

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2024] NZERA 14
3131874

BETWEEN AKANESI HAVEA
 Applicant

AND TAINUI HOME TRUST BOARD
 Respondent

Member of Authority: Geoff O’Sullivan

Representatives: John Wood, advocate for the Applicant
 Troy Wano, counsel for the Respondent

Investigation Meeting: 21 and 22 April 2022 at New Plymouth

Submissions (and
Information) Received: Up to and including 11 October 2022

Date of Determination: 12 January 2024

DETERMINATION OF THE AUTHORITY

Non-publication

[1] Some time after the investigation meeting was held, Ms Havea applied to the Authority for non-publication orders which would have the effect of suppressing her name. The application was resisted by Tainui.

[2] The basis for the application was essentially on the grounds that Ms Havea may well suffer ongoing health issues and there may also be detrimental effects on her ongoing prospects for employment.

[3] It is accepted the Authority has the power to prohibit publication in accordance with the Schedule 2 Clause 10 of the Employment Relations Act. Generally however, the Authority must balance Ms Havea’s position and circumstances with the public

interest in open justice. Exceptional circumstances consistent with the interests of justice must exist to support the making of such an order.

[4] In this case, no evidence is provided which would indicate having Ms Havea's name in the determination would impact adversely on her health. No evidence has been provided of that publication of her name may affect her ability to obtain further employment. I also note that some time has passed since the application for non-publication was made and the issuing of this determination. Accordingly the Authority declines the application for non-publication.

Employment Relationship Problem

[5] Ms Havea says that during her employment with Tainui Home Trust Board (Tainui), she was bullied but Tainui failed to respond to the complaints she made.

[6] She then says that as a result of the restructuring process Tainui undertook which commenced in August 2020, her employment ended as a result of redundancy on 10 December 2020. Ms Havea claims the termination of her employment was both substantively and procedurally unfair and accordingly her dismissal was unjustified. She seeks remedies for humiliation, loss of dignity and injury to feelings together with lost wages.

[7] Tainui rejects the claims saying there was no bullying and that any allegations made, were properly investigated and the outcome communicated to Ms Havea.

[8] In respect of the claim of unjustified dismissal, Tainui agrees it employed Ms Havea and says following extensive interaction with her through the restructure period, her employment terminated because her role was disestablished and this was communicated to her by letter on 15 September 2020.

This Determination

[9] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has stated findings for fact and law and expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

[10] This determination has not been issued within the three-month period required by s 174C(3) of the Act. As permitted by s 174C(4) the Chief of the Authority has

decided exceptional circumstances existed allowing a written determination of findings at a later date.

The Authority's Investigation

[11] The Authority heard from eight witnesses, namely Ms Havea, Ms Lois Lash, Mr Manoa Havea, (Ms Havea's husband), Mary Harker and from the respondent through Brenda Fawkner, Maxine Hooper, Antony Burn and later from Kerin Pollard who answered written questions from the Authority and from the representatives. All evidence was given on oath.

Background

[12] Ms Havea was employed by Tainui as a Financial Coordinator commencing her employment on 26 May 2014. Although the job description in her employment agreement provided she report directly to the CEO, in reality she reported to the Chairperson, Tony Burn.

[13] From as early as September 2014, Ms Havea considered she was being bullied. Examples she gave included her belief that a profit and loss statement she had provided to the CEO was deliberately omitted from reports which went to the Board. In March 2016, she sent an email complaint to the Chairman alleging she was being bullied by a manager. It seems she raised complaints in respect of various matters in 2017, 2018 and 2019. She claims none of the complaints she made were addressed.

[14] On 28 January 2020 Ms Havea sent an email to the CEO, copied to the Chairperson regarding her concerns for a safe working environment. On 12 February 2020, Ms Havea emailed the CEO reminding him she wished to discuss her concerns.

[15] On 23 March 2020, Ms Havea complained of a further incident where she felt humiliated and threatened by an assistant. On 13 May 2020 she received a response to her complaint which advised the CEO was concerned about the matter and that the person Ms Havea had complained about, also felt threatened and felt unsafe. The CEO stated, "This is an area you need to address as a priority". It appears this letter was issued without any proper investigation into the truth or otherwise of Ms Havea's allegations. Issues between Ms Havea and Tainui continued until the restructuring process started on 18 August 2020. Ms Havea believes her history of complaining

coloured Tainui's attitude to her and was the driving force behind the proposed restructure.

