

unjustifiably summarily dismissed from her employment in July 2009; and a declaration that TRA's actions in September 2009 comprise unlawful discrimination on the grounds that TRA set out to find complaints to investigate about Mrs Masoe and for her raising a personal grievance.

[4] Mrs Masoe is seeking remedies including compensation for humiliation, distress and injury to feelings relating to the redundancy dismissal in the sum of \$20,000. She is seeking compensation for humiliation, distress and injury to feelings relating to the alleged unjustifiable disadvantage claim and discrimination claim in the sum of \$20,000.

[5] A claim for penalties pursuant to s.63A(3) of the Employment Relations Act 2000 for an alleged breach of the Act by TRA failing to provide a written employment agreement to Mrs Masoe was withdrawn during the Authority's investigation meeting.

[6] Penalties are sought in regard to the alleged failures by TRA to observe the requirements of good faith where it is alleged those failures were deliberate, serious and sustained and that the failures were intended to undermine the employment relationship. The penalties have been sought under s 4 A (a) and s 4 A (b) (ii) of the Employment Relations Act 2000.

[7] Mrs Masoe is seeking special damages to compensate her for legal expenses incurred by her because of the respondent's conduct and behaviour that required her to obtain legal representation during the course of her employment relationship.

[8] Finally, Mrs Masoe is seeking costs and medical expenses and disbursements arising from this matter.

[9] TRA denied all the claims. TRA says it has mitigated any requirements for compensation for the applicant in regard to the 1 July 2009 matter because it reinstated Mrs Masoe quickly on discovering its failings. Any compensation should be restricted to \$2-3,000 (submissions). TRA denied that it treated Mrs Masoe unfairly and has claimed that it was entitled to conduct an investigation into serious allegations made against her. TRA is in turn seeking costs.

The issues

[10] The first issue to determine is the matter of the 1 July 2009 redundancy decision to dismiss Mrs Masoe. She was dismissed summarily following a decision being made without proper consultation and without proper process being followed. She is entitled to remedies. The issue is how much compensation she should receive from TRA for hurt, humiliation and impact on her feelings.

[11] The second issue relates to TRA's investigation in regard to the ten allegations Mrs Masoe was notified of for investigation.

[12] The issue is what would a fair and reasonable employer have done and did the TRA follow a fair process in conducting its investigation?

[13] I am required to determine this matter in regard to s.103A of the Employment Relations Act 2000. That section provides:

103A Test of justification

For the purposes of s.103(1)(a) and (b), the question of whether dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.

[14] I must also make a decision in regard to the claim that Mrs Masoe has been discriminated against because of her personal grievance. The Employment Relations Act 2000 provides:

104 Discrimination

(1) *For the purposes of s.103(1)(c), an employee is discriminated against in that employee's employment if the employee's employer or a representative of that employer, by reason directly or indirectly of any of the prohibited grounds of discrimination specified in s.105, or by reason directly or indirectly of that employee's refusal to do work under s.28A of the Health and Safety in Employment Act 1992, or involvement in the activities of a union in terms of s.107, -*

(a) *Refuses or omits to offer or afford to that employee the same terms of employment, conditions of work, fringe benefits, or opportunities for training, promotion and transfer as are made available for other employees of the same or substantially similar qualifications, experience or skills employed in the same or substantially similar circumstances; or*

- (b) *Dismisses that employee or subjects that employee to any detriment, in circumstances in which other employees employed by that employer on work of that description are not or would not be dismissed or subjected to such detriment; or*
- (c) *Retires that employee, or requires or causes that employee to retire or resign.*
- (2) *For the purposes of this section, **detriment** includes anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.*
- (3) *This section is subject to the exceptions set out in s.106.*

105 Prohibited grounds of discrimination for purposes of s.104

- (1) *The prohibited grounds of discrimination referred to in s.104 are the prohibited grounds of discrimination set out in s.21(1) of the Human Rights Act 1993, namely –*
 - (a) *Sex;*
 - (b) *Marital status;*
 - (c) *Religious belief;*
 - (d) *Ethical belief;*
 - (e) *Colour;*
 - (f) *Race;*
 - (g) *Ethnic or national origins;*
 - (h) *Disability;*
 - (i) *Age;*
 - (j) *Political opinion;*
 - (k) *Employment status;*
 - (l) *Family status;*
 - (m) *Sexual orientation.*

The facts

[15] Very briefly, the facts are that Mrs Masoe has been employed with the TRA since 2000. She was employed as the manager of the Pacific Island team for the Family Start programme.

