

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
ER AUTHORITY AUCKLAND OFFICE**

BETWEEN Reginald Patrick Ratahi

AND Te Whanau O Waipareira Trust Incorporated Society

REPRESENTATIVES Mark Ryan, Counsel for Applicant
Phillip Rice, Counsel for Respondent

MEMBER OF AUTHORITY R A Monaghan

INVESTIGATION MEETING 24 May 2006

**SUPPLEMENTARY
AFFIDAVITS RECEIVED** 25 and 26 May 2006

DATE OF DETERMINATION 30 May 2006

DETERMINATION OF THE AUTHORITY ON INTERIM APPLICATION

[1] Reginald Ratahi seeks an interim order for reinstatement to his position as Chief Executive Officer at the Te Whanau O Waipareira Trust ("the trust").

[2] The trust dismissed Mr Ratahi summarily on 13 April 2006. Mr Ratahi's solicitor raised a personal grievance alleging unjustified dismissal in a letter to the trust dated 19 April 2006, and says there was no response to that letter. Mr Ratahi's statement of problem was filed in the Authority on 1 May 2006. It sought, among other things, a finding that Mr Ratahi has a personal grievance on the ground of his unjustified dismissal, and reinstatement. It was accompanied by the urgent application for interim reinstatement with which this determination is concerned. The parties have attended mediation.

[3] The Authority's investigation was to have been confined to the papers, which included affidavits from Mr Ratahi, John Tamihere (currently executive trustee at the trust) and Evelyn Taumaunu (the chairperson of the trust). For reasons to which I will return, some additional information and discussion was required.

Background to dismissal

[4] Mr Ratahi had been employed as CEO of the trust since March 2002.

[5] The trust held an annual general meeting on 23 November 2005. Several new trustees, including Mr Tamihere, were elected. The election was not without controversy.¹ Mr Tamihere was one of the trustees appointed to investigate the management of the trust's affairs.

[6] During the course of that investigation Mr Tamihere became aware of a number of matters, including some I now set out.

¹ *Tamihere & Ors v Taumaunu & Ors* (High Court Auckland, Heath J, CIV 2005-404-6958, 21 December 2005)

[7] In September 2005 a manager from Kiwibank contacted Mr Ratahi and Bruce Bryant, the trust's chief financial officer, seeking a written explanation of various matters, as well as noting that the Inland Revenue Department ("IRD") had charges against three commercial properties held by the trust and querying when the charges would be removed. Mr Tamihere deposed that the existence of the charges had not been disclosed to the trust.

[8] In November 2005 the IRD forwarded a written statement of arrears (including penalties) to an accounts manager at the trust, identifying an overdue amount in excess of \$200,000, with a further amount in excess of \$100,000 due for payment in just under a fortnight. In January 2006 it forwarded to Mr Bryant an updated statement of arrears (including penalties), by then in an amount close to \$500,000. The debt collection officer concerned sought to discuss payment. By further letter dated 8 February 2006, addressed to the trust, the officer identified outstanding arrears of \$720,323.39. The letter demanded immediate payment.

[9] A statutory demand for payment was served on the trust on 14 February 2006. The demand was for payment of \$720,323.39 within 15 working days of the date of service.

[10] There was a special meeting of the trust board on 15 February 2006. According to the minutes, Messrs Ratahi and Bryant attended. The minutes also record that there was a discussion about the trust's finances, but do not record any mention of the statutory demand or the correspondence leading to it. Mr Tamihere deposed that there was no such disclosure, nor was the fact that certain trust cheques had been dishonoured.

[11] There was another special meeting of the trust board on 15 March 2006. According to the minutes, Mr Ratahi attended. Again there was no record in the minutes of any mention of the statutory demand. Mr Tamihere deposed that there was no such disclosure. Nor was there any disclosure that Messrs Ratahi, Bryant and a trustee had met with the IRD on 3 March 2006 to persuade it not to wind up the trust. Instead a proposal for the sale of trust-owned shares to the value of \$4.1 million was put to the IRD – without authorisation according to Mr Tamihere.

[12] A monthly meeting of the trust went ahead on 29 March 2006, with the minutes recording Mr Ratahi as in attendance. There was no mention of the statutory demand again in those minutes, but appended to the minutes was a report from Mr Tamihere. Many serious concerns about the management of the trust were raised in the report. They included inadequate financial reporting, the making of decisions outside the decision-maker's delegated authority, conflicts of interest, and failures to disclose. On the trust's tax situation, the report recorded that:

"We are told that \$600,000 was paid to Inland Revenue for PAYE arrears and we are told that on a monthly basis we continue to suffer penalties on \$55,000 underpaid to Inland Revenue. This money is recoverable subject to investigation but management have not formally advised the Trust Board what possibilities there are of this.

