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Cairns v Te Aka Ora Charitable Trust (Auckland) [2016] NZERA 639; [2016] NZERA Auckland 202 (21 June 2016)

Last Updated: 2 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 202
5590691

BETWEEN ELIZABETH CAIRNS Applicant

A N D TE AKA ORA CHARITABLE TRUST

Respondent

Member of Authority: James Crichton

Representatives: Stan Austin, Advocate for Applicant

Libby Brown, Counsel for Respondent

Investigation Meeting: 21 April 2016 at Gisborne

Date of Determination: 21 June 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant (Ms Cairns) alleges that she was unjustifiably dismissed by the respondent (the Trust). That claim is resisted by the Trust which says that the dismissal was procedurally fair and substantively justified.

[2] Ms Cairns was employed as a Service Delivery Manager with the Trust in February 2012 and as such was a member of the senior management team. Immediately prior to her employment, she had for a short period been a trustee of the Trust.

[3] In evidence that she gave to the Authority, the Trust's Financial Controller, Ms Raewyn Chaffey, said that she recalled a conversation that she had had with Ms Cairns around November 2014 when Ms Cairns raised with her the possibility of money generated from a fundraising effort for an unrelated entity, being lodged to the

Trust's bank account on a temporary basis. Ms Chaffey's evidence to the Authority

was that she had no difficulty with that sort of temporary arrangement.

[4] However, the following May 2015, it was apparent that Ms Chaffey had become irritated with the informal arrangements concerning this sum of money and she referred the matter to the Trust's Board.

[5] This notification immediately alerted the Trust's Board and questions were

asked about effectively who the money belonged to and what it was for.

[6] Ms Cairns, who was present at the Board meeting, acknowledged that she knew about the money and on inquiry from Board members, Ms Cairns said she had deposited the money for "*safe keeping*" and had subsequently withdrawn amounts of the total sum to pay for costs of an unregistered charitable entity called Aroha Noa.

[7] There is a conflict in the evidence as to whether Ms Cairns represented that she was the chair of Aroha Noa or not. It is evident from the testimony of the trustees that they formed the view that Ms Cairns was the titular head of Aroha Noa; conversely, Ms Cairns' evidence is that she does not recall saying she was "*the chair of Aroha Noa*" but she admits that when asked who was the chair, she replied that she was but said that she only "*chaired the meetings*".

[8] When I asked Ms Cairns about that, she said that she had been to a number of meetings of the group which "*grew out of a student exercise*" and their tutor had approached Ms Cairns to speak to the group. Ms Cairns says that she went along with some of her staff from the Trust and that she ended up as the chair simply to sort the organisation out.

[9] That said, I have no doubt that Ms Cairns managed to convey to trustees the notion that she had some significant involvement in the leadership of Aroha Noa and while calling her the chair may give her a grander status in the organisation than she (or indeed Aroha Noa) intended, it seems to me beyond doubt that Ms Cairns was involved in Aroha Noa.

[10] Ms Cairns seeks to minimise that involvement of course and says, amongst other things, in her written evidence that she "*only chaired the meetings*" but she seems to fail to grasp that even if that is all that she did (and on the facts that certainly is not the case, given that she effectively provided the Trust's bank account for Aroha

Noa to use as well), by chairing meetings of an entity, one must be perceived to develop some engagement with that entity beyond the engagement of an otherwise unconnected individual.

[11] The explanation that Ms Cairns provided at the May 2015 Board meeting was essentially that Aroha Noa required temporary access to a bank account as Aroha Noa was still in the process of incorporating as a trust and the evidence also suggests that Ms Cairns made some passing reference to the Trust being "*a fund holder for Aroha Noa*".

