IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

AA 518/10
5273527

	BETWEEN	DOLLY BISHOP and individuals listed in Schedule A of the statement of problem Applicants
	AND	WAITEMATA DISTRICT HEALTH BOARD Respondent

Member of Authority:	R A Monaghan
Representatives:	P Cranney, counsel for applicants A Russell, counsel for respondent
Investigation Meeting:	12 July 2010
Determination:	20 December 2010

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Dolly Bishop and the individuals listed in Schedule A to a statement of problem filed in the Authority, and attached to this determination, say their employer (or former employer as the case may be) the Waitemata District Health Board (WDHB) deducted money unlawfully from payments they received following certain declaratory judgments of the Employment Court. The individuals were employed at the WDHB's Mason Clinic.

[2] The payments received were of a civilian clothing allowance, which had not been paid to the employees during the relevant period and which was the subject of the judgments in the court. The deductions concerned a shoe allowance which had been paid during the relevant period.

[3] Regarding entitlement to the shoe allowance, the WDHB says: under the applicable collective employment agreements the shoe allowance was not payable when the civilian clothing allowance was payable; the allowances are not paid concurrently to WDHB employees for any one period of work; and the New Zealand Public Service Association (the PSA) had accepted the method of calculation on behalf of members in another unit operated by the WDHB.

[4] Regarding the allegedly unlawful deductions, the WDHB says there was no deduction at all. It simply took account of the shoe allowance in its method of calculating the clothing allowance that was payable. It says in the alternative that if its method of calculating the payments owed amounted to a deduction then the deduction was a valid and lawful set-off or abatement.

[5] The applicants: disagree with the construction of the collective agreements contended by the WDHB; say there was a deduction and deny there was a valid and lawful set-off or abatement; and say even if the WDHB has a valid claim for the recovery of the shoe allowance, the claim is precluded under the Limitation Act 1950. Any such claim is also precluded by the doctrine of res judicata, because the claim was not raised in the proceedings over entitlement to the clothing allowance when it could have been.

The declaratory judgments of the Employment Court

[6] In *New Zealand Public Service Association v Waitemata District Health Board*[1] (the 2005 decision) the Employment Court determined a dispute about the interpretation of provisions in the relevant collective employment agreement (cea) regarding the payment of a clothing allowance to nursing staff at WDHB's Mason Clinic. The dispute centred on the meaning and application of clause 8.4.2 of the applicable collective employment agreement (cea), which provided for an allowance payable daily when an employee was directed by the employer to wear civilian clothing instead of the normal uniform. The allowance was not payable to staff who, with the employer's permission, elected to wear civilian clothing while on duty.

[7] The court declared at paragraph [69] that:

[1] [2005] ERNZ 253

> *[69] …the defendant has breached the terms of employment of the plaintiff's members by failing to provide them with a normal uniform until September 2002 which removed their ability to elect to wear civilian clothing..*

[8] The decision was not disturbed on appeal.[2]

[9] In *New Zealand Public Service Association v Waitemata District Health Board*[3] (the 2007 decision) the court answered an application for a further declaration regarding the period to which the 2005 decision related. It declared that

> *[17] The declaration in paragraph [69] of the judgement of the court … is for the period from 27 May 1997, being the date 6 years prior to the commencement of the plaintiff's proceedings in the Employment Relations Authority, until September 2002, being the date specified in the judgment at paragraph [69] as the date when uniforms were provided.*

[10] Payment of the clothing allowances was made in December 2007, but with the adjustment or deduction in respect of the shoe allowances paid to the employees concerned between 27 May 1997 and September 2002 (the relevant period).

The allowances

[11] Clause 8.4.1 of the applicable cea provided:

> *(a) Where the employer requires an employee to wear a particular type of shoe, an allowance of $122.79 pa shall be paid from the date of appointment.*
> *(b) Where an employer requires an employee to wear a particular type or colour of shoe, stocking or pantyhose, six pairs of these shall be supplied free of charge or an allowance of $30.42 shall be paid in lieu.*
> *(c) …*

[12] I have assumed from the way this matter was argued that the parties' references to a 'shoe allowance' were to the allowance set out at clause 8.4.1(a).

