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Faulkner v Secretary for Justice (Auckland) [2011] NZERA 413; [2011] NZERA Auckland 143 (11 April 2011)

New Zealand Employment Relations Authority

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Faulkner v Secretary for Justice (Auckland) [2011] NZERA 413 (11 April 2011); [2011] NZERA Auckland 143

Last Updated: 7 July 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2011] NZERA Auckland 143 5302466

BETWEEN LEONIE FAULKNER

applicants

AND SECRETARY FOR JUSTICE

respondent

Member of Authority: Representatives:

Investigation Meeting: Submissions received: Determination:

James Wilson

Catherine Stewart for the applicant Alastair Sherriff for the respondent

2 & 3 November 2010 in Gisborne

At the conclusion of the investigation meeting

11 April 2011

DETERMINATION OF THE AUTHORITY

The employment relationship problem

[1] With the exception of a 9 month break in 2002/2003 Ms Leonie Faulkner ("Ms Faulkner") was employed in the Maori Land

Court in Gisborne from 2001 until she resigned with effect from 13 May 2010. At the time of her resignation Ms Faulkner was employed as a team leader in terms of the Ministry of Justice/PSA Collective Employment Agreement.

[2] In her statement of problem Ms Faulkner said that she has three personal grievances against her employer, the Secretary of Justice ("the Secretary" or "the Ministry"):

- a. that the performance management action taken against her was unjustified and caused her disadvantage;
- b. that she had been discriminated against by reason directly or indirectly of her activities in a union (specifically that she had participated in a strike lawfully);
- c. that she had been constructively dismissed.

In her (amended) statement of problem Ms Falkner sought;

- (a) Compensation for the distress and injury to her feelings for each of the three personal grievances;
- (b) compensation for the loss of any benefits whether or not of a monetary kind which she might reasonably have been expected to obtain if her personal grievance had not arisen;
- (c) reimbursement of wages or other monies lost as a result of each of her three personal grievances including but not limited to:

- (i) loss of future career prospects;
- (ii) full reimbursement of unpaid sick leave from 8 March 2010 to the date of her constructive dismissal on 13 May 2010;

- (d) Damages for breach of (her) employment agreement.
- (e) Penalties for breach of (her) employment agreement
- (f) legal costs

I note that in her closing submissions on behalf of Ms Faulkner, Ms Stewart did not pursue the question of damages (other than for hurt and humiliation) or penalties for the alleged breaches of Ms Faulkner's employment agreement. I have assumed that this omission was deliberate and I have not therefore addressed these remedies in this determination.

[3] In her statement problem Ms Faulkner did not seek reinstatement. However shortly after the commencement of the Authority's investigation meeting she requested that the Authority order her reinstatement.

[4] In her statement in reply the Secretary says that the Ministry's actions in performance managing Ms Faulkner were justified and did not cause her disadvantage; that there had been no intention to discriminate against her on the grounds of her activities in the union and the Ministry does not accept that Ms

Faulkner was constructively dismissed. Rather, the Ministry says, Ms Faulkner resigned of her own accord after a long period of sick leave.

The issues for determination

[5] There are several separate, but intertwined issues that require determination in this matter. These relate directly to the personal grievances raised by Ms Faulkner:

- i. Did the Ministry discriminate against Ms Faulkner because of her activities as a union member? And
 - were the Ministry's actions, in seeking to performance manage Ms Faulkner and in ceasing to pay her sick leave, what a fair and reasonable employer would have done in all the circumstances? And
 - did the circumstances and the actions of her employer which led to Ms Faulkner's resignation, amount to a constructive dismissal.

The answers to these questions will determine whether Ms Faulkner does have personal grievances against the Ministry. If she does it will then be necessary to determine the extent of any remedies she is entitled to receive.

The key events

[6] On 17 November 2009 Ms Faulkner sent an email to her Team Manager, Mr Keith Bacon, with a copy to the District Manager, Mr Walton Sadlier, in respect to a meeting to be held on 23 November in Wairoa. The final paragraph of this email said:

[Mr Sadlier]: I refer to our discussion and your instructions (e-mail) of 23/10/09 and due to industrial action someone else will need to assist Eddie Moses at the meeting.

