

and unjustified discrimination. The substantive remedies claimed by Mr Meihana are permanent reinstatement as Community Development Worker, payment of salary since 25 November 2009, and compensation for humiliation, loss of dignity and injury to feelings.

[5] In considering interim reinstatement applications the Authority is required to apply the law relating to interim injunctions and also have regard to the object of the Act. The relevant law requires that four recognised tests or questions are to be applied to the circumstances of each case. In relation to the object of the Act, the Authority must have regard to the principle that productive employment relationships are founded on good faith behaviour and also on mutual trust and confidence.

[6] A further relevant object of the Act, at s 101C, is the recognition of reinstatement as a remedy for any personal grievance. It has been made the primary remedy under s 125.

[7] Much of the evidence of the Authority for the purpose of determining the application was presented in affidavit form by the parties' witnesses. They were Mr Meihana, Ms Keriana Reedy, the manager of Network Murupara, and Ms Rita Teddy, the former Chair of the society at the time Mr Meihana's employment terminated in November 2009.

[8] There was also general discussion at the investigation meeting by all participants in it, carried on with a view to finding a way of avoiding the need for orders to be made by the Authority. In that spirit, with the acknowledgment of the parties, the Authority later contacted the Department of Internal Affairs to obtain information about a funding agreement that had been entered into in December 2009 between Network Murupara and the Crown. The performance of that agreement is viewed as central to Mr Meihana's employment relationship problem and its resolution.

[9] As I apprised counsel later, from that contact my attention was drawn by the Department to issues that are not matters for the Authority but for the parties to the funding agreement to seek to resolve. The Authority may only recognise that there is presently a funding blockage for Network Murupara and that according to the affidavit evidence of Ms Reedy, this has had and continues to have a direct bearing on the society's ability to retain the position Mr Meihana is seeking reinstatement to.

[10] Network Murupara is an incorporated society and non-profit organisation that provides economic and social development activities and services to the Murupara community. It is governed by a board of trustees of which Ms Teddy was Chair at relevant times.

[11] The funding for the activities of Network Murupara has been provided by way of grants from various government organisations. How such grants have been used is generally reviewed by the provider after 12 month periods.

[12] One such grant was obtained by Network Murupara from the Department of Internal Affairs for a Community Development Scheme. An employed position known as Community Development Worker was approved as part of the proposal and Mr Meihana, who was at the time a member of the society's Board, applied for and was appointed to the position.

[13] There is in this case, I find, a serious question as to whether Mr Meihana was appointed permanently to that position or whether his employment was subject to a fixed term agreement.

[14] Although the written contract document is headed "***Fixed Term Agreement between an Employer and an Employee,***" clause 3 of it provides the following:

3 Nature and Term of the Agreement

3.1 Individual Agreement of Ongoing and Indefinite Duration

*This Employment Agreement is an individual employment agreement entered into under the Employment Relations Act 2000. The employment shall commence on **Monday 25th May to 25th November 2009** and shall continue until either party terminates the agreement in accordance with the terms of this agreement. The clauses in this agreement may be varied or updated by agreement between the parties at any time.*

[15] If the employment agreement is deemed to be one of 'fixed term' then on its face it has failed to comply with s 66 of the Employment Relations Act 2000, which requires a fixed term employment agreement to contain a statement as to both how the employment will end and the reasons for it ending in that way.

[16] There is considerable ambiguity in clause 3.1 as to whether Mr Meihana's agreement was for a fixed term. Three possibilities are: it ends on 25 November

2009; or it continues after that date until terminated by either party under the provisions of the agreement; or it is of indefinite duration.

[17] If, as contended by the society, it is a fixed term agreement, then there has been a failure to comply with the requirement to specify the genuine reasons for it ending in that way. The express consequence of that situation is that the society cannot rely on the fixed term as having been effective to end Mr Meihana's employment if he elects, as he clearly has, to treat that term as ineffective.

[18] There is no dispute that Mr Meihana worked as Community Development Worker under the general terms of the agreement until he received, on 16 November 2009, a letter signed by Ms Teddy advising that his agreement was due to expire on 25 November 2009. She also advised:

In the event that funding is available for the Community Development Worker, you are eligible to apply.

[19] In her affidavit Ms Teddy advised that the Board did concede that Mr Meihana should have been given one month's notice of termination under the provisions of his employment agreement. Her evidence was that, nevertheless, the Board had done the best it could to inform Mr Meihana that the agreement was at an end and had done so in as timely a way as possible.

[20] The evidence of both Ms Teddy and Ms Reedy, which I accept, is that Network Murupara has a substantial financial deficit and is unable to continue the position held by Mr Meihana without funding from the Department of Internal Affairs or other source. The evidence is that although the position was advertised and although Mr Meihana has recently applied for it, the Board is unwilling to appoint anyone until funding is available.

[21] Ms Teddy's evidence is that she does not know why the funding contractually promised by the Department has been withheld by it.

[22] Ms Reedy in her affidavit confirmed much of Ms Teddy's evidence. In December 2009 the Department of Internal Affairs had entered into a funding agreement for the Community Development Scheme. It provided funding for the position Mr Meihana had been employed in and which has been recently advertised. Ms Reedy stated that there have been no interviews of applicants at this time because

the funding under the agreement with the Department has not been transferred to the account of Network Murupara.

[23] The Authority's discussions with the representative designated under that agreement for the administration of it established that there is a hold up with payment of the funds and that this has come about because of issues the Department has with the governance being exercised by the society's Board and compliance with reporting conditions under the funding agreement.

[24] As I advised counsel, issues such as these and the resolution of them are not matters for the Authority but for the parties to the funding agreement, which has dispute resolution provisions. The Authority may only recognise that there is presently a funding blockage for Network Murupara and that this has a direct bearing on the ability of the employer to retain the position Mr Meihana is seeking reinstatement to.

[25] I find that the present and continuing highly unfavourable financial circumstances of Network Murupara must lead to the application for interim reinstatement being declined.

[26] As was stated by the Employment Court in *Cliff v Air New Zealand Ltd* [2005] 1 ERNZ 1, at para.[12] with reference to applicants for interim reinstatement, while they must establish an arguable case of personal grievance "*they must also establish an arguable case that they will thereafter be reinstated in employment and not simply compensated monetarily for their grievances.*"

[27] The future funding and solvency of the society must be regarded as highly uncertain at this stage. If that remains the position at the time the substantive remedy of permanent reinstatement is sought, clearly Mr Meihana will have a hurdle to overcome in establishing that reinstatement will be practicable. If Network Murupara does not have the money to pay for his position then the strong likelihood is that permanent reinstatement will not be regarded as practicable and will not therefore be ordered.

[28] Although it is not the reason for termination relied on by the employer, there is raised by these circumstances a prospect that in effect a redundancy situation will arise and lead to the end of any employment to which Mr Meihana may be reinstated to.

[29] The Authority must therefore conclude that although in some respects there is an arguable case arising from the termination of employment, particularly in relation to the requirements of s 66 of the Employment Relations Act and whether they were met and also the requirement for any termination to be on notice, with regard to the prospect of Mr Meihana obtaining reinstatement, even to the relatively low level required of an arguable case I find the standard has not been reached in this case.

[30] As a consequence of that conclusion the additional tests of balance of convenience and overall justice of the case are not able to be met.

Determination

[31] Accordingly, the Authority's discretion whether to grant interim reinstatement must be exercised against making that order and for the above reasons the application is declined.

[32] The Authority will confer with counsel as to a timetable for a meeting to fully investigate the claims, so that they may be finally determined.

[33] Costs are reserved.

A Dumbleton
Member of the Employment Relations Authority