[13] On the trust's finances in general, Mr Tamihere reported:

"We are told as at the 15th February 2006 by Mr Bryant and Mr Ratahi that we are in a break even position. We are shown a pictorial chart showing something far different in requesting a sale of a further 4.1 million dollars of assets."

[14] Mr Tamihere deposed that the trust did not learn of the full extent of the trust's tax defaults, or the service of the statutory demand, until a delegation of trustees met with the IRD on 10 April 2006. On 6 April Mr Tamihere had ascertained from the IRD that several tax returns had not been filed, and that a cheque for a payment had bounced. He called for an urgent meeting of the trust board.

[15] A special meeting of the trust board went ahead on 12 April 2006. Mr Tamihere moved a motion of no confidence in the management of the trust, and deposed that he explained that the effect of such a vote would be that Mr Ratahi would have to be dismissed. Speaking in

support of the motion he raised the tax arrears and the statutory demand as well as a number of other matters.

[16] According to the minutes Mr Ratahi responded to the motion, making a number of comments including:

"The IRD and bank issues were being addressed and sell of properties and shares to recover debt had been carried out."

[17] The motion of no confidence was put to the vote, and was carried.

[18] The chairperson of the trust handed a letter of dismissal to Mr Ratahi the next day, 13 April 2006. The letter identified the reasons for dismissal, in effect, as the failures to disclose: the statutory demand; the meeting with the IRD in March 2006; and the history of debt and dishonoured cheques.

Applicable legal principles

[19] The employment law institutions have developed a well-established body of law regarding the interim reinstatement of a dismissed employee pending determination of the merits of an employee's personal grievance.

[20] Principles relevant to grants of interim relief in general have been summarised as follows:

"... while the principles on which the discretion is exercised have been described in various ways, one of these ways has been to say that there are four elements on the way to a decision:

1. Is there an arguable case?
2. Where does the balance of convenience lie?
3. Whether other remedies are available to the plaintiff.
4. The overall justice of the case."²

[21] Counsel for the trust referred to authorities identifying the test in (1) above as being whether there is a 'serious question to be tried'.³ Whatever the correct formulation, the threshold for consideration of a grant of interim relief is not high.

[22] In respect of applications for orders for interim reinstatement, there is a developing recognition of the use of 'garden leave' as an alternative to reinstatement in the form of a full return to ordinary duties in the workplace. The Employment Court has said this of the statutory underpinning for orders to that effect, as well as the usefulness of such orders:

"[20] ... The objective of s 127, as are the statutory objectives of all the Employment Relations Act's provisions relating to employment relationship problem solving, is to provide a just solution to the parties' problems in the particular circumstances of each individual case. Section 127 expressly allows reinstatement on conditions. This gives the Authority (and the Court on a challenge) the ability to craft a solution other than to allow or reject in whole an application for reinstatement of the justice of the case may so require."⁴

[23] His Honour went on to say that, in that case, the Authority erred in exercising its discretion by failing to consider reinstatement on conditions.

Arguable case

[24] Mr Ratahi's affidavit in support of the present application did not set out his position on any of the substantive issues indicated by the letter of dismissal, or those discussed during the 12 April meeting, rather it addressed the conduct of that meeting. In particular Mr Ratahi deposed that:

² see **Tasman Pulp & Paper Co Limited v NZ Shipwrights etc IUOW & Anor** [1991] 1 ERNZ 886, 894, and for a summary of the approach of the Employment Court as at December 1997 see **Baker v Armourguard Security Limited** [1998] 1 ERNZ 424, p 435.

³ **Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited** [1985] 2 NZLR 129

⁴ **Cliff & Anor v Air New Zealand Limited** (24 February 2005, Chief Judge Colgan, AC6A/05)

- . the chairperson told him the meeting was for the purpose of discussing the possible sell down of assets to cover debt, and she was unaware of what else was on the agenda;
- . as at the commencement of the meeting, Mr Ratahi was still unaware of the agenda;
- . he was invited to comment on the discussion for and against the motion of no confidence in the management;
- . the comment was that he had not been given an opportunity to respond to the allegations, but if given the opportunity would be able to dispute the majority of them; and
- . he left the meeting before the motion was put to the vote.

