

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Northland Pathology Laboratory Limited (Applicant)
AND Dr Tersia Vermeulen (Respondent)
REPRESENTATIVES Marc Corlett & Simone Hachache for the applicant
Wayne Peters, for the respondent
MEMBER OF AUTHORITY James Wilson
INVESTIGATION MEETING 15 February 2001
22 February 2001
DATE OF DETERMINATION 28 March 2001

DETERMINATION OF THE AUTHORITY

The employment relationship problem.

On 15 December 2000 Northland Pathology Laboratory Limited (Northland Pathology) lodged an application with the Authority requesting the Authority to resolve the following problem:

(a) The legality of the respondent's purported termination of her employment with the applicant on 15 December 2000, as advised in a letter from the respondent's solicitor dated 13 December; and

(b) The liability of the respondent for damages for wrongful repudiation of her employment contract with the applicant.

As a part of this application the applicant requested that the Authority accord this matter urgency. However after some difficulty in arranging for the statement of problem to be served on the respondent and given the proximity of the Christmas break, Northland Pathology agreed that this matter could be held over until the New Year. A formal reply to the statement of problem was received from Mr Peters, on behalf of Dr Vermeulen, on 19 January 2001.

In her statement in reply Dr Vermeulen stated *inter alia* that:

The reasons for the termination of employment arise from conduct of the applicant (employer), such conduct amounting to a constructive dismissal of the respondent (employee).

The investigation process.

Having asserted in his statement in reply that Dr Vermeulen had been constructively dismissed Mr Peters submitted that the Authority should not consider the application from Northland Pathology Ltd until after his client's constructive dismissal claim had been heard. However in a telephone conference held on 2 February 2001 it was agreed that:

- Mr Peters would serve and file submissions regarding Dr Vermeulen's constructive dismissal claim on 14 February 2001.
- An investigation meeting would be held into both matters i.e. Northland Pathology's original application and Dr Vermeulen's claim that she was constructively dismissed, on 15 February 2001.

Background.

Several aspects of Dr Vermeulen's employment with Northland Pathology are under dispute. However much of the history is agreed between the parties. In so far as it is agreed the following sets out the chronology of her appointment, employment and termination.

In mid-1999, while residing in Australia, Dr Vermeulen applied for a job in Auckland. Her application was not successful but, with her permission, her CV was passed on to Northland Pathology. Shortly afterwards she was contacted by Dr Desmond Reddy of Northland Pathology and invited to consider a position with his laboratory. About October 1999 she and her husband travelled to Whangarei to discuss the position first-hand with Dr Reddy and to consider the life style offered for her family should they decide to move to Whangarei. Several aspects of Dr Vermeulen's discussions with Dr Reddy during her visit are disputed. However it is not disputed that, despite an offer of employment, Dr Vermeulen decided not to accept a position at that time. The main reason for this decision was that her husband, an ophthalmologist, was not able to gain employment in Whangarei. Dr Vermeulen and her family subsequently returned to South Africa.

Following intermittent telephone contact in the intervening period, in March 2000 Dr Reddy verbally offered Dr Vermeulen a position on a two-year contract and with the salary of \$180,000 per annum. Dr Vermeulen verbally accepted this offer and it was agreed that she would take up the position in late September/early October 2000.

In July 2000 Dr Reddy faxed Dr Vermeulen a written contract. Dr Vermeulen then rang Dr Reddy to discuss a number of points in respect to the contract and the working environment and conditions in Whangarei. It is the information and impressions she says that she received during the course of this conversation that Dr Vermeulen says formed the basis of her dispute with Northland Pathology and her subsequent constructive dismissal.

Dr Vermeulen and her family arrived in New Zealand on 2 October 2000 and commenced working with Northland Pathology on 9 October 2000.

Following an incident, the import of which is also under dispute, Dr Vermeulen arranged for her solicitor, Mr Peters, to write to Dr Reddy on 27 October 2000 setting out a number of concerns regarding her conditions of employment. Included in this letter was the statement that:

For reasons, including those set out below, our client reserves her position as to the continuation of her employment.

On 2 November 2000 Dr Reddy replied to Mr Peters' letter disputing the various points raised and stating that:

In view of the issues raised in your letter and our concern that Dr Vermeulen "reserves her position as to the continuation of her employment", we have contacted the Employment Relations Service with the view to seeking assistance from them to help resolve any concerns Dr Vermeulen may have.

