

broadcast as NIU FM; in early 2007 it merged with Radio 531PI and established the media network, Pacific Radio News.

[5] The applicant is a radio broadcaster. In 1999 he was employed by Auckland Pacific Islands Peoples' Radio 531 PI, then owned by the Auckland Pacific Islands Radio Trust, to be the host of its flagship programme, The Breakfast Show, which went to air live from 6am to 10am Monday to Friday.

[6] When Radio 531 PI was taken over by the respondent in early 2007, Mr Ka was employed under an individual employment agreement as host of its breakfast show. His hours of work were 6am to 10am Monday to Friday.

[7] On the morning of 21 September 2009 Mr Pere Maitai, then the new Programming Director, asked Mr Ka to see him. Mr Maitai presented Mr Ka with an employment agreement for Head Announcer/Sports Radio 531PI.

[8] On 23 September Mr Ka signed that agreement accepting the position. This agreement gives a number of position titles:

The employee is employed in the position of Announcer. The employee will report to Pete Maitai the Programme News and Current Affairs Director of the employer.

[9] On the page specifying the remuneration, the position is listed as *Head Announcer/Sports Radio 531PI*. On the Job Profile the position title is *Head Announcer*.

[10] It is accepted by the parties that the position title should be *Head Announcer/Sports Radio 531PI*.

[11] On 8 October 2009, after some issues had arisen, Mr Maitai sent an email to a number of staff stating:

Hi all,

Jeff will be handling all issues to do with 531PI day time and daytime weekend. That means programming, rosters, and in particular, ads. Please see him first then me if there is a fall down. I believe this will help with the recent problem we had.

I will be making an announcement about Jeff next week after I have spoken to the day and weekend staff of 531PI.

Thanks for your cooperation.

Pete Maitai

[12] No announcement was made. At that time, consideration was being given to making changes to the organisation.

[13] Mr Ka responded to this email on 11 October saying he had some ideas he wanted to run past Mr Maitai, setting out a roster and referring to the possibility of a move to a talk-type programme station.

[14] Mr Ka had also been running a sports show for 4 hours on a Saturday.

[15] On 30 October 2009 he received an email from Mr Maitai advising him that the sports show was closing down immediately. This was due to financial difficulties with sponsorship. Mr Maitai said that he would discuss with Mr Ka the programmes for the following year along with Mr Ka's potential involvement.

[16] On Friday afternoon 6 November 2009, the Chief Executive Officer, Mr Tom Etuata, telephoned Mr Ka and they spoke about the cancellation of the sports show. Mr Etuata told Mr Ka not to worry about it as he would rearrange things for him to be back producing, hosting and presenting the sports show. Mr Ka agreed.

Head Announcer Position and 11 November Meeting

[17] On 5 November Mr Maitai emailed Mr Ka referring to previous correspondence about salary and stating in the last paragraph:

I have been advised that the position of Head Announcer, 531 PI, should be advertised. This will be done internally next week. I hope this has answered all your questions.

[18] On 11 November Mr Ka had a meeting with Mr Maitai. What happened at that meeting is strongly contested. Mr Ka has notes that he wrote after the meeting. He says that Mr Maitai told him that there would be no more sports on Saturday until the following year, that they would be moving to a talk format next year and would re-name and re-brand Radio 531 PI as Pacific Radio Talk. The community language programmes would be moving to the slot of 10am to 2pm which would enable Ms Ah Chong to take over the breakfast show from Mr Ka.

[19] Mr Ka said Mr Maitai told him “*you are finished. I will be bringing you off air and Yolande [Ah Chong] will be doing the breakfast in the New Year*”. Mr Maitai told him he was coming off the breakfast show and all that he might have for him for the following year would be the sports show.

[20] Mr Ka said Mr Maitai told him that he had made a mistake about giving him his contract. In his evidence Mr Ka said:

Pere then rose, and with what I considered to be a cruel and egotistical manner; and unceremoniously walked out of our meeting and as he went he turned round and laughed at me mockingly.

