

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 228/08  
5113403

BETWEEN                      DIANA POHATU  
   Applicant

AND                              KAITI SCHOOL BOARD OF  
   TRUSTEES  
   Respondent

Member of Authority:        Alastair Dumbleton

Representatives:             Ross Crotty, Counsel for Applicant  
   Paul Robertson, Counsel for Respondent

Investigation Meeting:      17 and 18 April 2008

Submissions Received       26 May 2008

Determination:                3 July 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     On 19 December 2007 the applicant Mrs Diana Pohatu was dismissed for serious misconduct by her employer, the respondent Kaiti School Board of Trustees. Mrs Pohatu had been Deputy Principal of Kaiti School and had taught there for over 30 years. Although Mrs Pohatu was paid two months salary to 16 February 2008, she was required to leave her job immediately and not return in the first term after New Year to work out the notice period.

[2]     Mrs Pohatu raised a personal grievance and mediation was undertaken by the parties to try to resolve the employment relationship problem. When settlement could not be achieved the Authority commenced an investigation to determine her claim that the dismissal was unjustified.

[3]     To remedy her personal grievance Mrs Pohatu seeks:

- Reinstatement to her former position as Deputy Principal at Kaiti Primary School;
- Reimbursement of lost wages of \$6,575 (net) from 16 February to 16 May 2008;
- Compensation equivalent to one year's salary for the loss of her job;
- Compensation of \$20,000 for humiliation, loss of dignity and injury to feelings;
- Costs.

[4] After completing her teacher training Mrs Pohatu taught at several primary schools before being appointed to the staff of Kaiti School in 1976.

[5] During her long career there she achieved promotion several times, culminating in her appointment as Deputy Principal in 1994. She moved to Scale G2 in that position in 2000.

[6] Nearly all the pupils at Kaiti School are Maori and Mrs Pohatu taught a bilingual class from 2002. In 2005 she completed a Bachelor of Teaching degree, majoring in Te Reo Maori. She has described to the Authority the passion she had for teaching children at the school.

[7] The performance and conduct of Mrs Pohatu as a professional teacher and her dedication and commitment to that work for Kaiti School, have not been put in issue before the Authority in this case. Mrs Pohatu was dismissed for her actions over a few days while she was acting in a management role as Principal of the school during the absence of the permanent Principal, Ms Darryle Prosser.

[8] From the evidence, I find established as fact the following circumstances surrounding the dismissal of Mrs Pohatu. Near the end of the third school term in 2007 the Principal Ms Prosser took annual leave for the last three days of term, 19 to 21 September. This absence had been prearranged and approved by the Board of Trustees, her employer. While Ms Prosser was away Mrs Pohatu acted as Principal.

[9] To implement a resolution or decision of the Board of Trustees, a letter from it to the Ministry of Education was drafted. The purpose of the letter, which was dated

18 September 2007, was to seek permission from the Ministry for the Board to permanently employ Ms Vicki Lee who had been a teacher at Kaiti School for nearly three years, although employed on a series of fixed term contracts.

[10] Although not marked “*Confidential*” the letter referred to Ms Lee by name and contained an appraisal of her professional abilities. It advised of certain areas of skill and proficiency as a teacher, and of other attributes, the Board believed Ms Lee had.

[11] The Board’s letter referred to earlier advice it had received from the Ministry that the staffing entitlement to be approved for the school in 2008 might be less than the 2007 level. The letter noted that the number of new enrolments the Board was expecting for 2008 would lead to pupil numbers rising up to or beyond the level advised by the Ministry as being required to maintain the 2007 approved teacher numbers.

[12] The Board’s letter advised the Ministry that the NZEI (the teachers’ union) and STA (the School Trustees’ Association) supported its request for Ms Lee to be employed in a permanent position.

[13] Once it had been prepared, in Ms Prosser’s absence the letter was handed by Ms Carol Morgan, the school secretary, to Mrs Pohatu for her as acting Principal to sign on behalf of the Board of Trustees.

[14] Mrs Pohatu had not been involved in the deliberations of the Board that had led to the drafting of the letter and had not seen it before, but upon reading the letter she felt opposed to the request made in it to the Ministry for Ms Lee to become permanently employed.

