

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2015] NZEmpC 89
WRC 14/14**

IN THE MATTER OF a challenge to a determination of the
 Employment Relations Authority

BETWEEN IRITANA HOROWAI NGAWHARAU
 Plaintiff

AND THE PORIRUA WHANAU CENTRE
 TRUST
 Defendant

Hearing: 24 February and 8 May 2015
 (heard at Wellington)

Appearances: B Paradza, advocate for the plaintiff
 A Knowsley and N Manuel, counsel for the defendant

Judgment: 12 June 2015

JUDGMENT OF JUDGE A D FORD

Introduction

[1] Between February 2012 and June 2013, the plaintiff, Mr Ngawharau, was employed by the Porirua Whanau Centre Trust (the Trust or the defendant) in the role of Social Worker Support. He was a vulnerable worker in every sense of that term. Mr Ngawharau claimed that his employment was summarily terminated by the Trust on 6 June 2013 and that his dismissal was unjustifiable. The Trust denies that Mr Ngawharau was dismissed and maintains that he was deemed to have abandoned his employment.

[2] Mr Ngawharau issued proceedings in the Employment Relations Authority (the Authority). The Authority, in a determination dated 15 April 2014, noted that Mr Ngawharau claimed that he had been instantly dismissed for poor performance

on 6 June 2013 and, in the alternative, that the Trust had coerced him to resign.¹ The Authority concluded that, either way, he had not been dismissed, nor had he confirmed his resignation. It found that he had simply not turned up for work for three weeks and the Trust decided that he had abandoned his employment. His claim, therefore, failed.

[3] Mr Ngawharau challenged the whole of the Authority's determination seeking a complete rehearing of the entire matter. The initial statement of claim filed by an advocate on behalf of the plaintiff (not Mr Paradza) was defective. On 8 July 2014, the Court issued a minute requiring an amended statement of claim to be filed by 5 August 2014. On 5 August 2014, the plaintiff's advocate filed an application seeking a one-week extension of time which was opposed by the defendant. The Court issued an interlocutory judgment on 14 August 2014 granting the extension of time sought and Mr Paradza, who had by then taken over acting for Mr Ngawharau, proceeded to file amended pleadings in an acceptable form.²

Background

[4] Mr Ngawharau told the Court that everybody knows him as "Ed", which he explained is short for Iritana. He is 52 years of age. He is a solo father with a 15-year-old son who lives with him. One of the witnesses also spoke of him having a daughter but her age was not stated.

[5] I described Mr Ngawharau above as a "vulnerable worker". Although he may have done so, there was no evidence that he had ever had a regular job before he acquired his employment with the Trust in 2012. At the time he was taken on by the Trust he was in his second year of study for a degree in Social Work at Te Wānanga o Aotearoa in biculturalism and social development. He acknowledged in cross-examination, however, that he had "a bit of a record" and he referred to his "criminal days" and his "drunken and addiction days". He explained:

From them days it's taken me over 20 years of staying clean and bettering myself to go from the world I knew into this, yeah.

¹ *Ngawharau v The Porirua Whanau Centre Trust* [2014] NZERA Wellington 34.

² *Ngawharau v The Porirua Whanau Centre Trust* [2014] NZEmpC 148.

[6] He was challenged by Mr Knowsley, counsel for the defendant, about his claim that he had stayed clean for over 20 years and he acknowledged that he had other convictions in 2002 and 2008 and that "quite a while ago" he had "a whole long list of lots of convictions for all sorts of things".

[7] The Trust was aware of Mr Ngawharau's criminal past when it employed him. The Chief Executive Officer (CEO) of the Trust, Ms Liz Kelly, told the Court that she was not aware of the full extent of his criminal record until she received the police record and then she had to obtain special permission from the Board of the Trust to employ him. Ms Kelly and the Board can only be commended for their initiative in offering Mr Ngawharau an employment opportunity but, as this case demonstrates, in taking on such a vulnerable worker the Trust also assumed more responsibilities than might otherwise have been the case.

[8] One of those responsibilities is the extra effort an employer of a vulnerable worker may have to go to in order to comply with its good faith obligations under s 4 of the Employment Relationship Act 2000 (the Act). Of particular relevance to the facts of the present case is the requirement in s 4(1A)(b) of the Act for the parties to be active and constructive in establishing and maintaining a productive employment relationship in which they are, among other things, "responsive and communicative".

The job

[9] Mr Ngawharau's individual employment agreement was dated 13 February 2012 (the employment agreement). It recorded that the Trust:

... is primarily funded by Government Departments to carry out programmes that the Government of the day deem as necessary to support the community. These programs may change as the Government reviews its policies and funding regimes.

[10] Mr Ngawharau's designated position was described as "Social Worker Support". It was stated to be "a permanent position". He was to work 40 hours a week Monday to Friday and his rate of pay for the position was \$16 per hour. His duties were set out in what is referred to in the employment agreement as a "Position Description" but, surprisingly, that document was not produced in evidence.

Mr Ngawharau, however, described his employment as "support worker for Mrs Alita Harris who was, and I believe still is, the Senior Social Worker for the (Trust)".

[11] In answer to questions from the Court, Mr Ngawharau explained that the Trust provided assistance to young people in need and to families having to deal with domestic violence. A major part of its programme involved Whanau Ora (Maori health).

[12] Mr Ngawharau described his own duties in these terms:

There I had clients, whanau I was working with. I mainly like working with youth, but I was working with a few families. I supported a - our senior social manager with some of her work, also co-facilitated a parenting programme and holiday programmes and worked with youth.

