

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Rick Tuiasau (Applicant)
AND Sport Waitakere (Respondent)
REPRESENTATIVES Paul Pa'u, counsel for the applicant
Kathryn Back, counsel for the respondent
MEMBER OF AUTHORITY Marija Urlich
INVESTIGATION MEETING 31 May 2005
SUBMISSIONS RECEIVED 13, 17 June 2005
DATE OF DETERMINATION 4 July 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Rick Tuiasau was employed as Sport Waitakere's Pacific Island sports coordinator from February 2002 until his dismissal in March 2004. His was the only such position in New Zealand. Sport Waitakere ("the Trust") is a sports and recreation community trust located in West Auckland. In February 2004 Mr Tuiasau was advised his position would be made restructured. In reaction to this advice Mr Tuiasau sent emails to colleagues, family and friends outside the Trust advising his position had been made redundant. These emails were the subject of an investigation by the Trust which resulted in Mr Tuiasau's suspension and dismissal for serious misconduct. He says his suspension and dismissal were unjustified. He seeks remedies of lost wages and compensation for hurt and humiliation consequent to his suspension and dismissal. The Trust says Mr Tuiasau's suspension and dismissal was justified in all the circumstances and that he was treated fairly and reasonably.

[2] To determine this employment relationship problem I must consider the lawfulness of Mr Tuiasau's suspension and dismissal for serious misconduct. I also must consider whether the restructuring announcement was conducted in accordance with the Trust's obligations of good faith.

Issues

(i) notice of restructuring

[3] On 10 February 2004 Mr Tuiasau, along with all other staff of the Trust, were invited to and attended a meeting with the Trust's CEO, Garry Calvert. The email invitation to the meeting was headed "Tues 1.45pm Restructure Meeting". On a white board Mr Calvert drew a diagram of the

Trust's new staffing structure. The changes to the staffing structure included splitting Mr Tuiasau's role in two and creating two new positions. Mr Calvert told the assembled staff they could apply for the new positions but that there was no guarantee they would be successful in getting a position in the new structure. He also invited them to make an appointment to speak with him individually. Mr Tuiasau asked Mr Calvert what the timeframe was around implementing the new structure and was told "probably the end of the month". The Trust accepts the new structure was not presented as a proposal, but as advice to staff of the structure to be implemented.

[4] Mr Tuiasau said this was the first advice he had received from the Trust that his job was redundant. He was shocked to learn his position had been split in two. He left the meeting and sent an email to colleagues, family and friends outside the Trust.

[5] At 5.14pm Mr Tuiasau sent the following email to Mr Calvert:

"Garry,

I am unsure as to exactly what to plan for in terms of future activities and Vasa Pasifika Kilikiti in School planning for the remainder of the year. There has been no communication as to where I fit or if I fit your vision for the Complex. I am comfortable listening and learning from you, but there has not been any clear rationale behind this decision to make the role of Pacific Island Sports Coordinator redundant.

Do I still have your support to go ahead with the Forum/Fono? I believe it is important and it will provide opportunities to have sector collaboration from other key stakeholders.

There are other options that could have been explored. I am the best in Pacific Island Sport Development, Sports Coordination and I have deep community networks behind me at all levels.

I would like to meet with you to discuss this further as soon as possible.

Rick Tuiasau"

[6] Immediately prior to the meeting of 10 February Mr Tuiasau had received a telephone call from a friend employed at a community agency advising advertisements for the new positions in the Trust had been circulated by her CEO. This was confirmed in the Trust's statement in reply dated 9 July 2004 which described such action as the "usual practise". Mr Tuiasau said the advice from his friend compounded his feelings of shock on receiving notice of the restructuring.

[7] The Trust says the 10 February meeting was not the first notice Mr Tuiasau and staff had received of the restructuring. Ross Dallow, the Trust's chair, then Board member, said the impetus for the restructuring came from a September 2003 SPARC audit which found the Trust was the lowest performing in the country. SPARC is the funding agency for the Trust. The audit covered governance issues. Mr Dallow said staff were advised in September 2003 that restructuring would take place and that from November 2003 to February 2004 staff worked on performance management plans.