During November 2000 the parties attended mediation. Unfortunately no agreement was reached during the mediation process but discussions continued regarding possible settlement options. During those discussions it appears that Northland Pathology agreed that a settlement, whereby Dr Vermeulen could terminate her contract prior to the completion of the two-year fixed term, would be the best option. However no agreement was finalised and on 13 December 2000 Mr Peters wrote to Dr Reddy stating:

Our client hereby formally gives notice of termination of her contract with Northland Pathology on the basis that she considers she has been constructively dismissed, details of which will be advised in due course as appropriate.

The letter advised that Dr Vermeulen would conclude her employment at 4 p.m. on Friday 15 December 2000.

The issues for determination.

Dr Vermeulen's employment contract contains the following terms.

3. Term:

3.1 The parties agree that this contract becomes effective on 2 October 2000 and shall continue in force until terminated according to the terms of this contract.

And:

15. Termination:

15.1 This contract shall terminate on 1 October 2002 as has mutually been agreed to by both parties. If there are personal circumstances resulting in the employee's decision to leave New Zealand, then the employee is required to give the employer six months' written notice.

15.2 The above clause shall not prevent the employer from terminating the contract for disciplinary reasons or if the employee materially breaches any of the terms of this contract or acts in a manner reasonably likely to prejudice the professional or ethical reputation of the employer or in the event of serious misconduct by the employee.

Other than the provision contained in clause 15.1, there are no provisions in the contract for termination by the employee giving a period of notice. There is no suggestion that Dr Vermeulen's contract was terminated in terms of subclause 15.2.

Although expressed by the respective representatives in slightly different ways the core issues for determination by the Authority are generally agreed to be:

1. Was Dr Vermeulen constructively dismissed?
2. If Dr Vermeulen was constructively dismissed what, if any, remedies is she entitled to?
3. If she was not constructively dismissed did Dr Vermeulen wrongfully repudiate her employment contract and, if so, is the applicant, Northland Pathology, entitled to recover penalties and/or damages?

The law relating to constructive dismissal.

The Court of Appeal, in *Auckland etc. Shop Employees etc. IUOW v. Woolworths (NZ) Ltd* [1985] ERNZ Sel Cas 136, held that constructive dismissal includes, but is not limited to, cases where:

- (a) An employer gives an employee a choice between resigning or being dismissed;
- (b) An employer has followed a course of conduct with the deliberate and dominant purpose of coercing the employee to resign; and/or
- (c) A breach of duty by the employer causes an employee to resign.

It is not disputed that Northland Pathology wanted Dr Vermeulen to remain in their employ. If there was a constructive dismissal it was in terms of the third of these categories.

In *Auckland Electric Power Board v. Auckland etc. Local Authorities Officers IUOW* [1994] 1 ERNZ 168, the Court of Appeal dealt with cases where the constructive dismissal was caused by a breach of duty on the part of the employer. The Court said:

In such a case as this we consider the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or other communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach. As to the duties of an employer, there are a number potentially relevant in this field. How some should be defined precisely is a matter no doubt still open to debate: see the discussion in the Auckland Shop Employees case. But in our view it can now safely be said in New Zealand law that one relevant implied term is that stated in the judgment of the Employment Appeal Tribunal, delivered by Browne-Wilkinson J, in Woods v. W M Car Services (Peterborough) Ltd quoted in the Auckland Shop Employees case. As the Judge put it:

“In our view it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee: Courtauld's Northland Textiles Ltd v. Andrew [1970] IRLR 84. To constitute a breach of this implied term it is not necessary to show that the employer intended any repudiation of the contract; the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that

the employee cannot be expected to put up with it: see British Aircraft Corporation Ltd v. Austin [1978] IRLR 322 and Post Office v. Roberts [1980] IRLR 347. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed: Post Office v. Roberts.

We regard this implied term as one of great importance in good industrial relations...”

Dr Vermeulen alleges that her resignation was caused by a breach of duty on the part of her employer. To determine the truth of that allegation I must examine *all of the circumstances of the resignation*. If the answer is in the affirmative I must ask whether the breach of duty was of *sufficient seriousness to make it reasonably foreseeable by (Northland Pathology) that (Dr Vermeulen) would not be prepared to work under the conditions prevailing*. As to the duty alleged to have been breached and the seriousness of that breach, I must ask whether Northland Pathology, *without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them and (Dr Vermeulen)*. It is not necessary that Northland Pathology intended to repudiate the contract. I need to examine Northland Pathology’s *conduct as a whole and determine whether, judged reasonably and sensibly, it was such that (Dr Vermeulen could not) be expected to put up with it*. I must look at the *conduct of the parties as a whole and assess its cumulative impact*.

