

*Under the Employment Relations Act 2000*

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND OFFICE**

**BETWEEN** Tracey Mace (Applicant)  
**AND** Accounts Enforcement Limited (Respondent)  
**REPRESENTATIVES** Ray Parmenter, Counsel for Applicant  
John Hogan, Counsel for Respondent  
**MEMBER OF AUTHORITY** Leon Robinson  
**INVESTIGATION MEETING** 24 March 2005  
**DATE OF DETERMINATION** 12 September 2005

**DETERMINATION OF THE AUTHORITY**

**Employment Relationship Problem**

[1] Ms Tracy Mace (“Ms Mace”) claims that she was unjustifiably constructively dismissed by the respondent Accounts Enforcement Limited (“AEL”). AEL denies Ms Mace was constructively dismissed.

[2] The parties were unable to resolve the differences between them by the use of mediation.

**The issues**

[3] These issues arise:-

- (i) Did Ms Mace resign?
- (ii) Was the resignation caused by a breach of duty on the part of the AEL?
- (iii) If it was, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

**A resignation?**

[4] Ms Mace sent this email to the managing director of AEL Mr Wal Britton (“Mr Britton”) on 30 August 2004:-

Dear Mr Britton

*Because of my treatment over recent months and more pertinently recent weeks, I can no longer work at AEL and therefore tender my resignation. This treatment has had a serious impact on my health and overall well-being and as a result of this, I wish my resignation to be effective immediately as I cannot face any further time in the office or meetings such as you convened this morning.*

*I will be taking the matter of my treatment as an employee further and you will receive the appropriate communication from my Barrister, Mr Ray Parmenter.*

*Yours sincerely  
Tracy Mace*

## **Was there a breach of duty?**

[5] Ms Mace was initially employed by AEL from 3 December 2001 as a recoveries officer. The terms of employment were varied on 2 April 2002 so that Ms Mace was permitted to work from her home, as was recorded in advice of the same date from Mr Britton as follows:-

...

*Effective Monday April 15 2002 or as soon as Jetstream is installed at your home I have agreed to your working from home on a trial basis for a period of three months.*

*We have agreed to review this arrangement each month to ensure it is working well for you and the company.*

*I would also like to take this moment to thank you for the excellent contribution that you make to this company it is very much appreciated.*

*Regards  
Wal Britton*

...

[6] That final commendation was apparently testimony to Ms Mace's exemplary performance as a collector. Regrettably, thereafter the working relationship between the parties began to deteriorate.

[7] From October 2003 until June 2004 Ms Martin took over the role of Corporate Sales Manager in addition to her collection duties. She was expected to secure new corporate business.

[8] The employment relationship became strained as from June 2004. In an email to Mr Britton of 9 June 2004, Ms Mace stated:-

*In recent times, I have noticed the different "vibe" coming from most of the staff towards me which I have tried to ignore and have maintained my positive attitude in response. No longer is there a smile, hello or similar greeting directed towards me unless I make the effort. I am happy to make this effort but I am also not stupid and this change of atmosphere is not my imagination.  
Is there anything I should know perhaps?*

[9] Mr Britton responded:-

...

*If you believe that there is a difference in the attitude shown to you by any of the staff, then you should address the problem directly with them.  
A positive attitude is all that could be asked of anyone.*

[10] Mr Britton and AEL's Executive Manager Ms Tracey Martin ("Ms Martin") became concerned that not enough new business was coming in and that AEL's top clients were not being properly managed. These matters were raised with Ms Mace at a usual weekly meeting on 15 June 2004. Ms Mace was also advised that there would be a structured review of her performance the following month to monitor the situation. I find that Mr Britton told Ms Mace that her working from home was not working for AEL. Ms Mace was provided with a letter the same date which stated:-

*We refer to our meeting with you, Wal Britton, and Tracey Martin 15 June 2004.*

*We trust that the issues discussed at that meeting were clear. Please remember that a structured review will take place on 13 July 2004.*

[11] Ms Mace was not required to manage debt collection files after this meeting. The new client situation did not improve. By email of 7 July 2004 Mr Britton wrote to Ms Mace:-

