



[2] Mr Michael Page, Director of NWLL, admitted Mr Te Whiu had not been paid any annual holiday pay upon termination. However, he said Mr Te Whiu was not paid because he owed NWLL money, which NWLL deducted from Mr Te Whiu's final pay.

[3] NWLL claimed Mr Te Whiu owed it:

- (a) Six days' wages (it did not put a monetary value on this) because he had not worked out his full two weeks' notice period; plus
- (b) \$3,149.48 for damage Mr Te Whiu allegedly caused to a work truck whilst employed.

[4] Mr Te Whiu accepted six days' pay should be deducted for his failure to work the last six days of his notice period. Mr Brown calculated this as amounting to \$1,661.04 (being 6 x his average daily pay of \$276.84).

[5] However, Mr Te Whiu disputed he was liable for damage to the work truck and said this issue was not raised with him before his employment ended. Mr Te Whiu said NWLL only raised concern about the damage to the truck after the Labour Inspector pursued his unpaid annual holiday entitlements.

[6] Mr Brown requested that a penalty be imposed on NWLL under s.229(3) of the Employment Relations Act 2000 ("the Act") for its failure to produce and/or supply Mr Te Whiu's wage and time records when requested under s.229(1)(c) and (d) of the Act to do so by a Labour Inspector.

[7] On 7 September 2010 Mr Brown wrote to Mr Page requiring NWLL to provide him with a copy of Mr Te Whiu's wage and time records. No response was received. On 18 October 2010 Mr Brown issued a Notice requiring NWLL to produce Mr Te Whiu's wage and time records to the Labour Inspector for inspection.

[8] Mr Page admitted the wage and time records had not been provided, but said Mr Brown advised him by telephone he did not have to provide them. Mr Brown denied that.

[9] Mr Brown sought interest on Mr Te Whiu's unpaid holiday pay from 19 August 2010 (being the date Mr Te Whiu's employment ended) until the date full payment has been made.

**Pre investigation issues**

[10] The Statement of Problem was filed on 25 March 2010. A Statement in Reply was not received. A telephone conference was held on 11 May 2010 and the parties agreed to attend an investigation meeting in Gisborne on Saturday 21 May 2010.

[11] Mr Page emailed the Authority with a letter on 17 May 2010 which he said was the respondent's Statement in Reply. Although the respondent's response was not in the required form, the Authority treated the letter as if it were a Statement in Reply. Leave was granted at the investigation meeting to the respondent to treat this letter as its Statement in Reply and leave was granted to file it outside the 14 day time limit.

[12] At the investigation meeting, Mr Page sought to pursue a counterclaim against Mr Te Whiu. However, the Statement in Reply did not include a counterclaim. Even if the Statement in Reply had raised a counterclaim, the applicant in this matter was Mr Brown, and the respondent's counterclaim was against Mr Te Whiu, not Mr Brown.

[13] The Statement in Reply letter did not identify the amount NWLL alleged Mr Te Whiu owed it for incorrect notice and/or for damage to its truck. It did not explain why Mr Te Whiu was liable for the damage. It did not identify when the truck had been damaged or how. It did not explain what damage had been caused. It did not state when the damage to the truck had been assessed or who had assessed it. It did not specify how much damage had been caused. It did not explain whether the alleged damage had been fixed, and if so, when that had occurred. These were all matters which would have required evidence if the proposed counterclaim was to be investigated.

[14] Because the respondent's Statement in Reply letter had only been received three working days before the investigation meeting, the Authority had not timetabled any evidence on what can be categorised as counter claim issues.

[15] Neither Mr Te Whiu, Mr Brown or the Authority were prepared to address a counterclaim during the investigation meeting on 21 May 2011. Mr Page was therefore advised the respondent would need to file a Statement of Problem against Mr Te Whiu if it wanted to have the issue of the liability regarding the alleged damage to the truck determined.

[16] The Authority advised the parties that its investigation on 21 May 2011 was solely into whether Mr Te Whiu had a wage arrears claim, which necessarily would include determining what, if any, deductions Mr Te Whiu had consented to being made from his final pay. The parties were advised the Authority would consider evidence about the alleged truck damage within the context of what contractual deductions Mr Te Whiu had consented to NWLL making from his final pay.

[17] On 14 June 2011 the Authority received a Statement in Reply in the correct form. Leave was not granted to file this out of time because by that stage the investigation meeting has already been held and leave had already been granted to NWLL to file its letter dated 17 May 2010 as its (out of time) Statement in Reply.

