

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2011] NZERA Auckland 398
5160909

BETWEEN MALLORY SELLIMAN
Applicant

AND TE RÚNANGA O KIRIKIRI
ROA TRUST INC.
Respondent

Member of Authority: Alastair Dumbleton

Representatives: Rose Alchin, counsel for Applicant
Alex Hope, counsel for Respondent

Consideration of papers: 14 September 2011

Determination: 14 September 2011

DETERMINATION OF THE AUTHORITY

Application to reopen investigation

[1] On 20 October 2010 the Authority concluded an investigation into an employment relationship problem by issuing a determination under AA452/10. In it the Authority member (Ms Vicki Campbell) held that an employee Ms Mallory Selliman had a personal grievance in that she had been unjustifiably disadvantaged by the actions of her employer Te Rúnanga O Kirikiri Roa Trust Inc. As remedies the Trust was ordered to pay \$15,000 to Ms Selliman pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000.

[2] The Authority did not uphold Ms Selliman's additional claim of unjustifiable dismissal, as it found she had not raised a grievance in that regard within the required 90 day period. Leave for her to raise a grievance outside of time on the grounds of exceptional circumstances was declined by the Authority.

[3] Both Ms Selliman and the Trust challenged the Authority's determination to the Employment Court. Following a judicial settlement conference in the Court the parties have jointly applied to have the Authority reopen its investigation.

[4] The object of the reopening application is to have removed from the Authority's determination the names of four individuals and a school wherever they appear. The parties want those names to be replaced with references to employee "A," "B," "C" or "D" and in the case of the school with "a Hamilton High School" or "the High School."

[5] The grounds put forward in support of the reopening application are that in its determination the Authority has expressed findings adverse to the four individuals A, B, C and D and to the High School. It is alleged that the Authority did so without hearing from those individuals or that institution, and therefore acted contrary to s 157(2)(a) and s 173(1)(a) Employment Relations Act, provisions that require the Authority to comply with the principles of natural justice.

[6] The Authority considers it must decline the reopening application.

[7] For the Authority now to decide that it had earlier acted unlawfully, by making adverse findings against individuals and an institution without giving them an opportunity to be heard, would also be a breach of natural justice as to do that the Authority would in effect need to sit in judgment of itself.

[8] Having issued a determination and then having changed its mind as to its correctness in law, it is not open to the Authority to reopen an investigation (which it may do of its own motion as well as on application) and substitute a different determination. The Authority can reopen an investigation to reconsider factual findings where new evidence has come to light only since the investigation finished or where it had not been reasonably obtainable during the investigation.

[9] If harm has been done by the Authority through its determination then the point of reopening the investigation should be to correct that by allowing the individuals and institution an opportunity to be heard and allow findings to be confirmed or withdrawn where necessary.

[10] Although it is their identification that is the issue, the individuals or the institution have not made known to the Authority any views they may have about the

Authority's determination, or indeed about this reopening application. Frequently reopening applications are accompanied by affidavits from witnesses who give an indication of their willingness to be involved in the matter and also give an indication of the nature of the evidence that they would provide to the Authority upon a reopening being granted.

[11] Without that evidence or information there is nothing to indicate whether the result of the Authority's investigation would be any different to that given in the determination if the individuals and institutions were given an opportunity to be heard, assuming they were not before. There is nothing to indicate that their evidence was not available at the time of the Authority's investigation and could not have been presented by either of the parties at that time, or called for by the Authority. It comes back to the same point; the Authority is being asked to determine that the Authority acted unlawfully as alleged.

[12] In any event I do not agree that the Authority in its determination made findings that three named persons "bullied" Ms Selliman while she was employed by the Trust. The Authority set out its legal role in determining the grievance claim which did not require findings of fact to be made as to the conduct of the individuals. The enquiry was directed at the employer's conduct in responding to Ms Selliman's complaint of being bullied by others. In this regard the Authority determined that the Trust had not acted as a fair and reasonable employer.

[13] What are alleged to be findings of fact with regard to the named individuals are part of the Authority's narrative or description of the evidence presented to it and from which findings could be made. A finding (at para [25] of the determination) that there was a general sense in a workplace that a persons behaviour was bullying in nature is not a finding that that person bullied Ms Selliman or anyone else. It is only a finding that some thought that kind of conduct was occurring.

[14] A finding (at para [74]) that a person other than Ms Selliman had been "treated with disrespect" by two named individuals is also not a finding that Ms Selliman had been bullied by the pair, and disrespectful behaviour is not necessarily bullying.

[15] It seems to me that the *de novo* hearing before the Employment Court is the appropriate way for the allegedly erroneous determination to be addressed, as the parties are given the opportunity to 'begin again at the beginning' and can make the

evidence available to the Court that they say was not given to or taken by the Authority. Whatever the outcome of the challenge, the Authority's determination would be set aside by the Court so that the findings in it should be of no consequence from that point on.

Determination

[16] Reopening the investigation is declined.

A Dumbleton

Member of the Employment Relations Authority