[21] Mr Maitai said that the prospect of Mr Ka leaving the breakfast show was still very much at the discussion stage at the time of the 11 November meeting in light of the proposed operational changes and the options generated by them for Mr Ka. However, in the interval Mr Ka continued with his breakfast show announcing responsibilities without change, which was the situation until he left work on 17 November. He did not tell him that he was losing his ongoing breakfast host on-air announcing role at that stage, but that might change if changes were made to Mr Ka’s position.

[22] Mr Maitai said there discussions surrounding a number of matters including the proposed reformatting of the morning talk show.

[23] The first entry on Mr Ka’s notes about there being no sports show until next year was consistent with the respondent’s subsequent proposal to have an expanded and dedicated sports show across both radio stations.

[24] Mr Maitai said he may have advised that certain aspects of his current role were finished specifically in relation to the Saturday morning sports show. It is likely that Mr Ka misinterpreted that advice in the subsequent recording of the meeting after its completion.

[25] A Head Announcer’s position was advertised on 16 November 2009.

[26] The applicant contends that his position and the position that was advertised by the respondent were the same and that he was effectively dismissed at the time that the advertisement was placed.

[27] The respondent says that this is a different position which has more managerial and supervisory responsibility than the position at that stage held by Mr Ka.

[28] On 13 November Mr Etuata emailed all staff saying that the position of Head Announcer would be advertised internally to all staff on 16 November 2009. The email from Mr Etuata on 13 November said that two new positions, Head Announcer for NUI FM and Head Announcer for Radio 531 PI had been established and that recruitment processes to fill those roles would begin the following week.

[29] Mr Ka said that shortly after that announcement, Mr Maitai approached him in the hallway and said to him, in what he considered to be a mocking manner:

If you want me to consider you again for your position I suggest you apply for it, but I don't think I'll be making another mistake.

[30] Mr Maitai did not recollect making that comment. I find that Mr Ka was mistaken in his recollection as Mr Maitai's making such a comment would have inconsistent with an email asking Mr Ka to reconsider withdrawing his application for the position.

[31] Mr Ka applied for the position of Head Announcer:

I am writing to be considered for the position of Radio 531PI Senior Announcer.

I am currently the Breakfast Show Host on Radio 531PI and have been an employee of Radio 531PI for going on ten years.

During my time I have been involved in and have experience in all aspects of the on-air side of Radio 531PI including producing, interviewing and on-air presentation.

I am excited by the opening of this position as I see it as an ideal opportunity for me to further enhance and develop the skills and experience I already have while moving forward and progressing along with the Station as a whole.

I would be more than happy to elaborate or answer any questions or queries you may have.

I thank you for the opportunity and your consideration.

[32] On 23 November Mr Ka received an email from Mr Maitai asking him to attend an interview with him and Mr Carrick Courtney, a consultant, at 11am on Tuesday, 24 November.

[33] By this stage, being of the view that he had a number of personal grievances, Mr Ka had sought advice from a number of different organisations. Since his consultations he had concluded that he might have been constructively dismissed a long time ago and that Mr Maitai was “*the centre, the creator, the perpetrator and escalator of his employment problems*”. He believed that Mr Maitai would be adverse, hostile and biased towards him and that to go for the interview would be a futile exercise and “*an opportunity for him [Mr Maitai] to once again oppress, humiliate and hurt me more.*”

[34] He accordingly wrote to Mr Maitai on 23 November:

Dear Pere,

Please be advised that I will not be attending the interview and taking legal advice.

My applying in the first place was a mistake and out of ignorance of the law.

[35] On 23 November he sent an email to Mr Maitai copying it to Mr Etuata, stating:

Dear Pere,

Your advertising and interviewing persons for my job is, in my opinion, proof that you have unjustifiably and constructively dismissed me.

Please advise me by return email why I should not be of that opinion.

