

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Hemi Rau (Applicant)
AND Waikato Raupatu Trustee Company Limited (Respondent)
REPRESENTATIVES Giles Brant for the Applicant
Malcom Crotty for the Respondent
MEMBER OF AUTHORITY Marija Urlich
CONSIDERATION OF PAPERS
DATE OF DETERMINATION 2 April 2004

DETERMINATION OF THE AUTHORITY

PRELIMINARY DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This determination concerns a request made by Mr Rau for the respondent, Waikato Raupatu Trustee Company Limited (“WRT”) to provide to the Authority documents he believes it holds and are relevant to these proceedings.

[2] WRT opposes provision of these documents on the grounds that the Authority does not have jurisdiction to order discovery and/or the documents sought are not relevant, confidential or subject to legal professional privilege.

Background

[3] On 26 September 2003 Mr Rau filed an application for interim reinstatement in the Authority. On 6 October a telephone conference was convened and the parties agreed to attend mediation on an urgent basis.

[4] Following a mediation on 16 October the matters between the parties remained unresolved and a further telephone conference was convened for 26 November to timetable an investigation meeting of Mr Rau’s substantive application. During the conference call Mr Brant, for Mr Rau, sought an order from the Authority that specific documents be produced by WRT to the Authority. Following the telephone conference Mr Crotty, for WRT put his reasons in writing for opposing the request by facsimile dated 9 December.

[5] By facsimile dated 19 December Mr Brant applied for orders requiring the Trust to provide specific documents and sought a hearing date for this preliminary matter to be dealt with. A timetabling conference call was held on 23 December to deal with this application.

[6] The parties attended an investigation meeting on 3 February to deal solely with Mr Brant's request for the provision of specified documents. By consent the dates set down for the substantive application, 11 and 12 February were vacated. Dates for the substantive application remain unsecured.

[7] By facsimile dated 16 February Mr Brant advised the parties were engaged in productive settlement discussions and requested the Authority delay issuing its determination on the provision of documents issue until the outcome of those discussions was known to the parties.

[8] By facsimile dated 23 March Mr Brant wrote advising the settlement discussions had not been successful in resolving the issues between the parties and sought the release of the Authority's determination on the discovery issue.

The documents requested

[9] The documents Mr Brant has requested are:

- (i) in-committee minutes from WRT's Board meeting of 30 June 2003; and
- (ii) any other in-committee meeting minutes of the WRT Board relating to Mr Rau's position (up to and including 28 October 2003, but excluding the in-committee minutes for the 26 May 2003 Board meeting; and
- (iii) the minutes of WRT's most recent Board meetings.

Submissions

[10] The Trust opposes the request for documents on the following grounds:

- (i) the Authority has no jurisdiction to order inter-party discovery citing *Andrews v Commissioner of New Zealand Police*(Colgan J, ECrt at Chch, 24 Sept 2003);
- (ii) the in-committee minutes dated 30 June 2003 do not exist;
- (iii) the remaining documents sought are confidential and privileged and therefore cannot be the subject of a discovery order.

[11] Mr Rau replies:

- (i) *Andrews* supports his application, in that the specific documents requested are necessary for the Authority to have before it to investigate the substantive application, form a view on the merits and make a determination;
- (ii) if any of the requested documents are confidential they can have confidentiality orders made surrounding their use;
- (iii) litigation privilege can only be claimed where legal advice is a result of this litigation being contemplated. The original letter in this proceeding is dated 8 August 2003 and documents after this date can have legal advice deleted from copies.

Determination

[12] The Employment Relations Act 2000 does not provide a process for the discovery of documents.

[13] The Authority is an investigative body charged with resolving employment relationship problems by establishing the facts and making a determination without undue regard to technicalities (section 157(1) Employment Relations Act 2000). In its investigation of any matter the Authority may call for evidence and information from the parties or from any other person (s160(1)(a) of the Act).

[14] I have read and am guided by the principals set out in *Andrews*. The investigation of Mr Rau's substantive application is extant. It is entirely consistent with the investigative model and within the Authority's power to order documents be produced which have been brought to the attention of the Authority by a party to proceedings and which the Authority decides are relevant to the investigation of the employment relationship problem.

[15] Having read the statement of problem and statement in reply it is clear to me that the minutes of the WRT Board, in-committee or otherwise, where they are relevant to these proceedings and able to be provided should be made available to the Authority. These documents will assist the Authority in its investigation of the employment relationship problem.

[16] However, if the documents requested do not exist then they do not exist. Mr Brant has requested an affidavit in support. I do not believe this is necessary. Parties participate in Authority proceedings mindful of their good faith obligations and I have no reason to believe the parties to these proceedings are not conducting themselves in compliance with those obligations. However, why Board minutes were not taken at meetings when WRT's constitution expressly provides that minutes must be taken (clause 12.7 Waikato Raupatu Trustee Company Limited) may be relevant to the substantive application. **There can be no order pursuant to section 160(1)(a) issued for provision of in-committee minutes on 30 June, 28 July and 28 October 2003 because the documents do not exist.**

[17] Mr Crotty has advised the minutes of 15 and 25 August 2003 are not relevant because Mr Rau's role or related issues were not discussed in these minutes. If the documents are not relevant to the employment relationship problem they will not assist in the investigation and determination of it. **There will be no order pursuant to section 160(1)(a) for provision of the minutes of 15 and 25 August 2003 because these documents are not relevant to the investigation of Mr Rau's employment relationship problem.**

[18] With regard to the in-committee minutes taken on 29 September and 9 October Mr Crotty opposes providing these documents on the basis that they are subject to legal professional privilege and are confidential. He submits they are both expressly confidential and also confidential in that they constitute evaluative material and relies on section 29 of the Privacy Act 1993 to refuse a request for disclosure.

[19] I accept legal professional privilege is a well established ground for refusing to provide a requested document. Where a document contains such material then the material should be deleted from the copies provided to the Authority.

[20] However, I cannot see how a request to provide material relevant to an investigation of an employment relationship problem can be opposed on the basis that the material is expressly confidential and confidential because it contains evaluative material as defined in the Privacy Act

1993. Any concerns regarding confidentiality may be addressed by a non-publication order, or such other order as appropriate, if such an order is applied for and granted. **Accordingly, I order the WRT to provide to the Authority and to Mr Brant copies of the in-committee minutes dated 29 September, 9 October, 28 November and 17 December 2003 with deletions of material subject to legal professional privilege where appropriate.**

[21] At the conclusion of the investigation meeting into this preliminary matter Mr Brant made a request for a general order of discovery. **I do not have the jurisdiction to make an order for general discovery and for this reason this request is declined.**

Mediation

[22] I understand the parties have engaged in extensive settlement discussions to date however, they may consider further mediation is desirable once the documents subject to the above orders have been provided. If it would be helpful to the parties for the Authority to facilitate an early mediation date the parties should contact Ms Shaw, the support officer assigned to these proceedings.

Costs

[23] The question of costs is reserved. The parties may wish to wait until the determination of the substantive issue to have the question of costs resolved. If not the Authority should be advised and a timetable will be set.

Marija Urlich
Member, Employment Relations Authority