

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2012] NZERA Auckland 216
5326707

BETWEEN

NICOLA TIMU
Applicant

A N D

TE RUNANGA
O KIRIKIROA TRUST INC
Respondent

Member of Authority: K J Anderson

Representatives: A Singh, Counsel for Applicant
A Hope, Counsel for Respondent

Investigation meeting: 18 October 2011 at Hamilton

Submissions Received 16 November 2011 from Respondent
22 November 2011 and 23 January 2012 from Applicant

Date of Determination: 25 June 2012

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Ms Timu, claims that she was unjustifiably dismissed on 17 August 2010. She asks the Authority to find that she has a personal grievance and award her the remedies of reimbursement of lost wages and compensation of \$20,000 for hurt and humiliation.

[2] The respondent, Te Runanga O Kirikiriroa Trust Inc (the Runanga) says that Ms Timu was employed as a casual employee and when some problems arose relating to her actions, she was offered work in an alternative area of the Runanga's operations, for the purpose of undertaking professional training. But Ms Timu refused this alternative casual employment and the employment relationship therefore came to an end.

[3] The Authority has received evidence from Ms Timu and from Mr Jack Puke in support. Evidence for the Runanga has been received from Ms Mere Balzer, Chief Executive Officer,¹ Ms Karen Whiteman, Human Resources Manager, Ms Liz Moana Puru, Administrator, and Mr Rodney Cox, Clinical Nurse/Specialist Manager, Rongo Atea.

[4] The parties have presented various documents along with comprehensive closing submissions. All of the available material has been closely considered by the Authority, albeit it may not be specifically referred to in this determination.

Background

[5] Ms Timu commenced her employment on 3 November 2009 under the terms and conditions of a written employment agreement (the Agreement) signed by the parties on this date. Relevant to the issues before the Authority, the Agreement provides at clause 1.0:

NATURE OF AGREEMENT

The parties agree that: the casual employment is on an “as and when” required basis at all times. The Runanga is entitled to offer you casual employment at any time to meet its operational requirements. The Runanga is not obliged to offer you work at any time. Similarly, you are entitled to accept or reject any offer of work at any time. Each period of casual employment is a separate engagement. Where more than one period of casual employment is undertaken, the employment ceases at the end of each period. The service is not continuous. Nothing in this agreement provides any entitlement to further employment beyond each period of casual employment. You should not have any expectation of further offers of casual employment.

[6] Clause 2 of the Agreement states that the place of work for Ms Timu is the Runanga office which is: “currently located at 59 Higgins Road, Hamilton”. The clause then goes on to provide the following:

Your place of work is the Runanga Service Unit; Rongo Atea and Nga Whare Tuhono, respectively. Located at 180 Dey Street and 8 Avon Street Hamilton, respectively.

[7] In regard to the hours of work, clause 3 provides that:

Due to the casual nature of your employment, it is not possible in this agreement to be specific as to your hours of work and any meal and refreshment break periods that will apply during the hours that you work. You will be informed of the days and hours that you will be

¹ Including a sworn affidavit dated 16 November 2011.

required to work and of any applicable breaks for meals and refreshments when each offer of casual employment is made. If you are unable to attend work for any reason you must advise the manager as early as possible before you are due to start work that day or, if that is not practicable, as early as possible after that.

[8] Then, finally, at clause 8 of the Agreement, under Termination, it is provided that:

Due to the casual nature of your employment, formal notice of termination is not required.

[9] Ms Timu reported to the Clinical Nurse Specialist and Manager, Mr Cox. He is also the stepfather of Ms Timu. Mr Cox is a registered nurse and at the time in question he was responsible for the services known as Rongo Atea and Nga Whare Tuhono. Mr Cox explained to the Authority that Rongo Atea is a residential youth drug and alcohol addiction service. It operates out of a purpose-built premises owned by the Runanga. The clients in Rongo Atea are known as taiohi (youth or young person). They are in a residential semi-secure facility where they receive treatment over an intensive 10 week period. Nga Whare Tuhono is an adult service for clients diagnosed with mental health issues. It is also a residential programme; the clients live in accommodation provided by the Runanga. Ms Timu was employed in the Rongo Atea area as a kai mahi (support worker).

