

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

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| BETWEEN | Adrienne Scott (applicant) |
| AND | Chief Executive, Department of Corrections (respondent) |
| REPRESENTATIVES | Megan Williams for the applicant Phillip Cornegé for the respondent |
| MEMBER OF THE AUTHORITY | Denis Asher |
| INVESTIGATION | Wellington, 7 February 2006 |
| DATE OF DETERMINATION | 13 March 2006 |

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. Ms Adrienne Scott says she was unjustifiably disadvantaged by the Department – statement of problem received on 1 November 2005. By way of advice communicated during the investigation into her employment relationship problem, Ms Scott advised that the amended remedies she now sought were \$7,000 compensation for humiliation, etc and costs.

2. The Department says the disadvantage claim is without merit and says it should be dismissed – statement in reply received on 18 November.
3. The parties did not settle their employment relationship problem in mediation. Agreement was subsequently reached on a one-day investigation into the substantive problem in Wellington commencing at 10.00 a.m. on 7 March 2006. The parties provided witness statements and some documents in advance of the investigation as well as, in the applicant's case, further documents during the investigation. Efforts by the parties to settle the matter on their own terms during the investigation were unsuccessful.

Background

4. The key facts are largely agreed.
5. By way of a written individual employment agreement (IEA), signed off by the applicant on 14 July 2003 and effective from the 31st of that month, Ms Scott was employed by the Department in the position of intervention services trainer, Head Office, Wellington. She was required to *“deliver training, participate in the development of course content and materials and promote and model high standards of skill development and process integrity for course participants”* (position description dated 23 April 2003, statement of problem). What that means is that Ms Scott was required to deliver training to staff who undertake and deliver offender assessment and rehabilitative intervention programmes.
6. Her internal functional relationships were to, amongst others, other trainers, the training co-ordinator, programme facilitators and probation officers and sentence planners; external relationships included external providers, community groups and hapu and iwi (position description, above).
7. Clause 22 of her IEA encouraged Ms Scott to raise any issues she had about her employment with her manager. It also set out a plain language explanation of the Employment Relations Act 2000, the requirements for raising a personal grievance – including the 90-days requirement – and details about the mediation services provided by the Department of Labour.

8. By email dated 27 October 2004 and letter of 12 March 2005, Ms Scott's representative – Ms Megan Williams – advised the Department of the applicant's concerns. The letter of 12 March advised of Ms Scott's belief that,

... she has been disadvantaged in her appraisal process as a result of her being expected to do Maori Culture training. She believes there has been a breach on (the Department's) part of her employment agreement ...

As you are aware, when she was first employed and since that time she has voiced concern to you on many occasions regarding the fact that she was not comfortable carrying out the Maori cultural training programs. She did not consider that she had the required training in the subject to feel competent and safe to do so. ...

... Ms Scott believes she now has a personal grievance.

(attachment to statement of problem)

9. In its reply dated 22 March the Department expressed surprise at notification of the grievance because, *"Ms Scott is not required to deliver Maori cultural training as part of her performance review"* (statement of problem). Also, Ms Scott was not being measured on her ability to deliver Maori cultural training as part of her performance review. However, her role required Ms Scott to support new employees, including new trainers and new Maori cultural trainers *"in the generic aspects of their training role"* (above). Her grievance was therefore considered as without merit.
10. Ms Scott responded by seeking mediation as she believed she had been detrimentally affected in her performance assessments and resulting remuneration considerations. While not resiling from its position, and in a letter dated 4 April 2005, the Department properly agreed to undertake mediation.
11. In an earlier letter dated 11 March, the Department communicated to Ms Scott its wish to meet with her to discuss various concerns it had about her performance.
12. In a report dated 21 June, and for various reasons set out therein, a Department review panel concluded that *"a fair process was not followed in conducting the assessment of Ms Scott in the 2003/04 Assessment"* (attachment to statement of problem). The

Review Panel also recorded that it was not required to, and had not, commented on whether Ms Scott's progression competencies had been met.

13. Ms Scott resigned from the Department on 2 May 2005, effective 17 June.

Applicant's Position

14. Ms Scott's statement of problem sets out her claim that she was required to deliver Maori cultural training to trainers in prisons notwithstanding her advice to the Department, on numerous occasions, that she was not trained to do so.
15. During the investigation into her substantive employment relationship problem, Ms Scott said that she was unjustifiably disadvantaged by the Department's failure to not always ensure that, when delivering training, she was accompanied by a suitably qualified Maori cultural trainer. Because she is Maori, Ms Scott found that the attendees expected her to deliver the Maori cultural training component of the course. Because she was not trained to do so, Ms Scott found the situation invidious (my term) – she felt pressured to undertake Maori cultural training when, in reality, she was not qualified to do so and it was unsafe.
16. Ms Scott says she and her representatives raised her concerns with the Department on a number of occasions with – she claims – sufficient particularity that it would, or should, have been aware of the implications of its actions and of her resulting distress. She was disadvantaged by the Department, and other's, assumption that – as a Maori – she was competent to undertake Maori cultural training, when in fact she had made clear to the former she was not adequately trained to do this work. Her performance review was marked down to her disadvantage.

Respondent's Position

17. While disagreeing with the substance of her claim, the Department accepts that Ms Scott raised a personal grievance in respect of the alleged requirement that she deliver Maori cultural training. The Department's position is clear: it has never required Ms Scott to deliver Maori cultural training. It accepted she was not employed nor sufficiently skilled to provide such training. The Department

communicated that advice to Ms Scott on a number of occasions during her employment with the respondent, along with the assurance that the applicant would not be measured on her ability to deliver Maori cultural training as part of her performance review.

