

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Phillip Allan Hemopo (Applicant)
AND Arai Te Uru Kokiri Centre Inc (Respondent)
REPRESENTATIVES Barry Dorking, Counsel for Applicant
Grant Walker, Advocate for Respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 30 May 2005
31 May 2005
SUBMISSIONS RECEIVED 10 June 2005 from the applicant
10 June 2005 from the respondent
20 June 2005 from the respondent
DATE OF DETERMINATION 27 July 2005

DETERMINATION OF THE AUTHORITY

[1] Mr Hemopo commenced employment with the respondent Arai Te Uru Kokiri Centre Incorporated (“the Centre”) in July 1997 as the computer and business studies tutor. He was interviewed for and appointed to the position by the then manager of the Centre Kua Langsbury. Mr Langsbury managed the Centre since its inception in 1982 until his retirement in June 2002. Mr Langsbury was then elected Chairperson of the Incorporation.

[2] The Centre was managed by Lynette Collins from July 2002. Ms Collins had been employed by the Centre prior to this for 17 years.

[3] The Centre provides courses to students in Dunedin in various subjects including business and computing and is funded by Skill New Zealand. Some students who attend at the Centre have failed in the mainstream education system and have generally had difficulties in the past with achievement. The Centre operates within the rohe of Ngai Tahu and applies Ngai Tahu values.

[4] Mr Hemopo signed a one year fixed term contract on 18 December 1998 which commenced on 18 January 1999 and concluded on 16 January 2000. Mr Hemopo’s employment continued beyond the expiry of the term of that contract until 16 July 2003. From time to time an employment agreement was offered to him but Mr Hemopo believed that the terms and conditions in those agreements were inferior to his existing terms and conditions and he did not sign a new agreement.

[5] When Mr Hemopo was handed another draft employment agreement in or about February 2003 he was still not happy to sign but decided to join a union, the Southern Region Association of Staff in Tertiary Education (“the union”). He spoke to Kristine Smith who is the Assistant

Secretary of the union and it was agreed that she would negotiate Mr Hemopo's employment agreement on his behalf. Ms Smith also agreed to recover some unpaid money that Mr Hemopo said were owing to him by the Centre in terms of a qualification he had obtained and performance based long service payments.

[6] Graham Wicken was the Programme Manager at the Centre. He was employed at the Centre from April 1995 in various roles before he became Programme Manager. He retired from his position at the end of December 2003 as a result of ill health.

[7] Mr Wicken brought up matters of inter staff/management relationships within the Centre at a staff meeting on 4 April 2003 which resulted in a discussion that carried over to a further staff meeting on 7 April 2003. Mr Wicken felt that there seemed to be some ill feeling in the Centre which was not good for individuals or the Centre and expressed the view that people could leave if they did not want to work there.

[8] Mr Hemopo then talked openly about the difficulties that he was having with Ms Collins. Mr Hemopo told her that he felt that she treated him differently to other staff and that she had become hostile toward him after he had joined the union. There was discussion. Mr Hemopo said that for a time after that frank discussion relationships within the Centre improved.

[9] Mr Hemopo then said that he was instructed by Mr Wicken on or about May 2003 to falsify some attendance records for students who had been absent on the basis that funding for those students to the Centre would stop. Mr Hemopo said that he had been approached before this time by Ms Collins and Mr Wicken to alter attendance records but not to the same extent. Mr Hemopo said that he was uncomfortable with altering records because he felt it was illegal but it seemed to him that his job was on the line and that he started keeping the computer copies of the attendance records to protect himself.

[10] Ms Smith met with the Centre representative, Joe Enright, at her office on or about 15 July 2003 to progress the negotiations for Mr Hemopo. Mr Enright raised some complaints about Mr Hemopo with Ms Smith which included his inaccurate timekeeping. Mr Enright said that he was of the view that the Centre was not liable to pay Mr Hemopo for his qualifications or long service and he also said that Mr Hemopo was having an affair with another tutor at the Centre and that this was not approved of because Mr Hemopo was married.

[11] Ms Smith arranged to meet with Mr Hemopo and the other tutor for whom the union was also acting to tell them about her earlier meeting with Mr Enright. Mr Hemopo and the other tutor were having a relationship but they told Ms Smith that they were not inappropriate in the workplace. Mr Hemopo accepted that there may have been minor timekeeping discrepancies but said no more than any other staff members and that he was singled out in that respect.

