

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 13/10  
5132606

BETWEEN JANE POTENE  
Applicant

AND TAPUIKA IWI AUTHORITY  
Respondent

Member of Authority: Vicki Campbell

Representatives: Gretchen Stone for Applicant  
Kim Stretton for Respondent

Investigation Meeting: 30 September 2009 at Tauranga

Further Information Received: 9 October 2009 from Applicant  
13 and 15 October 2009 from Respondent

Submissions Received: 23 October 2009 from Applicant  
No submissions received from Respondent

Determination: 18 January 2010

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1] Ms Jane Potene was employed by Tapuika Iwi Authority (“TIA”) in December 2006 as a Health Co-ordinator. This was a new position established to develop and implement a quality management system for the delivery of health services through TIA. The role also required Ms Potene to develop the infrastructure for the delivery of services. This included undertaking a survey to ascertain what specific health services should be offered to the Te Puke Community.

[2] In October 2007 the funding for the position was stopped and as a result, in July 2008 Ms Potene was dismissed by reason of redundancy. Ms Potene challenges that dismissal which she says was unjustified. TIA denies the claims.

[3] I am required to scrutinise TIA's actions in accordance with the statutory test of justification set out at section 103A of the Employment Relations Act. The section states:

For the purposes of section 103(1)(a) and (b), the question of whether a 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.

[4] The test of justification does not change the longstanding principles about justification for redundancy<sup>1</sup>.

[5] The Authority must be satisfied on two general points – that the business decision to make a position redundant was made genuinely and not for ulterior motives; and that the respondent acted in a fair and open way in carrying out that decision – particularly, did it consult properly about the proposal to make Ms Potene redundant and otherwise act in a way that was not likely to mislead or deceive them, that is, in good faith?

[6] The written employment agreement between the parties provides for redundancy in the following terms (verbatim):

If the Employer is considering a proposal that may affect the employee's employment such as restructure, loss of contract or outsourcing proposal the employer shall consult with the employer where practicable and in the case of outsourcing or loss of contract, make endeavours to redeploy the employee or negotiate with a new employer possible transfer to the new employee.

If redeployment or transfer is not achieved, then the employee's position will be declared surplus to requirements.

In the event that the Employee's position is declared surplus to the Employer's requirements, the Employee will be given the notice specified in the First Schedule. The Employer may, at its discretion, make a payment in lieu of notice and not require the Employee to work out the notice period. No redundancy compensation shall be payable.

[7] Where the redundancy, as in this case, is due to the loss of a contract, TIA is required to endeavour to redeploy Ms Potene however, where redeployment or transfer is not achieved, Ms Potene will be declared surplus and provided with the requisite notice.

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<sup>1</sup> *Simpson Farms v Aberhart*, unreported, Employment Court, Colgan CJ, [2006] 1 ERNZ 825.

### Was the redundancy genuine?

[8] The Court of Appeal in *GN Hale & Son Ltd v Wellington Caretakers IUOW*<sup>2</sup>, cemented an employers right to:

...make his business more efficient, as for example by automation, abandonment of unprofitable activities, re-organisation or other cost-saving steps, no matter whether or not the business would otherwise go to the wall. A worker does not have the right to continued employment if the business could be run more efficiently without him.

[9] Further, the Employment Court in *Simpsons Farms*<sup>3</sup> reiterated the right of an employer to make genuine commercial decisions relating to how its business operations will function including decisions to make positions or employees redundant. A genuine redundancy is determined in relation to the position, not the incumbent<sup>4</sup>.

[10] Ms Potene contends her redundancy was not genuine for two reasons. The first is that she was made redundant rather than TIA dealing with issues relating to her performance. And secondly, Ms Potene contends there was ongoing funding for her position, which is denied by TIA.

#### *Performance issues*

[11] By letter dated 14 December 2006 TIA received confirmation from the DHB as to the requirements for funding of Ms Potene's position. A copy of this letter was provided to Ms Potene. The requirements set out by the DHB included requirements that the provision of health services was to be commenced by the end of 2007, and that monthly reports and invoices be furnished for the duration of the contract. Payments by the DHB to TIA were contingent on the reports and invoices being furnished.