[13] The employment relationship appeared to be relatively uneventful until May 2013 when Mr Ngawharau was seconded to another entity.

The secondment

[14] There was no provision in the employment agreement allowing for Mr Ngawharau to be seconded to any other entity but in May 2013 he was seconded for an initial period of one-week to the South Pacific Academy (the Academy). The Campus Manager of the Academy at the time was Mr Mike Fermanis who was also Chair of the Trust.

[15] Mr Ngawharau described the work of the Academy. It appeared to operate as an alternative type of school focused on providing a mix of educational and recreational activities for youth and adult learners alike with the objective of assisting them in obtaining meaningful employment. Mr Ngawharau's job was to recruit students for the Academy's programme. He described how he recruited students from the local courthouse, Work and Income New Zealand and from his own network of youth. He said that he signed up eight students in the first week.

[16] There was a conflict in the evidence as to how Mr Ngawharau's secondment to the Academy came about. I will endeavour to summarise it.

[17] Ms Kelly said that towards the end of April 2013, Mr Ngawharau approached her and said that he was not happy working at the Trust as he was not getting on with Ms Harris, who was his direct report. He told her about his concerns. Ms Kelly asked him how he was getting on with his reporting and he said that since Ms Liz Johnston, the Operations Manager of the Trust, had set up a template for him that his reporting was "okay".

[18] They talked about what he wanted and, according to Ms Kelly, Mr Ngawharau told her that he wanted to leave because he was not happy. Ms Kelly knew that the Academy was looking at recruiting students for a course designed to get unemployed youths and second-chance learners into work and she told Mr Ngawharau that she could speak to the manager of the Academy to see if they had a role for him.

[19] Ms Kelly said that she then spoke to Mr Fermanis and they agreed to offer Mr Ngawharau an opportunity to work at the Academy for a week. The Academy would pay the Trust a fee for any registrations he enrolled.

[20] Ms Kelly went on to say:

6. Following my discussion with Mike, I let Ed know a position may be available with the [Academy]. I told him that the [Academy] needed more enrolments for their programme and that if he was able to show he could register new students there was a position available. I agreed that the Trust would second Ed into the [Academy] for one week so that Ed could check out working there and see if it suited him and the [Academy].
7. The Trust seconded Ed into the [Academy] for one week. The Trust continued to pay Ed.
8. After one week, Ed asked if the secondment could be extended for another week. He enjoyed what he was doing and was trying to close a number of [enrolments]. The Trust agreed.

[21] Mr Fermanis said that around April 2013 he went to Ms Kelly to ask for help. Mr Fermanis had low numbers of students in the classes at the Academy and he wondered if any clients of the Trust may be interested in enrolling. He said he had heard that Mr Ngawharau had been very successful in getting young people for the holiday programme.

[22] A few days later Mr Fermanis received a call from Ms Kelly who suggested that Mr Ngawharau might want to do something different and she suggested that he work for the Academy on secondment for a week. Mr Fermanis described Mr Ngawharau's work as recruiting students and occasionally going on activities with the youth programme. He said that during the three-week period he was working at the Academy, he had general discussions with Mr Ngawharau about the possibility of his working for the Academy on a full-time basis recruiting, if he could get the numbers up. He noted that Mr Ngawharau did not say anything negative about the Trust while working at the Academy.

[23] Mr Fermanis told the Court that Mr Ngawharau reacted very well with students. He said: "They liked his war stories".

[24] Mr Ngawharau told the Court that he had been enjoying his work with the Trust and had no desire whatsoever to leave the job but he was becoming increasingly insecure and was fearful of losing his job because of "all sorts of gossip" he had heard about Ms Kelly's displeasure over his performance – "that I was poorly performing, that I had become a liability." Mr Ngawharau said: "All this was happening to me despite the fact that Mrs Harris, my Senior Social Worker was happy with me and my work."

[25] Mr Ngawharau continued in evidence:

Later Lisa Holden started mentoring me which made me more confident with what I was doing at work. I never suggested to anyone that I no longer wanted to work for the Trust. I just wanted this to be addressed and put right as I had no other job to go to. After all I was enjoying my work and had no desire to leave my job whatsoever despite the attitudes.

[26] In reference to the secondment, Mr Ngawharau said:

After a short while in May 2013 Liz Kelly approached me and she said she had been talking to Mike Fermanis, who at the time was defendant's Trust Board Chair. She told me that arrangements had been made for me to go on secondment with Mike at South Pacific Academy (SPA) for a while as he needed me to help recruit students from the community. I did not ask to be seconded to SPA neither was my consent sought. Nothing was put in writing as expected and I was to remain on salary with the defendant and despite the extra work. Being put on secondment with SPA made me unhappy as it was not structured and I had no idea what exactly I was supposed to do there

apart from recruitment as assisting Mike with his campaign for mayor with the Porirua City Council. It also meant I was working away from my clients who I had been working with. I also did not know who I was answerable to between Mike and the respondent. The whole arrangement was not good for me.

