

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2020] NZERA 530
3078774

BETWEEN SALATAIMA MASINA
Applicant

AND TE RAHUITANGA
KOHANGA REO
Respondent

Member of Authority: Vicki Campbell
Representatives: George Masina, advocate for Applicant
David Prisk, advocate for Respondent
Investigation Meeting: 17 November 2020
Submissions Received: 17 November 2020 from Applicant
17 November 2020 from Respondent
Determination: 21 December 2020

DETERMINATION OF THE AUTHORITY

- A. Te Rahuitanga Kohanga Reo is ordered to comply with the terms of the record of settlement within 28 days of the date of this determination.**
- B. Costs are reserved.**

Employment relationship problem

[1] On 23 September 2019 Ms Masina entered into a record of settlement with Te Rahuitanga Kohanga Reo (the Kohanga Reo). Pursuant to that agreement, the Kohanga Reo agreed to:

- a) Provide Ms Masina with a written apology within 21 days;
- b) Issue a public apology, the wording of which had been agreed; and
- c) Pay a sum of money to Ms Masina within 21 days.

[2] Ms Masina alleges the Kohanga Reo has breached the record of settlement by failing to issue the public apology, and make payment of the agreed sum. She seeks a compliance order pursuant to ss 137 and 151 of the Employment Relations Act 2000 (the Act).

[3] The Kohanga Reo disputes it has lawfully entered into the record of settlement. It says the person who attended mediation had no authority to enter into an agreement and it is not enforceable against it. Essentially the Kohanga Reo is asking the Authority to set the record of settlement aside.

Direction to further mediation

[4] During the investigation meeting it became apparent that some issues between the parties would benefit from further mediation. A proposal to direct the parties to mediation was discussed and not opposed by either party.

[5] Accordingly the parties were directed to attend further mediation within 14 days of the date of the investigation meeting. Mediation has now been completed. The parties have advised the Authority the issues have not been able to be resolved and have asked the Authority to conclude its investigation and issue a written determination.

Issues

[6] In order to resolve Ms Masina's application I must determine:

- a) Is the record of settlement enforceable against the Kohanga Reo?
- b) If the answer to a) is yes, has the record of settlement been breached;
- c) If the record of settlement has been breached should a compliance order be made?

[7] As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and

specified orders made as a result. While I have not referred in this determination to all the evidence and submissions received I have carefully considered all relevant material lodged with the Authority.

Background to the record of settlement

[8] The Kohanga Reo was experiencing difficulties with its Chairperson, Mr Te Kitohi Pikaahu leading to a majority of the parents of the Kohanga Reo to demand Mr Pikaahu's resignation.

[9] The minutes of a hui of the Kohanga Reo held on 16 September 2019 record the following:

- a) Mr Pikaahu resigned as the chair;
- b) A new chair was elected;
- c) The Kohanga Reo would continue with a restructuring process; and
- d) A letter was to be sent to the national trust about what needs to be done to save the Kohanga Reo, specifically the low roll and lack of funds.

[10] The day after the meeting, on 17 September 2019, Mr Pikaahu emailed the whanau advising them of a mediation with Ms Masina scheduled for 23 September 2019. Mr Pikaahu advised that he and Ms Martin would attend the mediation.

[11] On 18 September 2019 a group of whanau from the Kohanga Reo signed a document in which they advised they were seeking legal representation for the Kohanga Reo to attend the mediation being held on 23 September 2019 and stating that neither Ms Martin nor Mr Pikaahu would be acknowledged as representatives to speak on behalf of the Kohanga Reo.

[12] That same day a letter signed by whanau was sent to all whanau confirming that three redundancies, including that of Ms Masina, would proceed. The letter records that the employment agreements for the three affected kaimahi provided for four weeks' notice, but the financial situation of the Kohanga Reo meant only two weeks' notice could be paid at that time with a further two weeks in November when the kaupapa funding was received.

[13] The newly appointed Chair, Mr John Tahī Tahī, was aware of the mediation scheduled for 23 September 2019. He wrote to the mediation service of the Ministry of Business, Innovation and Employment (MBIE) via email on Friday, 20 September 2019 and advised (verbatim):

I am the newly appointed Chairman of Te Rahuitanga Kohanga Reo.

The previous Chairman, Te Kitohi Pikaahu organized a mediation on Monday 23rd September 2019.

He was replaced as Chairman on 16th September 2019.

It has now been agreed we will now postpone the mediation until a lawyer is engaged to represent Te Rahuitanga Kohanga Reo.

Mr Te Kitohi Pikaahu has no authority to act on behalf of, or represent Te Rahuitanga Kohanga Reo.

Please advise alternative dates at your earliest convenience.

[14] Mr Tahī Tahī did not receive a response to his email from mediation services. On 23 September 2019 he followed up by email asking if his email from the previous Friday had been received.

[15] In response mediation services requested official documentation showing the change in Chairman. This is because mediation services had contacted Mr Pikaahu and had been informed by him that he was still the duly elected chair and had authority to act in the matter.

[16] Despite the Kohanga Reo's advice to the mediation services and its request that the mediation be delayed to enable it to seek legal advice, the mediation proceeded as scheduled. Mr Pikaahu and Ms Martin attended the mediation ostensibly, on behalf of the Kohanga Reo.

