

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 201  
5563823

BETWEEN                      JACQUELINE TE HUIA  
   Applicant  
  
A N D                              NGATI HINE HEALTH TRUST  
   Respondent

Member of Authority:        James Crichton  
  
Representatives:              Geof Jackett, Advocate for Applicant  
   Penny Swarbrick, Counsel for Respondent  
  
Investigation Meeting:        23 May 2016 at Whangarei  
  
Date of Determination:        21 June 2016

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant (Ms Te Huia) alleges that she was unjustifiably constructively dismissed from her employment with the respondent (the Trust) on 7 May 2015 and the Trust denies that allegation saying that Ms Te Huia resigned her employment.

[2]     Ms Te Huia commenced employment with the Trust in July 2007 as a Youth Service Coach. Since 26 October 2012, Ms Te Huia had been employed in the Kaikohe offices of the Trust.

[3]     Also employed in that office was Mr Bo McGee. It is common ground that the two did not get on. Ms Te Huia told me amongst other things that she found “*he was difficult to work with and did not usually follow the laid down procedures*” and she said that “*while some measures were put in place on all staff to target his behaviour (by the Trust) ... he always failed to comply and there appeared to be no further consequences placed upon him by management*”.

[4] It is common ground that Ms Ellen Smith, who managed the Kaikohe office, asked Ms Te Huia and Mr McGee to meet with her to try to improve their working relationship. Ms Smith's evidence is that she thought the meeting was a success while Ms Te Huia claimed there was a brief improvement in Mr McGee's behaviour but then he relapsed again.

[5] Importantly, Ms Smith said that she had confidence in both Ms Te Huia and Mr McGee; they simply worked differently but each were effective members of the team.

[6] Ms Smith was also very clear that at all times when Ms Te Huia complained about Mr McGee (which was frequently) prior to the meeting just referred to, she would always deal with the matter promptly and the short point was that, while Ms Te Huia had complaints about Mr McGee, equally Mr McGee had complaints about Ms Te Huia, specifically that he said that Ms Te Huia tried to get him to do things the way she did them and he preferred to do them his way. Moreover, Mr McGee claimed Ms Te Huia complained about his music tastes and the way he dressed and he felt that was none of her business.

[7] Ms Smith also gave me a deal of historical evidence about Ms Te Huia's general approach to the workplace which could perhaps be characterised by a somewhat rigid approach to how things ought to be done with a rather rule-based approach which was not necessarily an approach attractive to all.

[8] Ms Smith gave me that evidence from a background not just as Ms Te Huia's manager but before that as a co-worker who had worked with Ms Te Huia for a period.

[9] There was an incident on 19 March 2015 which led inexorably to the termination of the employment relationship. Ms Te Huia says that on that day, Mr McGee arrived at work with headphones on blaring music that was loud and offensive, including bad language, and that he was wearing a t-shirt which also had "*offensive lettering*" on it. She says that Mr McGee "*flatly refused*" to answer the phones when they rang. Ms Te Huia summarised her concerns in the following way in her evidence:

*The whole demeanour of Mr McGee was offensive, aggressive and threatening to my safety in my workplace.*

[10] As a consequence, Ms Te Huia decided to leave the workplace “*for fear of my own safety*” and in her written brief of evidence, she claimed that she advised her manager, Ms Smith, that she would remain home until an adequate solution could be arrived at which would enable her to safely return to the workplace.

[11] But that is not Ms Smith’s evidence of what she was told and when I asked Ms Te Huia what she remembered telling Ms Smith, she said that she had said words to the effect:

*There’s been an incident with Bo. I don’t feel safe in the workplace.*

[12] Ms Smith’s evidence is that first she got a text message from Ms Te Huia and immediately rang her back. It was in that conversation, according to Ms Smith, that Ms Te Huia said she had left the office but Ms Smith was adamant that at no time did Ms Te Huia refer to an incident, or even refer to Mr McGee, and that all that she could get out of Ms Te Huia was the statement that Ms Te Huia felt unsafe at work and needed to leave. Ms Smith told Ms Te Huia to go home and she then proceeded immediately to Kaikohe; when she received Ms Te Huia’s text message she was in Kawakawa.