[8] The Trust was galvanised into taking steps to restructure the organisation following the adverse SPARC report. However, the evidence received does not demonstrate the Trust undertook a transparent consultation process with staff regarding the restructuring. The advice to staff of a restructuring immediately following the SPARC audit was not specific. Mr Tuiasau could not be expected to imply from the performance management process that this was a preliminary to announcing a restructuring his position within the Trust. There was no evidence Mr Tuiasau had received notice prior to the 10 February meeting that his position may be effected by any restructuring. Mr Tuiasau was not given an opportunity to present his view on the new structure or given an opportunity to seek advice.

[9] Was Mr Tuiasau given notice his employment would be terminated at the meeting of 10 February? The evidence does not support such a finding. Clause 21 of Mr Tuiasau's written

employment agreement provides for four weeks notice of termination for redundancy. On 10 February Mr Tuiasau was told his position was to be restructured and that he could apply for a position in the new structure. There is no evidence he was given notice of termination for redundancy.

[10] Circulating advertisements for positions in a new structure which has not yet been announced to the effected staff and failing to consult with staff prior to making a decision to restructure positions does not marry with an employer's obligation to deal with staff in good faith by consulting with staff on a proposal which may effect their employment (section 4(4) Employment Relations Act 2000). In doing so the Trust breached the good faith obligations it owed to Mr Tuiasau.

(ii) Mr Tuiasau's emails

[11] Mr Tuiasau's email of 10 February advises:

"Malo People,

Well, the cream is off the custard as they say. The mustard is off the hotdog. The cat is out of the bag.

I have just been informed that my position as Pacific Island Sports Coordinator is being made redundant and a new role of Sport Development Pacific Islands (how original) is being advertised this weekend along with other positions. As I have explained, this environment is not a safe one, and does not understand our community needs and how to engage our people.

I can resign in protest and/or not apply for the new position, but where does that leave us. With a new graduate that is enthusiastic and energetic but knows very little about how and what is really going on.

What I need is for you to be at this Fono on the 26th of this month February, and contribute to the Auckland Regional Pacific peoples Physical Activity Fono where a strategy will be discussed and developed.

I *will* make this happen if it is the last thing I do in this role. The only one in the country,

Rick Tuiasau"

[12] During the afternoon Mr Tuiasau received a number of replies to his email. He replied to those individuals variously:

"...

There is no level playing field, its all about power and dominance over others. This bugs me, but is a harsh reality. I have already been told by friends that things are not safe for me here but I am strong am (sic) I can endure."

"...

I am the most experienced, most qualified but not white, which is what>they are looking for. It's a shame that race still is an issue but it is>not pleasant being amongst the rubbish that discrimination and>bias brings.

..."

"Anne I was always prepared for this. I saw it coming which is why I came to your house for support and advice. It was obvious to me that this was a possible action or reaction to my work and the lack of understanding of an Australian who has never had experience working with Pacific Communities. Remember they still practise legalized Apartheid in Aussie.

I feel responsible for my work and position but the goalpost keeps being moved.

...

This is not a safe working environment but I must continue to dig in because we will be further marginalized if I depart.

I have some choice words I would like to use right now but it would give them more ammunition to fight me with.

..."

[13] At the investigation meeting Mr Dallow said he was not aware of any negative feedback received by the Trust as a consequence of Mr Tuiasau's emails. The allegation of serious misconduct faced by Mr Tuiasau was that the emails "...stated negative comments about the organization (sic) and the CEO which besmirches Sport Waitakere's name and reputation and was a breach within the employment contract signed." (11 February meeting notes).

[14] Parties to employment agreements have mutual obligations of trust and confidence which they must maintain. Employees owe their employer a duty of fidelity. Mr Tuiasau sent the emails immediately after he had received the news his position had been made redundant and I accept that this news come as a shock, but I do not accept this shock justified his actions. Mr Tuiasau's emails of 10 February allege the Trust and its CEO are racist and that he has been disadvantaged in his employment because of his race. Such communications were derogatory of the Trust and its CEO and had the potential to damage the reputation of the Trust.

