

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Amira Garas-Endrawis

**AND** Albany Food Warehouse Limited

**REPRESENTATIVES** Amira Garas-Endrawis, in person  
Mary-Kate Paterson, advocate for Albany Food Warehouse Limited

**MEMBER OF AUTHORITY** Rosemary Monaghan

**INVESTIGATION MEETING** 2 August and 1 November 2006

**DATE OF DETERMINATION** 23 November 2006

DETERMINATION OF THE AUTHORITY

**Employment relationship problem**

[1] Albany Food Warehouse Limited (trading as Pak'n'Save Albany) ("AFWL") employed Amira Garas-Endrawis as a checkout assistant in its Albany supermarket, commencing 20 April 2004. Mrs Garas-Endrawis' employment ended in 2005 following difficulties she experienced in performing her checkout duties, and an apparent lack of suitable alternative duties, as a result of an injury to her back.

[2] Mrs Garas-Endrawis says she was unjustifiably and actually or constructively dismissed, and has a personal grievance. She also says that a change to her hours of work, which was associated with her injury, was an unjustifiable action affecting her employment to her disadvantage. She says she has a personal grievance in that respect too.

[3] Finally, Mrs Garas-Endrawis seeks 'all her entitlements', which she clarified to say she is owed unpaid holiday pay as well as payment in lieu of notice of termination of employment.

[4] AFWL says Mrs Garas-Endrawis was not dismissed, rather she resigned. It also says the change to her hours of work was by agreement, and that no outstanding wages or holiday pay are owed.

**Mrs Garas-Endrawis' injury**

[5] Mrs Garas-Endrawis injured her back at work on 28 May 2004. She was attempting to lift, and scan, a box of wine bottles in the course of carrying out her checkout duties when the twisting motion and the heaviness of the box caused the injury. At the time it was diagnosed as a thoracic strain. The matter was referred to the Accident Compensation Corporation and treated as a work injury. Mrs Garas-Endrawis left the workplace following the injury, and was absent until 12 June 2004.

[6] A medical certificate dated 3 June 2004 provided that Mrs Garas-Endrawis would be fit to return to normal work on 12 June 2004, to work normal hours. A note from Mrs Garas-Endrawis' physiotherapist to the checkout manager, Bob McCloughen, dated 11 June 2004, recorded that Mrs Garas-Endrawis still had some residual stiffness in her thoracic area. It

added a recommendation that Mrs Garas-Endrawis start back at work but asked Mr McLoughen to assign lighter duties. The physiotherapist believed Mrs Garas-Endrawis was likely to injure herself further if she sat for '8-9 hours lifting heavy items'. However that document did not amount to a medical certificate.

[7] After her return on 12 June Mrs Garas-Endrawis carried out her normal duties, although her hours of work were reduced. On occasion she probably had to lift some items of the kind which caused her original injury - and she said she was from time to time required to carry out packing duties at the checkouts - but she was never obliged to sit for '8-9 hours lifting heavy items'.

[8] Early in July Mrs Garas-Endrawis was still experiencing difficulties, so was absent from work for most of that month. A medical certificate dated 5 July 2004 provided that she would be fit to return to work on 26 July 2004, and would be 'unable to perform work involving heavy lifting'.

### **Hours of work**

[9] According to the parties' written employment agreement, Mrs Garas-Endrawis' hours of work prior to her injury were Wednesdays and Fridays from 4 – 10 pm, and Saturdays from 9 am to 6 pm. Thus, depending on her rostered breaks, she was employed to work for some 19.5 hours per week.

[10] In June 2004 she worked for three days a week, at 5 – 5.5 hours a day. On her further return to work on 26 July 2004, she worked for four days a week for periods varying between 4 and 4.5 hours a day. Mr McLoughen said he arranged those hours so that Mrs Garas-Endrawis could have a rest day or days between her work days, and would have made additional hours of work available if he had been asked to.

[11] Later in July an occupational therapist was monitoring Mrs Garas-Endrawis' progress, through the ACC. According to the therapist's report dated 6 August 2004, Mrs Garas-Endrawis reported an exacerbation of her symptoms after four hours' work despite using the techniques she had been taught to alleviate the problem. The report also recorded an agreement that Mrs Garas-Endrawis continue to work for four hours per day, four hours per week, for another week, then move to working four hours per day, five days per week.

