

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2011] NZERA Wellington 163

File Number: 5289428

BETWEEN NEW ZEALAND PUBLIC  
SERVICE ASSOCIATION

AND First Applicant  
PETER ROBERTSHAW,  
CHARLOTTE WIN, and NEIL  
RAEBURN as representatives  
of all the First Applicant's  
members employed by the  
Respondent listed at Schedule A  
to the Statement of Problem

AND Second Applicants  
Secretary for Justice

Respondent

Member of Authority: Denis Asher

Representatives: Peter Cranney & Caroline Mayston for the applicants  
Alastair Sherriff & Deidre Marshall for the respondent

Investigation Meeting Wellington, 29 April 2010

Submissions Received By 28 October 2011

Determination: 30 October 2011

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**DETERMINATION OF THE AUTHORITY**

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## **Background**

[1] This employment relationship problem was first set out in statements of problem and reply filed on 4 & 21 December 2009.

[2] An investigation followed on 29 April 2010. At the request of the parties I refrained from issuing a determination so that they might undertake further mediation in an effort to resolve their differences. Further mediation proved unsuccessful.

[3] In an attempt to further assist the parties I issued a draft determination on 10 June 2010.

[4] The parties made ongoing effort to resolve matters on their own terms. Success was not initially achieved and, by way of a determination dated 10 June 2011, I referred three questions of law to the Employment Court (*NZPSA & Ors v Secretary for Justice* [2011] NZERA Wellington 100) (the referral determination).

[5] Those matters referred to the Court were, with one exception, subsequently resolved by the parties on their own terms.

## **One Remaining Matter**

[6] As is made clear in a joint consent memorandum dated 20 September 2011, there is one outstanding matter that the parties want the Authority to determine. It is the issue of the lawfulness or otherwise of subsequent pay deductions, as set out in pars [17] b to [35] b of the referral determination (above).

[7] Following a telephone conference on 17 October and subsequent emails, a timeline was agreed for the filing of final submissions.

## **The Problem**

[8] Pars [17] b to [35] b of the referral determination (above) set out the following:

[17] *In its written submissions dated 21 February 2011, the applicants say there are three legal issues:*

a. ...;

b. *Whether the subsequent pay period deductions were lawful, i.e. did they comply with the requirements of the WPA, in particular s. 6 (2); and*

c. ... .

[18] *In respect of the first issue, the law is clear: an employer has two choices in respect of a worker who offers partial performance – to accept partial performance and pay full wages or suspend that worker under ss 87 & 88 of the Act: Rockhouse v AG [1998] 1 ERNZ 598, 600.*

[19] *Here, the respondent chose not to suspend and all deductions are therefore unlawful and must be repaid.*

[20] *Deductions in subsequent pay periods were not lawful because inadequate notice to the worker was given (in breach of s. 6 (3) (b) of the WPA), and – by the application of additional resources – it was practicable for the respondent to effect the deductions in the proper pay period.*

[21] *Deductions from the bailiffs' allowance were unlawful as the allowance is a contractual annual entitlement and there is no common law or statutory rule entitling the respondent to reduce or abate payment for lawful strike action.*

### ***Respondent's Position Summarised***

[22] *Amongst other things, the respondent says its position is that an employee undertaking 75% of their normal work because of strike action results in zero pay (oral submissions 29 April).*

[23] *The amounts taken from employees' wages in the relevant pay period were not deductions, but reductions resulting from the employee not being entitled to pay for hours he or she did not work, i.e. as no wages were payable there was no deduction.*

[24] *Where the amounts taken from wages occurred in a subsequent pay period the employer complied with s. 6 of the WPA. That is because recovery resulted as a result of strike action, it was not reasonably practicable to avoid making an overpayment, notice was given to employees and the overpayment was recovered within the two month timeframe.*

[25] *The respondent also says it is not required to pay employees for services not provided for various reasons including clause 4.4 of the Staff CEA. It provides as follows:*

#### *4.4 Deductions*

*4.4.1 The Ministry shall make the appropriate deductions from any salary or wages due where an employee:*

- ...*
- is absent from work without authorisation ...*

[26] *While there is no equivalent provision in the TLM CEA deductions can also be effected because of s. 6 of the WPA.*

[27] *Because of the methods normally used by the respondent in arranging the payment of wages to its employees it was not reasonably practicable for it to avoid making an overpayment to those taking strike action, in terms of s. 6 (3) of the WPA, i.e. they were paid normal wages for the period in which the industrial action occurred and recovery was effected in a subsequent period.*

