

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Sarah McLennan (Applicant)
AND Arthur Barnett Limited (Respondent)
REPRESENTATIVES Jenny Guthrie, Counsel for Applicant
Sharon Knowles and Danny Tuato'o, Counsel for Respondent
MEMBER OF AUTHORITY Philip Cheyne
INVESTIGATION MEETING 8 June 2006
DATE OF DETERMINATION 7 September 2006

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Sarah McLennan worked for Arthur Barnett Limited in Dunedin for about seven years in various capacities while she was a student at school and at university. Ms McLennan says that her employment was summarily terminated on Friday, 18 February 2005 when her manager (Philip McLennan) left a phone message for her. Mr McLennan is also Ms McLennan's uncle. Ms McLennan had been off work on leave then ill since just before Christmas but she says she expected to be at work on Monday 21 February 2005 but for the phone message.

[2] Arthur Barnett says that the message left by Mr McLennan did not amount to a dismissal. It says that the onus was on Ms McLennan to let it know of her university timetable for 2005 so it could sort out hours of work for the new university year. Arthur Barnett says that the obligation was on Ms McLennan because she had said that her work availability for 2005 would be different from what it had been for 2004. This was said before the period of leave and illness from Christmas 2004 until February 2005. Arthur Barnett also says that Ms McLennan did not keep it properly advised about her absences from Christmas 2004.

[3] To resolve the problem it is necessary to identify the relevant terms of the employment prior to the absences from December 2004, explain how a dispute between Ms McLennan and another employee developed, review the communications between Ms McLennan and Arthur Barnett during the period of absence, and assess the effect of the message left by Mr McLennan on 18 February 2005 against this background.

Terms of employment

[4] There is a written individual employment agreement signed by Ms McLennan and on behalf of Arthur Barnett and dated 6 July 2001. Clause 4 says that it comes into force when signed and expires on 31 July 2002, but subject to mutual agreement can be renewed for a further twelve months term commencing 1 August 2002. Despite this provision Ms McLennan's employment

continued after 31 July 2003. Neither party disputes that the terms of the written agreement continued to apply subject to any other agreed variations.

[5] Clause 1 of the agreement states that the parties are Arthur Barnett Limited and –

(“the Employee”). All employees employed by the employer either on a full-time, part-time, casual or flexi-time basis. All employees will complete a standard company engagement which will include individual hours of employment and rate of remuneration and after being signed by both parties will bind those parties to agreeing to the terms and conditions of this Individual Employment Agreement.

There was no *standard engagement* completed for Ms McLennan. Clause 19.4 refers to individual employee classifications detailed in schedule 2, but this too was not completed for Ms McLennan. In the *Remuneration* part of the agreement reference is made to salaried workers, permanent part-time employees, and flexi-time employees. The last two mentioned groups are said to have the same rights as full-time staff. There is also reference to casual employees.

[6] I was provided with Ms McLennan’s pay slips from October 2004. The slips demonstrate that Ms McLennan’s hours of work in each fortnightly pay period varied to some extent. Ms McLennan’s evidence is that there was a degree of flexibility mainly to accommodate her university exams, but for the most part she worked 40 hours and five days each week. She describes her position as a *relatively full-time job*. However this pattern of work changed in November 2004. Then, Ms McLennan decided to reduce her work commitment from five to three days per week. Mr McLennan’s evidence is that he was told by Ms McLennan that she wanted to reduce her hours and he said that was fine. The evidence of both is that Ms McLennan did not explain the reason for the reduction. The department rosters show that Ms McLennan tended to work Monday, Tuesday and Wednesday from about the middle of November 2004 although there was some variation on this theme.

[7] There is another aspect about Ms McLennan’s days and hours of work that needs to be canvassed. Both Ms McLennan and Mr McLennan agree that they had a discussion in November about Ms McLennan’s prospective hours of work for 2005 given her intention to study law full-time. I accept Mr McLennan’s evidence that Ms McLennan told him that she could not give a commitment because she did not know what her university workload would be; that it was agreed that they would wait and see what her programme was and Arthur Barnett would try to fit around that if possible; that he told Ms McLennan that he could not guarantee any particular arrangement in advance; and that it was possible she might be assigned to other duties which could be more easily worked around her study commitments.