[27] In cross-examination Mr Ngawharau strongly denied that he had ever told Ms Kelly that he was unhappy and was going to resign and leave the Trust. He was asked in cross-examination how it came about that he went to the Academy to work and the following exchange took place:

A. Liz had asked me into the office, into her office. I'd been requested to go into her office. Our first meeting. In that meeting when I sat down, Liz said to me, the first thing Liz said to me was, 'A little birdie told me you weren't happy here.' And I didn't know what she was on about at first and then I had to go through the list of staff. 'What about this one? What about Lita, what about Lisa?' and all the work and how I got on with them and I said, 'All right.' I mentioned that I had – to Liz that I had a talk, I talked to her about Lita, but I had also said Lita knows this but anything else there was nothing wrong. Then Liz mentioned she had talked to Mike Fermanis about there could be a position, or go and help him to be seconded and I didn't even know what that word meant and she said she'll get to me and I was just, 'Oh yep,' and then a little way later she called me in again and that's when I ended up at [the Academy]. Oh for a week, I was meant to go there for a week, yeah. That had already been arranged and yeah. My first day at [the Academy] was confusing because when I got there I also got rang up from the [Trust], I had to go back and do the parenting group so yeah I was, on the first day I didn't know where I was, to tell you the truth.

Q. So you were to go to [the Academy] for a week?

A. For a week, yeah.

Q. So how did you end up being there for more than three weeks?

A. After a week I went back to [the Trust] and Mike rang up to Liz to say that he wanted me back but it was meant to be an extra week but it ended up being over two weeks, being two weeks not a week. So three weeks all up.

[28] Mr Ngawharau told the Court that during the first week at the Academy he signed-up eight students but then, as he put it, "it all went downhill". He explained this observation by explaining that the youths wanted more than the Academy had to offer – they wanted a qualification that would get them into a university or a polytechnic.

The meeting on 5 June 2013

[29] Mr Ngawharau gave unchallenged testimony about a short meeting he had with Ms Kelly on 5 June 2013. At that time he was still on secondment to the Academy. He said that Ms Kelly was "clearly in a bad mood" and she asked him whether he had come to resign. He said he found that question confusing. Ms Kelly told him that he needed to make a decision as to whether he was going to be working at the Trust or at the Academy.

[30] Ms Kelly then asked whether Mr Fermanis had any hours for him and when he told her that he did not know she asked him to go back and find out. Mr Ngawharau said he wondered why she did not just pick up the phone and find out for herself but, in all events, he did go and see Mr Fermanis and asked him about getting hours. Mr Fermanis indicated to him that it would depend upon whether he was able to recruit students but if he was able to get 30 students then he might be able to get him 30 hours a week. Mr Ngawharau noted it was "a worse deal" than what he was on at the Trust and so nothing happened.

The meeting on 6 June 2013

[31] The crucial meeting in the case took place on Thursday, 6 June 2013. Ms Kelly and Ms Johnston met with Mr Ngawharau. Ms Kelly explained in evidence the reason for the meeting:

9. I met Ed in my office with Liz Johnston on the afternoon of 6 June 2013. At this stage Ed had been on secondment for nearly three weeks. In that time Ed had not enrolled one new student and [the Academy] had reported they had no idea what he was doing, that they rarely saw him. I had also been told that he had been into the Community Police Base and said he had a new job and didn't work at the [Trust] anymore. We met to discuss what was happening.
10. I told Ed he needed to make a decision as to where he wanted to work. I told him the Trust could not afford to keep paying him if he was not working for the Trust. I said we are going to have to let you go if you are not going to be working for us. And if I can just say at this point that at no stage in that discussion was poor performance ever mentioned.
11. At that point Ed became very angry. Ed said this was not what he expected. I asked him what he had expected. Instead of answering, Ed stormed out.

12. I looked at Liz Johnston and asked if she was ok, because of Ed's anger, I felt fearful and concerned as to what Ed might do. We were both stunned.

[32] Ms Johnston confirmed what Ms Kelly had told the Court. She said that when Mr Ngawharau became angry and stormed off, "I was shocked how angry he became and was worried he might do something."

[33] Mr Ngawharau was asked in cross-examination to give his account of what Ms Kelly had said. The following exchange is recorded in the transcript:

A. Okay, on the 6th when I went in, sat down, I had been at Court all day with a student, sat down, Liz says to me, 'Well have you got any hours? Has Mike got you any hours?' And I says 'I'm recruiting, that's all I know.' And that's when she said, 'Well I have to be the bearer of bad news,' and this took three minutes, if I say four its giving a lot of - no, it wouldn't have been that long, yeah. 'Yeah I hate to be the bearer of bad news but I have to let you go,' and that happened in yeah minutes and I was out the door.

Q. And you got quite angry and swore didn't you? Used bad language in your own words?

A. Yeah, I said, "BS," that's the only swear word I said, yeah.

Q. Yeah but you were quite angry and you stood up knocking furniture over?

A. No, I stood up and the back of my knees hit my seat over, that's the only thing that went over. But I didn't pick it up.

Q. Yes, so your chair got knocked over?

A. Yeah.

Q. And you then stormed out?

A. Yep.

[34] I have quoted passages from Mr Ngawharau's cross-examination because his answers were spontaneous and had the ring of truth about them. In his written brief, he said that Ms Kelly also accused him of poor performance but that was strongly denied by Ms Kelly and Ms Johnston. I am prepared to accept their denials in this regard. I suspect that the reference to poor performance was more likely to have been an afterthought by Mr Ngawharau as he tried to rationalise what had happened.

