

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Anna Andrews (Applicant)
AND Blue Sky Wireless Limited (Respondent)
REPRESENTATIVES Trish MacKinnon for Applicant
Paul May for Respondent
MEMBER OF AUTHORITY G J Wood
INVESTIGATION 5 May 2005
MEETING
FURTHER SUBMISSIONS 20 May 2005
RECEIVED BY
DATE OF 30 June 2005
DETERMINATION

DETERMINATION OF THE AUTHORITY

Introduction

1. Ms Anna Andrews claims that her resignation from the employment of the respondent, Blue Sky Wireless Limited (“Blue Sky”) constituted a constructive dismissal as a result of ongoing concerns over her being paid less than the minimum wage, not being paid for sick leave and abusive treatment by her managing director. Blue Sky accepts that Ms Andrews was not paid in accordance with the Minimum Wage Act 1983 or the Holidays Act 2003 on occasions, but claims that it was attempting to remedy this situation before Ms Andrews left and that she simply failed to comprehend that Blue Sky was genuinely trying to resolve matters with her. It denied all claims of abusive or aggressive behaviour.

The Facts

2. Blue Sky operates as an agent for Telecom, selling its cellular phones and other services. Ms Andrews was employed by it on 20 October 2003 in a direct sales

capacity. She originally started as a salaried worker on \$33,000 per year, but this changed at her instigation on 2 February 2004. It was agreed that as it would take time for the commissions to come through then she would be paid her normal salary in February, as well as the new commission rates for that month. That effectively meant that Ms Andrews was paid twice in respect of the February period. Accordingly it was agreed in the new employment agreement that this sum would be treated as a bond, which would be written off in full if Ms Andrews stayed in Blue Sky's employment until 1 August 2005. The agreement further provided that if Ms Andrews resigned between 1 August 2004 and 31 January 2005, she would owe (and have to repay) Blue Sky the sum of \$1,832.76.

3. The agreement also provided that her salary was based on a 40 hour working week and that she was required to attend to her work duties during the business's normal hours of operation, which were Monday to Friday between 8.30am and 5.30pm. Ms Andrews did not accept that she had to undertake administrative duties such as answering the phone when she was on a commission basis, despite the clear terms of the agreement. I do not accept that Ms Andrews was ever told that people could leave for the day once they had achieved their daily targets and that some did. Ms Andrews, however, believed that she could come and go as she pleased, particularly if she met her sales targets. This she did, which caused problems in the office.
4. Ms Andrews' manager, Mr Peter Bowers, and the managing director of Blue Sky, Mr James Collins, determined to meet with all staff separately on 26 May to deal with their concerns over such administrative matters as having all staff out at lunch at the same time. They therefore set up break and lunch rosters. For the reasons given above, Ms Andrews did not consider that this was fair.
5. This meeting also occurred at a time when Ms Andrews had had significant sick leave and she knew that this would affect her earnings in the next month. I accept that during the meeting Mr Collins became frustrated and that frustration upset Ms Andrews, as Mr Collins was the boss and is a forceful personality. I accept that to an unconfident young woman like Ms Andrews, Mr Collins' behaviour in that meeting could have been seen as over-bearing. What Ms Andrews could see but could not explain clearly to her managers was that under the commission-based structure, she

stood the risk of having little or no earnings if she had a bad month, but yet she was expected to spend time that could otherwise be spent on obtaining sales doing administrative work. On the other hand, Blue Sky's managers were clear that Ms Andrews' agreement provided that although she was paid commission only, her agreement provided for her to do her share of the administrative work in the office. They were unaware of the risk that this commission-only payment structure placed on Blue Sky, in that it might find itself in breach of the Minimum Wage Act should Ms Andrews' sales in any one month be particularly low.

