

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 75/09
5115496

BETWEEN LUCY ORA HAMON
 Applicant

AND COROMANDEL
 INDEPENDENT LIVING
 TRUST
 Respondent

Member of Authority R A Monaghan

Representatives: P Weston, advocate for Applicant
 M Edwards and M Salmen, counsel for Respondent

Investigation Meeting: 25 and 26 August 2008, 10 October 2008

Submissions received: 4 and 15 December 2008 from Applicant
 5 December 2008 from Respondent

Determination: 10 March 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Lucy Ora Hamon says her former employer, the Coromandel Independent Living Trust (“CILT”), dismissed her constructively and unjustifiably. CILT denies that Ms Hamon was dismissed and says she abandoned her employment.

[2] Ms Hamon said in her statement of problem that she was induced to enter into the employment agreement by misleading and deceptive conduct on CILT’s part, and that CILT:

- a. misrepresented the extent to which she would be able to attend to other activities during her employment, and in particular to the business of another trust, Wahine Ora, of which she is a trustee;

- b. misrepresented that Wahine Ora and CILT were the co-owners of a community project for which a grant of funding had been obtained;
- c. misrepresented that it would define ‘the project’ to which the funding related; and
- d. failed to disclose that CILT maintained a conflict of interest register.

[3] The inducements and misrepresentations were said to give rise to the constructive dismissal. They are concerned with differences between the parties over: the nature of the ‘partnership’ between Wahine Ora and CILT in association with a grant of funding for adult community education services; the way in which the grant would be managed; the nature of Ms Hamon’s role in CILT; and the existence and management of possible conflicts of interest involving Ms Hamon and her activities other than those conducted on behalf of CILT.

[4] Ms Hamon alleged further that CILT:

- a. harassed her and made false allegations about her;
- b. breached its obligation to act in good faith towards her;
- c. breached procedural fairness;
- d. was guilty of ‘other behaviour pursuant to s 122 to her disadvantage’;
and
- e. was guilty of theft.

[5] Finally, Ms Hamon says that CILT repudiated the employment agreement in the course of an exchange of correspondence in which attempts were made to reach a negotiated settlement of the parties’ differences.

[6] Ms Hamon seeks a payment of lost remuneration in respect of the balance of the term of her fixed term employment agreement, compensation under s 123(c)(i) for injury to her feelings, and penalties for breach of the employment agreement.

[7] The allegations of breach of good faith were broadly stated and did not specify the conduct said to amount to such breach. To the extent that more specificity was provided in submissions, the allegations will be addressed in the course of addressing the rest of the matters set out above.

[8] The claim for penalties was similarly broadly stated and did not specify the terms of the parties' agreement said to have been breached. The claim was not addressed in submissions.

[9] CILT denies all of the above allegations and says it has no liability in respect of any of the remedies sought.

Background

[10] CILT is incorporated and registered as a charitable trust. Its mission statement is: 'to enhance the well-being of all people in the Upper Coromandel Peninsula'. To that end it offers a number of services to the local community including: the Coromandel Resource Centre which provides information, advice and advocacy for individuals and community groups in respect of health, transport, employment and benefit entitlement, as well as housing its own offices and offering space to other service providers; vocational and support services for people with special needs; adult learning programmes; and extensive project work including co-ordinating Coromandel on Track/Huarahi Ora, and participating in the provision of quality affordable housing as part of the Well-Housed Coromandel project.

[11] Ms Hamon is a co-trustee of Wahine Ora, which is also registered as a charitable trust. Her husband Peter Weston, who is also her advocate in this matter, is the other trustee. Ms Hamon said she founded the trust as a support organisation for abuse survivors in Hauraki, with a focus on survivors of sexual abuse. Its primary recovery programme is named 'Poutama', and uses tools from Maori culture to help survivors in the recovery process. It also has a strategy of delivering wider education programmes for women in an attempt at early intervention.

[12] Both organisations receive funding from relevant government bodies.

The relationship between CILT and Wahine Ora regarding funding

A. The application for funding

[13] In or about April 2007 CILT became aware that the Tertiary Education Commission (“TEC”) was offering funding for adult community education (“ACE”) projects. CILT was already involved in adult community education in association with the Coromandel Area School (“the school”), and saw an opportunity to expand its services. Its managing trustee, Michael Noonan, allocated the preparation of the application for a funding grant to Nadine Wishnowsky, who was employed as CILT’s community development co-ordinator.

[14] Ms Wishnowsky is Ms Hamon’s cousin. She noted that the funding application form allowed for joint applications and suggested to Mr Noonan that Wahine Ora be included as a joint applicant. She did so because she believed Wahine Ora had also developed workshops in respect of adult community education. Mr Noonan agreed, and Ms Wishnowsky approached Ms Hamon.

[15] The form made provision for a ‘main applicant’ (identified as CILT on the completed form) and a ‘joint applicant’ (identified as Wahine Ora on the completed form). It also provided:

“If you are submitting a joint application please provide details of any formal arrangements for this structure (eg copies of a memorandum of understanding, any legal arrangements between the two organisations).”

