New Zealand Employment Relations Authority Decisions

Watene v Te Taiwhenua O Heretaunga Trust [2011] NZERA 141; [2011] NZERA Wellington 27 (22 February 2011)

New Zealand Employment Relations Authority

Watene v Te Taiwhenua O Heretaunga Trust [2011] NZERA 141 (22 February 2011); [2011] NZERA Wellington 27

Last Updated: 9 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 27 5329953

BETWEEN ALAYNA ANN WATENE

Applicant

AND TE TAIWHENUA O

HERETAUNGA TRUST Respondent

Member of Authority: Representatives:

Investigation Meeting:

Further information received by:

Determination:

G J Wood

Stuart Webster for the Applicant Dave Robb for the Respondent

11 February 2011 at Napier

16 February 2011

22 February 2011

REASONS FOR DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Watene is the Chief Executive of the respondent (The Trust). The Trust received a written complaint about Ms Watene from a senior staff member, and has since sought to investigate that complaint. Ms Watene seeks an interim injunction restraining the Trust Board and the Board Chair from proceeding with the investigation into the complaint (including the Board making any decisions), pending the determination of Ms Watene's unjustifiable disadvantage personal grievance and claim for a permanent injunction. The personal grievance for unjustifiable disadvantage is based on the Board's alleged failure to adhere to its own investigatory and disciplinary processes under the Board's Trust Deed, conflict of interest and predetermination. The Trust denies all claims.

[2] Ms Watene has provided an undertaking as to damages in support of the interim injunction. The matter was heard on an urgent basis, utilising only affidavit evidence from Ms Watene and a number of people on the Board of, or engaged by, the Trust. On 16 February, following advice from the parties that all settlement options had been exhausted, I determined the application and dismissed it. My reasons follow.

Discussion

[3] On 26 November 2010 a senior employee of the Trust wrote a complaint to the Board Chair about Ms Watene. The complaint followed the apparent breakdown of negotiations between the Chief Executive and the complainant, whereby a mutually agreed exit from the employment of the Trust Board was being considered.

[4] Fundamental to this case is whether or not the Board or its chairperson has dealt with that complaint in accordance with the Trust's Trust Deed. The Deed provides for disputes or complaints in clause 12. It states (noting that for some reason there are two sub clauses titled 12.3, which will for convenience be referred to as 12.3.1 *Escalation,* and 12.3.2 *Fair Hearing):*

12.1 Dispute or complaint process

Any complaint, or dispute between Members and/or Trustees or staff shall:

- *In the first instance be addressed between effected parties, then failing resolution:*
- *Be communicated in writing to the CE who will use best endeavours to resolve the matter with the effected persons, then failing resolution;*
- *Be brought before the Chairperson of the Board who will use best endeavours to resolve the matter with the effected persons, then failing resolution;*
- *Be referred to the full Board who may settle the matter itself or establish a Kaiwhakawa Rununga to deal with the complaint, and failing resolution a serious dispute may;*
- *Be referred to independent mediation for resolution, the outcomes of which will be final and binding upon effected parties.*

12.2 Kaiwhakawa Rununga

A Kaiwhakawa Rununga may be established to deal with a complaint or dispute in accordance with Clause 12.1. The Board will develop and maintain terms of reference for Kaiwhakawa Rununga setting out:

- *How Kaiwhakawa rununga members shall be selected;*
- *The process they shall follow in considering any complaint or dispute.*

In any case Kaiwhakawa Rununga members shall be selected who hold any or all of the following attributes:

- *proven expertise in mediation and alternative dispute resolution;*
- *expertise in te reo and tikanga Maori, preferably*

Ngati Kahungunu;

- *persons who would be regarded amongst Ngati Kahungunu and other significant sections of Maoridom, as being of good reputation and standing in the community;*
- *has no conflict of interest.*

12.3 Escalation

Any dispute or complaint must follow the process set out in 12.1 above, except where the dispute or complaint is directed at the CE, or Chair, in which case it automatically escalates to the next level.

Where complaints or disputes received by the Board are of an operational nature or pertain to staffing the Board shall refer them to the CE.

12.3 Fair Hearing

The CE, Board, or any Kaiwhakawa Rununga shall, through any enquiry pertaining to a registered complaint or dispute, observe tikanga, and observe the principles of natural justice1 and in particular:

- ***disclose of relevant material:*** *must ensure details of the dispute or complaint are promptly made available to effected parties; and*
- ***prior notice:*** *must provide at least 14 days notice of any hearing of the dispute or complaint; and*

The 'principles of natural justice' are set out in the Bill of Human Rights and guidance as to how these can be interpreted in practice is available from the Ministry of Justice.

