

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 61/08
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BETWEEN	ROBERTSON TURNBULL LIMITED T/A QUEENSTOWN NIGHT 'N DAY FOODSTORE Applicant
AND	LABOUR INSPECTOR Respondent

Member of Authority: Philip Cheyne

Representatives: Don Rhodes, Counsel for Applicant
Andrew Gane, Counsel for Respondent

Investigation Meeting: 5 February 2008

Determination: 8 May 2008

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Robertson Turnbull Limited is a company that operates a business in Queenstown called Queenstown Night 'N Day Foodstore. The company operates that business under a franchise agreement with Night 'N Day Foodstores Limited (the franchisor). The franchisor provides advice and support to the company which employs a number of staff in its business.

[2] Deborah Ieiri was employed by the company from August until November 2005. In December 2005 Ms Ieiri complained to the Department of Labour who investigated and eventually issued a demand notice requiring the company to pay for Ms Ieiri's benefit the sum of \$1,819.04, payable under the Minimum Wage Act 1983 and the Holidays Act 2003.

[3] In its objection to the demand notice, the company says that it calculated and paid the wages and holiday pay owing to Ms Ieiri but then she forfeited four weeks wages under the applicable employment agreement because she failed to work out her notice period. The company disagrees with the Labour Inspector's view that the forfeiture provision in the employment agreement is not enforceable because of a lack of proper consent at the time the agreement was signed. There is also an argument about the circumstances surrounding Ms Ieiri's non-attendance at work for part of the notice period in November 2005.

[4] The starting point for the Authority is to set out the relevant terms of employment. I will then determine what happened during the notice period. Against that background I will determine the validity of the company's objection to the demand notice.

The employment agreement

[5] There is an individual employment agreement signed by Ms Ieiri and dated 17 August 2005. Clauses 5 and 9 of the agreement say:

5 Deductions

The employee agrees to have deductions from remuneration including holiday pay, for overpayment, debts owed to the employer, payments made when the employee has defaulted, for payment for any absence in excess of entitlements for any debts incurred in the name of the employee, money for clothing or other equipment supplied by the employer, by agreement, or for any compensation payments made for which the employee is ineligible.

...

9. Declaration

(a) *I have read and fully understood the Employment Agreement and Employee Handbook, how the rules will be applied and the penalties for a breach of any of the rules. The rules and their application and penalties have also been explained to me.*

...

(c) & *I do hereby accept the offer of employment made to me by the Company and agree to abide by the conditions of employment set out in this Agreement and Employee Handbook.*

...

- (e) & I have received copies of the Agreement and Employee Handbook 2005 for my own records.

...

[6] The *Employee Handbook 2005* says:

TERMS OF EMPLOYMENT

Termination of Employment

Not less than four weeks notice shall be given by either party of the termination of employment, where the employee fails to work any part of the notice, and where the employment is terminated without the requisite notice, four weeks wages shall be paid or forfeited by the party who fails to give notice, or an amount equivalent to the employee's wages for four weeks in the event of default, but nothing in this clause shall prevent the summary termination of the employment for serious misconduct. The period of notice in either case shall be exclusive of the whole or any part of the annual holiday required to be given in pursuant of an employment agreement. Notice shall be paid or worked at the discretion of the employer.

PAYMENT OF WAGE

- (a) *All wages shall be paid weekly by direct credit to the employee's nominated bank account not later than Thursday. Should a holiday fall on any regular payday, wages shall be paid on the working day previous to the holiday.*

...

- (c) *The pay week under this agreement is the period from midnight Sunday/Monday until midnight Sunday/Monday following.*

- (d) *On notice being given by either party, all pays owing will be held until the notice is worked out and any monies owing will be paid at the end of the employment or varied as agreed by the employer.*

- (e) *Where the employee fails to work any part of any notice they shall forfeit the equivalent of four weeks ordinary pay.*

...

[7] There is also a form letter that was given to Ms Ieiri. It says that the employee is entitled to seek independent advice about the attached employment agreement before signing.