[12] The Trust's Board members formed the view that there was a potential conflict of interest between Ms Cairns' involvement with Aroha Noa and her role as a senior manager with the Trust and they sought a full written report from her to be provided for the next Board meeting. That report was emailed on 16 June 2015. A copy of it is before the Authority. It is hardly a fulsome account of Ms Cairns' involvement with Aroha Noa. Moreover, in the one paragraph of the report that refers to the relationship with Aroha Noa, Ms Cairns refers to a grant application made with the Ministry of Social Development (MSD) for \$54,000, that the grant was in part retrospective being for a period commencing on 1 February 2015 and that as the designated fund holder, the Trust had effectively become the head contractor from the commencement date (1 February 2015), while Aroha Noa was to deliver the services as the subcontractor.

[13] Attached to Ms Cairns' report was an explanatory letter from MSD dated

12 June 2015 and MSD's Letter of Grant which was effectively the terms and conditions of the funds being advanced by MSD to the Trust for Aroha Noa to perform certain services. MSD was requesting a prompt sign-off from the Board, in part not doubt because the services being provided had ostensibly commenced five months before.

[14] In my view, a proper construction of the Letter of Grant is that it is a document between MSD on the one hand and the Trust on the other and Aroha Noa is mentioned as no more than a bit player. Indeed, as the Reverend Donald Tamihere said in his evidence for the Trust, Aroha Noa got no mention whatever until the final three paragraphs of the Letter of Grant. Put another way, there are 21 paragraphs that refer to the Trust and its obligations to MSD and just three that refer to Aroha Noa's obligations to the Trust as the subcontractor.

[15] The Board formed the view that the effect of this proposed arrangement might well have implications for its own funding applications for its own projects given that MSD was one of its major funders.

[16] Having received this information, the Trust formed the view that it had to institute a disciplinary proceeding against Ms Cairns and it wrote to her by letter dated

14 July 2015. While there is a great deal of detail in that letter, broadly there are two allegations; the first relates to the events and actions just referred to and the second relates to an entirely unrelated contention that Ms Cairns had, in contravention of Trust policy, recruited her niece to a position of employment with the Trust, despite the latter having a criminal conviction. That allegation of course concerned both issues of nepotism and the propriety of having an employee with a criminal conviction.

[17] Two members of the Trust Board were delegated to conduct an inquiry and as a consequence, meetings with Ms Cairns were held and a decision ultimately arrived at to dismiss her on notice.

The issues

[18] The only issue in the present case is whether the Trust can justify its dismissal of Ms Cairns.

Was the dismissal justified?

[19] This is a case where the factual matrix is not greatly in dispute. Ms Cairns acknowledges that she had a relationship with

Aroha Noa but she disputes that the relationship brought her into a conflict of interest situation with her own employer and she maintains that everything that she did in relation to Aroha Noa was consistent with the Trust's own values and with her job description.

[20] Moreover, Ms Cairns maintains that while she did employ her niece who had a criminal conviction, this was a simple oversight and she ought not to be dismissed for an ordinary human error.

[21] Both of those positions are rejected by the Trust which, while acknowledging the common ground between it and Ms Cairns, and in particular Ms Cairns' frank

acceptance of the central elements of the allegations, prefers a darker view of her conduct than the one that she advances herself.

[22] Dealing first with the question of the employment of the niece with the criminal conviction, I have not been persuaded by Ms Cairns that this was a simple human error which ought not to sound in disciplinary consequences. First of all, there is the disputed evidence of Ms Chaffey, the Trust's Financial Controller, who says she raised the recruitment with Ms Cairns asking if Ms Cairns "thought it was the right thing to do" and suggested to Ms Cairns that she should clear the appointment with the Board.

[23] Ms Cairns says that the first statement is correct but that Ms Chaffey never told her to clear the matter with the Board. But whether Ms Chaffey did or did not, it is still difficult to understand how Ms Cairns can maintain that this was a simple human error when she would have been put on notice at a very early stage by Ms Chaffey raising the matter with her (which Ms Cairns acknowledges did happen).

[24] Moreover, and even more damaging to Ms Cairns' position that this was a simple human error, is her decision to obtain a letter from the funder of the programme that her niece would work on, indicating that it had no difficulty with her criminal conviction.