[7] On 20 November 2009 Ms Faulkner took industrial action (six hours strike) as part of national industrial action notified to the Ministry by her union, the PSA. Although not legally required to do so Ms Faulkner, through her union delegate, advised Mr Sadlier prior to commencing her strike.

[8] On the evening of 20 November 2009 Mr Sadlier sent an e-mail to Ms Faulkner in reply to her e-mail of 17 November 2009. The relevant portions of this email are set out below:

1] Meeting of owners...

I received this e-mail on Tuesday yet the way the message is framed I have been told on the last paragraph that "due to industrial action someone else will need to assist Eddie Moses at the meeting"

I would have appreciated:

[i] The para should have been in bold to get my attention; and

[ii] you actually go and ask your immediate manager to consider a replacement person.

[iii] ...

[vi] These meetings were arranged during week two of industrial action and at no time did you indicate you weren't available. I even mentioned in the e-mail of 23 October that Hastings had considered this scenario for their office.

[vii] This industrial action preference seems to be a double standard to me as you preferred to stay on at the special sitting yesterday, yet I came to take your place during the lunchtime "work to rule" action. Does this preference only apply when the Judge is present and the office managers don't matter? An explanation would be nice.

2] Industrial action taken today

Also with industrial action taken today:

[i] I did not receive notice from you that you were taking industrial action.

[iii] I spoke to (the PSA delegate) this morning and she said that she had talked to you and that you were to talk to me about the action you were going to take. Is this also another example of preference to not talk to a manager or follow instruction even from your PSA rep?

[iv] I only require from the staff what action they are taking, so I record your whereabouts. I am not asking for anything else.

3] Following instructions

My main concern with all of this is whether you are able to follow instruction from your managers, judges or peers. If you are unable to do this then I would say that this is well only lead to disciplinary action.

The e-mail then lists several examples of failure to follow instructions and ends...

I will be discussing with (Mr Bacon) what further action to take and we are available for any comment from you in this matter.

[Note: The Ministry subsequently acknowledged that Ms Faulkner's PSA representative did advise Mr Sadlier that Ms Faulkner would be on strike on 20

November 2009]

[9] On 4 December 2009 Ms Faulkner wrote to Mr Sadlier saying:

Kia ora Walt. I wish to acknowledge the points you have raised in your e-mail. I have been taking PSA assistance and will respond in due course.

Mr Sadlier replied:

Thanks for that Lee, I too will be taking PSA assistance and will await your response.

[10] Regrettably, following this exchange something of a standoff seems to have developed. Ms Faulkner says that she was *really quite traumatised* by Mr Sadlier's email of 20 November and *felt highly uncomfortable about whether the PSA would be representing my interests or his*. Nevertheless she advised her PSA delegate that she felt she could not comment further until she knew what *further action* Mr Sadlier was referring to. Mr Sadlier, on the other hand says that he was waiting for Ms Faulkner to respond in terms of her email of 4 December 2009.

[11] The impasse was eventually broken by an e-mail from the PSA delegate to Mr Sadlier advising him that *we think that Ms Faulkner cannot make comment until you have responded to this matter* i.e. the *further actions* that Mr Sadlier may have discussed with Mr Bacon.

[12] On 16 February 2010 Mr Sadlier wrote to the PSA delegate, with a copy to Ms Faulkner, advising the *further actions* the Ministry intended to take. In particular the e-mail said:

Action plan

(Ms Faulkner) will be under an action plan for three months commencing Monday, 1 March 2010 and to be reviewed on Tuesday, 1 June 2010. (Mr Bacon) will meet with (Ms Faulkner) to discuss the requirements and a written action plan to be completed by 26 February 2010. The action plan to be held by (Mr Bacon) and to contain the following requirements.

The e-mail then went on to outline a timetable and issues to be monitored for inclusion in the proposed action plan. Mr Sadlier says that the proposed action plan was not a *performance management plan* in terms of a formal performance management process and his intention was that Ms Faulkner and Mr Bacon would meet and finalise the plan. He also asserts that the implementation of this action plan was not prompted by Ms Faulkner taking industrial action in November 2009.

[13] On 18 February 2010 Mr Bacon emailed Ms Faulkner and at least one other staff member instructing them that *as your letter writing has been substandard to help rectify this matter you are to submit your letters to D. or myself prior to them being sent out*. The Ministry says that this instruction was totally separate from the other issues raised with Ms Faulkner.

