

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Koral Doidge (Applicant)
AND The ANZ Banking Group New Zealand (Respondent)
REPRESENTATIVES Eddie Mann, Advocate for Applicant
Andre Lubbe, Advocate for Respondent
MEMBER OF AUTHORITY Ken Anderson
INVESTIGATION MEETING 16 December 2003
FINAL SUBMISSIONS RECEIVED 12 January 2004, 15 January 2004 and 2 February 2004
DATE OF DETERMINATION 22 March 2004

DETERMINATION OF THE AUTHORITY

The Employment Relationship Problem

Ms Doidge says that the withdrawal by her employer of the payment of a mileage allowance was a serious breach of her employment agreement and hence effected a constructive dismissal.

However, ANZ Banking Group (New Zealand) Limited (“ANZ”) says that the mileage allowance previously paid to Ms Doidge was not a contractual term or condition of her employment, rather, it could be classed as a privilege and as such, could be removed at any time and hence Ms Doidge does not have a personal grievance.

For reasons of completeness, I note that Ms Doidge originally presented a claim that she had been discriminated against but that claim was withdrawn at the investigation meeting.

Background Facts and Evidence

Ms Doidge was originally employed by ANZ in 1994 in a full-time position as a Voucher Processing Operator. In November 2001, Ms Doidge resigned from her employment with ANZ and took up a teaching position. However, as she was available to perform voucher processing work during the school holidays, Ms Doidge was offered the opportunity of employment with ANZ on a casual basis.

This offer of casual employment was recorded in a letter from ANZ to Ms Doidge, dated 5 November 2001. The letter conveys that the documents that formed “part” of the individual employment agreement were:

- “this Letter of Offer;
- the ANZ Banking Group (New Zealand) Limited Collective Employment Agreement (910100);
- the applicable Supplementary Service Agreement.”

The letter goes on to convey that:

“Your employment agreement and any of these documents may only be changed by mutual agreement between you and ANZ. ANZ may from time to time introduce, vary or cancel rules, policies and procedures, but not so as to amount to a unilateral change to any of the above documents comprising your employment agreement.

You will be notified of when work is available and you may be engaged for more than one period of employment. Each period of employment will be treated as a separate engagement and recorded in a supplementary service agreement.”

The author of the above letter was Ms Sharon Geary, the Manager, Voucher Processing and Lockbox NZ, for ANZ.

Ms Doidge says that as the letter did not make any reference to the mileage allowance that was currently being paid, she requested that Ms Geary confirm that this would continue to be paid. Ms Geary duly recorded in a letter dated 12 November 2001, that:

“As discussed this is a casual contract for the Christmas period. Hours of work 6.00pm to 11.00pm, Step 4, with penal payments from 9.00pm. A mileage allowance will be paid in addition to this.”

Ms Doidge began her first period of casual employment in December 2001 during the summer school holidays. She subsequently had casual employment during the next school holidays from 28 March to 12 April 2002. On both occasions, Ms Doidge was paid a mileage allowance of \$203.00 (net) per fortnight.

Ms Doidge was offered and accepted, a further period of casual employment from 23 September to 4 October 2002. This employment was to be on the same terms and conditions as had previously applied.

However, Ms Geary attended a Voucher Processing Centre conference from 13 September to 15 September 2002, followed by a manager’s conference on 16 and 17 September. At the manager’s conference, it was decided, that as Wellington and Christchurch employees were no longer being paid a mileage allowance, then, this payment should not continue for Auckland employees. It was also decided that for permanent employees, the payment would cease in 2003, but for casual and new employees, the payment would cease from 16 September 2002.

Ms Geary says that a Team Leader attempted to contact Ms Doidge, along with another casual employee, on 17 September 2002 to inform them that the mileage allowance would not be paid for the forthcoming period of employment, Monday 23 September to Friday 4 October. It seems that the Team Leader was unable to contact Ms Doidge until Friday 20 September 2002. Upon being told of the decision pertaining to the cessation of the mileage allowance, Ms Doidge contacted Ms Geary who confirmed that the decision was final and that ANZ considered that the mileage allowance was a “benefit” rather than a contractual obligation.

Ms Doidge conveyed to Ms Geary that the mileage allowance made it financially worthwhile to work at the processing centre and asked if ANZ would increase the hourly rate to compensate for the loss of the allowance, but this received a negative response.

Upon giving consideration to the loss of income resulting from the removal of the mileage allowance, Ms Doidge decided that she would not commence employment on Monday 23 September 2002, as previously agreed. However, it seems that she did not see fit to inform Ms Geary, or anyone else within ANZ, that she no longer intended to work the period previously agreed to. While the loss of the mileage allowance amounted to a net sum of \$203.00 for the fortnight, the wages earned would have amounted to \$986.42 (gross).

Analysis and Conclusions

It has been claimed for Ms Doidge that the mileage allowance was a contractual term of her employment. Furthermore, it is claimed that the decision of ANZ not to continue the mileage allowance amounted to such a reduction in Ms Doidge's remuneration, that its removal amounted to a breach of her employment agreement of such degree that she was entitled to treat the employment contract as being repudiated or at an end. Hence, Ms Doidge claims that she was constructively dismissed.

Was there a constructive dismissal?