[16] By letter dated 1 July 2009, Mrs Masoe, without any warning or process, was advised she was being made redundant. The effect of that notice was that she was to leave work immediately. Mrs Masoe consulted a lawyer and a personal grievance was raised and, as a consequence of this action, she was reinstated.

[17] Mrs Masoe's role is to manage a group of seven staff undertaking the Family Start programme. This is a programme funded by Ministry of Social Development (MSD). It is a preventative programme which focuses on children between the ages of 0 and 5 years with regard to their health, education and social wellbeing. The focus of the programme is on Pacific and Maori families at high risk.

[18] The programme in Porirua is provided by the Taeaomanino Trust (the Trust) and TRA. The two organisations have in the past worked together under a memorandum of undertaking (MOU). They had, in the past, developed a joint bid in order to secure the contract. The role of Taeaomanino Trust looks after all Pacific service delivery and cultural practice, while TRA provides for Maori. MSD has required one contract and thus agreement was reached between Taeaomanino Trust and TRA that TRA would be the lead agency and the legal employer of all staff (both Maori and Pacific). Both the contract and the MOU expired on 30 June 2009.

[19] In June 2009, TRA, through its general manager, Mr Tahī Tait, purported to terminate the agreement between TRA and Taeaomanino Trust. Both these organisations indicated an intention at that time to tender for the Family Start programme with MSD. Both were in the tender process, which closed in August 2009.

[20] On 8 September 2009, Mrs Masoe received a letter dated 1 September 2009 written by Mr Tahī Tait in which he alleged that there were 10 instances of serious misconduct, each of which if proved could result in the termination of her employment.

[21] On 9 September, Mrs Masoe's solicitor wrote to TRA's solicitors noting the absence of information and seeking further information and raising other concerns about the matter. Some information was provided by TRA's solicitor, who suggested that a meeting should nonetheless proceed on 14 September 2009 for a disciplinary investigation. This meeting was not suitable to the applicant and her solicitors, who were seeking more time.

[22] Mrs Masoe, in the meantime, learned that a copy of the 1 September 2009 TRA letter concerning the allegations being made about her had been supplied by Mr Tait to a senior manager at the MSD. She has taken great offence about this course of action. Mrs Masoe claimed that this action confirms that the allegations were being used in an attempt to smear her, and the Taeaomanino Trust, which she had been closely associated with over a long period of time. TRA have absolutely denied this allegation. Mrs Masoe's daughter is the Chief Executive of the Taeaomanino Trust. Mrs Masoe has been a Trustee, but given the current events has distanced herself from the Trust.

[23] The disciplinary investigation meeting was postponed to Friday, 18 September. On 18 September, Mrs Masoe and a support person, Mr Louis Smith, attended the meeting and TRA was represented by its solicitor, and Mr Tait and Laura Bell, practise manager. Mrs Masoe says she was not in a position to respond fully at that meeting and has claimed that her response during that meeting was of a preliminary nature. Mr Tait and Ms Bell have disputed that claim. They claimed that the purpose of the meeting was to enable Mrs Masoe to respond and subsequently they gave her time for her solicitor to provide a further response before they made any decision.

[24] On 23 September, Mrs Masoe's solicitor was emailed and informed of the findings, which included some of the allegations where conclusions had been reached that she had committed serious misconduct. Mrs Masoe's solicitor subsequently learned that further investigations had been undertaken without further reference to Mrs Masoe or her representatives. They also learned that Mrs Masoe's named witnesses had not been spoken to.

[25] Mrs Masoe also has raised grave concerns about the veracity and reliability of the person who TRA relied upon and who made the allegations.

[26] Mrs Masoe has been requested by TRA to provide input and any comment on reasons why she should not be dismissed.

[27] On 15 October 2009, the Employment Relations Authority heard an application for interim relief and granted an interim injunction restraining the respondent from taking any further steps in relation to the disciplinary process involved to that point. This did not prevent TRA from starting again or getting input from Mrs Masoe on a procedure she could agree with. TRA has not elected to undertake any changed process or investigation.

