

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 430/09
5111622

BETWEEN CATHERINE MANNING
 Applicant

AND NGA WAHINE ATAWHAI O
 MATUKUTUREIA
 Respondent

Member of Authority: K J Anderson

Representatives: L Darroch, Counsel for Applicant
 L Fremaux, Advocate for Respondent

Investigation Meeting: 15 September 2009

Submissions received: 30 September 2009 from Applicant
 13 October 2009 from Respondent

Determination: 2 December 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Catherine Manning claims that she was constructively dismissed, on or about 9th November 2007, and that the dismissal was unjustified. Ms Manning also seeks the reimbursement of certain costs incurred during her employment namely; the rental of a home office for 12 months in the sum of \$7,800 and payment for the remainder of a telephone contract in the sum of \$900. Finally, Ms Manning seeks to be paid four weeks' pay which she says she is entitled to as notice pertaining to the alleged redundancy of her employment.

[2] The respondent, Nga Wahine Atawhai o Matukutureia ("NWAoM"), denies that Ms Manning was constructively dismissed or dismissed at all. Rather, NWAoM says that Ms Manning, having found alternative employment, chose to resign.

NWAoM has a counterclaim. It seeks an order from the Authority that Ms Manning return certain property belonging to NWAoM, being:

- (i) A fax machine;
- (ii) A printer;
- (iii) A photocopier/scanner;
- (iv) A laminator;
- (v) A commercial binding machine;
- (vi) A credenza; and
- (vii) A data show projector.

Background Facts and Evidence

[3] NWAoM is a branch of the Maori Women's Welfare League, a national organisation incorporated in 1952. The management committee of NWAoM consists of volunteers whom, among other things, have an interest in promoting activities which benefit the Manurewa/Clendon community. Prior to the circumstances pertaining to Ms Manning arising, NWAoM had from time to time managed community based projects financed by government funded providers. Ms Manning had until most recently been President of the Branch and at the beginning of the events before the Authority, she was an Executive Committee member.

[4] Some time in late October 2006, Ms Manning was offered a contract with the Ministry of Social Development ("MSD") pertaining to coordinated integrated case management for young people and their families. It appears that the contract relates to a pilot programme which would address youth gang issues. The evidence of Ms Manning is that she had discussions with Bernie Matthews, the then President of NWAoM, and with Anne Candy, the Branch Treasurer. The purpose of meeting with these two executive members of NWAoM was, to obtain their support for the branch to manage and administer the MSD contract. Following a branch meeting, it was subsequently agreed that NWAoM would fulfil this role.

[5] Ms Manning and Ms Candy met with an official of the MSD on 7th November 2006. Ms Candy says that the purpose of the meeting was to finalise and sign a service contract. The copy of the contract provided to the Authority is not signed but I understand that this is the contract which was agreed to. It is the evidence of Ms Candy that, at the time this contract was agreed to, NWAoM believed that a contractual arrangement had been entered into between Ms Manning and the MSD and that NWAoM were just to have an "umbrella" role and provide administration services, meaning, as I understand it, that NWAoM would allow its name to be used

but the contract belonged to Ms Manning. It was only later that NWAoM discovered this was not the situation. Because it is not disputed that an employment relationship between Ms Manning and NWAoM existed, the Authority is not required to explore this further. It is enough to note that the fundamental terms of the contract with MSD are that the term was for eight months, 1 November 2006 to 30 June 2007, (with two other variations signed by Ms Candy on 1st March 2007) and that MSD would pay a total sum of \$160,000 over the term of the contract, upon the achievement of certain “*outputs/milestones.*” Relevant to the matters before the Authority, is that one of the outputs/milestones is that an ICM Coordinator was to be available by the end of November 2006.