Meeting on 7 June 2013

[35] Mr Ngawharau explained how he then went back to the Trust on 7 June 2013:

10. I came back the following day on the advice of Lisa Holden to obtain a written confirmation of the dismissal. I also wanted to apologise for walking out and the bad words I had spoken the day before. I did not get a written confirmation on 7 June 2013. Liz became more friendly suggesting to me that it would be easier for both parties if I formally resigned by letter than by instant dismissal. She said that way I would be able to get future employment. I realised at this stage that I was being pushed into resigning. I could tell Liz had realised she had made a mistake in dismissing me although she was not saying it. I felt that any resignation at this stage would only benefit her, not me. This also confirmed to me that she had indeed dismissed me the day before because she never told me she wanted me back at work. Instead she wanted me to resign which I was not prepared to do. Liz never retracted her words.

[36] In cross-examination Mr Ngawharau agreed that he left the meeting of 7 June on the basis that he was going to go away and think about whether he would resign or not. He said that he was worried about his job prospects, given his criminal history, if he was sacked and had no job to go to. He agreed that Ms Johnston and Ms Kelly suggested that he take time to think about it and get some independent advice. He explained to the Court that another factor which concerned him and made him think about the resignation option was that if he was sacked he would not be able to receive the unemployment benefit for a stand-down period which he said was "something like 26 weeks".

[37] In further evidence in cross-examination, Mr Ngawharau said that after the meeting on 7 June 2013 he went and saw Mr Fermanis and explained that he had been sacked. Mr Fermanis told him not to worry about it because he would talk to Ms Kelly (or Ms Johnston) and he told Mr Ngawharau just to get him some students. Mr Ngawharau also confirmed that at the meeting itself Ms Kelly and Ms Johnston had offered to help him with a letter of resignation because he "didn't know how to do one". Ms Kelly also talked about his final pay and holiday pay entitlement. She also told him that if he did resign, she would not require him to work out his period of notice.

The aftermath

[38] Mr Ngawharau did not return to work at the Trust after the meeting on 7 June 2013. Ms Johnston sent a text message to Mr Ngawharau on 11 June 2013 asking whether he was "coming in to sort out his resignation letter". She sent follow-up text messages on 12 and 13 June. She said that Mr Ngawharau responded to the first two texts indicating he had car issues but she did not receive a reply to her third message.

[39] On 10 or 11 June 2013, Mr Ngawharau consulted the Porirua Community Law Centre and on 13 June 2013 he was able to speak to a lawyer, Ms Kaye Green. Ms Green contacted the Trust requesting a meeting on 17 June 2013. Ms Kelly sent a letter to Mr Ngawharau on 17 June 2013 advising that neither he nor Ms Green had attended the meeting. In that letter, she sought confirmation as to his resignation or continued desire to work at the Trust. She indicated that if he failed to advise her of his intentions by 19 June 2013 it would appear to her that he had abandoned his employment.

[40] Ms Green was called as a witness for Mr Ngawharau. I do not find it necessary, however, to deal in any further detail with what transpired after 7 June 2013. On 3 July 2013, another lawyer, Mr Bill Bevan, of Gault Bevan Law sent a letter to Ms Kelly formally raising a personal grievance under the Employment Relations Act 2000 (the Act) on Mr Ngawharau's behalf. In reference to the meeting on 6 June 2013, Mr Bevan said in his letter:

On 6 June he says he was called to [a] meeting after returning from the South Pacific Academy where he had been temporarily seconded. His ongoing employment was discussed with yourself and with Liz [Johnston] present. He says your words to him were 'I'm sorry to be the bearer of bad news but we have to let you go'. He understandably took from that that a decision had been made by management to terminate his contract. He became upset as the centre had no good reason to terminate his contract and left the workplace at that point.

He says he returned the next day to apologise for his reaction and at a subsequent meeting with you was advised that it would look better for his work record if he resigned. He took that advice and tendered his resignation.

Lisa Holden

[41] Ms Lisa Holden was called to give evidence on behalf of Mr Ngawharau. She is a highly qualified counsellor holding a Bachelor's Degree in psychology (BSc (psychology)) and a Masters Degree in counselling (M. Couns). I found Ms Holden to be a thoughtful, objective and credible witness and I accept what she had to tell the Court.

[42] Ms Holden was contracted as a counsellor for the Trust between July 2011 and November 2013 providing counselling services and in that capacity she met Mr Ngawharau who was working as a support for Mrs Harris. Ms Holden said she observed that Mr Ngawharau and Mrs Harris had a very close and warm working relationship and to her knowledge Mrs Harris had a high regard for him.

[43] Ms Holden said she believed that she had a good working relationship with Ms Johnston and they often talked about strategies for staff development. One role they thought would be useful for the development of Mr Ngawharau's public speaking skills was to arrange for him to facilitate the regular network meetings which the Trust held with people from different agencies and Ms Johnston also mentioned sending him on a speaking course, such as Toastmasters but the Toastmasters option was never actioned.

[44] Ms Holden said that through her discussions with Ms Johnston she got the impression that management at the Trust were not happy with Mr Ngawharau's job performance. In response to this, she offered to provide internal clinical supervision for Mr Ngawharau which she did. She told the Court that she didn't have any problems supervising Mr Ngawharau and, "in fact, he was a pleasure to work with". Ms Holden said that during her supervision of Mr Ngawharau, he had communicated to her that he really enjoyed his client work and found it fulfilling.