[13] Clause 8.4.2 provided:

> *An allowance of $3.04 per day (or proportionate part thereof for an employee employed part time) shall be paid for each working day on which, because of therapeutic requirements or in the interests of patient care/rehabilitation an employee*

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[2] *Waitemata District Health Board v New Zealand Public Service Association* CA118/05, 1 December 2006
[3] Employment Court Auckland, Judge Shaw, AC 56/07, 14 November 2007

is directed by the employer to wear civilian clothing instead of the normal uniform. Provided that this allowance shall not be payable to staff wholly or mainly employed in an administrative role or staff who, with the employer's permission, elect to wear civilian clothing while on duty.

[14] Clause 8.4.5 was headed 'uniform clothing' and provided:

The term 'uniform' shall include uniform dresses (or tunics and culottes), trousers, shorts, shirts, cardigans and coat or jacket.

Is the shoe allowance payable when a clothing allowance is paid?

[15] The essence of the position Mr Cranney advanced was that, under clause 8.4.2, a clothing allowance was payable when employees were directed to wear civilian clothing instead of the 'normal uniform'. Clause 8.4.5 defined the word 'uniform' as including dresses (or tunics or culottes), trousers, shorts, shirts, cardigans and coat or jacket. Neither of these provisions mentioned shoes or stockings. Accordingly the shoe allowance in clause 8.4.1 was a separate and independent allowance, payable in addition to the clothing allowance.

[16] Audrey Walsh, a senior manager at the Mason Clinic and who had been employed there since the clinic opened in 1989, said staff at the Mason Clinic had never received both the shoe allowance and the civilian clothing allowance for any one period of work. The shoe allowance was payable for staff who were required to wear a uniform shoe with the uniform clothing issued to them. Ms Walsh said that the 'uniform shoe' for males was either black or grey (or in summer, white) shoes or buckled sandals. For females it was black, white or brown shoes or buckled sandals.

[17] The civilian clothing allowance was payable when staff were directed to wear civilian clothing. When there was such a direction, Ms Walsh's evidence was that there was no requirement to wear a uniform or particular shoe as part of a uniform. There were certain restrictions on safety grounds on the footwear that could be worn, but these were not considered to be requirements in terms of clause 8.4.1. Accordingly a clothing allowance was payable when a direction was made under clause 8.4.2, but no shoe allowance.

[18] A policy on standards of dress, which was applicable between 1992 and 1999, included sections headed 'safety', professionalism' and 'mufti'.

[19] The 'safety' section addressed footwear. It opened with the statement: *Certain articles of clothing are not safe or professional for use in a psychiatric institution.* It specified that jandals, footwear not secured by ties or buckles, and shoes with heels over 5 cm high were items of that kind. It also addressed other matters such as jewellery, scarves and the unsuitability of provocative clothing.

[20] The 'professionalism' section addressed uniform requirements. Under the headings 'issued uniforms' it listed items of both clothing and shoes. It specified black or grey shoes with socks for men, adding white shoes or black or white buckled sandals in summer. For women it specified white, black or brown shoes with pantyhose, with an alternative of white, black or brown buckled sandals in summer.

[21] The policy stated that no mixture of uniform and mufti was acceptable. An acceptable standard of dress was to be adhered to when mufti was worn.

[22] A policy issued in March 1999 and subsequently reviewed did not refer to uniforms. Indeed Ms Walsh said the policy was concerned with acceptable standards of dress when civilian clothing was worn and was not concerned with uniforms. The policy set out similar restrictions on footwear to those in the 'safety' section of the earlier policy.

[23] Nevertheless a shoe allowance was being paid at the Mason Clinic during the relevant period. According to Ms Walsh this was because the WDHB believed that it was providing uniforms.