[12] Mr Hemopo then told Ms Smith that he had been required to falsify the student attendance records which he completed each day. Ms Smith recalled seeing a pile of attendance records in Mr Hemopo's possession although I am not satisfied that she considered these carefully. She was of the view however that they were the same records provided for the investigation meeting by Mr Hemopo.

[13] Ms Smith then went to leave the Centre. On her way out she saw the programme manager Graham Wicken. He questioned her about failing to notify him that she was attending at the Centre that day. The discussion that then took place is I find most accurately recorded in Mr Wicken's note of the exchange dated 16 July 2003. Ms Smith told Mr Wicken that she thought the Centre was falsifying its records and that the Tertiary Education Commission ("the TEC") would be

interested in knowing about this. Mr Wicken denied the allegations. Ms Smith has some fairly strong views about altering of records in this way. In Mr Wicken's notes there is a statement attributable to her that she *was aware most [private training establishments] were doing this and that they were ripping off the system*. She also said that one institution had been required to repay \$100,000.00 to Skill New Zealand the previous year. Ms Smith could not recall Mr Wicken telling her that she should talk to Mr Enright but as that appears twice in Mr Wicken's notes I am of the view that it is likely that was said. Ms Smith told Mr Wicken that she felt he should know she was going to report the Centre as *she, herself, did not like surprises*.

[14] Ms Smith said that Mr Wicken was angry. Although Mr Wicken has Parkinsons disease he did not explain to Ms Smith that his shaking was because of this. Ms Smith said to me at the investigation meeting that whilst now knowing of this she still maintained that Mr Wicken was very angry at the time. There is no dispute that Mr Wicken used the word *shit stirring* about Ms Smith raising the matter.

[15] Mr Wicken talked to Ms Collins about the allegations made. Mr Langsbury arrived at the Centre that day to discuss some issues with Ms Collins. Ms Collins told Mr Langsbury that Mr Hemopo had made an allegation that the Centre was falsifying its reports. This upset Mr Langsbury greatly as he was very concerned about honesty. Mr Hemopo agreed that Mr Langsbury was not implicated in anyway in the matter.

[16] Mr Langsbury went straight to see Mr Hemopo who was in his office. I do not need to consider evidence beyond that I heard from Mr Langsbury and Mr Hemopo about the nature of the exchange. Both Mr Langsbury and Mr Hemopo agreed that the time spent in Mr Hemopo's office was less than one minute. I largely accept Mr Hemopo's account of the exchange. Mr Hemopo holds Mr Langsbury in high regard and I do not think that he would misrepresent the exchange. Mr Hemopo was also the calmer of the two and therefore more likely to recall more exactly what was said. Mr Hemopo said that Mr Langsbury was shaking with rage and eye balled him and I find in a raised voice said *You've told that woman that I'm cooking the books and I don't like it Phil, I don't like it*. I accept Mr Langsbury's evidence that he said words to the effect that *the Kokiri Centre are not thieves*. Mr Langsbury also said that Mr Hemopo had gone *too far* and that he was *very angry*. Mr Langsbury then turned around and left the office.

[17] Mr Hemopo said that he was upset and shocked by the confrontation with Mr Langsbury and was lost as to what to do after he left the office. He stayed at work for about half an hour and then telephoned in sick. There was a mediation the following day between the parties but no resolution of the matter. Mr Hemopo said that he felt that he had no option but to leave the Centre as he thought that the behaviour was likely to happen again and he was extremely upset.

[18] Mr Hemopo claims that the treatment he received from his employer amounted to breaches of duty, was serious and caused him to resign on 17 July 2003. His evidence was that this exchange was against a background of issues he had with his employment when Mr Langsbury was replaced by Ms Collins as Manager of the Centre in July 2002 and the negotiations about his employment agreement.

[19] Mr Hemopo seeks lost wages for a period of five months until he commenced a course at Teachers College and compensation in the sum of \$15,000.00. Mr Hemopo also seeks recovery of unpaid wages in the sum of \$4,160.00 on the basis of underpayment of salary at the rate of \$2080 per year and \$2000 for a long service performance payment of \$500 a year for four years.

[20] The respondent does not accept that Mr Hemopo was constructively dismissed and says that he left his employment voluntarily. It further says that there was no provision in Mr Hemopo's

employment contract for either a long service performance payment or an incremental qualification based payment.