Determination

Unjustified dismissal 1 July 2009

[28] Mrs Masoe is entitled to compensation for an unjustified dismissal carried out on 1 July 2009. She has given evidence of the impact on her of the dismissal and has been supported by witnesses. She was reinstated quickly when TRA found out that it had not acted fairly and that the dismissal was unjustified. I accept that Mr Tait and

Ms Bell did not publicise its decision. Mrs Masoe informed other people what had happened to her, and it was accepted that she was entitled to do that. TRA put her in that position and exacerbated the situation by reinstating her without any explanation. I have to find some balance between the actions of the parties and the impact on Mrs Masoe of the TRA's actions. It is my assessment that Mrs Masoe is to be compensated \$8,000 for hurt and humiliation and loss of feelings.

Unjustified action disadvantage and discrimination claims

[29] There are four (4) matters requiring a determination on the facts. Firstly, did TRA set out to find complaints about Mrs Masoe once it had decided to reinstate her?

[30] Secondly, has there been a failure by TRA to follow a proper procedure and properly investigate the ten complaints?

[31] Thirdly, would a fair and reasonable employer have concluded that Mrs Masoe had the opportunity to respond fully on 18 September and that it was not a preliminary response before it made a decision?

[32] Fourthly, has there been any discrimination in TRA's actions following on from her reinstatement for raising a personal grievance?

[33] Was the information deliberately sent to MSD by Mr Tait?

[34] I am not convinced on the balance of probabilities that TRA set out to approach any employees to find complaints to investigate about Mrs Masoe. I conclude that the timing is coincidental. I am supported in reaching this conclusion because TRA did reject some of the complaints in Mrs Masoe's favour. Therefore the link to establish any discrimination has not been met to a sufficient standard, I hold.

[35] It has been suggested that TRA should have approached Mrs Masoe in a sensitive way before formalising the complaints in writing. Indeed during the Authority's investigation meeting a number of witnesses discussed the options available in a cultural setting. The fact that none of them were pursued was not fatal except in the impact that the more formal approach has had on all the people involved. I would add that an informal course of action potentially also leaves an employer open to the accusation that they have predetermined a matter and have not followed a proper process because not enough detail is given. A clear understanding would be needed if any informal and sensitive approaches were envisaged. The omission of

having some informal contacts with Mrs Masoe beforehand on its own does not give rise to a personal grievance.

[36] TRA was entitled to investigate the serious matters raised. The letter quite rightly set out the broad allegations and possibilities on Mrs Masoe's future employment. But Mrs Masoe was entitled to get all the information and there is some doubt about that happening in full. A fair and reasonable employer would have permitted Mrs Masoe an opportunity to have a full response, instead of considering that her one chance was at the meeting on 18 September and allowing her lawyer to respond afterwards. A prudent employer would have ensured that she had nothing more to add, given she had obtained legal assistance and her lawyer had concerns about the information being relied upon and the procedure followed. Her lawyer tried to raise these and they were not adequately considered and responded to I hold. Moreover, a fair and reasonable employer would have given Mrs Masoe another opportunity to respond given she provided what she thought was a preliminary response and had provided a list of witnesses she considered would help her. Mrs Masoe had a support person present and he thought she was making a preliminary response only. TRA followed up its enquiry with other people after the meeting without going back to Mrs Masoe. She was entitled to know what they had to say and who they were. The decision not to do this was unfair. Thus, TRA's investigation and disciplinary process was flawed, I hold.

[37] On the witnesses, because the allegations involved serious matters, TRA had an obligation to ensure it interviewed all relevant witnesses and give the results of such interviews to Mrs Masoe. I accept it tried to interview one of the people directly involved, a cleaner. It could not locate him at the time and did not interview him at the time, but he gave evidence at the Authority's investigation meeting. English is his second language. Thus, without his input it would have been hard for the employer to make any adverse findings against Mrs Masoe. This is especially important considering that findings of credibility needed to be made in regard to the person who made the complaints. TRA may have benefitted from information from some of the people on Mrs Masoe's list. The absence of this was unfair and contaminated the investigation, I hold.

