

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Piatarahi Callaghan (Applicant)

AND Poutiri Charitable Trust Incorporated (Respondent)

REPRESENTATIVES Mark Beech and Michelle Dean, Counsel for Applicant
Richard Harrison, Counsel for Respondent

MEMBER OF AUTHORITY Leon Robinson

INVESTIGATION MEETING 26 & 27 February 2004
2 April 2004

DATE OF DETERMINATION 7 September 2004

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

- [1] This is an Investigation into an employment relationship problem arising out of an alleged unjustifiable dismissal.
- [2] The employee Ms Piatarahi Callaghan ("Ms Callaghan") was dismissed from her employment with Poutiri Charitable Trust Incorporated ("Poutiri") following a disciplinary meeting on 1 November 2002.
- [3] Ms Callaghan claims her dismissal was unjustifiable. By an application dated 23 July 2003, she asks the Authority to investigate and resolve her employment relationship problem by granting her orders for reimbursement, compensation and loss of future benefits.
- [4] Poutiri says she does not have an employment relationship problem because its decision to terminate her employment was justified.
- [5] The Authority has concluded its Investigation of Ms Callaghan's employment relationship problem and renders this Determination in resolution of that problem pursuant to section 174 of the Employment Relations Act 2000.

OFFICE OF THE EMPLOYMENT RELATIONS AUTHORITY

The evidence

- [6] Poutiri is a registered charitable trust which was established by whanau, hapu and iwi across the Bay of Plenty to manage the delivery of various health care services in the Bay of Plenty Region.
- [7] Its kaupapa, is to provide leadership in Maori organizational development and to act as a provider of resources. It has a contract with the District Health Board to provide certain public health care services and it subcontracts with providers affiliated to it to deliver these services.
- [8] Ms Callaghan was employed by Poutiri as its Chief Executive Officer. The terms and conditions of her employment were included in a written individual employment agreement dated 5 September 2002.
- [9] She reported to the Poutiri Board of Trustees. There are seven Trustees on that Board.
- [10] Poutiri has close ties with a number of its services providers. One such service provider is the Nga Kakano Foundation Incorporated ("Kakano").
- [11] Ms Callaghan's sister Ms M-R ("Ms M-R"), who for present purposes need not be identified, was an employee of Kakano as well as a Board Member of Poutiri.
- [12] Ms Callaghan's whangai son Mr K, who also need not be identified, was General Manager and Board Member of Kakano.
- [13] Ms Callaghan was a Board Member of Kakano.
- [14] In August 2002 there was an unsavoury incident at Kakano's offices between Mr K and Ms M-S involving serious violence ("the altercation"). Ms M-S sustained physical injuries as a result of the altercation and she raised a personal grievance with her employer Kakano.
- [15] The Chairperson of Poutiri Mr Arapeta Wiremu Tahana ("Mr Tahana") was formally advised of the altercation by letter of 6 August 2002 by Kakano's secretary Ms Mereana Taiatini.
- [16] Mr Tahana sought Ms Callaghan's assistance in resolving the tension at Kakano and Ms M-S's personal grievance. He offered himself as a mediator. He sought Ms Callaghan's assistance in arranging that mediation. Ms Callaghan was reluctant to become involved. She took leave from mid August 2002 to mid September 2002.
- [17] A Poutiri Trustee Ms Sally Wilkinson ("Ms Wilkinson") was appointed acting Chief Executive Officer for the month that Ms Callaghan was on leave. During this time Poutiri was restructured including new managerial appointments.
- [18] The Authority accepts the weight of evidence and rejects Ms Callaghan's denial and finds that when she returned from leave, Mr Tahana and Ms Wilkinson attempted to discuss Kakano matters with her. Ms Callaghan was hostile and insisted that it was not a problem. She said they should "*mind [our] own bloody business*". When Mr Tahana raised the subject of Ms M-S and Ms Callaghan becoming involved, Ms Callaghan became abusive and said "*I'll kill that bloody Rutu*", "*I'll fucking take her down*", "*If she takes me down I'll take everything down*" and "*Ill kill her family.*" The meeting was immediately abandoned.

