

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Beverly May Phillips (Applicant)

**AND** Bay of Plenty Polytechnic (Respondent)

**REPRESENTATIVES** Bill Nabney, for Applicant  
Mark Beech, for Respondent

**MEMBER OF AUTHORITY** Ken Raureti

**INVESTIGATION MEETING** 1 September 2004  
2 September 2004  
3 September 2004  
18 October 2004

**SUBMISSIONS RECEIVED** 6 October, 2 November and 17 November 2004

**DATE OF DETERMINATION** 17 January 2005

DETERMINATION OF THE AUTHORITY

**Nature of the employment relationship problem.**

[1] Ms Phillips was employed as a Hairdressing tutor. She commenced employment as a casual temporary employee in 1994, moved on to a fixed term contract in 1995, and was confirmed in a permanent position in December 1995. Ms Phillips last day of actual attendance at work was 8 August 2003, she says that she has been unjustifiably constructively dismissed, or alternatively she claims she was unjustifiably disadvantaged.

[2] Her employer, the Bay of Plenty Polytechnic denies that she was unjustifiably dismissed; it says that she resigned of her own accord.

[3] The investigation of this matter was conducted over four full meeting days. The written evidence and supporting documents submitted to the Authority exceeded one thousand three hundred pages, the respondent's bundle of documents totalled 197, and a further 7 documents were discovered during the investigation. In total, I received evidence from 19 witnesses and made further enquiries of 14 of those people at my meeting and allowed the parties representatives an opportunity to further question and explore issues with each of those 14 witnesses. A large amount of the evidence covered matters that were quite sensitive and personal, particularly in respect of Ms Phillips' personal/home circumstances. There were occasions where the sensitivities and emotion attached to certain parts of the evidence necessitated several adjournments to allow Ms Phillips, (with the help of her strong support team) to regain her composure as best as she could in the

circumstances to continue with the meeting. There were also parts of some of the other evidence that differed in perspective, and that perspective was a recollection of how they individually perceived it. I do not intend to summarise all of the evidence, although the parties can be reassured that I have read and listened to it all and had regard for it.

[4] I take this opportunity to thank all of those who attended my meeting, some actively giving evidence and others in a supportive capacity for the manner in which they conducted themselves in what sometimes were emotionally fraught circumstances.

### **Background.**

[5] Ms Phillips' evidence traversed her entire employment with the BOP Polytechnic. She recalled and referred to a number of incidents and issues as having a detrimental affect on her employment such as not long after she had started in 1994, Ms Jewelle Lloyd who had applied for the position that Ms Phillips had got opened the doors to the salon she was teaching in and said to her 'you've got my job' closed the doors and walked off. Another incident Ms Phillips recalled related to March 1999 when she had 6 weeks off work after having ruptured her achilles tendon. During the early stages of her absence, she said the Polytechnic dropped off a full basket of files with a direction that she conduct some follow-up telephone work with students to check on their work experience progress. She said that this happened because Ms Lloyd had instructed the Head of Department to drop the work off for her.

[6] Ms Phillips says that it was after she returned to work from her achilles operation that the team issues, and issues surrounding her work load first arose, and that they continued through to August 2003.

[7] Another example of an incident Ms Phillips gave evidence on related to a serious head on car collision she happened upon in the early hours of one Sunday in July 2003. She assisted at the scene of the accident for some time before the emergency services arrived. When Ms Phillips went to work later that morning, she told two of her colleagues of her experience and advised them that she would need a bit of support during the day. She said she asked Ms Dianne Jewell if she would give her a call when they went to morning tea. As Ms Jewell was going to morning tea, she popped her head into the salon and said "come on" and left Ms Phillips to walk to the staffroom on her own.

[8] These, and other incidents were raised by Ms Phillips to illustrate the work environment she says she had to endure during her employment. However in the course of the investigation meeting (and confirmed in the Ms Phillips' submissions) she is claiming a constructive dismissal relying on the third category as set out in *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963 where she says there was a breach of duty by the Polytechnic that caused her to resign.

[9] The alleged breach of duty on the part of the Polytechnic relates to its actions of convening a team meeting for the 8<sup>th</sup> of August, to discuss "1..Workload-Bev..How can we best use Bev 2..Reveiw Intermediate Hair..Salon vs place for Assesments..3..EFTs review for 04 32 an 14 Is that realistic?." (Email 7 August 2003 doc 134), and the management of that meeting with the prior knowledge of the nature of the complaints to be levelled at Ms Phillips.

