

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2016] NZERA Christchurch 190
5522403

BETWEEN AMANDA VAN DEN
 TILLAART
 Applicant

A N D MBS (2008) LIMITED t/a
 NELSON BEAUTY THERAPY
 Respondent

Member of Authority: David Appleton

Representatives: Anjela Sharma, Counsel for Applicant
 Kevin Murray and Shayne Boyce, Advocates for
 Respondent

Investigation Meeting: Determined on the papers by consent

Submissions Received: 20 September & 18 October 2016 for Applicant
 19 October 2016 for Respondent

Date of Determination: 21 October 2016

DETERMINATION OF THE AUTHORITY No 2

[1] By way of a determination dated 25 August 2016¹ the Authority found, inter alia, that Ms Tillaart had suffered unjustified disadvantage in her employment and had failed to comply with the Holidays Act 2003.

[2] There were three issues outstanding at the end of the Authority's investigation meeting:

- a. The amount of holiday pay still owed to Ms Tillaart;
- b. The amount of interest payable on the outstanding holiday pay; and
- c. The amount of KiwiSaver remaining to be paid.

¹ [2016] NZERA Christchurch 143

[3] I had directed the parties to seek to agree these outstanding amounts, but they have been unable to do so. This determination therefore addresses these outstanding matters.

How much holiday pay remains to be paid?

[4] It will be of assistance for me to replicate passages of the Authority's determination dated 25 August 2016 in respect of this matter. The Authority stated, in paragraphs [79] to [90].

[79] There is no argument between the parties that, when her employment ended, Ms Tillaart was owed \$5,774.60. The respondent has deducted \$1,724.67 in respect of training costs, and Ms Sharma submits that the respondent should have paid the holiday pay sum in full.

[80] The employment agreement contains the following provision relating to the right to make deductions:

15.3 Deductions from Salary/Wages

Where requested by the Employee, the Employer shall deduct from their salary/wages any agreed amount for matters such as superannuation, a staff social club or union fees and pay the amount to the organisation specified by the employee. The Employer shall also be entitled to deduct from any salary payment payable upon termination of employment any overpayment made to the Employee for leave taken in advance.

[81] MBS also had a Training and Overseas Seminar Policy which stated as follows:

Nelson Beauty Therapy is committed to working with its employees to update their skills. We are active in providing training and opportunities to attend seminars both in New Zealand and overseas.

While providing these opportunities we do need to protect the investments made by the company and the costs associated with these programmes.

In order to clarify the responsibilities of the company and our employees when training and attendance at seminars is provided, we will be introducing the following policies and procedures:

1. Attendance at any training programme or seminar by a particular employee will be at the discretion of the company.
2. Prior to any firm commitment being made to attend any offsite training or seminar, the company will meet with the employee and agree on which costs will be met by the company and which costs will be met by the employee.
3. Once an agreement has been reached, the employee and the company will confirm this in writing. The written confirmation will include an acknowledgment by the employee that they have read and understood this policy document.
4. If the employee elects to resign from their position within the specified period, the company will require them to repay a portion of the costs associated with attending the training programme or seminar. These costs will include travel, accommodation and enrolment costs associated with the programme. The amounts to be repaid are as follows:
 5. - Resignation within 12 months of attending any international training including:
 - Conference in Malaysia will require 100% of the cost to be paid in full, including airfares, hotel and conference-related costs.
 - Resignation within 6 months of attending the programme or seminar will require repayment of 75% of the costs.
 - Resignation within 1 year of attending the programme or seminar will require repayment of 50% of the costs.
6. If you have any questions or concerns in regard to this new company policy, please do not hesitate to discuss this with your Manager.

[82] This agreement was signed by Ms Tillaart on 20 March 2013 and countersigned by Mrs Shepherd.

[83] The letter sent to Ms Tillaart after she had given Mrs Shepherd her resignation letter stated that Mrs Shepherd would withhold \$401 from her pay, in accordance with the Training Policy, but using a deduction of 50% instead of 75%.

[84] In her submissions, Ms Sharma submits that the respondent cannot rely on the training policy or the employment agreement because of the repudiation by the respondent of Ms Tillaart's contract, by its actions. I cannot find that there was such a repudiation of contract, however, as no claim for constructive dismissal was pursued before the Authority until after all the evidence had been heard. The evidence I did hear did not cogently

show a repudiation by the respondent. I therefore reject this argument.