(iii) the suspension

[15] Mr Tuiasau attended work on 11 February at his usual time. His computer had been removed from his work station. On discovering this he asked Sarika Naidu, Mr Calvert's personal assistant, why it had been removed and she told him Mr Calvert wanted to see him.

[16] Clause 20.6 of the employment agreement provides for disciplinary suspension:

"Further, if the Trust believes, on reasonable grounds, that you have engaged in serious misconduct, then it may, after giving you a reasonable opportunity to be heard, suspend you from your duties on pay for a reasonable period pending the investigation of your conduct."

[17] At about 9am Mr Tuiasau was asked to attend a meeting in Mr Calvert's office. He was not told what the meeting was about. Present were Mr Calvert, Ms Naidu, taking notes, and Rochelle Hobbs, the then administration manager. Ms Hobbs was present as a witness for the Trust. Ms Naidu's notes of the meeting have been made available to me. Mr Tuiasau accepted them as generally accurate with the exception that they do not record his request for copies of the emails which Mr Calvert was relying on. Mr Calvert told Mr Tuiasau he was investigating allegations of serious misconduct in relation to inappropriate emails sent by Mr Tuiasau, that he was suspended and the terms of the suspension. Mr Calvert sent Mr Tuiasau a letter dated 12 February confirming the allegations to be investigated and the fact and terms of suspension.

[18] Mr Tuiasau was not given an opportunity to have a representative present, he was not given a reasonable opportunity to be heard on the allegations because he was not told what the emails were upon which the allegations were based and he was not given an opportunity to be heard on the appropriateness of suspension. In failing to give Mr Tuiasau a fair opportunity to respond to the allegations under investigation or comment on the appropriateness of suspension the respondent cannot demonstrate it had a reasonable basis upon which to take such a serious disciplinary step as suspending Mr Tuiasau. Mr Tuiasau's employment agreement expressly provides for such an opportunity. The Trust gave no explanation as to why the employment agreement had been set aside.

[19] I find Mr Tuiasau has a personal grievance; his employment was affected to his disadvantage by his unjustified suspension.

[20] Mr Tuiasau seeks compensation to the sum of \$10,000 for injury to feeling caused as a result of his unjustified suspension. I received evidence from Mr Tuiasau that he was very upset and angry at the suspension and had difficulty taking it in that his position had been made redundant one day and suspended the following day. Mrs Tuiasau said it was very humiliating for her husband to

be at home on suspension and it was very difficult to explain to their children and extended family why Mr Tuiasau was at home.

[21] The Trust is ordered to compensate Mr Tuiasau to the sum of \$3000.00 pursuant to section 123(c)(i) of the Act.

(iv) the investigation

[22] The allegation of serious misconduct faced by Mr Tuiasau was that the emails "...stated negative comments about the organization (sic) and the CEO which besmirches Sport Waitakere's name and reputation and was a breach within the employment contract signed." (11 February meeting notes). New allegations of bullying and harassing conduct were raised with Mr Tuiasau on 3 March.

[23] The Trust is required to demonstrate it conducted a fair and complete investigation into the allegations raised with Mr Tuiasau which justified its belief serious misconduct had occurred¹.

[24] Mr Tuiasau is critical of the process used by the Trust in its investigation of the allegations against him. He says:

- (i) the decision-maker, Mr Calvert, was personally offended by the contents of the emails and was therefore unable to reasonably consider Mr Tuiasau's explanation;
- (ii) the Trust failed to provide all relevant material to be relied on;
- (iii) he had no knowledge of the IT policy relied on by the Trust; and
- (iii) the Trust failed to give Mr Tuiasau adequate notice of possible disciplinary consequences including dismissal.

