

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

WA 193/09  
File Number: 5158527

BETWEEN                      John Nepe-Apatu  
   Applicant

AND                              Te Kohanga Reo National Trust  
   Board  
   Respondent

Member of Authority:      Denis Asher

Representatives:            Andrew Gallie for the Applicant  
   Barbara Buckett for the Respondent

Investigation Meeting      Napier, 17 & 18 November 2009

Submissions Received      By 11 December 2009

Determination:              11 December 2009

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**DETERMINATION OF THE AUTHORITY**

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**The Problem**

[1]      Did Mr Nepe-Apatu resign or was he unjustifiably dismissed?

[2]      If he was unjustifiably dismissed, what remedies are owed him and did he contribute to his grievance?

## The Investigation

[3] In his statement of problem filed in the Authority 9 April 2009 Mr Nepe-Apatu said he had been unjustifiably dismissed and he sought, amongst other things, reinstatement. At that time the parties had not undertaken mediation; Mr Nepe-Apatu was willing to attend.

[4] In its statement in reply received on 24 April the respondent (TKR) said Mr Nepe-Apatu was justifiably dismissed for serious misconduct in terms of par 10.2 of their employment agreement, including assault, harassment of a work colleague or others and actions which seriously damaged the respondent's reputation.

[5] TKR also submitted the remedy sought by the applicant was *"so outrageously out of kilter within anything this jurisdiction is likely to award ... it demonstrates these proceedings have been filed in bad faith and lack credibility"* (par 3.8).

[6] TKR said that, should the Authority find in Mr Nepe-Apatu's favour, 100% contributory fault should be found. It is alleged, amongst other things, that he acted deceitfully and took personal advantage of a project funded by TKR. It sought reimbursement of any other income or monies paid to the applicant while he was working for and being paid by TKR.

[7] However, by the time of its final submissions (received 3 December) TKR's position had changed and, amongst other things, it invited the Authority to conclude that, by his actions at their final meeting on 17 March Mr Nepe-Apatu, including (verbatim) *"leaving the meeting, leaving a note with his laptop and phone ... inviting his resignation, caused his termination ... . His leaving ... started a chain of events which lead to the termination of his employment. The employer merely responded to the applicant's actions"* (par 3). In other words, Mr Nepe-Apatu resigned.

[8] In a telephone conference on 30 April the parties agreed to undertake mediation by 20 May. As previously communicated to the parties, and which counsel for the applicant, Mr Gallie said he had already advised his client in respect of, I confirmed that the level of compensation sought (\$150,000) was not commonly

awarded by the Authority and strong argument and good case law would be required to support such a claim.

[9] The matter was subsequently not resolved at mediation.

[10] In a second telephone conference on 10 June the parties agreed to a two-day (if necessary) investigation in Napier, and a time-line for providing the Authority with witness statements and an agreed bundle of documents (note: all references to documents in this determination are to the parties' agreed bundle).

[11] During the conference Mr Gallie advised his client was amending his claim for compensation for hurt to a sum to be determined by the Authority.

[12] By letter dated 16 July, and in respect of the matters set out in pars 4 & 5.1 of its statement in reply, counsel for TKR, Ms Buckett, advised that her client was discontinuing its "*counter-claim in order to limit the argument before the Authority to the justification of dismissal*".

[13] Some delay occurred both in the parties' meeting agreed time lines for providing witness statements and, because of an unfortunate accident to counsel for the respondent, the matter coming to an investigation.

## **Background**

[14] Mr Nepe-Apatu was employed by TKR as one of its 10 district managers. His terms and conditions of employment were set out in an individual agreement dated 18 July 2007.

[15] At the time of his appointment TKR knew Mr Nepe-Apatu was a patched member of the Mongrel Mob.

[16] His principal responsibilities were set out in schedule 1 of his employment agreement. In particular, Mr Nepe-Apatu was responsible for quality advice and support to 58 kohanga reo and their whanau in his district and for Board training courses involving the Tertiary Education Commission (TEC).

[17] Whanau are required to self manage and, to that end, develop the necessary skills to manage their kohanga. This includes the language, curriculum, administration, compliances and human resources. They are not managed by a particular officer but by the whanau itself. It is the respondent's role to administer vital support to help kohanga develop the necessary skills and promote the language.

[18] Mr Nepe-Apatu received a significant pay increase during his employment with TKR so as to bring his remuneration into line with similar positions elsewhere in the organisation.

[19] Mr Nepe-Apatu's employment was terminated, in disputed circumstances, during or following a meeting on 17 March 2009.

