

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 276/08
5104526

BETWEEN LINDA DEAN
 Applicant

AND SUPERDOCKETS
 ADVERTISING LTD
 Respondent

Member of Authority: Dzintra King

Representatives: David Collins, Advocate for Applicant
 Tony Vercauteren, Advocate for Respondent

Investigation Meeting: 21 May 2008

Determination: 4 August 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Ms Linda Dean, claims that she has been unjustifiably constructively dismissed and unjustifiably disadvantaged by the respondent, Superdockets Advertising Ltd (“Superdockets”). The respondent denies the allegations.

[2] Ms Dean also brought claims relating to unpaid wages. The parties attempted to negotiate a resolution to this issue but have failed to do so. Leave is reserved for the parties to file any additional material regarding the wages issue and I will issue a separate determination. Any documents or submissions should be filed within three weeks of the date of this determination.

[3] Ms Dean said she had a number of concerns regarding her treatment by the company. These included what she says was an unlawful deduction from her wages and lack of clarity regarding payment of statutory holidays and lunch breaks.

[4] Mr Tony Vercauteren is the director of the company. Ms Heather Shanley managed the company's accounts. On 1 March Ms Dean emailed Ms Shanley asking for a meeting and requesting that Ms Nicci George, her immediate manager, also be present at the meeting.

[5] Ms Shanley replied the following day suggesting that Ms Dean talk to Mr Vercauteren as Ms George was away and he was the person who made the decisions. On the evening of Friday 2 March Ms Dean emailed Mr Vercauteren asking for a meeting early the following week.

[6] It appears that Ms Dean had been taking lunch breaks, which should have been unpaid, but that she had been paid for the time. The company was seeking to have the monies incorrectly paid repaid. There were a number of conversations between Ms Dean and Ms Shanley on this matter.

[7] On 26 February Ms Shanley emailed Ms Dean asking her to send through the times for the lunch hours that had not been recorded.

[8] On 27 February Ms Dean emailed Ms Shanley setting out the number of lunch break hours.

[9] Ms Dean accepted that she had not been entitled to be paid for her lunch breaks and that she should repay the money. She says she had discussions with Ms Shanley about doing this on an agreed drip feed system. Ms Shanley could not recall such a conversation. Ms Shanley deducted the amount owed from Ms Dean's wages without informing her that she would be doing so. Ms Dean was upset by this. This forms part of the background to the request for a meeting with Mr Vercauteren.

[10] On 6 March Ms Dean, Ms Shanley and Mr Vercauteren had a meeting. Ms Dean said Mr Vercauteren did not give her any notice regarding the meeting. Part of the meeting dealt with Ms Dean's concerns and part with the fact that Ms George had had to return to England and Mr Vercauteren would be taking a hands on managerial role.

[11] Ms Dean said that when she broached the deduction from her pay and told Mr Vercauteren that it was illegal he said he didn't give a fuck about legalities. At the Investigation Mr Vercauteren accepted that he could have said that. He told her he was a reasonable guy but not to throw legal things at him as he didn't care. When the statutory holiday matter was raised Ms Dean said Mr Vercauteren offered to pay her for two hours and again said he didn't care about the legal side of it. Mr Vercauteren could not recall saying anything about two hours. Ms Dean said Ms Shanley called her a baby. Ms Shanley denied this but accepted that she had told Ms Dean that she needed to grow up.

[12] Ms Dean said she asked to be able to have a support person but was told that if she left the meeting she was leaving her employment. Mr Vercauteren said he was shocked when she asked for a support person.

[13] Ms Dean said she left the meeting feeling defeated and backed into a corner.

[14] She had earlier sought advice about the deduction from her wages and had become so disheartened with the way things were progressing that on 4 March she had written a resignation letter. This made no reference to any problems at work. It reads:

I regretfully wish to tender my resignation from your company to take effect from 7th March 2007 with the final date being 21st March 2007 as per my Employment Agreement.

I would like to thank you for the opportunity you have offered me however I wish to pursue other employment opportunities more suited to my study interests.

Once again I would like to thank you and wish you and your company the best for the future.

[15] Ms Dean thought about matters after the meeting on 6 March and telephoned her father. She decided to hand in her resignation. About half an hour after the meeting she gave Mr Vercauteren the letter and told him that due to what had happened

at the meeting she had decided to leave. He asked her why and she said that it was unfair.

[16] Mr Vercauteren stressed that the letter was dated prior to the meeting. Therefore, in his view, the meeting could not have had any effect on the decision to resign.

[17] Mr Dean said she had been trying to resolve issues and get the matter of the wages deduction sorted out. She has asked Ms Shanley if she could pay it off. Ms Shanley said she did not recall this request.

[18] Ms Dean said that at the meeting Mr Vercauteren had said he would give her two hours' pay for the statutory holidays. Mr Vercauteren was unsure whether he had said this.

[19] Ms Dean said she felt her employer did not deal satisfactorily with the issue of the unpaid statutory days and the unauthorised deduction.

[20] Mr Vercauteren said they met with Ms Dean within days of the money being taken. He had said they would look at the situation but never had a chance to sort it out.

[21] I prefer Ms Dean's account of what took place at the meeting. She had notes which she made shortly afterwards.

[22] That an employee has given consent to the employer to make deductions must be unequivocal. In *Rahts v Criterion Papers NZ Ltd* 9/12/92, J L Scott (adjudicator), AT227A/92, the Tribunal held that an acknowledgement of debt signed by the worker did not amount to written consent to deduct from wages as contemplated by s 5 Wages Protection Act 1983. That situation parallels this one. Ms Dean acknowledged that she owed her employer money for the lunch breaks but had not given an unequivocal consent to the deduction. The deduction was illegal.

[23] The meeting on 6 March was conducted in a most unsatisfactory manner. It is not appropriate for an employer to tell an employee that he doesn't give a fuck about the legalities and that he doesn't care about the legal side of things. Ms Dean had legitimate concerns and was entitled to expect that her employer would address them properly and in good faith.

[24] Ms Dean had written her resignation letter before the meeting. This does not mean that her handing it on 6 March cannot constitute a constructive dismissal. The surrounding circumstances regarding the termination of employment are to be taken into consideration. Ms Dean was becoming increasingly frustrated because she was unable to get her employer to deal with payment issues. The letter was only handed in after the meeting.

[25] Ms Dean was constructively dismissed and has a personal grievance.

Remedies

[26] Ms Dean said that at first she did not look for a job. She found other employment in October 2007. Ms Dean did not mitigate her loss and so no award for lost remuneration can be made.

[27] Ms Dean seeks compensation for humiliation and distress. The respondent is to pay the sum of \$4000.00 pursuant to s 123 (1) (c) (i) Employment Relations Act 2000.

Costs

[28] Costs were reserved. If the parties are unable to resolve this issue the applicant should file a memorandum within 28 days of the date of this determination. The respondent is to file a memorandum in reply within 14 days of receipt of the applicant's memorandum

Dzintra King

Member of the Employment Relations Authority

