

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2011] NZERA Christchurch 159
5337807

BETWEEN DOUGLAS KARL HIXON,
LABOUR INSPECTOR
Applicant

A N D ASHWOOD PARK REST HOME
2004 LTD
Respondent

Member of Authority: Helen Doyle

Representatives: Labour Inspector Douglas Hixon in person
Jenny Dempsey, Advocate for Respondent

Investigation Meeting 7 July 2011 at Blenheim

Further information: Provided 29 August 2011

Date of Determination: 14 October 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The Labour Inspector, Douglas Hixon, wants the Authority to determine whether it was lawful for Ashwood Park Rest Home 2004 Ltd (“Ashwood Park”) to deduct money from the final pay of two of its previous employees, Wendy Gullery and Kirsten Brown following their resignation.

[2] Mr Hixon says that Ms Gullery is entitled to reimbursement of the sum of \$832.00 net withheld from her final pay and \$105.15 gross being an underpayment of holiday pay. He says that Ms Brown is entitled to reimbursement of \$441.60 withheld from her final pay and reimbursement of \$25.00 that was deducted because Ashwood Park said that she failed to return a walkie talkie radio but Ms Brown said that she did return the radio. Initially it was claimed that \$9.00 was deducted from Ms Brown’s final pay for a name badge but I am satisfied that whilst this may have initially been

the case the amount of \$9.00 was subsequently credited in the final pay. A penalty is also sought under s.13 of the Wages Protection Act 1983.

[3] Ashwood Park is a retirement village. Its facility manager Jenny Dempsey does not accept that the deductions were unlawful and says that the company relied on a provision in both employees' employment agreement for a forfeiture of two weeks pay where employment is terminated by either party without the requisite notice. In terms of the underpayment of the holiday pay claim, Ms Dempsey accepted that Ashwood Park would be happy to reimburse the full amount if the Authority makes such a finding. Ashwood Park does not accept that the walkie talkie radio was returned.

The Issues

[4] The Authority will have to consider the following issues for both employees:

- Did Ms Gullery and Ms Brown give the notice required in their employment agreements to Ashwood Park when they resigned?
- What do their employment agreements provide about forfeiture of wages in lieu of notice and deductions?
- If the required notice was not given was Ashwood Park entitled to withhold money from the final payment due to both employees under the employment agreement?
- In considering the enforceability of the clause about forfeiture of wages or holiday pay is such provision a genuine pre-estimation of the damage likely to arise if there is a breach of the requirement by Ms Gullery or Ms Brown to give notice or, is it a penalty provision which the Courts have taken the view is unenforceable.
- Was the walkie talkie returned by Ms Brown and is Ashwood Park entitled to make a deduction in relation to it?
- Is there an underpayment in terms of the holiday pay?
- If the deduction was unlawful should there be a penalty awarded?

Wendy Gullery

[5] Ms Gullery was employed at Ashwood Park as a cleaner on an hourly rate of \$13.00 from 12 July 2007 until she resigned on 5 October 2010 giving two weeks notice. There is some dispute in the evidence as to whether Ms Gullery resigned on 4 or 5 October 2010. I prefer the evidence that such resignation was on 5 October 2010 but the date is not particularly material.

[6] Ms Gullery explained in her evidence that she has a condition known as spinal degeneration of the upper and lower spine that is non-operative. She resigned as she had difficulty undertaking her role with that condition although her evidence was that she did not have the condition confirmed by a specialist until after her resignation.

[7] The relevant provision in Ms Gullery's employment agreement is clause 17 and the material parts of that are as follows:

17.1 Either party can terminate this agreement by the giving of two weeks written notice of termination. This shall not prevent the employer from summarily dismissing the employee for serious misconduct.

17.5 For the avoidance of doubt, the provision of this agreement are express and sufficient authorisation from the employee to the employer to deduct from wages in accordance with the Wages Protection Act 1983;

17.6 Where employment is terminated by either party without the requisite notice, two weeks pay shall be paid or forfeited in lieu of such notice.