[12] Mrs Garas-Endrawis denied such an agreement, but while investigating this problem I formed the view that her stance has been influenced by problems and disagreements she has had with the ACC, and her evidence has been coloured by the general view she formed subsequently that her rights were being breached and she was treated unfairly. As far as the employment relationship is concerned, Mr McLoughen's evidence was that Mrs Garas-Endrawis discussed with him her need to move to four hour work shifts, as well as the way her days of work would be allocated. I did not perceive any real conflict in the evidence on that point. Indeed Mrs Garas-Endrawis commented that she did not have a problem with the change in her hours at the time – that came later.

[13] Further therapist's reports recorded difficulties when Mrs Garas-Endrawis was asked to perform packing duties, and reservations on Mrs Garas-Endrawis' part concerning the increase to a four hour per day, five day working week. This is consistent with Mrs Garas-Endrawis' evidence that she was continuing to experience pain in her back.

[14] A medical certificate dated 11 August 2004 indicated Mrs Garas-Endrawis was not fit for heavy lifting. However she had continued to report for work after 26 July.

[15] On 14 August 2004 Mrs Garas-Endrawis signed a variation to her written employment agreement, in which her hours of work changed to Mondays, Tuesdays and Fridays from 10 am to 2 pm, and Saturdays from 9 am to 1 pm. Thus she was to work for 16 hours per week. Mr McLoughen said he regarded as temporary the variation to Mrs Garas-Endrawis' hours of work, and I have no reason to disbelieve him. Although Mrs Garas-Endrawis now protests that the reduction was unfair, nothing in the evidence indicates that the changes she and Mr

McLoughen discussed were implemented other than by consensus, or that they were other than a response to the pain and discomfort she was feeling.

[16] A report from the occupational therapist dated 30 August 2004 recorded Mrs Garas-Endrawis' advice that her back had improved considerably, and expressed the view that Mrs Garas-Endrawis was capable of working for 20 hours per week on checkout duties. The therapist recorded that Mrs Garas-Endrawis was being discharged from her caseload.

[17] There followed a slight increase in Mrs Garas-Endrawis' hours of work, but from 10 September – 17 October 2004 she was out of New Zealand on leave unrelated to her injury.

[18] There was nothing to suggest the variation to Mrs Garas-Endrawis' hours of work was addressed formally on her return to work on 18 October 2004. However her pay record shows that the average number of hours she worked between her return and Christmas week was 19.3.

[19] At the same time, while she was absent on leave Mrs Garas-Endrawis had consulted an orthopaedic specialist and obtained a new diagnosis of the injury to her back. The injury was more serious than a thoracic sprain. On her return she was referred to a New Zealand specialist, who made the same diagnosis. In November 2004 she was offered the option of surgery, but preferred more conservative treatment. An open letter from her doctor dated 30 November 2004 merely recorded that she had been referred to a specialist and repeated the restriction on heavy lifting.

### **Events leading to the termination of employment**

[20] Mrs Garas-Endrawis continued to report for work until 14 January 2005. She had been carrying out normal checkout duties, but was continuing to experience pain. The evidence about what happened that day was marred by Mrs Garas-Endrawis' blurring of a number of conversations about the work she was to do, and Mr McLoughen's lack of detailed recall. It seems, however, that Mr McLoughen asked her to carry out packing duties at the checkout, and she wanted to work on the express checkout instead. Mr McLoughen declined. His evidence was that Mrs Garas-Endrawis told him she could do serious damage to her back if she continued on the checkout. Mrs Garas-Endrawis did not recall saying that, but it is likely she did so.

[21] Mr McLoughen asked for her till key and told her to go home. Her evidence was that she asked him if this was her last day of work, and he told her she could return for work when she was medically cleared. Mr McLoughen's view was that no light duties were available for her.