[6] Ms Manning was employed by NWAoM as the ICM Coordinator, effective from on or about 13th November 2006. The evidence of Ms Candy is that Ms Manning; “*set herself a salary of \$60,000 as that was what she had been receiving at her previous employment (Manukau City Council).*” While it appears that the salary that Ms Manning was paid was agreed to without much discussion, it does not seem entirely accurate to say that Ms Manning “set herself” the salary as it was mutually agreed to and I understand that NWAoM never took issue with that.

[7] As NWAoM did not have an office available for Ms Manning and it was her preference to do so, an understanding was reached that she would work from home. It was agreed that Ms Manning would purchase new furniture for her home office and that NWAoM would take her old furniture. It was also agreed that various items of office equipment would be purchased which NWAoM would retain ownership of. The return of this is now sought by order of the Authority.

[8] There was also the matter of a business telephone for Ms Manning. It was agreed that a separate phone number related to the MSD contract would be appropriate and a service contract was entered into with Telecom. A two year cell phone contract was also entered into with Vodafone in Ms Manning’s name. The Authority has been requested to determine the issue about liability for the cell phone rental payments under the contract, following the termination of Ms Manning’s employment. The position of NWAoM is that it is prepared to reimburse Ms Manning for the cell phone rental (\$45 per month) from March 2007 to November

2007, the sum of \$405, but does not accept liability for any period after November 2007 when Ms Manning left her employment.

[9] Ms Manning also claims that she had an agreement with NWAoM that she would be paid home office expenses i.e. power, phone, water and a contribution to rates, of \$150 per week. Ms Manning says that the entitlement to be paid home office expenses is provided for in an employment agreement between her and NWAoM. I have viewed two documents neither of which appears to be a concluded agreement. At best they are only draft documents, prepared, as I understand it, by Ms Manning. It appears that Ms Manning relies on the second of the two drafts. This is not signed by the parties and in fact, there is no provision for signatory parties. My inclination is that the document is an incomplete draft which was not accepted as a binding employment agreement if indeed, it was ever discussed. This inclination is reinforced to some extent by the fact that NWAoM were initially under the mistaken impression that Ms Manning was acting in an independent capacity in regard to managing the MSD contract.

[10] The draft document provides at clause 7.5 for an “*accommodation allowance*” of \$150 per week to be paid on a six monthly basis (the earlier draft provided for \$250 per week). It is argued for Ms Manning that as NWAoM paid Ms Manning the annual salary of \$60,000, mileage allowance and the tea and coffee allowance provided for in the draft agreement, it follows that the other conditions, including the accommodation allowance, were agreed to also. I do not accept this proposition. Rather, I conclude that it is more probable that the draft agreement prepared by Ms Manning was her “wish list” of what she wanted from NWAoM, but certain elements, including the accommodation allowance, were never agreed to by NWAoM. I also note that in the *Amended Statement of Reply* received by the Authority on 4th March 2009, NWAoM agrees that there was an arrangement with Ms Manning that she would work from her home as she had family childcare commitments. However, when Mr Tikaroa and Mr Heke were employed, other premises were made available at Finlayson Avenue and Ms Manning was then requested to work from there. She did not wish to do this.

[11] Notwithstanding the above issues, it seems that NWAoM were satisfied enough with the arrangement entered into with Ms Manning regarding the MSD contract until some time in February 2007. It then became apparent that Ms Manning

wished to employ two other people as provided by the two variations to the MSD contract. Some of the NWAoM executive members became concerned about the nature of the MSD contract and who had responsibility overall. Following a meeting with an MSD officer, it was clarified that it was indeed NWAoM who had the accountability. Having viewed the MSD contract and the two variations to it, the fact that NWAoM is named as the provider party and Ms Candy is named as the contact person, I find it difficult to understand how NWAoM ever had any doubt about this, but I accept that their mistaken perception that Ms Manning had the responsibility was genuine, particularly given that Ms Manning consistently maintained that the MSD contract was her “baby”.