[8] Mr Hixon became involved after the amounts were deducted from Ms Gullery's final pay. He wrote to Ms Dempsey about the deduction of money. Ms Dempsey in a letter dated 29 October 2010 to Mr Hixon sets out succinctly the rationale for the deduction from Ms Gullery's final pay. That is that Ms Gullery advised she would not work out and, did not work out, her notice period. In light of that Ms Dempsey said in her letter that the final payment for money owing to Ms Gullery was paid out on 7 October 2010 and deduction of two weeks wages made.

[9] Clause 17.6 read in the context of clause 17 as a whole does not require two weeks notice to be worked out but to be given. Clause 17.1 refers to the giving of two weeks written notice. Ms Gullery did give two weeks notice to Ashwood Park but was not well enough to work that out as supported by a medical certificate. Her

evidence was that her condition deteriorated at or about that time and she then had her condition confirmed by a specialist.

[10] In those circumstances no deduction should have been made from final pay. Ms Gullery is entitled to what has been withheld from her in her final pay.

[11] I accept Mr Hixon's calculations in relation to the holiday pay that indicate a small underpayment was made to Ms Gullery. This in all probability arose because of the difference in calculation of holiday pay on an average or ordinary weekly pay basis and not through any deliberate action on the part of Ashwood Park.

Orders

Deduction from final pay

[12] I order Ashwood Park Rest Home 2004 Ltd to pay the Labour Inspector for the benefit of Wendy Gullery the sum of \$832.00 net being money unlawfully deducted from her final pay.

Interest

[13] Ms Gullery should have received this money at the time of her final pay and in those circumstances is entitled to interest on it as she has in effect been deprived of the use of that money. I have taken into account what would have been Ms Gullery's last day of employment and then have allowed two further days for the final pay to have been made. Ms Gullery is entitled to interest on the net sum of \$832.00 from 20 October 2010 at the rate prescribed under s.87(3) of the Judicature Act 1908 of 5% (clause 11 of schedule 2 of the Employment Relations Act 2000) until payment is made.

Underpayment of holiday pay

[14] I order Ashwood Park Rest Home 2004 Ltd to pay to the Labour Inspector for the benefit of Wendy Gullery the sum of \$105.15 gross being holiday pay.

Penalty

[15] I am not satisfied this is a type of matter that should attract a penalty. Ms Dempsey held a misguided but nevertheless genuine view that notice was required

to be worked out by an employee. She relied on as she said in her evidence the medical certificate that provided Ms Gullery was fit for work on 18 October 2010.

Kirsten Brown

[16] Ms Brown was employed at Ashwood Park as a caregiver from 16 November 2009 until 24 October 2010. She was paid \$13.80 per hour.

[17] The relevant provisions in Ms Brown's employment agreement are in clause 17 and the material parts of the clause are as follows:

17.1 Either party can terminate this agreement by the giving of four weeks written notice of termination. This shall not prevent the employer from summarily dismissing the employee for serious misconduct.

17.4 If at the time of termination of the employee's employment, the employee has not returned to the employer any property that belongs to the employer, the employer may deduct from the employee, the reasonable depreciated value of the property.

17.5 For the avoidance of doubt, the provision of this agreement are express and sufficient authorisation from the employee to the employer to deduct from wages in accordance with the Wages Protection Act 1983.

17.6 Where the employment is terminated by either party without the requisite notice, two weeks pay shall be paid or forfeited in lieu of such notice. The employee agrees to forfeit holiday pay in lieu of such notice should there be insufficient wages outstanding.

[18] Ms Brown since the Labour Inspector lodged the statement of problem shifted to Auckland and considered that given the amounts of money claimed it was not worthwhile for her to pay airfares to attend at an investigation meeting in Blenheim. Ms Brown was able to be connected by conference call to the investigation meeting. I heard evidence from Ms Dempsey, the assistant manager at Ashwood Park, Mary Agnew and receptionist Sharon Ashby.

[19] There is a dispute I will have to resolve about when Ms Brown resigned. Ms Dempsey said that Ms Brown did not resign from her employment until 22 October 2010 when she delivered a medical certificate to the receptionist Sharon Ashby and stated that at that time she was leaving.