[8] From this it is apparent that from about November 2004 Ms McLennan was engaged to work either part-time or as a flexi-time employee. She was not a casual employee. She was engaged to work generally three days per week usually Monday, Tuesday and Wednesday, but this was subject to any agreed variation from time to time. In particular, there was an expectation that Ms McLennan would work different days and/or hours from the beginning of the 2005 university year.

Conflict with another employee

[9] Arthur Barnett appointed a new employee (Maria Devlin) in October 2004 to the newly created role of inventory administrator. I accept Arthur Barnett’s evidence that the position was at a more senior level to that of Ms McLennan, although Ms Devlin was made familiar with Ms McLennan’s work as part of her induction. Ms McLennan’s evidence is that she resented being

asked by Ms Devlin to show her the job and she accepts that she was probably a bit abrupt with Ms Devlin. This resulted in a meeting between Mr McLennan and Ms McLennan in late November 2004 where he told her that she had to work together with Ms Devlin in a professional manner. Mr McLennan spoke again to Ms McLennan on 17 December 2004. He told her that he had not noticed any improvement, that he did not accept Ms McLennan's claim that it was not deliberate, and that he would be taking the matter further unless there was a huge turn around.

[10] Sue Smaill is Arthur Barnett's General Manager. Louise Caulfield is Arthur Barnett's Human Resources Manager. Ms Devlin had spoken to Ms Smaill about her difficulties with Ms McLennan and that resulted in a meeting between Ms Smaill, Ms Caulfield and Ms McLennan at 11 am on 20 December 2004. There is a file note dated 20 December 2004 made by Ms Caulfield which I accept as an accurate summary of the discussion. The history of the problem was canvassed and it was made clear that there would need to be further discussion to find a solution. Ms Smaill also asked Ms McLennan what her plans were for 2005 and Ms McLennan said that she would know more in February 2005. That was in connection with Ms McLennan's earlier discussion with Mr McLennan about working hours for 2005. There was a second meeting at 2 pm the same day between Ms McLennan, Ms Smaill and Ms Caulfield. Arthur Barnett proposed shifting Ms McLennan from her existing department back to the floor. Ms McLennan said that she would consider the option.

[11] A further meeting was convened the next day. Ms McLennan declined the option of being shifted. Ms Smaill said that the interaction between Ms McLennan and Ms Devlin would be closely monitored and disciplinary action might ensue if set standards of behaviour were not complied with. After this meeting however, it was decided that Ms Devlin would move out of the department.

[12] I mention these events as part of the background, but as will be explained, they are part of resolving Ms McLennan's employment relationship problem.

[13] In evidence Ms McLennan says that Arthur Barnett wanted her out having appointed Ms Devlin. I do not accept this assertion. I see no reason to be critical of Arthur Barnett for the way it dealt with the issue between Ms McLennan and Ms Devlin. A sensible solution was suggested to Ms McLennan and Arthur Barnett accepted her position when she declined to be shifted. An alternative arrangement was then made with Ms Devlin after which Ms McLennan had little contact with Ms Devlin before Ms McLennan went on leave.

Leave arrangements

[14] There is a dispute between Mr McLennan and Ms McLennan about what arrangements she made for leave over the Christmas period. Ms McLennan's evidence is that she arranged to finish work on Wednesday, 22 December 2004 while Mr McLennan says that the arrangement was for her to finish work on Tuesday, 21 December 2004. I accept that Ms McLennan went to see her GP after work on 21 December. She got a medical certificate that day certifying her unfit for work from then until 26 December 2004. There is evidence from Kent Smith, Ms McLennan's friend, that he took the medical certificate into Arthur Barnett and gave it to a person to put in Ms Caulfield's pigeon hole. Ms Caulfield did not receive the medical certificate. The only point of a medical certificate was if Ms McLennan was otherwise due to work on 22 December. Mr McLennan accepts that Ms McLennan had earlier cut back to three days per week and 22 December would have been her third day of work that week. This evidence supports Ms McLennan's recollection on the point, which I accept as accurate. Mr McLennan must be mistaken about when Ms McLennan's leave was due to commence. Both Ms McLennan and Mr McLennan agreed that she was due to return to work on Monday, 10 January 2005.

