

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Diana Margaret McLeman (Applicant)
AND New Zealand Commercial Care Limited (Respondent)
REPRESENTATIVES Dennis Standing, Counsel for Applicant
No appearance for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 14 June 2005
DATE OF DETERMINATION 1 July 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Diana McLeman lodged a statement of problem with the Authority on 25 February 2005 and identified the respondent as Robert John Hughes t/a New Zealand Commercial Care Limited. In that statement, Ms McLeman outlined her problem as an unjustifiable dismissal, a series of unjustifiable actions causing her disadvantage, a breach of contract, recovery of arrears of wages, breach of implied terms of the employment agreement and a failure to provide a written employment agreement in breach of section 65 of the Employment Relations Act 2000. To remedy her problem, Ms McLeman sought distress compensation of \$15,000.00, reimbursement of lost remuneration, compensation for breach of contract in the amount of lost earnings, an order for wage arrears and costs. Ms McLeman also asked for a declaration that she was engaged as an employee.

[2] Ms McLeman was left to run the business during the principal's absence for about 3 months ending in September 2004. Ms McLeman usually worked about 5 hours per day, seven days per week but had to work longer to run the business during the principal's absence. On the principal's return, there was some disagreement between them and a week or so later, Ms McLeman resigned on a week's notice. There followed correspondence between solicitors for both sides canvassing these and many other issues on which the respective clients disagreed.

[3] In submissions at the investigation meeting, counsel for Ms McLeman identified the issues as Ms McLeman's status as an employee, whether she was unjustifiably dismissed or alternatively whether Ms McLeman was subject to two unjustified actions causing her disadvantage. Arrears of wages and holiday pay were sought as well as remedies for grievances.

[4] First, I need to determine whether Ms McLeman was an employee. If she was, then I must determine whether she resigned or was dismissed unjustifiably, whether there was any unjustifiable action that disadvantaged her in her employment and whether there was any underpayment of holiday pay or wages due.

Non appearance of the respondent

[5] Throughout her engagement, Ms McLeman knew that she was dealing with Mr Hughes on behalf of the company. I am satisfied that the correct identity of the respondent is New Zealand Commercial Care Limited and note my earlier order to that effect.

[6] New Zealand Commercial Care Limited did not lodge a statement in reply, did not participate in the phone conference and did not attend the investigation meeting. I am satisfied that the notice of investigation meeting was personally served on Robert Hughes, the sole director and shareholder of New Zealand Commercial Care Limited. There being no good cause for the respondent's failures, I proceeded with the investigation in its absence.

Employee or independent contractor?

[7] Ms McLeman told me that when she was first engaged, she had signed a single piece of paper which she called a contract. However, she was not given a copy of that document and it has not emerged in any of the to-ing and fro-ing between the solicitors prior to these proceedings. I am left therefore to consider the remaining circumstances in order to determine the real nature of the relationship.

[8] The indications are primarily that it was an employment relationship. Ms McLeman did not supply the tools of trade such as cleaning equipment or a vehicle to get from job to job. She had no financial interest in the business as a shareholder, partner or otherwise. She did not risk any profit or loss from its operation. The clients were all invoiced for her work by NZ Commercial Care Limited. She was paid (usually weekly) at an hourly rate depending on her hours of work. She regularly reported her hours to Mr Hughes or recorded her hours in a communication book bought by Mr Hughes and which was kept in the work vehicle. At least for some weeks, Ms McLeman was given payslips with relevant information completed by the company under headings *Staff Member Date Hours Gross P.A.Y.E and Total*. The history of the engagement includes loans and advances from the company to Ms McLeman with repayments taken from wages. All this strongly suggests employment.

[9] The only indications that Ms McLeman was not an employee are the heading *Contract Cleaner* alongside the heading *Job Title* on the payslips and the tax treatment which includes an accountant on behalf of Ms McLeman lodging a tax return on the basis of her being an independent contractor. The accountant was also the company's accountant. However, the heading is no more than a label and is inconsistent with the other aspects mentioned above. Tax treatment is a consequence rather than determinative of status. I find that the real nature of the relationship was employment.

Dismissal or resignation?

[10] In a letter dated 1 November 2004, Ms McLeman's solicitors said that she had been unjustifiably dismissed following an allegation by Mr Hughes that she had stolen company money. The response of the company's solicitors was that Ms McLeman resigned in the face of the allegations. However, in her evidence, Ms McLeman told me that the theft allegation did not emerge until after she had put in her resignation. She told me that she resigned because she was exhausted, having worked extra hours during the time Mr Hughes was absent leading up to September 2004. She also told me that Mr Hughes promised to pay her for the extra hours worked. Having seen and heard Ms McLeman, I accept this evidence.