[25] It is difficult to square the terms of that letter, which was produced at the disciplinary meeting on 30 July 2015 and is itself dated 30 July 2015 with Ms Cairns' contention of simple human error; if it is simple human error, why would she go to the trouble of obtaining a letter from the funder to present to the employer at the disciplinary meeting? Plainly, she thought she was vulnerable to the allegation that the criminal conviction of her niece was a problem and she sought to reduce the risk of such a finding by showing that the funder of the programme that the niece would work on was not concerned about the criminal offending. That is not consistent with simple human error and I reject Ms Cairns' argument in respect to that matter, preferring the view that the Trust formed that her engagement of her niece was a deliberate act in contravention of the Trust's policies and procedures and that it is more likely than not that Ms Cairns employed her niece without consulting trustees because she knew that the trustees would take a jaundiced view of the engagement, particularly having regard to the nature of some of the niece's previous offending (stealing from a charitable trust).

[26] On the other allegation against Ms Cairns, her contention broadly is that Aroha Noa and the Trust were two charitable organisations whose *raison d'être* was similar and that her support for Aroha Noa in a personal sense was no more than a fulfilment of her job description.

[27] Ms Cairns seemed unable to see any basis for the Trust's view that her activities had potentially compromised the Trust's reputation and effectively committed itself to a project which it has not chosen for itself. Ms Cairns stoutly maintained that the Trust had never demonstrated any actual harm from her behaviour.

[28] But that is not the legal test; the test for justification requires the Authority to make a judgment about whether a good and fair employer in the Trust's position could have concluded that she was guilty of serious misconduct by virtue of the actions that she took and if a good and fair employer in the Trust's position could have reached a conclusion that Ms Cairns was guilty of serious misconduct, that is sufficient for the law's purposes; there is no requirement for actual damage to be demonstrated because the apprehension of damage is enough.

[29] In his evidence to the Authority, the Rev Tamihere summarised the Trust's

position in the following terms in his brief of evidence:

Liz [Ms Cairns] had put the Trust into a compromising position with one of its primary funders on two fronts. I was of the opinion that if MSD discovered that the Trust had no idea it was a fund holder for this unknown entity and/or it had hired staff with criminal convictions, either incident could have impacted on the Trust's ongoing relationship with MSD and therefore its future funding applications.

[30] I have reached the conclusion that a good and fair employer in the Trust's position, after conducting a proper inquiry, could have concluded that the Trust was in a compromising position because of either or both of Ms Cairns' actions impacting on the Trust's relationship with MSD.

[31] In relation to Ms Cairns' involvement with Aroha Noa, I am satisfied that a reasonable employer in the Trust's position would conclude that Ms Cairns was involved with Aroha Noa because of what Ms Cairns herself said and because of what she did. She said that she was the chair of Aroha Noa, or at worst that she chaired

their meetings. Either way, her involvement is more extensive than someone who had no involvement at all in Aroha Noa.

[32] Moreover, there is an email from Ms Cairns to Aroha Noa dated 2 June 2015 and headed "*Chairperson Position*" in which in her first paragraph of the email, Ms Cairns says:

... I have to stand down as interim chairperson due to the conflict of interest that has arisen through MSD nominating us as the fund holder.

[33] That email sent from the Trust seems to emphasise the extent of Ms Cairns' involvement rather than minimise it.

[34] But as I have already observed, the precise nature of Ms Cairns' role at Aroha Noa is neither here nor there; any reasonable person being advised that she was either the chair or was chairing its meetings or, in terms of this email, was having to stand down as chairperson because of a perceived conflict of interest, would conclude that there was a significant relationship between the individual and the entity that was at least more intertwined than would be the position with somebody who had never heard of Aroha Noa.

[35] But what about Ms Cairns' view that the interests of the Trust and Aroha Noa are one and the same and that all she was doing was fulfilling her job description? That argument might have some validity if there had not been a semblance of secrecy about the whole affair. If Ms Cairns had told her employer what she was up to at an early stage instead of trying to keep the information from her employer, then she would have been in a stronger position to argue that all she was doing was fulfilling her obligations in terms of her job description.