[20] By letter in Maori dated 17 March 2009, TKR's chief executive, Ms Titoki Black, advised that, amongst other things:

*Even with the face to face discussions we had today, this communication is to confirm the decision I have made that you vacate the position you hold as Kaiwhakahaere ā rohe (District Manager) for Ngati Kahungunu on the 23<sup>rd</sup> of March 2009.*

*We have both held our present positions now for more than a year, yet there have been many complaints (to me) of your conduct towards others. This particular behaviour has been the subject of deliberations and indeed, you have been treated generously. Time has been afforded you to allow you to adopt a more acceptable mode (of behaviour) but to no avail.*

(agreed translation; doc 71)

## **Findings**

[21] As the parties' evidence in general makes clear, Mr Nepe-Apatu's employment with TPK was a troubled one. Two incidents stand out: as accepted by the applicant, on Friday 10 August 2007 Mr Nepe-Apatu directed abusive and obscene language at the partner of a senior manager, and fought with the same man. He said he had been provoked by the actions and language of the other man and fought in self defence.

[22] Later, and separately, TKR authorised a report (doc 63) into the applicant and the conduct of that manager. The outcome was agreed: as confirmed by their evidence, the parties to this problem undertook to resolve the issues set out in the report “*the Maori Way*” (term used by all parties at the Authority’s investigation). The report appeared some time after December 2008.

[23] Specifically, the parties’ representatives met and reached a confidential understanding. Mr Nepe-Apatu said, and the respondent did not dispute, that – as part of this process – it was agreed that in the event of TPK having any future concerns about the applicant’s performance it would communicate its concerns in the first instance to Mr Nepe-Apatu’s brother.

[24] Whatever was agreed by the parties did not extend to any formal disciplinary action like that set out by the respondent as doc 13, but which Mr Nepe-Apatu disputes ever having seen.

[25] However, notwithstanding the confidential outcome, I am satisfied that the report prepared for TPK confirmed other evidence before the Authority that there were widespread, and ongoing concerns about Mr Nepe-Apatu’s performance. No one questioned his commitment to te reo Maori and tikanga Maori, but they were often troubled by – amongst other things – his swearing and intimidatory behaviour, his ability to fulfil his role and the perception he was using his position to unfairly advance the interests of his domestic partner.

[26] The report identified, as confirmed by the applicant, the open conflict between himself and another, more senior manager which embarrassed and shamed many. It was divisive and clearly created difficulty for those working around the pair.

[27] While the report confirmed Mr Nepe-Apatu’s claims he was being actively undermined by that senior manager, it made firm recommendations in respect of the applicant, including he be immediately placed “*on probation for six months*”, that he cease swearing and intimidating behaviour, cease all gang affiliations during work hours, refrain from using his partner in a personal assistant capacity and manage personal commitments to ensure they did not impinge on professional responsibilities

(page 6, doc 63). The report also recommended Mr Nepe-Apatu undertake professional and personal development.

[28] The final recommendation was that, if Mr Nepe-Apatu breached these requirements then they would be considered serious, and the chief executive officer could enforce disciplinary procedures *“and this may include issuing ... a final written warning”* (above).

[29] While the outcome in respect of the matters identified in the report was confidential, the respondent had ongoing issues with the applicant. As Ms Black makes clear in her witness statement at para 21, *“Matters came to a head with (Mr Nepe-Apatu) ... on 21-23 February 2009”*. Ms Black then lists the precipitating factors (pars 21-26 inclusive). They included Mr Nepe-Apatu’s failure to work as a team member, other embarrassing behaviour, and shouting and swearing at his staff. Ms Black concluded that Mr Nepe-Apatu’s *““ahua” was unforgivable”* (par 29). Another complaint followed shortly afterward.

[30] Ms Black reflected on the issues and *“decided that something had to be done about his bad and abusive behaviour. That I needed to talk with him and engage with him about it”* (par 33).

[31] Ms Black instructed her personal assistant to call Mr Nepe-Apatu to a meeting in Wellington. Other than being told there were issues his chief executive wanted to discuss, the applicant was given no notice of the purpose of the 17 March 2009 meeting, nor was he advised of his right to be represented; his brother was not contacted in respect of the impending meeting.

[32] At par 35 of her witness statement, Ms Black says the purpose of the meeting *“was to talk with him about all the issues that had come to my attention, to discuss with what needed to change and to give him a final warning about his behaviour”*. As it happened, the outcome to the 17 March meeting was more than a final warning.

[33] In her witness statement, Ms Black describes the 17 March meeting and makes clear its obvious tensions and difficulties. Ms Black agrees she used the phrase attributed to her by Mr Nepe-Apatu, that ‘I just don’t know what to do with you’. At

par 39 of her witness statement, Ms Black says she had to leave her meeting with the applicant for about 20 minutes, and that when she returned “*he had gone leaving a resignation letter behind*” (par 39, Ms Black’s statement; doc 70), together with his laptop and phone.

[34] During the investigation Ms Black agreed that, during a later conversation, after locating Mr Nepe-Apatu and taking him to the airport, he said, “*Put it in writing*”. I asked Ms Black what “*it*” was. She answered, “... *that I was going to terminate his employment*”.