[36] Mr Maitai replied on the 25th saying that Mr Ka had not been unjustifiably or constructively dismissed. He stated that at the Team Development day on 31 October Mr Etuata had announced a number of upcoming changes for the radio station, including the appointment of new Head Announcer roles for both stations which replaced the former APD roles. Mr Ka had not attended the meeting. Mr Maitai said:

The new Head Announcer roles are not as senior as the previous APD positions, but they are more senior than the current 531PI Head Announcer position which is responsible for announcing duties as

well as some minor team co-ordination activities. The new more senior Head Announcer roles are team leader roles and will be responsible for the management of the on-air announcing teams, including performance reviews.

[37] He went on to say:

If you do not wish to participate in the interviews for the new Head Announcer position you will simply continue in your current role and pay. You will need to decide whether or not you wish to progress your application for the new 531PI Head Announcer position, and we will need to receive advice from you to that effect by 5pm on Wednesday 25 November 2009, otherwise we will proceed to the next stage in the selection process.

[38] He concluded:

In the meantime your current position, and remuneration, continues unchanged. Please contact me to discuss.

[39] Mr Ka responded on 26 November saying his intentions had been made clear in his earlier emails and he had no further comments to make until he received further advice from his employer.

[40] On 27 November Mr Etuata emailed Mr Ka stating:

Pere is out of the office today, however I have had an opportunity to discuss your concerns with him regarding your current role and the vacancy that was recently advertised. I request that we meet here at the office on Monday 30 November at 2pm to discuss this further. Please confirm your availability to meet with us at that time.

[41] Mr Ka replied:

Please clarify for me what there is to be discussed further when my position has been clearly stated for you in my emails to Pere (with copies to you and others).

What you really need to do BEFORE any meeting between us can take place is for you as my employer's authorised representative (the CEO) to formally advise me in very clear terms if my existing employment contract is a firm and unfringed by the unilateral variation Pere had illegally and arbitrarily imposed on me.

If you send your affirmation to me by return email, I will confirm by return email to you my availability to meet with you at 2pm on Monday 30th.

[42] Mr Etuata replied on 28 November:

As per Pere's email dated 25/11/09 to you this is confirm that your current position, and remuneration, continues unchanged.

[43] Mr Ka then sought further clarification from Mr Etuata saying that Mr Maitai's email referred to him as Breakfast Host when his employment agreement stated he was Head Announcer/Sports Host. He asked "*are you affirming then that my 'current position, and remuneration' is indeed Head Announcer Sports Host and 'continues unchanged'?*"

[44] On 28 November Mr Etuata replied saying "*Your current employment agreement continues unchanged.*"

[45] Mr Ka said he believed that response was a confirmation that the position Mr Maitai had advertised was Mr Ka's position. He thought that the current employment being referred to was the breakfast show which would continue only until the end of the year as Mr Maitai had told him on 11 November.

[46] Mr Etuata and Mr Ka met on 30 November. Mr Ka said Mr Etuata told him that his position was safe and that the Head Announcer role that they had advertised was another position and not his. It had the same title but different components like management and rostering.

[47] Mr Ka says from the moment this was said to him he got upset and offended. He believed that Mr Etuata was, like Mr Maitai, treating him as if he were dumb and stupid and did not understand what was going on and what Mr Etuata was trying to do to him. He reminded Mr Etuata that he was already doing the duties he said were a component of the advertised role and said Mr Etuata "*continued ranting on about the advertised role still being different when to me it was the same job and he knew it to be so and yet still tried his best to deceive me.*"

[48] Mr Etuata told him that if he had attended the Team Development Day he would have been in the loop and would never had got the impression that his employment was in doubt. He told Mr Etuata that he had been told by Mr Maitai when he met him on 11 November that he was finished and that Mr Maitai had made a mistake in appointing him. When he tried to describe the meeting Mr Etuata

ignored him. Mr Etuata said they would not be making any appointments for the advertised role as the interviewed talent was not up to scratch.

