

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Raki Ihaia (Applicant)  
**AND** Te Wananga O Aotearoa (Respondent)  
**REPRESENTATIVES** Maria Ihaia, Advocate for the Applicant  
Christie McGregor, Counsel for the Respondent  
**MEMBER OF AUTHORITY** Ken Anderson  
**INVESTIGATION MEETING** 11 May 2005  
**DATE OF DETERMINATION** 25 July 2005

**DETERMINATION OF THE AUTHORITY**

**The Employment Relationship Problem**

- [1] Mr Ihaia says that he was unjustifiably dismissed on or about 23 August 2004. The dismissal being constructive in nature rather than a summary dismissal. Mr Ihaia also says that subsequent to the termination of his employment, an agreement was reached with the Chief Executive Officer of Te Wananga O Aotearoa, that he would be paid his salary until the end of the Raranga course for 2004 and that this agreement was breached. Apart from the remedies he seeks for his alleged personal grievance, Mr Ihaia seeks payment of his salary in accordance with the agreement that was reached.
- [2] Te Wananga O Aotearoa (“TWOA”) says that Mr Ihaia chose to resign of his own free will and that he was not dismissed, constructively or otherwise. TWOA also says that because a joint agreement was reached with both Mr and Mrs Ihaia regarding the continued payment of their respective salaries, and Mrs Ihaia subsequently breached that agreement, TWOA was relieved of any obligation to continue to pay Mr Ihaia.

**Background Facts and Evidence**

- [3] Unfortunately, Mr Ihaia did not attend the investigation meeting held on 11 May 2004. His absence was explained, but only on the day of the meeting with the Respondent’s people present, as being on medical grounds. A Doctor’s certificate of sorts was provided by Mrs Ihaia, acting as Mr Ihaia’s advocate. Mr Ihaia has been a somewhat anonymous and reluctant physical presence in regard to his own employment relationship problem and the Authority is left to make what it can of the evidence that is available from other sources, including the content of the *Statement of Problem*, an affidavit from Mr Ihaia dated 10 May 2005, and the evidence of the Respondent.
- [4] Mr Ihaia was employed to give assistance to students and staff involved in the Raranga

(weaving) programmes run by TWOA at the Paeroa Outpost that was managed by the Akapura Campus at Te Awamutu. Mr Ihaia worked with his wife, Mrs Maria Ihaia, a Tutor at the Paeroa Outpost.

- [5] On 29 July 2004, Mrs Ihaia was dismissed from her employment with TWOA.<sup>1</sup> As an outcome of the problems that arose with Mrs Ihaia, the Paeroa Outpost was closed and the administration for the Raranga was taken back to the Akapura Campus. Mr Ihaia continued in his role assisting with the conduct of the Raranga programme.
- [6] The evidence of Ms Lorraine Anderson, the Akapura Campus Director, is that on 30 July 2004, following the dismissal of Mrs Ihaia, she met with Mr Ihaia and reassured him that he remained a valued employee of TWOA and that the necessary support for him to remain working from Paeroa would be provided. Mr Ihaia sought to take some leave which Ms Anderson granted. She requested that Mr Ihaia meet with her at the Akapura Campus, some time after returning from leave, for the purpose of discussing the implications of the move of the administration back to Te Awamutu.
- [7] Mr Ihaia went on leave from 9 August and returned to work on 16 August 2004. It appears that Mr Ihaia had some expectation that he would be contacted then by someone from the Akapura Campus. This did not occur, but nothing in particular rests on that. On 19 August 2004, Mr Ihaia assisted with a student tutorial at Paeroa as part of his normal duties.
- [8] A fundamental component of the Raranga programme is the requirement for students to attend Noho Marae weekends at selected Marae in the area. The Noho Marae weekends are from Friday evening to Sunday afternoon and students are taught the practical aspects and protocols pertaining to Raranga in a traditional Marae setting. At the Noho Marae weekends, Mr Ihaia fulfilled his role as a Kaumatua, in addition to his usual role as a technical assistant to the Raranga programme. On Friday 20 August 2004, Mr Ihaia was present at the Ngahutoitoi Marae.
- [9] On that day, Mr Eugene Cassidy, an Academic Manager for TWOA, at that time, visited the Marae. Mr Cassidy dropped in some cheques relating to the Noho Marae and spoke with the two tutors as well as the student representative. The evidence of Mr Cassidy is that Ms Anderson had asked him to check with Mr Ihaia to see if Mr Ihaia was “settled” about the Raranga programme, given the circumstances pertaining to Mrs Ihaia. Mr Cassidy says that Mr Ihaia was comfortable with his presence and the two men had a casual conversation about the Raranga programme. But, when Mr Ihaia turned to the matter of Mrs Ihaia’s dismissal, Mr Cassidy says that Mr Ihaia expressed some anger towards TWOA.
- [10] The further evidence of Mr Cassidy is that because of the sensitivity of the issues that existed between Mrs Ihaia and TWOA, he diverted the conversation back towards the Raranga programme and the positive things that Mr Ihaia had achieved, and Mr Ihaia became more reasonable and less angry. However, Mr Ihaia did say that he felt he was being harassed by Ms Anderson and Mr Cassidy advised him that TWOA had a policy about harassment and if Mr Ihaia felt it necessary, he could make a complaint. Mr Cassidy says that when he left Mr Ihaia, he appeared to be in good spirits.

