IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2014] NZERA Auckland x
5439519

	BETWEEN	PETER MELGERS Applicant
	AND	HAROLD GOWER Respondent

Member of Authority:	Robin Arthur
Representatives:	Applicant in person Respondent in person
Investigation Meeting:	7 July 2014
Determination:	8 July 2014

DETERMINATION OF THE AUTHORITY

A. Within 28 days of the date of this determination Harold Gower must pay Peter Melgers the following sums:

(i) $1523.05 as holiday pay; and

(ii) $64.68 as interest on that holiday pay for the period from 3 September 2013 to 8 July 2014; and

(iii) 21 cents per day as interest on that holiday pay from 9 July 2014 until the amount owed is paid in full.

B. Mr Gower must also reimburse Mr Melgers for the fee of $71.56 paid to lodge this matter in the Authority.

Employment relationship problem

[1] Peter Melgers was not paid holiday pay due to him when he ended his employment as a dairy farm worker for Harold Gower on 20 August 2013.

[2] Mr Gower did not dispute the holiday pay was owed but said he was entitled to keep that money for two reasons – firstly, that Mr Melgers had not given the one month's notice required in the employment agreement that the two men had signed and, secondly, because the holiday pay due covered some of the amount Mr Gower said was due to him as rent for use of a house at the farm that Mr Melgers stayed on in after his employment ended.

[3] Mr Gower also said he was entitled to deduct $192.30 from any holiday pay due because he overpaid Mr Melgers. The overpayment was made in the 'first week compensation' paid after Mr Melgers suffered a back injury while putting away equipment in the milking shed on 30 July 2013. Mr Gower mistakenly paid that compensation at the rate of 100 per cent of the wages due rather than at the 80 per cent rate required under the Accident Compensation legislation.

[4] Following the injury Mr Melgers was referred by his GP to physiotherapy and then for an x-ray. The x-ray revealed osteoarthritis. Mr Melgers said his GP then advised him against continuing to work in farming and he then decided to give up farming work.

[5] On 20 August 2013 Mr Melgers told Mr Gower that he would not be returning to work. The two men disagree about what was then said about use of the farm house from that point but Mr Melgers did not move out until Mr Gower got an order from the Tenancy Tribunal on 10 December 2013 for immediate possession of the premises.

[6] The terms of Mr Melgers' employment, which included arrangements for use of the farm house under a service tenancy, were in an employment agreement that the two men signed on 11 March 2013. It was an LIC FarmWise employment agreement that Mr Melgers had arranged to get because he wanted a signed, written agreement before he moved into the property and began work on the farm. Mr Gower was familiar with this standard form agreement and he had since also used it for the employment agreement he signed with a new farm worker employed some months after Mr Melgers' employment ended.

[7] The terms of the agreement Mr Melgers and Mr Gower signed included:

(i) an annual salary of $50,000 paid fortnightly ($1923.08 per fortnight gross); and

(ii) a house to live in (at no cost to Mr Melgers apart from paying any electricity or telephone bills); and

(iii) a requirement to vacate the house within 14 days of notice of the employment ending; and

(iv) a notice provision requiring one month's notice in writing of termination of the employment agreement and stating that "*where the required notice is not given, a month's salary will be paid or forfeited as the case may be*".

Investigation and issues

[8] For the Authority's investigation meeting Mr Melgers and Mr Gower provided written statements and various background documents. Under oath they each confirmed their own statement was true and correct before answering questions from me. They both had the opportunity to provide any additional comments and information.

[9] As permitted under s174 of the Employment Relations Act 2000 this determination has not set out all the evidence received. I have stated findings on relevant facts and issues of law and expressed conclusions on five issues that required determination in order to dispose of the matter. Those issues were:

(i) What holiday pay was due to Mr Melgers at the end of his employment?

(ii) Did the terms of the employment agreement and the Wages Protection Act 1983 allow Mr Gower to withhold payment of that holiday pay?

(iii) If so, was the forfeiture provision in the notice clause of the employment agreement enforceable?