[10] Ms Phillips' ASM Workload Agreement for 2003 had a fixed number of teaching hours. She was responsible for the Apprentice Programme and tutored Year 2 and Year 3 classes of which there were to be two of each in 2003. Ms Phillips was also responsible for a series of 1 day seminars and training workshops in specialised areas. During the course of the year, through no fault of Ms Phillips, several training workshops and one Year 2 Apprentice Class were cancelled

leaving her with some available capacity. Mr Diver (Head of School of Retail & Design) and Mrs Jewell raised the workload issues with Ms Phillips on several occasions in respect of how they could replace her lost hours/classes. Whilst Ms Phillips attempted to make up her workload hours and she helped out by tutoring the Certificate of Hairdressing course on several occasions, there was a general belief amongst the rest of the hairdressing team that she was not pulling her weight and she was letting the team down.

[11] The team felt that she was not a team player, and gave evidence of occasions that Ms Phillips would often express a willingness to help out however she would negate it with a “*but*” and would often not assist team members, or would not recognise the urgency of requests for assistance. Over a period of time from about May 2003 (when the Polytechnic found out that the Year 2 Apprentice class would not run) through to the meeting of the 8<sup>th</sup> August, team members were complaining to Mr Diver about their perceptions that Ms Phillips was not team player and concerns about her workloads were raised. Ms Phillips had raised her own concerns with Mr Diver about assessment standards and issues in the Intermediate Hairdressing Programme.

[12] During this period, Ms Phillips’ commitments to her family increased. Her mother nearly died (she had major heart surgery), her father moved in with her, and her son *who is a handful at the best of times was very emotional and used the situation to see just how far he could push boundaries* (6 Aug email doc 131). Mr Diver was aware of a lot of Ms Phillips’ personal circumstances as they often talked about and shared some of their problems. There were several occasions where Mr Diver offered her time out because she was upset, and he even suggested that she contact Relationship Services for support through counselling. Ms Phillips did contact Relationship Services and was receiving counselling during the period.

[13] Ms Lloyd and Ms Jewell were also aware of Ms Phillips’ personal circumstances, and of the need to address the workload/team issues, however they (including Mr Diver) chose to postpone dealing with them in a team meeting environment to give her time to get back on her feet. On 7 August Mr Diver decided to call a team meeting and sent an email to them advising them of a meeting for 3.15pm Friday in the salon to discuss *1..Workload Bev..How can we use Bev? 2..Review Intermediate Hair ..Salon vs place for Assessments.....3.. EFTs review for 04 32 and 14 Is that realistic....* Ms Phillips does not work on Thursdays, and she says she did not receive the email.

### **Friday 8 August 2003.**

[14] During the morning Ms Phillips had attended an 8.15 am meeting and she had an urgent request from the Marketing team to discuss posters for an upcoming hair show. Ms Lloyd was expecting Ms Phillips in the salon at 10.00 am to assist there, however Ms Phillips was of the view that she was not needed there until 11.00 am.. When Ms Lloyd called in to the salon it was in chaos with students needing assistance. Ms Lloyd says she was really angry and she telephoned Ms Phillips to see where she was, and once again *Bev was too busy to come down* and help out. Ms Lloyd hung the phone up in Ms Phillips’ ear. When Ms Phillips arrived in the salon later that morning, the immediate *crisis* was over.

[15] Ms Phillips had a lot of things on her plate that day, she had attended the early morning meeting, had an unplanned meeting with the Marketing team, worked in the salon, and was due to start student assessments the following Monday for which she had not done any preparation, Ms Jewell had arranged a quick meeting requiring Ms Phillips’ attendance for 2.30 pm, and there was also Mr Diver’s meeting later in the afternoon. She said she went back into her office not having had any breaks in the day and not being able to prepare for Mondays assessments and she told Karen Pratt she felt like crying, to which Karen replied *make sure you don’t cry in the meeting.*

[16] Ms Pratt said that she said to Bev, *to be strong* because she *thought Bev may not like some of the things she was going to hear, as no one likes to hear anything negative about oneself*. Ms Pratt said that the other members of the team often had meetings in Ms Jewell's office and the discussions invariably came back to the frustrations surrounding Ms Phillips. She believed that Mr Diver was aware of the intensity of feelings of frustration from the team towards Ms Phillips.

