



[2] Mr de Souza lodged a statement of problem in the Authority on 29 April 2019. At the time he was still employed by Remarkable Tortillas but had been on annual leave from 5 April 2019. At the Authority's investigation meeting, Mr de Souza clarified that he was claiming unjustifiable dismissal as well as unjustifiable disadvantage.

[3] Remarkable Tortillas denies all Mr de Souza's claims. Through its director, Russell Griffiths, it says it treated all its employees equally and fairly. It says it was supportive to Mr de Souza in many ways such as making rental accommodation available to him and supporting him in some personal matters. It rejects Mr de Souza's claims regarding his workplace injury and says it supported him throughout from the time he reported his injury. It denies dismissing Mr de Souza.

[4] The parties attended mediation but were unable to resolve the differences between them.

### **Issues**

[5] The Authority must determine:

- (a) Whether Mr de Souza was unjustifiably disadvantaged in the workplace;
- (b) Whether he was unjustifiably dismissed;
- (c) If (a) and/or (b) apply, what remedies are appropriate; and
- (d) Whether issues of contribution arise.

### **The Authority's Investigation**

[6] In the course of the investigation I heard from Mr de Souza himself and one other witness who gave evidence for him. Four witnesses gave evidence for Remarkable Tortillas. I am not required to set out a record of all evidence heard or received, as specified in s 174E of the Employment Relations Act 2000 (the Act) and will not do so. In determining this matter, however, I have carefully considered all the material placed before the Authority, including all evidence of the parties and the submissions they made.

[7] This determination has been issued outside the time frame set at s 174C(3) of the Act in circumstances the Chief of the Authority has decided, as he is permitted by s 174C(4) to do, are exceptional.

**Was Mr de Souza harassed, unfairly treated and disadvantaged in his employment?**

[8] Mr de Souza's evidence of harassment and unfair treatment related mainly to issues around taking leave for personal reasons; taking annual holidays; treatment by his employer while he was on sick leave; workplace safety concerns; and his privacy not being respected while he was renting accommodation above the workplace.

[9] Mr de Souza said he began to ask for annual holidays after he had been employed by Remarkable Tortillas for a year. He did so, he said, because his body was tired from the physical nature of the work he performed and the working environment, which involved the heat of commercial ovens. Mr de Souza also said he needed time off to heal a foot injury he had sustained at work in August 2018 and for which he had obtained a medical certificate from a general practitioner (GP).

[10] Mr de Souza's evidence was that he asked his manager verbally for the leave but was denied. His manager was Mr Daniel Griffiths whom I shall refer to as Mr D Griffiths to avoid confusion with his father, Mr Russell Griffiths (Mr R Griffiths).

[11] Remarkable Tortillas rejects Mr de Souza's allegations. Mr R Griffiths said Mr de Souza made regular requests for leave and for time off to attend to personal matters. These were often approved, even when the request was made at short notice. When leave was declined for business continuity reasons, Mr de Souza would react adversely and accuse his employer of not caring about him or treating him badly.

[12] Mr R Griffiths acknowledged there was sometimes poor communication on both sides between Mr de Souza and Mr D Griffiths, usually relating to Mr de Souza requesting leave to attend to personal matters that day. Accommodating those requests created difficulties and frustrations for the company in attempting to maintain its production schedule. Mr R Griffiths said the employer supported Mr de Souza in many ways by making rental accommodation available when his previous living arrangements were unsatisfactory to him, and helping him with transport and time off for Court and personal matters.

[13] Text messages between Mr de Souza and Mr D Griffiths support Remarkable Tortilla's assertions that Mr de Souza often gave scant notice of wanting to leave work early, or take a day's leave for personal reasons. Text messages provided to the Authority by Mr de Souza show, for example, that on 17 and 31 October 2018, and on 2 November 2018, Mr de Souza

notified his employer in the morning that he needed to leave early or take time off work to attend to personal matters that day. Some of Mr D Griffiths' text responses expressed a willingness to try to accommodate Mr de Souza's wishes while others made clear his frustration at being given insufficient notice to arrange cover for Mr de Souza's absence.