- ***opportunity to be heard:*** *must ensure effected parties have an opportunity to be heard, if not in person then by other means, including writing.*
- ***cultural safety:*** *must ensure effected parties have the right for hearings to be conducted and heard in accord with tikanga Maori and in te reo Maori if requested;*
- ***right to representation:*** *allow effected parties to bring a support person, kaumatua, or nominate a representative to present on their behalf, or to attain legal representation; and*
- ***cross-examination:*** *must provide effected parties the right to cross examine any evidence or information provided by an effected party;*
- ***reason for decision:*** *provide written notice to effected parties of the outcome of any hearing setting out the reason for the decision;*
- ***avoidance of conflict of interest:*** *must ensure any members of the review panel are not interested or effected parties;*

12.4 Appeal

Effected parties may, within seven days after receiving notification of any decision, appeal such decision in writing to the Board, if they believe there are reasonable grounds for such an appeal in accordance with principles of natural justice.

In considering an appeal the Board will determine whether the decision shall stand, be re-heard, or modified along with any actions taken in accord with such outcome, considering whether the basis of the appeal is based on reasonable grounds in accordance with principles of natural justice.

The outcomes of considering such an appeal will be final.

[5] The Board considered, understandably, that it was required to address the complaint. The Board determined to deal with the complaint itself, and chose not to establish a Kaiwhakawa Rununga, as it believed that would unduly complicate matters. In any event the Board considered that in and of itself it meets all the requirement of a Kaiwhakawa Rununga.

[6] The Board decided first to appoint an independent investigator. Staff and other people that may have held relevant information were to be interviewed by the investigator. This process commenced with the complainant. However, all other members of the senior management team and Ms Watene refused to be interviewed by the investigator. Subsequently, written questionnaires were prepared, which (with some possible exceptions) the senior management team also refused to complete. Other witnesses, who were not part of this team, were however interviewed.

[7] The Board had first written to Ms Watene proposing an investigation process on a confidential basis, by using an external investigator who would report to the Chair and the full Board, which would then identify what actions were required. Ms Watene was told that this was an investigative and fact finding process only at this point. Ms Watene did not agree with that process and wrote to the Board seeking fundamental changes, which the Board did not accede to.

[8] Over a period of several weeks Ms Watene was denied access to the complaint until she signed a confidentiality agreement, which would have required her to return all the information contained in the complaint to the Board following resolution of it, nor would she have been able to disclose any of the information provided to any other person. This matter was not remedied until 23 December, when the Board forwarded a copy of the complaint to Ms Watene without the need for her signing any confidentiality agreement. By that time, however, she was on leave and was not able to read the complaint until 16 January 2011.

[9] Ms Watene had other concerns about the Board (and in particular the Chair) being involved in the investigation and resolution of the complaint, which have grown over time, rather than receded. In particular, Ms Watene considers that fair process has not been followed; the Chair has a conflict of interest because at the least she has been closely involved in supporting the complainant, making inquiries of management, other Board members and outside agencies about the complaint, and investigating the matter in a way different to that proposed by Ms Watene's former lawyer; and there is predetermination.

[10] By way of example of a failure to provide her with a fair opportunity to be heard Ms Watene referred to certain aspects of the questionnaire that she believes assumes her guilt.

[11] The Chair's evidence was that she has no conflict of interest as she has had extremely limited contact with the complainant and that her interactions with her and Ms Watene subsequently were to help progress the investigation into the complaint.

[12] Pre-determination was said to have occurred because of the breach of confidentiality, the need for consent over the proposed investigation process by Ms Watene, plus statements in Board meetings such as:

a. *issues have resulted in an undesirable workplace situation* for the complainant;
b. that the *feedback from the HR adviser to the Chair was that there was no foundation to the PG;* and
c. that *Board members commented that this felt very much like "battered wife syndrome" and that given the issues of bullying, domination and behaviour issues that were highlighted that this may be influencing staff's confidence in the process.*

[13] The Board considers that other than non-disclosure (since remedied), as the complaint was only at an investigatory stage the other parts of fair process in issue have not yet become applicable. Having considered all issues known to and raised by Ms Watene at the time, the Board still determined to continue investigating the matter, believing there were no breaches of process, no conflicts of interest and no predetermination.

[14] Without Ms Watene's knowledge an interim report was furnished to the Board on 9 January, after Ms Watene had declined to be interviewed. The final report was distributed to the Chair on 7 February. In the interim Ms Watene has brought these proceedings.

[15] The substantive investigation meeting has been set for 12 April, mediation not having resolved the matter. The investigation meeting for a claim for an interim injunction was held, as noted above, on 11 February, in order to determine what should happen until the Authority issues its determination on the substantive issues.