6. Ms Andrews was still upset the next day. She went to see Mr Collins and told him that she did not think the way he talked to her at the meeting was right. Ms Andrews was in tears. Mr Collins said he apologised if he had said or done anything that had caused offence. Mr Collins then checked with Mr Bowers if he thought he had been threatening or abusive during the meeting, and Mr Bowers told him that he did not think he had been. Mr Collins decided that he would be careful in his interactions with Ms Andrews in the future.
7. However, the parties' perceptions of what Ms Andrews was actually required to do in terms of administrative work was never resolved. Ms Andrews continued to believe that she was not required to do such work although she did in fact do it. It did not, however, help her state of mind about her job.
8. Ms Andrews' concerns about the commission structure came to fruit in June, as her pay was greatly reduced to that previously and in fact was below the minimum wage for the two pay periods in that month. This exacerbated Ms Andrews' financial difficulties.
9. Also in late June, Ms Andrews' cousin left the employment of Blue Sky under something of a cloud. While Mr Collins and Mr Bowers met with Ms Andrews to discuss this event, Ms Andrews was reassured that she was not being held in any way accountable for what had occurred and all parties agreed that those matters should be kept confidential and not discussed at work. Furthermore, any dealings relating to Ms Andrews' cousin were to be dealt with directly by Mr Bowers.

10. I do not accept that Mr Collins or Mr Bowers made fun of Ms Andrews' cousin or other members of her family, or Ms Andrews herself, or hired a private investigator to investigate Ms Andrews' family. Other than Ms Andrews' claims, there is no direct evidence that any of these events took place and therefore, on the balance of probabilities, I find that they did not take place. Ms Andrews is a very emotional person and given the stress she was under at work, I consider that her recall of events, in particular in relation to when meetings were held, was less likely to be accurate than the recall of her managers, Messrs Bowers and Collins.
11. Despite being entitled to five days' sick leave after six months' employment, Ms Andrews was not paid for the five days she took sick leave for in May and June.
12. Ms Andrews had to leave work early on 13 July because of car problems. On 14 July she told Mr Bowers that she had no money for petrol or food and could not get to work until the next day. Mr Bowers and Mr Collins were concerned about Ms Andrews' leave. Mr Bowers requested a formal interview with her by email and noted that if Blue Sky was not satisfied with the outcome a warning letter could be issued.
13. Ms Andrews responded to Mr Bowers stating that she did not feel comfortable being alone in a room with him and Mr Collins due to being "attacked" last time. Given that she was unable to arrange a support person, she suggested a meeting the next day. She also noted that she had a few concerns she would like to raise as well. Mr Bowers responded by suggesting a time of 3.30 for the meeting. In the meantime, Mr Bowers approached Ms Andrews and told her that the matter was not that serious. They then had a quick chat over a cup of coffee. Ms Andrews explained why she did not want to meet with Mr Collins. Accordingly, Mr Bowers and Ms Andrews had a meeting later that day. The leave issue could not be discussed then, however, as Mr Bowers did not have all the information at that time.
14. The full meeting was not in fact held until 22 July. The main focus of that meeting was Ms Andrews' concerns about the level of her pay, which was again very low on 15 July. This is the first time this issue was directly raised with Mr Collins. It was at this time that Mr Collins told her that he could not see that there could be a problem

with someone who was earning approximately \$37,000 per year, but that he would look into the matter.

15. Ms Andrews was very upset about what she claimed to be investigations into her family, including her cousins and other relatives, which was troubling her greatly. Mr Collins made it clear that there were no investigations being undertaken by Blue Sky and that it did not want her to leave. Ms Andrews was granted stress leave for the next few days and she asked how much it would cost her to leave. There was reference made to the bond amount, but Mr Collins told her that that would not be enforced if Ms Andrews wanted to leave.
16. Blue Sky agreed to look at topping up her wages where commissions were low in any given period. Mr Collins also denied telling staff that Ms Andrews was fat and lazy. The end result of the meeting was that Mr Collins and Mr Bowers agreed to look into Ms Andrews' concerns and get back to her.
17. The three protagonists met again on 27 July. This time Ms Andrews was assisted by a co-worker. The first issue to be dealt with was her non-attendance at work earlier that month. Ms Andrews' explanation concerned her money problems. Mr Bowers said that she had no right to take leave without permission and needed to apply for leave in the future. Ms Andrews responded by saying she believed she could come and go as she pleased because she was on commission. Mr Bowers noted that her agreement required her to work 40 hours per week. After an adjournment of some five minutes or so, Mr Collins advised Ms Andrews that no action would be taken about the leave issue, but that leave would need to be applied for in the future.
18. Ms Andrews then raised the issue of her not being paid the minimum wage over the last six weeks. She relied on the Department of Labour website for information to that effect, which she showed to Messrs Bowers and Collins.
19. Ms Andrews indicated that she did not believe she had been paid the minimum wage for the last two months. After it was made clear to Mr Collins that it was not the average over the year but the average each payday that counted, Mr Collins understood that there had been underpayments. The parties then went on to discuss how this could be rectified. At this point Ms Andrew's co-worker left the meeting.