18. It does not accept her new allegation – that it placed her in an unsafe and humiliating situation by failing to always ensure the presence of Maori cultural trainers at training sessions run by the applicant – was ever raised at all or within the required 90-day period. Also, it does not accept that this is a legitimate grievance. No mention of this claim is made in any of the applicant's communications including the advice of a grievance dated 12 March 2005, in which Ms Scott's complaint about an expectation to undertake Maori cultural training is repeated. No mention of this complaint was made on any other occasion, despite the fact that the parties met on numerous occasions in respect of the applicant's concerns. It was not fair to the respondent to now say it should have been aware of Ms Scott's concerns.
19. Even if the applicant provided cultural training, Ms Scott has not produced any evidence in support of her claim that she experienced significant disadvantage. The reference to *Commitment* in her 2003/04 draft performance review (document 19 in the applicant's bundle) is an assessment in respect of her position, and not an expression of the Department's expectation that she undertake Maori cultural training – refer to the *Responsiveness* section of the applicant's *Person Specification* (attached to the statement of problem) where the requirement that she demonstrate an understanding and respect for Maori, Pacific Peoples' and ethnic minorities' values and beliefs is made clear.
20. Ms Scott has not raised a personal grievance in respect of the concerns she expressed during the Authority's investigation about the accuracy or fairness of her 2003/04 draft performance review. The final document anyway restored her original *Commitment* mark of 3 as sought by Ms Scott, following her complaint about its earlier reduction to 2. There is no evidence in support of, and no basis to, Ms Scott's claim her performance review was adversely affected by her refusal to undertake Maori cultural training.

21. While the respondent accepts the genuineness by which Ms Scott holds to her concerns, the applicant nonetheless is unable to establish any actual disadvantage in respect of her complaints. Any claims of disadvantage must be discounted by the broader concerns the applicant held and expressed about the manner in which the Department undertook training, including Maori cultural training.

Discussion and Findings

22. I am satisfied there is no basis to Ms Scott's claim she was disadvantaged, either in respect of the original claims as set out in her advocate, Ms Megan Williams' letter of 12 March 2005 or – notwithstanding the respondent's legitimate concerns about the failure to raise the grievance within 90-days – the significantly different claim put by the applicant during the substantive investigation. I reach this conclusion for the following reasons.
23. As is evident from minutes, letters, emails and witness statements, there is a lengthy history of communication between the parties about Ms Scott's concerns, between 2003 & 2005. What clearly emerges from their communication is that Ms Scott, on numerous occasions, objected to what she saw as the Department's expectation she undertake Maori cultural training. She also raised a related concern, that her refusal to do that work would detrimentally affect her performance assessments and her resulting remuneration. No mention is made of the applicant's concern she was coming under pressure as a result of having to undertake training without the assistance of Maori cultural trainers.
24. What is equally clear are assurances by the Department that Ms Scott was not required to undertake Maori cultural training and had not been measured on her ability in that area as part of her performance review – as examples, refer to Mr Ken Mair's witness statement, produced as it was by the applicant, recording the parties' exchange at meetings on 10 & 16 December 2003. See also the parties' correspondence of 12, 22 & 29 March 2005 attached to the statement of problem.
25. Ms Scott appears to have accepted the first assurances communicated by the Department at the 10 & 16 December 2003 meeting: I reach this conclusion because the applicant took no further steps to pursue a grievance at that time. Mr Mair is an

experienced and skilled advocate who has appeared on a number of occasions before the Authority. It is difficult to imagine that, as a result of his advice, Ms Scott did not appreciate the options available to her at that time: they were, essentially, accept the assurances or take the matter further as a personal grievance. As it happened, Ms Scott delayed pursuing those same concerns until she authorised Ms Williams to put them forward in the latter's letters of 12 & 29 March 2005. In between December 2003 and March 2005 there is no evidence of any changed or adverse actions by the Department, in respect of Ms Scott.

26. What also emerges clearly from the record of communication is the failure of Ms Scott and/or her representatives to articulate at any time the grievance put during the Authority's investigation, that the Department should have known it was placing Ms Scott in an invidious and humiliating position by requiring her to carry out training without the support of a Maori cultural trainer, when the attendees would expect the applicant – as a Maori – to perform that work.
27. It is clear from the flavour and specifics of the communication between the parties that Ms Scott held sincerely and strongly felt views about the inadequacy of the Department's training programme, in particular its Maori cultural training programme. However, those concerns do not amount to personal grievances as they cannot be said to have unjustifiably disadvantaged the applicant.
28. In light of the extensive communication between the parties, the Department would have fairly and reasonably expected of Ms Scott that – in the context of those communications – she would have articulated all her concerns, including the one raised during the Authority's investigation about the pressures she felt when required to provide a training course without the presence of a Maori cultural trainer. Ms Scott's failure to properly put her employer on notice cannot now be turned into a legitimate complaint that the respondent should have anticipated the applicant's dilemma.
29. I am therefore satisfied that the Department did not behave unjustifiably toward Ms Scott and/or of her being disadvantaged.

30. Finally, I am satisfied that the applicant did not raise her grievance, as it was articulated during the Authority's investigation, within the required 90-days. Further, the applicant has properly not sought leave to raise a grievance outside of the 90-day period as it would be very difficult to see how grounds for exceptional circumstances might apply. This is because Ms Scott was represented at key occasions in respect of her concerns and took other initiatives in respect of them which clearly illustrate her familiarity with what was required of her to pursue such matters.

Determination

31. For the reasons set out above I find against the applicant, Ms Adrienne Scott's, substantive claim against the respondent, the Chief Executive, Department of Corrections, that it unjustifiably disadvantaged her.

32. As advised to the parties, costs are reserved.

Denis Asher

Member of Employment Relations Authority