[85] Ms Sharma also argues that there has been a miscalculation of the PAYE taken from Ms Tillaart's holiday pay. However, I heard insufficient evidence to be able to conclude this point one way or another. I direct the parties to co-operate with one another in resolving that issue.

[86] Section 6 of the Holidays Act 2003 provides:

6 Relationship between Act and employment agreements

(1) Each entitlement provided to an employee by this Act is a minimum entitlement.

(2) This Act does not prevent an employer from providing an employee with enhanced or additional entitlements (whether specified in an employment agreement or otherwise) on a basis agreed with the employee.

(3) However, an employment agreement that excludes, restricts, or reduces an employee's entitlements under this Act—

(a) has no effect to the extent that it does so; but

(b) is not an illegal contract under the Illegal Contracts Act 1970.

[87] Ms Tillaart's right to holiday pay was restricted to that set out in the Holidays Act 2003. Her employment agreement did not afford her any enhancements.

[88] I find that the respondent was not entitled to deduct from Ms Tillaart's final holiday pay entitlement any sum not expressly provided for in the Holidays Act. This is because it does not have an express right to deduct from holiday pay (or even salary). The Training and Overseas Seminar Policy refers to "repayment". In addition, clause 15.3 of the employment agreement does not expressly give a right to deduct from salary sums due under the Policy. Indeed, the clause refers to a right to deduct from any salary payment payable upon termination (as final holiday pay is) any overpayment made to the employee for leave taken in advance. The sum to be repaid under the Policy does not fall into this category.

[89] Therefore, whilst the respondent was clearly entitled to require Ms Tillaart to repay a sum in respect of her resigning shortly

after attending a training course, it was not entitled to recover that sum by withholding a sum from her statutory final holiday pay². The respondent is therefore to pay to Ms Tillaart the balance of the holiday pay owed. The parties are to co-operate with one another in seeking to agree what that balance is. In the absence of an agreement within four weeks of the date of this determination, the parties may make an application to the Authority for a determination.

[90] Mrs Shepherd calculated that Ms Tillaart was to pay \$401 in respect of the training. During the investigation meeting, Mr Shepherd recalculated that the correct amount that was \$301.77. However, the respondent's counterclaim does not extend to any sum due to the respondent as a result of Ms Tillaart resigning shortly after receiving training. I cannot, therefore, order Ms Tillaart to pay this sum to the respondent.

[5] Having found that the respondent was not entitled to make any deductions from Ms Tillaart's final holiday pay, it remains to be calculated what was paid to her, and what remains to be paid.

[6] Ms Sharma submits that a total net sum of \$2,903.02 was paid to Ms Tillaart by the respondent after she resigned, but that \$593.02 of that was attributable to an agreed payment in respect to back pay owed arising from a pay increase that was never implemented. The sum of \$5,774.60 that the parties agree is the starting point of what is owed by way of holiday pay, is a gross figure. Ms Sharma submits that tax of \$1,005.30 should be deducted from that sum, which leaves a net figure of \$4,769.16.

[7] Ms Sharma says that Ms Tillaart has been paid a net figure of \$1,500 towards her holiday pay, and that she is therefore owed a total net sum of \$3,269.16.

[8] Ms Boyce and the respondent relies on a calculation made by MYOB. The difference in their calculation is a difference in tax of \$749.28 (\$1,754.58 - \$1,005.30) and the \$593.02 payment made by the respondent to Ms Tillaart which it says should

² For the avoidance of doubt, an employer may make deductions from final statutory holiday pay in accordance with an express contractual right to do so, pursuant to s.5 of the Wages Protection Act 1983, and s.86 of the Holidays Act, which treats holiday and leave pay as salary or wages and subject to deductions that an employer is required, or entitled to make.

be deducted against the holiday pay due. The respondent also deducts a KiwiSaver contribution of \$172.33 from the holiday pay (at 3% of the gross sum owed).

[9] Ms Boyce also submits that Ms Tillaart should deal with IRD herself to sort out the correct tax. I would have some sympathy with this approach if the respondent had paid to Ms Tillaart all that it says is owed to her by it, and had accounted to the IRD for PAYE on that payment. However, Ms Tillaart is still waiting to be paid the sum that the respondent is prepared to admit is owed. There is absolutely no reason for it to have still not paid her what it says is outstanding, over two years after she left its employment.

[10] The other problem with the respondent's approach is that the MYOB figures it relies on are based on the data that are inputted, including tax rate. As the respondent has chosen not to pay what it concedes it owes to her, there is no reason to continue to rely upon incorrect data.