The departure of Ms Timu from her employment

The evidence of Ms Timu

[10] The evidence of Ms Timu is that while she was not rostered to work on 17 August 2011, she went to the workplace to help with graduation photos and also to speak to someone about why she was not on the roster. Ms Timu says that she was in the staff room with Mr Jack Puke, working with the graduation photos on the computer, when Mr Cox came forward. The evidence of Ms Timu is that Mr Cox asked Mr Puke to leave as he wanted to meet with Ms Timu. Mr Puke duly left the room and Ms Timu gave an implausibly graphic recollection of the discussion that took place between her and Mr Cox.

[11] Ms Timu attests that Mr Cox opened the discussion with a question:

Do you want me to talk to you as a father or as a manager?

[12] Upon Ms Timu indicating that she believed Mr Cox should speak to her as her manager, after being asked by Mr Cox, she then indicated that she did not require a support person,.

[13] Ms Timu's further evidence is that Mr Cox then told her that he had received complaints from the parents of two taiohi that Ms Timu had provided their children with cigarettes.² Ms Timu says that she denied this allegation and told Mr Cox that the two young people named had been stealing cigarettes from her and that she had told the team leader (Ms Jo Elliot) about it. Ms Timu also says that she filled in a CIN (Client Incident Notification) form. The oral evidence of Ms Timu is that she had noticed cigarettes had gone missing and one of the taiohi had confessed to taking them. Ms Timu did not identify who the taiohi is that she was referring to.

[14] The evidence of Ms Timu is that, upon informing Mr Cox that she had not done anything wrong, he accused her of lying and that he informed her that he had three staff members who could confirm this. Ms Timu says that Mr Cox was not prepared to disclose the names of the staff members. Ms Timu attests that she became tearful and was informed by Mr Cox that he had decided that she would not continue to work in the Rongo Atea area and that she would now be required to work in the Nga Whare Tuhono unit. Ms Timu says that upon protesting that she could not work in the Nga Whare Tuhono unit because she would be unable to take her children there when working, Mr Cox was unsympathetic. Ms Timu attests that the conversation concluded on the basis that Mr Cox asked her if she should have her brother (Riki) present as a support person. Ms Timu says that she inquired: "*What for? Does this mean I'm fired?*" and that Mr Cox responded: "*Yes effective immediately*".

[15] The evidence of Ms Timu is that Mr Cox then fetched her brother who arrived with Ms Timu's young daughter. Ms Timu says that upon Riki inquiring why she was upset, she told him: "*I was just fired. Dad just fired me*". Ms Timu says that she left the Runanga premises shortly after and drove home in her brother's car.

[16] The evidence of Ms Timu is corroborated to some extent by that of Mr Puke but generally, I found his evidence to be vague and lacking in detail with regard to certain matters, such as, the time of day that Ms Timu was allegedly dismissed. The evidence of Mr Puke was also inconsistent when being cross-examined by Mr Hope.

² The Authority understands that the Taiohi are between 13 and 17 years of age.

For instance, when asked by Mr Hope as to whether he was working on the day in question, Mr Puke replied that he was not and that he just came in to do photos for the graduation. However, Mr Puke's written statement of evidence records that after the departure of Ms Timu from the Runanga premises, he went back to work for the rest of his shift. Further, the oral evidence of Mr Puke is that Mr Cox asked Riki to take Ms Timu home whereas Ms Timu says that she actually drove home in Riki's car. On the whole, I have to say that I found the overall evidence of Mr Puke to be unreliable.

The evidence of Mr Cox

[17] There are some substantial conflicts between the evidence of Ms Timu and that of Mr Cox. First, Mr Cox says that Ms Timu had "*problems*" establishing "*appropriate boundaries*" with the taiohi and he gave examples of two earlier instances pertaining to inappropriate behaviour on the part of Ms Timu. Mr Cox then attests that with respect to the allegations regarding Ms Timu giving cigarettes to taiohi, he was asked by Ms Balzer, the Chief Executive Officer of the Runanga, to investigate this matter. Mr Cox says that he spoke to Ms Timu on 9 August 2010, not 17 August 2010; as Ms Timu has attested. Mr Cox produced a copy of the notes that he prepared pertaining to his discussion with Ms Timu.