[12] Mr Teinakore Tikaroa and Mr Victor Heke were employed as youth workers around about early March 2007, albeit Ms Candy says that there was no selection or interview process. They were each paid a salary of \$50,000 per annum and worked at premises located at Finlayson Avenue which had been arranged by NWAoM. Ms Manning continued to work from her home. The existence of separate workplaces appears to have created some tensions and confusion in regard to a blurred reporting accountability relating to Ms Manning and members of the executive of NWAoM. There is some conflict in the evidence in regard to whether Ms Manning was purposely isolated from Mr Tikaroa and Mr Heke or whether it continued to be her wish to work to work from her home rather than be based in the same premises as the two men who reported to her. I conclude that it was most probably the latter as Ms Manning had the care of her grand daughter and it suited her to work from her home.¹

[13] In order to provide mobility for Mr Tikaroa and Mr Heke, two cars were purchased. Ms Candy says that this was on the advice of Ms Manning but as the Treasurer of NWAoM, Ms Candy had the final right of approval in regard to payment for the cars.

[14] From March 2007 or shortly after, the relationship between Ms Manning and the executive members of NWAoM deteriorated. While the evidence of Ms Candy, Ms Kupa and Ms Panapa, as compared with Ms Manning, portrays different reasons for the deterioration, what comes through is that the executive felt there had been a

¹ The evidence of Mr Ngatai is that Ms Manning had been requested to work from the Finlayson Avenue premises but declined to do so.

lack of transparency and/or they had been misled by Ms Manning in regard to the overall responsibility for performing the MSD contract and the associated costs. On the other hand, Ms Manning had the perception that she was not being permitted to manage Mr Tikaroa and Mr Heke as she wished in order to achieve the outcomes required by the MSD. Ms Manning subsequently (24th August 2007), relinquished the role of supervisor (or kaitohutohu) and became an integrated case management coordinator on the same basis as Mr Tikaroa and Mr Heke. Despite these different perceptions, it is clear is that the costs associated with delivering satisfactory outcomes for the MSD had escalated beyond the funding available and corrective action was essential.

The Review

[15] In late August/early September 2007, a business consultant, Mr George Ngatai, was engaged by NWAoM to complete a review of the organisation. His brief obviously went somewhat further than that as he appears to have assumed a management role in regard to implementing the changes which emerged from his review. Mr Ngatai's evidence is that, among other things, he was instructed to look at the MSD contract and the roles of Ms Manning, Mr Tikaroa and Mr Heke. Mr Ngatai says that his role was to: "... *review the organisation to ensure that it was working within all contractual arrangements ...*" existing between NWAoM and the MSD and then report back to the President of NWAoM, Ms Panapa, and the executive. On 7th September 2007 Mr Ngatai met with the NWAoM staff to explain his role as a consultant and the nature of the review that he would be conducting. This is confirmed in an email of the same date to Ms Manning.

[16] The further evidence of Mr Ngatai is that in the process of conducting his review of matters relating to the MSD contract he discovered many irregularities pertaining to the process used to employ Mr Tikaroa and Mr Heke. It was his view that the two men did not have the relevant experience or social work qualifications to be working with at risk youth, and that Ms Manning had not followed a proper process pertaining to their engagement. Mr Ngatai says that it was of particular significance that NWAoM had failed to provide assistance to an adequate number of clients in order to meet its contractual obligations to the MSD. In his oral evidence to the Authority, Mr Ngatai estimated that the client numbers were down 30 to 50 from

where they should have been. While the possibility of a refund of funds to MDS was discussed, this matter was apparently resolved by NWAoM giving an undertaking to proportionally increase client numbers when the next contract was entered into.