[8] Colin Robson was the manager of the shop at relevant times and he recruited Ms Ieiri. His evidence is that he went through the company's normal recruitment

process with Ms Ieiri which included explaining to her the effect of specific provisions in the employment agreement such as the termination of employment provisions set out above. He says that Ms Ieiri took the agreement away and returned two days later and signed it. He also says that Ms Ieiri gave the impression of understanding his explanations.

[9] Ms Ieiri participated in the investigation by providing a written statement and by phone for part of the meeting. She says that she received an agreement which she took away and that Mr Robson explained some provisions but not those relating to her forfeiting money if she did not work out a notice period. Ms Ieiri says that she did not read the agreement, that she got advice from her friends that agreements generally were the same for everyone and that she signed and returned the agreement.

[10] It is difficult to resolve the evidential differences between Mr Robson and Ms Ieiri given his attendance at the investigation meeting where he answered questions and confirmed his evidence on oath and her more limited participation. However, I will assume for the purposes of this determination that Mr Robson's evidence above should be preferred. Even without that assumption, the evidence is that Ms Ieiri was provided with a copy of the intended employment agreement, advised that she was entitled to seek independent advice about it, and given a reasonable opportunity to seek that advice. The impression I have is that Ms Ieiri was able to understand this advice even though English is not her first language. In the event, she elected to sign the agreement without getting any specific advice.

[11] The employment agreement, handbook, letter and a script that guided Mr Robson's explanation are all part of the advice and support the company receives from the franchisor. Despite these documents referring to weekly employment and weekly pays, the company operates a fortnightly pay period. Nothing turns on this inconsistency.

Ms Ieiri's resignation

[12] Ms Ieiri became dissatisfied with the employment and decided to resign. There was a discussion with Mr Robson who indicated that she needed to work out a notice period. Ms Ieiri gave four weeks written notice of her resignation on 18 October 2005, so her last day of work under that notice should have been Tuesday 15 November 2005.

[13] The Company's payroll records indicate that pays of \$661.69, \$537.96 and \$469.75 were calculated as due to Ms Ieiri for the periods ending 23 October, 6 November and 20 November. The records show 25 October, 8 November and 22 November as the pay days for each period. Previously Ms Ieiri's wages had been paid by direct credit into her bank account on the relevant pay day. The three pays referred to above were not paid to Ms Ieiri in that manner. Rather the Company wrote out cheques for each pay. The cheques are dated 31 October, 8 November and 23 November 2005. I accept that the cheques were completed on those dates.

[14] There is some dispute about what happened with the cheques. Mr Robson's evidence is that the cheques were left on the shop's notice board for Ms Ieiri to uplift. He says that was company practice. Deborah Turnbull is a director of the company. Her evidence is that she decided to stop the direct credit payments of wages for Ms Ieiri and to pay her by cheque because of Ms Ieiri's several failures to turn up for work. However Mrs Turnbull's evidence is also that she decided not to enforce the *Employee Handbook 2005* clause about withholding wages until the end of the notice period because it was thought that Ms Ieiri had been sufficiently reliable. There is an obvious contradiction in this evidence.

[15] Mrs Turnbull was unsure if she told Ms Ieiri about the changed method of payment for her wages. Mr Robson was also unsure if he told Ms Ieiri about the changed method of payment but he noted that his shifts never overlapped any of Ms Ieiri's shifts during the relevant period.

[16] Mrs Turnbull says that an envelope containing the cheque was left on the notice board to coincide with each pay period. However she did not think that there was more than one envelope up on the board at a time or that the envelope stayed up on the board through to the end of November. I also note that the cheque for \$661.69 was dated six days after the regular pay day for that pay period, so at least to that extent Mrs Turnbull has to be wrong about when the envelope was put on the board. In any event, the Company's evidence is intended to support the contention that pay was made available to Ms Ieiri during her notice period even though she did not collect the cheques or actually receive the wages.

[17] Ms Ieiri told me that she knew nothing about the cheques. There is no reason to doubt what she says on that point in light of the uncertainties and improbability of the company's evidence. If Ms Ieiri had known that the cheques were available she

would have uplifted and banked them. It follows that she did not know of them. Ms Ieiri says that because of the lack of pay she looked for and obtained another job during her notice period. She then worked at the Beefeater Steak House on 13 days between 21 October and 21 November 2005. Ms Ieiri says that she worked about three hours or so each shift at this alternative job.