*I thought that now you are concentrating full time on selling AEL you would be out and about visiting current clients and prospective clients. It seems to me that you should be spending less time working from home now. Therefore could you please put together a schedule for Tracey and I which reflects that. You are aware that we do not have enough work on hand to fully occupy the collectors. The collection figures for last month dropped dramatically and this month they are appalling. AEL is in a situation where we need a substantial injection of new files and we are not getting them. What benefits to AEL are your proposals for this week and next week? As discussed with you we need to review the sales process on 13 July 2004 to determine what measures need to be taken to get the necessary results. Tracey Martin and I will undertake that review with you. Please advise if 11.00 am 13 July 2004 is not suitable. In respect of coming in today, you have obviously made other plans so please email your report.*

[12] The further review meeting was held on 13 July 2004. There was no mention of this or the previous session being disciplinary in nature. There was however, discussion about contact with clients and Ms Mace was requested to make 20 calls per day to existing clients and to provide a list of prospective clients she proposed visiting. Ms Mace indicated she was confident of picking up a sales technique and she was offered a training course. I find that Ms Mace returning to work from the office was also mentioned.

[13] There is much dispute between the parties about the cause of the deterioration of the relationship thereafter. Ms Mace says she was ignored and treated badly. She says there was an awful atmosphere of negativity. Ms Martin says that Ms Mace resented being managed so closely and did not respond well to criticism. Ms Mace says there was constant trivial nitpicking.

[14] Ms Mace was eventually instructed to attend a performance review meeting on Friday 6 August 2004. She was invited to bring a support person. She preferred her father was that support person but because he was away from New Zealand the meeting was rescheduled for Wednesday 11 August 2004.

[15] Mr Britton was not present at this meeting but the AEL's solicitor attended in Mr Britton's absence apparently because Ms Martin was apprehensive about conducting the meeting on her own. Ms Mace saw fit to have her own solicitor attend as well, together with her father Mr Thomas Kane.

[16] Ms Martin outlined a number of areas of concern about Ms Mace's performance. Ms Mace responded to each of the matters raised with her, she says fully and articulately. Ms Martin says that Ms Mace was requested to return to the office full time so that she could be better managed. At this point Ms Martin says that Ms Mace, her lawyer and father walked out of the meeting. The meeting was apparently rather acrimonious.

[17] It is unfortunate that AEL's lawyer was present because that conveyed the wrong impression for Ms Mace. In my view it changed the nature of the purported performance review and Ms Mace would have been rightly confused as to whether the review was actually disciplinary in nature.

[18] Ms Mace's lawyer at 5.10 pm after the meeting sent AEL's lawyer an email. That email advice noted in relation to the performance criticisms:-

*The criticisms of my client were unfounded or were answerable by the fact that she has been working two positions and has had insufficient guidance from your client's management as to what they want from her.*

and:-

*The inability to sheet anything home to my client was unsatisfactory for your client.*

and:-

*As a result of that lack of satisfaction, my client was told, inter alia, that she had to return to the office to work and that her computer access over the weekend was to be cut off from 5pm Friday.*

[19] Ms Martin wrote to Ms Mace by letter dated 12 August 2004. Ms Martin advised that AEL accepted that Ms Mace had not been provided with a monthly sales budget or a position description and that the situation would be rectified. The advice further directed Ms Mace to attend at the office from Monday 16 August 2004 for work between 8.30 am to 5.00 pm.

[20] Ms Mace responded by letter dated 12 August 2004 but faxed to Ms Martin on 13 August 2004. Ms Mace considered she had been exonerated of any criticism relating to client management.

[21] In advice of 13 August 2004, Ms Martin responded to Ms Mace's lawyer's email of 11 August 2004. She says that Ms Mace's "*continuing to work from home is no longer sustainable.*" The matters referred to in the lawyer's advice at paragraph 18 above were not expressly challenged.

[22] The lawyer responded to Ms Martin by facsimile advice of 14 August 2004. The lawyer stated:-

*I say you are grossly exaggerating the nature and extent of "deficiencies". So, this is the position: either you back down on imposing changes of hours and workplace or I will file an injunction to stop you.*

[23] Ms Martin wrote to Ms Mace by letter dated 19 August 2004. She made it clear that AEL did not accept Ms Mace's client contact was sufficient. She further advised they would have to wait for Mr Britton to return before there was any certainty about Ms Mace's request to work from 9.00 am to 4.45 pm at the office.