[18] Mr Cox told the Authority that he compiled some handwritten notes after his meeting with Ms Timu and then prepared the typed version produced to the Authority, after the Runanga became aware that Ms Timu was pursuing a personal grievance.³ The submissions for Ms Timu raise a question about the genuineness and accuracy of Mr Cox's notes given that he could not produce his handwritten notes to the Authority; and that the version produced was compiled some two months after the meeting with Ms Timu. However, having observed Mr Cox closely during the investigation meeting, I have no reason to doubt the general credibility of his evidence and I accept that his notes are a reasonably reliable record of his recollection of his meeting with Ms Timu. I also accept the corroborative evidence of Ms Balzer in regard to her discussions with Mr Cox prior to the meeting between him and Ms Timu.

[19] In regard to the date of the meeting between Mr Cox and Ms Timu, I conclude that it is more probable that it was 9 August 2010. When verifying this date, Mr Cox

³ The record shows that the personal grievance was raised via a letter dated 26 October 2010.

referred to an incident involving two female taiohi “attacking” another girl due to perceived “narking” related to Ms Timu and the cigarettes issue. This incident is recorded in the CIN forms and a progress note pertaining to the Taiohi who had apparently been accused of narking.

[20] The evidence of Mr Cox regarding his meeting with Ms Timu is that he had been asked by Ms Balzer to investigate the matter of the allegations regarding Ms Timu giving cigarettes to the two taiohi. Mr Cox attests that:

I did not dismiss Nikki. I told her simply she would not be offered more work at Rongo Atea until she received further training in relation to professional boundaries. I told her she would be offered work at Nga Whare Tuhona. She did not accept this.

[21] Mr Cox also says that:

I recall that Nikki did not go home after I spoke to her. Her time sheet shows that she worked her shift to midnight. I asked her if she wanted to go home but she refused the offer. She wanted to stay at work.

[22] Mr Cox says that he offered to look after Ms Timu’s young child to allow her to work at the Nga Whare Tuhono unit.

[23] The oral evidence of Mr Cox is that there was some further discussion “*on a family basis*” where attempts were apparently made to persuade Ms Timu to work at the Nga Whare Tuhono unit and obtain some professional training with regard to correcting the issues that had arisen in relation to appropriate contact with the younger clients.

Analysis and conclusions

[24] Ms Timu claims that she was dismissed on 17 August 2010. The matter of whether or not Ms Timu was dismissed is an issue that remains to be determined. On the weight of the evidence, I conclude that the employment of Ms Timu terminated on 9 August 2010, following her discussion with Mr Cox: not 17 August 2010 as Ms Timu alleges.

[25] It is argued for the Runanga that Ms Timu was a casual employee, employed on an as-required basis and as she refused to accept work at the Nga Whare Tuhono unit, she could not be offered other employment, as until she participated in some professional training, in regard to her appropriate contact with the taiohi, she could

not be offered any further work at the Rongo Atea unit. Effectively, the position of the Runanga is that, as a casual employee, Ms Timu could have no expectation of ongoing work, due to her refusal to move to the Nga Whare Tuhono unit. Therefore, the first question for the Authority to determine is:

Was Ms Timu a casual employee?

[26] Ms Timu acknowledges that she was initially employed as a casual employee but she says that at the time of the termination of her employment, she was employed as a permanent employee with expectations of being given regular rostered work. The Authority has been referred to *Jenkinson v. Oceana Gold (NZ) Ltd*⁴ where it was held that:

The distinction between casual employment and ongoing employment lies in the extent to which the parties have mutual employment related obligations between periods of work. If those obligations only exist during periods of work, the employment will be regarded as casual. If there are mutual obligations which continue between periods of work, there will be an ongoing employment relationship. The strongest indicator of ongoing employment will be that the employer has an obligation to offer the employee further work which may become available and that the employee has an obligation to carry out that work.