[16] Ms Hamon says Ms Wishnowsky told her ‘the project was to be a partnership between Wahine Ora and CILT and that both organisations would manage the funds and the project together.’ Ms Wishnowsky says she had an informal discussion with Ms Hamon, during which she advised that ‘CILT was making an application to the TEC for funding and it was felt Wahine Ora might make a good joint application.’ She denied any discussion about involving Wahine Ora at trustee level.

[17] Ms Hamon says she told Ms Wishnowsky that Wahine Ora would enter into ‘the partnership’. Ms Wishnowsky says Ms Hamon told her she was interested in Wahine Ora being a ‘joint applicant’. At Ms Wishnowsky’s request Ms Hamon provided details of Wahine Ora’s activities which were necessary for the preparation of the funding application – in particular the scope of its activities and details of relevant courses it had provided. There was nothing inappropriate about the request, and the TEC had expressly sought the information.

[18] Ms Wishnowsky duly completed the application. It was forwarded to the TEC late in April 2007. In a signed memorandum of understanding dated 27 April 2007, and attached to the application pursuant to the requirement quoted above, Mr Noonan and Ms Hamon recorded:

“We agree to form a partnership for the purposes of progressing Adult Education in the Upper Coromandel Peninsula and throughout Hauraki where opportunities arise.
Our partnership is for the length of a year from the time we receive TEC funding.”

[19] A code of conduct and conflict resolution policy was attached. The documents referred to the parties as ‘partners’. This was the only documentation provided pursuant to the requirement. There was no evidence of any other ‘legal arrangement’ between the two organisations beyond the discussions conducted primarily between Ms Hamon and Ms Wishnowsky, and no other document referring to the matter.

[20] Ms Hamon says that on or about 27 April Ms Wishnowsky met with her and provided her with a copy of the memorandum. She responded by asking whether the purpose of the agreement was to record ‘the partnership’ between Wahine Ora and CILT. Ms Wishnowsky told her the TEC required any partnership involving its funds to be formally recorded. Ms Hamon also says Ms Wishnowsky told her the funds and programmes would be managed together and jointly owned together with any building or equipment purchased as part of ‘the project’. Ms Wishnowsky said Ms Hamon simply signed the memorandum and there was no discussion.

[21] According to Mr Noonan, the intention was that CILT and Wahine Ora would run separate adult education courses, with funding being allocated across the courses as approved by CILT. CILT was to be the main fund holder. I accept that this was CILT’s intention.

[22] According to Ms Wishnowsky, the notion of ‘partnership’ as CILT applied it in general involved an acknowledgement that CILT ‘drove’ the application (as it did in respect of the TEC application), but that partners would not expect to hold or control funds or be involved in day-to-day running. Regarding programmes for which funding had been obtained, CILT’s intention at least was that the ‘partner’ would consult with CILT about particular programmes the partner wished to offer, while the

final decision about whether the funds would be applied to the programme was CILT's.

[23] When Ms Hamon was asked at the investigation meeting about whether CILT's view of the partnership arrangement was discussed with her she replied only that she had not been involved in a partnership like it before, and commented on her teaching of partnership matters in business courses she ran. That kind of answer leaves open the possibility that such matters were raised, but that they were dismissed as not being in accordance with the partnership arrangement as Ms Hamon saw it. I do at least accept that CILT's notion of the 'partnership' arrangement was as Mr Noonan and Ms Wishnowsky described it.

B. Whether CILT and Wahine Ora were in a formal partnership

[24] Mr Weston and Ms Hamon have approached the 'partnership' with CILT as if it incorporated rights and obligations of the kind contemplated in a formal legal partnership (except to the extent that the organisations here were not for profit, a matter which for present purposes I leave aside). They have done so in reliance on the fact that the word 'partnership' was used in certain documents, as well as Ms Hamon's evidence about conversations with Ms Wishnowsky in particular, which in material respects I do not accept.

[25] In particular I do not accept that Ms Wishnowsky told Ms Hamon the funds and programmes would be managed jointly and jointly owned, together with any building or equipment. Such a statement is inherently unlikely in the light of the amount of the funding granted, the activities to which it was to apply, and the respective size and scope of the activities of the two trusts. Moreover I regard the statement, and others like it, as a re-casting of what was actually said in order to fill in what were probably gaps in the detail of how the two organisations would work together and to support the argument that a formal partnership had been entered into. While Ms Wishnowsky probably used the word 'partnership' from time to time, I consider it likely she did so in a loose and informal sense and do not accept she went any further.

[26] Finally, even if Ms Wishnowsky had gone further regarding the nature of the ‘partnership’, she was an employee of CILT who was completing an application form for a grant of funding. Ms Hamon knew that. Ms Wishnowsky had neither actual nor ostensible authority to enter into any arrangement on behalf of CILT beyond obtaining Wahine Ora’s agreement to participate as a joint applicant for the funding.