[14] Ms Faulkner says that after receiving Mr Sadlier's e-mail of 16 February she felt *deeply demoralised and aggrieved* and as a result of work-related stress went on sick leave from 22 February 2010.

[15] Although a meeting was arranged between Ms Faulkner, the PSA, Mr Sadlier and Mr Bacon for 23 February Ms Faulkner was so unwell that she went in to work with a medical certificate on that day, met with the PSA organiser and delegate and

advised them that she was not well enough to attend a meeting at that time.

[16] A medical certificate provided to the Ministry by Ms Faulkner dated 8 March 2010 said:

(Ms Faulkner) was seen and examined by me on 8/03/10 and in my opinion has been medically unfit prior to this date and will continue to be off work for another two weeks after this date until I review her again on 22/03/10.

[17] Apparently Mr Bacon asked the local PSA representative to contact Ms Faulkner to invite her to a meeting to be held on 11 March 2010. According to Mr Bacon Ms Faulkner refused to attend and wanted the request in writing. On 11 March 2010 Mr Bacon wrote Ms Faulkner:

I have received your medical certificate dated 8 March 2010.

We need to meet to discuss the present situation in regards to your health. We suggest that you bring support to the meeting. We need to know whether your ill health is work or non work related, if you have attended SEED and what is the long-term projection with your health.

Please note that you will need to be contactable at all times.

We invite you to a meeting on Monday, 22 March 2010 with Mr Sadler and Mr Pohatu. I will be away on leave so will not be able to attend.

*Your leave through to 8 March was paid sick leave. **Any sick leave taken after that date will be unpaid sick leave.***

(Emphasis added: Ms Faulkner received no sick leave payments after 8 March 2010)

Ms Falconer replied on 12 March:

I refer to your letter dated 11 March 2010. and have enclosed a medical certificate dated 8 March 2010 (this has been updated by my doctor, as in her opinion I should be off longer).

I am attending SEED as the Ministry is aware, as they have authorized approval. I confirm that sick leave is work related.

If you wish to contact me, just put it in writing.

I decline your invitation to attend your meeting as arranged by you on 22 March 2010

(The amended medical certificate enclosed with this letter extended Ms Faulkner's proposed absence from work until 5 April 2010.)

Mr Bacon responded:

Thank you for your confirmation that the sick leave is work related. The meeting is required to determine in what way it is work related and what needs to be done about it. You are being issued a fair and reasonable instruction as our employee and are therefore obligated to attend the meeting on Monday 22 March . . Failure to attend the meeting is a breach of the Ministry's Code of Conduct and you may face disciplinary action.

[18] There is some dispute between the parties about exactly what was said at the meeting on 22 March 2010. However following the meeting the Ministry produced minutes which included the following summary:

The PSA Delegate... is no longer representing (Ms Faulkner) and she will be confirming work representation in the future.

Both parties agreed to disagree on the (sic) number of points. (Mr Sadler) asked whether some form of report from the SEED counsellor would be available to further help management better evaluate the "work-related stress"; (Ms Faulkner) believed she was experiencing.

(Ms Faulkner) indicated that the information was confidential to her; however would consider providing that information.

(Ms Faulkner) has submitted her current recovery program and believes she has taken all reasonable steps in relation to the "work-related stress".

Management have acknowledged this information and have on a number of points disagreed with this assessment. Management will discuss further steps when (Mr Bacon) returns.

(Ms Faulkner) would contact (Mr Sadler or Mr Bacon) as to when she will be returning; probably within a fortnight of this meeting.

[19] On 7 April 2010 Ms Faulkner's new representative, Catherine Stewart, wrote to the Ministry's General Manager Human Resources raising two personal grievances on behalf of Ms Faulkner; unjustified disadvantage (relating to the performance management e-mails) and discrimination against Ms Faulkner because of her union activities in (relating to Mr Sadler's email of 20 November 2009). In this letter Ms Stewart suggested a meeting between the parties to resolve Ms Faulkner's personal grievances and/or the involvement of the Department of Labour mediation service. The Ministry responded on 9 April 2010 advising that Mr Sadler and Mr Bacon had been asked for a report on the matters raised and a formal response would be provided by 30 April 2010. Ms Stewart then advised the Ministry that this timeframe was too protracted she would be seeking urgent mediation assistance.

