

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON OFFICE**

**BETWEEN** Margaret MacLeod (Applicant)

**AND** ABC Plumbing Drainage & Gas Limited and AB Computer Services Limited and Gordon Anslow (Respondents)

**REPRESENTATIVES** Gail Irwin for the Applicant  
Gordon Anslow In person and for ABC Plumbing Drainage & Gas Limited and AB Computer Services Limited

**MEMBER OF AUTHORITY** P R Stapp

**INVESTIGATION MEETING** Wellington, 5 April 2005

**FURTHER INFORMATION** 7, 11, 19, 20, 21 April & 1 May 2005

**DATE OF DETERMINATION** 6 May 2005

**DETERMINATION OF THE AUTHORITY**

**Employment relationship problem**

[1] Margaret MacLeod says that she was interviewed by Gordon Anslow and accepted for employment in his business. She says she commenced her employment as a dispatcher/receptionist at business premises in Johnsonville Road, where ABC Plumbing Drainage & Gas Limited and AB Computer Services Limited operated from, on 17 February 2004. She later moved to Lower Tyers Road Ngauranga Gorge in Wellington. She says she believed her employer was ABC Plumbing Drainage & Gas Limited.

[2] She says she agreed to \$12.00 per hour and to work 8 am to 6 pm Monday to Saturday inclusive. There was no employment agreement given to her until much later and then it referred to AB Computer Services Limited as the employer. Since there was some disagreement over the proffered agreement it remained unsigned.

[3] Difficulties arose during her employment about the employment agreement, her hours of work and her treatment including being given warnings on 1 and 7 July 2004 and being suspended on pay. She raised a personal grievance on 19 July that was not settled in mediation.

[4] The applicant was declared by her doctor on 23 August to be medically unfit for work from 17 until 27 August 2004 and this was extended on 27 August until 3 September 2004. She did not return to work.

[5] There was further mediation between the parties on 24 and 26 August 2004. The matter did not settle.

[6] She resigned on 30 August 2004. She says her resignation was because her employer breached her employment rights, verbal abuse from another employee, and her duties were taken over by yet another employee, and was not paid. Her final pay was made on 17 September when her resignation was accepted, including wages of \$480 for 5 days and holiday pay.

[7] A statement in reply was received from ABC Plumbing Drainage & Gas Limited and AB Computer Services Limited. They agree that Ms MacLeod was paid \$12.00 per hour but that her hours were variable and that she was never requested to work beyond 6.00pm.

[8] The applicant filed another employment relationship problem application in the authority upon becoming suspicious about the companies Mr. Anslow is involved in. He has been personally cited in the employment relationship problem.

[9] The issues in this matter include:

- Who was Ms. MacLeod's employer?
- Has the employer breached the Employment Relations Act for not providing an employment agreement?
- Was there a unilateral variation in the hours of work?
- Is the applicant owed any wages and holiday pay?
- Was there a breach in the applicant's employment that was sufficiently serious to make it foreseeable that she would resign?

**Who was Ms. MacLeod's employer?**

[10] I am satisfied that Ms MacLeod's employer was ABC Plumbing & Drainage Limited. My reason is that Ms. MacLeod says she believed this at the time Mr. Anslow interviewed her. Her wage and time records produced by Mr. Anslow refer to ABC Plumbing & Drainage Limited. Her bank statements refer to ABC Plumbing & Drainage Limited making the payments of wages. There was no employment agreement at the time of engagement. The parties were in dispute over the employment agreement that referred to AB Computer Services Limited. This agreement was provided to the applicant much later during her employment. The tax certificate produced by Mr. Anslow refers to Ms MacLeod's employer being ABC Plumbing & Drainage Limited. Ms MacLeod's "*weekly goals for work*" referred to ABC Plumbing & Drainage Limited in documents produced. The IRD reference to the source of the income was ABC Plumbing Drainage & Gas Limited. Timesheets produced by Mr. Anslow on 21 April refer to "*ABC Plumbing*" and "*ABC Timesheet*".

[11] Mr. Anslow has produced no independent evidence that AB Computer Services Limited was the employer and that ABC Plumbing Drainage and Gas Limited was acting as some agency for payments to be made. In light of the above considerations I am not satisfied that the introduction of an employment agreement sometime after Ms MacLeod started work, and where Ms MacLeod was working in premises jointly shared for the business of ABC Plumbing Drainage & Gas Limited and AB Computer Services Limited, meant the latter was Ms MacLeod's employer.

**Gordon Anslow's role**

[12] Mr. Anslow has been cited in the proceedings personally. He was not the employer personally but the applicant has some concerns about his role, and the enforcement, of any entitlements from her employment. Since Mr. Anslow is a director of both companies, did not reasonably provide an employment agreement for Ms MacLeod when she was employed, and there has been an argument raised about who her employer was, I have decided to reserve any question arising about the roles of the respondents in paying the applicant any entitlements in her employment, and who is ultimately responsible for any liability, including Mr. Anslow personally. In the meantime any orders will be made against the employer, ABC Plumbing Drainage & Gas Limited. The applicant should note that any inability of her employer to pay alone will not necessarily succeed in lifting the corporate veil because other considerations are taken into account.

