

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Daryl Ruebe-Donaldson (Applicant)
AND Sky Network Television Limited (Respondent)
REPRESENTATIVES Mark Ryan, Counsel for Applicant
Tony Drake, Counsel for Respondent
MEMBER OF AUTHORITY R A Monaghan
INVESTIGATION MEETING 14 July 2005, 15 February 2006
SUBMISSIONS RECEIVED 8 and 23 March 2006
DATE OF DETERMINATION 31 March 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This employment relationship problem between Daryl Ruebe-Donaldson and her former employer, Sky Television Network Limited (“Sky TV”), has already been the subject of a determination by the Authority¹, and of a judgment of the Employment Court on a challenge to the determination². In the former, the Authority found that Ms Ruebe-Donaldson had not raised her personal grievance alleging constructive dismissal within the 90-day period required under the Employment Relations Act 2000. The Authority also declined leave to proceed with the grievance. In the latter, there was a concession that the constructive dismissal grievance was barred by the effect of s 114 of the Act.

[2] At the same time the Court found that correspondence from both Ms Ruebe-Donaldson and her solicitor amounted to a complaint from Ms Ruebe-Donaldson that she had been unjustifiably disadvantaged in her employment by the conduct of her employer. The Court was satisfied Ms Ruebe-Donaldson had taken reasonable steps to raise a grievance of that kind, which the employer was able to address by way of a reference to the mediation service. It concluded that a disadvantage grievance had been raised within the required 90 day period. Despite having been pleaded as an unjustifiable constructive dismissal, the problem could be dealt with as a disadvantage grievance under s 122 or s 160(3).

[3] A fresh statement of problem was filed in the Authority, making express reference to an unjustified disadvantage grievance. The parties attempted mediation again, but were unable to resolve the problem. By the time it came back to the Authority for investigation, the member who

¹ **Daryl Ruebe-Donaldson v Sky Network Television Limited** (AA 27/04, 20 January 2004)

² **Daryl Ruebe-Donaldson v Sky Network Television Limited** (AC 44/04, 13 August 2004)

carried out the original investigation had resigned to take up another position. The practical effect was that I re-heard some evidence about the underlying facts, and have included in my investigation the briefs of evidence and documents filed for the purposes of the original investigation.

Ms Ruebe-Donaldson's employment

[4] Ms Ruebe-Donaldson was employed in the dispatch office at Sky TV for some five years, until her employment ended in February 2002.

[5] The office was a relatively confined space, and six people worked in it. They included Ms Ruebe-Donaldson, her supervisor Andre O'Keefe, and four others. In the latter half of 2001 Mr O'Keefe began noticing an unpleasant odour in the office, and said he also received complaints from other staff members about the odour. Mr O'Keefe and at least some of the complainants believed the odour came from Ms Ruebe-Donaldson.

[6] John Sigglekow, the manager responsible for the dispatch group, was aware there had been complaints about an odour in the dispatch office, and had noticed an odour himself when he visited the office. He arranged for an air conditioning engineer to check the air conditioning. The check was in addition to the annual inspection and certification process for the building's warrant of fitness, and the 6-weekly cleaning of filters. The engineer reported that he found nothing wrong with the system. At the engineer's suggestion, however, Mr Sigglekow moved a fresh air unit so the fragrance it emitted would circulate more effectively. Mr Sigglekow also caused an air vent to be moved so that fresher air was circulated.

[7] The complaints continued. In or about October 2001 Mary Paul, a female employee from another area, became aware of the complaints and approached Mr Siggelkow with an offer to speak about personal hygiene to the women in dispatch. Both Mr Siggelkow and Mr O'Keefe believed that was a sensitive way of dealing with the problem, and accepted Ms Paul's offer. Ms Paul went ahead and spoke to the women, including Ms Ruebe-Donaldson, and made suggestions about personal hygiene. It was common ground that, at that point, Ms Ruebe-Donaldson was not told there had been complaints that she was the source of the odour problem.