[45] The witness identified two particular occasions where she had specifically asked Ms Johnston about Mr Ngawharau's performance. The first was when she asked how Mr Ngawharau was managing with facilitating the network meetings and, as she recalled it, she thought Ms Johnston's response was, "Lisa, it was

embarrassing". The second was after Ms Kelly and Ms Johnston visited the Breakaway Holiday Programme and found that it was not arranged as they would have liked it to have been. Ms Holden asked Ms Johnston how Mr Ngawharau was and Ms Johnson replied, "Lisa he was a liability".

[46] Ms Holden was asked in examination in chief whether she had any concerns regarding Mr Ngawharau's work. She replied:

I don't think he had very good processes, I think his paperwork was not up to scratch and he knew that and I think that his, he probably wasn't doing enough so he didn't have a full case load as, I don't know, several families. He probably had, he had some families but not enough, he wasn't doing, yeah, so we were trying to work on that, trying to encourage him to do his paperwork, do his processes and take more of a lead role in more cases, yeah.

[47] Ms Holden gave evidence about the crucial meeting on 6 June 2013. She told the Court:

On the 6th June 2013 Mrs Harris, Alita, the senior social worker informed me that Ms Kelly had called her into her office and told her, she said she was letting Ed go. Mrs Harris was really upset about this.

Later that afternoon, on the 6th of June, I walked into the staff area where the social work staff sat and into a conversation between Mrs Harris and Ed. Ed told me that he had just been fired. When I asked him what had happened he said that Ms Kelly had said to him, 'How's your day?,' and after that she had said 'I've got bad news for you, I am letting you go.'

I then suggested, recognising that that, actually that that's not a clear process, that's not a good employment process to be fired just like that, I then suggested to the plaintiff that he seek written confirmation regarding his dismissal and he said that he'd go back the next day to do that.

Chronology of findings

[48] It is not easy to correlate the different versions of events presented to the Court and almost inevitably in a case like this there will be some differences in witnesses' recollections but I have been able to make certain factual findings on the evidence which I will now proceed to summarise. They will supplement additional findings made later in this judgment.

[49] I do not accept that Mr Ngawharau ever told Ms Kelly that he wanted to leave the Trust because he was not happy. I accept what Ms Holden told the Court on this issue: ,

Ed loved working there, he loved working with the people, he loved working with the families and young people. Yes I think possibly he had some issues with management, he was in talking about Liz Kelly, specifically, but he had a really lovely relationship with Alita. Alita Harris, the senior social worker, they called each other, 'Bro,' and 'Sis,' and he you know she was a loyal supporter of his, you know, she'd defend him and she always believed in him. She was his immediate boss, I guess, his immediate manager and they had a really lovely, really – like he would go out and buy her food and she'd buy him – you know, like really lovely relationship. His daughter lived at her house, a really, really, personable relationship. I'd even go so far as saying they had a real care for each other.

[50] I accept that management (Ms Kelly and Ms Johnston) had developed some real concerns over Mr Ngawharau's performance in some important areas such as those identified by Ms Holden.³ But those performance issues had never been raised or discussed with Mr Ngawharau. Mr Ngawharau had, nevertheless, heard gossip about Ms Kelly's displeasure over his performance and that led to him becoming increasingly insecure.

[51] Ms Kelly was aware from her discussions with Mr Fermanis that there was an opportunity for Mr Ngawharau to do some recruitment work for the Academy and she proceeded to arrange for him to be seconded to the Academy for a period of one week. There was no provision in the employment agreement allowing for such a secondment and Mr Ngawharau was not offered the opportunity to have a support person present when the secondment proposal was discussed.

[52] Ms Kelly told the Court that after the first week, Mr Ngawharau asked if his secondment could be extended for another week.⁴ However, I do not accept that statement. Mr Ngawharau said in cross-examination that after the first week, Mr Fermanis rang Ms Kelly to say that he wanted him back at Academy for an extra week but it ended up being over two weeks – “three weeks all up”. In cross-examination, Mr Fermanis agreed with Mr Ngawharau's version of events.

³ At [44].

⁴ At [19].

[53] While on secondment, Mr Ngawharau was still expected to carry out some or all of his regular duties with the Trust. He told how his first day at the Academy was confusing to him because when he arrived at the Academy he received a call from the Trust to go back and "do the parenting group". In cross-examination, Ms Kelly confirmed that Mr Ngawharau had told her of a problem that developed with his immediate boss, Ms Harris, when he was seconded to the Academy because she kept asking him about his case load and where he was.

[54] Ms Kelly had formed the view that Mr Ngawharau had not been performing in his secondment role with the Academy. She spoke in evidence of how Mr Ngawharau had failed to enrol any new students in the three weeks he was with the Academy; she said that the Academy had reported that they had no idea what he was doing; that they rarely saw him and that she had been told that he had been into the Community Police Base and said that he had a new job and he did not work at the Trust any more.

[55] It was for the reasons mentioned in the previous paragraph that Ms Kelly arranged for her and Ms Johnston to meet with Mr Ngawharau on 6 June 2013. However, none of the matters had been discussed with Mr Ngawharau and he had been given no indication prior to the meeting on 6 June as to what the meeting was going to be about, nor had he been given the opportunity to have a support person present.

[56] Mr Ngawharau did not at any stage resign from the Trust. In the letter referred to in [40] his then solicitor, Mr Green, speaks about him having tendered his resignation on 7 June 2013 and in answer to a question from the Court Mr Ngawharau indicated that he resigned verbally on that day but I did not find his answer convincing. I consider it more likely that he was genuinely confused at the meeting on 7 June about how he should deal with Ms Holden's suggestion that he go back to Ms Kelly and apologise for his language the day before and obtain written confirmation of his dismissal. Moreover, it is not part of the defendant's case that Mr Ngawharau resigned. The defendant's defence is that he abandoned his employment.