[22] Either on 14 January, or before that, the possibility of other positions had been discussed. Mrs Garas-Endrawis said she was told there were none available in the office. In fact at some point there was an office vacancy, and I was told it was given to a checkout supervisor with more relevant qualifications. The only vacancy mentioned to Mrs Garas-Endrawis was a cleaning position, which she did not accept.

[23] The evidence about what happened next was not clear. Mr McLoughen said he contacted the ACC and told the case officer of Mrs Garas-Endrawis' statement that she could do serious damage to her back if she continued on the checkout. I consider it likely he also said there were no alternative duties available.

[24] For reasons I attempted to identify, the ACC gained the view that Mrs Garas-Endrawis' employment had ended in January 2005. I was unable to ascertain the basis for that view because the case officer concerned told me she had no dealings with Mrs Garas-Endrawis' file in January, and my copy of the ACC file notes does not record what happened in January.

[25] Assuming Mr McLoughen's account of what he told the ACC is accurate, he did not go as far as stating expressly that the employment relationship had ended. However it is clear from the ACC file notes that it acted on its view that the relationship had ended.

[26] In an employment context, determining whether the relationship had ended requires emphasis on the exchanges between Mrs Garas-Endrawis and her employer. I do not construe the evidence I heard on that point as amounting to any more than Mr McLoughen sending Mrs Garas-Endrawis home until she was cleared to return to work. Neither party treated it as a dismissal at the time. Mrs Garas-Endrawis remained on the payroll although she did not attend for work, and she considered herself to be still in employment. She also retained her uniform. An employee earnings certificate dated 14 February 2005, and provided to the ACC, says nothing about the employment having ended, and records an obligation to pay Mrs Garas-Endrawis for the statutory holiday at the end of January.

[27] The potentially open-ended nature of Mrs Garas-Endrawis' absence from 14 January is not an unknown phenomenon in employment law. The mere existence of that state of affairs does not mean the employment relationship has ended, and the employer should be kept advised of progress towards recovery. The decided cases tend to address how such absences were resolved, usually in the context of a claim of unjustified dismissal associated with the method of resolution. No process of resolution had begun between the present parties in January 2005, and in particular there had been no move towards dismissal.

[28] Apparently on the assumption the employment relationship had ended, in February 2005 the ACC referred Mrs Garas-Endrawis for an occupational assessment. The assessment identified a number of suitable employment options of a clerical or administrative nature. A medical assessment by an occupational medicine practitioner concluded that a new vocation was necessary, again listing possible positions of a clerical or administrative nature. Indeed Mrs Garas-Endrawis said she has a tertiary qualification and has worked as an accountant outside New Zealand.

[29] In or about late April 2005 Mrs Garas-Endrawis sought to exercise her staff discount privileges while shopping at Pak'n'Save. That action supports the conclusion that she did not consider her employment to be at an end at that time. However she found her employee number had been assigned to someone else. I was told that was because Mrs Garas-Endrawis was not using it, which was not a satisfactory explanation. That kind of action should not have been taken until AFWL obtained confirmation of Mrs Garas-Endrawis' intentions.

[30] From that incident Mrs Garas-Endrawis concluded her employment had been terminated, but unfortunately it was her ACC case manager rather than her employer whom she contacted in order to clarify the matter. The indication she said she received was that her employment had ended. She probably did get such an indication, but she should not have sought clarification of her employment status from the ACC – she should have approached her employer.

[31] That is what she said she did next. Unfortunately her evidence on the point was too vague to be of weight. She could say only that she contacted an unnamed individual at Pak'n'Save, who informed her she had no job. There was no suggestion the person concerned was Mr McLoughen or either of the other management representatives who participated in the investigation meeting, and no indication of who the person was or when the conversation occurred.

[32] Some time later, in May or June 2005, Mrs Garas-Endrawis contacted Ian Campbell, the store manager. He was not familiar with Mrs Garas-Endrawis' circumstances and indicated he would get back to her. Unfortunately he did not do so and his involvement did nothing to clarify matters at the time. Further, during the investigation meeting he had almost no recall of any part of any relevant conversation. That was not helpful so I have resorted to the ACC file notes as the only other source of information. Although I put the notes to Mr Campbell, they did not assist his recall. Unsatisfactory though this aspect of the evidence was, I have addressed it because otherwise there is no way of accounting for the events between early June and mid-July 2005.