[21] The respondent further says that in the week Mr Hemopo left his employment he removed a hard drive, replaced it with an inferior model and when the correct hard drive was eventually returned it contained no data. The Centre counterclaims for the costs and expense associated with that together with the cost of advertising for and interviewing Mr Hemopo's replacement.

[22] The counterclaim was amended at the investigation meeting to be:

- Cost of advertising and interviewing a replacement for Mr Hemopo in the sum of \$226.10.
- Invoices from a computer company, BearTech Solutions, in the sums of \$227.50 and \$70.00 plus GST being the sum of \$334.68.
- Hours spent retrieving records by the manager and programme manager of 50 and 30 hours respectively in the total sum of \$1691.80.

[23] The issues for determination in this case fall under four headings and are as follows:

Claim for underpaid wages

1. Did the remuneration scale form part of Mr Hemopo's employment contract?
2. If the remuneration scale did form part of Mr Hemopo's terms and conditions of employment what sums, if any, are owed to him.

Allegation of falsification of attendance records

1. Was Mr Hemopo on the balance of probabilities required to falsify his attendance records by Mr Wicken or Ms Collins?

Constructive Dismissal

1. Was Mr Hemopo's resignation caused by the actions of the employer?
2. Was there a breach of duty on the part of the employer?
3. If there was a breach of duty by the employer was it of sufficient seriousness to make it reasonably foreseeable that there was a substantial risk of resignation by Mr Hemopo.
4. Did Mr Hemopo's behaviour contribute to the situation that gave rise to the grievance in a way that would require a reduction in remedies?

Counterclaim

1. Was Mr Hemopo authorised to remove the hard drive of his computer from the Centre?
2. Why was the hard drive removed and reformatted?
3. Did the Centre suffer damage as a result of the removal of the hard drive and its reformatting?
4. Is Mr Hemopo liable for any damage suffered by the Centre?

Did the remuneration schedule form part of Mr Hemopo's employment agreement?

[24] Both Mr Dorking and Mr Walker referred me to the well known rules for contract interpretation and I have applied them in this matter. The respondent's view is that the remuneration scale does not form part of the employment contract.

[25] The document headed remuneration scales is attached to the employment agreement, is signed by Mr Hemopo and Mr Langsbury and is dated the same date as the agreement. I consider that there are two references to the remuneration scale or matters within the remuneration scale in other parts of the employment agreement.

[26] The first is clause 3 of the employment agreement. It is headed remuneration and refers to appendix II. There is no other appendix II attached to the employment agreement and must be seen to be referring to the remuneration scale. The second is the reference in clause 10.0 of appendix one to the employment agreement which is the individual job/services profile. It provides that *All tutors are required to meet all of the above performance indicators, as per the individual tutor's Employment Agreement and/or Services Agreement, with reference to 'Performance –Based Long Service' review.* There is reference to a performance based long service review within the remuneration scale.

[27] I am satisfied that the remuneration scale did form part of Mr Hemopo's employment contract.

What, if any, sums are owing to Mr Hemopo?

[28] When the fixed term contract expired on 16 January 2000 Mr Hemopo's employment continued and no further employment agreement was entered into. His terms and conditions therefore were those contained in his individual employment agreement including the provisions in the remuneration scale. I find that a reasonable person would conclude that if Mr Hemopo obtained a diploma in adult teaching or equivalent then he would receive an annual increment of \$2080.00 as provided in the remuneration scale. Mr Hemopo did obtain the equivalent of a diploma in adult teaching in May 2001 but did not receive the additional payment per annum which he should have under his employment agreement.

[29] Mr Walker submitted that if I was to make an award to Mr Hemopo based on the provision in the remuneration scale then I should reduce such award by the higher salary Mr Hemopo received. The salary was made up according to the remuneration scale of two performance based payments of \$500 each and the applicable base scale of \$27,040.00 to arrive at Mr Hemopo's total salary of \$28,040.00. On that basis I see the matter of the incremental scale as quite separate and do not take the salary level into account. Mr Hemopo is entitled to two payments in the sum of \$2080.00 in accordance with the remuneration scale attached to his employment agreement.