[20] Ms Brown said that she resigned in early October 2010. Ms Brown said that she telephoned Ms Dempsey on Saturday 2 October 2010 and advised her of her resignation and said a written copy of resignation would be available for Ms Dempsey on Monday 4 October 2010. Ms Brown provided a document that she says was the written notice left for Ms Dempsey of her resignation as at 2 October 2010. Ms Dempsey did not accept that the telephone call was made or that she received the written notice of termination.

[21] After the investigation meeting Ms Brown provided Mr Hixon and the Authority with a copy of her telephone records highlighting a call made on 2 October to a cell phone number to support a call was made to Ms Dempsey.

[22] The senior support officer at the Authority provided the records to Ms Dempsey for her comment. Ms Dempsey confirmed in an email to the senior support officer dated 29 August 2011 that the number on Ms Brown's Telecom records was her personal cell phone number. She said that she did not recall Ms Brown however contacting and advising of her resignation and she noted the call was only for one minute and thought that a conversation would have taken longer than that. She thought that possibly Ms Brown got the answer phone but she did not believe a message was left.

[23] I have carefully considered the evidence, documents and I have had regard to the telephone records. I consider it more likely that Ms Brown did give notice of her intention to resign on 2 October 2010.

[24] I have reached that conclusion for the following reasons. Ms Brown's communications with the Department of Labour call centre and to Mr Hixon prior to the statement of problem being lodged with the Authority were consistent that Ms Brown advised Ms Dempsey that she intended to resign in early October 2010 by way of a verbal telephone call initially and then written notice. The telephone records show a call having been made to Ms Dempsey's cell phone on Saturday 2 October 2010. Ms Dempsey said in her evidence that she never received a call however that seems inconsistent with the records. Ms Brown was clearly aware, I find in all likelihood from Ms Dempsey at the time she advised of her resignation, that she was required to work her four weeks notice out or forfeit two weeks wages.

[25] The statement in reply records amongst other matters that Ms Brown was absent as confirmed by medical certificates attached to the reply prior to and after 2 October 2010 and that **as a result Ms Brown did not work out her termination period**. I accept that Ms Dempsey may not have intended the sentence to mean that there was a notice period but it was not worked out by Ms Brown. It was however Ms Dempsey's view that the notice period was required to be worked out. It may have been that less emphasis was therefore placed on the actual giving of notice by Ms Brown in those circumstances.

[26] Having therefore found that Ms Brown gave notice of her resignation on 2 October 2010 her notice period ended on 30 October 2010. Ms Brown was covered by medical certificates until 25 October 2010 and that therefore left five days in which Ms Brown who only worked part-time could possibly have been rostered on to work.

[27] There were significant disputes in the evidence about why Ms Brown did not work that last week of her notice period. I'll start with what Ms Brown said about that last week. She said that on a Saturday 17 October 2010, (I do note that the Saturday was 16 October), she handed a medical certificate into her team leader explaining that she would be returning to work on 25 October 2010 in accordance with when her medical certificate said she should return to finish working the remainder of her notice period.

[28] Ms Brown said that she intended to return to work on 25 October 2010 but was contacted on 22 October 2010 by Ms Ashby who asked that she return her uniform items. Ms Brown queried the matter and Ms Ashby said that she would have Ms Agnew telephone her. Ms Brown said that Ms Agnew did confirm that she had been replaced and was no longer on the roster. Ms Brown said that she told Ms Agnew that was fine but she expected to receive her holiday pay. Ms Brown said that she then returned her uniform, walkie talkie and name badge but \$441.60 was withheld from her final pay and \$25 was deducted for the walkie talkie.

[29] Ms Ashby said in her evidence that on 22 October 2010 Ms Brown presented her with a medical certificate that provided she would be fit to resume work on 25 October 2010 and Ms Brown then said that she would not be returning to carry out her shifts. Ms Ashby said that she knew it would be difficult to replace her so she talked to Ms Agnew. Ms Agnew said in her evidence that she had rostered Ms Brown on to

work on 25 October 2010. She said that she telephoned Ms Brown to confirm she was not returning to work and then advised her to return her uniform items.