[18] NWLL was again advised it would have to file a Statement of Problem if it wanted the issue of the alleged damage to the truck investigated. No Statement of Problem has been filed by NWLL.

### **Post-investigation issues**

[19] Because NWLL had not provided Mr Te Whiu's wage and time record, Mr Brown's calculation of the annual holiday pay due was based on the information that was available to him prior to the investigation meeting.

[20] After hearing the evidence on 21 May 2011 it became clear that Mr Brown's calculations may not be correct. I therefore directed NWLL to provide Mr Te Whiu's wage and time records to Mr Brown. That information was eventually provided, although I note NWLL did not comply with the deadline I had set for the provision of such information.

[21] I also directed NWLL to calculate Mr Te Whiu's annual holiday pay and to provide its calculations to Mr Brown and to the Authority. The Authority reminded Mr Page of this obligation at least twice, but NWLL did not comply with the Authority's direction to calculate Mr Te Whiu's annual holiday pay.

[22] I therefore only had Mr Brown's updated calculations available to me. I gave NWLL an opportunity to comment on the amended calculations but no response was received and no request was made to extend the deadline for responding. In the absence of any information to the contrary, I have adopted Mr Brown's calculations as correct.

**Issues to be determined**

[23] The issues to be determined include:

- (a) What was Mr Te Whiu's annual holiday pay entitlement?
- (b) What, if any, deductions did Mr Te Whiu consent to NWLL making from his final pay?
- (c) What annual holiday pay was he paid upon termination?
- (d) What, if anything, is Mr Te Whiu owed?
- (e) Did NWLL fail to provide wage and time records to a Labour Inspector upon request?
- (f) If so, should a penalty be imposed?

**Background**

[24] Mr Te Whiu filed a complaint with the Department of Labour, Labour Inspectorate on 22 September 2010 about the non payment of his annual holiday pay. Mr Brown was the Labour Inspector assigned to Mr Te Whiu's complaint.

[25] On 27 September 2010 Mr Brown wrote to Mr Page and advised him of Mr Te Whiu's complaint. Mr Brown explained his role and requested copies of Mr Te Whiu's wage and time records, his employment agreement, and any other relevant information. Mr Brown also advised Mr Page that under the Wages Protection Act 1983 an employer was not permitted to withhold money from an employee without their permission.

[26] On 10 October 2010 Mr Page wrote to Mr Brown stating damage Mr Te Whiu caused to a work truck and six days' wages were to be deducted from his annual holiday pay. The amounts NWLL claimed it was owed were not quantified. NWLL did not advise what Mr Te Whiu's annual holiday pay entitlement was, nor did it identify how much it had deducted from his final pay.

[27] Mr Brown wrote to Mr Page on 18 October 2010 referring back to his 27 September 2010 request for wage and time records and stating, because NWLL had failed to produce those records, penalty action was under consideration.

[28] Mr Brown also advised Mr Page that if NWLL did not respond, Mr Brown would have to form an opinion about Mr Te Whiu's complaint based on the information he had provided. Mr Brown stated "*should you wish to change your position in regard to providing the information requested you should do so within seven days of this letter*".

[29] Mr Brown's letter of 18 October 2010 enclosed a Notice Requiring Production of Wages, Time and Holiday Records for Mr Te Whiu for Inspection by a Labour Inspector pursuant to s.229(1)(c) of the Act.

[30] The Notice dated 18 October 2010 stated:

*Failure to produce these records within 14 days of the date of this notice may result in a penalty action being taken, which in case of a company may result in a penalty being awarded of an amount not exceeding \$10,000 [...] Employment Relations Act 2000 section 135(2).*

[31] No information was received and Mr Brown filed a wage arrears claim with the Authority on Mr Te Whiu's behalf.

### **Relevant facts**

[32] Mr Te Whiu was employed by NWLL as a Foreman from 09 June 2009 to 19 August 2010 pursuant to a written employment agreement dated 13 July 2009. His employment agreement contained deduction and forfeiture of pay for inadequate notice clauses.

[33] Clause 6.6 of his employment agreement stated:

*You authorise North West Logging to make deductions from your pay for time lost due to sickness, accident, default (including leave without pay), or other absence, deductions required by law, or any other deduction as agreed.*

[34] Clause 6.7 stated:

*On termination you authorise North West Logging to make whatever deductions from your pay for any money you owe North West Logging. This will included (sic) any money or property belonging to North West Logging that you cannot account for.*

[35] Clause 10.2 stated:

*Where the employment is terminated without the required notice, the balance of the notice period not worked or given will be forfeited as the case may require. The notice period can be waived by agreement.*

[36] Mr Te Whiu said he gave verbal notice because at the time he resigned he did not have a copy of his employment agreement, so had not realised his notice had to be written. Mr Te Whiu said he left due to concerns about poor work standards which he had raised with Mr Page, but which he said had not been properly addressed.