[28] *Any overpayment in this regard may therefore be lawfully deducted from the employee's next pay.*

[29] *The law relating to employment contracts is clear and straightforward: the employer pays an employee to perform agreed tasks. It follows that a refusal to work those agreed tasks means no pay.*

[30] *There is no contractual or statutory basis for the applicants to claim wages for refusing to perform some agreed tasks. In fact and law the respondent is simply paying for the work properly performed.*

[31] *The respondent relies on s. 4 of the WPA: wages do not become “payable” until work is performed or some other lawful basis exists for payment, which is not the case here.*

[32] *The respondent forewarned the first applicant (the PSA) of her view of the law and her intention not to pay employees who refused to perform all of their duties.*

[33] *As a matter of fact or law an employer is not required to suspend or lock out an employee who refuses to perform their normal duties before determining not to pay for that non performance, or to recover payments for the same reason. Section 87 of the Employment Relations Act 2000 (the Act) says an employer, “... **may** suspend the employment of an employee who is party to the strike” (emphasis added).*

[34] *Deductions made in an employee’s fortnightly pay were specifically recorded in the respondent’s payroll kiosk as strike leave, along with conventional details of an individual’s pay including wage details, annual holidays owing, deductions for KiwiSaver, etc. All of its employees are familiar with the kiosk and the process for accessing it. Communications from the applicants’ representatives confirm its employees were on notice of the respondent’s intention to recover overpayments, and were aware when they had happened:*

1. *Pay - by now you will all have seen your payslips and be aware that the MOJ has docked our pay for the strike action. This was always to be expected.*

*(doc 6, Bronwyn Kingdom’s witness statement)*

### ***Discussion and Findings***

[35] *Three live issues remain between the parties:*

- a. ...;
- b. *Whether the subsequent pay period deductions were lawful, i.e. did they comply with the requirements of the WPA, in particular s. 6 (2); and*
- c. ... .

[9] As is made clear above, only one live issue remains and that is the question of the lawfulness or otherwise of subsequent pay deductions.

### **Summary of Applicants' Position**

[10] The issue for the applicants is whether the respondent acted in accordance with the Wages Protection Act 1983 (the WP Act) when it recovered overpayments made to workers who had taken industrial action.

[11] The applicants say overpayments cannot be recovered by deduction from a worker's wages unless the worker consents, but also acknowledge the exceptions provided in s. 6 of the WP Act when wages have been paid in respect of a recoverable period, being a period of unauthorised absence, strike, lockout or suspension.

[12] In order for deductions made in respect of such an overpayment to be lawful the employer must comply with the conditions set out in ss 6 (3) & (4) of the WP Act. In particular, no employer shall recover an overpayment unless, by virtue of the methods normally used to pay wages, it was not reasonably practicable for the employer to avoid making the overpayment, **and** the employer gives the worker notice before recovering that overpayment **and** notice is given not later than the next pay day, and that overpayment is recovered not later than 2 months after the notice is given (ss 6 (3)).

[13] The applicants rely on the comment by the Employment Court in *Tawhiwhirangi v A-G* unreported, WEC 7/98 as to the meaning of not reasonably practicable, namely that it is a much higher standard than merely difficult. They say the test is not met on the facts as additional resources could have been, but were not, used.

[14] Second, the applicants rely on the distinctions set out by the Employment Court in *Air Nelson Ltd v NZALPA IUOW Inc*, [2008] ERNZ 327 and in *NZ Stevedoring Co Ltd v NZ Waterfront Workers Union* [1990] 3 NZILR 437 between notice being given and served, i.e. the former requires that it must be received by the other party.

[15] Adjustment payslips produced by the respondent on its payroll kiosk following overpayment deductions, and which have to be accessed by way of the employee entering a specific number and password, and the posting of general notices of the possibility of overpayment requiring subsequent recovery do not, the applicants submit, do not satisfy the notice requirements of s. 6 (3) of the WP Act.

[16] Finally, they also say the respondent's adjustment payslip is in breach of s. 6 (4) as it failed to provide a notice specifying the date on which the overpayment was made and the actions that led to it being an overpayment.

#### **Summary of Respondent's Position**

[17] The respondent's submissions on the subsequent deductions issue begin with the single proposition: no work – no pay.

[18] Section 4 of the WP Act does not oblige an employer to pay wages until and unless the employee works, holidays aside.

[19] Hence, when payments which were not properly or lawfully payable were made, due to the respondent's payroll system, the respondent is able to lawfully recover them by deduction from subsequent pays in accordance with s. 6 of the WP Act.