[14] In some of those text exchanges Mr D Griffiths referred to the difficulties Mr de Souza's absence would create in the production line. In other texts he expressed his annoyance at receiving requests from Mr de Souza to leave early that day. On one occasion Mr D Griffiths reacted sarcastically to Mr de Souza's leaving work abruptly because he (Mr de Souza) was annoyed at something a production worker had said to him.

[15] Some of the communications between Mr de Souza and Mr D Griffiths do not reflect well on either the employee or the manager. However, I do not find evidence of leave being denied unreasonably to Mr de Souza. I note that some of his "requests" for leave were couched more as statements of intent to take leave and were made within an unreasonably short timeframe in the context of a production process.

[16] On 10 October 2018 Mr de Souza emailed his manager asking to "have days off and have my holidays...as soon as possible". Mr D Griffiths responded the same day that at present the company was "struggling to keep up with production" and was trying to employ someone but, until that happened, "we can't really afford to give you time off". He hoped to be able to give Mr de Souza time off shortly, once the staffing situation was resolved.

[17] Mr de Souza was entitled to take his annual holidays after having completed 12 months of continuous employment for Remarkable Tortillas.<sup>1</sup> The timing of his holidays was a matter for agreement between Mr de Souza and his employer. However, an employer must allow an employee to take annual holidays within 12 months after the date on which the employee's entitlement arose, and must not unreasonably withhold consent to an employee's request to take annual holidays.<sup>2</sup>

[18] Applying the statutory requirement to Mr de Souza's situation I find it was not unreasonable for Remarkable Tortillas to ask him to wait until it had employed another staff member in order to ensure continuity of production before he took his annual holidays. I do not find the employer denied Mr de Souza the opportunity to take his holidays and it did engage

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<sup>1</sup> Holidays Act 2003 at s 16.

<sup>2</sup> Ibid at s 18.

with him over the matter. As events evolved, Mr de Souza was away from work on ACC leave from November 2018 until March 2019. I will return to this shortly in the context of his claim to have been unjustifiably dismissed.

[19] Mr de Souza's claims to have been harassed and unfairly treated in his employment were not borne out by the evidence presented to the Authority. He described one incident where he said his employer was not compassionate by not offering to take him to hospital when he was suffering from back pain in November 2018.

[20] Mr R Griffiths' evidence was that, while Mr de Souza had on occasion previously been transported to personal appointments by Ms Anna Griffiths, he thought it inappropriate to do so when an employee was in pain. In his view it was more appropriate for an ambulance to be called so that trained medical personnel could attend Mr de Souza. That seems to me to be a prudent approach to take rather than a demonstration of a lack of compassion.

[21] Another claim by Mr de Souza was that, after he moved into accommodation above the work premises, Mr R Griffiths would go to his room all the time and he felt like a hostage. Mr R Griffiths denied this. He recalled going to Mr de Souza's room only twice while he was living above the work premises, the first time being to show the ambulance personnel where Mr de Souza was.

[22] The second time Mr R Griffiths recalled going to Mr de Souza's room was on 28 December 2018 when he enquired if Mr de Souza would be at work the following day as his medical certificate had expired. Mr Griffiths said he did this as he needed confirmation from Mr de Souza for production planning purposes. He said he did not enter the room but talked to Mr de Souza from the landing outside the room.

[23] Mr de Souza's evidence of the second of those occurrences was very different from that of Mr R Griffiths, including allegations that his employer yelled and screamed at him. While I have little doubt the conversation was robust, my observation of the respective demeanours of Mr de Souza and Mr Griffiths during the investigation meeting leads me to conclude Mr de Souza's account of the event was likely to be much exaggerated.

