

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Paul Sweeney (Applicant)
AND Te Korowai Hauora O Hauraki (Respondent)
REPRESENTATIVES Rose Alchin, Counsel for Applicant
John Burley, Counsel for Respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 15 December 2003
16 December 2003
DATE OF DETERMINATION 27 January 2004

DETERMINATION OF THE AUTHORITY

Employment relationship problem

Paul Sweeney says his dismissal from Te Korowai Hauora O Hauraki (“the Trust”) on 26 April 2002 was unjustified. He seeks reinstatement to the position he held at the time of his dismissal, reimbursement of wages lost as a consequence of the dismissal and compensation for hurt and humiliation.

The Trust says Mr Sweeney was not dismissed but rather the employment agreement came to an end because it was frustrated. In the alternative, the Trust argues that it had no option but to dismiss Mr Sweeney.

Background

Mr Sweeney was employed by the Trust on 3 September 2001 as a Kaiawhina Whanau (Counsellor/Support worker). He had first been employed by the Trust from June 1995 until June 1997 but had resigned due to ill health.

The Trust provides services to Maori people in the Hauraki Tribal Region. These services include drug and alcohol counselling, support and rehabilitation programmes, anger management and violence prevention programmes to Maori men and their families. The Trust receives funding to provide these services from government agencies including the Child Youth and Family Service (“CYFS”).

In August 2001 Mr Sweeney attended an interview for the position of Kaiawhina Whanau. He was interviewed by Hugh Kininmonth, CEO of the Trust and two other staff members. Mr Sweeney was offered and accepted the position. There is no dispute that Mr Sweeney was appointed to a generic counselling role. The initial appointment included a six month trial period.

Mr Sweeney was orphaned as a young teenager and spent several years as a Ward of the State. He became involved in gang activities and was convicted of various offences, as well as becoming dependant on drugs and alcohol. In 1986 Mr Sweeney was convicted and sentenced to prison as a party to a gang related rape. Mr Sweeney's last offending was in 1991. Since then Mr Sweeney has ceased offending and rehabilitated himself. He has trained as a counsellor and has been drug and alcohol free for many years. Mr Sweeney had fully disclosed his past convictions to the Trust.

The Trust's funding arrangement with CYFS was the subject of a contract extant at the date Mr Sweeney was interviewed and employed by the Trust in August/September 2001. The contracting arrangements with CYFS include standard form Business Viability Standards ("BVS"). BVS 6, section four provides:

"The organisation must be able to demonstrate to Child, Youth and Family that:

...

The organisation does not employ any person in a paid or voluntary capacity...who has a conviction for sexual crimes...."

Mr Kininmonth told me at the investigation meeting that prior to and at the time of employing Mr Sweeney in August/September 2001 he had turned his mind to the prohibition on employment of those with convictions for sexual crimes. He also said he had informally discussed Mr Sweeney's re-employment with the local CYFS office. He said he assessed the risk that Mr Sweeney's re-employment could compromise the funding arrangements with CFYS and determined the risk was manageable.

By letter dated 24 September Mr Kininmonth received a letter from CYFS advising that it had come to it's attention that the Trust had a staff member with "convictions for sexual and violence against the person crimes". The staff member was Mr Sweeney. The letter advises the employment of Mr Sweeney amounts to non-compliance with the contractual obligations of BVS and lists the following options for the Trust:

"...

Te Korowai Hauora O Hauraki continues with the approval review process and advises what actions will be taken to remedy the situation.

Te Korowai Hauora O Hauraki relinquishes the current approval status held with C.Y.F and advises the writer of this decision.

Te Korowai Hauora O Hauraki continues current services in contravention of the approval status held. The consequence of this decision will be suspension and revocation of the approval status held under section 405 of the Children Young Persons and Their Families Act 1989.

..."

The Trust Board meet to discuss this situation. On 28 September Mr Kininmonth wrote to CFYS seeking agreement that the Trust continue to employ Mr Sweeney and maintain its funding with CYFS. The letter contains a statement of support for Mr Sweeney and advises of the Trust's confidence that Mr Sweeney would not re-offend.

Mr Kininmonth received a response to his letter on 15 October, which included the following:

"...