[30] Ms Agnew having rostered Ms Brown on for a shift on 25 October 2010 as at 22 October 2010 must have known about the dates in the medical certificate. That means that Ms Brown either verbally advised someone earlier at Ashwood Park about the date she was fit to return to work on that date, or, as Ms Brown says, she gave the medical certificate to her supervisor on or about 17 October 2010.

[31] Both of these scenarios support that it is likely there was no indication from Ms Brown prior to 22 October 2010 that she intended other than to work out her last few days. Accordingly Ms Agnew rostered her on 25 October 2010. I am quite satisfied that Ms Brown was well aware of the consequence of not working. It seems somewhat unlikely, as I stand back and objectively consider this matter that Ms Brown would then simply present at Ashwood Park with a medical certificate and advise she would not be working out her shifts. I am not satisfied as I need to be, notwithstanding the evidence I heard, that this was why Ms Brown did not work out her last few days.

[32] If I am wrong in that matter I have then considered the enforceability of the clause regarding forfeiture of two weeks wages/holiday pay and whether it was a genuine forecast of what loss Ashwood Park would suffer if four weeks notice of termination was not given or, whether it was a penalty akin to a fine, if Ms Brown did not give four weeks notice.

[33] Ms Brown was a caregiver. She gave notice of her intention to resign on 2 October 2010. Aside from hearing some evidence about the inconvenience of replacing Ms Brown for the last few days from 25 October 2010, there was little clear evidence of any actual loss that could justify such a deduction for those last few days of the notice period.

[34] I find the clause providing for the forfeiture of the holiday pay was a penalty for two main reasons. Firstly because it was extravagant when compared to the greatest loss that could be suffered by Ashwood Park if four weeks notice was not given and secondly particularly in this case, because this single deduction of two weeks wages or holiday pay was regardless of whether any notice was given at all or notice was given but a day or so not worked out.

[35] I find in conclusion that the intention of the clause in this case was to secure performance with respect to the notice period by the imposition of a penalty rather than a genuine pre-estimation of damages - *Roberts & Turnball Ltd trading as Queenstown Night 'n Day Foodstore v Labour Inspector* (CA 61/08) Member Cheyne. I find that the forfeiture clause is a penalty provision and is not enforceable.

[36] Having requested Ms Brown return items to Ashwood Rest Home it does not appear that any of the witnesses I heard from were present when those items were returned. Ms Brown said that she returned the walkie talkie radio and when I put that to Ms Dempsey her response was to the effect *well it may have just been left on the counter and then taken*. An employer giving evidence about deductions from pay in relation to the failure to return items needs in my view to have clear evidence of the failure to return. In this case I cannot be satisfied that Ms Brown did not return the property in the absence of a proper handover and accounting at that time.

Orders in relation to Ms Brown

Deduction from final pay

[37] I order Ashwood Park Rest Home 2004 Ltd to pay to the Labour Inspector for the benefit of Kirsten Brown the sum of \$441.60 net being the amount deducted from her final pay.

Interest

[38] Ms Brown should have been paid her final pay without this deduction being made and is entitled to interest from 1 November 2010 in accordance with clause 11 of Schedule 2 of the Employment Relations Act 2000 at the rate prescribed under s.83 (3) of the Judicature Act 1908 of 5% on the sum of \$441.60 net until payment is made, and I so order.

Deduction of \$25 for walkie

[39] I order Ashwood Park Rest Home 2004 Ltd to pay to the Labour Inspector for the benefit of Kirsten Brown the sum of \$25 being monies deducted for the walkie talkie.

Penalty

[40] I am not minded to award a penalty. There is an element of complexity about forfeiture clauses and in those circumstances I make no award.

Costs

[40] I order Ashwood Park Rest Home 2004 Ltd to pay to the Labour Inspector the sum of \$71.56 being reimbursement of filing fee.

Helen Doyle
Member of the Employment Relations Authority