

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Jeanette Wenborn (Applicant)
AND Modus Group Limited (Respondent)
REPRESENTATIVES Graham Rossiter for the Applicant
Andrew Blair for the Respondent
MEMBER OF AUTHORITY P R Stapp
INVESTIGATION MEETING Palmerston North 24 August 2005
DATE OF DETERMINATION 10 October 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

1. This is an issue about whether or not there was an offer and acceptance of employment involving Modus Group Limited (Modus Group) and a third party, and whether or not the third party was an agent for Modus Group.
2. There are a number of factual issues. Did Clare Howard (a Client Services Consultant with Sterling Human Resources Limited) offer, and did Miss Wenborn (the applicant) accept employment with Modus Group on 10 December 2004? What employment arrangement did Modus Group envisage for filling the vacancy, ie a temporary arrangement whereby Sterling Human Resources would be the employer directly, or a “*contract*” (the parties’ term) for a fixed term with Modus Group being Miss Wenborn’s employer?

The facts can be briefly summarised as follows

3. Modus Group had a vacancy for an administrative position when one of its temporary staff who was employed directly by Sterling Human Resources as the employer, decided to leave. Modus Group engaged Sterling Human Resources to fill the vacancy. The responsibility for filling the vacancy was given to Claire Howard, a Sterling Human Resource Client Services Manager. She advertised the position on the internet for a “*Funding Officer Administrator, temporary position in Levin for a client*” (ie Modus Group Limited). The advertisement

stipulated the term would be for approximately three months. Ms Howard at Sterling Human Resources was the contact person.

4. Miss Wenborn, who resided in Palmerston North, contacted Ms Howard about the vacancy. Ms Howard reviewed Miss Wenborn's cv and sent it to Liz Legge, the Office Manager at Modus Group. Mrs Legge expressed an interest in Miss Wenborn and an interview was arranged.
5. Mrs Legge interviewed Miss Wenborn on 29 November 2004. At this point both of them were interested. Mrs Legge understood that Miss Wenborn was going to think about the travelling and commuting from Palmerston North to Levin. Mrs Legge understood she would wait on Miss Wenborn to comment through Ms Howard (email dated 29 November 2004 at 4.13pm). Ms Howard confirmed to Mrs Legge that she had not heard from Miss Wenborn and gave a commitment to forward any feedback that she obtained (email 29 November 2004 at 4.26pm). Ms Howard replied on 30 November 2004 (email at 7.53am) that she still had not heard from Miss Wenborn and hoped to hear something that day.
6. On 1 December 2004 (email at 9.53am) Ms Howard confirmed that Miss Wenborn had telephoned her with an interest in the position but had a few questions. The questions related to remuneration and the hourly rate that Modus Group could offer. There were also issues about the start date and how long the assignment would be for.
7. In the meantime, Mrs Legge had another candidate to interview and wanted to discuss the candidates with the directors. She anticipated the position would pay around \$17 per hour to start and be reviewed after eight months. She envisaged the start date would be around 10 January 2005 and would be looking at a contract period of eight months with a view to an annual period thereafter (email 3 December 2004 at 12.15pm).
8. On 9 December 2004 (email at 1.39pm) Mrs Legge indicated that she was interested in Miss Wenborn. She requested Ms Howard to confirm Miss Wenborn's availability and to take the next step to get a "contract". She wanted the terms in line with *Modus Group's Head Contract* with Sterling (Legge). Mrs Legge says that she meant that Sterling Human Resources would employ Miss Wenborn and provide her to Modus as a contractor.
9. On 9 December 2004 (email at 4.55pm) Ms Howard queried Mrs Legge on the nature of the placement of Miss Wenborn on a *contract* with Modus Group or as a Sterling Human Resources temporary placement similar to the arrangement for the person vacating the position, ie as an employee of Sterling.

