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

[2014] NZERA Christchurch 83
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| | BETWEEN | SHAUNE DONALD<br>Applicant |
| | A N D | POLLARD CONTRACTING LIMITED<br>Respondent |

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| Member of Authority: | David Appleton |
| Representatives: | Raewyn Tretheway, Counsel for Applicant<br>James Pullar, and later David Beck, Counsel for Respondent |
| Investigation meeting: | 1 April 2014 at Christchurch |
| Submissions Received: | 22 April 2014 from Applicant<br>21 May 2014 from Respondent |
| Date of Determination: | 9 June 2014 |

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## DETERMINATION OF THE AUTHORITY

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**A. The respondent is to pay to Mr Donald three days' holiday pay, one further day's pay for 17 June 2013, together with the sum of $813, net of tax, unlawfully deducted from his final pay.**

**B. Costs are reserved.**

### Employment relationship problem

[1] Mr Donald claims that the respondent unlawfully:

a. deducted annual leave from his accrued entitlements while he was suspended;

b. deducted sick leave from his accrued entitlements when he was suffering from a work-related injury;

c. failed to pay him for a day when he was off sick (23 May 2013), contrary to his accrued entitlements;

d. failed to pay him for a day (17 June 2013) when he was suspended from work;

e. failed to allow the accrual of annual leave in relation to days when he was suspended from work and on special leave;

f. deducted $813 from his final wages; and

g. failed to compensate him for using his home as a work base and storage area and for using his tools, which were often broken, lost or not returned.

[2] Mr Donald had also claimed that the respondent had failed to pay him commission that had been agreed for the winning of new clients and had unlawfully deducted annual leave from his accrued entitlements when he took time off in lieu. However, Mr Donald withdrew these two allegations after the investigation meeting after I had directed that further evidence in support of the allegations be produced.

[3] The respondent denies that its actions were unlawful for the reasons that will be explored below.

**Background**

[4] Mr Donald worked for the respondent, a demolition and contracting company based in Christchurch, initially as an independent contractor and then, in May 2011, as an employee. It is agreed between the parties that, although employment agreements were given to Mr Donald to sign, he refused to do so because he disagreed with some of the clauses contained in them.

[5] Mr Donald was dismissed by the respondent on 18 June 2013 following a disciplinary investigation. Mr Donald brought unjustified dismissal proceedings against the respondent in the Authority and, by way of a preliminary determination[1],

[1] [2014] NZERA Christchurch 1

the Authority granted leave for Mr Donald's personal grievance for unjustified dismissal to be heard outside of the statutory 90 day period but disallowed a personal grievance for unjustified disadvantage. The Authority's determination has been challenged in the Employment Court by the respondent and that challenge has yet to be heard. The Authority therefore restricts this determination to the issue of the alleged unlawful actions of the respondent in respect of sick pay, holiday pay and deductions from wages.

**Key background facts and determination**

[6] On 7 September 2012, Mr Donald says that he sustained an injury to his lumbar region whilst driving a truck for the respondent between Christchurch and Picton, due to a fault with the seat. This aggravated a pre-existing injury he said. He was signed off sick by his GP for five days, from Tuesday, 11 September 2012.

[7] On 4 October 2012, ACC wrote to the respondent stating that Mr Donald's claim for a work-related gradual onset injury had not been approved. Up to that point, Mr Donald had been paid *first week compensation* by the respondent in accordance with the rules of the ACC scheme for three days (12 to 14 September 2012). Following rejection by ACC of Mr Donald's claim, the respondent converted the three days paid as first week compensation to sick leave. However, this did not occur until 11 June 2013, as is recorded on a payslip produced before the Authority.

*Was the respondent entitled to treat 12 to 14 September 2012 as ordinary sick leave?*

[8] The respondent says that Mr Donald did not report the injury as a workplace injury in its incident book. Mr Donald said that he discussed doing so with one of the respondent's directors, Mr Pollard, who told him that he should not treat it as a workplace injury as it would cost the company more money in terms of ACC levies. Mr Pollard was not present at the Authority's investigation meeting to comment on this allegation and I accept Mr Donald's evidence in this regard.

