

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 521
5466607

BETWEEN WYF INTERNATIONAL
COMPANY LIMITED trading
as WARM KIWI
INSULATION
Applicant

A N D ALAN DOWD
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Mr James Wang, General Manager of the Applicant, and
Ms Merry Li, Representative of the Applicant
Respondent in person

Investigation Meeting: 16 December 2014 at Auckland

Date of Determination: 17 December 2014

DETERMINATION OF THE AUTHORITY

- A. The applicant, WYF International Company Ltd trading as Warm Kiwi Insulation (Warm Kiwi) is not entitled to recover monies paid to Mr Dowd to which it says he was not entitled.**
- B. Warm Kiwi is not entitled to rely on the forfeiture provision in the notice clause of the employment agreement and require payment by Mr Dowd of salary in lieu of notice to it.**

Employment relationship problem

[1] The applicant, WYF International Company Limited trading as Warm Kiwi Insulation (Warm Kiwi) seeks payment from the respondent, Mr Alan Dowd of the sum of \$1,320.00. This sum represents two weeks' salary in lieu of notice of resignation. Mr Dowd failed to give notice as required under the notice clause in his employment agreement (forfeiture provision).

[2] Warm Kiwi also says Mr Dowd was paid the sum of \$376.75 in wages to which he was not entitled and seeks reimbursement. From the total of these sums (\$1696.75) Warm Kiwi has deducted the sum of \$231.00 in wages owing to Mr Dowd for 14 hours of work performed by him for it on 5,6 and 7 May. Warm Kiwi seeks a total of \$1465.75 from Mr Dowd. Mr Dowd has not sought payment to him of the wages of \$231.00.

Investigation Meeting

[3] For the Authority's investigation meeting, Mr Wang and Mr Dowd provided written statements. Under oath each confirmed their own statement was true and correct before answering my questions. Ms Merry Li gave evidence orally which she swore was true and correct. Each witness had the opportunity to provide any additional comments and information and did so.

[4] As permitted under s174 of the Employment Relations Act 2000 (the Act), this determination has not set out all the evidence received. I have stated findings on relevant facts and legal issues and made conclusions in order to dispose of the matter.

Issues

[5] The issues for determination by the Authority are:

- a. Is Warm Kiwi entitled to seek reimbursement from Mr Dowd of monies paid to him to which it says he was not entitled?
- b. Is Warm Kiwi entitled to rely on the forfeiture provision in the notice clause of the employment agreement with Mr Dowd?

First Issue

Is Warm Kiwi entitled to seek reimbursement from Mr Dowd of monies paid to him to which it says he was not entitled?

[6] Mr Dowd was employed by Warm Kiwi as a sales representative pursuant to an individual employment agreement (the employment agreement) dated 30 March 2014. The employment agreement included a three month trial period.

[7] Mr Dowd commenced employment on Wednesday, 9 April. On his second day of employment, 10 April, Mr Dowd received a telephone call from his mother telling him that his father had had a heart attack and was in hospital. Mr Dowd immediately informed the General Manager of Warm Kiwi, Mr James Wang of the situation and that he would not be able to come to work for the next few days.

[8] Mr Dowd was informed by the doctors at the hospital that his father would probably not make it through the next few days. On Sunday 13 April, Mr Dowd's father died and his funeral was held on Thursday 17 April.

[9] Mr Wang was supportive of Mr Dowd during what was a very difficult time and attended the funeral. At the funeral, Mr Dowd and Mr Wang had a brief discussion about work. Mr Dowd informed Mr Wang that he hoped to be back at work the following week, on 22 April 2014 after the Easter holiday break.

[10] Mr Dowd went to work on Tuesday 22 April and left the office to visit various construction sites. Mr Dowd understood this to be part of his role. Mr Dowd went to his mother's home on occasion during work hours because he was feeling unwell.

[11] On about 24 April, Mr Dowd and Mr Wang had a discussion in the office regarding Mr Dowd's work hours and where he was to perform his work. Mr Wang says it had come to his attention via the GPS system on the company vehicle being used by Mr Dowd that he had spent some of his working hours at his mother's home. Mr Wang says he made it clear to Mr Dowd at the meeting that he was required to perform his work at the office or at a construction site but not at any other locations without his permission.

[12] Mr Dowd accepts that there was a meeting between them to discuss his hours of work, but says that up until that time he understood he was able to visit various construction sites as part of his work routine. Mr Dowd also says and that the visits to

his mother's house were because he was not feeling well and he was trying to cope with his new position following his father's recent death.

[13] Mr Wang says he gave Mr Dowd a verbal warning at the meeting on 24 April that his position may be in jeopardy if he continued to visit locations which were not authorised including his mother's home, during his working hours. On the evening of 24 April, Mr Wang travelled to Shanghai on business and there were no further discussions with Mr Dowd about his performance.