[18] The roster records Ms Ieiri as *no show* for her shift starting at 11pm on Monday 17 October 2005. That is irrelevant for present purposes as she gave her notice later on 18 October. The roster then records Ms Ieiri as *no show* for her shifts starting at 11pm on 25, 26 and 31 October 2005, *sick* for the shift starting at 11pm on 16 November and *ACC/sick* for the shifts starting at 11pm on 19, 20 and 21 November. Mr Robson told Ms Ieiri that she had to make up her *no show* shifts that occurred after her notice. He therefore included her on the roster for 19, 20 and 21 November. Ms Ieiri consulted a doctor on 18 November, who certified her as unfit for work between 18 and 22 November as a result of a work accident said to have occurred on 8 November 2005. However, company records show Ms Ieiri as sick and not at work at the time of the alleged accident.

The demand notice

[19] The Labour Inspector calculated that Ms Ieiri was entitled under the Minimum Wage Act 1983 to a total of \$1,429.75 for the pay periods ending 23 October, 6 November and 20 November 2005. A further sum was calculated as owing under the Holidays Act 2003 for holiday pay. Under s.224 of the Employment Relations Act 2000 the Labour Inspector may serve a demand notice if satisfied, after considering any comments by the employer, that the employee is entitled to wages or holiday pay under the two Acts mentioned above. I accept Mr Henning's evidence to the effect that he was so satisfied and a demand notice for \$1,819.04 was served.

[20] Section 226 of the Employment Relations Act 2000 says that the function of the Authority in respect of an objection to a demand notice is to determine whether or not any or all of the money specified in the notice is due to the employee by the employer. In other words, the Authority must be satisfied that Ms Ieiri is owed money under the Minimum Wage Act 1983 and the Holidays Act 2003.

The Minimum Wage Act 1983

[21] Section 6 of the Minimum Wage Act 1983 says:

Notwithstanding anything to the contrary in any ... contract of service ... every worker ... shall be entitled to receive from his employer payment for his work at not less than th[e] minimum rate.

[22] Section 11 of the Minimum Wage Act 1983 says:

... where there has been any default in payment or any such wages or other money ... the whole ... of any such wages or other money may be recovered by the worker or by a Labour Inspector to the use of the worker ... , notwithstanding any express or implied agreement to the contrary

[23] The argument for the Company is that it met its obligations by calculating the contractual wages due for the three pay periods, writing the three cheques and placing them on a notice board for Ms Ieiri to see and pick up. Having paid Ms Ieiri in this manner, the Company says it was then entitled to a deduction as a result of the operation of the forfeiture clause in the contract.

[24] I find that the Company breached ss.6 and 11 of the Minimum Wage Act 1983. Ms Ieiri did not receive from her employer any payment for her work during the three pay periods and there was a default by the Company in paying minimum wages due to her. The contractual obligation was to pay wages by direct credit. The Company stopped doing that without Ms Ieiri's consent in order to control whether or not she received her wages. The result was that Ms Ieiri did not receive any wages. The Company cannot call in aid the contractual provision about retaining wages during the notice period (although it says it did not do so here), nor the widely worded consent to deduction clause. Both contractual provisions are defeated by the words of s.11 which entitles the employee to recover minimum payments notwithstanding any express agreement to the contrary.

[25] On this finding it is not necessary at present to deal with the dispute between the parties about Ms Ieiri working elsewhere during the notice period, whether she was genuinely incapacitated as a result of an accident, whether there was (or needed to be) informed consent to the contractual withholding and forfeiture clauses or the lawfulness of such clauses generally. The finding recognises Ms Ieiri's statutory entitlement to actually receive a minimum rate of pay for time worked and the Company's default in making that payment to her.

Holidays Act 2003

[26] It is not disputed that Ms Ieiri was entitled to holiday pay of the amount specified in the demand notice for an alternative holiday and for proportionate holiday pay.

