

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Maria Ortiz (Applicant)

AND AB Computer Services Limited (First Respondent)
AND ABC Plumbing Drainage & Gas Limited (Second Respondent)
AND Absolute Plumbing Drains & Gas Limited (Third Respondent)

REPRESENTATIVES G Ogilvie for the Applicant
G Anslow for the Respondents

MEMBER OF AUTHORITY G J Wood

INVESTIGATION 25 August 2005

MEETING

DATE OF 9 September 2005

DETERMINATION

DETERMINATION OF THE AUTHORITY

1. Mr Gordon Anslow is the sole shareholder and director of all three respondents in this case, ABC Plumbing Drainage and Gas Limited (“ABC Plumbing”), AB Computer Services Limited (“AB Computers”) and Absolute Plumbing Drains and Gas Limited (“Absolute Plumbing”). ABC Plumbing was incorporated in October 2001 and ceased trading in February 2005, on the advice of its accountants. At the same time Absolute Plumbing was established and it took over any new work Mr Anslow obtained in the plumbing field. AB Computers was registered in July 2003 and its function is to undertake computer repairs. All of the companies operate from the same premises.
2. The applicant, Ms Maria Ortiz, commenced work at the premises in early September 2004. She commenced work as a casual employee doing clerical work. There was some turnover in the office and by the end of the month Ms Ortiz had been appointed to a full time accounts position. This was confirmed by notes from a staff meeting held on 24 September 2004, which I accept are accurate.

3. The vast majority (over 90%) of her work involved doing invoicing work for ABC Plumbing. Ms Ortiz was paid by ABC Plumbing from the commencement of her employment and the Inland Revenue Department was informed that ABC Plumbing was Ms Ortiz' employer for tax purposes. She was paid \$9 per hour, plus holiday pay of 6%, on a pay as you go basis.
4. Ms Ortiz was offered an employment agreement after she started her new job, which I accept she never signed. She never signed the agreement because it described her as a casual employee, whereas her time sheets proved to me that she was working an average of around 40 hours per week, which can not be equated with casual employment. Furthermore, she declined to sign the agreement because it was in the name of AB Computers and she did little work for that company. The substance of her work was, as noted above, work for ABC Plumbing.
5. I note that clause 12.2 of the purported employment agreement requires consultation regarding the possibility of redundancy, except in exceptional circumstances, as well as before a decision to proceed with redundancy is made, including over alternatives to dismissal. The clause also requires the employer to provide the employee sufficient information to enable meaningful consultation and consideration of the employee's views with an open mind, before a decision is made.
6. Ms Ortiz and Mr Anslow did not have a positive working relationship, I determine. Communication was not a strong point for either of them, with Mr Anslow being an ineffective communicator and Ms Ortiz a poor listener. Together with the financial difficulties that ABC Plumbing was facing, difficulties in their relationship were bound to occur.
7. When Ms Ortiz was not paid for Labour Day, she raised the matter with Mr Anslow. After she objected to being told that she was a casual worker she was later paid for the day, by ABC Plumbing.
8. Ms Ortiz was later instructed to take the Christmas period, until after Wellington Anniversary Day, as unpaid leave. Despite raising the issue with Mr Anslow she was never paid for those five statutory holidays.

9. By early February 2005 rumours reached Ms Ortiz that Mr Anslow was considering forming a new company to do all the plumbing work, because of unpaid client bills. Mr Anslow confirmed in evidence that he had been advised around that time that ABC Plumbing should cease trading. He further noted that ABC Plumbing still had a high level of assets, consisting of outstanding debtors. I accept that Ms Ortiz was a party to some discussion about the state of the business before the events of 17 February, but not about any possible impact on her employment.
10. No doubt because of the impending changes to Mr Anslow's company structure, he pressured Ms Ortiz around this time, to sign the employment agreement he had proffered the previous year. Ms Ortiz again refused to sign the agreement.
11. I find that Ms Ortiz first realised that the potential changes to ABC Plumbing's operations would affect her own position on 17 February, when she was given a letter by Mr Anslow (on behalf of ABC Plumbing, further evidence that she was an employee of that company), which stated:

"Dear Employee,

Regarding redundancy

We write to inform you that your position in this company is becoming redundant.

