IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2013] NZERA Auckland 373
5396669

	BETWEEN	DIANNA McQUADE Applicant
	A N D	CRUSADER MEATS NEW ZEALAND LIMITED Respondent

Member of Authority:	K J Anderson
Representatives:	H Burdon, Advocate for Applicant S Menzies, Counsel for Respondent
Investigation Meeting:	12 April 2013 at Hamilton
Submissions Received:	2 May 2013 from Applicant 16 May 2013 from Respondent
Date of Determination:	20 August 2013

DETERMINATION OF THE AUTHORITY

Introduction

[1] The applicant, Ms Dianna McQuade, brings several claims to the Authority for determination. Firstly, Ms McQuade claims that there was a unilateral change to her employment agreement, relating to non-taxable earnings and her daily travel to the workplace. Secondly, Ms McQuade says that the change to the employment agreement was an unjustified action by her employer which resulted in a disadvantage to her employment. Finally, Ms McQuade claims that the actions of the respondent led to her resignation; which Ms McQuade says was, effectively, an unjustifiable constructive dismissal. Ms McQuade asks the Authority to accept that there is merit in her claims and she seeks that various remedies be awarded. For completeness, I record that Ms McQuade was also pursuing a claim regarding an alleged breach of the

Minimum Wage Act 1983 but following some discussion about this claim at the investigation meeting, Ms McQuade has withdrawn this claim.

[2] The respondent, Crusader Meats New Zealand Limited (Crusader Meats/the company), denies the claims of Ms McQuade.

Background

[3] Ms McQuade worked in the meat processing plant operated by Crusader Meats at Benneydale. Ms McQuade applied initially for a general labourer position that was advertised by Work & Income New Zealand (WINZ). But after being interviewed for that role, the company offered her a position in the engineering maintenance department.

[4] Ms McQuade commenced her employment on 27 February 2012. The parties signed an individual employment agreement (the IEA) on 6 March 2012. Relevant to the matters before the Authority is clause 13 of the IEA:

> 13.0 TRAVEL
>
> 13.1 Location of the Plant
>
> The company recognises that the location of the Employee's employment means the Employee can travel reasonable distances to work.
>
> (a) Schedule "B" outlines the travel [sic] outlines the non taxable portion of an employee's gross wages.
>
> (b) Schedule "B" outlines the travel reimbursement if the Employee is required to use their private vehicle for travel above and beyond that which is deemed as normal. It is at the sole discretion of the Employer to define and decide what is normal given the specific circumstances at the time.

[5] The reference to Schedule B in the above clause is to a schedule headed "Non-taxable earnings". Listed in the schedule are various towns and locations, and their respective distances in kilometres from the Benneydale meat processing plant. Relative to Ms McQuade's circumstances: she resides in Tokoroa, it is recorded in the schedule that the travel distance is 134kms. Related back to clause 13 of the IEA, it is agreed that a portion of the employee's gross wages shall be *"*non-taxable*"*. To arrive at the non-taxable portion of Ms McQuade's gross wages, Schedule B provides for a simple calculation: 50 cents times 134kms equals $67. To calculate the non-taxable portion of the appropriate gross earnings, the number of trips completed during the

pay period by Ms McQuade is multiplied by $67. Therefore, the practical outcome for Ms McQuade was that for each day that she travelled to work from Tokoroa to the workplace at Benneydale, $67 of her income was not taxed. This arrangement applied to all of the employees at the Benneydale plant, approximately 170 people.

[6] The general manager of the company, Ms Anne Marie Kelly, explained the background to the travel arrangement[1] to the Authority. Ms Kelly testified that the travel arrangement (the arrangement) came about because of the remote location of the meat plant and the fact that there is no public transport available. The arrangement had operated for approximately 13 years and until relatively recently; the company believed that the arrangement was approved by Inland Revenue.

The dispute

[7] The evidence of Ms McQuade is that she commenced employment with Crusader Meats on 27 February 2012. Ms McQuade says that when she received her first pay slip she thought that there was something wrong in regard to the amount that she had been paid but thought there may have been *"*an office error*"*. Ms McQuade waited until she got a second pay slip and then consulted her father, who in turn spoke to an organiser for the Engineering Printing & Manufacturing Union (the Union).

[8] The basis of Ms McQuade's concern was that she believed that when she commenced her employment, she was going to be paid $16 per hour; plus an additional travel allowance, which she says would have equated to something close to the hourly rate of $25 per hour that she had been paid at a previous position.

