**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI**
**ŌTAUTAHI ROHE**

[2020] NZERA 83
3066352

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| | BETWEEN | LAVINIA McLEOD<br>Applicant |
| | AND | C and S BROWN ENTERPRISES LIMITED<br>Respondent |

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| Member of Authority: | Helen Doyle |
| Representatives: | Tarryn Saville, advocate for the Applicant<br>No appearance by the Respondent |
| Investigation Meeting: | 24 January 2020 at Christchurch |
| Submissions Received: | On the day |
| Date of Determination: | 24 February 2020 |

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## DETERMINATION OF THE AUTHORITY

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**A Within 28 days of the date of this determination C and S Brown Enterprises Limited is ordered to pay:**

**(i) The sum of $1,980 being unpaid wages and holiday pay to Lavinia McLeod.**

**(ii) Interest on the sum of $1,980 from 4 February 2019 in the sum of $64.10.**

**(iii) A penalty of $1,500 for a breach of the Wages Protection Act 1983 by paying $750 to the Authority to be paid into the Crown Account and $750 to Lavinia McLeod.**

**B Costs are reserved and a timetable set for an exchange of submissions.**

**Employment Relationship Problem**

[1] Lavinia McLeod commenced employment with C and S Brown Enterprises Limited (the company) on 1 December 2018 as a Butchery Manager. She was party to a written individual employment agreement (the employment agreement) with the company.

*Resignation letter*

[2] On 4 February 2018 Ms McLeod resigned in writing in a letter addressed to the two directors of the company, Christopher and Susan Brown with immediate effect. She stated in her letter that she had made the decision to resign because she had not been paid that morning for her last week's work although understood other employees had been paid as normal. Ms McLeod wrote that it was the second week in a row without notification that she had not been paid on time and she had incurred bank fees for automatic payment defaults. She said that she was aware that by not working out her notice period she would sacrifice holiday pay but that she could not risk working and not being paid.

[3] The letter also set out that she considered she was unfairly held responsible for a chiller failure and loss of product. She also wrote that she did not consider that the role she undertook was a management role as advertised and was more that of an ex boner or knife hand. Ms McLeod wrote that she would return the uniform and keys by post at her earliest convenience.

[4] Ms McLeod has the following clauses in her employment agreement with the company:

> 6 (a) Notice – employment may be terminated by either party giving.. 4… weeks' notice. In the absence of the appropriate notice being given, wages equivalent to the length Of notice shall, be paid or forfeited in lieu of notice.
>
> 7(b) In the event of termination of employment, it is agreed that deductions from the final Pay may be made for any unreturned goods, protective clothing and/or tools, or dept Owing to the company, whatsoever it may be.

[5] In resigning with immediate effect Ms McLeod did not work out the notice period in her employment agreement.

[6] Mr Brown on behalf of the company sent Ms McLeod a letter dated 11 February 2019. The letter set out that she was owed holiday pay of $730 and outstanding wages of $1,250 being a total sum of $1,980. The letter further advised that Ms McLeod owed a sum to the company for four weeks' pay in lieu of notice under her employment agreement, the cost of a uniform that had not been returned, the cost of replacement locks and keys and the cost of a locksmith's charge for the company's safe. The sum of $1,980 for outstanding wages and holiday pay had been taken into account leaving a balance payable of $4,091. An invoice was attached for that sum.

[7] A further letter was sent to Ms McLeod dated 12 February 2019 advising that the uniform and keys had been received and altering the amount payable by Ms McLeod to take this into account to $3,020.

[8] Ms McLeod says that the forfeiture period in her employment agreement is unenforceable.

[9] She says that there was a breach of the Minimum Wage Act 1983 because there was a default in the payment of her wages on 4 February 2019. Further, that there was a breach of the Holidays Act 2003 because holiday pay was not paid on termination of her employment, or alternatively, was a breach of the Wages Protection Act 1983.