(iv) Did the dispute over whether Mr Melgers owed rent for use of the house after his employment ended make any difference to his holiday pay entitlement?

(v) What orders should be made about the holiday pay and any interest on it?

Holiday pay entitlement

[10] Under sections 23 and 27 of the Holidays Act 2003 Mr Melgers was entitled to be paid annual holiday pay based on eight per cent of his gross earnings when his employment came to an end.

[11] For the purpose of calculating that entitlement Mr Melgers' gross earnings – in the period from starting work on 18 March 2013 until 20 August 2013 – totalled $19,230.80. He received ten fortnightly payments of $1923.08. The last such fortnightly payment included the 'first week' compensation paid by Mr Gower. (From 6 August until 20 August Mr Melgers got no pay from Mr Gower but received lost earnings compensation directly from ACC - which is not included in the calculation of gross earnings).

[12] The gross earnings should not include the $192.30 Mr Gower overpaid Mr Melgers for the 'first week' compensation so the correct total for holiday pay purposes is $19,038.50. The holiday pay entitlement due to Mr Melgers on those gross earnings was $1523.05.

[13] Mr Melgers should have been paid that amount as holiday pay by no later than the end of the pay period during which he resigned – that is by no later than 2 September – unless Mr Gower had some right, arising out of the employment agreement or the application of relevant legislation and case law, to withhold such a payment.

The effect of the employment agreement and the Wages Protection Act 1983

[14] Mr Gower's position was that he had such a right due to the notice provision allowing for the forfeit of one month's salary if the employee did not give one month's notice.

[15] Holiday pay is treated as salary or wages under the Holidays Act, so appeared to be included within the ambit of the reference to 'salary' in the notice provision of this employment agreement.[1] And while s4 of the Wages Protection Act 1983 requires such salary or wages to be paid to the worker without deduction, s5 of that Act allows an employer to make a deduction for any lawful purpose "*with the written consent of the worker*".

[16] Mr Melgers argued he had not given written consent to any such deduction. I concluded he was not correct in making that assertion. He signed an employment agreement – that he had sought out himself and presented to his employer – with a notice provision allowing for a deduction of that kind. Such provisions, where expressly stated in written

[1] Section 86 of the Holidays Act 2003.

agreements, have been held to be effective in allowing forfeiture of wages where notice provisions have not been observed.[2]

Forfeiture

[17] A forfeiture provision may be unenforceable, however, where it amounts to a penalty or fails to provide a genuine estimate of loss resulting from less than the agreed notice being given. The Authority has frequently taken that view, based on a principle stated by the Employment Court in *Ozturk v Gultekin*, that it was unconscionable in a breach of contract case to recover a sum out of proportion to the loss incurred.[3]

[18] I found nothing in the present matter to support differing from that principle or its application in a number of earlier Authority determinations. The forfeiture provision in the employment agreement, assessed objectively at the time that it was entered into, was in the nature of a penalty to compel performance rather than a genuine assessment of liquidated damages. It was not based on any assessment, made in the particular circumstances, of costs that were likely to be incurred by short notice being given (such as employing a replacement – at a greater cost than the wage that would otherwise be paid – or incurring greater expenses in training or relocating a new worker). I tested that conclusion against the very limited evidence of what actually happened by way of established loss to Mr Gower's farm business after Mr Melgers had resigned without providing the required notice.

[19] Mr Gower did the milking and other farm duties himself for several months – from the day after Mr Melgers' injury and for the remainder of the year. He did not incur the wage costs he would otherwise have incurred for Mr Melgers and he did not pay for any relief or short-term workers. Mr Gower said he was prevented from doing some building work for which he would otherwise have earned income but he gave no evidence about what that work

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[2] *Service Workers Union v Thai Orchid Restaurant Limited* (unreported, EC, AEC 29/91, 16 October 1991, Finnigan J at 8); *Northern Hotel IUOW v Morris Catering Limited* NZILR 1009 at 1011; *Portia Developments Limited v Taylor* (unreported, EC, AEC 100/97, 9 September 1997, Travis J at 8); *Pakinga v Coromandel Peninsular Couriers Limited* [2011] NZERA Auckland 58; *Kumar v Flyway Logistics Limited* [2102] NZERA Christchurch 69; and *Brown v North West Logging Limited* [2011] NZERA Auckland 285 at paras [56] and [67].