[27] As for Mr Noonan, who might arguably have had actual or ostensible authority to enter into a more formal arrangement with Wahine Ora, I do not accept that he signed the 27 April memorandum in confirmation that a kind of formal legal partnership was being entered into. He, too, was using the word in the less formal sense.

[28] Mr Weston submitted that the word ‘partnership’ has a precise and usual meaning. In the context of the legal rights and obligations associated with the formal structuring of businesses, and as between professional advisors in the course of that kind of activity, of course it does. However the word is used frequently in other contexts and can have a different meaning in those contexts, particularly in discussions between laypeople and often in association with the provision of social or community-based services. It was not for Mr Weston to define unilaterally the context in which the word was being used, then seek to apply his meaning of the word accordingly.

[29] I do not accept that the parties’ discussions up to and including the date of commencement of the employment relationship amounted to formal discussion and negotiation of their rights and obligations in the course of structuring a business, or that there was any mutual intention to enter into any kind of formal legal partnership.

[30] The word ‘partnership’ in the context of the funding in question was used loosely during these discussions. In general the respective roles of Wahine Ora and CILT were not spelled out as clearly as they should have been. However I have no hesitation in finding that CILT used the word ‘partnership’ in the sense of ‘sharing’ or ‘associating’ as a layperson would understand it, rather than in the significantly more formal sense that Mr Weston and Ms Hamon sought to attribute to it.

Ms Hamon’s appointment to an employed position at CILT

[31] By letter dated 10 July 2007 the TEC advised Mr Noonan that funding had been approved for twice the amount sought in the application, and for a 12-month rather than a 6-month period.

[32] Mr Noonan decided to establish the position of adult learning centre co-ordinator, referred to as the 'ALCC'. The ALCC would be responsible for establishing an adult learning centre and for its day to day running, as well as otherwise managing CILT's community education services. The position was established not solely for the purposes of the TEC funding, and other sources of funding would also be applied to the establishment and running of the adult learning centre. In or about August 2007 Mr Noonan advised Ms Hamon that he was creating the position.

[33] The position was advertised as a new full time position in August and September 2007. It was to be for a 12-month term. Ms Hamon applied for the position. She was sent an information pack which included a 'job description' and a 'project description'.

[34] In the context of the issues being raised here I find these documents were unremarkable examples of their kind. The job description amounted to a reasonably accurate and informative description of the position being offered. It referred to: setting up the adult learning centre; the need to work in 'partnership' with 'key stakeholders'; the need to meet the objectives of the TEC; and the identification of community education needs, the marketing and promotion of programmes, the recruitment and enrolment of students and other activities in association with the planning and implementation of education programmes. None of these activities were out of the ordinary for an employed position of that kind.

[35] The project description referred expressly to the creation of the adult learning centre as well as to the TEC funding and to an additional grant. The vision for the centre was expressed to be: "to create a place for adult learners to access study space, ICT resources and support. We will encourage external providers to deliver programmes locally. ..."

...

[36] CILT embarked on what I accept was an open and genuine recruitment process, interviewing three applicants including Ms Hamon. Ms Hamon was the successful applicant. By emailed message dated 24 October 2007 she was sent a written employment agreement.

[37] There appeared to be an underlying and fundamental failure on Ms Hamon's part to separate Wahine Ora's role as a joint applicant for funding from the entirely independent process of establishing the ALCC position within CILT, and making an appointment to the position. I do not accept that Ms Hamon was appointed for any reason other than that she appeared to be the best applicant.

[38] For example Ms Hamon said that, on a date not specified, she had a discussion with Ms Wishnowsky in which Ms Wishnowsky told her the ALCC would manage 'the project' for CILT and Wahine Ora. It was a separate joint project and the position was not part of CILT but was independent and under the umbrella of both organisations.

[39] Ms Wishnowsky denied having that conversation. It is fair to say the ALCC was to manage 'the project' in the sense that the job description made the setting up and running of the learning centre a key activity. At the same time any references to the 'management' of 'the project' were to activities of that kind, and not to any aspect of management not set out in the job description. Moreover I have no hesitation in finding the position was as an employee of CILT, and that no representation to different effect was made to Ms Hamon. At best, Ms Hamon misunderstood the proper role of Wahine Ora as a joint applicant for the TEC funding, and way in which the funding would be applied to the ALCC's position.

[40] Further, there was no merit in the allegations regarding misrepresentation as to who would define 'the project', or in submissions to the effect that Ms Hamon's position as ALCC was poorly defined or unclear to an extent giving rise to a constructive dismissal. There was a lack of clarity regarding the relationship between Wahine Ora and CILT, but there was no reason to tar the employment relationship with any associated concerns.

[41] As for the employed position, while I do not accept it was poorly defined I comment that it was a new position, and the nature of the duties indicated a degree of initiative and proactivity could reasonably be expected from the incumbent. It could even be anticipated that, at times, Ms Hamon would find herself wearing two hats in that she would be arranging educational programmes as an employee of CILT, and being involved in their provision through Wahine Ora. That matter was capable of being managed.