This company is thereby giving you two weeks notice of your redundancy.

Your termination day will be 24 February 2005.

Thank you for your past service."

12. Given the strained relations between Mr Anslow and Ms Ortiz, it is of little surprise that she told Mr Anslow she was not going to accept this letter and was going to talk to a representative. Unlike the majority of other employees, Ms Ortiz was not given the opportunity to apply for and be appointed to positions with the new company, Absolute Plumbing, but I accept that all staff, including Ms Ortiz, were in fact terminated from ABC Plumbing's employment with effect from 24 February.
13. Ms Ortiz tried to raise her concerns with Mr Anslow on a number of occasions over the next week, but I accept that she was unable to do so.

14. On 24 February, Ms Ortiz took some time off to go to a job interview. She then attended the beginning of a staff barbecue, which coincided with the changeover between ABC Plumbing and Absolute Plumbing. Ms Ortiz asked for her reference, which the parties had not been able to agree on. She also asked for the extra week's pay in lieu of notice, given that her employment was to have ended a week later if two weeks' notice had been given. I accept that Mr Anslow told her that if she wanted to be paid for an extra week she would have to work it. Ms Ortiz refused to work the next week because she had other things to do.
15. Finally, I note that Ms Ortiz's last week's pay was paid by Absolute Plumbing. Mr Anslow explained that this was because ABC Plumbing did not have the funds to meet those last week's wages, which is one of the reasons, I presume, that the company ceased trading.
16. Discussions then followed between Mr Ogilvie (on Mr Ortiz's behalf) and Mr Anslow, without them resolving any of the issues. As part of those communications Mr Ogilvie sought a copy of Ms Ortiz's wage and time records, but these have never been supplied.
17. Mr Anslow agreed to go to mediation over Ms Ortiz' concerns. In fact two mediations were held, the second at Mr Anslow's request, but matters were unable to be resolved and the Authority is therefore required to make a determination.
18. Ms Ortiz linked her dismissal with her refusal to sign the employment agreement as a casual worker. She had difficulty finding new employment and she accordingly enrolled at university in July 2005.

Determination

19. I find that Ms Ortiz's employer was ABC Plumbing. That is consistent with who paid her wages and with the Inland Revenue Department's records. It could not be demonstrated that Ms Ortiz had signed any employment agreement with AB Computers. Furthermore, Mr Anslow's claim that AB Computers was the employing company cannot be supported by the payment of any wages to Ms Ortiz. Similarly, no written contracts existed between ABC Plumbing and AB Computers, or, later, AB

Computers and Absolute Plumbing. If there was the type of arrangement Mr Anslow claimed, whereby AB Computers employed staff which it supplied to ABC Plumbing, then such documentation would have been expected. In any event, I doubt that Mr Anslow would have wanted to mislead the Inland Revenue Department about who Ms Ortiz's employer was. Furthermore, the substance of Ms Ortiz's work was invoicing accounts for ABC Plumbing.

20. I reserve for later determination, should it be necessary for enforcement purposes, the issue of whether or not Absolute Plumbing has any responsibility for any wages or other compensation owing to Ms Ortiz.
21. I accept from assessing all the standard indicia that Ms Ortiz was not a casual employee; she was identified in ABC Plumbing's minutes as a full time employee and her average hours are consistent with that. The fact that she did not work set hours, i.e. start and finish at the same time every day, does not indicate at all strongly that she was a casual worker. The fact that holiday pay was incorporated in her weekly pay is only a minor indicator of casual employment. These factors are overwhelmed by the other indicators set out above, I hold.
22. I accept that this appears to be a genuine redundancy situation. Mr Anslow was given professional advice that ABC Plumbing should cease trading and he took that advice. The fact that he immediately set up another company to commence plumbing work does not mean that Ms Ortiz was entitled to automatically be transferred over to the employment of Absolute Plumbing.
23. In terms of consultation and the way the redundancy was effected, I find ABC Plumbing was in breach of its duties under the Employment Relations Act. While Ms Ortiz was aware that the company's trading position was poor and that there would be changes, she was entitled, pursuant to s.4(1A) of the Employment Relations Act, to access to information about any future decision likely to have an adverse effect on the continuation of her employment and an opportunity to comment on the information before the decision was made. A general discussion on how changes in a company may be forthcoming is not sufficient to meet this test. Furthermore, employees who are made redundant through no fault of their own are entitled to a dignified exit:

