

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Jacqueline de Souza (Applicant)
AND Waikato Students' Union (Respondent)
REPRESENTATIVES David Allan for the applicant
Joan Forret for the respondent
MEMBER OF AUTHORITY James Wilson
INVESTIGATION MEETING 9 and 10 March 2006
DATE OF DETERMINATION 8 May 2006

DETERMINATION OF THE AUTHORITY

Jacqueline de Souza's employment relationship problem

1. In her original statement of problem, filed with the Authority in June 2004, Ms de Souza said that the problem she wished the Authority to resolve was:

- (a) Bullying by the former President of the Waikato Students Union (WSU), Daniel Philpott.*
- (b) Redundancy - failure to complete a mediated settlement.*
- (c) "Sham" redundancy.*
- (d) Unpaid wages.*

Ms de Souza sought payment for lost wages, compensation for humiliation and stress of \$20,000 and costs. Before Ms de Souza's problem was eventually the subject of an Authority investigation meeting she withdrew her claim for unpaid wages.

2. In their statement in reply the WSU (2004) Executive said they took no ownership of the actions of Mr Philpott, rejected Mr Souza's claim in respect to the uncompleted mediated settlement, and asserted that they, being a new Executive were unable to comment regarding Ms de Souza's assertion that her redundancy was a sham.

Background

3. Before outlining the various events which gave rise to Ms de Souza's application I wish to acknowledge the personal difficulty and stress Ms de Souza has experienced in bringing this matter to the Authority. In her statement of evidence, and in person at the investigation meetings, Ms de Souza outlined in some detail her personal history including a proud family heritage, a difficult and violent relationship and a painful and stressful medical history. In bringing her application to the

Authority Ms de Souza demonstrated great courage and fortitude. Despite her difficulties Ms de Souza's evidence was clear and concise.

4. In April 2002 Ms de Souza joined the WSU Advocacy Service as a volunteer. In October 2002 she approached the then acting President of the WSU seeking to apply for the paid position of Advocacy Coordinator. At a meeting of the WSU Executive on a 14 October 2002 a motion was passed that she be appointed to that position. She took up the position on 18 October 2002. On that same day she was advised that she had been elected as vice president of the WSU for the year beginning 1 January 2003. At that same executive election Mr Daniel Philpott was elected President.

5. It seems, from subsequent events, that Mr Philpott had a deeply held personal conviction that members of the Executive should not also be employees of the WSU. This conviction seems to have motivated him in what rapidly became an extremely difficult relationship with Ms de Souza. Regrettably Mr Philpott was not available to give evidence to the Authority. I am advised by the WSU witnesses that Mr Philpott has had no contact with the WSU since his departure at the end of 2003 and none of the current Executive or staff have any idea of his present whereabouts. It has not been possible therefore to question Mr Philpott directly on his version of the various events which led to Ms de Souza's application. I have been forced to rely on the evidence of others who observed the various incidents, and the written records of those incidents were these exist.

6. On 17 December 2002 the outgoing Executive passed a resolution formally revoking Ms de Souza's employment agreement. It would appear, although there is no direct evidence to this effect, that Mr Philpott may have had some influence on this decision. Over the next few weeks Ms de Souza was assured that "it will be sorted out" and then in early January was formally dismissed by Mr Philpott. (It appears that Mr Philpott was particularly angry that Ms de Souza had spoken to a staff member regarding plans Mr Philpott had to dismiss that staff member.) Also during this time Ms de Souza tendered her resignation as vice president, and then withdrew that resignation when it appeared that she would no longer be employed as Advocacy Co-ordinator.

7. In February 2003 the Executive reinstated Ms de Souza to the position of Advocacy Co-ordinator and Ms de Souza resigned as vice president. The issues surrounding these incidents were dealt with at mediation at that time. The events leading up to that mediated settlement do not form part of the Ms de Souza's current application. However these events do demonstrate the origins of the strained relationship between Ms de Souza and Mr Philpott.