[49] Mr Ka said “*I was persuaded that this statement was an untrue statement it could not have been anything else*”. He asked Mr Etuata whether his employment agreement could be changed so that he reported directly to Mr Etuata rather than to Mr Maitai. He said Mr Etuata said they should meet again to discuss the role of Head Announcer Sport with Mr Maitai and that he had asked why did he need to do that if he was still the Head Announcer Sport. Mr Etuata had replied they would need to meet with Mr Maitai to discuss the role.

[50] What Mr Maitai and Mr Etuata said they were endeavouring to do was to progress Mr Ka’s existing role by a potentially significant expansion of the sports component so as to have a dedicated sports show for both Radio 531 PI and NIU FM, following the Board decision to have such a programme given the importance of the coverage of sporting events to the listening demographic of both radio stations.

[51] Mr Ka said he told Mr Etuata that their meeting had not brought about any positive outcomes or solved his employment relationship problem, which was Mr Maitai’s unjustified conduct in the bullying of him and the likelihood that Mr Maitai would continue to make him unhappy, distressed and uncomfortable. He said Mr Etuata just giggled back at him as though it was a joke.

[52] Mr Etuata denies that there was any reference whatsoever to bullying and he denies giggling at Mr Ka. I accept Mr Etuata’s evidence.

[53] On 1 December Mr Etuata emailed Mr Ka:

I trust I have clarified for you that there is no change to your current terms and conditions of employment with us here.

On your return to your normal duties you will need to meet with Pere and myself to discuss plans for developing the role of Head Announcer Sports and finalising the job profile for this position.

Please confirm with me as soon as possible when you will be returning back to work.

[54] Mr Ka said he regarded this email, claiming that there had been no change to his current terms and conditions, as being in bad faith given that at the meeting on the 11th with Mr Maitai he had been told there would be no more sports until the next

year, they would be moving to a talk format and that the breakfast show would be taken over in the new year.

[55] On 1 December Mr Ka emailed Mr Etuata stating:

Thanks for your email. I am somewhat surprised by your serious assertion that everything is alright when in fact it isn't.

It was unfortunate that you treated our meeting as an insulation exercise for the serious wrongs done to me.

I was hoping that you would restore the trust and confidence in the happy work environment that we used to enjoy, but you didn't.

Even I know that there have been serious wrongs done to me, and fundamental breaches of my existing employment agreement and the applicable law.

I was prepared to get over it, but you resorted to justifying instead treating me like I'm dumb and stupid and did not know what you were doing.

You're a nice guy Tom, but your unjustifiable conduct at our meeting has only served to exacerbate the employment relations problem that Pere has caused.

I am ready willing and able to work in good faith, but you must also be prepared as my employer to do the same by fixing the problem from your side first.

I await your advice.

Jeff.

[56] Mr Etuata replied:

Your continued absence from work is without cause. Your medical certified expired nearly two weeks ago; further to our meeting of 30 November, you confirmed you were well.

Please report for work on Monday 7 December at your normal start time.

If you still believe you have an issue with your employment situation there are provisions in your employment agreement for dealing with employment disputes. If you would like another copy of our disputes procedure I will provide you with another copy on Monday. In the meantime I look forward to your return to work next week.

[57] On 4 December Mr Ka responded:

Please note mine are not absences from work, but were, as you and Pere already knew from the onset, caused by fundamental breaches and personal grievances that you have still to date avoided to resolve.

If they are not resolved by 4pm tomorrow afternoon you can expect my resignation on Monday morning.

In view of your continued exacerbating and unjustifiable action, I think it best this matter be referred to the Employment Relations Authority. It's your call Tom.

[58] Mr Etuata replied saying:

I have reviewed all the correspondence between us and I am still not clear what the basis of your allegations are.

You indicated you are upset that a Head Announcer role was advertised internally. It was stressed to you, and this was supported by the letter of offer provided to you at the time, that the position advertised is not the Head Announcer/Sports position previously offered to you.

As I have attempted to explain to you the role of Head Announcer 521 has first line responsibility for the management of the team of announcers. The Head Announcer/Sports is responsible for sport.