The respective positions.

In order to examine all of the circumstances of Dr Vermeulen's resignation it is necessary to briefly canvass the respective positions of the parties.

Dr Vermeulen's perspective.

In her statement of evidence to the Authority Dr Vermeulen states:

However, when the environment one works within descends to a level where one has no confidence in a supervisor and an atmosphere between employer and employee which is poisonous, I consider I would be negligent not to terminate such a relationship unless there is a genuine prospect of my work environment being changed.

I accordingly endeavoured to try and negotiate a settlement with Dr Reddy for my release, wherein I agreed to stay for a period of some months for him to arrange an alternative pathologist. No settlement could be reached, and given the impossible position I found myself in, I consider I had no option but to resign on the basis that the terms and conditions of my employment had been changed so dramatically that I was in effect being placed in a position of having been constructively dismissed.

In support of this perspective Dr Vermeulen points to a number of statements and omissions by Dr Reddy which she believes were misleading.

1. Interest in perinatal pathology.

Dr Vermeulen states that, on her first visit to New Zealand in mid-1999, she emphasised to Dr Reddy her particular interest in paediatric pathology. Subsequently, she says, Dr Reddy advised that the obstetricians at Whangarei Hospital were keen for her to come to Whangarei as they would like a perinatal pathologist on site. The clear inference that she took from this

comment was that perinatal work would be very much part of her responsibilities. This type of work was listed in her curriculum vitae as a special interest and Dr Reddy was aware that she was to attend a specialist course in the UK prior to taking up the position in Whangarei.

On arrival it soon came to her attention that there had been only two perinatal cases in the preceding 11 months. She approached Dr Reddy about the absence of perinatal work but his response was that he could not predict how much and what type of work came in. Dr Reddy suggested that she speak to the Head of Obstetrics in an effort to increase her involvement in perinatal pathology. She states that she was staggered by Dr Reddy's response as he had known that perinatal work was an important consideration for her in taking a position and he had represented to her that perinatal work of a significant nature would be available.

2. Coronial post-mortems.

On receiving her draft contract Dr Vermeulen noted that the list of duties included coronial post-mortems. She states that in her telephone conversation with Dr Reddy in July 2000 she had pointed out to him that, because of the different systems in South Africa, her training did not include forensic pathology i.e. she had not carried out coronial post-mortems for unnatural deaths. He replied that the post-mortems she would be required to do would only be natural deaths at home such as heart attacks and strokes.

When she commenced her duties Dr Vermeulen discovered that some of the post-mortems that she would be required to perform would include unnatural deaths. When she approached Dr Reddy he suggested that she read some post-mortem reports to see how they were set out and said that he would be available to help out with any "unnatural" post-mortems. She believes that this was a deliberate misrepresentation by Dr Reddy and outside the ambit of what she had understood to her duties to be.

It should be noted that the performing of autopsies is listed in Dr Vermeulen's contract and she does not dispute that she knew she would be on a "1 in 3" roster to undertake these duties.

3. Place of work.

Because she preferred working in a hospital environment Dr Vermeulen states that she had, during the telephone call of July 2000, sought confirmation from Dr Reddy that she would be based at Whangarei Hospital. Dr Reddy had replied that, yes, she would be based at the hospital. On arrival in New Zealand she discovered that she was not to be based at the hospital but rather at the laboratory in Rust Ave. She considered this to be unsatisfactory for a number of reasons. She had been led to believe that she would be based at the hospital and this was an important consideration for her. There was a lack of continuity between cases, office space, microscopes and secretaries. There was unnecessary time lost in travel between the hospital and the laboratory. The family needed to obtain a second vehicle and there was no free parking available at the laboratory.

4. Maintenance of academic expertise.

On her original visit to New Zealand in July 1999, Dr Reddy had indicated to Dr Vermeulen that she could expect to go to Auckland once a week to maintain her academic skills. Once she had commenced work it became clear that this was not a genuine option and when she raised the matter with Dr Reddy she was told that she could attend such meetings "as long as it did not interfere with (her) existing workload". Shortly after her arrival it became evident that 2 other pathologists were unhappy with their employment and shortly afterwards they left.

(Including Dr Reddy there was a total of 4 pathologists employed by Northland Pathology) Under these circumstances she regarded any suggestion that she find time to attend academic meetings outside of her “existing workload” as ridiculous.

In addition to the concerns outlined above Dr Vermeulen was particularly incensed by an incident that occurred less than two weeks after she commenced work.

