

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 48
5409673

BETWEEN ALEX EARL
 Applicant

AND MURRAY J MCLAUGHLAN &
 CO LIMITED trading as
 MURRAY J MCLAUCHLAN &
 CO LIMITED
 Respondent

Member of Authority: P R Stapp

Representatives: Greg Bennett, Counsel for the Applicant
 Murray French, Advocate for the Respondent

Investigation Meeting: 2 April 2014 at Wellington

Submissions Received: by 11 April 2014

Determination: 19 May 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] This is a matter about the validity of a trial clause in an individual employment agreement that is relied upon by Murray J McLauchlan to dismiss Mr Earl on 18 December 2012. Mr Earl and Mr McLauchlan have an issue about when the offer and acceptance of employment was agreed and whether there was an individual employment agreement signed off (I will refer to this as the first/original agreement), either before work commenced on 13 November 2012 at 9.00am, or much later the same day after work had commenced. Mr Earl has produced an agreement that he says was the first agreement signed, but Mr McLauchlan says the agreement is significantly different and was provided by him as a copy for Mr Earl to use for

Immigration visa purposes (I will refer to this agreement as Mr Earl's agreement and/or the second agreement)

[2] Mr Earl has also claimed that Mr McLauchlan prevented him from bringing his lunch to work after a day working overtime on a Sunday, and he says that he was not allowed time to go and buy lunch and had no time to arrange to take lunch to work. Mr Earl alleges that he had been verbally abused and threatened at work by Mr McLauchlan. However, subsequently in the statement of problem filed in the Employment Relations Authority on 7 May 2013, this problem was extended to include claims against Mr McLauchlan for abusing, swearing and threatening Mr Earl in his work and the claim that that he would "*fire*" Mr Earl. Mr Earl has also claimed that it was unjustified of Mr McLauchlan to require him to work with asbestos on a roof.

[3] When the proceedings were commenced Mr Earl claimed wage arrears, including overtime for work. The parties have a disagreement on the amount of the overtime hours Mr Earl has claimed. Mr Earl did not believe that he had been paid his full holiday leave entitlement. Since then the wage arrears, holiday pay and overtime claims have been withdrawn (at the Authority's investigation meeting).

[4] Mr McLauchlan denies all Mr Earl's claims.

The issues

[5] The issues in this matter relate to the credibility of both Mr McLauchlan and Mr Earl.

[6] The primary issues are as follows:

- (a) Was there a lawful trial clause in the individual employment agreement between Mr Earl and Mr McLauchlan?
- (b) Was there any action of the employer that was unjustified disadvantaging Mr Earl in his employment in regard to the claim of personal grievance raised on 18 December 2012?

[7] There are some factual issues between both parties and the important ones are as follows:

- (a) At what time did Mr Earl and Mr McLauchlan agree on an offer and acceptance of employment?
- (b) Did Mr Earl telephone Mr McLauchlan on 12 November 2012?
- (c) What time did Mr Earl start work on 13 November 2012?
- (d) When was the employment agreement signed off on 13 November 2012?
- (e) Did Mr Earl return to the workshop at the end of the day on 13 November 2012?
- (f) What is the explanation for the alleged missing employment agreement?
- (g) Were there two employment agreements, and what is the explanation for the second employment agreement?
- (h) Was Mr Earl given the van to use for work and to use from home to work; ie at the point of starting work or later in the day on 13 November 2012,
- (i) Was Mr Earl sworn at and abused by Mr McLauchlan?
- (j) Could Mr Earl have filled out a worksheet on Sunday after completing over time?
- (k) What were the work arrangements involving the asbestos roof?

Background

[8] Murray J McLauchlan has a plumbing business which he runs from Lower Hutt. He is a director of the company that is registered as Murray J McLaughlan & Co Limited (McLauchlan), but because the spelling of his name on the registered document is misspelt he trades as Murray J McLauchlan & Co Limited.

[9] From time to time Mr McLauchlan has employed people and used a local agency called Equip Recruitment to obtain temporary workers. McLauchlan is a small business and is run by Mr McLauchlan. The business has an accountant, and an

employment consultant who has been engaged to assist in the current employment relationship problem. At the time of these events Mr Earl was McLauchlan's only employee.