### **3.15 pm meeting.**

[17] The first part of this meeting discussed the matters surrounding the Intermediate Hair Programme, moderation and different assessment standards. Mr John Dickson, (Academic Advisor) attended the first part of the meeting, after which he then left. The second part of the meeting commenced with Mr Diver gesticulating or clapping his hands and introducing the agenda with words to the effect that *Bev believes that she is a team player, but some people here don't think so, or, Everyone thinks that Bev is not a team player but Bev thinks she is*". Mr Diver facilitated the meeting and invited Ms Lloyd to start.

[18] Ms Lloyd described herself as having *a no nonsense nature and was often the mouthpiece for the team and at that time she had absolutely enough of the whole situation*. Ms Lloyd broached the issue of Ms Phillips' workload/hours of work and when Ms Phillips responded to that, being that she did not accept the criticism, Ms Lloyd said that is when she (Ms Lloyd) became sarcastic.

[19] Ms Lloyd's demeanour while she was having her say was described by her team colleagues as *definitely angry, very angry and flushed in the face, quite angry, still angry from the morning salon incident, she vented what she kept bottled up for so long, she got quite wound up explaining Bev's shortcomings and spoke with a raised voice*.

[20] Ms Lloyd's predominant criticisms centred on Ms Phillips perceived unwillingness to help the team out and always seemed to have a *but I have something else to do*, workload/teaching hours, and assessment issues. She was described by her colleagues as *especially trying to get the frustrations she felt through to Bev, some of the things she said to Bev were harsh, quite negative* and at one stage, Mr Diver felt that Ms Lloyd was *getting far too personal* so he stopped it and said *that's not relevant, or, lets not talk about that here*.

[21] After Mr Diver was satisfied that Ms Lloyd had said all she wanted he then went around the table allowing each of the team members an opportunity to have their say, which they did. Unfortunately the tone of the meeting had been set and each person had their own say with further negative criticisms, punctuated with some positives. One person went to within centimetres of Ms Phillips' lips and gestured a zipping motion with her hands towards Ms Phillips' lips and said *you need to zip up the buts*.

[22] Ms Phillips said that she had little or no opportunity to respond to the criticisms of her. I do not accept that assertion, as the overwhelming balance of the other witnesses evidence strongly states that she actively engaged in her self defence, and part of the temperatures and voices rising during the meeting were a result of some of Ms Phillips' reactions.

[23] The meeting would not have been a pleasant experience particularly for Ms Phillips, however when it ended, she followed her colleagues to the salon and expressed to them that she didn't realise that there was such a problem. Ms Phillips went up to Ms Joseph and thanked her for making her aware of her feelings, and apologised to Ms Joseph if she had undermined her.

[24] After the meeting, Mr Diver went and spoke to Mr Dickson because he did not think the meeting had gone well. He felt they had talked about the issues but did not talk them through to resolution with the meeting ending on a bad note.

### **Events after the 8 August meeting.**

[25] On Sunday 10 August Ms Phillips left a telephone message for Mr Diver asking him to contact her. When he returned her call, she was very upset; she wasn't coherent and said she was going to resign. She told Mr Diver that she was not aware of the depth of feeling of the others, that she thought she had been set upon at the meeting and her dignity had suffered. Mr Diver said that he would not accept her resignation while she was in that state and he told her to take some time off as sick leave.

[26] On Wednesday 13 August Mr Diver rang Ms Phillips to see how she was. She was tearful, and again he cautioned her about making a hasty decision on resignation. Mr Diver said they discussed the possibility of sick leave. I accept that Mr Diver was supportive toward Ms Phillips post 8 August and he was trying to facilitate her absence (on pay) through to the end of the year.

[27] On Thursday 14 August Ms Phillips wrote admiration letters to her colleagues and arranged for them to be hand delivered. To Mr Diver she wrote *Dear Graeme.....I totally admire your excellent communication skills, open door policy for all.....I think you have a great sense of humour, full of energy.....and demonstrate a very happy disposition.....I respect you Graeme and believe it is people like you who make a difference in this world. You have certainly made a difference in mine. With love, honour and respect Bev x.*

[28] To Ms Jewell she wrote *Dear Dianne I totally admire and respect your dedication .....You are an awesome tutor.....in fact your talents are many. I love your sense of humour and thoroughly enjoy your company. I also admire the way you have the "guts" to say exactly how a situation is for you.....It's people like you who can make a difference in this world. You have certainly made a difference in mine. With love, honour and respect Bev x.*