[8] According to Mr O'Keefe, for a month or two afterwards the odour problem was not as bad. The problem appeared to have been resolved. However it became noticeable again at the end of 2001, and again when Ms Ruebe-Donaldson returned from her holiday break on 14 January 2002. After that it was worse than before. Three staff members complained to Mr O'Keefe, and reduced their complaints to writing in letters dated 21, 22 and 23 January 2002. Two of the letters accused Ms Ruebe-Donaldson of being the source. The odour was variously described as 'a stench', as making the observer feel ill, or as making the observer need to leave the room.

[9] On 24 or 25 January Mr O'Keefe referred the written complaints to Mr Siggelkow. Mr Siggelkow contacted Sharon Eaton, Sky TV's personnel officer, to ask her to look into the matter.

[10] Meanwhile a colleague had told Ms Ruebe-Donaldson that she was believed to be the source of the odour, and that a letter of complaint was being prepared. On or about 25 January Ms Ruebe-Donaldson, too, contacted Ms Eaton and left a message saying she wanted to talk to her. At the time Ms Eaton had been told there were complaints about Ms Ruebe-Donaldson being the source of an odour but knew little else, including how much Ms Ruebe-Donaldson knew of the complaints. Her office was not in the same premises as the dispatch office, so on hearing from Ms Ruebe-Donaldson she travelled to the dispatch office premises to find out from Ms Ruebe-Donaldson exactly what was upsetting her.

[11] During that conversation Ms Eaton told Ms Ruebe-Donaldson there had been complaints about an odour, and that Ms Ruebe-Donaldson was said to be the source. Ms Eaton mentioned that the complaints had been reduced to writing, but was not able to show them to Ms Ruebe-Donaldson there and then because she had not received them herself.

[12] Ms Ruebe-Donaldson also raised an incident of which Ms Eaton was unaware. It concerned Mr O'Keefe's action, on or about 23 January 2002, in labelling the chairs in dispatch with the name of the person who used the chair. Ms Ruebe-Donaldson thought the action was aimed at her, and found it humiliating.

[13] In evidence Mr O'Keefe said he labelled the chairs because there had been breakages, as well as complaints when the chairs' supports were re-adjusted in ways that did not suit the usual user. The labelling was to ensure people used their own chair, in the interests of avoiding such problems. However in his written brief of evidence he also acknowledged that the other women in dispatch had been complaining about Ms Ruebe-Donaldson using their chairs. I consider it likely that they did not want her to sit in their chairs in part because of the odour at least some of them believed was attributable to her, and Mr O'Keefe knew this. Accordingly I consider it likely that the real problem being addressed by the action was the concern about Ms Ruebe-Donaldson.

[14] Returning to the 25 January conversation, Ms Eaton was unaware of the chair incident and beyond suggesting the matter may be OOS-related told Ms Ruebe-Donaldson she could not comment on it. I accept that, at that point her discussion with Ms Ruebe-Donaldson was very much a preliminary one. She sought to reassure Ms Ruebe-Donaldson, and to work out what to do next since significant complaints of a delicate nature had been made on the one hand while Ms Ruebe-Donaldson was denying any responsibility on the other. The meeting ended with Ms Eaton indicating she would speak to Mr Siggelkow.

[15] In her evidence Ms Ruebe-Donaldson did not accept Ms Eaton was unaware of the detail of the complaints, or that Ms Eaton was seeking to reassure her. She told me she did not believe Ms Eaton took the matter seriously, but the reason she gave for that belief was that Ms Eaton had not brought the letters of complaint with her. She also felt that, since she denied being the source of the odour and her support person backed that up, she should not have been 'singled out'. Those views were feelings Ms Ruebe-Donaldson had, but I do not believe Ms Ruebe-Donaldson's assessment of Ms Eaton's approach to the discussion was a fair one. Similarly, and especially given the extent of the problem, the mere fact that Ms Ruebe-Donaldson was denying the allegations did not mean Ms Eaton was obliged to accept the denial immediately and act accordingly.