[10] In the early part of November 2012 Mr McLauchlan decided to employ a plumber to assist him. Mr MacLauchlan says he ideally wanted a qualified and licenced plumber, but he would have taken on somebody with lesser qualifications. On 11 November Mr McLauchlan started an advert on Trade Me for a person from "*any experience level, from beginning an apprenticeship to fully qualified*", but nothing eventuated from the advert. At around this time he ran into a Mr Stu Hurst who runs Equip Recruitment based in Petone. Mr McLauchlan says that Mr Hurst is an acquaintance who he sees now and again. Mr McLauchlan says that Mr Hurst had provided temporary labourers at various times for the business in the past. Mr McLauchlan says that he casually mentioned that he was looking for a plumber and had not had much luck in obtaining one. Mr Hurst undertook to keep an eye out for somebody. Subsequently Mr Hurst rang Mr McLauchlan on 12 November to say that he was sending a person called Alex Earl to see him on Tuesday 13 November 2012.

The facts and findings on the offer and acceptance and signing off an employment agreement

[11] Mr Earl says he telephoned Mr McLauchlan on Monday 12 November to arrange a meeting the next day. Mr McLauchlan adamantly denies that any telephone call was made by Mr Earl and instead he was solely relying on his call from Mr Hurst to say that Mr Earl would arrive to see him on 13 November. Since Mr Earl never referred to this earlier I believe Mr McLauchlan is more likely than not to be correct.

[12] Mr Earl arrived at the business on 13 November at or about 7.30am, and had his tools. He and Mr McLauchlan had a discussion that lasted until approximately 9.00am when they both agree that they set out for work for the rest of the day. At some stage Mr McLauchlan gave Mr Earl a van to use for tools and carrying materials. The employment certainly commenced around 9.00am.

[13] During their meeting they discussed Mr Earl's qualifications and the arrangement for employing him either directly and/or through Equip Recruitment. Messrs Earl and McLauchlan say they each telephoned Mr Hurst before they started out to work. They had entered an arrangement for Mr Earl to be hired directly by Mr

McLauchlan, instead of him being a temp from Equip. Mr McLauchlan conceded that he did telephone Mr Hurst and that he did not tell Mr Hurst the truth about the arrangement when he told Mr Hurst that the person Mr Hurst was sending had not arrived.

[14] Mr McLauchlan informed me that did not say to Mr Hurst that he had employed anybody, but he avoided telling the truth to Mr Hurst about the arrangements he made with Mr Earl. Mr McLauchlan's approach to this was because he and Mr Earl had come to an agreement for Mr Earl to be employed directly by McLauchlan and he did not want to disclose the arrangement to Mr Hurst. Both Messrs Earl and McLauchlan were implicated in the changed arrangements.

[15] It is common ground that there must have been at least two agreements that came about during the short time that Mr Earl was employed, as both witnesses accepted during cross examination. The first agreement was the original agreement that was apparently signed off on 13 November, but cannot be located. There is no explanation about what has happened to it. The second agreement was Mr Earl's agreement that he has produced at the investigation meeting. The difference on the agreements is that Mr McLauchlan says the original agreement was signed off before 9.00am on 13 November 2012 when the arrangements were put in place including the trial, and Mr Earl who says the original was the same as the one he has produced. The latter is adamantly denied by Mr McLauchlan.

[16] The parties' positions on the signing off of the employment agreement by 9.00am on 13 November 2012 are affected by the following:

- a. That Mr McLauchlan says Mr Earl arrived ready to start work in whatever employment capacity since he had been sent by Mr Hurst. That Mr Earl had his tools with him at the start of the day when he was dropped off by somebody else giving him a ride. It was more likely than not he was ready to start work if not as a direct hire, certainly as a temp working for Equip. First this is consistent with him and Mr McLauchlan having a discussion about employment, qualifications and ringing Mr Hurst on 13 November. Second, there has been no proof of any telephone call that Mr Earl alleges he made on the twelfth. He never referred to it in his substantive statement of evidence, statement of problem and personal grievance letter, for me to be certain that it actually occurred. There are no telephone records to prove it.