[9] However, the respondent does not seem to deny that the injury to Mr Donald's lumbar region was triggered by the drive to Picton, but relies on the letter from ACC dated 4 October 2012 to treat the period of sick leave as being ordinary sick leave and not a workplace injury subject to first week compensation. It also relies on the fact that Mr Donald did not choose to review the ACC decision.

[10] Mr Donald explains that he felt that he had no need to seek a review of the ACC decision because his physiotherapy, acupuncture and chiropractor bills were paid by ACC, and he had been paid first week compensation, after which he was able to go back to work.

[11] It seems clear that Mr Donald had no idea at the time the ACC rejection letter was received that the respondent was going to convert the first week's compensation to ordinary sick leave on the strength of the letter. Indeed, this did not occur until June 2013, some nine months later. If Mr Donald had known that, he is likely to have been incentivised to seek a review.

[12] Overall, I believe that Mr Donald was unfairly treated by the respondent by it not forewarning him during the period when he could have reviewed the decision of ACC that it intended to take three days of his sick leave from him on the strength of the ACC's letter, and further not advising him of the decision to do so until June 2013, when his employment was about to end. This amounts to a breach of its duty of good faith towards Mr Donald in my view. However, Mr Donald has not raised a personal grievance, nor lodged an unjustified disadvantage claim in respect of that treatment.

[13] What occurred was that, on 11 June 2013, the company reversed out the $576 that Mr Donald had been paid as first week's compensation, and paid him $720 instead, which was three days' sick leave. He was also paid out 0.38 days' sick leave. In fact, by 11 June 2013, Mr Donald had no more sick leave allowance left, because of sickness absence he had had on 23 May 2013, and 29 to 31 May 2013, which should have been paid as sick pay, but was not. I deal with these dates below.

[14] Dealing strictly with what Mr Donald is entitled to in respect of the period 12 to 14 September 2012, he has been paid three days' sick leave (on 11 June 2013), and as ACC designated the period as a non-work related injury, and at that time Mr Donald still had sufficient sick leave, I cannot interfere with that approach.

*Should Mr Donald have been paid sick pay on 23 May 2013?*

[15] On Thursday, 23 May 2013, Mr Donald was sick and did not attend work. This originally led to the respondent believing that Mr Donald had misled it by claiming to be sick while he was actually shifting house. However, the respondent says that there was eventually no adverse finding in respect of that allegation

according to the respondent. The respondent says that Mr Donald was not paid sick pay (or any pay) for that day at the time because the respondent was waiting the result of the outcome of the disciplinary investigation. However, when the respondent's disciplinary investigation concluded that there was no adverse finding in respect of Mr Donald's absence on that day, he had by then run out of sick leave. Therefore, no sick pay was due to him it says.

[16] However, this was not true, because he had, even on the respondent's case, 0.38 of a day's sick leave left on 23 May 2013. In addition, a document produced by the respondent, which had already adjusted Mr Donald's sick leave in respect of the three days' absence due to injury for the period 12 to 14 September 2012, showed that he actually had 3.38 days' sick leave left when the (later) three day adjustment is ignored. Given that the adjustment did not occur till June 2013, it is unclear why Mr Donald was treated as having run out of leave on 23 May 2013. Therefore, as at 23 May 2013, Mr Donald was owed one day's sick pay in respect of his sick leave on that day.

[17] However, as he was paid 3.38 days' sick leave on 11 June 2013, it is not appropriate to order the respondent to pay him any further sick pay, as his entire employment long entitlement was limited to 10 days' pay, which he has already received in full.

*Was annual leave unlawfully taken from Mr Donald for the period 27 and 28 May 2013?*

[18] In respect of the allegations against him, Mr Donald received a letter from the respondent dated 25 May 2013 in which Mr Donald was given *"the opportunity to take special leave on full pay"* until a planned disciplinary meeting on Tuesday 28 May. However, Mr Donald was actually signed off sick, in accordance with a medical certificate from his GP, from Monday, 27 May 2013 until Tuesday, 4 June 2013. Mr Donald says that, in respect of Monday, 27 and Tuesday 28 May 2013, he believes that annual leave was taken off him although the respondent denies this, saying that it paid him on the understanding that he had wanted to take special leave as offered in the letter of 25 May.