[12] It was common ground that payments from the DHB ceased in October 2007 due to the requirements under the DHB contract not being met, in particular no services were being delivered. This state of affairs was confirmed in an independent audit undertaken on behalf of the DHB in January and February 2009. That report notes that during the Audit TIA was unable to provide any evidence that it was providing any of the services required under the DHB contract.

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<sup>2</sup> [1991] 1 NZLR 151.

<sup>3</sup> *Supra* n 1.

<sup>4</sup> *NZ Fasteners Stainless Ltd v Thwaites* [2000] 1 ERNZ 739.

[13] Ms Potene wrote a letter to TIA on 20 December 2007 outlining concerns she held with respect to her position. Ms Potene gave TIA one months notice to address her concerns.

[14] It was common ground that in January 2008, Ms Potene started seeking alternative employment options outside TIA and kept Mr George Skudder, a Trustee, informed of her progress.

[15] In February Ms Potene emailed Mr Skudder requesting a meeting to discuss the Health Co-ordinator position. Both the December and February correspondence from Ms Potene were discussed at a TIA Trustees Meeting in April 2008. At that meeting it was decided that a subcommittee of two be appointed to meet with Ms Potene and her representative to discuss her concerns.

[16] There is no correspondence or evidence either from TIA or Ms Potene suggesting there were issues with Ms Potene's performance. I therefore struggle to understand why Ms Potene complains that her redundancy was used to cover up performance issues.

[17] I am satisfied it is more likely than not, that Ms Potene was aware she was not delivering against the required objectives of the DHB contract and that she was aware funding had been stopped by the DHB. The only concerns raised were those of Ms Potene in her letter and emails of December and February.

[18] The report and minutes of the meeting on 2 May where Ms Potene had the opportunity to discuss her concerns with the subcommittee were provided to the Authority at the investigation meeting. Ms Potene received a copy of the report and minutes on or about 30 May 2008. Ms Potene did not take any issue with the accuracy or otherwise of the documents at that time and so I have concluded that she accepted that both the Report and the minutes of the meeting summarised the discussions which took place.

[19] The minutes attribute a comment to Ms Potene that she had been told by Mr Skudder that her position would become redundant. This led to a request from Ms Potene at the meeting that TIA Trustees confirm the status of her employment contract.

[20] I find it is more likely than not that Ms Potene was aware that funding for her position had ceased and that it was likely that her position may not continue. Ms Potene argued that services were being delivered pursuant to the DHB contract and that had she been invited to discuss the services being delivered then the funding from the contract would not have ceased and therefore her position would not have become redundant.

[21] I do not accept that argument as having any weight. It was Ms Potene's responsibility to provide reports to the Board on her activity on a monthly basis. According to Ms Potene's job description these reports were to be factual and informative. It is not apparent whether Ms Potene completed any reports, however, as noted in the 2009 Audit, there was no evidence of service delivery, which indicates it is likely that no written reports were completed by Ms Potene.

[22] I find Ms Potene's position was disestablished as a direct result of funding not being made available from October 2007. I find the redundancy was for genuine commercial reasons.

#### **Was the process used fair and reasonable?**

[23] Section 4 of the Employment Relations Act 2000 requires TIA to deal with Ms Potene in good faith. This duty is to be exercised not only generally but in specific situations including redundancy.

[24] The duty of good faith set out in the Act requires an employer who is proposing to make a decision that will have an adverse affect on the continuation of employment of an employee to provide to that employee, access to information relevant to the continuation of the employee's employment, about the decision, and an opportunity to comment on the information before the decision is made.

[25] In *Communication & Energy Workers Union Inc v Telecom NZ Ltd*<sup>5</sup>, the Court discussed the meaning of consultation in the context of redundancy and listed a series of propositions extracted from the Court of Appeal's decision in *Wellington International Airport Ltd v Air NZ*<sup>6</sup>. In particular, the Court noted:

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<sup>5</sup> [1993] 2 ERNZ 429.

<sup>6</sup> [1993] 1 NZLR 671 (CA).