[15] For that reason Mrs Pohatu did not sign the letter but sent an email to Ms Prosser, which began as follows:

*Kia Ora Darryle,*

*This is to let you know that I did not sign the letter to the Ministry which you asked Carol to give me. This letter concerns me as it is a Conflict of Interest. I will be included in the process of surplus staffing and therefore disagree with the contents of the letter.*

[16] Ms Prosser received the email on a boat at sea on Thursday 20 September and replied to it the following day. Her message back to Ms Pohatu began with the following:

*Hi Diana,*

*Yes I totally agree. ...*

*I think Carla could sign the letter as BOT Chair. I can certainly do it when I return or a copy can be sent to me here as an attachment and then I could sign it and fax it back to you at school.*

[17] The conflict Mrs Pohatu had identified was between her acting in the interests of the Board of Trustees in seeking to have Ms Lee appointed to a permanent position, and acting in her own personal interests and those of her colleagues in seeking to prevent that appointment so that a redundancy or redeployment situation could be avoided. Security of employment was a concern Mrs Pohatu had as much for those of her colleague teachers who were permanently employed by the school, as for herself.

[18] The letter drafted to the Ministry contained a clear endorsement by the Board of Ms Lee as a suitable appointee to the permanent position recommended. A different opinion of Ms Lee was held by Ms Pohatu.

[19] She confirmed in her evidence to the Authority that her objection to the letter and request made by the Board in it to the Ministry was not based solely on the possibility that if granted the request could lead to redundancy or redeployment. She also disagreed with the Board's assessment of Ms Lee, with regard to her merit and her suitability to teach in the permanent position the Board wanted for her.

[20] Mrs Pohatu's evidence about her objections to the Board's letter was as follows:

*I read the letter and expressed to Carol [Ms Carol Morgan, the school Secretary] how upset I was regarding its contents. I said that I wasn't going to sign it. I believed that signing it would create a conflict of interest and that myself and the permanent staff members could be at risk. The letter recommended a person for a position that was not there. At the time we were all ready for surplus staffing. My concerns regarding the letter included:*

- (a) *It created an additional teaching position when surplus staffing was imminent.*
- (b) *It was bias toward Viki.*

- (c) *It overstated and misrepresented Viki's expertise in Te Reo Maori, Tikanga Maori and Kapa Haka to justify the appointment.*
- (d) *It understated current staff and their proficiencies in order to justify the appointment.*
- (e) *I was the last teacher to appraise Viki in her bilingual position and she was definitely not capable of presenting the required skill of level 2 for bilingual. Viki is now in a mainstream teaching position for the year 2008.*

[21] Mrs Pohatu formed and retained an adverse opinion of Ms Lee from the time she had applied for a job at Kaiti School. As a member of the committee that had interviewed her, Mrs Pohatu had opposed her appointment but was outvoted by the others on the committee.

[22] In her evidence Mrs Pohatu expressed the resentment she continued to have about Ms Lee's appointment. She has remained critical of the appointment and the process used by the Board for it. She also remains critical of the Principal Ms Prosser for making a clerical error when completing the details of Ms Lee's temporary employment agreement, a mistake that Mrs Pohatu believes led to the need of the Board to have Ms Lee appointed to a permanent position.

[23] Further Mrs Pohatu is critical of Mrs Prosser for being absent from school and therefore unable to directly manage the situation that developed when the 18 September letter was given to Mrs Pohatu to sign. This is an entirely unreasonable criticism, as Ms Prosser was deep sea fishing while taking planned and approved annual leave. Even so, from her boat Ms Prosser had communicated with Mrs Pohatu by email and agreed that she should not sign the letter to the Ministry.

[24] On 20 September 2007 after Mrs Pohatu had told the school secretary Ms Morgan that she would not sign the letter, she contacted her union the NZEI and discussed the particular concerns she held about the Board's recommendation disclosed in the draft letter.

[25] She then showed the letter to Ms Jan Stirton, a senior teacher, and she discussed its contents with Ms Honey Moeau, another teacher. Neither was a member of the Board of Trustees.

[26] Next day, Friday 21 September and the last day of term, Mrs Pohatu asked all the permanent staff of Kaiti School to attend a meeting with her. Six teachers were

present. Ms Lee had not been asked to the meeting, as she was a temporary employee.

[27] As confirmed by Mrs Pohatu in her written evidence, she informed those at the meeting of the recommendation made by the Board in its letter to the Ministry for Ms Lee to be appointed to a permanent position. She also said in her evidence:

*I discussed with them how this recommendation would put the rest of the permanent staff at risk because of surplus staffing.*

[28] There was a break from 21 September to Monday 8 October for the school holidays. At the start of the new term the Principal Ms Prosser was absent for the first two days, returning to work on Wednesday 10 October. While she was still away, on the Monday Mrs Pohatu met again with the permanent staff and discussed again with them the 18 September letter addressed to the Ministry about Ms Lee's employment. Ms Lee's suitability for the position was also discussed. Either that day or at a further meeting the following day, it was decided that the group would write to the Board to express their concerns about the contents of the draft letter from the Board to the Ministry. A letter was prepared by one of them. Mrs Pohatu's evidence was that it was read to the meeting and unanimously adopted by the permanent staff, which included her, as representing their views and wishes in the matter.