[11] For the purposes of this determination, having seen the personal tax summary for Ms Tillaart for the tax year 2014/15, I accept Ms Sharma's calculation that the correct PAYE sum to be deducted from the holiday pay due is at the rate of 17.5%, amounting to \$1,005.30.

[12] With regard to the status of the \$593.02, the respondent does not deny that it owed Ms Tillaart back pay. It has also not explained what else the sum it paid relates to, or how such an odd amount can relate to part payment of holiday pay. I therefore accept Ms Sharma's submission that it relates to back pay, and I therefore discount it from the calculation of holiday pay.

[13] I do accept that it is appropriate to deduct KiwiSaver contributions from the holiday pay, at 3%, so long as the \$172.33 is paid to Ms Tillaart's KiwiSaver provider.

[14] I therefore accept Ms Sharma's calculation, less the \$172.33 Kiwisaver. The respondent is to pay to Ms Tillaart the net sum of \$3,096.83 in respect of unpaid holiday pay.

Interest

[15] The Authority held the following in its determination of 25 August 2016:

[123] Ms Tillaart also claims interest on the whole amount of \$5,774.60 holiday pay from 5 September 2014 until payment is made in full.

[124] Section 84 of the Holidays Act provides:

84 Power to award interest on unpaid holiday pay or leave pay

(1) Subsection (2) applies if—

(a) the Authority gives judgment for an employee in an action to recover holiday pay or leave pay; or

(b) the Authority makes a determination under section 226 of the Employment Relations Act 2000 in favour of the employee.

(2) The Authority may include, in the sum for which judgment is given or the determination is made, interest for the whole or any part of the period between the date when the cause of action arose and the date of payment in accordance with the judgment or determination.

(3) Interest included in a judgment or determination must not exceed interest at the rate calculated under clause 11 of Schedule 2 of the Employment Relations Act 2000.

(4) This section does not authorise the giving of interest upon interest.

[125] I accept that interest should be paid by the respondent in respect of the unpaid and late paid holiday pay, but not on the entire amount of \$5,774.60 from 5 September 2014 until payment is made in full. This is because part of this sum has already been paid. Interest should be calculated by reference to the outstanding balances until payment is paid in full. By way of illustration only, if \$1,000 had been paid immediately, then a further \$3,774.60 paid on 31 December 2014, so that \$1,000 remains outstanding, interest would be due as follows:

- a. On \$4,774.50 at 5% between 5 September 2014 until 31 December 2014;
- b. On \$1,000 at 5% between 5 September 2014 until payment is made in full.

[16] The following payments were made by the respondent in respect of the outstanding holiday pay:

- a. On 4 December 2015, the sum of \$500
- b. On 8 December 2015, the sum of \$500; and

- c. On 18 December 2015, the sum of \$1000.

[17] Therefore, interest at 5% is to be paid on the net sums outstanding as follows:

- a. On the sum of \$4,769.16 between 5 September 2014 and 3 December 2015 (455 days);
- b. On the sum of \$4,269.16 between 4 December 2015 and 7 December 2015 (4 days);
- c. On the sum of \$3,769.16 between 8 December 2015 and 17 December 2015 (10 days); and
- d. On the sum of \$2,769.16 from 18 December 2015 until payment is made in full.

KiwiSaver owing

[18] The respondent has not addressed Ms Sharma's calculation in respect of KiwiSaver, and I therefore accept her calculation. This is based on a gross pay made and yet to be made to Ms Tillaart of \$8,266.03, consisting of the final holiday pay, the back pay, and final pay, including notice pay. The KiwiSaver owing is therefore \$247.98. If contributions have already been made in respect of KiwiSaver on one or more of these three elements, then I trust that the respondent can prove that to Ms Tillaart. If that is the case, the parties can co-operate to recalculate the KiwiSaver owing.

Orders

[19] I order the respondent to make the following payments to Ms Tillaart:

- a. the net sum of \$3,096.83 in respect of unpaid holiday pay;
- b. interest on unpaid holiday pay as set out in paragraph 17 above;
- c. A KiwiSaver contribution as set out in paragraph 18 above.

Costs

[20] I reserve costs on this matter, and shall address them in the costs determination that will follow in respect of the substantive investigation. At the time of issuing this determination, submissions were yet to be received on behalf of the respondent.

David Appleton
Member of the Employment Relations Authority