[10] Ms McLeod seeks reimbursement of outstanding wages and holiday pay in the sum of $1,980 together with interest on that sum. She also seeks penalties in the sum of $10,000 and an order that they, or part of the penalties, be paid to her and reimbursement of the filing fee together with costs.

**No appearance on behalf of the respondent**

[11] I am satisfied that the company was served with the statement of problem at its registered office. The Authority has not received a statement in reply from the company however is in receipt of letters from its then solicitor Mr Craig Wakelin that were attached to the statement of problem. It is clear from that correspondence sent in response to claims for payments the company considered the forfeiture/deductions

provision to be enforceable with reference to the managerial position that Ms McLeod held.

[12] Mr Brown was connected for the purposes of a telephone conference call with the Authority to set the matter down on 30 October 2019.

[13] He advised the Authority Officer at the commencement of the conference that he didn't know anything about the matter and did not wish to participate in the telephone conference. The call therefore proceeded in his absence.

[14] I am satisfied that the notice of investigation meeting and notice of direction was subsequently served at the registered office of the company 4 November 2019.

[15] The Authority delayed the commencement of the investigation meeting in the event that there was some delay on the part of the person authorised to represent the company. There was however no appearance on behalf of the company.

**The issues**

[16] The Authority needs to determine the following issues:

(a) Was holiday pay and final wages for Ms McLeod calculated and then deducted?

(b) Was consultation required under s 5(1A) of the Wages Protection Act 1983 (WPA) before the deduction?

(c) If consultation was required did it occur?

(d) If consultation did not occur then was the company otherwise entitled to withhold the money?

(e) If the deductions are unlawful is Ms McLeod is entitled to reimbursement of the amounts with interest?

(f) Were there breaches of provisions of the Minimum Wage Act 1983 (MWA) by the company?

(g) Were there breaches of the Holidays Act 2003 or alternatively the WPA by the company?

(h) If so, should there be penalties awarded?

(i) Should the penalties, or part of the penalties, be paid to Ms McLeod?

**Was the payment of holiday pay and final wages calculated and then deducted?**

[17] The evidence confirms that outstanding wages and holiday entitlements due to Ms McLeod were calculated by the company and then deducted from the four week notice period relying on the forfeiture clause and the failure initially to return the uniform and the need to replace locks. The uniform and keys were returned after the first letter from the company and adjustments made to the amount claimed from Ms McLeod. The amount claimed for the keys and replacement locks was an anticipated rather than actual cost for the company.

**Was consultation required under s 5(1A) of the WPA before the deduction?**

[18] The WPA provides that there is to be no deductions from wages except in accordance with provision in the Act.

[19] Materially s 5 of the WPA provides as follows:

> (*1) An employer may, for a lawful purpose, make deductions from wages payable to a worker-*
>
> *(a) with the written consent of the worker (including consent in a general deductions clause in the worker's employment agreement); or*
>
> *(b) on the written request of the worker.*
>
> *(1A) An employer must not make a specific deduction in accordance with a general deductions clause in a worker's employment agreement without first consulting the worker.*

[20] I am satisfied that before making the deductions in reliance on clause 6 and clause 7 of the employment agreement there should have been consultation with Ms McLeod.

**Was there consultation?**

[21] Ms McLeod in her evidence said that she resigned in writing and that there was no earlier communication with the company. She said that the reference in her resignation letter to knowledge that she would sacrifice holiday pay came from general knowledge about what she thought may happen because she resigned without notice.

[22] Mr Wakelin in a letter dated 20 February 2019 did not accept on behalf of the company that the claim of unlawful deduction was incorrect and unjustified. He wrote that there was an express decision to abandon employment on 4 February. Further that when the company became aware of the non-attendance and intention to abandon employment his client made an effort to communicate [with Ms McLeod] and mentioned withholding of wages in accordance with the forfeiture provision. He said this was consistent with Ms McLeod's response about holiday pay being sacrificed.