[24] The facts found by the Employment Court in the 2005 decision indicate that Ms Walsh's belief was not well-founded. After setting out a detailed history of the provision of uniforms at the Mason Clinic the court said:

> *[45] From the time the Mason Clinic opened there was no structured system for the issue of uniforms to its staff. The WDHB's formal system with its dedicated uniform room and cards for each staff member gave way to storage in Ms Brown-Toko's room for men's uniforms only. The system of annual distribution was stopped and it was left to staff to initiate requests for uniform. Those staff who had been employed for many years and were used to uniforms attempted to keep wearing them but not without significant difficulty. No information was given to staff about the availability of uniforms by management which relied on PSA delegates to advise their members about such matters.*
> …

> *[47] These factors did not encourage the uptake of uniform wearing by male staff and at least from 1995 until 2002 there was no proper uniform available at all for female staff apart from that which was unsuccessfully trialled.*
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> …
>
> *[53] … It was the norm for the staff at the Mason Clinic to wear civilians and management acquiesced to that position to the point that it became standard*

[25] In such circumstances, it would not be surprising if at least some of the staff understood they were receiving a shoe allowance because of the restrictions on footwear contained in the policy on dress standards.

[26] Both parties advanced their positions on the entitlement to a shoe allowance starkly and with little by way of expansion. The WDHB says shoe allowances were never payable when a clothing allowance was paid, with the response being that requirements regarding footwear were in existence at the Mason Clinic so the shoe allowance was paid correctly.

[27] In further support of its position the WDHB relied on a custom and practice that a shoe allowance was paid when a uniform was worn, but not when civilian clothing was worn and an allowance paid under clause 8.4.2. The two allowances had never been paid together as a matter of custom and practice. Anne Manley-Lumsden, a human resources advisor with direct experience in the administration of the allowances, said that was her approach, and her understanding of the way the allowances were applied over the whole of the WDHB.

[28] The remainder of the information in support of the custom and practice issue arose out of the parties' resolution in 2001 of the payment of a civilian clothing allowance at the WDHB's Taharoto unit. It was said that uniforms had never been provided there. The clothing allowance was to become payable and employees were also to receive backpay in respect of it. It seems the employees had been receiving a shoe allowance during the period for which back payment was to be made.

[29] An emailed message dated 8 November 2001 from the then-employee relations manager records that the shoe allowance would be stopped when the clothing allowance became payable, and the 'system' would automatically deduct the

shoe allowance from the backpay. There does not seem to have been a challenge to that position at the time.

[30] It seems, too, that in 2002 there was opposition to the proposed re-introduction of uniforms at Taharoto. In discussing that matter in a letter dated 14 January 2002, the PSA commented that the reintroduction of uniforms would mean staff would be entitled to the payment of the shoe and stocking allowance 'not currently received'.

[31] The discussion went no further because a letter from the employee relations manager dated 13 February 2002 advised that the decisions regarding the clothing allowance and uniforms were deferred. None of the participants gave evidence.

[32] In the absence of anything more than the correspondence just summarised, I cannot form any view of the position of the PSA on the entitlement to a shoe allowance when the clothing allowance was being addressed at Taharoto. For that reason I do not accept the submission of the WDHB that the actions of the PSA at Taharoto mean the PSA or its members are estopped from pursuing the claim they make here.