[30] I order Arai Te Uru Kokiri Centre Incorporated to pay to Phillip Hemopo the sum of \$4160.00 gross being his annual increment for holding a qualification equivalent to a Diploma in Adult Teaching.

[31] There is provision within the remuneration scale for an annual payment for performance based long service of \$500.00 per annum. The payment is based on performance against the individual job profile and carries with it an implied obligation on the part of the employer to

undertake a performance review on an annual basis. The performance assessments were not undertaken. Mr Hemopo seeks \$500 for the year 2000, 2001, 2002 and 2003.

[32] The payment for performance was discretionary and based on an assessment of performance against the individual job profile. Mr Hemopo's performance was not capable of being assessed as there was no performance review carried out from 2000. Mr Hemopo therefore lost a chance to receive a performance based payment of \$500.00. I am of the view that there should be reimbursement of a sum for that lost chance. I do not consider the value of the loss of that chance to be the full \$2000.00. Mr Hemopo may not have always achieved the standard required. I am of the view that the value of the loss of the chance to be paid a performance based long service payment is \$1000.00.

[33] I order Arai Te Uru Kokiri Centre Incorporated to pay to Phillip Hemopo the sum of \$1000.00 gross for the loss of chance of a performance based long service payment.

Was Mr Hemopo asked to falsify the attendance records?

[34] Mr Hemopo alleges that he was required by Mr Wicken and Ms Collins to falsify his attendance records to achieve funding increases or prevent funding losses since 2002. Mr Wicken prints out the record of the students enrolled in a course and leaves that in the tutor's pigeon hole each week. The tutors then deal with the recording of student attendance and advise management of consistent absences. The tutors are supposed to return the attendance records on a weekly basis but I accept Mr Wicken on occasion had to chase up the records. Mr Wicken and Ms Collins deny that they ever asked Mr Hemopo to falsify his records.

[35] No evidence in support of the allegations was provided by Mr Hemopo until in or about December 2004 when the evidence for the investigation meeting was lodged and served.

[36] The Centre asked the TEC in September 2003 to conduct an audit with respect to the allegation that the Centre had misrepresented trainee enrolments. The TEC was not prepared to take any steps until a formal complaint had been made and they formed a view there was substantive reason to investigate such a claim. No formal complaint has been made to the TEC.

[37] There was no evidence to satisfy me that any other tutor at the Centre had been asked to falsify attendance records. The tutor with whom Mr Hemopo had a relationship said that she had not been asked to falsify records and I place considerable weight on her evidence.

[38] I advised the parties that I would need to make some findings on this matter. I requested Mr Walker obtain several additional documents from the TEC and I was provided with these. I have carefully considered these along with all the records Mr Hemopo provided pertaining to 2002 and 2003.

2002 records

[39] In 2003 the Centre used a computer programme called Puk e DATA to deal with enrolments and departures of students. The programme produced rolls of data for the attendance records which were then marked off by the tutor. That programme was not available to produce data for Mr Hemopo in 2002. For that year he generated his own attendance records and provided them to Mr Wicken.

[40] Mr Hemopo supplied two versions of records for weeks commencing 21 January 2002 until 13 September 2002 which are weeks 1 - 34. Mr Hemopo refers to one version of records as *cooked*

attendance records and the other as *accurate attendance records*. The *cooked records* are the ones which Mr Hemopo said he was required to make changes to and which formed the official record of the Centre. The *accurate records* are the records that Mr Hemopo says provide what the attendance for each day actually was. The respondent also provided its official record of attendance made up of Mr Hemopo's records for weeks 1- 19 being 21 January to 21 June 2002.

[41] Mr Hemopo has made his own comments in the 2002 records that he has called *accurate attendance records* about being asked on occasion to enter a student as present when they were absent from the course. These comments appear to be the only significant difference between the two records.

[42] I accept Mr Walker's submission that there are anomalies between the *cooked* and *accurate records* supplied by Mr Hemopo and the official records of attendance which Mr Hemopo submitted for the same period and which have been provided by the respondent. I take week 9 as an example which is for the period 18 March 2002 to 22 March 2002. Mr Hemopo does not suggest for this week he was asked to make any alterations to the record and therefore the official record he handed in should match with the Centre's record. Neither Mr Hemopo's *cooked* record or his *accurate* record for that week match the official record of the Centre. There is a change in the entry for the student Joanne and the number of hours of attendance for all students for the week is slightly different. There is also an additional line 13 which has the entry that one of the students has family problems whereas in Mr Hemopo's own records that additional line 13 is missing and the entry about the student having family problems is made below the number of hours.