In her evidence she recounts a series of events which started on 18 October 2000. She had made an arrangement for Dr Reddy to meet with her at the hospital for a “multi-header” session (a group examination of histology slides using a multi-headed microscope). Dr Reddy did not arrive. The following day, while Dr Vermeulen and another pathologist were looking at the slides, Dr Reddy rang and subsequently joined them to take part in the session. He, according to Dr Vermeulen, made no apologies for his failure to attend the previous day.

Dr Vermeulen states that she was “absolutely staggered” to receive the following week a memorandum from Dr Reddy which read:

Dear Tersia

Could you please contact me in future if you wish me to multihead cases with you so that times can be arranged. Please feel free to contact me at any time either at the laboratory or on cell phone.

In her evidence in respect to this memorandum Dr Vermeulen says:

I do not accept Dr Reddy’s statement that the letter referred to (above) represents a general instruction to staff. The letter was addressed to me and refers to the particular multihead session that we had arranged to deal with on 18 October. Dr Reddy’s explanation is, in my view, completely untenable and for him to assert that the letter was directed to Drs F & S Baksh is, in my opinion, most unprofessional. The letter could easily be interpreted by the NZMC as myself having acted improperly, even negligently, neither inference being true.

I formed the view then, which I still hold, that Dr Reddy is thoroughly untrustworthy and dishonest. Dr Reddy was my supervisor and, as such, my career was in his hands. In the context of a relationship as supervisor and pathologist, I consider that once trust and confidence had evaporated I could no longer discharge my duties as a pathologist while working in such environment.

In summarising Dr Vermeulen's position in his closing submissions Mr Peter says:

At the core of Dr Vermeulen's position is the fact that the misrepresentations as to her duties and the conduct of the employer destroyed any trust or confidence that Dr Vermeulen had in her employer. Dr Vermeulen considers that she was unable to continue to perform her duties and that if she had endeavoured to do so she ran the serious risk of compromising herself professionally.

Northland Pathology's perspective.

Not surprisingly Northland Pathology have a somewhat different perspective on the issues raised by Dr Vermeulen.

1. Interest in perinatal pathology.

Dr Reddy agrees that he discussed with Dr Vermeulen her interest in perinatal pathology during the recruitment period. However he says that he did not discuss or give Dr Vermeulen any indication of the volume of perinatal work that would form part of her employment with Northland Pathology. In particular he says:

Our discussions did not result in it being an oral term of her contract that her work would specifically include perinatal pathology. The extent of our discussions on that topic had simply included me acknowledging her interest and letting her know that her pursuing it would not be opposed, but encouraged, by the Company. I did say, as Dr Vermeulen says in (her statement), that obstetricians were keen to have a perinatal pathologist on site. However, this is not the same as saying that a perinatal pathologist was needed. I was merely saying that if one was there, she would be appreciated.

2. Coronial post-mortems.

Dr Reddy agrees that he did discuss autopsies in general terms during the telephone conversation with Dr Vermeulen in July 2000. He asserts however that he would not have told her that she would not be required to conduct post-mortems resulting from unnatural deaths. He points out that this would have made any type of staff roster at Northland Pathology extremely difficult to work. He says:

I would not have agreed to this being a term of her contract, as it simply would not have been workable or practical for us. Dr Vermeulen may have merely assumed that she would not come across many unnatural deaths in Whangarei. However, we did not agree that this would be a term of her employment.

3. Place of work.

Dr Reddy says that he is puzzled by Dr Vermeulen's assertion that he told her that she would be based at the hospital. He says that he does not believe he would have told Dr Vermeulen this as her written contract stated that "some/all" of her duties would be performed at the hospital. He also says that he would not have told her that she would be solely based at the hospital as he knew that there would be times when she would be needed to work in the Rust Ave laboratory.

In his evidence Dr Reddy says:

The vast majority of the work Dr Vermeulen performed and reported was at the hospital. There was only a small amount which she undertook at Rust Ave. She had her own office at the hospital and she also shared one on a rotation basis with the other two pathologists I had working at that time.

The portion of time for Dr Vermeulen spent at the hospital and lab respectively ended up changing after the other two pathologists left. She was based totally at the hospital from 30 October to 15 December.