[23] I am not satisfied that there was consultation before making the deductions between the company and Ms McLeod under s 5(1A) of the WPA. Had there been such consultation as the Act requires, then consideration could have been given to the failure to make payment to Ms McLeod as expected on the day she resigned, that this was the second time this had occurred and her view she was the only employee not paid on time. Such conduct could potentially be repudiatory of the employment agreement. Consideration could also have been expected to have been given to Ms McLeod's view that her role was not a managerial one.

**If consultation did not occur then was the company otherwise entitled to withhold the money?**

[24] On the basis that there was no compliance with the requirement to consult in s 5(1A) of the WPA then the company unlawfully deducted Ms McLeod's final week's wages and her holiday pay in reliance on the forfeiture provision in her employment agreement.

[25] The company has not participated in the investigation of this problem before the Authority. It has not lodged a statement in reply, counterclaim or pursued its own claim against Ms McLeod. The company simply deducted money that it owed Ms McLeod for wages and holiday pay in reliance on a forfeiture provision and initially a general deductions provision with no consultation as required by law. When asked to reimburse the amounts before Ms McLeod lodged her statement of problem with the Authority it refused to do so.

[26] The company would have needed to persuade the Authority that the forfeiture provision is enforceable. It would have been required to do so in the circumstances that Ms McLeod says she resigned and her view of her role. Consultation under the WPA would have involved a discussion about these matters. Further, the company would have needed to establish that the forfeiture provision is not a penalty and is a genuine pre-estimation of

damage arrived at when the parties bargained about the employment agreement. Ms McLeod returned her uniform and keys so there can be no loss attributed to that.

[27] The company was not entitled to deduct wages and holiday pay owing to Ms McLeod.

**If the deductions are unlawful is Ms McLeod is entitled to reimbursement of the amounts deducted with interest?**

[28] Ms McLeod is entitled to be reimbursed amounts unlawfully withheld from her being the sum of $1,250 for wages and $730 for holiday pay. That is a total sum of $1,980.

[29] Ms McLeod is entitled to interest on the sum of $1,980 under clause 11 of schedule 2 of the Employment Relations Act 2000 in accordance with the Interest on Money Claims Act 2016 from the date her employment ended on 4 February 2019 in the sum of $64.10.

**Was there a breach of the MWA?**

[30] Ms Saville submits that the failure to pay Ms McLeod's wages constituted a breach of s10 of the MWA. She submits that the MWA is applicable to every employee whether they are earning minimum wage or not. Ms Saville also claimed that there was a breach of the employment agreement however there is no penalty for that breach claimed in the statement of problem.

[31] Ms McLeod was paid above minimum wage. Section 10(2) of the MWA defines the persons who are liable to a penalty. Materially the persons are:

> (a) every person who makes default in the full payment of any wages payable by that person under this Act.

[32] The MWA prescribes minimum rates of wages for classes of workers that must be paid unless limited exceptions apply. Ms McLeod was not paid by the company under the MWA but paid above minimum wage as prescribed in her employment agreement. The MWA does not therefore apply.

[33] Ms Saville submits that if the MWA did not apply an employee would not have recourse to the employer. The employee has an employment agreement that provides the rate of pay and if there is a failure the agreement can be enforced and arrears recovered under s

131(1) of the ERA. A penalty can also be imposed under the ERA for a breach of an employment agreement.

[34] There is no breach of the MWA for which a penalty could be considered.

**Was there a breach of the Holidays Act 2003 or alternatively the WPA?**

[35] I have found that a deduction of wages and holiday pay in reliance on forfeiture and deduction clauses in the employment agreement was unlawful because there was a failure to consult with Ms McLeod under s 5 (1A) of the WPA.

[36] The unlawfulness occurred because of a breach of the WPA and therefore any penalty should properly be assessed under that WPA rather than the Holidays Act 2003.

**Should there be a penalty awarded under the WPA?**

[37] Section 13(1) of the WPA provides that where any employer or a person on behalf of the employer contravenes or fails to comply with any provision of the Act that employer is liable to a penalty imposed under the Employment Relations Act 2000.