[29] The teachers' letter, which had at its foot the names of 8 teachers including Mrs Pohatu, was three pages long. Throughout it contains strong criticism of the Board, the Principal and Ms Lee. In places it is written in an accusatory and declamatory style. Ms Prosser and Ms Lee herself are blamed for the situation leading the Board to seek a permanent position for Ms Lee. In this regard the letter reads;

*..... the majority of staff are bearing the brunt of the principal's error, and to the inappropriate advantage of one new teacher [Ms Lee]. The fact also that the new teacher in question does have other viable options, but that she has deliberately chosen to pursue this course through the NZEI representative, to the potential detriment of her peers, is completely self-serving, arrogant and individualistic, and not conducive to positive future internal staff relations, peer collegiality, or team-building – which are essential in a school of Kaiti School's size, demographic, decile and nature.*

[30] In their letter intended for the Board the teachers disputed the assessment made by the Board of Ms Lee's proficiency and expertise in Te Reo Maori and Kapa

Haka, which assessment was described by them as “*offensive*” to other teachers. The Board’s assessment is variously described in the letter as being false, incorrect, inaccurate, and overstated.

[31] The teachers’ letter requested of the Board that Ms Lee;

*..... be urged to desist in seeking a permanent appointment at Kaiti School, and that she instead pursue the other viable options before her, as a priority.*

[32] Upon her return on the Wednesday the Principal Ms Prosser learned of the meetings Mrs Pohatu had held with the permanent staff to discuss the Board’s 18 September letter to the Ministry about Ms Lee’s employment. Ms Prosser also received a complaint from Ms Lee that confidential information about her had been shared with permanent staff. A meeting of the permanent staff was called by Ms Prosser to address the situation.

[33] I accept the evidence of Ms Prosser that at the Wednesday meeting she clearly advised Mrs Pohatu and the other permanent staff present that the 18 September letter should not have been seen by any staff members except Mrs Pohatu in her capacity as acting Principal. I find that Ms Prosser made it clear that Ms Lee’s employment was a private or confidential matter for the Board and was not for public discussion. She warned that the disclosure of information about Ms Lee to the staff could incite a personal grievance from Ms Lee. I also find that Ms Prosser unequivocally instructed the teachers including Mrs Pohatu to stop their actions immediately.

[34] Ms Prosser’s evidence about telling the staff at the meeting to desist from their actions was corroborated by three of the teachers who were present. It follows that I do not accept the evidence of Mrs Pöhatu that she was not told by Ms Prosser to stop having the staff meetings.

[35] I also find that during the Wednesday meeting, in front of other staff Mrs Pohatu questioned the competence of Ms Prosser.

[36] I find that next morning, on Thursday 11 October, Mrs Pohatu was again told by Ms Prosser to stop having meetings of permanent staff to discuss Ms Lee’s employment situation. During the discussion Mrs Pohatu heatedly criticised Ms Prosser for lacking leadership, causing Ms Prosser to feel upset.

[37] Later on the same day, Thursday, Mrs Pohatu I find sent a note to the permanent staff asking them to attend a meeting after school. Ms Prosser had left the school for the day and was unaware this meeting was to take place. Mrs Pöhātu led or chaired the meeting in the course of which copies of Board of Trustees' meeting minutes were distributed by one of those present. These included minutes of two meetings, each headed "*IN COMMITTEE EXCERPT.*" Both excerpts referred to Ms Lee's employment situation at Kaiti School and included personal details of her service. The minutes expressly noted that Kaiti wanted only the best people at the school and also that "*there is no disputing Viki is a top-line teacher but to take her on in a permanent position brings redeployment issues.*" Also minuted in the excerpts was a concern of the Board that a personal grievance might be brought by Ms Lee if she was not appointed to a permanent position.

[38] The teachers' group letter intended for the Board was discussed further and approved, either on the Thursday or at a further meeting of permanent teachers Mrs Pöhātu called on Friday 12 October. Ms Prosser was unaware that a meeting was to take place on the Friday and she did not attend. At that meeting a package was distributed to those present. It was made up of the final draft of the teachers' letter to the Board and copies of the Board meeting minutes, including those marked "*IN COMMITTEE EXCERPT.*"

[39] On the Friday Mrs Pohatu sought advice from her union the NZEI about what was being planned by the group of permanent teachers. The advice received was that she could lose her job if she proceeded to give the Board the letter the group had agreed to send. With that advice they decided not to send it but to destroy their copies of it, as well as copies of the meeting minutes.