[24] There was no evidence to support Mr de Souza's claim that the further injury he suffered after returning to work resulted from his employer not following medical advice. Both parties referred to an inspection visit from an ACC investigator which did not appear to have resulted

in any recommendations for change to the workplace. The report was not provided to the Authority but an ACC provider described the work as “light to medium physical demand”. Documents provided by Remarkable Tortillas confirm the employer worked with the ACC provider on a graduated return to work plan for Mr de Souza following his longer period on ACC from November 2018 to March 2019.

[25] After considering the claims made by Mr de Souza, I conclude he was not disadvantaged in his employment by any unjustifiable actions of his employer and therefore does not have a personal grievance in terms of s 103(1)(b) of the Act.

### **Was Mr de Souza dismissed?**

[26] Mr de Souza did not identify any one event as constituting a dismissal. I have concluded he considered he had been constructively dismissed, although that was not the terminology he used. In his evidence Mr de Souza claimed his employer had wanted him to resign and had created a bad working environment to achieve the termination of his employment. That brings his claim squarely into the realm of constructive dismissal and I will examine the circumstances leading to the ending of his employment through that lens.

[27] The Court of Appeal in *Auckland Shop Employees Union v Woolworths (NZ) Ltd* considered the kinds of case that could be treated as constructive dismissals.<sup>3</sup> It held they included, but were not limited to, cases where:

- (a) an employer gives an employee the option of resigning or being dismissed;
- (b) an employer has followed a course of conduct with the deliberate and dominant purpose of coercing an employee to resign; and
- (c) cases where a breach of duty by the employer leads an employee to resign.<sup>4</sup>

[28] Mr de Souza accused Mr R Griffiths of trying to obtain his resignation without actually using that word, and of making the workplace unpleasant for him so that he would not want to remain there. Mr Griffiths denied ever having sought Mr de Souza’s resignation. His evidence is that Mr de Souza indicated he no longer wished to work for Remarkable Tortillas but that the employer did not treat that as a resignation. I will outline the events that led to this situation.

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<sup>3</sup> [1985] 2NZLR 372.

<sup>4</sup> Ibid at 374 & 375.

[29] Mr de Souza suffered an injury on 8 November 2018, for which he had one week off work on a medical certificate after which he returned to the workplace. He continued to experience pain, however, and shortly afterwards obtained the first of a series of medical certificates, which resulted in him being off work on ACC for four and a half months as I have referred to earlier in this determination.

[30] Mr de Souza returned to the workplace on 11 March 2019 on a graduated return to work plan involving reduced hours for a two-week period. This was described as a “work trial” by the ACC Provider (the Provider) that liaised with Mr R Griffiths over the plan. The Provider was in contact with Mr Griffiths during the trial to check Mr de Souza’s progress. The trial was clearly deemed successful as Mr de Souza was cleared for full-time work by his medical specialist from 25 March 2019.

[31] Mr Souza said he did not like the work environment when he returned to the workplace in March 2019. He said only one of the employees spoke to him and that he felt he was being picked on passively. He did not provide any specific examples of the poor treatment he claimed to have received.

[32] In one of Mr R Griffiths’ texts in response to a request from the Provider as to Mr de Souza’s progress during the two-week trial period, he noted how well Mr de Souza was coping with the physical demands of the job but also referred to his “*sullen and grumpy state*”. In a text to Mr R Griffiths on 28 March, Mr de Souza made it clear he did not wish to work more than 6 hours a day as he was “*doing a course and other activities and I have to program my life to carry on.*” He informed Mr Griffiths he could not work after 4pm daily and that he had training that was important to his career on three evenings a week.

[33] The following week, beginning Monday 1 April 2019 Mr de Souza was on a course in Wellington at the start of the week. Mr R Griffith said Mr de Souza told him the course was to help him find another job. He arrived back in the workplace after lunch on Thursday 4 April although according to Mr Griffiths he had been scheduled to start at 10.00 am. He left abruptly later in the day before his shift had ended and he texted Mr R Griffiths as he left work.

