

WISA. In the alternative, it claims that it was under no obligation to pay Ms Ryder a wage because any employment agreement had been suspended by the concurrence of the parties, and that in any event it would be inequitable and unjust for the Authority to award any payments to Ms Ryder.

Factual discussion

[3] As its name implies, WISA looks after the interests of students at Whitireia Polytechnic. In March 2009 Ms Ryder was elected as WISA's Vice President.

[4] In May 2009 WISA's then President stood down from the role. I accept that WISA's executive committee decided to hold an extraordinary meeting of the executive committee on 7 May, at which Ms Ryder was nominated for the position of Chairperson/President, and that she was unanimously elected by the eleven or so members present. No general meeting of the association was, however, ever held.

[5] Whatever the constitutional position, Ms Ryder's appointment was not challenged for the next fourteen months. There was no question that she worked hard in the role.

[6] WISA was in financial difficulties and involved in a dispute with Whitireia Polytechnic, which meant that, for at least some of this period, it was withholding student fees from WISA. This meant that WISA was in even more financial difficulty while the withholding of fees was continuing. At this point WISA was also facing significant claims from former staff members.

[7] WISA and its executive took some steps to deal with this situation. For example, at an employment subcommittee meeting on 2 September 2009, which Ms Ryder attended, it was decided that:

In light of the amount of hardships allocated, changes will be made to meeting fee structures of the President and Vice President, and all Executives.

[8] It was also stated:

We need to be seen to be broke as our students.

Employment contracts will be set up for management of WISA – in the future.

[9] Ms Ryder regularly sent out President's reports. In particular, she sent one out on 30 October 2009, which was not read by the current President, who gave evidence for WISA. Her reason for not usually reading Ms Ryder's reports was that they were too long. In that report, which dealt with WISA's financial problems, Ms Ryder stated:

My focus for the rest of the year is to have a Special General Meeting to introduce our Executives and confirm our positions within WISA and to present a budget for 2010 and to present a new WISA constitution.

[10] She also stated:

I do realise the amount of work that goes into running an Association and am willing to give it my all as long as there is a balance between my work, study, and family, all will be well for me in my role as President. I accepted an employment agreement at the beginning of October, that I have had a chance to give to my lawyers, but am willing to hold off on payment until WISA is in a financially stable position.

[11] She also sets out a number of recommendations for the ongoing work of WISA. Amongst the summary she stated:

It has been discussed with management and WISA lawyers the importance of an employment contract for the President. I have been inclined to take the advice and have accepted the employment contract at the beginning of October 2009, however I know that the financial situation the Association is in given the Personal Grievances and the Legal fees that are still being paid, and I have agreed with the WISA management to hold off from receiving any putea in way of PAYE until next year when the Association is in a better financial and stable position.

[12] It was clear therefore that the Executive was placed on notice that Ms Ryder had agreed to an employment agreement. That employment agreement was provided to the Authority by Ms Ryder. It was not amongst WISA records. On the balance of probabilities, i.e. what is more likely than not, I conclude that Ms Ryder did sign an employment agreement on 1 October 2009, as the document on its face shows.

[13] The employment agreement appears to be based on the terms suggested in the constitution, in that the salary set was \$45,000 for a full time role. Clause 14 of the constitution dealt with honoraria, salaries and wages. All members of the executive

were to be paid an honorarium. The total amount of honoraria was to be set out in the annual budget. The honorarium for the Vice President, adjusted for inflation, was to be \$27,000, upon the expectation of 30 hours service per week. The constitution also stated that *the President shall be entitled to a salary which shall be decided by the employment subcommittee*. No salary guidelines were contained in the constitution.

[14] Ms Ryder's employment agreement also provided for a bonus of \$10,000 if her KPIs were met. She received such a bonus for the 2009 year, but never received any other remuneration. No job description was provided to the Authority.

[15] On at least two occasions while President Ms Ryder made it clear that she would not expect payment until WISA could afford it and that she would not be taking legal action to make WISA pay her. WISA's current president also accepted that it was possible that such comments by Ms Ryder, about her foregoing her salary in the interim, were made.

[16] The employment agreement was signed by Ms Ryder, WISA's vice president and its international executive on 1 October 2009. However, the employment agreement was said to commence from 1 June 2009 and to have a term of five years. This five year term was inconsistent with the constitution, as, it appears, was the bonus arrangement. Similarly, a cash flow forecast from WISA in order to help resolve issues between it and the Polytechnic did not include any provision for a presidential salary.