There is considerable legal precedent in the area of constructive dismissal, all pertaining to particular factual scenarios, but I am assisted in this matter, by an early case. In *Wellington etc Clerical etc IUOW v Greenwich [1983] ACJ 965*, it was stated that the essential questions to be addressed in regard to a possible constructive dismissal, are:

- (a) What were the terms of the contract?
- (b) Was there a breach of those terms by the employer that was serious enough to warrant the employee leaving?

The first question that requires an answer is: What were the terms of the contract that existed between Ms Doidge and ANZ, specific to the mileage allowance?

This raises the issue of whether the payment of the mileage allowance was a contractual term and could not be unilaterally removed, or whether it had the status commonly referred to as a privilege.

While there is no written reference to the payment of a mileage allowance in the collective agreement, or any other document, it seems to me that the payment of the mileage allowance was well established as a term of employment and had an implied contractual status rather than simply a discretionary payment or privilege that could be removed at any time. The payment applied not only to casual employees such as Ms Doidge, but also to permanent employees. I understand that it continues to be paid to the permanent employees at ANZ.

The intention of ANZ to cease paying the mileage allowance to Ms Doidge was implemented with little or no notice or consultation, i.e. on Friday 20 September, when Ms Doidge was due to begin her employment on Monday 23 September 2002. While ANZ say that it was not possible to contact Ms Doidge any earlier, that does not mitigate the action that took place. I conclude that removing the payment of the mileage allowance in the manner that occurred was a unilateral act on the part of ANZ and as such was a breach of the terms and conditions of Ms Doidge's employment agreement.

"It is trite law that such a change cannot be unilateral, it must be mutual."

Grant v Superstrike Bowling Centres Ltd [1992] 1 ERNZ 727 at p.734.

Furthermore, in the letter to Ms Doidge of 5 November 2001, ANZ acknowledge that unilateral changes to her terms of employment would not occur. While that letter makes reference to certain documents, it seems to me that the same principles must apply to any other actual or implied contractual terms and conditions and I have concluded that the mileage allowance was such a contractual term.

That then takes us to question two as applied in *Greenwich*. Was there a breach of those terms by the employer that was serious enough to warrant the employee leaving?

Ms Doidge says that the refusal by ANZ to continue to pay the mileage allowance was such a substantial change to her conditions of employment that the position was no longer viable and had therefore become untenable. I cannot accept that the breach of the Ms Doidge's employment contract was serious enough to warrant her refusing to present for work on Monday 23 September 2002. It seems to me that it was a somewhat dramatic and unnecessary step for Ms Doidge to forsake not only the period of employment for September/October 2002, but also possible future employment with ANZ. While I can understand that while Ms Doidge was understandably upset about the cessation of the mileage allowance, she may have thrown the baby out with the bath water, so to speak.

Overall, I conclude that both parties to this matter made major mistakes. Firstly, ANZ had no legal right to remove the mileage allowance in the manner that occurred. I would suggest that a more prudent employer would have continued to have paid the mileage allowance for the period of employment in September/October and then entered into negotiations with Ms Doidge prior to her next period of casual employment. On that basis, Ms Doidge could have exercised her discretion as to whether she wished to accept a new engagement on the terms being offered.

The mistake made by Ms Doidge was that instead of continuing with the work engagement and utilising the dispute resolution processes available to her under the provisions of the Employment Relations Act, such as mediation, which may have enabled an agreed resolution regarding the mileage allowance, she chose to not work at all and hence lost the opportunity to obtain some reasonable income immediately and possibly also for the future. That was of course Ms Doidge's prerogative, but I conclude that there was not a constructive dismissal and hence there are no remedies available to her pursuant to s.123 of the Employment Relations Act 2000.

That then takes me to the breach of the employment contract on the part of ANZ and the consideration of any remedy that may be available to Ms Doidge. I have to say that had Ms Doidge worked out her two week engagement, and given the breach of her employment agreement by ANZ, I would have had no hesitation in ordering that ANZ should have complied with Ms Doidge's employment terms and hence pay her the sum of \$203.00 being the appropriate mileage allowance for the period of the September/October engagement.

However, the failure on the part of Ms Doidge to fulfil the period of employment that was available to her, effectively deprives her from the remedy of an order of compliance, quite simply because the mileage allowance was conditional on actually travelling the distance. Regrettably, Ms Doidge chose not to work, did not travel, and hence there can be no mileage allowance entitlement due to her.

I also note that Ms Doidge has not elected to pursue an action for the recovery of a penalty for breach of an employment agreement pursuant to ss.134 and 135 of the Employment Relations Act and now pursuant to s.135(5) of the Act, that action is no longer available, as it has to be commenced within 12 months after the cause of the action has arisen.

Determination

The determination of the issues concerning this matter can be summarised as follows:

- (a) The refusal on the part of ANZ to pay Ms Doidge the mileage allowance was a breach of her employment terms and conditions that would normally have attracted the remedy of an order

of compliance. However, the failure on the part of Ms Doidge to fulfil the period of employment available to her has deprived her of any remedy.

- (b) The breach of Ms Doidge's employment contract was not serious enough to constitute a constructive dismissal. Ms Doidge does not have a personal grievance and hence the remedies that Ms Doidge seeks are not available to her.

Costs

Given that both parties were at fault in this matter, as reflected within this determination, it is appropriate that costs lie where they fall and it is so ordered.

Ken Anderson
Member
Employment Relations Authority