- b. That there is a dispute about whether Mr Earl returned to the premises during 13 November after the employment had commenced. Mr McLauchlan says he gave Mr Earl the van when he started work and gave him permission to use it to get home and to work as the van was needed for jobs and it contained all the material and tools. Mr Earl did not challenge that he had the use of the van, but only the time that he was given the permission to use it. Mr Earl was adamant that he did return to work later in the day and then signed off the employment agreement. However, he has no evidence to refute what Mr McLauchlan says on the matter and Mr Earl's timesheet does not support them returning together the same day.
- c. That Mr Earl produced a signed individual employment agreement (Mr Earl's agreement) that he says was the same as the one that was signed off on the 13th November, but signed off later the same day and after the work had commenced. Mr Earl's agreement is not sufficient to prove that it was the same as the original agreement given Mr McLauchlan's evidence. Mr Earl's agreement was created much later than 13 November when Mr McLauchlan was in a hurry and to assist Mr Earl with Immigration New Zealand. Also, the failure by Mr McLauchlan to produce the original agreement would not help identify the time it was signed unless it had the time on it. There is no suggestion it did have the time on it.
- d. That Mr McLauchlan accepts that he signed off Mr Earl's agreement, but he says that Mr Earl's agreement was created much later when he was in a hurry and Mr Earl asked for a copy of his agreement to provide to his immigration consultant. Mr McLauchlan may have got wrong who Mr Earl wanted the agreement for, given Mr Earl's evidence, but I note that neither party had cause to call either the immigration consultant and/or the immigration officer managing Mr Earl's case. Mr Earl disputes what Mr McLauchlan says. However, they both accepted that there were two agreements and that it was not necessary to call anybody else, but of course they differ on what the agreements were. However, during cross examination, and questioning from the Authority, Mr Earl said that he needed a copy of the employment agreement for immigration purposes for a new visa, but now says that the copy he has produced was the same one as he provided to Immigration New Zealand. Apparently this would be the only copy Immigration would have on

the file because Mr Earl says he was working on an open visa at the time. Mr Earl's agreement cannot validate the trial clause because he had started work by the time the copy was made and signed.

- e. That Mr McLauchlan says he was in a hurry at the time Mr Earl asked for the second agreement and he took a copy of the template he thought applied, without noticing a material difference in that it referred to "apprentice plumber", and he let Mr Earl fill in the details of the wage rate and minimum hours for overtime himself, that he would not have allowed in regard to the original agreement. He cannot explain why he was not able to find the original agreement. He says in the original agreement he would have filled in the details, not Mr Earl. That seems more likely as he was offering the rate of pay and threshold for overtime and he was running the business. The two agreements would have contained the same statutory requirements for the 90 day trial clause based on the template Mr McLauchlan has produced and Mr Earl's agreement that he produced. Mr Earl agrees that Mr McLauchlan told him there would need to be a trial, but Mr Earl says this was raised after he had started work on 13 November. It seems clear that Mr McLauchlan signed Mr Earl's agreement hurriedly to give Mr Earl a copy when Mr Earl asked for it and that it is more likely than not that Mr McLauchlan hurriedly disposed of the matter by obtaining the wrong template, letting Mr Earl fill in the details of the rate of pay and the hours to be completed for overtime to apply and signing off.
- f. That Mr McLauchlan says that Mr Earl's agreement could not have possibly been the agreement that he signed off on 13 November 2012, because it referred to the position being for an "apprentice plumber". This is not supported by him wanting someone with "any experience level, from beginning an apprenticeship to fully qualified" from the Trade Me advert and a "plumber" with his discussions with Mr Hurst. Moreover, Mr MacLauchlan did not carry out any checks at the time about Mr Earl's qualifications. These checks have been made much later in an attempt to prove Mr Earl could not be possibly right about his claims. There is also no other documents to support the evidence.

- g. That Mr McLauchlan and Mr Earl have gone through each other's evidence in much detail to highlight where they have found inconsistencies, misleading statements and alleged untruths.

[17] Mr McLauchlan's difficulty is to prove that the employment agreement was actually signed before 9.00am and for Mr Earl to have proper time to get advice before commencing work. It simply does not matter that Mr Earl arrived ready to work because the Court has made it very clear that an employer must have an employment agreement signed off in writing before work commences and that there is appropriate time for the worker to get independent advice before signing it off. Also the Courts have not said that an oral offer and acceptance meets such requirements. Mr McLauchlan has not been able to explain what happened to the first agreement. Because it is accepted that there were two agreements, I hold that the original agreement, whatever template was used, would have applied at the time, but there is no certainty that such an agreement was signed off before the employment commenced (whatever happened later in the day) and that Mr Earl had adequate time to get advice. It was the employer's responsibility to ensure that the employment agreement was retained, (even if he gave it to Mr Earl by mistake) and to permit an employee to get advice.

[18] Mr McLauchlan relies on using the Master Plumbers standard template individual agreement, which includes a 90 day trial clause. Mr Earl's agreement is consistent with this. Mr Earl also says he knew Mr McLauchlan was offering a trial at the start, but only became aware of this later in the day. However, it was Mr McLauchlan's responsibility to ensure the strict requirement to sign it off before the employment commenced. He has not been able to satisfactorily prove he did so because he has not been able to provide the first employment agreement. A template copy he says applied is not enough, I hold, especially given the conflict in the evidence.