- [19] The Authority finds that Ms Callaghan's attitude became negative towards Poutiri Board members and relations then became strained.
- [20] The Authority further finds that Mr Tahana and Ms Wilkinson attempted another meeting with Ms Callaghan and took kaumatua Mr Ben Moke with them. Ms Callaghan was not as abusive as the previous meeting but remained hostile. She was adamant she would not be involved and said she did not have to listen to them. She was reminded of her obligations to Poutiri. She replied that her loyalties were to Nga Kakano and not Poutiri. She was offered further time off but declined.
- [21] Mr Tahana became directly involved in negotiations of the settlement of Ms M-S's personal grievance. He insisted Ms Callaghan persuade the Kakano Board to resolve the matter by adopting a particular proposed settlement. Mediation was held at the end of September 2002 early October 2002.
- [22] Ms Callaghan duly put the particular proposed settlement to the Kakano Board which rejected the particular proposed settlement but proposed an alternative counter-offer of settlement. Kakano's solicitor Mr Attwood advised that Kakano would only settle with Ms M-S if Poutiri gave an undertaking that Kakano's contracts with it would not be at risk. This position was outlined in advice dated 11 October 2002.
- [23] Ms Callaghan attended a meeting of the Poutiri Board on 17 October 2002 and presented the draft annual report. The Authority finds Ms Callaghan was aggressive and confrontational. She slammed the door and sat at the end of the table as far away from Board members. She was curt and turned away from Board members and did not face them when she spoke. She walked out at the end of the meeting.
- [24] Mr Tahana was asked to talk to Ms Callaghan about her behaviour. He told her the Board was not happy with her attitude and hostility, her body language and her coldness. He told her he considered an apology was appropriate. She refused and was aggressive towards him. He left her to consider her position and returned to the Board meeting.
- [25] A short while later, he was handed a resignation letter from Ms Callaghan.
- [26] Mr Tahana wrote to Ms Callaghan by letter dated 18 October 2002 advising that the Board had concerns about her behaviour that required her response and that it required a high degree of trust and confidence from her. The letter further advised that one of the outcomes of the Board's deliberations may be an assessment that the working relationship was not reconcilable. The letter stated:-

"This is to acknowledge your resignation which was handed to me yesterday.

I have discussed the matter with the Board who would prefer that you take the time over the weekend to consider the matter further.

The Board advises that they continue to have trust and confidence in you even though recent events with Nga Kakano have strained working relationships. It is the Board's wish to set things back on track, which was the purpose of my talk with you yesterday.

If you would like to discuss the matter further with me please call me at home (xxx) or on my cell phone (xxx) over the weekend.

If your position remains unchanged by end of business Monday October 21 2002 then the Board will accept your resignation.

Heoi ano, e Pia, ko te tumanako, kia mahi tahi ano tatou i runga i te kaupapa i waihangatia e Kui ma, e Koro ma."

[27] Ms Callaghan subsequently withdrew her resignation by letter dated 21 October 2002. She said:-

"In response to your letter dated Friday 18 October 2002 I have taken the opportunity as advised to reflect on my position and have come to the realization that my actions were the result of the considerable stress I have experienced in the workplace.

I reaffirm my commitment to the Kaupapa which led to the establishment of Poutiri and its subsequent success as such I formally withdraw my resignation and make myself available to return to work at the Board's direction.

This decision has been aided greatly by the expressed confidence of the Board in me as their Chief Executive, as conveyed in your letter 18 October 2002.

Like the Board I too have a desire to set things back on track and make myself available to meet with them to respond to the issues the Board have with me and to which was first brought to my attention in the meeting you had with me on Thursday 17 October 2002.

I would also ask that I be given an opportunity to raise my own employment issues with the Board at this meeting. In discussion with my whanau and kaumatua they have advised that if the Board agrees to meet with me I should have appropriate support to accompany me."

[28] Mr Tahana replied by letter dated 22 October 2002. He said:-

"Thank you for your response to my letter received 21 October 2002. I note that you have decided to withdraw your resignation.