[25] Mr Tuiasau also says there was no reasonable basis upon which the Trust could find the emails amounted to serious misconduct because they cannot objectively be viewed as offensive and there is no evidence the investigation considered if any actual damage had been caused to the Trust's reputation as a consequence of the emails. I do not agree for the reasons set out in paragraphs 13 - 14 above.

[26] Disciplinary meetings were held on 17, 19 February, 3 and 8 March 2004. At the first meeting Mr Tuiasau was given copies of the emails which formed the basis of the allegations. At the second meeting Mr Tuiasau, through his representative, provided an apology for damage caused by the emails and gave an assurance it would not happen again. By way of explanation, Mr Pa'u said the emails had been written following the shock announcement of Mr Tuiasau's position being made redundant and finding out from someone external to the Trust the positions had already been circulated. The next disciplinary meeting was held on 3 March 2004. Three further complaints concerning Mr Tuiasau were tabled.

[27] Mr Pa'u wrote to Mr Calvert on 5 March raising the following concerns about the investigation process to date:

- (i) the 3 March meeting was the first advice dismissal was a possible disciplinary outcome;
 - (ii) the delay at tabling new allegations and information was unacceptable;
 - (iii) a personal grievance for unlawful suspension was raised;
 - (iv) Mr Calvert's derogatory and adversarial comments to Mr Tuiasau were unacceptable;
- and

¹ *Airline Stewards & Hostesses of NZ IUOW v Air NZ Ltd* [1990] 3 NZLR 549

- (v) the examination of emails without notice to Mr Tuiasau was unacceptable.

[28] The letter went on to seek Mr Tuiasau's immediate reinstatement and a request that the parties attend urgent mediation. Mr Calvert provided a response by letter to the criticisms and declined both requests.

(v) Mr Tuiasau's dismissal

[29] The parties next attended a meeting on 8 March 2005. Ms Naidu's notes of this meeting record Mr Calvert said Mr Tuiasau was dismissed 5pm 8 March. Mr Tuiasau says he was not told at the meeting he was dismissed and the first he knew was when he was not paid on the next pay day. Ms Naidu's notes of the meeting record it was expressly stated that Mr Tuiasau was dismissed but no reasons for the dismissal are recorded. It is likely the advice of dismissal was swamped by the simultaneous settlement discussions which the parties were actively pursuing.

(vi) was Mr Tuiasau's dismissal justified?

- (a) was the decision-maker impartial?

[30] I am satisfied Mr Calvert was the decision-maker. Mr Dallow said he was present to keep an eye on the situation and provide another point of view for Mr Calvert. Mr Tuiasau said Mr Calvert's conduct towards him in the investigation meeting was aggressive, that he banged on the table, described Mr Tuiasau's conduct in sending the emails as a "brain explosion", minimised his position in the organisation and this conduct made it difficult for him to participate in the investigation. Mr Dallow said there were vigorous exchanges between Mr Calvert and Mr Pa'u, that Mr Calvert was clearly upset by the comments made in the emails by Mr Tuiasau and they were frustrated by Mr Tuiasau's reluctance to participate in the investigation.

[31] I am satisfied on the evidence received that Mr Calvert was unable to conduct a fair investigation in an impartial manner². Mr Calvert responded to the emails as a personal insult and used the investigation process to vent those concerns. This was inappropriate and tainted the decision-making process. Concerns about Mr Calvert's partiality were drawn to the Trust's attention in Mr Pa'u's letter of 5 March 2005. While I accept it is usual in an organisation such as the Trust for a CEO to conduct a disciplinary investigation this was a situation where another decision-maker should have been appointed and the Trust was in a position to do that.

- (b) examination of the emails without notice

[32] The Trust did not breach any obligation owed to Mr Tuiasau in searching the computer and printing off emails without notice to him. The emails were written on a computer provided to Mr Tuiasau to perform his duties.