[13] When Ms Smith got to Kaikohe she spoke with Mr McGee who was unable to enlighten her, denied there had been any incident and denied that there had been any contributing conduct from him which caused Ms Te Huia to leave.

[14] Ms Smith then arranged to meet with Ms Te Huia on 24 March 2015. That meeting took place at the Police station where Ms Te Huia’s husband worked. There are notes of that meeting provided to the Authority. Ms Smith simply decided to use that meeting as an information gathering exercise and so she tried to get an understanding of what Ms Te Huia’s concerns were with Mr McGee.

[15] Ms Smith’s evidence is that all of the matters bar one were matters that Ms Te Huia had consistently complained about previously. She said that Mr McGee did not put in the necessary hours to do his job appropriately, did not dress properly, listened to awful music and refused to answer the 0800 number when it rang. Ms Smith’s evidence is that the only one of those matters which is in any way new to her was the claim that Mr McGee refused to answer the telephone; everything else was a complaint that Ms Te Huia had already made previously and on a number of

occasions. Critically for our purposes, Ms Smith is adamant that Ms Te Huia at no stage repeated the comment that she “*felt unsafe*”.

[16] Ms Smith said that she would engage with the Trust’s General Manager, Ms Kapa Kingi, would also talk with Mr McGee, would arrange for Ms Te Huia to remain on full pay but not be required to attend the office and would report back on an urgent basis.

[17] Ms Smith was as good as her word. She spoke with Mr McGee. He said he had been asked to turn down his music by Ms Te Huia and he had done so. He agreed to stop wearing a particular top which he assumed might be offensive to Ms Te Huia (it was a cancer fundraiser t-shirt with a corruption of a rude word on it), and he had no idea what Ms Te Huia’s complaint was about the failure to answer the phone and maintained that he did his share of phone answering unless he had clients in the office. On his timekeeping, Ms Smith was clear that she always knew where he was and had no concerns about the work commitment.

[18] Conversely, Mr McGee complained about Ms Te Huia saying in effect that she was bossy, wanted him to do things her way and that she was not a team player and did not support other staff.

[19] Ms Smith consulted with Ms Kapa Kingi and it was provisionally agreed that the two staff members could no longer work together. It was decided to offer Ms Te Huia the option of moving to the Kawakawa office but to do exactly the same work there. The option of simply moving Ms Te Huia’s desk further away from Mr McGee’s desk was considered but not thought likely to resolve the issue.

[20] There was a further meeting between Ms Smith and Mr and Ms Te Huia on 30 March 2015 where the Kawakawa option was advanced but Ms Te Huia immediately rejected it saying she should not move because she had “*done nothing wrong*”.

[21] On 31 March 2015, Ms Te Huia texted Ms Smith and asked for a restorative meeting between Ms Smith, Ms Te Huia and Mr McGee and Ms Smith attempted to organise that but Mr McGee was simply unwilling to meet with Ms Te Huia; his view was that he had done what she wanted and he was not interested in investing any more emotional energy in the matter.

[22] Ms Te Huia returned to the workplace on 7 April 2015 and her evidence is that “upon arriving back at work it was apparent no changes had occurred as [Mr McGee] was still in same unprofessional work attire and came in with headphones blaring”.

[23] Ms Te Huia made a further request for a reconciliation meeting but was again told that Ms Smith had been unable to interest Mr McGee in such a meeting and accordingly at 3pm on that day, Ms Te Huia submitted her resignation which was accepted. The resignation gave four weeks’ notice and a personal grievance was raised shortly after the end of the notice period on 19 May 2015.

### **The issues**

[24] The only issue in the present case is whether a proper construction of the evidence discloses that there has been a constructive dismissal.

### **Was Ms Te Huia constructively dismissed?**

[25] I have not been persuaded that Ms Te Huia has been constructively dismissed. Although only dealt with obliquely in Ms Te Huia’s case, it seems that her contention for the constructive dismissal is based on the traditional third leg identified by the Court of Appeal in *Auckland Electric Power Board v. Auckland Provincial District Local Authorities Officers IUOW (Inc)* [1994] 1 ERNZ 168 where the Court of Appeal held that constructive dismissal included a breach of duty by the employer causing the employee’s resignation.