Did Mr Ngawharau abandon his employment?

[57] There was a provision in cl 12 of Mr Ngawharau's employment agreement which stated:

Where the Employee is absent from work for a period of 3 days, without notifying the Employer, the Employee shall be deemed to have abandoned their employment.

[58] In *Cross v Onerahi Hotel Ltd*, Judge Inglis observed that “in such circumstances, the employee has essentially unilaterally terminated the employment agreement and there is no dismissal”.⁵ Reference was also made by Judge Inglis to *E N Ramsbottom Ltd v Chambers* where the Court of Appeal noted that there was substantial force in a submission from counsel that:⁶

... where the issue is whether the employee abandoned the employment, the employer should be cautious in drawing that inference and must face a high threshold if contending that the employment ended on the employee's initiative in that way.

[59] As Judge Inglis noted, that approach is embodied in the statutory obligations of good faith under s 4 of the Act.⁷

[60] The evidence was that Mr Ngawharau did not return to work after his meeting on 7 June 2013. His case was that he had been dismissed the previous day and the only reason he went back to the Trust was to apologise for his language at the meeting on 6 June and to try and obtain written confirmation of his dismissal as Ms Holden had suggested.

[61] The defendant pleaded that the plaintiff had not been dismissed or forced to resign. It claims that he "was given multiple opportunities to return to work after he absented himself but failed to return to work and was deemed to have abandoned his employment."

⁵ *Cross v Onerahi Hotel Ltd* [2014] NZEmpC 26, at [32].

⁶ *E N Ramsbottom Ltd v Chambers* [2007] NZCA 183; [2000] ERNZ 97 (CA), at [26]. See *Cross v Onerahi Hotel Ltd*, above n 5, at [33].

⁷ *Cross v Onerahi Hotel Ltd*, above n 5, at [33]. See also discussion of the concept of ‘abandonment of employment’ in *Crowther v Ray Marshall Transport Pty Ltd* [2014] FWC 2119, at [78].

[62] I do not accept that Mr Ngawharau did, in fact, abandon his employment. The 7th of June was a Friday. The defendant pleaded that Mr Ngawharau did not show up for work on the following Monday or Tuesday (10 and 11 June 2013). It further pleaded:

Positive Defences:

The defendant raises the following defences in accordance with regulations 20(1)(b)(ii) and 20(2) of the Regulations:

9. Abandonment

...

b. ...

vii. The defendant sent a text to the plaintiff inquiring as to what the plaintiff was doing and asking if he would come in to work on 11 June 2013.

[63] However, the text in question, timed at 9.39 am on 11 June 2013, which was from Ms Johnston, did not request Mr Ngawharau to return to work. It stated:

Morning Ed, just wondering how things are going. What is happening 2day. Do you want to come in & we can sort out your letter? Liz J

[64] In her evidence in relation to this text message, Ms Johnston said:

10. I sent Ed a text message on Tuesday 11 June 2013 at 9:39 AM to ask whether he was coming in to sort out his resignation letter. Ed replied that he was coming in but was a bit slow as he didn't have a car. ...

[65] Ms Johnston's text message was not a request to Mr Ngawharau to return to work but an invitation to come into the office and she would help him compose a resignation letter. If Mr Ngawharau had accepted then I suspect the Court would be dealing with a constructive dismissal claim.

[66] Subsequently, in a text message of 13 June 2013 and in a letter of 17 June 2013, Ms Kelly queried Mr Ngawharau as to his intentions regarding work but that correspondence was self-serving. It was sent off after the Trust had become aware on 13 June 2013 that Mr Ngawharau had sought legal advice as to his position. For these reasons, I reject the defendant's contention that Mr Ngawharau abandoned his employment.

Was Mr Ngawharau dismissed?

[67] In *Ramsbottom*, the Court of Appeal also considered the concept and definition of a dismissal. It adopted dicta from other reported cases to the effect, relevantly, that:⁸

[19] ... On an ordinary use of language 'dismissal' is a unilateral act by the employer which terminates the employment contract. ...⁹

[20] ... defined dismissal as **'the termination of employment at the initiative of the employer'**. ...¹⁰

(emphasis added)

[68] In *Sharpe v MCG Group Pty Ltd* [2010] FWA 2357, Fair Work Australia considered cases dealing with the concept of termination at the initiative of the employer.¹¹ In my view, the principles discussed in those cases would have equal application in any consideration of the meaning of the same expression in this jurisdiction. In *Sharpe*, it was noted:¹²

[24] ... Essentially, termination at the initiative of the employer involves as an important feature, that the act of the employer results directly or consequentially in the termination of the employment, so that the employee does not voluntarily leave the employee relationship. ...

[69] Reference was made in *Sharpe*¹³ to a particular passage by Justice Moore in the case of *Rheinberger v Huxley Marketing Pty Ltd*,¹⁴ which had subsequently been referred to with approval by the full Court of the Australian Industrial Relations Commission in *O'Meara v Stanley Works Pty Ltd*.¹⁵ Justice Moore stated:¹⁶

However, it is plain from these passages that it is not sufficient to demonstrate that the employee did not voluntarily leave his or her employment to establish that there had been a termination of the employment at the initiative of the employer. Such a termination must result from some action on the part of the employer intended to bring the

⁸ *E N Ramsbottom Ltd v Chambers*, above n 6, at [19] and [20].