[20] On 19 April Ms Faulkner provided a new medical certificate saying that she *needs to be on indefinite leave of absence until the legal matters are resolved. It would be detrimental to her mental health to return to work with these issues unresolved.* Mediation took place on 29 April 2010 but the parties were unable to resolve the issues.

[21] Despite further discussions the issues remained unresolved and on 13 May 2010 Ms Stewart wrote to the Ministry advising:

Further to our personal grievance letter to you dated 7 April 2010 we are writing to advise that Ms Faulkner resigns from the Ministry effective immediately.

After considerable effort on her part to resolve this matter, Ms Faulkner's trust and confidence in the Ministry is so seriously undermined that she effectively has no choice but to resign from her employment. There are a number of breaches of the

Ministry's duties to Ms Faulkner, including those arising from her employment agreement and policy documents, which have repudiated Ms Faulkner's employment and have given her no effective choice but to resign.

The letter concluded:

Please treat this letter as a formal notification to you of a further personal grievance on behalf of Ms Faulkner on the grounds of constructive dismissal.

Discussion

Was Ms Faulkner discriminated against?

[22] Section 103 of the Employment Relations Act (the Act) provides that a personal grievance includes that an employee has been discriminated against in the employee's employment and section 104 and s.107 include and define *involvement in the activities of a union* as one of the *prohibited grounds of discrimination*. Section 119 makes it clear that where an *employee alleges that they have been discriminated against by reason directly or indirectly of the employee's involvement in the activities in a union* there is a *rebuttable presumption that the employer or representative of the employer discriminated against the employee on the grounds, or for the reason, ...alleged by the employee.*

[23] Of particular relevance is section 104(2) which defines *detriment* for the purposes of *discrimination* as including *anything that has a detrimental effect on the employee's employment, job performance, or job satisfaction.*

[24] Ms Faulkner alleges that Mr Sadlier's e-mail of 20 November 2009 raised a number of criticisms regarding her participation in what was legal strike action and, in a manner which appeared to be retaliatory, went on to elevate those concerns (about her taking industrial action) to concerns about her work performance. In her written submissions to the Authority Ms Stewart suggests that:

It is clear from reading this e-mail that the reason Mr Sadlier was angry on 20 November 2009 was because he felt aggrieved by Ms Faulkner taking industrial action. The e-mail is riddled with criticism about her industrial action.

It is submitted that Mr Sadlier's email caused Ms Faulkner to be subjected to detriment in her employment for the purposes of section 104(1)(b)... had Ms Faulkner not participated in the strike on 20 November 2009, she would likely not have received the performance management e-mail on that day because there simply would have been no foundation for it.

[25] In his evidence Mr Sadlier says:

The strike wasn't the point. My disappointment was that there was an important meeting with several Maori landowners which she had organized and I did not appreciate the casual way in which she chose to notify us very late (17th) that we would have to find someone else to deal with them.

My 20 November 2009 e-mail arose from my feeling that she was using the strike to cover up her own poor performance.

After 20 November 2009 (Ms Faulkner) was on strike several more times. In none of the strikes by (Ms Faulkner) before 20 November 2009, nor those after, did I have similar performance concerns. The 20 November 2009 e-mail from me was performance related and not strike related.

[26] In his submissions on behalf of the Ministry, Mr Sheriff argues that:

It is not credible to conclude that a single isolated performance related e-mail in the midst of a pattern of ongoing strike conduct of the applicant amounted to discrimination against her. Discrimination is not something established solely by the eye of the beholder. It must be objectively and reasonably established. It is a serious allegation. It is not made out here for the simple reason it is not true.

[27] Put simply, an employee has a personal grievance, on the grounds of *discrimination*, if the actions of their employer which are to the employee's detriment, were as a result, *directly or indirectly*, of the employee's activities as a member of a union. It is for the employer to show that the detrimental action was not as a result of the union activities. In this case there is no doubt that Mr Sadlier's email of 20 November 2009 was to Ms Faulkner's detriment in that had a detrimental effect on her *job satisfaction*. Despite Mr Sadlier's protestations it was, I find, written as a direct result of Ms Faulkner's participation in a lawful strike. Had she not gone on strike he would not have written the letter. It is possible that he would have taken up the performance concerns in some other forum but the Ministry produced no evidence that any process to raise these concerns was initiated or even contemplated at that time. It may be that Ms Faulkner's actions contributed to the situation but this is a matter that I will discuss as part of my determination of the remedies to be awarded.