[19] On this point, having examined a printout from the respondent's payroll system, there is no evidence that Monday 27 and Tuesday 28 May 2013 were treated

as annual leave days for Mr Donald. I believe, therefore, that he was paid as if he were on special leave in accordance with what the respondent asserts and that annual leave was not unlawfully taken from him in respect of these two days.

*Was annual leave unlawfully taken from Mr Donald for the period 29 May to 31 May 2013?*

[20] As Mr Donald had been signed off sick until Tuesday, 4 June 2013, he was treated by the respondent as being absent on sick leave for Wednesday 29, Thursday, 30 and Friday, 31 May 2013. The respondent's payroll records show that, in respect of Wednesday, 29 May 2013, Mr Donald had only 0.38 of a day sick leave left. It therefore used that 0.38 of a day and paid the rest as annual leave for 29 May and also paid Mr Donald for 30 and 31 May 2013 as annual leave.

[21] The evidence is that the respondent did ask Mr Donald if this was what he wanted to do, as opposed to not being paid for those days, and that he did not respond. It therefore eventually took the initiative to pay Mr Donald for his sick leave out of his annual leave.

[22] It is Mr Donald's assertion that he did in fact have enough sick leave in order to accommodate these days out of his sick leave entitlement. This is for two reasons. First, he states that, by May 2013, he had accrued 15 days' sick leave but had used less than 10 days. Second, he disputes that the days he had taken off sick because of his lumbar injury (Wednesday 12 to Friday 14 September 2012) should have been taken out of his sick leave entitlement.

[23] With respect to Mr Donald's assertion that he had, by May 2013, accrued 15 days' sick leave (ignoring the days he had already taken as sick leave), I cannot agree with him. Sections 63 and 65 of the Holidays Act 2003 make clear that the entitlement to sick leave does not arise until an employee has completed six months' continuous employment with the employer, and that an employee is entitled to five days' sick leave for the first 12 month period of continuous employment beginning at the end of the six month period, and for each subsequent of continuous employment.

[24] Therefore, Mr Donald would not have accrued a third set of five days' sick leave until 29 November 2013, after he had been dismissed. Mr Donald says that a director of the respondent company, Ms Thomas, had told him that he was about to

accrue another five days' sick leave. She denies this, however, and does not see why she would have done so.

[25] It is clear from the contents of the employment agreement used by the company that it does not allow the accrual of more sick leave than is provided for in the Holidays Act and, in any event, Mr Donald says that he did not sign that agreement. Therefore, in the absence of a separate agreement, which I am not satisfied occurred, Mr Donald's entitlement was governed by the Holidays Act, and by May 2013 he had only accrued 10 days' sick leave. He did not dispute, save for his lumbar injury, that he had taken the days of sick leave shown in the respondent's record.

[26] Therefore, I do not agree that Mr Donald was entitled to more than 10 days' sick leave, less any he had already taken, when he was signed off sick from Wednesday, 29 May 2013.

[27] However, as at Wednesday 29 May 2013, Mr Donald was still entitled to 2.38 days' sick leave, because the adjustment in respect of the ACC rejection had not yet occurred but he should have been paid sick pay in respect of 23 May 2013. Therefore, the use by the respondent of 2.62 days' annual leave for this period was incorrect. Mr Donald should have been paid 2.38 days' sick leave.

[28] However, as Mr Donald has already received his entire 10 day entitlement to sick pay, it is not appropriate to order the respondent to pay him in respect of these days.

*Was annual leave unlawfully taken from Mr Donald for the period 5 to 7 June 2013?*

[29] Monday 3 June 2013 was a public holiday (Queen's Birthday) and Mr Donald was paid correctly in respect of that day. On Tuesday, 4 June 2013, Mr Donald attended the respondent's first disciplinary investigatory meeting. He was paid for that day, in respect of what the respondent called special leave. However, in respect of the period Wednesday, 5 June to Friday, 7 June 2013, Mr Donald was paid annual leave and had three days taken out of his annual leave allowance. This is because he had previously applied for annual leave for the whole of that week from Tuesday 4 June to Friday 7 June 2013 and had had the request been approved.