In the meantime, as I have explained to you, your current role continues (although we have had to back fill the role during your absence).

We are still keen to progress the sports role with you and would very much like you to return to work on Monday so that we can pick up where we left off.

I do not expect you to resign, and would be disappointed if you did so.

[59] The applicant has focused on the references in this email to the responsibilities for sport. The reference to progressing the sports role is a reference to the discussions that the company had been endeavouring to have with Mr Ka regarding expanding that portion of his work.

[60] Mr Ka replied stating:

Please realise although you have affirmed my position you have still yet to grant me an assurance, and trust in confidence, that you will provide me with a safe and comfortable work environment on – if and when I return.

The Head Announcer position that you advertised was MY POSITION despite your continuing denial.

I am sure as the abundance of evidence shows the Employment Relations Authority will find it so as well, so please Tom do not go down that road again and let us move on.

Give me that undertaking by return mail and I will be happy to be back at work on Monday or Tuesday if that is too early for you.

[61] Mr Etuata replied:

I was not aware there was any issue with the safety of the work environment – your email is the first time it has been raised. As CEO, my first concern is the safety and wellbeing of your people, yourself included. In response to your email, I do not believe the safety of the work environment is threatened in any way. I sincerely hope you do return to work this week. Perhaps we should meet tomorrow to enable us to move forward, with a view to you returning to work in your announcing role on Wednesday. I suggest you come and meet with myself and Pere here tomorrow at 1pm.

[62] Mr Ka said that he thought that if Mr Etuata had not refused to hear him at the meeting on 30 November he would have known that the centre of his employment personal grievance was “*Pere’s unjustified conduct and bullying of me; in the likelihood of Pere since I would still be answerable to him, continuing to make me unhappy, distressed and uncomfortable in my work under him*”. He believed that Mr Etuata’s refusal to accept that the safety of his work environment was threatened was a demonstration that he lacked appreciation of the health and safety obligations of an employer. Mr Ka said they seemed to be going round and round and getting nowhere.

[63] Mr Etuata replied saying that it was necessary for the matter to be discussed face to face as it was not good to continue discussing it over email. He said he was referring the matter to Mediation Services so they could try and work their way through this, but that mediation needed both parties to agree. Once Mr Ka had confirmed his agreement to mediation, a time and date would be arranged.

[64] Mr Ka responded by saying it was not about mediation and on 10 December wrote:

Hi Tom,

Pere first, and then you (for and/or as my employer) both wilfully committed fundamental breaches of my rights as your employee and very seriously breached your contractual obligations and duties as my employer so severely that I could not now reasonably or any longer be expected to continue in the employment contractual arrangement.

When I registered my employment grievances with Pere and subsequently yourself, you both resorted to denials and pretences avoiding the evidence of the employment problem and then following a course of deceptive conduct with the deliberate and dominant purpose of coercing and manipulation, to create an atmosphere in which my continuing in your employ is impeded so to become intolerable, thus creating an atmosphere of fear, intimidation and distrust for me in the workplace.

For all the above and other reasons to be given in the appropriate actions I will now have to take, I will now have to resign not because I want to leave, but because of Pere's and your unfair, illegal, corrosive and intolerable conduct.

[65] On 21 December Mr Etuata replied saying that he was disappointed with the decision to resign, particularly given his suggestion that concerns might be mediated with the Department of Labour, although he had not explained why that was the case. He accepted the resignation. Unfortunately, Mr Ka did not take up the offer to mediate.

[66] Mr Ka's position was to do the breakfast show and to do the sports show for four hours. That sports show was cancelled. The respondent accepts that the manner in which it was cancelled was not done in the best possible way.

Head Announcer Position

[67] I have looked at the position description for the Head Announcer position attached to the employment agreement and at the Job Profile for the position advertised on 16 November. These are two different positions. There are areas of similarity between them but I accept the respondent's position that there were significantly more managerial responsibilities in the new position. Mr Ka's position did not include in the common area of programming any responsibility for developing and maintaining programme format, developing and maintaining a style guide, monitoring on-air staff and guiding them with programme formats. In his employment agreement he was to assist with programming and promotional planning work delegated to him as well as participating in promotional activities including outside broadcasts, cross-overs, events and functions.