⁹ *Principal of Auckland College of Education v Hagg* [1997] ERNZ 116 at 124; [1997] 2 NZLR 537 (CA) at 546.

¹⁰ *Wellington etc Clerical etc IUOW v Greenwich (t/a Greenwich & Assocs Employment Agency and Complete Factors Centre)* (1980) ERNZ Sel Cas 95 at 103; [1983] ACJ 965 at 974.

¹¹ *Sharpe v MCG Group Pty Ltd* [2010] FWA 2357.

¹² At [24].

¹³ At [26].

¹⁴ *Rheinberger v Huxley Marketing Pty Ltd* (1996) 67 IR 154.

¹⁵ *O'Meara v Stanley Works Pty Ltd* [2006] AIRC 496 at [20].

¹⁶ *Rheinberger v Huxley Marketing Pty Ltd*, above n 14, at [160]-[161].

employment to an end and perhaps action which would, on any reasonable view, probably have that effect. I leave open the question of whether a termination of employment at the initiative of the employer requires the employer to intend by its action that the employment will conclude. I am prepared to assume, for present purposes, that there can be a termination at the initiative of the employer if the cessation of the employment relationship is the probable consequence of the employer's conduct.

[70] It seems to me that, on any view of the facts in the present case, it was the actions of the Trust on 6 June 2013 that resulted in the termination of Mr Ngawharau's employment. Mr Ngawharau had been summoned to a meeting with Ms Kelly and Ms Johnston. Although there was some dispute over the precise words used by Ms Kelly, I accept that they were along the lines that, "I hate to be the bearer of bad news but we are going to have to let you go if you are not going to be working for us."

[71] It was Ms Kelly who had arranged for Mr Ngawharau to be seconded to the Academy for one week. Mr Ngawharau did not even know what the word "seconded" meant but he went along with his employer's instructions. Several times in the course of his evidence he described how he was "confused" over these developments. I accept that evidence. Ms Kelly subsequently agreed to a request from Mr Femandis, of the Academy, to extend the secondment arrangement for an additional two-week period. Mr Ngawharau considered that he was performing well on his secondment but Ms Kelly believed otherwise. There were no complaints, however, from Mr Femandis about Mr Ngawharau's performance, either at the time of the secondment or in his evidence before me. Nor was Mr Ngawharau challenged over his statement to the Court that he had signed up eight students in the first week.

[72] Mr Ngawharau told the Court in evidence, which I accept, that it was very clear to him that Ms Kelly was dismissing him from his job and that was when he became angry and emotional and used the bad language which he apologised for the following day. It is difficult to interpret Ms Kelly's ultimatum in any other way. Mr Ngawharau was employed by the Trust. He could be forgiven for asking himself rhetorically, "Why would I not be working for the Trust unless Ms Kelly is trying to persuade me to leave the Trust and work for the Academy?" I am satisfied that had Ms Kelly not delivered the ultimatum in question, Mr Ngawharau would have remained in his employment relationship with the Trust. In these circumstances, in

my view, it can properly be said that the termination of his employment was at the initiative of his employer, the defendant.

Was the dismissal justifiable?

[73] Section 103A(1) of the Act provides that whether a dismissal or an action was justifiable must be determined on an objective basis by applying the test in subs (2) which states:

103A Test of justification

...

- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[74] In applying the test, the Court must consider the non-exhaustive list of factors set out in s 103A(3) of the Act. Those factors are:

(3) ...

- (a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and
- (b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and
- (c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and
- (d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.

[75] In addition to the factors listed in subs (3), the Court may consider any other factors it thinks appropriate.¹⁷ A dismissal or action must not be found to be

¹⁷ Employment Relations Act 2000, s 103A(4).

unjustified solely because of minor procedural defects if they did not result in the employee being treated unfairly.¹⁸

[76] Relevant at all stages of an employment relationship is the mutual obligation of good faith in s 4 of the Act. Of particular relevance in the present case is the duty on an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of an employee to provide to the affected employee access to information relevant to the continuation of the employment and an opportunity to comment on the information before the decision is made.¹⁹

[77] The test of justification contemplates that there may be more than one response or other outcome that might justifiably be applied by a fair and reasonable employer in all the circumstances of a particular case. It is well established, however, that in undertaking its analysis, the Court may not substitute its view for that of the employer. Its role is to inquire into and assess on an objective basis whether the decision to dismiss (or any other action taken) fell within the range of conduct open to a fair and reasonable employer in all the circumstances at the time.²⁰

[78] In applying the statutory test and the foregoing principles to the facts of the present case, I have concluded that the actions of the defendant were not in accordance with how a fair and reasonable employer could have acted in all the circumstances at the time of Mr Ngawharau's dismissal. Putting to one side the obvious procedural defects in the way the Trust implemented the secondment arrangement (in respect of which no disadvantage grievance was raised), there were other serious procedural defects associated with the meeting of 6 June 2013 which resulted in Mr Ngawharau being treated most unfairly.

[79] I have made the point earlier in this judgment that Mr Ngawharau was a vulnerable employee. For that reason, in any matter that had the potential to reflect adversely on the security of his employment relationship, he needed to be treated, in

¹⁸ Employment Relations Act, s 103A(5).

¹⁹ Employment Relations Act, s 4(1A)(c).