Your suggestion of a meeting is (sic) good one, you can raise any employment issues you have as well as responding to concerns which I have raised with you on behalf of the Board. The Board will be meeting on Wednesday night and this will be an opportunity for the Board members to discuss these issues amongst themselves preparatory to meeting with you.

The Board would like to meet with you and any support you wish to bring to the meeting on Thursday evening in the Summit Room of the Lake Plaza Hotel (Eruera St, Rotorua) at 5.30 pm. We will then take the opportunity to fix a date by which the issues can be discussed in greater detail.

In the meanwhile I suggest that you remain away from work until we have had the meeting to explore these issues. The Board needs to have a high degree of trust and confidence in its Chief Executive. It is therefore important that we are open with our views so that the issues can be given a proper hearing before a final decision is made. It may mean that one outcome of our deliberations may be an assessment that the working relationship is not reconcilable. However, consistent with the undertaking I gave to you in my letter of 21st October 2002 the Board is hopeful that full trust and confidence can be restored."

[29] On 23 October 2002 Ms Callaghan's solicitors advised that she considered her employment contract to have been breached by the Board. The solicitors said:-

"Given the relationship and past incidents between our client and the board of Poutiri we wish to record that our client considers her employment contract has been breached both substantively and procedurally in respect of the Poutiri Board's actions, giving rise to a grievance. We will provide details of these breaches shortly."

- [30] The Board met in Rotorua on 23 October 2002. Ms M-S was permitted to address the Board. She also informed the Board that Ms Callaghan had been directly involved in discussions with the Kakano Board concerning her (Ms M-S's) personal grievance and confirmed that Ms Callaghan had attended Kakano Board meetings where the matter had been discussed. Ms Kimiora Rawiri the Deputy Chief Executive Officer ("Ms Rawiri") also addressed the Board with concerns about staff relationships and key personnel wishing to leave Poutiri.
- [31] Ms Wilkinson addressed the Board with other concerns about Ms Callaghan. These included the reporting of overheads by Ms Callaghan, staff relations, and relationships with providers. The Board discussed these matters and it was resolved that a formal process would be put in place to address concerns with Ms Callaghan. Mr Tahana was authorized to make any necessary decisions regarding Ms Callaghan's employment.
- [32] The Poutiri Board's solicitor wrote by letter dated 25 October 2002 to Ms Callaghan seeking her response. The concerns set out were:-
- A breakdown in staff relationships as a result of her behaviour;
 - Inappropriate comments about representatives of Poutiri funders in front of staff;
 - Alleged misleading conduct with respect to the reporting of a reduction in overheads and failure to report a mistake in payment;
 - Conduct undermining and denigrating the Board to staff;
 - Her behaviour towards the Board as well as individual Board members including her threats against Ms M-S;
 - The level of her involvement with Nga Kakano particularly surrounding Ms M-S's personal grievance.
- [33] A meeting was arranged for 30 October 2002 for Ms Callaghan to respond to the Board's concerns but was not held until 1 November 2002.
- [34] Ms Callaghan duly attended the meeting on 1 November 2002 with her two legal advisers Mr Beech and Mr Attwood as well as a number of supporters and responded to the matters raised with her.
- [35] The Authority finds that in essence her responses were as follows:-
- She did not accept that there was division within staff. She had an ex-staff member in attendance to validate there was no division and there were others who could not make it to the meeting. She referred to her disappointment with senior managers who had not communicated their concerns to her. She also referred to her relationship with Ms Rawiri, expecting that she would have said something to her if things had got to the point of resignation.