[26] Traditionally, the Courts have broken down that test into two questions relating first to causation and second to foreseeability.

[27] Although I note that there is no explicit claim for a particular kind of constructive dismissal in Ms Te Huia’s claim, it is plain on the evidence that there was no suggestion that she was given the choice of resigning or being dismissed nor any evidence of the Trust following a course of conduct with the dominant purpose of effecting a resignation.

[28] Indeed, on the latter point, all of the evidence is to the effect that the Trust sought to retain Ms Te Huia’s services and did everything it reasonably could to facilitate that.

[29] So reverting to the breach of duty allegation, Ms Te Huia's claim rests principally on her contention that the steps taken by the Trust after the 19 March 2015 departure from the workplace by her, were so inadequate as to constitute a breach of the employer's duty.

[30] I simply do not accept that proposition. There are, I think, two fundamental difficulties with the claim as it stands. The first is that Ms Te Huia never properly articulated her concerns to the employer and in the absence of a clear and unequivocal understanding by the employer of the nature of the mischief that the employer has to address, it is difficult to sheet home a claim that the employer has not responded appropriately.

[31] On Ms Smith's evidence, which I prefer to Ms Te Huia on this point, there was one reference to Ms Te Huia feeling unsafe at work and that was in the telephone conversation the two women had on 19 March 2015. There was never any repeat of that allegation despite two meetings between Ms Smith and Mr and Ms Te Huia; indeed, in the meeting immediately after the incident on 24 March 2015, the only matters traversed it seems were Ms Te Huia's various claims about Mr McGee's behaviour and nothing at all about her responses to that behaviour and certainly no suggestion that he made her feel unsafe.

[32] Nor was there any reference to an incident or an altercation. Ms Smith's evidence, which I accept on this point, is that the first occasion she knew that there had been a "*verbal altercation*" between Ms Te Huia and Mr McGee was in Ms Te Huia's letter of resignation and at no stage during Ms Te Huia's engagement with her employer did she use language of the sort that she used in her written brief of evidence to describe what happened. As I alluded to earlier in this determination, Ms Te Huia referred to Mr McGee being "*offensive, aggressive and threatening to my safety in my workplace*" and in her oral evidence she developed that theme even further with even more direct language.

[33] But the difficulty with all of that is that, with the exception of the single reference to feeling unsafe in the initial telephone call with Ms Smith, there is absolutely no specificity which would enable the employer to understand the magnitude of the problem.

[34] Even so, the employer responded promptly and I am satisfied did what it could within the context of the knowledge it had about the extent of the problem. Based on my questioning of Ms Smith, I am satisfied that had she been apprised of the events of 19 March 2015 with more direct language of the sort that I have just referred to from Ms Te Huia's evidence, she might well have felt able to take further steps in the matter.

[35] What is apparent from the evidence is that Ms Smith, having been apprised by Ms Te Huia of the latter "*feeling unsafe*", took immediate action by driving from Kawakawa (where she was when she spoke to Ms Te Huia on the telephone) to Kaikohe and immediately interviewing Mr McGee who was unable to shed any light on the matter.

[36] Then, Ms Smith convened the first of two meetings with Ms Te Huia in which I am satisfied there is no evidence whatever, either from the written record of the meeting or indeed from the evidence of the parties who were there, that Ms Te Huia repeated the allegation of feeling unsafe and indeed all she did was repeat claims about her difficulties with Mr McGee and his behaviour and added one item of his behaviour which she had not complained about before, namely his alleged refusal (a refusal which incidentally is denied by Mr McGee) to answer the telephone when it rang.

[37] So, having been unable to find out exactly what it was that was so dramatic and significant as to cause Ms Te Huia to leave the workplace, either from the woman herself or indeed from Mr McGee, the Trust provided the credible alternative of suggesting that Ms Te Huia might want to accept an exactly similar role to the one she currently had but in the Kawakawa office. Instead of considering that option and perhaps seeking to engage with the employer about whether it would be prepared to assist in the financial costs of that change because of the travel commitment from Kaikohe to Kawakawa, Ms Te Huia rejected it immediately and seemed to want Mr McGee to move to Kawakawa.

