in 2005 before Ms Gibson went on leave, for NPH to negotiate and conclude contractual arrangements which were necessary to secure future SIA funding. Further, the employer reasonably concluded I find that she failed to ensure as required that NPH accounted for its use of present SIA funding made available by the DHB but used by NPH before authority had been obtained through entering into contractual arrangements.

[35] It was also a reasonable conclusion reached by NPH that Ms Gibson had failed to keep the Board properly informed of the situation as it developed in relation to the need to secure future funding and to account for the use of present funding. The Board could reasonably expect that a KA carrying out the duties and responsibilities of that position as had been agreed and defined, would report on serious adverse developments particularly when it became apparent there was a risk that funding would be declined or reduced by the DHB if required steps were not taken by NPH. I am satisfied from the evidence of three Board members including the chairperson Mr Tahata, that they had been left unaware of the problem until the NPH Financial Controller Mr Nick Comerford alerted them to it at the end of July 2005.

[36] The neglect by Ms Gibson of her duties and responsibilities as KA in this regard caused a substantial diminishment in the funding available to NPH during the latter part of 2005 and in 2006. Her neglect also caused approval to be withheld for some funding that had been spent, and made NPH liable to have to repay it. Her action or inaction was reasonably viewed by NPH as a serious failure in the performance of her employment agreement, or serious misconduct.

McKenzie Street house

[37] I am satisfied that NPH reasonably rejected Ms Gibson's explanation for the total expenditure on its McKenzie Street property significantly exceeding the budgeted figure of \$150,000. It was reasonable for NPH to regard the additional expenditure of about \$54,000 approved by Ms Gibson as not having been authorised by the Board as it should have been. The Board reasonably rejected Ms Gibson's rationalisation of the situation that the excess could be allocated to a separate maintenance budget. This was reasonably viewed by NPH as a serious breach by Ms Gibson of her KA employment agreement.

Salary increases made to staff

[38] I find it was a reasonable conclusion of NPH from its inquiries that Ms Gibson had approved increases in remuneration to several NPH staff, to a total of about \$60,000, but without obtaining Board approval. This too I find was reasonably viewed by NPH as a breach by Ms Gibson of her employment agreement.

Appointment of new staff member

[39] Inquiries made by NPH showed that Ms Gibson had appointed a new member of the staff without Board approval as expressly required under the authority delegated to her in the employment agreement. Her explanation was reasonably able to be rejected by NPH, I find. A further matter reasonably of concern to NPH was the undisclosed personal association in several respects that Ms Gibson had with the appointee and which gave the appearance of a conflict of interest which remained undeclared by Ms Gibson.

Personal expenditure on MBA course

[40] I find that NPH was reasonably entitled to view seriously the conduct of Ms Gibson in charging her personal expenditure on accommodation and travel in a total of about \$3,364 to NPH. Fees for the course of several thousand dollars were also charged without authority to NPH. At the very least this conduct and her explanation or attempted rationalisation of it showed that Ms Gibson lacked the judgement that NPH could reasonably expect its KA to have and that she had failed to properly appreciate and respect the limitations on uses to which NPH or central agency funds could be put.

Procedural justification

[41] As to procedural justification, an employer is not required to have given a prior warning before it investigates suspected misconduct and conducts a disciplinary inquiry that leads to the punishment of the employee. I find that Ms Gibson was fully advised of the allegations made against her and given a full opportunity to explain her conduct and behaviour before NPH determined whether she was guilty of misconduct.

[42] I reject the claim that new grounds for disciplinary action were raised after the 31 January meeting but without allowing Ms Gibson an opportunity to address them before the decision to dismiss was made. This claim was made with reference to the “*update as at 10 February 2006*” memorandum produced by the Board. I find that the memorandum updated details of the existing allegations, such as the amount of SIA funding, the level of spending on the McKenzie Street house and on MBA fees and expenses, but without adding new allegations.

[43] Ms Gibson retained a lawyer as her support person (at a cost of some \$16,000 met by the Board), a clear indication that she was aware of the nature of NPH’s inquiry into her conduct. Also, the 31 January memorandum from the Board clearly advised her of the seriousness of the situation being investigated and, by the strongest of inferences, of the possibility of serious consequences to her employment with NPH including dismissal.