- She denied comments in respect of Mr Kevin McConnell, while she accepted there were statements made about Ms McLean but these were not of a serious nature. She stated that any comments between staff of this nature were appropriate to let off steam and should remain in confidence. She was disappointed that this confidence was breached. She also said there was no complaint from the District Health Board or the individuals concerned.
- As to the overhead figure, she maintained that her figure was correct. As to the mistake in payment, she agreed that there was a mistake but said that this was not hidden from the Board as there was a Board member who had knowledge of the payment. Further, she considered that she was only required to notify the Board of issues which were likely to have a negative impact on Poutiri.
- In response to the concerns about her working relationship and attitude towards the Board, she expressed her resentment towards the Board and comments she believed individual Board members had made about her family. She accepted that she had withdrawn from the Board, she said she felt betrayed by Board members and confirmed the very strong hostility which she had been displaying over recent weeks. She denied making the threatening comments about Ms M-S.
- In relation to her involvement with Kakano, she advised that she was involved in Board decisions as a member of the Board, but was not present at meetings with lawyers.

[36] At the conclusion of the meeting on 1 November 2002, Ms Callaghan was dismissed. An email was sent to Ms Callaghan's solicitors advising that the Board had resolved to dismiss her as it considered that the relationship of confidence and trust had broken down irretrievably. The email stated, "*the Board believes that trust and confidence of it's CEO has broken down and at this time does not appear retrievable.*"

[37] The above narrative sets out the facts established by the Authority in Investigating Ms Callaghan's employment relationship problem.

The Legal principles

[38] In investigating the employment relationship problem, the Authority is guided by established legal principles. It must first be satisfied that there was a dismissal. It then examines whether the employer's decision to dismiss was justified¹.

[39] There is a legal test of justification set out in a Court of Appeal decision *BP Oil v Northern Distribution Union*² where the President of that Court said that the test was "*essentially whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances*". Cooke P (as he was then) further continued and added that it was a question of fact and degree in each case.

[40] More recently, that test has been reformulated by the Court of Appeal in another decision *Wilson & Horton Newspapers Ltd v Oram*³ as follows:

¹ *Wellington Drivers IUOW -v- Fletcher Constructions Co Limited* [1982] ACJ 663, *Wilson & Horton Newspapers Ltd v Oram* [2000] 2 ERNZ 448(CA)

² [1992] 3 ERNZ 483, at 487 (CA)

³ [2000] 2 ERNZ 448 at 457 (CA)

"The Court has to be satisfied that the decision to dismiss was one which a reasonable and fair employer could have taken. Bearing in mind that there may be more than one correct response open to a fair and reasonable employer, we prefer to express this in terms of "could" rather than "would" used in the formulation expressed in the second BP Oil case ([1992] 3 ERNZ 483(CA) at p 487) . . ."

[41] The Authority is guided by these legal principles in conducting its investigation.

Discussion

[42] The Authority determines the merits of Ms Callaghan's employment relationship problem by assessing whether Poutiri's decision to dismiss accords with established legal principles.

A dismissal

[43] There is no doubt that Ms Callaghan was dismissed. That is evidenced by email correspondence of 1 November 2002 and it is not denied. Ms Callaghan was summarily dismissed because Poutiri's Board considered that *"trust and confidence of its CEO has broken down and at this time does not appear retrievable."*

[44] The Authority regards that description as essentially a termination premised upon a breach of the implied obligation of trust and confidence. That is to be distinguished from a dismissal for serious misconduct.

[45] It is Poutiri's case that Ms Callaghan has acted contrary to her obligation of confidence and trust and therefore it is justified in terminating her employment.

[46] Where an employment relationship has come to an end because of incompatibility, the onus is on the employer to justify the dismissal by showing that the necessary level of incompatibility exists. The cases of incompatibility justifying dismissal will be rare. Each case of incompatibility must be considered on its own merits⁴.

[47] In such cases as Poutiri contends, the Court in *Reid* sounded the following caveat:-

*"The Court and Tribunal must nevertheless carefully examine the evidence. It may not be open to an employer, simply to justify its dismissal of an employee against whom a number of serious allegations have been made, to say that there is a breakdown in the employment relationship. Such cases require a careful evaluation of the evidence and will be unusual as, I am satisfied, this is."*⁵

[48] Was this one of those rare cases? The Authority enquires as to the justification for the dismissal. It looks to see whether Poutiri carried out a full and fair investigation of the situation, that the employer believed on reasonable grounds that there was a factual basis for these concerns and finally that the situation had to be such for which dismissal was an option open to a fair and reasonable employer.