[11] In *Auckland etc Shop Employees etc IUOW v Woolworths (NZ) Ltd* [1985] ACJ 963, the Court of Appeal identified at least three types of constructive dismissals. On Ms McLeman's evidence, the present case is not one of resign or be fired. Nor is there any evidence that Mr Hughes conducted himself with the deliberate and dominant purpose of coercing a resignation. That leaves the third category where a breach of duty leads the employee to resign.

[12] As indicated by my acceptance of her evidence above, Ms McLeman resigned because she felt exhausted, having worked significantly more hours than usual during Mr Hughes's absence. There is a bit more to it. When Mr Hughes returned from overseas, he took Ms McLeman out for a coffee to catch up. She told him that she was considering leaving. He asked her what she would do and she said that she was thinking of going to clean at a couple of businesses that were his former clients. He went ...*right off at me*.... Ms McLeman walked away but Mr Hughes went after her and continued the *discussion* saying that he would sue the companies to prevent them employing her. He asked her if she really wanted to leave and she indicated that she would think about things. Ms McLeman continued working for another week and then gave notice of resignation. Ms McLeman finished up on about 23 September 2004.

[13] On that evidence I find that Ms McLeman became dissatisfied with her employment and resigned without that resignation being caused by any breach of duty on the part of Mr Hughes. The initiative for the termination was Ms McLeman's.

[14] The alternative argument for Ms McLeman is that she was unjustifiably disadvantaged by Mr Hughes's actions in not paying her for the extra hours she worked and by making the false allegation of theft against her, including a threat of police involvement. One difficulty with this is that, on Ms McLeman's evidence, Mr Hughes promised to pay her for her extra hours. This is not a case of a repeated promise that was never honoured. The second difficulty is that the allegation about theft and the threat of police involvement came when Mr Hughes called at Ms McLeman's house to collect company equipment after she had finished work at the end of the notice period. There was no longer any employment relationship. Mr Hughes's behaviour clearly has affected the way that Ms McLeman now views Mr Hughes, but it could have no effect on her employment or the conditions of her employment when it is understood that phrase in the grievance definition relates to the on the job situation.

[15] Ms McLeman gave evidence, which I accept, that the theft allegation related to money that she expended on behalf of the company during Mr Hughes's absence but with his knowledge and approval at that time. The allegation of theft appears to be an attempt by him to get back at Ms McLeman for becoming dissatisfied and resigning.

[16] For the above reasons, I find that Ms McLeman does not have a personal grievance.

Arrears

[17] I accept Ms McLeman's evidence that she worked every statutory holiday between 30 June 2002 and 23 September 2004. Counsel adopted (and I accept) the conservative estimate that Ms McLeman worked 5 hours on each day. The law relating to this changed on 1 April 2004. Prior to that date, Ms McLeman was entitled to a paid holiday for each statutory day worked. I count 18 such days which at \$11.20 per hour for 5 hours per day totals \$1,008.00. Between 1 April 2004 and 23 September 2004, there were 4 further statutory holidays. For each statutory holiday Ms McLeman was entitled to half time extra (\$112.00) for the hours actually worked plus a paid holiday (\$224.00), a total of \$336.00. Ms McLeman is entitled to arrears for statutory holidays amounting to \$1,344.00.

[18] Ms McLeman never received any paid holidays and was not paid outstanding holiday pay at the termination of her employment. In the absence of adequate records, it is necessary to estimate what is owed based on the minimum of 7 days per week, 5 hours per day mentioned by Ms McLeman. Ms McLeman worked for 2¼ years approximately. She was therefore entitled to 6¾ weeks pay for untaken leave and accrued holiday pay. At 35 hours and \$11.20 per hour, Ms McLeman is entitled to \$2,646.00 holiday pay.

[19] I accept Ms McLeman's evidence that she worked an extra 188 hours during Mr Hughes's last absence. She is entitled to payment for those hours, a total of \$2,105.60 plus holiday pay of \$126.37.

[20] There is also a claim for an additional 5 hours pay per week for that part of the employment being the 54 weeks preceding Mr Hughes's 3 month absence. The claim is essentially speculative and I am not satisfied the evidence establishes to a sufficient standard that Ms McLeman worked these extra hours. Accordingly, no award is made under this claim.

Summary

[21] The personal grievances are not sustained.

[22] New Zealand Commercial Care Limited is to pay Ms McLeman arrears of holiday pay, statutory holiday pay and wages totalling \$6,221.97.

[23] Ms McLeman has been denied the use of the arrears and is entitled to interest, at the rate of 9% per annum, commencing on 23 September 2004 until the arrears are paid in full.

[24] Costs are reserved.

Philip Cheyne
Member of Employment Relations Authority