[16] On 18 August 2020, Ms Havea received a letter from the CEO inviting her to a meeting on 20 August 2020 to discuss proposed changes (Document 34). As Ms Havea was not sure what the proposed changes might mean for her, she wanted to take a support person with her but in the end Ms Havea attended the meeting alone, mainly because she was unclear about what was to be discussed and in her words, she was a "private person". At a meeting Mr Pollard, an HR Consultant, and the CEO were present. Mr Pollard briefly presented a proposed restructure (Document 36). Ms Havea was advised to seek legal advice and submit feedback by 31 August 2020. The final decision was to be made on 2 September 2020.

[17] Ms Havea now says the restructuring proposal given to her on 21 August was substantially untrue. The incumbent CEO had resigned on 6 August and so was never going to be affected by a restructure. Further, it was clear that only Ms Havea would lose her job. No-one else seemed to be affected.

[18] On 27 August 2020 Ms Havea asked for more time to respond to the proposal. She felt she did not have sufficient information enabling her to give clear and informed feedback. She had been advised that the reason for her potential redundancy was that the Finance Department processes were to be outsourced. Ms Havea wanted to know precisely what processes the Board was planning to outsource.

[19] On 27 August 2020 the CEO advised that Tainui was "considering fully outsourcing its business advisory and specialist systems and service functions (IT, HR and Finance)". It is worth noting that the consultation document given to Ms Havea referenced only her position and that of the CEO as being affected.

[20] On 7 September 2020 Ms Havea submitted feedback for the Board to consider. The timeframe for this to occur was extended on 9 September 2020 with a Board meeting set down for 14 September 2020.

[21] On 11 September 2020, Ms Havea was told by the CEO that there were only four Board Members expected to make the decision. She was not told that this was a sub-committee. Tainui's constitution required six members to be present to constitute a quorum.

[22] On 15 September 2020, Ms Havea met with Mr Pollard and the CEO. Mr Pollard advised that the proposed restructure was confirmed, and she was asked to work until the end of November 2020 when her employment would end on the basis of redundancy.

Evidence and discussion

Ms Havea

[23] Ms Havea gave evidence in respect of first, her claims that she was bullied, and that Tainui failed to respond to her complaints, and secondly, that she was unjustifiably dismissed as a result of the restructuring process. In her written statement, Ms Havea listed the dates on which the events she complained of occurred. These range from 30 September 2014 right through to 20 April 2020.

[24] A number of the complaints made by Ms Havea fall short of complaints about bullying. For instance, Ms Havea refers to her email of 30 September 2014. In essence, the email is a complaint about profit and loss documentation being separated from the balance sheet which resulted in members of the Finance team not being given a complete copy of the financial reports. Ms Havea advised that she felt unsafe working with people who she felt hid information from her and others. She finished by stating that she strongly believes that open disclosure is essential to enable appropriate and informed decisions.

[25] It is clear that Ms Havea had ongoing concerns and in her letter of 22 March 2016, which she sent to the CEO, she was complaining about aggressive behaviour she had been subjected to and to which nothing had been done. Ms Havea stated she felt her hurts and concerns were not being taken seriously, before outlining a specific complaint.

[26] Her email of 6 April 2016 complains about being sworn at, and again she reminded the CEO that she felt she had been harassed and bullied, which was having a negative effect on her job performance and job satisfaction.

[27] On 29 March 2016, Ms Havea emailed, indicating she was looking forward to the problem being solved in the near future.

[28] There were some responses from the CEO and indeed on 24 March 2016, Mr Burn responded that he would follow matters up to ensure it was dealt with at the appropriate level.

[29] Other complaints from Ms Havea followed in a similar vein. On 20 September 2017, Ms Havea's counsellor recorded meeting with Ms Havea through her doctor's referral because of the stress she was suffering. She records Ms Havea's complaints of not being heard or ignored in relation to accusations levelled at her, and complaints not being considered.

[30] On 6 February 2018, Ms Havea had her lawyers write to the Privacy Commissioner which amongst other things, refers to pre-existing and unresolved personal grievances going back to at least November 2016.

[31] On 7 May 2018, Tainui wrote to Ms Havea with a complaint about her behaviour which in essence came about because Tainui had not dealt with the previous issues. Tellingly, Tainui's letter advises:

This incident could be considered as minor and unnecessary to occur, however, the method you adopted to resolve the issue to your satisfaction, has resulted in [P] making this complaint.