Aoraki Corporation Ltd v. McGavin [1998] 1 ERNZ 601 (CA). No doubt Mr Anslow was focused on trying to make Absolute Plumbing a success. Furthermore, he did not have a good relationship with Ms Ortiz, for the reasons set out above. However, those are not reasons for allowing Ms Ortiz to leave in circumstances where she was given less than the required notice, no real forewarning of what was to occur, different treatment from the vast majority of other employees of ABC Plumbing who were offered employment with Absolute Plumbing, and where Mr Anslow displayed a seemingly offhand attitude to her departure.

24. I therefore determine that Ms Ortiz's redundancy was an unjustified dismissal. This affected Ms Ortiz greatly, as was clear from her evidence at the Authority. While she is not entitled to compensation for the loss of her job, including lost wages, on the basis that this was a genuine redundancy, she is entitled to significant compensation for the way she has been treated. I set that sum at \$8,000 as claimed. In a redundancy situation like this there can be no issue of any contributory actions by Ms Ortiz.
25. Ms Ortiz is also entitled to be paid \$360 gross for the additional week's notice she was entitled to. It is not uncommon for employers to give notice but to not require employees to work out that notice, particularly where the employer is starting up a new business over that notice period, which the worker is not going to be working in. Given that Ms Ortiz had other things to do in the following week when she raised the matter with Mr Anslow, it was reasonable for her to decline his offer to work out the extra week of her notice. As she had altered her position, she was not required to do so.
26. Ms Ortiz is also entitled to be paid an additional \$360 for the public holidays over Christmas, New Year and Wellington Anniversary, as these public holidays clearly have to be paid to full time staff of which Ms Ortiz was one.
27. During correspondence between Mr Ogilvie and Mr Anslow, he was requested to forward a copy of Ms Ortiz's time and wage records. He failed to do so. This point is noted again in the Statement of Problem. No direct response was ever received from Mr Anslow on this point. He stated that he thought that this matter would be dealt with in mediation, but whatever happened in mediation it is clear that the records have

never been provided. Mr Anslow did not even bring them to the investigation meeting. In these circumstances, it is clear that a penalty is appropriate. I determine that the level sought of \$500 is also appropriate in the circumstances.

Conclusion

28. Ms Ortiz was employed by ABC Plumbing and was unjustifiably dismissed by it because, although her redundancy appeared to be a genuine one, it was not carried out in a fair manner. Ms Ortiz is also entitled to payment for five public holidays and a week's notice on top of \$8,000 compensation for the unjustified dismissal. ABC Plumbing is also required to pay a penalty to the Crown of \$500 for failing to provide wage and time records when requested, pursuant to s.130.
29. Leave is reserved to retain Absolute Plumbing as a respondent in the event that enforcement issues arise.
30. I therefore order ABC Plumbing Drainage and Gas Limited to pay to Ms Maria Ortiz the following sums: \$8,000 in compensation under s.123(c)(i); \$360 gross in unpaid notice; and \$360 gross in lieu of pay for public holidays. I further order ABC Plumbing Drainage and Gas Limited to pay \$500 to the Crown as a penalty for failing to provide wage and time records.

Costs

31. Costs are reserved.

G J Wood
Member of Employment Relations Authority