

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

CA 212/10  
5288231

BETWEEN                      LABOUR INSPECTOR (JO-  
ANN DUFF)  
Applicant

A N D                              CORNERSTONE  
ENTERPRISES              LIMITED  
TRADING AS DEE NIGHT 'N  
DAY  
Respondent

Member of Authority:        Helen Doyle

Representatives:              Jo-Ann Duff for Applicant  
Don Rhodes Advocate for Respondent

Investigation Meeting:        8 June 2010 in Invercargill

Submissions Received:        7 July 2010 from Applicant  
15 July 2010 from Respondent

Date of Determination:        22 November 2010

---

**DETERMINATION OF THE AUTHORITY**

---

**Employment relationship problem**

[1]     The Labour Inspector lodged a statement of problem with the Authority wanting to recover on behalf of an employee, Davinder Sharma, an amount later clarified to be holiday pay in the sum of \$1,151.62 net together with the imposition of a penalty for non-compliance with minimum employment standards.

[2]     Night 'n Day Foodstores Limited is a franchised operation. Cornerstone Enterprises Limited (Cornerstone) owns and operates two stores in Invercargill which are part of the Night 'n Day Foodstores Limited franchised operation. One of the stores is Dee Street Night 'n Day Foodstore and it is at this store that Mr Sharma worked.

[3] Cornerstone in response to the claim by the Labour Inspector for holiday pay, relies on a forfeiture clause in its 2008 handbook to retain any money that is owing to Mr Sharma up to four weeks wages if four weeks notice is not given. The handbook provisions are incorporated into Mr Sharma's terms and conditions of employment by clause 9 of his individual employment agreement.

[4] The Labour Inspector accepted that these conditions were drawn to Mr Sharma's attention and that he signed alongside the term and condition related to termination of employment.

[5] The provision in the hand book is as follows:

***Termination of employment***

*No less than four week's notice shall be given by either party of the termination for employment. Where the team member fails to work any part of any notice, or where the employment is terminated without the requisite notice, four week's wages shall be paid or forfeited by the party who fails to give or work the notice, or an amount equivalent to the team member'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 pursuant of an employment agreement. Notice shall be paid or worked at the discretion of the Company.*

[6] In clause 8 of the individual employment agreement Mr Sharma authorises deductions from his wages as follows:

*The staff agree to have deductions made from remuneration including holiday pay, for overpayment, legal costs or fines imposed due to a breach by the staff, debts owed to the employer, costs associated with dishonesty, payments made when the staff has defaulted, for payment for any absence in excess of entitlements, for any debts incurred in the name of the employer, forfeiture of notice, money for clothing or other equipment supplied by the employer, by agreement, training costs, or for any compensation payments made with which the staff is ineligible.*

[7] These clauses in the Night 'n Day Rules and Handbook are well known to the Authority. They have been the subject of four determinations.

[8] Mr Rhodes in his submissions refers to two earlier determinations where the respondent party was unrepresented at the Authority's investigation meeting and the Authority enforced the forfeiture clause in the handbook and ordered that the

employees concerned make payment for failure to give notice – *Night n Day Foodstores Ltd v. O’Connor* (CA12/05) and *Night n Day Foodstores Ltd v. Holden* (CA46/04).

[9] In two later determinations the Authority did not enforce the forfeiture clause on the basis that it was a penalty – *Roberts & Turnbull Ltd trading as Queenstown Night ‘n Day Foodstore v. Labour Inspector* (CA61/08) and *CA and JA Ward Ltd v. Angie Marie Wood* (CA16/09). Mr Rhodes submits that *Roberts* is distinguishable from this matter. *Roberts* was followed by the *Ward* matter.

[10] The Authority reviewed these determinations and considered submissions provided following the investigation meeting. There was a submission from the Labour Inspector to the effect that forfeiture clauses by their very nature are penalty clauses and are therefore unlawful and unenforceable. The Authority talked to Ms Duff and Mr Rhodes by way of telephone conference about whether the matter should be removed to the Employment Court. Both Ms Duff and Mr Rhodes were receptive to that and could see a benefit in that for the future.

