

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2014] NZERA Wellington 34  
5427954

BETWEEN            IIRITANA HOROWAI  
                              NGAWHARAU  
                              Applicant

AND                    THE PORIRUA WHANAU  
                              CENTRE TRUST  
                              Respondent

Member of Authority:    P R Stapp

Representatives:        Chris Moses, Advocate for the Applicant  
                                  Alan Knowsley, Counsel for the Respondent

Investigation Meeting:    25 March 2014 at Wellington

Submissions Received:    At the investigation meeting

Determination:            15 April 2014

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The employment relationship problem filed by Mr Iritana Horowai Ngawharau against the Porirua Whanau Centre Trust (PWC) is about how their employment relationship ended on or about 6 June 2013, and what happened after that?

[2]     During his employment with the PWC, Mr Ngawharau went on a secondment with an organisation called the South Pacific Academy (SPA). There are two issues arising about this. They are that Mr Ngawharau says that he had no idea what the secondment was about, what his role was and he complains that there were no terms and conditions of employment put in writing in regard to the secondment. Second, he claims that he was not unhappy in his work at PWC for Ms Liz Kelly, the Chief

Executive Officer of the PWC, to say that the secondment was a solution to a problem that she says existed.

[3] Mr Ngawharau says that on 6 June 2013 he reasonably believed that he had been instantly dismissed for poor performance by Ms Kelly. He says that on 7 June 2013 when he returned to PWC to apologise for losing his temper at their meeting on 6 June 2013, Ms Kelly reconsidered the decision and reinstated him so that he could resign on the same day.

[4] Mr Ngawharau claims in the alternative that PWC coerced him to resign, the next day. Also he claims that if there is a dismissal, PWC failed to follow a proper procedure and had no cause to dismiss him.

[5] PWC denies all Mr Ngawharau's claims. Ms Kelly says that Mr Ngawharau had been unhappy at PWC. She was approached by Mr Mike Fermanis the campus manager at the South Pacific Academy (SPA) for assistance. The suggestion of a secondment became a possible solution as to Mr Ngawharau's feelings about PWC. When the secondment ended Mr Ngawharau was expected to return or make arrangements with Mr Fermanis for permanent work at SPA. PWC claims that Mr Ngawharau failed to return to work when he was given opportunities to do so, and PWC came to the conclusion that he had abandoned his employment in failing to make contact on what he wanted to do.

### **Issues**

[6] The issues are as follows:

- (a) How did the employment end on either 6 or 7 June 2013?
- (b) Did PWC coerce Mr Ngawharau to resign on 7 June 2013?
- (c) Was Mr Ngawharau dismissed?

### **The facts**

[7] Mr Ngawharau was employed by PWC and under the terms of an individual employment agreement he was paid an hourly rate of \$16 to work 40 hours per week. His rate of pay increased to \$18 per hour during his employment. He was employed

as a support social worker at PWC. The agreement applied from 13 February 2012 for him to work at Cannons Creek.

[8] Mr Ngawharau went on secondment to SPA in May 2012 on an arrangement between Ms Kelly and Mr Fermanis to recruit students for SPA. Mr Fermanis needed someone to help out at SPA at the time. Ms Kelly says that this was a solution to the problem of Mr Ngawharau's unhappiness at PWC. He accepts that he had issues with PWC, but they were different matters to Ms Kelly's concerns, and he says that he was not unhappy. Mr Ngawharau's role at SPA was to recruit students for one week, but the time was extended. Ms Kelly says Mr Ngawharau asked for a week's extension of time, and during the Authority's investigation did not disagree with this. Mr Fermanis says Mr Ngawharau reported to him at SPA. He had no information about the reason why Ms Kelly chose Mr Ngawharau to be seconded. The work lasted three weeks, for which the PWC paid Mr Ngawharau's wages, and I accept that he requested the extension, which is consistent with him helping two clients from there later.

[9] Mr Ngawharau says he was confused about the role and to whom he answered to at SPA. He says he did not agree with the secondment and was unhappy with the secondment. This is inconsistent with the facts, I hold

[10] I hold that there was at least an arrangement for the secondment that Mr Ngawharau entered into with Ms Kelly. My reasons are:

- (a) That Ms Kelly and Mr Fermanis have been able to confirm the arrangement;
- (b) That Mr Ngawharau did understand he had a role with SPA for at least three weeks and that he reported to Mr Fermanis;
- (c) That Mr Ngawharau's had feelings about some issues at PWC, and in particular about Liz Kelly. It is common ground that the events did not involve performance and disciplinary procedures;
- (d) That Mr Ngawharau confirmed speaking to Ms Kelly and Mr Fermanis about the arrangement and work on secondment including the extension of time with SPA;

- (e) That Mr Ngawharau talked to Liz Holden, a counsellor at PWC, that he had been seconded to SPA. This confirms that there was an arrangement and that he would return to PWC, unless a permanent position came about at SPA.

[11] Mr Ngawharau says that he was “fired” or that he believed that he had been “fired”. He has relied on his claim that Ms Kelly said “*I’m sorry to be the bearer of bad news but we have to let you go*”. Unfortunately for Mr Ngawharau, the evidence of Ms Kelly and Liz Johnston, operations manager at PWC, is that Ms Kelly said “*I said we are going to have to let you go if you are not going to be working for us*”. This is supported by the facts that there was a secondment; that between Mr Fermanis and Mr Ngawharau they were to work out any permanent arrangements; and Mr Ngawharau was to inform Ms Kelly about what he wanted to do.