[68] Mr Ka was not dismissed when the Head Announcer position was advertised on 16 November.

The 8 October Email

[69] The applicant has made much of this email. It is unfortunate he was not told expressly that this was an interim arrangement, although on the evidence before me I am satisfied that it was.

[70] Mr Courtney confirmed that at the time of this email both APD roles were still unfilled, albeit subsequently replaced by the Head Announcer for both 531 PI and NIU FM, which were advertised on 16 November.

[71] Mr Maitai confirmed that the arrangements involving Mr Ka outlined in that email were interim only to allow Mr Maitai himself to complete other priority work for both radio stations relating to the proposed operational restructuring.

[72] Mr Ka said some people did come to him as a result of that email on some daily issues, but he did not say who or what specific team leadership matters he had dealt with.

[73] Mr Courtney said that when there were preliminary discussions concerning re-organisation of the three broadcast bands a range of options were discussed including continuing with the APD role, introducing self-managing teams and the creation of head announcer positions. A decision was made to proceed with the head announcer model. Both positions were to carry team leadership responsibilities for the first time, hence the specific programming and team performance responsibilities included in the position description.

[74] The creation of those roles and their place in the proposed structure was communicated to staff during the Team Development Day presentation which took place on 31 October 2009. The job profiles for the new Head Announcer positions had been prepared in early November.

[75] The pay levels for the positions were different. Mr Courtney said no formal evaluation had been done of Mr Ka's existing position but that the new one was at level 7, being \$49,000 to \$61,000. Mr Ka's position was in the range of \$42,000 to \$53,000.

Dismissal

[76] The issue to be decided is whether Mr Ka was constructively dismissed on 10 December.

[77] Although the allegations of bullying and intimidation were withdrawn, it is clear reading the resignation letter that these formed a significant part in his decision to terminate his employment. This is also clear from reading the Statement of Problem and the affidavit.

[78] The discussions about taking over the breakfast host position occurred shortly before the 2009 Christmas holiday break and not before Mr Ka's resignation.

[79] Mr Maitai said when the co-hosting suggestion was made to him by Ms Ah Chong, he told her that that was not possible because of Mr Ka's decision to resign.

[80] Having read Mr Ka's brief of evidence and the emails, it is clear that Mr Ka had formed an unfavourable view of Mr Maitai which appears to go back to some queries regarding wages. At the time of the meeting on 11 November, the sports show had been cancelled in an abrupt and unfortunate manner and Mr Ka had had what he referred to as six problems with Mr Maitai constituting three personal grievances. Those views and the use of language in the emails and in his brief of evidence indicate that the view that Mr Ka had formed of Mr Maitai was such as to make it likely that when further discussions were had between the two, there was already an existing perception that what was being put to him would be negative and that that was the light in which it was perceived.

[81] Mr Ka's job had not gone. His position had been affirmed. He was asked to return to work and mediation was offered. Unfortunately, Mr Ka did not take up the opportunities that were presented to him to try and resolve the issues that concerned him.

[82] The one breach of the employment agreement was the sudden withdrawal of the sports programme which was a unilateral alteration to Mr Ka's duties. Mr Ka's job did not change. He continued to be the breakfast host until he left on sick leave. Any other changes to his employment agreement and his duties would have been effected, if at all, through a process of discussion which both Mr Maitai and Mr Etuata had endeavoured to have.

[83] The employer did not pursue a course of action with the deliberate intention of inducing Mr Ka to resign. Mr Ka was not constructively dismissed. He does not have a personal grievance.

Costs

[84] If the parties are unable to resolve the issue of costs, the respondent should file a memorandum within 28 days of the date of this determination. The applicant is then to file a memorandum in reply within 14 days of receipt of the respondent's memorandum.

Dzintra King
Member of the Employment Relations Authority