4. Maintenance of academic expertise.

Dr Reddy accepts that he and Dr Vermeulen mutually agreed that her attendance at academic meetings would be helpful. However his recollection is that this was not agreed prior to Dr Vermeulen signing her employment contract or that this formed an oral term of her employment. In his evidence he says:

When Dr Vermeulen raised this issue with me once she had started work, I told her that if she intended to sit the Australasian College of Pathologists exam, she would be at an advantage if she began preparing for this in February. I told her that it may be beneficial for her to attend Friday morning teaching sessions in Auckland to help her in preparation for this. However, I said that if she wanted to take time out of work, while the Company would assist her where it could, she would need to make arrangements for her rostered work to be completed so that delays in patient diagnosis did not occur.

I consider this to be a reasonable statement, as the Company simply could not afford to have her take an entire day off work a week. One-day a week would have equated to 20% of her workload.

In response to Dr Vermeulen's concerns regarding the "multihead sessions" memorandum Dr Reddy says that, when Dr Vermeulen had asked him why he had sent the memo to her, he had explained that it was not meant to criticise her personally. It was a memo sent to all three pathologists and that it was not meant in any way to insult or upset her. He points to his subsequent letter to Mr Peter's that said *inter alia*:

We have already discussed the memo mentioned in your letter with Dr Vermeulen. We have on two occasions (18th instant and at the above mentioned discussion) apologised for being unable to attend the multihead discussion on 18 October as the result of an unforeseen circumstance. Dr Vermeulen has verbally accepted this apology. The memo sets in place for the future the means of arranging such multihead sessions with us, it was sent to all three pathologists, and casts no inference on Dr Vermeulen as you suggest. We indicate that the issuing of the memo specifically related to issues in connection with Drs F & S Baksh and have nothing whatsoever to do with the incident on 18 October 2000. The memo serves to document part of my responsibility to the New Zealand Medical Council in my role as Supervising Pathologist.

In summarising Northland Pathology's position regarding whether or not Dr Vermeulen was constructively dismissed, Mr Corlett/Ms Hachache submit that:

- the Company did not breach any of the oral terms of Dr Vermeulen's contract as none existed;
- it did not breach any of the express or implied contractual terms of the contract; and
- it did not breach its duty to act as a fair and reasonable employer which includes not making any misrepresentations.

Application of the law to Dr Vermeulen's resignation.

Was Dr Vermeulen's resignation caused by a breach of duty on the part of her employer? Dr Vermeulen in her evidence points to what she considered to be misrepresentations and inappropriate behaviour by Dr Reddy that made it impossible for her to continue in his employ. Northland Pathology have implied that Dr Vermeulen may have had other motivations.

There appear to be three possible alternative scenarios regarding the circumstances of Dr Vermeulen's appointment:

Scenario 1. Dr Vermeulen had a strong desire to immigrate with her family to New Zealand. The position in Whangarei did not suit either her personal interests or those of her husband. However she accepted the position, despite the reservations and ignoring the two-year contractual term on the assumption that once she was in New Zealand she would be able to gain a more suitable position and resign from her contract with Northland Pathology with impunity.

Scenario 2. Dr Reddy was in desperate need of an additional pathologist to fulfil his contract with Northland Health. He deliberately misled Dr Vermeulen as to the nature of the work and other conditions so as to persuade her to accept the position.

Scenario 3. Both Dr Reddy and Dr Vermeulen chose to gloss over those issues that might militate against Dr Vermeulen's appointment. As is often the case when two parties are considering entering into an employment contract both wished to rationalise the decision to themselves.

Dr Vermeulen and her husband had decided to uproot their family to take up a position halfway round the world. She chose to overlook those aspects of the position and its location, which were not perfect. Dr Reddy was very keen to appoint Dr Vermeulen and chose not to highlight those points that might dissuade Dr Vermeulen from coming.

On balance I believe that the third of these scenarios most accurately reflects the true position. It is therefore necessary to consider whether Northland Pathology had a duty to provide Dr Vermeulen with more information during the appointment process.

There is clearly an obligation on an employer to provide a prospective employee with full and accurate information on which the applicant can make a decision. This obligation mirrors the obligation on an employee to be open and honest with a prospective employer. However, as Chief Judge Goddard said in the Employment Court in *Skywards Catering Ltd (T/A Wings Bar and Restaurant) v. Aphorp-Hall* [1995] 2 ERNZ 218:

It seems to me that the correct answer is as follows. It is, of course, true that an applicant for employment is not obliged to disclose all facts that may be thought to be material to the intended employer's assessment of the applicant. That rule does not, however, permit applicants actively to misstate the true position about themselves. Misstatements are governed by other rules.

Just as an employer can expect a prospective employee to portray themselves in the best possible light so an employee should expect their prospective employer, without being dishonest, to do the same. Obviously the degree of initiative expected by a prospective employer must take into account the type of applicant.