[17] The completed review conducted by Mr Ngatai identified that the integrated case management roles held by Ms Manning, Mr Tikaroa and Mr Heke, did not comply with the criteria in the MSD contract. Therefore, NWAoM needed to consider the possibility of disestablishing these roles and create new roles which would meet the requirements of the MSD contract. In summary, as it relates to the role held by Ms Manning, Mr Ngatai's review recommended that the three Integrated Case Manager (ICM) positions should be reduced to two and that one of these two roles would be as a Manager/ICM Co-ordinator. These recommended changes, along with other matters are set out in a *Review of Staffing* document. This is undated but it seems that the staff became aware of the document on 12th September 2007 when they received a memorandum from Mr Ngatai that conveyed the operational changes which were to be adhered to "*immediately*" including such matters as hours of work, weekly reports and use of vehicles. The general purpose of the *Review of Staffing* document was to:

"Outline proposed changes in the organisational structure, governance, responsibility, systems and processes and staffing within the organisation that would allow Nga Wahine Atawhai o Matukutureia to achieve set objectives."

[18] There is some confusion and variance in regard to the evidence as to what happened and when after the distribution of the review document, but a letter dated 14th September 2007 from Mr Tony Spelman to Ms Candy, puts matters into context. Mr Spelman was approached by NWAoM staff to advise and assist them in regard to the review proposals. In this letter, Mr Spelman notes that Ms Manning was admitted to hospital the night before and placed under observation. [Ms Manning subsequently remained in hospital for three days and then was on sick leave from 17th September until her resignation on 9th November 2007.] Mr Spelman sought a meeting to discuss the affect of the review proposals.

[19] A meeting duly took place with Mr Ngatai and Ms Panapa on 24th September 2007. Ms Manning was present along with other NWAoM staff represented by Mr Spelman. The evidence of Ms Manning is that Mr Ngatai and Ms Panapa utilised the forum to "*attack*" her. She says that she was shouted at and accusations were made

against her regarding the performance of the MSD contract and she became upset. The evidence of Ms Manning is collaborated to some extent by that of Mr Tikaroa. The evidence of Mr Spelman is more measured. He says that the meeting was intended to be of a collaborative nature and it began that way. But when a critical or dismissive remark was made by Mr Ngatai, along the lines of: “*Don’t be so stupid Catherine*” Ms Manning was insulted and became upset and the meeting came to an end.

[20] The evidence of Mr Ngatai is that he accepts that there were raised voices at the meeting but he does not believe his comments were threatening, albeit he acknowledges that Ms Manning said that she felt threatened and unsafe. However, Mr Ngatai says that he finds it odd that Ms Manning should say that she felt threatened by him as the next day (25th September); Ms Manning phoned him and asked to meet at his residence. Mr Ngatai duly met with Ms Manning and he says that she told him that she did not want to make things difficult for NWAoM and that the “*best way out*” was for her to leave. Mr Ngatai says that he informed Ms Manning that there was a process in place regarding the review and she should await the outcome of this.

[21] On 18th October 2007, Mr Ngatai and Ms Kupa met with Ms Manning, Mr Tikaroa and Mr Heke along with Mr Spelman. Mr Ngatai says that the purpose of the meeting was to discuss the proposed restructure and potential disestablishment of roles. Mr Ngatai says that the staff were to provide their feedback and suggest any changes or recommendations but no information was subsequently received by the due date.

[22] On 23rd October, Mr Ngatai wrote to Ms Manning and the other two Integrated Case Managers inviting them to a Hui to discuss the review and the proposed restructure and the affect on their respective positions. The meeting with Ms Manning and her support person took place on 26th October. Mr Ngatai and Ms Kupe were present for NWAoM. Mr Ngatai’s evidence is that Ms Manning indicated that she wished to withdraw from the restructure process and wanted to discuss an offer to exit from the organisation. Mr Ngatai informed that they were not offering any exit package but Ms Manning could put something in writing for the President, Ms Panapa, to consider.