8. On 20 March 2003 Ms de Souza was shown a letter written by Mr Philpott which was apparently to be tabled at the next executive meeting. This letter was considered by the executive in closed meeting but it appears that a version was circulated to members of the executive prior to the meeting. In this letter Mr Philpott said that he believed he had *an unmanageable conflict of duty and interest ... as an employer of two of the Waikato Students Union employees*. He went on to say:

I find it reprehensible that two WSU employees were appointed by the executive committee in 2002 while in tenure as executive officers of our organisation. ... I believe that the appointments were not made in the interest of our organisation and that they were made solely in the interest of the 2002 executive committee and individual members thereof.

The WSU have suggested that this letter did not criticise Ms de Souza personally. However in his final paragraph Mr Philpott said:

Therefore I advised the Waikato Students Union that I must exclude myself from any matters specifically relating to the employment of D.C. or Jackie de Souza.

Read as a whole there can be no doubt that Mr Philpott was critical of Ms de Souza.

9. On 27 March 2003 Ms de Souza received a phone call from a reporter at the Waikato Times. This reporter asked Ms de Souza to comment on Mr Philpott's letter. The WSU say that there is no evidence that Mr Philpott leaked this letter to the newspaper and that they cannot be held accountable for its contents or its distribution. They say that the WSU took all reasonable steps to retract the letter, the Executive considered the letter in committee and took appropriate action to ensure that Ms de Souza had alternative employment support by arranging for her to report to the Union Manager. Although I accept that there is no direct evidence that Mr Philpott gave a copy of his letter to the newspaper, I note that the Executive itself clearly believed that he had done so. On 15 April 2003, in a letter to Ms de Souza's legal representative, Simon Scott, Ms Forret on behalf of the WSU said:

Mr Philpott's letter to the WSU executive was not supplied to any external party with the WSU's authority. Provision of that letter to the Waikato Times was ill considered and the WSU has censured Mr Philpott for his actions in that respect.

This comment would seem to confirm that the Executive believed that Mr Philpott had leaked the letter. The letter did go on to confirm that following consultation it had been agreed that Ms de Souza would now report to the Waikato Student Manager.

10. On 4 April 2003 Ms de Souza, through her representative, Mr Scott, raised a formal grievance with WSU. Mr Scott sought, on behalf of Ms de Souza:

1. A written apology from Mr Philpott for stress and humiliation he has caused Jackie [Ms de Souza] (the wording of which is to be pre-approved by Jackie) and a written assurance from the executive of the Waikato Students Union that they will do everything in their power to provide a safe workplace in the future.

2. That no further public announcements concerning Jackie's employment be made, either by Mr Philpott or the WSU Executive, save for if requested, a statement that "the matter has been settled" and nothing further.

3. \$20,000 for hurt and humiliation under section 123 of the Employment Relations Act.

4. Costs in respect of this matter.

11. The WSU responded to Ms de Souza's grievance by way of Ms Forret's letter of 15 April 2003 (referred to in paragraph 9 above). This grievance was subsequently the subject of mediation but no settlement was reached.

12. It is clear from Ms de Souza's evidence that her relationship with Mr Philpott continued to be strained and she outlines a number of occasions where, she says, Mr Philpott used his position as President to make her working life difficult. This included a request for a written opinion at very short notice and having her removed as secretary to the hardship committee. Mr Souza says that due to the constant stress she found it necessary to take medical advice and, in September take a week's stress leave.

13. While Ms de Souza was on stress leave she was advised that the WSU Executive had decided, as a result of financial difficulties, to review all of its staffing requirements. She was advised that one of the options of this review was that she and other staff may be made redundant.

14. Over the next two or three months a specifically appointed "Review Committee" met with staff and their union representatives and reviewed the WSU finances. For reasons which will become clear later in this determination, it is not necessary to set out in detail the process followed by the WSU. At the end of this process, in a letter dated the 26th November 2003, Ms de Souza was advised:

At its meeting on Tuesday 25 November 2003 the WSU Executive resolved to disestablish the Activities, Clubs and Education and Advocacy coordinating positions. That decision means that your position is to be disestablished and that your employment is to be terminated due to redundancy.

.....

The Executive regrets that this decision will result in the termination of your employment. Your employment agreement provides that you receive two weeks notice. This letter is notice of your termination which will be effective on Thursday 11 December 2003.