---

<sup>1</sup> An alleged personal grievance pertaining to the dismissal of Mrs Ihaia has been previously determined by the Authority (AA 260/05). While the Authority has appropriately investigated and determined the employment relationship problems of Mr and Mrs Ihaia as two distinct and separate matters, because of the nature of the respective employment relationships with TWOA, some integration between the two matters is unavoidable.

- [11] In his *Statement of Problem*, Mr Ihaia says that he was “suddenly confronted” by Mr Cassidy and asked if he felt capable of continuing to work “as things stand.” Mr Ihaia says that he responded in the affirmative and also said he had been asked that question before by Ms Anderson and other tutorial staff and considered this to be harassment.
- [12] Mr Ihaia appears to accept that he was feeling fine when Mr Cassidy left him but upon “reconsideration” he says that he felt “affronted by this harassment.” The evidence of Ms Noeline Curtis and Ms Georgina Masiutama, the Raranga Tutors, is that after Mr Cassidy left the Marae, Mr Ihaia expressed to them that he felt that he had been harassed by Mr Cassidy and that he felt that TWOA were checking up on him. Mr Ihaia was apparently quite upset and expressed some doubts about remaining in the employment of TWOA.
- [13] The further evidence of Ms Masiutama is that on the evening of 20 August 2004, Mr Ihaia produced a page of paper headed “*Lucky’s<sup>2</sup> Resignation*” that had apparently been prepared earlier that day. Mr Ihaia announced that he was calling a meeting after dinner that night on the Marae and he was going to resign.  
A meeting of students and others, including the catering staff, duly took place. The students had all been given a copy of “*Lucky’s Resignation*.” This document can best be described as a critical discourse alluding to, among other things, the dismissal of Mrs Ihaia and more probably than not, prepared by her that day, following the visit of Mr Cassidy to the Marae. The document concludes:  
  
“Friday 17 August,<sup>3</sup> Lucky was approached by a representative of Apakura Campus who asked Lucky if he felt that “he was capable of continuing as things stand.” Lucky replied that this was harassment.  
  
After thinking for a while, he informed Noeline and Georgina that he was resigning and laying a complaint. He was asked if he was walking out – he said no, he was resigning.”
- [14] It subsequently transpired that Mr Ihaia announced to the gathering at the Marae that he was resigning from his position with TWOA and he then left, effectively ceasing his role from the evening of 20 August 2004.
- [15] The further evidence of Ms Masiutama is that the actions of Mr Ihaia were very disruptive for the students and that she and Ms Curtis were left to reassure the students that the Raranga programme would continue to be provided and that the Noho Marae programme would continue for that weekend. Ms Curtis presented a report to Ms Anderson, dated 26 August, pertaining to events that occurred at the Noho Marae during the weekend 20-22 August 2004. Attached to the report was a copy of *Lucky’s Resignation*.
- [16] On Monday 23 August 2004, an email over the name of Mr Ihaia, was received by the Chief Executive Officer of TWOA, Dr Rongo Wetere. The germane content of the email is:  
  
“Circumstances as outlined in the attachment have given me no option but to resign. As you are the person, as CEO, to give me employment, I wish to thank you for the opportunity of working for your organisation.  
I’m sure you will understand however, when you have read the attachment, the reasons why I am laying a complaint with Te Wananga O Aotearoa for Constructive Dismissal. I have copied and pasted excerpts from Employment Relations [sic] on the internet for your clarification.”
- [17] The attachment referred to is the document *Lucky’s Resignation* and the “excerpts” referred

---

<sup>2</sup> Mr Ihaia is commonly known as Lucky rather than Raki.

<sup>3</sup> This date is incorrect. Friday was the 20<sup>th</sup> August.

to is material pertaining to resignation and constructive dismissal that have apparently, been downloaded from an unnamed internet source, possibly the Department of Labour website.

