

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 251/07
5091244

BETWEEN LJS EMPLOYMENT LIMITED
 Applicant

AND THERESA MITCHELL
 Respondent

Member of Authority: Robin Arthur

Representatives: Philip Officer for Applicant
 No appearance for Respondent

Investigation Meeting: 7 August 2007 at Auckland

Determination: 15 August 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] This matter concerns whether an employee can be required to reimburse training costs and compensate an employer for leaving a job with giving an agreed period of notice.

[2] The applicant company, which runs a chain of branded fish and chip stores, initially sought orders that the respondent, a former employee, either attend disciplinary meetings or pay compensation for notice and training costs. By the time of the investigation meeting the applicant sought only the compensation orders for one week's wages for inadequate notice and a further week's wages in reimbursement of training costs.

[3] The respondent did not lodge a statement in reply or respond to messages from the Authority Support Officer about doing so.

The investigation

[4] The parties were notified of the investigation meeting. The respondent did not attend the meeting at the scheduled time. A call was made to what is understood to be the respondent's

cellphone number and a message left on an answer service which identified the phone number as being hers. No reply was received within half an hour of the scheduled meeting time. I proceeded with the investigation meeting.

[5] Giving evidence under affirmation Mr Officer for the applicant answered questions about the company's claim. Documents attached to the statement of problem set out the detail of the respondent's employment and subsequent non-attendance at work.

The facts

[6] The respondent attended a job interview at the applicant's St Lukes Shopping Centre store on 9 May 2007. She was offered a full-time position and signed an employment agreement on 14 May 2007. She started work at the store the next day and worked 31.5 hours over four days. On the fifth day she was rostered to work but phoned in to say that she would not come to work because her ankle was too sore.

[7] Early the following week she called the store and said she would be off work for a week because she had a broken ankle and said this had happened at work.

[8] The following day Mr Officer wrote to her asking her to attend a disciplinary meeting to discuss various issues. These issues included being unwilling to work rostered hours set for her and saying she had hurt her foot at work when the company had information that she had arrived at work limping and had told another staff member that her foot injury occurred before coming to work.

[9] Two days later Mr Officer spoke with the respondent by telephone and arranged a disciplinary meeting for four days later, but the respondent did not attend that meeting. Mr Officer then wrote again to the respondent scheduling a further disciplinary meeting another week later, but she did not attend that meeting either.

[10] By email on the previous week, she had advised the store Manager that she would be handing back her uniform.

[11] After the respondent had failed to attend the second scheduled disciplinary meeting, Mr Officer wrote to her on 7 June 2007 saying she was technically deemed to have terminated her employment for abandonment of employment. By letter to the respondent a week earlier, he had warned her that if she failed to attend the second disciplinary meeting the company would deem her

to have abandoned her employment and was then able to terminate her employment without further notice or warning and could then apply penalties provided under her employment agreement.

[12] In the 7 June letter Mr Officer stated that the company accepted the respondent's resignation and noted that she had terminated her employment without notice.

[13] He then set out the company's claim that it was entitled to compensation of one week's ordinary pay in lieu of notice and a further week's ordinary pay in compensation for, and reimbursement of, its training costs. Both claims were made in reliance on terms in the respondent's employment agreement – a standard form used by the applicant – which stated at clause 12:

12. Terms of Employment

- (a) *One weeks notice of termination of employment in writing shall be given by either party, unless another period of notice is agreed on in writing by both parties, but this shall not affect the Employer's right to dismiss for serious misconduct, when the Employee is subject to instant dismissal and entitled to payment up to the day of dismissal only.*
- (b) *If the Employee leaves the Employer's service without notice or without good cause, the Employee shall **forfeit** one week's ordinary pay in lieu of notice. The Employer reserves the right to deduct accordingly **from the final pay**, and any other monetary Bond posted, of the Employee, one week's ordinary pay as allowed in this clause.*
- (c) *Where the Employee absents himself or herself from work on any day for more than one consecutive day without the consent or notification of the Employer, this shall be considered as serious misconduct and the Employee shall be deemed to have terminated their employment unless a reason satisfactory to the Employer can be given, and shall **forfeit** an ordinary week's pay.*
- (d) ***At the termination of employment** providing the proper notice is given the Employer, subject to the return of any part of uniforms not purchased and any other equipment or documents supplied, the Employer shall pay the final net amount due to the Employee less any deductions allowed for in this contract no later than the next pay period unless otherwise agreed to in writing by both parties, and the Employee authorises the Employer to **deduct from the Employees final pay** (including holiday pay) whatever monies the Employer may be owed under the employment relationship including annual, sick leave or bereavement leave taken in advance.*
- (e) *If the Employee leaves the Employer's service within two months of the Employee's commencement of employment for any reason, the Employee shall **forfeit** one week's ordinary pay in reimbursement towards the Employers employment related and training costs. The Employer reserves the right to deduct accordingly **from the final pay**, and any other Monetary Bond posted, of the Employee, one week's ordinary pay as allowed under this clause. (my emphasis)*

[14] The respondent was employed on the adult minimum wage at the time of \$11.25 per hour. She received \$196.37 for 31.5 hours worked over four days after allowing for deduction of PAYE and a \$90 payment she was required to make for her uniform.