- (c) no knowledge of the IT policy

[33] The Trust says the IT policy was read out to all staff, including Mr Tuiasau, at a staff meeting in October 2003 and was available to all staff. Mr Tuiasau says he had no knowledge of the policy. Knowledge of the IT policy is not relevant to the issues to be weighed in determining this employment relationship problem - the distribution of communications derogatory of the Trust and the CEO to parties external to the Trust.

² *NZ Tramways IUOW v Auckland RC* [1992] 3 ERNZ, 883

(d) failure to provide relevant material

[34] At the second disciplinary meeting Mr Tuiasau was given copies of the emails and the meeting was adjourned to allow him an opportunity to seek advice and prepare a response. The breach in not giving Mr Tuiasau the material at the first meeting to enable him to provide a response was therefore remedied.

[35] I accept the Trust received the three further complaints on or about 3 March and that they were provided to Mr Tuiasau shortly thereafter.

(e) reasons for dismissal unclear

[36] No reasons for dismissal are recorded in the 8 March notes and there is no statement for the reasons for dismissal. Three further complaints were produced at the 3 March meeting and it is unclear what if any weight the Trust put on these complaints in its decision to dismiss Mr Tuiasau.

[37] While it is likely the reason for Mr Tuiasau's dismissal was that the allegations of serious misconduct in relation to the emails were upheld, this is speculative. The decision-maker, Mr Calvert, was unable to tell me the reasons because did not give evidence at the investigation meeting. It is unfortunate no reasons were given to Mr Tuiasau and a significant flaw in this dismissal process. If reasons had been given Mr Tuiasau may have been spared the surprise and distress caused when his pay did not go through on the pay day following his dismissal, as he expected.

(f) notice of disciplinary consequences

[38] Mr Tuiasau was first told he could be dismissed as a consequence of this disciplinary investigation on 3 March. It is unfortunate he was not told this was a possible outcome at the start of the disciplinary process. However, I have received no evidence of disadvantage caused by this late advice; Mr Tuiasau was represented from 19 February on through the disciplinary process, the error was remedied by 3 March and submissions on penalty were delayed until the 8 March meeting.

[39] For the reasons set out above I find Mr Tuiasau was unjustifiably dismissed.

[40] Mr Tuiasau seeks \$20,000 compensation for the injury to his feelings resulting from his dismissal. Mr Tuiasau said he was humiliated to be dismissed from a position which was a unique resource for the Pacific Island community. Mr Tuiasau and Mrs Tuiasau gave evidence of the financial and emotional strain his dismissal put on their relationship and impact on the immediate and extended family and the wider community. A lot of the evidence I received on injury to feelings focussed on the redundancy of Mr Tuiasau's position, rather than the fact of his dismissal.

[41] The Trust is ordered to pay Mr Tuiasau \$6000.00 pursuant to section 123(c)(i) of the Act.

[42] Mr Tuiasau also seeks reimbursement of wages lost as a consequence of his dismissal for the two months until he was able to find employment. I am satisfied on the evidence received he took reasonable steps to find a position and mitigate his losses.

[43] The Trust is ordered to reimbursement Mr Tuiasau 2 months wages at his rate of pay at date of dismissal.

Contribution

[44] Section 124 of the Act requires that I consider the extent to which Mr Tuiasau's actions may have contributed to the situation which gave rise to his personal grievances. I have found the emails Mr Tuiasau sent on 10 February breached the obligations he owed to his employer because they had the potential to damage the Trust and were the origin of the Trust's investigation into allegations of serious misconduct against Mr Tuiasau. Mr Tuiasau acknowledged the inappropriateness of the emails in his apology to the Trust. The sending of the emails was deliberate and Mr Tuiasau said his intention in sending the emails was to rally support among his networks to oppose the restructuring of his position. Mr Tuiasau's sending of emails to external networks which had the potential to damage the Trust to his external networks was blameworthy conduct.

[45] **All remedies awarded to Mr Tuiasau should be reduced by 50%.**

Costs

[46] Costs are reserved. The parties are invited to try to resolve this issue themselves. If they are unable to do so the parties may apply to the Authority to determine costs.

Marija Urlich
Member of Employment Relations Authority