10. Mrs Legge says that she immediately, upon receiving Ms Howard's email telephoned Ms Howard (9 December). Ms Howard does not remember any such conversation or telephone call taking place on that date. Mrs Legge says she telephoned Claire Howard at about 5.03pm and spoke to her for about 9 minutes. Mrs Legge says that she talked to Ms Howard about wanting to offer an option of a "contract" that meant to her that the placement would be a temporary placement under the terms and conditions previously used by Modus Group with Sterling Human Resources, ie Ms Wenborn would be employed by Sterling, while contracted to work for Modus. She says the hourly rate was important to her because of the loading that would be added for invoicing such an arrangement and there was an issue about the availability of the placement to start on 5 January 2005. She knew from the interview that Miss Wenborn was working for the Palmerston North City Council (PNCC) until the end of January 2005. She also wished to make reference checks, given the longer period of the placement and the sensitivity of the information involved in the role.
11. On 10 December Ms Howard telephoned Miss Wenborn and left a voice message about an offer. They had had a subsequent telephone conversation and Ms Howard says that Miss Wenborn said she would have to think about the position and get back to her. Miss Wenborn says that during this telephone conversation she was offered the position and they discussed the start date, 5 January 2005, the rate and hours.
12. On 14 December 2004 Ms Howard confirmed with Mrs Legge that she had spoken to Miss Wenborn who had a keen interest in the position and was excited with the offer. Ms Howard was waiting on Miss Wenborn to inform her of her employment situation at the PNCC and a final response.
13. Miss Wenborn says that she telephoned Ms Howard on 14 December to accept the position but requested \$18 per hour to help her travel costs. Miss Wenborn produced a note she made of this telephone call, albeit she wrote it some 2-3 months, later. Ms Howard did not refer to this telephone call in her evidence and in the Authority's investigation said that she could not recall it. It was Ms Howard's evidence that the arrangement occurred on 17 December.
14. Ms Howard confirmed to Mrs Legge on 17 December 2004 (email at 8.43am) that Miss Wenborn was interested in the position and would like to take up the opportunity. Ms Howard says that she offered the position to Miss Wenborn and that Miss Wenborn accepted it, although she asked for more money on the hourly rate (\$18) to cover travel costs. Miss Wenborn says that she was offered the position and accepted it on the understanding that her employer would be Modus Group. Ms Howard agreed that this is what she understood.

15. In the meantime Miss Wenborn says she had given notice to her manager at PNCC to leave. No one else was told this until 17 December.
16. In that the request for more money on the hourly rate was taken up within Modus Group, a decision was made by the directors to withdraw the offer thinking that the request for more money was a counter offer on the proposed rate (email 17 December 2004 at 11.30am). Ms Howard informed Miss Wenborn that the offer had been withdrawn. Ms Wenborn was surprised and disappointed.
17. On 17 December 2004 Miss Wenborn emailed Mrs Legge with her decision to seek legal advice as she had given two weeks notice to her manager at PNCC of her decision to leave. Miss Wenborn says that she then had to ask her manager at PNCC to withdraw her resignation and she continued to see out her term with PNCC.
18. Upon getting legal advice, Miss Wenborn raised a personal grievance on 9 February 2005 that Modus Group rejected on 16 February 2005. Ms Howard in the meantime, upon leaving her employment with Sterling Human Resources, provided a timeline of the events that she was involved in that included the various emails, telephone conversations, except that she did not include the detail involving the telephone call that Mrs Legge says she had on 9 December 2004.

The issue and the parties' submissions

19. The issue for me to determine is whether or not Ms Howard was an agent for Modus Group and whether there was offer and acceptance of employment involving Modus Group through Ms Claire Howard on 10 and/or 14 December 2004?
20. Mr Rossiter's submissions focussed on the issue quite simply in that there was an offer on 10 December and it was accepted on 14 December and that offer was for employment with Modus Group Limited through its agent, Sterling Human Resources Limited, Ms Howard. He says that Ms Howard exceeded her authority to bind Modus Group.
21. Ms Wenborn has been consistent throughout with her claim against Modus Group and that it was her employer as she believed that Ms Howard was acting as the agent for Modus Group.
22. Mr Rossiter says that the issues surrounding the telephone conversation between Ms Howard and Mrs Legge on 9 December are not relevant and that other issues in the evidence are either not relevant or are extraneous. He argued that certainty over the rate was not a requirement in

order for Ms Wenborn to qualify as intending to work because the contract had been formed. He says that the discussion on \$18 was an enquiry from Ms Wenborn and was not a counter offer on uncompleted terms.

23. He requested the Authority to find that the offer was made on 10 December by Miss Howard and it was accepted on 14 December by Miss Wenborn. Also he requested the Authority to decide if Ms Howard exceeded her authority and submitted that if that was so, Sterling Human Resources was acting within the scope of its ostensible authority, where Modus Group held it out to be its agent to Miss Wenborn by Ms Howard's actions.
24. Mr Blair submitted that Modus Group's arrangement with Sterling Human Resources was to contract whereupon the direct employment relationship was with Sterling Human Resources. There was a history of the arrangement. Furthermore the response from Miss Wenborn was a counter offer that supports no offer and acceptance being completed.

Ostensible authority and Offer and Acceptance

25. Sterling Human Resources was an agent for Modus Group. It had been requested to fill a vacancy.
26. I note that Ms Howard says in her evidence that she offered Miss Wenborn the vacancy to work for Modus Group on 14 December 2004 and she says that Ms Wenborn accepted the offer on either 14 or 17 December.
27. There is insufficient evidence that Ms Howard had any authority to offer a position to Miss Wenborn on the basis that Modus Group would be the employer. This is supported by the advertisement and Ms Howard's confusion between a *contract* and Sterling Human Resources providing Miss Wenborn as a contractor. Furthermore Mrs Legge tried to address any confusion that Ms Howard had, and she was supported by the history of the arrangements between Modus Group and Sterling Human Resources on filling previous vacancies. Ms Howard had never before filled a vacancy for Modus Group whereby Modus Group would be the employer. Ms Howard could clearly have misunderstood her authority and it is possible she exceeded her authority. However, there is insufficient evidence that Ms Howard conveyed to Miss Wenborn that she had authority to offer the position on behalf of Modus Group being the employer given the existence of the other arrangements and process involving Mrs Legge. This is despite her saying to Miss Wenborn that "*they wanted to offer her the position*". This comment is consistent with Modus Group's intention to contract from Sterling Human Resources compared with Ms Howard saying she offered it believing that