[19] Mr McLauchlan says that he has had training with the Master Plumbers and fully understood the requirements to include a valid 90 day trial clause to apply and that the agreement had to be signed off before any employment started. Mr McLauchlan has not satisfied me that he did attend any course when he was not entirely truthful with Mr Hurst, and has not provided any paperwork and any witness to support him attending and/or participating in a course. He could not provide the

details and time as to where and when the course was attended and/or in what way the course was conducted. This impacts on his reliability in regard to his evidence even though he was adamant that he knew that the agreement had to be signed off for the trial to come into force and be valid.

[20] I hold that on balance that Mr McLauchlan has not been able to prove that the employment agreement was signed off at the point that there was an offer and acceptance reached prior to work starting at 9.00am on 13 November 2012, and that is consistent with both parties agreeing an agreement was signed off at some time on 13 November, albeit he and Mr Earl say at different times.

[21] I hold that Mr Earl was dismissed by Mr McLauchlan on 18 December 2012. There was no investigation into any of the problems alluded to in Mr Earl's employment. This employer had the resources to reasonably arrange an investigation given it has engaged a consultant to manage the employment relationship problem subsequently and used an accountant. There were no concerns put to Mr Earl and for him to have a reasonable opportunity to respond on any allegations (about his qualifications, the standard of his work, performance, the completion of his timesheets and access to Mr McLauchlan's office) before Mr McLauchlan could make a genuine consideration on what to do. Indeed Mr McLauchlan had no defence to justify the dismissal since he relied entirely on the claim that the 90 day trial clause was valid (statement in reply).

Other matters in Mr Earl's claim

[22] It is clear that during the employment Mr McLauchlan and Mr Earl started to have difficulties on a personal level. Those difficulties are exemplified by both their approach to their evidence, in disputing each other's reliability and identifying and assessing the conflicts in each other's evidence in an unusually pedantic and opinionated way. For McLauchlan the problems seem to relate to Mr Earl's ability, performance and knowledge and his qualifications. The latter is more of an issue now than what it may have been at the time when Mr McLauchlan accepted Mr Earl's representations and that Mr Earl had a driver's license. For Mr Earl the problems seem to relate to Mr McLauchlan's personal behaviour and lack of tolerance toward him.

[23] I have no doubt that Mr McLauchlan is a robust person. I have no doubt whatsoever that the robustness in the workplace involved an amount of swearing, but I am not satisfied that it necessarily led to Mr McLauchlan abusing and swearing at Mr Earl personally and asking him to do anything against the law and or to fail to meet professional requirements, including health and safety. This is because there is no other independent evidence available to support Mr Earl's claims.

[24] Mr Earl volunteered to work overtime on Sunday 16 December 2012 when Mr McLauchlan asked him to work. Even although the claim for overtime has now been withdrawn, it is the catalyst for Mr Earl's claim that Mr McLauchlan prevented him arranging to take his lunch to work the next day and/or from going and getting lunch the same day. The withdrawn claim relates to a dispute over at least one hour's overtime over and above the overtime threshold in the employment agreement, but Mr Earl withdrew it because he had insufficient proof that he worked the time he claimed. He could not contradict and/or rebut Mr McLauchlan's evidence on the point. On this basis it was Mr Earl's responsibility to arrange his lunch the next day. He has not proved that Mr McLauchlan unjustifiably prevented him from doing so.

[25] There were difficulties in the work in as much as Mr McLauchlan says that Mr Earl was not a good plumber as he had claimed to be. Mr McLauchlan had issues about the quality of Mr Earl's work and raised questions about the quality of his tools. There was also an issue that Mr McLauchlan had about Mr Earl not completing job sheets, supposedly kept in the van, to the required standard, and that this brought about frustration and arguments between the two of them when the matter came to a head. One of the last straws for Mr McLauchlan was Mr Earl's alleged failure to complete the job sheet for the overtime on Sunday 16 December 2012. They have a disagreement about the completion of the timesheet and Mr Earl's ability to do it when Mr Earl said that the sheets were located in Mr McLauchlan's locked office in the workshop and that he could not get one until the following Monday. Mr McLauchlan denies this. Mr McLauchlan claims that Mr Earl should have had the job sheets in his van in any case.

