

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKAURAU ROHE**

[2022] NZERA 49
3086092

BETWEEN RAYMOND UTUTAONGA
Applicant

AND NORTH WESTERN FARMS
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Sharon Henare, representing the Applicant
Emma Smith, counsel for the Respondent

Investigation Meeting: On the papers

Submissions and/or further 10 and 14 February 2022 from the Applicant
evidence 27 January 2022 from the Respondent

Determination: 22 February 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] In the determination dated 14 September 2020 (determination [2020] NZERA 370) I determined that the Applicant, Mr Raymond Ututaonga, did not raise his claims for unjustifiable dismissal or a breach of good faith by the Respondent, North Western Farms Limited (NWFL) within the statutory time frames.

[2] However, I determined that Mr Ututaonga could raise his claims in respect of the deductions made from his final salary payment by NWFL.

[3] I also determined that Mr Ututaonga could raise his claim that he was paid below the minimum wage payment as set out in the Minimum Wages Act 1983 (MWA).

[4] Mr Ututaonga challenged the preliminary determination to the Employment Court and on 14 September 2021 Judge Holden determined that Mr Ututaonga was statute barred from advancing his challenge due to failure to file within the appropriate time frame.

[5] The Employment Court referred the matter of Mr Ututaonga's MWA claim back to the Authority.

[6] During a case management conferences held with the parties on 2 November 2021 Mr Ututaonga confirmed that he did not intend to pursue the claim for payments being made below the minimum wage.

[7] The issue remaining for determination therefore is whether or not there was adequate consultation prior to the deductions being made by NWFL.

Note

[8] The parties agreed to the Authority determining this issue based on the papers currently before the Authority. As set out in the Authority's minute dated 2 November 2021 the Applicant was to lodge and serve submissions and any supporting documents by 13 January 2022, and the Respondent was to lodge and serve submissions and any supporting evidence by 27 January 2022.

[9] The Respondent has filed its submissions in accordance with the timetable.

[10] Ms Henare on behalf of the Applicant filed a submission on 3 November 2021 and advised that a statement from Mr Ututaonga would be filed and served by 13 January 2022. However no statement from Mr Ututaonga had been filed by the due date. Various telephone calls were made to Mr Ututaonga's telephone without being able to obtain an answer and voice messages were left on the answer machine advising that the promised statement has not been filed, however no response was received from Mr Ututaonga.

[11] A written submission from Mr Ututaonga was subsequently submitted on 10 February 2022, and a written witness statement by Mr Ututaonga was filed on 14 February 2022, both of which fell outside of the Authority's timetable as agreed with the parties.

Brief Background to this issue

[12] NWFL is a farming entity which had been focused for approximately twelve years prior to 2017 solely on dairy farming.

[13] Mr Ututaonga was employed as 2IC and was provided with an individual employment agreement signed by him and Mr Smith (the Employment Agreement).

[14] The Employment Agreement referred to the deduction of wages at clauses 12 and 13, and at clause 16 referred to the service tenancy. The relevant sections are:

12.3 For salaried Employees:

12.3.1 Your gross annual salary will be: \$55,000.00

12.4.2 The market value of your accommodation, to be deducted from your salary, is agreed at: \$150.00 per week

13 Payment of wages or salary and deductions

13.3 You authorise us to deduct from wages, salary and final wages including holiday pay, any monies owed by you to us. These monies include, but are not limited to:

13.3.1 Rent ...

13.3.2 Damage to accommodation ...

13.3.3 Damage to accommodation ...

13.3.4 Any unreturned chattels and property ...

13.3.5 ACC payments ...

13.4 Before we make a deduction under clause 13.3 above, we will consult with you as to the amount of the deduction.

13.5 By signing this agreement you are providing your consent to deductions under the Wages Protection Act 1983 and dated 1 May 2017.