[34] Mr de Souza’s text, which I was shown in the course of the investigation meeting, included the words “*I am leaving the company*”; “*You won Russell*”; and “*I want my holiday pay as soon as possible. If I can start tomorrow it would be amazing*”.

[35] Mr de Souza did not report for work the following day but emailed Mr Griffiths reiterating his request for his annual leave immediately. His email of 5 April referred to the bad work environment and accused Mr Griffiths of wanting “*to get rid of me*” since his injury.

[36] Mr Griffiths invited him to come into the office that day to discuss the matter as he was unclear as to Mr de Souza’s intentions. He said he needed to clarify what Mr de Souza meant as it sounded as though he was leaving his employment. Mr de Souza did not come in that day as he had been requested, but did meet Mr Griffiths at the factory on Monday 8 April.

[37] Mr Griffiths said Mr de Souza told him he no longer wanted to work at Remarkable Tortillas and he asked the employee if he would confirm that in writing. Mr Griffiths said he did not ask Mr de Souza to resign, but simply to record in writing what he had told him. Mr Griffiths also said they reached agreement that Mr de Souza would be paid weekly until his holidays expired, which Mr Griffiths subsequently confirmed in an email.

[38] Mr de Souza did not confirm in writing what he had told Mr Griffiths. A week later he emailed his employer saying that he was not going to resign as Mr Griffiths had requested. I do not accept this email establishes that Mr Griffiths had asked for Mr de Souza’s resignation and I accept Mr Griffiths’ evidence of what he had asked Mr de Souza to do. In preferring Mr Griffiths’ evidence I take into account that Mr de Souza acknowledged in the investigation meeting that Mr Griffiths had not used the words “resign” or “resignation” to him.

[39] I also take into account evidence that Mr Griffiths did not treat Mr de Souza as having resigned. He referred to the period of holiday leave being an opportunity for Mr de Souza to “cool off” from the events of 4 April when Mr de Souza had left work abruptly before the end of his shift. This brings me to consider two incidents that had occurred that day.

[40] The first incident involved a young relative of Mr Griffiths, Olivia Griffiths, who was also employed by Remarkable Tortillas. Ms Griffiths gave evidence that Mr de Souza had approached her that day when she was alone in the office. He had informed her aggressively that she was not his instructor; she was not to give him instructions as he only took instructions from a supervisor not from a little girl; and she was to show him respect as she was “*just young and still in nappies.*”

[41] Ms Griffiths said Mr de Souza then stormed out of the office. She said this incident happened after she had told him earlier the wraps that were being produced that day were “a

*bit small*". Ms Griffiths described her communication to Mr de Souza as one that was normal between the packers and oven operators. She said she was frightened and felt degraded by his treatment of her, which she spoke about to her employer the next day.

[42] Mr de Souza denied the incident and, in oral evidence, accused Ms Griffiths of lying. He said there was no issue about the tortillas being too small that day and he spoke dismissively about Ms Griffiths.

[43] The second incident that occurred on 4 April 2019 allegedly involved Mr de Souza approaching an oven operator some time after the incident involving Ms Griffiths and shouting and swearing at him without provocation, leaving the employee shaken and distressed. Mr de Souza left the workplace after that incident.

[44] The oven operator provided a signed statement but was unable to attend the Authority investigation. As his evidence was not able to be tested, I form no conclusion about that incident other than to note the employee's written evidence is consistent with Ms Griffiths' written and oral account of Mr de Souza speaking and acting aggressively to her that afternoon.

[45] I was not convinced by Mr de Souza's denials of the incident involving Ms Griffiths and prefer her evidence on the matter. In considering their respective versions, I took into account that Mr de Souza had, in his oral responses in the investigation meeting, demonstrated the type of behaviour he had denied displaying towards Ms Griffiths on 4 April. I also took into account evidence given by a witness who appeared for Mr de Souza.