[20] The respondent neither locked out its employees nor did it suspend them. It was nevertheless entitled to deduct the overpayments arising out of unauthorised absences: ss. 6 (1) (a) of the WP Act.

[21] It was not reasonably practicable for the respondent to avoid making the overpayments. The Employment Court decision in *Tawhiwhirangi v A-G in respect*

*of the Department of Corrections* [1998] 1 ERNZ 571 is binding on the Authority: the public service payrolls in Corrections and Justice are sufficiently similar for the Authority to reach a conclusion consistent with the Court's decision and uphold the latter's subsequent deductions as lawful.

[22] The respondent's communication to its staff of its intention to deduct and of actual deduction took many forms, including emails, internal internet entries, Ministry guidelines, communications to union representatives (repeated by the union to its members) and to each affected employee in the kiosk system.

### **Discussion and Findings**

[23] The applicants are not disputing the basis of the deductions, that they were in respect of unauthorised absence (arising out of strike action), or their accuracy; they say instead that the respondent's actions breached the provisions of ss. 6 (3) & (4) of the WP Act.

[24] As is made clear above (refer to par 25, quoted at par 8) the respondent relies on clause 4.4 of the Staff CEA to effect deductions, including those in subsequent pay periods, as well as on the decision of *Tawhiwhirangi v A-G* [1998] 1 ERNZ 571. In the latter, and after extensive evidence, the then Chief Judge Goddard held that, "*given the system in use, it was not practicable for the department to avoid the overpayment, nor was it reasonable to expect the department to have done so having regard to its wage paying methods*" (p 582).

[25] Ms Kingdom provides an explanation of the respondent's pay system in pars 60-77 of her witness statement. In it she explains the respondent's intranet payroll kiosk (which detailed deductions in respect of "*strike leave*"), staff access to their pay and leave details, the fortnightly pay cycle and how employees are paid nine working days in arrears and one in advance for that period.

[26] Ms Kingdom also explained how, on the Friday prior to any pay day, team leaders and managers are required to submit to payroll details of an employee's completed hours of work. Payroll closes on the following Monday. Because of the respondent's pay cycles, strike action results in two scenarios: first, a reduction in pay

relating to the strike action because the worker's manager is able to communicate the completed details to payroll in time for it to be processed before the next pay day. Second, the details are communicated after payroll has closed and the reduction cannot be processed in the same pay period.

[27] As was the case in *Tawhiwhirangi* (above), a large number of employees took industrial action (approximately 1415 in this instance *vis* almost 1,000 in *Tawhiwhirangi*); as noted above, 33,446 hours were lost because of industrial action.

[28] Ms Kingdom's evidence was that, because of the respondent's normal methods, it was not reasonably practicable to avoid effecting reductions over than in the same pay period. I accept that (unchallenged) evidence: because of the size of the task and its complexity, I do not accept – with all respect – the simplistic proposition that it was practicable or reasonable to, as the applicants suggest, overcome those problems by application of more resources. That is because such resources are not readily to hand, would entail significant cost and delay would arise from the training and putting in place of the extra hands required. The respondent's defence in respect of ss. 6 (3) (a) of the WP Act therefore succeeds.

[29] I am also satisfied the applicants were given extensive notice of an intention to recover (per ss. 6 (e) (b) of the WPA). That is because the parties' negotiations were extensive, commencing as they did on 2 May 2009. They proceeded from then over a lengthy period of time, from July to October 2009, and included mediation. Those negotiations also included the applicants advising the respondent of their industrial action plan, including an escalation to work stoppages. As a result the latter took steps to manage the effects of the action, including the preparation of guidelines that were subsequently placed on its intranet, along with a frequently asked questions page. Both clearly signalled that workers' pay would be docked for the period of their absence because of industrial action.

[30] The respondent's intention to dock pay was directly communicated to the first applicant in October 2009 (document 3 in the respondent's bundle); its delegates then (properly) communicated notice of the same to other union members (doc 4, etc above). Without detailing all of the communication, I find that the respondent met several times over the requirement of ss. 6 (3) (b) & (c) of the WP Act.

**Summary of Findings**

[31] In a nutshell, and as set out above, I am satisfied the respondent has met all of the requirements set out in ss 6 (3) (a), (b) & (c) of the WP Act.

**Determination**

[21] For the reasons set out above the applicants' claims do not succeed.

[22] As requested, costs are reserved.

**Denis Asher**

**Member of the Employment Relations Authority**