[32] Undoubtedly, matters were taking a toll on Ms Havea's health and a medical report following admission to hospital on 11 November 2019 stated "*Very emotional throughout history and exam. Being bullied at work, and feels she has been racially discriminated against. ...*" The medical advice concluded that a component of stress was contributing to her symptoms.

[33] Tainui's response to this, whilst acknowledging Ms Havea's medical advisor may be able to assist in explaining what Tainui would need to do to ensure Ms Havea could cope with the work environment, went on to say:

Tainui believes the work environment is safe. Tainui understands you alleged it is not because of the way you say you have been treated. Tainui also has to accept that it has had two employees working with you who have both made the same allegations arising from your behaviour. The working environment at Tainui is safe.

[34] On 28 January 2020, Ms Havea emailed Mr Burn, again complaining of her colleagues' behaviour and asking for the CEO to ensure that the behaviour would not occur again.

[35] On 12 February 2020, Ms Havea again referred Tainui to the unacceptable behaviour she was experiencing. She noted she had been complaining about being bullied, harassed and treated disrespectfully on a number of occasions but no change had occurred. The email also raised other issues. And finally, on 20 April 2020, Ms Havea emailed the Board and the CEO. She referred to the email thread following on from her email of 29 February 2020 regarding a safe working environment and noted that the issue had not been resolved. The meeting she had requested had not occurred. She highlighted a further incident which had occurred on 24 March 2020, requesting a formal investigation.

[36] Mr Hook responded, confirming a meeting held on 29 April 2020, saying that they had investigated the matter and did not believe the behaviour complained of warranted further disciplinary action or dismissal as Ms Havea had suggested. He stated the complaint raised by Ms Havea would not be taken any further. The email finished with a statement to Ms Havea to spend less time on past issues and more time on building a relationship. This does not give an indication that Tainui was effectively addressing the complaints.

Restructure

[37] Ms Havea gave evidence that the restructuring process started on 18 August 2020, and only affected her. Mr Hook wrote to her on that day asking her to attend a meeting to discuss proposed changes. The letter highlighted that they would discuss the impact that changes may have on the structure of the business and for some individuals personally.

[38] Ms Havea says she returned to work after leave on 21 August 2020 and met alone with the CEO, and Mr Pollard the HR consultant. Mr Pollard presented the proposed restructure (see Document 36) and advised her to seek legal advice and then submit the feedback by 31 August 2020. He said she would be informed of the Board's final decision on 2 September 2020. During the meeting, Ms Havea asked if there were performance issues and said both men hesitated before Mr Pollard replied, "I shouldn't say this, but Tony should back off."

[39] Ms Havea says she realised that the restructure was serious and would affect her position, but she did not think she would be without a job. She said she asked for more time and she wanted to know just what part of her position was being outsourced. She

said that no-one went through the documents with her. The meeting was short and she didn't fully understand what was being said. She was told to take the documentation home and read it carefully.

[40] Ms Havea says that when she read some of the rationalisation for a restructure, she saw the problem being with the CEO, not with her as a finance manager. She felt it was about the CEO not having ability in finance and did not feel it related to her. When looking at feedback regarding outsourcing, Ms Havea said that she simply saw having a CEO with a chartered accountant qualification, as assistance to her.

[41] Ms Havea says she asked questions about this but all she was told was that financial services would be outsourced.

[42] Ms Havea said she thought they would consider her feedback, but the evidence was this was not before the sub-committee which considered the termination of her employment. Ms Havea says that she never thought that Tainui would outsource the whole finance section, and in fact ultimately they did not. This was one reason why she believed her employment as such was not at risk.

[43] Later Ms Havea discovered that after that CEO's resignation, the Board had determined this opened the way for their Board to appoint a CEO role encompassing strong financial skills. She also learned that the outsourcing plan had been reduced and it was most likely it would cease within three months, with a second clerical assistant being employed (Document 36, Page 7). Tainui's plan was that a second clerical assistant would be employed who would be trained by Ms Havea and who would then manage all clerical work under the supervision and oversight of the CEO. Finance services were not fully outsourced as planned, and in effect, Ms Havea was replaced by an employed clerical assistant.

[44] Ms Havea says that the premise in which the proposed restructuring was based, was a complete sham. The restructuring proposal which provided for outsourcing of the finance function was a misstatement. The proposal put to the Board (Point 2) spoke of the need for a chartered accountant, and there was no suggestion that this would be a contracted position.