[33] The application of custom and practice to the interpretation of employment agreements was summarised simply and clearly in a decision of the Arbitration Court, citing other decisions, in *NZ Harbours IUOW v Wellington Harbour Board* as being:

> *… if a custom is proved which is not necessarily inconsistent with an award, such award may be treated as having tacitly sanctioned a custom, and should be interpreted in the light of the custom.*
>
> …
>
> *Before a custom could be incorporated into a contract of service that custom must be general, must be reasonable, and not repugnant to the express terms of the contract or to a necessary implication from them. If a custom is proved which is not necessarily inconsistent with an award, such award may be treated as having tacitly sanctioned the custom and should be interpreted in the light of the custom … but before such a custom can be proved it must be shown that it was of genuinely wide application in the industry.*[4]

[34] I accept the link Ms Walsh described was present with reference to the wearing of uniforms by nurses. There is a distinction between the requirement to

[4] [1986] ACJ 721, 723.

wear a particular type of shoe in association with the specified uniform clothing, as reflected in the policy on dress standards applicable between 1992 and 1999, and restrictions of the kind set out in later policy documents and which were imposed for safety reasons.

[35] At the same time the decisions of the Employment Court indicate that there were difficulties in practice with the system for the provision and wearing of uniforms in the WDHB's mental healthcare facilities at least. For practical purposes the system fell into virtual disuse at the Mason Clinic, while the wearing of uniforms was also the subject of dispute and disagreement at the Taharoto Clinic. However the application of the cea was not limited to the mental healthcare facilities, and I do not accept that the shortcomings, difficulties, and disagreements experienced in those facilities displaced the wider application of the shoe allowance.

[36] For the above reasons I conclude that the shoe allowance was not payable in circumstances where a civilian clothing allowance was payable.

Was there was a 'deduction' or was a 'method of calculation' applied

[37] Section 4 of the Wages Protection Act 1983 provides that, with exceptions not applicable here, -

> … *an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.*

[38] Mr Russell's submissions to the effect that the WDHB's actions did not amount to a deduction from the payments owed, rather they were simply a method of calculating the payments owed, centred on cases and commentary on the meaning of the word 'deduction'. A convenient summary is contained in *Portia Developments Limited trading as Silverstone Intercredit New Zealand v Taylor*.[5]

[39] As noted in the summary there is a distinction between a subtraction made as part of a process of calculating wages, and a deduction made from wages payable. Another way of putting the difference was that there can be a lawful deduction if for

[5] (Unreported) Employment Court, Judge Travis, AEC 100/97, 9 September 1997 at p 7 – 8.

the purpose of fixing correct entitlement but not if the deduction is from wages already fixed.

[40] The 'method of calculating payment' (or fixing correct entitlement) of the civilian clothing allowance was as set out in clause 8.4.2. The clause set out the circumstances necessary to qualify for the payment, and the amount to be paid and rate at which it was to be paid when those circumstances were met. The method was augmented by the declaration of the Employment Court regarding the period in respect of which payment was to be calculated.

[41] By taking the shoe allowance into account in calculating the clothing allowance, the WDHB went beyond the method of calculation identified in clause 8.4.2. It did not simply make a subtraction as part of the process of calculation, as there was nothing in the provisions setting out the method which permitted it to do so. In applying its view of the application of the shoe allowance the WDHB inserted a new step outside the agreed method of calculation in clause 8.4.2, and in doing so made a deduction from the amount payable (or already fixed).

[42] The deduction was not authorised, and was made in breach of s 4. However this does not in itself prevent the WDHB from seeking to recover the overpayment using a lawful means.

Whether the Limitation Act prevented claims for any set off or abatement

[43] Mr Cranney submitted that, even if the employees were not entitled to the shoe allowance, it is too late for the WDHB to seek to recover the overpayment. He says such a claim amounts to a set-off, and is precluded by s 4 of the Limitation Act 1950.

[44] Section 4 reads in part:

> *(1)Except as otherwise provided in this Act […] the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say, -*
> *(a) actions founded on simple contract or on tort:*
> …
> *(d) actions to recover any sum recoverable by virtue of any enactment, other than a sum by way of penalty or forfeiture.*

[45] Section 30 of the Limitation Act reads:

> *For the purposes of this Act, any claim by way of set-off or counterclaim shall be deemed to be a separate action and to have been commenced on the same date as the action in which the set off or counterclaim is pleaded.*

[46] A counterclaim was pleaded in the statement in reply filed on 31 July 2009. The remedy sought was a declaration that there was an overpayment in the relevant payment period, and that this was recoverable by the WDHB against the applicants.