[17] In an email to the whanau on 24 September 2019 Mr Pikaahu updated them on the mediation held the previous day. In his email Mr Pikaahu raised the 20 September 2019 notification to mediation services. He disputed he had resigned as the Chairman and advised:

It has been reported to Kerry Jones that I purportedly resigned as the chair. I called Kerry who verified the report. I emphatically informed her that it was simply incorrect and basically false news. After the telephone call I did pause to consider why it was not verified with me directly since I have had a very close

and trusted working relationship with Kerry, Karen and Monica. I am prepared to challenge what appears to be a blatant attempt to obstruct a fair and due process in an unethical and unacceptable way.

In addition, to that, an email was sent to the coordinator of the mediation last Friday seeking that the mediation be suspended for a later date. The mediator contacted me to ask my opinion of the request to suspend the mediation by the newly elected "chairman." I was somewhat forthright in stating that I was the validly elected chairman and would continue with the mediation. As a result of the confusion it was suggested, by the coordinator's managers, that the mediation be held elsewhere. I offered to present my credentials at the mediation to verify my claim to be the properly elected chairman and that I did not and have not resigned. I also offered to provide the draft minutes up until I closed the meeting. This seems to have convinced the coordinator and his managers of my position.

During the mediation process, and after we had reached a settlement, three emails arrived at the mediation purporting to have been sent on the authority of the Whanau. The emails were sent after 10.30am and received some time after that. The content of the emails essentially challenged me in my capacity as the chair. My immediate response to the emails was to refute them all.

[18] Mr Pikaahu provided the mediation services with copies of documents which he considered to be relevant and after some deliberation, the mediator accepted Mr Pikaahu's authority to represent the Kohanga Reo and to enter into a record of settlement.

[19] The Kohanga Reo continues to assert that Mr Pikaahu had no authority to enter into the record of settlement dated 23 September 2019 and it is not enforceable.

Is the record of settlement enforceable?

[20] There was clearly a dispute before the mediation commenced as to Mr Pikaahu's authority to represent the Kohanga Reo at mediation and accordingly, enter into a record of settlement on its behalf.

[21] The mediator had considered the emails from Mr Tahi Tahi and documents presented by Mr Pikaahu and concluded Mr Pikaahu had the requisite authority to enter into terms of settlement.

[22] While that conclusion is at odds with the email from Mr Tahi Tahi the mediator took steps to satisfy herself that Mr Pikaahu was authorised to act on behalf of the Kohanga Reo before proceeding and being satisfied he was duly authorised proceeded to assist the parties to resolve their differences.

[23] Agreed terms of settlement are enforceable under s 149(3) of the Act which states:¹

Where, following the affirmation referred to in subsection (2) of a request made under subsection (1), the agreed terms of settlement to which the request relates are signed by the person empowered to do so,—

(a) those terms are final and binding on, and enforceable by, the parties; and

(ab) the terms may not be cancelled under sections 36 to 40 of the Contract and Commercial Law Act 2017; and

(b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise.

[24] The reference to the “person empowered to” signed the agreed terms of settlement is a reference to a mediator who has authority vested in her under s 149(1) of the Act.

[25] Section 37 of the Contract and Commercial Law Act 2017 allows for cancellation of an employment agreement if a party is induced to agree through a misrepresentation.

[26] The Kohanga Reo says Ms Masina has been induced to enter into the record of settlement through Mr Pikaahu’s misrepresentation to the mediator that he was authorised to enter into the terms of settlement. It contends Mr Pikaahu’s actions were duplicitous and the record of settlement should be set aside.

[27] As noted by the Court in *TUV v WXY*, s 149(3) of the Act limits the circumstances in which parties can revisit their agreements. It is not directed at deeming the validity of the agreement itself.²

[28] I have concluded that s 149(3) of the Act prohibits the Authority from cancelling or setting aside the record of settlement. Having been signed by the mediator, the record of settlement is enforceable against the Kohanga Reo.

Have the terms of the record of settlement been breached?

[29] There is no dispute that the terms of the record of settlement have not been fulfilled by the Kohanga Reo. Accordingly there has been a breach.

¹ See Employment Relations Act 2000, s 150(1)(a).

² *TUV v WXY* [2018] NZEmpC 154 at [45].

Should a compliance order be made?

[30] Given that there has been a breach of the record of settlement the Te Rahuitanga Kohanga Reo is ordered to comply with the terms of the record of settlement within 28 days of the date of this determination.

Costs

[31] Costs are reserved. The parties are invited to resolve the matter. If they are unable to do so Ms Masina shall have 28 days from the date of this determination in which to file and serve a memorandum on the matter. The Kohanga Reo shall have a further 14 days in which to file and serve a memorandum in reply. All submissions must include a breakdown of how and when the costs were incurred and be accompanied by supporting evidence.

[32] The parties could expect the Authority to determine costs, if asked to do so, on its usual “daily tariff” basis unless particular circumstances or factors require an adjustment upwards or downwards.

Vicki Campbell
Member of the Employment Relations Authority