[44] The letter of 13 February notifying Ms Gibson of dismissal did not specify the matter or matters that NPH had found provided “*just cause*” for her dismissal. However the letter expressly referred to the memoranda of 31 January and 13 February 2005 and to the “*major concerns*” that had been raised therein about Ms Gibson. I note that Ms Gibson did not invoke s 120 of the Act to require NPH to provide a written statement of the reasons for her dismissal. I find there was no material procedural irregularity in respect of the degree of information given by NPH about the dismissal and reasons for it.

Minutes of NPH Board meetings

[45] The Authority received these and reviewed them in the course of its investigation. Disclosure was directed after Mr Tahata in his evidence had referred to the minutes, which obviously an organisation such as NPH will keep as a matter of

course. The NPH Board minutes are plainly not a record of everything said about a subject referred to in them. The primary purpose of meeting minutes such as these is to record decisions made, which will usually be noted as being a 'Resolution,' as in these minutes.

[46] The value of the minutes to the Authority is as a contemporaneous written description of particular matters discussed at meetings held several years ago. I view them as providing some idea of the knowledge, views, feelings and attitude of Board members individually or generally. The minuted views of one member or a group of members is not necessarily to be taken as the concluded position taken by the Board itself. Unless an item is the subject of a formal resolution recorded as such, I do not view the minutes as necessarily indicating that any particular decisions were taken at the time about any matter referred to in the minutes.

[47] Some of the minutes are shown as taken from 'In Committee' meetings of the Board. I note that in May 2005 the Board discussed the "behavioural manner" of Ms Gibson towards questions from the staff representative on the Board. This was recorded as being "*not a matter that was to be tolerated at Board Hui.*" This appears to be a sign of the friction that arose as a result of Ms Gibson espousing her views that the KA had a role independent of or autonomous from the Board. The role of KA and the relationship of that position to the Board were principally defined by the employment agreement which provided that the KA was a position subordinate to the Board, contrary to Ms Gibson's views it seems.

[48] In Committee on 26 August 2005, the Board formally resolved the following;

That the KA be advised that the Board is totally dissatisfied with the loss of SIA funding and not meeting the contractual obligations of the DHB. The board is also concerned that they were not being informed by the KA of the situation and finds this issue as a breach of her contract and KPI's.

[49] There is nothing in those minutes indicating that any decision was made by the Board to take any particular action against Ms Gibson, who had started her sabbatical leave by this time.

[50] The minutes of an In Committee meeting held on 1 September 2005 record that the Human Resources Sub-Committee was to be asked "*to investigate the non-performance of contract obligations by KA and her reporting to the Board.*"

[51] At a meeting on 5 September reference was made to In Committee minutes of 28 July recording the following;

SIA Funding – Read out reporting from KA which did not warn the board of SIA problems.

[52] The matters of the McKenzie Street house spending, staff remuneration increases and 04/05, 05/06, budgets were also discussed under the heading KA POSITION IN RESPECT TO. The minutes include with reference to the KA “*it is very clear she has no authority to approve salary increases outside the budget.*”

[53] The minutes of 14 November 2005 record under the heading Update of SIA, “*problem of this magnitude has endangered the whole organisation.*”

[54] An In Committee meeting held on 24 November 2005 appears from the minutes to have been an occasion for detailed discussion about several matters to do with the performance and conduct of Ms Gibson. The minutes record those matters as being;

- The appointment of an HR consultant
- Approval of Capex for the McKenzie Street, NPH property
- Expenditure outside the budget
- The SIA Contract
- Management appointment

[55] The minutes go on to record things that were to be done in preparation for action or possible action being taken against Ms Gibson. Those things include speaking to a lawyer and taking advice from the EMA employer’s organisation. The minutes then record the following;

Is there a way we can suspend her rather than allow her back.

Yes if the grounds are agreed upon by the lawyer leading up to dismissal.

Preference of chair is that she would resign but if not then dismissal is what the board will need to do.

Bottom-line is she has breached her contract and the board want her dismissed.

Chair has the full support of the board.

Resolution: That the board have reviewed and accepts the documentation with inclusion of White Cross and that the Chair and Deputy Chair are to continue the process of seeking legal advice re dismissal of the KA due to breach of contract be accepted.

[56] Precisely what the discussion was that these minutes purport to be a record of cannot be clear from the note format of the minutes. While some lines in parts of the Board minutes suggest that NPH had already set its mind upon dismissal before 13 February 2006, I accept that these parts are capable of being misread if considered in isolation from the rest of the minutes. What is clear is that the Board had by November 2005 decided to take disciplinary action against Ms Gibson and to obtain legal advice about doing so.