[33] I record that I attempted to speak to the ACC case officer who had taken over Mrs Garas-Endrawis' file by mid-2005, and a resumption of the investigation meeting was scheduled for that purpose. However that person had been out of New Zealand on an extended period of leave. She did not return on the expected date and her date of return was now unknown, so the investigation was ended without hearing from her.

[34] According to a file note dated 9 June 2005 the new case officer was uncertain of Mrs Garas-Endrawis' employment status and sought to clarify it with Mr Campbell. Mr Campbell told the case officer that AFWL could not continue to provide light duties for Mrs Garas-Endrawis, had told her so and had not heard from her for several months, so concluded she had accepted this and her employment had ended. If that account is correct then the view AFWL was taking at the time was that Mrs Garas-Endrawis had abandoned her employment. However AFWL did nothing to confirm whether this was so - and Mrs Garas-Endrawis' approach to Mr Campbell should have suggested it was not.

[35] The case officer's note also refers to the ACC's understanding that Mrs Garas-Endrawis' position could not be kept open, so that as a result vocational rehabilitation had started. AFWL had not been kept informed of this by the ACC or Mrs Garas-Endrawis. The case officer asked Mr Campbell for a letter confirming Mrs Garas-Endrawis' job could not be kept open. He said he would provide one, effective from 'a few months ago'. He should not have said that without conducting a proper check of Mrs Garas-Endrawis' employment status, and without addressing the matter properly with her.

[36] The case officer conveyed this information to Mrs Garas-Endrawis. Understandably, she was confused by it.

[37] Mr Campbell did not provide the letter of confirmation anyway, and the request was raised with him again at the end of June. This time Mr Campbell referred the matter to Mary-Kate Paterson, the business services manager. One of Ms Paterson's early actions was to seek a full complement of Mrs Garas-Endrawis' medical certificates, and query why AFWL did not appear to have a full complement. Ms Paterson's concern about the point was treated with surprise by Mrs Garas-Endrawis' case officer when it was reported to her, and she wondered at the concern since the employment relationship was apparently over. Unfortunately she expressed her surprise to Mrs Garas-Endrawis. Unfortunately, too, confusion over that matter has not helped the confusion endemic in this problem.

[38] Meanwhile in late June and early July Ms Paterson attempted to arrange a meeting with Mrs Garas-Endrawis. She also sought to speak to the case officer, but it appears she was unable to do so. Mrs Garas-Endrawis asked her case officer to attend the meeting, but the case officer declined in reliance on a policy that ACC staff not attend meetings about employment issues.

[39] Eventually on 19 July 2005 Mrs Garas-Endrawis and her husband met with Ms Paterson. Ms Paterson advised Mrs Garas-Endrawis that she was still a staff member and was still on the payroll. Mrs Garas-Endrawis indicated her surprise at that information, then sought to raise her concern about the reduction in her hours of work, and why she had not been permitted to continue to work on 14 January. Finally she said she was unable to carry out any heavy lifting or bending because it caused her pain. She would not be able to 'do the checkout job again' in the meantime. According to her, Ms Paterson indicated that would be a ground to terminate her employment.

[40] There followed a discussion about the possibility of alternative work in the office. Mrs Garas-Endrawis said she wanted to consult with her case officer on the point, but said too that she would not accept a position at a 'lower level than [she] was qualified for'. Indeed, earlier that month her case officer had drawn to her attention a vacant position in a bank and recommended that she apply for it. It seems to me that Mrs Garas-Endrawis failed to distinguish between wider vacancies the ACC recommended to her as part of her rehabilitation (and on the assumption her employment at AFWL had ended), and work AFWL might be able to offer her in the interests of continuing her employment. She was not entitled to expect

AFWL to provide her with work of the kind the ACC was exploring as part of the rehabilitation process, although it was open to both parties to agree on an alternative position of some kind in order to continue the relationship.