[23] Via a letter dated 29th October, Ms Manning proposed that she exit the organisation on a voluntary redundancy basis for a compensation sum of \$5,000. Ms Manning also required that NWAoM pay all costs associated with the cell phone contract and that she should receive a payment of \$7,650 for the use of her home office for 11 months as well as retaining the furniture that had been bought. Ms Manning informed that:

“George I want to resolve this matter in a manner that is amicable and ask that you place this proposal to [NWAoM] governance for consideration and decision. George I am aware that I am on sick leave but in order for this to be resolved I do not want to be negotiating this matter after the 9th of November when my sick leave entitlement will lapse, after this date I will not be returning to the League as an employee of the League and will seek alternative action to resolve this outside of the League.”

[24] In response to a question from Ms Darroch, Mr Ngatai confirmed that NWAoM was not prepared to consider any exit package until the restructuring process was completed. This process included advertising the respective positions and inviting staff, including Ms Manning, to make application. The evidence shows that that the positions were not advertised until 30th November with applications closing 5th December 2007.

Resignation

[25] On Friday 9th November 2007, Ms Manning sent an email to Mr Ngatai (as written):

“As per our conversation today and email dated 29/10/07 my employment with the league is terminated as of todays date 9/11/07 as I have found it is impossible to continue employment under Nga wahine Atawhai o matukutureia MWWL. Please find attached the original letter re exit proposal and accet this as official notice of termination.”

[26] Mr Ngatai responded the same day. He made reference to a conversation with Ms Manning earlier that day in regard to meeting to discuss the exit proposal but not until Ms Manning’s sick leave came to an end on or about 13th November. Mr Ngatai also referred to the review process which was in place. The letter concluded:

“As I said to you at many hui Catherine there is a process which we have to follow and you agreed so I will be in touch with regarding where we go to from here. If you are available any time next week to meet please confirm a time that suits you. This letter and the letter dated 29 October 2007 are the only two letters received by this organisation stating that you now find it

impossible to continue employment under Nga Wahine Atawhai o Matukutureia. Again Catherine we will need to discuss this further. I will await your response.”

[27] Mr Ngatai never received the response he may have anticipated as Ms Manning commenced new employment with another enterprise on Monday 12th November 2007. NWAoM concluded that Ms Manning must have arranged this employment while she was on sick leave. I accept this is most probably correct.

Was Ms Manning constructively dismissed?

[28] The answer to this question must be no. There is no evidence to suggest that Ms Manning was placed in a position whereby her resignation should be seen as a constructive dismissal. While I accept that there was a breakdown in communication between Ms Manning and members of the NWAoM executive, it has to be taken into account that the members of the executive are volunteers and have other employment commitments, hence it was not possible for them to be available as and when Ms Manning may have had issues to discuss.

[29] Clearly the meeting which took place on 24th September 2007 was tense with Ms Manning most probably enduring some aggressive comment about the management of the MSD contract and the affect on NWAoM as an organisation, and she was upset by this. However, the overall evidence shows that she quickly recovered and sought to negotiate an amicable exit package. In the meantime, whilst on sick leave, she obtained alternative employment. In summary, I accept that NWAoM did not follow a course of conduct deliberately aimed at coercing Ms Manning to resign. Nor did NWAoM breach any duty it owed to Ms Manning to such a degree that she felt she must resign.

[29] It is most unfortunate that this employment relationship ended as it did as both Ms Manning and NWAoM have had a close affinity over a number of years in regard to promoting the valuable role of NWAoM in the community. No doubt it was anticipated that the MSD contract was going to be another means to continue this role. Unfortunately, neither party appears to have appreciated, at least initially, that the management of such contracts requires a somewhat more exacting and business like approach than was taken. Both Ms Manning and NWAoM must accept some

responsibility for this. But in the round, I can find nothing of substance relating to the actions of NWAoM which converts the resignation of Ms Manning into a constructive dismissal.

Does Ms Manning have an entitlement to be paid for the use of her home office?