20. Mr Collins estimated that the figure owing was around \$560. Mr Collins asked Ms Andrews what a fair settlement price would be. There was a discussion about the cost of getting Ms Andrews' car back on the road and Mr Collins then suggested that the sum of \$1,000 might be fair. Ms Andrews stood by her view that she only wanted what was fair for some time. Then she stated that she believed \$1,500 would be appropriate. Mr Collins replied that that would have to be discussed with his wife. Subsequently an agreement was reached at \$1,250. This was understood to be a payment to settle the minimum wage issue that Ms Andrews had legitimately raised.
21. Mr Collins then got legal advice and had prepared a record of settlement to be completed by a mediator. The record of settlement was set out in standard terms. Both parties had agreed that changes to the employment agreement were needed in order to ensure that the Minimum Wage Act was complied with in future. Accordingly the record of settlement also provided for the parties to enter into a new employment agreement. Accordingly, the key term of settlement was that:
- “Blue Sky Wireless Limited will pay within three days of the date of signing the new employment agreement, on a without prejudice and denial of liability basis, the compensatory sum of \$1,250 (gross) in terms of s.123(c)(i) of the Employment Relations Act 2000.”*
22. Mr Collins made clear to Ms Andrews that the sum of \$1,250 would cover both the underpayment and any concerns she had had in the past over how Blue Sky dealt with this. Mr Collins also explained that the mediator would explain the import of the settlement with Ms Andrews before the matter would be finally signed off.
23. When shown the document Ms Andrews was concerned, despite being told not to worry about it, that she did not have a new employment agreement. She told her employers that she would look at the document overnight and return it the next day.
24. The next day Mr Bowers, who wanted to clear up the underpayment before the pay run which was made later the next day, approached Ms Andrews about signing the terms of settlement. He told her that if she signed it then, the money could be paid that week, but if she delayed it would have to be dealt with in the next pay run in two weeks' time. I accept that Mr Bowers was not pressuring Ms Andrews into signing the document, because it was to Ms Andrews' advantage and Blue Sky's financial

disadvantage for it to be dealt with that week and not two weeks later. However, Ms Andrews believed that Blue Sky was trying to put one over her and she was very concerned about that, particularly as she had done some internet research and discovered that s.123(c)(i) did not bear any correlation with the issue of underpayment of wages.

25. The next day, 29 July, another meeting was held between Ms Andrews, her co-worker, Mr Collins and Mr Bowers. Ms Andrews told Blue Sky that she could not sign the agreement because it had nothing to do with her underpaid wages. Mr Collins said that that was included in the compensatory payment. When Ms Andrews asked Mr Collins if he knew what s.123(c)(i) meant, Mr Collins replied that he did not. The discussion went round in circles from that point. Mr Collins made it clear that new employment agreements could not be signed immediately as they had yet to be prepared and as the issue impacted on a number of other staff. Ms Andrews did not trust that if she signed the record of settlement she would have any say in what was contained in the new employment agreement. That was another reason she declined to sign the record of settlement. Mr Collins became extremely frustrated, while Ms Andrews became more and more upset and was crying.
26. It was clear that Ms Andrews was so upset that she did not understand what Blue Sky's managers were trying to tell her. Ms Andrews wanted to take the rest of the day off to see someone about the matters and Mr Collins challenged her about that, telling her that she had already agreed to it. I do not accept, however, that Mr Collins told Ms Andrews that other issues might have to be brought up, for reasons given above. Ms Andrews accepted that she was "hysterical" at that time. Ms Andrews told Blue Sky that she had not done anything wrong and only wanted what was right. Mr Collins was annoyed at that comment and forcefully told her that he had not done anything wrong either. He also told Ms Andrews that she was pushing his patience.
27. I accept that Mr Collins was very frustrated by this point and that Ms Andrews genuinely interpreted his reaction as one of anger. Mr Collins asked Ms Andrews why she was changing her mind. Ms Andrews indicated that she could not sign anything until she had a new employment agreement. Mr Collins then told Ms Andrews that the record of settlement could not be changed because he had got it from the

Department of Labour. I accept that that was his view at the time, but it is one that is clearly incorrect. At that point all Ms Andrews knew about her new employment agreement was that she would be on a \$30,000 per year base salary.