Dr Vermeulen is a senior medical practitioner. She was considering a position which meant moving her family from South Africa to New Zealand. She spent a week in Whangarei specifically to understand the position she was considering accepting. She had ample opportunity to check out the detail of such things as the level of paediatric pathology likely to occur in Whangarei, the system of post mortems operative in New Zealand and the level of professional support available. It was a reasonable assumption for Dr Reddy to make that, as a consultant pathologist, Dr Vermeulen would understand the range and volume of work to be expected in a city and catchment area the size of Whangarei and Northland. If these were issues that Dr Vermeulen considered were of critical

importance, she could easily have clarified them, either directly from Dr Reddy or by independent research.

The second area in which Dr Vermeulen asserts Dr Reddy has breached his duty towards her surrounds the “multihead incident” and memorandum. I accept that Dr Vermeulen's reaction to this incident and the subsequent memorandum were influenced by what she considered were his misrepresentations during the recruitment process. However Dr Vermeulen's reaction as is set out in her evidence seems to be entirely out of proportion. It may have been more tactful of Dr Reddy to speak to Dr Vermeulen before he issued the memorandum and/or to have addressed the memo jointly to the three pathologists. In any event as soon as he appreciated Dr Vermeulen's concerns he explained his motivations to her. An appropriate reaction, if Dr Vermeulen was concerned about her reputation, may have been to request that all copies of the offending memorandum should be destroyed. Instead her reaction was to arrange for a letter from her solicitor combining all of her concerns and *reserv(ing) her position as to the continuation of her employment.*

Despite an attempt to reach a compromise (including the possibility of an agreed period of notice) Dr Vermeulen terminated her employment with Northland Pathology with only 2 days' notice and only 10 weeks after she had commenced her employment with them. Both parties entered into an agreement, and signed a contract, for 2 years. Inherent in that contract was a duty on both parties to attempt to preserve that relationship for 2 years. I am not convinced that Dr Vermeulen made sufficient effort in this regard. She may have been unhappy with her situation but she has not demonstrated that things were so bad that *she could not be expected to put up with it.*

Looking at the conduct of the parties as a whole and assessing its cumulative impact I find that Dr Reddy did not breach his duty as an employer. Even if his duty to inform Dr Vermeulen was greater than I have suggested, and there was therefore a breach of that duty, I do not believe that this breach was of sufficient seriousness to make it reasonably foreseeable by (Northland Pathology) that (Dr Vermeulen) would not be prepared to work under the conditions prevailing.

Having determined that Northland Pathology did not breach its duty as an employer I must also find that **Dr Vermeulen was not constructively dismissed.**

Did Dr Vermeulen wrongfully repudiate her contract of employment?

A quote from Judge Colgan in the Employment Court in *Clarke and Cleeve v Vita New Zealand Ltd*, unreported oral decision AEC 21/97: 17 March 1997 is relevant:

This case is fundamentally one of interpretation of an employment contract. Accordingly, the task of the Tribunal and the Court is as has been established in a number of recent cases one of which, Northern Distribution Union (Inc) v 3 Guys Ltd [1992] 3 ERNZ 903, will suffice for the purpose of reference. If the words of the contract are clear and unambiguous, resort to extrinsic evidence should not be permitted for interpretative purposes. Plain words must be given the ordinary meaning unless this would result in an absurdity. The Court's function is to seek to ascertain not what the parties may have meant to say but rather the meaning of what they said. An ambiguity in the interpretation of contract (and an employment contract in particular) cannot be created simply because it is contended by one party that such exists. The object sought to be achieved in construing any contract is to ascertain the mutual intentions of the parties as to the legal obligations each assumed by the contractual words in which they sought to express them: Lewison's The Interpretation of Contracts (1989) para 1.02 adopting the words of Lord Diplock in Pioneer Shipping Ltd & Ors v. BTP Tioxide Ltd

[1982] AC 724. *The Court must construe a written agreement in the light of the circumstances surrounding its making: Quainoo v. NZ Breweries Ltd [1991] 1 NZLR 161.*

Dr Vermeulen has not suggested that her contract with Northland Pathology was illegal. In any event there is nothing to suggest that it was. I am therefore required to interpret the plain meaning of the words as written. These appear to be clear and unambiguous. The *mutual intention* of the parties was to commit themselves to a two year contract. The contract itself provides for only two ways in which it can be terminated before the expiry of the two years:

- by the dismissal of Dr Vermeulen for cause in terms of clause 15.2 or
- *if there are personal circumstances resulting in the employee's decision to leave New Zealand in which case the employee is required to give the employer six months written notice.* (Clause 15.1).