- [18] Unfortunately, it appears that communication between Dr Wetere and Ms Anderson was not as might be expected, as on 30 August 2004, Ms Anderson wrote to Mr Ihaia:

“As discussed with you on Friday 30<sup>th</sup> July 2004, the administration base of the Raranga Noho Marae programme has been transferred from Paeroa to Te Awamutu.  
You were encouraged to relocate with the office. If you need assistance to relocate, please let me know.

However, it has been brought to my attention recently that you have spoken to numerous people wishing to resign from your employment. If you wish to discuss this matter in person, you are most welcome to make an appointment to see me at your earliest convenience.

I would just like to assure you that your employment with the programme is continuing. Therefore, until such time that I receive formal notification from you, I expect to see you at work.”

- [19] To compound the unfortunate lack of communication between Dr Wetere and Ms Anderson, in response to a written request from Mrs Ihaia dated 16 August 2004, and apparently unknown to Ms Anderson, Dr Wetere agreed to meet with Mrs Ihaia to discuss her dismissal. A meeting duly took place on 2 September 2004. Mr Ihaia was not present at this meeting, but it appears that in addition to the dismissal of Mrs Ihaia, the resignation of Mr Ihaia was discussed.
- [20] The evidence of Dr Wetere is that he offered to continue to pay the salaries of both Mr and Mrs Ihaia until the end of the Raranga course year. Dr Wetere says that he believed, and Mrs Ihaia accepted, that the offer to continue paying the two salaries was in full and final settlement of any issues being disputed by Mr and Mrs Ihaia. There is some suggestion that Mr Ihaia was to carry out some work related to the closure and securing of the Paeroa Outpost, at the direction of Dr Wetere, but the evidence on this matter is inconclusive.
- [21] Note: Counsel for the Respondent has submitted to the Authority that all matters that transpired pertaining to the meeting, involving Dr Wetere on 2 September 2004, were and are, confidential and/or without prejudice and privileged. Therefore, the Authority is not able to give any consideration or weight to what transpired at this meeting. However, I am of the view that the meeting in question was simply just that, a meeting. While Dr Wetere may have considered that mediation occurred, I conclude that this was not so. The meeting was not in any shape or form a mediation of the kind contemplated by the Employment Relations Act 2000 (“the Act”), nor was it a mediation, as defined by section 5 of the Act. There was no independent mediator involved and there was no criteria agreed to between the parties as to the conduct of the meeting or any record of its outcome that was binding upon them. While I find that an oral agreement was arrived at, and Mrs Ihaia subsequently breached that agreement, thus relieving TWOA of any further obligation regarding any payment to her, it was not a mediated agreement as contemplated by sections 147,148 and 149 of the Act.
- [22] It subsequently transpired, that Mr Ihaia continued to be paid his salary until on or about 21 October 2004 but payment was stopped then upon the instruction of Dr Wetere.<sup>4</sup> The cessation of payment came about as the result of Mrs Ihaia pursuing a personal grievance against TWOA and the unsuccessful mediation of her alleged grievance on 19 October 2004,

---

<sup>4</sup> There is some evidence that suggests that payment to Mr Ihaia ceased on 1 October 2004. However, the evidence of Mr Down seems to suggest that it is more probable that payment ceased following the unsuccessful mediation of Mrs Ihaia’s grievance on 19 October 2004.

with a Department of Labour mediator.

The evidence of Mr Alan Down, the Human Resources Consultant for TWOA, was that given the outcome regarding Mrs Ihaia, he advised Dr Wetere that it was likely that Mr Ihaia would also pursue a personal grievance and that would be a breach of the joint agreement that had been reached. However, the records of the Authority show that Mr Ihaia did not file a *Statement of Problem* until 18 November 2004.

## The Issues to be Determined

[23] There are several issues that require determination. They are:

1. Was the termination of Mr Ihaia's employment simply a resignation of his own free will or was it in reality a constructive dismissal?
2. Was the resignation accepted by TWOA?
3. Did TWOA breach the agreement to continue to pay Mr Ihaia his salary to the end of the 2004 Raranga course?

### A resignation or constructive dismissal?

[24] The law relating to constructive dismissal is well established. The onus of showing that a constructive dismissal has occurred rests on the employee. In *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd (1985) ERNZ Sel Cas 136*, the Court of Appeal held that a constructive dismissal could include cases where a breach of duty by the employer causes an employee to resign.

[25] The matter of a breach of duty on the part of the employer was expounded upon further by the Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers' IUOW [1994] 1 ERNZ 168*. The Court held that:

“In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.”

[26] Applying the above findings of the Court of Appeal to the circumstances surrounding Mr Ihaia, the first question to ask is: Was his resignation caused by a breach of duty on the part of his employer?