Should Te Korowai Hauora O Hauraki decide to continue to employ the staff member in the delivery of services contracted and approved by Child Youth and Family then I need to let you know, suspension of Te Korowai Hauora O Hauraki's approval may occur under section 405 of the Children, Young Persons and Their Families Act 1989.

..."

By letter dated 12 November CYFS served notice on the Trust of suspension of approval and revocation of approval by gazette effective 9 January 2002.

On 28 November Mr Kininmonth drafted a letter under Mr Sweeney's name to John Tamihere, MP for Hauraki seeking his "...support in continuing this work for Te Korowai Hauora O Hauraki..." and enclosing a copy of the 12 November letter from CYFS to the Trust.

On 7 December Mr Tamihere forwarded this correspondence to Steve Maharey, Minister of Child Youth and Family seeking answers to specific questions regarding CFYS' decision to suspend and revoke approval of the Trust.

On 21 December Mr Maharey replied to Mr Tamihere's questions in writing, including:

"...the Department accepts the possibility that there may be exceptional cases that require a different approach."

Suspension and revocation were not gazetted on the notified date of 9 January. The reasons why the notice was not gazetted are unclear but the effect was that suspension and revocation of approval did not occur.

By letter dated 4 February Mr Kininmonth wrote to Verna Smith, General Manager, CYFS, enclosing a copy of Mr Maharey's letter of 21 December and seeking a review of the notice of suspension and revocation of approval. The letter restates the Trust's full support for Mr Sweeney and sets out some detail of Mr Sweeney's personal circumstances.

Ms Smith replied by letter dated 28 March confirming the decision to revoke the Trust's approval under section 405 of the Children and Young Person's and Their Families Act 1989 ("CYP&F Act") by gazette.

By letter dated 5 April Mr Kininmonth wrote to Ms Smith, including the following:

"...

It appears from your letter of 28th March, that despite the measures put in place and the circumstances put forward, Mr Sweeney's employment must be terminated for Te Korowai to retain CYF accreditation. In all CYF correspondence over the past six months, this has never been stated clearly.

In order for Te Korowai Hauora O Hauraki to act appropriately on your decision please confirm by return mail exactly what Te Korowai Hauora O Hauraki must do to retain or regain CYF approval in line with the Minister's letter.

"..."

On 18 April the Trust Board meet to discuss the "CYF issue". The minutes of the meeting have been made available to me, and include the following:

"...

The round table discussion concluded with a vote from the Trustees. The outcome was that the majority of Trustees felt that the staff member should be asked to leave if it meant that Te Korowai Hauora O Hauraki was to lose funding that could be applied to benefit the people.

"..."

Part of the meeting of 18 April was conducted in committee; I quote from the relevant part of the minutes:

"...

Hugh's question is "Do we retain approval even if we dismiss Paora [Mr Sweeney]. This is not clear in Verna Smith's letter.

In previous meeting of 27th February 2002 the Trustees agreed that he should be asked to leave if our funding is jeopardised.

Harry [Mikaere] was of the mind that we continue to pursue the legal opinion. This is not an emotional issue but he does not want to see any employee prosecuted twice.

Harry suggested we “get the legal advice before making a decision and move on.” He does not want to see the clients of Te Korowai Hauora O Hauraki suffering because of the withdrawal of funding.

Harry wants to know whether CYF’s Business Viability Standard 6.4 is legitimate.

Hugh to gain legal opinion and discuss with Harry for final decision.

...”

Following this meeting Mr Kinimonth sought legal advice regarding Mr Sweeney’s employment status and instructed the Trust’s solicitor to contact CYFS in a last effort to try to shift their position, which occurred without success.

On 26 April Mr Kininmonth asked Mr Sweeney to meet with him “to explore other avenues” in regard to the CYFS crisis. Mr Sweeney was coming to Auckland that day. As Mr Kininmonth resides in Auckland it was agreed they would meet that evening at the home of Mr Sweeney’s mentor, Judge Jeremy Doogue, with whom Mr Sweeney was staying while in Auckland.

At the meeting Mr Kininmonth told Mr Sweeney CFYS had not changed their position, that the effect of this was that his employment agreement with the Trust was frustrated and Mr Kininmonth asked if Mr Sweeney could think of any other areas to explore. Judge Doogue asked Mr Kininmonth if he was dismissing Paul and asked what his entitlements were which Mr Kininmonth confirmed.