[25] In her affidavit, the chairperson accepted that she had not warned Mr Ratahi of the possibility of a motion of no confidence in the management. She had, however, forwarded to Mr Ratahi copies of messages from Mr Tamihere discussing and expressing his strong concern about the information he was uncovering. Mr Ratahi was also made aware that Mr Tamihere had sought to table a motion of no confidence in the treasurer, chief executive officer and chief financial officer at an executive meeting of the trust board on 9 April. That motion did not proceed.

[26] As far as the present application is concerned, in essence Mr Ratahi is saying he has an arguable case that his dismissal was not justified because an unfair procedure was used in effecting it.

[27] The trust says that, at its highest, Mr Ratahi's case is that he was not adequately warned that his position was in jeopardy. It pointed to the series of concerns Mr Tamihere had raised, and Mr Ratahi's knowledge of those concerns. It also says specific allegations were put to Mr Ratahi again at the meeting of 12 April, and that he had an opportunity to reply to them.

[28] The fundamental requirements of a fair procedure in effecting a dismissal are:

- (a) the employee must be given notice of specific allegations of misconduct;
- (b) the employee must be given a real opportunity to explain or refute the allegations; and
- (c) there must be an unbiased consideration of the explanation.⁵

[29] These requirements sit within the wider test of what action was open to a reasonable and fair employer.

[30] The difficulty I have with the procedure the trust used is that the affidavits do not disclose that Mr Ratahi was adequately warned of the prospect of his dismissal. I do not accept that he could be expected to assume his dismissal at the meeting of 12 April was likely, although in the circumstances the prospect of dismissal at some time was unlikely to be far from his thoughts.

[31] Nor would I accept, on the material I have, that it was clear to Mr Ratahi prior to the meeting precisely which allegations he would be expected to answer. That is not to say he was unaware of Mr Tamihere's view of the trust's tax liabilities, and the lack of disclosure of those and a number of other matters. However when it came to arguing for the retention of his job, the scope of the matters to be discussed at the meeting was put to him in advance of it in the broadest possible terms, to the extent that the trust's concerns were said to be about 'management' and were not necessarily even limited to concerns about him.

[32] That, in turn, means Mr Ratahi's ability to provide a full explanation of the allegations put to him at the meeting was hampered, although the contents of the minutes suggest he had a greater opportunity to provide an explanation (and took it) than was identified in his affidavit. However the full extent of the opportunity remains to be addressed during an investigation into the merits of his grievance.

⁵ **New Zealand Food Processing, etc, IUOW v Unilever New Zealand Limited** [ERNZ] SelCas 582

[33] I therefore conclude that Mr Ratahi has an arguable case that the procedure used in terminating his employment was unfair.

[34] The lack of comment from Mr Ratahi on the substantive reasons for the dismissal makes it difficult to assess the impact of any procedural unfairness. I can, however, say that the allegations of financial mismanagement, accompanied as several were by supporting documentation, were so serious as to call into question the extent of the remedies to which Mr Ratahi would be entitled if his dismissal was found to be unjustified. In particular, aside from any personal culpability he may have, as chief executive officer he had overall responsibility for the management of the trust. On the material I have, the trust would at least have a strong argument for the reduction of any remedies awarded to him, and that reinstatement was not practicable.

Balance of convenience

[35] Having reached the above conclusions, I turn to the balance of convenience. This requires an assessment of the relative hardship to the parties if:

- (a) interim relief is refused, but it later emerges that Mr Ratahi was unjustifiably dismissed and is entitled to remedies; and
- (b) interim relief is granted, but it later emerges that Mr Ratahi's dismissal was justified and he is not entitled to any remedy.

[36] Mr Ratahi's affidavit was extremely brief, and did not contain an account of any facts relevant to the balance of convenience. I sought further evidence from him on that point.

[37] I also advised the parties that the Authority would be able to convene an investigation meeting in respect of the substantive application within the next 2 – 3 months. Indeed it may not be necessary to wait even that long. Accordingly I asked Mr Ratahi how his personal circumstances would be affected if he were to remain unpaid and out of his employment for such a period.

[38] Mr Ratahi relied on the following:

- (a) the financial strain associated with not receiving his salary;
- (b) the possible adverse effect on his future employment prospects; and
- (c) the stress he would suffer.

1. Financial strain

[39] Inevitably the ability to service personal debt is jeopardised if salary payments cease. I asked Mr Ratahi if his ability to meet payments such as mortgage and credit card payments would be jeopardised to the extent that a subsequent award of money in his favour would fail to remedy matters. The answers he gave to these and similar questions were so vague that I sought further evidence of his financial position.