[12] Also, Mr Ngawharau in his statement of problem filed in the Authority and used as the basis of his evidence was that “*I had reason to believe I was instantly dismissed from my position as social support worker on June 6 2013*”. Reason to believe is different from the actual situation of being “*fired*”. The word “fired” was never actually used by Ms Kelly. It makes it therefore more likely than not, that she did not “fire” him, I hold.

[13] Also to support my conclusion, Mr Ngawharau was angry, which he accepts, and he left the meeting in an angry state. It is likely that in such circumstances he has overlooked the qualification that Ms Kelly and Ms Johnston say was put on the words of having to let him go. Indeed, their evidence is consistent with the documentation that supports them after this matter was raised. It follows that it is more likely than not that Ms Kelly and Ms Johnston are more accurate recalling what Ms Kelly said.

[14] Mr Ngawharau has relied on a comment that one of his witnesses says that Ms Johnston called him a “*liability*”. Ms Johnston could not recall making such a comment. I cannot conclude that from any such comment, even if it was made, that Ms Johnston was complicit in wanting to remove Mr Ngawharau from PWC given her attempts by text to get him to respond. Given that Mr Ngawharau had issues with PWC any such comment would need to have been put in to context and in the absence of that and that Ms Johnston could not remember saying such a thing, it is not safe for me to rely on the alleged comment.

[15] On 7 June 2013, Ms Kelly, Ms Johnston and Mr Ngawharau met again. Mr Ngawharau says that at this meeting he was coerced to resign. I hold that Ms Kelly genuinely believed that he did make a decision to resign, given a management meeting minute produced during the Authority's investigation, but it is common ground that other than a verbal resignation, nothing was confirmed in writing from Mr Ngawharau. Since Ms Kelly and Ms Johnston wanted his resignation in writing if that is what he decided to do, that would have been the minimum expectation to have it confirmed, I hold. However, Mr Ngawharau never put his resignation in writing and it is inconsistent to believe that he was coerced into resigning when he did not do so and was advised by Ms Kelly that he should get legal advice, which is what he did do at the time. Ms Kelly's advice to Mr Ngawharau, to get representation, is not consistent with an employer coercing an employee to resign. The meeting broke down. After this Mr Ngawharau did not return to work.

[16] Instead, Ms Kelly and Ms Johnston sought to discuss with Mr Ngawharau about what was happening and what he wanted to do. Ms Kelly and Ms Johnston say they were waiting on Mr Ngawharau to make a decision, and if he was not working for the Trust it could not pay him and that the Trust would have to let him go if/as he was not working for it.

[17] Ms Johnston says that she scheduled a meeting with Mr Ngawharau's representative at the time, to be held on 17 June 2013, and Ms Johnston made arrangements for Ms Kelly to attend. It was left for Mr Ngawharau's representative at the time to arrange his attendance. Neither of them attended.

[18] When the meeting did not occur Ms Kelly wrote to Mr Ngawharau on 17 June 2013 and requested him to attend another meeting set for 19 June 2013. This letter was sent, but Mr Ngawharau did not receive it immediately. It was discovered at the Authority's investigation meeting that Mr Ngawharau never picked up that letter at his aunt's address until about 22 June 2013, because he had changed his address during the period, and of course when he picked up the letter had missed the deadline (19 June). At some point, he then took the letter to his representative and that person telephoned Ms Kelly on 26 June 2013. Ms Kelly was concerned to hear the version of events that Mr Ngawharau had provided to his representative, but came to a conclusion based on the information that Mr Ngawharau's first representative gave her that he was not returning. Ms Kelly was entitled to rely on that information and it

was a reasonable conclusion she came to. Indeed this is consistent with Mr Ngawharau's evidence that his representative at the time told him not to return to work and Ms Kelly says the representative commented that Mr Ngawharau had technically abandoned his employment.

[19] From this point, PWC's contact with Mr Ngawharau ceased and without such contact and any correspondence from either him or his representative at the time, PWC came to the conclusion that Mr Ngawharau had abandoned his employment. In addition it is clear from the text messages produced that between 11 and 13 June 2013 Ms Kelly and Ms Johnston wanted Mr Ngawharau to go to work and discuss his intentions with them. Ms Kelly's letter dated 17 June could not have been clearer that there needed to be a meeting. Mr Ngawharau had been given the opportunity to get a representative to help. PWC had attempted to make contact with him and gave him a reasonable opportunity to respond. Ms Kelly reasonably understood that Mr Ngawharau had decided not to return to work when she spoke to Mr Ngawharau's representative on 26 June. However the thread of his text replies was to put a decision and response off. He clearly was doing his own things at the time having regard to his text replies. This is supported by a file note he produced from his representative's office about what he was doing and to put everything on hold until he was heard from. He now says that he was instructed by his representative at the time not to go to work. He is responsible for that decision. His decision seems consistent with what Ms Kelly says she was informed by the representative. The matter took a different turn from 3 July 2013 when another representative for Mr Ngawharau wrote to PWC raising an employment issues and claiming sums of money for lost wages, compensation and costs. Since then he has engaged Mr Moses (his current advocate) for help.

[20] I am satisfied that the payment of Mr Ngawharau's wages by PWC does not assist him to claim he was dismissed because the regular wages were paid in arrears on or about 6 June, including one statutory holiday. The next payment was his final wages processed when he had not been back to work, on or about 26 June.

### **Determination of the matters**

[21] I conclude that there was not a dismissal. Mr Ngawharau did not confirm any resignation, and did not turn up for work for three weeks before the employer decided on reasonable grounds that he had abandoned his employment.

**Costs**

[22] Costs are reserved.

P R Stapp  
Member of the Employment Relations Authority