[27] Section 23 requires an employer, when the employment comes to an end, to pay the employee their proportionate holiday pay. Under s.27 the employer must pay that holiday pay in the pay that relates to the employee's final period of employment. Section 60 requires the employer to pay any untaken alternative holiday also in the pay that relates to the employee's final period of employment. Under s.86, holiday pay is to be treated as salary or wages earned by the employee and subject to deductions that the employer is required or entitled to make for tax or any other purpose. Under s.6, the entitlements under the Act are minima and any agreement that excludes, reduces or restricts those entitlements has no effect.

[28] The argument for the Company is that it paid Ms Ieiri her holiday pay which was then set off against her forfeiture to the Company of four weeks wages for her failure to work out her notice period.

[29] The Company could not validly extend the notice period without Ms Ieiri's agreement and there is no evidence that she did agree to Mr Robson continuing to include her on the roster. To the contrary, the evidence indicates that she was unwilling to agree to that. Therefore the notice period is from 18 October to 15 November 2005. The rosters for this period indicate that Ms Ieiri did not show up for work on 24, 25 and 31 October and was sick and did not work on 8 November 2005. On the face of it, the employment agreement provides that Ms Ieiri must forfeit four weeks wages for these failures.

[30] In *Ozturk v. Gultekin T/A Halikainas Restaurant* [2004] 1 ERNZ 572 the former Chief Judge referred to the well established principle that it is unconscionable in a case of breach of contract to recover a sum which is out of proportion to the loss which occurs. Liquidated damages clauses are acceptable but penalty provisions are not. The following passage comes from *Law of Contract in New Zealand* at 21.2.6 where the authors say:

It is always, therefore, a question of importance whether a conventional sum is liquidated damages or a penalty. This is a

question of construction “to be decided on the terms and inherent circumstances of each particular contract, judged of as at the time of making the contract, not as at the time of the breach”. What has to be ascertained is whether it can reasonable be inferred that the parties intended to form a genuine pre-estimate of the damage likely to ensue from a breach.

The distinction between penalties and liquidated damages depends on the intention of the parties to be gathered from the whole or the contract. If the intention is to secure perform of the contract by the imposition of a fine or penalty, then the sum specified is a penalty, but if, on the other hand, the intention is to assess the damages for breach of the contract, it is liquidated damages.

[31] The authors refer to *Dunlop Pneumatic Tyre Co Ltd v. U Garage and Motor Co. Ltd* [1915] AC70, *Lombank Limited v. Excell* [1963] 3 ALLER 486 and *Law v. Redditch Local Board* [1892] 1 QB 127.

[32] The parties’ intentions are to be discerned objectively from the words used in their written agreement. Considering the provision entitling the employer to retain wages until the end of the notice period, the forfeiture provision of four weeks wages for failure to work any part of the notice period and the consent to deductions provision, it is clear that the intention was to secure performance of the contract by the imposition of a fine amounting to four weeks wages for any breach. Indeed the employment agreement at clause 9 specifically refers to penalties for breach of the rules.

[33] For the Company there was evidence about the cost to it and the time required to recruit and train a replacement employee. The evidence does not address the present circumstances. Ms Ieiri worked 16 or her 20 rostered shifts for the Company during the four week notice period. There is no evidence of any loss of sales or the like but I accept there was probably some inconvenience in having to organise replacements at late notice. The damage suffered by the company for a breach amounting to a failure to work four shifts at various times during a four week notice period was negligible at best.

[34] It follows that forfeiture of four weeks wages is extravagant and unconscionable in comparison to any likely loss arising from the breach. The provision amounts to a penalty and is not enforceable.

[35] Ms Ieiri should have been paid her holiday pay (as well as her wages) and was not.

[36] It is not necessary to deal with the other issues raised by the Labour Inspector.

Summary

[37] I do not uphold the company's objection to the demand notice. Ms Ieiri is entitled to the sums specified in the demand notice. The company must now pay for Ms Ieiri's benefit the sum of \$1,819.04 to the Labour Inspector.

[38] Costs are reserved.

Philip Cheyne
Member of the Employment Relations Authority