[41] Ms Paterson told Mrs Garas-Endrawis there were no positions in the accounting field. She also said she had not seen the occupational therapist's reports. She went on to tell Mrs Garas-Endrawis that the best thing for her, if she could not work as a checkout operator, would be to resign. Mrs Garas-Endrawis was to think about this.

[42] By letter to Mrs Garas-Endrawis dated 20 July 2005 Ms Paterson said:

"You indicated ... that you would not wish to return to working in your position as checkout operator and that you would not take any position unless it was in the accounting field you have trained in. Unfortunately we do not have any position in that area.

With you[r] agreement, I would like to terminate your position with Albany Pak'n'Save and pay you any annual leave and alternate days which are owing to you. I look forward to having a reply from you by 29 July 2005."

[43] Mrs Garas-Endrawis further agreed in evidence that she had given the indication Ms Paterson set out in the 20 July letter. She replied by letter dated 27 July 2005, and signed by her, saying:

"... I think its settled in our meeting because as you know after the accident I can't do any heavy lifting, bending, twisting at this time. Now I am looking forward to return back to my career as accounts career, and I am sure that god will give me a good job.

If you would like to terminate my position at Albany Pak'n'Save it's ok."

[44] Mrs Garas-Endrawis produced another letter of the same date, but not signed, in which she took an entirely different tone. The letter disagreed with Ms Paterson's summary of the facts and did not contain any agreement to the effect that the employment should end. The letter was not sent, and AFWL was entitled to act on the sentiments in the letter that was sent. Moreover the contents of the latter are substantially more in accordance with the direct evidence of what happened than are the contents of the former.

[45] Several weeks later AFWL began receiving a series of letters from Mrs Garas-Endrawis complaining about her treatment and making a number of allegations, many of which were emotional and unwarranted. Mr Campbell met with Mrs Garas-Endrawis in an attempt to answer and resolve her concerns, but she has refused to accept those attempts in the spirit I would accept they were meant. She has made increasingly numerous and extravagant allegations which ultimately have not assisted her credibility. She does, however have some core concerns which she is entitled to raise, and I now turn to them.

### **Was there a dismissal**

[46] Of her alleged dismissal, Mrs Garas-Endrawis has said variously that it occurred in or on:

- (a) 14 January 2005;
- (b) April/May 2005;
- (c) July 2005.

#### **1. 14 January 2005**

[47] I have already referred to my finding that the legal effect of the conversation between Mrs Garas-Endrawis and Mr McCloughen on 14 January was not one of dismissal. The subsequent confusion has led Mrs Garas-Endrawis to believe her employment was terminated then - without her knowledge or consent - and to view the actions of AFWL with considerable distrust as a result.

[48] However her employment was not terminated at all on that date. Miscommunication and misunderstanding caused her (and apparently the ACC) to believe that it was.

## 2. April 2005

[49] The confusion about whether Mrs Garas-Endrawis' employment had terminated in January spilled over into confusion about whether it had terminated by about the end of April.

[50] No-one addressed me with any clarity on this matter. The month of April seems to have been identified as a possible date of termination because:

- (a) that is when the incident regarding Mrs Garas-Endrawis' staff discount occurred; and
- (b) Mr Campbell indicated to the ACC that he would write a letter saying no alternative work had been available for Mrs Garas-Endrawis 'effective a few months ago' (which might have meant effective in April although his evidence was far too vague to indicate any kind of answer); and
- (c) inexplicably, Ms Paterson signed a certificate of service for Mrs Garas-Endrawis in which it was said "Her contract was completed on 31/04/2005."

[51] The best I can make of all of this is that it was symptomatic of the confusion and misunderstanding over Mrs Garas-Endrawis' employment status. It was not helped by Mr Campbell's casual approach in May and June, and although Mrs Garas-Endrawis seems to have some trust and regard for him as a result of their interactions, as a matter of employment law his conduct of the matter in May and June exposed AFWL to considerable risk.

[52] There was no satisfactory explanation for the date on the certificate of service either. However for the reasons I have set out, I construe the circumstances as a combination of misunderstanding and miscommunication, but do not consider they amounted to a dismissal.