15. Ms de Souza felt strongly that her redundancy was directly related to the difficult relationship she had with Mr Philpott - in fact she believed that her redundancy was a sham and had been manipulated by Mr Philpott to remove her from her position. She immediately sought mediation assistance. This mediation took place 9 December 2003. At the conclusion of the mediation meeting the parties signed an agreement which included the following statements:

- 2. This is a partial settlement of all matters between the parties.*
- 3. Jackie de Souza has raised a personal grievance alleging that her pending dismissal on 11 December 2003 is unjustified.*
- 4. The parties had discussed this matter and had agreed that Jackie will continue to be employed until 28 February 2004, so as to allow further discussion to take place.*
- 5. Any termination on 28 February 2004 will be deemed to be on notice.*
- 6. The respondent's representatives agree to recommend this proposal to the respondent at the next executive meeting.*

This settlement was signed, on behalf of WSU, by Mr Sandy Pushpamangalam the new President elect.

16. The next meeting of the WSU Executive was an emergency meeting and it appears that only three members of the Executive were present when the vote on the proposed settlement was taken. The minutes record that Mr Pushpamangalam used his casting vote to defeat the notion. In his evidence to the Authority Mr Pushpamangalam says:

I do not consider that I breached the mediation agreement. I agreed to recommend the proposal to the Executive. I did recommend the proposal to the Executive but following the discussion and further consideration I felt obliged to cast my vote against adopting the agreement in the best interests of the organisation.

Ms de Souza says that she has a personal grievance based on this failure to ratify the mediated settlement and says that the WSU, through Mr Pushpamangalam, breached the duty of good faith by failing to recommend the settlement to the Executive.

17. Following further correspondence between the parties' representatives, Ms de Souza filed her statement of problem with the Authority on 15 June 2004.

Preliminary issues

“Sham” redundancy

18. At the conclusion of the investigation meeting, and in subsequent submissions, Mr Alan, for Ms de Souza, accepted that Ms de Souza's redundancy had not been a sham. In the light of the evidence produced at the meeting this concession was appropriate. I accept Mr Alan's submission that it was not until the Authority had been able to consider detailed financial statements and question the WSU witnesses that the possibility of a sham could be ruled out.

Timing of the raising of Ms de Souza's grievance.

19. Both at the investigation meeting and in her subsequent submissions Ms Forret argues that Ms de Souza's claim that her workplace was unsafe had not been raised with WSU inside the statutory 90 days. Ms Forret argues that the personal grievance raised by Ms de Souza in April 2003 was specifically related to two incidents involving Mr Philpott and did not notify WSU of a grievance in relation to an unsafe workplace. She says that Ms de Souza raised the unsafe workplace grievance in June 2004 (in her statement of problem) and that this was some six months after the termination of her employment and well outside the 90 day statutory period provided in the Employment Relations Act.

20. I do not accept Ms Forret's argument. In his letter of 4 April 2003 Mr Scott said:

*In addition to all of this, (Ms de Souza) **feels unsafe in the current working environment at the WSU. She considers that she has suffered treatment from (Mr Philpott) that is both prejudicial and discriminatory. At times, (Ms de Souza) has felt that (Mr Philpott) was one step away from taking a violent action towards her. In fact, (Ms de Souza) reports that she feels "the violence in his looks"**.* (My emphasis)

Mr Scott's letter went on to seek a written assurance from the WSU Executive: *that they will do everything in their power **to provide a safe workplace in the future*** (My emphasis). Although Mr Scott's letter did not specifically say that Ms de Souza had a personal grievance relating to the failure to provide a safe workplace, it clearly spelt out that she was concerned about her safety and that this formed part of her overall grievance. This grievance was never settled and, I find, is legitimately raised as part of Ms de Souza's overall application to Authority.

Discussion

Unsafe workplace: bullying by Mr Philpott

21. The WSU has attempted to distance itself from Mr Philpott's behaviour. They point out that Mr Philpott is no longer President of the Union and that the Executive at the time took steps to mitigate his behaviour. He was censured by the Executive for leaking his letter to the newspaper and arrangements were put in place for Ms de Souza to report to the Union Manager. I have some sympathy for the current Executive. It was not they who behaved badly towards Mr Souza and since his departure they have made efforts to clarify the relationship between the President and the staff of the Union. The then executive took steps to censure Mr Philpott and two attempted to limit the circulation of his letter of 19 March 2003. Nevertheless Mr Philpott, as President was, according to the WSU rules:

...responsible for the employment, dismissal and supervision of the work of any person employed by the Association as Union Manager, Accounts Secretary or any other person ...

