

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2018] NZERA Auckland 100
3014372**

BETWEEN	ADMIRAL MANGANDA Applicant
AND	WAIKATO ETHNIC FAMILY SERVICES TRUST First Respondent
	SONIA OFSTED Second Respondent
	WAIKATO ETHNIC FAMILY SERVICES TRUST MANAGEMENT COMMITTEE Third Respondent

Member of Authority:	Eleanor Robinson
Representatives:	Hamish Burdon, Advocate for Applicant Nick Wilkinson, Counsel for First and Second Respondents
Investigation Meeting:	On the papers
Submissions received:	from Applicant from First and Second Respondents
Determination:	27 March 2018

DETERMINATION OF THE AUTHORITY ON A PRELIMINARY MATTER

Employment Relationship Problem

[1] The Applicant, Mr Admiral Manganda, is claiming that he was unjustifiably dismissed, and unjustifiably disadvantaged as a result of suspension by the Respondent, Waikato Ethnic Family Services Trust (WEFST).

[2] WEFST denies that Mr Manganda was unjustifiably dismissed or disadvantaged and claims that he was justifiably dismissed for serious misconduct.

[3] Mr Admiral Manganda is claiming is that the Second Respondent, Ms Sonia Ofsted, and the Third Respondent, Waikato Ethnic Family Services Trust Management Committee, aided and abetted WEFST in the alleged unjustifiable dismissal and disadvantage.

[4] The preliminary matter which is before the Authority for determination is whether or not the Second and Third Respondents should remain as parties to the proceedings.

[5] The parties agreed to the Authority determining this issue based on the Statement of Problem and the Statement in Reply, documents submitted by the parties, and on submissions from the parties.

Issues

[6] The issue for determination is whether or not the Second and Third Respondents should remain as parties to the proceedings brought by Mr Manganda.

Key Facts

[7] WEFST is a small charitable trust set up to assist people in need, primarily migrant and refugee people although its services are available to anyone. It has a Board, the members of which are volunteers and carry out the governance function for WEFST

[8] Mr Manganda was employed on 7 October 2016 by WEFST as Administrator.

[9] During December 2016 Ms Sonia Ofsted, Director and Founder of WEFST and Mr Manganda's Manager, reported the serious concerns she had about Mr Manganda's performance to the WEFST Board (the Board). The concerns were regarding Mr Manganda's attitude and unacceptable performance.

[10] The Board initiated an investigation which was carried out by person appointed by WEFST and the results of which were presented to the Board.

[11] Following the conclusion of the investigation, the Board reached a decision to terminate the Applicant's employment with WEFST, advising him in a letter sent by the Chairperson on behalf of WEFST that: "*The Board has decided to terminate your employment as of 13th March with WEFST with 4 weeks' notice which will be paid in lieu as soon as possible.*"

The Applicant's Submissions

The Second Respondent

[12] The Applicant submits that the Second Respondent raised the alleged concerns about the Applicant, requested an investigation, and requested his suspension.

[13] The Applicant submits that the Second Respondent was the 'mind' of WEFST and responsible for aiding and abetting the First Respondent in its unjustifiable dismissal and unjustifiable disadvantage.

[14] The Applicant is seeking that a penalty be awarded against the Second Respondent

The Third Respondent

[15] The Applicant submits that the Third Respondent falls within s 142W (3)(e) of the Employment Relations Act 2000 (the Act) on the basis that it was in a position to exercise influence over the management or administration of the entity.

[16] The Applicant submits that the Third Respondent conducted a flawed investigation process into the allegations against him.

The Respondent's Submissions

The Second Respondent

[17] The Respondent submits that whilst the Second Respondent raised concerns about the performance and behaviour of the Applicant, she did not form part of the investigation committee which the Board appointed to investigate the concerns.

[18] The Board met and decided on an appropriate outcome.

[19] As the Second Respondent did not form part of the process conducted in response to the concerns raised, and did not make the decision to dismiss the Applicant, she could not be deemed to have aided or abetted it.

The Third Respondent

[20] The Respondent submits that s 142W(2) of the Act states:

(2) However, if the breach is a breach by an entity such as a company, partnership,, limited partnership, or sole trader, a person who occupies a position in the entity may be treated as a person involved in the breach only if that person is an officer of the entity.

(3) for the purposes of subsection (2), the following persons are to be treated as officers of an entity:

(e) any other person occupying a position in the entity if the person is in a position to exercise significant influence over the management or administration of the entity.

[21] The Respondent submits that the role of the Board is that of governance, not of the management or administration of WEFST, moreover the Board members are volunteers.

[22] As the Board are not considered to be officers of the entity, it is inappropriate for them to be joined to the proceedings before the Authority..

Determination

Should the Second and/or the Third Respondent be joined to the proceedings before the Authority?

The Second Respondent

[23] WEFST is the employer of the Applicant, there is no dispute between the parties that that is the case.

[24] The board of an entity, including a charitable trust, has the power to delegate authority for the operational running of the company to a person who may be appointed in a managerial capacity.

[25] Provided that the Second Respondent acted within her delegated powers and in good faith during the performance of her duties as Manager I find that she would be acting on behalf of WEFST which would be vicariously responsible for her actions, including any alleged breach of the employment agreement.

[26] It is not uncommon for applications filed with the Authority to name persons or parties as respondents, who may then file a response denying that he, she, or it, is properly named as a respondent. Such a response does not automatically result in the named person or party being joined or retained as a respondent. It is incumbent upon, and part of the duties of, the Authority Member dealing with the relevant application to ensure that the correct parties are named as respondents.

[27] In this case, whilst the Second Respondent raised concerns about the Applicant with the Board, she was not part of the investigation process, nor did she make the decision to dismiss the Applicant, which was made by the Board as WEFST.

[28] I determine that the Second Respondent should not be joined to the proceedings before the Authority.

The Third Respondent

[29] A charitable trust is a legal entity. The Board of WEFST when appraised of the concerns about the Applicant raised by the Second Respondent nominated an investigation

team and at a meeting after the investigation concluded, the Board met and considered and undertook the appropriate outcome.

[30] The Board of WEFST stated that it had reviewed the process undertaken by the investigation team, the evidence, and reached a decision to dismiss the Applicant.

[31] I find that the Third Respondent in the application for joinder by the Applicant, namely Waikato Ethnic Family Services Trust Management Committee, appears to be the investigative nominees of the Board. As such I find it acted under the direction of the Board rather than on its own initiative.

[32] I determine that that the Third Respondent should not be joined as to the proceedings before the Authority.

Next Steps

[33] I have determined that WEFST is the correct and sole respondent in this matter.

[34] Clearly the process undertaken by the Respondent during the investigation, and the decision reached which resulted in the dismissal of the Applicant, will fall to be determined in the substantive investigation.

[35] The Authority will therefore contact the parties shortly to progress the matter.

Costs

[36] Costs are reserved pending the final resolution of the matter.

Eleanor Robinson
Member of the Employment Relations Authority