[14] Mr Dowd tried to continue to work, but felt increasingly unable to do so. He obtained a doctor's certificate specifying that he was unfit to work from 1 to 3 May and then from 7 to 9 May.

[15] On Monday 19 May 2014, Mr Dowd resigned from his employment with immediate effect. Mr Dowd says he was not well and was grieving the sudden death of his father. Mr Dowd felt unable to continue working.

[16] Following his resignation, Warm Kiwi sought to recover various sums it says he owes it. The sums Warm Kiwi seeks from Mr Dowd are salary paid for work not performed on:

- Good Friday (18 April), Easter Monday (21 April)- \$264.00,
- 2.5 hours on 22 April -\$41.25,
- 2.2 hours on 23 April-\$38.50,
- 2 hours on 24 April-\$33.00.

[17] Under s.46 of the Holidays Act 2003, Mr Dowd was entitled to be paid statutory holidays on Good Friday and Easter Monday. Mr Dowd was employed to work for Warm Kiwi from Monday to Friday each week. Because of Mr Dowd's father's heart attack he was unable to work on Good Friday which fell on 18 April nor on Easter Monday which fell on 21 April.

[18] Mr Dowd was also entitled to be paid for the hours worked by him on 22, 23 and 24 April. It was not until 24 April that Mr Dowd was informed by Mr Wang that he was to perform his duties in the office or at the construction site. Warm Kiwi was

not entitled to retrospectively seek repayment for hours of work that Mr Dowd claimed he performed, albeit not in the office or at the construction site.

[19] This part of Warm Kiwi's claim fails.

Second Issue

Is Warm Kiwi entitled to rely on the forfeiture provision in the notice clause of the employment agreement with Mr Dowd?

The forfeiture provision

[20] Warm Kiwi relies on clause 13.2 of the employment agreement. This clause states:

The Employer may terminate this agreement for cause, by providing two weeks notice in writing to the Employee. Likewise the Employee is required to give two weeks notice of resignation. The Employer may, at its discretion, pay remuneration in lieu of some or all of this notice period. Likewise the Employee may pay remuneration in lieu of some or all of this notice period.

[21] Mr Dowd failed to give two weeks notice in accordance with the termination clause and Warm Kiwi seeks payment by him of the equivalent of two weeks wages being \$1,320.00.

[22] A forfeiture provision such as this one, in my view, is unenforceable in the circumstances. The Employment Court in *Ozturk v. Gultekin*¹ considered a similar type provision in a settlement agreement recorded by a Mediator. In that case, Judge Goddard referred to the fact that the jurisdiction under the Act is one of equity and good conscience. Judge Goddard stated:

“Courts of equity and Courts of conscience have always turned their backs on any agreement that imposes a penalty or a forfeiture. It is one thing for the parties to agree, as part of a settlement, that damages are payable in the event of a particular breach. If the amount agreed on is a genuine estimate of the loss that the parties expect will be caused if there is a breach of the contract, then that estimate is called liquidated damages and is recoverable. However, if the amount concerned is not a genuine pre-estimate, but is an

¹ [2004] 1 ERNZ 574 at para.[5]

attempt to compel performance by holding it as a threat over the head of one of the parties, it becomes a penalty and will not be recoverable. This is because equity takes the view that it is unconscionable in a case of breach of contract to recover a sum which is out of proportion to the loss which actually occurs.”

[23] The forfeiture provision in the notice clause is not based on any assessment, made in the particular circumstances, of costs that were likely to be incurred by the failure to give notice (such as employing a replacement – at a greater cost than the wage that would otherwise be paid – incurring greater expenses in training or relocating a new employee). There was no evidence of loss suffered by Warm Kiwi, or of any expenses incurred by it as a result of Mr Dowd’s actions in resigning without providing the required notice.

[24] Another aspect of the equitable assessment of the enforceability of the clause was the reason for Mr Dowd’s failure to give the required notice.

[25] Shortly after Mr Dowd had commenced employment with Warm Kiwi, his father suffered a heart attack and died shortly afterwards. This was a traumatic event for Mr Dowd and he became unwell. Mr Dowd attempted to continue working and felt that by resigning with immediate effect, this was better for Warm Kiwi than if he attempted to continue to work. Mr Dowd was unable, due to his health and mental state to keep working as required by Warm Kiwi.

[26] In my view, Warm Kiwi is unable to recover two weeks wages from Mr Dowd under the employment agreement. The forfeiture provision is not enforceable in the circumstances.

Costs

[27] No application for costs in this matter was made and none is awarded.

Anna Fitzgibbon
Member of the Employment Relations Authority