**The course of the Authority's proceedings**

[13] The parties were given an opportunity to settle after the investigation meeting held on 5 April and they agreed to return to mediation and I gave them until Friday 15 April to produce an agreed settlement so there could be no further delays. There has been no settlement reached. Mr. Anslow was directed to produce his wage records by Friday 8 April and a computer printout was provided. On 21 April the Authority received timesheets from Mr. Anslow for the applicant. An opportunity was given to the applicant's representative to comment on both documents. Responses were received.

**Has the employer breached the Employment Relations Act for not providing an employment agreement?**

[14] The Employment Relations Act requires that an employer provide to an employee who enters into an individual employment agreement a copy of the intended agreement. This was not done by ABC Plumbing Drainage & Gas Limited at the time of Ms MacLeod's agreement to work on 17 February 2004. An employment agreement was handed to the applicant on 22 July 2004. This was unreasonable. I do not accept Mr. Anslow's defence that the business is a small employer, and is too busy and any ignorance of the law. Ms MacLeod could reasonably have expected to be provided with a written employment agreement much earlier in her employment. Such an agreement is required for consideration of issues such as the name of the employer, the description of the work to be performed, where the work was to be performed, the arrangements relating to the time of work, the wages and the dispute resolution procedures. It is a coincidence that the agreement produced was handed to Ms MacLeod upon her raising an employment relationship problem. I conclude that there was a deliberate default in providing an employment agreement in a reasonable time.

[15] Ms MacLeod disputed that AB Computer Services Limited was her employer. It came to her notice when she was given an employment agreement with that name included. This was after she had reasonably believed her employer was ABC Plumbing Drainage & Gas Limited when she started work. The company through Mr. Anslow has made no proper explanation for not meeting the requirement to provide an employment agreement in a more reasonable time.

**Penalty for the failure to provide an employment agreement**

[16] There has been a breach of the Act where the employer failed to provide an employment agreement at least before 22 July 2004. The failure was unreasonable and indefensible and has not assisted the employment relationship problem. The action has been brought within 12 months of the breach and attracts a penalty under the Act. I order ABC Plumbing Drainage & Gas Limited to pay a penalty of \$1,500. This is to be paid to the Crown as a matter of public policy.

**Was there a unilateral variation in the hours of work?**

[17] I am satisfied that Ms. MacLeod believed that she was required to work from 8am to 6pm daily Monday to Friday and work on Saturdays. I further determine that Ms MacLeod's hours of work were unilaterally altered without consultation and without terms for variation. My reasons for these conclusions are that her employer did not produce in reasonable time a written employment agreement with an indication of the arrangements relating to the times of work and that there was any terms for variable hours. I am further supported by the timesheets that confirm Ms MacLeod worked 8am to 6pm daily Monday to Friday and on Saturdays and the hours changed. There are significant discrepancies between the wage and time record and computer printout produced by Mr. Anslow and the pay slips and information provided to the IRD. I accept Ms MacLeod's evidence that Mr. Anslow told her that her hours were altered to 8am to 5pm Monday and subsequently that she was not to work on Saturdays and he made other arrangements.

**The reduction in hours of work means that the applicant is owed wages**

[18] ABC Plumbing Drainage & Gas Limited owes Ms MacLeod a total of \$2,280 as claimed. She is also entitled to holiday pay of \$136.80 on the above sum.

**Was the correct holiday pay paid upon the termination of employment?**

[19] The applicant has made a claim for a readjustment in the final holiday pay she was paid on 17 September 2004 (\$812.16 holiday pay). From the evidence she has claimed an adjustment of \$42.66 on the sum she was paid during her employment and claimed in her statement of problem.

[20] The records produced by Mr. Anslow show inconsistencies in the amounts calculated by him for gross earnings comparing the wage and time records and the pay slips and the applicant's representative's use of the applicant's bank statements. There are different totals of gross wages. The sum of \$42.66 has been derived from a reconciliation of the wages slips for the period 17 February until 17 September. This includes a payment of wages not included in the total earnings and the payment for sick leave that was not included for the holiday pay calculation. The applicant says that the correct figure is \$854.82 holiday pay from her pay slips. I am satisfied that discrepancies have been proven to exist in the records and accept the applicant's evidence. ABC Plumbing Drainage & Gas Limited owes Ms. MacLeod \$42.66 holiday pay.

**Was there a breach in the applicant's employment that was sufficiently serious to make it foreseeable that she would resign?**

[21] The applicant was declared by her doctor to be medically unfit for work from 17 until 27 August 2004. Her sick leave was extended on 27 August until 3 September by the doctor. Ms MacLeod did not return to work and resigned on 30 August 2004. She says her resignation was because her employer breached her employment rights and following verbal abuse from another employee and her duties being taken over by yet another employee and not being paid.