[29] To Ms Lloyd, she wrote *Dear Jewelle If there is something I admire about you, it is your "guts" and ability to respond on the spot, no matter what the situation might be. You are incredibly focussed and I admire your determination and drive. I love your sense of humour and remember with fondness some of the laughs we have shared.....Ben and Adam are lucky to have such a dedicated Mum and one who is filling the cake tins. It is people like you who can make a difference in this world. You certainly have made a difference in mine. With love, honour and respect Bev x*

[30] After Ms Phillips had been off work for some weeks she read a provision in her employment agreement dealing with disregarded sick leave which provides an entitlement to sick leave on pay which is not debited from the sick leave entitlement. There are certain criteria which have to be met for disregarded sick leave to be granted. Ms Phillips was firmly of the view that her circumstances met the criteria and that she should be granted the disregarded sick leave, so she requested it through Mr Diver. He sought advice from HR and was told that Ms Phillips' circumstances did not meet the criteria. Ms Phillips did not accept that interpretation and asked once again for the leave.

[31] By this stage (8 October) Ms Phillips had been off work for 2 months and she had just provided the Polytechnic with a medical certificate saying she would be unfit for work for a further 60 days. The Polytechnic had already been communicating with her about the duration of her absence and on the 8<sup>th</sup> October Mr Diver wrote to her seeking a meeting with her to discuss her absence and a likely return date as planning was underway for the 2004 staffing levels. He advised

her that her sick leave allocation runs out on the 29<sup>th</sup> October 2003 and reconfirmed HR's view that disregarded sick leave did not apply in her circumstances; however it needed to be discussed further.

[32] Ms Phillips contacted Mr Diver and told him that she didn't think that she would ever return to work but she needed to get well enough so that she would be psychologically and emotionally able to make that important decision. She told him that her firmly held view is that she is entitled to the leave and she would fight to get it. She also contacted Dr Alan Hampton, the CEO of the Polytechnic and arranged to meet with him to discuss her situation.

[33] That meeting occurred on the 28<sup>th</sup> October 2003. The outcome of the meeting was that Dr Hampton was going to get back to her on the issue of disregarded sick leave and if it was not allowed to her she would have to take unpaid leave or annual leave. By the 4<sup>th</sup> of November Dr Hampton had not got back to Ms Phillips so she instructed her lawyer to give notice of a personal grievance by way of an unjustified disadvantage.

[34] On 12 November Dr Hampton (pp'd by Ms Carol Delaney, HR Manager) wrote to Ms Phillips asking her what her intentions were. The letter did not address the disregarded sick leave issue and nor did it address the issues raised in Ms Phillips' 4 November notice of a personal grievance.. Ms Phillips replied to Dr Hampton's letter personally and said: *In your letter of 12 November 2003 you have not referred at all to the matters raised by Bill Nabney in his letter to you of 6 November and you have not given any indication as to whether you intend to address any of those matters.*

*As advised in that letter, the manner in which I have been treated is intolerable and I am unable to continue working at the Polytechnic. Accordingly, I advise I hereby resign from the Polytechnic, the date of resignation to be 12 November.*

[35] The letter goes on to emphasize that she had no option but to resign because of the Polytechnic's treatment of her which was further exacerbated by its failing to address any of the issues raised by her.

## **Legal principles**

[36] Generally speaking, a constructive dismissal can be difficult to establish and the onus is on the employee to show that there has been a substantial action or inaction on the part of the employer that leads to a resignation. Because Ms Phillips is claiming that a constructive dismissal occurred, the onus of proof falls upon her to show that there was indeed a dismissal, rather than just a resignation offered at her own initiative. As was held by the Employment Court in *Compass Union of NZ Inc v Carlton United Breweries (NZ) Pty Ltd* [1992] 1 ERNZ 1 at p.2:

“Although it is clearly established by authority in cases such as this that justification for a dismissal must be established by an employer, when such a preliminary question as the existence of an employment relationship or the fact of a dismissal as opposed to a resignation are challenged, the onus of persuading the Court that such necessary prerequisites exist rests upon the applicant. See, for example, the judgments of the Labour Court in *Northern Hotel etc IUOW v Little Ponsonby Tavern Ltd* [1990] 2 NZILR 113 and *Airline Stewards and Hostesses of NZ IUOW v Air New Zealand* [1998] 2 NZILR 883.”

[37] The legal principles to be applied to constructive dismissal claims have been set out in a number of Court decisions. In *Auckland Shop Employees IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963 the Court of Appeal held that constructive dismissal included, but was not limited to, cases where:

- i) *An employer gives an employee a choice between resigning or being dismissed;*
- ii) *An employer has followed a course of conduct with the dominant purpose of coercing an employee to resign;*
- iii) *A breach of duty by the employer leads an employee to resign.*

[38] What we are looking at in this case is the third category and whether the circumstances fall within it.