The Law

[16] The tests for an interim injunction are as set out in *Cliff v. Air New Zealand Ltd* [2005] 1 ERNZ at 9. Those tests are three:

• *First whether the plaintiffs have an arguable case of unjustified dismissal;*

Second, whether the balance of convenience including the existence of alternative remedies sometimes said to be a separate test favours the plaintiffs;

Third, the remedy being discretionary, where the overall justice of the case lies until it can be heard, including particularly the respective strengths of the party's case so far as they can be ascertained at this stage.

[17] Where a worker seeks to restrain an employer from conducting a disciplinary process the following factors are important, as was set out *Russell v. Wanganui City College* [1998] NZEmpC 254; [1998] 3 ERNZ 1076 at 1082:

> *(i) In the ordinary course of things an employer is entitled to conduct an investigation into the conduct and performance of an employee that is of concern to it and, indeed, bound to do so in the ordinary course of its business*

of being an employer.
(ii) It is a grave matter for the Court to interfere with this entitlement by some form of prior restraint and to take such a course requires justification on proper grounds.
(iii) It follows that there must be a burden on the employee in that situation to show that it is just and convenient that the employer's ordinary rights should be interfered with or modified.
(iv) It further follows that an employee cannot be entitled as of right to have an employer's disciplinary process stayed because of a pending or possible criminal proceeding.
(v) The Court's task is one of balance and justice between the parties taking account of all relevant factors.
(vi) Each case must be judged on its own merits and it would be wrong and undesirable to define in the abstract what are the relevant factors.

Arguable Case

[18] It is important to note that as well as an interim injunction, Ms Watene seeks a permanent injunction restraining the Board and/or the Board Chair from investigating the complaint. That is because Ms Watene considers that the Board is required to establish a Kaiwhakawa Rununga.

[19] I conclude that this claim can only be established at the minimal arguable level. Rather than all roads leading to the Kaiwhakawa Rununga as Mr Webster submitted, I consider, having analysed the dispute and complaint process, that at least in the first instance all roads are more likely to lead instead to the Board of the Trust.

[20] The key point is 12.3.1 *Escalation.* Any dispute has to follow the dispute process in 12.1, except that where it is directed at the CE it automatically escalates to the next level. Unlike the views of the parties I consider it most likely that there are only two possible implications from this wording.

[21] The first and more compelling interpretation is that the word *except* does not mean that the process in 12.1 is no longer relevant, but simply that the levels by which complaints are escalated will be different in cases involving the Chief Executive. On assessment, clause 12.1 provides for five levels, each described in a separate bullet point. They can be seen as levels because one builds on the other, so that after each of the first four bullet points it is stated that *failing resolution* a complaint moves to be dealt with in the next bullet point or *level.* Thus in this case it could be said that under clause 12.1, bullet points/levels 1 and 2 can not be utilised, because they would involve the Chief Executive deciding on a complaint related to her.

[22] Thus a complaint would need to be brought before the Chairperson of the Board, and it can be said that she has used her best endeavours to resolve the matter. Therefore the matter is to be referred to the next bullet point/level, the full Board. The full Board then under this analysis has options, either to settle the matter itself, or to establish a Kaiwhakawa Rununga. Other than a meeting of members itself it is difficult to see who would have greater powers and responsibilities for dealing with the Trust's affairs than the Board. Nowhere does the dispute or complaint procedure indicate that there is any responsibility on the Board in any particular circumstances to choose either one of the two options. It therefore appears to be an unfettered discretion. In effect the Board has deliberately made the choice to settle the matter itself rather than establish a Kaiwhakawa Rununga.

[23] The alternative explanation for escalation to the next level is that it is reference to 12.4 *Appeal.* It may be that the reference to escalation means escalation to an appeal, which would be an appeal in writing to the Board. However, while that has the benefit of not requiring the Board to *settle* a complaint rather than *determine* it (which might mean different things) and then use its discretion to refer the matter to independent mediation, this analysis has the drawback of assuming that a decision has already been made. I note that the outcome of considering such an *appeal* would be final.

[24] Clearly the Trust Deed has not been well drafted and is not clear accordingly. It is for this reason that I have determined that there is an arguable case that there may be other interpretations which might, with full analysis, hold sway, although that appears unlikely to the Authority at this stage.

[25] Again there is an arguable case that the Board Chair has a conflict of interest, although there is no direct evidence of this and the evidence to date is more consistent with her undertaking her role under the third level of 12.1. Although appearing very weak that claim can only be determined properly in a substantive investigation.