²⁰ *Howard v Carter Holt Harvey Packaging Ltd* [2014] NZEmpC 157 at [50], *Angus v Ports of Auckland* [2011] NZEmpC 160, (2011) NZELR 40 at [25].

colloquial terms, with kid gloves. In other words, from a practical point of view, it was essential that the employer comply in every respect with its statutory good faith obligations and the requirements necessary to satisfy the s 103A test of justification. Unfortunately for Mr Ngawharau, that did not happen.

[80] Instead, Mr Ngawharau was summoned to a meeting with the two most senior officers of the Trust, the Operations Manager, Ms Johnston, and the CEO, Ms Kelly. He was not given the opportunity of having a support person with him. He did not know what the meeting was going to be about. He had received nothing in writing or any other indication prior to the meeting explaining why it was taking place. In other words, he was ambushed and as soon as Ms Kelly told him that she hated being the bearer of bad news but they would have to let him go, he reacted, not surprisingly, with an angry outburst which included the use of inappropriate language.

[81] The situation Mr Ngawharau found himself in was not unlike that which the Court encountered recently in *Maharaj v Recon Professional Services Ltd*.²¹ In that case, Mr Maharaj reacted with an angry outburst at a disciplinary meeting. In reference to the incident the Court noted:²²

Suffice it to say, however, that the rules of natural justice and the good faith procedural requirements in the Act are intended to prevent the type of showdown that occurred at the disciplinary meeting in the present case where Mr Maharaj feeling an undoubted deep sense of injustice, reacted in the way that he did by storming out of the meeting with a volley of threats and expletives.

[82] I accept that on the following day when Mr Ngawharau returned to the office and apologised over his behaviour the previous day, Ms Kelly suggested to him that he obtain independent advice but he should have been given those directions prior to the critical meeting on 6 June 2013 – not afterwards.

[83] Had Mr Ngawharau been given proper notice of the 6 June 2013 meeting and a clear indication of what it was going to be about, he may well have endeavoured to arrange to have Ms Holden and/or Mrs Harris attend in support. It seems from the

²¹ *Maharaj v Recon Professional Services Ltd* [2014] NZEmpC 114.

²² At [34].

evidence that both women would have been supportive. The Court did not hear from Mrs Harris, which was somewhat surprising given that she was the senior social worker and Mr Ngawharau's Manager. As noted in [47] above, Mrs Harris was "really upset" to learn about the outcome of the meeting of 6 June 2013.

[84] For the reasons discussed, I find that Mr Ngawharau was unjustifiably dismissed from his employment on 6 June 2013.

Remedies

Lost remuneration

[85] In his pleadings, Mr Ngawharau seeks reimbursement, pursuant to s 103(1)(b) of the Act, of lost remuneration in the sum of \$10,240 made up of 16 weeks' of lost wages. That calculation was no doubt based on 40 hours per week at a rate of \$16 per hour. There was an indication in the evidence that his hourly rate may have increased to \$18 but that point does not appear to have been pursued.

[86] It is not known how the "16 weeks" figure was made up. Mr Ngawharau told the Court that 12 weeks after the termination of his employment with the Trust he was able to obtain other employment with Kokiri Marae in the Hutt Valley. Until then he had no regular income and he was not able to obtain the unemployment benefit. He said that to get by he obtained financial support from his family and a work colleague. At the time of the hearing, Mr Ngawharau was no longer working at the Marae but he had resumed study for his Social Work Degree.

[87] Mr Ngawharau was not challenged on his evidence in relation to remedies and there was no suggestion that he had not made appropriate efforts to mitigate his loss. Under s 128(2) of the Act, he is entitled to be reimbursed in the lesser of a sum equal to his lost remuneration or to three months' ordinary time remuneration. As the pleadings stand, the lesser figure based on a 12-week period would amount to \$7,680 made up of 40 hours per week at \$16 per hour. I award compensation for lost remuneration in the said sum of \$7,680.

Compensation for hurt and humiliation

[88] Under this head, Mr Ngawharau seeks the sum of \$10,000. He told the Court how he could not stay in his flat after his dismissal and he and his son had to live separately for a while. He talked about how the dismissal affected his life "quite a bit" and he was angry over the way in which he had been treated. As noted above, he was placed in the position of having to borrow money from family and a former work colleague.

[89] I accept that the plaintiff has made out a relatively modest claim for humiliation, loss of dignity and injury to feelings and pursuant to s 123(1)(c)(i) of the Act I award him compensation under this head in the sum of \$4,000.

Contribution

[90] Section 124 of the Act requires the Court, when determining the remedies for an established personal grievance, to consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance and reduce the remedies awarded accordingly.

[91] For the reasons canvassed above, I do not consider that Mr Ngawharau engaged in any blameworthy conduct that gave rise to the personal grievance and I decline to order any reduction in remedies on that account.

Summary

For the reasons stated above, my conclusions are:

- (a) Mr Ngawharau was unjustifiably dismissed by the defendant;
- (b) Mr Ngawharau is awarded:
 - (i) the sum of \$7,680 in reimbursement of lost remuneration;
 - (ii) the sum of \$4,000 for hurt and humiliation;
- (c) There is to be no reduction in remedies on account of contributory conduct.

[92] The plaintiff is entitled to costs. If they cannot be agreed upon then Mr Paradza is to file cost submissions within 21 days and Mr Knowsley is to have a like period of time in which to file submissions in response.

A D Ford
Judge

Judgment signed at 10.15 am on 12 June 2015