[37] Mr Te Whiu said Mr Page asked him to stay on, but he declined to do so. He believed this made Mr Page angry which Mr Te Whiu believed was the catalyst for his annual holiday pay being withheld. Mr Page denied that.

[38] NWLL has not quantified what deduction it said should have been made from Mr Te Whiu's final pay pursuant to clause 10.2 of his employment agreement. Mr Brown stated it should be \$1,661.04 and Mr Page did not dispute that figure.

[39] Mr Te Whiu did not take any annual holiday whilst employed. He received his final pay on 2 September 2010, but that did not include any annual holiday pay.

[40] Mr Te Whiu said he confronted Mr Page after his employment had ended about the failure to pay his annual holiday pay. He alleged Mr Page told him money was owed to creditors, so if there was money left over after paying the creditors he would be paid his annual holiday pay, but if not, Mr Te Whiu would not be paid his annual holiday pay until the following fortnight.

[41] Mr Te Whiu waited until the next pay period. When he was not paid, he confronted Mr Page at his home for the second time. Mr Te Whiu said it was during this second conversation Mr Page told him for the first time he would not be getting any annual holiday pay because he had damaged a work vehicle. Mr Page accepted he did not provide Mr Te Whiu with any information about how much annual holiday pay he was due or the amount of the deductions NWLL said Mr Te Whiu had consented to it making from his final pay. Mr Te Whiu was not referred to the relevant clauses in his employment agreement.

[42] Mr Te Whiu said he expressed his anger to Mr Page about NWLL claiming for alleged damage to the truck because it had not been raised with him while he was

employed, and he believed other workers who had damaged or written off work vehicles had not been required to pay for damage they had caused.

[43] Mr Page agreed there had been two meetings at his house. He said he told Mr Te Whiu at the first meeting he would not be paid annual holiday pay because of the damage to the truck, and that Mr Te Whiu “*understood my reasoning and accepted this*”. Mr Te Whiu denied that.

[44] Mr Page said Mr Te Whiu brought his wife to the second meeting, and he alleged she was abusive to him, so he told them “*they should seek a third party contact [him] because [he] was unprepared to discuss the matter with them any further*”.

### **Conflicts of evidence**

[45] There were two main conflicts of evidence I had to resolve on the balance of probabilities, from an objective perspective:

- (a) Did Mr Te Whiu agree or consent to NWLL’s decision not to pay him any annual holiday pay because of the damage it alleged he had caused to a work truck; and
- (b) Did Mr Brown tell Mr Page by telephone he did not have to comply with his (Mr Brown’s) two written requests to produce or provide copies of Mr Te Whiu’s wage and time records?

[46] I consider Mr Page’s evidence that Mr Te Whiu accepted he would not be paid any annual holiday pay because of the alleged damage to the truck is unlikely to be correct. Mr Te Whiu’s actions were inconsistent with him holding such a belief. He went to Mr Page’s house twice to obtain payment and when it became clear he was not going to be paid he immediately sought help from a Labour Inspector. These were not the actions of an employee who had consented to an employer making a deduction from his final pay.

[47] I consider Mr Page’s evidence that Mr Brown told him in a phone call he did not have to provide Mr Te Whiu’s wage and time records is also unlikely to be correct. Mr Brown had made two written requests for Mr Te Whiu’s wage and time records, neither of which were responded to.

[48] The failure of NWLL to provide this information hampered Mr Brown's investigation. It also compromised his ability to calculate Mr Te Whiu's entitlements accurately. Mr Page was unable to give any details of the alleged telephone call such as when it occurred or what else was discussed. I accept Mr Brown's evidence that he never told Mr Page NWLL did not have to provide copies of or produce Mr Te Whiu's wage and time records. Mr Brown clearly needed that information so it would have been very unusual for him to have verbally advised Mr Page to ignore his requests.

### **Relevant law**

[49] Section 4 of the Wages Protection Act 1983 ("WPA") requires an employer to pay an employee's wages without deduction. Section 5 WPA entitles an employer to make deductions from an employee's pay, with the written consent of or at the request of the employee.