[36] But that argument is difficult to make when the other party to the employment agreement (the employer) has literally no idea that the employee considers that part of her obligation is to facilitate the work of another organisation, even where that other organisation has laudable aims.

[37] There is a statutory obligation on parties to an employment relationship to be open and communicative and broadly, to treat each other in good faith and Ms Cairns' behaviour simply does not meet that test. Far from being open and communicative, she has been secretive and has failed to disclose to the employer her involvement with

this other, no doubt laudable, entity. Had she done so, her argument that she was doing no more than her job description required, may have been made out.

[38] But it cannot be right that one party to a bilateral employment relationship can act unilaterally of the other and entirely without the other's knowledge even where the activity may well be broadly consistent with the employer's own obligations and aspirations.

[39] However, it is worse than that because not only did Ms Cairns actively spend her time engaging in activities to further Aroha Noa but she also implicated the Trust and she started doing that from November of 2014, again long before the trustees had any notion of what she was doing. Despite her efforts to explain away what she was doing, the letter from Aroha Noa dated 28 July 2015 makes clear that at a very early stage in its engagement with MSD, Ms Cairns had effectively volunteered the Trust's bank account for use by Aroha Noa.

[40] So in addition to allowing Aroha Noa to lodge and withdraw funds from the Trust's bank account for over six months without the knowledge of the trustees, the

28 July 2015 letter from Aroha Noa makes clear that certainly from 9 April 2015, MSD thought it was dealing with the Trust and it is difficult to see why Ms Cairns could imagine that it was appropriate for her to keep on making commitments on behalf of the Trust when the trustees themselves knew nothing about it.

[41] When the matter was finally flushed out as a consequence of the initial discussion at the May 2015 Board meeting and then the subsequent report from Ms Cairns, her explanation of her behaviour was that she was effectively waiting for confirmation of MSD's involvement and that only came to hand with the MSD correspondence dated 12 June 2015. But that cannot be right. The letter from Aroha Noa dated 28 July 2015 indicates that the Trust (presumably through Ms Cairns herself) would have had notification on or about 9 April 2015 of the approval of the grant so even if Ms Cairns' point about waiting for the official confirmation is right, she could have put that before the Board in April 2015.

[42] But even that would have been too late. In my judgement, Ms Cairns had an absolute obligation to disclose to the trustees what was happening and while it seems to now be common ground that Ms Cairns was not herself involved in the negotiations with MSD, it is nonetheless absolutely apparent that on and from November 2014

when she effectively allowed an unformed entity to use the Trust's bank account as if it were their own, she was locking her employer into a relationship about which the trustees of the employer knew nothing at all. It is apparent in a consideration of the

28 July 2015 letter from Aroha Noa that once Aroha Noa had established that it could use the Trust's bank account as it had in November 2014, it then went ahead in reliance on that fact in its discussions with MSD. And, whether or not Ms Cairns was involved in those discussions with MSD, the fact remains that the Letter of Grant from MSD is, to intents and purposes, written as if it represents a contractual relationship between MSD and the Trust rather than a contractual relationship between MSD and Aroha Noa and the only way that could have happened is on the footing that Aroha Noa had been given assurances by Ms Cairns that it could proceed on that basis.

[43] For these reasons then, I conclude that the Trust, after conducting a proper investigation, could have reached the conclusion that Ms Cairns was guilty of serious misconduct and that dismissal on notice was the appropriate sanction for that.

Determination

[44] I am satisfied that Ms Cairns was justifiably dismissed from her employment by Te Aka Ora Charitable Trust and as a consequence her claim fails in its entirety.

Costs

[45] Costs are reserved but the parties are urged to try to resolve costs on their own terms. If that proves unsuccessful, the Trust can file and serve a submission on costs and Ms Cairns has 14 days to respond to that.

James Crichton

Chief of the Employment Relations Authority

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