Mr Sweeney told me at the investigation meeting that this advice that his employment agreement was frustrated came as a shock and that this was the first time the Trust had advised him his employment could end. Mr Kininmonth accepted that the 26 April meeting was the first time the Trust had discussed frustration of contract or ending the employment relationship with Mr Sweeney.

By letter dated 1 May Mr Kininmonth wrote to Mr Sweeney confirming the termination of his employment with two weeks notice pursuant his employment agreement. The letter also advised Mr Sweeney the Trust wished to offer him a payment equivalent to two months wages in recognition of the impact of the decision on Mr Sweeney and his whanau. Mr Sweeney replied by letter dated 6 May advising that he did not accept the Trust had a right to dismiss him and that he intended to file a personal grievance.

Notice of the Trust’s revocation of approval was gazetted on 2 May. Ms Smith replied to Mr Kininmonth’s letter of 5 April by letter dated 9 May.

By letter dated 17 May 2002 from his representative, Ms Alchin, Mr Sweeney lodged a personal grievance for unjustified dismissal with the Trust and sought reinstatement and compensation for hurt and humiliation.

CYFS’ decision to revoke the Trust’s approval was the subject of High Court judicial review proceedings brought by Mr Sweeney. In October 2002 Ms Alchin requested Mr Sweeney’s application in the Authority be put on hold pending the outcome of the judicial review. This application was granted.

The judicial review proceedings named CFYS as the first defendant and the Trust as second defendant. Justice Laurenson's judgement was delivered on 20 October 2003. The summary of orders provides:

"...

- a) A declaration that the decision of the first defendant to apply Business Viability Standard 6.4 to the plaintiff was unlawful, unreasonable and contrary to the rules of fairness because in the particular circumstances of this case the plaintiff was entitled to be heard because the decision necessarily involved placing the plaintiff's livelihood in jeopardy;
- b) The above decision be set aside;
- c) A declaration that the decision of the first defendant under s405 of the Act to revoke the Approval of the second defendant was unlawful, unreasonable and contrary to the rules of fairness because the effect of that decision was to deprive the plaintiff of his livelihood and he had not been afforded the opportunity to be heard;
- d) The above decision be set aside;

..."

Following the issuing of Laurenson J's judgment I directed the parties, in these proceedings, to attend mediation to attempt to resolve Mr Sweeney's employment relationship problem. This attempt was unsuccessful.

Determination

By way of justification the Trust says Mr Sweeney's employment contract was frustrated and ceased to exist by operation of law. In the alternative, the Trust says Mr Sweeney's employment was terminated but that the dismissal was justified both in substance and procedure.

(i) Was the contract of employment frustrated?

The doctrine of frustration is applicable to contracts of employment. The following quote from *Motor Machinists Ltd v Craig* 2 ERNZ [1996] 585, at p 591 provides a useful summary of the doctrine of frustration:

"Frustration of contract occurs:

"when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from further performance."

See *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] 1 AC 675, 700; [1981] 1 All ER 161, 175 (HL), per Lord Simon of Glaisdale."

The Trust says the employment relationship came to an end because the contract was frustrated as a result of the CFYS decision to revoke the Trust's approval under section 405 of the CYP&F Act 1989. The Trust says the revocation of approval rendered the employment agreement impossible to perform.

Ms Alchin referred me to the Court of Appeal judgment in *Karelrybflot AO v Udonvenko* [2000] 2 NZLR 24, and in particular the following passage from p 33:

“Whether a contract is frustrated in the particular circumstances of the case will be a matter of fact and degree, but it seems to us that, in view of the nature of the contract of employment, the doctrine will not easily be able to be invoked by an employer because of the drastic effects which it would have on the rights of vulnerable employees – the present respondents being an example (*16 Halsbury’s Laws of England* (4th ed.) para 283). We bear in mind also the observation of Bingham LJ (as he was then) in *J Lauritzen AS v Wijsmuller BV* [1990] 1 Lloyd’s Rep 1 (The “*Super Servant Two*”) at p 8 that:

“2. Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended...”