[17] Ms Ryder was on the domestic purposes benefit at all times during her tenure while she acted as President. Ms Ryder gave evidence that she has kept Work & Income informed throughout of the existence of her claim for lost remuneration. This is necessary because Ms Ryder is obliged to account to Work & Income for any sums awarded by the Authority.

[18] As a result of a student meeting in July 2010, raising concerns about the legitimacy of Ms Ryder's position as president, amongst other things, the Association Executive had a meeting on 30 July to discuss what had occurred. Ms Ryder answered questions about how she became president. In response to issues about why she was not being paid, Ms Ryder said that she would not bring a personal grievance because she had not been paid; for her it was more about the welfare of the students.

She said she needed an employment contract and would possibly have one for 2011, which is inconsistent with her earlier statements, including those directly above.

[19] As a result of student concerns, the Executive decided to stand Ms Ryder down immediately from the position as President from 4 August 2010. She was told (verbatim):

This outcome was reached at an Extraordinary Executive Meeting held this afternoon. I moved a motion to stand you down pending an outcome of a police complaint lodged against you with the Crimes Investigation Bureau. This motion was carried.

There was passionate debate on this matter for and against, so this was an extremely hard decision to make. However a majority vote indicates the need to protect you and WISA from further implications of misconduct.

The intention of this decision is not to single anyone out, hence we WISA do not accuse you directly for any misconduct. However, students have lodged a letter of no confidence in the President in parallel to the police complaint lodged with the Crimes Investigation Bureau. It is in the best interest of WISA that you be stood down until this matter is resolved.

We hope that this matter serves in everyone's favour being no misconduct or criminal wrongdoing, in which you will then resume the role as the President, should you wish to do so.

WISA also has no record of your employment, appointment or election as President of the Association. This needs to be cleared up before you can be re-instated in any case.

[20] Ms Ryder responded that she had been duly elected; that the employment documents were confidential, but that she had signed an employment agreement on 1 October 2009; and that she did not get paid any money for wages or salary, but had received an end of year bonus and an executive allowance in 2009.

[21] These issues all arose because it was discovered that in excess of \$1million had been taken from WISA accounts. The WISA Vice President, a close associate of Ms Ryder, later admitted defrauding the Association and was sentenced to jail as a result. A forensic audit conducted by an accounting firm showed that WISA's financial and executive processes were poor. Ms Ryder was one of three signatories who signed a number of cheques where the proceeds were used improperly. Tens of thousands of dollars of WISA funds remain unaccounted for beyond that admitted to by the Vice President. Ms Ryder has not been charged with any offences.

[22] Immediately after being stood down. Ms Ryder was trespassed from WISA for two years. Ms Ryder accepted that at that point she had lost her job. Ms Ryder contested her suspension, but has never made a claim for unjustified dismissal until closing submissions. In this regard I note that there is a 90 day time period for raising personal grievances. Ms Ryder was aware of that and did not raise a personal grievance for unjustified dismissal and WISA does not consent to it being raised out of time.

[23] I accept that WISA remains in a very poor financial situation.

[24] The parties have attended mediation but have been unable to resolve matters. It therefore falls to the Authority to make a determination.

The law

[25] Section 6 of the Act deals with whether someone is an employee or not. An employee means any person employed by an employer to do any work for hire or reward under a contract of service; but does not include volunteers who do not expect to be rewarded for work to be performed as a volunteer and receive no reward for work performed as a volunteer. To determine whether someone is an employee under a contract for service, the Authority must determine the real nature of the relationship between the parties, including any matters that indicate the intention of the parties, but is not to treat as a determining matter any statement by the persons that describe the nature of their relationship.

[26] The issue of ostensible authority was dealt with in *Nelson v. Porirua Community Law Research Centre Inc* [1993] 2 ERNZ 1109. There it was stated, at 1123:

“Ostensible” means overt. The test is how did it look to the applicant? How would it have looked to any reasonable person in the same situation? ... All one needs to ask is how did the applicant come to be dealing with these people on behalf of the respondent?