[11] Ms Duff confirmed in writing that an application for removal would be made on behalf of the Labour Inspector. She subsequently advised that the Labour Inspector wanted the Authority to determine the matter in the first instance by letter dated 3 November 2010.

[12] The Authority will therefore proceed to determine the matter.

### **The issues**

[13] The issues before the Authority are as follows:

- Was there a failure by Mr Sharma to provide four weeks notice?
- If there was, should the Authority enforce the clause? This will involve consideration whether the requirement to pay or forfeit four weeks wages for failing to give the requisite notice was a genuine pre-estimation of damages or a penalty.
- Should the Authority order reimbursement of the holiday pay retained and/or a penalty?

***Was there a failure by Mr Sharma to provide four weeks notice?***

[14] Mr Sharma did not attend the Authority investigation meeting. The Labour Inspector explained it would have been too expensive for him to do so and disproportionate to the possible amount he could recover. I spoke briefly to Mr Sharma by telephone at Ms Duff's request during the investigation meeting, but can place little weight on that discussion.

[15] I heard evidence from the owner/operator of the Dee Street Night 'n Day Foodstore, Mr Rohloff.

[16] Mr Rohloff explained that Mr Sharma was employed in a supervisory position at the store. He was therefore a more senior staff member. Mr Sharma's employment agreement provided the types of tasks that he may be required to undertake as including general cleaning, tidying, pricing, security, customer service, food manufacturing, cooking, baking, office and book work, handling stock, staffing requirements and any other particular aspects of the business through to management as instructed.

[17] Mr Sharma maintained that he provided the required notice in writing to Mr Rohloff. The Labour Inspector in circumstances where there was no evidence of any written notice advised the Authority that she was unable to determine how much notice was in fact given or in what form.

[18] Mr Rohloff was firm in his evidence that no such notice was given and he set out in his evidence a timeline in terms of interactions with Mr Sharma.

[19] On 26 May 2009 Mr Rohloff said he had a discussion with Mr Sharma, during which Mr Sharma advised Mr Rohloff that he wanted advice on running a dairy.

[20] On 28 May 2009 Mr Sharma took a day off for the purpose of travelling to Dunedin to look at a dairy.

[21] Mr Rohloff said that Mr Sharma did not approach him during work on 30 and 31 May or 1 or 2 June 2009. On 2 June 2009 Mr Rohloff was approached by the milkman who commented on Mr Sharma leaving. Mr Rohloff said that he responded to the milkman in words to the effect that Mr Sharma was not leaving as far as he knew but was looking into a dairy in Dunedin.

[22] Mr Rohloff said he had no discussion with Mr Sharma on 3 or 4 June, but on Friday 5 June 2009 two other staff approached him and asked if Mr Sharma was leaving. Mr Rohloff said that he was not leaving as far as he knew.

[23] Mr Rohloff said on 5 June 2009, following Mr Sharma's commencement of work at 2.00pm, he approached him and asked him whether Mr Sharma was leaving. Mr Sharma responded that he was and advised Mr Rohloff that his last day would be 9 June 2009. Mr Rohloff said that he told Mr Sharma that the employment agreement required four weeks notice and that if Mr Sharma finished early there would be consequences. Mr Rohloff asked Mr Sharma for notice in writing, but said that Mr Sharma did not provide that.

[24] I accept Mr Rohloff's evidence that Mr Sharma did not give four weeks notice. He gave four days notice.

[25] There was no accounting to Mr Sharma in terms of any money owing to him after he left his employment. This was only provided after the Labour Inspector became involved.