[47] I digress to say the counterclaim relied on s 94A of the Judicature Act 1908, which addresses the recovery of payments made under mistake of law. In support it referred to what was said to be the mistaken belief that the factual circumstances at the time with regard to the clothing allowance (namely that it was not payable because uniforms were available) required the payment of a shoe allowance. No further argument in respect of s 94A was developed or raised in the submissions of either party, except that Mr Cranney advised at the investigation meeting that he sought to reserve his position on whether the Authority had jurisdiction to address a matter argued under s 94A at all.

[48] Jurisdiction was confirmed when the judgment of the Employment Court in *The New Zealand Fire Service Commission v Warner & Ors*[6] was issued shortly after the investigation meeting. However in the absence of any other submission or argument based on s 94A I simply note that the court concluded claims for the repayment of monies allegedly overpaid mistakenly to employees fall within the definition of 'employment relationship problem.'

[49] Returning to the Limitation Act, very little argument was offered by either party. For my part, assuming that the counterclaim falls within s 4(1), I turn to the question of when the 'cause of action accrued'.

[50] Neither party identified a date on which the cause of action accrued, so I take the basic approach of seeking to identify the date on which the fact which gave right to a claim occurred. I find the date to be the date on which the overpayment was made. The last date on which that could have occurred is in September 2002.

[6] [2010] NZEmpC 90

Accordingly the last date on which an action could be brought to recover any overpayment is in September 2008.

[51] The WDHB acted unilaterally to recover the overpayments in the form of deductions to the payments made in December 2007, and it did not make any claim prior to doing so or at the time. With reference to s 30 of the Limitation Act the date of filing of the counterclaim, July 2009, is the relevant date for the purpose of determining when the WDHB sought to take action. This date was outside the 6-year period commencing even with the last date in the relevant period. Accordingly the counterclaim cannot proceed.

[52] This conclusion means it is not necessary to address whether the counterclaim is also precluded by the doctrine of res judicata.

Summary

[53] Standing back from all of the above I find there was an overpayment in that a shoe allowance was paid when there was no entitlement to it, but that the associated deduction from the payment of the clothing allowance was in breach of the Wages Protection Act. The existence or not of an otherwise valid set off does not excuse the breach of that Act.

[54] It was open to the WDHB to seek to recover the overpayment but it did not act lawfully as far as the Wages Protection Act is concerned, or in time as far as the right to recover the overpayment is concerned.

Conclusion

[55] The above summary amounts to a declaration of the rights of the WDHB and the named employees in this matter. I declare accordingly.

[56] Beyond that, and for the time being, I make no further order for the following reason.

[57] The original statement of problem was filed by the solicitor for the PSA. As noted, the applicants were cited as the persons listed in schedule A annexed to the statement and to this determination. An amended statement of problem again cited the persons listed at the annexed schedule A, and sought an order that the 'respondent repay the deductions'. The payments and the deductions in question were also detailed in schedule A.

[58] During the investigation meeting attention was drawn to the fact that the PSA is not a party to this employment relationship problem. With one exception there was nothing to indicate that any of the individual applicants had authorised the PSA to act on their behalf in the problem. Subject to the resolution of those matters the investigation continued, and I have addressed the merits of the problem on the basis that one of the named applicants appeared and gave evidence and Mr Cranney continued to act.

[59] Leave was reserved to the parties to make such application as they considered necessary to resolve the above. If either party wishes to make an application such application is to be filed and served by the close of business on 31 January 2011. If no application is made in time, and no extension of time has been sought and granted before that date, the reservation of leave will lapse.

[60] On receipt of an application I will address the further steps to be taken.

Costs

[61] Costs are reserved pending the outcome of the above procedure.

R A Monaghan
Member of the Employment Relations Authority