[9] The evidence of Mr David Wackrow, the human resource manager, is that Ms McQuade came to see him after she had received three or four pays. There was some discussion about the non-taxable component of the wages. Mr Wackrow says he explained how the travel arrangement worked and that it was his understanding that Ms McQuade then understood how it operated. Mr Wackrow says that he also understood that a number of other employees in the engineering department had explained to Ms McQuade the operation of the non-taxable component of her wages.

[1] It has been established that this is a "travel arrangement" as compared with a non-taxable travel allowance.

[10] The further evidence of Ms Kelly is that while the company believed that it had approval from Inland Revenue to operate the travel arrangement as it did, problems arose with that approval as a result of a complaint that was, initially, laid with the (then) Department of Labour. Ms Kelly attests that the company believes that Ms McQuade was a party to the complaint, via the Union.

[11] In a letter dated 10 May 2012, Inland Revenue informed Crusader Meats that while acknowledging that the company had been granted approval to treat the payment of a *"*travel allowance*"* as a non-taxable amount in 2001:

> [… the normal gross wage based on the employee's hourly rate remains fully taxable and an amount can only be treated as a non-taxable allowance when it is paid on top of the normal gross wage.

[12] Inland Revenue further informed Crusader Meats that:

> The deduction of a travel allowance from the gross pay of your employees as shown in the attached sheet is incorrect. The total gross pay of each employee is fully taxable. A travel allowance paid on top of the gross pay would be non-taxable. Please ensure that all employees of Crusader Meats are correctly taxed from the pay period commencing on or after 21 May 2012.

[13] The company complied with the direction from Inland Revenue and as a result, Ms McQuade, and the other 170 employees, all received noticeably less net pay each week. As at the date of the investigation meeting, the matter remains unresolved.

The resignation of Ms McQuade

[14] On 16 July 2012, Ms McQuade presented a written resignation to the company giving two weeks' notice; informing that:

> […the company has made it to [sic] hard & stressfull [sic] for me to carry out my work duties. Also with removing the travel allowance, I am finding it harder & harder to get to work. When the travel was being paid although incorrectly, I was able to make ends meet. I will be borrowing money of [sic] my father to carry out the term of my notice.

The last day of work for Ms McQuade was 27 July 2012.

[15] Ms McQuade now says that:

(a) There was a unilateral change made to her employment agreement, namely, that she no longer had the benefit of a non-taxable portion of her gross earnings. The outcome being, she alleges, that it was no longer financially viable for her to travel to and from work;

(b) She was disadvantaged in her employment by an unjustifiable action by her employer, being the cessation of the tax arrangement that resulted in a reduced net pay.

Was there a unilateral change to Ms McQuade's employment agreement?

[16] It is commonly accepted that following the direction from Inland Revenue on 10 May 2012, Crusader Meats treated all wages earned by Ms McQuade (and all other employees) as taxable income. It is not clear how this change in circumstances was conveyed to other employees, but in Ms McQuade's case; it was explained in a letter (2 July 2012) to her union representative. It was also explained that the tax benefit that Ms McQuade had been receiving was not a travel allowance and that Inland Revenue had directed the company to cease the arrangement as it did not comply with acceptable tax practices.

[17] It is obvious that the directive from Inland Revenue had a significant impact on the net pay that Ms McQuade received. It is equally clear that Crusader Meats was legally obliged to comply with the Inland Revenue direction. However, I do not accept that the change in the tax arrangement was a unilateral change to Ms McQuade's employment agreement. Rather, the change that took place, with Ms McQuade's full knowledge and involvement, was required to ensure that Crusader Meats, and Ms McQuade, complied with the law in regard to the deduction and payment of PAYE tax. The parties really had no option. Ironically, it appears that Ms McQuade was instrumental in the abolition of the long-standing tax arrangement that had delivered a net pay benefit to her, and the other Crusader Meats employees.

Analysis and conclusions

[18] As largely accepted by the parties at the investigation meeting, there is no real dispute about the facts of this matter. Rather, a legal analysis is required regarding the consequences for both parties of compliance with the Inland Revenue directive. I asked the parties to provide written submissions addressing the doctrine of frustration

of contract (the doctrine). I am grateful to Mr Menzies for his legal submissions on this matter and I have found them to be most helpful.