[27] It is submitted for Ms Timu that there are several factors that are indicative of an ongoing employment relationship. First, it is argued that there was a “consistent and predictable pattern” whereby Ms Timu worked Friday, Saturday and Sunday over a period of eight months. Further, it is posited that Ms Timu was “automatically placed” on the roster to work every Friday, Saturday and Sunday without consultation and that Ms Timu was only consulted with regard to working extra shifts between Mondays and Thursdays.

[28] Both parties have provided their respective summaries of the hours that Ms Timu worked. The summaries, derived from the timesheets for 2010, show that Ms Timu usually worked on Friday, Saturday and Sunday of each week, sometimes working up to 16 hours on a double shift. Then there are other periods where it appears that the taiohi were not in residence and on home leave, hence Ms Timu did not have any work. Ms Timu was also able to request some weekends off. I also note that the timesheets all have a declaration at the top of them - thus:

⁴ [2009] ERNZ 225.

I [name] have accepted a casual engagement of employment from [date] to [date]. I understand that I have no expectation of ongoing employment with Te Runanga o Kirikiriroa Trust.

[29] The timesheets are signed by the employee and his or her manager. However, I note that the dates of the casual periods of employment are sometimes not inserted. Nonetheless, it appears that these timesheets are only intended for those employees who are employed on a casual basis. Another factor is that the residential courses for the taiohi are for a period of ten weeks and as I understand it, each intake is dependent on Government funding being available. Therefore, at best, the employment of Ms Timu was for a period of ten weeks and during that period she was allocated work on the basis of usually three shifts each week, mainly to cover the weekends in order to allow permanent staff to have that time off.

[30] Ms Moana Puru is the administrator for the Runanga and part of her duties is to prepare the duty rosters for each week. The evidence of Ms Puru is that, when preparing the rosters, she would put the permanent staff into the matrix and any gaps would be filled by "the casual pool". Ms Puru says that the casual employees, including Ms Timu, would come in and fill the gaps available and Ms Puru would then type the respective names into the roster. Ms Puru says that sometimes casual employees would ring her about the work available and on other occasions she would ring around the casual staff to find someone who would work a vacant shift. Ms Puru recalled that Ms Timu would discuss with her which shifts she wanted to work.

[31] While it has to be accepted that generally Ms Timu would be rostered to work Fridays, Saturdays and Sundays, that does not, on its own, point to an ongoing employment relationship, particularly given that during the ten week period that the taiohi were engaged with the Runanga, they sometimes went home and there was no work available for Ms Timu. The key question is whether or not the Runanga had an obligation to offer Ms Timu further work which became available and associated with that: did Ms Timu have an obligation to carry out that work?

[32] If one takes the wording of the employment agreement and the timesheet declaration literally, then the conclusion has to be that there were no mutual obligations as to offering and accepting work. However, the practical application of what happened in the employment arrangement was somewhat different, in that based on the consistency of the work that was made available to her, Ms Timu had a reasonable expectation (at least during most of 2010) that she would be offered

regular work and it can be reasonably assumed that the Runanga expected her to be available to fulfil her obligations when she was included in the rosters for each week.

[33] I conclude that Ms Timu was offered work on something better than just an intermittent or irregular basis and that her circumstances were similar to those that prevailed for the employee in *Barnes v Whangarei Returned Services Association (Inc)*,⁵ where while the employment agreement specifically defined the employment relationship as casual, the employee was included on a roster and worked regularly three nights a week for several months. The Court found that the pattern of work was sufficiently regular and continuous to make the employment ongoing and not casual.

[34] In summary, I conclude that the employment status of Ms Timu was not casual in its nature. But neither could it be said to be permanent part time given that each intake of young people relied on funds being available. It seems to me that the nature of Ms Timu's employment was more inclined to be part time for a fixed term. The fixed term being for 10 weeks with no basis for an expectation of further employment beyond that. However, it has to be said that this finding is only relevant to the extent that it goes to the argument of whether or not the Runanga could simply refuse to offer Ms Timu any further work due to the belief that she was a casual employee. I find that the belief of the Runanga was not correct and that she was entitled to be offered continuing work, at least to the end of the 10 week period. This is a matter that now needs to be examined further but given my overall findings, the employment status of Ms Timu probably assumes less relevance.