16.24.1 Keep the premises reasonably clean and tidy, and notify us as soon as any repairs are needed

16.24.5 Not damage or permit damage to the premises, and inform us of any damage

16.24.9 Leave the property clean, tidy and clear of rubbish and possessions at the end of the tenancy, including leaving the carpets in a reasonably clean and tidy condition.

16.31 You are liable for damage arising from your action/inaction which is not attributable to fair wear and tear. You agree to deductions being made (following consultation with you) from your wages, including your final wages and holiday pay to cover any such damage.

16.32 At the conclusion of the tenancy, you agree to leave the accommodation in a clean and habitable condition. ..

16.32.1 The property's carpets are left in a reasonably clean and tidy condition,

16.32.11 Wall surfaces are cleaned, where necessary, and woodwork is wiped down.

16.32.18 All accumulated rubbish is removed from the property.

16.33 In the event that the property is not left in a clean and tidy condition, you authorise us, after consultation with you, to make a deduction from any monies owed to you of a sum equivalent to the cost of having the property reasonably cleaned, whether we engage commercial cleaners, or undertake the cleaning personally.

[15] Following a restructuring of NWFL Ms Smith wrote to Mr Ututaonga on 4 December 2018 confirming the termination of Mr Smith's employment on grounds of redundancy on 31 May 2019.

[16] Mr Ututaonga left the employment of NWFL on 26 April 2019 and was paid his final wage payment on 3 May 2019.

[17] Monies were deducted from Mr Ututaonga's final pay as set out in a letter from Ms Smith dated 9 May 2019. The letter stated that upon inspection of the accommodation resided in by Mr Ututaonga during his employment with NWFL, NWFL had found the property: "to be in an unacceptable, filthy and damaged condition."

[18] The letter referred Mr Ututaonga to clauses in the Employment Agreement including clauses 13.3.2 and 13.3.3 which authorised NWFL to make deductions from his final pay for costs associated with damage to the property. The letter set out the amount due and deductions made:

We are instructed that your final gross pay is \$3,591.04 including the value of one freezer beast. However deductions for damage may only be made against your net pay which is \$2,791.04 ...

On those grounds, when \$3,511.00 is deducted from your final net pay a balance is due from you to the employer in the sum of \$1,085.38.

The employer has proposed not to seek to recover that amount from you but rather simply deduct from your final pay the amount available as a contribution towards those costs.

[19] Although the letter referred to a deduction being made from Mr Ututaonga's final pay, Mr Ututaonga was paid his final pay by NWFL on 28 April 2019 and the deductions at issue were in fact made from the outstanding payment of Mr Ututaonga's holiday pay and a discretionary payment in lieu of a freezer beast.

[20] Mr Ututaonga filed a Statement of Problem on 31 December 2019 in which the claims included one for: "Deductions from wages without consultation". Mr Ututaonga also stated in the Statement of Problem that: "We were expecting a reasonable amount to pay out of my final salary for damages but not anything over \$800.00 which is fair."

Was there adequate consultation prior to the deductions being made by NWFL?

Were deductions authorised by agreement between the parties?

[21] An employer may make deductions from a workers wages provided that the requirements as set out in the Wages Protection Act 1983 (the WPA) are met. These are:

5 Deductions with worker's consent

- (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.
- (2) A worker may vary or withdraw a consent given or request made by that worker for the making of deductions from that worker's wages, by giving the employer written notice to that effect; and in that case, that employer shall—
 - (a) within 2 weeks of receiving that notice, if practicable; and
 - (b) as soon as is practicable, in every other case,— cease making or vary, as the case requires, the deductions concerned.

[22] In accordance with the WPA, an employer may for any lawful purpose make deductions from a worker's salary with the written consent of the worker.

[23] I find that Mr Ututaonga had provided his consent to deductions being made from the final payments due to him by signing the Employment Agreement containing the General Deductions clause and the Specific Deductions clause.

[24] These clauses made specific reference to deductions being made in respect of repairs and cleaning of the accommodation provided by NWFL to Mr Ututaonga as part of his employment terms.