[16] Ms Ruebe-Donaldson was overcome by upset and emotion. Later on 25 January she telephoned Mr Siggelkow to say she was leaving for the day as she could not cope. Her evidence was that he asked her if she wanted to talk, she said 'no', and he told her not to take things personally. She duly went home, and began a period of sick leave.

[17] In a letter to the Auckland regional manager, Jeremy Brown, dated 26 January 2002 Ms Ruebe-Donaldson set out her wish that the allegations about her be resolved in a timely fashion, and her view that she was being victimised and harassed. She handed the letter to Mr Brown on or about the same day. Mr Brown read it in her presence, but could do no more than indicate the concerns would be followed up. At the time, he had not yet seen the letters of complaint.

[18] On Wednesday 30 January Ms Ruebe-Donaldson and her then-solicitor attended a meeting with Mr Brown and Ms Eaton. The position put on behalf of Sky TV was that the work in dispatch was good, but there had been complaints about an unpleasant odour and the perception was that Ms Ruebe-Donaldson was the source. The company needed to look into this. The position put on

behalf of Ms Ruebe-Donaldson was that she had been put in an embarrassing position by workplace gossip, and her supervisor had not only allowed it but had participated in it. She raised a concern about the preparation of the written complaints, and said she had medical advice to the effect that she did not have a body odour problem.

[19] Mr Brown wanted to obtain more information from the women in dispatch, as well as Messrs O’Keefe and Siggelkow. Ms Eaton’s notes indicate at least two of the women were spoken to on 30 January, and both referred to the strength of the odour. Both also believed Ms Ruebe-Donaldson was the source, although one said so only indirectly. Mr Siggelkow and Mr O’Keefe also provided statements dated 9 and 12 February respectively, commenting on the existence of the odour and setting out their actions in respect of it. From his own experience of it, Mr O’Keefe considered the source of the odour to be unmistakable.

[20] In a letter dated 4 February 2002 Ms Ruebe-Donaldson’s solicitor informed Ms Eaton that Ms Ruebe-Donaldson had consulted her doctor, who advised that she suffered no personal hygiene problem which should cause her embarrassment. Indeed a letter from Ms Ruebe-Donaldson’s general practitioner dated 1 February 2002 recorded: “... I have never noted any odour and carefully checked for this on both of her recent consultations. She has no medical problems which would be associated with any odour or lack of personal hygiene.” The solicitor’s letter went on to detail concerns that:

- (i) in the 30 January meeting, the managers proceeded as if the allegations about Ms Ruebe-Donaldson were correct;
- (ii) Mr O’Keefe had been openly discussing the problem with other staff members before addressing concerns with her; and
- (iii) the management was determined to support Mr O’Keefe at all costs, while providing no support to Ms Ruebe-Donaldson.

[21] The letter ended by setting out a set of conditions under which Ms Ruebe-Donaldson would contemplate a return to work. In response, Sky TV suggested mediation. Ms Ruebe-Donaldson remained on sick leave until the mediation went ahead on Friday 22 February 2002. Her resignation followed on 26 February 2002.

Determination

[22] This problem was not argued in the Authority in quite the same way as in the solicitor’s letter of 4 February 2002. However I would have been unlikely to uphold the complaint summarised in (i) above, and it was appropriate not to pursue it with any great vigour. I consider it likely that Ms Ruebe-Donaldson’s concern that, at the 30 January meeting, the managers proceeded on the basis that the allegations against her were correct, was based on her emotional reaction to having such allegations made about her at all rather than a well-founded assessment of the approach being taken. The meeting was difficult for all concerned – and particularly for Ms Ruebe-Donaldson – but I am satisfied that Mr Brown was making a conscientious attempt to find out as much as he could before deciding what to do about the complaints.

[23] Similarly, I do not believe it was fair to say the management was determined to support Mr O’Keefe at all costs and was failing to support Ms Ruebe-Donaldson. Nothing in the evidence about the conduct of the 30 January meeting, or anywhere else, supported such a conclusion.