[15] Based on her four days work, the applicant calculated one week's normal pay to be \$354.38 and sought payment from her of compensation equivalent to two weeks' pay at that rate.

The issues

[16] Resolution of this employment relationship problem requires determination of the following issues:

- (i) Is the respondent liable to pay the applicant compensation equal to one week's ordinary pay for her failure to give notice of resignation; and
- (ii) Is the respondent liable to pay to the applicant compensation equivalent to one week's ordinary pay to reimburse its training costs?

Failure to give notice

[17] The employment agreement sets out a number of provisions requiring the employee to forfeit one week's ordinary pay in specified circumstances – at clause 12(b) for leaving the job without notice or without good cause, and at clause 12(e) for leaving the job for any reason within two months of starting – the latter forfeiture being said to be reimbursement towards the training costs.

[18] In each clause the employer is said to have a reserved right to deduct the week's pay "*from the final pay*".

[19] I put to Mr Officer the proposition that this allowed the employer to deny the employee a right to wages that she or her would otherwise have in their final pay – which most often would be accumulated holiday pay, as workers in the case of this company have their ordinary pay paid weekly – but did not extend to an obligation to pay compensation other than what might be due to them in any final pay owing. Mr Officer suggested that the term regarding forfeiture applied both to moneys that may be owed to the worker (that would otherwise be included in their final pay) or, if that did not meet the amounts required, an additional amount to be paid by the employee.

[20] I do not accept that argument. The plain words of the relevant clauses refer to forfeiting pay entitlements and authorising deductions of existing entitlements from an employee's final pay. The

terms do not extend to requiring an employee to pay compensation in the amount of a week's ordinary pay from their own resources.

[21] In respect of the claim for compensation for not providing the agreed notice – of one week in writing – I note the principle that there is an implied term that reasonable notice is required and an employer may seek a penalty for wilful breach of an employment agreement by not giving agreed notice: *PPP Industries Ltd v Doggett* [1996] 2 ERNZ 234 (ET) and *Cardy Business Machines Ltd v Cowan* (unreported, ET Auckland, AT43/96, 20 February 1996), and *Park v Brand Works Ltd* (ERA Auckland, AA426/05, 26 October 2005, Member Dumbleton) at [45].

[22] However, this does not apply to the present circumstances for two reasons. First, the applicant company here has agreed express provisions on the consequences of termination of employment and these provisions cannot be displaced by a term that would be implied in the absence of an express provision. Secondly, the principle noted relates to the prospect of a statutory penalty for breach of an employment agreement, not payment of compensation. Accordingly I decline the application for an order in relation to failure to provide notice.

Reimbursement sought for training costs

[23] The claim for an order for compensation to reimburse training costs is similarly declined.

[24] The training in general work duties, which Mr Officer explained is mastered by most new employees in less than a week, was for tasks related to food preparation, cooking, serving customers, assembling customer orders and completing sales transactions, general cleaning and dishwashing. It is training in the employer's routine system of work.

[25] Mr Officer explained that the cost to the company was that another staff member needed to be rostered for shifts during which new employees were being trained as the manager was diverted from his or her hands on tasks. However, he accepted that a new employee undergoing training was doing work and was entitled to be paid for that work.

[26] I consider that in the circumstances of this case, if I were to order the respondent to pay one week's ordinary pay to reimburse her training costs, she would in effect be repaying all the earnings that she had for the four days on which she attended work. The net effect would be that she received no pay for the hours that she worked. This, I consider, would be inconsistent with the intent of s6 of the Minimum Wage Act 1983 requiring every worker to be paid for his or her work at not less than the minimum rate.

[27] I note too that the applicant's terms of employment requiring reimbursement of training costs have already been the subject of an Authority determination: *LJS Employment Ltd v. Matthews* (unreported, ERA Auckland, AA125/06, 11 April 2006, Member Campbell).

[28] In that case that Authority found that the requirement to repay training costs amounted to the payment of a premium for the employment of a worker, a measure prohibited under the Wages Protection Act 1983. The Authority in that case determined that a demand by the applicant company for what amounted to a training bond, for what was nothing more than normal on-the-job training, was a premium prohibited by s12A of that Act and could not be "*extracted*" from the employee.

[29] Accordingly, both claims for compensation by way of an order requiring the respondent to pay to the applicant two weeks ordinary pay are dismissed.

[30] The employment agreement did allow for deductions from any outstanding entitlements due in a final pay (refer 5 of the Wages Protection Act 1983). The applicant was owed a small amount of money as holiday pay, which would otherwise have comprised a final payment to her. By her actions in failing to give the agreed notice forfeited that amount which the applicant was entitled to deduct.

Robin Arthur

Member of the Employment Relations Authority