[28] Ms Faulkner has a personal grievance against the Ministry of Justice on the grounds that she was discriminated against as a result of her taking part in a lawful strike.

Was Ms Faulkner unjustifiably disadvantaged?

[29] Ms Faulkner says that she was disadvantaged in two ways: she was subject to an unfair process which resulted in her being performance managed and the Ministry revoked payment of her sick leave entitlement without proper consultation.

[30] It is difficult to see how Ms Faulkner was disadvantaged by Ms Sadlier's requirement that she be subject to performance improvement plan. Certainly there was some blurring of the motivation for Mr Sadlier's e-mail on 20 November 2009 (dissatisfaction and cynicism regarding Ms Faulkner's motivation for taking strike action and concerns regarding some aspects of her performance). No doubt Ms Faulkner felt extremely stressed by that e-mail. However I am satisfied that Mr Sadlier genuinely had concerns regarding Ms Faulkner's performance. It is regrettable that Ms Faulkner's stress regarding the e-mail, compounded by her concerns regarding the role of the PSA delegate, obscured the quite legitimate attempts by Mr Sadlier to address those performance concerns. As set out above I have found that Ms Faulkner was discriminated against because of her taking part in a lawful strike. She was disadvantaged by the detrimental effect that discrimination had on her job satisfaction. While it is a little artificial to do so it seems appropriate to consider whether, had that discrimination not occurred, would the process followed by Mr Sadlier been unjustified and/or to Ms Faulkner's disadvantage. The answer I find, is no. **I find that Ms Faulkner was not subject to an unfair process which resulted in her being performance managed and does not therefore have a personal grievance against the Ministry for its justified actions in this respect**

[31] The position in respect to the revocation of Ms Faulkner's sick leave is completely the reverse. The Ministry appears to have completely ignored its own guidelines. Those guidelines say that their purpose:

.is to provide managers and staff with information and guidance on the interpretation and application of the "actual and reasonable" sick and domestic leave provisions in the Ministry's employment agreements.

The guidelines described "actual and reasonable leave" in the following terms:

It does not establish a maximum paid leave entitlement and each case is required to be dealt with on its merits. It does however recognise that there may come a time when it is no longer reasonable for the Ministry to support an employee through the provision of paid leave. An employee may inevitably regard a decision not to grant paid leave as a punitive action, however it is not inconsistent with the responsible management of the provisions and the Ministry's obligation to ensure appropriate management of its budget.

The guidelines then establish that *paid sick leave is to be provided for employees who are unable to attend work as a result of genuine illness*, but that there *may be situations where a manager has cause to question whether an employee has taken leave for genuine illness*. The guidelines then set out the process to be followed by the manager where they have such concerns. This process requires that the manager should meet with the employee to satisfy him or herself that the reason for the absence is genuine and the provision of paid leave is reasonable.

[32] On 11 March 2010, Mr Bacon wrote to Ms Faulkner, apparently in terms of the guidelines, inviting her to a meeting on 22 March to *discuss whether your ill health is work or non-work-related*. However, rather surprisingly, Mr Bacon's letter concluded:

Your leave through to 8 March was paid sick leave. Any sick leave after that date will be unpaid sick leave.

[33] Entirely against both the letter and the intent of the guidelines, and without any discussion whatsoever with Ms Faulkner Mr Bacon unilaterally revoked Ms Faulkner's entitlement to paid sick leave. Not only was this revocation a breach of Ms Faulkner's entitlements in terms of the collective agreement, no process, let alone a fair process, was followed in taking an action which was clearly to Ms Faulkner's disadvantage. **Ms Faulkner has a personal grievance against the Ministry for its unjustified actions in revoking her entitlement to paid sick leave.**

Was Ms Faulkner constructively dismissed?

[34] In *Auckland etc Shop Employees etc IUOW v. Woolworths (NZ) Ltd* [1985] ACJ 963, the Court of Appeal held that constructive dismissal includes cases

- where the employer gives the employee a choice between resigning or being fired, or
- the employer embarks on a course of conduct with the deliberate and dominant purpose of coercing the employee to resign, or
- a breach of duty by the employer leads the employee to resign.