There is no suggestion, from either party, that either of these provisions was applicable.

It was of course open to Dr Vermeulen to assert that she had been constructively dismissed and that this dismissal had been bought about by a breach of duty by her employer. As set out above I have determined that Dr Vermeulen was not constructively dismissed. The contract provides for no other process or reason whereby Dr Vermeulen could terminate her employment. I therefore determine that by resigning **Dr Vermeulen wrongfully repudiated her employment contract.**

Remedies.

Northland Pathology have sought the following remedies.

- (a) A determination under section 161 of the Employment Relations Act 2000 that Dr Vermeulen's actions on 15 December were an unlawful repudiation of her employment contract.
- (b) Judgment under section 162 of the ERA for the damages and losses that the Company has suffered and will suffer as a result of her breach.
- (c) An order for a penalty under section 135 of the ERA against Dr Vermeulen for the breach of her employment contract and an order that the penalty is paid to the Company.
- (d) An order that, if it transpires that the company loses its joint venture contract with Northland Health as a result of not being able to meet its obligations under the contract, the Company may bring a claim against Dr Vermeulen for losses suffered.
- (e) Costs under Schedule 2, clause 15 of the ERA.

(a) Unlawful repudiation of employment contract.

As set out above I have determined that Dr Vermeulen's resignation was in breach of her employment contract and was therefore an unlawful repudiation of that contract.

(b) Damages.

Section 162 of the Employment Relations Act 2000 gives the Authority jurisdiction to make orders in terms of the Contractual Remedies Act 1979

Subsection 7(2) of the Contractual Remedies Act provides that:

Subject to this Act a party to a contract may cancel it if, by words or conduct, another party repudiates the contract by making it clear that he does not intend to perform his obligations under it...

There is no doubt that Dr Vermeulen repudiated her employment contract.

Subsection 8(2) says:

The cancellation may be made known by words, or by conduct evincing an intention to cancel, or both. It shall not be necessary to use any particular form of words, so long as the intention to cancel is made known.

While there is no direct evidence that Northland Pathology have *made known by words* to Dr Vermeulen that they have cancelled her employment contract, such *intention to cancel* is clear from the actions. By way of illustration it is relevant to point to the change in remedies sought by Northland Pathology during the course of the investigation process. In the original statement of problem, received on 15 December 2000, Northland Pathology requested that:

The Authority issue a compliance order, under section 137 of the Employment Relations Act 2000, preventing the respondent from wrongfully repudiating her employment contract.

In their closing submissions, prepared on 9 March 2001, the Company had withdrawn its request that Dr Vermeulen be required to comply with her contract. During the intervening almost three months Northland Pathology had given up any hope that Dr Vermeulen would return to their employment and, by their conduct if not in specific words, had conveyed this to Dr Vermeulen.

Section 9 of the Contractual Remedies Act provides at subsection (1):

When a contract is cancelled by any party, the Court, in any proceedings or on application made for the purpose, may from time to time if it is just and practicable to do so, make an order or orders granting relief under this section.

In *Thomson v. Rankin* [1993] 1 NZLR (CA) the Court of Appeal, when discussing the jurisdiction outlined in section 9 said:

I agree with Fisher J. in Newmans that, in exercising the jurisdiction, the Court may inter alia have regard to the various heads of compensation often classified as restitution, reliance losses, or expectation losses.

And later:

The assessment of damages for breach of contract is essentially a question of fact which requires a consideration whether the particular damage claimed is sufficiently linked to the breach to merit recovery in all the circumstances.

Northland Pathology have provided a schedule of damages and losses which the Company is purported to have suffered.

(a) Wages for replacement locum working 18 - 22 December..... \$3,500.00
While there is no doubt that Northland Pathology did employ a locum to perform some or all of the duties which would have been performed by Dr Vermeulen, this cost would have been off set by the fact that they did not pay Dr Vermeulen's salary for this period. This is not a net cost to Northland Pathology and is not therefore recoverable.

(b) Accommodation costs for replacement locum..... \$300.00.
This is clearly an additional cost incurred by Northland Pathology directly linked to Dr Vermeulen's resignation.

(c) Relocation costs for Dr Vermeulen..... \$5,000.00.
Northland Pathology paid these costs to Dr Vermeulen on the assumption that she would work for them for two years. Her term of employment was a little over two months. The appropriate level of recovery is therefore a little under 22/24.i.e. \$4500.00.