[45] When Ms Havea returned to work on 21 August 2020 she learned that the CEO and Operational Manager had resigned. She says the health and safety person was

surprised to see her back at work as she had been told by the CEO that Ms Havea was leaving. The fact that her colleagues seemed to know more than she did was of some concern to Ms Havea.

[46] On 27 August 2020, Ms Havea emailed the CEO requesting an extension. In her request, she said she did not have enough information in order to give clear and informed feedback. She wanted to know what processes in the finance department were being outsourced. She also wished to know when the proposed restructure was expected to take place.

[47] The same day the CEO replied to Ms Havea's email saying they could not comment further on the timeframe, but also made it clear that no decisions would be made until they had a fully and properly considered any feedback or comment.

[48] Ms Havea's complaint at this stage is her view that Tainui advised her in its proposal that it was considering fully outsourcing its business advisory and specialist systems and service functions. However, the consultation she saw only referenced her position and that of the CEO. She saw no evidence that her finance assistant's position for instance, was subject to a restructuring proposal.

[49] On 11 September 2020, Mr Pollard informed Ms Havea by email that he and the CEO would meet with her on Tuesday 15 September to advise of the Board's decision (Document 42). She was told, "No final decisions will be made until we hear and genuinely consider your feedback." However, on the same day, Ms Havea was told by another Board Member that they had not received her feedback and was not aware of any Board meeting. This was despite the CEO telling Ms Havea that there were only four Board Members expected to meet to make the final decision, and Reverend Patterson would be one of them.

[50] On 15 September 2020 in the meeting with Mr Pollard and the CEO, Ms Havea was advised the proposed restructure had been confirmed. The confirmed restructure (Document 43), together with her feedback, were given to her and she was asked to continue work until the end of November 2020. Ms Havea says it was clear that there was no analysis of her feedback and it was not fully discussed, as claimed by the Chair.

[51] Ms Havea also took issue with the fact that Clause 15 of her individual employment agreement (Document 1) provided that if there were to be outsourcing,

then the Board would speak to her about whether or not there was an option of transferring her to the new employer. Likewise, Ms Havea says the Board did not discuss at any time the possibility of redeployment within Tainui.

[52] On 17 September 2020, Ms Havea met with Reverend Patterson, who had approached her in her office. Reverend Patterson advised Ms Havea that she was invited to attend the meeting held on 14 September. She confirmed there were only four Board Members (including her) and that her feedback was tabled at the meeting however she had to leave and had not participated in the discussion. She said one reason why she had to leave was the fact that she had already spoken with Ms Havea. That was before the initial timeframe given between the final date for feedback and the date for confirmation. This reinforced Ms Havea's belief that the decision about her dismissal had already been made.

[53] On 21 September 2020, Ms Havea received an email from Mr Pollard confirming her final day at Tainui would be Friday 11 December 2020.

[54] Ms Havea also gave evidence that two other Board Members said that they were also not given feedback. They told her they were unaware of any decision being made by the Board or any sub-committee to organise the disestablishment of her position. Ms Havea's evidence was that the Board at the meeting did not have quorum and had no legal power to do what it did.

[55] Of further concern to Ms Havea was that on 21 October 2020, whilst processing invoices, she noted that Tainui had paid a significant sum to Baker Tilly Staples Rodway, for providing HR Services regarding the restructure (Document 50) when the plan was for finance services to be outsourced to them.

[56] And finally, on 17 February 2021, Ms Havea received a phone call in which she was told that her role had been replaced by an accountant in Auckland who had heard of the job through Ms Havea's former assistant. It was clear the restructure had not played out as it should and it is now apparent that Ms Havea's position remained.

Humiliation, loss of dignity and injury to feelings

[57] Ms Havea then gave evidence regarding the damage to her health. The evidence was harrowing as she explained the physical, emotional, social, mental and spiritual

health effects she suffered. She said her self-esteem was smashed and she had lost her sense of value.

Mr Havea

[58] Mr Havea, Ms Havea's husband, gave evidence as to the effect Ms Havea's work environment had on her over a number of years. Mr Havea was a minister of the New Plymouth Methodist Church Parish, one of the owners of Tainui Village, and was one of the representatives of the Church on the Tainui Board.