Modus Group would employ Miss Wenborn. I am supported by the evidence where Mrs Legge interviewed Miss Wenborn, which was part of the contracting process; Mrs Legge needed to check references, the conflict over the date of the supposed acceptance and the delay between 14 and 17 December. Also, the recorded messages are ambiguous. Miss Wenborn's file note of the telephone call she says happened on 14 December does not confirm any arrangement about who the employer was.

28. Also, there is no clear evidence that Modus represented that Sterling Human Resources had the requisite authority to act on its behalf in any way other than to fill a vacancy and contract the arrangement. The principle is found in the case *New Zealand Building Trades Union v Ebert Bros Construction Ltd* [1991] 3 ERNZ 1004. The Court referred to: *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480, *Armagas Ltd v Mundogas SA* [1986] AC 717, 777 and *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257. Another relevant authority is: *Nelson v Porirua Community Law Research Centre Incorporated* [1993] 2 ERNZ 1109.
29. Ms Howard was acting as a go between I hold, given that Mrs Legge was interviewing the applicant; and that Ms Howard was waiting on Miss Wenborn to confirm her availability, I further hold. This is supported by the conflict in dates between Miss Wenborn and Ms Howard and may possibly explain the delay involving Ms Howard getting back to Mrs Legge until 17 December.
30. There is no evidence that Mrs Legge permitted Ms Howard to change the arrangement anticipated by Modus Group for Sterling to employ Miss Wenborn and contract the arrangement.
31. This is supported by Mrs Legge's telephone conversation on 9 December with Ms Howard that I accept occurred and I find is relevant. I accept it occurred because a record of the call was produced as was Ms Howard's email asking for clarification on the nature of the arrangement envisaged that makes it probable Mrs Legge did telephone. Mrs Legge impressed me with her memory of the content of the telephone call. It is relevant because it seems that Ms Howard misunderstood what was envisaged. As such I can only conclude that she was not empowered to act as an agent until the arrangement had been sorted out when Mrs Legge was concerned enough to ring Ms Howard on the arrangements. At this point any authority Ms Howard had (if she had any) was to fill the vacancy with Sterling Human Resources being the employer because the purported offer and acceptance occurred later, on 10 and 14 or 17 December.

32. I am not satisfied that Ms Howard actually offered Miss Wenborn the job for Modus Group to employ her directly although she offered Miss Wenborn an opportunity that could have been to fill the vacancy at Modus Group whilst being employed by Sterling. Ms Howard could not have exceeded her authority having regard to the telephone call on 9 December from Mrs Legge and the insufficient evidence that Modus Group was to be the actual employer.
33. There could be no offer of employment for Miss Wenborn and Modus Group when Ms Howard had no ostensible authority and that on balance I hold she did not exceed her authority. The evidence does not support Ms Howard, at the time, holding out that Sterling Human Resources was acting within the scope of its authority having regard to Mrs Legge's telephone conversation on 9 December before any offer was made and the ambiguity of the recorded messages.

Conclusion

34. There was no offer and acceptance in regard to Miss Wenborn being employed by Modus Group directly because Ms Howard did not have ostensible authority to act for Modus Group for that purpose. The evidence does not sufficiently support that Miss Wenborn could reasonably believe that Ms Howard was acting for Modus Group to employ her directly despite Mrs Legge interviewing Miss Wenborn and Ms Howard's evidence that she offered a job to Miss Wenborn and obtained Miss Wenborn's acceptance. There is an absence of reliable evidence that the offer was made for Modus Group to be the employer. Miss Wenborn has not been assisted by the timing of her written note of the telephone call she says occurred on 14 December, and the events involving Ms Howard on 17 December, and the delay between these dates. I am not satisfied that on the balance of probabilities any conversation on either 14 or 17 December could have left Miss Wenborn with the belief that Ms Howard was acting with authority to employ her for Modus Group. If there was any direct hire it could have only been with Sterling Human Resources Limited.
35. Miss Wenborn and Modus Group have both been affected by Ms Howard's misunderstanding and the delay between 14 and 17 December. However, any loss that Miss Wenborn might have incurred was an opportunity loss of the vacancy. It emerged during the Authority's investigation that she was able to continue in her role at the PNCC until it expired.

36. The applicant's claim is dismissed.

37. Costs are reserved.

P R Stapp
Member of Employment Relations Authority