[24] A submission made on behalf of Ms Ruebe-Donaldson in the Authority was that Sky TV failed to take reasonable steps to address complaints about the odour in the dispatch office when the problem first arose in mid-2001. I do not accept that submission. The matter was addressed at the time as a possible problem with the air circulation in the office. A check of the air-conditioning

system was carried out and an effort was made to improve the air circulation. When the odour remained, and the possibility emerged that Ms Ruebe-Donaldson was the source, Sky TV made an appropriately sensitive effort to deal with the problem by accepting Ms Paul's offer of assistance. After that it appeared the problem was resolved, at least for a short time.

[25] It was also submitted that Sky TV failed to take reasonable steps to address the renewed problem on Ms Ruebe-Donaldson's return from leave on 14 January 2002. I do not accept that. There was a short time lag while the increase in the degree of the problem became apparent, complaints were made to Mr O'Keefe, and they were referred to Mr Sigglekow. If, as she said, Ms Ruebe-Donaldson felt her colleagues were ignoring her that week, she did not raise her concern at the time. By the following week, the concerns about odour were being formally addressed.

[26] During the investigation meeting Ms Ruebe-Donaldson repeated her concern about Mr O'Keefe's handling of the matter. The evidence in support centred on the circumstances in which she became aware there were complaints that she was the source of an unpleasant odour, the chair labelling incident, and the generalised concern that her colleagues were ignoring her in the week beginning 14 January 2002. The last of these was too vague to be taken any further.

[27] Since at least some of her colleagues experienced an odour they believed came from her, it is unrealistic for Ms Ruebe-Donaldson to expect that they would not discuss it. Ms Paul's involvement obviously resulted from workplace discussions about the problem, but I do not accept that an employer is obliged to act to prevent employees from expressing their concerns. Then, at least for a brief time, Ms Paul's involvement assisted.

[28] As for any discussions in January 2002, again it was not realistic to expect that no-one would comment on or discuss their perception of the odour. This time the issue was raised with Mr O'Keefe, who escalated it to Mr Sigglekow for further action. Inevitably Mr O'Keefe had to discuss the concerns with the complainants, and it is eminently foreseeable that there would be some awkwardness and tension in the workplace while that was happening. Similarly - although there was no evidence of it beyond the complaints and their content - some forthright expressions of views could be expected. Apparently one of Ms Ruebe-Donaldson's colleagues even felt she should be warned, but there was nothing in that to suggest anything in the discussions indicated inappropriate conduct at a justiciable level.

[29] I accept that criticism can be made of Mr O'Keefe in that the labelling of the chairs was an inappropriate contribution to addressing the problem. However there was no evidence that during that difficult fortnight in January Ms Ruebe-Donaldson was openly laughed at or taunted for example. Nor was there any suggestion that the complaints were motivated by malice. It was apparent from Ms Ruebe-Donaldson's evidence that her overwhelming concern was with the fact that distressing and embarrassing allegations had been made about her, and she felt targeted because she considered the allegations unfounded. However I do not accept that the labelling of the chairs should be elevated to the point that legal redress is available in respect of it.

[30] Overall I have no doubt that the complaints about the odour in the dispatch office were motivated by genuine reasons, and that those who believed Ms Ruebe-Donaldson to be the source were similarly motivated. Sky TV could not do anything other than investigate. It was not obliged to accept Ms Ruebe-Donaldson's early denial if it considered (as it did) that a full investigation was necessary, and even less was it obliged to cease any investigation at all on the basis of Ms Ruebe-Donaldson's requiring it to do so. The circumstances were difficult and embarrassing for Ms Ruebe-Donaldson and that is unfortunate, but Sky TV was obliged to take into account the interests of all of the staff in the dispatch office in the way it addressed the matter. For these reasons I am not persuaded Sky TV acted unjustifiably or that the personal grievance is made out.

Costs

[31] Costs are reserved.

[32] The parties are invited to agree on the matter. If they seek a determination from the Authority they are to file and serve memoranda on the matter within 28 days from the date of this determination.

R A Monaghan
Member, Employment Relations Authority