[35] Ms Faulkner claims that she resigned as a result of a series of breaches of duty by her employer. In *Auckland Electric Power Board v. Auckland Provincial Districts Local Authorities Officers IUOWInc* [1994] NZCA 250; [1994] 1 ERNZ 168, in dealing with a claim of constructive dismissal as a result of breaches of duty, the Court of Appeal said:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

[36] As set out above I have found that the Ministry did breach its duty to Ms Faulkner in at least two separate ways: by discriminating against her in connection with her union activities and by unjustifiably revoking her entitlement to paid sick leave. Ms Stewart, in her submissions on behalf of Ms Faulkner, argues that that there were a series of events which eventually led to a situation where Ms Faulkner's health and ability to perform her role were deeply effected. In addition to the breaches I have already listed, Ms Stewart adds; a failure to review Ms Faulkner's performance goals, the "action plan" proposed by Mr Sadlier and the Ministry's failure to adequately respond to Ms Faulkner's workplace stress. On this last point Ms Stewart outlines a series of letters and discussions between herself and the Ministry which she says *led to an untenable working situation for Ms Faulkner*. In summary she says;

The Ministry was under no illusion about the serious impact on Ms Faulkners' health of the workplace situation but chose consistently to take no remedial action. The Ministry's actions or inactions, when taken together and in the context of their breaches of duty, show that their conduct was likely to destroy or seriously damage the relationship and trust and confidence with Ms Faulkner.

[37] The Ministry, for its part argues that Ms Faulkner never indicated that she was considering resigning and that none of the actions of the Ministry constitute such repudiatory breaches of duty as to justify termination of the employment relationship. Mr Sherriff argues that (whatever version of the minutes of the meeting are accepted as correct) there was nothing said on 22 March to indicate Ms Faulkner was considering resigning. Rather she indicated that she or her representative would be in touch regarding another meeting. Following that meeting the Ministry received a notice of grievance (7 April 2010) and subsequently attended mediation and subsequently offered to attend further mediation. There was further correspondence between the Ministry and Ms Stewart (non of which indicated that Ms Faulkner was considering resigning). On 13 May 2010 Ms Stewart again wrote to the Ministry advising them that Ms Faulkner was resigning effective immediately and raising a third personal grievance (for constructive dismissal). The Ministry immediately sort further discussion with Ms Stewart but despite these discussions Ms Faulkner's resignation was not withdrawn. Mr Sadlier says that the Ministry's desire was to facilitate Ms Faulkner's return to work and that the resignation came as a complete surprise.

[38] I have given a good deal of thought to the question of whether or not the circumstances which lead to Ms Faulkner's resignation amounted to a constructive dismissal. It is certainly true, as I have found above, that the Ministry breached its duty towards Ms Faulkner. It is also true that these breaches caused Ms Faulkner good deal of distress. On the other hand Ms Faulkner was far from forthcoming in her communication with her employer and there is no evidence that she or her representatives advised the Ministry that she was considering resigning. It can certainly be argued that her resignation may have been precipitous - she could had she wished, chosen to pursue an urgent application in the Authority seeking the reinstatement of her sick leave and compensation for the alleged personal grievances previously raised.

[39] On balance I have reached the conclusion that Ms Faulkner was constructively dismissed. The main factor weighing in favour of this conclusion is the close proximity of those who, in Ms Faulkners mind, had caused her the distress which resulted in her having to take stress leave. She reported to Mr Bacon - who had rescinded her sick leave, thereby cutting off her income, without consultation. Mr Bacon reported to Mr Sadlier, the regional manager, who had discriminated against her because of her union activities. When she raised the possibility of transfer to another office this was rejected as not practical. Ms Faulkner was left with a situation where, when she did recover from stress related illness she would be returning to a workplace which she believed was hostile. While I accept that both Mr Sadlier and Mr Bacon were genuine in their desire to have Ms Faulkner return to the workplace this would have been under all circumstances totally impractical. It was glaringly obvious that Ms Faulkner was unable to be at work because of the stress that being at the workplace had caused her. It should have been equally obvious to the Ministry that unless this ongoing situation was remedied she would have little option but to resign. Under these circumstances I am forced to the conclusion that Ms Faulkner was constructively dismissed in that she had no option but to resign. **Ms Faulkner has a personal grievance against the Ministry of Justice as a result of her constructive dismissal.**

Remedies

Contribution

[40] I have found that Ms Faulkner has 3 personal grievances against the Ministry of Justice being:

- she was discriminated against as a result of her taking part in a lawful strike.
- The Ministry's unjustified actions in revoking her entitlement to paid sick leave.
- She was constructively dismissed.