[15] Some time prior to 9 January 2005, Ms McLennan went into Arthur Barnett and spoke to the pay roll administrator, Daphne Sue. There is a conflict between Ms McLennan and Ms Sue over what was said. In particular, Ms Sue says that Ms McLennan said she would be resuming her former position as a casual employee after the Christmas break. Ms McLennan denies that. It is not necessary to resolve the conflict. Ms McLennan's status as an employee is a matter of agreement between her and Arthur Barnett. Ms McLennan could not unilaterally alter the terms of the agreement by any communication with Ms Sue. Any change required discussion and agreement with Ms McLennan's manager at the minimum. It follows that the evidential dispute is irrelevant to the resolution of the problem.

[16] Ms McLennan attended work on Monday, 10 January 2005. She queried Mr McLennan about her entitlement to payment for the previous statutory holidays. Mr McLennan sent an email to Ms Caulfield asking for advice on Ms McLennan's entitlement during the period of *leave without pay*. In a second email, Mr McLennan says that he has *looked back on the time sheets and her hours have been of a "casual" nature since about Labour Weekend*. Later on 10 January 2005 Ms McLennan returned to her GP and got a medical certificate certifying her as unfit for work from 10 January 2005 until 17 January 2005. Mr McLennan's evidence is that he got a text message on 11 January 2005 advising that Ms McLennan was sick and the medical certificate arrived at some point as well. Ms McLennan saw her GP again on 13 January 2005 and received a further medical certificate certifying her as unfit for work from 13 January 2005 until 22 January 2005. That certificate was also provided to Arthur Barnett. Mr McLennan's evidence, which I accept, is that he then expected Ms McLennan to return to work on Monday, 24 January 2005. That was the first Monday following 22 January 2005.

[17] There is a signed medical certificate dated 21 January 2005 which says that Ms McLennan was seen on that day and was medically unfit for work from 21 January 2005 until 4 February 2005. Ms McLennan apparently arranged for a copy of this certificate to be put on Mr McLennan's desk and there is evidence from a work mate (Shona Littlejohn) that she did this. On 24 January 2005 at 11.42 am Mr McLennan sent an email to Ms Caulfield reporting that Ms McLennan had not reported for work and had not contacted him. That supports Mr McLennan's evidence, which I accept, that he did not see the 21 January 2005 medical certificate on his desk. Later emails on 26 and 27 January 2005 also confirm that Mr McLennan remained unaware of the medical certificate. I also note Ms Caulfield's reference to clause 38 of the written employment agreement in response to Mr McLennan's question about abandonment which supports the earlier finding about the continued applicability of the written agreement.

[18] In the meantime, Ms Sue phoned and left messages on Ms McLennan's cellphone on 25 and 26 January 2005 to talk about an unrelated pay processing issue. There was a discussion between Ms McLennan and Ms Sue on 1 February 2005. There was a further discussion between them on 2 February 2005 following which Ms Sue transferred the call for Ms Caulfield to speak to Ms McLennan. By this time, Ms McLennan had arranged for another copy of the 21 January 2005 medical certificate to be put on Mr McLennan's desk which he saw on 1 February 2005.