Discussion

[49] Ms Callaghan called a number of witnesses at the Investigation Meeting. She gave evidence herself by way of comprehensive brief. Her witnesses included evidence from the kaumatua

⁴ *NZ Fire Service Commission -v- Reid* [1998] 2 ERNZ 250, Colgan J

⁵ *Reid* at page 275

Mr Perenara Moke, Ms Maude Takarua, Mrs Julie Beach, Mr Bryce Kihirini, Ms Janet McLean, Ms Maria McRae, her former solicitor Mr Michael Attwood, Mr Hingatu Thompson, Ms Fredina Harawira-Tarau, and Sameli Tongalea.

- [50] Much of that evidence related to disproving the allegations against her. In approaching matters that way, Ms Callaghan misconceived the focus of the Authority's enquiry. She may have understood that she was required to explain her conduct to the Authority. The Authority is not concerned to find whether the alleged conduct is actually proved. Rather, the focus is on the employer's enquiry and in that sense, what Ms Callaghan did is not relevant. The Authority concerns itself with what the employer did⁶. Ms Callaghan's proved conduct is however relevant in terms of contributory fault.
- [51] The Authority accepts that Poutiri had a legitimate interest in Kakano's management of the altercation. There had been an assault involving serious violence, questions of provocation aside. Poutiri as principal was concerned to see that Kakano was meeting its good employer requirements and more importantly, providing a safe working environment. The Authority is satisfied that the contractual relationships between Poutiri and the Area Health Board rendered this a legitimate and proper interest. When Kakano's Board wrote to Poutiri's Board by letter dated 6 August 2002 it did so because it accepted that Poutiri needed to be informed.
- [52] It was reasonable and proper for Poutiri to be concerned about the manner in which the Kakano Board dealt with the altercation. It was entirely reasonable that it was concerned about the delay in concluding matters and in particular, Mr K's eventual reinstatement as General Manager. The Authority accepts that Poutiri had not received any formal notification of steps taken by the Kakano Board to conclusively address matters. Mr Tahana's proactive involvement was entirely appropriate.
- [53] It follows then that the Authority considers it was appropriate for Poutiri have sought Ms Callaghan's involvement and assistance. She was its Chief Executive Officer. The Poutiri Board was right to seek her assistance in dealing with the matter. The Authority accepts she was not expressly instructed to intervene, but her influence was sought and there was nothing improper or inappropriate about Poutiri enlisting that support from her.
- [54] While Ms Callaghan clearly communicated her reluctance to become involved and her contention that Poutiri acted inappropriately and in breach of its obligations to her in seeking her assistance, that is to be contrasted with the Authority's finding that she was actively and intimately involved in the affair as a Board Member of Nga Kakano. The Authority is persuaded by Mr Bryce Kihirini's evidence and that of Mr Attwood in that regard. She attended meetings of the Board where the matter was discussed. While she was resisting her employer's request to assist it, she was actually intimately involved. That was not consistent with her duty of faithful service to Poutiri and entirely inconsistent with the reluctance to become involved that she had communicated to Mr Tahana.
- [55] The Authority finds that the Potuiri Board did not know Ms Callaghan was a Board member of Kakano. The Authority accepts Ms Wilkinson's evidence that it was only when she and Mr Tahana met with Ms Callaghan that they became aware of that fact. There was no evidence that she was asked to be involved because this fact was known. Indeed, Ms Callaghan does not give evidence that she was asked to be involved because it was known that she was Board member.