[50] Even if an employee owes their employer money, the employer may not deduct the amount owing from an employee's wages without their express written consent. An employment agreement may contain such consent. An employee may withdraw their consent to deductions being made from their wages by giving the employer written notice, in which case deductions must cease as soon as practicable.<sup>1</sup>

[51] Mr Te Whiu's annual holiday entitlement was to be calculated in accordance with the Holidays Act 2003 ("HA03"). Mr Te Whiu was entitled to be paid his annual holiday pay when his employment ended.<sup>2</sup>

[52] The mutual obligations of good faith set out in s.4(1A) of the Act require the parties to be active and constructive in maintaining an employment relationship which was, among other things, responsive and communicative. This obligation applied to communications NWLL had with Mr Te Whiu about his final pay and in particular to any deductions it proposed to make.

[53] I consider the s.4(1A) obligation required NWLL to explain what deductions it was going to make, how these deductions had been calculated, and why it believed Mr Te Whiu had consented to them before the deductions were made.

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<sup>1</sup> Section 5(2) WPA

<sup>2</sup> Section 27(1)(b) HA03

**What was Mr Te Whiu's annual holiday pay entitlement?**

[54] Mr Te Whiu's annual holiday pay entitlement is the total of his:

- (a) Annual holiday pay entitlement for his first 12 months of employment which is calculated as per s.24(2) HA03; and
- (b) Annual holiday pay entitlement from the anniversary of his start date (9 June 2010) to the date of termination (19 August 2010) which is calculated as per s.25(2) HA03.

[55] I accept Mr Brown's evidence that Mr Te Whiu was owed \$5,715.48 under s.24(2) HA03 and \$1,596.92 under s.25(2) HA03. I find Mr Te Whiu's total annual holiday pay entitlement upon termination was \$7,133.76.

**What, if any, deductions did Mr Te Whiu consent to NWLL making from his final pay?**

[56] Clause 10.2 of the employment agreement authorised the forfeiture of notice pay if the correct notice was not given. Mr Te Whiu agreed a deduction should be made. I have accepted Mr Brown's figure of \$1,661.04 as the appropriate amount which NWLL could have deducted for inadequate notice.

[57] There was no clause in the employment agreement which stated Mr Te Whiu would indemnify NWLL for damage to its property, such as damage caused to its vehicles. I further find that there was never any agreement he would do so. I have therefore concluded Mr Te Whiu did not consent to the alleged damage to a work truck being deducted from his annual holiday pay or final pay.

[58] I consider clause 6.6 of Mr Te Whiu's employment agreement is not relevant because it authorises recovery of wages from him for "*time lost due to [identified reasons]*" i.e. time spent away from work. The reference to "*accident*" in that clause involves time spent off work due to an accident. I find the use of the word "*accident*" does not create a contractual obligation on Mr Te Whiu to indemnify NWLL for damage caused as a result of an accident.

[59] Clause 6.7 of the employment agreement only gave Mr Te Whiu's consent to deductions being made for money owed, or money, or property, which was not returned to NWLL on termination.

[60] I find that the alleged liability for damage to the truck does not fall within the 'money owed' part of clause 6.7 because at the time Mr Te Whiu's employment ended it had not been established he owed NWLL for the alleged damage. Mr Page stated he did not get the truck damage assessed until January 2011. That was five months after Mr Te Whiu's employment ended and many months after the alleged damage occurred.

[61] I find that Mr Te Whiu never agreed before then that he owed NWLL for damage to the truck.

[62] It would have been open to NWLL to agree with Mr Te Whiu, whilst he was still employed, that he would indemnify it for the damage he allegedly caused to its truck. They could also have agreed on the amount he owed for the alleged damage. If such an agreement had been reached, it would have been money owed by Mr Te Whiu to NWLL, so it could have been deducted from his final pay, as per clause 6.7 of his employment agreement. However, that did not actually occur.

[63] I find Mr Te Whiu's employment agreement did not provide NWLL with his written consent to deduct alleged damage to a work vehicle from his final pay.

[64] Accordingly, NWLL was not entitled to make any deductions from Mr Te Whiu's final pay to reimburse it for damage it said he had caused to its truck.

[65] NWLL would have been entitled to have deducted \$1,661.04 (six days' wages) from his final pay provided it had calculated this amount and advised him of it upon termination. However, NWLL failed to do this, so it should not have made any deduction from Mr Te Whiu's final pay because it did not know how much he owed it. It was wrong of NWLL to withhold all of Mr Te Whiu's annual holiday pay in the circumstances.

**What annual holiday pay was Mr Te Whiu paid upon termination?**

[66] Mr Page agreed Mr Te Whiu has not been paid any annual holiday pay. It was also agreed that he had not taken any paid annual holiday whilst employed.