[25] The WPA specifies in s 5((1A) that deductions should not be made in reliance on a general deductions clause in an employment agreement without consultation with the worker taking place.

[26] In *Jonas v Menefy Trucking Ltd* the Employment Court confirmed this. The Court held that where a general deductions clause in an employment agreement is relied upon to make a deduction from wages which are payable to the worker, then consultation should take place prior to the deduction being made which is consistent with good faith. Judge Ford observed: "Without such a safeguard, the protection intended to be afforded by the Wages Protection Act 1983 would be illusory."¹

[27] Mr Ututaonga denies that any consultation took place prior to the deduction being made by NWFL.

¹ *Jonas v Menefy Trucking Ltd* [2013] NZEmpC 200 at [62]

Was there consultation prior to the deductions being made?

[28] In the sworn and certified affidavit submitted by Mr Robert Smith, Director, Mr Smith states that both the outstanding holiday payment and payment in lieu of the freezer beast had been deferred by agreement with Mr Ututaonga pending NWFL quantifying the extent of damage caused by Mr Ututaonga and his family to the property owned by NWFL

[29] In his affidavit Mr Smith stated that consultation with Mr Ututaonga was initiated in early April 2019 when Mr Ututaonga sought to bring forward the date of the end of his employment by a calendar month which was due to end in May 2019. At that time Mr Smith stated that Mr Ututaonga was reminded that the property provided by NWFL was to be left in the state and condition specified in the Employment Agreement.

[30] Mr Smith stated in his affidavit that concerns had been raised about the state of repair and cleanliness of the property during a routine inspection and Mt Ututaonga had been advised of the requirement that such matters would need to be rectified prior to departure. Further that if he failed to do so, repair and cleaning costs could be deducted from final wages if necessary.

[31] Mr Smith further states that:

- a) Mr Ututaonga asked for time to complete the necessary cleaning and it was agreed that he would stay for a week after his employment with NWFL finished on 29 April 2019 to complete that work;
- b) Mr Ututaonga and his family departed before completing the work and in advance of the final inspection taking place; and
- c) Mr Ututaonga was aware that holiday pay and pay in lieu of the beast had been withheld pending assessment of the property and obtaining quotes for repair of the damage to the property.

[32] In support of his assertion that Mr Ututaonga knew of, and had been consulted about, the deduction, Mr Smith attaches to his affidavit a text exchanges between him, Mrs Smith and Mr Ututaonga which took place on 6 and 7 May 2019:

Mr Ututaonga to Mr Smith at 7.02 p.m. on 6 May 2019:

Just wondering has holiday been paid tonight got some Bill's to be paid tonight cheers

...

Mr Smith to Mr Ututaonga at 7.21 p.m. on 6 May 2019:

Waiting on quotes from cleaner and wallpaper man they came through on Saturday and giving the amount of damage to wall paper and cleaning still needed not sure on what the amount will be ... hopefully will know by tomorrow fingers crossed ...will let you know asap.

Mr Ututaonga to Mr Smith at 7.32 p.m. on 6 May 2019:

Ok just to remind you I wont have any contact tomorrow cause have no ph or internet so hopefully it's in tomorrow I will check as soon as I can find free wifi somewhere when I can cheers and thankyou. :

Mrs Smith to Mr Ututaonga at 7.36 p.m. on 6 May 2019:

Hi Ray, Just letting you know that I've just put through your salary for this week through straight away for you (a few mins ago), and once Bobs had a look through house and gotten quote for wallpaper and stuff then will put rest of holiday pay over as you have annual leave hours owing – also taking into account value of beast etc. Hopefully it will be sorted for you by Monday.