[24] Ms Mace says the next two weeks were difficult and that Mr Britton and Ms Martin could barely contain their distaste for her. She says they harangued her over minor matters. She says Ms Martin didn't speak to her, did not greet or acknowledge her or any initiatives or suggestions she had. She says she was belittled and was subjected to unreasonable criticism and complaint and that the atmosphere was awful and negative.

[25] I consider the tone of Mr Britton's memorandum headed "*Notes for Meeting 30 August 2004*" is dismissive and disdainful. I am persuaded that it is in all probability demonstrative of the manner in which he behaved towards Ms Mace at the particular time.

[26] On 30 August 2004, Ms Martin says she attended the office at 9.15 am. Mr Britton says it was 10.30 am. He says that he invited her into his office and asked her why she was two hours late. He said that she told him she was acting as per her contract. He says he told her she knew she was required at work at 8.30 am.

[27] Ms Mace recorded events in an email of the same date. That email records that she asked Mr Britton whether he had responded to her lawyer. The email advice and Ms Mace's evidence is that Mr Britton then said he was not going to respond to that "*incompetent lowlife*" "*pond scum*" and that the lawyer had done Ms Mace a disservice. Ms Mace also says Mr Britton said a number of times that if he had been present at the meeting he would have smacked the lawyer. Ms Mace said she would not be manipulated and Mr Britton said she was not being manipulated.

[28] There was then some discussion about previous departing staff. Ms Mace was ordered out of Mr Britton's office. Mr Britton says Ms Mace made intimidatory and inflammatory remarks. Ms Mace asked if Ms Martin was her manager because Ms Martin had not spoken to her for weeks. Mr Britton then advised he would meet Ms Mace at noon that day to discuss a written contract. I am persuaded that Ms Mace's version of events is more likely correct given her relatively contemporaneous record.

[29] Ms Mace says that Mr Britton was yelling, shouting and shaking with rage. She says he went on and on in a tirade of abuse.

[30] Ms Mace, Mr Britton and Ms Martin met at 12.00 noon. They discussed a job description and various targets. Ms Mace says that she asked if they would respond to her lawyer and that Mr Britton said they would not respond to such "*low life*" "*pond scum*" and other similar unsavoury remarks.

[31] Ms Mace resigned that evening by giving the advice set out at paragraph 4 above. She says that AEL forced her to resign in that she had little choice but to resign. She says that as a consequence of Mr Britton's loss of control and venom that day and all recent events including the retaliatory, improper and vindictive behaviour in stopping her from working from home and cutting her remote access, she resigned by email at 8.08 pm. She says she couldn't trust AEL anymore and as they were trying to force her out she could not remain because they would make her life a misery.

[32] Mr Britton maintains that the arrangement for Ms Mace to work from home was subject to regular review, I do not agree. That is not what his written record of the agreement provides. He is correct that the arrangement was subject trial period but that was so only for a defined period of three months. As from July 15 it became a permanent arrangement and thereby a term of Ms Mace's employment. She continued to work from home from that period until the time of her resignation. As a term of Ms Mace's employment it could not be unilaterally varied and any variation required her consent.

[33] Ms Tracey Martin conceded there was no discussion or consultation with Ms Mace about working from home. I find therefore, that Ms Mace was told she had to return to work at the office and that there was no request but rather an instruction that she did so. I find too that her computer access over the weekend was to be cut. I cannot see any justification for that step. There was no consultation with Ms Mace about either of those matters. While I accept it was signalled to her, there is no evidence that her input or views were sought prior to either of those decisions being taken. Neither Ms Martin nor Mr Britton give evidence of any such input or consultation.

[34] I also find that in Ms Mace's particular circumstances, that absence of consultation was also in breach of the implied term not to do anything calculated or likely to destroy the relationship of confidence and trust. AEL knew of Ms Mace's childcare responsibilities. The arrangement that she worked from home was obviously one which was important to Ms Mace and which she had come to rely on. I have no doubt that had the matter been raised by way of consultation with her, she would have made a very strong case and resisted because of the significance of her child care responsibilities. She would not have remained silent or acquiesced. There is no record or any evidence of her making such a case and this, in my view, is to corroborate my finding that her input was never sought. It should have been. These actions were unfair to Ms Mace and I find a breach of the implied term of fair and reasonable treatment.