[59] Mr Havea gave some evidence as to how Ms Havea's complaints were treated. He noted that in November 2019 (Document 2) a complaint letter was received which complained about her treatment but made complaints also about being bullied. Mr Havea and another Board Member then wrote to the Board to express disappointment at how the CEO was dealing with complaints.

[60] Mr Havea says that after consideration of his workload and the problems faced by his wife, he resigned from Tainui Trust Board. He says on her last day of work his wife told him how she felt very lonely at work, she felt people were trying to avoid talking to her—and, although there had been a history of the Trust Board giving a small gift to employees who were leaving, this did not happen in her case.

Lois Lash

[61] Ms Lash also gave evidence over events that she witnessed affecting Ms Havea. In August 2020 she said she had a discussion with the CEO in his office, and he told her he was going to have a meeting with Ms Havea and the HR person. He said Ms Havea might not come back to work after the meeting.

[62] Ms Lash says that on 3 December 2020 she was in her office when she heard raised voices and saw a colleague shaking a pointed finger at Ms Havea, yelling at her. The colleague left but then returned and repeated the behaviour. Ms Lash says she found the colleague and Ms Havea both in tears.

Angela Harker

[63] Ms Harker provided counselling services to Ms Havea and gave evidence to the effect the working environment had on her. She assessed the impact on Ms Havea as severe. Her functioning and wellbeing were significantly depleted. She continued to

meet regularly with Ms Havea to provide informal support in her role as rest home chaplain.

[64] During November and December, whilst working at Tainui, she says she experienced a withdrawal of cooperation by other colleagues and unspoken changes in attitude and behaviour towards herself, as a result of her assisting Ms Havea. Ms Harker also said that, even after Ms Havea had left Tainui, she continues to be affected by the impact of her experiences on her health and wellbeing, her relationships and her employment prospects.

Kearin Pollard

[65] Mr Pollard gave evidence that he was engaged by Tainui as an HR consultant. He assisted with the development of documentation required to support the rationale behind the proposed process. He was also charged with facilitating meetings. In his evidence, he was not the decision maker.

[66] In answer to a question as to whether or not his instructions from Tainui included a need to justify the restructure, he said discussions took place with Mr Burn, and as a result he assisted in the development of the change proposal documentation. Mr Pollard did not explain why, if in his evidence, the restructure was only going to affect Ms Havea, she would not have been told straight away she was the only person affected, and given access to information.

[67] Mr Pollard confirmed that only a “sub-committee” of the Board was in attendance when the decision was made to proceed with the proposed restructuring. It is clear Mr Pollard led the procedural aspects of the restructuring.

[68] Although the Board’s constitution allowed for delegation, including powers of management, the evidence strongly suggested no formal delegation had been made of any of the powers of the Board, certainly not to the sub-committee. Further, any meeting of the Board required a quorum of six members. The constitution provides that no business shall be transacted at a meeting unless a quorum is present.

[69] Board Members have the power to appoint, engage or employ. The flipside of that coin, is it would be members who would have the power to dismiss. Mr Pollard’s evidence was clear, Ms Havea was dismissed by the sub-committee. His evidence casts a significant doubt as to whether the sub-committee was properly constituted. This is

especially so when he confirmed that all final decisions were made by the Board, and he simply confirmed them. There is no evidence of any Board decision relating to Ms Havea.

[70] Although Mr Pollard said he considered Ms Havea's employment agreement, he could not answer directly whether or not there were discussions regarding the proposed outsourcer employing Ms Havea or indeed who may have had such discussions with Ms Havea. He also said he had no knowledge as to who replaced Ms Havea, what qualifications they had, when they took over, and whether they were paid more or less than Ms Havea.

[71] Mr Pollard also confirmed (para 24 of his brief) that he could not point to any document showing the Board had power to delegate its power to terminate Ms Havea's employment to any other entity or sub-committee. He was also asked what selection criteria was used and what consideration was given to redeployment. Mr Pollard was unable to answer this question with any specificity.

Antony Burn

[72] Mr Burn is a chartered accountant and was the Chair of Tainui from 1 June 2014. Mr Hook was the Tainui CEO who resigned in October 2020. When he resigned, Mr Burn took over acting as temporary CEO until the position was filled. Mr Burn was a temporary CEO from 5 October 2020 to February 2021. Mr Burn said the Board knew about the meeting where the decision to terminate Ms Havea's employment was made. He said it was a deliberate move to have a small group selected for their skills to deal with the restructure. He also gave evidence that the full board did not have full feedback. He could not point to any documentation and/or evidence showing that the Board may have delegated some of its power to a sub-committee. In fact the evidence was no resolution or minute relating to any delegation existed.