⁶ *Glass -v- National Bank of New Zealand Limited*, unreported, ARC47/02, 29 September 2003, Travis J

- [56] The Authority finds that Ms Callaghan had declared her first loyalty was to Kakano. She behaved consistent with that declaration although the full extent of that disloyalty was not actually known to Poutiri at the time it dismissed her. It did not know the extent of it because she did not disclose it.
- [57] Although it did not know the full extent of Ms Callaghan's actual involvement in Kakano's management of the altercation, the Authority finds on the weight of evidence that she had told Mr Tahana and Ms Wilkinson that her loyalties were to Nga Kakano and not Poutiri. The Authority also accepts the weight of evidence that she had also told them to "*mind [their] own bloody business*" and that in relation to Ms M-S "*I'll kill that bloody Rutu*", "*I'll fucking take her down*", "*If she takes me down I'll take everything down*" and "*Ill kill her family.*" All of those statements are extremely serious and would constitute a complete destruction of confidence and trust.
- [58] It is perplexing then that when Mr Tahana wrote to Ms Callaghan by his letter of 18 October 2002, he advised the Board continued to have trust and confidence in her. He would of course have had the events described at para 58 above in mind when he made that declaration. As serious as Ms Callaghan's statements were, the Board Mr Tahana wrote, still had trust and confidence in her. That was a very generous position to take.
- [59] It is no surprise then that she is now aggrieved and that she instructed counsel when she did, when only days later, the Board through Mr Tahana in his letter of 22 October 2002 gave notice of an entirely different approach where her continued employment was in question.
- [60] Ms Callaghan was aware of her own conduct when she was informed of the continued trust and confidence in her. She must have regarded herself redeemed and very fortunate when she reciprocated with her desire to "*set things back on track*". She knew she had not behaved appropriately and had reflected on her own conduct. There was a state of disharmony and her relations with her employer Board had become strained. The Authority finds that fractured relationship had come about because of Ms Callaghan's behaviour. That finding is premised on Ms Callaghan's advice to the Board when she wrote to Mr Tahana and said:-

"I have taken the opportunity as advised to reflect on my position and have come to the realization that my actions were the result of the considerable stress I have experienced in the workplace."

- [61] Having made that finding, it must follow that the Authority does not accept Ms Callaghan's denial of her behaviour at the meeting on 17 October 2002. She told the Authority she did not slam the door and walk in and out or turn towards the wall when addressing the Board. The Authority finds she did behave that way because it is more likely than not than when she explains her actions were the result of stress, she is acknowledging that behaviour and other conduct which caused the strained relationship with the Board. Ms Callaghan's behaviour at this meeting typified the strained relationship that developed. This aspect of matters further assists the Authority in matters of credibility. The Authority prefers the evidence of the Board members Mr Tahana, Ms Wilkinson and Ms Willison where it is in conflict with Ms Callaghan's.
- [62] When Ms Callaghan says that she was pressured and that she was under considerable stress that was because of the altercation and Poutiri's interest in Kakano's management of it. She was naturally stressed because it involved her own immediate whanau – her son and her sister. She was stressed because she felt pressured by Mr Tahana and Poutiri's legitimate interest in affairs. It is understandable that her loyalties must have been tested but she had a legal relationship with Poutiri and there were attendant obligations on her. The Authority has

already said it accepts Poutiri's proper interest in the matter. It is also the Authority's view then, that her stress and pressure was not caused by any unjustifiable or improper action on Poutiri's part.