[26] It is apparent that Mr Earl could have gained access to the workshop with the remote door opener in his van (not challenged) and to get into Mr McLauchlan's office, which was not locked according to Mr McLauchlan. The latter was also not challenged by Mr Earl. It is also likely there were job sheets in the van. This is the

argument that culminated in Mr McLauchlan dismissing Mr Earl on 18 December 2012.

[27] During their discussion Mr Earl secretly recorded the argument with Mr McLauchlan on his cell phone. Mr Earl secretly recorded the meeting to endeavour to show Mr McLauchlan's behaviour involved swearing as proof of what he was saying about Mr McLauchlan's behaviour in the workplace. The recording has not assisted me to determine their behaviour and language, but it does prove that the relationship was robust.

Determination

[28] I hold that the 90 day trial clause is invalid because Mr McLauchlan has not been able to satisfy me to the required standard of proof that an individual employment agreement was signed off before the employment commenced and when he says it was prior to the commencement of employment. The actual agreement has not been provided in writing where it is the employer's responsibility to retain such an agreement. Also, as such there was not sufficient time for Mr Earl to get advice before 9.00am when work started. Mr McLauchlan relies on it being Mr Earl's responsibility to get his own advice. I agree, but the way the arrangement was entered into meant Mr Earl in reality had no time to do so and there is no written record of him waiving any right and responsibility to do so. For the reasons already given Mr Earl has a personal grievance for unjustified dismissal.

[29] I now turn to remedies for the claim. Mr Earl could not tell me, and did not provide a detailed explanation of his attempts to mitigate any loss, and failed to provide the details of earnings that he received before getting another job. I accept that he incurred a loss because his income from McLauchlan ceased, and that in general he says he did look in the papers for work. He made no applications for jobs. That barely gets him over the threshold to meet his responsibility to mitigate, although I accept that the Christmas New Year period would make it difficult to get another job at that time. However, Mr McLauchlan paid him his notice and holiday pay over the statutory holidays. Mr Earl had no evidence of even trying to get help from elsewhere to look for work. He did get another job later, but had to move to Christchurch to do so. He left me very unclear about the earnings he received in the period of his claim, and I concluded from what Mr Earl said that he earned at least a week's earnings in

temporary work. I have reduced his claim to two weeks' loss. I calculate his hourly rate as \$26.57 per hour for 40 hours per week. His lost wages amount to \$2,125.60.

[30] He has claimed \$10,000 compensation. Put bluntly he did not adequately explain what the claim was for and what the impact of his dismissal was on him, other than in general terms that he was humiliated, had lost dignity and had hurt feelings. He struggled to provide any oral explanation for the claim in any detail and without any examples of what happened to him. Two things strike me about the claim. First he did lose his income and this would have had some impact on his feelings. Second he was left to take his tools away and left standing in the rain on the curb outside the workshop until he could get a ride home. I accept that these would have had an impact on him and that they are linked to his dismissal. My assessment of these factors would be in the value of \$1,000 only.

[31] Mr Earl cannot be blamed for the situation of the employer's making. I hold that Mr Earl did not contribute to his personal grievance. Mr McLauchlan's evidence that he believed that Mr Earl has created the situation for his own advantage has not been proved because of their genuine differences, and the failure of the employer to follow the correct procedure. There is no reduction in the remedies.

Other claims for unjustified disadvantage

[32] The claim from Mr Earl that he was unjustifiably disadvantaged in his employment is dismissed. The information that he has relied upon for the claim I have noted as background in the parties' employment relationship. I have to say that the claim as originally raised on 18 December 2012 was modified later when the statement of problem was filed on 7 May 2013. Technically the claim in the statement of problem because of the change was outside the 90 day requirement to raise a personal grievance. This relates to the claims about how Mr Earl was allegedly treated in his employment by Mr McLauchlan and the matter of working with asbestos. The claims for unjustified disadvantage are dismissed. The issue as it was raised on 18 December about the lunch was not an unjustified disadvantage because Mr Earl has not proved that Mr McLauchlan prevented him from bringing his lunch to work and/or from being able to go and get lunch as he had the van and travelled from Wellington to Petone and it was Mr Earl's responsibility to organise what he had for lunch when he could take it. Mr Earl's claim for unjustified disadvantage is dismissed.

Summary of remedies for personal grievance for dismissal

[33] Murray J McLaughlan &Co Limited trading as Murray J McLauchlan & Co Limited is to pay Alex Earl:

- i. \$2,125.60 gross lost wages; and
- ii. \$1,000 nett compensation for humiliation, loss of dignity and injury to feelings.

[34] Costs are reserved.

P R Stapp

Member of Employment Relations Authority