[30] Mr Donald, however, asserts that, once he was required to attend the disciplinary meeting on 4 June 2013, he cancelled his holiday. He also said that he had been told by the respondent that he was not to contact any clients, and that he had first learned on 24 May 2013 from a client that he was no longer working from him. His point in saying this, I understand, is to argue that he was on enforced suspension from 27 May 2013.

[31] Ms Thomas stated in her written brief of evidence that *"despite the lack of work available we were prepared to have Shaune back at work for the rest of the week* [namely, 5 to 7 June 2013]. *However we understood from Shaune's comments that he wanted to take the annual leave"*.

[32] The *comments* referred to by Ms Thomas took place during the disciplinary meeting on 4 June 2013 and were recorded. The Authority heard the relevant extract of this recording. It is not easy to discern exactly what was said, because of people speaking over each other, but I distinctly heard Mr Donald's voice saying, words to the effect, *"I am available to come back to work tomorrow – if they are telling me I have to lose my annual leave, that's …"* at which point Ms Thomas' voice cuts across him. Later on, Mr Donald is heard to say *"I don't see why I should have to take my annual leave when I am suspended"*.

[33] The evidence of Ms Thomas to the Authority was that the respondent understood that Mr Donald wished to take his annual leave for those remaining three days, but that, if Mr Donald had insisted, the respondent would have found some work for him. Mr Donald says that he did not come into work for those three days because he understood he had been suspended.

[34] It is clear that Mr Donald and the respondent were at cross purposes during this period and it is possible that even Mr Donald's counsel of that time (not Ms Tretheway), was confused. However, I clearly heard Mr Donald say twice during the recording of the meeting that he did not agree that he should take his annual leave during those three days. He also explained to the Authority that he had originally intended to go to Rotorua for the week commencing 3 June, which the respondent knew, but that when he was then required to attend the meeting on 4 June he cancelled the holiday. The respondent says, however, that it was Mr Donald who asked to attend the meeting on that date.

[35] It is my finding that, by Tuesday 4 June 2013, Mr Donald no longer wished to take the annual leave that he had originally requested because he believed that he was suspended, and did not wish to use his annual leave while he was on a period of suspension which was beyond his control.

[36] Section 19 of the Holidays Act provides as follows:

> ***19 When employee may be required to take annual holidays***
> *(1) An employer may require an employee to take annual holidays if –*
>
> *(a) The employer and employee are unable to reach agreement under s.18(3) as to when the employee will take his or her annual holidays; or*
>
> *(b) Section 32 (which relates to close down periods) applies.*
>
> *(2) If subsection (1) applies, an employer must give the employee not less than 14 days' notice of the requirement to take the annual holidays.*

[37] Section 18(3) of the Holidays Act provides that, when annual holidays are to be taken by the employee is to be agreed between the employer and the employee.

[38] In light of the fact that Ms Thomas states in her evidence that the respondent would have allowed Mr Donald to come back to work if he had wished, that Mr Donald had stated twice during the meeting that he did not agree to take as annual leave the remaining three days of that following week, and given that the respondent could not at that stage compel Mr Donald to take his holiday, I conclude that the respondent was not entitled to require Mr Donald to treat those three days as annual leave. Therefore, Mr Donald is entitled to payment in respect of a further three days' holiday.

*Was the respondent entitled to treat days when Mr Donald was on special leave and suspension as discretionary days and to not allow the accrual of annual leave in respect of those days?*

[39] Between Monday 27 May, Tuesday 28 May and Tuesday 4 June 2013, Mr Donald was treated as being on special leave. Between Monday, 10 June and Friday 14 June and on Tuesday, 18 June 2013, the day when Mr Donald was dismissed by the respondent, the respondent treated Mr Donald as being on paid suspension. The issue that arises from this is that the respondent treated payment on

these days as discretionary payments under s. 5 of the Holidays Act and therefore disallowed any accrual of annual leave in respect of them under s.14 of the Holidays Act.