[27] While it could be said that more immediate support could have been given to Mr Ihaia by TWOA, given the circumstances regarding the dismissal of Mrs Ihaia and the consequential closure of the Paeroa Outpost, I conclude that any possible failure to adequately support Mr Ihaia was not a breach of any duty owed to him as an employee. As was held in *Wellington etc Clerical Workers IUW v Greenwich [1983] ACJ 965*:

“It is essential to examine the actual facts of each case to see whether the conduct of the employer can fairly and clearly be said to have crossed the borderline which separates inconsiderate conduct causing unhappiness or resentment to the employee from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship.”

- [28] Furthermore, I find that there was nothing that could be taken from the conduct of Mr Cassidy or Ms Anderson, that remotely represented harassment as alleged by Mr Ihaia. Nor do I find that Mr Ihaia received the “cold shoulder” from the other two tutors. It is natural that the dismissal of Mrs Ihaia would result in some resentment on the part of Mr Ihaia and it appears that he came to the conclusion that he no longer wished to be involved with TWA. That is a decision that he was entitled to come to, but I conclude that that the resignation of Mr Ihaia was not in any way caused by any fault on the part of TWA that could be seen to convert the resignation into a constructive dismissal.

### **Was the resignation accepted by TWA?**

- [29] I have earlier alluded to the different stances adopted by Dr Wetere and Ms Anderson in regard to the resignation of Mr Ihaia. While it appears that the resignation of Mr Ihaia was accepted by Dr Wetere, it does not appear to have been formally acknowledged until 21 October 2004, when Mr Down wrote to Mr Ihaia. Nonetheless, it is clear that Mr Ihaia was certain about his resignation and no longer came to work for TWA after 20 August 2004, albeit he continued to be paid until 21 October 2004. It does appear that Mr Ihaia became confused about the status of his employment, and that is understandable following the receipt of the letter of 30 August from Ms Anderson. However, I conclude that Mr Ihaia intended to and did resign from his employment on 23 August 2004, and that the resignation was more probably than not, accepted by Dr Wetere as of that date.

### **Did TWA breach the agreement to continue to pay Mr Ihaia his salary to the end of the 2004 Raranga course?**

- [30] It seems to me that the offer from Dr Wetere to continue to pay Mr Ihaia was a magnanimous gesture indeed, as given the circumstances pertaining to Mr Ihaia’s resignation, there was no obligation for him to do so. I also conclude that the arrangement entered into was rather loose and given the benefit of hindsight, perhaps unwise. Nonetheless, I am satisfied that an undertaking was given to both Mr and Mrs Ihaia that their salary would continue to be paid until the end of the 2004 Raranga course. While I have accepted that Mrs Ihaia breached what Dr Wetere saw as a full and final settlement of matters pertaining to the termination of the employment of both Mr and Mrs Ihaia<sup>5</sup>, and hence there no longer remained an obligation to pay Mrs Ihaia, the actions of Mr Ihaia have to be seen as independent from those of Mrs Ihaia.
- [31] It seems to me that Mr Ihaia was satisfied with the bargain that had been struck, as well he should have been given the magnanimity of Dr Wetere. There is no indication to show that Mr Ihaia intended to pursue a personal grievance until the payment of his salary stopped. Even then, he did not pursue an action with the Authority until 18 November 2004. It seems reasonable to assume that Mr Ihaia decided to pursue a personal grievance as a direct result of the fact that he was no longer being paid as agreed.

- [32] I do not accept that it was open to TWA to cease paying Mr Ihaia because of the actions of

---

<sup>5</sup> Determination No: AA 260/05.

Mrs Ihaia and I conclude that TWOA was obliged to honour the undertaking given by Dr Wetera that Mr Ihaia would be paid to the end of the Raranga course.

[33] Therefore, TWOA must pay Mr Ihaia from the date that the payment of his salary ceased, to the date that the 2004 Raranga course finished. I understand the respective dates to be 21 October 2004 and late November or early December 2004. I would expect that the parties will be able to establish the relevant dates and the sum due to Mr Ihaia, but in the event that further assistance is required, leave is given for the parties to return to the Authority accordingly.

### **Redundancy**

[34] In conclusion, and for reasons of completeness, I conclude that Mr Ihaia's assertion that his position was redundant cannot be sustained and I decline his claims accordingly.

### **Determination**

1. I find that Mr Ihaia was not constructively dismissed from his employment with Te Wananga O Aotearoa hence he does not have a personal grievance and the remedies he seeks are not available to him.
2. Mr Ihaia is entitled to be paid his salary from the date that it ceased to be paid until the end of the 2004 Raranga course. Te Wananga O Aotearoa is ordered to make the appropriate payment as set out in paragraph [33] above.
3. Given the overall outcome regarding the issues between the parties, it seems appropriate that costs should lie where they fall. It is now so ordered.

**Ken Anderson**  
**Member**  
**Employment Relations Authority**