[35] I agree that AEL was perfectly entitled to manage Ms Mace's performance. That is its management prerogative. It was obliged however, to treat her fairly and reasonably in doing so. Ms Mace had no budget guidelines and no position description. As such, the expectations of her were not clear and I find were not sufficiently communicated to her. I accept however, that the meeting at 12.00 noon on 30 August 2004 was intended to address those deficiencies so that expectations would have been made clear. It is hardly surprising in those circumstances that AEL's expectations were not being met. They simply weren't known.

[36] I find too that Mr Britton's behaviour and actions on the morning of 30 August 2004 culminating in the meeting at 12.00 noon were not the actions of a fair and reasonable employer. On balance, I accept Ms Mace's evidence that Mr Britton was yelling, shouting and shaking with rage and was abusive. I find that he referred to Ms Mace's lawyer as "*incompetent lowlife*" "*pond scum*" and other derogatory comments, and that he made comments about assaulting the lawyer. Those comments I find are more than likely demonstrative of the general character of the interaction that day and Mr Britton's general behaviour and demeanour towards Ms Mace.

[37] I cannot see how AEL could have expected to elicit Ms Mace's best performance in such a prevailing destructive and negative environment. I find too, that the events of that particular morning were also characteristic of the strained relationship which had developed since June and which Ms Mace had clearly perceived and raised with AEL. That conduct and AEL's actions through Mr Britton were in breach of the implied terms of the employment that it would act fairly and reasonably towards Ms Mace and that it would not do anything calculated or likely to destroy the relationship of confidence and trust between them. The conduct was also not in accord with the statutory duty of good faith. Accordingly, I find that AEL breached its duty to Ms Mace.

### **A reasonably foreseeable resignation?**

[38] The breach of the duties cited above were serious enough to cause Ms Mace to resign. AEL had been clearly put on notice by the lawyer of the seriousness of the situation and how serious Ms Mace regarded the matter. The lawyer had clearly communicated the consequences for Ms Mace and the detriment to her. It was in those circumstances and against that background reasonably foreseeable that Ms Mace would resign.

### **Determination**

**[39] I find that Ms Mace was unjustifiably constructively dismissed and accordingly she has a personal grievance. She is entitled to remedies in settlement of that personal grievance.**

[40] Having made that finding and in considering both the nature and the extent of the remedies to be provided, I am bound to consider the extent to which Ms Mace's actions contributed towards the situation that gave rise to the personal grievance.

[41] I find that Ms Mace did not contribute to the situation that gave rise to the unjustifiable constructive dismissal and there is no blameworthy conduct on her part which could constitute contributory fault. Had the performance management process become properly disciplinary and Ms Mace shown to have failed to improve her performance thereafter, I would have reached a different view. There is therefore, no basis for reducing the nature and extent of the remedies to be granted.

## Reimbursement

[42] Ms Mace says that the loss of her income from her employment with AEL has been hard. Since her forced resignation, she says she has tried to find alternative employment but has been unable to find comparable employment. She has only found temporary work and some limited part-time work. She has earned \$4,977.00 from two permanent part-time positions and has lived on an overdraft and credit cards. She now claims \$25,023.00 in lost wages being the difference between her annual salary at AEL of 30,000.00 and the part-time earnings. I am not persuaded of Ms Mace's efforts to mitigate her losses by finding alternative employment. Accordingly, I regard an award of three months' lost wages as appropriate. **I order Accounts Enforcement Limited to pay to Tracy Mace the gross sum of \$15,000.00 as reimbursement of lost wages.**

## Compensation

[43] Ms Mace was previously married. She has one primary school child and one child at secondary school. Working from home was very important for her. The cessation of that condition of her employment caused her much anguish. She says AEL's mistreatment of her caused her ongoing unhappiness. She describes AEL as unkind, mean-spirited, aggressive and nasty over a number of months. She says that the stress of the last months of her employment with AEL and the subsequent loss of her employment and income substantially contributed to the collapse of her marriage later in December 2004.

[44] I accept Ms Mace has suffered loss of dignity, hurt and humiliation, and injury to her feelings as a result of AEL's behaviour towards her. She said her health suffered, she lost weight and began smoking cigarettes. She is entitled to be compensated for that proved loss. Having regard to her evidence, the nature of the personal grievance and the length of her service with AEL, **I order Accounts Enforcement Limited to pay to Tracy Mace the sum of \$7,000.00 as compensation.**

## Costs

[45] In the event that costs are sought, I invite the parties to reach an agreement between them. If agreement cannot be reached, Mr Parmenter is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Hogan is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.