[38] This leads me to conclude that Mrs Masoe has a personal grievance of unjustified action in regard to the employer's procedure for conducting its

investigation. She has been disadvantaged because her employment has been put into jeopardy and the process was not fair. TRA did not act in good faith, but its action fell short of being deliberate, wilful and sustained.

[39] I am not satisfied that TRA's action on the process it followed was linked to the earlier personal grievance. This is because it would appear that the allegations were independently made. Legal advice was sought. TRA was entitled to investigate the allegations separately. They were serious matters and a fair and reasonable employer would have investigated them.

[40] Mrs Masoe should have been informed about the decision to send Mrs Masoe's personal information to MSD. The failure to be open and communicative on this was a breach of good faith, but not deliberate and wilful given Mr Tait genuinely believed that he was required to provide MSD with the information.

[41] Mrs Masoe is entitled to remedies for her unjustified disadvantage personal grievance. I have been asked to reserve findings on the lost wages until Mrs Masoe and her representative can assess this matter further from the details available. I have decided to do so as requested, but only because the claim has not been quantified properly. Leave is reserved.

[42] On the matter of compensation Mrs Masoe is seeking \$20,000 for her personal grievance. Since she has not been entirely successful on all her claims it is my finding that the claim has not been established. I hold that she is entitled to \$6,000 under s 123 (1) (c) (i) of the Act for the impact of the employer's failure in its investigation. Mrs Masoe's feelings have been affected by the impact of the employer's failed process on the matters against her which have still to be properly investigated.

[43] I must consider whether or not there has been any contribution and I hold that there has not been. This is because the procedure and the running of the investigation are the employer's responsibility and whilst both parties had a view about the nature of the meeting held on 18 September Mrs Masoe had conveyed her clear understanding of what she thought the situation was. A prudent employer would have covered this off more cautiously and been risk averse. Blameworthy conduct for a different understanding reasonably reached can not amount to contribution in this case, I hold.

Good faith, claim for penalties, and claim for special damages for costs

[44] I now move on to the other remedies sought, and the first being: penalties for a breach of good faith. TRA has breached good faith by not following a clearly defined procedure and lacking in fairness. However I consider that this was not deliberate or wilful, but because of poor execution of the procedure required. I have held that the employer was entitled to raise serious issues with Mrs Masoe. If it had been more thorough it would have interviewed all the relevant witnesses properly and given the results to Mrs Masoe for a final comment. In not doing so it has left open a question about the motives considering the breakup of the MOU between the Trust and TRA. Also Mr Tait's communication with MSD did not involve any advance communications with Mrs Masoe, as should have happened given the risks and what was at stake. The failure to do so has added to the suspicions of ulterior motives about the tendering for the Family Start programme, which both organisations had an interest in. Whilst the TRA's actions amounted to a breach of good faith I am not persuaded that the breaches were deliberate and wilful. This is because Mr Tait genuinely believed that he had to provide the information to MSD.

[45] Next is the claim for special damages for costs during the employment relationship. I have come to the view that Mrs Masoe would not have been able to handle the matter, as it escalated, on her own. She has had an order for costs already in regard to the interim proceedings and that matter is completely excluded from the assessment for special damages. There has been no provision of any invoices, receipts and affidavit evidence since the Authority's investigation meeting. Since this information was envisaged for the Authority's investigation and TRA has a right of any reply I have decided to reserve the matter. Leave is granted only because I am waiting on any invoices, receipts and affidavit evidence from parties if they wish to return to the Authority, and if it remains an issue.

Conclusion

[46] Te Roopu Awhina Ki Porirua Trust is to pay to Mrs Masoe:

- a. \$8,000 for hurt and humiliation and loss of feelings under s 123 (1) (c) (i) of the Act for the unjustified dismissal claim.
- b. \$6,000 under s 123 (1) (c) (i) of the Act for the impact of the employer's failure in its investigation.

[47] The lost wages claim is reserved.

[48] The claim for special damages for costs during the employment relationship is reserved.

[49] Costs are reserved.

[50] Any variation and changes, including any mutually agreed arrangements and request for orders by consent in regard to the previous orders of the Authority, are reserved.

P R Stapp
Member of the Employment Relations Authority