[19] I accept the submission that while it could be said that the travel arrangement has become frustrated by the Inland Revenue direction, in order for the doctrine to apply, the entire employment agreement would need to be frustrated because of that direction[2]. Therefore, the second avenue to be explored is the operation of the Illegal Contracts Act 1970. The Authority has been referred by Mr Menzies to the Burrows, Finn & Todd text (para.13.3.5) where it is stated:

> Where the invalidity arises only in relation to one of the promises made in the contract, other contractual obligations may be enforceable and valid. There may also be cases where it is possible for the Courts to sever from the contract one or more provisions which create the invalidity, thus leaving a valid contract. There are a few statutes which state that a contract is only void to the extent that it contravenes the particular statute. In the absence of authority on the point, logic would indicate that the contract is to be taken as being necessarily modified to accord with the statute and, presumably, may be enforced as so modified.

[20] It is submitted for the respondent that if the Authority comes to the view that the travel arrangement was void as a result of the Inland Revenue direction, the employment agreement should be modified to treat the travel arrangement as void; with the result that it could not be enforced. There is no evidence before the Authority as to the position of Inland Revenue in regard to whether Crusader Meats is deemed to have breached the Income Tax Act 2007 as it pertains to the deduction and payment of appropriate amounts of PAYE. But according to the letter of 10 May 2012:

> It is the Commissioner's intention to review the last four years PAYE underpayments.

[21] The company is invited to make a voluntary disclosure for the period going back to 1 April 2008. But for the purposes of the Authority's investigation, it seems appropriate to apply some of the advice given by Burrows, Finn & Todd. In particular:

> In the absence of authority on the point, logic would indicate that the contract is to be taken as being necessarily modified to accord with the statute [Income Tax Act 2007] and, presumably, may be enforced as so modified.

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[2] *Law of Contract in New Zealand*, Burrows, Finn & Todd (4th ed) para.20.4

[22] In summary, it is my conclusion that the travel arrangement provided at clause 13 of the employment agreement, and the accompanying Schedule B, is void because it is in breach of the Income Tax Act 2007 requirements relating to the proper deduction and payment of PAYE. It follows that the claim of Ms McQuade, in regard to her seeking reimbursement of moneys associated with the previously non-taxable component of her salary, is unenforceable.

Was Ms McQuade disadvantaged in her employment by an unjustified action by Crusader Meats?

[23] While it has to be accepted that the loss of net income for Ms McQuade, due to the cessation of the tax arrangement, was a disadvantage to her as compared with the net pay she received previously, I find that the disadvantage incurred was not due to an unjustifiable action by the employer. Quite simply, Crusader Meats (and Ms McQuade as a party to the IEA) was required to comply with the provisions of the Income Tax Act 2007, pertaining to proper deduction and payment of PAYE. In fairness to Ms McQuade, I have no doubts that she entered into the employment agreement in good faith and she could not have been expected to have knowledge that the tax arrangement was, possibly, illegal. Equally, it appears that Crusader Meats provided the tax arrangement in good faith, albeit, it seems, under an incorrect belief that it had the consent of Inland Revenue to do so.

[24] In summary, while I conclude that the circumstances that have led the parties to the Authority are most unfortunate for all concerned, I find that Ms McQuade does not have any grounds for a personal grievance claim under s.103(1)(b) of the Employment Relations Act 2000.

Was Ms McQuade constructively dismissed?

[25] In her letter of resignation, Ms McQuade indicated that there was, effectively, two grounds for her resignation. One ground was the issue of the cessation of the travel arrangement and the other ground was that:

> [… the company has made it too hard and stressful for me to carry out my work duties.

[26] This appears to be a reference to the circumstances whereby Ms McQuade was subjected to disciplinary action with the result that she received a series of warnings (one verbal and three written) related to her work performance and attendance. None

of the warnings were challenged at the time and it must be implied that they were accepted. There is no evidence of any unreasonable action on the part of Crusader Meats relating to these warnings and I can find no indication that the company was in any way in breach of its duties or obligations to Ms McQuade in regard to the various actions that were taken.

[27] Therefore, I am left to conclude that the resignation of Ms McQuade was a voluntary action on her part and there is nothing to suggest that the resignation constitutes a constructive dismissal. It follows that Ms McQuade's claim to the contrary must fail.

Determination

[28] For the reasons set out above, I find that:

(a) Crusader Meats did not breach Ms McQuade's employment agreement in regard to the travel arrangements and her claims to the contrary are not successful;

(b) Ms McQuade does not have a personal grievance because she was not unjustifiably disadvantaged in her employment; and

(c) Ms McQuade was not constructively dismissed. Rather, the termination of her employment was the result of a voluntary resignation.

Costs

[29] Costs are reserved. The parties are invited to resolve this issue if they can. In the event that a resolution is not possible, the respondent has 28 days from the date of this determination to file a memorandum as to costs. The applicant has a further 14 days to respond.

K J Anderson
Member of the Employment Relations Authority