[22] Mr. Anslow denies the allegations that the employer's actions contributed to Ms MacLeod resigning and says he did not know any medical reasons for her being unable to work. He says that he handed Ms MacLeod a suspension notice on 17 August until 9 00 am 18 August to return to work in response to Ms. MacLeod wanting to get a representative. This appears to relate to Mr. Anslow wanting to meet with Ms MacLeod in regard to various matters he wanted to investigate and that he raised with Ms MacLeod on 17 August. She did not return to work.

[23] The applicant visited her doctor on 23 August and her sick leave was backdated. She produced medical certificates. She did not return to work from 17 August and the parties did not meet until mediation was arranged on 24 and 26 August 2004 by which time the applicant had obtained a representative.

[24] I am satisfied that Mr Anslow suspended Ms MacLeod without her having any input into the decision for the suspension. He did this as a response to Ms MacLeod's request to get some representation. It appears that she accepted it and told Mr. Anslow she would arrange

representation without any pressure. There were certainly issues in their employment relationship that he had raised and was entitled to pursue. Also she was entitled to get representation. A grievance was raised that included many matters in Ms MacLeod's employment and the warnings on 1 and 7 July. I have considered the matters in the current employment relationship problem as back ground to the claim for constructive dismissal. The earlier problems were overtaken by the event of Ms Macleod's resignation, I hold. There are no claims to resolve the warnings and suspension in the current employment relationship problem filed in the Authority (SOP) since it was overtaken by a constructive dismissal claim. Any fault in the process in regard to the warnings and suspension has been overtaken by Ms MacLeod going on sick leave and not returning to work by resigning when she had raised a grievance to resolve those matters during her employment. There is no linkage between the resignation and the warnings and suspension since Ms MacLeod obtained a representative who took the issues up on her behalf and pursued them. I am satisfied that if there was any fault in the process of the warning and suspension it was minor in that it related to Ms MacLeod having an opportunity to get a representative and there was a short time involved in her being suspended and being expected to return to work.

[25] I conclude that Ms MacLeod had other options open to her, other than resigning, considering that she had raised a personal grievance and that her claims for unpaid wages could be pursued through the Authority and that mediation was also being pursued. Also she resigned before the expiry of her sick leave. She told the Authority that she had previously been unwell before this employment relationship, and I am not satisfied that she can establish that the cause of any stress related to the actions solely of her employer, where there has been no independent evidence offered.

[26] Her medical certificates are proof of her doctor declaring her unfit for work, but not evidence of any reasons attributable to the actions of her employer. When this is compared with the issues that Mr. Anslow wanted to raise with her I consider it is more than likely that Ms. MacLeod has prematurely resigned without waiting for the processes she commenced to be worked through.

[27] I dismiss her claim for constructive dismissal.

### **Costs**

[28] ABC Plumbing Drainage & Gas Limited is to contribute to Ms. MacLeod's costs since she has been successful in her wage claims. The employer has put the applicant to the unnecessary expense of the Authority's investigation on the issue of who her employer was where it was going

to be difficult to prove that AB Computer Services Limited was the employer. The respondent is responsible for adding to the length of the hearing. Documents produced late could have reasonably been included in the statement in reply. The applicant should not be put to the unnecessary expense of the delays and extra costs of the involvement of her representative because the employer's affairs were not in proper order. The applicant's constructive dismissal claim has added to the length of the process but since there were underlying issues in the employment relationship it was not unreasonable for these to be identified.

[29] Therefore I determine that the applicant is entitled to a contribution towards her costs and I award her \$2,000 and the filing fees of \$70.

### **Conclusion**

[30] I conclude that ABC Plumbing Drainage & Gas Limited is to pay to Margaret MacLeod:

- Wages of \$2,280 plus interest calculated at 7% per annum from the date of this determination until the date of payment.
- Holiday pay on the outstanding amount of wages being \$136.80 plus interest calculated at 7% per annum from the date of this determination until the date of payment.
- Holiday pay adjustment of \$42.66 plus interest calculated at 7% per annum from 17 September 2004 until the date of payment.
- Costs of \$2,000 and the filing fee of \$70.

[31] ABC Plumbing Drainage & Gas Limited is to pay to the Crown \$1,500 penalty for failing to reasonably provide the applicant with a written employment agreement before 22 July 2004.

### **Reserved leave**

[32] The issue of the role and responsibility of ABC Plumbing Drainage & Gas Limited and AB Computer Services Limited and Mr Anslow personally, in regard to the payment of Ms MacLeod's entitlements in her employment relationship, is reserved.

[33] I reserve any decision on the applicant's entitlement to the filing fee on Mr Anslow's personal inclusion in the employment relationship problem because it has not been disposed of yet and it might not be necessary to do so.

P R Stapp  
Member of the Authority