[39] In *Wellington Clerical Workers' Union v Greenwich* [1983] ACJ 965 Williamson J held that:

*"It is essential to examine the actual facts of each case to see whether the conduct of the employer can be fairly and clearly said to have crossed the border line which separates inconsiderate conduct causing some unhappiness and resentment to the employee from dismissive or repudiatory conduct reasonably sufficient to justify termination of the employment relationship".*

[40] In *Western Excavating Ltd v Sharp* [1978] 1 All ER 713 at 717 per Lord Denning MR, Lawton and Everleigh LJJ concurring it was held that:

*"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once."*

[41] In *NZ Woollen Workers' Union v Distinctive Knitwear NZ Ltd* [1990] 2 NZILR 438 at 448 per Goddard CJ held that:

*"But conduct falling short of a breach of a contractual term including any duty implied into it by law cannot entitle the worker to cancel the contract by resigning. For example, in this case there was evidence given by workers that Mrs Malcolm sometimes snapped at them or spoke to them in a manner which they regarded as inappropriate. That evidence if accepted, by itself, in the absence of any element of unfairness or oppressive conduct, is not enough. The law does not compel parties to a contract to do more than perform it and it does not require them to perform it politely, nor is this Court empowered to enforce courtesy in the workplace, no matter how desirable in that environment that quality undoubtedly is."*

[42] In the months, weeks and even days prior to the August meeting Ms Phillips was under external pressures. She sent various emails to Mr. Diver and Ms Jewell saying how she *was unsure if she could cope*, how *tough it was with all the other shit going on in her life* and she *did not have the usual support of her parents*.

[43] On the 6<sup>th</sup> of August she sent an email to a friend saying *she had passed her use by date in a lot of areas in her life. Her crisis at that time was her son who had been totally out of control and became verbally and physically abusive towards her* to the extent that she had called the police in for assistance.

[44] Understandably, the meeting of 8 August would have been a very difficult meeting for Ms Phillips. She was the subject of negative criticisms and came under fire of some personal and inappropriate comments and behaviours. The Polytechnic has to take some responsibility for the manner in which it managed the meeting and the circumstances surrounding Ms Phillips' reduced workload hours and making the time up.

[45] While it is my view that the Polytechnic must take some responsibility for its actions and inactions, there is in my view no compelling evidence demonstrating repudiatory conduct on the part of the employer to any degree serious enough to amount to a constructive dismissal.

[46] It is my determination that Ms Phillips was not constructively dismissed but the actions and inactions of the Polytechnic, and the manner in which it managed Ms Phillips' request for disregarded sick leave created a situation that affected her employment to her disadvantage. Dr Hampton's letter to Ms Phillips of 12 November did not address the disregarded sick leave. The advice Ms Delaney gave to Mr. Hampton was that in her view the leave did not apply, and given the amount of sick leave that Ms Phillips had already taken, even if Ms Phillips had fitted into the clause criteria she did not believe that Ms Phillips should be granted any further leave. Ms Delaney was also of the view that requiring Ms Phillips to take annual leave when her Sick leave entitlement ran out may motivate her to make a final decision about returning to work. The sick leave Ms Phillips had taken up to 29 October 2003 was her accumulated contractual right, it should not have featured in Ms Delaney's considerations of entitlement to disregarded sick leave.

[47] Ms Phillips' employment was affected to her disadvantage by an unjustifiable action of her employer, she has a personal grievance under section 103 1 (b) of the Employment Relations Act 2000 and is therefore entitled to remedies.

### **Remedies.**

[48] The remedies available to Ms Phillips relate to humiliation, loss of dignity and injury to feeling under s.123 (c) (i) of the Act. Under s.124 the Authority must consider the extent to which the actions of the employee contributed towards the personal grievance. To that extent I do not consider Ms Phillips' conduct blameworthy to an extent that the remedies should be reduced at all. I am satisfied that Ms Phillips has suffered humiliation, loss of dignity and injury to her feelings, however in light of the other external stresses and crisis she was embroiled in at the time I do not accept that the Polytechnic was the complete source of her injury to feelings. Accordingly, the Polytechnic is required to pay Ms Phillips the sum of \$4000.00 pursuant to s.123 (c) (i).

### **Costs**

[49] Costs are reserved.