[35] I am satisfied from Ms Black’s answer and from a plain reading of doc 70 that Mr Nepe-Apatu did not resign but instead, comprehending that his time with TKR was about to end, asked his employer to set out its position in writing to him: the applicant understood that position to be – as the letter of dismissal makes clear – that he would be terminated (doc 71).

### **Unjustified Dismissal**

[36] The decision to dismiss Mr Nepe-Apatu lacked any procedural fairness: he had received no notice of the complaints about him. He was given no opportunity to be represented especially, as was earlier agreed, by his brother. He was provided no notice that his employer was contemplating dismissing him and given no chance to participate in any investigation by TKR into the allegations and, if proven, appropriate sanctions. TKR’s actions were in complete breach of the undertakings it committed itself to at clause 35 of its handbook (doc 1) as well as it contracted undertakings with Mr Nepe-Apatu at clauses 10.2 & 11 and schedule 2 of their employment agreement, including suspending Mr Nepe-Apatu on pay while investigating alleged serious misconduct (clause 10.2, doc 2) and expressing “*their respective view points openly and informally, as soon as practicable after the issue has been identified, on at least two distinct occasions*” (schedule 3, doc 2).

[37] The respondent is also in breach of its contracted undertaking to arrange an internal mediation conference and, if that did not resolve the problem, to undertake the Department of Labour’s mediation process (schedule 3): it took neither of those steps. Mediation occurred only after the filing of Mr Nepe-Apatu’s statement of

problem and the Authority's first telephone conference, and not – as required by the employment agreement – after the filing of his notice of personal grievance.

[38] The respondent's position on mediation, as set out in its statement in reply (filed on 27 April 2009), that "*the applicant failed to attempt and/or offer mediation and instead proceeded to file these proceedings*" is plainly wrong as Mr Nepe-Apatu's grievance advice of 23 March 2009 asks for discussions and an urgent meeting "*to discuss this matter further*" (doc 72); he received no response to that request other than silence, hence the filing of a statement of problem followed.

[39] The other reason given by the respondent in its statement in reply, that the "*quantum of remedy sought ... is ... outrageously out of kilter*", while an apposite observation, was no ground to deny mediation (where such a point could expect to be effectively put) in face of its contracted obligation to undertake mediation as well as the scheme of the Employment Relations Act 2000 (the Act).

[40] The claims set out in the statement in reply that (verbatim) "*The rules of natural justice were fully complied and the respondent at all times acted according to the serious misconduct procedures as defined in the applicant's Individual Employment Agreement and respondent's human resources policies and procedures*" (par 3.2) would be misleading if they were not so patently false.

[41] TKR's actions amount to a serious and sustained breach of its obligations to Mr Nepe-Apatu.

[42] In *Air New Zealand Ltd v V* (unreported, Colgan C J, Travis, Shaw and Couch JJ, AC 15/09, 3 June 2009), at para [37] it was made clear that the Authority is required to objectively review all the actions of an employer up to and including the decision to dismiss, against the test of what a fair and reasonable employer would have done in all the circumstances.

[43] As abundant case law makes plainly clear, a fair and reasonable employer would meet its contracted obligations in a case such as this, would conduct an investigation into the complaints against Mr Nepe-Apatu, would give him every opportunity to be represented (especially when it had previously agreed to take up

matters with a named representative), and would reflect properly on any submissions made to it. The applicant enjoyed none of these obligations and he was therefore unjustifiably dismissed.

## **Remedies**

### **Reinstatement**

[44] It is not practicable to reinstate Mr Nepe-Apatu and I decline to do so. My reasoning is largely set out below in my conclusions on contributory conduct. While the applicant's dismissal was entirely lacking in procedural fairness, by 17 March 2009 Mr Nepe-Apatu was well aware of what his employer expected by way of appropriate conduct from him. It did not include directing obscene language toward his staff, speaking of senior managers using similar language, talking over people and shouting them down. It did include setting an example to whanau and reflecting his employer's values. The evidence that the applicant conducted himself inappropriately was confirmed by his own, grudging admissions during the Authority's investigation, and by the evidence of the TKR's witnesses that I had no reason to doubt. Mr Nepe-Apatu's wearing of a Mongrel Mob patched-vest in public while working for TKR did not breach any direction by the respondent: it never instructed him not to. However, it is a clear measure of Mr Nepe-Apatu's lack of judgement, and his confrontational style. Mr Nepe-Apatu attempted to mislead the Authority with the production of late evidence, a photograph, which he knew was not what he presented it initially to the Authority as. His overall behaviour demeaned himself, the respondent and their shared cause. There is no reason to believe his conduct would change were he to be reinstated. It is not feasible or practicable to reinstate Mr Nepe-Apatu as a repeat of the same problems is entirely foreseeable: the potential for a successful employment relationship does not exist as the differences between the parties are tectonic and will resurface.