Conflicts of interest

A. The employment agreement

[42] Ms Hamon's employment began on 29 October 2007, without the written agreement having been signed.

[43] Ms Hamon said she discussed the agreement with Mr Weston. His advice was that she could not sign the agreement as the conflict of interest clause it contained meant she would have to stop her Wahine Ora work. She was not prepared to do so, and did not sign the agreement. Although there was a conflict of interest provision in the agreement provided on 24 October, there was no evidence that Ms Hamon raised concerns about it with CILT prior to the commencement of her employment.

[44] Accordingly Ms Hamon approached Mr Noonan shortly after her employment began, to advise she had not signed the agreement as she worked for other organisations and needed to ensure she could meet her obligations in respect of them.

[45] At or about the same time Ms Hamon mentioned that she wished to start a company named the Coromandel Learning Centre Limited, and asked whether CILT would be interested. Indeed a company was registered in that name on 2 November 2007. Mr Noonan replied that the matter could be discussed during discussions about her employment agreement. I take that as a reference to the conflict of interest provision in particular, since there would be a conflict of the most obvious kind if both CILT's adult learning centre and a separate company associated with Ms Hamon were operating and providing the same service.

[46] At a staff meeting on 5 November 2007, which Ms Hamon attended, Mr Noonan asked staff members to ensure they had signed the Key Operating Policies and Procedures Manual (“KOPP”). The manual included a page relating to conflicts of interest, and requiring trustees and staff members to list on a register any activity that may give rise to a conflict of interest.

[47] Ms Hamon and Mr Weston met with Mr Noonan on 6 November 2007 to discuss the employment agreement, and in particular the conflict of interest and hours of work provisions. It did not appear that the latter was discussed in any detail during the meeting, except that Mr Noonan said Ms Hamon advised she had other work to do, and he accepted that. He also said rather cryptically that, at the time, he did not have the information Ms Hamon did about the extent of her other activities.

[48] Otherwise, on Ms Hamon’s account of the meeting she made the extraordinary assertion that she was not interested in being an employee of CILT, and that since Wahine Ora was a co-owner of ‘the project’ she was being employed by both Wahine Ora and CILT. It was not for her to make such an assertion, and in any event she had already entered into an employment relationship with CILT as her sole employer.

[49] Ms Hamon advised, too, that she understood the conflict of interest clause already in the agreement would prevent her from carrying out her Wahine Ora and other activities, and she was not prepared to end her involvement in them. However she was not necessarily correct, not least because only some and not all of her other activities would place her in a conflict. The first step was to identify possible conflicts by completing the register, as she was being asked to do. Thereafter, ways of avoiding any conflicts would be a matter for discussion.

[50] For his part Mr Weston criticised a number of aspects of CILT’s management, made a number of assertions about the law, and attempted to raise general concerns about the way in which ‘the project’ was defined, managed, and budgeted for. He did so in what he saw as his capacity as a trustee of Wahine Ora, a formal partner of CILT’s in respect of the TEC funding. In effect he was embarking on a discussion very broadly of the kind that could have been embarked upon as between the joint applicants for the TEC funding regarding the application of the funding.

[51] It was not appropriate to embark on such a discussion during a meeting sought in order to address the signing of the employment agreement and the specific outstanding issues Mr Noonan and Ms Hamon had identified.

[52] At the time Mr Noonan said little other than that any conflict of interest should be dealt with by the parties being open with each other. Further, he said he was in principle prepared to recognise Wahine Ora, and Ms Hamon's role in it.

[53] The parties agreed a new clause 16 would be added to the employment agreement. Both believed at the time that the clause addressed their concerns. The clause read:

“Acknowledgement.

That Lucy Hamon is also a trustee of Wahine Ora Trust, which is a joint applicant to TEC, and is a partner for this project, the Adult Learning Centre.”

[54] I do not accept that, on the plain meaning of those words, Ms Hamon was or became jointly employed by CILT and Wahine Ora, that Wahine Ora had or obtained a partnership status of the kind contended on behalf of Ms Hamon, or that Ms Hamon was otherwise entitled not to observe the conflict of interest provision and other obligations set out in the employment agreement.

[55] Mr Weston submitted that the insertion of the clause induced Ms Hamon to sign the employment agreement. I might accept at most that, being satisfied the clause addressed her concerns, Ms Hamon signed the agreement. Even so, the employment relationship had already commenced. The insertion of the clause was not relevant to Ms Hamon's acceptance of the offer of employment and agreement to enter into the employment relationship, although her understanding of the clause appears to have affected her subsequent conduct during the relationship.

[56] Mr Weston also submitted that the clause was a 'condition precedent' for the employment agreement and that without it being satisfied there was no agreement. Accordingly there was a constructive dismissal. I do not accept those submissions.

[57] First, when the clause was being discussed there was already an employment relationship and on the evidence overall I find there was no condition precedent to the

entry into that relationship. Further, the existence of the relationship did not rest on the signing of the written agreement, and any refusal or failure to sign the written agreement was not inherently fatal to the continuing existence of the relationship. I find the reliance on allegations of conditions precedent to be unhelpful.