(d) NZMC registration fees for Dr Vermeulen \$1,420.00.
I understand that the "unused" portion of this fee is recoverable from the NZMC. It is not appropriate therefore that I order Dr Vermeulen to repay this amount to Northland Pathology.

(e) Medical Protection Society fees for Dr Vermeulen..... \$300.00.
There appears to be some confusion as to whether or not Northland Pathology reimbursed these fees. Under the circumstances it is not appropriate that Northland Pathology be able to recover them.

(f) Recruitment costs for Dr Vermeulen..... \$1,000.00.
As with relocation costs in (c) above, the appropriate level of recovery is approximately 22/24 i.e. \$900.00.

(g) Recruitment costs for (temporary replacement) Filipino pathologist..... \$1,000.00.
the recruitment of this pathologist would not have been necessary had Dr Vermeulen continued on her employment. This is therefore a legitimately recoverable cost to Northland Pathology.

In terms of Section 9 of the Contractual Remedies Act I order that Dr Vermeulen pay to Northland Pathology the following sum by way of damages.

• Accommodation costs for replacement locum.....	\$300.00.
• A proportion of Dr Vermeulen's relocation costs.....	\$4,500.00.
• A proportion of recruitment costs for Dr Vermeulen.....	\$900.00.
• The recruitment costs of replacement pathologist.....	\$1000.00.
TOTAL	<u>\$6,700.00</u>

(b) Penalties.

Section 134 of the Employment Relations Act says:

(1) Every party to an employment agreement who breaches that agreement is liable to a penalty under this Act.

Section 135 of the Act says at subsection (2):

- (2) *Every person who is liable to a penalty under this Act is liable, --*
 (a) *in the case of an individual, to a penalty not exceeding \$5,000.*

It should be noted that the maximum level of penalty in the Employment Contracts Act was \$2000.

This case is unusual in that there are few previous cases in which an employer has successfully sought a penalty against an employee who has resigned in breach of his or her employment contract. There is little in terms of precedent therefore upon which to base the level of any penalty to be awarded. However in the *PPP Industries Ltd v. Doggett* [1996] 2 ERNZ 234 the Employment Tribunal awarded a penalty of \$500 against a sales representative who had resigned with no notice. Since that time, as noted above, the maximum penalty provided in the legislation has been increased by 250%.

Dr Vermeulen had committed herself to work for Northland Pathology for two years. Although she did make some attempt to negotiate a longer period of notice, in the end she resigned with only two days notice. On the other hand I am not convinced that Dr Vermeulen entered into this employment contract with the deliberate intention of resigning so quickly. Under all of the circumstances I believe the appropriate level of penalty is \$2000.00.

In terms of section 135 of the Employment Relations Act, therefore, I order that Dr Vermeulen pay a penalty of \$2000.00. In terms of section 136 of the Act I further order that one half of this penalty (\$1000.00) be paid to the applicant, Northland Pathology. The other \$1000.00 is to be paid to the Crown via the Employment Relations Authority.

(d) Future losses.

Northland Pathology have requested that I make an order that, should Northland Pathology lose their contract with Northland Health, the Company may bring a claim against Dr Vermeulen for losses suffered.

I do not believe such an order is appropriate. Northland Pathology entered into a contract with Northland Health knowing that they would be required to employ sufficient staff, including pathologists, to fulfil that contract. There was always a risk that they may not be able to do so. There was never any cast iron guarantee that staff would be available or that once recruited they would remain employed. Should Northland Pathology lose the Northland Health contract it would be difficult for Northland Pathology to show that the loss of the contract was directly linked to and solely caused by Dr Vermeulen's resignation.

Summary of Determination.

In the interests of clarity the following is a summary of the findings set out in this Determination.

1. Dr Vermeulen was not constructively dismissed by Northland Pathology.
2. By resigning from her position Dr Vermeulen unlawfully repudiated her employment contract.
3. In terms of section 162 of the Employment Relations Act Dr Vermeulen is ordered to pay Northland Pathology damages of \$6700.00.

4. In terms of section 135 and section 136 of Employment Relations Act, Dr Vermeulen is ordered to pay a penalty of \$2000.00. \$1000.00 of this penalty is to be paid to Northland Pathology and \$1000.00 to the Crown

Costs.

The question of costs is reserved in the meantime in the hope that the parties can reach agreement as to quantum. If this is not possible Northland Pathology may file a request for costs within three weeks of the date of this determination. Dr Vermeulen will be given the usual two weeks to respond.

James Wilson.
Member of Employment Relations Authority.