In other words the President was, for all intents and purposes and subject only to resolutions of the Executive, Ms de Souza's employer. In his dealings with Ms de Souza Mr Philpott was acting in his capacity as President of WSU. The fact that Mr Philpott is no longer the President does not remove the responsibility from the WSU for its President's actions.

22. In his role as President, and as Ms de Souza's employer, it was Mr Philpott who was responsible for providing Ms de Souza with a safe workplace. He did not do so. Even if I accept that relationships in organisations such as this are often "robust" (to use Ms Forret's expression) Mr Philpott's actions in writing and circulating his letter of the 19 March 2003 caused Ms de Souza distress and humiliation which was both predictable and unnecessary. Whether or not Mr Philpott "leaked" his letter to the newspaper is not particularly relevant. He wrote the letter and allowed it to be circulated in such a manner as it was almost certain to come to Ms the Souza's notice. Irrespective of his other actions Mr Philpott's letter amounted to an unjustifiable action by her employer for which Ms de Souza has a personal grievance. In fact there is evidence that suggests that Mr Philpott's behaviour towards Ms de Souza was a deliberate and sustained attempt to cause her stress and humiliation. Regrettably Mr Philpott is not available to explain his motivations for his behaviour. Despite the Executive's attempts to mitigate Mr Philpott's behaviour, I find that her employer failed in its duty to provide Ms de Souza with a safe workplace. She has a personal grievance in this regard.

Breach of mediated settlement

23. I do not accept that Ms de Souza has a personal grievance in respect to the WSU's failure to ratify the settlement reached at mediation in December 2003. As a representative of the Executive Mr Pushpamangalam agreed to recommend the settlement to the Executive. He was then left in the difficult position, as a member of that Executive, of having to consider the best interests of the organisation. On reflection he cast his vote against the settlement. I accept his assurance that, at the time he signed the proposed settlement he did so in good faith and that it was only subsequently, and in the light of additional information that, as President elect of WSU, he voted against. In any event the settlement was a partial settlement only. Even if the Executive had approved the settlement it would almost certainly not have resulted in Ms de Souza's long-term reinstatement. Her dispute related to her concern that a redundancy was a sham manipulated by Mr Philpott. It is possible that a further mediation may have demonstrated to Ms de Souza that this was not the case. With the benefit of hindsight we now know that the WSU, without input from Mr Philpott, had come to the conclusion that it was necessary to make several staff redundant. I find that in respect

to the failure to ratify the mediated settlement the WSU did not breach its duty of good faith and Ms de Souza does not have a personal grievance in this regard.

Summary of findings

24. Ms de Souza has accepted that the termination of her employment with the WSU was for reasons of genuine redundancy. I have found that she does not have a grievance against WSU as a result of the WSU's failure to ratify the settlement reached at mediation in December 2003. However I have found that Ms de Souza has a personal grievance against her employer in that they failed in their duty to provide her with a safe workplace.

Remedies

25. I have found that Ms de Souza has a personal grievance against her former employer, the WSU, in that the WSU failed in its duty to provide her with a safe workplace. In particular the actions of the WSU President, Mr Philpott, in writing his letter of 19 March 2003, amounted to an unjustified action on behalf of her employer. In terms of section 124 of the Employment Relations Act I have considered whether Ms the Souza contributed to the situation which gave rise to her personal grievance and find that she did not. She is entitled to be compensated for the hurt and humiliation which the actions of her employer have caused. The level of stress suffered by Ms de Souza was at a level more serious than most I have seen and for that reason I have set the level of compensation at the high end of the range usually awarded by the Authority.

26. In terms of section 123(1)(c)(i) of the Employment Relations Act the Waikato Students Union is ordered to pay Ms deSouza \$10,000 without deduction.

Costs

27. Costs are reserved. The parties are requested to attempt to settle this issue themselves in the first instance. I note that Ms de Souza is legally aided.

James Wilson
Member of Employment Relations Authority