[58] I might accept that Ms Hamon wanted the employment relationship to proceed in accordance with her view of the effect of clause 16, and that is why she signed the agreement. When it became apparent that the relationship would not proceed in that way, and she did not wish the relationship to continue if that was the case, she regarded the employment relationship as being at an end. If so, that was her decision. The circumstances did not amount to a constructive dismissal.

[59] The conflict of interest provision, in clause 11.2 of the agreement, was not amended and read:

“The employee agrees that there are no contracts, restrictions or other matters which would interfere with their ability to discharge their obligations under this agreement. If, while performing their duties and responsibilities under this agreement, the Employee becomes aware of any potential or actual conflict between their interests and those of the Employer, then the Employee shall immediately inform the Employer. Where the Employer forms the view that such a conflict does or could exist, it may direct the Employee to take action(s) to resolve that conflict, and the Employee shall comply with that instruction. ...”

B. Further discussions about conflicts of interest

[60] During an informal meeting with Mr Noonan on 26 November 2007, Ms Hamon commented that another organisation of which she is a trustee, Te Roopu Tautoko Rangatahi, had applied for funding from the Ministry of Youth Development. Ms Wishnowsky had just applied on behalf of CILT for funding from the same Ministry. Mr Noonan perceived a need to discuss conflicts of interest in more detail, and sought a meeting for that purpose. He also invited Mr Weston to attend.

[61] The meeting went ahead on 27 November. Ms Hamon and Mr Weston saw the meeting as a ‘trustee meeting’. Mr Noonan sought a discussion of the kind set out above, and to obtain Ms Hamon’s signature on the conflict of interest register.

[62] According to Ms Hamon's statement of evidence Mr Weston variously refused to discuss employment issues unless all trustees were present, and asserted that the matter of the conflict of interest had been dealt with on 6 November. He also made what I find was an unfounded and unreasonable accusation that CILT had tricked Ms Hamon into signing the employment agreement. He proceeded to give his views on various areas in which he said CILT had breached the 'partnership agreement', including the view that the 'project was not defined'. He indicated he would be recording the meeting, and insisted that the meeting be conducted as a trustees' meeting and that the budget for expenditure of the TEC grant be discussed. He had even prepared a budget himself.

[63] The meeting was not a 'trustee meeting' and Ms Hamon and Mr Weston were not entitled to insist that it be conducted as one. The approach they took meant there was little, if any, constructive discussion about the management of any conflicts of interest.

[64] Later Ms Hamon signed the conflicts of interest register. There was no merit in the allegations of any form of misleading or deceptive conduct on CILT's part in respect of the register.

[65] As the register required, Ms Hamon listed the organisations of which she was a trustee or shareholder, although she maintained the view that there was no conflict of interest because the matter of any conflict had been addressed.

[66] That view suggests CILT had agreed to countenance conflicts of interest that no organisation acting reasonably would countenance. I do not accept that CILT did so, and I do not accept that the discussion at the meeting of 6 November or the new clause 16 bear the interpretation Ms Hamon attributes to them. I do not accept, either, that aside from the misconceived view that the matter had been resolved by the insertion of clause 16 in the way contended, CILT acted unreasonably or oppressively in seeking to address particular conflicts which were threatening to arise.

[67] Not surprisingly Mr Noonan believed a number of matters remained outstanding. By letter dated 3 December 2007 he asked Ms Hamon to attend a further meeting to discuss ways of managing any conflicts of interest.

[68] He added that, depending on whether a satisfactory agreement could be reached the meeting may be disciplinary and a warning may result. The meeting was scheduled for 17 December 2007. Mr Noonan wrote a further letter, erroneously dated 4 rather than 11 December 2007, listing possible conflicts of interest in more detail. By then the issue was more than a general one of how conflicts of interests might be managed, and encompassed specific items of concern. They were:

- a. the non-disclosure of the expression of interest by Te Roopu Tautoko Rangitahi and/or Wahine Ora to the Ministry of Youth Development;
- b. Ms Hamon's response in the course of an approach to CILT regarding an application for funding for a sports co-ordinator role;
- c. the lack of disclosure in respect of Wintec funding for a Poutama course;
- d. that the Coromandel Learning Centre Limited would be competing against the adult learning centre Ms Hamon had been employed to establish on behalf of CILT;
- e. a letter Mr Weston had sent to CILT highlighted the potential conflict in Ms Hamon's involvement in Wahine Ora; and
- f. when asked about ordering CILT business cards, Ms Hamon responded she did not need any as she had Wahine Ora cards.

[69] The letter also referred to a 'Toolkit on Managing Conflicts of Interest in the Public Sector', a document which had been provided to Ms Hamon. The document contained detailed information about how to identify a conflict of interest, and well as the management of conflicts of interest.