**What, if anything, is Mr Te Whiu owed?**

[67] Upon termination Mr Te Whiu was entitled to be paid his full annual holiday pay. That has still not occurred. However, I find NWLL is entitled to claim back from

Mr Te Whiu \$1,661.04 for his failure to give the full period of contractual notice. This amount is to be deducted from the final balance NWLL is ordered to pay Mr Brown.

[68] Taking total unpaid holiday pay of \$7,133.76, then deducting \$1,661.04 as the amount which could have been deducted for inadequate notice, means Mr Te Whiu is still owed \$5,472.72.

**Did NWL fail to provide wage and time records upon request?**

[69] I am satisfied Mr Brown twice requested in writing a copy of Mr Te Whiu's wage and time records.

[70] Mr Brown clearly put NWLL on notice in his letter of 18 October 2010 that failure to comply with his previous request meant a penalty action was under consideration. Mr Page was given the opportunity to change NWLL's position regarding the provision of information to Mr Brown, but he did not do so, despite being warned of the potential consequences of that.

[71] Mr Brown's also issued a formal Notice Requiring Production of Wages, Time and Holiday Records for Mr Te Whiu for inspection by a Labour Inspector pursuant to s.229(1)(c) of the Act. The Notice clearly informed Mr Page that failure to produce these records within 14 days could result in a penalty action being taken, in which case NWLL was potentially liable for a penalty not exceeding \$10,000.

**Should a penalty be imposed?**

[72] NWLL breached its obligation under s.130(1) and (2) of the Act to produce or supply wage and time records to a Labour Inspector on request.

[73] I find NWLL, without reasonable cause, failed to comply with the requirement Mr Brown made of it under s.229(1)(c) and (d) of the Act, so is therefore liable for a penalty under s.229(3) of the Act.

[74] Mr Page said he did not provide the information requested because he emailed Mr Brown on 16 November 2010 asking for the dates of the payslips he wanted to be provided. Mr Page said he did not get a response from Mr Brown so did not provide any information.

[75] I consider Mr Page's explanation to be unsatisfactory. He had received two written communications which clearly identified what information was required. Wage, time, and holiday records are not payslips, so I do not consider Mr Page's query about payslip dates to be relevant. NWLL as an employer should have been aware of the distinction between payslips and wage and time records. I do not consider Mr Page's payslip dates query provided NWLL with reasonable cause for failure to comply with Mr Brown's two written requests.

[76] I find NWLL's breach was a deliberate one which occurred after it had been put on notice of the possible consequences of not providing wage and time records to a Labour Inspector. NWLL must have known it was at risk of a penalty and decided to run that risk.

[77] I note the information finally presented to the Authority by NWLL was not a wage and time record in accordance with the requirements of s.130 of the Act. It therefore appears that NWLL is still not keeping the wage and time records it is required to in the appropriate form.

[78] Employers have to be aware of their employment law obligations, and that includes the requirement on them to keep accurate wage and time records, and to provide them or access to them, upon request. Failure to do so hampers a Labour Inspector's ability to do their job effectively.

[79] The respondent's failure to provide wage and time records to Mr Brown was a serious one because it meant Mr Brown was deprived of the information he required to calculate Mr Te Whiu's holiday pay and wage arrears.

[80] Mr Te Whiu's employment ended on 19 August 2011 and over ten months later his annual holiday pay remains unpaid. I consider that NWLL's failure to respond to Mr Brown's requests under s.229(1)(c) and (d) of the Act deprived Mr Te Whiu of money he was legally entitled to be paid. I consider this to be a serious breach and accordingly a penalty is appropriate.

## **Orders**

[81] Mr Brown's wage arrears claim is upheld. I find Mr Te Whiu has not been paid the full amount of what he was owed by NWLL upon termination.

[82] I order that NWLL is to pay:

- a. \$5,472.72 to Mr Brown, for the use of Mr Te Whiu, as unpaid annual holiday pay; and
- b. Mr Brown, for the use of Mr Te Whiu, interest of 5% on \$5,472.72 from 19 August 2010 until that amount has been paid in full; and
- c. a penalty of \$3,000 to the Crown for failure to provide access to or a copy of Mr Te Whiu's wage and time records to a Labour Inspector when requested to do so.

## **Costs**

[83] The parties were not legally represented, so no issue arises as to costs.

[84] NWLL is ordered to reimburse Mr Brown \$71.56 for the filing fee.

Rachel Larmer  
Member of the Employment Relations Authority