[40] That evidence took the form of a supplementary affidavit with recent bank statements and a credit card account annexed. There was no comment on the extent of any ability to make alternative arrangements with the bank to cover any shortfalls over the next 2 – 3 months. While I accept that the absence of his salary will cause difficulty, and the documents give an indication of that, I am not satisfied that Mr Ratahi will suffer such financial hardship over the next 2 – 3 months that the balance of convenience favours his reinstatement.

2. Effect on future employment prospects

[41] Further to concerns such as the effect on his future employment prospects of not being reinstated on an interim basis, unfortunately the circumstances of Mr Ratahi's dismissal have already received media attention. Thus, for example, an interim order for reinstatement would be ineffective regarding protection from any damage to Mr Ratahi's reputation arising from the

dismissal. He told me he wants to clear his name, but his opportunity to do that will come when the substantive matter is heard.

3. Stress

[42] I accept the likelihood that in general Mr Ratahi has suffered, and will continue to suffer a degree of stress until this problem is resolved. However there was nothing to suggest that was so to the extent that interim reinstatement should be ordered.

4. An alternative to full reinstatement

[43] Mr Ratahi was frank in accepting that reinstatement to the workplace would be difficult for both parties because of the divisions extant in the trust since late 2005. He also told me that he had been working from home anyway because of the pressure being placed on him by some of the new trustees appointed at the end of 2005. For the trust, Mr Tamihere was clearly averse to Mr Ratahi's return and expressed a deeply-felt loss of trust and confidence in Mr Ratahi.

[44] Evidence of that kind suggested reinstatement to full duties was not realistic, and I asked the parties to consider agreeing on an alternative interim measure. I offered the trust the opportunity to file further affidavits addressing the possibility, which it took in the form of a further affidavit from Mr Tamihere and an affidavit from the chartered accountant to the trust.

[45] The trust remained opposed to any form of interim reinstatement. The reasons were:

- (a) the seriousness of the allegations against Mr Ratahi;
- (b) the extent of the loss of trust and confidence in him;
- (c) the trust remains in serious financial jeopardy, and any obligation to pay Mr Ratahi's salary would place it at further risk;
- (d) the financial jeopardy has largely been caused by Mr Ratahi's management, and it is unjust to further increase the jeopardy by obliging it to make such payments to him; and
- (e) efforts to address the trust's financial position have included the redundancies of some 14 permanent and 24 casual staff members, who would have a strong sense of grievance if such payment was made to the person perceived to be responsible for the financial mismanagement.

[46] One substantial asset of the trust's has already been sold in an effort to reduce debt, including the debt still owed to the IRD. The accountant deposed that a cashflow forecast prepared by his firm shows the trust will continue to be managed in an overdraft position despite the sale. The forecast also predicts a breach of the overdraft facility in the coming months. Mr Tamihere said that, if Mr Ratahi is ultimately awarded a monetary remedy, the trust may have to realise further assets in order to meet the award.

[47] I therefore conclude that the balance of convenience favours the trust.

Overall justice

[48] Taking a step back from the above, in Mr Ratahi's favour there are serious procedural flaws in the way in which his dismissal was effected. In the trust's favour, there are serious allegations, supported by some documentation, about the way in which Mr Ratahi either managed or oversaw the management of the trust's affairs. They include allegations about lack of disclosure to the trust of serious issues such as the trust's tax position and exchanges with the IRD, and of acting without authority. The state of its financial position is that it is operating in overdraft, owes a significant debt to the IRD which is to be addressed by the proceeds of the sale of a substantial asset, and has had to impose redundancies on staff. It now says it has no trust or confidence in Mr Ratahi.

[49] The nature of the allegations against Mr Ratahi, and his reliance only on procedural unfairness here, indicate that at least the trust will have a strong case for the reduction of any remedies Mr Ratahi might ultimately be awarded. It may also have a strong case against eventual reinstatement.

[50] Finally there is a relatively short time until the merits can be heard and no strong argument in support of interim reinstatement.

[51] For these reasons I decline to order Mr Ratahi's interim reinstatement. A support officer will contact the parties shortly regarding arrangements for an investigation into the merits of Mr Ratahi's claims.

[52] Both parties should be aware that this determination addresses only what should be done until those merits can be heard. It is an attempt to balance matters as they stand, in the absence of full information about the merits of Mr Ratahi's personal grievance in particular. Except in that context, it should not be taken as a finding about the merits.

Costs

[53] Costs are reserved.

R A Monaghan
Member of Employment Relations Authority