[45] In support of the above I also note serious but unsupported allegations put forward by Mr Nepe-Apatu in his witness statement, that others "*totally misappropriated*" TKR funds (par 27), and "*There has been blatant misappropriation*" (par 28) and of kohanga reo charging "*exorbitant fees*" (above), etc.

[46] By letter dated 5 November 2009 (not included in the bundle and some of which is advanced on a without prejudice basis) Mr Gallie acknowledged that “*Whether or not there exists substance to (his client’s) allegation (as I believe there to be) will presumably be covered in any determination given by the Authority*”. Mr Nepe-Apatu made clear during the investigation he had no evidence to support his claims, and he confirmed he had not raised his concerns with TKR during his employment.

[47] The respondent advised it was satisfied there is no evidence of financial mismanagement or theft.

[48] This is another reason I find why, having made and persisted with serious, and divisive, but unsupported allegations in respect of members of his broader organisation, notwithstanding being on notice he should substantiate or withdraw these claims, it would not be practicable to return the applicant to his former position.

#### **Compensation for Hurt**

[49] Mr Nepe-Apatu seeks compensation for hurt, etc as determined by the Authority. The applicant gave strong but unsupported evidence of the distress he felt at the time of his dismissal and subsequently. While his evidence was uncontested it should be measured in light of Mr Nepe-Apatu’s overall demeanour, his grudging acknowledgements of fault and his attempted misleading of the Authority.

[50] I accept Mr Nepe-Apatu’s claim his distress was deepened by the allegations set out in TKR’s statement in reply: while the respondent’s counter-claim was subsequently withdrawn (see par 12 above), the allegation of assault was not. There is no evidential basis to that claim: there is also no evidence of it being a factor in Ms Black’s mind in her decision to dismiss. If it was it should not have been as the only evidence of an assault was in respect of a matter that was dealt with much earlier by the respondent and which any way was “*expunged from the file on 28<sup>th</sup> February 2008*” (doc 13).

[51] TKR’s response to Mr Nepe-Apatu’s grievance has been as inflexible as Ms Black’s decision to dismiss was without warning. This was a situation which cried out for frank admissions by both parties in coming to a resolution on their own terms,

and in a way that was as proper and just to themselves as to the movement they both cherish.

[52] Having regard to the evidence before me including the koha extended at the time of his dismissal (see doc 71) and the value to Mr Nepe-Apatu in a public finding he was unjustifiably dismissed, I am satisfied that compensation for hurt of \$18,000 is appropriate in all the circumstances.

### **Lost Remuneration**

[53] Mr Nepe-Apatu is presently unemployed despite applying for “*heaps*” (oral evidence) of positions. He said his difficulties in finding fresh employment arise out of his unjustified dismissal. He is registered as unemployed and receives a benefit: he regularly reports to the agency in respect of position vacancies, etc.

[54] It is not clear why Mr Nepe-Apatu has not gone back to running full time the youth consultancy he set up and managed before taking employment with TKR.

[55] I note that Mr Nepe-Apatu has made every effort to bring on and resolve his personal grievance. Under these circumstances I am satisfied it is appropriate to apply s. 128 (3) of the Act in his favour and award remuneration lost for six months from the date of his final pay period.

### **Contributing Fault**

[56] As will be clear from par 41 above, this is an instance of significant contributory fault (s. 124 of the Act). There is a clear record, as confirmed by TKR’s report which is not disputed by the applicant, of his behaviour – his swearing and shouting down of people and poor judgement/inappropriate conduct – contributing significantly to the situation that gave rise to his personal grievance.

[57] The evidence of the extent of that conduct is substantial and calls for a corresponding reduction of the remedies that would otherwise have been awarded. Having regard to Mr Nepe-Apatu’s admissions and the evidence of others I set that contribution at 50%.

**Determination**

[58] TKR is to pay to Mr Nepe-Apatu:

- a. As compensation for hurt, the sum of \$18,000 less 50% contributory fault, i.e. \$9,000 (nine thousand dollars); and
- b. Six months lost remuneration, less 50% contributory fault. Leave is reserved to the parties if they are unable to agree this sum.

[59] Costs are reserved. As indicated to the parties during the investigation, costs typically follow the event. This investigation ran to two-days, albeit with some of that time being taken up by the parties unsuccessfully attempting to settle matters on their own terms. Subject to parties' submissions, but taking into account the costs Mr Nepe-Apatu was unnecessarily put to in defending unsubstantiated allegations advanced by the respondent which were withdrawn late in proceedings or not at all, I can see no reason not to set costs at \$4,000 per day.

**Denis Asher**

**Member of the Employment Relations Authority**