[26] There is also an arguable case of pre-determination by the Board. For example there is evidence to support a finding of a pre-determined or otherwise unfair investigation because of the late disclosure to Ms Watene of the complaint. The complaint investigator engaged by the Board would have been in a better position to prepare questions for staff and other people with information about the complaint if they had been advised of Ms Watene's response before doing so. This would have avoided any issues of the questionnaire assuming that certain events happened when Ms Watene may dispute them ever occurring. Comments of the *battered wife* sort, which assume that the Board has a negative predisposition toward Ms Watene, if not that a decision has already been made, provide similar evidence. Furthermore, the Board has accepted two

reports from the investigator without disclosing their contents to Ms Watene. It is one thing to continue the investigation when Ms Watene declined to be involved, but quite another to fail to disclose material that she should have the right to respond to.

[27] Contrary to that the Board Chair in her affidavit emphasised on several occasions that no decisions had been made. However there is an arguable case that there is pre-determination or otherwise an unfair process. The logical conclusion that follows from a finding of pre-determination is that no Board decision could ever be a fair and reasonable one, in which case the Ms Watene could claim that the only appropriate course of action by the Board, even though the matter is normally within the Board's discretion, would be the constitution of a Kaiwhakawa Rununga.

[28] Therefore I conclude that there is an arguable case for a permanent injunction and a claim for an unjustified disadvantage, and thus a claim for an interim injunction as well.

Balance of Convenience

[29] Ms Watene is continuing in her job. Having her go through what may prove to be an unnecessary process, however, will be of stress to her and therefore damages are not an adequate remedy for her.

[30] On the other hand the Board has a complaint and has to investigate it. Therefore damages would not be an adequate remedy for it. It is difficult to see what damages the Board would suffer other than additional costs from the investigator. Damages are therefore not an adequate remedy for either party.

[31] For similar reasons the direct relative hardship between the parties is also fairly equal. However, there is a third party to consider, the complainant. In any employment situation a complainant is entitled to have his or her complaint dealt with promptly, as has not been the case to date. An interim injunction would simply further delay that by a matter of months, when these matters should normally be dealt with within weeks if not days.

[32] The Board is saddled with the difficult position of supporting the complainant, its Chief Executive and its members through this difficult process. I therefore conclude that the balance of convenience favours the Board.

Overall Justice

[33] Ms Watene's case does not appear at all strong for a permanent injunction requiring the Board to establish a Kaiwhakawa Rununga, for the reasons given above that the Board is most likely properly seized with dealing with the complaint itself. Furthermore, Ms Watene was consulted about the proposed investigation and her counter-suggestion was considered, although rejected. The Board is entitled to set the process, provided it follows its own Trust Deed, and this does not require agreement with Ms Watene.

[34] The evidence of conflict of interest and pre-determination is not strong at this point, although I accept that pre-determination is always difficult to prove. However it appears largely speculative because the Board has appointed an external investigator and has made no decisions to date about the substance of the complaint. Certainly the evidence is more consistent with the Board battling with the complaint before it and how to resolve it, rather than conflict of interest and pre-determination. However the reports have not been provided to Ms Watene, some strong negative comments have been made by Board members about Ms Watene and the investigator's questions have not been balanced due to the Board's insistence of confidentiality. This was the Board's own failure. Ms Watene should have been given the complaint earlier and then have been allowed to respond before the investigator was involved, as a matter of best practice. The Board, in reliance on the Trust Deed (and clause 12.3.2 in particular) should never have contemplated dealing with such a complaint with such strict insistence on non-disclosure. That, however, is a minor matter in the wider scheme of things.

[35] Furthermore, there is no suggestion of any disciplinary action against Ms Watene at this point, which militates against a finding of predetermination. I therefore conclude that the overall justice also favours the Board because of the strength of the Board's case, as it appears at this point.

Progressing the Complaint

[36] There are some matters that may assist the parties in the progression of the complaint, if the Board still chooses to do so. First, Ms Watene should now respond to the complaint.

[37] Second, the Board should be cognisant at the appropriate times of its obligations under 12.3.2, which have not yet been met. In particular, Ms Watene or her representative will be entitled to cross-examine, at some point, any person who gives information to the enquiry.

[38] Third, the Board may best be assisted by getting information from third parties, whether or not employed by the Board, in addition to the complainant and Ms Watene. Their perceptions may be important. Furthermore, I would have thought it part of an employee's obligations to answer questions from his or her employer about events that are relevant to the work and standing of the Trust.

[39] Fourth, if the Board or an independent investigator was to conduct such interviews it would need to be careful of balance, by asking open-ended questions rather than assuming any information based on the complaint or the response.

[40] Fifth and finally, it is in the interests of both parties, despite the existence of the substantive investigation meeting on 12 April, to progress matters quickly. The actions of the Board are those for which it must bear full responsibility however (including what has happened to date or may happen in the future), as it is the Board's investigation process.

G J Wood

Member of the Employment Relations Authority