[70] Mr Noonan's assistant, Deborah Hide-Bayne took notes at the meeting of 17 December. The notes indicate the issues listed in the 4 December letter were discussed in detail, and there was a full and broad discussion about conflicts of interest, their nature and their management. There was nothing oppressive or unfair about the discussion as recorded. The meeting ended on the basis that all parties needed to work on the process for managing conflicts of interest.

Other allegations of breach

[71] The broader allegations of breach contained in the statement of problem appeared to be directed at the following additional matters.

A. The disciplinary meeting

[72] By letter also erroneously dated 4 rather than 11 December 2007, Mr Noonan confirmed that a disciplinary meeting would follow the 17 December meeting about conflicts of interest. The disciplinary meeting would address concerns about whether Ms Hamon was spending CILT time on the activities of other organisations in which she was involved. The letter stated that a written warning could result.

[73] Ms Hide-Bayne also took notes of that meeting. The notes indicate the concerns were discussed in detail. Ms Hamon provided explanations and denied any wrongdoing. The meeting ended on the basis that Mr Noonan would give thought to the matter. Subsequent events overtook the disciplinary process and no warning was ever issued.

[74] Ms Hamon's concern about hours of work was identified in the statement of problem as an allegation of misrepresentation about the extent to which Ms Hamon would be able to attend to other activities during her employment. There was no such misrepresentation. Ms Hamon's hours of work were identified in the employment agreement, and she was expected to observe them. There was no misrepresentation or breach of duty to her in that respect. Instead Ms Hamon found, after her employment had commenced, that she was expected to account to CILT for her use of time during working hours. CILT was entitled to expect that of her.

[75] CILT was also entitled to commence a disciplinary procedure when it developed concerns about the way in which Ms Hamon was using her time.

B. The allegation of theft

[76] Ms Hamon had with her at the 17 December meetings a document which either she or Mr Weston had prepared, and which was headed 'Chronology of Events and Statement of Issues.' The document is 8 pages long. Its content is as suggested

by the title. It covers many of the matters also raised in this investigation. It ended with the statement:

“Claim: bias, oppressive behaviour, constructive dismissal and unlawful conduct.”

[77] The document was not presented at either of the 17 December meetings and Mr Noonan said he found it after both meetings had ended. He arranged for it to be sent by facsimile to the human resources consultant who had also attended the meetings, Raewyn Kirkman. He sought her advice about it.

[78] Ms Hamon has accused CILT of stealing the document.

[79] Ms Hamon had probably left the document in the meeting room by accident. The submissions on her behalf expanded on the accusation of theft by saying the act of theft occurred when Mr Noonan failed to return the document after he found it, and inviting the Authority to find that by stealing or dealing dishonestly with the document in that way Mr Noonan had destroyed or severely damaged the relationship of trust between the parties.

[80] It was further submitted that this act caused the constructive dismissal. I do not accept that submission. Whether or not Ms Hamon was exercised by her conclusion that her document had been stolen, that matter was peripheral to the core concerns set out in this determination and even in the document in question. It played no more than a minor role in the termination of her employment.

C. Snowballing

[81] The word ‘snowballing’ was used in Mr Weston’s submissions to say that CILT had recycled the same issues and added fresh petty allegations to create mass, without making a genuine attempt to resolve the issues. It appeared from the submission that this was said to be a breach of good faith and a failure to accord fair treatment to Ms Hamon.

[82] The submission is not a fair or accurate characterisation of the events described in this determination. I do not accept that CILT was attempting to recycle

the same issues, or that it failed to make genuine attempts to resolve them. I do not accept that it added fresh petty allegations in the process. Rather it sought repeatedly and with limited success to achieve a resolution of important issues such as the management of conflicts of interest. Then, as Ms Hamon's view of the limits of her obligations as an employee became apparent, it sought to resolve the matters arising as a result.

[83] In particular I do not accept that, in first commenting on then asking Ms Hamon to explain, her expression of interest in funding from the Ministry of Youth Development CILT acted oppressively or unfairly. Further, much was made in evidence of a conversation Mr Noonan had with a funding provider in which the provider mentioned Ms Hamon had approached it on behalf of another organisation regarding an activity possibly also within CILT's scope. The provider warned against the possibility of double dipping. I do not accept that Mr Noonan did more than raise the matter with Ms Hamon, or that there was anything inappropriate in his doing so.

[84] In turn I do not accept that the conduct apparently being referred to was oppressive, or amounted to a breach of good faith or a failure to accord fair treatment to Ms Hamon.

Events leading directly to the termination of employment

A. Repudiation of employment agreement

1. The emailed message of 20 December

[85] In the period immediately following the 17 December meetings Ms Kirkman engaged in discussions with Ms Hamon or Mr Weston aimed at securing a resolution of the problems between the parties. Ms Hamon says the discussions amounted to repudiation by CILT of the employment agreement.

[86] Ms Hamon attached to her statement of evidence a copy of an emailed message dated 20 December 2007 from Ms Kirkman to Wahine Ora under the heading 'settlement offer'. She says its contents in particular amount to a repudiation of the employment agreement.