[30] The argument for Ms Manning is that it was a term of her written employment agreement that she should be paid an allowance of \$150 per week as an accommodation, power, phone and amenities allowance for the use of her home office. The claim before the Authority is for a total of \$7,800 ($\150×52 weeks) but I do not accept that this was ever agreed to. Rather, it seems that NWAoM accepted that Ms Manning could work from home, given her whānau child care commitments. Indeed, NWAoM went further and agreed to purchase new office furniture for Ms Manning which it was accepted she would retain. But even if I am wrong about Ms Manning's entitlement, the most she would be entitled to would be payment for 15 weeks (14 November 2006 to approximately 28 February 2007) when the premises at Finlayson Avenue were available and which she was requested to work from but chose not to. However, it is my finding that it is more probable than not that there was no agreement that Ms Manning should be paid an accommodation allowance hence I must decline her claim.

Is Ms Manning entitled to be paid for the remainder of the cell phone contract?

[31] Having purchased the phone from the MSD contract monies, NWAoM have agreed to pay Ms Manning for the cell phone rental from March 2007 to November 2007, when Ms Manning resigned from her employment ($\$45 \times 9$ months = \$405) but it is not accepted that they should pay the remainder of the two year service contract ($\$45 \times 15$ months = \$675). Ms Manning claims a sum of \$900 but this cannot be correct. In fact, looking at the evidence, it seems that both parties have not accurately assessed the potential liability under the service contract. Ms Manning says that the cell phone contract came into force in December 2007 but I think this would be December 2006. The contract expired at the end of November 2008. Therefore, the portion that NWAoM have accepted liability for would be December 2006 to November 2007, that is 12 months \times $\$45 = \540 , leaving a remainder of \$540.

[32] It is agreed that Ms Manning had an entitlement to be paid for the cell phone contract up to her departure. There is a provision (clause 9.1) in the draft employment agreement relating to the use of a mobile phone that the employer will; “*meet the rental costs of the telephone*” and while there was no agreement on the total content of the draft agreement, it is established that NWAoM accept liability for payment for the cell phone rental up to Ms Manning’s departure. In normal circumstances, upon the departure of an employee, the phone would be returned and the employer would continue to have the liability for the remainder of the contract. In order to resolve this problem, it seems reasonable that this is what should occur here. An order will follow.

Is Ms Manning entitled to be paid four weeks’ notice of redundancy?

[33] The answer to this question must be no because Ms Manning was not made redundant. At the time she resigned the restructuring process was still a work in progress and no decisions had been made as to Ms Manning’s future. Effectively, by resigning (without any notice), Ms Manning pre-empted any decision pertaining to her future employment. That of course was her prerogative but she has no entitlement to paid notice on the grounds of redundancy, or otherwise.

Is Ms Manning obliged to return the office equipment belonging to NWAoM?

[34] There is no doubt that the equipment in question belongs to NWAoM, Ms Manning has no right to retain it and it must be returned. An order will follow.

Determination

1. I find that Ms Manning was not constructively dismissed from her employment with NWAoM. She does not have a personal grievance and her claims are dismissed.
2. I find that there was no agreement reached that Ms Manning would be paid an accommodation allowance for the use of her home office and this claim is dismissed.
3. I find that it is more probable than not that NWAoM accepted liability for the total period of the cell phone contract and Ms Manning should be paid

accordingly. Nga Wahine Atawhai o Matukutureia is ordered to pay to Ms Manning the sum of \$1,080.00 (\$45 x 24 months) within 21 days of the date of this determination. Ms Manning is ordered to return the cell phone to NWAoM within 21 days of the date of this determination.

4. I find that NWAoM continues to retain ownership of the office equipment listed at paragraph [2] of this determination. Ms Manning is ordered to return this equipment within 21 days of the date of this determination.

Costs

[35] Given the outcome of this matter and the historical nature of the relationship between the parties it seems appropriate that costs should lie where they fall. It is so ordered.

K J Anderson
Member of the Employment Relations Authority