## 3. July 2005

[53] An opportunity to resolve the confusion came at last in the meeting of 19 July. I would say, too, that if I am wrong in my conclusion that no dismissal had crystallised between January and July, then the circumstances were capable of correction and that opportunity was taken on 19 July.

[54] At that meeting Ms Paterson confirmed the view that the employment relationship was continuing, and asked Mrs Garas-Endrawis about her ability to perform her checkout duties. Mrs Garas-Endrawis did not indicate a wish to return to those duties, rather she said she was still unable to carry them out.

[55] As for the possibility of alternative positions, AFWL relied principally on Mrs Garas-Endrawis' insistence that she be given a position more aligned with the true level of her qualifications. That was reflected in Mrs Garas-Endrawis' letter of 27 July, which expressed a wish to return to her original career and a positive view of her future.

[56] The initiative for the formal pronouncement of the end of the relationship came from Ms Paterson. It was she who put it to Mrs Garas-Endrawis that termination was appropriate. After a discussion about her ability to do the job she was employed to do, and of possible alternatives, Mrs Garas-Endrawis expressed her agreement to the termination of her employment. Overall the circumstances amounted to a termination by consensus.

[57] Mrs Garas-Endrawis now says Ms Paterson pressured her into resigning, failed to give reasonable consideration to alternative duties, and wanted to get rid of her because of her back injury. I do not accept those arguments. They are not consistent with the evidence of what actually happened.

[58] I therefore conclude that there was no dismissal.

**Hours of work**

[59] On the facts as I have found them, the changes to Mrs Garas-Endrawis' hours of work were made by agreement. She now feels it is unfair that her hours were changed, but I do not accept that. Not only were the changes made by agreement, but they were probably sensible and in accordance with AFWL's obligations regarding Mrs Garas-Endrawis' health and safety while at work.

[60] I do not accept there was any breach of the employment agreement in respect of the reduction in hours, or that the reduction warrants a finding of an unjustified action affecting Mrs Garas-Endrawis' employment to her disadvantage.

**Holiday pay**

[61] Mrs Garas-Endrawis referred her claim for holiday pay to a Labour Inspector. The inspector investigated the claim and found no monies were owed. He advised Mrs Garas-Endrawis of this by letter dated 20 June 2006.

[62] Mrs Garas-Endrawis has nevertheless persisted in her view that she is owed money for the period April to July 2005. When I enquired about the basis for this, given she was not at work and was not in receipt of salary or wages or other payments under the employment agreement, she could do no more than assert repeatedly that she was owed holiday pay for the period.

[63] I have nevertheless reviewed her pay record. There was an unused entitlement to annual leave as at the end of the first 12 months of employment. The annual entitlement was to three weeks' leave, or 12 days' leave in terms of the hours of work arrangement. Mrs Garas-Endrawis received 3 days' paid leave in advance of her entitlement when she was absent in September-October 2004. The remainder outstanding was 9 days.

[64] On the confirmation of the termination of her employment in July 2005, Mrs Garas-Endrawis was paid \$533.45 (gross). The net amount was \$447.44. The sum comprised 9.25 days' annual leave, plus 12 hours' pay in lieu of alternative statutory holidays. I have checked both calculations and seen nothing wrong with those figures.

[65] Moreover documents which Mrs Garas-Endrawis filed herself indicate that she has checked the calculations and has not found an error. I reiterate for her benefit that the Employment Relations Authority has no power to address any disagreement she may have with the ACC regarding its calculation or assessment of her entitlements in respect of earnings-related compensation.

[66] Mrs Garas-Endrawis has not been deprived of any entitlement to holiday pay.

[67] As for payment in lieu of notice, the employment agreement provided for termination by the giving of two weeks' written notice. It also provided that, where employment was terminated without the required notice by either party, one week's wages would be paid or forfeited.

[68] Here, no notice was given by either party. However since it was a termination by consensus there was no need for notice, and in the circumstances no purpose would have been served by the giving of notice. AFWL is not obliged to make any payment in lieu of notice.

**Costs**

[69] Costs are reserved. If the parties seek a determination from the Authority they shall have 28 days from the date of this determination in which to file and serve memoranda on the matter.

Rosemary Monaghan  
Member of Employment Relations Authority