***Should the Authority enforce the clause?***

[26] The nature of the business operated by Night 'n Day is that of a retail food and groceries store or small supermarket. Mr Rhodes in his submissions, and Mr Rohloff in his evidence, emphasised the inconvenience of having a person leave because of the training required to be provided to a new employee so they can work at an acceptable level – see *145 power point presentation*. Mr Rhodes submits that as Mr Sharma held a supervisory position it was a position of greater significance to the company particularly in terms of knowledge related to legislative requirements around age restrictions and hygiene standards.

[27] Mr Rhodes submits:

*The requirement to give 4 weeks notice is not part of any subversive or punitive thinking, but very simply a management decision to operate their business as efficiently as possible.*

[28] Mr Rhodes acknowledged that Cornerstone was unable to quantify its loss because of the breach of the agreement by Mr Sharma to give four weeks notice. He did submit that where a more experienced senior staff member leaves without notice

the training provided costs more because it has to be provided on an individual basis rather than as a group session. The Authority did not hear any evidence about the cost of this or whether the travel and wage costs to provide such training were actually incurred in this case.

[29] In *Robertson* the Authority member referred to the principle in *Ozturk v Gultekin T/A Halikainas Restaurant* [2004] 1 ERNZ 572 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. It is acceptable for the parties to a contract to intend that the sum in the contract forms a genuine pre-estimation of the damage likely to ensue from a breach (liquidated damages). This is so even if the consequences of the breach are such to make precise pre-estimation impossible – *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79.

[30] In *Robertson* however the Authority concluded that the parties intention objectively from the words used in the in the Night ‘n Day handbook with respect to the notice period is to secure performance by the imposition of a fine or a penalty. Support was found for this within the employment agreement itself at clause 9 where it refers to a penalty for a breach of the rules.

[31] Whilst I accept Mr Rhodes’ submission that *Robertson* is distinguishable on its facts from the present matter the principles with respect to the enforceability of penalty provisions are still applicable.

[32] I find, as in *Robertson*, that the provision in the handbook relating to forfeiture of four weeks wages is a penalty provision. It is a sum that is out of proportion or extravagant in comparison to any likely loss arising from the breach. I find that, notwithstanding that the money withheld in this case was not a sum equal to the full four week period. Mr Rhodes submits that the four days notice given was taken into account at least and the sum may even be for a lesser period than the balance.

[33] I do not find the cases relied on by Mr Rhodes’ in his submissions where an employee is penalised and that penalty is accepted without the necessity for a detailed analysis of loss persuasive in the circumstances of this case.

[34] The Authority can award actual damages for a breach where there is proof of loss. There is evidence before the Authority of inconvenience when the required notice is not given and training costs, although training would have to be undertaken

in any event by a new employee. There is no evidence however of actual loss caused by the breach by Mr Sharma. There was no evidence of any lost sales for example to customers as a result of Mr Sharma not being present for the balance of his notice period or evidence of the cost of any out of the ordinary training to Cornerstone.

[35] For completeness it seemed to me that the Labour Inspectors submission that all forfeiture clauses are penalty clauses and unenforceable goes too far. An analysis of the facts as they arise in each case is usually required.

### **Determination**

[36] The forfeiture provision in the handbook that was relied on for withholding Mr Sharma's holiday pay is a penalty and is not enforceable.

[37] The Authority is not satisfied that there is evidence of actual loss as a result of the breach and makes no award in those circumstances.

[38] Mr Sharma is entitled to his holiday pay of \$1,151.62 net.

[39] I order Cornerstone Enterprises Limited to pay to the Labour Inspector for the benefit of Davinder Sharma the sum of \$1,151.62 net.

[40] I make no order as to a penalty in circumstances where there may have been some uncertainty as to the enforceability of this provision given the two earlier undefended cases and the different facts in the *Robertson* case.

### **Costs**

[41] I order Cornerstone Enterprises Limited to pay to the Labour Inspector the sum of \$70 being reimbursement of the filing fee.

Helen Doyle  
Member of the Employment Relations Authority