- (a) Consultation requires more than mere notification and must be allowed sufficient time. It is to be a reality, not a charade. Consultation is never to be treated perfunctorily or as a mere formality.
- (b) If consultation must precede change, a proposal must not be acted on until after consultation. Employees must know what is proposed before they can be expected to give their views.
- (c) Sufficiently precise information must be given to enable the employees to state a view, together with a reasonable opportunity to do so. This may include an opportunity to state views in writing or orally.
- (d) Genuine efforts must be made to accommodate the views of the employees. It follows from consultation that there should be a tendency to at least seek consensus. Consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses and then deciding what will be done.
- (e) The employer, while quite entitled to have a working plan already in mind, must have an open mind and be ready to change or even start anew.

[26] The integrity of a restructuring scheme, even where motivated by genuine operational requirements, may be compromised by its application to particular individuals for reasons other than that their jobs have gone. Where the selection of an employee for redundancy is "...tainted by some inappropriate motive..." and the redundancy is "...masking another and different reason..." the worker will have a valid grievance<sup>7</sup>.

[27] Ms Potene met with Ms Rutu Swinton on 21 July 2008 and was handed a letter dated 17 July 2008 advising her that her employment would be terminated due to a lack of funding for the position.

[28] On 23 July Ms Potene was told that her final day of employment would be 28 July with a payment of one months pay.

[29] Ms Potene says the Board of Trustees decided on 14 June that her position would be made redundant and therefore the decision was made without any consultation with her.

[30] The Authority has had the benefit of reading the minutes of the Board meeting on 14 June 2008. Two motions agreed to at this meeting are relevant to this issue. Firstly, it was agreed that the sub-committee would seek advice as to the required process to terminate Ms Potene's employment agreement and secondly, it was agreed that a meeting would take place at which time the subcommittee would advise Ms Potene that TIA was exiting the service contract with the DHB and therefore wished to negotiate an exit package with her.

[31] There was clearly a desire from TIA to remove Ms Potene from her current position and that decision was made without any consultation or exchange of

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<sup>7</sup> *Savage v Unlimited Architecture Ltd* [1999] 2 ERNZ 40.

information with Ms Potene. This contrasts with Ms Swinton's own written evidence that she had advised Ms Potene in May that it was unclear how long TIA could continue to fund Ms Potene's position, but it was likely she would continue to retain her job.

[32] I am satisfied that Ms Potene was aware of the funding situation with regards to her position, however, proper consultation over the possibility of redundancy required TIA to go further than to rely on the fact that Ms Potene was aware funding had ceased. TIA had continued to employ Ms Potene a further seven months during which time Ms Potene had been told that it was likely she would continue in employment.

[33] It was not until the meeting on 21 July that Ms Potene discovered her position was to be made redundant. Two options for continued employment were put to Ms Potene at that meeting, however, Ms Potene did not believe the positions were genuinely available and therefore advised that she was not interested in either position. As a result Ms Potene was advised on 28 July that her employment would terminate as a result of redundancy. Ms Potene was paid a month's notice in lieu.

### **Remedies**

[34] This was a genuine redundancy. TIA had lost the funding from the DHB contract for Ms Potene's position. It follows that ongoing lost wages can not be claimed, nor can Ms Potene be compensated for the loss of her jobs. However Ms Potene can be compensated for the failure of TIA to properly consult about the redundancy before a final decision was made about it.

[35] In her statement of problem Ms Potene claims \$10,000 for compensation for hurt and humiliation. Ms Potene gave compelling evidence as to the hurt and distress she suffered as a result of the redundancy. Ms Potene told me that she had been left completely shattered by the experience and has been unable to find alternative employment since her dismissal. She told me her self confidence had taken a blow and that she had suffered many sleepless nights. To further aggravate her sense of distress Ms Potene lives in a small community where it is common knowledge that she had been made redundant.

[36] Taking all relevant factors into consideration I am satisfied that Ms Potene should receive \$5,000 under this head.

**Tapuika Iwi Authority is ordered to pay to Ms Potene \$5,000 as compensation pursuant to s123(1)(c) within 28 days of the date of this determination.**

### **Costs**

[37] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Ms Potene may file and serve a memorandum as to costs within 28 days of the date of this determination with any replies to be lodged with 14 days of that date. I will not consider any application outside that timeframe.

Vicki Campbell  
Member of Employment Relations Authority