[57] It can at least be inferred that by resolving to seek legal advice the Board intended to act lawfully in accordance with the advice it received. I am satisfied that while the Board had strong and adverse views about Ms Gibson's conduct and performance, it had not made a final decision to dismiss before meeting with her in January 2006 or before taking into account her explanation given on 13 February 2006. The Board's decision to fund her legal advice (to \$16,000) indicates that the Board wished to follow due legal process and be fair to Ms Gibson. It is also clear that Mr Tahata wished to deal with the matter in accordance with the culture of NPH and tikanga Maori, by seeking consensual termination of the employment to allow a dignified departure of Ms Gibson.

[58] It is not surprising that NPH lost all trust and confidence in Ms Gibson as an employee of KA standing. She clearly destroyed that trust and confidence by the specific instances of misconduct that NPH reasonably concluded she was responsible for, and it seems overall she showed considerable disrespect in her attitude towards the NPH and its Board as her employer. NPH was the party entitled to give directions as to her conduct and also entitled to have those obeyed by Ms Gibson as its servant. This should have been clear to Ms Gibson from the wording of her employment agreement which stated that she "*shall in all respects be responsible to the Board*" and stated also that the extent and nature of her responsibilities and authorities "*shall be such as are determined by the employer.*"

[59] NPH was an employer with its own an enterprise and was not merely a figurehead notionally put in charge of a redistribution of public monies from the DHB or central government to the community. The keeping of proper controls on the

spending of its funds and having its employees observe and respect those controls, was vital to the operation of NPH, as it will be with any other employer.

Determination

[60] I find that in relation to both substantive and procedural justification for Ms Gibson's dismissal, viewed objectively the actions of NPH and how NPH acted were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred. In these respects a neutral observer would have considered the dismissal to be justified.

[61] Accordingly, the determination of the Authority is that the dismissal of Ms Gibson was a justified dismissal. It follows that no orders are to be made against NPH and that Ms Gibson is not entitled to any of the remedies she has sought.

[62] Had the Authority found that dismissal was unjustified for any reason, the degree of blameworthy conduct by Ms Gibson contributing to the situation that gave rise to her grievance is likely to have been assessed as being so great that no remedies would have been awarded to her.

NPH counterclaim

[63] I find that the claim by NPH against Ms Gibson to recover expenditure of \$3,364.65 incurred through her unauthorised actions has been established. It is clear that Ms Gibson was authorised to take sabbatical leave without the "privileges" of her employment agreement and that she was to receive her normal pay during this time but not expenses.

[64] Ms Gibson is therefore ordered to reimburse \$3,364.65 to NPH.

[65] In relation to the claim for damages to compensate for Ms Gibson's alleged breach of the terms of her employment contract, \$220,000 plus interest has been claimed. This reduction from the \$580,000 originally claimed takes into account mitigation and recovery that NPH was able to achieve to reduce the financial impact of Ms Gibson's failure to secure funding and properly assign spending to particular work or services provided.

[66] I find that there was a breach of the employment agreement and that by her negligence Ms Gibson caused her employer NPH to lose the opportunity of obtaining funding or of otherwise being reimbursed for expenditure in providing health services.

[67] However, I am not satisfied that this has necessarily caused loss or damage to NPH in terms of its purposes and objectives as a non-profit organisation. The Authority has no evidence that as a result of Ms Gibson's conduct NPH was unable to fully continue with its work for the benefit of its community.

[68] While NPH funds had to be re-allocated or re-budgeted to overcome the SIA funding constraints and deficit caused by Ms Gibson, I am not satisfied that NPH suffered compensatable loss or damage that is quantifiable directly with reference to the lack of funding that might otherwise have been available if Ms Gibson had performed her job properly.

[69] The Authority's investigation has been focused largely on the personal grievance of Ms Gibson and as well the investigation time was somewhat limited by the one day allocated for that purpose at Gisborne.

[70] I will therefore leave this part of NPH's counterclaim undetermined for now so that NPH can decide whether it wants to participate further in an investigation and provide more evidence to the Authority to enable me to decide this part of its counterclaim claim one way or the other.

[71] NPH is to advise the Authority whether it wants to continue with its action against Ms Gibson. There may be some logistical matters for NPH to consider, such as Ms Gibson's resettlement in Australia for the time being and her ability to meet an amount as great as \$220,000 if that were to be awarded against her.

[72] The question of costs is reserved on the determination given so far. It is hoped that the representatives will, after discussion, be able to reach some agreement as to the disposal of this issue. If not, application in writing can be made in the usual way and a timetable for a reply will then be set by the Authority.