[43] There are other such examples which in my view cast considerable doubt about the reliability of Mr Hemopo's records and which of the records is in fact the correct record. It also supports that the records are capable of being changed from time to time by Mr Hemopo and that slight deviations or changes may occur from time to time but are not of themselves evidence of falsification of records.

[44] I do not find that the records supplied for 2002 in these circumstances are sufficient to determine on the balance of probabilities that Mr Hemopo was required to falsify his attendance records. If there was some confusion during this period about the attendance records then Mr Hemopo did not raise that with anyone.

2003 Records

[45] In support of the allegation for 2003 Mr Hemopo provided copies of the *doctored* or *cooked* attendance records which went into the official record of the Centre for weeks between 17 March and 23 May 2003 together with copies of what he says were the *original records*.

[46] Mr Hemopo also provided his own spreadsheet pages which he said were the *accurate* records and diary entries made in spreadsheet form which refer to various requests from Mr Wicken and Ms Collins to falsify attendance records as well as day to day interactions with students.

[47] On 17 March 2003 one attendance form has a student, Margaret, as unacceptably absent and the other attendance form which Mr Hemopo calls *doctored* has her present. Both were Puk e DATA forms which Mr Wicken provides to the tutors. In comparing the attendance records with Mr Hemopo's own spread sheets one student who is was marked as present on both the Puk e DATA forms is not there at all on Mr Hemopo's *accurate* spread sheet record. There is some confusion therefore as to the status of Mr Hemopo's own spread sheet.

[48] For the week beginning 24 March 2003 Mr Hemopo has provided two Puk e DATA forms. One which has Margaret's name on it and the other which Mr Hemopo says is the accurate form does not. Mr Hemopo says that he was given one sheet initially without Margaret's name on it and then another with Margaret's name on it and said that he was asked to mark her as present. I found it a little surprising that Mr Hemopo would get two different forms for this week. If one wanted to falsify records why then would one remove Margaret from the form at all when she had been marked present the previous week. I could not rule out the possibility of an event which led to Margaret being put back on the list as there is some evidence from Mr Wicken about following up a student who was absent. Mr Wicken also gave evidence that he was asked by Mr Hemopo to print out some more attendance records as Mr Hemopo had misplaced the other records.

[49] Another student is marked sick on what Mr Hemopo refers to as the original form but present on the doctored form. There would not appear to be any good reason for this as sickness is an acceptable reason for absence and the student in question had been attending well before that time. Mr Hemopo said with respect to some of these matters where the changes could have no possible benefit for the Centre that he was asked to make the attendance form look better.

[50] There are two records again for the week commencing 31 March 2003. I am confused by the two records as to which one is the original and which one is the doctored copy. The record which Mr Hemopo says is the original has a new student commencing on Tuesday 1 April 2003 and her name is printed on the Puk e DATA form. That record does not include Margaret. On the form Mr Hemopo says he was asked to doctor for that week and handed in as the official record the new student's name is not printed although the form includes Margaret's name. Mr Hemopo has handwritten the new student's name on the form. The number of students is also incorrectly noted as 10 when it should be 11. This would seem inconsistent with falsification of records when the purpose would be to boost or at least maintain student numbers. It would seem to be improbable if Mr Hemopo was given an additional record for that week which included Margaret's name that it would not include the new student. There is also an inconsistency with Mr Hemopo's own spreadsheet in that he has a student with an acceptable absence which is not reflected in either the cooked or original attendance record for that week.

[51] I accept that the Centre completed a learner withdrawal form advising the TEC that Margaret's last day of attendance was 14 April 2003. A verified copy of the programme trainee list from the TEC shows that the date the withdrawal was actioned for Margaret was on 9 May 2003. Margaret however continued to appear on the attendance records which Mr Hemopo claimed were cooked for the weeks commencing 7, 14 and 28 April 2003 as present although there was no corresponding benefit to the Centre from 14 April 2003.