[40] At some time, probably over the weekend, an unknown person left a copy of the letter intended for the Board together with the minutes on Ms Prosser's desk, where she found them on Monday 15 October. She told the Authority that the letter, when she read it, was like a bombshell and that she felt gutted and devastated to see the names of her staff associated with it. She concluded that the instructions she had given to Mrs Pohatu and permanent staff the previous week to desist from their actions, had been ignored.

## Conclusions of independent investigator

[41] The Board's response to the situation was to commence a disciplinary process against Mrs Pohatu. As part of that the Board commissioned an independent investigation by an employment consultant and mediator, Mr Gary Tayler. After interviewing most of those directly involved, Mr Tayler in a detailed report to the Board, concluded;

- 1) *The actions of Ms Pohatu as Acting Principal in sharing Viki Lees private information with other staff instead of addressing her concerns directly with the Board, constitutes a serious breach of duty and disregard for Viki Lees rights. Whether she remembers the warning given out by Ms Prosser about Viki Lee's privacy rights matters not, because with so many years of service behind her she must have known of such a fundamental employee's right.*
- 2) *The actions of Ms Pohatu in inciting distrust and concern in other staff as to the decision of the Principal and the Board based on her own personal views as to Viki Lee's skill and abilities was unjustified, wrong in fact and constitutes a dereliction of her duty at the high end of the scale.*
- 3) *Her actions have created a situation where neither Ms Prosser nor Viki Lee has any trust in Ms Pohatu.*
- 4) *The letter written on her behalf contains no acceptance from her that she has done anything wrong. Rather she continues to criticise Ms Prosser and maintains her personal views of Ms Lee's skill level. And curiously she criticises the Board for its alleged failure to follow due process in regards to this investigation but does not explain what that failure is.*

[42] After hearing further from Mrs Pohatu and her solicitors about Mr Tayler's conclusions, the Board wrote to her on 19 December advising that her employment was to be terminated for serious misconduct. In its letter the Board said it had accepted Mr Taylers finding of unprofessional conduct on the part of Ms Pohatu. The Board also said it upheld, "*the most serious allegation ..... inciting distrust and concern in other staff against the Principal and the Board of Trustees.*"

[43] The Board noted in the dismissal letter that Mrs Pöhātu had continued to maintain her innocence of any misconduct and had shown no remorse for her actions. The Board said her attitude in this regard gave it no confidence that the relationship of "*trust and fidelity*" between Mrs Pöhātu and the Principal or the Board could be re-established.

**Section 103A – test of justification**

[44] Counsel Mr Crotty and Mr Robertson made extensive submissions as to the way s 103 of the Employment Relations Act 2000 should correctly be applied to the facts they invited the Authority to find established in this case.

[45] I find that the test has been met by the Board as the employer of Mrs Pohatu. Upon consideration given on an objective basis, the Authority determines that the Board's actions and how the Board acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal occurred.

[46] A neutral observer I find would have agreed with the Board's assessment that the actions of Mrs Pohatu amounted to serious misconduct. I reject the submission of Mr Crotty that her conduct in disclosing the Board's 18 September letter to the permanent staff was permitted by the Code of Ethics for Registered Teachers. That Code at Part 4 requires teachers to strive to;

*(h) respect confidential information on colleagues unless disclosure is required by the law or serves a compelling professional purpose.*

[47] No law required the disclosure of the Board's letter and, on the broadest possible view, disclosure served no purpose of teaching or education as a profession. The disclosure was for a different purpose, to control or influence the teachers' employer in deciding what positions of employment to create for the school and who to appoint to them. If the teachers legitimately had that control or influence in employment matters, they might have expected to also be accountable and share in the liability for any grievance brought successfully in respect of decisions made about those matters.

[48] Mrs Pöhatsu and the permanent teachers were not without effective remedies readily accessible to them if they had wished to challenge the appointment of Ms Lee to a permanent position. It was open to Mrs Pöhatsu to privately take up her concerns about the 18 September letter directly with the Board. Alternatively Mrs Pöhatsu and any of the permanent staff could have brought a grievance claim against the Board if they considered its actions in appointing Ms Lee to a permanent position were unjustified and had disadvantaged them in their employment.