Determination

[27] Replacement of the President in the course of his or her term was a matter that needed to be dealt with under WISA’s constitution. The constitution in force at the time defined the Chairperson or President as *the executive member elected at a general meeting to chair/preside over the executive meetings of the Association.*

[28] The executive (which impliedly included the President) was to constitute the Executive Committee. This Executive Committee was to remain in office for two years from the last AGM (annual general meeting) and committee members were elected until they were relieved by the incoming executive. If an executive member was elected at an SGM (special general meeting) his/her term would end when relieved by the incoming executive.

[29] The constitution also required the appointment of an employment and finance subcommittee (known as the employment subcommittee) who were responsible for all employment issues. The executive was required to appoint staff as necessary and to negotiate their terms and conditions of employment.

[30] The constitution also stated that no person was to be employed in any position by the Association until such time as a written job description for such position was ratified, and that such job description must not be in conflict with any of the rules of the Association.

[31] The second schedule provided for payment to office holders. The third schedule of the constitution dealt with elections. The Treasurer and Chairperson were required to complete a Police check before taking up their portfolios.

[32] The second clause of the third schedule dealt with vacancies on the Executive. Clause 2.1 states (verbatim):

2.1 The fact that at any given time there are vacancies in the membership of the executive shall not prevent its continuing exercise of authority provided there remains a quorum of the committee.

2.1.1 Should an executive committee member resign a new member will be drawn from the list of nominees, and the executive may decide to reallocate if the executive member's portfolio. If none remains on the list of nominees, a Special General Meeting shall be called immediately for electing replacement members.

...

2.1.3 The executive may co-opt members onto the committee after two-thirds of the current executive's term in office has been served and there are no other members left to draw from the list of nominees.

...

2.2 The general meeting shall elect a chairperson to chair the meetings of the executive committee of the association for his/her tenure but the

executive may choose another member to chair other meetings of the association.

2.3 *No officer or employee of the association shall make a decision, undertaking, or offer a policy or opinion binding the association without Executive Committee approval.*

[33] It is clear from the constitution that the resignation of the chairperson/president and the creation of a vacancy is to be treated differently than that of an executive member. Schedule 2, clause 2.2 provides a different process for the chairperson than for other Executive members. It therefore follows by implication that the chairperson/president position can not simply be filled by other nominees, as it could be for other executive positions.

[34] In addition, there is no evidence that Ms Ryder was ever a nominee for the position of president. She stood for an executive role and was the Vice President. Therefore she could not be reallocated the presidential portfolio under clause 2.1.1. Therefore a special general meeting should have been called immediately upon the resignation of the President. It was not.

[35] I find that at the time the genuine belief of both parties was that, as the President, Ms Ryder was required to have an employment agreement and thus would be and was an employee of WISA. I accept on the balance of probabilities that as a result of this expectation the parties entered into an employment agreement and that the signatories on behalf of WISA (the Vice President and the International Officer) appeared to Ms Ryder to hold an authority to enter into that employment agreement with her.

[36] In the light of this signed employment agreement and the presidential reports, I accept that Ms Ryder did accept employment as president for the period from 1 June 2009 until her suspension and dismissal. Although Ms Ryder was not a de jure President, she was the de facto president, and under the constitution the President is to be provided with an employment agreement.

[37] I note that the witness for WISA who was on the employment subcommittee was not involved in the preparation and signing of the employment agreement. However, that is not determinative of the situation because the Vice-President and the International Officer had ostensible authority to bind WISA. In the absence of evidence that the employment was a sham, the Authority must uphold it. The

evidence that Ms Ryder never referred to the existence of the agreement when responding to her suspension is insufficient proof of a sham.

[38] Ms Ryder's total term as President of WISA was between 1 June 2009 and 4 August 2010. That is 1.178 years, constituting \$53,013.70 in pay. Given that I have found that the employment agreement did exist, can Ms Ryder now rely on it to claim unpaid wages?

[39] The real nature of the relationship between Ms Ryder and WISA was that of employer/employee as at the time people believed, including Ms Ryder and WISA, that she was its president. Whilst she was not validly its president because her appointment was in breach of the constitution, that does not mean she could not be an employee of WISA.

[40] WISA also claims that the employment agreement was not valid because there was no job description and no Police check. Employment law is clear that even if certain parts of an expected employment agreement are missing, an employment agreement can be ascertained from surrounding circumstances. Those circumstances are clear, as set out above.