[73] Others gave evidence on behalf of Tainui refuting some of the claims made by Ms Havea but the evidence did not impact on the matters the Authority had to determine. For instance, the issue regarding the bulk of Ms Havea's disadvantage claims is not whether or not the complaints were justified, it was the Board's lack of proper process in dealing with them.

Analysis

The disadvantage claims

[74] There is a commonality which runs through all Ms Havea's disadvantage claims, namely lack of engagement from Tainui. There is no doubt that Ms Havea over a number of years repeatedly raised complaints which were not addressed. Indeed, Tainui's evidence indicates that only one complaint, namely her last one which involved an altercation with a colleague, was considered. Ms Havea was told that Tainui had considered the complaint and spoken to the colleague but this was as far as it had been taken.

[75] Tainui's dealing with Ms Havea's ongoing complaints was inadequate. Whether or not Ms Havea's complaints were justified remains unknown for the simple reason they were never investigated. Ms Havea gave compelling evidence as to the effect that the lack of action on behalf of Tainui had on her and it was significant. It adversely impacted her health and led to her having to have time off from her employment. Tainui's approach overall to the complaints made by Ms Havea and its apparent refusal or reluctance to investigate them, was not the action of a fair and reasonable employer.

The Redundancy

[76] Ms Havea claims that her dismissal was unjustifiable because of the flaws in the restructuring process which meant her redundancy could not be substantively or procedurally justified. The Court of Appeal considered the obligations on an employer during a redundancy process in *Grace Team Accounting Limited v Judith Brake*.¹ The Court of Appeal analysed s 103A of the Act along with s 4(1A) of the Act which contains an explicit requirement for disclosure of information and consultation in redundancy situations.

[77] Right at the beginning of the process, Ms Havea complained that she had not been given sufficient information to properly inform herself regarding the proposal. She wished to know what processes Tainui were planning to outsource.

[78] There is some doubt as to whether the proposed redundancy was genuine. This is because Ms Havea had a history of making complaints, including complaints that her

¹ [2014] NZCA 541.

earlier complaints were not being addressed or investigated. As noted earlier, Ms Havea suggests that this was the real motive behind her redundancy. On the face of it, the “consultation pack” given to Ms Havea seems impressive. It is, however, less so when one realises that it seems that Ms Havea was always going to be the only person who would lose her job.

[79] It is not until some way into the pack, that there is a reference to the outsourcing of business services. I find that Ms Havea was not given any meaningful information on which she could have consulted in a meaningful way. The driver for the restructure seems to be a view that Tainui had a weak structure within the finance area. There was no supporting information given to back this up and to that extent, there was no discernible business case to remove Ms Havea from her employment.

[80] As noted by the Court in *Stormont v Peddlethorp Aitken* employees must know what is proposed before they can be expected to give their view on it.² I find that Ms Havea did not have sufficient or accurate information on which to base her feedback. Further, as Mr Pollard confirmed, no consideration was given to the change provision in her employment agreement which provided that if there were to be outsourcing then Tainui would approach the company or person to whom work was being outsourced to see if they could offer the affected employee, Ms Havea, a role. The fact that this did not occur casts doubt on the genuineness of the redundancy.

The Board's constitution

[81] It has been argued by and on behalf of Ms Havea amongst other procedural flaws already canvassed, that the decision to terminate Ms Havea's employment on the grounds of redundancy was unconstitutional. It is argued this is because a sub-committee was set up without approval of the Board, without proper delegation and without having access to Ms Havea's feedback. It was accepted by Tainui that only four members made up this committee. It could not have been a Board meeting because the constitution would have required six members to be present for a Board meeting to be properly constituted. Ms Havea's evidence was that some Members of this sub-committee were not aware of her feedback and therefore not fully informed.

² [2017] NZEmpC 71 at [54].

[82] Tainui has a registered constitution, an amendment to which was registered on 11 October 2005. The following provisions are of note. Clause 6 of the Constitution provides that Members have the power to:

Appoint, engage or employ upon such terms and conditions as Members shall think fit. Such manager or managers, employees, contractors, or persons to management as the members may consider necessary or desirable to further the terms of the trusts created by this constitution.³

[83] Clause 6 also gave the Members the power to delegate any of their powers including powers of management and any other powers and duties to any person on such terms as they think fit.