- [63] The Authority accepts that following the Board meeting on 23 October 2002, matters became more serious because of what the Board learned from Ms M-S and Ms Rawiri. Ms M-S informed the Board that Ms Callaghan had been directly involved in the Kakano Board discussions concerning her (Ms M-S's) personal grievance and she confirmed that Ms Callaghan had attended Kakano meetings where the matter had been discussed. Ms Rawiri also addressed the Board with concerns about staff relationships and key personnel wishing to leave Poutiri. While on 18 October 2002 the Board could make a statement of its confidence and trust in Ms Callaghan, after the meeting of 23 October 2002, that situation had changed.
- [64] Ms Callaghan did not seek any further particulars, details or clarification of the allegations against her that had been set out in Poutiri's solicitor's advice of 25 October 2002.
- [65] At the meeting on 1 November 2002, Poutiri's solicitor sought full disclosure from Ms Callaghan as to her involvement with Kakano. She was being asked to be completely open about her level of involvement, especially surrounding the employment dispute and mediation with the Kakano Board. Ms Callaghan's representatives intervened and took issue with what, if any, conflicts could arise by Ms Callaghan's involvement with the Kakano Board. There was an exchange between lawyers over this. One of her representatives said that the Board was fully aware of Ms Callaghan's involvement with Kakano, that this was known to both the Board and staff. Mr Tahana could not see why Ms Callaghan could not be open about the level of her involvement with the Nga Kakano Board. He felt she was sheltering behind her representatives and was disappointed that she was not being more forthcoming. As is now known, her involvement was significant.
- [66] It is now known that while she resisted and was reluctant to be involved, she actually was. The extent of her actual involvement as the Authority has found it was entirely inappropriate and inconsistent with her duty of fidelity to her employer Poutiri. Her actual involvement placed her in conflict. Poutiri was concerned to have the matter resolved without delay. The Authority accepts that Kakano in seeking to resolve the affair sought an undertaking from Poutiri that its future contracts with Poutiri were not at risk. It tied that undertaking with resolution of Ms M-S personal grievance. That being so, Ms Callaghan had a conflict of interest. While that is a conclusion the Authority reaches now, the issue for present purposes is that Ms Callaghan did not make any material disclosures of her actual involvement when she should have at the meeting on 1 November 2002.
- [67] This failure goes to the trust and confidence that Poutiri could repose in her. Poutiri was not entitled to conclude that Ms Callaghan had not made full and frank disclosure because it did not know what she had not disclosed. It was entitled however, when it learned of her actual involvement as a Kakano Board member, to consider that involvement in the context of Mr Attwood's advice of 11 October 2002 and the linking of settlement of Ms M-R's grievance with the undertaking as to its future contracts.
- [68] It was reasonable for Poutiri to require Ms Callaghan's influence and assistance with respect to Kakano's management of the altercation. It had a legitimate interest in managing that process and reaching a conclusion. It was also reasonable for Poutiri to find that Ms Callaghan did not assist in the resolution of the matter. She had been uncooperative, resistant and hostile towards Board members. She had not disclosed she was a Board member of Kakano. She made a declaration of her loyalty to Kakano before Poutiri and stated that

Poutiri should not be involved. She did assist in making arrangements for Mr Tahana to meet with the Board and the mediation. However, Poutiri was entitled to conclude Ms Callaghan had acted in a conflict of interest. She had acted contrary to her duty of fidelity to her employer Poutiri.

- [69] If Poutiri considered the position with its Chief Executive was salvageable, there appeared to be no mending of bridges on Ms Callaghan's part at the meeting on 1 November 2002. The Authority accepts Mr Tahana's evidence that at the meeting on 1 November 2002, Ms Callaghan acknowledged that there had been a good working relationship in the past, but she now believed it to be based on a misconceived premise and there was no longer a working relationship. Mr Tahana considered this was a particularly strong response, and took it as a confirmation that she had no respect or confidence in the Board and that she could not work with it. The Authority regards this evidence as particularly material in making this Determination.
- [70] Ms Callaghan did not give the Board any confidence of a continuing employment relationship. She made an outright declaration that the relationship could not continue. That in itself is a rare occurrence and is persuasive for the Authority.
- [71] How could Poutiri continue to have any confidence and trust in her? The Authority has little doubt that any reasonable employer would be entitled to consider the employment relationship as untenable.
- [72] As concerns the other matters they too considered with the position set out above would not have instilled any continuing confidence in Ms Callaghan either.
- [73] Mr Tahana and Ms Wilkinson had been present when Ms Callaghan had made threats against Ms M-R. At the meeting of 1 November 2002 she denied those comments. Having made those comments but denying them, it was reasonable for the Board to reject her denials of derogatory comments about individual Board members and the Board Chair. That is what Ms Rawiri had told the Board. It was reasonable for the Board to then conclude that she made such comments. Those comments were inconsistent with her duty of fidelity to her employer Board.
- [74] Similarly too, when she admitted referring to Ms McLean as "*Mary Poppins*" it was reasonable for the Board to conclude that she had made inappropriate comments about representatives. That was inappropriate behaviour for a person in Ms Callaghan's position. The comments alleged against Ms Callaghan were comments made about Mr McConnell and Ms McLean. Although she denied the comments except for the *Mary Poppins* comment, it was reasonable for the Board to reject her denial given Mr Tahana and Ms Wilkinson were particularly aware that she had denied comments she had made to them.
- [75] It was reasonable for the Board to also accept that two senior members of staff had expressed a desire to leave Poutiri and this information was also reasonably taken into account by Poutiri when considering Ms Callaghan's future and continuing role as Chief Executive Officer.
- [76] As for the allegation concerning the mistaken payment, the Authority is not convinced that Ms Callaghan's conduct in relation thereto could be described as misconduct. There had been an error which was inconsequential once it was remedied. The matter was capable of being properly concluded by Poutiri communicating its expectations to Ms Callaghan for future reference. The issue relating to overheads was more serious. The Authority accepts that Ms Callaghan had been informed of the correct overhead calculation but she did not amend the