28. Mr Collins wanted to obtain fresh legal advice on the matter and asked Ms Andrews and her co-worker to leave so that Blue Sky management could discuss what was going to happen next. Ms Andrews was so upset that she walked over to her desk, picked up her keys and walked out of the office. Ms Andrews then left the offices, despite her co-worker's advice to the contrary. She went straight to her aunt's office, where she was sent to see her doctor. Her doctor gave her a medical certificate stating that she could not work for the next two weeks.
29. Ms Andrews' co-worker had informed Mr Collins and Mr Bowers of Ms Andrews' leaving. She tried to get hold of Ms Andrews throughout that day but was unsuccessful.
30. The next day, Blue Sky received an email from Ms Andrews setting out her version of what had occurred the day before and stated that she needed a couple of days to get her "head right". She then stated that if any questions arose, she only felt comfortable dealing with her co-worker.
31. The co-worker managed to contact Ms Andrews on 2 August, where the allegation of Ms Andrews' being called fat and lazy by Mr Collins was raised. She stated that she had not heard it and this surprised Ms Andrews. Ms Andrews also told her co-worker that she was not coming back to work and she asked her to tell Mr Collins this.
32. On 3 August Mr Bowers emailed Ms Andrews telling her that he was sorry to hear from Ms Andrews' co-worker of her decision. He noted that once there was formal advice of her intention, the transition would be made as smooth as possible. Similarly, Mr Collins wrote a letter to Ms Andrews dated the same date stating that he had been told that she would be resigning as she did not intend to come back. The letter noted that Mr Collins and Mr Bowers had tried to contact Ms Andrews and that it was not their intention for her to resign. The letter contained a request for a meeting with Ms

Andrews to resolve all issues once and for all. The issues to be clarified were as follows:

- “1. *The signing of the ‘record of settlement’.*
2. *To clarify your resigning or not and if not, then when we can expect you back to work.*
3. *The supply of a medical certificate for the leave that you have taken.”*

33. A meeting was suggested for Thursday.
34. Ms Andrews replied the next day, Wednesday 4 August, stating that she was medically unfit to return until 12 August. She said she was thus not able to attend any such meeting.
35. Mr Collins replied on 6 August stating that she had not clarified whether she had resigned or not. Mr Collins asked her if she could urgently contact him to clarify if she was resigning. On 10 August Ms Andrews replied stating that due to the stress she was under she was not capable of giving him an answer. She said that she had not made an absolute final decision.
36. The matter was then finally clarified on 15 August when Ms Andrews wrote formally resigning, claiming constructive dismissal. She said a long list of issues had led to her coming under too much stress. These included personal attacks, the involvement of her family and the minimum wage and sick leave issues. It was clear that by that point Ms Andrews too had taken legal advice.
37. The parties attended mediation but were unable to resolve their employment relationship problem. Similarly, attempts to resolve the matter during the course of the investigation meeting were unsuccessful and a determination of the Authority is therefore required.

The Law

38. The evidence shows that Blue Sky had not followed a course of conduct with the deliberate and more dominant purpose of coercing Ms Andrews to resign. Thus the emphasis to be taken in this case from the leading case on constructive dismissal, *Auckland Shop Employees’ IUOW v. Woolworths* (1985) ACJ 963, is the Court of

Appeal's finding that a resignation can amount to a dismissal where a worker resigns as a result of a breach of duty by the employer. First, the resignation must have been caused by the breach of duty. Second, the breach must be of sufficient seriousness to make it reasonable foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing. The Court of Appeal then noted that the issue was whether a substantial risk of resignation was reasonably foreseeable having regard to the seriousness of the breach.

39. All the circumstances must be taken into account, particularly as resignations which are in fact constructive dismissal situations can follow from "the straw that broke the camel's back". In this regard, a hostile atmosphere may be an important factor. However, incorrect perceptions about events are not relevant in this context (see *Harrod v. DMG World Media (NZ) Ltd* [2002] 2 ERNZ 410).
40. The behaviour of both parties must be taken in the context of their contractual relationship. Thus it was held in *NZ Woollen Mills IUOW v. Distinctive Knitwear NZ Ltd* (1990) 2 NZILR 438 at 448:

"... There was evidence given by workers that Mrs Malcolm sometimes snapped at them or spoke to them in a manner which they regarded as inappropriate. That evidence if accepted, by itself, in the absence of any elements of unfairness or oppressive conduct, is not enough. The law does not compel parties to a contract to do more than perform it and it does not require them to perform it politely, nor is this Court empowered to enforce courtesy in the workplace, no matter how desirable in that environment that quality undoubtedly is."