[38] In considering a penalty the Authority is required to have regard to the factors set out in s 133A of the Employment Relations Act 2000 (ERA) and the additional factors set out by the Employment Court in *Preet.*[1]

[39] Deducting money without consultation does not address the inherent inequality of power in the relationship and the objects in s 3 of the ERA of good faith. It left Ms McLeod in a position where she has had to make a claim against the company to receive payment for her final week's wages and holiday pay. There is one breach of s 5(1A) of the WPA and that impacted on Ms McLeod alone.

[40] The maximum penalty for the breach of the WPA is $20,000. The correspondence from the lawyer for the company at the time supports a belief that the company was entitled to act in the way that it did. I conclude it is more likely than not that the company did not set out to deliberately defeat the WPA, however it deliberately decided to deduct the sums with no consultation with Ms McLeod. This was in circumstances where the money withheld was owed to Ms McLeod and it was the company failing to pay wages on time for the second

[1] *Borsboom (Labour Inspector) v Preet VTC Limited and Warrington Discount Tobacco Limited* [2016] NZEmpC 143, (2016) 10 NZELC 79-072

occasion that had led to her resigning with immediate effect. Consultation could have resulted in quite a different outcome. I do not consider the breach was inadvertent and that is an aggravating circumstance.

[41] Ms McLeod has been without her money for some time, however I do weigh that the company calculated and provided in writing the sums it was deducting so that there was some clarity about the amounts. That is not always the case.

[42] There is a need to emphasise the importance of compliance with employment standards. It is not an infrequent occurrence that matters come to the Authority because of issues about withholding of final pay or holiday pay without consultation leaving the employee having to progress a claim to recover the money. There is a need to punish and deter those who breach minimum employment standards.

[43] There is no evidence about the financial state of the company.

[44] The maximum penalty is $20,000. I have assessed aggravating features at 50% of the maximum penalty recognising the importance attached to consultation before deductions are made in the WPA when relying on a general deductions clause. I provisionally allocate that to the maximum penalty bringing the provisional total for a penalty to $10,000.

[45] There are limited mitigating factors and no evidence about financial matters. Taking into account similar cases I consider it appropriate to reduce the provisional total by a further 25% for mitigating circumstances and a further 30% for financial factors. I accept that it is a small company.

[46] I now consider whether the provisional amount of $5,250 after the steps taken above is proportionate to the seriousness of the breach and the harm occasioned.

[47] I find that a reduction is required because the provisional penalty is disproportionate to the seriousness of the breach and the harm occasioned when all matters are considered. In doing so, I do weigh that penalties should punish, deter and be realistic but also they should be just and fair to take into account the different circumstances of each case. I find that a penalty award of $1,500 will still reflect the seriousness of the failing in this case.

**Should a portion of the penalty be paid to Ms McLeod?**

[48] Orders have been made for reimbursement of wages and holiday pay with interest. I accept they will not fully compensate Ms McLeod for the stress involved in leaving her workplace following a second issue about wages not being paid on time, then receiving an invoice claiming she owed the company several thousand dollars and that her wages and holiday pay were being deducted from this amount. This was after a very short period of employment.

[49] I find it appropriate that a portion of the penalty of $750 be paid to Ms McLeod and the balance of $750 to the Crown.

**Costs**

[50] I reserve the issue of costs as requested by Ms Saville. Ms Saville has until 10 March 2020 to lodge and serve submission as to costs and Mr Brown has until 24 March 2020 to lodge and serve submissions in reply.

**Orders made**

[51] Within 28 days from the date of this determination C and S Brown Enterprises limited is ordered to:

(a) Pay to Lavinia McLeod the sum of $1,980 being unpaid wages and holiday pay.

(b) Pay interest on the sum of $1,980 from 4 February 2019 in the sum of $64.10.

(c) Pay a penalty of $1,500 by paying $750 to the Authority to be paid into the Crown Account and $750 to Lavinia McLeod.

[52] Costs are reserved and a timetable set for an exchange of submissions.

Helen Doyle
Member of the Employment Relations Authority