[19] In their discussion on 2 February 2005 Ms McLennan and Ms Caulfield talked about when Ms McLennan intended to return to work. In November 2004, Ms McLennan had arranged with Mr McLennan to take leave without pay from Monday, 7 February 2005 until Sunday, 20 February 2005 for a holiday in Australia. Ms McLennan told Ms Caulfield that she had decided not to go to Australia. Ms Caulfield asked and Ms McLennan confirmed that she had not told Mr McLennan about this change in her plans. Ms Caulfield then rang Mr McLennan who confirmed he did not need Ms McLennan to work during the two weeks. Ms Caulfield rang and told Ms McLennan that she was not required over this two week period and that Mr McLennan would be in touch.

[20] Ms McLennan is critical of Arthur Barnett for causing her to think that arrangements had been made to cover her intended two week absence when no cover had actually been arranged. Her evidence suggests that there was something improper in Arthur Barnett not agreeing to let her work during the two week period despite her short notice about a change in plans. Her evidence also suggests that her request for leave without pay had not been formalised so she was entitled as of right to work during the two week period. I do not accept this evidence. Ms McLennan requested the time off as leave without pay and it was granted. She was entitled to change her plans and make herself available to work, but Arthur Barnett was also entitled to stick by the original arrangement whether or not a replacement had been organised for Ms McLennan. In any event, Ms McLennan saw her GP again on 7 February 2005, obtained a medical certificate certifying her as unfit for work until 20 February 2005, and forwarded that to Arthur Barnett.

[21] Mr McLennan had been on holiday for part of this time and he returned to work on 14 February 2005. He spoke to Ms Caulfield who told him of the 2 February 2005 discussion with Ms McLennan and that she had told Ms McLennan that Mr McLennan would be in touch with her when he had some work available. In that context, Mr McLennan rang Ms McLennan on Friday, 18 February 2005 but had to leave a message. Ms McLennan's evidence is that the message was *just letting you know that I'll be keeping in contact with you and letting you know if we've got some work available*. Mr McLennan's evidence is that he said he was ringing to check how she was; that he had not heard from her for a long time; that he would contact her when they had some work available or that she might contact him when she had her timetable available; and that she should feel free to call next week to discuss things further.

[22] Ms McLennan took the message as a termination of her employment. She sought legal advice and her solicitor wrote to Ms Smaill on 22 February 2005 alleging a dismissal and proposing mediation. Ms Smaill replied on 3 March 2005 explaining that she had been away from Dunedin and would provide a substantive response shortly. In a letter dated 9 March 2005, Ms Caulfield stated that Ms McLennan had been and remained a casual employee, suggested there had been a misunderstanding and invited discussion. Nothing further happened until 13 May 2005 when Ms McLennan's solicitor wrote again. There was a response on 13 June 2005 denying any dismissal and asserting that Ms McLennan's employment was as a permanent flexi-time employee without fixed hours of work.

[23] There was eventually a mediation but the problem was not resolved and the present proceedings were subsequently lodged with the Authority.

Was Ms McLennan dismissed?

[24] The test for justification of any dismissal is set out at section 103A of the Employment Relations Act 2000. The introduction of this statutory test does not affect the requirement to first establish whether a dismissal occurred. A dismissal is the termination of the employment relationship at the initiative of the employer: see *Wellington etc Clerical etc IUOW v Greenwich* [1983] ACJ 965. The argument advanced for Ms McLennan is that while there were no actual words of dismissal, the termination of the relationship could and should be inferred from the facts. In particular, Ms McLennan took from the phone message of 18 February 2005 that her employment had been ended by her employer. Part of the context for her is her view about Ms Devlin replacing her.

[25] I do not accept that the communication of 18 February 2005 amounts to the termination of the employment at Arthur Barnett's initiative. The differences between Ms McLennan and Mr McLennan about the content of the message are not great, but even if Ms McLennan's account is accepted, Arthur Barnett said that the relationship was to continue rather than end. On balance, I prefer the evidence of Mr McLennan about the communication. On that basis, it was for

Ms McLennan to initiate the discussion about her 2005 study timetable so there could be agreement about a schedule of hours suitable for both Ms McLennan and Arthur Barnett.