We do not consider that the contracts under which the respondents were employed were frustrated by the forfeiture in the circumstances of this case, particularly having regard to the short period between the forfeiture and their expiry date. In the first place, the Court would be slow to find frustration where, despite its protestations to the contrary, the judge found that at the time of entering into the employment contracts and undertaking obligations to the seamen Karelrybflot must have known that Abel was facing proceedings under the Fisheries Act 1983 which could result in forfeiture. It elected to offer the crew term contracts and must be taken to have assumed the risk of loss of the vessels by forfeiture until such time as a release could be negotiated or was finally refused.

...

We should add that we would still be of the same view that there was no frustration in the circumstances of this case even if we had been persuaded that the forfeiture came upon the Karelrybflot like a bolt from the blue”

In *Karelrybflot* the crew sought payment of wages unpaid as a consequence of forfeiture of vessels upon which they were engaged to crew. One of the defences advanced by the employer was that the employment agreements were frustrated as a consequence of the forfeiture of the vessels. The Court of Appeal found there was no frustration.

The Trust was aware of its obligations under BVS 6 and the possible consequences of non compliance prior to its employment of Mr Sweeney. This is set out clearly in the contracting documents entered between the Trust and CFYS. The Trust was also fully aware of Mr Sweeney’s criminal convictions. Mr Kinimonth’s evidence was that he turned his mind to the potential problem Mr Sweeney’s employment with the Trust could create with the funding agency, CYFS, assessed the risk and determined it was manageable. That this risk assessment was incorrect is no fault of Mr Sweeney. In employing Mr Sweeney the Trust assumed the risk that it would not longer meet the CFYS’ viability standards with the consequence that approval would be revoked. The Trust cannot say the revocation of approval was a supervening event that it was not aware was a possibility at the time of engaging Mr Sweeney.

For these reasons I decline the justification of frustration. Mr Sweeney was dismissed.

(ii) Was Mr Sweeney’s dismissal justified?

In the alternative the Trust has argued that it dismissed Mr Sweeney and that the dismissal was justified.

The substantive justification for Mr Sweeney’s dismissal is that from 2 May, the date of gazetting revocation of approval, the CFYS relationship and funding stopped. The 18 April minutes show that at that date the possibility that the relationship with CYFS would cease was not acceptable to the Trust. However, the question still remained at 18 April - would termination of the employment agreement with Mr Sweeney stop the gazetting of revocation of approval? Mr Kinimonth had written to Ms Smith on 5 April with this question and by 18 April he had not yet received a reply.

Mr Sweeney was dismissed on 26 April. The dismissal was confirmed by letter dated 1 May. By 1 May Mr Kininmonth had not yet received a reply to his letter of 5 April and the revocation of approval had not yet been gazetted. In these circumstances there is no substantive justification for the dismissal. The Trust's own documents show it did not know if Mr Sweeney's dismissal would preserve the relationship with CYPS and further the revocation of approval had not yet been gazetted. On the evidence before me and for the reasons set out above I am not satisfied that at the date of dismissal there existed a substantive reason for Mr Sweeney's dismissal.

In terms of the process used to dismiss Mr Sweeney, there was no dispute that the meeting of 26 April was the first time Mr Sweeney had been advised his employment was in jeopardy. I accept Mr Sweeney's evidence that up to this point he thought the Trust was fully supportive of him retaining his position despite CYFS steps to revoke approval. The Trust's actions towards Mr Sweeney support this view. The Trust had confirmed Mr Sweeney's appointment as a permanent member of staff following a positive review, entered a new employment agreement dated 11 March 2003 and gave Mr Sweeney a pay rise.

Mr Kininmonth said he had repeatedly discussed the CFYS issue with Mr Sweeney during the period of his employment, and gave an example of a discussion in early 2002 when Mr Sweeney offered to resign to resolve the CFYS crisis. This offer was rejected by Mr Kininmonth, sending a clear message to Mr Sweeney that the Trust did not want to end the employment relationship. I do not believe it is reasonable to infer the possibility of dismissal from this discussion.

The failure to give Mr Sweeney any notice that the meeting of 26 April was a dismissal meeting was a serious flaw in the dismissal process. The effect was to deny Mr Sweeney the opportunity to prepare for the meeting or seek advice. The process was also flawed because the Trust cannot show it conducted a fair investigation into the issues. Issues critical to the Trust's consideration of the CYFS crisis remained outstanding, the 5 April letter to Ms Smith had not yet been replied to and the revocation of approval had not been gazetted.