[87] No objection was made to the production of the message, and surprisingly it was Mr Weston who asked that its without prejudice nature be addressed in the course of the investigation meeting. The message read:

“Further to your email to Mike Noonan dated 18 December 2007 headed Employment Dispute – meeting 17.12.07 – ‘without prejudice offer’

It is the view of the Coromandel Independent Learning Trust (CILT) that any employment relationship going forward will be problematic given the complexities of the situation and the current differences in views on key aspects such as the nature of the partnership between Wahine Ora and CILT.

It is also apparent that for both parties recent events have eroded the level of trust and confidence each has in the other, and that is having an impact on the employment relationship.

On that basis, CILT is at this point not prepared to renegotiate the employment agreement.

CILT is keen to resolve this issue so that the Learning Centre project can progress

On a without prejudice basis, CILT proposes two alternatives to resolve this matter:

[portion blanked out]

If the latter option is agreed to, CILT would present Wahine Ora with a Request For Proposal clearly setting out its requirements, and Wahine Ora would respond with a Proposal to meet those requirements.

To clarify the without prejudice nature of this offer, this is intended to signify that what is taking place is not to be taken as any more than a negotiation. It signifies an attempt to try to find a way around the problem and possibly to reach a solution. ...

... this offer will remain open until 14 January 2007.”

[88] Mr Weston made a number of submissions regarding the without prejudice nature of the message. For the most part they did not assist. That is not to say I have not considered them, or was unaware of the legal principles referred to in them, rather that is the view I take of them.

[89] Accordingly rather than addressing the submissions in any detail I address the central question as it was developed in final submissions, namely whether the message amounts to repudiatory conduct on CILT's part.

[90] In that respect Mr Weston relied on the decision of the Employment Court in **Bayliss Sharr & Hansen v McDonald**¹. There was a discussion in **Bayliss Sharr & Hansen** regarding when the privilege applies in general, and the court found the privilege did not apply to certain 'off the record' discussions because there was no dispute existing between the parties to the discussions. In turn, evidence of the content of those discussions was admissible. The court did not disturb a finding in the decision under challenge that the employee, who was being subjected to a disciplinary process and who then went through an apparently inconclusive 'employer-initiated exit strategy', was constructively dismissed when she then refused to return to the workplace.

[91] I have no hesitation in finding the circumstances here were different from those in **Bayliss Sharr & Hansen**. I have set out in detail the development of the dispute between the parties regarding the roles of Ms Hamon and Wahine Ora in respect of the TEC funding, and the difficulties over conflicts of interest. Ms Hamon was represented throughout the efforts to resolve those matters, but they had become intractable.

[92] Nothing in material made available to me indicated the discussions with Ms Kirkman were any different in kind from those commonly entered into in attempts to resolve difficulties in employment relationships. I do not accept that the statements regarding loss of trust and confidence should be characterised as repudiatory statements by one party – if anything they reflected the feelings of both parties and set out why a negotiated resolution was desirable. Their intent and purpose have been misstated and misunderstood.

B. Ms Hamon's leave over the Christmas-New Year period

[93] CILT says Ms Hamon had arranged annual leave for the period 21 December 2007 – 13 January 2008.

¹ [2006] ERNZ 1058

[94] Ms Hamon did not report for work on the expected date of 14 January 2008. She says she had arranged a longer period of leave to complete a holiday and carry out planned work for Wahine Ora. For present purposes it is not necessary to resolve the disagreement about whether that was so except to say I accept Mr Noonan genuinely believed Ms Hamon was to report for work on 14 January, and was uncertain of her intentions when she did not report to work or otherwise contact CILT.

[95] Accordingly Ms Kirkman wrote a letter dated 17 January 2008 referring to an abandonment of employment provision in the written employment agreement, and seeking a meeting. There was nothing improper about the letter. I find unreasonable the submission that this was an attempt to engineer grounds for dismissal, and I do not accept the submission that such conduct was oppressive. It was a valid response to the uncertainty over Ms Hamon's intentions.

[96] Mr Weston replied in a message dated 21 January 2008, asserting that Ms Hamon was facilitating a Poutama course as arranged, and was due to return to work on 29 January. The message ended with the statement:

“My client is now treating her situation as one of constructive dismissal effective from the date and time of this email.”

[97] By letter dated 22 January 2008 CILT's then-solicitors advised that Ms Hamon's position remained open and CILT wished to resolve matters.

[98] By email message dated 29 January 2008 Mr Weston replied, detailing the grounds for the constructive dismissal. They comprised a number of allegations of unlawful conduct, most of which were repeated the Authority.

[99] Ms Hamon did not return to work.

Whether Ms Hamon was dismissed

[100] A termination of employment which on its face is effected at the initiative of an employee can amount to a constructive dismissal if it falls within one or more of the following categories:

- (a) the employee is told to resign or be dismissed; or
- (b) the employer follows a course of conduct with the deliberate and dominant purpose of coercing the employee to resign; or
- (c) a breach of duty on the part of the employer caused the resignation, and the breach was sufficiently serious to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing.²

[101] Paragraph (c) above sets out the relevant legal test for whether Ms Hamon was constructively dismissed. No argument based on paragraph (b) was raised.