[26] Sensibly, Ms McLennan sought legal advice and her view of the matter was promptly communicated to Arthur Barnett. The response from Arthur Barnett came close to reflecting the reality of the situation. The relevant part reads –

Sarah McLennan is still employed at Arthur Barnett Limited as a casual employee; her employment has not been terminated.

Sarah has been working for Arthur Barnett Ltd for the last 7 years. She commenced in a part time capacity on the shop floor, then moved into the Marking room department where she has been for the past 4 years as a casual employee. Her hours of work have been varied and flexible to accommodate her study commitments. This arrangement has been beneficial to both parties to date.

Given our position, it would seem that a misunderstanding has taken place. I would welcome further discussion, however question whether a formal mediation is the appropriate forum at this stage.

[27] Arthur Barnett was wrong to describe Ms McLennan as a *casual employee*. However, it is correct to say that the hours of work had been varied and flexible to accommodate her study commitments. If the invitation for further discussion had been promptly taken up, then the mistaken label of *casual* to describe the flexible working schedule could easily have been sorted out. The duty of good faith requires the parties to an employment relationship to be active and constructive in maintaining the relationship and to be responsive and communicative: see section 4 (1A) of the Employment Relations Act 2000. What was needed was the discussion referred to in November and December 2004 about Ms McLennan's availability for work for 2005.

[28] Because there was no termination of the relationship at the initiative of Arthur Barnett, it follows that there can be no personal grievance as alleged.

[29] Even if a grievance could be established there would be little scope for substantial remedies. Ms McLennan's evidence is that she did not look for any alternative employment after the events of February 2005. She then went to Australia for about a month commencing in mid March 2005. In those circumstances, any lost remuneration is properly attributable to her decision not to seek other work rather than any grievance against Arthur Barnett.

[30] Ms McLennan suffered a stress-related illness during the latter part of 2004 and 2005 but that, too, cannot be attributed to any wrongful action on the part of Arthur Barnett. Ms McLennan came to the view that Arthur Barnett intended to replace her with Ms Devlin. That may explain why Ms McLennan did not co-operate with Ms Devlin. Arthur Barnett was entitled to raise that issue with Ms McLennan but she did not accept that she was at fault. It is more likely that any stress illness attributable to events at work arose from Ms McLennan's strongly held but incorrect views about Ms Devlin than the phone message from her uncle. I also note that Ms McLennan told her GP on 21 December 2004 about the work situation and personal stress with another worker. That confirms that the stress related illness predated and was caused by something other than the phone message from Mr McLennan. Ms McLennan explicitly did not pursue a stress claim against Arthur Barnett in these proceedings.

Summary

[31] Ms McLennan was not dismissed by Arthur Barnett and does not have a personal grievance.

[32] Costs are reserved. In her evidence, Ms McLennan said that she did not have any money to pay costs. She was questioned about ownership of several motor vehicles and said that she had transferred ownership from her to Mr Smith. That response is apparently at odds with information obtained by counsel for the respondent from public sources. In any event, Ms McLennan was granted legal aid and counsel properly advised the Authority and the respondent of that fact. The consequence may be that any costs award against Ms McLennan must be limited to her contribution as required by the Legal Services Agency. However if there is any issue about costs, Arthur Barnett may serve and lodge a memorandum and Ms McLennan may serve and lodge a reply.

[33] One of the remedies sought is payment of unpaid statutory holiday pay for the Christmas and New Year statutory holidays in December 2004 and January 2005. It appears that Ms McLennan was not paid these four days because of Mr McLennan's and Ms Caulfield's view about the variability of her working days during the last few months of 2004. However, given the earlier finding about the nature of the arrangement regarding working hours, those statutory days fell to be observed on days that were otherwise working days for Ms McLennan. They also fell when she was on annual leave. Ms McLennan is entitled to a day's pay for each holiday calculated in accordance with the Holidays Act 2003. Leave is reserved if there is any difficulty. This is the recovery of arrears rather than a personal grievance.

Philip Cheyne
Member of Employment Relations Authority