[52] Mr Hemopo also alleges that he was asked to cook his attendance records for a student called Samuel. Samuel commenced with the Centre on 11 April 2003 and it was noted in his learner withdrawal form that his date of last attendance was 2 May 2003. This withdrawal was actioned according to a verified copy of the programme trainee list from TEC on 23 May 2003. Samuel did not attend regularly and Mr Hemopo in his computer programme classroom diary records on 5 May 2003 that *I have informed management regarding sams attendance in my monthly report. He will be taken off the course.* This entry appears consistent with what actually occurred with respect to Samuel however a later entry in Mr Hemopo's diary provides on 23 May 2003 that at a staff meeting Mr Hemopo was asked by Mr Wicken to cook the records with respect to Margaret and Samuel. Margaret's withdrawal from the course had already been actioned as at 9 May 2003 by TEC and Samuel's withdrawal was actioned on 23 May by TEC. The entry in Mr Hemopo's diary does not seem consistent with the documents from the TEC in terms of what had happened with those particular students.

[53] On 19 June 2003 there is a further entry in Mr Hemopo's diary where he says that once again he has been approached by Ms Collins to cook the attendance books before Warren from TEC comes about some complaints made by a past student. I asked Mr Walker to obtain any records from TEC about the nature of the visit and a record of the visit was duly provided. The visit was as the result of a complaint about two issues at the Centre from a trainee. The first issue was that trainees are forced to take part in Te Reo and other cultural activities and the second was that trainees were being picked on and harassed by other trainees. The issues do not appear to have any relevance to the attendance records and Mr Hemopo did not provide any evidence by way of student names or records to support that claim.

[54] Mr Dorking submits that Ms Smith did not advise Mr Wicken that it was Mr Hemopo rather than the other tutor who made the allegation. He says that the immediate assumption by Mr Wicken that it was Mr Hemopo supports knowledge of a request to falsify allegations. I am of the view that the more likely explanation is that Mr Hemopo was seen as a bit of a trouble maker. Mr Wicken did not have a similar view about the other tutor. I also balance against that the fact that Ms Collins and Mr Wicken immediately approached Mr Langsbury about the allegations when he came into the Centre shortly after they had been made. Mr Wicken and Ms Collins did not delay or hide the fact that an allegation had been made. There is also considerable force in Mr Walker's submission that if the Centre wanted to falsify the attendance records it could have simply done that without needing to involve Mr Hemopo.

Conclusion

[55] There are unexplained inconsistencies within the records provided by Mr Hemopo, his own spread sheet and his diary which mean that I cannot safely rely on them for a true picture of the situation regarding student attendances so as to conclude there was dishonesty. The evidence is not sufficient for me to conclude on the balance of probabilities any dishonest action on the part of the Centre in 2002 or 2003 with respect to requiring Mr Hemopo to falsify attendance records. I cannot rule out that Mr Hemopo may have been confused as to what occurred administratively when a student was withdrawn from the course.

Constructive Dismissal

Was Mr Hemopo's resignation caused by the actions of the employer?

[56] I accept Mr Hemopo's evidence that the reason he resigned was the exchange he had with Mr Langsbury on 16 July 2003. Mr Hemopo said to me that he *felt terrible and felt that he had offended Kuaa and had not had a chance to respond*. The resignation was against a background of issues that Mr Hemopo had in his relationship with Ms Collins. His written evidence about his final week at the Centre however provided that *I thought things could be sorted out between my representatives and theirs. It looked very promising. We had been discussing the progress of the negotiations and I was informed by Kris that it would be fair to tell them that I had copies of the attendance records and that I had said that they were forcing me to cook the books. I said to her that if she did that the shit would hit the fan*. For completeness Mr Hemopo was not of the view that the request to *doctor books* was the main reason for the breakdown in the relationship although he referred to it as *a pain*.

Was there a breach of duty on the part of the employer?

[57] In an employment relationship there are mutual duties of trust, confidence and good faith in dealings between an employer and an employee.

[58] When Mr Langsbury came to hear about the allegations I accept that he was very upset and hurt and he proceeded directly to talk to Mr Hemopo. The matter as to whether the exchange that then took place was a breach of duty is finely balanced. On one hand I can understand Mr Langsbury's anger and the fact that he took the allegation as an attack on his own integrity and that of the Centre which he had been a central part of since its inception. On the other hand a reasonable employer should have acted in a more measured way and talked to Mr Hemopo's representative rather than Mr Hemopo directly. Likewise Ms Smith should have raised the serious allegations with Mr Enright, the Centre's representative. He would no doubt have been able to then manage and take the heat out of the situation in advising his client. An employee however must be permitted to raise allegations. The allegation was serious and it required investigation even if it was felt that it was without substance.