[102] I return to the differences between the parties over:

- a. the nature of the ‘partnership’ between Wahine Ora and CILT with reference to the TEC funding;
- b. the nature of Ms Hamon’s role in CILT; and
- c. the attempts to manage conflicts of interest.

[103] I do not accept on the facts that Wahine Ora and CILT entered into a formal partnership of the kind contended by Ms Hamon. I do not accept on the facts that the entry into that or any other form of partnership was a ‘condition precedent’ to Ms Hamon’s entry into an employment relationship with CILT. At most if such a condition was present in Ms Hamon’s mind before the relationship commenced it was not communicated to CILT and was not the basis for the parties’ entering into the employment relationship. I do not accept on the facts that any misrepresentation was made to Ms Hamon regarding the entry into a partnership, rather there have been differing views of what was meant by the term ‘partnership’. I do not accept that Ms Hamon was induced to enter into the employment relationship on the basis of any misrepresentation in that respect.

² See: **Auckland Shop Employees IUOW v Woolworths (NZ) Limited** [1985] 2 NZLR 372 and **Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW** [1994] 2 NZLR 415, [1994] 1 ERNZ 168.

[104] Finally, aside from the imprecise use of the word ‘partnership’, I do not accept that CILT was at fault in the resulting misunderstanding. It was not guilty of a failure to act in good faith in the matter.

[105] Ms Hamon and Mr Weston approached the employment relationship on the basis that that it was to proceed in the manner Mr Weston sought to assert during the meetings with CILT after the relationship had commenced. There was an early emergence of disagreements and misunderstandings on the matter. It could have been open to Ms Hamon to conclude as a result that the employment relationship was unlikely to proceed as she had expected or wished, and to resign. However I do not accept that state of affairs was caused by any misrepresentation or failure to act in good faith on the part of CILT or Mr Noonan or that such resignation could amount to a constructive dismissal.

[106] Further to Ms Hamon’s role in CILT, there were no reasonable grounds for concluding that her position as an employee was to be other than as discussed during the recruitment process, and set out in the information pack and written employment agreement. In particular Ms Hamon would be an employee of CILT’s, and was employed to perform the position set out in the job description under the terms and conditions set out in the written employment agreement.

[107] I do not accept that clause 16 changed any of that. If it was intended to do so from Ms Hamon’s point of view, and particularly to the extent contended, there was no meeting of the minds over the matter. Further the wording of the provision is not adequate to make clear such an extensive and significant change.

[108] The inclusion in the written agreement of the conflict of interest provision was prudent, and I have found nothing inappropriate in CILT’s attempt to manage potential conflicts of interest.

[109] Further incidents referred to during what was intended as evidence that Ms Hamon was ‘harassed’ in her employment or was subject to other actions to her disadvantage, or that CILT breached its obligation to act in good faith towards her during her employment, are associated with CILT’s attempts to address the primary issues.

[110] I do not detail some of the allegations either because I do not accept that certain threats Ms Hamon alleged were made about the future of her employment were made at all or were made in the context she alleged, or because I consider the incidents amount to reasonable questioning aimed at eliciting from Ms Hamon details of her activities which she felt she was not obliged to provide or resented being asked about.

[111] More significantly, however, issue was taken with CILT's attempts to conduct a disciplinary meeting, and to address concerns about what would have been real conflicts of interest.

[112] I do not accept that Ms Hamon was harassed in her employment, that CILT breached its obligation to act in good faith towards her, or that CILT was guilty of 'other behaviour to her disadvantage' in any of those respects.

[113] Finally, I have already addressed the allegation of theft.

[114] For these reasons I find Ms Hamon was not constructively dismissed. She was not dismissed at all.

Penalties

A. Penalties sought against CILT

[115] No-one addressed the matter of penalties in submissions. That did not assist in the difficulty caused by the broad and general claim set out in the statement of problem. If I am to assume that the breaches of agreement for which penalties were sought correspond in some way with the matters addressed elsewhere on behalf of Ms Hamon, then I find the claims are not established and make no orders.

B. Penalties sought against Mr Noonan

[116] The statement of problem also asserted that penalties were sought against Mr Noonan. That matter was not pursued in submissions.

[117] Mr Noonan was not cited as a party to this employment relationship problem, as he should have been if a claim was being made against him in his personal capacity. On the evidence I heard I would not in any event have ordered a penalty against him in that capacity.

Concluding comment

[118] This investigation has been bedevilled by accusations and counter-accusations as between the parties, none of which should have been made in the Authority. It has also bristled with misconception, misunderstanding and mis-statement. None of this has assisted in the resolution of the employment relationship problem, and for that reason I have chosen not to refer to any of it in any detail.

Costs

[119] Costs are reserved.

[120] If the parties are unable to resolve the matter themselves any party seeking an order for costs shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The other party shall have a further 14 days in which to file and serve any memorandum in reply.

R A Monaghan

Member of the Employment Relations Authority