41. Thus, for instance, during a performance appraisal, employers can hold frank discussions with employees, including the voicing of dissatisfaction with the employee's performance (see *New Zealand Institute of Fashion Technology v. Aitken*, unreported, Goddard CJ, AC57A/04, 24 November 2004). Furthermore, even if an employer adopts a position that is incorrect, this does not mean that workers can peremptorily determine that they have been constructively dismissed where there is ample time to seek a resolution through the use of the Department of Labour's Mediation Services (see *McCammon v. Wellington Free Ambulance Service Inc*, unreported, Goddard CJ, WC8/03, 21 March 2003).

Determination on Constructive Dismissal

42. Ms Andrews had some unfounded concerns about the way she was being treated and her family investigated, as a result of the difficulties Blue Sky had with her cousin. They were no doubt an important part of her reasons for leaving Blue Sky and this must be counted against Ms Andrews in my analysis as to whether she was constructively dismissed [*Harrod* applied]. The same applies to another of her reasons for leaving, being her unfounded belief that she could work hours to please herself and did not have to do any administrative duties.
43. Ms Andrews was also concerned about certain aspects of her pay, such as not being paid sick pay, but this was not part of her reasoning when she decided to leave and therefore cannot be taken into account either.
44. In respect of her trust and confidence in Mr Collins, I do not consider that her concerns were sufficiently based on fact and/or sufficiently serious to constitute grounds for a constructive dismissal. I note in this context that while Ms Andrews could not talk to Mr Collins easily, she was always able to deal with her own manager, Mr Bowers. On the other hand I accept that Mr Collins did let his frustrations over the situation boil over on a couple of occasions in a manner which was quite unhelpful in an employer/employee relationship. However, the Authority is not the arbiter of desirable standards. In this sense I do not consider that Mr Collins' actions went beyond an acceptable manner for any length of time to constitute unfairness or oppression (*Distinctive Knitwear* applied). This is particularly so in view of the fact that after Ms Andrews left she was granted leave and extensive efforts were made to contact her and to get her to come back and discuss the issues of concern to her.
45. That leaves the issue over the minimum wage. Mr Collins did not handle that matter with any degree of expertise. However, as soon as the matter was raised in a manner that was understandable by Blue Sky, action was taken to remedy Ms Andrews' concerns. The offer made by Blue Sky was well in excess of the amount owing under the Minimum Wage Act. It was simply unfortunate that both parties did not understand the implications of the language they were using in the terms of settlement or the role of the Mediation Service. Had either party taken advantage of the ready

availability of a mediator, these issues would have been easily dealt with. However, as noted above, it was Ms Andrews who precluded further discussion on these matters, not Blue Sky.

46. It therefore follows that as Ms Andrews resigned because of the way that Blue Sky dealt with her wage concerns, rather than the fact that she was paid less than the minimum wage for a short period, and there was no serious breach of duty by Blue Sky in the way that it handled the issue, then no constructive dismissal can flow from it.
47. I therefore dismiss Ms Andrews' claim for constructive dismissal.

Outstanding Remuneration Issues

48. I note that Ms Andrews has already been paid \$322.50 for the sum owing over the minimum wage default issue. I have taken that into account in determining the sum owing to Ms Andrews. I accept the calculations made on behalf of Ms Andrews that she is in fact still owed \$3,059.59 gross in arrears of wages including commissions, holiday pay and sick leave.
49. I do not accept that Schedule 2 of the employment agreement relating to the repayment of salary made in advance, i.e. in the nature of a bond, meets the requirements of the Wages Protection Act 1983 and therefore Blue Sky cannot rely on it as a deduction from Ms Andrews' final pay, which is in effect what it did. The same principles apply to Blue Sky's claim that it can deduct \$668.25 for bad debts for Star Property Services.
50. I therefore conclude that in order to resolve this particular employment relationship problem, Blue Sky Wireless Limited will pay to Ms Anna Andrews the sum of \$3,059.59 gross.

Costs

51. Costs are reserved.

G J Wood
Employment Relations Authority Member