[40] The respondent has since conceded, correctly in my view, that these nine days of paid suspension and special leave should not have been treated as discretionary days for the purposes of the Holidays Act, and has agreed to pay to Mr Donald the equivalent of 5.54 hours deducted from him in respect of a reversal of accrued annual leave. Ms Tretheway has confirmed that this sum has been received by Mr Donald and does not dispute that 5.54 hours is correctly calculated. I therefore treat this matter as resolved.

*Should Mr Donald have been paid on 17 June 2013?*

[41] On Monday, 17 June 2013, Mr Donald received no pay as it was a *rain day*. The respondent states that no employee was paid that day as there was torrential rain and no work was able to be done. This was the practice within the company. Mr Donald states that he was guaranteed 40 hours pay a week and that he negotiated this when he joined the company so as to ensure he had a stable income. This has not been expressly denied by the respondent, and when I review the time and wage records produced by the respondent for the whole of Mr Donald's employment, I note that he worked less than 40 hours a week on only one occasion, in October 2011. It would therefore appear that Mr Donald's evidence is correct in this respect and, given that he would have received eight hours of pay for that day to make him up to 40 hours a week, I find that he is entitled to be paid in respect of eight hours pay for Monday, 17 June 2013.

*Was the respondent entitled to deduct $813 from Mr Donald's final pay?*

[42] The respondent explained that it had deducted the sum of $813 from Mr Donald's final pay because he had failed to return keys to the premises of the respondent. This is hotly denied by Mr Donald. In any event, Ms Thomas states that, because she felt unsafe in respect of Mr Donald, she used a chain to secure the gates of the premises after his departure. She explained that she deducted the sum of $813 because that was how much the company had spent on its locking system previously (in 2012 and April 2013), and that it could now no longer use that system in case Mr Donald gained entry after his dismissal.

[43] Mr Donald says that he was told that a chain which belonged to him in any event was used to secure the gates of the premises after he had left the respondent's employment and that the respondent therefore did not expend any money. Ms Thomas was unable to refute this. Ms Thomas did agree that the company had not, to her knowledge, purchased a new locking system since the deduction.

[44] With respect to the deduction of $813 from Mr Donald's final pay, I find that this was unlawful. First, Mr Donald had not consented to the deduction, as is required by s.5 of the Wages Protection Act 1983. Even if the respondent's employment agreement had been expressly entered into by Mr Donald, which is open to argument, the clause governing deductions from salary and wages in it does not cover the situation of having to change locks because of an unreturned key. It refers to a situation where the employee is indebted to the employer by reason of, inter alia, failing to return company property, but it does not make explicit that the employer may deduct a sum which relates to any consequential losses arises out of such a failure. In the absence of such an express clause, the right to recover is limited to the value of an unreturned item.

[45] Secondly, although the sum of $813 was deducted from the wages of Mr Donald, the money was not used to purchase new locks and keys, and so I cannot award the sum deducted to the respondent by way of damages. In addition, the respondent had had the use of the locks since 2012, and so it cannot argue that the entire $813 that it spent on the locks was wasted because of Mr Donald's alleged actions in June 2013.

*Should the respondent compensate Mr Donald for using his home as a work base and storage area and for using his tools?*

[46] Mr Donald gave no evidence of what arrangement was reached with the respondent in this respect, what tools were lost, broken or not replaced, and on what basis the compensation was to be calculated. Accordingly, I decline to order the respondent to pay any such compensation to Mr Donald.

**Orders**

[47] I order the respondent to pay to Mr Donald the following:

a. Three days' holiday pay in respect of the period 5 to 7 June 2013;

b. One day's pay in respect of the *rain day* on 17 June 2013;

c. $813 net of tax in respect of the unlawful deduction from Mr Donald's final pay;

**Costs**

[48] Costs are reserved. The parties are to seek to agree how costs should be dealt with between them. If they cannot do so within 28 days of the date of this determination, then any party seeking costs should serve and lodge a memorandum within a further 14 days, and any reply must be served and lodged within 14 days of receipt of that memorandum.

David Appleton
Member of the Employment Relations Authority