[3] [2004] 1 ERNZ 574 at [5]. See, for example, *Robertson Turnbull Limited v Labour Inspector (*ERA CA 61/08, 8 May 2008, Member Cheyne); *Livingston v GL Freeman Holdings Limited* [2013] NZERA Christchurch 90; *Hixon v Ashwood Park Rest Home 2004 Limited* [2011] NZERA Christchurch 159; *Labour Inspector v Cornerstone Enterprises Limited* (ERA CA212/10, 22 November 2010, Member Doyle) and *DA&JA Ward Limited v Wood* (ERA, CA16/09, Member Crichton).

would have been or whether any alleged subsequent loss of income was greater than what he saved from not having to pay Mr Melgers' salary.

[20] Another aspect of the equitable assessment of the enforceability of the clause was the reason for not giving the full period of required notice. In Mr Melgers' case it was because he suffered a back injury and, on medical advice, decided he could not return to farming work. There was no suggestion that he delayed providing that information to Mr Gower or had deliberately left him 'in the lurch' at short notice to pursue some personal advantage or advancement, such as a better-paid position elsewhere, without first meeting his obligations. He was simply unable, due to his physical condition, to safely keep working.

[21] Accordingly, although Mr Melgers' employment agreement provided written consent for deductions, allowing the value of his holiday pay (up to a maximum of one month's salary) to be forfeited for not providing the required notice in the circumstances he faced following his injury, I concluded the provision of the agreement was a penalty and not enforceable.

Did the rent issue make any difference?

[22] The dispute over whether Mr Melgers owed Mr Gower any rent for the use of the house (from the end of his employment until the possession order granted in early December 2013) was, ultimately, not relevant to determining his entitlement to holiday pay.

[23] Mr Melgers' holiday pay entitlement should have been paid to him (at the very latest) by 2 September 2013. He could not have incurred any obligation to pay rent for the house by then because the terms of his service tenancy allowed him to stay there for up to 14 days after he terminated his employment agreement on 20 August – that was up until 3 September.

[24] Whether Mr Melgers should, as a matter of law or general fairness, have paid rent to Mr Gower for the use of the house from 3 September until early December was a matter outside the terms of the employment relationship and, therefore, the Authority's jurisdiction. It was a matter for the Tenancy Tribunal. The Tribunal did make an order on 10 December 2013 requiring Mr Melgers to pay rent for the period from 19 August until 6 December 2013

but later, on 24 April 2014, dismissed a claim for rent arrears because it said Mr Gower had withdrawn that claim.

[25] In those circumstances the Authority could not belatedly 'set off' the value of the holiday pay against such rent arrears that were due or could be awarded by the Tenancy Tribunal for a period outside the employment relationship. The holiday pay to which Mr Melgers was entitled should have been paid to him by at least 2 September last year. He was entitled to the use of that money from then and to an order for it now.

Orders required

[26] For the reasons given above I concluded Mr Melgers was entitled to an order requiring Mr Gower to pay him $1523.05 as annual holiday pay within 28 days of the date of this determination.

[27] Where the Authority determines an employee is entitled to an order for holiday pay, section 84 of the Holidays Act allows interest, at a specified rate, to be included in the sum that the Authority determines must be paid by the employer. Accordingly, I have determined Mr Melgers should have interest at the annual rate of five per cent on the sum of $1523.05 for the 308 days from 3 September 2013 to 8 July 2014 (amounting to $64.68) and a daily rate of 21 cents interest from then until the sums ordered are paid in full.

Costs

[28] No application for costs on this application was made and none are awarded. Mr Melgers is, however, entitled to have Mr Gower reimburse him for the fee of $71.56 paid to lodge this matter in the Authority.

Robin Arthur
Member of the Employment Relations Authority