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report to take account of it. That was the information before the Board. Ms Callaghan did not adjust her report accordingly when she presented it to the Board on 17 October 2002. She did not have any explanation why she had not done so. Poutiri was entitled to find Ms Callaghan had not acted appropriately.

[77] The Court in *Mabry v West Auckland Living Skills Homes Trust Board (Inc)*⁷ adopted the following analysis which the Court considered encapsulated the essential issues as follows:-

- (i) Whether the employer was entitled to come to the conclusion that the employment relationship was irreparable;
- (ii) If so, whether that state of affairs was attributable wholly or substantially to the appellant;
- (iv) Whether the manner in which the employer carried out the dismissal was fair in the circumstances.

[78] Applying that analysis in the present matter, the Authority finds Poutiri was reasonably entitled to conclude that the employment relationship was irreparable for the reasons set out at paragraphs 64 – 76 above. The Authority further concludes that the state of disharmony was attributable wholly or substantially to Ms Callaghan. That is the conclusion the Authority reaches at paragraph 61 above. As to the manner in which the dismissal was carried out, the Authority considers there was a full and fair investigation. The allegations were set out in the advice of 25 October 2002. Ms Callaghan was represented by Counsel. She attended a meeting on 1 November 2002 where she was afforded a full opportunity to respond to the allegations against her. She took that opportunity. The Authority accepts that Poutiri was not required to make any further enquiry in relation to any of the responses Ms Callaghan made at the meeting on 1 November 2002.

[79] The Authority concludes that the state of disharmony was caused by Ms Callaghan's conduct. Her conduct and the state of affairs that came about as a result of it, gave the Poutiri Board valid concerns as to its continuing relationship with her. In all the circumstances her conduct struck at the very heart of the employment relationship. Most striking in this case, was that Ms Callaghan made an outright declaration that the relationship could not be salvaged. The Authority accepts Poutiri's evidence that had Ms Callaghan been suitably contrite or co-operative and reflective, matters might well have been different.

Determination

[80] As a matter of fact and degree, the Authority considers Poutiri was justified in its assessment that Ms Callaghan's conduct destructively impaired the basic/necessary level of confidence and trust which underpinned her employment with Poutiri as its Chief Executive Officer.

[81] The Authority finds that Poutiri's decision in all the circumstances of the case to summarily dismiss Ms Callaghan on 1 November 2002 was a decision which a fair and reasonable employer could make in the particular circumstances.

[82] **The Authority finds that Ms Callaghan does not have a personal grievance. She is not entitled to the remedies sought and the Authority is unable to assist her further.**

⁷ unreported, AEC30/01, 19 December 2001, Travis J

Costs

[83] The parties are encouraged to resolve the question of costs between them, but failing such agreement, Poutiri's Counsel is to file a memorandum as to costs within 14 days of the date of this determination. Ms Callaghan's Counsel are to file a memorandum thereafter but within 28 days of the date of this Determination.

L. Robinson

Leon Robinson
Member of Employment Relations Authority