The nature of the termination

[35] The evidence of Ms Timu is that she was summarily dismissed by Mr Cox but I do not accept that this is so. Rather, I find that the reality of the situation was that Ms Timu was informed that given the complaints that had been received by the Runanga that Ms Timu had provided cigarettes to two young women, Mr Cox had decided that she would no longer be offered work in Rongo Atea unit but she would be required to work at the Nga Whare Tuhono unit, in order to obtain training in maintaining appropriate contact boundaries with the clients. Ms Timu objected to this on the grounds that she would not be able to take her young child to Nga Whare Tuhono

⁵ [1997] ERNZ 626.

unit; albeit Mr Cox said that the family would continue to assist Ms Timu with child care, as they had already been doing.

[36] The question that now arises is: Was it fair and reasonable for the Runanga to instruct Ms Timu to work at the Nga Whare Tuhono unit? I find that it was. This is because Ms Timu was clearly having problems distancing herself from involvement with the young people in the Rongo Atea unit. The matter of how the taiohi obtained cigarettes probably required further investigation by Mr Cox but there had been two earlier incidents involving Ms Timu and it appears that Ms Timu failed to understand that her behaviour was inappropriate.

[37] The employment agreement also provides that the place of work for Ms Timu was: "*Rongo Atea and Nga Whare Tuhono, respectively.*" Therefore the Nga Whare Tuhono unit was a designated place of work for Ms Timu. The substantive reason that Ms Timu gave for refusing to work at Nga Whare Tuhono was that she would not be able to take her young child there when she was working during day shifts. But apart from the fact that Mr Cox offered to assist with the care of the child, there was no obligation on the employer to provide child care, albeit it seems that given the culture prevailing within the Runanga, Ms Timu would have, most probably, received some assistance from her family.

[38] I also raised the matter of a possible conflict of interest with the parties in that it was not appropriate for Mr Cox to be involved with disciplinary action pertaining to Ms Timu. The closing submissions for the Runanga have addressed this matter along with an affidavit from Ms Balzer, whereby she very proficiently explained the principles of Tikanga Maori, including whanaungatanga, manaakitanga and tino rangatiratanga. I respectfully accept the importance of those principles in regard to the role and functions of the Runanga. I have simply raised the matter of a possible conflict of interest in regard to the role of Mr Cox in a disciplinary setting which has now come before the Authority. It seems to me that, given the family situation, Mr Cox should have been excused from the disciplinary process and it should have been managed perhaps by Ms Balzer, or another person authorised to do so. Nonetheless, reflecting upon the overall situation, including the culture of the Runanga, I do not find that there was any unfairness visited upon Ms Timu due to Mr Cox being her manager and stepfather. Nor do I understand that Ms Timu claims

otherwise. However, I do add that the situation was less than best practice in an employment relations setting.

Determination

[39] I find that Ms Timu was not dismissed from her employment. Rather, I conclude that she refused to accept employment at the Nga Whare Tuhono unit and by doing so effectively resigned from her employment. It appears that Mr Cox and possibly other family members, attempted to persuade Ms Timu to accept the alternative employment and obtain further training with the possibility that she could subsequently return to the Rongo Atea unit. Unfortunately, Ms Timu appears to have rejected the best intentions of those closest to her. That is regrettable as it appears that she had more to offer the Runanga in the future. But ultimately, Ms Timu has to assume responsibility for her own actions rather than accuse others of inappropriate behaviour. Ms Timu does not have a personal grievance and hence the remedies that she seeks are not available to her.

Costs

[40] Costs are reserved. The parties are invited to resolve the matter of costs if they can, taking into account the usual daily tariff approach of the Authority for a one day hearing. In the event that a resolution cannot be reached, the respondent has 28 days from the date of this determination to file and serve submissions. The applicant has a further 14 days to file and serve submissions.

K J Anderson
Member of the Employment Relations Authority