[59] Mr Langsbury is a very senior figure not just in the Centre but in other Maori organisations and Mr Hemopo clearly holds him in high regard. Mr Hemopo is considerably younger than Mr Langsbury. The exchange must be seen in that light. Mr Langsbury *eyeballed* Mr Hemopo and expressed his anger in a raised voice. I accept that Mr Hemopo was shaken by the exchange and that he felt powerless.

[60] It was not an angry exchange about work issues that Mr Hemopo could deal with and move on. The anger was about the fact that Mr Hemopo had made an allegation about *cooking of the books* to his representative and clearly Mr Langsbury believed there was no substance in it. He told Mr Hemopo *the Kokiri Centre are not thieves*. Mr Hemopo felt that the exchange was *verbally abusive*. I accept that Mr Langsbury did not intend that at all and was simply reacting to the allegation the Centre was dishonest but Mr Hemopo in my view was clearly upset by it. There was no opportunity for him to respond and no one came to see him when he remained on campus for a short period after the exchange. Mr Langsbury was the only senior person at the Centre who Mr Hemopo had not made allegations against. The exchange did not leave Mr Hemopo with anywhere to go at a time when he was attempting to negotiate a new employment agreement. The exchange was I find in these circumstances a breach of the duty of fair treatment that was owed to Mr Hemopo by the Centre.

Was the breach of sufficient seriousness to make it reasonably foreseeable that there was a substantial risk of resignation?

[61] The causative breach of duty that I need to consider is the angry exchange with Mr Langsbury. Having made very serious allegations of dishonesty against the Centre, I find the direct and angry approach by Mr Langsbury to Mr Hemopo in the circumstances described above, was a breach of sufficient seriousness to make it reasonably foreseeable that Mr Hemopo would resign.

[62] I find that Mr Hemopo was unjustifiably constructively dismissed on 17 July 2003. He has a personal grievance and is entitled to remedies.

Contribution

[63] I am required in this case to consider whether Mr Hemopo's behaviour contributed to the situation that gave rise to the personal grievance in a way that would require a reduction in remedies. I find that the direct approach by Ms Smith, who was cloaked with Mr Hemopo's authority, to Mr Wicken rather than to the Centre's representative Mr Enright directly contributed to the angry exchange. There was, as I have earlier expressed, no ability for Mr Enright to manage the situation in those circumstances with his client. The second matter where I find contribution is the fact that there was no assessment by Ms Smith before she spoke to Mr Wicken about the substance

of the allegations and therefore she could only make the allegations in general terms. Although Ms Smith threatened to make a complaint to TEC I take into account that no such complaint had been made at the time of the investigation meeting. The third matter that I find contributes to the situation is that I have not found the allegations to be made out on the balance of probabilities.

[64] In these circumstances I find that there was contribution by Mr Hemopo to the exchange on Mr Hemopo's final day at the Centre. I assess the level of contribution at 65%.

Lost Wages

[65] I am not minded to award to Mr Hemopo in the circumstances of this case an amount in excess of 3 months. Looking at the matter overall I am not satisfied that the employment relationship would have continued much beyond this period. Mr Hemopo was able to obtain some limited employment but has not provided sufficient evidence of any income that he may have received before he became a student. Mr Hemopo made allegations that Ms Collins had made comments to prospective employer's about him which denied him employment opportunities. I am not persuaded by the evidence that Ms Collins did jeopardise Mr Hemopo's opportunities.

[66] Mr Dorking and Mr Walker are in the first instance to attempt to reach agreement as to the amount owed to Mr Hemopo for three months loss of wages taking into account the increase in Mr Hemopo's salary for the qualification but not the performance payment for which I have already made an award. The contribution figure will also have to be taken into account. Mr Hemopo should obtain some information from the Inland Revenue Department as to any income he may have received during that period.

[67] Leave is reserved for either party to come back to the Authority if agreement cannot be reached.

Holiday and final pay

[68] There should be a full accounting to Mr Hemopo with respect to his final pay and holiday pay. Mr Hemopo should be paid any money owing with respect to final days worked and holiday pay.