[46] Much of that witness's evidence concerned incidents at which she had not been present and to which I have accorded little weight as she appeared to be reflecting what she had been told by Mr de Souza. However, the witness had noted in her written evidence that Mr de Souza had shown some anger and aggression, which she had counselled and cautioned him about. She attributed it to his frustration at having insufficient linguistic ability in English to be able to communicate his feelings adequately.

[47] After considering the different accounts of these events, I do not accept Mr de Souza's claim that his employer was responsible for creating an unpleasant work environment for him. I consider it likely that Mr de Souza's attitude to the work and to his fellow employees and managers contributed significantly to any tension there may have been in the workplace. In oral evidence Mr de Souza had told me he wanted to leave Remarkable Tortillas before he was

put on ACC leave in November 2019 and had been looking for other employment. That may explain the sullen and grumpy demeanour Mr Griffiths had observed in March 2019 when Mr de Souza returned to the workplace.

[48] Mr Griffiths knew of the 4 April events in the workplace when he met with Mr de Souza on 8 April 2019. I accept that he agreed to Mr de Souza taking his annual holidays at that time because he believed it would provide a cooling off period for the employee. It was clear from Remarkable Tortillas' statement in reply that Mr Griffiths intended to have a discussion about the events of that day once Mr de Souza returned following his holiday break.

[49] I find there is no evidence to support Mr de Souza's claims that his employer sought his resignation, whether directly or by applying pressure on him, or that Mr Griffiths made the workplace unpleasant for him to persuade him to resign.

[50] Mr de Souza's annual holiday leave expired in early May 2019 and his visa expired shortly afterwards on 9 May. Immigration NZ (INZ) wrote to him by letter dated 10 May 2019 to inform him he had been granted an interim visa valid for six months from that date on the same work conditions of his previous visa.

[51] Mr de Souza, who had lodged proceedings in the Authority on 29 April 2019, emailed Mr R Griffiths on 23 May 2019 attaching a copy of the INZ letter and asked when he could return to work. Mr Griffiths replied asking Mr de Souza to send him a copy of his expired visa as he needed to sight that document. Mr Griffiths explained that Mr D Griffiths, who had managed all matters relating to Mr de Souza's work visa, no longer worked for Remarkable Tortillas by this time.

[52] Mr R Griffiths could not locate a copy of the expired visa and was unaware of all of its conditions. In his email, which he marked for Mr de Souza's urgent attention, he asked Mr de Souza to bring the expired visa into the office so he could take a photocopy of it.

[53] Mr de Souza did not respond to the email and did not return to the workplace. When I asked him why he had not responded to Mr Griffiths, he said there were problems and Remarkable Tortillas did not want him. He did not specify what the problems were. Mr Griffiths said that as the interim visa was pegged to the conditions of the expired visa he needed that document in order to know exactly what the conditions were.

[54] There is no evidence of Mr de Souza following up on the matter with his employer other than through these proceedings. I conclude his employment came to an end as a result of his failure to provide his employer with the expired visa that prescribed the conditions of the new interim work visa. While it is surprising Remarkable Tortillas was unable to locate a copy of the original visa, it was not unreasonable for the employer to ask Mr de Souza to bring in that document so that it knew what conditions were applicable to the new interim work visa.

[55] I conclude Mr de Souza's employment came to an end when his visa expired and he failed to engage with his employer over its request for a copy of the expired visa. In the circumstances I find there was no dismissal by Remarkable Tortillas.

### **Conclusion**

[56] Mr de Souza's claims to have been disadvantaged in his employment by unjustifiable actions by his employer and to have been unjustifiably dismissed fail.

### **Costs**

[57] The issue of costs is reserved although, as Mr de Souza represented himself and Remarkable Tortillas was represented by its director, I do not anticipate any claims for costs will arise.

Trish MacKinnon  
Member of the Employment Relations Authority