[38] But it was not Mr McGee who had the problem; Mr McGee objected to Ms Te Huia's behaviour in the workplace as well but he had not asked the employer to address that behaviour or come up with a solution for him.

[39] Then, after the second meeting with Ms Te Huia, Ms Smith received a further request from Ms Te Huia that there be another attempt to have a reconciliation meeting with Mr McGee; Mr McGee refused to participate in that and the Trust respected that view and did not press it.

[40] In my view, having reflected on the evidence I heard, I must conclude that the Trust formulated its response to Ms Te Huia's issue based on the limited information that she provided them with and that the response of the Trust was a response that a good and fair employer could have made in those circumstances.

[41] Ms Smith satisfied me in her evidence that had Ms Te Huia been more explicit about the extent of her difficulties and in particular used the sort of language that she used in her evidence at my investigation meeting, then Ms Smith might well have felt obliged to conduct further and more fulsome inquiries than the ones she did.

[42] But even if there had been a more explicit statement of the extent of the difficulties, I still must doubt whether the Trust could have done anything more than it actually did. I certainly do not accept the proposition that in failing to have a reconciliation meeting with Mr McGee, that somehow precipitated the resignation of Ms Te Huia thereby establishing causation and that the failure to have the reconciliation meeting would have led a fair and reasonable employer to foresee that a resignation was in prospect.

[43] The context is also relevant. Ms Te Huia had had a reasonably long career with the Trust and the evidence I heard especially from Ms Kapa Kingi was to the effect that there had been a great deal of investment by the Trust in Ms Te Huia and a great deal of support provided to Ms Te Huia over the years when she had various personal challenges during the employment. None of this evidence suggests that the Trust was indifferent to Ms Te Huia's needs and when she articulated them clearly, as had been the case 12 months previously for example when a hui resulted in certain changes being made to her work environment, the Trust had demonstrated what a good and fair employer it actually was.

[44] I am satisfied then that looking at the matter either from the point of view of the test for justification under s.103A of the Employment Relations Act 2000 (the Act), or indeed looking at the matter in terms of the third kind of constructive dismissal typically identified, Ms Te Huia cannot succeed.

[45] On the test for justification, I think the response made by the Trust was the response that a good and fair employer could make, even if it could be said that other employers might have done something different.

[46] Similarly, looking at the narrow constructive dismissal allegation, I have not been persuaded that the Trust's response is a breach of duty, but even if that finding puts the matter too explicitly, it is difficult to see how the Trust's behaviour caused the resignation and in my judgment impossible to conclude on the evidence that the resignation was reasonably foreseeable.

[47] After all, Ms Te Huia had been employed by the Trust for many years, had been complaining about Mr McGee for many years, and on the evidence that I am satisfied the Trust heard about the 19 March 2015 episode, there was nothing to suggest the escalation in the interpersonal difficulties between the two co-workers.

[48] On that basis then, Ms Te Huia's claim fails in its entirety.

### **Determination**

[49] I have not been persuaded that Ms Te Huia has any viable personal grievance and on that footing she is not entitled to any remedies.

### **Costs**

[50] Costs are reserved but of course, as the Trust is the successful party, it is entitled to look to Ms Te Huia for a contribution to its costs. If those costs are set in the Authority they will be set on the basis of the usual daily tariff approach where the starting point would be a requirement that Ms Te Huia might be asked to contribute \$3,500 to the costs incurred by the Trust, subject of course to the Authority's entitlement to consider increasing or decreasing that sum based on the submissions that it received.

[51] In the particular circumstances of this case, the Trust may think it appropriate to not pursue a contribution to its costs for Ms Te Huia and I commend to it the suggestion that, in all the circumstances, notwithstanding it has been completely successful, that it accepts that costs should lie where they fall.

James Crichton  
Chief of the Employment Relations Authority