Compensation

[69] I am satisfied that Mr Hemopo was genuinely upset and distressed by his exchange with Mr Langsbury. He holds Mr Langsbury in high regard and has avoided contact with him after the exchange. Although the evidence from Ms Collins was that Mr Hemopo did not appear upset after the exchange I accept he was. Mr Hemopo does appear initially confident but from my observations during the investigation meeting is actually quite a sensitive person. In the circumstances I am of the view that an appropriate level of compensation is \$8,000.00. Taking contribution into account the award to Mr Hemopo is \$2,800.00.

[70] I order Arai Te Uru Kokiri Centre Incorporated to pay to Phillip Hemopo the sum of \$2800.00 without deduction under section 123 (c) (i) of the Employment Relations Act 2000.

Counterclaim

Was Mr Hemopo authorised to remove the hard drive from the Centre computer?

[71] The respondent clearly viewed the removal of the hard drive by Mr Hemopo from the computer in his office at the Centre on Monday 14 July 2003 suspiciously. The evidence though was that Mr Hemopo in his role as computer tutor did on occasion remove and take hardware home without authorisation. Mr Hemopo was seen as very capable at dealing with problems when they arose with respect to the computers. There seemed limited monitoring of his activities with the computer equipment. In those circumstances where Mr Hemopo had removed hardware previously without authorisation I am not satisfied that it was sufficiently clear that he needed specific authorisation to remove hardware on this occasion.

Why was the hard drive removed and reformatted?

[72] Mr Hemopo says that he removed the hard drive because he had discovered a computer virus and he needed to format the drive to deal with the virus. He said that the incorrect hard drive was replaced in the machine in error. There is insufficient evidence to persuade me that this was not the situation. Mr Hemopo says that had he not been forced to resign then he would have been able to copy the work files across to the drive.

Did the Centre suffer damage as a result of the removal of the hard drive and its reformatting?

[73] Mr Hemopo did return some of the missing records when he gave another tutor a CD ROM. It appeared that much of the time spent by Ms Collins which is now claimed was spent on other matters than those related to removal of the hard drive. In terms of the costs associated with replacing Mr Hemopo I have found he was unjustifiably constructively dismissed. There was also some work that was required to be done by Mr Wicken because Mr Hemopo took his network router from the system which was not associated with removal of the hard drive. Mr Wicken was only able to roughly assess what the actual hours he spent on matters related to the hard drive were. I am further not satisfied that the work carried out by BearTech was directly related to issues with the hard drive.

Is Mr Hemopo liable for any damage suffered by the Centre?

[74] I do not find that the counterclaim has been made out against Mr Hemopo. I do not find that Mr Hemopo is liable to the Centre for the amount of its counterclaim.

Costs

[75] I reserve costs. The parties are to attempt to reach agreement with respect to costs. Failing agreement an application for costs can be made by the applicant to the Authority within 21 days and the respondent has a further 14 days to respond to the same.

Summary of orders and findings

[76] I have ordered Arai Te Uru Kokiri Centre Incorporated pay to Phillip Hemopo the sum of \$4160.00 gross being a qualification based annual increment for a two year period.

[77] I have ordered Arai Te Uru Kokiri Centre Incorporated to pay to Phillip Hemopo the sum of \$1000.00 gross for loss of a chance of a performance based long service payment.

[78] I have not found on the balance of probabilities any dishonest action on the part of Arai Te Uru Kokiri Centre Incorporated with respect to requiring Phillip Hemopo to falsify attendance records.

[79] I have found that Phillip Hemopo was unjustifiably constructively dismissed on 17 July 2003.

[80] I have assessed contribution by Phillip Hemopo to the situation that gave rise to the grievance at 65%.

[81] Phillip Hemopo is entitled to lost wages for a period of three months. The parties are to attempt to reach agreement on the amount, failing which leave is reserved to come back to the Authority.

[82] There is to be a full accounting to Phillip Hemopo with respect to his final pay and holiday pay and any outstanding amounts are to be paid to him.

[83] I have ordered Arai Te Uru Kokiri Centre Incorporated pay to Phillip Hemopo the sum of \$2800.00 without deduction under section 123 (c) (i) of the Employment Relations Act 2000.

[84] I have not found that the counterclaim by Arai Te Uru Kokiri Centre Incorporated has been made out.

[85] I have reserved the issue of costs.

Helen Doyle
Member of Employment Relations Authority