Before considering what remedies should be awarded to Ms Faulkner I am required in terms of section 124 of the Employment Relations Act (the Act) to consider whether or not she *contributed to the circumstances which gave rise to (her) personal grievance*. If she did I am required to reduce any remedies accordingly.

[41] I find that Ms Faulkner did not contribute to the situation that gave rise to her personal grievances. While she could have been more forthcoming with her employer regarding her intention to resign, I accept that the stress she was under was such that such communication was difficult, even with the assistance of an experienced advocate. Neither the discrimination by

Mr Sadlier, nor the revocation of her sick leave, were matters to which she contributed.

Reinstatement

[42] It was not until the start of the Authority's investigation meeting, some six months after her constructive dismissal, that Ms Faulkner requested that she be reinstated. Under the circumstances I have no hesitation in declining this request. The circumstances which led to Ms Faulkner's constructive dismissal included her loss of trust in her managers. Any reinstatement contemplated would, therefore, necessitate her being transferred another office. I accept the submissions of the Ministry that no such alternate position is available. **Ms Faulkner's application for reinstatement is declined as being impracticable**

Compensation for hurt and humiliation

[43] While I have found that Ms Faulkner has three separate personal grievances against the Ministry it is appropriate to award compensation for the hurt and humiliation these grievances have caused her under one head. Each grievance was directly related to the circumstances of the others - distress caused by the original discrimination grievance contributed to Ms Faulkner's departure on stress related sick leave; the revocation of paid sick leave entitlements arose as a result of the Ministry's assumption that that stress was not caused by factors in the workplace and Ms Faulkner's constructive dismissal was a result of this compounding stress.

[44] Ms Faulkner was clearly distressed. Both her medical practitioner and her husband gave evidence attesting to that distress. The stress caused her first to absent herself and eventually resign from her position. She continued to display symptoms of that stress at the time of the Authority's investigation meeting in November 2010. **In terms of section 123(1)(c) (i) of the Act the Ministry of Justice is to pay Ms Faulkner \$10,000.00, without deduction, as a compensation for the hurt and humiliation it has caused her by its unjustifiable actions.**

Recovery of wages.

[45] Ms Faulkner's salary was stopped with effect from 9 March 2010 when the Ministry unilaterally revoked her entitlement to paid sick leave. At the time of the Authority's investigation meeting (3 November 2010) she had been unable to secure a new employment despite a number of attempts to do so. In terms of section 123(1)(b) of the Act **the Ministry of Justice is to reimburse Ms Faulkner for all wages lost from the time her sick leave was revoked until 30 November 2010.** (Note: in her submissions on behalf of Ms Faulkner, Ms Stewart, at paragraph 7.1, seems to suggest that the Ministry may have already reimbursed Ms Faulkner the unpaid sick leave up to 8 May 2010. Any reimbursement already made should be taken into account when calculating the amount the Ministry is to reimburse under this order.)

Costs

[46] Costs are reserved in the hope that the parties will be able to settle the question of costs themselves. If they are unable to do so Ms Faulkner may file and serve a submission in respect to costs within 28 days of the date of this determination. The Ministry will then have 14 days in which to reply.

Summary

[47] By way of summary of the findings and orders set out above: I have found that:
Ms Faulkner has 3 personal grievances against the Ministry of Justice, being;

- **She was discriminated against as a result of her taking part in a lawful strike.**
- **The Ministry's unjustified actions in revoking her entitlement to paid sick leave.**
- **She was constructively dismissed.**

I have declined Ms Faulkner's request that she be reinstated but have ordered that

- **the Ministry pay her, in terms of section 123(1)(c)(i) of the Act \$10,000.00, without deduction as a compensation for the hurt and humiliation it has caused to her it's unjustifiable actions.**

And:

- **The Ministry of Justice is to reimburse Ms Faulkner for all wages lost from the time her sick leave was revoked until 30 November 2010.**

And
Costs are reserved

James Wilson

Member of the Employment Relations Authority

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