[49] I find contrary to Mr Crotty's submission that Mrs Pohatu was under no legal duty of any kind to disclose the Board's letter or to consult her permanent colleagues

about its contents. Neither did she have an entitlement or license to do that. Her duty was to maintain confidentiality in respect of a private matter between employer and employee.

[50] The Kaiti School Code of Conduct at page 4 required Mrs Pohatu to observe the principle that the rights of colleagues were to be respected. Ms Lee had a right to reasonable privacy in respect of employment matters that Mrs Pöhātu became aware of while acting as a Board member. Expressed at page 8 of the Code is a duty of employees of Kaiti School to have respect for the rights of others. This includes avoiding behaviour that might distress other employees or disrupt the workplace. After she heard about them, Ms Lee complained about the closed meetings that had been held by other staff to discuss her personal employment situation. She might well have been distressed by what was taking place in this regard. A duty to respect the privacy of individuals when dealing with personal information is also repeated at page 8.

[51] The Code of Conduct provides that failure to observe its requirements may result in disciplinary action, including termination of employment.

[52] Expressed at page 6 of the School's Code is the duty of employees to comply with all lawful and reasonable instructions of the employer or its duly delegated representative. In that latter capacity Ms Prosser lawfully and reasonably instructed Mrs Pohatu on two occasions to stop having the staff meetings about Ms Lees proposed appointment. I find that Mrs Pöhātu disobeyed those instructions on Thursday 11 October and again the next day. Expressly under the Code at page 6, disobedience of the duty to comply with instructions may result in disciplinary action including dismissal.

[53] I reject the evidence of Mrs Pohatu that she had reasonable cause to think that the contents of the Board's 18 September letter were not confidential. Her evidence also does not sit well with the submission made on her behalf that she acted under a duty to disclose information that was confidential.

[54] At best, Mrs Pohatu's actions showed that she significantly lacked the judgement required to be exercised by a senior employee holding the position of Deputy Principal and as such required to act as a school principal on occasions. That serious failing alone could have justified dismissal on notice from the position. At

worst, Mrs Pohatu's actions amounted to a rejection of her duty to act faithfully towards her employer and to comply with its lawful and reasonable instructions. For that failure summary dismissal would have been justified. Mrs Pohatu was dismissed on notice but with summary effect, a fair and reasonable punishment I find.

[55] Unfortunately Mrs Pohatu, although recognising that she was in a conflict of interest situation, attempted to exploit to her personal advantage as a member of the permanent teaching staff, the information from the Board she had been entrusted with. Her actions seriously undermined, if not destroyed, the trust and confidence that she was required to maintain with the Board as her employer.

[56] In the circumstances, had she succeeded in her claim of unjustified dismissal it is unlikely that reinstatement to the Deputy Principal position would have been ordered by the Authority. Although the standing of Mrs Pohatu as a teacher is unblemished by this investigation, the Authority would have had no ability to order that she be employed as a teacher but without any senior management role. Her contributory fault to any situation found to have given rise to a grievance would have substantially if not totally disintitiled her to remedies for that grievance.

[57] I find that there was no material failure of process arising from the fact that Mr Tayler did not interview Ms Barbara Seymour as one of the permanent teachers involved in meetings with Mrs Pohatu. She had an opportunity to be interviewed but was not either because of her indifference to the investigation or a preference not to be interviewed. Given the weight of information Mr Tayler obtained from those he did interview, it is unlikely Ms Seymour's account of relevant events would have altered his conclusions as adopted by the Board.

[58] Some of the permanent teachers who had met with Mrs Pohatu and who had put their name to the letter intended to be sent to the Board, later admitted to wrongdoing and apologised to Ms Prosser for their actions. Although the form of their punishment was much less severe than dismissal as imposed on Mrs Pohatu, I do not consider a disparity of treatment situation arises here. This is because Mrs Pohatu's involvement is to be viewed as being quite apart from the others, as she was the Deputy Principal and on the days in question had been entrusted by her employer with the most senior management and leadership role in the school. She was clearly the instigator of the group opposition to the permanent appointment of Ms Lee. Any

differences of treatment are reasonably explained in this way. Disciplinary action against one of the group of permanent teachers is still continuing.

### **Determination**

[59] The Authority therefore determines that Mrs Pohatu does not have a sustainable personal grievance arising out her dismissal or any of the events surrounding it. Dismissal was justified.

### **Costs**

[60] Costs are reserved for submissions which may be made in writing, if the parties are unable to resolve the question themselves.

A Dumbleton  
**Member of the Employment Relations Authority**