[84] Clause 6.3 provided:

Members shall, in the exercise of the foregoing powers, where required by law, be subject to such consents and approvals as may be appropriate.⁴

[85] The evidence before me, including that of Mr Pollard, makes it clear that there was no formal delegation of Board powers to any sub-committee. Indeed, the evidence is that there was no delegation, informal or otherwise from the Board to the sub-committee. Tainui was unable to point to any evidence at all, of any discussions regarding such a delegation. Mr Pollard's evidence that the Board was aware of what the sub-committee was doing, is not sufficient to discharge obligations under the constitution.

[86] It follows therefore that I consider the sub-committee which made the decision to terminate Ms Havea's employment was improperly formed. It did not have the power to terminate Ms Havea's employment. Even if that were not the case, it was clear that this sub-committee did not have information before it which would have enabled it to deal with Ms Havea's employment in any meaningful way. I note the constitution provides that the Board requires a quorum of six before it can carry on business. The sub-committee comprised four members and accordingly it could not be argued its decision was a decision of the Board.

Conclusion

[87] Ms Havea has been disadvantaged in her employment by unjustifiable actions of Tainui. She raised complaints of bullying and other matters which were not properly

³ Powers of Members Clause 6 of the Constitution.

⁴ Clause 6.3 of the Constitution.

investigated or dealt with by Tainui. Most of her complaints related to matters other than the process Tainui was following in reaching its conclusion her employment should terminate. Although there was some engagement with Ms Havea regarding a proposal to make her redundant, she simply did not have enough information to provide informed input into any decision affecting her employment.

[88] Further, as noted earlier, the goalposts seemed to shift and the reasons for Ms Havea's redundancy and the need for her employment to end became quite unclear. As discussed above, there is an issue with the decision making on behalf of Tainui.

[89] Generally, the decision to make Ms Havea redundant was a decision for the Board to make. Whilst it has the power under its constitution, provided it complies with quorum rules etc. to delegate such a task, I find that no such delegation occurred. There is simply no evidence that the sub-committee which made the decision was either informed or indeed properly constituted. It follows that Ms Havea is entitled to consideration of remedies in relation to her claims of disadvantage.

[90] It follows also that Ms Havea's dismissal on the grounds of redundancy was unjustified both procedurally and substantively for the reasons given above. She is entitled to a consideration of remedies in respect of that.

Remedies

[91] Ms Havea has claimed \$10,000.00 in terms of s 123 (1)(c)(i) of the Act in respect of the unjustified disadvantage I found she had suffered during her employment. I consider such a claim appropriate under the circumstances.

[92] Ms Havea also claimed a sum of \$20,000.00 in terms of s 123(1)(c)(i) of the Act as compensation for humiliation, loss of dignity, and injury to her feelings as a result of her dismissal. I accept Ms Havea's evidence justifies an award at that level. Accordingly Tainui is ordered to pay Ms Havea that sum.

[93] Ms Havea has also claimed three months of lost wages. It is clear her health was not the best following the termination of her employment, however, under the circumstances I consider an award of three months lost wages as justified and accordingly Tainui is ordered to pay Ms Havea a sum of \$22,250.00 (less PAYE) on account of salary.

Summary of Orders

[94] Tainui Home Trust Board is ordered to pay Ms Havea the following within 28 days of the date of this determination:

- (a) A sum of \$10,000.00 in terms of s 123 (1)(c)(i) of the Act, as compensation for the humiliation, loss of dignity, and injury to Ms Havea's feelings as a result of the unjustified disadvantage she suffered during her employment.
- (b) A sum of \$20,000.00 in terms of s 123 (1)(c)(i) of the Act, as compensation for the humiliation, loss of dignity, and injury to Ms Havea's feelings as a result of her unjustified dismissal.
- (c) Lost wages of three months' salary (based on a salary of \$89,000.00 per annum less PAYE) of \$22,250.00.

Costs

[95] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[96] If they are not able to do so and an Authority determination on costs is needed Ms Havea may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum Tainui Home Trust Board would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[97] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.⁵

Geoff O'Sullivan
Member of the Employment Relations Authority

⁵ For further information about the factors considered in assessing costs, see www.era.govt.nz/determinations/awarding-costs-remedies/#awarding-and-paying-costs-1.