[41] I also accept that Ms Ryder was an employee and not a volunteer, as demonstrated by the presidential role she held, the employment agreement she signed, her written comments at the time referring to the above and the long hours she worked.

[42] Although Ms Ryder accepted that she would not be paid until WISA's finances improved, or at least until the next year, the fact that she was effectively dismissed in August 2010 meant that she should be entitled to claim for periods for which she had previously foregone payment. I conclude that Ms Ryder is not estopped from claiming her salary. She never said that she would never claim the salary, but unilaterally agreed to deferring payment until at least the next year when WISA's financial position was expected to have improved. WISA supplied no consideration to Ms Ryder to make such an undertaking enforceable. Furthermore, although WISA's financial position never has improved, I accept that it was implicit in any undertaking that should she cease to be president, then she would be entitled to claim the salary she had foregone. Her undertaking was for deferral, not that she

would never be paid. In other words, it went without saying that if the relationship ended, Ms Ryder would then seek payment, which she has done.

[43] WISA also claims that it would be “*inequitable and unjust for the Authority to uphold a wages claim ...*”. This was because Ms Ryder and her associate were two of the three signatories to WISA’s bank accounts, from which substantial amounts of money can not be accounted for, and that most of the money was lost when Ms Ryder was president. Those are not matters to refuse Ms Ryder payment of a salary to which she would otherwise be entitled. Rather they are matters which the Police can pursue. I note, however, that Ms Ryder still has not been charged by the Police some more than two years later. Furthermore, WISA is entitled to bring claims in the Authority against Ms Ryder for any moneys it says are not properly accounted for. Therefore equity grounds can not be used to refuse an employee wages to which they would otherwise be entitled.

[44] Ms Ryder also claims a \$10,000 bonus. That sum can not be awarded by the Authority given that there is no certainty that she would have received a bonus for the next year, especially given the fact that her employment did not continue for the whole year.

[45] I conclude that Ms Ryder is not entitled to holiday pay as there was no evidence that she had not taken holidays during her term as president – there was only a bald assertion in submissions that these sums were owed. That is not evidence, and given Ms Ryder’s senior position at WISA I would have needed proper evidence for me to accept, given her position and the nature of a student association where the members have long holidays, that she had taken no holidays in fourteen months.

[46] I do not accept that Ms Ryder was unjustifiably suspended. Not all suspensions require prior consultation - see for example *Singh v. Sherildee Holdings Ltd* [2010] ERNZ 407. Here Ms Ryder’s employment was inextricably bound to her position as president. Once she was suspended as president (which involved a quite different relationship between the parties to that of her employment), her employment had to be suspended on the same terms and at the same time. Procedural issues generally required under employment law were therefore not relevant. On substantive grounds it was clear that a fair and reasonable employer would suspend Ms Ryder as its employee president at the same time as when she was suspended as the chair of the executive meetings of the Association.

[47] Ms Ryder also claims for lost remuneration after her suspension. However this is inconsistent with her evidence (which accords with the facts) that after having been trespassed, which was effectively at the same time as when she was suspended, her employment with WISA was over. It was at that point she should have claimed unjustified dismissal because she had, in effect, been dismissed.

[48] Contrary to Ms Ryder's submissions, I accept that WISA has acted in good faith throughout. It genuinely believed that Ms Ryder was not entitled to remuneration during her term as president and it is entitled to argue that point of view. No penalty is therefore appropriate.

Summary

[49] Ms Ryder was justifiably suspended by WISA and is not entitled to any remedies thereby. WISA has not been shown to have breached its duties of good faith to Ms Ryder and is therefore not liable to any penalty.

[50] Ms Ryder's claim made in submissions for unjustified dismissal, which is clearly out of time, is not capable of determination by the Authority.

[51] Ms Ryder was however an employee of WISA and is entitled to be paid under her written employment agreement. Ms Ryder's claim for holiday pay and a \$10,000 bonus are dismissed for want of evidence. In any event she had been dismissed during the year she claimed the bonus.

[52] I therefore order the respondent, Whitireia Independent Students Association Incorporated, to pay to the applicant, Ms Loretta Ryder, the sum of \$53,013.70. A copy of this determination will be sent to Work & Income to inform them of this development.

Costs

[53] Costs are reserved