Mr Sweeney's dismissal was unjustified, he has a personal grievance.

Remedies

(i) Reinstatement

There has been no evidence to persuade me that this is not a situation where reinstatement would be appropriate. Mr Kininmonth repeatedly advised me at the investigation meeting that Mr Sweeney made an important contribution to the Trust and was a valued employee. He also said he continues to hold this view. There was some evidence from Mr Mikaere that some members of the current Trust Board oppose Mr Sweeney's reinstatement because they do not believe he should ever have been employed by the Trust in light of his criminal offending. However, I do not understand this factor to be a ground upon which the Trust opposes reinstatement, and it is not relevant to a consideration of this remedy.

I understand the Trust's principle opposition to reinstatement is the uncertainty it may create with its relationship with CYFS. The Trust is concerned that if Mr Sweeney is reinstated then it will be back in the situation it was in early 2002, facing suspension and revocation of approval and the consequent threat to current and future funding. While I acknowledge this concern, it is beyond the scope of these proceedings to consider. The remedy claimed is reinstatement to the position held at date of dismissal. In these circumstances there is no barrier to reinstatement because the effect of the High Court judgement is to render CFYS' decision to revoke approval void. What steps CFYS may take in relation to Mr Sweeney's reinstatement are in the future and cannot be anticipated by

this determination.

Mr Kininmonth has given evidence that if Mr Sweeney is reinstated this will create a practical difficulty for the Trust because of the particular focus of Mr Sweeney's work with the Trust. I do not understand this claim because Mr Sweeney was employed in a generic role. No evidence was presented that the position Mr Sweeney held at date of dismissal was tied to a particular funding stream or that the Trust is bound by any insurmountable funding structure. The Trust has been on notice from the initial lodging of his personal grievance that Mr Sweeney sought reinstatement. I am not persuaded that there is any practical barrier to reinstatement.

Accordingly, I order Mr Sweeney reinstated forthwith to the position he held at date of dismissal pursuant to section 125 of the Act.

(ii) Lost wages

Mr Sweeney seeks reimbursement of wages lost from the period 1 July 2002 to date of hearing. These lost wages total \$41,040.00.

To be successful in a claim for lost wages Mr Sweeney must show wages were lost as a consequence of his dismissal. Upon dismissal Mr Sweeney received a payment equivalent to two months wages from the Trust. Taking this payment into account and having heard Mr Sweeney's evidence of his attempts to find alternative work Mr Sweeney is entitled to be reimbursed for wages lost for the period of 1 month pursuant to section 128(2) of the Act.

Section 128(3) of the Act provides a discretion to order the reimbursement of wages lost to a sum greater than the 3 month minimum set by section 128(2) of the Act. This is a situation where it is appropriate to exercise this discretion. The High Court judgment dated 20 October 2003 removed the grounds upon which the Trust made the decision to end Mr Sweeney's employment relationship. From this date there was no barrier to Mr Sweeney being reinstated. Exercising this section 128(3) discretion, Mr Sweeney is entitled to lost wages from the 20 October 2003 until date of this determination.

(iii) Hurt and humiliation

Mr Sweeney seeks an award of \$25,000 for hurt and humiliation caused as a consequence of his dismissal.

Mr Sweeney said his dismissal from the Trust was the most humiliating and devastating situation he has had to take his family through. He said his mana and credibility in the small community of Thames has been damaged as a result of the dismissal and that rumour and innuendo have surrounded his dismissal. He said he felt part of the Trust's family and that he deserved better support and job security than that afforded to him. Mr Sweeney was not responsible in any way for his dismissal.

Mr Sweeney has a personal grievance and he is entitled to an award under section 123(c)(i) of the Act at the rate of \$9,000.

Costs

I invite Ms Alchin and Mr Burley to attempt to resolve the question of costs between them. If they are unable to do so Ms Alchin should file a memorandum of costs within 28 days of the date of this determination. Mr Burley has a further 14 days from date of receiving Ms Alchin's memorandum

in which to file a memorandum in response. Ms Alchin should file anything in reply within 7 days of receipt.

Marija Urlich,
Member of Employment Relations Authority