Mr Ututaonga to Mrs Smith at 12.59 p.m. on 7 May 2019

Hi jen any luck with my holidays really in need now for the rest I'm using wifi in town so I'll check later thanks

Mrs Smith to Mr Ututaonga at 6.21 p.m. on 7 May 2019

Hiya, I've been chasing this today and just been told we'll have the quotes by this evening so will be able to put through as soon as we have those amounts. thanks

[33] I find that as stated by Mr Smith and confirmed in the text messages, there had been consultation with Mr Ututaonga prior to any deductions taking place. It is clear from the text messages that Mr Ututaonga was aware that deductions were to be made from the amounts due in respect of outstanding holiday pay entitlement and value of a freezer beast once the quotations for the wallpaper and requisite cleaning had been received by NWFL. There is no indication in the text messages that Mr Ututaonga objected to deductions being made at that point.

[34] Mr Smith stated that on the evening of 7 May 2019 the quotations in respect of cleaning and wallpapering had been received and an email was sent to Mr Ututaonga setting out in detail the work to be completed. The email stated:

Hi Raymond,

As you know we've been through the house on Saturday and completed the final inspection of the property. We were quite disappointed with the condition that the house was left in, both inside and outside.

We've now received quotes for both cleaning and wallpapering. To break it down:

Wallpaper

The wallpaper quotes covers ...

The quote ha come through as:

Stripping, sizing and hanging of paper: \$2047

Wallpaper cost – 12 rolls at \$47 per roll: \$564

Total Wallpaper cost: \$2611

Cleaning

We've been quoted an estimate of \$900 by our cleaner to get the house back to the same condition as when you originally moved in. It is the same cleaner who did the house before you moved in.

So the total cost of repairs and cleaning comes out at \$3511, which is \$900 for cleaning and the rest for Wallpaper as above.

Holiday pay owing is \$2791.04 (I have attached file showing your leave balances)

Freezer beast (x2 half beasts) is valued at \$800

Which works out to \$3591.04 owing to you in total.
When we deduct the amount for cleaning and damages of \$3511, this leaves you with a final pay of \$80.04.

We can provide hard copies of the quotes or discuss further if you wish, or if you are happy for us to go ahead and pay the \$80.04 then we will do this straight away.

[35] Mr Ututaonga responded the following day, 8 May 2019 stating:

Hi as I have no way of contact I give permission to my father and mother in law to sort on my behalf sorry about this but I don not accept any of these charges,

[36] I find that the text messages confirm that Mr Ututaonga was aware that monies were being withheld by NWFL pending quotations being obtained for the cleaning and the rectification of the damage in the accommodation and that Mr Ututaonga accepted this.

[37] In addition, in the Statement of Problem filed with the Authority on 31 December 2019 Mr Ututaonga explicitly states that he was expecting a reasonable amount to be deducted from his salary, which confirms that there had been consultation and that he was expecting a deduction to be made for rectification to the property owned by NWFL and which he and the family had occupied during his employment with NWFL.

[38] I find that there had been consultation prior to the deductions being made.

Was the consent withdrawn?

[39] Mr Ututaonga advised NWFL that he did not accept the charges. I do not find that non-acceptance of an amount in excess of that anticipated upon being made aware of the quotations equates to withdrawal of the consent.

[40] Moreover, in the Statement of Problem filed with the Authority on 31 December 2019 Mr Ututaonga explicitly states that he was expecting a reasonable amount to be deducted from his salary, but that such an amount would not be in excess of \$800.00. I find that the fact that the amount that was to be deducted exceeded Mr Ututaonga's expectation does not equate to his having withdrawn his consent to a deduction being made.

[41] In fact, the reference to an expectation of a reasonable amount being deducted underpins that Mr Ututaonga was aware of the fact that deductions were to take place.

[42] I find that consent was not withdrawn by Mr Ututaonga.

[43] **I determine that there was adequate consultation prior to the deductions being made by NWFL, and that consent was not withdrawn prior to the deductions being made.**

Costs

[44] Costs arise in connection with this issue, and that of the preliminary issue.

[45] I have received submissions from the Respondent on this issue of costs. Should the Applicant wish to make a submission on the issue of costs in respect of the preliminary matter and the current issue which is the subject of this determination, they are to be received no later than 14 days from the date of this determination.

Eleanor Robinson
Member of the Employment Relations Authority